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**Evaluating Self-Defence Claims in the United
Nations Collective Security System: Between
Esotericism and Exploitability.**

By Isobel Roele, LLB, LLM.

**Thesis submitted to the University of Nottingham
for the degree of Doctor of Philosophy.**

August 2009

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Abstract.

This thesis is about identifying valid self-defence claims in the UN collective security system. The thesis suggests a fresh theoretical approach to balancing the imperative for adaptation of the right of self-defence with the danger that too broad a right could be exploited by states wishing to justify national policy. The starting point for the thesis is the twin realist criticisms that the right of self-defence is either too narrowly drawn and therefore not fit for the purpose of protecting states' interests, or too broadly drawn and therefore hostage to the subjective interpretation of states using force. These problems were intensified during the Administration of former President G.W. Bush in the USA. In this work, these two criticisms are dubbed 'esotericism' and 'exploitation' respectively.

The problem of self-defence, as an exception to the general prohibition on the use of force, is often phrased in terms of a choice between the is of state practice and the ought of abstract norms. In this thesis, it is suggested that no such choice needs to be made. In order to identify a valid self-defence claim, the is of evaluative state practice is harnessed and constrained by a process of argumentation grounded in mutual understanding of the facts of a given case. Two strands of social theory are used to accomplish this. One of them questions whether states have to be conceived as rationally self-interested actors and suggests that the key to the identification of valid self-defence claims is for states to take responsibility for their claims and evaluations of the right. The other strand of theory expands on Habermas' idea of the criticizable validity claim. The report that self-defence has been used should act as a starting point for argumentation and not the last word in national process of decision.

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List of Abbreviations.

AJIL – American Journal of International Law
ASIL Proc. – American Society of International Law Proceedings
ARSP - Archiv fur Rechts- und Sozialphilosophie.
Berk. JIL – Berkley Journal of International Law
BYIL – British Yearbook of International Law
Can. YIL – Canadian Yearbook of International Law
Case W. Res. JIL – Case Western Reserve Journal of International Law
Chi. JIL – Chicago Journal of International Law
CSA – Comprehensive Safeguards Agreement
DRC – Democratic Republic of Congo
Dept St. Bull. – Department of State Bulletin
EJIL – European Journal of International Law
EJLR - European Journal of Law Reform
Flo. JIL – Florida Journal of International Law
GA - United Nations General Assembly
GLJ – German Law Journal
Harv JIL - Harvard Journal of International Law
HRQ – Human Rights Quarterly
IAEA - International Atomic Energy Agency
ICBM – Intercontinental Ballistic Missile
ICJ – International Court of Justice
IO – International Organisation (Journal).
ISS – Ideal Speech Situation
ISSJ – International Social Science Journal
JCSL – Journal of Conflict and Security Law
JIA – Journal of International Affairs
JLE – Journal of Legal Education
LJIL – Leiden Journal of International Law
Max Pl. Yk UN L – Max Planck Yearbook of United Nations Law
Mich. JIL – Michigan Journal of International Law
MLR – Modern Law Review
NAM – Non-Aligned Movement
NATO – North Atlantic Treaty Organisation
Neth. JIL – Netherlands Journal of International Law
Nor. JIL – Nordic Journal of International Law
NWULR – Northwestern University Law Review
OAF – Operation Allied Force
OEF – Operation Enduring Freedom
OIF – Operation Iraqi Freedom
OPT – Occupied Palestinian Territory
P5 – Permanent five members of the security council (Britain, China, France, Russia and the US).
PCIJ – Permanent Court of International Justice
Rev. IS – Review of International Studies
San Diego ILJ – San Diego International Law Journal
SC – United Nations Security Council
Stan. LR – Stanford Law Review
TCA – Theory of Communicative Action

UK – United Kingdom of Great Britain and Northern Ireland
UN – United Nations
UNMOVIC – United Nations Monitoring Verification, and Inspection Commission
US – United States of America
USSR – Union of Soviet Socialist Republics
Vill. LR – Villanova Law Review
Vir JIL – Virginia Journal of International Law
WMD – Weapons of Mass Destruction
WPO – World Public Order
Yale JIL – Yale Journal of International Law
Yale LJ – Yale Law Journal
YBILC – Yearbook of the International Law Commission

INTRODUCTION.

This thesis is about self-defence in the UN collective security system. It is asserted that unless it is possible to distinguish valid from invalid claims to use force in self-defence, the system will be exploitable by dominant states wishing to legitimize their self-interested behaviour. The research question posed by this thesis is: Can the UN collective security system distinguish valid from invalid claims to have used force in anticipatory self-defence? The question was inspired by a growing feeling that the effectiveness of a legal system stands and falls with its ability to make distinctions between the valid and the invalid. Behind this is an assumption that legal systems in general, and the UN collective security system in particular, should be seen as discursive venues rather than instruments of behaviour modification. Self-defence is viewed in this thesis as a means of justifying uses of force which would otherwise be invalid under the blanket prohibition contained in article 2(4) of the UN Charter.¹

The Nuremberg Military Tribunal held that “whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced”.² Indeed, Lauterpacht has written that it would be “self-contradictory” to claim that the right of self-defence is “above the law and not amenable to evaluation by law”.³ The project of identifying valid self-defence claims is complicated by the propensity for the security environment to change; inter alia, actors, technology, diplomatic relations and modes of violence are all subject to change. The task for legal scholarship is to

¹ Article 2(4) UN: “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”.

² Judicial Decisions: “International Military Tribunal (Nuremberg), Judgment and Sentences” 41(1) AJIL (1947) 172, p. 207. Interestingly, the Tribunal suggested that they were dealing with a claim of preventive self-defence: that the invasion of Norway was necessary to forestall an allied invasion (p. 205).

³ H. Lauterpacht, *The Function of Law in the International Community* (1966) Archon Books, Connecticut, p. 180.

accommodate this change without opening the law to exploitation by giving too much power to the individual state to interpret it, or consigning the law to esotericism by opening an apparently impracticable credibility gap between the narrow exception of self-defence and the practice of states.

International law is said to be caught between normativity and concreteness. It has been argued that where the law is justified as effective by its closeness to concrete state behaviour, it can be criticised for being insufficiently normative; for failing to distinguish the is from the ought. On the other hand, where law is justified as formally correct according to its own normative framework and distant from subjective standards, it can be criticised for being utopian and opening too broad a gap between concrete state practice and the norms of the collective security system.⁴ Consequently, it has been said that international law is “singularly useless as a means of justifying or criticizing behaviour”.⁵ In this thesis, Koskenniemi’s ‘apology’ and ‘utopia’, the two big realist criticisms against which international lawyers fight, have been renamed ‘exploitability’ and ‘esotericism’. This is because it was hoped that these words would emphasise that norms are instruments that can be exploited or simply ignored. In contrast, the words ‘apology’ and ‘utopia’ seem to refer to the arguments of international lawyers justifying a particular reading of the norms, rather than to the norms themselves.

⁴ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (2005) Cambridge, p. 58.

⁵ *Ibid.*, p. 67.

A. The Bush Doctrine of Pre-emption.

The so-called ‘credibility gap’, and with it the idea that states must take matters into their own hands to secure their national interests, is far from new. However, the criticism resurfaced with the emergence of a new National Security Strategy (NSS) for the United States in 2002. The George W. Bush Administration declared war on “rogue states and their terrorist clients”,⁶ and located the greatest threat to security “at the crossroads of radicalism and technology” in the form of terrorists armed with Weapons of Mass Destruction.⁷ In order to tackle these changes to the strategic environment, the Administration proposed a doctrine of pre-emption because “new threats...require new thinking”.⁸ The Charter system would have to “adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries”.⁹ This would mean that the US could use force “even if uncertainty remains as to the time and place of the enemy’s attack”.¹⁰

Although it is a product of a “culture of dynamism”¹¹ that rejects formal rules whenever they are taken to have outlived their usefulness,¹² the rationale of the doctrine of pre-emption also has antecedents in the doctrine of self-help. This doctrine appeared to form part of customary law some time prior to the development of international collective security. It was therefore not altogether clear what status the new doctrine of pre-emption had in relation to law. It could be taken as a strategic

⁶ National Security Strategy of the United States of America, 2002, p. 14. Available at: <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>.

⁷ Ibid., G.W. Bush Foreword.

⁸ Remarks by President G.W. Bush at the Graduation Exercise of the United States Military Academy, West Point, New York June 1, 2002.

⁹ US National Security Strategy (2002), p. 15.

¹⁰ Ibid., p. 15.

¹¹ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002) Cambridge University Press, p. 496.

¹² Ibid., p. 485.

alternative to the law born of political expediency, or it could be taken as a necessary adaptation of the law that was already valid law by virtue of this necessity. By failing to break its ties with the UN collective security system, the doctrine of pre-emption attempted to cling to any residue of legitimacy that came from its attempted association (or at least lack of deliberate dissociation) with the collective security system.

Self-help left the protection of its vital interests to the individual state and, according to some commentators, it is said to live on in the residual right of self-defence preserved in article 51 of the UN Charter.¹³ Accordingly, the doctrine of pre-emption was apparently linked to a conception of customary self-defence that preceded the Charter framework for the maintenance of international peace and security.¹⁴ More worryingly, the NSS also warned that “[w]hile the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone”.¹⁵ This was an arrogation of the ultimate right to interpret self-defence and, it will be argued, to act in situations that are not easily evidenced in practice. Indeed, former Secretary General of the UN, Kofi Annan, said that its “logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years”.¹⁶

The thrust of the thesis is that an ‘intersubjective’ approach to decision-making could overcome some of the problems associated with doctrinal approaches to collective

¹³ See Chapter I, at pp. 28-9.

¹⁴ “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack”, US National Security Strategy (2002), p. 15.

¹⁵ *Ibid.*, p. 6.

¹⁶ Press Release; UN Doc. SG/SM/8891; GA/10157 23 September 2003.

security law. A forceful realist criticism of doctrinal approaches is that, in practice, the formal norms of the collective security system are interpreted subjectively. To the extent that such formal norms are said to be objectively valid, this status can be exploited by states wishing to legitimate their actions.

The intersubjective approach contained in this thesis shifts the focus from doctrine to process. Firstly, it does this by construing statements that self-defence has been exercised as Habermasian ‘criticizable validity claims’. Justification becomes a matter of the process of evaluating a claim and not of the intrinsic quality of a given use of force. The element of ‘criticizability’, moreover, places the emphasis on the audience of a claim rather than the claimant. In the UN collective security system, this amounts to a claim that all uses of force in self-defence should ultimately be subject to collective evaluation. The important factor to stress is that the move from abstract doctrine to concrete process means that evaluation is actually done by states, rather than notionally assumed by international lawyers.

The thesis has two halves. In the first half, some of the realist criticisms and doctrinal responses are set out. The aim is to identify why doctrinal international lawyers have not been particularly effective in defending the collective security system. The second half of the thesis builds on what has been learned, suggesting that an intersubjective approach wherein states take responsibility for redeeming and evaluating self-defence claims according to the facts of each case is set out. A brief summary of each substantive chapter is set out below.

B. Summary of Chapters.

Chapter I is entitled “Realist Criticisms of the Collective Security System”. The aim of the chapter is to sketch out the problem of the ‘credibility gap’ between state practice and doctrinal norms. In order to do this, the first part of the chapter is an introduction to realist thought. It is said that realist methodology aspires to be scientific and, as a result, rejects ‘ought statements’ in favour of ‘is statements’. The idea is that rationally self-interested individuals cannot be constrained by a legal system that lacks effective enforcement measures because it adds little or nothing to a process of cost-benefit analysis. The effect of these assumptions on analyses of self-defence is to emphasise, on the one hand, the importance of the interests that the right of self-defence protects and, on the other hand, the inability of the collective security system to protect these interests due to its doctrinal inflexibility.

The aims of chapters II and III are very similar: To show that international lawyers’ attempts to answer realist criticisms thus far have not been entirely successful. Chapter II is entitled “Secondary Rules of Interpretation and Custom”. It is about international lawyers’ arguments that relied on doctrines of interpretation and particular readings of the relation between custom and the Charter to justify a given view of self-defence. On the one hand, there are international lawyers whose work can be criticised as ‘esoteric’. These are writers who emphasise the normative over the concrete. For instance, regarding doctrines of interpretation, they might prefer to rely on the literal interpretation of the text and the intentions of the drafters of the Charter rather than the object and purpose of the document or the subsequent practice of the parties. Regarding customary law, such international lawyers tend to prefer the

element of *opinio iuris* to state practice. These techniques tend to distance the ought of the norm from the is of state practice and thus point to esotericism.

On the other hand, some international lawyers attempt to answer realist criticisms by accepting many of the problems that they see in the system but arguing that the system can accommodate them. Such international lawyers tend to play up the collective security system's ability to adapt to the vicissitudes of strategic reality. However, it is argued, their approaches to interpretation and customary law can often bring the ought too close to the is and risk making the law exploitable. This is particularly the case where no process of third party evaluation of self-defence claims is suggested.

Chapter III, "Evaluations of Self-Defence Claims in UN Organs", is about such third party evaluations. It suggests, again, that while placing the ultimate authority to interpret the right of self-defence outside the reach of individual states, such writers can, nevertheless, become trapped in the concreteness-normativity dilemma. The chapter discusses conceptions of the Security Council (SC) as the ultimate evaluator of self-defence claims.

International lawyers' conceptions of the Council can appear both exploitable and esoteric. Exploitable conceptions tend to emphasise the discretion that the Council has to maintain international peace and security and the notion that such freedom of will was the price of the involvement of the Great Powers. Esoteric conceptions sometimes offer a vision of SC discretion constrained in a quasi-constitutional system. This is sometimes done by subjecting the SC to certain abstract principles such as the

rule of law, and sometimes by considering the possibility for judicial review of SC resolutions. Finally, it is emphasised that while the SC is a multilateral body and therefore a more appealing alternative to autointerpretation by individual states, this status should not drive international lawyers to play down its flaws of selectivity, inconsistency and opacity.

Chapters IV and V contain the rudiments of an alternative means of identifying valid self-defence claims without succumbing to esotericism or exploitability. Chapter IV, “Intersubjectivity”, proposes that reports of self-defence should be conceived of as ‘criticizable validity claims’. This idea is taken from Jürgen Habermas’ Theory of Communicative Action (TCA).¹⁷ The concepts of the criticizable validity claim and what it means to ‘redeem’ such a claim, and therefore participate rationally in a discourse oriented to reaching understanding, are discussed. It is argued that in order to vindicate a self-defence claim, a state must give reasons that can be accepted by his fellow participants in the evaluation discourse.

In the second half of the chapter, it is argued that it would require a fundamental change in attitudes on the part of states to implement such a conception. This is because states are often seen to operate in what Alexander Wendt has called a “Lockean Anarchy”.¹⁸ This means that states conceive of one another as rivals with more or less fixed interests that must be achieved at the lowest cost possible. It will be argued that under US NSS of 2002, the US conceives of certain actors as ‘enemies’ in

¹⁷ J. Habermas, *The Theory of Communicative Action*, Vol. I: Reason and the Rationalisation of Society and Vol. II: Lifeworld and System: A Critique of Functionalist Reason, (trans. T. McCarthy) (1984 and 1987) Polity Press, Cambridge.

¹⁸ A. Wendt, *Social Theory of International Politics* (1999) Cambridge University Press, p. 279.

the sense required by the Hobbesian conception of the other.¹⁹ The Hobbesian relation between self and other renders survival a matter of ‘kill-or-be-killed’. This means self-defence claims can be difficult to bear out with ‘good reasons’ where third party evaluators have not also constructed a Hobbesian relation with the target state. In short, the chapter concludes that states’ attitudes must change so that they accept the responsibility of the self-defence claim. For claimant states this responsibility is to offer good reasons and for evaluating states this is to offer criticism and pose questions: In both cases what is required is an attitude oriented to understanding and not to strategic victory or to the obliteration of the other.

The fifth and final chapter is entitled “An Evidence-Based Approach to the Evaluation of Self-Defence Claims”. Taking the insights about where the intersubjective understanding with which a validity claim could be vindicated might come from, this chapter turns from doctrine to ‘the facts’ of particular cases. The aim of the chapter is to show that relying on the facts per se is problematic insofar as facts do not speak for themselves. The chapter takes the view that facts are socially constructed and therefore in order for intersubjective understanding of them to come about, the process of establishing them must be collective. This means that claimant states must substantiate their statements that they were facing, for instance, an imminent threat with evidence that they were so threatened.

The key claim of the chapter is that the process of evidencing a claim requires the production of criticizable reasons for action. It is argued that the ancillary of criticizability is positivity. This means that processes of claim and justification must

¹⁹ Ibid., p. 260

be transparent and, preferably, recorded and publicised. It is argued that where a claim either cannot be evidenced, because the materialisation of a threat was merely possible, or where intelligence is brought in ‘evidence’ of a claim but is removed from the process of scrutiny, a state will not satisfy the conditions for the criticizability claim. In consequence, it is argued that self-defence taken pursuant to the Bush doctrine of pre-emption would be unlikely to be redeemable under this conception of evaluation.

C. Scope of the Project and Omissions.

Before embarking on the thesis proper, some words should be said about the ambit of the thesis and decisions to exclude certain elements. However, to list all relevant areas that one has not covered leaves one open to the devastating effect of a single counter example. It is hoped that no point necessary to make the argument is among the omissions in this thesis.

The thesis is narrowly focused on the controversial question of whether self-defence can be used against future threats and attacks from other states. It is recognised, however, that there are other controversies surrounding the right of self-defence. One of the biggest of these is the position of non-state actors. While the issue of attacks and threats emanating from non-state actors can be closely connected to the need to anticipate or pre-empt threats, the decision has been made to exclude it from the ambit of the thesis.

The primary reason for this exclusion is lack of space. Furthermore the aim of the chapters II and III is to demonstrate some of the weaknesses of existing defences of the collective security system, rather than to make an exhaustive study of the right of self-defence. It is therefore hoped that these weaknesses can be demonstrated using selected examples. Additionally, it is submitted that the issue of non-state actors and the corresponding problem of state responsibility are matters that could be dealt with as part of a process of critical inquiry into a criticizable validity claim. There is no reason to suppose that the evidence-based approach that was applied to anticipatory self-defence could not also be applied to claims involving non-state actors.

Another point to stress is that no attempt has been made to exhaustively review all the work done on self-defence by international lawyers. Instead, the work of certain international lawyers has been taken to evidence particular arguments made about self-defence. Furthermore, it is not suggested that the present project is the only approach to self-defence. It is only suggested that if the problem of self-defence is conceived of as a matter of balancing law's responsiveness to social change with the potential exploitation of that law with the powerful, then a solution involving public evaluative processes seems sensible.

As for the scope of the project, it should be stressed that no blueprint for action is given in this thesis. The thesis is a work of theory and may be seen as the first steps towards a more practical project. The ideas presented are intended as a starting point for future discussion about the best way to evaluate self-defence claims. The contribution of the thesis is to emphasise the importance of the process of evaluation per se and to reject the proposition that international law should be accountable for

states' assumption of responsibility for their own exercises of self-defence. While a direction for future development of evaluation is suggested in the form of an evidence-led process of inquiry, the bricks-and-mortar institutionalisation is beyond the remit of this thesis.

CHAPTER I

Realist Criticisms of the UN Collective Security System.

INTRODUCTION.

The thesis argues that the presence of “armed attack” in Charter Article 51, which contains the right of self-defence,¹ facilitates the distinction between valid and invalid uses of force. The argument is made, in the light of the Bush Doctrine of Pre-emption,² that the further self defensive responses stray from an initial visible aggression such as an armed attack, the harder it is to identify valid claims. It is argued that without the ability to distinguish valid from invalid claims of self-defence, the collective security system risks providing powerful states with cosmetic justifications for violent coercion.

The thesis is situated between realist critiques of the collective security system and a ‘legalist’ or ‘institutionalist’ sense of the importance of legal norms and institutions in restraining violent power.³ Many have pointed out that the constraint of the use of armed violence between nations is marked by poles of realism and idealism, reality and utopia, the practical and the abstract for instance.⁴ Another way of describing this

¹ Article 51 UN: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

² National Security Strategy of the United States of America, 2002. Available at: <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>. (Hereinafter ‘US National Security Strategy (2002)’).

³ While the term ‘legalist’ is sometimes used pejoratively (see e.g. H.J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th ed. (1978) Knopf, New York, p. 12. (Hereinafter, ‘Morgenthau, *Politics Among Nations*’) and M. Koskenniemi, “The Place of Law in Collective Security” 17(2) *Mich. JIL* (1995-6) 455, p. 455. (Hereinafter, ‘Koskenniemi, “The Place of Law in Collective Security”’).) it is not so intended here.

⁴ See e.g. E.H. Carr, *The Twenty Years’ Crisis 1919-1939: An Introduction to the Study of International Relations* (1981) The MacMillan Press, London, pp. 10-20. (Hereinafter, ‘Carr, *The Twenty Years’ Crisis*’); M. Koskenniemi, *From Apology To Utopia: The Structure of International Legal Argumentation* (2005) Cambridge University Press, p. 504. (Hereinafter, ‘Koskenniemi, *From Apology*’.)

difference is Keohane's distinction between instrumental and normative optics as opposing ways of viewing international relations.⁵ Indeed, such poles can play a useful role in describing or explaining how the collective security system or a system based on the balance of power works.

This thesis takes many of the insights of realism and of critical approaches to international law⁶ and applies them to the arguments of those who wish to assert the relevance of the collective security system at whatever cost, and of those who wish to assert a vision of collective security that could abide in happy abstraction, untroubled by effective action. Many such arguments came to light after September 2001 because of the radical departure it was supposed to mark. International lawyers are divided in how to deal with the problems that it has thrown up: Greenwood has noted that there are those who see the doctrine of pre-emption as clearly illegal and those who see it as requiring a reconsideration of PIL.⁷

The present author shares many of the sympathies of the international lawyers whose work is criticised by realists; a preference for more law,⁸ an assumption that PIL has a useful role to play in regulating the use of force and agreement that "the claim to act pre-emptively [is] a serious erosion of international law...simply a euphemism for

⁵ R. Keohane, "International Relations and International Law: Two Optics" 38(2) Harv. ILJ (1997) 487. (Hereinafter, 'Keohane, "Two Optics"'.)

⁶ During the 1990s, David Kennedy attempted to form a loose grouping of those interested in New Approaches to International Law (NAIL): D. Kennedy, "A Newstream of International Law Scholarship" 7 Wis. ILJ (1988-9) 1. These were well discussed by D.Z Cass in "Navigating the Newstream: Recent Critical Scholarship in International Law" 65 Nor. JIL (1996) 341.

⁷ C. Greenwood, "International law and the Pre-emptive Use of Force against Afghanistan, al Qaeda and Iraq" 4 San Diego ILJ (2003) 7, p. 8. (Hereinafter, 'Greenwood, "International Law and the Pre-emptive Use of Force"'.); See also, J. Yoo, "Using Force", 71(3) Univ. Chi. LR (2004) 729, p. 731. (Hereinafter, 'Yoo, "Using Force"'.)

⁸ See D. Kennedy, "When Renewal Repeats: Thinking Against the Box" 32 NYU JIL&P (1999-2000) 335, p. 400. (Hereinafter, 'Kennedy, "Thinking Against the Box"'.)

aggression”.⁹ Interestingly, E.H. Carr described realism as “a reaction against the wish-dreams of the initial stage”. He explains that “realism is liable to assume a critical and somewhat cynical aspect”.¹⁰ It is submitted that critical insights can be useful to strengthen the collective security system against being undermined, but that once such criticism turns to dogma it loses its insight. Certain realist writers appear to have substantive motivations behind their critical attitude to international law. While in theory all states’ freedom of action would be increased by the removal of the Charter rules on the use of force, in practice the inequalities in power between states means that a sort of Thucydidean motto of “the strong do what they can and the weak suffer what they must” would hold sway.¹¹ Thus, it is not unusual to find international lawyers in the US, the so-called sole superpower,¹² using a more “instrumental optic” to give realist arguments for a broader reading of the right of self-defence.

In the present Chapter the realist criticisms of the collective security system and “mainstream” international lawyers’ responses to them will be discussed. It is argued that the Bush doctrine can be seen as a consequence of a realist approach to international relations and that the arguments supporting it are realist. Such an approach rejects not only the content of the provisions of the Charter system of collective security but, in some cases, the very concept of such a system. The chief criticism is that, as between sovereign equals lacking a supreme authority, the system cannot account for states’ agreement to limit the right to use force under article 2(4). This criticism is attended by the view that general rules are inappropriate for

⁹ M. Reisman and A. Armstrong, “The Past and Future of the Claim of Pre-emptive Self-Defense” 100(3) *AJIL* (2006) 525 p. 547.

¹⁰ Carr, *The Twenty Years’ Crisis*, p. 10.

¹¹ Thucydides’ *History of the Peloponnesian War*, “The Melian Dialogue” (Ch. XVII).

¹² In the NSS, it was said that the US “possesses unprecedented—and unequaled—strength and influence in the world”, *US National Security Strategy* (2002), p. 1.

regulating the use of force between states because they are both over and under-inclusive. This lack of fit between doctrine and reality is augmented whenever there are changes in the “strategic reality”. For example, the development of nuclear weapons, the rise of guerrilla warfare, the inter-continental ballistic missile (ICBM), weapons of mass destruction (WMD), and the danger that these may fall into the hands of terrorists. Such a lack of fit has been dubbed the “credibility gap” between the abstract norms of the Charter and the concrete reality of state practice.¹³

PART ONE: REALISM.

Two main realist criticisms of the rules on self-defence will be examined. One of these is that the gap between doctrine and practice is too wide. This is summed up by Michael Glennon; “the international system has come to subsist in a parallel universe of two systems, one de jure, the other de facto”.¹⁴ A large part of this reason is that the collective security system “is deficient in all three fundamentals of an efficient judicial system: compulsory jurisdiction, hierarchy of judicial decisions, and the application of the rule of stare decisis”.¹⁵ Another, leading on from the first, is that the norms that exist are used solely by states as ex post rationalisations of action. These correspond to the “interpretative thesis” and the “causal thesis” identified by Koskenniemi.¹⁶

¹³ D. Bowett, “Reprisals Involving Recourse to Armed Force” 66(1) AJIL (1972) 1, p. 1. (Hereinafter, ‘Bowett, “Reprisals”’.); T.M. Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States” 64(4) AJIL (1970) 809, p. 837. (Hereinafter, ‘Franck, “Who Killed Article 2(4)?”’.); M.J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter” 25(2) Harv. JL&PP (2001-2) 539, p. 549. (Hereinafter, ‘Glennon, “The Fog of Law”’.)

¹⁴ Glennon, “The Fog of Law”, p. 540.

¹⁵ Morgenthau, *Politics Among Nations*, p. 289.

¹⁶ Koskenniemi, “The Place of Law in Collective Security”, p. 463.

The collective security system is an object of knowledge for both international lawyers in the discipline of Public International Law (PIL) and international relations (IR) scholars in their own discipline. However the perspectives that the mainstreams of both disciplines have on the use of force between states is very different. Kratochwil says that in IR norms “have been understood solely as ideological reflections, deceptions, subterfuges or...as an impediment to achieving one’s goals in a “rational way”.¹⁷ In PIL most scholars would reject such a cynical claim. However, there is disciplinary overlap and there is also marginal scholarship in both disciplines. Thus it is possible to identify a “normative optic” in IR¹⁸ or an “instrumental optic” in PIL.¹⁹

It is not possible to define realism without controversy, however it is thought necessary to emphasise some traits and commonalities. Carr identifies Machiavelli as the first important political realist. He explains that Machiavelli’s thought had three main tenets: The first was that “history is a sequence of cause and effect”; the second is that theory does not create practice, practice creates theory; and the third one is that ethics are a function of politics and not vice versa.²⁰ We can, in this, discern some of the main trends in realist thinking: A rejection of theoretically deduced or transcendently presupposed rules that do not relate to practice, and their replacement with scientifically verifiable rules of causality.

¹⁷ F. Kratochwil, “Thrasymachos Revisited: On the Relevance of Norms and the Study of Law for International Relations” 37(2) JIA (1984) 343 p. 343.

¹⁸ See e.g. N. Onuf, “Do Rules Say What They Do? From Ordinary Language to International Law” 26 Harv. ILJ (1985) 385. (Hereinafter, ‘Onuf, “Do Rules Say What They Do”’.)

¹⁹ See e.g. Yoo, “Using Force”; Sofaer, “Pre-emption”; J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, (2005) Oxford University Press. (Hereinafter, ‘Goldsmith and Posner, “Limits”’.)

²⁰ Carr, *The Twenty Years’ Crisis*, p. 63-4.

The relationship of political realism to international law is profoundly connected to the discipline of IR. In *The Gentle Civilizer of Nations* Koskenniemi introduces “the turn to ‘international relations’” using the work of Carl Schmitt and Morgenthau.²¹ As to Schmitt, Koskenniemi explains that his “anti-formalism was connected to his emphasis on the significance of the political which, for him, was crucial for the State’s function in maintaining order”.²² In large part this was because where the normal order was disrupted, Schmitt relied on the sovereign to decide on the exception.²³ This is reminiscent of Hobbes’ *Leviathan* wherein “the Right of making Warre” is “annexed to the Sovereignty”,²⁴ and where the sovereign has the greatest power of all.²⁵ It also provides a link into international law by way of early theories of voluntarism.²⁶

It is often thought that this individualism accurately describes what occurs in the collective security system. Glennon says that in the international legal system, “states engage in a hard-headed, cold-blooded calculus, weighing the costs of violating the supposed rule against the benefits of complying with it”.²⁷ From this, we can identify another key realist prioritisation: The interests of the individual decision-maker. This is key to the more modern strand of realism, Game Theory. The idea is to scientifically predict state behaviour from state interests. Keohane explains that

²¹ See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002) Cambridge University Press, pp. 413-509 – “Out of Europe: Carl Schmitt, Hans Morgenthau, and the turn to ‘international relations’”. (Hereinafter, ‘Koskenniemi, *The Gentle Civilizer*’.)

²² *Ibid.*, p. 430.

²³ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2006) University of Chicago Press, p. 5.

²⁴ T. Hobbes, *Leviathan*, (1985) Penguin, p. 234: Part II, Ch. 18. (Hereinafter, ‘Hobbes, *Leviathan*’.)

²⁵ *Ibid.*, p. 237: Part II, Ch. 18.

²⁶ Cf. A.C. Arend, “International Law and the Preemptive Use of Military Force” 26(2) *The Washington Quarterly* (2003) 89, p. 93 “If states are sovereign, under the logic of the *Lotus* case, they can do as they choose unless they have consented to a rule restricting their behaviour”.

²⁷ M.J. Glennon, “The Emerging Use-of-Force Paradigm” 11(3) *JCSL* (2006) 309, p. 316. (Hereinafter, ‘Glennon, “The Emerging Use-of-Force Paradigm”’.)

“[s]tate ‘interests’ may be inferred from their behaviour, which is then ‘explained’ by the very same interests”.²⁸

The insights of Game Theory have been used by certain international lawyers in an attempt to create a more relevant international law. Thus, Goldsmith and Posner state that “international law emerges from states acting rationally to maximise their interests, given their perceptions of the interests of other states and the distribution of state power”.²⁹ The problem with this is that it tends to reduce the ought of a norm to the is of behaviour. This deprives law of its constraining force and offers it up, instead, as a facilitator of the interests of those states powerful enough to take advantage of it. Accordingly, it will be argued that while those international lawyers who take on the insights of realism completely may close the “credibility gap”, they open up the law to exploitation.

A. The Science of International Relations?

The realist method for evaluating the effectiveness of international law is often presented as scientific.³⁰ A scientific method based in reality can be seen to generate a cynical tone to level at the utopian hopes of cosmopolitan international lawyers.³¹ However the claim that the study of IR is a science is just as problematic as claims that international law is a science.³² Thus, Duxbury criticised the policy realism of the

²⁸ Keohane, “Two Optics”, p. 490.

²⁹ Goldsmith and Posner, *Limits*, p. 3.

³⁰ See e.g. Morgenthau, *Politics Among Nations*, p. 16; Goldsmith and Posner, *Limits*, p. 15.

³¹ David Kennedy explains that within international law there are “broad waves of critical anxiety and enthusiastic reform”. It is suggested that the close historical relationship between IR and PIL enables the extension of this insight. Kennedy, “Thinking Against the Box”, p. 340.

³² Indeed, Hans Kelsen juxtaposed law to politics, endowing law with scientific credentials and politics with the irrationality of passion – Koskenniemi, *The Gentle Civilizer*, p. 247.

New Haven School led by McDougal: “[P]olicy science assumes the attainability of an unrealistic state of detachment”.³³ The problematic nature of the claim of scientific method emanates from the reason for which this claim is usually made: The ability to claim to be correct. Realists are able to dismiss legalist approaches to self-defence because according to their purportedly objective, neutral technique of measuring state interests, they will prove useless.

It has long been recognised that any claim to impartial objectivity in the social sciences should be treated circumspectly. One of its fore-fathers, E.H. Carr said that “[p]olitical science is the science not only of what is, but of what ought to be”.³⁴ This was because it was not possible to rid IR of purposiveness.³⁵ Critics of realist approaches have also pointed out that the objective outcomes of the realist process of cost-benefit analysis depend on what goes into the black box. Thus, Cryer criticises Goldsmith and Posner for making unjustified choices about what is and what is not in a state’s interest.³⁶ This means that the pseudo-scientific nature of realist criticisms of the international legal system can simultaneously provide justifications for substantive policies that undermine it.

Realist scholars often take advantage of the insights of the social sciences to ground their critiques of normative approaches.³⁷ Thus, Morgenthau criticised international law for “paying almost no attention to the psychological or sociological laws

³³ N. Duxbury, *Patterns of American Jurisprudence* (1995) Clarendon Press, Oxford, p. 173. (Hereinafter, ‘Duxbury, *Patterns of American Jurisprudence*’.)

³⁴ Carr, *The Twenty Years’ Crisis*, p. 5.

³⁵ *Ibid.*, p. 3.

³⁶ R. Cryer, “The Limits of Objective Interests” 82(1) *Int Affs* (2006) 183, p. 183-4. (Hereinafter, ‘Cryer, “The Limits of Objective Interests”’.)

³⁷ McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (1961) New Haven, Yale University Press. (Hereinafter, McDougal and Feliciano, *Law and Minimum World Public Order.*); Goldsmith and Posner, *Limits*.

governing the actions of men in the international sphere” and concentrating on what the law should be instead.³⁸ Scientists collect data and analyse them using disciplinarily approved methods. Similarly, realists look at facts and apply reason based on self interest to them. In this way they hope to produce predictive theories about what might happen, as well as advising decision-makers about which courses of action in a given scenario are optimally rational.

It has been explained that “[r]ealism receives its strength from its focus on empirical-instrumental questions such as ‘what happened?’ or ‘what can be made to happen?’”.³⁹ This approach means that it is common to see realists set great store by “the facts”. This reflects their preference for arguments from “concreteness”.⁴⁰ The power of such an approach depends on the objective correctness of facts and their existence independent to the perception of those who might discuss them.⁴¹ Morgenthau himself began his career as a lawyer, but became disillusioned with the positivism of his contemporaries. Koskenniemi has explained that he gradually became “the external observer in regard to law” so that his work ceased to be “a study in law” but was a “study of law”.⁴² The nub of the social scientific approach to the study of international affairs is that takes the perspective of an external observer.⁴³ This is the claim, pertinent to this thesis in another regard, that it is possible to take and to express an objective view of things and events in the world.⁴⁴

³⁸ H. Morgenthau, “Positivism, Functionalism and International Law” 34(2) AJIL (1940) 260, p. 283.

³⁹ Koskenniemi, “The Place of Law in Collective Security”, p. 465.

⁴⁰ See Introduction, at p. 3.

⁴¹ Cf. Carr, *The Twenty Years' Crisis*, p. 3; K.N. Waltz, *Theory of International Politics* (1979) McGraw-Hill, New York, p. 4. (Hereinafter, ‘Waltz, *Theory of International Politics*’.)

⁴² Koskenniemi, *The Gentle Civilizer*, p. 455 italics in original.

⁴³ Koskenniemi, “The Place of Law in Collective Security”, p. 465.

⁴⁴ See Chapter V, at pp. 315-321

One of the chief problems for international lawyers attempting to counter realist criticisms is that arguments from objectivity are unlikely to have persuasive force against realists' own arguments from objectivity. Where international lawyers taking a normative optic seek to argue that the norms of the collective security system are objectively valid, it is possible for a realist to simply counter that the system of doctrinal law in which that validity is given is simply irrelevant to states' practice in the area. Where international lawyers taking a more instrumental optic argue that states have interests in abiding by the Charter norms, it is merely one reading of the facts against another and again is unlikely to have persuasive force with anyone committed to realist thinking. It cannot be assumed that the facts speak for themselves.

A good example of this is the assumption that the collective security system has failed to prevent states engaging in armed violence. Glennon, for instance, notes that between 1945 and 1999 126 out of 189 states engaged in armed conflict.⁴⁵ While Henkin does not dispute the validity of statistics that show states still engage in armed violence, he states that the occurrence of war in no way negates the value of the collective security system; the statistics simply do not show the greater number of times that the law on the use of force was observed.⁴⁶ The use of statistics to scientifically analyse states' behaviour is flawed in the most part because by looking at how states have behaved or what they have done, it is very often not possible to see why they have so behaved. Another problem affecting both sorts of counter-arguments that international lawyers might make is that the commitment of most international

⁴⁵ Glennon, "The Fog of Law", p. 540.

⁴⁶ L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (1979) Columbia University Press, New York, p. 47. (Hereinafter, 'Henkin, How Nations Behave'.)

lawyers to objectivity means that they are estopped from making meta-level attacks on realists' own commitment to objective truth.

B. Primus inter Pares?

Realists using the interpretative thesis argue that the collective security system is doomed because it lacks an effective centralised enforcement agency.⁴⁷ It is said that without this, “[o]bligations are both causally ineffectual and unamenable to scientific inquiry”.⁴⁸ It is said that even when the SC is not paralysed by the veto, it remains an ineffective central power because its decisions are dependent on the interests of its permanent members. The criticism depends on certain Hobbesian assumptions about actors and their anarchical inter-relation in the sphere of security. For instance, Waltz has written that “[s]tates strive to maintain their autonomy”.⁴⁹ It will be argued that these assumptions tend to make it impossible to appreciate the collective security system within a realist frame of understanding. Furthermore, the realist understanding of the natural condition of states as individualistic anarchy tends to exclude the Kantian cosmopolitan idea of the gradual legalisation through institutionalisation of international sphere.⁵⁰ Waltz has also stated that “[i]nternational systems are decentralised and anarchic” as opposed to “centralised and hierarchic” like domestic ones.⁵¹ Furthermore, the pursuit and protection of interests has only one instrument in a system of anarchy shorn of more complex social structures: Force or coercion.

⁴⁷ Morgenthau, *Politics Among Nations*, p. 308.

⁴⁸ Koskenniemi, “The Place of Law in Collective Security”, p. 470.

⁴⁹ Waltz, *Theory of International Politics*, p. 204.

⁵⁰ I. Kant, “Idea for a Universal History with a Cosmopolitan Intent” (1784), in *Perpetual Peace and Other Essays*, (trans. Ted Humphrey) (1983) Hackett Publishing, Indianapolis, p. 34.

⁵¹ Waltz, *Theory of International Politics*, p. 88.

Waltz has also written that “[i]n international politics force serves, not only as the ultima ratio, but indeed as the first and constant one”.⁵² Indeed, it is often assumed – particularly insofar as coercion can be interpreted broadly to include a spectrum of pressure from the production of incentives for leverage to the threat of destructive force⁵³ – that coercion alone is capable of providing reasons for states to act. There is a certain assumption that the collective security system should be measured against constitutional regimes at the national level. This is an assumption that many international lawyers seem to share. It is argued that such ambition is not only beyond the reach of the collective security system at the present time, but quite unnecessary in order for it to be effective.

It might be argued that collective security is impossible between states. This is based on a paradigm of order taken from Hobbes. It is sometimes said that, without the paraphernalia of international institutions, “[a]mong states the state of nature is a state of war”: bellum omnium.⁵⁴ The Hobbesian cure for this war of all against all is the Leviathan: A sovereign power capable of defeating all contrary claims to wield authority.⁵⁵ By contrast, at the international level legal norms are applied and created horizontally as between states.⁵⁶ The problem with this is that these norms cannot transform anarchy into order because they lack a greater power creating reasons for states to act against their prima facie interests.

⁵² Waltz, *Theory of International Politics*, p. 113.

⁵³ See e.g. McDougal and Feliciano, *Law and Minimum World Public Order*, p. 106.

⁵⁴ Waltz, *Theory of International Politics*, p. 102.

⁵⁵ T. Hobbes, *Leviathan* (1985) Penguin, p. 185 P. I, Ch. 13.

⁵⁶ Even the SC acts “on behalf of” UN member states: See UN Charter, article 24(1).

Moreover, the horizontal system contains the seeds of its own ineffectiveness: Waltz explains that “so long as anarchy endures, states remain like units”.⁵⁷ This has clear implications for the ability to distinguish valid from invalid claims of self-defence in a situation where two sovereign equals claim that they have used self-defence against one another. However it also has implications for the behaviourist rather than communicative model of collective security. This holds that the collective security system is only effective where it manages to at least decrease the instance of inter-state violence. This is a forceful criticism where international lawyers sympathetic to the collective security system also assume that it must be capable of changing states’ behaviour in order to be effective. Such an ambition is, as the realists point out, unlikely to be realised.

Since the collective security system is part of a legal order which is supposed to regulate the behaviour of sovereign states, it is tainted by the contradiction in the idea of governing sovereigns. It has been said that the UN collective security system inherited the clash between individual national interests and collective ones that infected the League of Nations.⁵⁸ Many international lawyers overcome this contradiction by stating that the legal system is a horizontal one; sovereign equals regulate one another. However the effectiveness of this in practice depends on the equality de facto and not just de iure of the sovereigns. This is because, as Morgenthau emphasised, in the international field “it is the subjects of the law themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments”.⁵⁹

⁵⁷ Waltz, *Theory of International Politics*, p. 93.

⁵⁸ N.D. White, *The United Nations and International Peace and Security* (1990) Manchester University Press, p. 4. (Hereinafter, ‘White, *The United Nations and International Peace and Security*’.)

⁵⁹ Morgenthau, *Politics Among Nations*, p. 286.

Chapter VII intensifies this tension between the individual and the collective by enabling the SC to override the article 2(7) protection of the domestic sphere in the name of the collective and at the same time preserving the sovereign right of self-defence.⁶⁰ An illustration of the way that individualism can lead to the potential exploitation of collective security norms can be found in the work of Bowett. In 1958 he argued for a wide right of self-defence not limited to the occurrence of an armed attack. He defended this, *inter alia*, as “a restriction on the rights of sovereign states not lightly to be presumed”.⁶¹ Bowett is not unusual amongst international lawyers, particularly more traditional doctrinalists, in so holding. Indeed, the Permanent Court of International Justice’s statement to similar effect in the *Lotus* case is often cited: “Restrictions upon the independence of States cannot therefore be presumed”.⁶² While it has been said that recently “an obsession with sovereignty...has given way...to an international community and a general legal order”,⁶³ it is submitted that some writers view the right of self-defence as an exception to this.⁶⁴

One such restriction, it is sometimes argued, is the narrow framing of article 51. Thus, while realists with an instrumentalist optic may argue for a right to use force in self help regulated by nothing but the necessity of survival or the rationale of individual

⁶⁰ “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

⁶¹ D.W. Bowett, *Self-Defence in International Law* (1958) Manchester University Press, p. 188. (Hereinafter, ‘Bowett, *Self-Defence in International Law*’.)

⁶² *The Case of the SS Lotus*, Series A – no. 10 PCIJ Reports (1927), p. 18.

⁶³ D. Kennedy, “International Law and the Nineteenth Century: History of an Illusion” 65(3) *Nor. JIL* (1996) 385, p. 387

⁶⁴ See e.g. M. Halberstam, “The Right to Self-Defense Once the Security Council Takes Action” 17(2) *Mich. JIL* (1995-6) 229, p. 238

prosperity,⁶⁵ those attempting to defend the relevance of the collective security system may be tempted to argue that the right of self-defence is “inherent” and remains unchanged by the Charter. Morgenthau suggested that a sort of right of self help was preserved in the UN system in article 51: Article 51, he wrote, is a “reaffirmation of the traditional principle of common international law: it is for the injured nation to enforce international law against the law breaker”.⁶⁶ The individualistic approach to international affairs is inescapable in any discussion of individual self-defence.

Roberto Ago explained that “the very essence of the notion of self-defence” demands that every state has the *prima facie* right to apply self-defence itself because “the extremely urgent situation obviously leaves it no time or means for” conferring with other bodies.⁶⁷ In itself, this is unobjectionable. In domestic legal systems the exercise of the right of self-defence does not need prior authorisation.⁶⁸ The problem is where the right of *prima facie* application is converted into unchallengeable authority. In most domestic criminal law systems self-defence is subject to subsequent evaluation. Individualism can seem to be closely connected to the question of autointerpretation and with the idea of sovereignty. This provides a connection between realist criticisms of the collective security system and the tenets of the international lawyers who attempt to defend it. In other words, realists can use international lawyers’ own principles and assumptions against them.

⁶⁵ Waltz, *Theory of International Politics*, p. 104.

⁶⁶ Morgenthau, *Politics Among Nations*, p. 309.

⁶⁷ R. Ago, “Addendum to Eighth Report on State Responsibility”, [1980] II(I) ILC Ybk 13, para. 123.

⁶⁸ H. Kelsen, “Collective Security and Collective Self-Defence Under the Charter of the United Nations” 42(4) *AJIL* (1948) 783, pp. 784-5; H. Lauterpacht, *The Function of Law in the International Community* (1966) Archon Books, Connecticut, pp. 393-4. (Hereinafter, ‘Lauterpacht, *The Function of Law*’.)

It is assumed that when states feel threatened by one another they will consider neither ethical objections nor collective views about their response but will act wholly selfishly. The realist logic dictates that unless such objections and views can be rendered as interests to be weighed in the balance, they are simply irrelevant to the decision to use force. In order for a normative reason against selfish action to ‘count’, it is often said that it must be backed by the threat of sanction. This provides a bridge between realism in IR and the Austinian conception of law properly so called which demanded the addressees of law to be in “subjection” to the sovereign law-giver.⁶⁹ It is assumed that unless states which use force beyond the parameters of Chapter VII are likely to be sanctioned for such uses, it remains rational for them to flout article 51 thus jeopardising the absolute prohibition on the use of force on which the Charter is said to hang.

There are various degrees of this criticism. A few scholars argue that the anarchy between states is impervious to law and that the collective security system must necessarily fail. It is more usual to hear the argument that the collective security system simply lacks sufficient vertical authority in the form of reliable sanctions. This argument was at its height during the Cold War years when, as White wrote in 1990, “[p]ermanent member, particularly superpower, interests and influences have become so pervasive on the post-war world that the veto has effectively debarred the Security Council from taking action”.⁷⁰ However the argument has also been said to apply more recently in cases where the permanent members cannot agree that enforcement action under Chapter VII is necessary.

⁶⁹ J. Austin, *The Province of Jurisprudence Determined*, W.E. Rumble (ed.) (1995) Cambridge University Press, p. 171

⁷⁰ White, *The United Nations and International Peace and Security*, p. 9.

A recent instance of this was the dissenting views of France, Russia and China over the necessity of using force against Saddam Hussein's regime in Iraq in 2003. While it is generally agreed that the official justification of Operation Iraqi Freedom (OIF) was an SC authorisation, some international lawyers were moved to argue that the use of force could have been taken as pre-emptive self-defence.⁷¹ This stance was aided by the US policy on multilateralism: The G.W. Bush Administration's NSS warned that "[w]hile the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists".⁷²

The suggestion in this is that the right of self-defence could be used outside the collective security system where the decisions of the SC did not match US expectations of the action necessary to ensure international peace and security. This approach severely undermines the authority of the SC to determine permissible uses of force and aggregates unchecked power to the hands of the most powerful member states. Indeed, the proposition sparked much debate about the position of the hegemon within the collective security system and the compatibility of the two. Many said that collective security could only survive where there was a balance of power and that it could not operate in a system in which some actors could flout the rules.

Few international lawyers describe the international sphere as anarchic.⁷³ This may reveal a difference in disciplinary vocabulary between PIL and IR that can prevent real engagement in argument. The word anarchy does not necessarily connote chaos,

⁷¹ Sofaer, "Pre-emption"; W.H. Taft IV and T.F. Buchwald, "Preemption, Iraq, and International Law", 97 *AJIL* (2003) 557.

⁷² US National Security Strategy (2002), p. 6.

⁷³ Cf. R. Mullerson, *Ordering Anarchy* (2000) Martinus Nijhoff Publications, The Hague.

which would tend to negate law, merely a lack of top-down rule.⁷⁴ Wendt has written compellingly about three modes of anarchy: Hobbesian, Lockean and Kantian. These states of anarchy are characterised according to the inter-relation of the states within them: States in Hobbesian relation to one another are enemies; states in Lockean relation are rivals; and states in Kantian relation are friends.⁷⁵ He explains that in his own discipline of IR the Hobbesian model can dominate realist thinking about states' behaviour.⁷⁶ However Hobbesianism is also to be found in the bedrock of realist thinking that "international politics...is a struggle for power".⁷⁷ According to this view, rational actors seek primarily to improve the position of the individual rather than the community.

The place of the individual making rational choices at the centre of realist approaches leads naturally to the Hobbesian or Lockean conceptions of international anarchy: Any sort of submission to authority or to a collective is rendered contingent by the ongoing process of cost-benefit analysis and the preference for short-term gains that can be displayed in realist writing.⁷⁸ This means that the collective security system cannot be seen as a good thing except insofar as it enables individual states to flourish. For this reason, realist arguments say that compliant state behaviour is contingent on coincidence of interest or the ability of the collective security system to punish infractions and assert its position independently of its individual members. This topic will be returned to in Chapter IV.

⁷⁴ According to the Oxford English Dictionary it comes from *αν* + *αρχός* meaning without a head: "ad. Gr. *ἀναρχία*, n. of state f. *ἀναρχ_ος* without a chief or head, f. *ἀν* priv. + *ἀρχός* leader, chief".

⁷⁵ A. Wendt, *Social Theory of International Politics* (1999) Cambridge University Press, pp. 246-312. (Hereinafter, 'Wendt, Social Theory'.)

⁷⁶ Wendt, *Social Theory*, p. 259.

⁷⁷ Morgenthau, *Politics Among Nations*, p. 21.

⁷⁸ See Cryer, "The Limits of Objective Interests", p. 183.

C. Adaptability of the Charter System?

This section of the Chapter follows on from the last one sketching the Hobbesian assumptions of realist writers and how they overlap with certain doctrinal approaches to collective security. This is because a popular realist argument is that the prohibition on the use of force and the corresponding narrow right of self-defence are contingent on the ability of the SC to maintain international peace and security. In response many international lawyers argued that the collective security system was not necessarily doomed simply because article 43 agreements⁷⁹ had never been made or because the Cold War prevented the permanent five (P5) from agreeing. A further argument was that article 51 could, in the light of the unforeseen circumstances, be construed more broadly to pull up some of the slack left by the lack of enforcement action. Some of these arguments were based on the presence of the words “nothing in the present Charter shall impair the inherent right of...self-defence” in article 51 coupled with a prioritisation of the national decision. Others were based on evolutionary or responsive approaches to interpretation. The problem is that both approaches tended to give the ultimate authority to interpret the scope of the right to claimant states themselves since, owing to its paralysis, the SC was unlikely to be able to evaluate the claims. This rendered the Charter exploitable and, in the event, the right of self-

⁷⁹ Article 43 UN: “1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes”.

defence was exploited *inter alia* throughout the 1980s by the Reagan Administration.⁸⁰

Similar arguments have taken place over other changes that have occurred in the security environment in which the collective security system operates.⁸¹ These include innovations in weaponry and tactics and will also be discussed below. All of these changes to “reality” are linked by the idea that unless the “credibility gap” is to increase even more, the Charter norms will have to be adapted, reinterpreted or scrapped. Thus, Yoo juxtaposes his “instrumental approach” with the “doctrinal” one of many international lawyers⁸² such as Franck,⁸³ Gray,⁸⁴ Alexandrov,⁸⁵ Henkin,⁸⁶ Brownlie⁸⁷ and Bowett⁸⁸ whose work focuses on the UN Charter. The need for adaptability is, relatedly, intrinsically linked to the commitment of international lawyers to generally applicable norms rather than evaluation on a case by case basis. This will be discussed at the end of the present section.

⁸⁰ The Reagan Administration took a broad view of self-defence to justify its interventions in Central America during the 1980s. For instance, Operation Urgent Fury, the invasion of Grenada in October 1983, was justified as self-defence despite an absence of an ‘armed attack’ in a conventional sense. (UN Doc. S/21035 Letter Dated 20 December 1989 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council.) The US also justified its indirect use of force in Nicaragua as an exercise of collective self-defence of Honduras, El Salvador and Costa Rica before the ICJ. (ICJ Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Vol. II, US Counter-Memorial, para. 6). Again, however, there was no obvious ‘armed attack’ that could have triggered the right.

⁸¹ See T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) Cambridge University Press, p. 1. (Hereinafter, Franck, *Recourse to Force*’); W.M. Reisman, “Editorial Comment: Assessing Claims to Revise the Laws of War” 97(1) *AJIL* (2003) 82, p. 82. (Hereinafter, ‘Reisman, “Assessing Claims”’.)

⁸² Yoo, “Using Force”, p. 730.

⁸³ Franck, *Recourse to Force*, *passim*.

⁸⁴ Gray, *International Law and the Use of Force*, *passim*.

⁸⁵ S.A. Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) Kluwer International, The Hague, *passim*.

⁸⁶ Henkin, *How Nations Behave*, *passim*.

⁸⁷ I. Brownlie, *International Law and the Use of Force by States* (1963) Oxford University Press, *passim*. (Hereinafter, ‘Brownlie, *International Law and the Use of Force by States*’.)

⁸⁸ Bowett, *Self Defence in International Law*, *passim*.

The credibility gap is particularly sensitive with regard to the UN Charter collective security system because its drafters made such a conscious effort to avoid the faults which engendered a yawning chasm between aspiration and fact in the League of Nations. As Brierly explained, “[i]t was to correct the supposed weakness of the League as a system of security that a new and stronger body had to be created”.⁸⁹ Wedgwood asserted that the League was founded on a “covenant of inaction”.⁹⁰ The central innovations made the Charter collective security system resemble a primitive domestic constitution in the sense that they seemed to claim a monopoly on the use of force for the SC (with the exception of self-defence). As we have seen, article 2(4) prohibited the use of force as a weapon of policy. However the Charter included the possibility of enforcing this prohibition by providing for special agreements by which states would provide troops and equipment so that the SC could maintain international peace and security.⁹¹ Moreover the Charter provided for a Military Staff Committee (MSC) to oversee the deployment of such delegated forces.⁹² However article 43 agreements were never made and the MSC remains a token committee.

Furthermore, as critics of the collective security system do not tire of pointing out, the continuing unanimity of the Great Powers on which the system was premised did not last.⁹³ International lawyers were faced with a dilemma, as the practice of states diverged from the black letter of the Charter: Should state practice be exposed as violative? Or should it be seen as gradually moulding the Charter rules to the

⁸⁹ J.L. Brierly, “The Covenant and the Charter” 23 BYIL (1946) 83, p. 84.

⁹⁰ R. Wedgwood, “The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense” 97(3) AJIL (2003) 576, p. 584

⁹¹ See n. 79, *supra*.

⁹² Article 47(1): “There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament”.

⁹³ Franck, “Who Killed Article 2(4)?”, p. 809.

exigencies of politics? International lawyers who argued the former could be accused of rendering the right of self-defence under-inclusive and making the law esoteric. Those who argued the latter could be accused of making the collective security system vulnerable to exploitation by the powerful.

The place of self-defence in the Charter is often explained doctrinally as one of the two exceptions to the general prohibition on the use of force contained in article 2(4).⁹⁴ In viewing the right of self-defence as an internal exception to the collective security system, rather than as an external alternative to it, the scope of the right of self-defence was tied to the effectiveness of the SC in maintaining international peace and security.⁹⁵ This is reflected in the so-called “asymmetry” of articles 2(4) and 51.⁹⁶ Article 2(4) prohibits the threat or use of force but article 51 only allows states to take action against armed attacks. It would seem sensible to suggest that the scope of armed attack is smaller than that of threat or use of force. This connection is entrenched by the parallels that are often drawn between the prohibition on the use of force and the exceptional authority given to the SC to enforce international peace and security and the monopoly on the use of force that most national governments enjoy.⁹⁷ Morgenthau has written that the effectiveness of the Charter regime was “predicated on the continuing unity of the permanent members of the Security Council”.⁹⁸

⁹⁴ See e.g. M. Bothe, “Terrorism and the Legality of Pre-emptive Force” 14(2) EJIL (2003) 227, p. 228.

⁹⁵ D. Bowett, “Collective Self-defence under the Charter of the United Nations” 32 (1955–56) BYIL 130, p. 130. (Hereinafter, ‘Bowett, “Collective Self-Defence”’.)

⁹⁶ Glennon, “The Fog of Law”, p. 546; S.D. Murphy, “Protean Jus Ad Bellum” 27(1) Berk. JIL (2008) 22, p. 29.

⁹⁷ High Level Panel on Threats, Challenges and Change, *A More Secure World: Or Shared Responsibility* (2004), para. 190. (Hereinafter, ‘High Level Panel, *A More Secure World*’.)

⁹⁸ Morgenthau, *Politics Among Nations*, p. 470; Franck, “Who Killed Article 2(4)?”, p. 809.

During the Cold War, the P5 were divided along East/West lines. Any attempt to use the SC to undermine one of the superpowers or its allies would be met with the veto by the other. Owing to the fact that the SC cannot take enforcement action under Chapter VII without the consent of its P5,⁹⁹ the centralised protection of states by the SC was effectively non-existent. This led some to question the continued validity of the general prohibition on the use of force, but the more usual response – and the one that seemed to be taken by some states – was that the right of self-defence had simply expanded to fill the gap. McDougal wrote that self-defence “has been regarded as indispensable to the maintenance of even the most modest minimum order”.¹⁰⁰ There were many attempts to extend self-defence beyond the scope of article 51 to situations where an armed attack had not occurred: Cases of the protection of nationals,¹⁰¹ hot pursuit¹⁰² and anticipatory self-defence¹⁰³ are all examples of this.

The effectiveness of the Charter scheme has been subject to other social changes flowing from the Cold War. The end of bipolarity led to the age of the sole superpower.¹⁰⁴ For example, Schachter has written that the “rough parity between them [the USA and the USSR] undoubtedly contribute[d] to restraint”.¹⁰⁵ Once this balancing factor was removed after the Cold War, the US became not only the most powerful state outside the confines of the Charter, it also gained great power inside

⁹⁹ UN Charter article 27(3): “Decisions of the Security Council on all other [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting”.

¹⁰⁰ M.S. McDougal, “The Soviet-Cuban Quarantine and Self-Defense” 57(3) AJIL (1963) 597, p. 598.

¹⁰¹ See e.g. Bowett, *Self-Defence in International Law*, p. 87-105.

¹⁰² During the apartheid era, South Africa seemed to invoke ‘hot pursuit’. See e.g. UN Doc. S/PV.1944 (1976), para. 49.

¹⁰³ R. Higgins, *Problems and Process: International Law and How We Use It* (1994) Oxford University Press, p. 242.

¹⁰⁴ M. Byers, “Pre-emptive Self-Defense: Hegemony, Equality and Strategies of Legal Change” 11(2) *J. Pol. Phil.* (2003) 171, p. 171. (Hereinafter, ‘Byers, “Pre-emptive Self-Defense”’.)

¹⁰⁵ O. Schachter, “Self Defence and the Rule of Law” 83(2) AJIL (1989) 259, p. 268. (Hereinafter, ‘Schachter, “Self-Defense”’.)

the collective security system. This is because the US is among the permanent members of the SC. This means it has a veto that can prevent the SC from taking any measure adverse to its interests. Koskenniemi has also attested to the dominant role the US plays in the body.¹⁰⁶ This is augmented by the fact that since the Cold War the SC has proved itself well capable of agreeing resolutions under Chapter VII. The power of the US to carry out its national policy in spite of or even through the UN organs should not be forgotten.¹⁰⁷

Aside from the changes in the effectiveness of the SC, other social changes have also been said to have had an effect on the scope of the right of self-defence. Gray has explained that articles 2(4) and 51 are “very much a response to the Second World War and are accordingly directed to inter-state conflict”.¹⁰⁸ More sceptically, Yoo wrote that “the drafters of the UN Charter designed their system to win the last war, not the next”.¹⁰⁹ A common argument, therefore, against a narrow reading of self-defence is that new paradigms of violence have taken hold, such as guerrillas or more recently non-state actors armed with WMD. It is argued that it would be foolhardy to expect a state to wait until an attack had occurred lest it be decisive. The doctrine of pre-emption expands this, arguing that it would be foolhardy to let a distant threat become imminent. Thus Reisman has argued that “the opportunity for meaningful self-defence could be irretrievably lost if an adversary, armed with much more destructive weapons and poised to attack, had to be allowed to initiate its attack” first.¹¹⁰ It is argued by some that it is not possible to come to terms with non-state

¹⁰⁶ Koskenniemi, “The Place of Law in Collective Security”, p. 460-1.

¹⁰⁷ M. Byers, “Letting the Exception Prove the Rule” 17(1) *Ethics. & Int. Affs.* (2003) 9, p. 11. (Hereinafter, ‘Byers, “Letting the Exception Prove the Rule”’.)

¹⁰⁸ Gray, *International Law and the Use of Force*, p. 6.

¹⁰⁹ Yoo, “Using Force”, p. 736.

¹¹⁰ Reisman, “Assessing Claims”, p. 84.

actors as equals since they are effectively excluded from the collective security system because they are not states and since they do not respond to the same pressures as states nor to the same logics of action, states must be allowed to make pre-emptive surgical strikes on their encampments or to otherwise employ force to pacify these actors.

As well as new actors using force, there are also new weapons and delivery systems. For instance, Bowett suggested that “the technological advances of modern warfare may well have made any system of collective security simpliciter archaic and outmoded”.¹¹¹ Against this, Henkin maintained in 1979 that “neither the failure of the Security Council, nor the birth of many new nations nor the development of terrible weapons” means that article 51 should be expanded.¹¹² Nevertheless, the march of technological progress means that the collective security system is sometimes seen as lagging behind new developments in the arms industry.¹¹³ The increased availability of ICBMs and nuclear weapons has changed the playing field by making a first strike potentially deadly. If this were to be the case then the logic of the inclusion of armed attack in article 51 – that the act of aggression was the prior use of force and the act of defence the subsequent – could no longer hold. It was argued that states could not be expected to wait like sitting ducks for a potentially devastating attack.¹¹⁴

The constant social, political and technological changes that run through international life render the so-called “credibility gap” a problem for international lawyers. The problem is that Charter doctrine does not match state practice. In the context of

¹¹¹ Bowett, “Collective Self-Defence”, p. 161.

¹¹² Henkin, *How Nations Behave*, p. 141.

¹¹³ But cf. Byers, “Letting the Exception Prove the Rule”, p. 10-11.

¹¹⁴ M.S. McDougal and F.P. Feliciano, “Legal Regulation of the Resort to International Coercion: Aggression and Self-Defense in Policy Perspective” 68(6) *Yale LJ* (1958-9) 1057, p. 1150.

reprisals, Bowett introduced the phrase “credibility gap” into discussion on the law on the use of force.¹¹⁵ It is said that the practice of states does not bear out a narrow interpretation of the right of self-defence. Franck is another writer who once pointed to the “credibility gap”. In 1970 he wrote; “what killed article 2(4) was the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their national interest”.¹¹⁶ This disparity is increased or at least retrenched by claims that the strategic reality has fundamentally changed. The credibility gap is closely connected to the realist argument that states only seem to comply with international law where their interests coincide with it. This means that where it can be in states’ interests to violate a norm, such as article 2(4), it is possible to argue that the Charter rules on the regulation of the use of force have become obsolete.

In order to close the credibility gap and save the relevance of the collective security system, many writers have attempted to argue that such violations can actually be seen as commensurate with the law. There are various ways of doing this: Re-reading the facts; re-interpreting the Charter; or replacing it with customary norms instead. The credibility gap cannot be closed, however, until proponents of collective security let go of the claim to objectivity. In this regard, the realist criticism is potent. Carr explains that “the bankruptcy of utopianism resides not in its failure to live up to its

¹¹⁵ Bowett, “Reprisals”, p. 1.

¹¹⁶ Franck, “Who Killed Article 2(4)?”, p. 837; It should be noted that Franck changed his views later. In response to the invasion of Iraq in March 2003, he wrote calling on international lawyers to “guard their professional integrity” rather than allow the powerful to take advantage of the current power disequilibrium. Franck, “What Happens Now?”, p. 620; See also, T.M. Franck, “Is Anything ‘Left’ in International Law” 1 *Unbound* (2005) 59, p. 63, suggesting that international lawyers on the left reappraise their deconstructive strategies.

principles, but in the exposure of its inability to provide any absolute and disinterested standard for the conduct of international affairs”.¹¹⁷

When international lawyers argue that the Charter can adapt to meet realist criticisms, they are aided by the doctrine of sources.¹¹⁸ It is said that the binding power of collective security norms flows from “the will of each individual member of the international community”.¹¹⁹ This does not have to include merely the initial consent to the Charter in 1945, but can be expanded to include small acts of consent by practice which can become customary norms. While some approaches to the formation of customary norms are relatively strict and require identification of general practice accepted as law, there are those who will find practice relevant to customary norm formation in mere acquiescence to practice purported to be lawful. Practice is also used in the form of “subsequent practice” as a means of treaty interpretation.¹²⁰

A familiar ground for the identification of practice with regard to self-defence, an action that is better described as exceptional rather than general, is the SC. The condemnation or commendation of a use of force by the SC on behalf of UN member states is sometimes seen as indicating the state of customary international law because it appears to reflect the *opinio iuris* of states. The authoritativeness of such indications

¹¹⁷ Carr, *The Twenty Years' Crisis*, p. 88.

¹¹⁸ The sources of international law are laid down in article 38(1) of the ICJ Statute:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

¹¹⁹ Lauterpacht, *The Function of Law*, p. 3.

¹²⁰ See Chapter II, at p. 83-87.

usually differs from scholar to scholar and from situation to situation.¹²¹ For instance, the apparently unanimous acceptance that the US had a right of self-defence in SCRs 1368 and 1373 following the attacks of September 2001 is to be contrasted by the failure of SC members to take enforcement measures against Israel for its use of force against the Osiraq reactors in 1981. Both activities have been used to suggest that the SC has recognised a right of anticipatory self-defence.¹²²

D. Normative Indeterminacy.

One of the factors enabling the importation of customary international law norms into the collective security system is that the Charter is full of “loopholes” and indeterminacy. If the norms of the Charter appear to admit of more than one interpretation, it is said that the practice of states can aid international lawyers in identifying the more authoritative interpretation. While realists might urge such an approach because norms comprised of present state practice are sometimes seen as more likely to be in states’ immediate interests, more doctrinal international lawyers can come to the same result using the concept of sovereignty and reasoning that the binding nature of collective security norms derives from state consent. States’ changing interests can therefore be said to increase ambiguity. Accordingly, Schachter says that indeterminacy occurs partly because “[g]eneral formulas accepted as law are

¹²¹ E.g. some read the outbreak of the 1967 Six Day War as supportive of anticipatory self defence and others as indicative of its lack of international acceptance. Cf. Franck, *Recourse to Force*, p. 104 and Gray, *International Law and the Use of Force*, p. 130.

¹²² E.g. D’Amato argues that SCR 487 (1981) “can only be seen as covert support for Israel’s air strike” despite the fact that the first operative paragraph of that resolution “strongly condemns the military attack by Israel”, A. D’Amato, “Israel’s Air Strike against the Osiraq Reactor: A Retrospective” 10(1) *Temp. I&C LJ* (1996) 259, p. 262.

subject to continuing interpretation and, therefore, to fresh arguments as to what the law should be”.¹²³

The more open-textured a norm is, the easier it will be to find an interpretation favourable to a state’s immediate interests. This might be true for case-to-case readings or over the longer term. For instance, where a state wishes to use force in self defence it may be eager to make a wide interpretation of article 51 but would be loathe to see that interpretation apply to a similar situation in which another wished to take action in self-defence against it. States’ medium-term power-relations are also relevant to this. If a state finds itself in the ascendant, as the US does at present, it may be in its interest to advocate a wide right of self-defence that is more available to it than to other states.¹²⁴ However, should the US find itself under threat from an aspiring superpower in the future, such a broad interpretation would no longer be favourable to it. By imbuing the collective security norms with ambiguity, states ensured that the Charter could endure, eliciting “maximum support through minimal specificity”.¹²⁵

The indeterminacy of Charter norms therefore creates the danger alluded to in the realist “causal thesis”;¹²⁶ that where states use justifications of self-defence they do so merely for the tinsel of rationalisation. Morgenthau says that “in order [for international documents] to obtain the approval of all subjects of the law, necessary for acquiring their legal force, [such documents] must take cognizance of all the divergent interests that will or might be affected by the rules to be enacted”. This

¹²³ Schachter, “Self-Defense”, p. 267.

¹²⁴ Byers, “Pre-emptive Self-Defense”, p. 181.

¹²⁵ Franck, *Recourse to Force*, p. 51.

¹²⁶ *Supra*, at p. 18.

means that legislation is deliberately drafted in broad terms that can be “vague or ambiguous”.¹²⁷ This does not mean that the collective security scheme of the Charter is meaningless, just that the net in which meaning is interstitially created¹²⁸ is more loosely woven than it might be. The UN Charter is often held out to be a prime example of this.¹²⁹ The ambiguity of the meaning of article 2(4), for instance, means it is possible, if not quite convincing, to argue that there is no general prohibition on the use of force, but only of those threats or uses of force against the territorial integrity, political independence or other purpose inconsistent with the Charter.¹³⁰ However indeterminacy in the meaning of legal norms does not necessarily arise only from “loopholes”.¹³¹

Notable gaps in article 51 include the lack of reference to necessity and proportionality which might be used to govern the duration and mode with which self-defence is carried out.¹³² For instance, in the case of the right of self-defence with which this thesis is primarily concerned, the article 51 formulation is said not only to be indeterminate but also over-determining. This means that ambiguity arises, as discussed above, from clashes between state interest and the literal interpretation of the text. Ambiguity has also been identified by scholars interested in linguistic and semantic indeterminacy. In this section, the text of the Charter will be dealt with before the more theoretical linguistic and semantic indeterminacy point is tackled.

¹²⁷ Morgenthau, *Politics Among Nations*, p. 285-6.

¹²⁸ Koskenniemi, *From Apology*, p. 9.

¹²⁹ Franck, *Recourse to Force*, *passim*.

¹³⁰ A. D’Amato, “Israel’s Air Strike Against the Iraqi Nuclear Reactor” 77(3) *AJIL* (1983) 584, p. 585; See also Sofaer’s view that dispatching an aggressor is not inconsistent with Charter purposes, ‘Sofaer, “Pre-emption”’, p. 223.

¹³¹ Franck, *Recourse to Force*, p. 1.

¹³² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Merits*, ICJ Reports, 1986, para. 176 (Hereinafter, ‘*Nicaragua (Merits)*’).

Article 51 is said to be indeterminate because it appears to contain an internal contradiction between the rules of the Charter and those of customary international law by describing the right as “inherent” and then going on to draw the bounds of the right more narrowly than states had been accustomed, despite saying that “nothing in the present Charter shall impair” it. The right is also said to be indeterminate because it does not suggest what sort of use of force might be appropriate to respond to an armed attack.¹³³ Finally, where the customary principles of necessity and proportionality are read into the Charter framework,¹³⁴ it has been said that they render the right uncertain because they “leave ample room for diverse interpretations in particular cases”.¹³⁵

However the right is also over-determining because not only does it require states to wait until the occurrence of an armed attack, but it also expressly makes the exercise of the right of self-defence subject to SC measures and, though failure to do so is said to be merely indicative of illegality, it imposes a reporting requirement on states.¹³⁶ The more determinate the rule, the less flexible it is and the more likely instances of violation will be. The less determinate a rule, the easier it is for claimants of self-defence to argue that their behaviour technically falls within the scope of the provision however abhorrent it may be. The credibility gap can be widened or lessened according to an international lawyer’s willingness to resort to concrete practice to assuage the utopian character of pure normativity. However, an international lawyer must be careful not to stray too far into concrete state practice lest the broad norm of self-defence he ends up advocating drifts too far from the

¹³³ Ibid.

¹³⁴ E.g. Greenwood, “International Law and the Pre-emptive Use of Force”, p. 12.

¹³⁵ Schachter, “Self-Defense”, p. 267.

¹³⁶ Nicaragua (Merits), para. 200.

normative vision held in the Charter. This Koskenniemi skilfully describes as an oscillation between concreteness and normativity.¹³⁷ Koskenniemi says that the impossible task mainstream international lawyers set themselves of justifying legal norms as both concrete and normative produces an “argumentative structure...[that] both creates and destroys itself”: “[T]he two requirements [of normativity and concreteness] cancel each other out”.¹³⁸ Through a realist lens, it might be seen that article 51 is an agglomeration of the worst of both worlds. Some international lawyers have attempted to argue for the continuing relevance of the Charter norms because within ambiguity lies the seed of adaptation.¹³⁹

This process of adaptation is aided by the first source of ambiguity noted; the apparent reference to natural or customary law in the first words of article 51: “Nothing in the present Charter shall impair the inherent right” of self-defence. This has enabled scholars to argue that since article 51 does not include the words “if and only if an armed attack occurs”, the right of self-defence is not to be read as limited to a response to an armed attack.¹⁴⁰ To the extent that pre-1945 customary law permitted – for instance - anticipatory self-defence, such scholars maintain, this should be imported into article 51 to illustrate other situations in which self-defence is permissible.¹⁴¹ It is arguable that the departure from the literal text of the Charter was aided by the ICJ when, in the 1980s, it sought jurisdiction over the US dispute with Nicaragua in the teeth of a US reservation *rationae materiae* to the optional clause.¹⁴²

¹³⁷ Koskenniemi, *From Apology*, p. 17.

¹³⁸ M. Koskenniemi, “The Politics of International Law”, 1 *EJIL* (1990) 4 p. 8. (Hereinafter, ‘Koskenniemi, “The Politics of International Law”’.)

¹³⁹ See Franck, *Recourse to Force*, *passim*.

¹⁴⁰ M.S. McDougal, “Comments” *ASIL Proc.* (1963) 163, p. 164.

¹⁴¹ Bowett, *Self-Defence in International Law*, p. 192.

¹⁴² Article 36(2) of the ICJ Statute: “The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in” certain legal disputes.

This reservation excluded disputes arising from multilateral treaties unless “all parties to the treaty affected by the decision are before the Court”.¹⁴³ The dispute concerned the right of collective self-defence mentioned in article 51 of the Charter. If the dispute arising between the parties was found to come within the UN Charter, it would be non-justiciable as contravening the reservation. The Court, keen to assert its competence, held that it did not need to rely on the Charter because it found that a parallel regime existed in customary international law.¹⁴⁴ The reason that “customary international law continues to exist alongside treaty law” is that “the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content”.¹⁴⁵ This judgment has meant that the importation of state practice into the interpretation of the scope of the right of self-defence has the imprimatur of the foremost international judicial body.

The judgment can be read as an attempt to assert the relevance of the collective security system, but it should be remembered that the broad view of self-defence thereby enabled can be easily exploited because of the difficulties in analysing state practice. Franck has warned that “the line between violation and adaptation” is blurred.¹⁴⁶ To go still further, it is possible to make a “floodgates” argument. To the extent that state practice is allowed into the Charter to aid its interpretation as better expressing either states’ will or their interest, how is it possible to draw the line? The doctrine of pre-emption is most apposite since the G.W. Bush Administration purported to have based it on existing law. This meant that the doctrine could be

¹⁴³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Jurisdiction and Admissibility*, ICJ Reports, 1984, para. 67.

¹⁴⁴ *Nicaragua (Merits)*, para. 172 .

¹⁴⁵ *Ibid.*, para. 176.

¹⁴⁶ Franck, *Recourse to Force*, p. 9.

presented as a mere “adaptation” of the law, meaning it would not seem like a direct challenge to the continuing relevance of the Charter system. In the NSS it was written that the US “has long maintained the option of preemptive actions to counter a sufficient threat to our national security”.¹⁴⁷ This seems to seek authority from the practice of a single state, rather than the general practice of states so as to qualify as valid custom under article 38(1)(b) of the ICJ Statute. However, it is submitted that the appeal to consistent past practice is more of an assertion of sovereignty and an implicit claim that the US has never acceded to the narrow reading of article 51.¹⁴⁸

On the other side of the coin are those international lawyers who read article 51 literally and suggest that even if the Charter has not subsumed customary law, it has at least modified it.¹⁴⁹ The credibility gap is sometimes said to emanate from the “push button approach” of international lawyers. Sofaer has criticised the “mechanical” approach of “most international lawyers” to the application of the exceptions to article 2(4) in the Charter.¹⁵⁰ However Sofaer makes it clear that this critique is by no means new: He cites policy realists McDougal and Feliciano as criticising the narrow reading of article 51 as “logically unwarranted”.¹⁵¹ While it is submitted that few, if any, international lawyers think of the collective security system as a slot-machine, it is apparent that certain writers are less swayed by state interests than others.

¹⁴⁷ US National Security Strategy (2002), p. 15.

¹⁴⁸ This theme will be returned to in the following Chapter.

¹⁴⁹ See e.g. H. McCoubrey and N.D. White, *International Law and Armed Conflict*, (1992) Dartmouth Publishing Co., p. 89.

¹⁵⁰ ‘Sofaer, “Pre-emption”, p. 213.

¹⁵¹ In McDougal, “The Soviet-Cuban Quarantine” 57() *AJIL* (1963) 597.

One of the most eminent international lawyers who uses what Gray calls the “narrow view” is Brownlie.¹⁵² In 2002 Brownlie told the House of Commons Foreign Affairs Committee that the “language [of article 51] effectively excludes the legality of pre-emptive action” except where a stated intention to attack has been decisively set in train.¹⁵³ This advice was not, ultimately, heeded by the British Government who preferred the more expansive reading of Greenwood.¹⁵⁴ This is an illustration of the esotericism that can result from readings of the law that fail to take into account the national policies of states. The substance of the right of self-defence will be returned to in the next Chapter when international lawyers’ interpretations of doctrine will be discussed. We shall turn now to a matter better expressed as a question of form: Indeterminacy.

Koskenniemi has warned that law can open a “mine of argumentative possibilities for mala fide statesmen in search of justifications”.¹⁵⁵ This is because the structure of international legal argumentation is characterised by dilemmas between utopia and apology.¹⁵⁶ In terms of self-defence, we can see this in the tension within article 51 between the utopian requirement that an armed attack has occurred before states resort to force and the phrase “nothing in the present Charter shall impair the inherent right to...self-defence” which, in some hands, tends towards apologia. The play between apology and utopia is mirrored in another axis; ascending and descending arguments.

Ascending arguments justify positions from base factors such as state interest or

¹⁵² See e.g. Brownlie, *International Law and the Use of Force by States*.

¹⁵³ Memorandum to the UK Foreign Affairs Committee on 24 October 2002 by Prof. Ian Brownlie QC “Iraq, WMD and the Policy of Pre-emptive action” in House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War on Terrorism: Second Report of the Session 2002-3*, pp. Ev. 21-23.

¹⁵⁴ Memorandum by Prof. Christopher Greenwood QC “The Legality of Using Force Against Iraq” 24 October 2002. in House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War on Terrorism: Second Report of the Session 2002-3*, pp. Ev. 17-21.

¹⁵⁵ M. Koskenniemi, “Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons”, 10 *LJIL* (1997) 137, p. 152.

¹⁵⁶ Koskenniemi, *From Apology*, p. 20.

factual behaviour. Descending arguments justify positions from common interests or values anterior to the individual's interest.¹⁵⁷

Koskenniemi says international law's "argumentative structure...is capable of providing a valid criticism of each substantive position but itself cannot justify any".¹⁵⁸ This is because, where valid counter arguments are always available from the opposing pole in a dilemma, none can ultimately impose themselves as correct. In terms of self-defence, this would mean that a state wishing to claim self-defence for a use of force that was made in anticipation of an attack would use ascending arguments from its interest in preventing damage to its territory and citizenry. However such a justification could be countered by a descending argument that the Lauterpachtian rule "there shall be no violence" prevails.¹⁵⁹

One of the basic criticisms levelled at doctrinal approaches to international law is that they unwarrantedly put their faith in the objectivity of legal reasoning. The objectivity of the law comes through the provision of solutions "in a legally determined way, independent of political considerations".¹⁶⁰ In some cases this criticism flows from a radical subjectivism critique that rejects the possibility of objectivity per se. Carty wrote that international law is no more than the way that international lawyers look at international relations.¹⁶¹ In other cases the criticism is based around a belief that a bit of subjectivity in the application of the law is a good thing.¹⁶² On the other hand, the

¹⁵⁷ Ibid., p. 59.

¹⁵⁸ Koskenniemi, "The Politics of International Law", p. 8.

¹⁵⁹ See Franck, *Recourse to Force*, p. 1.

¹⁶⁰ Koskenniemi, *From Apology*, p. 24.

¹⁶¹ A. Carty, *The Decay of international law? A Reappraisal of the Limits of the Legal Imagination in International Affairs* (1986) Manchester University Press; See also Koskenniemi, *From Apology*, p. 548.

¹⁶² 'Sofaer, "Pre-emption", p. 213.

objectivity of legal form is a means of countering the powerful: it “resist[s] the pull towards imperialism”.¹⁶³

The claim that international law lacks objectivity and the belief that it must have objectivity if it is to provide a sufficiently forceful argument, or exclusionary reason, against state interests is particularly pertinent in the collective security system. This is because the *prima facie* applier of the right of self-defence is the state in question. This need not be a problem if such a decision was to be evaluated as an international claim *ex post*. However, as we will see in Chapter III, the evaluation of self-defence can be both formalised and esoteric and politicised and exploitable depending on the choices one makes in presenting an evaluation. Furthermore, as was discussed above, the sovereign, individualistic nature of the subjects of the collective security system means that evaluation cannot be foisted upon them if they are to cooperate with it.¹⁶⁴ To give a state primary responsibility to interpret a norm is to give it very great power to bring its action within a justification to the extent that the norm it applies is flexible.

The objectivity of legal norms can also lend weight to the argument of those taking an instrumentalist optic. Here, objectivity tends not to be formal but substantive; certain values and principles are taken to be objective. This sort of objectivism can be found in the G.W. Bush Administration NSS. One of the legitimising reasons for an expanded right to use force is the descending argument that US national values of “freedom, democracy and free enterprise” have become universally applicable since

¹⁶³ M. Koskenniemi, *The Gentle Civilizer*, p. 500.

¹⁶⁴ But cf. Chapter IV, at p. 225-232.

the Cold War.¹⁶⁵ The assumption that principles can be universally applied is also found in the work of international lawyers who supported the G.W. Bush Administration's preference for national discretion in the exercise of self-defence. Sofaer has put forward the test of "reasonableness in a particular context" to determine whether a use of force is valid or not.¹⁶⁶ As Kant pointed out; "ease of use and apparent adequacy of a principle do not provide any certain proof of [a maxim's] soundness".¹⁶⁷

In this case, Sofaer assumes that the factors on which a judgment of reasonableness is based are capable of being perceived by every one and interpreted in the same way. Indeed, resort to general principles rather than detailed rules is another means of imbuing the rules on self-defence with flexibility. However it is suggested that where no third party evaluation of a claim is possible, the subjective element which flexibility brings to the law by way of the operator's discretion will render the right of self-defence ripe for exploitation by states. Indeed, when the same sort of technique was used by McDougal and Feliciano during the 1960s, their scholarship was widely seen to be an apologia for US foreign policy. For instance, Duxbury wrote that "from the Truman era onwards, policy science became a cloak for Cold War chauvinism".¹⁶⁸ McDougal and Feliciano used the value of "human dignity" as the ultimate telos for international law and as a means for distinguishing "the factual processes of international coercion and the process of authoritative decision by which the public order of the world community endeavours to regulate such process of coercion".¹⁶⁹

¹⁶⁵ G.W. Bush Foreword to the US National Security Strategy (2002), p. 1.

¹⁶⁶ 'Sofaer, "Pre-emption", p. 213.

¹⁶⁷ I. Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns* (1785), J.W. Ellington (trans) 3rd ed. (1993) Hackett, p. 5.

¹⁶⁸ Duxbury, *Patterns of American Jurisprudence* p. 197.

¹⁶⁹ McDougal and Feliciano, *Law and Minimum World Public Order*, p. viii and 10.

The ability of law to act as a conduit for the policies of the powerful through processes of universalization has been discussed by Koskenniemi.¹⁷⁰ He has written that appeals to universal interests of principles are merely attempts “to realise [...] special interest without having to fight”.¹⁷¹ Koskenniemi’s point is that while a given value of, for instance, reasonableness, might appear to be universal, in fact it has been coloured with particularity and is not empty or neutral. Indeed, this is a criticism that has been made by realists such as E.H. Carr.¹⁷²

E. Autointerpretation.

There are those who argue not only that the extent of the right of self-defence should be broader, but also that individual states have sole discretion to determine the limits of this breadth in particular cases. Thus, Glennon write that “states will continue to judge for themselves what measure of force is required for their self-defense - action that is appropriate...not because defense is permitted by the UN Charter, but because defense is necessary for survival and survival is intrinsic in the very fact of statehood”.¹⁷³

Auto-interpretation would be an insuperable obstacle to distinguishing valid from invalid uses of force in self-defence except from the point of view of the claimant nation. As Sofaer admits, “[s]tates are hardly models of objectivity in seeking to

¹⁷⁰ M. Koskenniemi, *The Gentle Civilizer*, p. 505.

¹⁷¹ M. Koskenniemi, “International Law in Europe: Between Tradition and Renewal” 16(1) EJIL (2005) 113 p. 116.

¹⁷² Carr, *The Twenty Years’ Crisis*, p. 82.

¹⁷³ Glennon, “The Fog of Law”, p. 558.

advance and protect their interests”.¹⁷⁴ Indeed, the effect of auto-interpretation would be to reduce any apparent international claim to a national decision by denying any process of international evaluation. Oscar Schachter’s position is that without objective evaluation, a state’s claim to have used force in self-defence is not a legal one:

To say that each state is free to decide for itself when and to what extent it may use arms would remove the principal ground for international censure, and, in effect, bring to the vanishing point the legal limits on unilateral recourse to force.¹⁷⁵

His position is that while the right of self-defence may be “inherent”, it is not “autonomous” if it is to be regulated by the rule of law.¹⁷⁶ This is indubitably the case where very powerful states are concerned. Gray sounds a note of caution in this regard, saying the disclaimer in the doctrine of pre-emption that the US “does not use its strength to press for unilateral advantage”¹⁷⁷ “lacks plausibility”.¹⁷⁸ Schachter is sensitive to the idea that there is a difference between views of law as a restraint and law as a facilitator of states’ interests.¹⁷⁹ He says that “[t]o conclude that law must yield to...judgments of national interest negates the idea of law as a restraint on state

¹⁷⁴ Sofaer, “Pre-emption”, p. 225.

¹⁷⁵ Schachter, “Self-Defense”, p. 263.

¹⁷⁶ *Ibid.*, p. 277.

¹⁷⁷ G.W. Bush Foreword to US National Security Strategy (2006).

¹⁷⁸ C. Gray, “The US National Security Strategy and the New ‘Bush Doctrine’ on Pre-emptive Self-defense” 1(2) *Chin. JIL* (2002) 437, p. 437. (Hereinafter, ‘Gray, “The US National Security Strategy”’.)

¹⁷⁹ See Lauterpacht, *The Function of Law*, p. 180.

conduct”.¹⁸⁰ Nevertheless there are legal realists who state that international law is merely facilitative of states’ interests and exerts no compliance pull.¹⁸¹

The controversy between realists who believe that self-defence is a natural, and perhaps not even legal, right and the doctrinal and institutional lawyers who hold that it is a legal right delimited by law can also be seen through the prism of application. Indeed, it is central to Lauterpacht’s distinction between law’s recognition of the right and its regulation of it.¹⁸² Those who believe that the exercise of self-defence is a matter for the aggressed state alone to determine effectively recast what might be a claim at the international level as a decision at the national level. Glennon reads the word “inherent” in article 51 as an affirmation of the claimant state’s authority to judge for itself the necessity to use force in self-defence, but also as indicative that it cannot be gainsaid by any other body’s evaluation.¹⁸³ The effect of this is to remove the decision from the international political space and make it extremely difficult to criticise.

A more prosaic argument buttressing the primacy of national discretion to use force in self-defence is that no-one but the aggressed state is in a better position to answer the question of what is necessary for its defence.¹⁸⁴ In the Nicaragua case, although the US did not claim that law was irrelevant to self-defence claims, it did claim that the US alone was competent to judge the necessity of self-defence against the Contras.¹⁸⁵

¹⁸⁰ Schachter, “Self-Defense”, p. 273.

¹⁸¹ Goldsmith and Posner, *Limits*, p. 13.

¹⁸² Lauterpacht, *The Function of Law*, p. 180.

¹⁸³ Glennon, “The Fog of Law”, p. 553-4, discussing the “until the SC has taken necessary measures” clause.

¹⁸⁴ *Ibid.*, p. 552, arguing that it is a state’s “responsibility to safeguard[] the well-being of their citizenry”.

¹⁸⁵ Schachter, “Self-Defense”, p. 262.

Judge Schwebel in his dissenting opinion at the Merits stage approved of this approach on the grounds that the court was not equipped with the information to make the decision; “the court is not in a position to subpoena the files of the Central Intelligence Agency and the White House”.¹⁸⁶ The matter is particularly relevant regarding the threat from “rogue states and their terrorist clients”¹⁸⁷ because threats are “more diverse, less visible and less predictable”.¹⁸⁸ The argument that intelligence cannot be shared lest national security be jeopardised will be further discussed in Chapter V. For the present, it is enough to say that withholding the evidence on which a claim of pre-emptive self-defence was based would in effect mean that the US assurance that “[t]he reasons for our actions will be clear” must simply be taken on trust.¹⁸⁹

It is sometimes said that national security is the most fundamental of all states’ interests.¹⁹⁰ Yoo argues that self-defence is “grounded...in a vision of individual rights and liberties in relation to state action”.¹⁹¹ To the extent that this view is held by those advocating a cost-benefit analysis of the validity of claims to have used force in self-defence, it seems to weight the scales in favour of the state claimant of self-defence. However, there are those who argue that a state’s security interests can be better protected by the collective than through unilateral action. On the one hand there is the long-term argument that once states begin to expect that force will not be used, they will be less likely to use force. On the other hand there is the argument that owing to the sorts of threats that states face nowadays, it is simply not possible to

¹⁸⁶ Nicaragua (Merits), Dissenting Opinion of Judge Schwebel, para. 71.

¹⁸⁷ US National Security Strategy 2002, p. 14.

¹⁸⁸ European Security Strategy, A Secure Europe in a Better World, 12 December 2003, p. 3.

¹⁸⁹ US National Security Strategy 2002, p. 16.

¹⁹⁰ Reisman, “Assessing Claims”, p. 82.

¹⁹¹ Yoo, “Using Force”, p. 730.

tackle them unilaterally.¹⁹² One example of this is the attempt to prevent the proliferation of WMD. A single state acting alone cannot monitor all other states' borders or ensure that their controls are adequate.

This is a powerful argument for the continuing participation of the US in the collective security system, but it does not tackle those particular instances where a state may desire to act unilaterally. Equally, the argument that ultimately it is in all states' favour to have a narrow exception to the absolute prohibition on the use of force is easily set aside in particular cases.¹⁹³ This highlights one of the problems with the realist conception of interests; that it is possible for a decision-maker to have conflicting interests. This thesis itself deals with the conflicting interests of using force as a means to a desired end and using law as a means of justifying such force. The problem is that where international lawyers simply produce alternative readings of what is in a state's interest it is unlikely to have much persuasive power over a realist audience.

CONCLUSION.

The realist critiques of the UN collective security system and the right of self-defence that operates within it centre around two main objections. The first objection is that the right of self-defence is too narrow and does not take account of state interests. The second objection is that, without centralised machinery to evaluate claims, the indeterminacy of the Charter norms enables states to exploit its provisions to make spurious justifications. These conclusions flow from realists' assumptions about how

¹⁹² High Level Panel, *A More Secure World*, p. vii.

¹⁹³ Particularly where no statistics exist. Henkin, *How Nations Behave*, p. 69.

the rational state behaves, what state interests consist of and the facilitative role law is supposed to play at the international level.

Koskenniemi's *From Apology* is about the structure of legal argumentation and it is submitted that the to-ing and fro-ing of argument about self-defence fits his model.¹⁹⁴ Esoteric arguments are descending arguments that appeal to normativity, while exploitable ones are ascending arguments rooted in concreteness. In the course of the Chapter we have encountered attempts by international lawyers to answer realists claims that international law is irrelevant to security issues. It has been shown that some of the answers given simply render international law esoteric because they fail to engage with the realist criticisms. According to Henkin, "[u]nable to deny the limitations of international law, they insist that these are not critical, and they deny many of the alleged implications of these limitations".¹⁹⁵ International lawyers who insist on a textual approach to interpreting article 51 might fall into this camp.

On the other hand, we have also encountered international lawyers who attempt to beat realists at their own game, engaging with the critiques and showing how realists have underestimated the collective security system. In some cases this is because the international lawyer is writing for a different audience; for political decision-makers, for instance.¹⁹⁶ Thus, Byers writes that "[i]nternational lawyers in the Department of State, together with lawyers in other parts of the U.S. government, have excelled in

¹⁹⁴ Koskenniemi, *From Apology*, p. 59.

¹⁹⁵ Henkin, *How Nations Behave*, p. 25.

¹⁹⁶ Several prominent US international lawyers who take a realist approach have also been advisors to the US Government: Abraham Sofaer (US State Department Legal Advisor 1985-1990), John Yoo (Office of Legal Counsel, Department of Justice, 2001-2003) and William H. Taft IV (US State Department Legal Advisor 2002-2005), for instance.

shaping the law to accommodate the interests of the United States”.¹⁹⁷ It has been shown that the “credibility gap” cannot be completely closed without reducing the ought to the is and rendering adaptation and violation indistinguishable. International lawyers often echo Henkin’s comment,¹⁹⁸ reiterated by the ICJ,¹⁹⁹ that legal norms can be honoured in the breach.

It is not unreasonable for realists to question whether international law has any place in questions of security. Indeed, realist critiques have uncovered much that is lacking or taken-for-granted in the present system. However, in the opinion of the present writer, the place of law in collective security is indispensable. This thesis will be concerned with showing how the collective security system may be able to distinguish between valid and invalid uses of force without simply opening itself to exploitation by dominant states. Koskenniemi, a former legal advisor to the Finnish delegation at the Security Council during the early 1990s showed how, when push came to shove, international law became very relevant indeed.²⁰⁰ There was a resurgence in this feeling following the more recent intervention in Iraq in 2003. It has been said that “international law has become important politically, intellectually and culturally” at that time.²⁰¹

International law had an important role to play not only in providing a justification for OIF but also as a means of criticising it. This was picked up by the media which has

¹⁹⁷ Byers, “Letting the Exception Prove the Rule”, p. 9.

¹⁹⁸ Henkin, *How Nations Behave*, p. 45.

¹⁹⁹ “If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”. *Nicaragua (Merits)*, para. 186.

²⁰⁰ Koskenniemi, “The Place of Law in Collective Security”.

²⁰¹ S. Estreicher and P.B. Stephan, “Taking International Law Seriously” 44(1) *Vir. JIL* (2003) 1, p. 1.

arguably become an increasingly important forum in which international legal communication takes place.²⁰² Many well-known academics signed a letter to the Guardian which garnered much coverage in protest against the action.²⁰³ Another important event that was much covered in the press was the resignation of the deputy legal advisor to the Foreign Office, Elizabeth Wilmshurst.²⁰⁴ International law was one of the few available means of authoritative opposition to the intervention.²⁰⁵ The second half of this thesis will explore what might be done to ensure that it retains its critical potential.

²⁰² C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005) Brill, Leiden, p. xi.

²⁰³ Guardian, 7 March 2003.

²⁰⁴ Resignation letter available at: http://news.bbc.co.uk/2/hi/uk_news/politics/4377605.stm.

²⁰⁵ See e.g. O. Bowcott, “Was the War Legal? Leading Lawyers Give their Verdict”, Guardian, 2 March 2004. Available at:

<http://www.guardian.co.uk/politics/2004/mar/02/uk.internationaleducationnews>; D. MacLeod, “Blair Could Face International Court over War Conduct”, Guardian, 6 November 2003. Available at:

<http://www.guardian.co.uk/world/2003/nov/06/iraq.iraq>; S. Carrell and R. Verkaik, “War on Iraq was Illegal, say Top Lawyers”, Independent, 25 May 2003. Available at: <http://www.independent.co.uk/news/uk/crime/war-on-iraq-was-illegal-say-top-lawyers-539026.html>.

CHAPTER II

Secondary Rules of Interpretation and Custom.

INTRODUCTION.

In this chapter some examples will be given of the ways in which international lawyers using doctrinal approaches, or adopting a more “normative optic”,¹ have attempted to show that rules and doctrines of collective security can answer realist criticisms of their ineffectiveness and irrelevance. In the previous chapter some of the realist criticisms of the law on the use of force within the UN collective security system were set out and some general observations about international lawyers’ responses to them were recorded. In this chapter, we will look at certain genres of response in more detail. There have been two main ways of countering the realist criticisms. One approach has been to use state practice either as an interpretive tool, or as part of customary law, to show that the right of self-defence is not in fact as narrow as it may seem from the text of the Charter. Another approach has been to stand by the text of the Charter and to argue that the narrow reading of self-defence, in which action is premised on the occurrence of an armed attack and which therefore rules out anticipatory self-defence, remains the law in force.

While the former technique may lead to the exploitation of law through specious justifications using self-defence claims, the latter may lead to the collective security system becoming irrelevant to state practice. International lawyers using these techniques to justify their narrow or wide interpretations are often driven to make concessions to concreteness or normativity to prevent these consequences. For instance, those who rule out anticipatory self-defence may nevertheless create a category of exceptions to cover situations in which a nuclear warhead has been

¹ Keohane, “International Relations and International Law: Two Optics” 38(2) Harv. ILJ (1997) 487. (Hereinafter, ‘Keohane, “Two Optics”’.)

launched.² Conversely, those who support a wide right of self-defence based on customary law may attempt to limit the relevance of state practice using secondary rules of recognition whereby practice is only relevant when certain conditions are met. This means that conceptions of the collective security system vacillate between ‘concreteness’ and ‘normativity’ and therefore remains vulnerable both to criticisms that question its objectivity and to criticisms that it is ineffective and irrelevant in the twenty first century.³

The normativity of the law on the use of force lies in the distance between the is of state behaviour and the ought of the Charter. However the concreteness of the law, its effectiveness, lies in the experience that states appear to act in conformity with it. David Kennedy has written that international lawyers face a dilemma which causes “[s]ome [to] explain the normativity of international law, in the process reducing its scope” and “[o]thers [to] explain its scope, but simultaneously [to] reduce its normative power”.⁴ Similarly Koskenniemi wrote, “the wider the laws grasp, the weaker its normative force”.⁵

For many international lawyers, the gap between the is and the ought is mediated by secondary rules of international law. In order to justify a given reading of the scope of self-defence as law, it will be necessary for an international lawyer to do so within a legal framework of rules of recognition and interpretation. The commonality of this framework is what gives his arguments persuasive force against those who disagree

² *Infra*, p. 91.

³ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (2005) Cambridge University Press, p. 58. (Hereinafter, ‘Koskenniemi, *From Apology*’.); See Chapter I, at p. 5.

⁴ D. Kennedy, “Theses about International Law Discourse”, 23 *German YIL* (1980) 353 p. 360.

⁵ M. Koskenniemi, “The Fate of Public International Law: Between Technique and Politics”, 70(1) *MLR* (2007) 1, p. 23.

with him, to the extent that they purport to share that framework. Where argument and counter-argument originate in the same system, and where that system provides no uncontested, authoritative mechanism or principle for choosing between arguments, the stalemate can only be broken using arguments from outside the system.⁶ It is common to see arguments made from natural law or *realpolitik*, often under the guise of ‘common sense’,⁷ in order to show why – for instance – one interpretation of the Charter framers’ intent is more authoritative than another.⁸ Secondary rules are just as subject to multiple interpretations and selections as are the primary substantive rules on the use of force.

A. Secondary Rules.

In order to retain the normativity of the collective security system, doctrinal lawyers use an artificially limited measure of relevance. Legal positivism holds that a rule is valid when it has been validly created or interpreted. Secondary rules of creation and interpretation limit the factors that can be considered. In international law, these secondary rules pertain *inter alia* to the creation of valid customary norms and the interpretation of relevant norms. To the extent that such rules exclude considerations of necessity or impede the process of evolution of a norm, realists seem to think that they render the law esoteric or encumbering. Thus Glennon complains that

⁶ Koskenniemi, *From Apology*, p. 63.

⁷ T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) Cambridge University Press, p. 98. (Hereinafter, ‘Franck, *Recourse to Force*’.); R. Higgins, *Problems and Process: International Law and How We Use It* (1994) Oxford University Press, p. 242. (Hereinafter, ‘Higgins, *Problems and Process*’.)

⁸ S.D. Murphy, “The Doctrine of Preemptive Self-Defense” 50(3) *Vill. LR* (2005) 699, p. 703 (Hereinafter, ‘Murphy, “The Doctrine of Preemptive Self-Defense”’.); O. Corten, “The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate” 16(5) *EJIL* (2005) 803, p. 804 (Hereinafter, ‘Corten, “The Controversies Over the Customary Prohibition on the Use of Force”’.)

international lawyers have judged “the unilateral option is intrinsically wrong” without considering all the relevant factors.⁹

Some international lawyers take an alternative approach, seeking to minimise the effect of formal rules on their use of substantive norms. In favouring the “common lawyer approach”, Sofaer says that it is “based on the proposition that use-of-force principles are mere words in the abstract and that their meaning therefore should be developed through a process of examining and weighing all the facts related to particular uses of force”.¹⁰ Other international lawyers have attempted to engage with realist concerns and to include some non-legal factors in the consideration of the scope of self-defence. They have done so, usually, by modifying – rather than abandoning - the secondary rules of interpretation or custom formation. In doing so, they not only make such interpretations vulnerable to exploitation by those with spurious claims to justify, but they also trap themselves in “a constant movement between formalism and realism”.¹¹ This is because, in seeking to retain the authority of formal law while at the same time responding flexibly to social changes, such writers are vulnerable to claims that their work is both exploitable and esoteric.

Rules of recognition and interpretation are what Herbert Hart called “secondary rules”.¹² Secondary rules of interpretation are particularly important for our purpose because, as should be apparent from the previous chapter, one of the major realist

⁹ M.J. Glennon, “Platonism, Adaptivism and Illusion in UN Reform” 6(2) *Chi. JIL* (2005-6) 613 p. 627.

¹⁰ A.D. Sofaer, “International Law and Kosovo” 36(1) *Stan. IJL* (2000) 1, p. 11. (Hereinafter, ‘Sofaer, “International Law and Kosovo”’.)

¹¹ M Koskenniemi, “International Law in a Post-Realist Era”, 16 *Aust. YIL* (1995) 1, p. 2. (Hereinafter, ‘Koskenniemi, “International Law in a Post-Realist Era”’.)

¹² H.L.A. Hart, *The Concept of Law*, 2nd ed. (1994) Oxford University Press, p. 94. (Hereinafter, ‘Hart, *The Concept of Law*’.)

criticisms is that the rules on the use of force suffer from the defect of “stasis”. Hart identified stasis as the second in a triumvirate of defects alongside uncertainty and inefficiency.¹³ These two criticisms were also made by realists of the collective security system. Thus, Murphy observed that “[t]he jus ad bellum is generally viewed as a static field of law” rings true and the law risks becoming irrelevant.¹⁴

B. Structure of the Chapter.

In the first section of this chapter the use of doctrines of interpretation will be discussed. It will be argued that, since the words of the Charter on their own have no inherent meaning, ‘ordinary language’ approaches to article 51 are not incontrovertible. It will also be argued that the ‘intention’ school of interpretation can be problematic in the case of so-called ‘quasi-constitutional’ treaties. Finally, arguments from the ‘object and purpose’ of the Charter will be considered and it will be concluded that they too offer no decisive answer to the content of self-defence.

In the second section of this chapter on the relationship between customary law and the Charter, the uncertainty of what counts as law will be discussed. The right of self-defence is said to be an “inherent right” or «droit naturel» in the equally authoritative French text of the Charter.¹⁵ Indeed, there are some who claim that the

¹³ Ibid., pp. 92-3.

¹⁴ S.D. Murphy, “Protean Jus Ad Bellum” 27(1) Berk. JIL (2008) 22, p. 22. (Hereinafter, ‘Murphy, “Protean Jus Ad Bellum”’.)

¹⁵ Article 51: Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une agression armée, jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales. Les mesures prises par des Membres dans l'exercice de ce droit de légitime défense sont immédiatement portées à la connaissance du Conseil de sécurité et n'affectent en rien le pouvoir et le devoir qu'a le Conseil, en vertu de la présente Charte, d'agir à tout moment de la manière qu'il juge nécessaire pour maintenir ou rétablir la paix et la sécurité internationales.

right of self-defence is a right of *ius cogens*.¹⁶ However at the same time, the right of self-defence seems to be placed under certain specific conditions by the text of article 51 and it has been argued that these conditions did not exist before the Charter.¹⁷ It is far from clear, however, whether the extent of the right of self-defence in customary law is radically different to that under article 51.¹⁸

PART ONE: DOCTRINES OF INTERPRETATION.

It has been said that international law's claim to objectivity is that the law is able to apply abstract principles to concrete problems so that legal solutions reflect the legitimate normative basis of international law.¹⁹ The objectivity of the law seems to reside in it being purely legal. The use of rules of interpretation is also a feature that distinguishes international lawyers from others who might suggest meanings for the text of the Charter.²⁰ The ability to manipulate and navigate the secondary rules of the international legal system is central to the idea of international law. Indeed, if we refer again to Hart, the very existence of those secondary rules is a *sine qua non* of the status of international law as a legal system rather than merely a collection of primary substantive rules.²¹

The systemic nature of the system might be said to depend on whether particular interpretations of the right of self-defence are guided by the doctrine of interpretation

¹⁶ This argument was made by Bosnia and Herzegovina in its Request for the Indication of Provisional Measures of Protection on 20 March 1993, para. 129; See also, M. Halberstam, "The Right to Self-Defense Once the Security Council Takes Action" 17(2) *Mich. JIL* (1995-6) 229, p. 238

¹⁷ *Infra*, at p. 110-114.

¹⁸ *Infra*, at p. 112.

¹⁹ N. Purvis, "Critical Legal Studies in International Law" 32(1) *Harv JIL* (1991) 81 p. 96.

²⁰ F. Kratochwil, "Is International Law "Proper" Law?" 69(1) *ARSP* (1983) 13, *passim*.

²¹ Hart, *The Concept of Law*, p. 214.

alone or by other political or moral reasons. One might expect, if the secondary rules of interpretation were to do this, that every correct application of these rules would yield the same result. However, according to Higgins “almost every phrase in Article 2(4) and Article 51 is open to more than one interpretation”.²² Koskenniemi has famously made the argument that a (liberal) system of rules can be manipulated to provide almost any outcome because of the aporetic nature of the norms within it: They are “based on contradictory premises”.²³ This will be seen below where the object and purpose of the Charter will be discussed.²⁴ Article 51 is an interesting case insofar as its contradictory premises are writ large in its text. It has been called “an inept piece of draftsmanship”.²⁵

The narrow right of self-defence is often justified by the literal text of article 51: Article 51 allows self-defence “if an armed attack occurs against a Member of the United Nations”. Few writers hold that a state may only use self-defence in the event of the occurrence of an armed attack. This position has been criticised on the grounds that it renders the right of self-defence under-inclusive. In particular it has been said that modern warfare makes it impracticable to insist that a state allows its adversary to strike first before it has recourse to self-defence.²⁶ On the other hand, article 51 can also be criticised for being over-inclusive. There are times where a state’s response to an armed attack is no longer “necessary” for its protection and it resembles an illegal act of reprisal.²⁷ The “normative indeterminacy” of self-defence was discussed more

²² Higgins, *Problems and Process*, p. 240.

²³ Koskenniemi, *From Apology*, p. 67.

²⁴ *Infra*, at pp. 87-94.

²⁵ McDougal M.S. McDougal and F.P. Feliciano, “Legal Regulation of the Resort to International Coercion: Aggression and Self-Defense in Policy Perspective” 68(6) *Yale LJ* (1958-9) 1057, p. 1145. (Hereinafter, ‘McDougal and Feliciano, “Legal Regulation of the Resort to International Coercion”’.)

²⁶ See Chapter I, at p. 39.

²⁷ D. W. Bowett, “Reprisals involving Recourse to Armed Force” 66(1) *AJIL* (1972) 1, p. 3.

thoroughly in the previous chapter.²⁸ In order to navigate these poles international lawyers have interpreted self-defence so as to lessen these effects in practice.

Most international lawyers who discuss self-defence rely on a positive doctrine of interpretation to some extent. Franck, for instance, adopts an “evolutionary” approach to interpretation which favours state practice.²⁹ In contrast, Bothe prefers a more strictly formal approach, expressly invoking the Vienna Convention on the Law of Treaties 1969 (VCLT).³⁰ Interpretation does not apply solely to the text of the UN Charter or even to legal texts in general. Even international lawyers who reject the continued relevance of the Charter for determining the scope of the right of self-defence³¹ must still have recourse to doctrines of interpretation. Those who concentrate on state practice must interpret that practice; facts do not speak for themselves but are asserted through communication by actors with agendas.³²

It should, however, be emphasised that international lawyers do not treat matrices of interpretation as a sort of black box. It is usually acknowledged that a good deal of subjective preference insinuates its way into the law through interpretation. Fitzmaurice wrote that international lawyers must “accept the fact that in the last resort all interpretation must consist of the exercise of common sense by the judge,

²⁸ See Chapter I, at pp. 42-53.

²⁹ Franck, *Recourse to Force*, p. 7.

³⁰ M. Bothe, “Terrorism and the Legality of Pre-emptive Force” 14 *EJIL* (2003) 227, p. 229. (Hereinafter, ‘Bothe, “Terrorism and the Legality of Pre-emptive Force”’.)

³¹ E.g. J. Yoo, “Using Force”, 71(3) *Univ. Chi. LR* (2004) 729. (Hereinafter, ‘Yoo, “Using Force”’.); J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, (2005) Oxford University Press. (Hereinafter, ‘Goldsmith and Posner, “Limits”’.); M.J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter” 25(2) *Harv. JL&PP* (2001-2) 539.

³² Henkin wrote that “law is made by political acts, through political procedures, for political ends”, *International Law: Politics and Values*, (1995) Martinus Nijhoff, The Hague, p. 4.

applied in good faith and with intelligence”.³³ It is submitted that the majority, these days, do.

The problem is where it is not a judge but a national government that is interpreting a Charter provision, as is always, at least initially, the case with self-defence. Stone warned that “[n]o normative formulae that have the slightest chance of even wide minority approval can hope to deprive the applying organ of ample leeways to decide a particular case according to its arbitrary will”.³⁴ Even if a self-defence claim was subsequently evaluated at the international level, it is unlikely that this would take place in a courtroom. Lauterpacht wrote that governments do not like to submit their vital interests to judicial settlement because “of their reluctance to entrust the decision on matters of vital national importance to outside bodies over which they have no control”.³⁵ Aside from the question of authoritative interpretation, this raises questions about the fragmentation of evaluation as well as the paucity of evaluation. It has been said that states cannot prevent others from evaluating their uses of force, even if those evaluations do not constitute quasi-judicative binding judgments on them.³⁶ The lack of centralisation and the presence of two political main organs in the UN mean that it is hard to build up a system of precedent like those of domestic common law systems.

³³ G.G. Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points” 28 BYIL (1951) 1 p. 3.

³⁴ J. Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958) Stevens and Sons, London, p. 25.

³⁵ H. Lauterpacht, *The Function of Law in the International Community* (1966) Archon Books, Connecticut, p. 174. (Hereinafter, ‘Lauterpacht, *The Function of Law*’.)

³⁶ O. Schachter, “Self Defense and the Rule of Law” 83(2) AJIL (1989) 259, p. 264. (Hereinafter, ‘Schachter, “Self-Defense”’.)

A. The Vienna Convention on the Law of Treaties.

The VCLT provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.³⁷ It is often said that this provision reflects three distinct schools of thought: Those with a preference for the ordinary meaning of the text; those with a preference for the intentions of the drafters; and those who prefer teleological interpretation.³⁸ While it is sometimes argued that these elements of ordinary meaning, context and object and purpose are hierarchically ordered,³⁹ the wording of this provision might equally suggest that international lawyers are free to make interpretations involving any or all of these elements. This may, of course, lead to contradiction where the ordinary meaning of words conflicts with the object and purpose of the treaty. In the case of the interpretation of article 51, the ordinary meaning of “the occurrence of an armed attack” might be said to conflict with the object and purpose of self-defence where a state cannot protect itself without anticipating such an attack.

The VCLT throws up other potential points of controversy. For instance, in article 31(3)(b) “[t]here shall be taken into account, together with the context... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. This seems to open the door to international lawyers who may wish to emphasise the importance of state practice in the interpretation of the right of self-defence and therefore to, perhaps, favour the broader

³⁷ Vienna Convention of the Law of Treaties of 1969, article 31(1).

³⁸ N.D. White, *The United Nations System: Toward International Justice*, (2002), Lynne Rienner Publishers, p. 26. (Hereinafter, ‘White, *The United Nations System*’.)

³⁹ Cf. ILC Report 1966, YBILC 1966 II., paras 8-9.

conception justified through the preference for a more flexible system. It will be argued that the use of ‘subsequent practice’ as an interpretative tool is often poorly distinguished from the use of ‘general practice’ as an element of customary law. The question of subsequent practice will be discussed in the section on the intention of the parties, below.⁴⁰

A third potential point of contention is that the VCLT makes provision for “supplementary means of interpretation” where the meaning remains “ambiguous or obscure” after having had resort to article 31 or where it led to a “manifestly absurd or unreasonable” result.⁴¹ This effectively provides a further means of extending argumentation about the right of self-defence and therefore preventing an international lawyer from claiming that, under the VCLT rules, his interpretation is authoritative. This is because, for those who take the individual nation’s perspective, it is manifestly unreasonable not to permit a state to pre-empt threats to its security, while for those who take the collective security system’s perspective, to allow nation states to have the final word on the legality of their own uses of force is equally absurd.

Finally, it should be stated that the VCLT does not form the basis for all international lawyers’ interpretative exercises, particularly where the UN Charter is concerned. This is because the interpretative techniques that are seen as relevant to more or less short-term bilateral treaties are not thought to apply to treaties underpinning long-running international organisations.⁴² White has written that “[i]t would be

⁴⁰ *Infra*, at p. 83-87.

⁴¹ VCLT, articles 32(a) and (b).

⁴² Franck says that the Charter is like a “living tree” unlike “ordinary treaties” and cannot therefore be construed contractually, *Recourse to Force*, p. 6.

impractical and too legalistic to restrict the United Nations to the exact wording of the charter given that the treaty was formulated in 1945 and was designed to function in the world at that time”.⁴³ The UN Charter can be further particularised in this respect: It is sometimes said to be a constitutional document.⁴⁴ This feature can also work in favour of both narrow and broad interpretations of self-defence. It can favour the narrow conception because it might be argued that the constitutional nature of the norms of the Charter give them priority over other norms, including those of state practice.⁴⁵ It can also favour the broad conception of self-defence because if the Charter is a “living instrument”, its life is in the practice of its member states (within its organs).⁴⁶

It is suggested that the approaches to interpretation used by international lawyers bleed into one another to the extent that it becomes extremely difficult to track an international lawyer’s interpretative methodology. Those international lawyers who specifically refer to the VCLT seem to produce less ambiguous readings of the Charter based on more or less systematic uses of the doctrines contained in the Vienna Convention. However such clear readings can lead to accusations of esotericism because they remove the fluidity both from the substantive right of self-defence and from the secondary rules of interpretation.

Those whose use of doctrines of interpretation is less explicit can be seen to create ambiguities in their interpretations. For instance, the category of “ordinary meaning”

⁴³ White, *The United Nations System*, p. 27.

⁴⁴ See e.g. B. Fassbender, *The United Nations Charter and the Constitution of the International Community* (2009) Martinus Nijhoff, Dordrecht.

⁴⁵ Article 103 UN: “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”.

⁴⁶ Franck, *Recourse to Force*, p. 7.

becomes meaning in the context of a particular case; the category of intention becomes confused between the present intention of UN members and that of the drafters of the Charter sixty years ago; finally, the question of subsequent practice becomes intermingled with that of customary law formation. Owing to the elastic nature of “ordinary meaning”, “intention” and “object and purpose” and their intertwined inter-relation, international lawyers who want to exploit the legitimacy of applying doctrines of interpretation are more free to do so.

B. Ordinary Meaning.

According to the VCLT, international lawyers should attempt to find the “ordinary meaning” of the words of a particular provision. The first port of call for some writers is a dictionary.⁴⁷ It seems like common-sense to reject certain conceptions of self-defence on the grounds that they do not seem to be reflected in the language of article 51. However it should be emphasised that few, if any international, lawyers take a wholly ordinary-meaning approach. This is partly because the apparent requirement for an ‘armed attack’ to have occurred appears to preclude, for instance, anticipatory action, and partly because “the reference to ‘plain meaning’ has little value and begs many questions”.⁴⁸ An international lawyer could never decisively end a debate with ordinary meaning.

Theories of linguistic indeterminacy have been used to bolster realist rule sceptic arguments as well as the Critical Legal Studies critique of legal objectivity. In the works following the *Tractatus*, Wittgenstein moved away from an idea that words

⁴⁷ Bothe, “Terrorism and the Legality of Pre-emptive Force”, p. 229.

⁴⁸ I. Brownlie, “The Use of Force in Self Defence”, 37 *BYIL* (1961) 183, p. 235. (Hereinafter, ‘Brownlie, “The Use of Force in Self-Defence”’.)

were reflections of reality.⁴⁹ Since there is no word-world reflection, “sentences cannot say what they mean or do”.⁵⁰ The meaning of words is not a given. According to Wittgenstein, what we understand by a given word depends on its use in context.⁵¹ As Koskenniemi put it “[e]xpressions are like holes in a net. Each is empty in itself and has identity only through the strings which separate it from the neighbouring holes”.⁵² Thus, to talk about the ‘ordinary meaning’ of words implies that there is a neutral context in which a word can be considered. The VCLT appears to appreciate this because it also determines what counts as relevant context in which a provision should be interpreted.

The ordinary meaning of ‘armed attack’ is a point of some controversy, as is the significance of the phrase “if an armed attack occurs”. Some writers compare the French and English texts. It is sometimes said that *«l’objet d’une agression armée»* is less ambiguous than armed attack.⁵³ Others try to read ‘armed attack’ in the light of the Definition of Aggression that was adopted as a General Assembly (GA) resolution in 1974.⁵⁴ This became a common practice after the Nicaragua case when the ICJ asserted that the Definition had attained customary status.⁵⁵

⁴⁹ L. Wittgenstein, *Philosophical Investigations*, (trans. G.E.M. Anscombe) 2nd ed. (1963) Basil Blackwell, Oxford, p. 128, para. 432.

⁵⁰ Onuf, “Do Rules Always Say What They Do?”, p. 390.

⁵¹ L. Wittgenstein, *The Blue and Brown Books: Preliminary Studies for the “Philosophical Investigations”* (2nd ed. 1960), Harper & Row (1965), p. 4.

⁵² Koskenniemi, *From Apology*, p. 9; See also, J. Boyle, “Ideals and Things: International Law and the Prison-House of Language” 26(2) *Harv. ILJ* (1985) 327, p. 332.

⁵³ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 711

⁵⁴ A. Randelzhofer, “Article 51” in Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (2002) Oxford University Press, p. 796; J. Kammerhofer, “Uncertainties of the Law on Self Defence in the United Nations Charter” 35(1) *Ned. YIL* (2004) 143, p. 161. (Hereinafter, ‘Kammerhofer, “Uncertainties of the Law on Self Defence”’); H. McCoubrey and N.D. White, *International Law and Armed Conflict*, (1992) Dartmouth Publishing Co., p. 51. (Hereinafter, ‘McCoubrey and White, *International Law and Armed Conflict*’.)

⁵⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, para. 195. (Hereinafter, ‘*Nicaragua (Merits)*’.)

However, by no means every international lawyer views the Definition of Aggression as helpful in elucidating the meaning of ‘armed attack’. One problem is that the definition predates 9/11 and the new “strategic reality” posited by the G.W. Bush Administration. The ordinary meaning of ‘armed attack’ is significant as regards the accommodation of the doctrine of pre-emption in the collective security system because, over the years, international lawyers have been willing to designate various events as ‘armed attacks’ which may seem to stretch the phrase.⁵⁶ It is said that the phrase ‘armed attack’ is linked to an outmoded view of inter-state violence that does not reflect the indirect aggression of states who sponsor terrorist or guerrilla groups. In 1945 the warfare paradigm was still the massing of armies along a frontier.⁵⁷

The idea that a decisive attack could come out of the blue, some say, is not contemplated in the phrase ‘armed attack’. In order to prevent the Charter from becoming esoteric, international lawyers have been willing to be extremely creative in interpreting ‘armed attack’. Some argue for “constructive armed attacks” where situations equivalent to an armed attack are caught within article 51 even though they do not particularly resemble ‘armed attacks’.⁵⁸ There are also arguments that an accumulation of less grave forms of attack might amount to an armed attack.⁵⁹ There are other arguments that the Charter does not specify when an armed attack begins.⁶⁰

⁵⁶ C. Gray, *International Law and the Use of Force*, 2nd ed. (2004) Oxford University Press, p. 99. (Hereinafter, ‘Gray, *International Law and the Use of Force*’.)

⁵⁷ T.M. Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States” 64(4) *AJIL* (1970) 809, p. 812. (Hereinafter, ‘Franck, “Who Killed Article 2(4)?”’.)

⁵⁸ Bothe, “Terrorism and the Legality of Pre-emptive Force”, p. 231.

⁵⁹ The US made this argument in *Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Reports 2003, p. 161, para. 72.

⁶⁰ T.D. Gill, “The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy” 11(3) *JCSL* (2006) 361, p. 364. (Hereinafter, ‘Gill, “The Temporal Dimension of Self-Defence”’.)

Some scholars have refused to countenance the possibility that ‘armed attack’ could accommodate anticipatory action, despite Gray’s observation that “[s]tates prefer to rely on self-defence in response to an armed attack if they possibly can” rather than invoke anticipatory self-defence.⁶¹ Bothe holds that article 51 was not intended to include anticipatory self-defence because ‘armed attack’ cannot be read to include threats of an armed attack. He explains that because article 2(4) applies to the ‘threat’ as well as the ‘use’ of force, one would expect article 51 to have included express provision for threats were they intended to be covered. Similarly, article 39 includes threats to the peace but was clearly meant to be of broader application than article 51.⁶² It has been said that such arguments risk “stretching...article 51 beyond all measure”.⁶³

If ‘armed attack’ is generally viewed as meaning almost anything that has warranted a forcible response, then it might be said that the Charter text provides no effective obstacle to subjective interpretation. Kelsen points out that it is “very probable” that a state accused of aggression would “deny to be guilty of an ‘armed attack’, especially by interpreting this term in another way than its opponent”.⁶⁴ In order to counter-act this Franck has urged a “break it, don’t fake it” approach to justification.⁶⁵ One of the problems with widening the scope of self-defence is that it will be able to accommodate many more valid interpretations and therefore make disputes between

⁶¹ Gray, *International Law and the Use of Force*, p. 130.

⁶² Bothe, “Terrorism and the Legality of Pre-emptive Force”, p. 229.

⁶³ Gray, *International Law and the Use of Force*, p. 99.

⁶⁴ H. Kelsen, *Law of the United Nations: A Critical Analysis of its Fundamental Problems* (2000) London Institute of World Affairs, p. 799. (Hereinafter, ‘Kelsen, Law of the United Nations’.)

⁶⁵ T.M. Franck, “Break It, Don’t Fake It”, 78 *For. Aff.* (July-Aug 1999) 116, p. 118.

belligerents more difficult to settle. It is far from unusual for both sides to a conflict to claim to have used force in self-defence.⁶⁶

A second controversy has been the meaning of “if an armed attack occurs”. Brownlie says that “the ordinary meaning of the phrase precludes action that is preventive in character”.⁶⁷ However there are those who have argued that ‘armed attack’ does not have to be read as exhaustive of the situations in which a state may resort to force in self protection. This position is often backed by a conception of what ‘common-sense’ requires: In other words, those writers who have already decided on a preference for anticipatory action tend to use that assumption to back up the ‘common-sense’ of their proposition.⁶⁸

The question of the occurrence of an armed attack also begs the question when an armed attack begins.⁶⁹ It seems that this cannot but be seen as a temporal continuum along a chain of causation that would be very difficult to predict in advance. Following this line of argument to its logical conclusion, it would be possible to argue that the doctrine of pre-emption was only a reasonable extension of this: The attack can be said to have commenced as soon as a state feels threatened. It has been written that this can be done using the concept of immediacy.⁷⁰

⁶⁶ Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (2005) Cambridge University Press, p. 187. (Hereinafter, ‘Dinstein, War, Aggression and Self-Defence’.)

⁶⁷ Brownlie, “The Use of Force in Self-Defence”, p. 242.

⁶⁸ Arguments like this one by Sofaer for the extension of the Webster formula are illustrative: “It cannot rationally be claimed to apply in haec verba to the possibility of an attack with modern technology”. A.D. Sofaer, “On the Necessity of Pre-emption” 14(2) EJIL (2003) 209, p. 214. (Hereinafter, ‘Sofaer, “Pre-emption”’.) Similarly, McDougal has written “no other principle could be either acceptable to states or conducive to minimum order”, “The Cuban-Soviet Quarantine and Self Defence” 57(3) AJIL (1963) 597, p. 599.

⁶⁹ Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 170.

⁷⁰ Gill, “The Temporal Dimension of Self-Defence”, p. 369; See also, *infra*, at p. 114-120.

Such an interpretation must not restrict defensive measures to mere reaction, or anticipation of an attack, but rather includes actions of a truly anticipatory character in the face of a clear and concrete threat of an attack within the foreseeable future.

This is because it can be hard to draw the line between an attack that is at the launch, one that is in the planning stages and one that is merely intended by one's adversary.⁷¹ Others have, rightly, pointed out that such a trope for interpreting 'armed attack' only succeeds where the attack is irreversible because self-defence is not necessary otherwise. However there is also controversy about when an attack has reached the point of no return. There are those, like Brownlie, who argue that self-defence involves an element of trespass and therefore that an attack has not commenced until an international boundary is crossed.⁷² The problem with this is that it does not take account of the threat of Weapons of Mass Destruction mentioned in the previous chapter.⁷³

In this section the author has attempted to show that however clearly article 51 appears to rule out anticipatory self-defence on the face of it, there are still those who are prepared to argue it does not in fact do so. Many such writers back up their non-literal interpretations of self-defence using doctrines of interpretation that enable them to interpret the provisions of the article "in context". Sometimes this refers to the context of the Charter and sometimes to that of the particular situation.⁷⁴ These sorts of approaches can seem to be exploitable to the extent that they favour subjective

⁷¹ This is largely because intelligence-gathering on such matters is problematic.

⁷² Brownlie, "The Use of Force in Self-Defence", p. 243; Kammerhofer, "Uncertainties of the Law on Self Defence", p. 171.

⁷³ Chapter I, at p. 39.

⁷⁴ Gill, "The Temporal Dimension of Self-Defence", p. 369.

interpretations on a case by case basis over more predictable, less adaptable text-based readings.

C. Intention.

The ordinary meaning of article 51 is important to many international lawyers because it represents the intention of UN member states. In his commentary to what became the VCLT, Waldock wrote that “the basic rule of treaty interpretation [is] the primacy of the text as evidence of the intentions of the parties”.⁷⁵ In the specific context of the UN Charter this can be problematic for two main reasons. The first is that the parties to the Charter may not share an intention as to a particular aspect of an article. This may be because, as Franck has said, agreement among a large group of states requires watering down the specificity of the provisions to cover the broadest range of interpretations.⁷⁶ It may also be because states simply did not contemplate a particular situation in 1945, and therefore formed no intention as to how the norm should be applied to it.⁷⁷

The second problem is that the states who signed the UN Charter in 1945 no longer represent the UN membership as it stands today. In 1945 there were 51 members, but since 2006 there have been 192 states members of the UN. In short, the words of the Charter are not representative of the intention of nearly three quarters of member

⁷⁵ Yearbook of the International Law Commission Vol. II 1964 (A/CN.4/SER.A/1964/ADD.1) p. 56 Commentary §13.

⁷⁶ Franck, *Recourse to Force*, p. 51; Gray, *International Law and the Use of Force*, p. 8; Koskenniemi, *From Apology*, p. 591.

⁷⁷ H. Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” 26 BYIL (1949) 48 p. 79.

states insofar as they did not participate in the drafting process.⁷⁸ A related problem is that the Charter is over 60 years old. In the light of the statement of the International Law Commission (ILC), that «le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties»,⁷⁹ it seems that it must be argued that the Charter is such a rare exception, if it can be said to reflect the will of the parties. This suggests that textualist readings of article 51 are open to the criticism that they no longer represent states' wills as expressed through their actions.⁸⁰ Indeed, McDougal stated that he thought Charter interpretation was a matter of “find[ing] out what are contemporary expectations of what it means, not what some may think the words say literally or what the founders may have initially intended”.⁸¹

There is a further problem with intentionalist approaches to interpretation which is that it is not possible to know what a state intended by a particular phrase without extraneous evidence. Indeed, Fitzmaurice has written that “the question is...not so much one of what meaning is to be attributed to the text in the light of the intentions of the parties, as of what the intentions of the parties must be presumed to have been in the light of the meaning of the text”.⁸² If the text is the only elucidation of the parties' intention then it seems a rather circular method when intention was introduced in order to elucidate the meaning of the text.

⁷⁸ It might also be mentioned that the near universality of UN membership means that the membership of, particularly new states, was a foregone conclusion rather than a choice.

⁷⁹ Yearbook of the International Law Commission Vol. II 1964 (A/CN.4/SER.A/1964/ADD.1) p. 56 Commentary §13, quoting Max Huber. (The text is, apart from rare exceptions, the only and the most recent expression of the common will of the parties.)

⁸⁰ This is the criticism sketched in Chapter I, see e.g. p. 34.

⁸¹ M.S. McDougal, “Comments” ASIL Proc. (1963) 163, p. 164 (Hereinafter, ‘McDougal, “Comments”’.); See also, M.J. Glennon, “The Emerging Use-of-Force Paradigm” 11(3) JCSL (2006) 309, p. 315.

⁸² G. Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” 33(1) MLR (1957) 203 p. 207.

This would explain the great frequency with which international lawyers refer to the debates at San Francisco despite the VCLT holding that the travaux préparatoires of a treaty are merely supplementary means of interpretation.⁸³ In most cases, international lawyers can find in the travaux evidence for both the proposition that states did not intend to limit states' right to use force to cases where an armed attack has occurred,⁸⁴ and for the proposition that article 51 was intended to be a highly limited temporary right.⁸⁵

One of the main arguments from intention, used to back up the narrow conception of self-defence taken from an 'ordinary meaning' reading of "in the occurrence of an armed attack", is that the UN Charter was intended to succeed where the League of Nations had failed.⁸⁶ According to James Brierly there was a general feeling that "the League had failed because it was not strong enough for its task".⁸⁷ The League of Nations was "passiv[e] in the face of violence";⁸⁸ on its watch, there was Japanese violence against Manchuria, Italian violence against Ethiopia and eventually, of course, the aggression of Nazi Germany in the 1930s. The prohibition of the use of force and the creation of a Security Council with the power to bind member states were innovations that may have stemmed from this concern.

⁸³ VCLT, article 32: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

⁸⁴ D.W. Bowett, *Self-Defence in International Law* (1958) Manchester University Press, p. 188. ('Bowett, *Self-Defence in International Law*')

⁸⁵ Brownlie, "The Use of Force in Self-Defence", p. 237.

⁸⁶ McCoubrey and White, *International Law and Armed Conflict*, p. 23.

⁸⁷ J.L. Brierly, "The Covenant and the Charter", 23 *BYIL* (1946) 83, p. 84.

⁸⁸ Franck, *Recourse to Force* p. 2.

The League of Nations failed to prevent the Second World War, and the inclusion in the preamble of the Charter of the ambition to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind” flows from this. However, international lawyers use this historical background in different ways. On the one hand, international lawyers arguing for a narrow right of self-defence say that the Charter must have intended to all but eliminate the unilateral recourse to force by states. They argue that the horrors of war were intended to be avoided at all costs.⁸⁹ On the other hand, it has been pointed out that “if the United States had stumbled across the Japanese fleet clearly on course for Pearl Harbor in 1941, it could have acted in self-defence”.⁹⁰

D. Subsequent Practice.

There is an argument to be made that suggests that owing to the length of time since the Charter was drafted, the matter of “subsequent practice” becomes particularly important in elucidating the intentions of the parties.⁹¹ White has suggested that “[t]he move has been away from the intent of the founding states toward more observable means of interpretation, namely, the purpose of treaties and subsequent practice, concerned with the current intent of the members and therefore subjective”.⁹²

Furthermore, the lack of detail in article 51, particularly as to the nature of the force to be used in self-defence, is said by some to indicate that the framers of the Charter left

⁸⁹ L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (1979) Columbia University Press, New York., p. 136. (Hereinafter, ‘Henkin, How Nations Behave’.)

⁹⁰ McCoubrey and White, *International Law and Armed Conflict*, p. 92.

⁹¹ VCLT article 31(3)(b): Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

⁹² White, *The United Nations System*, p. 26.

it to states to substantiate the norm through practice.⁹³ Thus, Franck says that although the “interaction of text and practice” is hard to evaluate, it “can provide evidence of ‘live’ meaning given to inert words by existential experience and transactional process”.⁹⁴ That is not to say that only those, like Franck, taking a broad interpretation of self-defence use subsequent practice to elucidate the meaning of a norm.⁹⁵ In another area of its practice, the ICJ has shown itself willing to look to the practice of states to elucidate the meaning of Charter articles.⁹⁶

One problem here is that since the Charter was drafted, states have “stretch[ed] article 51 beyond all measure”.⁹⁷ This means that to allow subsequent practice to count as better reflecting the intention of the parties to the UN Charter would not only be to prefer the practice of those states who are in a position to use force in self-defence, but also may make it easier to argue for a wide interpretation of self-defence. Murphy finds that those who take a narrow view of self-defence “tend[] to downplay or ignore...the possibility that over time states may reinterpret article 51 through their practice”.⁹⁸ However this is not necessarily the case; the interpretative doctrine of *rebus sic stantibus*, for instance, may allow international lawyers the opportunity to reinterpret article 51.⁹⁹

Subsequent practice can also be used to argue for a narrower right of self-defence. In the context of anticipatory self-defence, two incidents that are often cited are the

⁹³ M. Byers, “Terrorism, the Use of Force and International Law after 11th September” ICLQ (2002) 401 p. 405.

⁹⁴ Franck, *Recourse to Force*, p. 51.

⁹⁵ E.g. McDougal, “Comments”, p. 164.

⁹⁶ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962), p. 157.

⁹⁷ Gray, *International Law and the Use of Force*, p. 99.

⁹⁸ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 721.

⁹⁹ Henkin, *How Nations Behave*, p. 138.

Israeli attacks on Egypt in 1967 and Iraq in 1981. Both of these uses of force were condemned by states and this is taken by some to indicate that states still understand article 51 to exclude anticipatory action.¹⁰⁰ It is to be borne in mind that other equally distinguished commentators have drawn precisely the opposite conclusions from these particular episodes.¹⁰¹

It is submitted that subsequent practice in treaty interpretation is not always clearly defined from its close relation in customary law, 'general practice'. This leads to an ambiguity in the secondary rules relating to the recognition and interpretation of the rules on the use of force that spans creation, modification and interpretation of self-defence. Some international lawyers do not seem to distinguish interpretations of article 51 from identifications of the scope of the customary right of self-defence.¹⁰²

In the next part of the chapter, the relationship between customary law and the law of the Charter will be explored further. For now, suffice it to say that if the right of self-defence is seen as being wider in customary law than it is in the Charter, incorporating it in the Charter as 'subsequent practice' effectively overrides the narrow reading of self-defence that does not permit anticipation of an armed attack. This is because the streams of law could not be said to exist separately; customary law would have colonised the Charter.

There is some dissent as to the use of subsequent practice: Kammerhofer dislikes the idea that subsequent practice can modify a prior treaty because "the text remains and withers all storms of changing customs".¹⁰³ If the intentions of the participants at San

¹⁰⁰ Gray, *International Law and the Use of Force*, pp. 131 and 133.

¹⁰¹ Franck, *Recourse to Force*, p. 101-106.

¹⁰² A. D'Amato, "Trashing Customary International Law" 81(1) *AJIL* (1987) 101, p. 105.

¹⁰³ Kammerhofer, "Uncertainties of the Law on Self Defence", p. 148.

Francisco are examined, it can be claimed that the interpretation is esoteric because the world has moved on so far since 1945. On the other hand, if the present intentions of the parties are taken as conclusive as to the meaning of the provision then it may be that the ought comes too close to the is and the Charter scheme loses its normativity.

Perhaps for this reason, in the interpretation of the articles of the UN Charter, it is usually said that the practice of member states has significance where they act through UN organs rather than when they act individually.¹⁰⁴ However this collective approach does not solve every problem where the intentions of parties are deduced merely from failure to condemn a potentially violative use of force.¹⁰⁵ This is particularly objectionable where a failure to pass a condemnatory resolution in the Security Council (SC) is the result of a permanent member using its veto.¹⁰⁶

The subsequent practice of the parties can be as ambiguous as the words it is supposed to illuminate. According to Simma UN practice is “sometimes ambiguous”.¹⁰⁷ The concentration on the present intentions of the parties also brings the law closer to the policy realism school. This school advocated a view of legal norms as the expectations of states. McDougal and Feliciano say that where self-defence is concerned “the most important condition that must be investigated is the degree of necessity – as that necessity is perceived and evaluated by the target-claimant and incorporated in the pattern of its expectations”.¹⁰⁸ The patterns of a

¹⁰⁴ White, *The United Nations System*, p. 26; R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, (1964) Oxford University Press for the Royal Institute of International Affairs. But cf. Murphy, “The Doctrine of Preemptive Self-Defense”, p. 737.

¹⁰⁵ Franck used this method to validate the Israeli action mentioned above.

¹⁰⁶ See Chapter III, at p. 154-157

¹⁰⁷ B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (2002) Oxford University Press, p. 790. (Hereinafter, ‘Simma (ed.), *The Charter of the United Nations: A Commentary*’.)

¹⁰⁸ McDougal and Feliciano, “Legal Regulation of the Resort to International Coercion”, p. 1141-2.

state's expectations are dependent on many varied, non-legal factors. It might be suggested that such an approach would render the norm so flexible as to become more or less meaningless in the hands of a self-interested interpreter.

It is suggested that recourse to the subsequent practice of the parties can render the right of self-defence exploitable because it enables scholars to accord a great amount of weight to prima facie violations of the Charter. It is also suggested that to the extent that it is conflated with the development of customary norm it can lead to claims that "recourse must be had to customary law as a means of complementing the Charter *lex scripta*".¹⁰⁹ It is suggested that this conflation of custom and the Charter is particularly exploitable because the near-universality of the Charter is used to garnish claims of contrary state practice and lend them its legitimacy as a treaty-based obligation. On the other hand those uses of subsequent practice that strictly limit it to express statements formally made by the parties may invoke criticism that the approach is esoteric.

C. Object and Purpose.

Kammerhofer has suggested that behind academic differences about the scope of self-defence are differences about the *telos* or goal of the norm.¹¹⁰ While Murphy has written that "reasonable minds disagree on the object and purpose of article 51",¹¹¹ it is submitted that its purpose is fairly uncontroversial: The protection of the nation-state. Koskenniemi agrees; it is "clearly to protect the sovereignty and the

¹⁰⁹ Gill, "The Temporal Dimension of Self-Defence", p. 364.

¹¹⁰ Kammerhofer, "Uncertainties of the Law on Self Defence", p. 197.

¹¹¹ Murphy, "The Doctrine of Preemptive Self-Defense", p. 723.

independence of the state”.¹¹² What is controversial, however, is the relation between that purpose and the other principles and purposes expressed in the Charter.¹¹³

The problem is that while the purpose of the right of self-defence is to protect states, there are potentially conflicting purposes elsewhere in the Charter such as the minimisation of the resort to force. Since article 51 is an exception to the general prohibition on the use of force, it might be expected that international lawyers would agree that the purpose behind article 2(4) should prevail. However, there are international lawyers who argue that such a purpose could not have been intended to limit the sovereign right to resort to force.¹¹⁴ In large part this argument is based on the ‘inherency’ of the right of self-defence as expressed in article 51.¹¹⁵

It should also be borne in mind that during the Cold War, the right of self-defence was often seen to operate in lieu of collective security enforcement rather than as an exception to it. It would seem from the National Security Strategy that the doctrine of pre-emption would play a similar role in the event that the US could not secure the necessary support in the SC.¹¹⁶ This would mean that the relationship between the objects of minimisation of unilateral force and self-protection would be modified. Illustrative of this sort of approach is McDougal’s view that a use of force to anticipate an imminent attack could not be contrary to the purposes of the UN.¹¹⁷ This is because he does not accept that the Charter laid down a presumption against the

¹¹² M. Koskenniemi, “Iraq and the ‘Bush Doctrine’ of Pre-Emptive Self-Defence. Expert Analysis”, Crimes of War Project, 20 August 2002. Available at: <http://www.crimesofwar.org/expert/bush-koskenniemi.html>, p. 1-2

¹¹³ In articles I and II of the UN Charter.

¹¹⁴ Simma (ed.), *The Charter of the United Nations: A Commentary*, p. 713; R. Wedgwood, “The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense” 97(3) *AJIL* (2003) 576, p. 584.

¹¹⁵ *Infra*, at p. 110-114.

¹¹⁶ See Chapter I, p. 31.

¹¹⁷ McDougal, “The Soviet-Cuban Quarantine”, p. 600.

validity of the use of force: Permissible coercion is supposed to be part of normal life among states.¹¹⁸

Franck says that the drafters of the Charter were reacting to the horrors of total war and that the principles of Chapter I of the Charter were “of transcendental importance...elucidating all other provisions”.¹¹⁹ Nevertheless it is suggested that principles and purposes can be seen to conflict. McDougal and Feliciano say that “the rules of the law of war, like other legal rules, are commonly formulated in pairs of complementary opposites and are composed of a relatively few basic terms of highly variable reference”.¹²⁰ It could be said that a complementary opposite can be found for many of the principles expressed in the Charter.

In this part of the chapter it will be suggested that the opposing principles of the respect for state sovereignty and the minimisation of the resort to armed force will be discussed. The principles and purposes of the UN are contained in articles 1 and 2 of the Charter, respectively. It will be argued that, together with the preamble, they can support both the preference for sovereignty and the preference for pacifism. The first principle of the Charter aims inter alia for “the suppression of acts of aggression”,¹²¹ this is bolstered by the second purpose of “strengthen[ing] universal peace”.¹²² As to the principles of the Charter, articles 2(3) for the peaceful settlement of disputes and

¹¹⁸ McDougal and Feliciano, “Legal Regulation of the Resort to International Coercion”, p. 1147.

¹¹⁹ Franck, *Recourse to Force*, p. 12.

¹²⁰ M.S. McDougal and F.P. Feliciano, “International Coercion and World Public Order: The General Principles of the Law of War” 67(5) *Yale LJ* (1958-9) 771, p. 815. (‘Hereinafter, McDougal and Feliciano, “International Coercion and World Public Order”’.)

¹²¹ Article 1(1) UN.

¹²² Article 1(2) UN.

2(4) containing the blanket prohibition of the use of force both appear to confirm this view.¹²³

However support for the primacy of sovereignty can also be found in articles 1 and 2. For instance, the second purpose of the Charter includes “respect for the principle of equal rights”. It seems that one way of ensuring equal rights is to allow smaller states to take defensive measures against larger states that might attempt to dominate them. The principles of the Charter seem to confirm this view. Indeed, the very first principle of the UN is respect for sovereign equality. The fact that article 2(7) specifically guarantees the sanctity of the domestic sphere except where enforcement action is concerned only serves to emphasise this.

Those who take a narrow view of self-defence that precludes anticipatory action have tended to favour the minimisation of the use of force over the protection of the nation-state. Brownlie’s view was that “even as a matter of ‘plain’ interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence”. This is because “[t]he whole object of the Charter was to render unilateral use of force, even in self-defence, subject to control by the Organization”. Brownlie says that this is evident in the fact that article 51 makes the right of self-defence subject to the SC taking necessary measures.¹²⁴

Another international lawyer taking a narrow approach is Bothe. He held that according to the object and purpose of the treaty, the Charter is supposed to “restrain

¹²³ It has been suggested that these principles are peremptory norms. McCoubrey and White, *International Law and Armed Conflict*, p. 34.

¹²⁴ Brownlie, “The Use of Force in Self-Defence”, p. 240.

the unilateral use of force”.¹²⁵ As for the purpose of self-defence itself, Kammerhofer says that his “personal view” is that not even anticipation of an imminent attack can be construed as an ‘armed attack’ because “the condition [armed attack] makes the ending of an armed attack the only valid objective of self-defence under Article 51”.¹²⁶ It is submitted that this is somewhat circular and that it would not be unreasonable to object that since a valid objective of self-defence is the protection of the state, the words ‘armed attack’ cannot have been intended to limit the right.

Indeed, perhaps owing to this objection Brownlie apparently felt obliged to deviate from his unswervingly hard line against the unilateral use of force. Owing to his narrow conception of article 51 and his rejection of states using force to anticipate imminent threats,¹²⁷ Brownlie creates a category of exception to catch cases where “technical means of countering the instrument of aggression will not adequately ensure protection if action is only taken when the object enters the territorial domain”.¹²⁸ He singles out cases of the use of rockets in flight and fast aircraft. However Brownlie admits that this category is a bit problematic because the policy of the law may be undermined and even abused.¹²⁹ Similarly, Henkin suggests that there may be an exception “for the special case of the surprise nuclear attack”. He says that “if there was clear evidence of an attack so imminent that there was no time for political action to prevent it” and the only meaningful action was pre-emptive self-defence the action may be legal.¹³⁰

¹²⁵ Bothe, “Terrorism and the Legality of Pre-emptive Force”, p. 229.

¹²⁶ Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 168.

¹²⁷ Brownlie, “The Use of Force in Self-Defence”, p. 243.

¹²⁸ *Ibid.*, p. 259

¹²⁹ *Ibid.*, p. 263

¹³⁰ Henkin, *How Nations Behave*, p. 144; See also A. Garwood-Gowers, “Pre-emptive Self Defence: A Necessary Development or the Road to International Anarchy?” 23(1) *Aust. YIL* (2004) 51, p. 56 (Hereinafter, ‘Garwood-Gowers, “Pre-emptive Self Defence”’.)

Those who take a broader view of self-defence also use the object and purpose of the Charter to justify their view. They tend to prefer the individual perspective of national protection over the collective perspective of the minimisation of the recourse to force. Greenwood says that the Charter gives priority to “keeping the peace” over preventing the use of force.¹³¹ Similarly, Bowett wrote that “it would be a strange conclusion if a state’s protection of its own legitimate interests were inconsistent with” the maintenance of international peace and security.¹³² Reisman is another commentator to prioritise the national over the international: “The first imperative of every territorial community – hence the first imperative of the international law that these communities have created – is provision for national defense”.¹³³

There are other objections to this expansive view of self-defence. The biggest objection is that to the extent that self-defence is not interpreted within the Charter framework and therefore balanced against, for instance, the general prohibition on the use of force, the purpose of national protection can justify an extremely broad spectrum of force. Corten suggests that those who take an expansive approach to identifying and interpreting the customary right of self-defence follow a purposive logic. They assume that the norm is for the protection of states and that states will stop at nothing to protect themselves: “This type of reasoning...rests upon an

¹³¹ C. Greenwood, “International law and the Pre-emptive Use of Force against Afghanistan, al Qaeda and Iraq” *San Diego ILJ* (2003) 7 p. 10 (Hereinafter, ‘Greenwood, “International law and the Pre-emptive Use of Force”’.)

¹³² Bowett, *Self-Defence in International Law*, p. 186

¹³³ W.M. Reisman, “Editorial Comment: Assessing Claims to Revise the Laws of War” 97(1) *AJIL* (2003) 82, p. 82 (Hereinafter, ‘Reisman, “Assessing Claims”’.)

objectivist theoretical viewpoint...It is logically and objectively impossible to refuse to allow pre-emptive anti-terrorist action”.¹³⁴

Another argument against purposivity, at least purposivity in the hands of the self-interested interpreter is that the object and purpose of the Charter includes the desire to limit the exploitation of self-defence for national purposes.¹³⁵ For instance, Judge Sir Robert Jennings pointed out the collective self-defence’s vulnerability to abuse as a “cover for aggression disguised as protection”.¹³⁶ Thus it seems that the broad view of self-defence drifts too far from a normative ought and it becomes easier for states to exploit the Charter provisions to their own advantage.

Finally in this section, it should be mentioned that there are also those who attack the Charter conception of self-defence on the grounds that article 51 can act as a “signpost for the guilty and a trap for the unwary”.¹³⁷ It has been said that it does not behove the law to list the factors that would signal an invalid claim lest it “open[] a mine of argumentative possibilities for mala fides statesmen in search of justifications”.¹³⁸ The argument here is that where international lawyers seek to flesh out the abstract norm of self-defence, they may inadvertently make the right of self-defence more exploitable even though they may feel that the instances of lawful force that they are enumerating under the category of self-defence make the rule less ambiguous not more so.

¹³⁴ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 808

¹³⁵ Garwood-Gowers, “Pre-emptive Self Defence”, p. 56.

¹³⁶ Nicaragua (Merits), p. 14. Dissenting Opinion of Judge Sir Robert Jennings, p. 544.

¹³⁷ A. Chamberlain, to the House of Commons, 24 November 1927 cited in Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 197.

¹³⁸ M. Koskenniemi, “Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons”, 10 LJIL (1997) 137, 152 citing J. Stone, Conflict Through Consensus (1977).

This is a crucial point: The right of self-defence is not exploitable only because it is ambiguous and therefore leaves statesmen ample room to employ it in justifications. Self-defence is also exploitable where it is over-specified because it creates extra categories under which an act of self-defence can be justified. This is particularly relevant to the Bush doctrine of pre-emption which was accompanied by rhetoric about an ‘axis of evil’.¹³⁹ Kammerhofer points out that in a situation where “a state (or group of states) is a priori accorded the status of ‘innocent’ and others are always ‘guilty’, then...an abstract definition of aggression is not desirable”.¹⁴⁰ The ‘axis of evil’ comprised Iran, Iraq and North Korea, three states who were also singled out in the National Security Strategy of 2002 as “rogue states”.¹⁴¹ It therefore seems that the clear but contradictory phrases of article 51 may leave the right of self-defence vulnerable to exploitation rather than protecting it.

PART TWO: CUSTOMARY LAW AND THE UN CHARTER.

“International custom, as evidence of a general practice accepted as law” is recognised as a source of law to be applied by the ICJ.¹⁴² It is comprised of state practice and *opinio iuris* and is not necessarily tied to a negotiated text. International lawyers who make a narrow reading of self-defence tend to limit the effects of state practice and therefore prioritise the Charter over customary norms. This ties the use of force in self-defence to the existence of an armed attack and its logic of strict

¹³⁹ G.W. Bush, State of the Union Address, 29 January 2002.

¹⁴⁰ Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 199.

¹⁴¹ National Security Strategy of the United States of America, pp. 13-14. Available at: <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>. (Hereinafter, ‘US National Security Strategy (2002)’.)

¹⁴² Article 38(1)(b) ICJ Statute.

exception to the general prohibition on the use of force which is the cornerstone of the collective security system.

To the extent that the fundamental norms of the collective security system are not duplicated in the system of customary law, to purport that custom exists beside the Charter would mean that the collective security system could be bypassed without violating the law. Thus, Kelsen's view was that the right of self-defence has no other content than that determined by article 51.¹⁴³ However, article 51 purports to preserve the 'inherent' right of self-defence.¹⁴⁴ Furthermore, it has been pointed out that the right of self-defence sketched in article 51 is insufficiently detailed and that recourse to custom is therefore unavoidable to flesh it out.¹⁴⁵

There are international lawyers who believe that the Charter text is no longer relevant to the task of finding the limits of self-defence. For instance, Murphy argues for a "protean jus ad bellum" because the Charter norms no longer reflect the real normative situation.¹⁴⁶ Murphy, echoing the sentiments of the New Haven school, would prefer "a normative regime that is less oriented toward a textual codification of the norm and more toward the practical and nuanced application of the jus ad bellum".¹⁴⁷ Custom, particularly the state practice element, is also a useful tool in the interpretation of the right of self-defence particularly as it reflects subsequent practice.¹⁴⁸

¹⁴³ H. Kelsen, *Recent Trends in the Law of the United Nations* (1964) Stevens and Sons, London, p. 914.

¹⁴⁴ *Infra*, at p. 110.

¹⁴⁵ *Nicaragua (Merits)*, para. 176; Gill, "The Temporal Dimension of Self-Defence", p. 364.

¹⁴⁶ Murphy, "Protean Jus Ad Bellum", p. 23.

¹⁴⁷ *Ibid.*, p. 23.

¹⁴⁸ *Supra*, at p. 83-87.

Many international lawyers assert that a separate right of anticipatory self-defence is a customary norm based on the Caroline correspondence. A debate exists as to whether the Charter preserved such a right or erased it.¹⁴⁹ The use of customary international law to modify the extent of the right of self-defence can be seen along a spectrum, stretching from armed attack to pre-emption, that is punctuated by qualitative differences in approach. These differences are: Firstly between the use of customary practice as an aid to interpretation; secondly the use of custom as providing a right of anticipatory self-defence; and thirdly the use of custom as a conduit for self help. That the form of custom is able to accommodate such vastly contrary positions suggests that Carty was right to call the concept of general custom “the most dubious apparatus of international lawyers”.¹⁵⁰

A. State Practice and *opinio iuris*.

It has been suggested that the use of custom by international lawyers differs greatly depending on their preference for a narrow or wide right of self-defence, and depending on their international or national perspective. The difference comes in how the international lawyer uses customary international law and what significance and form he accords to state practice and *opinio iuris*.¹⁵¹ The differences in the ways that international lawyers use the custom are difficult to untangle. Murphy has explained that this is because international lawyers are often dilatory in setting out their methodological premises.¹⁵² However, it may be said that the relationship between the

¹⁴⁹ *Infra*, at p. 106-109.

¹⁵⁰ A. Carty, *The Decay of international law? A Reappraisal of the Limits of the Legal Imagination in International Affairs* (1986) Manchester University Press, p. 21.

¹⁵¹ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 804.

¹⁵² Murphy, “The Doctrine of Preemptive Self-Defense”, p. 703.

Charter and custom and the genre of customary international law itself are somewhat problematic in themselves.

According to article 38(1)(b) of the ICJ Statute, customary norms are evidence of a “general practice accepted as law”. This is said to have two elements: Practice and *opinio iuris*. On the face of it, practice might be described as what states do and *opinio iuris* as what states say they do. In the North Sea Continental Shelf Cases it was said that *opinio iuris* implies “the existence of a subjective element” of belief that the practice is “rendered obligatory by the existence of a rule of law requiring it”.¹⁵³ *Opinio iuris* prevents the norm being over-concretised and reduced to the is of state practice. It demands that international lawyers show not only that, for instance, the practice of anticipating attacks in self-defence is done by states in fact, but also that states view such practices as legal. As Bothe explains, “[a] good factual argument does not make new law”.¹⁵⁴ Thus, Corten says a major difference between restrictive and expansive approaches is that restrictive approaches favour *opinio iuris* over practice.¹⁵⁵

The twin pillars of customary norms, practice and *opinio iuris*, are subject to various difficulties. Koskenniemi wrote that these two elements of *opinio iuris* and practice are circular because they refer back to one another.¹⁵⁶ In the first place, it is not always easy to distinguish one from the other. This is because it is not always clear what constitutes general practice or *opinio iuris*. There seem to be differences in opinion about the probative value of conduct or of speech in establishing *opinio iuris*,

¹⁵³ North Sea Continental Shelf Case (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark), 10 February 1969, para. 77.

¹⁵⁴ Bothe, “Terrorism and the Legality of Pre-emptive Force”, p. 232.

¹⁵⁵ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 816.

¹⁵⁶ Koskenniemi, *From Apology*, p. 411.

belief that certain behaviour is lawful. There are also differences between the ‘modern’ and ‘classical’ approaches to *opinio iuris*. Some seem to suggest that *opinio iuris* can be implied through acquiescence.¹⁵⁷ Against this, it is said that on the restrictive view of self-defence “the widespread acceptance of the war against Afghanistan is insufficient to support the conclusion that there has been a relaxation in the definition of indirect aggression”.¹⁵⁸ This suggests that the exclusion of acquiescence in the formation of custom may be criticised as leading to esoteric norms.

There is also some concern that establishing “general practice” is problematic since self-defence is an exception to a rule and therefore, in theory at least, a rarity. Furthermore, the two elements of *opinio iuris* and practice are not always well separated¹⁵⁹ and it is not clear what their relationship is.¹⁶⁰ A related matter is that sometimes the practice of certain states seems to be valued above the practice of others in establishing the content of the norm.¹⁶¹ This final point profoundly affects the value that is given to particular instances of the acceptance or rejection of a self-defence claim, as opposed to any general attempt to elucidate the abstract norm.¹⁶²

State practice is relevant to the customary right of self-defence as evidence of its extent. In many cases, practice that is taken as evidence does not expressly state its significance. Instead, analysts must infer conclusions from particular behaviour. The

¹⁵⁷ I.C. McGibbon, “Customary International Law and Acquiescence” 33 BYIL (1957) 115, p. 145; F.R. Kirgis, “Custom on a Sliding Scale” 81(1) AJIL (1987) 146, p. 146. (Hereinafter, ‘Kirgis, “Custom”’); Cf. M. Byers, “Book Review: Recourse to Force” 97(3) AJIL (2003) 721, p. 722.

¹⁵⁸ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 818.

¹⁵⁹ Koskenniemi, *From Apology*, p. 411.

¹⁶⁰ J.A. Beckett, “Countering Uncertainty and Ending Up/Down Arguments” 16(2) EJIL (2005) 213, p. 220, saying that modern views of custom see the relationship between *opinio iuris* and practice as an aggregate while classical ones view it as a synthesis.

¹⁶¹ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 820.

¹⁶² See e.g. UN Doc. A/RES/29/3314 (XXIX) Definition of Aggression, 14 December 1974.

more interpretable state behaviour is, the more things it could signify, the greater the subjective discretion of the interpreter. Murphy says that whether writers focus on what states say or what they do is important.¹⁶³ This is because where states express the significance of their actions, the discretion of the interpreter is lessened. In the opinion of McCoubrey and White, who take a narrow view of self-defence, “a significant emphasis should be placed on what states say in compiling an analysis of state practice”.¹⁶⁴

However there are other writers who distrust states’ own descriptions of their conduct and who dismiss the relevance of state practice in UN organs on the grounds that it is deceitful.¹⁶⁵ For McDougal and Feliciano, mere verbal allusion is insufficient for “a structure of legality”. What is necessary is that it “must go beyond words to expectations that are substantially corroborated by deeds”.¹⁶⁶ These authors think of themselves as expert analysts of state behaviour who can glean scientifically respectable conclusions from their neutral methods.¹⁶⁷ Against this view, the ICJ cautioned against “ascrib[ing] to states legal views that they do not themselves advance”.¹⁶⁸ It seems that while the McDougalist approach may enable the law to respond with far more agility to the pull of necessity, it also makes self-defence extremely vulnerable to exploitation.

A further problem with self-defence as a whole is that it is an exceptional act rather than a daily occurrence and therefore practice relevant to it will be infrequent. It is

¹⁶³ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 727.

¹⁶⁴ McCoubrey and White, *International Law and Armed Conflict*, p. 30.

¹⁶⁵ Goldsmith and Posner, *Limits*, p. 169.

¹⁶⁶ M.S. McDougal, H.D. Lasswell and W.M. Reisman, “The World Constitutive Process of Authoritative Decision” 19(3) *JLE* (1966-7) 253, p. 258.

¹⁶⁷ See Chapter I, at pp. 21-25; Goldsmith and Posner, *Limits*, p. 16.

¹⁶⁸ *Nicaragua (Merits)*, para. 207.

said that there have been very few justifications of anticipatory self-defence to date.¹⁶⁹ If there is a lack of practice suggesting, for instance, anticipatory or pre-emptive self-defence, does this mean that it has not crossed the threshold of normativity? It has been asserted that “scarcity of practice does not necessarily reflect such a [negative] belief; it may just indicate that the circumstances calling for preemptive self-defense only infrequently arise”.¹⁷⁰ Since there are few incidents in which states have unequivocally asserted a right to anticipatory self-defence, its proponents must make inferences from state practice that may signify a great number of possible meanings. As Murphy astutely points out, it is often hard to discern whether a state is acting in anticipation of a threat, pre-emptively or in response to a prior act.¹⁷¹

This difficulty is demonstrated by the US-led action in Afghanistan in 2001, Operation Enduring Freedom (OEF). This action was taken in response to the bombing of the World Trade Centre on 11 September 2001. The US representative Ambassador Negroponte wrote to the President of the SC, according to the reporting requirement in article 51, explaining that the US was acting in self-defence and suggesting that the US had evidence of potential future attacks that it intended to “prevent and deter”.¹⁷² However, in resolution 1368, the SC unanimously asserted that the US had a right of self-defence on the day after the attacks before any such evidence was publicised. It is hard to tell, therefore, whether OEF could be taken as evidence of anticipatory self-defence or whether it should be seen as a case of reprisal

¹⁶⁹ L. Henkin, “Reports of the Death of Article 2(4) Are Greatly Exaggerated” 65(3) AJIL (1971) 544, p. 544.

¹⁷⁰ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 738.

¹⁷¹ *Ibid.*, p. 733.

¹⁷² UN Doc. S/2001/946 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.

or, indeed, whether it should simply be taken *sui generis* in the light of the uproar caused by 9/11.

As far as state practice is concerned, it is also to be remembered that most international lawyers think that the practice must be “widespread” rather than isolated.¹⁷³ This is because if the norm is to be universally applicable, it should reflect the will of all states. It is therefore necessary to look at the reactions of states to claims of self-defence by others. This has the added advantage of limiting the exploitability of state practice by including as large a survey as possible. Murphy worries that this technique is problematic in practical terms: What sorts of actions will count as a reaction to another’s claim? What if there are contradictory signals on the national and international levels? What if one doubts that the ‘real motive’ behind the reaction was connected to the legal status of the claim?¹⁷⁴

On a practical level, gauging the reactions of states is extremely hard work.¹⁷⁵ There are 192 states in the UN and all of them have numberless outlets for opinion. Based on the approach of the ICJ in the Nicaragua case, Kritsiotis has attempted to limit the relevance of states’ reactions according to whether they are political or legal, formal or informal.¹⁷⁶ These distinctions can seem artificial. For instance, is a statement legal because it involves ‘self-defence’ or must it invoke article 51? Gray raises further difficulties when she notes that states tend not to condemn or commend uses of force on the basis of doctrine, but tend to do so on the facts. States’ uses of force are

¹⁷³ But cf. Kirgis, “Custom”, arguing that the more *opinio iuris*, the less frequent or consistent practice need be and vice versa.

¹⁷⁴ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 736.

¹⁷⁵ Higgins, *Problems and Process*, p. 8.

¹⁷⁶ D. Kritsiotis, “Arguments of Mass Confusion” 15(2) *EJIL* (2004) 233, p. 242.

frequently condemned on the grounds that they are disproportionate so that the states evaluating them do not commit themselves to particular readings of doctrine.¹⁷⁷

A third problem with assessing states' reactions to uses of force lies in the problematic concept of *opinio iuris*. A state is an artificial entity and, even if one does narrow down the 'mind' of the state to its government, national governments are also artificial entities. It may be the case, then, that a state cannot be said to possess a view on whether particular behaviour was legal or not. This can make it hard to draw conclusions about the relevance of particular instances of evaluation to the development or adaptation of the right of self-defence.

B. Reducing the ought to the is?

It has been suggested that “[c]ustom is precisely what enables us to link the abstract legal concept to the particular factual situation”.¹⁷⁸ It might therefore be suggested that what states usually do provides a sort of informal precedent that offers guidance to those attempting to interpret the right of self-defence bearing in mind the idea that the binding force of norms flows from the sovereign will. The use of customary norms and state practice sometimes reflects an affinity with the concerns of realist writers that the Charter system does not adequately deal with the reality of interstate relations.¹⁷⁹ For instance Bowett, who describes his approach as “empirical”, seeks to analyse the practice of states to see which rights have been deemed capable of protection by the exercise of self-defence.¹⁸⁰

¹⁷⁷ Gray, *International Law and the Use of Force*, p. 101.

¹⁷⁸ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 806.

¹⁷⁹ See Chapter I, at p. 33-42.

¹⁸⁰ Bowett, *Self-Defence in International Law*, p. 8.

Further along the spectrum, the school of policy realism which thinks of norms as expressing states' expectations as reflected in what they usually do (and what they are otherwise expected to do) has justified a broad view of self-defence. Finally, the doctrine of pre-emption was justified in part by an assertion of US practice¹⁸¹ and in part by centuries' old (pre-prohibition on the use of force) international law.¹⁸²

For international lawyers wishing to answer the realist criticisms by suggesting that customary norms or state practice mitigate the rigour of article 51 in some way, a problem arises. They must provide a legal framework of recognition and interpretation which prevents the is of practice subsuming the normativity of the right of self-defence. The problem is that the existence of secondary rules limiting, for instance, the speed with which self-defence can adapt, or requiring widespread practice rather than consistent practice by a single state,¹⁸³ means that many of the criticisms about the responsiveness of law made by realists still bite. This is illustrative of Koskeniemi's criticism that international lawyers are often stuck between arguments of normativity and arguments of concreteness.¹⁸⁴

Koskeniemi has warned that "there must be some distance between fact and the law".¹⁸⁵ This is because, as Kratochwil explains, "the possibility of violating norms has made the explanation and prediction of action in terms of norms particularly

¹⁸¹ "The United States has long maintained the option of preemptive actions", US National Security Strategy (2002), p. 15.

¹⁸² This is also suggested by Sofaer's examination of the work of Vattel, Pufendorf and Grotius. Sofaer, "Pre-emption", p. 216.

¹⁸³ The doctrine of "instant custom" has been widely rejected by international lawyers. And in article 38(1)(b) of the ICJ Statute it says that custom must be "general".

¹⁸⁴ Introduction, at p. 3.

¹⁸⁵ Koskeniemi, "International Law in a Post-Realist Era", p. 4.

difficult”. Thus in IR norms “have been understood solely as ideological reflections, deceptions, subterfuges or...as an impediment to achieving one’s goals in a “rational way”.¹⁸⁶ This highlights that the different conceptions of the functions of collective security norms is central to the question of whether the norm is effective or not. For realists and others taking an “instrumentalist optic”,¹⁸⁷ norms express expectations of future behaviour. For doctrinal international lawyers and others taking a “normative optic”, norms can be constraints on behaviour that may or may not be obeyed.

This basic difference can make it difficult for the defenders of the collective security system to engage with its critics. However, the difference should not be over-emphasised. Few doctrinal international lawyers are blasé about whether the prohibition on the use of force is obeyed in practice. In part this is because two of the major sources of international law, treaties and custom, are based on states’ intention to be bound. If state practice ceases to display such an intention or submission, it may be questioned whether the provisions of the Charter have validity according to a doctrinal framework never mind a realist one. Those adhering to a vehemently doctrinal method may render the law esoteric in the process.

Custom introduces an added level of complexity into identifying valid self-defence because the formulation of the norm is no longer static, reduced to a moment of time in which a document was signed, but instead dependent on what states do over time. A flexible norm is also a moving target. In relation to this, it is to be emphasised that the use of customary norms and state practice also makes the job of distinguishing violations and adaptations of self-defence more complex. Thus Reisman says that the

¹⁸⁶ F. Kratochwil, “Thrasymachos Revisited: On the Relevance of Norms and the Study of Law for International Relations” 37(2) JIA (1984) 343 p. 343.

¹⁸⁷ Keohane, “Two Optics”; See also Chapter I, at p. 16.

decentralised nature of international law means that “much law-making...is initiated by unilateral claim”.¹⁸⁸ While Franck is a little more circumspect, he says that “[i]n international law, violators do sometimes turn out to be lawgivers”.¹⁸⁹ However Gray makes the point that most state practice does not lead one to reappraise the law even where it is law-violating because the violation is a matter of fact and not doctrinal development.¹⁹⁰

International lawyers’ attempts to mediate between the descriptive is and the prescriptive ought are often mirrored by a parallel mediation between the subjective and the objective. Practice relevant to law goes beyond the merely subjective. Many international lawyers objectify such practice using secondary norms that set more or less stringent conditions on the sort of practice that can be said to be norm-generating. However, international lawyers disagree among themselves about the degree of stringency of these norms and, consequently, the flexibility of the system. Further, the array of different opinions about the scope of self-defence can stoke critics’ fires by enabling them to claim that the norms of the collective security system are “singularly useless as a means of justifying or criticizing behaviour”.¹⁹¹ This is because such disagreement among international lawyers is sometimes taken as evidence that legal doctrine cannot produce objective answers.

¹⁸⁸ Reisman, “Assessing Claims”, p. 82.

¹⁸⁹ T.M. Franck, “What Happens Now? The United Nations After Iraq” 97(3) AJIL (2003) 607, p. 614.

¹⁹⁰ Gray, *International Law and the Use of Force*, p. 11.

¹⁹¹ Koskenniemi, *From Apology*, p. 67; See Introduction, at p. 3.

C. Parallel Streams of Law?

In Bowett's view the Charter is not a source of rights and the members of the UN have more rights than those accorded to them under it. For him, there is nothing to stop other rights existing simultaneously with the Charter.¹⁹² If a separate customary right of self-defence were to exist in parallel to article 51, the scope of self-defence would be broadened to the extent that the customary right was broader than the Charter one. This is because states would simply justify their uses of force according to custom and not the Charter. Brownlie points this out and deduces that article 51 cannot exist alongside some other right: "[W]here the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic". Brownlie says there would be no point in having the Charter at all.¹⁹³

The intermingling of the customary and Charter law on the right of self-defence is something all international lawyers have had to take seriously, whatever their stripe, since the mid-1980s.¹⁹⁴ The ICJ found that it had jurisdiction to hear a case brought by Nicaragua against the US, despite the fact that the US had made a reservation to article 36(2) of the ICJ Statute providing for the Court's compulsory jurisdiction.¹⁹⁵ This reservation seemed *prima facie* to exclude the question of self-defence from the purview of the court: It excluded "disputes arising under a multilateral treaty, unless

¹⁹² Bowett, *Self-Defence in International Law*, p. 185; See also Sofaer, "International Law and Kosovo", p. 10.

¹⁹³ Brownlie, "The Use of Force in Self-Defence", p. 240.

¹⁹⁴ S.A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (1996) Kluwer International, The Hague, p. 135 (Hereinafter, 'Alexandrov, Self-Defense'); Greenwood, "International Law and the Pre-emptive Use of Force", p. 12.

¹⁹⁵ *Nicaragua (Merits)*, para. 36.

(1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction”. The Court found that it was precluded from considering the applicability of either article 21 of the Organisation of American States (OAS) Charter or article 51 of the UN Charter.¹⁹⁶ However, it concluded that the reservation to the Optional Clause “has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply”.¹⁹⁷

The Court rejected two further US arguments: Firstly, that it is precluded from applying customary norms; and secondly that the use of force in self-defence is not justiciable. As to the first argument, it was said that this was “either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content”.¹⁹⁸ The Court took as evidence for the continued existence of a customary right of self-defence the presence of the word “inherent” in article 51. The Court said that it “cannot...be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law” because the detail of article 51 must be supplied by customary international law.¹⁹⁹

As to the second argument, the US suggested that “the Court should hold the application to be inadmissible in view of the subject-matter of the application and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the on-going exercise of ‘the inherent right to

¹⁹⁶ Ibid., para. 50.

¹⁹⁷ Ibid., para. 56.

¹⁹⁸ Nicaragua (Merits) 1986, para.174.

¹⁹⁹ Ibid., para. 176.

individual or collective self-defence' under Article 51".²⁰⁰ The US claimed that "a judgment of the Court that purported to deny the validity of a state's claim to be engaged in self-defence...must naturally 'impair' the 'inherent' right guaranteed to that state by Article 51".²⁰¹ It has been pointed out that the adoption of this position by the US is somewhat curious since it made the opposite arguments at the International Military Tribunal at Nuremberg.²⁰²

The Court did not deal exhaustively with the relationship between article 51 and the customary right of self-defence. In particular, it refrained from discussing whether a customary right of anticipatory self-defence existed.²⁰³ However the Court found that "both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations".²⁰⁴ The Court also held that the Charter provisions continued to be relevant to the determination of the scope of the customary law applicable.²⁰⁵ In his dissenting opinion, Judge Sir Robert Jennings was critical of the majority for doing this.²⁰⁶ As the basis for its understanding of customary self-defence, the article 2(4) prohibition on the use of force was said to exist in customary law.²⁰⁷ It found evidence for this, *inter alia*, in the Declaration of Friendly Relations²⁰⁸ which is said to attract

²⁰⁰ ICJ Pleadings, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Vol. I I, US Counter-Memorial, para. 435.

²⁰¹ *Ibid.*, para. 517.

²⁰² P.W. Khan, "From Nuremberg to the Hague: The United States Position in *Nicaragua v. United States and the Development of International Law*" 12(1) *YJIL* (1987) 1, p. 8.

²⁰³ *Nicaragua (Merits)*, para.194.

²⁰⁴ *Ibid.*, para. 181.

²⁰⁵ *Ibid.*, para. 183.

²⁰⁶ *Ibid.*, Dissenting opinion of Judge Sir Robert Jennings, p. 532.

²⁰⁷ *Ibid.*, para.188.

²⁰⁸ UN Doc. GAR 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970.

“unanimous agreement”.²⁰⁹ The weight attached to the judgments of the ICJ by many of the international lawyers taking a restrictive view of self-defence means that the scope of the customary right of self-defence cannot be ignored in a discussion of self-defence.

The ICJ’s judgment has been criticised for drawing the right of self-defence too narrowly. The Court refrained from examining state practice in the actions of states and instead based its findings on negotiated texts passed as GA resolutions. This can be criticised for artificially distancing customary international law from the is of state practice. Reisman says that behind the Nicaragua judgment was a desire to prevent “an inexorable slide down that precipitous slope” towards pre-emption. For him, the reasoning is not easily applicable where the non-state actors concerned are armed with WMD and are impervious to concerns about reciprocity of retaliation.²¹⁰

Thus, the relevance of a narrow conception of state practice and the customary right of self-defence can be criticised for failing to reflect changes in the strategic reality from which necessity flows. However the fact that the Court recognised that the two streams of law exist in parallel means that those who take a broad view of self-defence are relieved of the necessity of making the argument that customary law is relevant. The question then becomes about the extent of the customary right of self-defence that exists along side the Charter.

²⁰⁹ R. St J. MacDonald, “The Nicaragua Case: New Answers to Old Questions” 24 *Can. YIL* (1986) 127 p. 142.

²¹⁰ Reisman, “Assessing Claims”, p. 89.

D. The 'Inherent' Right to Self-Defence.

The confusion between custom and the Charter is fomented by the wording of article 51. Owing to the fact that article 51 opens with the words “nothing in the present Charter shall impair the inherent right to...self-defence”,²¹¹ international lawyers of a more traditional stripe are able to approach the realist conception that the right of self-defence is not a legal right under the Charter but a rival sort of natural right that is not regulated by international law or collective evaluation. McDougal wrote that “[t]here is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly preserves the right of self-defence, had the intent of imposing by this new provision limitations upon the traditional right of self-defence”.²¹² Against this, Kelsen thought that the addition of the word “inherent” in article 51 was merely a legislator’s preference and that there would be no difference if it were dropped.²¹³ Alternatively, Brownlie’s reading of article 51 uses the presence of “inherent” to bolster a restrictive argument: “[I]t is not incongruous to regard Article 51 as containing the only right of self-defence permitted under the Charter”. This is because of the reference to “inherent right”.²¹⁴ The extent of that right depends on what the extent of the right was prior to 1945.

There are two rival conceptions of the state of customary law in 1945. One is that sovereign states were free to take measures of self help as a way of safeguarding their interests.²¹⁵ The opposing view is that the basic norm of the prohibition on the use of

²¹¹ Emphasis added.

²¹² McDougal, “The Soviet-Cuban Quarantine”, p. 599; See also, J. Yoo, “International Law and Iraq” 97(3) AJIL (2003) 563, p. 571. (Hereinafter, ‘Yoo, “International Law and Iraq”’.)

²¹³ Kelsen, *Law of the United Nations*, p. 792.

²¹⁴ Brownlie, “The Use of Force in Self-Defence”, p. 239.

²¹⁵ Bowett, *Self-Defence in International Law*, p. 3.

force has effectively rendered acts of self-help illegal. In a well-known article, Brownlie noted the confusion caused by the residue of pre-Charter self help.²¹⁶ It has been said that in the past “each state [had] an uncontrolled faculty, as a sovereign competence and prerogative, to prosecute its rights, real or imagined, by recourse to coercion and violence”.²¹⁷ This is because self help involves the vindication of a legal right whereas self-defence is related to self-preservation, a category with narrower purposes than that of self-help.

The right of self-defence is narrower still because it connotes reaction against a use of force.²¹⁸ There was no need for a state to have been the victim of any violence before it could take forcible countermeasures to vindicate its rights. Self help, then, is anathema to the Charter’s prohibition of the use of force. Therefore, to the extent that the customary right ‘preserved’ in the Charter is one of self-help, it effectively negates the collective security system because it can no longer be said that the system has the monopoly on the use of force.

The terminology of self-defence, self preservation and self help causes some confusion. While the terms are not often used interchangeably these days, it remains the case that self-defence is often related to self help. For instance, there are academics who view self-defence as a species of self help.²¹⁹ In doing so they may seem to suggest that self-defence is not only an exception to the prohibition on the use of force, but it is an exception that exists outside the collective security system and does not share its logic or its internationalist perspective.

²¹⁶ Brownlie, “The Use of Force in Self Defence”, pp. 226-7.

²¹⁷ McDougal and Feliciano, “International Coercion and World Public Order”, p. 817.

²¹⁸ Brownlie, “The Use of Force in Self-Defence”, p. 222.

²¹⁹ Dinstein, *War, Aggression and Self-Defence*, p. 176; Bowett, *Self-Defence in International Law*, p. 3; Lauterpacht, *The Function of Law*, p. 393.

According to Brownlie, self-preservation acts as a sort of conduit between Charter self-defence and nineteenth century self help. He wrote; “[t]o permit anticipatory action may well be to accept a right which is wider than that of self-defence and akin to that of self-preservation”.²²⁰ To the extent that it can be argued that the preservation of the state is an ‘inherent’ right, it could be said that the limitation of the occurrence of an armed attack is unfounded. In today’s literature this confusion is manifested in the use of the Caroline correspondence which occurred at a time when self-preservation and self-defence were not distinguished.²²¹ It is possible to argue, then, that the Webster formulation of the right of anticipatory self-defence cannot be accommodated in the collective security system as part of pre-existing customary international law because it did not relate specifically to self-defence. Thus, Kammerhofer suggests that the Caroline correspondence is not necessarily relevant because in 1837 the use of force had not been prohibited and the Charter right of self-defence can only be understood in the context of the Charter.²²²

The effect of the inclusion of ‘inherent’ in article 51 will depend on whether writers believe that pre-1945 custom was based on self help or whether it included the prohibition on the use of force. Some scholars seem to think of custom as being primarily shaped by the nineteenth century practices of the Great Powers when restrictions on the sovereign state were not lightly presumed and war was viewed as an instrument of national policy.²²³ However, Brownlie has made the argument that pre-Charter customary law was not very different to the article 51 right. He pointed to

²²⁰ Brownlie, “The Use of Force in Self-Defence”, p. 227.

²²¹ Ibid., p. 227.

²²² Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 153.

²²³ McCoubrey and White, *International Law and Armed Conflict*, p. 19.

the seismic developments that occurred after WWI: The League of Nations and the Kellogg-Briand Pact both pointed to a developing trend towards limiting states' right to resort to force.

The Covenant of the League demonstrates a move towards the pacific settlement of disputes, with states undertaking that “if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council” rather than immediately resorting to force.²²⁴ In signing the Covenant, members agreed that resort to war in violation of this would be construed as an act of war against all League members who would break off relations with the delinquent state.²²⁵

The Kellogg-Briand Pact was signed four years later in 1928. It provided “for the renunciation of war as an instrument of national policy”.²²⁶ Moreover, the early twentieth century had seen a gradual move towards the legalisation and institutionalisation of inter-state dispute settlement. The Permanent Court of Arbitration was established in 1899 by the Convention for the Pacific Settlement of International Disputes. Moreover, the conduct of warfare had also begun to be regulated in the nineteenth century with the Hague Conventions of 1899 and 1907. For those scholars who prefer a narrow view of self-defence, these events seem conclusive of the proposition that the Charter reflected state practice in 1945.

On the other hand, it has also been possible for international lawyers to counter-argue that this trend towards limiting the sovereign right to resort to war did not in fact, and

²²⁴ Covenant of the League of Nations 1924, article 12.

²²⁵ *Ibid.*, article 16.

²²⁶ Kellogg-Briand Pact 1928, article 1.

was not meant to by the states responsible for these innovations, to deprive sovereign states of the right to use force in self-defence. A frequently used example are the reservations to the Kellogg-Briand Pact by which several states specifically exempted the right to resort to force in self-defence from the ambit of the Pact. The British reservation purported to cover anything that was a “special and vital interest for our peace and safety”.²²⁷ This has been taken to mean something wider than ‘armed attack’ and therefore to reflect the position that the right of self-defence remained unlimited by the developments of the early twentieth century.²²⁸ It has also been claimed that the prohibition on the use of force rested on the ability of the SC to maintain and restore international peace and security. It might be argued that during the Cold War when the SC was deadlocked, customary practice necessarily diverged from the Charter norm as states took matters into their own hands.²²⁹

E. Imminence.

Having examined the question of the relationship between the Charter and customary versions of self-defence in broad terms, we will now turn to the question of anticipatory self-defence. As mentioned above,²³⁰ anticipatory self-defence is sometimes said to be valid insofar as it can be said to have survived developments since the mid nineteenth century. In an exchange of letters in the 1830s and 40s with Lord Ashburton on behalf of the UK, the US Secretary of State, Daniel Webster, asserted that an action in self-defence would be valid where the necessity of self-

²²⁷ In Further Correspondence with Government of the United States Respecting the United States Proposal for the Renunciation of War (1928) an exchange of letters between the US and the UK reveals that the drafters of the Treaty specifically had in mind the reservation of self-defence. Available at: http://avalon.law.yale.edu/20th_century/kbbr.asp#no2.

²²⁸ Koskenniemi, *The Gentle Civilizer*, p. 433.

²²⁹ See Chapter I, at p. 33.

²³⁰ *Supra*, at p. 110-111.

defence was “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.²³¹ This is commonly read as laying down three requirements for a valid use of force in self-defence: Necessity, proportionality and imminence. Following this, the International Military Tribunals at Nuremberg and Tokyo applied a test of imminence to the German invasion of Norway and the Japanese invasion of the Dutch East Indies, respectively.²³²

However, as far back as the 1960s, certain writers asserted that “the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies”.²³³ While perhaps not reflecting the reasoning behind this criticism, this statement might also be related to the existence of the collective security system. It may be said that during the mid-nineteenth century there was no SC to take action to maintain international peace and security and that therefore the right of self-defence had to be broader.

Objections have also been made to the use of the Caroline on the grounds that “[t]he formula was not customary international law in 1837”, “a single incident cannot create customary international law”, the agreement was political not legal, nor was it accepted in practice and finally that it was limited to certain kinds of self-defence.²³⁴

These are objections that flow from choices made about the recognition of valid legal

²³¹ R. Y. Jennings, “The Caroline and McLeod Cases” 32(1) *AJIL* (1938) 82, p. 89. (Hereinafter, ‘Jennings, “The Caroline and McLeod Cases”’.)

²³² Alexandrov points out that the application of the test lead to contrary results: The Tokyo tribunal accepted the argument that Japan had committed itself to invading Dutch territory, while the Nuremberg tribunal rejected the German argument that it was responding to an imminent allied landing in Norway. Alexandrov, *Self-Defense*, p. 164.

²³³ McDougal, “The Soviet-Cuban Quarantine”, p. 598.

²³⁴ J.A. Green, “Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence” 14(2) *Car. JICL* (2006) 429, at pp. 438-444.

norms: The secondary rules that enable scholars to claim objectivity for their readings of self-defence.

There have been other criticisms of the use of the Caroline correspondence on the grounds that it is too restrictive. McDougal and Feliciano have written that the Webster formula is “so abstractly restrictive as almost, if read literally, to impose paralysis”.²³⁵ This does not, however, mean that the formulation is no longer used. Rather, the general acceptance of the relevance of the Caroline, particularly following Jennings’ well known article,²³⁶ means that it can be seen as a minor snag in the fabric of international law that may lead to its unravelling.

Relying on the Caroline in the light of McDougal’s objections, Sofaer has made a reading of the three Webster principles that entirely subordinates imminence to necessity and proportionality.²³⁷ Other international lawyers are less radical, but they have still been willing to exploit the Caroline to justify a right of self-defence that supposedly complements today’s strategic reality. Greenwood makes it clear that defining “imminence” depends on social circumstances. He says that “it is necessary to take into account two factors that did not exist at the time of the Caroline incident”: The gravity of the threat (WMD) and the delivery of the threat (by terrorists).²³⁸ Similarly, Yoo has written that “under international law the concept of imminence

²³⁵ McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (1961) New Haven, Yale University Press, p. 217. (Hereinafter, ‘McDougal and Feliciano, *Law and Minimum World Public Order*’.)

²³⁶ Jennings, “The Caroline and McLeod Cases”.

²³⁷ Sofaer, “Pre-emption”, p. 220.

²³⁸ Greenwood, “International Law and the Pre-emptive Use of Force”, p. 16.

must encompass an analysis that goes beyond the temporal proximity of a threat to include the probability that the threat will occur”.²³⁹

The imminence requirement has been central to many discussions of the G.W. Bush doctrine of pre-emption. What is striking about the National Security Strategy of 2002 in which it was set out²⁴⁰ is that the claim made was that international law must adapt.²⁴¹ There has been some confusion about whether the proposition was not one of ought or is. It is not clear whether the changed strategic reality somehow automatically enlarged the scope of the unilateral right to use force or whether the Bush administration was arguing for a change in the law.

This confusion stems from the approach of the NSS drafters. Instead of rejecting the current system outright, the NSS appears to simultaneously lay down an ultimatum for reform and suggest that the reform is well underway within the system.²⁴² The NSS markets the doctrine of pre-emption as an extension of the right of anticipatory self-defence based on imminence, necessity and proportionality, the Webster formula. It has been suggested that “the US seeks first to secure a pre-existing claim, and then to stretch the resulting rule so as to render it highly ambiguous”.²⁴³ Mention of the Charter norms on the use of force is conspicuous by its absence in Part V of the NSS in which the doctrine is contained.²⁴⁴

²³⁹ Yoo, “International Law and Iraq”, p. 572

²⁴⁰ See also; Commencement Address at the United States Military Academy in West Point, New York 1 June 2002. Available at: <http://www.dartmouth.edu/~govdocs/docs/iraq/060102.pdf>. (Hereinafter, ‘Bush, West Point Speech’.)

²⁴¹ US National Security Strategy (2002), p. 15.

²⁴² “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack” and “The United States has long maintained the option of pre-emptive actions”, p. 15.

²⁴³ M. Byers, “Pre-emptive Self-Defense: Hegemony, Equality and Strategies of Legal Change” 11(2) J. Pol. Phil. (2003) 171, p. 179-80. (Hereinafter, ‘Byers, “Pre-emptive Self-Defense”’.)

²⁴⁴ The word “Charter” does not appear anywhere in the US National Security Strategy (2002).

Byers explained that “according to traditional means of treaty interpretation, the words “if an armed attack occurs” preclude any right to pre-emptive action”.²⁴⁵ In effect, it is suggested, the doctrine of pre-emption is situated in a framework of customary international law bowdlerized of the Charter norms. This is one of the reasons that international lawyers wishing to defend the Charter system by tempering its rigour with the flexibility of custom may, in effect, bolster arguments for pre-emption rather than counter them to the extent that the Charter can be subsumed completely by custom.

It is arguable that allowing anticipatory self-defence in this way can encourage a “slippery slope” that effectively renders the Webster formula no more than a badge of legitimacy. The Bush doctrine was an attempt to remove the imminence criterion completely. The rationale for his removal was that “at the crossroads of radicalism and technology” exist terrorists armed with WMD.²⁴⁶ Yoo has offered an argument in favour of this move, suggesting that “a more flexible standard should govern the use of force in self-defense, one that focuses less on temporal imminence and more on the magnitude of the potential harm and the probability of an attack”.²⁴⁷

The idea is simply that the US could not afford to wait for the terrorists armed with WMD to strike. It argued that the alternative to pre-empting this new breed of threat is waiting like “sitting ducks”²⁴⁸ or “hoping for the best”.²⁴⁹ Former US President G.W. Bush has said that “[i]n the world we have entered, the only path to safety is the path

²⁴⁵ Byers, “Pre-emptive Self-Defense”, p. 172

²⁴⁶ G.W. Bush Foreword to the US National Security Strategy (2002), p. ii.

²⁴⁷ Yoo, “Using Force”, p. 730.

²⁴⁸ Alexandrov, Self-Defense, p. 149; McDougal, “The Soviet-Cuban Quarantine”, p. 601.

²⁴⁹ Bush, West Point Speech.

of action”.²⁵⁰ It will be argued that this sort of precautionary approach to self-defence gives the claimant state a dangerously broad authority to invoke self-defence in a way that does not admit of third party evaluation.²⁵¹

While the right of anticipatory self-defence is said to be “controversial” by some writers,²⁵² since 9/11 many have given more credence to the view that it may be possible to anticipate an imminent attack in certain situations. Indeed, the view has been expressed by both the former Secretary General of the UN and by his High Level Panel on Threats, Challenges and Change which were established to consider the collective security system’s response to changes in the strategic environment. Former Secretary General Kofi Annan was confident that “[i]mmminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened”.²⁵³

Similarly, the High Level Panel found that despite the fact that 1945 and 2004 are “different worlds”,²⁵⁴ “article 51 needs neither extension nor restriction of its long-understood scope”.²⁵⁵ However, “according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate”.²⁵⁶ However Gray says that at the

²⁵⁰ Ibid.

²⁵¹ See Chapter V, at p. 262.

²⁵² C. Gray, “The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA” 5(3) *Chin. JIL* (2006) 555, p. 566. (Hereinafter, ‘Gray, “The Bush Doctrine Revisited”’); Bothe, “Terrorism and the Legality of Pre-emptive Force”, p. 231; Henkin, *How Nations Behave*, p. 141.

²⁵³ UN Doc. A/59/2005 Report of the Secretary-General, “In Larger Freedom: Towards Development, Security and Human Rights for All” (2005), para. 124.

²⁵⁴ Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), “Part One: Toward a new security consensus”, p. 10.

²⁵⁵ Ibid., p. 3.

²⁵⁶ Ibid., p. 63, para. 188.

World Summit in 2005 “a majority of states were not willing to accept anticipatory, let alone pre-emptive self-defence”.²⁵⁷ Glennon also criticises the High Level Panel for suggesting that self-defence can be used in response to an imminent attack. He says that this has no basis in doctrinal sources.²⁵⁸ The inclusion of imminence in the definition of anticipatory self-defence falls short of the freedom of action propounded by the G.W. Bush Administration. It can therefore be seen as an unsatisfactory compromise that does not properly address concerns about the efficacy of the collective security system.²⁵⁹ For instance, “a potential attack may be treated as very likely to occur, even though it is not imminent” would not fall within the definition.²⁶⁰

It will be claimed that a crucial difference between pre-emption and anticipation is that “[a] credible claim for anticipatory self-defense must point to a palpable and imminent threat. A claim for preemptive self-defense can only point to a possibility, a contingency”.²⁶¹ It is suggested that insofar as the imminence of an attack makes it easier to recognise and to evidence, the ability of the collective security system to distinguish valid from invalid self-defence claims rests on it. Thus Greenwood suggested that “[t]he right of self-defence will justify action only where there is sufficient evidence that the threat of attack exists”.²⁶²

Many international lawyers have suggested that a similar reasoning lay behind the inclusion of ‘armed attack’ in article 51.²⁶³ It is suggested that to the extent that a

²⁵⁷ Gray, “The Bush Doctrine Revisited”, p. 566.

²⁵⁸ Glennon, “The Emerging Use-of-Force Paradigm”, p. 310.

²⁵⁹ *Ibid.*, p. 312.

²⁶⁰ Sofaer, “Pre-emption”, p. 221-222.

²⁶¹ Reisman, “Assessing Claims”, p. 87.

²⁶² Greenwood, “International Law and the Pre-emptive Use of Force”, p. 16.

²⁶³ Glennon, “The Fog of Law”, p. 546; M.E. O’Connell “The Myth of Pre-emptive Self Defence” (October 2002) ASIL Taskforce on Terrorism p. 19.

claim can be evidenced to the satisfaction of an evaluative discourse, this distinction is possible to make. It is submitted that the distinction could no longer be made where a state took action pre-emptively and then refused to give evidence for its actions on the grounds that it was based on classified intelligence.²⁶⁴ In this part of the thesis I have presented some ambiguities and problems in the operation of customary law in order to demonstrate that where custom is applied in order to ‘save’ article 51 from obscurity and esotericism, there is a danger that the writer will open the door to far broader claims than he intended. This is because the operation of custom in practice is deeply contested. On the other hand, where customary norms are used to create a rule-guided compromise between the narrow position of article 51 and the doctrine of self-help, they remain open to the criticism that they are overly determining and irrelevant to the present day strategic reality. International lawyers have not seemed able to escape the double-bind of exploitation and esotericism.

CONCLUSION.

International lawyers sympathetic to the UN collective security system face a dilemma posed by the realist challenge to doctrinal and other normative approaches. The realist charge is this: “Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behaviour”.²⁶⁵ The challenge has a long pedigree; Franck famously declared the death of article 2(4) in 1970 on the grounds that “what killed article 2(4) was the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their

²⁶⁴ See Chapter V, at p. 295.

²⁶⁵ Glennon, “The Fog of Law”, p. 549.

national interest”.²⁶⁶ The dilemma is this: In order to assert that the Charter system remains relevant and effective to states’ decisions to use force, international lawyers must show that states adhere to its provisions. However in order to assert that the article 2(4) prohibition on the use of force is not merely illusory and that the article 51 right of self-defence is more than a *carte blanche*, international lawyers must be able to distinguish violations of self-defence from adaptations.²⁶⁷

For international lawyers taking the restrictive approach, the facilitation of states’ interests is not the primary objective. It does not always seem to matter whether the rule works well or not: “Whether or not a norm produces undesirable effects if applied to reality, is irrelevant for the validity”.²⁶⁸ This is, perhaps, because they are conscious of maintaining the distance between the concrete is and the normative ought. Indeed, in many cases it is apparent that international lawyers are chary of increasing the scope of article 51 lest it be abused by powerful states. As Koskenniemi puts it, “the wider the right of self-defence is, the wider the authorisation for those people who can actually use force to do so”.²⁶⁹ Thus, the effectiveness from the point of view of the nation state simply is not very important for such international lawyers. Corten writes that the restrictive interpretation holds “[e]ven if it encounters limits in its effectiveness...”.²⁷⁰ Similarly it has been said that “[r]egardless of the shortcomings of the system, the option of a preventive use of force is excluded by Article 51”.²⁷¹ Such international lawyers could be criticised for esotericism, and it could be claimed that international law has the capacity for more flexibility. However, in this section

²⁶⁶ Franck, “Who Killed Article 2(4)?”, p. 837.

²⁶⁷ See Franck, *Recourse to Force*, p. 9; Schachter, “Self-Defense”, p. 267.

²⁶⁸ Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 145.

²⁶⁹ Koskenniemi, “Iraq and the ‘Bush Doctrine’ of Pre-Emptive Self-Defence”, p. 1.

²⁷⁰ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 821.

²⁷¹ Dinstein, *War, Aggression and Self-Defence*, p. 187.

the author has sought to show that, since adaptation often comes in the form of a prima facie violation, this technique may open the law to abuse. Thus, Carty warns that when a state declares adherence to international law we should be put on our guard and not comforted.²⁷²

Defending the restrictive approach to self-defence, Corten writes that “[t]he diversity of possible interpretations is not denied, but this relativism is limited by the need to justify choices in terms of the common reference framework that positive law represents”.²⁷³ The problem with this is that those scholars who take a broader approach and justify it using, primarily, state practice and the realist logic of rational interests may simply suggest that the framework of positive law is just as ineffective and irrelevant as the restrictive reading of self-defence that it justifies. In effect, the debate about the scope of self-defence is merely transported to the realm of secondary rules. In this respect, Murphy has suggested that the differences in approaches to self-defence are methodological.²⁷⁴ The methodological differences lead to more or less narrow or wide rights of self-defence.

It seems, with this proliferation of methods, that the secondary rules that international lawyers assert as the framework in which they conceptualise the right of self-defence are not givens but are in fact choices. Murphy has suggested that “in reading the literature one cannot help but feel that international lawyers are often coming to this issue with firm predispositions as to whether anticipatory self-defense or preemptive self-defense should or should not be legal and then molding their interpretation of

²⁷² A. Carty, *Philosophy of International Law* (2007) Edinburgh University Press, p. 112.

²⁷³ Corten, “The Controversies Over the Customary Prohibition on the Use of Force”, p. 815.

²⁷⁴ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 703.

state practice to fit their predispositions”.²⁷⁵ It may be said that one of these preferences stems from the suspicion that, as Reisman suggests, international lawyers are resistant to change. Reisman suggests that this is an illogical and unreflective response.²⁷⁶ This undermines the claim to objectivity made by many international lawyers who must try to assert the correctness of their own set of secondary rules. This tends to point towards an infinite regression of authority

Kammerhofer has astutely observed that “there are no ‘knock-down arguments’ in international law”.²⁷⁷ If neither arguments for the restrictive conception of self-defence nor arguments for the broad view can command a decisive victory over the other, one is left to wonder how legal arguments come to an end. Koskenniemi says that there is “no legal criterion that will say when [the point of argumentative termination] has been reached”.²⁷⁸ In the light of the confusion within the collective security system that this chapter has attempted to sketch, it seems problematic to suggest that a correct answer could be reached either as to the meaning of self-defence in abstracto or to the validity of a particular claim of self-defence. Koskenniemi has stated that “the institutional and intellectual structures of modern society” in which international lawyers are presently situated cannot “answer questions of practical rationality” because “the only justifiable arguments are those which are ‘objective’”.²⁷⁹ The so-called “flight to the objective” characteristic of some international lawyers does not in itself provide an incontrovertible means of assessing

²⁷⁵ Ibid., p. 720.

²⁷⁶ Reisman, “Assessing Claims”, p. 83.

²⁷⁷ Kammerhofer, “Uncertainties of the Law on Self Defence”, p. 203.

²⁷⁸ Koskenniemi, *From Apology*, p. 598, his italics.

²⁷⁹ Ibid., p. 557.

the validity of self-defence claims.²⁸⁰ Instead, the claim of objectivity allows international law to be hi-jacked by those wishing to give spurious justifications a patina of legality.

While it might be said that norms are indeterminate in abstracto, it may also be claimed that, in practice, what is and what is not a valid claim of self-defence can be made evident through the process of evaluation. The next chapter will deal with this question. While international law is often criticised for lacking centralised machinery, the collective security system is centred around the SC which, at least notionally, has the clout to enforce its decisions. It will be argued that, again, international lawyers are caught in a dilemma. This is because the price that is paid for this ‘clout’ is the politicisation of the process of decision-making. The chapter also warns against attempting to describe the Council as an institution constrained by norms.

²⁸⁰ D. Kennedy, “Book Review: From Apology to Utopia: The Structure of International Legal Argumentation by Martti Koskenniemi (1989)” 31 Harv ILJ (1990) 385 p. 386.

CHAPTER III

Evaluations of Self-Defence Claims in UN Organs.

INTRODUCTION.

In the previous chapter it was suggested that using secondary rules of recognition or interpretation does not enable international lawyers sympathetic to the collective security system to defend it from realist criticisms that it is ineffective or irrelevant. This was because where an international lawyer attempted to meet realist criticisms by acknowledging that the system has become outmoded and that it should adapt to include at least anticipatory self-defence, he often justified himself according to a framework of secondary norms that remained open either to the criticism of exploitability or to the criticism of esotericism.

In this chapter, we will move away from the idea of the indeterminacy of the abstract norms of the collective security system by focussing on the practice of the Security Council (SC) in the evaluation of particular self-defence claims. Koskenniemi has written that the vocabulary of the law's "significance resides not in what [it] mean[s], but in who can authoritatively decide what action [it] suggests in concrete circumstances".¹ It is therefore important to identify the evaluator of self-defence claims. The possibility that individual states could evaluate their own uses of force will not be discussed: Autointerpretation was discussed in chapter I.² Suffice it to say that several proponents of a very wide right of self-defence, one that would operate as an alternative to the collective security system rather than an exception within it, favour what has been called a "qualitative threat approach".³ This means that the subjectivity of the decision to use force is supposed to be alleviated by the application

¹ M. Koskenniemi, "International Law as Political Theology: How To Read Nomos der Erde?" 11(4) *Constellations* (2004) 492 p. 505.

² See Chapter I, at pp. 53-57.

³ S.D. Murphy, "The Doctrine of Preemptive Self-Defense" 50(3) *Vill. LR* (2005) 699, p. 703. (Hereinafter, 'Murphy, "The Doctrine of Preemptive Self-Defense".')

of various criteria such as the gravity of the threat, the probability of its materialisation and the exhaustion of alternatives.⁴ In chapter V, it will be shown that criteria like these do not form a sufficiently reliable bulwark against exploitability.⁵ The current chapter will concentrate on those who claim that self-defence can be evaluated within the system rather than outside it.

The aim of this chapter is to look at the effectiveness of propositions that some of the inflexibility or indeterminacy of the right of self-defence can be overcome through particular evaluations of self-defence claims. This takes Wittgenstein's insight mentioned in the previous chapter; words are given their meaning in contexts of use.⁶ Everything hangs on the construction of this context of use: The breadth of the right of self-defence will depend on whether a claim is interpreted within a framework of purposive law that operates to enable rather constrain the users of its norms, or in a framework of formal law that is orientated to internal coherence and takes the systemic perspective. The word 'framework' is used here to imply not only a doctrinal network of primary and secondary rules, but also institutional contexts both formal and informal. Evaluating institutions will be seen in the light of what Koskeniemi called "structural bias" that presages the outcome of any given claim.⁷

It will be argued that international lawyers who locate the force of the law in its ability to give objectively valid answers to legal problems remain stuck between esotericism and exploitability. It is generally accepted that international law operates

⁴ See e.g. A.D. Sofaer, "On the Necessity of Pre-emption" 14(2) EJIL (2003) 209, p. 226. (Hereinafter, 'Sofaer, "Pre-emption"'.)

⁵ See Chapter V, at pp. 274-279

⁶ See Chapter II, at p. 75.

⁷ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (2005) Cambridge University Press, pp. 600-615. (Hereinafter, 'Koskeniemi, *From Apology*'.); *Infra*, at pp. 134-138.

on a horizontal plane rather than a vertical hierarchy.⁸ This means that the question of who provides the objective evaluation of a self-defence claim is not clear-cut. To the extent that international lawyers view self-defence as a right within the collective security system, most of them look to the UN main organs for answers.⁹ Owing to the position of the Security Council in the collective security system,¹⁰ it features more heavily in discussions of self-defence evaluations than the other two organs. As Alvarez has noted, promoting the General Assembly (GA) or the International Court of Justice (ICJ) to chief interpreter status are both “extreme answers” neither of which has much support.¹¹ Consequently, this chapter concentrates on the practice of the Council.¹²

It is emphasised, however, that the ICJ and the GA – as well as non-UN organs – have played a role in the evaluation of self-defence claims and that international lawyers look to them for authoritative interpretations of the law. The GA has evaluated states’ uses of force many times in the past.¹³ It has also issued condemnations of states’ actions when the SC not done so.¹⁴ As to the ICJ, doctrinal international lawyers naturally look to the Court for authoritative statements of the law.¹⁵ While the Court

⁸ R.A. Falk, “International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order” 32(4) *Temp. LQ* (1958-9) 295, p. 296.

⁹ It is not claimed that the UN organs are the only institutions at international level interested in matters of peace and security, but space does not permit a full discussion of them.

¹⁰ See in particular, article 24(1) UN. See also, *infra*, at p. 145.

¹¹ J.E. Alvarez, *International Organisations as Law-Makers* (2005) Oxford University Press, p. 79. (Hereinafter, ‘Alvarez, *International Organisations as Law-Makers*’.)

¹² See M. Byers, “Book Review: *Recourse to Force*” 97(3) *AJIL* (2003) 721, p. 721, for criticism of this tendency.

¹³ See e.g. UN Doc. A/Res/ES-6/2 (1980) in an emergency session requested by the SC, the GA deplored the USSR for its invasion of Afghanistan; UN Doc. A/Res/41/31 (1986) calling for US compliance with the judgment of the ICJ in the Nicaragua case in which the Court’s rejected the US’s justification of collective self-defence.

¹⁴ See e.g. UN Doc. A/Res/ES-7/6 (1982) condemning Israel for acts of aggression within Lebanon and expressing regret that the SC had not acted to enforce its own resolution; UN Doc. A/Res/41/38 (1986) Condemning the US for Operation Eldorado Canyon in which it bombed targets in Libya.

¹⁵ It has been called “the guardian of legality for the international community as a whole”. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at

has had relatively little opportunity to evaluate self-defence claims,¹⁶ the matter has come before it several times.¹⁷ This chapter is not intended to provide an exhaustive study of evaluations of self-defence claims. International lawyers' approaches to the practice of the Council are laid out in order to demonstrate that attempts to minimise exploitability have often taken the form of secondary rules and that this can render the law inflexible, cumbersome and esoteric.

To avoid the dangers of auto-interpretation, many international lawyers using a more normative-optic or taking a perspective from the collective security system assert that evaluations have to be performed within the system. Again, the problem with evaluating claims within the system is that to the extent that the organ has rigorous and open processes of decision-making and operates according to the rule of law, it can fail to take into account the necessities of particular situations because it is bound by procedural rules. It will be argued that where the SC is said to operate within a normative framework of secondary rules, such a conception does not seem to reflect the practice of the Council and it can appear esoteric. On the other hand, to the extent that the organ is free from procedural or substantive constraints, it can be abused insofar as it can be influenced by the claimant state.

It will be suggested that international lawyers should beware of putting too much faith in the SC as the evaluator of self-defence claims. A blind preference for any

Lockerbie (Libyan Arab Jamahiriya v. United States of America) ICJ Reports, Order of 14 April 1992 Request for the indication of Provisional Measures. Separate opinion of Judge Lachs, p. 138. (Hereinafter, 'Lockerbie, Provisional Measures'.)

¹⁶ Alvarez, *International Organisations as Law-Makers*, p. 74.

¹⁷ See e.g. *Corfu Channel (United Kingdom v. Albania) (Merits) [1949] ICJ Rep.*, p. 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep.*, p. 14 ; *Oil Platforms (Islamic Republic of Iran v. United States of America) [2003] ICJ Rep.*, p. 161; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Rep. [2005]*, p. 1.

multilateral decision-making over auto-interpretation at the national level is not enough to save the collective security system from exploitation. It will be argued that it matters how and by whom claims are evaluated. In the two chapters following this one, some ideas about how evaluations ought to occur will be laid out.¹⁸ The rest of this chapter is divided into two halves. The first half discusses different ideas about the framework of the UN in order to show that even where international lawyers agree that evaluations should take place within the system, they do not necessarily mean the same system and that this can result in different degrees and varieties of constraint. The idea of structural bias will also be introduced in this part. In the second half of the chapter, the Council will be discussed in some depth.

PART ONE: EVALUATION IN THE UNITED NATIONS.

It is submitted that most international lawyers, particularly those with a preference for a narrower right of self-defence and a stronger prohibition on the use of force, think of the UN organs as the ultimate arbiters of self-defence claims.¹⁹ Owing to the Charter's identity as a treaty imposing obligations on almost all states and its commitment to law,²⁰ the UN can be seen as a primary site of international law. Myjer and White wrote that "[w]hen a state claims to have been subject to an armed attack against it, the norms and structures of international law should come into play".²¹ Self-defence is viewed as an exception occurring within the collective security framework and therefore, in order to secure the reality of the absolute prohibition on the use of force,

¹⁸ In particular Chapter V, at pp. 322-333.

¹⁹ T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) Cambridge University Press, p. 107. (Hereinafter, 'Franck, Recourse to Force'.)

²⁰ Article 1(1) UN.

²¹ E.P.J Myjer and N.D. White, "The Twin Towers: An Unlimited Right to Self Defence?" 7(1) JCSL (2002) 5 p. 5. (Hereinafter, 'Myjer and White, "The Twin Towers"'.)

it must be subject to regulation within that system. Another reason for the emphasis on UN organs is that they can be seen as a convenient reservoir of state practice.²² This may be because international legal discourse “is most intense in international organisations”,²³ or it may be because the task of evaluating the practice of every state for the last sixty five years could not be accomplished by a single scholar.²⁴

Evaluation within the collective security system is not clear-cut. It is said that “the problem of authoritative decision-making in international society relates...to its decentralised character”.²⁵ However, it is also sometimes suggested that the situation is different as regards the law on the use of force. Thus, Österdahl writes “[a]s we all know, decision-making on the use of force is centralised and resides within the UN Security Council”.²⁶ In other words, in the field of international peace and security, the Council seems to encourage the domestic analogy to be made.²⁷ Bull explained that there are two meanings to this. One takes its cue from Hobbes: That “states..., like individual men who live without government, are in a state of nature”. The other takes its cue from Kantian cosmopolitanism: the “reproduc[tion of] the conditions of

²² R. Higgins, “The Development of International Law by the Political Organs of the United Nations” 59 ASIL Proc. (1965) 116 p. 119; M. Byers, “Book Review: Recourse to Force” 97(3) AJIL (2003) 721, p. 724. (Hereinafter, ‘Byers, “Book Review”’.)

²³ I. Johnstone, “Security Council Deliberations: The Power of the Better Argument” 14 EJIL (2003) 437 p. 452. (Hereinafter, ‘Johnstone, “Security Council Deliberations”’.); Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) Harvard University Press, p. 152.

²⁴ Byers, “Book Review”, p. 724.

²⁵ I. Johnstone, “Treaty Interpretation: The Authority of Interpretive Communities” 12 Mich. JIL (1990-1) 371 p. 375.

²⁶ I. Österdahl, “The Diluted, Dismantled, Disjointed and Resilient Old Collective Security System or Decision-Making and the Use of Force – Law as it Could be” in O. Engdahl and P. Wrange (eds) *Law at War: The Law as it Was and the Law as it Should Be* (2008) Martinus Nijhoff, Leiden, p. 293. (Hereinafter, ‘Österdahl, “Diluted, Dismantled, Disjointed”’.)

²⁷ Interestingly enough this feature is also said to have inspired Habermas to defend a constitutional conception of the UN. T. Giegerich, “The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas’ Road to a “Well-Considered Constitutionalization of International Law” 10(1) GLJ (2009) 31, p. 39.

order within the state on a universal scale”.²⁸ The latter form of the analogy, where it is used in the descriptive sense, can signal a faith in the system over the individual that is unwilling to reflect on the concrete practice of its decision-makers.

The practice of UN main organs is also the practice of states who, in the horizontal system, act as agents in them. It will be suggested that where states have particular power within UN organs, the system and the individual come together in a way that makes the former vulnerable to exploitation by the latter. The problem is that the UN collective security system faces a dilemma between acting as a “beneficent servant of the ‘international community’” and “responding to the realities of power”.²⁹ The demands of the powerful cannot be ignored altogether lest they leave the system, rendering it toothless. On the other hand, to cave in to the powerful altogether may mean that the collective security system becomes no more than a rubber stamp for their policies.

There is a delicate balance between the *prima facie* individualist right of self-defence and the communal nature of the collective security system. This reflects the paradox of what Koskeniemi calls “the liberal doctrine of politics”; “to preserve freedom, order must be created to restrict it”.³⁰ This applies to the right of self-defence insofar as the use of force in self-defence always impinges on another state’s freedom at the same time as attempting to vindicate the claimant state’s freedom. Koskeniemi has explained that the way the liberal doctrine manages to reconcile the competing pulls

²⁸ H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (2002) Palgrave, Basingstoke, p. 44.

²⁹ Alvarez, *International Organisations as Law-Makers*, p. x.

³⁰ Koskeniemi, *From Apology*, p. 71.

towards individual freedom and collective order is in the concept of the rule of law.³¹

The rule of law holds that order must be neutral and ascertainable.

The rule of law and self-defence can be uncomfortable bed-fellows. It is said that state claimants of self-defence recoil from the suggestion that third parties have the right to evaluate uses of force taken to protect their own essential interests. On the other hand, uses of force in self-defence also have target states which may need the protection of the law against dominant states who seek to use the claim of self-defence as justificatory garnish. However, before moving on to discuss the presence of the rule of law in the collective security system, we will first examine the idea of structural bias.³²

A. Structural Bias.

In this section of the chapter, it will be suggested that it matters where and by whom a state's self-defence claim is evaluated. It is not enough to say that to the extent that states' claims to have used force in self-defence are evaluated at the international level, problems with the indeterminacy of legal doctrine are overcome. Since this thesis is concerned with the exploitability of the collective security system for the legitimization of uses of force, we will consider the possibility that ex post evaluations of self-defence claims may cover uses of force with a veil of legitimacy. It will also be argued that the perception of structural bias can also lead to the side-lining of potential evaluators who may not be expected to hand down the desired verdict.

³¹ Ibid., p. 71.

³² Ibid., pp. 600-615.

Koskenniemi coined the term “structural bias”: It means that “the system still de facto prefers some outcomes of distributive choices to other outcomes or choices”.³³ He developed the thesis after it occurred to him that describing systemic norms as indeterminate does not explain experiences of decision-making.³⁴ He sought to explain why it is that practicing lawyers often think of the practice of law as a fairly predictable exercise, making it possible for claimant states to exploit the system by taking their justifications to specific organs whose structural biases may favour their position.

It has been said that “[t]he United Nations system has a strong bias against unilateralism”.³⁵ This explains the preference for auto-interpretation displayed by certain scholars.³⁶ However, within the UN system there are differences in bias. The structural bias of the ‘political organs’ of the UN, the SC and GA, does not arise from the formal rules of process so much as the lack of them. This can be contrasted to the ICJ which operates within and through an abundance of rules. While the Charter pledges respect for “the sovereign equality of all its members”,³⁷ in practice states often vote according to their alliances and interests rather than on the merits of a particular claim.³⁸ The structural bias of a given organ can be determined by social factors such as the relative economic, diplomatic or military clout of actors within a forum. Additionally, fora of evaluation may be biased according to other, less

³³ Koskenniemi, *From Apology*, p. 606-7, italics in original.

³⁴ M. Koskenniemi, “The Politics of International Law – 20 Years Later” 20(1) EJIL (2009) 7, pp. 8-9.

³⁵ M. Koskenniemi, “The Place of Law in Collective Security” 17(2) Mich. JIL (1995-6) 455, p. 457.

³⁶ M.J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter” 25(2) Harv. JL&PP (2001-2) 539, p. 558. (Hereinafter, ‘Glennon, “The Fog of Law”’); Yoo stated that the collective security system is incapable of restraining the US use of force, in “Using Force”, p. 795.

³⁷ Article 2(1) UN.

³⁸ For instance, former President of the USA, Bill Clinton, passed a directive in 1994 to the effect that US participation in peace-keeping missions could depend, inter alia, on the existence of a US interest in doing so. M. Bertrand, “The UN as an Organization. A Critique of its Functioning” 6(1) EJIL (1995) 349 p. 352; M.J. Glennon, “The Emerging Use-of-Force Paradigm” 11(3) JCSL (2006) 309, p. 310.

advertent, measures. For instance, they may place procedural hurdles before a claimant state in the vindication of its self-defence claim. Alternatively, they may have a preference for the maintenance of international peace over the pursuit of national security thus prejudicing claimant states. Illustrating his theory, Koskenniemi has given the example of the Al-Jedda case in the UK.³⁹ Brooke LJ, giving the unanimous opinion of the Court of Appeal, said that the obligations contained in Security Council resolution 1546 (2003) “qualified any obligations contained in human rights conventions in so far as it was in conflict with them”.⁴⁰

In the view of the present author ‘structural bias’ does not necessarily have a negative connotation. This view is held because it is not thought possible to identify a neutral forum of evaluation. Furthermore, it is suggested that ‘bias’ is part and parcel of ‘structure’; one cannot have one without the other. However, it is possible to identify more or less exploitable or esoteric bias and therefore to make judgments about the structures that produce such bias. The matter of structural bias is intertwined with the matter of secondary rules. Indeed, in legal institutions one can see secondary rules as effectively creating the structure in which evaluations take place. The quality of the evaluative space created in the Security Council will depend on the secondary rules that are seen to constitute it. A paucity of secondary rules of law and an apparent mandate to make decisions based on exigency opens the SC to exploitation by its powerful permanent members.⁴¹ On the other hand, the conception of SC practice as

³⁹ M. Koskenniemi, “The Fate of Public International Law: Between Technique and Politics”, 70(1) *MLR* (2007) 1, p. 6. (Hereinafter, ‘Koskenniemi, “The Fate of PIL”’.)

⁴⁰ *R. (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, para. 80.

⁴¹ See Wedgwood’s defence of Operation Iraqi Freedom. R. Wedgwood, “The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense” 97(3) *AJIL* (2003) 576, pp. 577-8.

occurring within a framework of rules can make the body seem overly formalised and unduly tolerant of ‘rogue states’.⁴²

It has been said that “states undertake efforts to justify the resort to force in accordance with international legal principles, and these efforts are intended to satisfy particular audiences”.⁴³ If such claimants choose either the ICJ or the SC, it is relatively easy for them to make the argument that the decision thereby reached is correct. This is particularly the case if an evaluation of a claim by a permanent member is made in the SC.⁴⁴ However it can also be the case in a body with relatively rigorous and transparent process. In the ICJ, for instance, it is harder for a claimant of self-defence to vindicate his claim. This is because the claimant state will bear the burden of proof to show that he did in fact use necessary and proportionate force in response to an armed attack.⁴⁵

Koskenniemi has asserted that actors’ awareness of the structural biases of institutions means that political conflict is played out as jurisdictional conflict.⁴⁶ In the context of collective security this was illustrated by the judicial review debate pursuant to Libya’s seising of the ICJ after the US and the UK used to SC to sanction her for refusing to extradite the Lockerbie suspects.⁴⁷ Koskenniemi says that in specific cases “[t]he choice of the frame determine[s] the decision. But for determining the frame,

⁴² The Lockerbie example, mentioned below, is a good example of this. *Infra*, at p. 182-183.

⁴³ R. Goodman, “Humanitarian Intervention and Pretexts for War” 100(1) *AJIL* (2006) 107, p. 115.

⁴⁴ *Infra*, at p. 154-157.

⁴⁵ See e.g. *Oil Platforms*, para. 61.

⁴⁶ Koskenniemi, “The Fate of PIL”, p. 5.

⁴⁷ “The Libyan Arab Jamahiriya approached the International Court of Justice unilaterally in order to present its viewpoint.” UN Doc. S/1995/226 Letter Dated 95/03/27 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the Secretary-General (1995); *Infra*, at p. 182-183.

there [is] no meta-regime, directive or rule”.⁴⁸ He writes that “[i]n a world of plural regimes, political conflict is waged on the description and re-description of aspects of the world so as to make them fall under the jurisdiction of particular institutions”.⁴⁹

B. The Rule of Law.

The idea that the rule of law can reconcile the competing ‘ascending’ and ‘descending’ arguments identified by Koskenniemi,⁵⁰ depends on its ability to provide a neutral background against which the substantive rules operate. To this extent, the rule of law is closely related to the Hartian idea of secondary rules on which depend the systemic nature of international law.⁵¹ If the system of decision-making is complete in that it does not require subjective or political factors to be taken into account in order to reach a decision, it would be possible to call the evaluation of a self-defence claim an objective one. However, a system that excluded such extra-legal concerns would not adapt well to changing social circumstances or to the imperatives of necessity. It might be said that it risked becoming esoteric as the social norm deviated from the legal one.

In the present section, two approaches to the systemic nature of the Charter regulation of the use of force will be very briefly considered. One approach makes a claim that the Charter is a constitutional document. Onuf has suggested that the constitutional nature of a set of rules resides in the presence of secondary rules to administer the

⁴⁸ Koskenniemi, “The Fate of PIL”, p. 6.

⁴⁹ *Ibid.*, p. 7.

⁵⁰ Koskenniemi, *From Apology*, p. 59.

⁵¹ H.L.A. Hart, *The Concept of Law*, 2nd ed. (1994) Oxford University Press, p. 214. (Hereinafter, ‘Hart, *The Concept of Law*’.)

primary rules of obligation in the Hartian sense.⁵² This suggests that the system it creates is quasi-governmental and therefore holds it up to high standards of legitimacy. Another approach suggests that the Charter creates a collective security system. Kelsen wrote that “the principle of collective security is placed ahead of all” other provisions, that the monopoly of force is with the UN and that enforcement is centralised in the Security Council.⁵³ On this view, it is possible to give the organs within the framework far more freedom to act purposively within the specific limitations set down in the Charter.⁵⁴

Many international lawyers talk about the UN Charter as a constitution,⁵⁵ as though the organs comprising the UN were equivalent to a legislature, judiciary and executive.⁵⁶ This can mean that the SC is thought of as an international executive of a sort of world government with the GA as its legislature and the ICJ as its judicial arm.⁵⁷ However, this separation of competences does not always fit the practice of the organs concerned. This can lead to the SC being endowed with the functions of judiciary and legislature.⁵⁸ This might be said to render the so-called “separation of

⁵² N. Onuf, “The Constitution of International Society” 5(1) EJIL (1994) 1, p. 13.

⁵³ H. Kelsen, “Collective Security and Collective Self-Defence Under the Charter of the United Nations” 42(4) AJIL (1948) 783, p. 785-6. (Hereinafter, ‘Kelsen, “Collective Security and Collective Self-Defence”’.)

⁵⁴ *Ibid.*, p. 788.

⁵⁵ See e.g. B. Fassbender, *UN Security Council Reform and the Right of Veto* (1998) Kluwer Law International, The Hague; T.M. Franck, “Editorial Comment: The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality?” 86(3) (1992) AJIL 519; W.M. Reisman, “The Constitutional Crisis in the United Nations” 87(1) AJIL (1993) 83. (Hereinafter, ‘Reisman, “The Constitutional Crisis”’.); F.L. Kirgis, “The Security Council’s First Fifty Years” 89(3) AJIL (1995) 506. (Hereinafter, ‘Kirgis, “The Security Council’s First Fifty Years”’.); Abi-Saab et al, *The Changing Constitution of the United Nations*, Hazel Fox (ed), (1997) London, BICIL; M. Happold “Security Council Resolution 1373 and the Constitution of the United Nations” 16 LJIL (2003) 593.

⁵⁶ *Supra*, at p. 132.

⁵⁷ R.A. Falk, “On the Quasi-Legislative Competence of the General Assembly” 60(4) AJIL (1966) 782.

⁵⁸ V. Gowlland-Debbas, “Security Council Enforcement Action and Issues of State Responsibility”, 43(1) ICLQ (1994) 55. (Hereinafter, ‘Gowlland-Debbas, “Security Council Enforcement Action”’.); N.D. White, “On the Brink of Lawlessness: The State of Collective Security Law” Hilaire McCoubrey Memorial Lecture, University of Hull, 15 May 2002, p. 6. (Hereinafter, ‘White, “On the Brink of Lawlessness”’.)

powers” redundant because they would all be vested in one body and no longer able to act as checks and balances on the others’ exercises of power. Reisman has written that the Charter does not incorporate a “theory of constitutional checks and balances”.⁵⁹ An overt attempt to apply this to the UN collective security system will be discussed in the section on judicial review of SC resolutions.⁶⁰ It will be suggested that even if judicial review could happen in theory, courts tend to defer to executives over matters of security.

Perhaps owing to the legacy of Kant,⁶¹ the constitutional conception of the UN is often linked to the idea of world-government.⁶² This ties in with the idea that the Charter prohibits the use of force among the subjects of law and vests its monopoly in the SC.⁶³ It also links to the idea that the UN is something that may restrict as well as enable its members, an idea that realists reject.⁶⁴ On this view, acts of self-defence would happen within the UN system and not as an alternative to it. This flows from the pervasive nature of the UN when it is conceived of as regulating the public space in general rather than specific subject-areas within it. The conception of the UN as a collective security system tends to suggest that the UN regulates specific matters within the public realm.

⁵⁹ Reisman, “The Constitutional Crisis”, p. 83.

⁶⁰ *Infra*, at pp. 182-185

⁶¹ I. Kant, *Perpetual Peace and Other Essays*, (trans. Ted Humphrey) (1983) Hackett Publishing, Indianapolis. In the next chapter the work of Jurgen Habermas will be used. In contrast to this use, it should be noted that Habermas himself uses his ideas to support a constitutional project. Habermas, *The Divided West* (2006) Polity Press, Cambridge, p. 115-193.

⁶² M.J. Glennon, “The UN Security Council in a Unipolar World” 44(1) *Vir. JIL* (2003-4) 91, p. 97.

⁶³ See Chapter I, at p. 35.

⁶⁴ See Chapter I, at p. 54.

It should be noted that not all international lawyers share the constitutional conception of the UN.⁶⁵ Wood has dismissed the constitutional conception as fashionable. He says that it requires the unwarranted importation of conceptions from domestic jurisdictions.⁶⁶ However, if the Charter is seen as establishing only a system of collective security, many of the problems of viewing the UN as a government are replayed.⁶⁷ This is because of the systemic element of collective security; it implies a framework in which decisions, even if they are political, are not completely subjective and ad hoc. This will be returned to in the final part of the chapter where the Charter purposes and principles are considered as limitations on the Council's authority.⁶⁸

The classical conception of a collective security system is “a system, regional or global, in which each state in the system accepts that the security of one is the concern of all and agrees to join in a collective response to threats to, and breaches of, the peace”.⁶⁹ It has also been said that “[a] true collective security system...principally involves the provision of a police force which is largely independent of any members or groups that make up society”.⁷⁰ This implies that the individual state's interests are subordinated to those of the collective insofar as it implies that an undertaking to assist others when to do so might not involve a benefit and may incur costs. It also

⁶⁵ B. Simma, “Universality of International Law from the Perspective of a Practitioner” 20(2) EJIL (2009) 265, p. 297. (Hereinafter, ‘Simma, “Universality of International Law”’.)

⁶⁶ M. Wood, “The UN Security Council and International Law”, 7-9 November 2006, Hersch Lauterpacht Memorial Lectures, University of Cambridge. Available at: http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php. First Lecture: “The Legal Framework of the Security Council”, para. 17. (Hereinafter, ‘Wood, Hersch Lauterpacht Memorial Lectures’.)

⁶⁷ There is no reason why the Charter should not be both a constitution and a system of collective security; it is not suggested that these characterisations are alternative, merely that some international lawyers prefer one or reading to the other.

⁶⁸ **infra**, at p.177-80.

⁶⁹ Lowe, et al, “Introduction” in V. Lowe, A. Roberts, J. Welsh, D. Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (2008) Oxford University Press 1, p. 13. (Hereinafter, ‘Lowe, et al, “Introduction”’.)

⁷⁰ H. McCoubrey and N.D. White, *International Law and Armed Conflict*, (1992) Dartmouth Publishing Co., p. 125. (Hereinafter, ‘McCoubrey and White, *International Law and Armed Conflict*’.)

implies that an individual state would not be able to reap benefits by dominating the system of enforcement and using it as a tool for the fulfilment of national policy.

It has therefore been suggested that the UN Charter does not represent a system of collective security.⁷¹ Some realists claim that “the Council’s activity should not be understood as a functioning collective security system” because no rule application differentiates it from balance of power policy.⁷² It is said, in particular, that the dominance of the SC by the permanent members and their possession of veto-rights is incompatible with the concept of collective security.⁷³ This is because no action could be taken against a permanent member in the event that they were accused of aggression. Furthermore, the discretion with which they are endowed in finding threats to, or breaches of, the peace suggests that collective action is not automatic.⁷⁴ Attempts to counter these claims and anchor the SC more firmly within a Charter system based on the rule of law will be discussed later.⁷⁵

On the other hand, the UN system is often talked of as a collective security system by international lawyers.⁷⁶ Furthermore the reports by the Secretary General⁷⁷ and High Level Panel on Threats, Challenges and Change designate the UN a collective security system.⁷⁸ Others seem to see the UN as part of a larger system of collective

⁷¹ Lowe, et al, “Introduction”, p. 13.

⁷² Koskenniemi, “The Place of Law in Collective Security”, p. 463.

⁷³ Lowe, et al, “Introduction”, p. 6.

⁷⁴ *Ibid.*, p. 14.

⁷⁵ *Infra*, at p. 179-182.

⁷⁶ McCoubrey and White, *International Law and Armed Conflict*, p. 126.

⁷⁷ UN Doc. A/59/2005 Report of the Secretary-General, “In Larger Freedom: Towards Development, Security and Human Rights for All” 21 March 2005, paras 76-86.

⁷⁸ Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), Panyarachun’s letter of Transmittal to the SG, p. xi. (Hereinafter, ‘High Level Panel, A More Secure World’.)

security in which Regional Organisations can be seen as part of the apparatus.⁷⁹ To the extent that these arrangements come within Chapter VIII of the Charter, they can be seen as coming within the UN system as opposed to operating outside it.⁸⁰ However the proliferation of potential evaluating organs raises the problem of fragmentation which tends to militate against a systemic conception of collective security. This is because “[i]n the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before”.⁸¹

Thus, it may be possible for states to choose the forum in which they make a self-defence claim in order to benefit from the ‘structural bias’ of that forum. The use of force against Serbia in 1999 is a case in point. Russia was against the use of force and, reacting to Operation Allied Force, said that it was “profoundly outraged” by it.⁸² Proponents of the use of force had used the North Atlantic Treaty Organisation (NATO) to authorise the use of force.⁸³ Russia is not a member of NATO and the balance of opinion in that organisation leaned heavily towards the US and British position that force was necessary.⁸⁴ The Security Council is also structurally biased in

⁷⁹ White, “On the Brink of Lawlessness”, p. 9; See also discussion in Österdahl, “Diluted, Dismantled, Disjointed”, pp. 295-7.

⁸⁰ See e.g. Article 52(1): Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. (Emphasis added.)

⁸¹ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002) Cambridge University Press, p. 516. (Hereinafter, ‘Koskenniemi, *The Gentle Civilizer*’.)

⁸² UN Doc. S/PV.3988 (1999) Meeting of the Security Council on 24 March 1999, p. 2.

⁸³ The decision was taken by the Secretary General of NATO “after extensive consultations... with all the allies”. Press Statement by Dr. Javier Solana, Secretary General of NATO, 23 March 1999 Available at: http://www.nato.int/cps/en/natolive/opinions_27615.htm.

⁸⁴ It is not claimed that a valid decision to use force within NATO counts as valid throughout the collective security system, article 53(1) of the Charter suggests otherwise. However the relationship between regional organisations and the Charter is not clear-cut. Abass has asserted that “regional organisations... regard themselves as heirs apparent to the Security Council’s responsibility for the maintenance of international peace and security” and that intervention is no longer conditioned on the failure of the SC to intervene. A. Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) Hart Publishing, Oxford, p. 108.

favour of its permanent members (P5). The extent of that bias will depend on the extent to which the P5 are restrained by a normative framework, whether that arises from the text of the Charter or from more general considerations of the rule of law.

PART TWO: THE SECURITY COUNCIL.

Many commentators look at SC practice in evaluating states' self-defence claims.⁸⁵ In many cases no clear rationale is given for the focus on the SC, however it is sometimes pointed out that the right of self-defence in article 51 is dependent on the exercise by the SC of its responsibilities and on the report of the claimant state to the SC.⁸⁶ It is often unclear whether SC practice in determining specific self-defence claims is viewed as an adjudicative function that may have informal precedential value, whether it is viewed as the practice of the UN for the purposes of the authoritative interpretation of the Charter norms or whether it connotes state practice relevant to the development of customary law. This lack of clarity tends to facilitate the exploitation of the collective security system by making it difficult to argue against certain readings of the practice concerned.

Exploitability will be a theme of this part of the chapter. It is said that the Council lacks a legal culture.⁸⁷ The SC, in avoiding the problems of over-proceduralization and a preference for normativity over concreteness, falls into exploitability. It will be argued that international lawyers who wish to affirm the importance of international law to states' decision-making on the use of force may pay too high a price for the

⁸⁵ See e.g. Franck, *Recourse to Force*; Gray, *International Law and the Use of Force*; S.A. Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) Kluwer International, The Hague.

⁸⁶ Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (2005) Cambridge University Press, p. 215. (Hereinafter, 'Dinstein, War, Aggression and Self-Defence'.)

⁸⁷ Koskeniemi, "The Police in the Temple" p. 327.

benefits of effectiveness that the SC may bring. It will also be suggested that those international lawyers who posit normative constraints on the Council's discretion to make Chapter VII determinations may inadvertently provide justifications for otherwise arbitrary decisions.

It has been said that “[o]ne of the major functions of the Security Council is its role as a ‘collective legitimizer’ of the use of force by member states”.⁸⁸ The Council has “primary responsibility for the maintenance of international peace and security”.⁸⁹ Any action that is taken pursuant of the exercise of the right of self-defence involves a use of force. This is because measures not involving a use of force, though perhaps illegal by other lights, do not violate the absolute prohibition on the use of force.⁹⁰ Bearing this in mind, it is likely that exercises in self-defence will come within article 39 of the UN Charter, the gateway to Chapter VII.⁹¹ Indeed, since members of the UN are empowered to bring any dispute to the attention of the SC (or the GA),⁹² it would also be possible for the target state of the exercise of self-defence to complain to the SC. Further, it would be possible for the SC to initiate its own inquiry after, for instance, a state had reported its exercise of the right under article 51.⁹³ In practice, there is nothing to stop SC members, or international lawyers, treating the case as though there had been a self-defence claim.

⁸⁸ Lowe, et al, “Introduction”, p. 26; S.D. Murphy, “The Security Council, Legitimacy and the Concept of Collective Security after the Cold War” 32(2) Colum. JTL (1994-5) 201, p. 210. (Hereinafter, ‘Murphy, “The Security Council”’.)

⁸⁹ Article 24(1) UN.

⁹⁰ The debate about whether the use of force refers primarily to military force or can be stretched to cover economic aggression or other means of coercion does not concern us here.

⁹¹ “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”.

⁹² Article 35(1) UN.

⁹³ Some states regularly report action to the SC. The most recent at the time of writing being Israel's report in December 2008. UN Doc. S/2008/816 (2008) Identical letters dated 27 December 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and to the President of the Security Council.

The SC is often alluded to by writers as an organ that is both powerful and legitimate. It is powerful because of its composition and its members' discretion to take wide-ranging and binding decisions under Chapter VII. It is legitimate because it forms part of the collective security system. In this section, it will be questioned whether these two characteristics can be seen simultaneously in the work of the organ. It is said that the SC is the organ with the ability to decide competing claims. Corten believes that this lends a sort of "procedural legitimacy" to the process.⁹⁴ He writes that the legality of a use of force is recognised "as the result of a debate and vote on particular and often opposing conceptions". Corten says that this means that the particular conception that prevails "will not be decided upon by any particular interpreter, but by means of a strongly institutionalized procedure".⁹⁵ More formalistically, Kelsen found that the SC is the only UN organ competent to decide "whether an armed attack has occurred and who is responsible for it".⁹⁶ Gray, on the other hand, urges caution and questions whether the SC has the ultimate authority to make findings of legality or illegality over the use of force.⁹⁷

A. An Evaluation of a Use of Force by the Council.

The SC has dealt with complaints about the use of force wherein the complained against state has claimed it acted in self-defence. A relatively recent example of this was the conflict between Israel and Hezbollah in the summer of 2006. On 12 July

⁹⁴ O. Corten, "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate" 16(5) EJIL (2005) 803, p. 816.

⁹⁵ *Ibid.*, p. 816.

⁹⁶ H. Kelsen, *Law of the United Nations: A Critical Analysis of its Fundamental Problems* (2000) London Institute of World Affairs, p. 800. (Hereinafter, 'Kelsen, Law of the United Nations'.)

⁹⁷ Gray, *International Law and the Use of Force*, p. 13.

Hezbollah fired rockets into Israel from Southern Lebanon and abducted two Israeli soldiers. In response, having reserved the right to use force in accordance with article 51,⁹⁸ Israel blockaded and bombed Lebanon. The Lebanese government complained of “Israeli acts of aggression” to the SC and urged it to call a meeting.⁹⁹ The case involved complexities of both fact and law.

On 14 July the SC met to discuss the matter. The general consensus was one of condemnation of Israel’s use of force. However the grounds on which states did this were very different. For instance, Argentina, Denmark, France, Greece, Peru, Slovakia and the UK all affirmed Israel’s right of self-defence but said that the manner in which it was exercised was excessive.¹⁰⁰ The Russian delegate, calling Israel’s action “retaliatory”, suggested that it was disproportionate and inappropriate.¹⁰¹ The three African representatives, Congo, Ghana and Tanzania also condemned the disproportionate use of force.¹⁰² Lebanon and its supporters did not mention self-defence and instead classified the action as one of “aggression”.¹⁰³ In the minority, Israel and the US, while not mentioning self-defence talked in terms of a necessary reaction to terrorism.¹⁰⁴ Nevertheless, the SC did not pass a resolution condemning Israel’s use of force.

⁹⁸ UN Doc. A/60/937–S/2006/515 Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council.

⁹⁹ UN Doc. S/2006/517 *Letter dated 13 July 2006 from the Chargé d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the President of the Security Council.*

¹⁰⁰ UN Doc. S/PV.5489 Security Council Meeting of 14 July 2006, Argentina, p. 9; Denmark, p. 15; France, p. 17; Greece, p. 17; Peru, p. 14; Slovakia, p. 16; UK, p. 12.

¹⁰¹ *Ibid.*, Russia, p. 7.

¹⁰² *Ibid.*, Congo, p. 13; Ghana, p. 8; Tanzania, p. 13.

¹⁰³ *Ibid.*, China, p. 11; Lebanon, p. 4; Qatar, p. 10.

¹⁰⁴ *Ibid.*, Israel, p. 6; United States, p. 10.

The SC also heard a briefing from the Secretary General on the 20 July, although it is clear from the record of that meeting that there had been prior consultations of SC members.¹⁰⁵ While the Secretary General condemned Hezbollah's attacks and affirmed Israel's right of self-defence, he said that the Lebanese government clearly knew nothing of the attack. He also stated that Israel's use of force was excessive.¹⁰⁶ Unfortunately, the Council's discussion following this briefing was carried out through informal consultations for which no public record exists. The eventual outcome of the Council's deliberations was resolution 1701 passed on 11 August 2006.

The focus of this resolution was the negotiation of a ceasefire, the extension of the UNIFIL mandate and the imposition of an arms embargo on Lebanon rather than the apportionment of responsibility. While the SC "[e]xpress[es] utmost concern at the continuing escalation of hostilities" and "[e]mphasiz[es] the need for an end of violence", it falls short of blaming either party for the conflict. The resolution was made under Chapter VII and it designates the entire situation "a threat to international peace and security". It is suggested that this situation displayed some of the familiar characteristics of the SC's management of situations in which there has been a self-defence claim. These include a lack of detailed public scrutiny of the evidence, a lack of focus on the question of self-defence itself, a lack of engagement between speakers and the lack of any concrete finding of responsibility.

It might be questioned whether the SC can get around the problems with evaluation that have been attributed to the ICJ. After all, any evaluation of a state's use of force

¹⁰⁵ UN Doc. S/PV.5492 Security Council Meeting of 20 July 2006, p. 1.

¹⁰⁶ *Ibid.*, p. 2.

in self-defence could still potentially undermine a state's right to self-defence. However Schachter has explained that while it is not surprising that states do not welcome international scrutiny of their self-defence measures, "the influence of community judgment" is felt through the consideration of uses of force by the SC.¹⁰⁷ In other words, if realists seek an enabling law then augmenting its legitimating properties can only make the collective security system more useful to facilitate state policy. While other states may not trust a national decision, it will be harder for them to deny the validity of a decision in a UN organ. It can be argued that readings of the SC which view it as the handmaiden of powerful states may ensure its continuing use in the international area, but also reveal its vulnerability to exploitation.

B. Does the SC have a "quasi-judicial" role?

Various writers have suggested that the SC is 'quasi-judicial'.¹⁰⁸ In this section, it will be argued that those who claim that the SC has a quasi-judicial role in order to present a picture of the UN collective security system as a closed entity immune to political pressures or individual subjectivities, tend to render the system exploitable. This is because many of the questionable aspects of the SC, such as its dominance by powerful states or its lack of transparency,¹⁰⁹ are skated over or justified by such writers. To the extent that one wishes to compensate the indeterminacy of doctrine with an authoritative and effective decision-maker within the system, writers may be tempted to read into SC practice quasi-adjudicative determinations of self-defence

¹⁰⁷ O. Schachter, "Self-defense and the Rule of Law" 83(2) AJIL (1989) 259 p. 263. (Hereinafter, 'Schachter, "Self-Defense".')

¹⁰⁸ Gowlland-Debbas, "Security Council Enforcement Action"; V. Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" 88 AJIL (1994) 643; Alvarez, *International Organisations as Law-Makers* p. 69; Johnstone, "Security Council Deliberations", p. 452.

¹⁰⁹ *Infra*, at p. 154-157 and 174-179.

claims. It will be suggested that in fact the SC does very little express evaluation of self-defence claims and the perception of it as a would-be court is unfounded.

However the argument that the SC may act as a Court is not without basis in the text of the Charter. Under Chapter VI of the Charter, the SC was given a dispute resolution authority to investigate disputes that might endanger international peace and security.¹¹⁰ It is suggested that to the extent that the phrase self-defence has come to imply a use of force, any dispute involving self-defence comes within its remit. This is because article 39, the gateway to Chapter VII, does not seem to demand a global element so much as a non-national element in its three categories of aggression, breach of the peace and threat to the peace.

The SC does not purport to be a legal organ, it is known as a “political organ”.¹¹¹ However, that has not stopped many from asserting that it has a “quasi-judicial role”.¹¹² Such an assertion, it is suggested, lends the SC decision-making process a certain credibility that it does not necessarily warrant, as will be seen below. Kirgis has pointed out that when the SC acts in what he calls quasi-judicial mode it “has no rules of procedure for fair adjudicative hearings; nor could it reasonably be expected to adopt or follow any such rules”.¹¹³ Various international lawyers sympathetic to the collective security system have written hopefully about the SC’s juridical qualities. Elihu Lauterpacht said that there have been times when SCRs have been couched in “language resembling a judicial determination of the law”. One example given by Lauterpacht was the Council’s reaction to the declaration of independence by the

¹¹⁰ Article 34 UN.

¹¹¹ Alvarez, *International Organisations as Law-Makers* p. 68.

¹¹² Johnstone, “Security Council Deliberations”, p. 452; Alvarez, *International Organisations as Law-Makers* p. 69; Kelsen, *The Law of the United Nations*, p. 372.

¹¹³ Kirgis, “The Security Council’s First Fifty Years”, p. 532.

‘Turkish Republic of Northern Cyprus’.¹¹⁴ The Council not only held that the declaration would “contribute to a worsening of the situation” but, significantly, that it was “invalid”.¹¹⁵

One might assume that a self-defence situation would come more or less uncontroversially within “aggression” insofar as there had been an armed attack or at least insofar as the purported exercise itself resembled an armed attack. However the SC has been wary of finding an “aggression” under article 39.¹¹⁶ The ICTY Appeals Chamber has suggested that;¹¹⁷

While the ‘act of aggression’ is more amenable to a legal determination, the ‘threat to the peace’ is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

Insofar as aggression is a “more judgmental concept”,¹¹⁸ this would tend to suggest that the SC is averse to acting like a court. Indeed, in more recent years it has tended to avoid specifying any particular article 39 situation, preferring the term “threat to international peace and security”. It has been suggested that this has stemmed from an

¹¹⁴ E. Lauterpacht, “Aspects of the Administration of International Justice” Hersch Lauterpacht Memorial Lectures at the University of Cambridge (1991), No. 9.

¹¹⁵ UN Doc. S/Res/541 (1983).

¹¹⁶ But cf. the “acts of aggression committed by the racist regime of South Africa” against Angola which were condemned in UN Doc. S/Res/602 (1987).

¹¹⁷ Prosecutor v. Tadić Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72 (02/10/1995) para 29.

¹¹⁸ White, “On the Brink of Lawlessness”, p. 1.

unwillingness to apportion responsibility between states.¹¹⁹ Even after Iraq invaded Kuwait in 1990, the SC only found a “breach of the peace”.¹²⁰ On the other hand, it is said that “[t]he Council is not a court” and concepts such as breach of the peace or threat to the peace are not international crimes.¹²¹ This suggests that the SC is more attuned to extra-legal concerns than the ICJ. Indeed, unlike the ICJ, the SC is comprised of diplomats with a direct line of authority to nation state. While ICJ judges may have national sympathies, they are first and foremost members of the legal profession and not representatives of their nations.¹²²

On the other hand the SC is not renowned for acting like a court. It has been said that “[t]oo often, the United Nations and its Member States have discriminated in responding to threats to international security”.¹²³ The SC has been particularly guilty for this and is known for its selectivity.¹²⁴ One of the factors contributing to this is the very great discretion that has been given to the SC to exercise its powers.¹²⁵ Indeed, some have even suggested that the SC operates under no constraints.¹²⁶ Another factor is the fact that the SC is not a judicial organ. Schachter accepts that the members of political organs evaluating claims do not “observe standards of impartiality” and says that nation states “are expected to take positions in accordance with their conceptions

¹¹⁹ N. Krisch, “The Security Council and the Great Powers” in V. Lowe, A. Roberts, J. Welsh, D. Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (2008) Oxford University Press, p. 143.

¹²⁰ UN Doc. S/Res./660 (1990).

¹²¹ Koskenniemi, “The Place of Law in Collective Security”, p. 474.

¹²² Article 2 ICJ Statute: The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

¹²³ High Level Panel, *A More Secure World*, para. 41.

¹²⁴ A. Roberts and D. Zaum, *Selective Security: War and the United Nations Security Council Since 1945* (2008) Routledge.

¹²⁵ R. Cryer, “The Security Council and Article 39: A Threat to Coherence?” 1(2) *JCSL* (1996) 161, p. 165. (Hereinafter, ‘Cryer, “The Security Council and Article 39”’.)

¹²⁶ Kelsen, *Law of the United Nations*, p. 727; Dinstein, *War, Aggression and Self-Defence*, p. 214.

of national interest”.¹²⁷ While the SC has adopted rules of procedure that institutionalise, to some extent, its functioning, the fact that these rules remain provisional suggests that, on a spectrum of normativity and concreteness, the SC leans towards the concrete. The secondary rules of procedure that would govern the way that the SC handles legal rules are lacking in the SC. In large part this was because the SC was intended to be able to act promptly and decisively in emergency situations without getting tied up in red-tape.

Another aspect of the SC’s political nature is that when it is faced with a self-defence claim, it tends to view the claim as part of a wider factual situation rather than as a particular cause of action that must be decided upon in itself. States, pursuant to article 51, are encouraged to make self-defence claims to the SC. However, the SC does not stage corresponding public debates that look into the niceties of every claim. The role envisaged for the SC in article 51 “does not necessarily require the Council to pronounce on the legality of any claim to self-defence”.¹²⁸ Indeed, Schachter wrote that the SC was never intended to fulfil such a role.¹²⁹

However to the extent that a situation in which a self-defence claim was made would de facto affect international peace and security, the SC may not be able to avoid making an implied judgment of the legality of the use of force in self-defence. Johnstone says that having used a legal norm “rhetorically, [governments] begin to argue over its interpretation and application to the particular case at hand, rather than

¹²⁷ O. Schachter, “The Quasi-Judicial Role of the Security Council and the General Assembly” 59 AJIL (1964) 960 p. 962. (Hereinafter, ‘Schachter, “The Quasi-Judicial Role”’.)

¹²⁸ Gray, *International Law and the Use of Force*, p. 100.

¹²⁹ Schachter, “The Quasi-Judicial Role”, p. 960.

the validity of the law itself".¹³⁰ This would particularly be the case if the SC did not then take enforcement measures to relieve the state acting in self-defence as suggested by the text of article 51. Gray has pointed out that where states do discuss self-defence claims as such, they tend to condemn or accept the use of force on the basis of its factual characteristics rather than entering into extended doctrinal analysis.¹³¹ Nevertheless, the SC has, in practice, evaluated states' self-defence claims.¹³²

C. Composition.

A major reason for the SC's exploitability is its composition.¹³³ The SC has five permanent members (the P5) and ten non-permanent members who are chosen by the GA on a rolling basis every two years according to equitable geographical distribution and their ability to contribute to international peace and security.¹³⁴ The P5 have great advantages within the SC. In the first place this is because, as permanent members, they have more opportunities to influence the organ and to learn how to operate within its structures. In the second place, the P5 are advantaged by the veto. In order for the SC to pass a resolution it must have the affirmative votes, or at least the tacit acquiescence, of each permanent member.¹³⁵ The Cameroonian representative at the SC in 2002 told his fellow members that:

¹³⁰ Johnstone, "Security Council Deliberations", p. 454.

¹³¹ Gray, *International Law and the Use of Force*, p. 11.

¹³² E.g. in Israel's bombing of the Osiraq nuclear reactor in 1981; the UK and Argentinean conflict over the Falklands SC 2360th and 2362nd Meetings (1982); Israeli operations against Lebanon in 1978 and 1982; South African "hot pursuit" of rebels into Botswana, Mozambique and Angola SC 1944th Meeting (1985); Angola's complaint against South Africa S/Res/546 (1984); Iran's pursuit of Kurds over the border into Iraq S/25843 (1993); the US intervention in Iran to rescue the Tehran hostages (1979); the US intervention in Grenada S/16076 (1983).

¹³³ Murphy, "The Security Council", p. 256.

¹³⁴ Article 23(1) UN.

¹³⁵ Article 27(3) UN.

[T]he presence of permanent members...implies an almost perfect mastery of issues, procedures and practices and even of what is not said. When...accompanied by a particularly favourable relationship of power, there is a tendency to take advantage of one's position.¹³⁶

The P5 represent the victors of the Second World War. It is said that the rationale behind the decisional power that they wield in the SC is a result of their ability, as great powers, to form an effective power-house for the enforcement of SC decisions.¹³⁷ Simma has pointed out that “in most cases the SC is unable to implement Chapter VII measures by its own means, and therefore, often makes use of other organs or entities for this purpose”.¹³⁸ This is because the article 47 agreements that would have put troops and military resources at the disposal of the SC have never been made and so the SC is dependent on the ad hoc support of states. During the Cold War, the need for unanimity among the P5 meant that few SCRs were passed. However the end of bipolarity, while it enabled the activation of the SC, also meant the beginning of unipolarity.

The SC is sometimes said to be dominated by the “P3” meaning Britain, France and the US, or even by the “P1” meaning the US.¹³⁹ The US exercised its veto several times during the 1980s to prevent its armed violence in Central America being

¹³⁶ Ambassador Martin Chungong at SC Meeting (“wrap-up session”) 20 December 2002, UN Doc. S/PV.4677 quoted in K. Mahburbani, “The Permanent and Elected Council Members” in *The UN Security Council: From the Cold War to the 21st Century* D.M. Malone (ed.) (2004) Lynne Rienner, London, p. 253.

¹³⁷ Lowe, et al, “Introduction”, p. 12.

¹³⁸ B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (2002) Oxford University Press, p. 712.

¹³⁹ Reisman, “The Constitutional Crisis”, p. 97.

condemned in the SC.¹⁴⁰ In some cases it was not necessary for the veto to be used because no proposed resolution was voted on. An example of this occurred concerning Operation Eldorado Canyon in 1986. The US bombed targets in Tripoli and Benghazi in retaliation for Libya's alleged involvement in the Berlin Discothèque incident. Libya complained to the SC, requesting an immediate meeting.¹⁴¹ The meetings lasted for several days, and many states condemned the US,¹⁴² but no resolution resulted from the process. Rawski and Miller conclude that "[t]he Council has been forced to cater to US interests".¹⁴³ However, it should be noted that while the US can prevent the Council from issuing condemnations, it cannot force the Council to do so in the face of another permanent member's veto.

In cases where US, or other P5, interests are not directly at stake, their dominance of the SC need not prevent the body making an evaluation of a self-defence claim. However, it tends to be the case that those actors to whom the guarantee of collective security has been entrusted are the same actors who have the economic and military power to use force in self-defence. This could mean that if a permanent member of the SC were to claim self-defence, it could simply prevent the SC from discussing it. It has been written that "[e]rosion of Security Council authority to deal with situations that fall within Chapter VII appears to have become...part of the policy of powerful

¹⁴⁰ F. Rawski and N. Miller, "The United States in the Security Council: A Faustian Bargain?" in *The UN Security Council: From the Cold War to the 21st Century* D.M. Malone (ed.) (2004) Lynne Rienner, London p. 358. (Hereinafter, 'Rawski and Miller, "A Faustian Bargain?")

¹⁴¹ UN Doc. S/17991 (1986).

¹⁴² See e.g. UN Doc. S/PV.2675 Meeting of the Security Council of 15 April 1986, USSR (p. 6); Syria (p. 11); Cuba (p. 38) and India (p. 47).

¹⁴³ Rawski and Miller, "A Faustian Bargain?", p. 357 Although the article argues that the relationship is more complex than this and that it has been US impetus that has enabled the SC to act effectively on many occasions. In this regard see also T.M. Franck and J.M. Lehrmann, "Messianism and Chauvinism in America's Commitment to Peace Through Law" in *The International Court of Justice at a Crossroads*, L. F. Damrosch (ed.) (1987) Dobbs Ferry, New York.

states, particularly the United States”.¹⁴⁴ For instance, in the case of the US intervention in Grenada a draft resolution condemning the use of force was defeated by the negative vote of the US.¹⁴⁵

Another pertinent matter flowing from the composition of the Council is the superiority of the missions of the permanent representatives to the SC. In part this is because “[t]he staffing capabilities of the permanent members within the Council allows them disproportionately to influence the outcome of its proceedings”.¹⁴⁶ The permanent members are also advantaged by the fact that their officials are already familiar with the workings of the SC. Furthermore, it is said that the non-permanent members of the SC are “vulnerable...to the diplomatic, economic and military influence” of the permanent members.¹⁴⁷

D. Matters of Fact.

One of the ways in which SC evaluations of self-defence claims may avoid the danger of rendering self-defence claims exploitable is to evaluate each case on its merits. This is often given as a caveat in the proposals of international lawyers using an instrumental optic to view self-defence.¹⁴⁸ However it is also given by international lawyers with a more normative approach. Franck has written that “it appears that the

¹⁴⁴ Myjer and White, “The Twin Towers”, p. 16.

¹⁴⁵ The UK, France and Canada abstained. The action was also considered by the GA in which it was condemned but - as Gray puts it - “less than overwhelmingly, Gray, *International Law and the Use of Force*, p. 128). UN Doc. GA Res 38/7 (1983) had 108 affirmative votes but 27 states abstained and 9 states voted against the resolution.

¹⁴⁶ D.D. Caron, “The Legitimacy of the Collective Authority of the Security Council” 87(4) *AJIL* (1993) 552, p. 564. (Hereinafter, ‘Caron, “The Legitimacy of the Collective Authority of the Security Council”’.)

¹⁴⁷ Byers, “Book Review”, p. 723.

¹⁴⁸ See e.g. Sofaer, “Pre-emption”, p. 226; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (1961) New Haven, Yale University Press, p. 20.

principal organs of the United Nations have responded in accordance with the nuanced situational merits of each crisis” and not according to a general definition of self-defence.¹⁴⁹ An assumption is made that if the facts can be established, an answer to normative questions of reasonableness or necessity will be forthcoming. It might therefore be suggested that if the SC has sufficient capacity and will to find and analyse facts, its evaluation of self-defence claims could not be exploited by powerful states. However this proposition is simple neither in theory nor in execution. While the matter will be examined in some detail in chapter V,¹⁵⁰ some general issues will be touched on here.

It is sometimes said that the SC does not have sufficient means to gather facts on which to make evaluations of self-defence claims.¹⁵¹ Thus, Schachter writes that it is not the political motivations, but the “uncertainty surrounding the factual claims” that mean condemnations in UN organs are not always persuasive.¹⁵² Hutton has written that although in the early 1990s the SC members had “few sources of information beyond those available to their own states”, in more recent years the SC has recognised the benefits of broadening and improving its information base.¹⁵³ However it is submitted that the SC remains dependent on the knowledge-gathering and knowledge-sharing capacities of its members.¹⁵⁴ In large part this is because although the SC can, acting under Chapter VII, give states no choice but to host fact-finding

¹⁴⁹ Franck, *Recourse to Force*, p. 97.

¹⁵⁰ See Chapter V, at p. 328.

¹⁵¹ T. O’Donnell, “Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)” 17(5) *EJIL* (2006) 945 p. 959.

¹⁵² Schachter, “Self-Defense”, p. 269.

¹⁵³ S.C. Hutton, “Council Working Methods and Procedure” in *The UN Security Council: From the Cold War to the 21st Century* D.M. Malone (ed.) (2004) Lynne Rienner, London p. 241. (Hereinafter, ‘Hutton, “Council Working Methods and Procedure”’.)

¹⁵⁴ See e.g. Chapter V at p. 300.

commissions, as was seen over the question of Iraq's development of WMD, the host state's cooperation is often vital for the success of the mission.¹⁵⁵

The SC has been empowered by UN member states to set up subsidiary organs to enable it to fulfil its responsibility and it seems that there is no reason why this should not include fact-finding commissions.¹⁵⁶ Indeed, the SC has set up commissions on various occasions. For instance, it established a commission of inquiry to investigate reports of breaches of international humanitarian law and human rights in Darfur.¹⁵⁷ It has also set up a commission of inquiry to investigate the assassination of Lebanese Prime Minister Rafiq Hariri in February 2005.¹⁵⁸ In a few cases the SC has initiated fact-finding into questions pertinent to a self-defence claim. For instance, in 1991 it charged the Secretary General with establishing responsibility for the Iran-Iraq conflict.¹⁵⁹ The Secretary General referred to "Iraq's aggression against Iran" but advised that there was little to be gained in establishing an independent commission to investigate the question of responsibility.¹⁶⁰

It is submitted that while the use of independent fact finding commissions is to be applauded, the record of the SC suggests that they are the exception rather than the rule, and that many judgments remain dependent on information put forward by individual member states. Indeed, many international lawyers appear to exempt the

¹⁵⁵ One of the "key lessons" listed by the UN Monitoring and Verification Inspection Commission (UNMOVIC) was that "Even with unity and military backing there is still a reliance on the host country to cooperate fully with the inspection agency", UNMOVIC, *Compendium of Iraq's Proscribed Weapons Programmes in the Chemical, Biological and Missile Areas* (2007), p. 1061 Available at: <http://www.unmovic.org/>. (Hereinafter, 'UNMOVIC, Compendium'.)

¹⁵⁶ Article 29 UN.

¹⁵⁷ UN Doc. S/Res/1564 (2004).

¹⁵⁸ UN Doc. S/Res/1595 (2005).

¹⁵⁹ UN Doc. S/Res/598 (1987).

¹⁶⁰ UN Doc. S/23273 Further Report of the Secretary General on the Implementation of Security Council Resolution 598 (1987), paras. 7 and 9.

SC from “the burden of proof and evidence”.¹⁶¹ Gowlland-Debbas wrote that the Council “is not bound by judicial proceedings”. In reaching its conclusions it needn’t “insist on the production of evidence, cross-examine witnesses or examine in any depth the legal considerations”.¹⁶² Against this is O’Connell’s view that states must adhere to “a clear and convincing standard of evidence to justify a use of force in self-defence”.¹⁶³ However, it is submitted that there is a chasm between judicial treatments of facts and the SC’s approach to facts. In large part this flows from the lack of transparency in the operations of the Council.¹⁶⁴ The SC has no intelligence-gathering capacity of its own,¹⁶⁵ and must therefore rely on the contributions of its members and their willingness to share their findings with one another. This can mean that it is not at all clear what, if any, evidence the SC has considered.

E. Selectivity and Inconsistency.

It is said that the SC is selective in the uses of force it evaluates.¹⁶⁶ In large part, it will be argued, this is because its permanent members can prevent resolutions being passed.¹⁶⁷ For instance, during the 1980s the SC passed resolutions concerning conflicts in the Middle East and Africa but not about Central America.¹⁶⁸ In 1983 the US intervened militarily in Grenada (Operation Urgent Fury), through indirect CIA-

¹⁶¹ K. Wellens, “The UN Security Council and New Threats to the Peace” 8(1) JCSL (2003) 15 p. 22. (Hereinafter, ‘Wellens, “The UN Security Council and New Threats to the Peace”’.)

¹⁶² Gowlland-Debbas, “Security Council Enforcement Action”, p. 71.

¹⁶³ M.E. O’Connell, “Evidence of Terror” 7(1) JCSL (2002) 19, p. 28; See further, Chapter V, at pp. 311-314.

¹⁶⁴ *Infra*, at pp. 174-179.

¹⁶⁵ Lowe, et al, “Introduction”, p. 50.

¹⁶⁶ Koskenniemi, “The Place of Law in Collective Security”, p. 460-1; P. Wallensteen and P. Johansson “Security Council Decisions in Perspective” in *The UN Security Council: From the Cold War to the 21st Century*, D.M. Malone (ed.) (2004) Lynne Rienner, London, p. 22.

¹⁶⁷ Article 27(3) UN.

¹⁶⁸ The Iran-Iraq war, the conflict between Israel and Lebanon, the situation in Cyprus, and the attacks by South Africa on Angola.

led means in Nicaragua from 1982 and in 1989 in Panama (Operation Just Cause), but none of these incidents resulted in an evaluative resolution. While both Operation Just Cause and Operation Urgent Fury prompted open SC debates, it was not possible to agree on a decision about the uses of force.¹⁶⁹ Gray has pointed out that “[t]he use of force in Czechoslovakia, Hungary, Afghanistan and Vietnam could not even be put on its agenda”.¹⁷⁰

To illustrate the difficulties of gleaning a resolution from the SC where it directly concerns a permanent member of the SC, we will look briefly at the Grenada intervention from the SC perspective. Nicaragua complained to the SC about the US invasion of Grenada and demanded that the international community condemn it.¹⁷¹ This request was reiterated by Grenada.¹⁷² The US claimed that it was acting pursuant to a resolution of the Organisation of Eastern Caribbean States that found the disintegration of government in Grenada a threat to the continued peace and security of the Eastern Caribbean. However the US letter also stressed that its interest was in removing US civilians from danger.¹⁷³ The US letter did not mention self-defence and, owing to the transmission to the Secretary General rather than the President of the SC, it did not appear to be acting pursuant to article 51.

¹⁶⁹ UN Doc. S/PV.2899 Meeting held on 20 December 1989.

¹⁷⁰ C. Gray, “The Charter Limitation on the Use of Force”, in V. Lowe, A. Roberts, J. Welsh, D. Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (2008) Oxford University Press 86, p. 87. (Hereinafter, ‘Gray, “The Charter Limitation on the Use of Force”’.)

¹⁷¹ UN Doc. S/16069 Letter Dated 25 December 1983 from the Representative of Nicaragua on the Security Council Addressed to the President of the Security Council.

¹⁷² UN Doc. S/16075 Letter Dated 25 December 1983 from the Representative of to the United Nations Addressed to the President of the Security Council.

¹⁷³ UN Doc. S/16076 Letter Dated 25 December 1983 from the Permanent Representative of the United States of American to the United Nations Addressed to the Secretary General.

Guyana and Nicaragua drafted a resolution on the Grenada situation condemning the invasion of Grenada as a violation of international law and of Grenada's independence, sovereignty and territorial integrity. Although the resolution does not name the US as an aggressor, it does call for the immediate cessation of the intervention and is a clear indictment of the unlawfulness of the action.¹⁷⁴ This draft was rejected at a meeting of the SC.¹⁷⁵ A new draft was presented by Guyana, Nicaragua and Zimbabwe the next day.¹⁷⁶ This was discussed and rejected at another SC meeting.¹⁷⁷ In contrast, Operation Urgent Fury was roundly condemned at the GA.¹⁷⁸ All this tends to suggest, once again, that the SC is not capable of evaluating particular claims on their merits because of its structural bias in favour of already powerful states.¹⁷⁹

Although certain writers claim to have observed “a fairly coherent continuum of responses to such pleas in mitigation”,¹⁸⁰ it is also the case that one of the consequences of the selectivity SC evaluations of uses of force is inconsistency. If the SC is to have the freedom to decide what is purposively necessary to maintain or restore international peace and security, it is said that it should not be subject to constraining precedent.¹⁸¹ The lack of consistency points towards the absence of secondary rules of adjudication that safeguard applications of the law from arbitrariness.¹⁸² Hart suggested that part of the minimum moral content of law was

¹⁷⁴ UN Doc. S/16077 Guyana and Nicaragua: Draft Resolution.

¹⁷⁵ UN Doc. S/PV.2489 Provisional Verbatim Record Of The 2489th Meeting, Security Council, Held At Headquarters, New York, On Wednesday, 26 October 1983.

¹⁷⁶ UN Doc. S/16077/Rev.1 Guyana Nicaragua and Zimbabwe: Revised Draft Resolution.

¹⁷⁷ UN Doc. S/PV.2491 Provisional Verbatim Record of the 2491st Meeting, Security Council, Held at Headquarters, New York, on Thursday, 27 October 1983.

¹⁷⁸ UN Doc. A/Res/38/7 (1983).

¹⁷⁹ *Supra*, at p. 134-138.

¹⁸⁰ Franck, *Recourse to Force*, p. 186.

¹⁸¹ Dinstein, *War, Aggression and Self-Defence*, p. 283.

¹⁸² *Supra*, at p. 138.

that like cases are treated alike.¹⁸³ It would therefore be extremely hard to argue that SC evaluations occurred as part of a legal system of collective security. This is particularly damaging insofar as the evaluation that a self-defence claim is valid is a legal determination. This creates a dilemma because, as an avowedly political body, it is difficult to hold the SC to adjudicative standards. Nevertheless, it may be that a lack of consistency is also detrimental to conceptions of political collective security; lack of consistency would prevent the accumulation of experience and the emergence of expectations among states.

Franck transposed Hart's maxim into his own theory about international law and suggested that consistency is a characteristic of fairness.¹⁸⁴ This seems to be supported by the High Level Panel on Threats, Challenges and Change which found that consistency of decisions makes for the credibility of the SC and that the SC cannot function effectively without credibility.¹⁸⁵ However it has been suggested that consistency is not a realisable ambition for the SC. "Even if members of a security pact had parallel interests, a collective reaction procedure could still not be applied consistently. Political choices will have to be taken when interpreting, for example, who the aggressor is...".¹⁸⁶ Thus it seems that the SC is in a double-bind: Caught between the legitimacy of its decisions and the freedom to act decisively wherever it is necessary to do so. It is also to be emphasised that making claims that a pattern can be found in the evaluations of the political organs can also legitimate their decision-making in cases where it might be thought that states did not vote according to the merits of a particular case, but according to their own interests.

¹⁸³ Hart, *The Concept of Law*, p. 159.

¹⁸⁴ Franck, *Fairness in International Law and Institutions*, p. 313. (But not necessarily coherence, p. 230.)

¹⁸⁵ High Level Panel, *A More Secure World*, para. 246.

¹⁸⁶ Koskeniemi, "The Place of Law in Collective Security", p. 464.

F. Ambiguity of Evaluations.

Another aspect in which evaluations by the SC can be exploited is that it is not always clear precisely what is being evaluated. This is because states do not always make a self-defence claim where it might be expected that they would. Secondly, they often make self-defence claims where it may not be expected that they would: During the Cold War both the US and the USSR were accused of “playing fast and loose” with the claim of self-defence.¹⁸⁷ Finally, it is also because the SC itself does not usually refer to self-defence.¹⁸⁸ A good example of this is Israel’s Operation Opera against the Osiraq nuclear reactor in Iraq in June 1981. Franck uses the incident as an instance of anticipatory self-defence.¹⁸⁹ Iraq had made a complaint to the SC requesting it to convene to discuss the matter.¹⁹⁰ However, while it wrote to the President of the SC, Israel did not immediately claim self-defence.¹⁹¹

The letter, which did not mention the reporting requirement in article 51, ended with the words “[w]e shall defend the citizens of Israel in time, and with all the means at our disposal”.¹⁹² However at the first SC meeting following Iraq’s complaint, Israel

¹⁸⁷ White, “On the Brink of Lawlessness”, p. 4. However, this is not only a Cold War phenomenon. Russia reported its intervention in Georgia in 2008 as an act of self-defence, apparently under the head of protection of nationals: UN Doc. S/2008/545 (2008) Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council.

¹⁸⁸ Gray, “The Charter Limitation on the Use of Force”, p. 94; Noting, however, that it has done so in the case of apartheid-era South Africa (affirming Angola’s right to self-defence in UN Doc. S/Res/546 (1984)) and the invasion of Kuwait by Iraq (UN Doc. S/Res/661 (1990)). More recently, the SC referred to the US’ right to use self-defence in response to the acts of terrorism it had faced: UN Doc. S/Res/1368 (2001) and UN Doc. S/Res/1373 (2001).

¹⁸⁹ Franck, *Recourse to Force*, p. 106.

¹⁹⁰ UN Doc. S/14509 Letter Dated 8 June 1981 *from the Chargé d’Affairs of the Permanent Mission of Iraq* to the United Nations addressed to the President of the Security Council.

¹⁹¹ UN Doc. S/14510 Letter Dated 8 June 1981 from the Permanent Representative of Israel to the United Nations Addressed to the President of the Security Council.

¹⁹² Emphasis added.

specifically invoked article 51 and cited the works of inter alia Waldock and Bowett to the effect that a state cannot be expected to await an attack before it takes measures in self-defence.¹⁹³ Engaging with this claim, the Iraqi delegate countered with a textual reading of article 51.¹⁹⁴ At the second meeting of the Council on the issue, some speakers engaged in depth with the self-defence claim,¹⁹⁵ while others did not mention it.¹⁹⁶ It is suggested that it is far from clear on what grounds the Council eventually passed resolution 487 which “strongly condemn[ed] the military attack by Israel in clear violation of the Charter”.¹⁹⁷ The resolution quoted the text of article 2(4), but it made no mention of self-defence.

Israel was ultimately condemned for its use of force in the Council. But according to Franck, states rejected the claim because Israel had not provided evidence of the imminence of the threat from Iraq.¹⁹⁸ This reading helps him to suggest that the SC has tacitly accepted the doctrinal idea of anticipatory self-defence. However other writers have not accepted this reading of the SC’s evaluation.¹⁹⁹ The British delegate said in response to the claim that the act was one of self-defence that “there was no instant or overwhelming necessity for self-defence”.²⁰⁰ While this seems to be a direct reference to the Caroline case, other states were far less juridical in their references: For instance, France said that “[n]othing can justify an act which, moreover, has

¹⁹³ UN Doc. S/PV.2280 Meeting of the Security Council on 12 June 1981, para. 97.

¹⁹⁴ Ibid., para. 224.

¹⁹⁵ E.g. the Ugandan representative (paras 8-20), the Spanish representative (para. 78) UN Doc. S/PV.2282 Meeting of the Security Council on 15 June 1981.

¹⁹⁶ E.g. the French representative (paras 39-59), the German Democratic Republic representative, (paras 60-72), Ibid.

¹⁹⁷ UN Doc. S/Res/487 (1981), op. para. 1.

¹⁹⁸ Franck, *Recourse to Force*, p. 106.

¹⁹⁹ Gray, *International Law and the Use of Force*, p. 133.

²⁰⁰ UN Doc. S/PV.2282 2282nd Meeting of the Security Council on 15 June 1981, para. 106

aroused unanimous criticism throughout the world”.²⁰¹ The US representative, who declared simply that “Israel should be condemned”, was silent as to self-defence.²⁰²

Running alongside the piecemeal doctrinal discussion was a torrent of emotion. Rejections of Israel’s claim are in various cases peppered with references to the wider issue of Israel’s place in the Middle East and its own possession of nuclear weapons. For instance, the Iraqi representative spoke in some detail of Israel’s nuclear capacity.²⁰³ The lack of focus of the debate on the specific question of self-defence, and its political nature, is also reflected in the language used by some representatives: For instance, the Algerian representative referred to the “Zionist entity”. Similarly the Iraqi representative referred to “Zionist aggressor” and the Sudanese called Israel’s conception of national security “bizarre”.²⁰⁴ Such incendiary language is not only antagonistic, but also deviates from the question at issue. More importantly, however, the failure of speakers in the SC to confine themselves to commenting on the specific use of force tends to militate against any claim that the SC considers each issue on its merits.

Related to the ambiguity of evaluations is the question of tacit acceptance of a use of force. To the extent that writers suppose that where the SC has considered an issue, it has decided in not passing a resolution to acquit a claimant of self-defence, it is possible for them to argue that the SC’s failure to agree a resolution demonstrates its

²⁰¹ Ibid., para. 56.

²⁰² Excerpt from UN Doc. S/PV.2282 Meeting of the Security Council on 15 June 1981 reprinted in “Excerpts from the Provisional Verbatim Records of the UN Security Council during its Consideration of the Iraqi Complaint” 20(4) ILM (1981) 965, p. 985.

²⁰³ UN Doc. S/PV.2280 Meeting of the Security Council on 12 June 1981, para. 25; as did the Lebanese delegate, UN Doc. S/PV.2282 Meeting of the Security Council on 15 June 1981, para. 121 and the GDR delegate, *ibid.*, para. 67.

²⁰⁴ UN Doc. S/PV.2280 Meeting of the Security Council on 12 June 1981, paras. 146, 42 and 179.

acceptance that the use of force is not an act of aggression. Schachter wrote that in a few cases “the Council’s failure to act has been construed...as tacit approval or toleration of the use of force in question”²⁰⁵. This was the position taken by Franck in his view that the Israeli use of force in anticipation of attacks by Egypt and Jordan in 1967 was accepted as a use of anticipatory self-defence. However the use of acquiescence has also been criticised.²⁰⁶

Franck wrote that since a Russian draft resolution condemning Israel and demanding the return of captured territory garnered on 4 of 15 members’ votes and because the resolution ultimately adopted did not call for the surrender of captured territory,²⁰⁷ “[i]t is difficult not to conclude that the Council members gave credence” to Israel’s justification.²⁰⁸ Gray criticises “writers who seek to justify the use of force” who “seize on...failure to condemn by the SC and the failure to take any action against the state using force”.²⁰⁹ Wood also denies that the absence of condemnation is evidence of the legality of an action.²¹⁰

This method of viewing SC practice accounts for abstract claims by asserting a presumption and demanding contrary evidence for its rebuttal. In this sense the evidence is established by absence: Absence of condemnation; absence of opposition; absence of contrary reason. It is suggested that these assumptions rely on the presumption that the SC acts within a framework of secondary rules that guide its

²⁰⁵ Schachter, “Self-defence”, p. 264.

²⁰⁶ White, “On the Brink of Lawlessness”, p. 12.

²⁰⁷ UN Doc. S/Res/242 (1967). Note, however that the resolution does assert “the inadmissibility of acquisition of territory by war” in its preamble.

²⁰⁸ Franck, *Recourse to Force*, p. 103.

²⁰⁹ Gray, *International Law and the Use of Force*, p. 128.

²¹⁰ Wood, *Hersch Lauterpacht Memorial Lectures. Third Lecture: “The Security Council and the Use of Force”*, 9 November 2006 para. 18. (Hereinafter, ‘Wood, Third Lecture’.)

action, rather than according to the subjective discretion of political actors. To the extent that such assumptions enable the SC to be used to explain away states' uses of force, it is submitted that the SC is exploited because its structural bias favours the claimant of self-defence over the target state.

G. Indeterminacy of SCRs.

Intimately connected to the questions of what the SC has evaluated, and on what grounds, is the question of the interpretation of Council resolutions. It is said that the SC “does not make express determinations of violations; instead it very occasionally ‘recalls’ Article 2(4) in the preambles to its resolutions”.²¹¹ Resolutions are said to be ambiguous because, in order to garner the support, ideally, of 15 disparate member states, they have to cater to a variety of potentially conflicting interests. Thus, according to Wood, SC resolutions tend not to be very detailed.²¹² Indeed, in some cases the names of the parties are not even mentioned.²¹³ In other instances, the SC does not make clear the precise grounds on which a use of force has been condemned or accepted. A notorious example of the latter was the Council's ex ante acceptance of the US's Operation Enduring Freedom in Afghanistan in 2001. Resolution 1368 recognises the inherent right of self-defence in accordance with the Charter,²¹⁴ but it does not suggest what sort of action would be appropriate, still less whether the right of self-defence subsists after an attack is complete. Alvarez says that the Charter

²¹¹ Gray, “The Charter Limitation on the Use of Force”, p. 92.

²¹² M. Wood, “The Interpretation of Security Council Resolutions” 2 Max Pl. Yk UNL (1998) 73 p. 89. (Hereinafter, ‘Wood, “The Interpretation of Security Council Resolutions”’.)

²¹³ E.g. UN Doc. S/Res./233 (1967), which is concerned with the outbreak of fighting in the Near East but which mentions no state by name, only referring to “the Governments concerned”.

²¹⁴ UN Doc. S/Res/1368 (2001).

framers recognised that what matters is “general acceptance”.²¹⁵ This might imply that the passing of a resolution is more important than its content.

It is frequently difficult to tell on what terms an SCR has evaluated a claim of self-defence. Rosalyn Higgins has written that in many cases states’ votes can be ascribed to “political pressures rather than to legal beliefs”.²¹⁶ Wood says that this is putting it mildly.²¹⁷ Nevertheless, international lawyers still appear to expect it and in many cases, provide their own *ratio decidendi*. Bedjaoui has noted that the SC has tended not to mention the legal basis for its competence in a particular matter “by omitting any express reference to the chapter and article of the Charter on which its action was founded”.²¹⁸ Moreover, the SC tends not to make principled article 39 determinations, or at least not to do so in public, to ensure that its actions do not set unlimited or unintended precedents.²¹⁹

Bedjaoui says that because of the lack of explicit reference to authority, international lawyers are driven to interpret SCRs in order to glean the legal bases for their findings.²²⁰ Interpretation of SCRs is far from straightforward. Michael Wood has written about the difficulties of interpreting the resolutions of the SC on the basis that “there is little authority on the interpretation of non-treaty texts”.²²¹ Wellens notes that “too legalistic a look at formulation is not appropriate”²²² but that in most cases “the

²¹⁵ Alvarez, “Judging the Security Council”, p. 9.

²¹⁶ R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) Oxford University Press.

²¹⁷ Wood, *Third Lecture*, para. 6.

²¹⁸ M. Bedjaoui, *The New World Order and the Security Council* (1994) Martinus Nijhoff Publishers, The Hague p. 21. (Hereinafter, ‘Bedjaoui, *The New World Order*’.)

²¹⁹ Kirgis, “The Security Council’s First Fifty Years”, p. 517.

²²⁰ Bedjaoui, *The New World Order*, p. 21.

²²¹ Wood, “The Interpretation of Security Council Resolutions”, p. 86.

²²² Wellens, “The UN Security Council and New Threats to the Peace”, p. 20.

formulation is the result of long and intensive negotiation”.²²³ SCRs use “the covered language of diplomacy” either “out of political necessity” or “professional habit”.²²⁴ In very few cases of dispute between states over conflicting readings of the facts has the SC favoured one side over the other by finding that one of the parties, as opposed to a non-state actor or an event, constitutes the threat.²²⁵

The ambiguity of SC resolutions is exacerbated because they do not often use standard formulae. This includes the use of legal formulations. It is rare to see an SC resolution that refers to particular Charter terms.²²⁶ Apparently, there is almost “no input from the United Nations Secretariat” and “no standard procedure for drafting SCRs”.²²⁷ On the other hand, international lawyers and other interpreters often attempt to find evidence of standard formulae. A good example of this was the phrase “all measures necessary” in SC resolution 678. The question was whether this phrase was code for “use of force”. It is submitted that SC interpretation should not be seen as an exercise in cryptography.

Wood says that the interpretation of SCRs “depends in the last analysis on the intentions of the Security Council (as evidenced by the text of the resolution and the

²²³ Ibid., p. 21.

²²⁴ Franck, *Fairness in International Law and Institutions* p. 230.

²²⁵ With the possible exceptions of Iraq. UN Doc. S/Res/660 (1990) where the invasion of Kuwait was called a “breach of the peace” and Iraq was directly condemned. The North Koreans were condemned for a breach of the peace by its armed attack on the Republic of Korea UN Doc. S/Res/82 (1950). This can be compared with UN Doc. S/Res/1798 (2008) where the SC meticulously refers to “the situation between the parties” as to Ethiopia and Eritrea’s conflict. Likewise UN Doc. S/Res/1778 (2007) selects none of the states involved for particular condemnation in the Chad, Central African Republic case. UN Doc. S/Res/1773 (2007) is another example of the SC condemning neither Israel nor Lebanon in their dispute. In UN Doc. S/Res/713 (1991) none of the parties to the dissolution of the SFRY was singled out for blame.

²²⁶ Murphy, “The Doctrine of Preemptive Self-Defense”, p. 737; Gray, *International Law and the Use of Force*, p. 18.

²²⁷ Wood, “The Interpretation of Security Council Resolutions”, p. 80.

surrounding circumstances)”.²²⁸ But intention is very hard to pin down when one must first resolve the indistinction surrounding the identity of the drafter: Are SC members to be taken separately from the body? Higgins has pointed out that the SC “is really a dual concept; it is each of its individual members stating a case and it is also the sum total of the members acting in the name of the organ”.²²⁹ When the SC passes a resolution according to valid procedure, it should be seen as “a reflection of the corporate will of the Security Council, not the aggregation of the wills of the members of that body”.²³⁰ She says that when SC members act as participants in debates they use law in a very different way to when they act as decision-makers. This is a key point. One of the greatest sources of indistinction in the collective security system is that it is not clear when states act in their national capacity and when they act as organs of the collective security system. Higgins says that the positions of “protagonists and impartial organ” are blurred. For the former, the law is an instrument of national policy or a figleaf for “disagreeable political realities”. For the latter, law is a “common language” of justification.²³¹

Against this is the idea that, since the end of the Cold War, the SC has begun “to behave as a collective body” characterised by “greater cooperation”.²³² The idea of the communality of the SC has been taken forward by Ian Johnstone in his assertion that, while the SC may not constitute an interpretive community in Stanley Fish’s sense, there is sufficient normative commonality to enable understandings to

²²⁸ *Ibid.*, p. 92.

²²⁹ R. Higgins, “The Place of International Law in the Settlement of Disputes by the Security Council” 64(1) *AJIL* (1970) 1 p. 1. (Hereinafter, ‘Higgins, “The Place of International Law”’.)

²³⁰ N.D. White, “The Will and Authority of the Security Council After Iraq” 17(4) *LJIL* (2004) 645, p. 648.

²³¹ Higgins, “The Place of International Law”, p. 2 Higgins does note however that there are times at which superficial commonality is belied by profound diversity saying that at times legal arguments can be used to justify propositions that are ostensibly “inappropriate to the facts”.

²³² Hutton, “Council Working Methods and Procedure”, p. 237.

develop.²³³ The National Security Strategy of the Bush Administration also sought to assert generally shared values of freedom and democracy.²³⁴ This coming together of values has put a higher premium on unanimity in the SC.²³⁵ Not only does this tend to make for vaguer resolutions more capable of attaining the consent of all SC members,²³⁶ but it has also increased the frequency with which states make separate statements explaining their own position outside the SC.

Hutton has pointed out that the price of unanimity is “recourse to the devise of explanations of vote” to record a position without blocking consensus.²³⁷ A notorious instance of this practice concerned resolution 1441 (2002) passed in the run-up to the US-led Operation Iraqi Freedom in March 2003. The resolution found that if Iraq continued to be in “material breach” of its obligations, “serious consequences” would be considered by the Council. The lack of the words “all necessary means” suggested, according to some, that the Council did not intend to take military action since that formulation has become usual in cases of authorisation of force.²³⁸ However, the UK justified its part in Operation Iraqi Freedom as an authorised use of force pursuant to resolution 1441 which, it said, had reactivated resolution 678.²³⁹ It has been suggested that the members of the SC drafted it deliberately ambiguously so that they could retain political freedom.²⁴⁰ Perhaps a better explanation is that Council members that supported military action settled for ambiguous language in the face of

²³³ Johnstone, “Security Council Deliberations”, p. 460.

²³⁴ “The United States must defend liberty and justice because these principles are right and true for all people everywhere”, US National Security Strategy (2002), p. 3.

²³⁵ Hutton, “Council Working Methods and Procedure”, p. 237.

²³⁶ Wood, “The Interpretation of Security Council Resolutions”, p. 82.

²³⁷ Hutton, “Council Working Methods and Procedure”, p. 238.

²³⁸ Gray, “The Charter Limitation on the Use of Force”, p. 90.

²³⁹ The full text of the legal advice given by the Attorney General, Lord Goldsmith to the Prime Minister, Tony Blair is available at: <http://www.guardian.co.uk/politics/2005/apr/28/election2005.uk>.

²⁴⁰ M. Byers, “Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity” 10 *Glo. Gov.* (2004) 165, p. 165. (Hereinafter, ‘Byers, “Agreeing to Disagree”’.)

uncompromising opposition from France and Russia. This reading is suggested by the relatively unambiguous, if conflicting, statements given by the state representatives after the resolution was passed.²⁴¹

The SC meeting at which the resolution was passed demonstrates this. The US delegate stated that “If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security”.²⁴² The French delegate welcomed the lack of “automaticity” and that Iraq’s further failure to comply would be met with a further SC meeting.²⁴³ Similarly, the Russian delegate stressed the importance of “not yielding to the temptation of unilateral interpretation of the resolution’s provisions”.²⁴⁴ In the light of what occurred subsequently, it is clear that the expression of such contrary readings of resolutions plays an important part in the subsequent justification of uses of force.

Byers explained it is not that one set of arguments is better than the other but that both sets of arguments are “plausible”.²⁴⁵ If the SC were to apply this sort of reasoning to its evaluations of self-defence claims, disputes about who had the right to use self-defence would not be prevented from escalating. It is suggested that in that case, the value of unanimity is not worth the price of the resolution appraising the use of force being ambiguous.

²⁴¹ UN Doc. SC/7564 (2002) Press Release of 8th November 2002.

²⁴² UN Doc. S/PV.4644 Meeting of the Security Council 8 November 2002, p. 3.

²⁴³ *Ibid.*, p. 5.

²⁴⁴ *Ibid.*, p. 9.

²⁴⁵ Byers, “Agreeing to Disagree”, p. 173.

H. Lack of Transparency.

A major factor exacerbating the ambiguity of SC evaluations of self-defence claims and resolutions concerning particular uses of force is the lack of transparency in its operations. The debates that lead up to resolutions, and from which it may be possible to ascertain the grounds on which states made their assessments, are often made behind closed doors.²⁴⁶ This not only deprives international lawyers of a guide to interpretation, but also removes the possibility of scrutinising the process of decision-making.²⁴⁷ It is suggested that positions like that of Dinstein, who said “[a]s a non-judicial body the Council is not required to set out reasons for its decisions”,²⁴⁸ tend to render the SC exploitable.

It has been said that “[a]s the Council has become more effective and powerful, it has become more secretive”.²⁴⁹ Reisman says that it now contains smaller and smaller “mini-Councils” which “meet behind closed doors without keeping records”. The elitism implied in this is likely to alienate many states.²⁵⁰ On the other hand he says that “in many cases closed deliberations may be justified”.²⁵¹ In this vein, David Malone has pointed out that the informal P5 meetings that followed the end of the Cold War “helped anticipate and diffuse conflicts”.²⁵² Wood has noted that the more controversial the perception of a given issue, the more likely it is to be resolved off

²⁴⁶ Krisch, “The Security Council and the Great Powers”, p. 137; Koskenniemi, “The Place of Law in Collective Security”, p. 486.

²⁴⁷ This theme will be returned to in chapters IV and V.

²⁴⁸ Dinstein, *War, Aggression and Self-Defence*, p. 285.

²⁴⁹ Reisman, “The Constitutional Crisis in the United Nations”, p. 85.

²⁵⁰ This is apparent in the arguments made by Libya in the early 1990s and recently by Iran over its compliance with IAEA obligations. Both states assert that the SC is used as the instrument of US and UK policy.

²⁵¹ Reisman, “The Constitutional Crisis in the United Nations”, p. 98.

²⁵² D. Malone, *Decision-Making in the UN Security Council* (1998) Clarendon Press, Oxford p. 8.

the record in “corridor negotiations”.²⁵³ It is likely that, unless the interests of none of the current SC members are implicated, self-defence claims will fall within this category. Moreover there is a fear that the holding of public meetings merely creates a forum for propaganda and grandstanding.²⁵⁴

The SC holds private meetings and public meetings. Public meetings are further subdivided into “open debate”, “debate”, “briefing” and “adoption” formats. The extent of non-SC member states’ participation will be determined by the format chosen.²⁵⁵ While the function of a public meeting is said to be “[t]o take action and/or hold, inter alia, briefings and debates”,²⁵⁶ the function of a private meeting is “[t]o conduct discussion and/or take actions, e.g., recommendation regarding the appointment of the Secretary-General, without the attendance of the public or the press”.²⁵⁷ The SC has also made great use of the separate consultations Chamber. This tends to be used rather than the formal and public Council Chamber.²⁵⁸ This has a further effect of alienating smaller states and tends to suggest that the SC is dominated by its permanent members. Bailey and Daws refer to “the outrage felt by some medium and smaller states when they realised that the Security Council might sometimes meet in private”.²⁵⁹

²⁵³ Wood, “The Interpretation of Security Council Resolutions”, p. 94.

²⁵⁴ Israel accused Iraq of using the Council as a “smoke-screen” to hide its nuclear ambitions when Iraq complained to the Council about Israel’s destruction of its nuclear reactor: UN Doc. S/PV.2280 Meeting of the Security Council on 12 June 1981, para. 106.

²⁵⁵ UN Doc. S/2006/507 Note by the President of the Security Council, para. 35.

²⁵⁶ *Ibid.*, para. 35(a)(i).

²⁵⁷ *Ibid.*, para. 35(b)(i).

²⁵⁸ Security Council Report, “Special Research Report: Security Council Transparency, Legitimacy and Effectiveness” 18 October 2007 (No. 3). Available at: <http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.3506555/>. (Hereinafter, ‘Security Council Report, “Special Research Report”’.)

²⁵⁹ S.D. Bailey and S. Daws, *The Procedure of the UN Security Council*, (1998) Clarendon Press, Oxford p. 53. (Hereinafter, ‘Bailey and Daws, *The Procedure of the UN Security Council*’.)

However not all of the de-formalisation of the SC has had negative consequences. Not all “informal negotiations” imply shadowy backroom deals; some are announced in the UN Journal with a list of topics.²⁶⁰ Moreover not all informal meetings are exclusive. One form of meeting that has grown markedly in use is the “Arria formula meeting” which means that SC members can hear what external speakers have to say in a “very informal” setting.²⁶¹ However an Arria formula meeting comprises members of the SC for an exchange of views; it is not a meeting of the SC. The problem for international lawyers is that there is no record of the meeting except any off-the-record statements that might filter through.

It has been suggested that in many cases smaller states sitting on the SC are excluded from participation in the deliberative process because the meetings in which action is decided upon are not sufficiently publicised. This has two effects: One is that the claim that the SC acts on behalf of all members of the UN is undermined; and the second is that when the SC meets behind closed doors, no official record of the meeting is available for analysis. In theory states not members of the SC can request to be present at SC debates as non-voting participants.²⁶² This is particularly important where the SC is discussing a matter that is of direct relevance to a state, particularly if that state has been involved in a self-defence situation. In response to this the 2005 World Summit outcome document recommended that “the Security Council continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its

²⁶⁰ Hutton, “Council Working Methods and Procedure”, p. 246.

²⁶¹ Bailey and Daws, *The Procedure of the UN Security Council*, p. 73.

²⁶² Article 31 UN.

accountability to the membership and increase the transparency of its work”.²⁶³ At present the SC purports to be attempting to take account of these problems.²⁶⁴

However, real change is hampered where the permanent members of the Council are loath to change their working practices. It seems that there is a dilemma between the legitimacy of the SC process in investigating and dealing with issues and the “prompt and effective action”²⁶⁵ it is supposed to be able to take to maintain international peace and security. At an SC meeting, the UK has held that “[t]here will always be a need to balance transparency with the need for the Council to be able to work effectively”.²⁶⁶ Similarly, the French representative stressed that while openness and transparency are a good thing in the abstract, in practice France is against the formalisation of informal consultations.²⁶⁷ Some international lawyers take a similar view. Murphy opines that “‘fair’ and ‘genuinely collective’ decision-making by the Security Council is [not necessarily] a sensible approach for global conflict management”.²⁶⁸

According to the Council’s Informal Working Group on Documentation and Other Procedural Questions “[m]any non-members of the Council expressed concern about just being passive recipients of decisions and news after the event”.²⁶⁹ It seems that questions of access and participation could be solved relatively easily. This is because

²⁶³ UN Doc. A/Res/60/1 (2005) World Summit Outcome Document, para. 154.

²⁶⁴ E.g. UN Doc. S/PRST/1994/81 (1994) Statement by the President of the Council and UN Doc. S/1999/1291 (1999) Note by the President of the Security Council.

²⁶⁵ Article 24(1) UN.

²⁶⁶ UN Doc. S/PV.5968 (2008), Meeting of the Security Council of 27 August 2008, p. 17.

²⁶⁷ *Ibid.*, p. 9.

²⁶⁸ Murphy, “The Security Council”, p. 258.

²⁶⁹ Security Council Report, “Special Research Report”.

[k]nowing what the Council was likely to discuss, why and when was one of the most basic hurdles encountered by non-Council members hoping to have any kind of impact on the Council's work. The obscurity and lack of transparency inherent in the Council's working methods left most UN members extremely unhappy on all these fronts. Even within the Council, process was often obscure for elected members.²⁷⁰

While formal SC meetings are announced in the UN Journal, the substance of the informal consultations is not. It seems that the matter of dissemination is a core problem for the SC. At a debate on working methods, the Indonesian representative, while recognising that the nature of SC work required it to respond to crises as they arose rather than sticking rigidly to its agenda, suggested that the SC develop a more inclusive and responsive system for informing UN members of its work.²⁷¹ The dissemination is also important if the SC is to be properly scrutinised in its work.

Moreover the keeping of records is important if international lawyers are to be able to give their legal opinions about evaluations of uses of force made by the SC. To the extent that the decision-making processes of the SC are reserved from public view, it seems that there is no way of checking whether or not the SC is acting arbitrarily or responding to the merits of a given claim. Michael Wood has said that “most of the negotiating history of a resolution is not on the public record”.²⁷² Similarly Anthony Aust said of SC practice in the early 1990s “nowadays the verbatim record of an SC meeting usually gives little indication of the process which led to the adoption of...a

²⁷⁰ Ibid.

²⁷¹ UN Doc. S/PV.5968 (2008), p. 3.

²⁷² Wood, “The Interpretation of Security Council Resolutions”, p. 81.

resolution”.²⁷³ However it is submitted that the lack of documentary evidence of the process of evaluation creates indistinction that flows both from the lack of hooks for interpretation and from mistrust that such secrecy evokes in interpreting audiences.

I. Limits on Security Council Authority.

In order to tackle the problem of the exploitability of the SC, its broad discretion to use its binding powers and the dominance of its permanent members, some writers suggest that the SC is subject to legal limitations. It will be suggested that however desirable this might be, making the claim that the SC is in fact bound by such constraints in practice may help to legitimise the Council in ways that it does not deserve.

In the early 1990s, scholars began to fear for the SC’s over-activity. Some writers are happy to suggest that there are enough de facto limits on the SC without imposing any normative ones.²⁷⁴ Reisman says “[h]ard substantive and procedural standards for review of Chapter VII actions are difficult to pinpoint in the Charter”.²⁷⁵ However others have attempted to bring the SC’s discretion within normative limits. It is said that the SC is bound by at least the principles and purposes of the Charter.²⁷⁶ The SC’s position in the Charter system was described thus by former ICJ President Judge Bedjaoui:²⁷⁷

²⁷³ A. Aust, “The Procedure and Practice of the Security Council Today” in Rene-Jean Dupuy (ed.), *The Development of the Role of the Security Council: Peace Keeping and Peace Building* (1993) Dordrecht: Nijhoff.

²⁷⁴ Wood, *Hersch Lauterpacht Memorial Lectures. Second Lecture: “The Security Council’s Powers and their Limits”*, 8th November 2006 para. 16. (Hereinafter, ‘Wood, Second Lecture’.)

²⁷⁵ Reisman, “The Constitutional Crisis in the United Nations”, p. 93-4.

²⁷⁶ Alvarez, *International Organisations as Law-Makers* p. 80.

²⁷⁷ Lockerbie, *Provisional Measures, Dissenting Opinion of Judge Bedjaoui*, para. 24.

[O]ne could say that it would not be unreasonable to state that the Security Council must respect the Charter, on the one hand because it is the act to which it owes its very existence and also and above all because it serves this Charter and the United Nations Organization...[O]ver and above the spirit of the Charter, the actual text points the same way. Article 24, paragraph 2, of the Charter expressly states that ‘in discharging [its] duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations’.

It is also said that members of the UN are only obliged to carry out Council decisions where they are in accordance with the Charter.²⁷⁸ One problem here is that, as discussed in the last chapter, the Charter’s principles and purposes are ambiguous.²⁷⁹ For instance, article 1(1) of the Charter could be read as containing conflicting imperatives both for effective measures to maintain international peace and security and ones “in conformity with the principles of justice and international law”.²⁸⁰

Against the view that the SC is constrained by Charter purposes and principles, Wood notes the controversy that surrounds the phrase “in accordance with the present Charter” in article 25 according to which member states agree to carry out SC decisions.²⁸¹ He says that to leave it to the individual states to decide whether an SC decision was in accordance with the Charter would “place the Charter system...at the

²⁷⁸ Article 25 UN: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

²⁷⁹ Chapter II, at p. 89.

²⁸⁰ Koskeniemi makes the point that the principles are “many, ambiguous and conflicting” in “The Place of Law in Collective Security”, p. 483.

²⁸¹ Wood, Second Lecture, para. 18.

mercy of individual states” and render it toothless like the League of Nations.²⁸² Wood’s own position is that the phrase is addressed to states’ actions and not those of the Council.²⁸³ It is suggested that such an interpretation of SC discretion tends to render any limit on SC discretion to evaluate self-defence claims nugatory.

Similarly, Franck suggests that the SC is bound by a duty to act *bona fides* when using its Chapter VII powers.²⁸⁴ It is not entirely clear what acting *bona fides* implies in practice.²⁸⁵ For instance, would a *bona fides* finding that a claim to have used force in self-defence was invalid involve detailed consideration of all the available evidence? Or would it merely involve not allowing deciding according to inter-state alliances and enmities? In addition, while the concept is said to have fallen out of favour recently,²⁸⁶ it has been asserted that the SC must at least be limited by peremptory norms of *ius cogens*.²⁸⁷ This question came before the ICJ in relation to a self-defence claim by Bosnia and Herzegovina and its claim that resolution 713 (1993) deprived it of its inherent right of self-defence.²⁸⁸ However the application and content of *ius cogens* norms is not clear.²⁸⁹ This indeterminacy has practical

²⁸² *Ibid.*

²⁸³ *Ibid.*, para. 19.

²⁸⁴ Franck, *Fairness in International Law and Institutions*, p. 220. See also E. Davidsson, “The UN Security Council’s Obligations of Good Faith” 15 *Flo. JIL* (2003) 541.

²⁸⁵ Wood, *Second Lecture*, para 33; Cryer, “The Security Council and Article 39”, p. 169.

²⁸⁶ A.L. Paulus, “Jus Cogens in a Time of Hegemony and Fragmentation - An Attempt at a Re-Appraisal” 4(3) *Nor. JIL* (2005) 297, p. 297.

²⁸⁷ Judge Elihu Lauterpacht said that a norm of *ius cogens* forms a barrier against SC obligations in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Provisional Measures ICJ Reports (Order of 13/09/1993) Separate Opinion of Judge Lauterpacht para. 100*. Wood says that this is widely accepted, even “taken for granted” though there remain “dissenting voices”. Wood, *Second Lecture*, paras. 38 and 37.

²⁸⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ order 13/09/1993*.

²⁸⁹ UN Doc. A/CN.4/L.682 “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi; 13 April 2006 para 363.

effects. Judge Simma pointed out that were the SC to be subject only to the “rather indeterminate standard of jus cogens”, the standard may act as a “figleaf”.²⁹⁰

Another potential limit on the Council is said to be its need to create a general consensus behind its proposed action. It is said that the SC discretion in the use of its Chapter VII powers is tempered because “if an interpretation by the Council was not generally acceptable, it would be no more binding on members than a comparable interpretation by any other organ”.²⁹¹ However it is submitted that in some cases general acceptability may not save so-called “pariah states”.²⁹² For instance, it is suggested that if Iran or North Korea were to anticipate a perceived attack from the US, this would be received in a very different manner to any anticipatory action taken by the US against these states. In short, it is suggested that ‘general acceptability’ may simply be a conduit for widely shared prejudices that have not been appropriately examined.

J. Judicial Review.

Nevertheless, in some cases where the SC seems to have been used as a tool for national policy, there has been a widespread feeling that it has over-stepped the mark. Perhaps the most controversial example of the use of the SC as a tool for national policy was its use by Britain, France and the US to force Libya to extradite the men suspected of perpetrating the Lockerbie bombing of December 1988. In response, Libya applied to the ICJ for provisional measures to prevent the P3 from “taking any action against Libya calculated to coerce or compel Libya to surrender the accused

²⁹⁰ Simma, “Universality of International Law”, p. 293.

²⁹¹ Kirgis, “The Security Council’s First Fifty Years”, p. 527.

²⁹² See Chapter IV, at pp. 237-246.

individuals to any jurisdiction outside of Libya”.²⁹³ To the extent that such action included action taken through the SC, Libya’s request – had it been granted – would have compelled the Court to subject an SC resolution to judicial review. While the Court did not reject this possibility outright, it nevertheless declined to do so in this case.

More recently, the Kadi case has raised the spectre of judicial review once again. In this case a Saudi, Yassin Abdullah Kadi, was placed on one of the SC’s sanctions lists which obliged UN members to freeze any funds or financial resources controlled by him directly or indirectly. In order to implement this, the EC passed a Council regulation which Mr Kadi sought to be annulled by the Court of First Instance (CFI) on the grounds that it violated inter alia his right to a fair hearing and his right to property. The CFI refused to annul the regulation and Kadi appealed to the ECJ. In 2008 the Advocate General, Miguel Poiares Maduro, revived the judicial review of SC resolutions debate by suggesting that the ECJ should annul the regulation. He suggested that since there is no effective judicial review within the UN, the EC could not avoid undertaking review of SC resolutions itself.²⁹⁴ The ECJ itself was more equivocal. It said that “it is not...for the Community judicature...to review the lawfulness of such a resolution adopted by an international body” but that this did not mean it could not review the EC level implementing measures.²⁹⁵

²⁹³ Lockerbie, Provisional Measures, p. 3, para. 11.

²⁹⁴ Opinion of Advocate General Poiares Maduro delivered on 16 January 2008, Case C-402/05 P: Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, para. 38.

²⁹⁵ Case C-402/05 P: Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Judgment of 9 March 2009, paras 287 and 288.

Many writers think that direct judicial review is unlikely because courts tend to defer to the executive.²⁹⁶ The possibility of a less direct form of judicial review of SC resolutions has also been discussed. For instance, Cassese has suggested there might be scope for the “incidental” judicial review of resolutions.²⁹⁷ Another possibility is the “expressive mode” of review. Alvarez explains that this means that the Court keeps up an “ongoing dialogue” with the Council. This means that the ICJ could, without actually finding that a Chapter VII resolution was ultra vires, suggest that the Council was not acting according to the rule of law.²⁹⁸ It is submitted that this sort of weak judicial review may not be able to prevent Council members making arguments that the overriding purpose of the Charter is the maintenance of international peace and security and that to the extent that judicial review may render the Council’s ability to carry out its article 24(1) responsibility, it is incompatible with the Charter scheme.²⁹⁹

This judicial review discourse is interesting because it demonstrates the desire of many international lawyers to counter the SC’s concrete efficacy with normative legitimacy.³⁰⁰ If SC resolutions could be subject to judicial review by the ICJ, for instance, it would mean that SC practice would have to more closely conform to a due process model. This would particularly be the case where a resolution resulted in the imposition of sanctions or other measures that are capable of affecting individuals within a member state as well as the government of that state. It is suggested that such

²⁹⁶ Lowe, et al, “Introduction”, p. 42.

²⁹⁷ Prosecutor v. Tadić Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-AR72 (02/10/1995) para 20.

²⁹⁸ Alvarez, “Judging the Security Council”, pp. 28-36.

²⁹⁹ See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Preliminary Objections of the United Kingdom, Vol. I (June 1995), para. 4.17.

³⁰⁰ Alvarez, “Judging the Security Council”, p. 3.

a move may simply render the SC useless in the eyes of the member states who wished to use it to further their own policies.

E.H. Carr said that “as soon as the attempt is made to apply...supposedly abstract principles to a concrete political situation, they are revealed as the transparent disguises of selfish vested interests”.³⁰¹ It is suggested that this is, perhaps, to claim too much. The important question is whether such exploitation of legal rules can be scrutinised and challenged. It is submitted that the main evaluator of self-defence claims suggested by international lawyers, the SC, does not usually scrutinise or challenge self-defence claims; particularly when they are made by a member of the P5.

CONCLUSION.

Franck has stated that article 51 is “vulnerable to self-serving autointerpretation” in part because there is no “credible legitimating institutional process to patrol its limits”.³⁰² Many international lawyers consider that the SC has the ultimate authority to interpret self-defence claims.³⁰³ The practice of the Council itself has been explored. Despite the temptation for international lawyers to take advantage of the concentration of power within the SC, it has been said that the Council cannot be seen as an unproblematic evaluator of self-defence claims. This is because its pronouncements concerning the use of force are the product of heavily self-interested

³⁰¹ E.H. Carr, *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (1981) The MacMillan Press, London, p. 87-8.

³⁰² Franck, *Fairness in International Law and Institutions* p. 293.

³⁰³ See e.g. Dinstein, *War, Aggression and Self-Defence*, p. 213.

and opaque processes and because in very few cases is it possible to identify an unambiguous rejection of a self-defence claim.

Alvarez has elegantly pointed out the tension between the ‘realist’ and ‘legalist’ approaches to the matter of the place of law in collective security. He wrote that while the former sees the system as a purposive arrangement, structured with the SC at its apex, the latter view the collective security system as constitutional and see the rule of law as a limit of the Council’s power.³⁰⁴ In practical terms, however, it seems that the authority of the Council to have the last word on a self-defence claim is absolute. In large part this is because of its permanent members. Part of the price paid for their participation in the UN system was their dominance in the SC.³⁰⁵

It has been rightly said that “there has been a tendency to invest in the UN Security Council hopes for collective security that exceed what can be prudently based on the Charter and on the Council’s record”.³⁰⁶ It is suggested that such a tendency, while motivated by good reasons, may end up making the system more vulnerable to exploitation and not less. It has been said that this “at its worst masks...the extent to which particular actors pursue their own agenda under the banner of collective action”.³⁰⁷ This is because the Council is said to have reflected “the special interests and factual predominance of the United States and its Western allies within the Council”.³⁰⁸

³⁰⁴ Alvarez, “Judging the Security Council”, pp. 2-3.

³⁰⁵ Lowe, et al, “Introduction”, p. 12.

³⁰⁶ *Ibid.*, p. 14.

³⁰⁷ Caron, “The Legitimacy of the Collective Authority of the Security Council”, p. 560.

³⁰⁸ Koskeniemi, “The Place of Law in Collective Security”, p. 460-1.

Koskenniemi has written that “[l]aw’s contribution to security is not in the substantive responses it gives, but in the process of justification that it imports into institutional policy and in its assumption of responsibility for the policies chosen”.³⁰⁹ It is to this contribution that we now turn. The following two chapters will sketch out a role for law in the process of evaluation of self-defence claims. The first chapter will introduce the idea of intersubjectivity. It will be argued that realist criticisms of international law can be answered more firmly if the claim to the objectivity of legal norms and evaluations is dropped. The idea of the criticisable validity claim will also be set out. This entails the idea that if a state makes a self-defence claim, it must be prepared to vindicate the claim and others must be prepared to demand that it does. The final chapter will be an exploration of the place of facts and evidence in the vindication of self-defence claims. The idea is that there is insufficient normative commonality in disputes over self-defence to lead to intersubjective understanding about how the rules should apply. Instead, it is suggested that it may be possible for intersubjective understanding to be reached about what happened in a given case.

³⁰⁹ Ibid., p. 478.

Chapter IV

Intersubjectivity.

INTRODUCTION.

In this chapter and the one that follows it, a change of pace and direction will be made in pursuing the aim of this thesis; to seek a means of identifying valid self-defence claims. It has been suggested that international lawyers' responses to realist criticisms that the UN collective security system is either esoteric or exploitable have not managed to escape both poles simultaneously. It was suggested that where it was argued that international law would have to adapt to changing social circumstances and technological developments, their responses tended to render the right of self-defence so flexible that it could prove difficult to show that a state had acted outside the right. On the other hand, where the imperative to adapt was brushed aside, or where the process of adaptation was conditioned with secondary rules and quasi-judicative institutions, they remained open to the accusation that the law was esoteric and overly rigid.

The following two chapters will develop a new response to realist criticisms based on elements of Jürgen Habermas' Theory of Communicative Action (TCA). The idea is to develop the rudiments of a system of evaluation that is both sensitive to changes in the strategic environment and difficult to exploit. This will be done by decoupling the validity of a given self-defence claim from adherence to certain rules and re-coupling it to the claimant state's ability to give good reasons for its use of force. The concept of a good reason demands intersubjective recognition of what is or is not a good reason. It is suggested that, owing to the contested nature of the norms of the collective security system, the best way to do this is to look to 'the facts' of a given situation.

At present, statements that force has been used are not always taken as claims and are sometimes viewed as assertions.¹ Statements that force has been used in self-defence would be taken as criticizable validity claims. This means that they would be contestable; actors making such statements would be claimants who must look to their audience for vindication. It will be argued that the G.W. Bush Administration doctrine of pre-emption is fundamentally incompatible with the UN collective security system because of its designation of “outlaw states”,² the amorphousness of the threat that is pre-empted, the claim that the individual nation has the ultimate right to decide and the lack of transparency in the decision-making process. These factors reduce decision-making about the validity of a self-defence claim to the policies of elite actors capable of enforcing their will. This is for two reasons. The first reason, and a potential remedy for it, will be discussed in this chapter and the second in the next chapter.

The first reason that the doctrine of pre-emption is not commensurate with the collective security system is that statements that armed force has been used in self-defence are viewed as decisions at the national level and not as claims at the international level. This tends to mean that any process of evaluation at the international level can simply be ignored by a state powerful or stubborn enough to do so. The problem is located in the attitude of certain states to self-defence. It is seen as a mode of self-help, a natural right of self protection that cannot be taken away by law

¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Merits, ICJ Reports, 1986, para. 235 suggesting that submitting a report is “indicative of the view of that State”.

² G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004) Cambridge University Press, p. xi.

and operates outside the collective security system.³ The role of the collective security system is simply to acknowledge the right of states to use force in this way. It will be suggested that a potential solution to this problem lies in the attitudes to communication of the actors in the collective security system. Habermas explained that “[c]oming to an understanding means that the participants in communication reach an agreement concerning the validity of an utterance; agreement is the intersubjective recognition of the validity claim the speaker raises for it”.⁴ In consequence the presumption will be that the claimant state could be obliged to vindicate that claim by responding to criticisms levelled at it from other actors in the system.

The second reason concerns evidence. This has two major elements. The first is that the threats that are pre-empted are probabilistic and not material; evidencing them is a matter of intelligence estimates and inference. The second is that the nature of the threat, rogue states and their terrorist clients armed with WMD,⁵ is said to require intelligence precautions. This makes widespread intelligence sharing extremely unlikely and, since little direct evidence of probabilistic threats is in the public domain, renders any evaluation of pre-emption claims on the facts of each case as it arises highly unlikely. Here, the solution is simply to deny valid self-defence to claims that cannot be vindicated through evidence. This would act as a line-drawing

³ See Chapter I, at pp. 28-29.

⁴ J. Habermas, *The Theory of Communicative Action, Vol. II: Lifeworld and System: A Critique of Functionalist Reason* T McCarthy (trans) (1987) Polity Press, Cambridge, p. 120. (Hereinafter, ‘Habermas, *The Theory of Communicative Action, Vol. II*’.)

⁵ National Security Strategy of the United States of America (2002) Available at: <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>, p. 13. (Hereinafter, ‘US National Security Strategy (2002)’.)

exercise that, hopefully, would distinguish instances of acceptable flexibility from instances of exploitation on a case-by-case basis.⁶

It should be underscored that what follows is not a description of what already occurs in international discourses about self-defence. In effect, this part of the thesis is largely prescriptive. The aim is to lay down some minimal requirements for distinguishing valid from invalid claims to have used force in self-defence. In order to prevent the claims made being completely utopian, certain concessions to possibility will have to be made. However, this will be done bearing in mind the danger of exploitation that the collective security system faces from states that want to use it as a means of legitimating their actions and policies.

One concession that will not be made, however, is that the attitudes of states must change. It is submitted that many international lawyers take for-granted self-interested and strategic behaviour by states, perhaps because of the doctrine of sovereignty.⁷ Wendt has pointed out that the conception of the individual as a rationally self-interested actor is used by liberal scholars as well as realists.⁸ The central claim of this thesis is that states have to take responsibility for the process of claim and evaluation, rather than have it imposed on them by international lawyers as a notional duty. It might be that the responsibility to account for self-defence, and to evaluate such accounts, is the price states pay for tapping into the legitimacy of UN collective security processes.⁹

⁶ See Chapter V, at pp. 316.

⁷ See Chapter I, at p. 28.

⁸A. Wendt, "Collective Identity Formation and the International State" 88(2) *Am. Pol. Sci. Rev.* (1994) 384, p. 384. (Hereinafter, 'Wendt, "Collective Identity Formation"'.)

⁹ This might be seen as part of what Philip Allott called "re-imagining". Acknowledging that his theory had been attacked for being insufficiently predictive, he pointed out that the business of imagining the

A. From Objectivity to Intersubjectivity.

The force of this challenge to realist criticisms flows from intersubjective understanding generated among collective evaluators of the self-defence claim. The idea of intersubjectivity will replace objectivity as a counter to realist rule-sceptic arguments about radical subjectivity. It is the intersubjective understanding of a claim that will eventually determine whether it was or was not valid. Intersubjectivity occupies the ground between objectivity and subjectivity. If objectivity posits that things existing outside human perception do so independently of that perception, then subjectivity posits that nothing exists without the human subject who has autonomous control over his perception of the world. Intersubjectivity rejects the former position and modifies the latter. The idea is that the external world is constructed through the interaction of speaking and acting subjects. Meaning is created through communication about the world, it is not a given to be discovered by lone interpreters. To relate this to the evaluation of self-defence claims, we might say that a self-defence claim would be valid in the context of a specific discourse, if the evaluating audience and claimant could construct an understanding of the force used by the claimant to that effect.

International lawyers who sought to rely on the objectivity of legal norms and institutions as the location of the force of the law tended to run into two realist criticisms. One criticism was that the objective can be seen as a sort of empty

future can be a programme of practical action; “theory itself is a form of practice”. P. Allott, *Eunomia: A New Order for a New World*, (2004) Oxford University Press, p. xxvii.

structure that can disguise and legitimize the particularity of its contents.¹⁰ Koskenniemi has argued that the political contest over legal words manifests itself in an attempt to make the particular appear to be universal.¹¹ Using the work of Laclau,¹² he has argued that a fulfilled universal is hegemonic.¹³ In other words, the objectivity of the law can disguise the subjectivity of interpretations of legal norms. This was a particular problem for self-defence because it is, by its nature, applied by subjects of the law rather than officials of the legal system. Another criticism was that the objective was simply too uncompromising a prescription. It was argued that, to the extent that the objectivity of a norm was expressed through its constancy, it would prove inflexible and therefore run the risk of desuetude and esotericism.¹⁴

It is submitted that intersubjectively reached evaluations are opposable to subjective national decisions to use force in self-defence. The authority of the evaluation will stem both from the mutual identification of the evaluator and the claimant (it may be that today's evaluator is tomorrow's claimant),¹⁵ and from the credentials of the process of evaluation itself.¹⁶ Evaluation is a critical process of argumentation. Evaluators would be expected, on the one hand, to subject claims to thorough scrutiny and, on the other hand, to accept claims where they have been vindicated with good reasons. In turn, the acceptability of a given evaluation depends on its scrutability. In other words, evaluations of self-defence claims themselves raise criticizable validity claims that are guaranteed by reasons.

¹⁰ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002) Cambridge University Press, p. 500. (Hereinafter, 'Koskenniemi, *The Gentle Civilizer*'.)

¹¹ M. Koskenniemi, "International Law in Europe: Between Tradition and Renewal" 16(1) *EJIL* (2005) 113 p. 115. (Hereinafter, 'Koskenniemi, "Between Tradition and Renewal"'.)

¹² E. Laclau, "Subject of Politics, Politics of the Subject" in *Emancipation(s)* (1996) London, Verso, p. 53. (Hereinafter, 'Laclau, "Subject of Politics, Politics of the Subject"'.)

¹³; Koskenniemi, "Between Tradition and Renewal", p. 115.

¹⁴ See Chapter I, at p. 51.

¹⁵ *Infra*, at p. 207.

¹⁶ *Infra*, at p. 207-208.

If evaluations of self-defence claims are to be scrutinised, the factors on which the decision was made would have to be available; the claimant would have to be, in practice, willing to provide evaluators with the reasons for its decision. Furthermore, the process of the evaluation of the claim should be publicised. This is because the evaluation of the self-defence claim would be capable of multiple interpretations. The production of the grounds for, and processes of, evaluation would limit these interpretative possibilities. In this way, the process of evaluating a claim could be seen as the search for a better argument. As Habermas has stated “[t]he validity claim of norms is grounded...in the rationally motivated recognition of norms which may be questioned at any time”.¹⁷

The strength of intersubjective evaluations of self-defence claims lies in “the forceless force of plausible reasons”.¹⁸ While what is and what is not a better argument is not a given, it is submitted that by incorporating certain features of legal processes such as rigour, transparency, consistency and accountability into the process of evaluation, it stands a better chance of countering subjective claims. These processes, it will be seen in the next chapter, should relate to claims of fact. It is suggested that evaluating the validity of self-defence claims without a common conception of the factual situation of a self-defence claim renders case-by-case evaluation impossible. If the collective security system is to benefit from the flexibility of a case-by-case approach without becoming vulnerable to exploitation by dominant states, it will be necessary to ensure that the ‘cases’ under review are substantiated. This is particularly important if it is

¹⁷ J. Habermas, *Legitimation Crisis* (trans. T. McCarthy) (1988) Polity Press, p. 105. (Hereinafter, ‘Habermas, *Legitimation Crisis*’.)

¹⁸ J. Habermas, *Between Facts and Norms* (trans. W. Rheg) (1997) Polity Press, Cambridge, p. 24. (Hereinafter, ‘Habermas, *Between Facts and Norms*’.)

borne in mind that, as Gray wrote, states tend to criticise uses of force in terms of factual criteria such as proportionality rather than doctrinal ones.¹⁹

B. Structure of the Chapter.

The structure of this chapter is as follows: A discussion of some of the elements of Habermas' TCA will lead into consideration about whether intersubjective understanding in the collective security system could be possible as regards purely normative statements. Finally, the argument will be made that the key factor that will enable valid from invalid claims to be distinguished from one another is the identity and attitudes of the participants in discourse. Wendt's constructivist theory of cultures of anarchy will be used to make the point.

It will be argued that key to Habermas' TCA is the idea of being accountable and taking responsibility for one's statements. This requires a willingness to offer reasons for their vindication. Secondly, it is argued that participants in discourses must recognise one another. This is important in order for them to recognise the validity of one another's arguments. It will be argued that the G.W. Bush Administration's recognition of 'rogue states' not only objectified those states, but also presupposed the question of whether a given action was aggressive.

This chapter is intended to set up the theoretical framework for a more detailed discussion of the appraisal of facts in self-defence discourses in the next chapter. For

¹⁹ C. Gray, *International Law and the Use of Force*, (2004) Oxford University Press, p. 99. (Hereinafter, 'Gray, *International Law and the Use of Force*'.)

this reason, we will remain at the level of theory except where a practical example has illustrative value.

PART ONE: INTERSUBJECTIVE UNDERSTANDING.

In this thesis, intersubjective understanding refers to the understandings created about facts, norms and other expressible matters between subjects participating in discourses. Understandings about self-defence between states and other international actors are mediated by language.²⁰ Accordingly, Koskeniemi has accepted the view of language as “an intersubjective practice”.²¹ Discourse participants understand an utterance, something that is said, when they can accept or reject it for reasons. An utterance is criticizable when reasons can be given for it.²² In Habermas’ conception of understanding-creation, therefore, the rationality of an utterance is tied to its criticizability rather than to its intrinsic qualities such as truth or sincerity.

Accordingly, in this thesis, it will be held that a self-defence claim is valid if it can be accepted on the basis of reasons given to redeem the claim. The intersubjective element conditions validity not on objective correctness nor on subjective coercion, but on the mutual understanding of participants in an evaluation discourse. If claims in the collective security system are to avoid being exploitable, members of the

²⁰ Habermas, *Legitimation Crisis*, p. 10.

²¹ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (2005) Cambridge University Press, p. 597. (Hereinafter, ‘Koskeniemi, From Apology’.)

²² Habermas, *Between Facts and Norms*, p. 35.

evaluation discourse must adopt attitudes open to understanding wherein they base their acceptance or rejection of a claim on the better argument.²³

Koskenniemi famously said that international law was “singularly useless as a means of justifying or criticising behaviour”.²⁴ His reasoning was that for every argument from normativity, there could be a counter-argument from concreteness and vice versa.²⁵ In the previous three chapters we have encountered various examples of how a claim to objectivity by those attempting to counter realist criticisms of the collective security system has exacerbated the esotericism or exploitation of the approach. Intersubjectivity attempts to reconcile concreteness and normativity to the extent that the latter is determined by processes of discourse that are done by participants. The concreteness lies in the doing of communication that creates a normative result; the validation or rejection of a self-defence claim.

To the extent that the recognition of validity claims within the collective security system is an intersubjective process, claimants can be expected to take responsibility for their claims and be prepared to bear them out. It is submitted that one of the problems with attempts to answer realist criticisms of the collective security system’s ineffectiveness was that many of them took the strategic nature of states as an objective fact. It is assumed here that there is no necessary reason for states to act strategically; in principle, they are capable of acting communicatively.²⁶ It will be argued that the validation of a self-defence claim requires such a communicative

²³ J. Habermas, *The Theory of Communicative Action, Vol. I: Reason and the Rationalisation of Society* T McCarthy (trans) (1984) Polity Press, Cambridge, p. 36. (Hereinafter, ‘Habermas, *The Theory of Communicative Action Vol I*’.)

²⁴ Koskenniemi, *From Apology*, p. 67.

²⁵ See Introduction, at p. 3.

²⁶ *Infra*, at pp. 233-237.

attitude if the national decision is not to be merely imposed at the international level. The attitudes and identities of actors in the collective security system will be more thoroughly dealt with in the second part of the chapter.

This conception of law in the collective security system is, therefore, one of process and not doctrine. Koskeniemi's criticism of international law demands a view of legal argumentation as a process of unengaged claim and counter-claim. While this may succeed as a critique of those who profess that the legal doctrine is coherent and complete,²⁷ it does not provide a satisfactory critique of the use of legal language.²⁸ Contrariwise, communicative engagement is at the heart of intersubjective understanding. While counter-claims and alternative interpretations will be available to participants in discourses, they will be subjected to criticism and not left hanging in the ether.

A. Criticizable Validity Claims.

A criticizable validity claim is "equivalent to the assertion that the conditions for validity of an utterance are fulfilled".²⁹ There is an assumption in the TCA that any proposition raised in discourse is raised as a criticizable validity claim.³⁰ Habermas asserted that "anyone acting communicatively must, in performing any speech act, raise universal validity claims and suppose that they can be vindicated" because if "she wants to participate in a process of reaching understanding, she cannot avoid

²⁷ Koskeniemi, *From Apology*, p. 62.

²⁸ This is something Koskeniemi recognises. M. Koskeniemi, "The Politics of International Law – 20 Years Later" 20(1) *EJIL* (2009) 7, p. 9.

²⁹ Habermas, *The Theory of Communicative Action Vol I*, p. 38, italics in the original.

³⁰ J. Habermas, "Actions, Speech Acts, Linguistically Mediated Interactions, and the Lifeworld" in *On the Pragmatics of Communication* (M. Cooke, ed.) (2002) Polity Press, Cambridge, p. 236. (Hereinafter, Habermas, "Actions, Speech Acts".)

raising [certain] validity claims”.³¹ This means that understandings are precarious: “[T]he risk of disagreement [is] inherent in linguistic communication”.³² An understanding cannot be ‘banked’, as it were; if it were to be raised at another time, it would be raised as a criticizable validity claim.

Statements that imply truth claims are “discursively redeemable and fundamentally criticizable claims”.³³ In short this implies that the speaker is not imposing his interpretation of the world on his audience but opening it to discussion. Habermas explained that:

[c]orresponding to the openness of rational expressions to being explained, there is, on the side of persons who behave rationally, a willingness to expose themselves to criticism and, if necessary, participate properly in argumentation.³⁴

A criticizable validity claim is a sort of warranty for the validity of the assertion made.³⁵ It is a guarantee to produce reasons, if need be: “A speaker, with a validity claim, appeals to a reservoir of potential reasons that he could produce in support of the claim”.³⁶

An assertion can be criticised on several grounds. Habermas wrote that “[e]very speech act as a whole can always be criticized as invalid from three points of view: as

³¹ Habermas, “What Is Universal Pragmatics? (1976)”, p. 22.

³² Habermas, “Actions, Speech Acts”, p. 237.

³³ Habermas, *Legitimation Crisis*, p. 9.

³⁴ Habermas, *The Theory of Communicative Action Vol I*, p. 18.

³⁵ *Ibid.*, p. 302.

³⁶ Habermas, “Actions, Speech Acts”, p. 233.

untrue with respect to the statement made...; as incorrect with respect to established normative contexts...; or as lacking in truthfulness with respect to the speaker's intention".³⁷ However, the strength of the criticism is likely to be affected by the reasons that the state making the criticism has to support it. For instance, a criticism that a given state is untruthful may be difficult to prove *eo ipse*, while a criticism that the statement it made is untrue may be capable of being demonstrated.

If national decisions are not to become *de facto* international decisions, there must be a process of evaluation at the international level by which a national claim by an individual state becomes subject to an international decision taken collectively. However, in order for that process of evaluation to be meaningful the evaluators must be in a position to (in)validate the claim by the state. This requires input from the claimant state which in hard cases (and most self-defence cases will be fiercely contested) cannot rely on the self evident nature of the existence of a valid claim. The claimant state should therefore be taken to have raised a "criticizable validity claim" in its assertion that self-defence characterises its action. The onus is then on that state to provide reasons to bear out its claim. If the right of self-defence is a legal right, it is submitted that this can hardly be seen as an unreasonable request, particularly where the claim is challenged.

Validity claims are redeemed through discourse.³⁸ They must be "grounded". In other words, there must be some common ground between the speaker and the hearer of the claim in which they can share reasons for the validity of the claim. For instance, "grounding" descriptive statements means establishing the existence of states of

³⁷ Habermas, "Actions, Speech Acts", p. 231.

³⁸ Habermas, *The Theory of Communicative Action Vol I*, p. 10.

affairs; ‘grounding’ normative statements, establishing the acceptability of actions or norms of action”.³⁹ A corollary of the raising of the validity claim and the project of critique is that speaker and audience must be capable of being connected in understanding. If the evaluators of a self-defence claim and the claimant do not engage with one another, then the process of evaluation becomes a tick-box exercise that can be exploitable or merely esoteric. Habermas has explained that

[o]bjective agreement about something in the world – i.e. agreement the validity of which is open to question – is dependent on the fact of the creation of an intersubjective relation between the speaker and at least one listener capable of taking a critical position.⁴⁰

Habermas based the rationality of a proposition on its criticizability.⁴¹ To say that a claim is rational is to say that it can be understood. This has two prongs. The first prong is that states must expect that self-defence claims will be subject to evaluation. This involves abandoning the idea that they are fundamentally a sovereign decision.⁴² The second is that questions can be asked and answered about the claim that has been made. The ability to answer a question will depend on the existence of a common perception in many cases. It will be argued that a common perception in the UN collective security system is better based on facts than norms.⁴³

³⁹ Ibid., p. 39.

⁴⁰ J. Habermas, “A Reply” in *Communicative Action: Essays on Jürgen Habermas’ The Theory of Communicative Action*, A. Honneth and H. Joas (eds), J. Gaines and D.L. Jones (trans) (1991) Polity Press, Cambridge, p. 217, emphasis in the original. (Hereinafter, ‘Habermas, “A Reply”’.)

⁴¹ Habermas, *The Theory of Communicative Action Vol I*, p. 10.

⁴² See Chapter I, at pp. 53-57.

⁴³ *Infra*, at pp. 213-220.

B. Discursive Redemption of Claim.

It will not be necessary to undertake a process of discursive redemption of a validity claim in every case. It may be that the claim raised is not problematized by any of the other participants. However, it is unlikely that self-defence claims would prove unproblematic. It is therefore to be assumed that redemption will take place through argumentation. Habermas wrote that “[v]indication means that the proponent....justifies the claim’s worthiness to be recognized and brings about a suprasubjective recognition of its validity”.⁴⁴ The worthiness of the claim will depend on the evaluators’ acceptance of reasons given in support if it.

Rationality comes from the “guarantee that a speaker gives that, if necessary, s/he is in a position to honour with good justifications the claim s/he raises for the validity of that speech act”.⁴⁵ In the next chapter it will be argued that this implies inter alia a willingness to share intelligence.⁴⁶ However, the guarantee that a speaker gives also relates to the possibility that the audience addressed will be able to understand his proposition, that they will share a frame of reference with him. Validity claims are “effected in structures of linguistically produced intersubjectivity”.⁴⁷ This underlines the incompatibility of a communicative approach with the view that a self-defence claim could be seen as a matter solely for the individual state. It is to be emphasised that the validity of a self-defence claim does not lie in the objective correctness of that claim, but in the intersubjective recognition that it is correct. While “sensory experience is related to segments of reality without mediation”, communicative

⁴⁴ Habermas, “What Is Universal Pragmatics?”, p. 25.

⁴⁵ Habermas, “A Reply” p. 223.

⁴⁶ See Chapter V, at pp. 293-30.

⁴⁷ Habermas, *Legitimation Crisis*, p. 10.

experience has only a mediated relation with reality,⁴⁸ and must therefore take account of those involved in the mediation as well as the objects of communication.

The conception of claims of self-defence as criticizable validity claims requires not only that the claimant is willing to give reasons in redemption of his claim, but also, in order for the claim to be found valid or not, that those reasons resonate with the evaluators. Risse points out that “[s]peakers cannot simply repeat their utterances, if they want to convince a sceptical audience”.⁴⁹ These are the two facets of Habermas’ communicative rationality; openness to discourse and ability to give good reasons. The first of these aspects will be discussed in more detail in the second half of this chapter. For now, something will be said as to the second aspect, the ability to give good reasons.

The use of criticizable validity claims implies that when a statement is made, particularly a descriptive one that force has been used in self-defence, others can question it. The probability of a statement’s being questioned will rise according to the degree of controversy that it suggests. Self-defence claims are inherently controversial. This is because, as between states, the use of force is either an act of aggression or one of defence and it has been in response to a (potential) act of aggression or defence. Dinstein has pointed out that in many cases both states claim self-defence.⁵⁰ The use of force in international law is also controversial per se. This

⁴⁸ Habermas, “What Is Universal Pragmatics? (1976)”, p. 29.

⁴⁹ T. Risse, “Let’s Argue!”: Communicative Action in World Politics” 54(1) IO (2000) 1, p. 9. (Hereinafter, ‘Risse, “Let’s Argue!”’.)

⁵⁰ Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (2005) Cambridge University Press, p. 178. (Hereinafter, ‘Dinstein, *War, Aggression and Self-Defence*’.)

is because, contrary to what many realists hold, the absolute prohibition on the use of force is strongly embedded in conceptions of acceptable behaviour.⁵¹

In general, it can be stated with relative confidence that “[a]n appeal to pure particularism is no solution”,⁵² and that “[t]he assertion of one’s particularity requires appeal to something transcending it”.⁵³ In other words, if a state claims self-defence, it cannot justify itself by simply stating that it acted in its own best interests. This remains the case even though the right of self-defence arises as an exception to the general prohibition on the use of force.⁵⁴ The reason is not simply that self-defence arises within the collective security framework, but more particularly that the reasons redeeming self-defence claims must be seen as good reasons in the eyes of the evaluating states. Purely subjective claims of self interest are unlikely to hold much weight with potentially sceptical states. Schachter wrote that in order to be persuasive, governments have to justify their positions according to other than national interests.⁵⁵ It has even been said that “governments are impelled to justify their positions on grounds other than national self-interest”.⁵⁶ Similarly, Risse says that “it is virtually impossible in public debates to make self-serving arguments or try to justify one’s claims on self-interested grounds”.⁵⁷

⁵¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment. ICJ Rep. 1986, p. 14, para. 190.

⁵² E. Laclau, “Universalism, Particularism and the Question of Identity” in *Emancipation(s)* (1996) London, Verso, p. 26.

⁵³ Laclau, “Subject of Politics, Politics of the Subject”, p. 48.

⁵⁴ See Chapter I, at pp. 36.

⁵⁵ O. Schachter, *International Law in Theory and Practice* (1991) Martinus Nijhoff, Dordrecht, p. 35.

⁵⁶ I. Johnstone, “Treaty Interpretation: The Authority of Interpretive Communities” 12(23) *Mich JIL* (1990-1) 371, p. 387, emphasis added. (Hereinafter, ‘Johnstone, “Treaty Interpretation”’.)

⁵⁷ Risse, ““Let’s Argue!””, p. 17 citing Elster, *Deliberative Democracy* (1998) Cambridge University Press.

In order for a state to vindicate a claim, particularly where the claim is controversial, it cannot simply assume that its reasons are obvious. This is particularly the case where the purportedly defensive use of force was not a reaction to a visible armed attack. For instance, when Israel bombed the Osiraq nuclear reactor in 1981,⁵⁸ it claimed that when it acted there was “less than a month to go before Osirak might have become critical”.⁵⁹ Other states remained unconvinced. It was mentioned that the IAEA had condemned the attack, affirming the Non-Proliferation Treaty right to develop nuclear energy for peaceful purposes.⁶⁰ Indeed, the development of nuclear weapons is a good example of threats that may induce uses of pre-emptive force.⁶¹ The problem is that whether nuclear fuel cycle technology will or will not be used for military purposes, and whether those purposes will or will not involve an attack on a specific state, are not necessarily things that can be known. Wittgenstein explains that it is not enough to counter the assertion “it cannot be known” with the counter-assertion “I know it”.⁶² In other words, it is not enough for a claimant state to feel certain that it will fall victim to a nuclear attack.

An important aspect of the redemption of criticizable validity claims is that the parties involved in the justificatory discourse create an understanding about the claim; they do not simply discover the right answer. Similarly, the process of redeeming a criticizable validity claim is not one of simply convincing one’s audience of one’s own position. As Habermas explains; it “is not a question of achieving some prolocutionary effect on the hearer but of reaching rationally motivated understanding

⁵⁸ See Chapter III, at pp. 164-167.

⁵⁹ UN Doc. S/PV.2280 Meeting of the Security Council on 12 June 1981, para. 102.

⁶⁰ *Ibid.*, para. 166.

⁶¹ It is also a relatively topical one; both Iran and North Korea have been labelled threats to international peace and security for their nuclear programmes.

⁶² L. Wittgenstein, *On Certainty* (trans. G.E.M. Anscombe and D. Paul) (1979) Basil Blackwell, Oxford, p. 68e, para. 522. (Hereinafter, ‘Wittgenstein, *On Certainty*’.)

with the hearer, an understanding that comes about on the basis of a criticizable validity claim”.⁶³ This implies a non-strategic engagement between speaker and hearer and will be further discussed in the second half of the present chapter.⁶⁴

It is worth emphasising that it is in the nature of the redemption of criticizable validity claims to be temporarily authoritative: A finding that a self-defence claim is or is not valid does not become objectively correct because it is intersubjectively recognised. Habermas went as far as to say that agreement could be better described as “disagreement that has been avoided”.⁶⁵ The validity of the claim holds while the validity conditions of the claim are intersubjectively recognised. One of the consequences of this is that there would be no direct system of precedent. Habermas has written that “[w]e cannot simply freeze the context in which we here and now consider a certain type of reason to be the best and we cannot exclude a priori that other types of reasons would have a greater validity in other contexts”.⁶⁶

Another consequence of the limited nature of evaluations of self-defence claims is that they do not necessarily hold outside a discourse in terms of space or over time.⁶⁷ As Wittgenstein has stated, “what men consider reasonable or unreasonable alters”.⁶⁸ Further, a claim to have used force in self-defence may be intersubjectively recognised by a discourse, but this does not mean that every other discourse that heard the claim would also have recognised it. The evaluation is only as good as the process

⁶³ Habermas, *The Theory of Communicative Action Vol II*, p. 69.

⁶⁴ *Infra*, at pp. 233-137.

⁶⁵ Habermas, *The Theory of Communicative Action Vol II*, p. 73.

⁶⁶ Habermas, “A Reply”, p. 232.

⁶⁷ Habermas is sometimes thought of as having inherited the Kantian legacy of “universalistic individualism”. A. von Bogdandy and S. Dellavalle, “Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms” 10(1) *GLJ* (2009) 5, p. 5. It is submitted that there is no necessary reason that the instrument of communicative rationality should be tied to a universalization project.

⁶⁸ Wittgenstein, *On Certainty*, p. 43e para. 336.

of criticism that went into scrutinising the self-defence claim. If a state were to bring a claim before an audience it assumed would be predisposed to accept its claim – if the US brought a claim before NATO, for instance – the evaluation of that audience would in turn be open to critique as a criticizable validity claim in another discourse. The evaluators would have to give good reasons for their decision and defend themselves against accusations of structural bias.⁶⁹

In this sense, Habermas says that since justifications are affected by the context and argumentational form, there is no implication of a hierarchy; “no meta-discourses in the sense that a higher discourse is able to prescribe rules for a subordinate discourse”.⁷⁰ He adds that “[a]rgumentational games do not form a hierarchy. Discourses regulate themselves.”⁷¹ In other words, while the validity of propositions within a discourse might depend on the norms that characterise its intersubjective environment – the characteristics that make a certain discourse different from others – the validity of propositions outside it will be contingent on a separate act of recognition. Having said that, a good reason for the validity of a certain proposition that could be given in redemption of a claim may be that a previous discourse had already recognised the validity of the self-defence claim. What is to be stressed is that the characteristic norms of intersubjective understanding are descriptive rather than prescriptive norms.

In order for a reason to resonate as a good reason that can vindicate a self-defence claim, it must relate to some mutually recognised referent. Moreover, participants in a

⁶⁹ See Chapter III, at pp. 134-138

⁷⁰ Habermas, “A Reply” p. 231.

⁷¹ Ibid.

discourse, if they are to understand one another at all, must share certain perceptions about the world and assumptions about one another. There would be no point entering into discourse with one another if it was not expected or hoped that an understanding could be reached and that one's words were not merely falling on deaf ears.

C. The Lifeworld.

In order for actors to vindicate a given assertion, they need to be able to refer to a common measure that is external to any one of them when making such truth claims. In Habermas' TCA this point of commonality is provided by the constantly shifting lifeworld.⁷² The lifeworld "is prior to any possible disagreement and cannot become controversial in the way that intersubjectively shared knowledge can".⁷³ It therefore provides a constant aspect to a given evaluation and can be seen as characterising a particular discourse.

As a transcendental presupposition that is not, by definition, given to empirical observation, the lifeworld is a problematic concept.⁷⁴ However, taken in its thinnest guise, it might be thought that there is little to object to. The lifeworld consists of common understandings about the world. These understandings vary as discourses change the perceptions and understandings of their participants. However, the common understandings need not be substantive ones. For instance, it may be enough that there is an understanding that a question requires a response. Similarly, in order for participants to communicate with one another, they must – in most cases – make the assumption that they are each capable of understanding the other.

⁷² Habermas, *The Theory of Communicative Action*, Vol. II, p. 126.

⁷³ *Ibid.*, p. 131.

⁷⁴ *Ibid.*, p. 126.

The distinguishing factor of the lifeworld is that it is not criticizable. This is because it is not expressed: Participants do not make assertions about lifeworld knowledge.⁷⁵ If they do, it ceases to be taken-for-granted as part of the lifeworld. This is because the lifeworld is “the terrain of the immediately familiar and the unquestionable certain”.⁷⁶ Accordingly, the lifeworld plays an important role in the TCA. The criticizability of validity claims, as has already been noted, threatens to make communication overly dynamic. The lifeworld provides an anchor that stabilises understandings; it prevents everything from slipping into uncertainty.⁷⁷

The stability that the lifeworld provides is not, however, grounded in objectivity. The lifeworld is full of “fallible suppositions of validity”. Habermas does not claim that it is a realm of truth. In fact, it has only “a precarious kind of stability”.⁷⁸ Although lifeworld knowledge is not criticizable, this does not mean that the lifeworld does not change. This flexibility means that new understandings can be made and old ones discarded. Knowledge from the lifeworld can be problematized where a segment of the lifeworld is highlighted in a specific situation. This brings it to the surface, as it were, making the assumptions contained in it vulnerable to criticism. However, the knowledge of the lifeworld “cannot be intentionally brought to consciousness”.⁷⁹

Thus, while it may not seem at first glance that there is a common lifeworld existing between states in collective security discourses, it may be possible to identify one. It is not suggested that states in security discourses share a particularly thick lifeworld.

⁷⁵ Habermas, “Actions, Speech Acts”, p. 243.

⁷⁶ *Ibid.*, p. 237.

⁷⁷ *Ibid.*, p. 245.

⁷⁸ Habermas, *Between Facts and Norms*, p. 36.

⁷⁹ Habermas, “Actions, Speech Acts”, p. 242.

Further, it is submitted that few normative assumptions exist between states. Indeed, it has been the normative aspects of self-defence that have proved the most controversial.⁸⁰ The validity of a self-defence claim could not be ascertained through assumptions about the existence of a right to pre-empt threats, for instance. That is not to say that no normative assumptions exist. For instance, it is submitted that the proposition that the avoidable killing of large numbers of civilians in pursuit of self-defence is assumed to be wrong.⁸¹ Indeed, state actors frequently make assumptions about how one another ought to behave.

Owing to the unreflective nature of lifeworld suppositions, it is not possible to identify them at the level of participant in self-defence discourses. If lifeworld knowledge were to become an object of discourse, it would be criticizable and no longer taken for-granted by state actors. Habermas explains that “in delimiting the domain of relevance for a given situation, the context remains itself withdrawn from thematization within that situation”.⁸² He explains that a move must be made from the theoretical concept of lifeworld to the “everyday concept of lifeworld”.⁸³ This everyday lifeworld “defines the totality of states of affairs that can be reported in true stories”.⁸⁴

When a state makes a complaint that a use of force has been made against it or submits a report of self-defence, it often engages in narration.⁸⁵ The state refers to facts in the world that it assumes are, or can be, shared by other actors. In self-defence

⁸⁰ *Infra*, at pp. 213-220

⁸¹ See e.g. UN Doc. S/PV.5489 Security Council Meeting of 14 July 2006.

⁸² Habermas, *The Theory of Communicative Action*, Vol. II, p. 135.

⁸³ *Ibid.*, italics in original.

⁸⁴ *Ibid.*, p. 136.

⁸⁵ See e.g. Israel’s self-defence report in July 2006 (UN Doc. S/2006/515) and Lebanon’s complaint including specific instances of violence (UN Doc. S/2006/522).

claims, the idea of the common lifeworld refers to the supposition that most actors make that they inhabit the same world, and that things and events in that world can be comprehensibly described and referenced. One means by which this assumption can be seen is in the use of agenda items by the Council and Assembly. For instance, these organs have been referring to “the situation in the middle east” for over forty years.⁸⁶ This has become a narrative that is shared by all states in its form rather than in its substance. The details of the plot are not common among states, but the basic narrative arc and the shared appreciation that there is a narrative is common.

When state actors refer to events or objects in the world, they appear to assume that they can be appreciated by others. Thus, when the US bombed a pharmaceutical factory in Khartoum, Sudan offered to provide “full information” to the Council as regards the ownership of the factory and its output.⁸⁷ Sudan proceeded to submit a significant amount of documentation in support of this claim.⁸⁸ Sudan put its faith in ‘the facts’ to clear its name.⁸⁹ As far as self-defence claims are concerned, this common assumption can be counted as an object of knowledge taken for-granted in the lifeworld. This tends to mean that as between states, common understandings are more likely to consist of knowledge about the external world of facts than normative assumptions. We will now turn to examine this statement.

⁸⁶ UN Doc. S/Res./233 (1967) was the first Security Council resolution to be labelled “the situation in the middle east”. The Assembly followed suit with UN Doc. A/Res./2628 (1970) using the same terminology.

⁸⁷ UN Doc. S/1998/786 Letter Dated 21 August 2008 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, para. 4.

⁸⁸ See e.g. UN Doc. S/1998/793 Letter Dated 23 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council.

⁸⁹ The issue is further discussed in Chapter V, at pp. 305-307.

D. Facts not Norms.

The sorts of criticizable validity claims that have a better chance of garnering communicative understanding about the justification or otherwise of a use of force in self-defence are assertoric statements. These are statements which may be falsified,⁹⁰ and can be usefully compared to normative and expressive statements which require validation on other grounds (such as legitimacy and sincerity, for instance).⁹¹ Assertions describe facts in the ‘objective’ world, normative statements relate to the appropriateness of something in society and expressive statements relate to the subjective internality of the speaker.⁹²

It is submitted that actors hold shared assumptions about the ‘objective world’. The world of facts contains many things that we can take for-granted. For instance, Habermas recalls John Searle’s example of “the cat sat on the mat”. In order to uncover the presuppositions, he asked the reader to suppose this occurred in outer space, thus making the reader aware of his normal supposition that the cat is affected by gravity.⁹³ The nature of the lifeworld means that it is not really possible to articulate unproblematic lifeworld knowledge, even from an observer perspective. However for Habermas, an attempt to document the lifeworld at a specific point in time would not necessarily make sense. What is important is that it is credible that states share assumptions about the world.

⁹⁰ Habermas, *The Theory of Communicative Action*, Vol. II, p. 28.

⁹¹ *Ibid*, p. 63.

⁹² Habermas, *The Theory of Communicative Action*, Vol. I, p. 278.

⁹³ Habermas, “Actions, Speech Acts”, p. 242.

None of this should be taken to suggest that all facts are unproblematic.⁹⁴ In the first place this is because facts are statements about the world. As such, they introduce an element of subjectivity insofar as they imply a single perception of the world. Indeed, this perception may be flawed for reasons of mistake or deceit. As Habermas wrote, “[k]nowledge can be criticised as unreliable”.⁹⁵ However, just because facts are not immutable objective units, does not mean that they cannot play a useful part in grounding discourses about self-defence claims. This is because it will be possible for the participants in a discourse to construct understandings about the world. This will require a rigorous process of testing according to ostensive definitions wherever possible.⁹⁶ In this way, the evaluation of a self-defence claim resembles one of Wittgenstein’s simplified language games in which communication is stripped right back to its basic parts.⁹⁷

Ostensive definition works as a process of testing because it is not dependent on any single subject of discourse. In theory, because it relates to things that are outside individual subjects, all subjects have equal access to it. Habermas explained that “[t]he abstract concept of the world is a necessary condition if communicatively acting subjects are to reach understanding among themselves about what takes place in the world”.⁹⁸ In other words, if participants presume that they can agree about something in the world, there is a certain assumption that they share that world or at least have equal access to it. It is suggested that while this concept may be

⁹⁴ See Chapter V, at pp. 315-322.

⁹⁵ J. Habermas, *The Theory of Communicative Action Vol I*, p. 8.

⁹⁶ See Chapter V, at pp. 323.

⁹⁷ L. Wittgenstein, *Philosophical Investigations*, (trans. G.E.M. Anscombe) 2nd ed. (1963) Basil Blackwell, Oxford, para. 21.

⁹⁸ Habermas, *The Theory of Communicative Action Vol I*, p. 13.

philosophically controversial, for the purposes of communications about the use of force, the existence of an external reality is not really questioned.

In the next chapter this idea of common facts will be further explored, and problematized. It will be argued that while “the notion of anticipatory self-defence [may be] both rational and attractive”, if such claims “distort reality”,⁹⁹ it should be possible to discover and expose them by a process of establishing what happened. This section of the chapter will be confined to some observations about the commonality of norms in the international system.¹⁰⁰ The purpose is to underline that appeals to normative commonality can be extremely hard to bear out in practice. One of the main dangers of the appeal to principles is that they can be exploited because of their indeterminacy.¹⁰¹ Further, the appeal to norms can stymie communicative action rather than further it. This is because certain abstract norms have great rhetorical power and it can be difficult to make arguments against them in particular situations. These two aspects of assertions of common norms will be dealt with in succession.

Koskenniemi asserted that “we assume [principles of justice] to be subjective, indemonstrable and open to misuse”. Indeed, this is precisely why “[w]e have recourse to the law in the control of social behaviour”.¹⁰² The idea is that the institutions of law provide a central channel that filters out merely subjective

⁹⁹ T.M. Franck, *Fairness in International Law and Institutions* (1995) Clarendon Press, Oxford, p. 267. (Hereinafter, ‘Franck, *Fairness in International Law and Institutions*’.)

¹⁰⁰ There have been various studies that have looked at normative commonality and, for reasons of space they cannot be explored thoroughly here. An interesting project is Brunnée and Toope’s interactional theory that melds the insights of constructivism with those of Lon Fuller. J. Brunnée and S. J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” 39(1) *Col. JTL* (2000-1) 19. Ian Johnstone’s ‘interpretive communities’ is discussed *infra*, at pp. 246-252

¹⁰¹ See Chapter V, at pp. 274-279.

¹⁰² M. Koskenniemi, “Hierarchy in International Law: A Sketch” 8(4) *EJIL* (1997) 566 p. 575. (Hereinafter, ‘Koskenniemi, “Hierarchy”’.)

interpretations. Franck's distinction between 'idiot' and 'sophist' rules is instructive: "While an idiot rule more-or-less applies itself, sophist rules require an effective, credible, institutionalised and legitimate interpreter of the rule's meaning in various instances".¹⁰³ While Franck says that Charter articles 2(4) and 51 were supposed to be 'idiot' rules, they do not satisfy the test of common sense and therefore have not been followed.¹⁰⁴ However, if the rules are now seen as having been complicated by practice, they still lack the institutions that might make their application credible.

In fact, Franck was not optimistic about the search for legitimate norms in the area of the use of force. He held that in the area of the use of force neither sophist nor idiot rules will have much sway and that it may be better to resort to politics: "since neither an idiot rule nor a sophist rule seems to be able, so far, to express a clear and credible normative consensus".¹⁰⁵ While Franck's oeuvre displays an unusual sensitivity to the prevailing political conditions of the day, periodically veering from pessimism to optimism, he was, at first, reserved as to the normative consensus over self-defence. Even in the mid-1990s when hopes for a 'New World Order' were at their height, Franck remained cautious.¹⁰⁶ He became more optimistic as to normative consensus after the millennium. In *Recourse to Force*, he suggested that "[i]nternational law, like domestic law, also has begun gingerly to develop ways to bridge the gap between what is requisite in strict legality and what is generally regarded as just and moral".¹⁰⁷ His view remained that a consensus had built up, through practice in UN organs, that

¹⁰³ T.M. Franck, *The Power of Legitimacy Among Nations* (1990) Oxford University Press, p. 81. (Hereinafter, 'Franck, Legitimacy'.)

¹⁰⁴ Franck, *Legitimacy*, p. 76.

¹⁰⁵ Franck, *Legitimacy*, p. 77.

¹⁰⁶ Franck, *Fairness in International Law and Institutions*, p. 293.

¹⁰⁷ T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) Cambridge University Press, p. 180.

anticipating an imminent attack was within the law but the Bush doctrine of pre-emption was not.¹⁰⁸

It is submitted that Franck was attempting to speak law to power and to do so, he opposed the normative force of the law against the subjective hegemony of the US. Franck's later work displays dismay at the turn to realism taken by the G.W. Bush Administration.¹⁰⁹ Franck advocated that international lawyers on the left should stop deconstructing the law and start defending it.¹¹⁰ Deeply concerned with the 'spin' realists were putting on international law's efficacy, Franck was engaged in a project of counter-spin.¹¹¹ It is submitted that the normative consensus behind this project came mostly from like-minded international lawyers rather than from states. States have not taken unambiguous positions on the scope of the right of self-defence.¹¹² While it may be that the absolute prohibition on the use of force does command extremely broad support, the content of self-defence does not. That states go out of their way to avoid discussing doctrine is not reflective of normative consensus. In consequence it is submitted that attempting to find normative consensus over specific uses of force would be unlikely to end in intersubjective agreement without more.

The second problem that was mentioned was that the invocation of norms can prevent communicative action taking place. This is because so-called 'universal' norms of liberal-capitalist states in the West such as liberty, equality and human dignity are

¹⁰⁸ T.M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Disequilibrium" 100(1) *AJIL* (2006) 88, p. 103. (Hereinafter, 'Franck, "The Power of Legitimacy"'.)

¹⁰⁹ See e.g. Franck, "The Power of Legitimacy", p. 89; T.M. Franck, "What Happens Now? The United Nations After Iraq" 97(3) *AJIL* (2003) 607, p. 608.

¹¹⁰ T.M. Franck, "Is Anything 'Left' in International Law" 1 *Unbound* (2005) 59, p. 63. (Hereinafter, 'Franck, "Is Anything 'Left'?''.)

¹¹¹ Franck, "The Power of Legitimacy", p. 93.

¹¹² Gray, *International Law and the Use of Force*, p. 108.

rhetorically hard to dismiss. The Bush doctrine of pre-emption was part of a broader strategy that attempted to secure US safety by exporting its values and systems abroad.¹¹³ One of the key aspirations of the NSS was to “champion human dignity”.¹¹⁴ The idea that liberal values of freedom and equality are universal has been growing since the end of the Cold War,¹¹⁵ and there have been suggestions that this universalism might underpin, for instance, a “responsibility to protect” or a duty of humanitarian intervention.¹¹⁶ While these sorts of values may not seem immediately relevant to the issue of self-defence, they have nevertheless become entwined in self-defence debates. A case in point is that of Operation Enduring Freedom. This action was justified in October 2001 as measures in self-defence “against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan”.¹¹⁷ However, as the operation stretched on, it was re-branded as having humanitarian objectives.¹¹⁸

Another place in which one can find reference to common normative values is in the writings of international lawyers who supported the broad Bush doctrine of pre-emption. For instance, Sofaer lends his support to McDougal’s call for “reasonableness in a specific context”.¹¹⁹ McDougal supported a vision of international law wherein authoritative coercion was distinguished from unlawful coercion on the basis of its relationship to the primary value of World Public Order,

¹¹³ US National Security Strategy (2002), p. 3.

¹¹⁴ *Ibid.*, p. 1.

¹¹⁵ *Ibid.* G.W. Bush, Foreword, p. i.

¹¹⁶ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001. Available at:

<http://www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents>

¹¹⁷ UN Doc. S/2001/946 (2001).

¹¹⁸ S. Chesterman, “Humanitarian Intervention and Afghanistan” in J.M. Welsh (ed.) *Humanitarian Intervention and International Relations* (2006) Oxford University Press, p. 163.

¹¹⁹ Sofaer, “Pre-emption”, p. 213.

human dignity.¹²⁰ This language presages that which appears in the Bush Administration's NSS.

The problem with broad principles like human dignity is that they tend not to offer specific guidance in particular cases. This is because such moral values are amorphous and beg of multiple interpretations.¹²¹ McDougal and Feliciano appeared to be aware of this. They referred to "a world marked by deep, continuing conflict among differing conceptions or systems of WPO",¹²² adding that "universal consensus" on the values of world order seems unlikely except "on the level of rhetoric of a sufficiently high order of generality".¹²³ This did not prevent the authors relying on the "reasonable" conception of the concept as the correct one.¹²⁴ Nevertheless, another problem with such values is that they are often held sacred. Thus, Duxbury wrote that McDougal and Feliciano's position was that the values of human dignity were "beyond ethics" and therefore above discussion.¹²⁵

It is submitted that communicative action over normative values where those values are essentially contested is unlikely. The invocation of norms may exclude processes of coming to an understanding because it may be hard to escape stalemate-situations where one state's interpretation of a norm is levelled at another's with no shared

¹²⁰ M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (1961) New Haven, Yale University Press, p. viii. (Hereinafter, 'McDougal and Feliciano, *Law and Minimum World Public Order*'.)

¹²¹ Koskenniemi, *From Apology*, p. 207.

¹²² McDougal and Feliciano, *Law and Minimum World Public Order*, p. 185-6.

¹²³ *Ibid.*, p. 188.

¹²⁴ M.S. McDougal and F.P. Feliciano, "Legal Regulation of the Resort to International Coercion: Aggression and Self-Defense in Policy Perspective" 68(6) *Yale LJ* (1958-9) 1057, p. 1132. (Hereinafter, 'McDougal and Feliciano, "Legal Regulation of the Resort to International Coercion"'.)

¹²⁵ N. Duxbury, *Patterns of American Jurisprudence* (1995) Clarendon Press, Oxford, p. 178 citing McDougal, "The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System" in H.D. Lasswell and H. Cleveland (eds), *The Ethic of Power: The Interplay of Religion, Philosophy and Politics* (1962).

means of choosing between the two. It is submitted that facts may be able to break deadlocks over the application of norms in particular cases, insofar as the external world can provide support or ‘reasons’ that are acceptable by an audience of evaluators in a way that a subjective interpretation of a norm cannot.

PART TWO: PARTICIPANTS IN THE COLLECTIVE SECURITY SYSTEM.

In this part of the chapter, we are moving from a focus on the objects of discourse, what is discussed, to the subjects of discourse, who it is doing the discussing. Intersubjectivity has effects for both elements: “[C]ommunication about propositional content may take place only with simultaneous metacommunication about interpersonal relations”.¹²⁶ We have already seen that one of the consequences of intersubjectivity is that the objects of discourse are constructed through the communicative action of participants. In this part of the chapter we will discuss implications for the subjects of discourse. Intersubjectivity ties individuals together and renders them dependent on one another, not only for the meaning of objects in the world, but for their own identities. This ties in with Wendt’s view of the construction of enemy-, rival- and friend-relations between states. Two major aspects of the issue will be discussed here.

The first concerns Habermas’ distinction between strategic and communicative action. It is argued that states which are in Hobbesian or Lockean relations with others are unlikely to adopt an attitude open to understanding. In part, this is because such relations tend to involve the idea of the individual actor as an autonomous subject

¹²⁶ Habermas, *Legitimation Crisis*, p. 10.

ving for the upper hand. Where such a society of states contains a state whose ability to impose its will is much stronger than that of most states, as is at present the case with the US, the idea that it will engage communicatively decreases further still. In this regard, the exercise of self-defence can be seen as an instance of unreviewable sovereign power. This is incompatible with the criticizable validity claim, the core of which is that statements made at the international level are subject to critique.

The second aspect concerns the construction of identities through discourse. It is argued that where states construct one another as enemies, they cannot take part in a mutual process of coming to an understanding about a given self-defence claim. This is important because, ideally, both target and claimant states would be involved in the discourse evaluating a self-defence claim. In the first place this is because these actors would be in a good position to provide information about what happened. In the second place this is because the act of evaluating self-defence claims could put the brakes on escalating cycles of violence where neither state accepts that the other has used force lawfully. In this case, the involvement of concerned states may give the evaluation discourse more plausibility with those parties. Another aspect of the construction of identities through discourse and the Hobbesian relation of states is that enemies are aggressors. The roles of aggressor and defender are presupposed where states in a Hobbesian relation meet one another. Again, this means that the parties will not have attitudes open to understanding as regards the attempt to validate the self-defence claim.

Habermas' TCA is not an institutional template: It does not provide structural guarantees that participants will act communicatively rather than strategically and it

does not require a specific institutional framework for implementation. Instead, Habermas' theory sits, perhaps unsteadily, between the ought realm of philosophy and the is realm of sociology.¹²⁷ The TCA posits an ideal-type communicative scenario, the Ideal Speech Situation (ISS), as a model for 'real' discourses. The facets of the ISS are utopian and threaten to render the theory esoteric; participants must come to discourse with attitudes open to understanding. This seems to rule out strategic thinking or goal-oriented behaviour of any kind. It is unlikely that state representatives would come to security discourses in such a frame of mind.

On the other hand, the TCA has sociological elements. It locates meaning-creation, coming to an understanding, in the actions of individuals within social discourses. Habermas has explained that the ISS is not meant as a practicable ambition for a discourse. Instead, it is an ideal that all participants possess when they enter into communicative action.¹²⁸ Habermas explained that communicative reason has only 'weak' normative force; "it is not an immediate source of prescriptions". Weak normativity means that "individuals must commit themselves to pragmatic presuppositions of a counter-factual sort".¹²⁹ This should mean that the theory is immunised against criticisms of utopianism, although in practice Habermas is often criticised for being overly normative.¹³⁰

Communicative action, the process of reaching understanding through criticising validity claims, relies on communicative actors. Claimants must take responsibility for their assertions, and evaluators for their understandings of the claims. In this

¹²⁷ Habermas, *Between Facts and Norms*, p. 7.

¹²⁸ Risse, "Let's Argue!", p. 17.

¹²⁹ Habermas, *Between Facts and Norms*, p. 4.

¹³⁰ See Rorty's account of Postmodernity's "incredulousness towards metanarratives, Rorty, "Habermas and Lyotard on Postmodernity" 4(1) *Praxis International* (1984) 32, p. 34.

sense, ‘responsibility’ means that one “orients one’s actions to criticizable validity claims”.¹³¹ Ultimately, the onus is on the participants in a discourse to adopt communicative rather than strategic attitudes. While institutional structures may improve the chances of actors adopting such attitudes, they cannot force actors to view claims as criticizable or to attempt to redeem them. This relates to the mutually constitutive relationship between the individual and society, the agent and structure, the state and the international organisation. Neither element has complete priority over the other and neither element can completely determine the other. It is therefore submitted that one of the key conditions for identifying valid self-defence claims is that states change their attitudes to processes of justification.

This may seem to render the communicative approach to self-defence justification esoteric. It demands that claimant states take responsibility for their uses of force by attempting to redeem their self-defence claims. Simply expecting states which have used force to explain, in detail, why it was used may seem utopian. However, seen in a broader perspective, it may seem less so. Firstly, when states justify their uses of force as self-defence, whether in letters to the Security Council (SC), in International Court of Justice (ICJ) proceedings or in the SC itself, they are already disposed to give reasons. For instance, when the US-led coalition invaded Afghanistan in October 2001, the US letter to the SC explained that “[i]n 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”.¹³² While this remains, technically, a ‘report’ rather than an attempt at vindication, the willingness of states not merely to explain what they have

¹³¹ Habermas, *The Theory of Communicative Action*, Vol. II, p. 184.

¹³² UN Doc. S/2001/946 (2001).

done but also to explain why suggests that a more thorough process may not be beyond the pale.

A second reason to believe that a communicative approach may be possible is that it is not only the attitude of the claimant state that must change. The attitudes of (potential) evaluating states must also change. If states, as just mentioned, feel the need to flesh out their self-defence reports with reasons, this may be because they think other states require it of them. This would seem commensurate with the exceptional nature of self-defence; the absolute prohibition on the use of force renders armed violence an abnormal act that requires explanation. Habermas suggested that the demand for discursive redemption of validity claims grows as society becomes more integrated.¹³³ To some extent, states already adopt such an attitude. For instance, at a meeting in the Security Council, the US representative invoked article 2(4) to question Russia's intervention in Georgia in 2008.¹³⁴ However, it is often apparent that such challenges are no more than political point-scoring rather than an attempt to open a dialogue about what happened. This is reflected in the words of the Australian representative to the SC who said:

[t]oo often we turn up at open debates and merely read out what our capitals have sent us, rather than responding to the interventions that have gone before and that have been the product of very careful consideration.¹³⁵

¹³³ Habermas, *Legitimation Crisis*, p. 11.

¹³⁴ UN Doc. S/PV.5969 Meeting of the Security Council 28 August 2008, p. 15.

¹³⁵ *Ibid.*, p. 31.

It is submitted, therefore, that states must begin to engage with each other in order to evaluate self-defence claims. This should have a two-fold effect. First, if third states demand that a state which has reported a use of force in self-defence explains itself, then it would seem diplomatically difficult for that state to refuse. Second, if third states take a more engaged attitude in meetings where such claims are discussed, then they may begin to ask questions and demand reasons of the claimant state, rather than simply constituting a sounding-board for self-defence reports. Thus, while it will be argued that justifying self-defence is about responsibility, it should be borne in mind that this responsibility rests on the shoulders of all the members of the collective security system and not just the state that has used force in self-defence.

A. Individual Subjects and Strategic Action.

The move to intersubjectivity can be accommodated in the UN system of collective security. In the view of the present writer, the collective element of the system lies in the appraisal of self-defence claims which, except in cases of collective self-defence, emanate from a single state. Self-defence claims are, at the international level, as at the national level, initially a matter for the individual decision-maker.¹³⁶ However, if the absolute prohibition on the use of force is not to be reduced to vanishing point and self-defence is to remain an exception to and not an alternative to collective action, self-defence claims must subsequently be subject to evaluation.¹³⁷

It has been suggested that one of the features of a realist or instrumental optic on the collective security system is the idea of the individual as an autonomous decision-

¹³⁶ O. Schachter, "Self-Defense and the Rule of Law" 83(2) AJIL (1989) 259, p. 261.

¹³⁷ H. Lauterpacht, *The Function of Law in the International Community* (1966) Archon Books, Connecticut, p. 179. (Hereinafter, 'Lauterpacht, *The Function of Law*'.)

maker whose subjective preferences can be influenced, but whose interests are immutable.¹³⁸ Franck has written that the effect of the radical right on the US administration was to advocate what “amount[ed] to a doctrine of illimitable sovereignty”.¹³⁹ It has also been suggested that, among international lawyers, the traditional conception of sovereign states as the source of the authority of law is capable of being linked in to realist individualism.¹⁴⁰ The idea is that states are like billiard balls whose interactions take place in an “objective world”;¹⁴¹ their interactions do not change the fundamental cores of one another.

This realist conception of the individual as a rationally self-interested strategic actor operating independently of his environment is incompatible with a communicative approach to self-defence claims. Habermas has explained that “[w]hat comes about manifestly through gratification or threat, suggestion or deception, cannot count intersubjectively as an agreement”. In strategic action, the aim is not to reach an understanding about something but to exert a causal influence on the hearer.¹⁴² In contrast to strategic action, those acting communicatively do so through acts of reaching understanding and not egocentric calculations of success.¹⁴³ This also means that factors such as military might or economic prowess do not weigh heavily in processes of communicative action.

¹³⁸ . Wendt, “Anarchy is What States Make of It: The Social; Construction of Power Politics” 46(2) IO (1992) 391, p. 391. (Hereinafter, ‘Wendt, “Anarchy is What States Make of It”’.); See also, Chapter I, at p. 20.

¹³⁹ ‘Franck, “Is Anything ‘Left’?”, p. 61.

¹⁴⁰ Koskenniemi, *From Apology*, p. 224.

¹⁴¹ A. Wendt, *The Social Theory of International Politics*, (1999) Cambridge University Press, p. 258. (Hereinafter, ‘Wendt, *Social Theory*’.)

¹⁴² Habermas, “Actions, Speech Acts”, p. 222.

¹⁴³ Habermas, *The Theory of Communicative Action*, Vol. I, p. 286.

While it has been the case that states have acted strategically, it is not necessarily so. It is submitted that the realist conception of the individual is unconvincing. Individual states, even powerful ones, do not act completely independently of their environments. This is particularly the case where communication is concerned. Communication, unlike other media of interaction, levels the playing field to some extent. If a state wants to make itself understood, it has to rely on the receipt, and therefore the recipient, of its communication. Language is an intersubjective practice. The “structural constraints of an intersubjectively shared language” impel actors “to step out of the egocentricity of a purposive rational orientation to their own respective success and to surrender themselves to the public criteria of communicative rationality”.¹⁴⁴ As has been noted previously, the context in which that receipt takes place influences the meaning that is attributed to it.¹⁴⁵ The context also affects the way that others in the discourse are viewed.

In this section, it will be argued that the ways that states view one another, whether they take a more strategic or communicative attitude, is closely linked to the nature of the ‘society’, or to use Wendt’s term, ‘anarchy’ in which they find themselves. As mentioned previously, Wendt posits three cultures of anarchy: Hobbesian, Lockean and Kantian.¹⁴⁶ He argues that the cultures of anarchy arise from the generalisation of relations of enmity, rivalry or friendship, respectively.¹⁴⁷ These ‘cultures’ are contexts in which communication can take place. They are constituted by the attitudes and actions of acting subjects, and these subjects’ identities and actions are, in turn,

¹⁴⁴ Habermas, “Actions, Speech Acts”, p. 233.

¹⁴⁵ See Chapter II, at p. 75.

¹⁴⁶ See Chapter I, at p. 31-32.

¹⁴⁷ Wendt, *Social Theory*, p. 249.

constituted in the cultures. This is what is meant by the mutually constitutive nature of the individual and his society.

It should be emphasised that the relations constructed between states have implications for the identities of the states in question and not merely their interaction.¹⁴⁸ This is to emphasise that actors within a discourse cannot simply be taken as ‘givens’: They are profoundly influenced by the contexts in which they find themselves and by the attitudes of other actors to them. For instance the “nature of enmity as a position for the Other” has “implications for the posture of the Self”; if state A determines that state B is an enemy, its behaviour to that state will very likely induce state B to construct it as an enemy, this will perpetuate the enmity and risk a spiral of violence.¹⁴⁹ States who conceive of one another as enemies do not enter into communicative action with one another.

Similarly, the Lockean culture of anarchy is not particularly compatible with communicative action. This is because when states conceive of one another as rivals, they imagine a state of competition in which strategic action must be taken in order to ‘win’.¹⁵⁰ Habermas has explained that a strategic attitude oriented to success is inimical to communicative action.¹⁵¹ This is because where a participant in a discourse has a particular goal, the communicative goal of coming to an understanding about something is subordinated. The realist conception of the state as decision-maker is Hobbesian or Lockean; states are seen as rivals or enemies. Carty

¹⁴⁸ Ibid., p. 258.

¹⁴⁹ Ibid., p. 260.

¹⁵⁰ Ibid., p. 279.

¹⁵¹ Habermas, *Between Facts and Norms*, p. 27.

has suggested that Vattel introduced this logic into international law.¹⁵² Thus, many international lawyers buy into the dogmatic realist conception of the sovereign state which interacts cleanly with its environment.¹⁵³

In this regard, the work of Carl Schmitt is pertinent. Schmitt was concerned with the identity of the sovereign and with the exception. The exception, according to Schmitt, could not be codified in a normative order or circumscribed factually and was therefore not amenable to theories of constitutional liberalism. For Schmitt, the exception is “a case of extreme peril, a danger to the existence of the state”.¹⁵⁴ Since the exception cannot be circumscribed by norms, the decision of what constitutes the exception is taken by the sovereign who “stands outside the normally valid legal system, [but] nevertheless belongs to it”.¹⁵⁵ There are two main points as regards self-defence. The first is that, as an exception, its bounds cannot be preordained normatively; instead, it is a decision for the sovereign in each case as it arises. The second is that the sovereign decision occurs outside the collective security system, and yet still belongs to it. It is submitted that the G.W. Bush doctrine of pre-emption displayed these characteristics. While demanding the right to the ultimate decision on the use of force in self-defence, it nevertheless attempted to retain some connection with the existing collective security system.¹⁵⁶ Such a conception of self-defence is incompatible with the notion that all decisions to use self-defence are subject to collective intersubjective evaluation.

¹⁵² A. Carty, *Philosophy of International Law* (2007) Edinburgh University Press, p. 116.

¹⁵³ See Chapter I, at p. 25.

¹⁵⁴ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. G. Schwab) (2005) University of Chicago Press, p. 6. (Hereinafter, ‘Schmitt, *Political Theology*’.)

¹⁵⁵ *Ibid.*, p. 7.

¹⁵⁶ See Introduction, at pp. 4-5.

Schmitt's work has become popular with some international lawyers.¹⁵⁷ Schmitt wrote about international law,¹⁵⁸ and was concerned with the idea of the sovereign.¹⁵⁹ Koskenniemi has written that Schmitt has become popular among European international lawyers trying to understand the current realist US approach to international law.¹⁶⁰ Koskenniemi has also written that Morgenthau and Schmitt engaged in some academic exchanges, and that some of the former's analyses "were strikingly similar to those expressed by Schmitt."¹⁶¹ As Morgenthau was a founding figure in the discipline of International Relations, it would not be surprising to see the remains of Schmitt's influence in realist approaches to international affairs. Indeed, one of the characteristics of Schmitt's exception is that it is an instance of "real life" breaking "through the crust of a mechanism that has become torpid by repetition".¹⁶² Schmitt rejected the ought of normative order for the is of the decision.

Particularly relevant to the discussion in the present thesis is Schmitt's conception of the sovereign and of the political. He wrote that "[t]he political entity presupposes the existence of an enemy". He seemed to have an almost Darwinian approach to international relations, suggesting that states that did not fight would die out.¹⁶³ This seems very close to the Hobbesian idea that the state of nature is a state of war: Hobbes wrote that "during the time men live without a common Power to keep them

¹⁵⁷ The Leiden Journal of International Law recently convened a 'special focus' on the work of Schmitt, 19(1) LJIL (2006) 1, pp. 1-103.

¹⁵⁸ C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europeum*, (G.L. UIman, trans) (2006) Telos Press Publishing.

¹⁵⁹ See in particular, C. Schmitt, *The Concept of the Political* (G. Schwab, trans) (1996) University of Chicago Press. (Hereinafter, 'Schmitt, *The Concept of the Political*'.)

¹⁶⁰ M. Koskenniemi, "International Law as Political Theology: How to Read *Nomos der Erde*?" 11(4) *Constellations* (2004) 492, p. 493. (Hereinafter, 'Koskenniemi, "International Law as Political Theology"')

¹⁶¹ Koskenniemi, *The Gentle Civilizer*, p. 437.

¹⁶² Schmitt, *Political Theology*, p. 15.

¹⁶³ Schmitt, *The Concept of the Political*, p. 53.

all in awe, they are in that condition which is called Warre”.¹⁶⁴ Indeed, Schmitt relied on Hobbes to make his point.¹⁶⁵ The international realm lacks such a common power. This suggests that states are in a constant struggle with one another for ascendancy. It does not suggest an inter-relation of states geared to identifying the better argument.

It has already been mentioned that the lack of a centralised and effective body for maintaining order led some to suggest that states could fill the gap left by the paralysed Security Council using self-defence.¹⁶⁶ It has also been affirmed that the right of self-defence is a sovereign right that is inherent in the concept. Schmitt wrote that “The sovereign is: He who decides on the state of exception”.¹⁶⁷ This can be boiled down to the distinction between friend and enemy: “The specific distinction to which political actions and motives can be reduced is that between friend and enemy”. Schmitt said that it “denotes the utmost degree of intensity of a union or separation, an association or dissociation”.¹⁶⁸ It might thus be thought that the decision to use force in self-defence involves a decision that the target state is an enemy. In Schmitt’s view, this finding is irreversible insofar as it was made by a sovereign. This rules out the possibility of subsequent review of the action.

Indeed, Schmitt has written that a conflict with the enemy “can neither be decided by a previously determined norm nor by the judgement of a disinterested and therefore neutral third party”. This is because only the actual participants are in the right position to “correctly recognise and understand” the situation.¹⁶⁹ Schmitt emphasised

¹⁶⁴ T. Hobbes, *Leviathan* (1985) Penguin, p. 185 P. I, Ch. 13.

¹⁶⁵ Schmitt, *The Concept of the Political*, p. 52.

¹⁶⁶ See Chapter I, at pp. 37.

¹⁶⁷ Schmitt, *Political Theology*, p. 5.

¹⁶⁸ Schmitt, *The Concept of the Political*, p. 26.

¹⁶⁹ *Ibid.*, p. 27.

that “the state of exception is not a decision that can be constrained by juristic norms.”¹⁷⁰ This would be to exclude the collective security system and to effectively over-run it with the exception. It should also be understood that the sovereign is identified as an is rather than an ought in Schmitt’s theory: He who is capable of deciding on the exception. As an exception, the category of self-defence becomes an exploitable category for powerful states who wish to assert their sovereignty separate from the collective security system.

After 11 September 2001, various writers indicated that there had been a change in the US world-view: A “dangerous world requires a hardening of attitudes and more determinate, less conciliatory behavior”.¹⁷¹ This can be seen in the National Security Strategy of 2002. Not only did the US make a sharp division between its enemies and its friends, but it also made it clear that it would not make compromises for the sake of multilateralism: “we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively”.¹⁷² The doctrine of pre-emption appeared to have been formulated on the assumption that the US would ultimately have to look to itself, rather than the rest of the world, for its security. This implies a subjectivization of security interests that denies the existence of a collective security system. It will be argued that collective evaluation of self-defence claims requires an intersubjective openness to other actors in the collective security system.

¹⁷⁰ Schmitt, *Political Theology* p. 14.

¹⁷¹ Koskenniemi, “International Law as Political Theology”, p. 492.

¹⁷² US National Security Strategy (2002), p. 6.

B. Attitude Open to Understanding.

Evaluating self-defence claims demands a certain attitude from discourse participants; an attitude open to understanding. If one has already made up one's mind about a thing, the only point in undertaking a process of criticism is to legitimate that decision. Habermasian communicative action is not, therefore, purely persuasive. When claimants attempt to vindicate their criticizable validity claim by giving reasons, they must adopt an open attitude. This entails not restricting the information that can be brought to the evaluative discourse on the grounds that it is sensitive intelligence material, for instance.¹⁷³

The openness of the attitude of the claimant also extends to its acceptance or rejection of criticisms. If reasons are given for a criticism that a claimant cannot counter and must in good conscience accept, then the claimant should be willing to revise his position as to the validity of his self-defence claim. Risse has explained that “[w]hen actors engage in a truth-seeking discourse, they must be prepared to change their own views of the world, their interests and sometimes even their identities”.¹⁷⁴ This is particularly important where two states are both claiming self-defence.¹⁷⁵ In this case, an effective evaluation discourse may identify the actors with the roles of ‘aggressor’ and ‘defender’, for instance.

The requirement of an attitude open to understanding extends to other actors involved in the evaluation of a self-defence claim. If an evaluator were to come to a discourse

¹⁷³ See Chapter V, at p. 293-301.

¹⁷⁴ Risse, “‘Let's Argue!’”, p. 2.

¹⁷⁵ T.M. Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States” 64 AJIL (1970) 809 p. 811. (Hereinafter, ‘Franck, “Who Killed Article 2(4)?”’.)

with a preconceived notion about the aggressive or defensive character of a given use of force or state, it is unlikely that the evaluator will be receptive to the force of the better argument. Evaluators must be willing to revise their positions in the light of new understandings. In other words, a discourse evaluating a given self-defence claim is not a bargaining process where existing positions are traded off against one another, it is a constructive process where a new understanding is created.

A fair criticism, then, is that communicative understanding between states is a utopian notion.¹⁷⁶ However, the attitude open to understanding is part of a pure form of communication that Habermas calls an ideal speech situation (ISS).¹⁷⁷ Risse has written that the conditions of the ISS are not necessary to achieve understanding.¹⁷⁸ It is not therefore expected that in practice states will enter into communication without a position on whether a self-defence claim was valid or not. Certainly the claimant state and target state are likely to have strongly held contrary positions. Instead, a better way of conceiving the practical form of the open attitude is in contrast to its opposite.

Habermas uses rational-purposive action as a counterpoint to communicative action. Here, “the actor is primarily oriented to achieving an end” and defines success as “the appearance in the world of a desired state”.¹⁷⁹ Strategic action is coercive and the strategic actor whose identity is fixed. An actor’s interests, and therefore behaviour, can be changed using bargaining tools; providing incentives or costs. For Habermas, strategic actors are not ‘rational’ in the sense that they do not respond to reasons given

¹⁷⁶ See Chapter V, at pp. 333-338.

¹⁷⁷ It is merely a “limit case”, Habermas, *The Theory of Communicative Action*, Vol. II, p. 120.

¹⁷⁸ Risse, “‘Let’s Argue!’”, p. 17.

¹⁷⁹ Habermas, *The Theory of Communicative Action*, Vol. I, p. 285.

in discourse; they are “deaf to argument”.¹⁸⁰ Where all participants are deaf, an evaluative discourse becomes a dialogue de sourds; an empty mime. According to Risse, “[i]f everybody in a communicative situation engages in rhetoric – the speaker, the target and the audience – they can argue strategically until they are all blue in the face and still not change anyone’s mind”.¹⁸¹ This is important because, when reasons fall on deaf ears that do not attempt to understand them, the process of giving reasons becomes an empty process that might appear to legitimate a decision.

Risse distinguishes three logics of social interaction: bargaining, rhetorical action and truth seeking arguing.¹⁸² Each mode of behaviour has its own logic. The game theory logic of bargaining, for instance, supposes that rational actors choose the most cost-effective means of reaching a desired goal. In the TCA, people who behave rationally are willing “to expose themselves to criticism and, if necessary, participate properly in argumentation”.¹⁸³ In the first model, reasons for acting are presupposed, exogenous to individual actors. In the second model, reasons for understanding are created through an intersubjective process of argumentation.

In bargaining models, participants can be encouraged to change their positions on a given proposition by the provision of costs and benefits. This means that bargaining chips are introduced from outside the discourse to influence participants. For instance, a permanent member of the SC might offer trade and development incentives to a small non-permanent member. At its most radical, strategic bargaining can be seen as

¹⁸⁰ Ibid., p. 18.

¹⁸¹ Risse, ““Let's Argue!””, p. 8.

¹⁸² Ibid., p. 2.

¹⁸³ Habermas, *The Theory of Communicative Action*, Vol. I, p. 18.

waging of war by other means.¹⁸⁴ Instead, “[p]articipants in argumentation have to presuppose in general that the structure of their communication...excludes all force...except the force of better argument” either internal force within the process of reaching understanding or external to it.¹⁸⁵ Risse asserts that “relationships of power and social hierarchies [must] recede into the background”.¹⁸⁶

The idea that participants have attitudes open to understanding is coextensive with the idea that participants in a discourse are accountable for their utterances. As discussed above,¹⁸⁷ this means that they can redeem their statements by giving reasons if necessary. Where states do not consider one another accountable and refuse to be open to the reasons given by the other, they adopt an objectifying attitude to that other.¹⁸⁸ This means that they do not treat the other as a participant in a discourse, but as a discursive fact in itself – an object of discourse. Wendt has suggested that the question of mutuality is dependent on the identification of the self and the other. He says that this occurs on a continuum; where there is no identification – as in neo-realist theories – the other is completely objectified.¹⁸⁹ To state the obvious, intersubjectivity implies that there is a relation between self and other; the colour of this relation will affect the understandings that are created. At the same time, as Risse has written, the mutual constitutiveness of agents and social structures means that the object of discourse, what is talked about, cannot but compromise the subjects of

¹⁸⁴ M. Foucault, *Society Must Be Defended* (1997) Picador, New York, p. 16.

¹⁸⁵ Habermas, *The Theory of Communicative Action Vol I*, p. 25.

¹⁸⁶ Risse, “‘Let's Argue!’”, p. 7.

¹⁸⁷ *Supra*, at pp. 203-209.

¹⁸⁸ Habermas, *Between Facts and Norms*, p. 20.

¹⁸⁹ Wendt, “Collective Identity Formation”, p. 386.

discourse, those who talk.¹⁹⁰ It is to the identity of the participants in a discourse to which we will now turn.

C. The Identity of Participants.

As suggested above, the idea of coming to an intersubjective understanding is inimical to the individualist perception of states' interactions. This is because states would be expected to participate in evaluation discourses. Further, they will be expected to be ready to vindicate their claims and to change their positions to the extent that rational communication demands it. To the extent that a Lockean culture prevails among states, it is submitted that they will have to change their identities from rivals, or strategic actors, to communicative actors. It will be suggested that this can be achieved if states change their attitudes to one another. Wendt's theory was that cultures of anarchy gain their character from a generalisation of the way that individual states see others. Intersubjective structures determine what sort of anarchy it is: Hobbesian, Lockean or Kantian.¹⁹¹ In this way, the identity of a state is conditioned by others' perceptions of it.

Just as participants in security discourses construct the external world to which their claims pertain by making and understanding assertoric statements about it,¹⁹² so they construct one another. This involves collapsing the distinction between objects and subjects of discourse. The word subject often denotes, grammatically, the actor in a sentence and object denotes the thing with reference to which the subject acts. For instance, in the sentence "the SC is discussing security policy", the SC is the subject

¹⁹⁰ Risse, "Let's Argue!", p. 10.

¹⁹¹ Wendt, "Collective Identity Formation", p. 389.

¹⁹² Chapter V, at pp. 315-322.

of the sentence and security policy the object. If the SC were discussing Iran, Iran would be the object of the sentence. The point is that discourse is full of objectification insofar as to talk about a person, thing or event is to reify it giving it a core meaning or bounding a concept. Communication would be impossible without it.

However it must be stressed that this objectification, if communicative action is to take place, cannot be totalising. The degree of objectification in the system depends on the relationship between self and other; is it one of enemy, rival or friend? “The greater the degree of conflict in a system, the more the states will fear each other and defend egoistic identities”. Wendt says that in a Hobbesian bellum omnium “mutual fear” prevents anything other than negative identification with the other.¹⁹³ A lack of engagement with the other implies that one’s relation with the other will not change: Once designated as such, the other is immutably an enemy. This means that the project of involving the protagonists in a process of intersubjective evaluation of a self-defence claim would not work. States in an enemy-relation are unlikely to be persuaded by the power of better argument. It is submitted that this was the attitude taken on by the US under G.W. Bush in its War on Terror. So-called ‘rogue states’ are the objects of security discourse and not participating subjects in it. Furthermore, it is submitted that the designation of ‘rogue state’ presupposes an enemy-relation that tends to pre-decide questions of role-identity (roles, for instance, such as ‘aggressor’ and ‘defender’).

According to Wendt, identity can be seen as “a property of intentional actors that generates motivational and behavioural dispositions” and is rooted in an actor’s self-

¹⁹³ Wendt, “Collective Identity Formation”, p. 389.

understanding but also dependent on the intersubjective understanding of others; “identities are constructed by both internal and external structures”.¹⁹⁴ States do not have a single identity but many different ones that will come to the fore in particular social contexts in which a state acts. Two identities particularly concern us for the purposes of this thesis. One is that of aggressor/defender, identities that may be claimed by, or attributed to, states in self-defence discourses. Another is that of friend/enemy, roles that are to be found in the G.W. Bush Administration National Security Strategy.

Wendt distinguishes different types of identity; personal/corporate, type, role and collective. Type identities pertain to the quality of the state; is it a democracy, a capitalist state or a monarchical one? Role identities depend even more on others because they depend on the culture in which a state acts.¹⁹⁵ Role identities – such as aggressor or defending state – are not dependent on properties that are intrinsic to the state in question; in other words, the qualities that make the UK a parliamentary democracy still exist whether others recognise them or not, but a given role identity adopted by the UK depends essentially on the social structure in which the UK acts, for instance as a permanent member of the SC. This role is meaningless if no other state accepts that the UK is a permanent member. Role identities are therefore dependent on “[t]he sharing of expectations”.¹⁹⁶

Wendt has written that states’ identities are not individually given or possessed but constructed intersubjectively in society.¹⁹⁷ In Hobbesian, Lockean and Kantian

¹⁹⁴ Wendt, *Social Theory* p. 224.

¹⁹⁵ *Ibid.*, p. 226-7.

¹⁹⁶ *Ibid.*, p. 227.

¹⁹⁷ *Ibid.*, p. 335.

cultures, states gain their identities according to their conception of the other as an enemy, a rival or a friend.¹⁹⁸ Rivals and enemies can be distinguished because, while each are revisionist, the rival merely seeks to revise the self's behaviour or property and not its identity or existence, as does an enemy.¹⁹⁹ Violence between rivals is self-limiting because it is constrained by a mutual recognition of the other's right to exist; this right is not recognised by Hobbesian enemies.²⁰⁰ These identities are important to this thesis for several reasons. Firstly, they are pertinent as regards the possibility of interacting communicatively with an enemy or rival in a self-defence evaluation. It is important that states see one another as communicatively equal; that is equally capable of expressing themselves. Secondly, they pertain to evidencing claims to use force in self-defence. In the next chapter it will be argued that uncertainty is a major factor in the security environment. Owing to the lack of information about what is being done, predictions about behaviour can also be made according to states' identities. Where concepts of incapable or malfeasant states are held beyond the protagonists in question, the answer to the question of whether force has been used in self-defence or not may be presupposed.

It has already been stated that the distinction between friends and enemies was central to Schmitt's work.²⁰¹ For him, the nature of the enemy is of the other, "it is sufficient for his nature that he is, in a specifically intense way, existentially something different and alien".²⁰² It is suggested that this extreme otherness can be seen as the root of the lack of recognition of the other's right to exist. Wendt explains that one of the consequences of this lack of mutual recognition is that the other "will not willingly

¹⁹⁸ Ibid., p. 260.

¹⁹⁹ Ibid., p. 261.

²⁰⁰ Ibid., p. 261.

²⁰¹ Supra, at p. 229-232.

²⁰² Schmitt, *The Concept of the Political*, p. 27.

limit its violence towards the Self”.²⁰³ A strategic environment containing enemies will tend to be viewed as particularly “dangerous” by states,²⁰⁴ and therefore to be tackled on the precautionary principle. Where national security is seen as a process of managing risks, the presence of enemies can raise the stakes so high that even a remote threat cannot be risked.²⁰⁵

It is suggested that the G.W. Bush Administration National Security Strategy (NSS) moved away from the assumption that other states were Lockean rivals and marked out certain states that stood in a relation of Hobbesian enmity to the US. This does two things. It objectifies such states, effectively excluding them from participating in evaluative discourses, and it presupposes the question of whether there was prior aggression despite the absence of concrete evidence. This is summarised in an apparent shift in world-view of a strong US ally, former UK Prime Minister, Tony Blair: “[B]efore September 11th, I was already reaching for a different philosophy in international relations from a traditional one that has held sway since the treaty of Westphalia in 1648; namely that a country's internal affairs are for it and you don't interfere unless it threatens you”.²⁰⁶

The US declared itself to be at war with terrorists.²⁰⁷ A declaration of war is a formal statement that a Hobbesian relation exists between two actors. The NSS draws certain parallels between the War on Terror and the Cold War.²⁰⁸ However, in comparison with the ‘rogue states’ and terrorists armed with Weapons of Mass Destruction

²⁰³ Wendt, *Social Theory* p. 260.

²⁰⁴ Koskenniemi, “International Law as Political Theology”, p. 492.

²⁰⁵ See Chapter V, at pp. 263-274.

²⁰⁶ T. Blair, Sedgefield Speech, 24 March 2004.

²⁰⁷ US National Security Strategy (2002), p. 5.

²⁰⁸ *Ibid.*, p. 13.

(WMD), the Soviet Union appears in an almost nostalgic light.²⁰⁹ The view that some governments lack either the capacity or the will to ensure they do not pose a threat to others has effects for communication. The competence and trustworthiness of such actors can be compromised to the point that their utterances are not taken on the same terms as those of other participants.

The otherness of terrorists in the collective security system is relatively easy to identify. They are non-state actors who lack legal personality, and therefore a voice, in the UN. Terrorist networks lack many characteristics of states. They lack attributes like territory and populations which can deprive states of bargaining chips against them. They also lack unified structure which makes it hard to think of them, or strike at them, as a single entity.²¹⁰ It is controversial in international law whether one can use force in self-defence against a non-state actor.²¹¹ This aside, it would seem hard to escape the problem that such an act would probably involve an act of violence against another state.

In consequence, the G.W. Bush Administration adopted the concepts of conspiring with and harbouring terrorists. The NSS states; “We make no distinction between terrorists and those who knowingly harbor or provide aid to them”.²¹² In this connection, the US identified ‘rogue states’ as allies of terrorists. Rogue states also brutalize their own people, have no respect for international law, seek to use WMD aggressively, “reject basic human values and hate the United States and everything for

²⁰⁹ Ibid., pp. 13 and 15.

²¹⁰ The National Security Strategy of the United States of America, March 2006, p. 9. Available at: <http://www.strategicstudiesinstitute.army.mil/pdffiles/nss.pdf>. (Hereinafter ‘US National Security Strategy (2006)’.)

²¹¹ A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law” 12(5) EJIL (2001) 993, p. 997.

²¹² US National Security Strategy (2002), p. 5.

which it stands”.²¹³ The US concluded that “[w]e cannot let our enemies strike first”, not only because of the potential magnitude of harm caused by WMD but also because of “the inability to deter a potential attacker”.²¹⁴ Former President Bush has also referred to “weak states”.²¹⁵ These are states which are either unwilling or unable to prevent terrorists from operating from their territory. It has been noted that the US saw itself as facing just as big a threat from weak states as from rogue states.²¹⁶

Rogue and weak states are not equal before the law; rather the US adopts a kill or be killed attitude that designates them high-risk and therefore eliminable – or at least ripe for regime change - for a more secure world. Less polemically, this was stressed by Condoleezza Rice writing about the US response to the “strategic shock” of 9/11; “[w]hat has changed is, most broadly, how we view the relationship between the dynamics within states and the distribution of power among them”. Since some states are not “willing and able to meet the full range of their sovereign responsibilities”, “democratic state building is now an urgent component of our national interest”.²¹⁷ It is suggested that this rhetoric from the US effectively attempted to change the identities of states acting within the collective security system by constructing them as ‘rogue’ or ‘weak’.

The G.W. Bush Administration’s NSS imposed a two-tier structure onto the collective security system that makes the type identity of states relevant to the evaluation of their claim. The type identities that are seen in the NSS are “tyrannous regime”,

²¹³ Ibid., p. 14.

²¹⁴ Ibid., p. 15.

²¹⁵ Remarks by former President G.W Bush at 2002 Graduation Exercise of the United States Military Academy, West Point, New York, 1 June 2002.

²¹⁶ S. Patrick, “Weak States and Global Threats: Fact or Fiction?” 29(2) Wash. Q. (2006) 27, p. 27.

²¹⁷ C. Rice, “Rethinking the National Interest: American Realism for a New World” 87(4) For. Affs. (2008) 2, p. 2.

“oppressive and brutal dictatorships”, “freedom-loving states” and “market democracies” *inter alia*. Former US Secretary of State, Condoleezza Rice, has referred to a distinction between allies and partners on the basis that the former “share values” while the latter merely “share interests”. The language of “permanent allies” and “permanent enemies” is also striking in her article.²¹⁸ It seems that there is a hierarchy among states that not only gives the lie to the principle of sovereign equality, but also militates against the idea that states could engage with one another in justificatory discourses. It is likely that the target of a use of force would wish to participate in argumentation establishing what happened.²¹⁹ Indeed, it is submitted that its participation would, in most cases, be crucial. If this target state were to be written off as either too weak or too ‘evil’ to participate, it would not be possible for evaluators to come to a meaningful understanding about a self-defence claim.

While the rhetoric of ‘rogue states’ is not widely used outside the US, the concept of weak or failed states is. The High Level Panel on Threat, Challenges and Change used identified weak states as a prime danger to international peace and security.²²⁰ The EU have also identified “state failure” as a threat – which seems to capture elements of both rogue and weak states: “Bad governance – corruption, abuse of power, weak institutions and lack of accountability - and civil conflict corrode States from within”.²²¹ A similar approach is taken in the UK Security Strategy which was published more recently, in 2008.²²² It is submitted that this construction of certain

²¹⁸ *Ibid.*

²¹⁹ This is demonstrated by the instances in which a target state has complained to the Security Council. For instance, Libya complained in response to Operation Eldorado Canyon in 1986, UN Doc. S/17991 (1986).

²²⁰ High-level Panel, *A More Secure World*, p. 14, para. 20.

²²¹ European Security Strategy, *A Secure Europe in a Better World*, December 2003, p. 4. Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>

²²² UK Strategy, *Security in an Interdependent World*, p. 19, para. 3.42.

states as inimical to, or incapable of, collective security is likely to make any evaluation of a self-defence claim involving such a state a purely strategic matter.

As well as the problem of lack of communication, the enemy-relation has another effect on self-defence discourse. This relates to the identity of aggressor and defender. The nexus between the identity of the state and its security interests has been sketched by Wendt;²²³ a state's interest in classifying a use of force as aggression or defence is given by its identity as a target or claimant state of self-defence. Insofar as these identities remain paramount in the discourse, the interests and therefore positions of the states concerned will not change. This will lead either to a volatile stalemate or, where one state is considerably stronger than the other, to the subjugation of the weaker state. According to Koskenniemi, a state's self "consists of projections about its 'idea', institutions and physical base". He explains that whether the observer sees aggression or defence is determined by "whatever we see as the principle underlying the state's identity".²²⁴

To decide that a given state is a rogue state is also to decide that it is an enemy, and therefore an aggressor. This was evident in the so-called 'axis of evil' that included Iran, Iraq and North Korea.²²⁵ One of the consequences of this is that the state is completely objectified in discourse. In other words, the enemy is not somebody to talk to, but rather somebody to talk about. This can mean that attempts by a state to rebut accusations or make counter-claims are discounted. Libya's attempts to use the ICJ to counter-point the US, UK and France's use of the SC over the Lockerbie disaster is a

²²³ Wendt, "Anarchy is What States Make of It", p. 397.

²²⁴ Koskenniemi, "Hierarchy", p. 580-1.

²²⁵ G.W. Bush State of the Union Address, 22 January 2002.

case in point.²²⁶ A more recent example is that of Iran. Its arguments for its development of a nuclear fuel cycle are dismissed by most states.²²⁷ A certain animus belligerendi is imputed to such states; a presumption of mala fides that is very hard to counter.

It is worth stating the obvious; that an enemy is aggressive per se. This imposes a role-identity on a state that presupposes the very question that a discourse evaluating a self-defence claim would wish to answer. An enemy's military capabilities will be used to predict his future behaviour because we 'know' his inimical trajectory if unencumbered. The culture "gives capabilities a particular meaning".²²⁸ This means that a state must be able to pre-empt in a world where technology has made the first strike potentially fatal.²²⁹ Thus, another feature of the self's decision-making is that it will tend to assume the worst; negative possibilities rather than probabilities.²³⁰

D. Communicative Action in the Security Council.

In the previous chapter, the work of the Security Council was discussed as regards the evaluation of self-defence claims. The point was made that the SC appears to operate according to 'political', un-formalised, considerations can be seen as exploitable by more dominant states.²³¹ Nevertheless, some writers have attempted to conceive of the Council as forming an 'interpretive community' of intersubjective understanding.²³²

²²⁶ See Chapter III, at pp. 182-183.

²²⁷ See e.g. D. Miliband, 'Why We Must Not Take Pressure off Iran' *Financial Times*, 5 December 2007; IAEA Board of Governors Meeting, 15 June 2006.

²²⁸ See Chapter V, at p. 293.

²²⁹ Wendt, *Social Theory* p. 262.

²³⁰ *Ibid.*, p. 262; See also, Chapter V, at pp. 263-274.

²³¹ See Chapter III, at pp. 154-157.

²³² I. Johnstone, "Security Council Deliberations: The Power of the Better Argument" 14(3) *EJIL* (2003) 437. (Hereinafter, 'Johnstone, "Security Council Deliberations"'); E. Papastavridis,

This proposition, it will be argued, is not easy to bear out. This will be argued because it is to be stressed that taking advantage of intersubjective understanding in the evaluation of self-defence claims requires a radical change in attitudes and, correspondingly, in institutional structures. In the previous chapter it was argued that the SC is opaque, selective, exclusive and dominated by powerful states.²³³ These characteristics are more conducive to strategic rather than communicative action.

In the work of Ian Johnstone, the concept of interpretive community is attributed to literary theorist, Stanley Fish.²³⁴ The idea is that the interpretive community provides internal constraints on interpretation that emanate from the fact of membership of a community²³⁵ in the form of “shared standards and expectations”.²³⁶ Fish used this community to locate interpretive authority: “Meaning is produced by neither the text nor the reader but by the interpretive community in which both are situated”.²³⁷ It has some aspects in common with the idea of intersubjectivity, and Johnstone acknowledges a debt to Habermas.²³⁸ It will be argued that while Johnstone makes use of the concepts of ‘better argument’ and intersubjectivity, his findings as to communication in the SC do not point to the presence of intersubjective understanding.

Johnstone is attempting to vindicate the thesis that international law is important, if perhaps not decisive, for SC decision-making. He holds that “international law

“Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis” 56(1) ICLQ (2007) 83.

²³³ See Chapter III, Part II.

²³⁴ Johnstone, “Security Council Deliberations”, p. 443, citing S. Fish, *Doing What Comes Naturally*, (1989) Clarendon Press, Oxford and *Is There a Text in this Class? The Authority of Interpretive Communities* (1980) Harvard University Press.

²³⁵ Johnstone, “Treaty Interpretation”, p. 378.

²³⁶ *Ibid.*, p. 387.

²³⁷ Johnstone, “Security Council Deliberations”, p. 445.

²³⁸ *Ibid.*, p. 448.

operates largely through processes of justificatory discourse within and constrained by interpretive communities”.²³⁹ The UN Security Council is a body in which such discourses occur and Johnstone wishes to argue that when law is invoked in that body, it is not merely for rhetorical value. He uses the debates surrounding the NATO bombing of Serbia in 1999, Operation Allied Force (OAF), to illustrate his point. It is submitted that by presenting his thesis as descriptive, Johnstone does not manage to bear it out without imputing certain non-exploitative attitudes towards the law to the state actors participating in SC debates.

Johnstone posits that “there is a normative framework that structures SC debates” which can be seen because “some arguments are more acceptable...than others”. The framework comes from the UN Charter and the law relating to international peace and security.²⁴⁰ Johnstone also points out that the SC, or at least the P5, have been operating as a body for over 60 years; “the P5 have become an exclusive club with a shared history and set of experiences”.²⁴¹ As well as this procedural community, Johnstone also suggests that there is burgeoning community as regards substance: “The end of the Cold War has heralded some convergence of values”. Specifically, Johnstone suggests that the burgeoning human rights discourse evidences the existence of normative community.²⁴² Johnstone claims that this common framework of procedural and substantive norms makes it possible for states to identify better arguments.

²³⁹ Ibid., p. 477.

²⁴⁰ Ibid., pp. 456-7.

²⁴¹ Ibid., p. 460.

²⁴² Ibid., p. 458.

Examining the debates around OAF in 1999, Johnstone argues that while practice was far from demonstrating that states involved shared a common conception of the ‘right answer’, they did share views about what was the better argument.²⁴³ However, the episode is notoriously divisive.²⁴⁴ The SC did not mention the bombing campaign in a resolution passed immediately after OAF had finished.²⁴⁵ In the public debate, some states roundly condemned NATO for ‘aggression’ and violation of Charter norms.²⁴⁶ Among NATO states, some were adamant that their action was within the law.²⁴⁷ It was also suggested that the action was simply necessary or legitimate to prevent a “humanitarian catastrophe”.²⁴⁸ In fact, perhaps in order to secure the votes of each of the permanent five, resolution 1244 made no mention of OAF.

This is problematic insofar as Johnstone has asserted that one of the reasons that discourse in the SC is not epiphenomenal is that the interpretive community “in effect passes judgment on legal claims”.²⁴⁹ Indeed, it would seem that if Johnstone wishes to assert that a community which interprets norms according to shared standards and expectations exists, he must do more than point to a plethora of divergent arguments. Johnstone wrote that while the episode shows there was no normative commonality over the legality of humanitarian intervention in the SC, it also shows that the interpretive community in the SC “is sufficiently robust to warrant an effort to justify positions on legal grounds”.²⁵⁰ It is submitted that this does not overcome the realist

²⁴³ Johnstone, “Security Council Deliberations”, p. 460.

²⁴⁴ H. Charlesworth, “International Law: A Discipline of Crisis” 65(3) MLR (2002) 377, p. 379-380. (Hereinafter, ‘Charlesworth, “A Discipline of Crisis”’.)

²⁴⁵ UN Doc. S/Res./1244 (1999).

²⁴⁶ UN Doc. S/PV.4011 Meeting of the Security Council 10 June 1999, p. 7 (Russia), p. 8 (China).

²⁴⁷ *Ibid.*, p. 12 (Netherlands).

²⁴⁸ UN Doc. S/PV.3988 Meeting of the Security Council 24 March 1999, p. p. 5, (US), p. 8 (Netherlands), 12 (UK), 16 (Germany), 18 (Albania).

²⁴⁹ I. Johnstone, “US-UN Relations after Iraq: The End of the World (Order) As We Know It?” 15(4) EJIL (2004) 813, p. 835. (Hereinafter, ‘Johnstone, “US-UN Relations after Iraq”’.)

²⁵⁰ Johnstone, “Security Council Deliberations”, p. 475.

argument that states can, in this way, simply exploit legal norms rhetorically. The idea that states were alive to the issue of precedent-setting does not act as strong enough evidence to counter the claim that NATO states may have strategically exploited legal arguments to rationalize OAF.

Johnston argues that the fact that legal claims were not simply made straightforwardly, the fact that states were concerned about precedent and the fact that reputational costs are connected with implausible arguments “are evidence of a rational discourse within an interpretive community”.²⁵¹ It is submitted that the Kosovo episode may be said to demonstrate the potential power of the better argument, but that it is hard to see the SC as a body acting as an interpretive community to identify the better argument in practice. This is chiefly because the states arguing in the SC were not engaged with one another. This was spelled out by the Russian delegate who stated that “[n]othing of what I have heard here has changed that position”.²⁵² In effect, there were two sets of norms being opposed to one another: On the one side the sovereign integrity of the former Yugoslavia was stressed, on the other side the legitimacy of humanitarian action was argued. This dilemma was reflected in many academics’ readings of OAF:²⁵³ It was sometimes said that the operation was illegal but legitimate.²⁵⁴ This seems to reflect more of a normative confusion between order and justice than consensus over the action.

Indeed, Johnstone emphasises that the arguments of NATO states ran the gamut of doubt: Those who had “real doubt about the legality of the action, to those who had

²⁵¹ Ibid., pp. 475-6.

²⁵² UN Doc. S/PV.3988, p. 13.

²⁵³ Charlesworth, “A Discipline of Crisis”, p. 379.

²⁵⁴ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2004) Oxford University Press, pp. 185-198.

no such doubts but were reluctant to push the legal case” due to concerns over plausibility or precedent, through to those who had no doubts and were not concerned.²⁵⁵ Indeed, he notes that the arguments given by the US were a “laundry list” rather than a clear attempt to pinpoint the better argument.²⁵⁶ This might be taken to indicate the absence of a better argument, as opposed to the consciousness of a plethora of normatively undifferentiated different arguments.

To conclude, perhaps the most striking element in Johnstone’s work is the tentativeness of the assertion that commonality of values exist in the SC. For instance, he admits that “[i]t would seem rather far-fetched to suggest that a shared culture and common values inform deliberations in the Security Council”.²⁵⁷ His argument is not that there is fully fledged normative community, but rather “a sense of being in a relationship of some duration”.²⁵⁸ More recently, Johnstone has written that Operation Iraqi Freedom in 2003 was “a bridge too far”,²⁵⁹ and that “the normative and institutional framework embodied in the UN Charter has been damaged”.²⁶⁰

It is submitted that this ambivalence is symptomatic of the desire to claim that the collective security system works without enquiring too deeply into the workings of the Council. In a work that influenced Johnstone’s own study, Risse gave the SC as the example of an instance where disparate power determines who has access to a discourse and also where relative power determines how much weight is given to a

²⁵⁵ Johnstone, “Security Council Deliberations”, p. 469.

²⁵⁶ *Ibid.*, p. 468.

²⁵⁷ *Ibid.*, p. 456.

²⁵⁸ *Ibid.*, p. 456.

²⁵⁹ Johnstone, “US-UN Relations after Iraq”, p. 831.

²⁶⁰ *Ibid.*, p. 833.

given argument.²⁶¹ It seems to me that the selectiveness and opacity of the Council discussed in the previous chapter tends to militate against the construction of an intersubjective understanding about a given use of force in that body. While the desirability of the SC constituting an interpretive community may provide a direction for the reform of the body, it is submitted that it does not accurately describe current Council practice.

CONCLUSION.

The re-conception of the report of self-defence as a criticizable validity claim removes the authority to decide about an exercise of self-defence from the state that used force. This is because a claim is an offering in discourse, rather than an imposition on discourse. There is no obligation to accept a claim if good reasons cannot be produced to support a controversial statement. The claimant loses control of the decision to use force in self-defence as soon as it is uttered in an international discourse. This is because the statement becomes a positive object of critique. The central core of this thesis is simply that accountability is the obverse of legitimacy. The realist argument, that the law of self help can enter into the collective security system as a stop-gap for the loopholes and inadequacies of the UN rules and institutions, effectively reintroduces a situation where the international system is exploited for its legitimating properties and shorn of its critical capacities.

It is not enough, in this author's view, that international lawyers well versed in the annals of doctrine know that this or that claim was, despite its apparent acceptance or

²⁶¹ Risse, "Let's Argue!", p. 16.

the lack of adverse reaction, invalid. Kept within the college of international lawyers, such convictions carry little force. If law is to operate as a means of resistance to power, as well as a conduit for power, then it must do so communicatively. The communication of the insights of international lawyers and the use of legal structures to condition discourses, can give the law force in the material world; communication can bring into play the abstractions of law.²⁶² However it must be accepted that in this descent, the purity of abstraction will be lost and the law will become contestable and legal argumentation political.

It is suggested that an assumption should be created that self-defence claims will be scrutinised. Johnstone has written that “governments cannot escape collective judgment of their conduct by other governments...international lawyers and organs of public opinion”.²⁶³ For Koskenniemi the accountability of the strong, the articulation and protection of the weak, and arguments about legal validity “imagine the possibility of” a community that overrides individual subjectivities. This community makes “a meaningful distinction between lawful constraint and the application of naked power”.²⁶⁴ It seems to me that the UN collective security system supposes that such a ‘community’ of evaluators exists or, at least, that intersubjective understanding is possible within it.

The next chapter will discuss what sort of intersubjective understanding might be possible within the collective security system. It will be argued that understanding about the facts of a particular case may provide the firmest footing for the evaluation

²⁶² The direct involvement of international lawyers in public discourses about the legality of Operation Iraqi Freedom in 2003 is an example of the strength international legal discourse can have when it engages with external debates. See e.g. letter to the Guardian, 7 March 2003.

²⁶³ Johnstone, “Security Council Deliberations”, p. 441.

²⁶⁴ Koskenniemi, *The Gentle Civilizer*, p. 502.

of self-defence claims. In this regard Carty's suggestion that "the potential task of legal doctrine is to reconstruct conflict situations in accordance with basic principles of possible understanding, a theory of knowledge based on the development of argument, rather than a search for objectivity or experience as such" is highly instructive.²⁶⁵ It will be argued that there are cases where it will not be possible to build such an intersubjective understanding of a given situation. Into this category, it will be argued, falls the Bush doctrine of pre-emption.

²⁶⁵ A. Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986) Manchester University Press, p. 114.

CHAPTER V

Evidencing Self-Defence Claims.

INTRODUCTION.

The aim of this chapter is to examine how facts are and might be used in the evaluation of self-defence claims. A lack of consensus about normative substance means that divergent interpretations of the law can be justified in particular cases. Indeed it is said that states share little in common at the best of times; as Nardin points out, few environments are more pluralistic than the international one.¹ Instead, this thesis argues that common understandings, or knowledge, about the world may provide a practicable frame of reference in certain conditions. Importantly, the referent is both external to individual states and notionally shared by them all. This means that it should be theoretically possible to test propositions by ostensive demonstration. It is hoped that intersubjectivity will provide a limit of plausibility that can accommodate flexibility without enabling exploitation.

In order to ascertain the conditions in which claims might be ostensibly testable, this chapter examines some attempts to simply allude to facts as though they were objective and obvious. It will be argued that these approaches fail where they rely on the objectivity of facts; such approaches can be seen as exploitable where reliance on facts legitimises a given position without allowing for scrutiny. The position taken in this thesis is that social knowledge of facts is constructed through intersubjective processes; it is not the product of individual discovery. This approach has been influenced by the theories of social constructivism of the latter part of the twentieth

¹ T. Nardin, *Law, Morality and the Relations of States* (1983) Princeton University Press, p. 51. (Hereinafter, 'Nardin, Law, Morality and the Relations of States'.)

century.² As Koskenniemi explains, “a part of modern philosophy has rejected the epistemological enterprise and the idea of objectivity associated with it altogether”.³

Apologists for pre-emptive self-defence have occasionally relied on the objectivity or obviousness of the threat.⁴ It will be argued that refusal by the most powerful states to open their assertions of self-defence to scrutiny in the form of an international claim is irreconcilable with their use of the collective security system as an arena of justification. Formal multilateralism fleshed out by substantive unilateralism is exploitation by another name. The turn to facts has been made by non-realist international lawyers as well. This is reflected in the widespread use of the primarily factual criteria of necessity and proportionality as customary norms that supplement the UN Charter.⁵ The principle of proportionality will be used to illustrate that where ‘common-sense’ evaluation is relied on, one must also show that there is a common sense if such evaluation is not to be a site for exploitation or merely esoteric.

It will be argued that where factual assertions are not given to ostensive demonstration, the justification process is vulnerable to exploitation. It should be clarified that ‘ostensive demonstration’ does not connote proof or objectivity. What is meant by the phrase is that a factual assertion is capable of being taken as a

² See e.g. P. Berger and T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1967) Penguin, London; J.R. Searle, *The Construction of Social Reality*, (1995) Penguin, London; A. Wendt, *Social Theory of International Politics* (1999) Cambridge University Press. (Hereinafter, ‘Wendt, Social Theory’.).

³ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (2005) Cambridge University Press, p. 517. (Hereinafter, ‘Koskenniemi, From Apology’.)

⁴ E.g. W.H. Taft IV and T.F. Buchwald, “Preemption, Iraq and International Law” 97(3) *AJIL* (2003) 557, p. 557.

⁵ *Infra*, at p. 274-279.

criticizable validity claim and tested.⁶ On the one hand, this implies that the sort of fact claimed can be, in theory, commonly appreciated.⁷ For instance, the intention of a government to pursue aggressive policies against the claimant state is a fact, but *animus belligerendi* is not directly available to others, it can only be inferred from other facts.⁸ On the other hand, the fact claimed must be, in practice, available for critique. This means that states must take responsibility for their self-defence claims by undertaking to account for them. As Wilmhurst wrote, “[e]vidence is fundamental to accountability”.⁹

It has been written that “[i]nternational law as a process of communication implicitly demands an evaluation of evidence supporting opposable positions, particularly in the absence of judicial review”.¹⁰ In this regard, the practice of states to use intelligence to redeem their self-defence claims will be distinguished from the redemption of a claim by evidence of a fact. Similarly, the nature of intelligence as an assessment of probability will be distinguished from evidence of a material fact. The claim will be made that to evidence a proposition is to make an appeal to an audience which, as a reason supporting a criticizable validity claim, in practice gives that audience the capability to accept or reject the claim. In other words, it is stressed that the process of justification is a two-way street that relies on the reception of a claim as well as its emission.

⁶ The first meaning of the word ‘ostensive’ listed in the Oxford English Dictionary is “Denotative; directly or manifestly demonstrative. Chiefly in Logic: (of a proof, method, etc.) setting out a general principle manifestly including the proposition to be proved; direct (as opposed to indirect)”.

⁷ See Chapter IV, at pp. 213-220.

⁸ J.L. Brierly, “International Law and the Resort to Armed Force” 4(3) *Cam. LJ* (1932) 308, p. 312.

⁹ E. Wilmhurst, “The Chatham House Principles of International Law on the Use of Force in Self-defence” 55(4) *ICLQ* (2006) 963 p. 968. (Hereinafter, ‘Wilmhurst, “The Chatham House Principles”’.)

¹⁰ T. O’Donnell, “Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)” 17(5) *EJIL* (2006) 945, p. 51. (Hereinafter, ‘O’Donnell, “Naming and Shaming”’.)

In the final section of the chapter, it will be suggested that – by elimination – we have arrived at the sorts of fact that can ground a claim to self-defence. These facts, it will be argued, are open to ostensive demonstration: They can be tested. This flows from the idea that the obverse of the positivity of claims is their criticizability.¹¹ If a state wishes to rely on the legitimating properties of collective security system justification, such a process must be interactive and not merely rhetorical. The interactivity of the process demands that positive statements are open to scrutiny. The process will be more-than-merely-rhetorical if these statements are referable to a point of common understanding and the commonality of this point can be tested. This approach, like the approaches attempting to counter realist criticisms that were critiqued in the preceding chapters, is open to the charge of esotericism. However it is argued that there is a qualitative difference between attempts to base law's force in objectivity and the present attempt to base law's force in a fluid intersubjectivity because it depends on international actors' socially constructed (understandings of) facts and grounded because these understandings are less easy to manipulate than understandings about norms.¹²

Owing to the narrow remit of the thesis to provide a theoretical inquiry into the matter, no blueprint for an evidence-based approach to evaluation is given. However, some ideas about how a communicative process might work are sketched out at the end of the chapter. It is argued that inspiration can be taken from the collective security system's current use of fact-finding commissions and from bodies such as the International Atomic Energy Agency which deals with the accuracy of factual

¹¹ J. Habermas, *The Theory of Communicative Action, Vol. II: Lifeworld and System: A Critique of Functionalist Reason*, T. McCarthy (trans) (1987) Polity Press, Cambridge, p. 178. (Hereinafter, 'Habermas, *The Theory of Communicative Action Vol II*'.)

¹² See Chapter IV, at pp. 213—220.

statements. It is suggested that a fact-finding commission might operate with the cooperation and participation of the most affected states to produce a picture of the facts of a particular case. It would be important for such a commission to engage closely with other evaluative discourses in order to respond to their critical analyses of assertions made in the process of redeeming the criticizable validity claim of self-defence .

In this conception of evidence, it will not be possible to assert a formal definition of self-defence which must be substantiated by relevant evidence of facts. This is because the aim is to enable evaluators to distinguish valid from invalid claims to have used force in self-defence without being unresponsive to changes in the perception of security. The definitional approach seems to have been the system envisaged by the UN Charter drafters; a claim of self-defence could be evidenced by showing that an armed attack had occurred. Owing to a partly self-perpetuating sense that a right of self-defence with such limited substance could not protect states – either because the SC did not enforce international peace and security, or because new security threats surpassed the old standard of armed attack – states purported to accrue more and more of discretion to interpret article 51 to themselves.¹³

The 2002 and 2006 National Security Strategies of the G.W. Bush Administration in the USA combined justifications of justice and efficacy to argue for an uninhibited right not only to use force in self-defence, but also to justify force as self-defence. It is argued that whatever place individualism based on the ability to impose one's will has in the exercise of self-defence, it has no place in the justification of that violence as

¹³ See Chapter I, at p. 37-40.

self-defence. This is because while to an extent states can argue that self-defence is a matter for the individual nation, it is a contradiction in terms to argue that justifying the forms that such protection takes can be done without regard to other international actors. Justification does not justify unless it speaks to an audience.

A. Structure of the Chapter.

This chapter does two things. On the one hand, it presents an argument against the Bush doctrine of pre-emption. On the other hand, it suggests a way that the collective security system could move forward in the evaluation of self-defence claims. These two functions are closely linked. The second function seeks a way to balance the imperative of flexibility with the danger of exploitation. While the Bush doctrine of pre-emption is presented as a flexible response to changing social circumstances, it is suspected of being an attempt to exploit, undermine or sideline the UN collective security system.

In the previous chapter two theories were introduced. The first was Habermas' idea of communicative action and the second was Wendt's conception of inter-state relations. In this chapter, they will both be used to show that the Bush doctrine of pre-emption would have been beyond the limits of evaluation through the process of vindicating a criticizable validity claim. The Schmittian approach to sovereign states' right to decide the exception and the Hobbesian enemy relation, both introduced in the last chapter, can be used to understand the perspective of the Bush Administration and the tenor of their security policy.

Both the Schmittian exception and the Hobbesian enemy-relation can be seen as facets of the realist motto that the strong do what they can and the weak suffer what they must. The US is commonly held to be the world's sole superpower and,¹⁴ on this logic, it is in a position to arrogate the ultimate right to use force to itself. The Hobbesian enemy-relation is also significant because of the way that it affects the threats perceived by a state. The perception of external enemies lays down a presumption that threats exist and is therefore incompatible with the idea of external constraints on the decision to use force. The perception of enemies means that when and where they attack is a matter of probability and risk. This suggests that the best way to ensure national security is through the precautionary principle.

Having underlined the point that threats which are pre-empted are based in uncertainty, we will then move on to look at some of the ways in which international lawyers and states have used facts in attempts to evaluate the use of force. In the first part, we will deal with the claim that principles such as proportionality enable states to evaluate self-defence claims without committing themselves to certain readings of self-defence. It is argued that the principle of proportionality can lead to both esotericism and exploitation depending on whether one takes a constrain-view or a validation-view of it. This is because the calculation of proportionality depends on what one chooses as a referent.

The next part of the chapter deals with intelligence. It is argued that one of the consequences of the doctrine of pre-emption is that it makes resort to intelligence more likely. This is because, as mentioned above, the risk-approach to national

¹⁴ Byers, "Pre-emptive Self-Defense", p. 171.

security requires the prediction of outcomes. It is argued that this probabilistic process of decision-making is not easily transformed into evidence for the vindication of a self-defence claim at the international level. Secondly, it is argued that secret intelligence is, of its nature, anathema to the process of evidencing a claim. This is because it tends to be exempt from scrutiny. It is stressed that it is not enough to allude to facts, facts must be available for collective scrutiny.

In the third part of the chapter, the idea that facts have to be available to collective scrutiny is expanded. Having given examples of how facts should not be treated in evaluations of self-defence claims, this part of the chapter attempts a rough sketch of how they should be treated. It is argued that facts which are capable of ostensive demonstration are the least likely to be exploitable and would therefore make a stable common platform from which to evaluate a self-defence claim. It is suggested that one way of building a collective understanding of facts is to use fact-finding commissions. These would operate with the participation of interested parties and would respond to the questions of third party evaluators. In this way they would help to mediate intersubjective understanding.

B. Uncertain Threats and Hobbesian Decision-Makers.

Realist critics of the collective security system have pointed out that the credibility gap between theory and practice enables self-defence to act as a justification for the use of force in pursuit of national policy.¹⁵ Realist scholars privilege the individual

¹⁵ E.g. M.J. Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter" 25(2) Harv. JL&PP (2001-2) 539, p. 540. (Hereinafter, 'Glennon, "The Fog of War"'.)

decision-maker over the system in which he decides;¹⁶ using cost-benefit analysis they explain apparent phenomena of compliance as cost-effective and point out that in situations of extremity – of which self-defence, by its nature, is characteristic – states are unlikely to make short term concessions to long term collective security.¹⁷

In this conception of the subject – or actor - of collective security, realism coincides with voluntarism. It has been said that “[l]egal positivists, historically, provided the equivalent of the statist political theories advanced by Jean Bodin and Thomas Hobbes”.¹⁸ This sort of positivist theory prioritises the sovereign state over the collective security system because the system exists by dint of the consent of states.¹⁹ In the extremity of self-defence, the sovereign state can simply revoke its consent to be bound by the collective security system either because the sovereign has the ability to decide the exception, or because the authority of international law flows directly from the consent of sovereign states. In either version, the conception of inter-state relations is Hobbesian.²⁰ In this conception, the right of self-defence is the exception to the collective security system; a residual right that predates the UN Charter and that states may resort to self help in lieu of the operation of the collective security system.²¹

¹⁶ See Chapter I, at p. 20.

¹⁷ M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (1961) New Haven, Yale University Press, p. 67. (Hereinafter, McDougal and Feliciano, *Law and Minimum World Public Order*.)

¹⁸ C. Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy” 27(2) *Rev. IS* (2001) 133, p. 140.

¹⁹ Koskenniemi, *From Apology*, p. 304.

²⁰ See Chapter IV, at p. 238.

²¹ See Chapter II, at p. 110-114.

It is said that states can resort to force when it is necessary to do so.²² According to (policy) realists this necessity is perceived by the claimant and “incorporated into the patterns of his expectations”.²³ Such an overtly subjective understanding of necessity diminishes the usefulness of justificatory processes; it is unlikely to have much redemptive force in the face of contrary views, and it may encourage a claimant state to hide behind the formal rule. Others seem to view necessity as an objective fact: In answering Franck’s concerns that the doctrine of pre-emption claims a “right to use force to prevent even a threat to US superiority from developing”, Sofaer says that the “threat” must be “real”.²⁴ However in the absence of an authoritative body with compulsory jurisdiction to decide this question, it appears to remain a matter for the claimant state to decide the exception.

This individualistic conception of security finds echoes in the semantic shift from ‘threats’ to ‘risks’.²⁵ This is particularly the case where the “insurance-based” concept of risk is used because it is rooted in scientific positivism.²⁶ The term ‘risk’ implies that a danger can be managed or at least probabilised.²⁷ The term ‘threat’ on the other hand, takes control of the danger away from the endangered state and cedes it to the

²² See Chapter I, at p. 53.

²³ McDougal and Feliciano, *Law and Minimum World Public Order*, p. 230.

²⁴ A.D. Sofaer, “Professor Franck’s Lament” 27(3) *Hastings I&CLR* (2003/4) 437 p. 440.

²⁵ O. Kessler, “Is Risk Changing the Politics of Legal Argumentation?” 21(4) *LJIL* (2008) 863, p. 863. (Hereinafter, ‘Kessler, “Is Risk Changing the Politics of Legal Argumentation?”’). However while the UK National Security Strategy, *Security in an Interdependent World of March 2008* refers to “risk(s)” no fewer than 75 times, the word “threat(s)” is mentioned 105 times. In the US National Security Strategies the tendency to refer to threats rather than risks is even more pronounced: “risk” occurs only 5 times, while “threat” and its derivatives occurs around 50 times.

²⁶ Kessler explains that in this conception the calculation of risk is quantitative and involves a measuring of probability and expected loss. Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 866. He cites Foucault’s *Security, Territory and Population* (2007) Palgrave MacMillan, Basingstoke and Hacking’s *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference* (1975) Cambridge University Press for this “insurance-based” conception of risk.

²⁷ That risk implies management or regulation is clear from the recent Leiden Journal of International Law symposium: 21(4) *LJIL* (2008), pp. 783-884.

originator of the threat.²⁸ The implication is of an imposition on the claimant state, of something out-of-its-hands. Furthermore, Kessler argues that the doctrine of pre-emption “shifted the morality of the threat from the actual to the possible”.²⁹ It is submitted that the move to the vocabulary of risk implicitly de-legalises the processes of security decision-making and justification because, as risks, the uncertainty of threats to international peace and security are a matter for predictive theories of international relations.

Uncertainty is endemic in the facts that legal processes, such as evaluation of self-defence claims, are called on to examine. In this sense the environment in which and on which the collective security system operates not only lacks norms, but also common facts.³⁰ Uncertainty can encourage states to take a more risk-averse approach to security. Nardin has noted the potential of anarchy (“the absence of international government”) to be a “fertile ground...for the germination of mutual fear” and therefore to lead to a Hobbesian “security dilemma”: By taking steps to safeguard its security, it becomes a security threat to other states.³¹ Under G.W. Bush the US approached this state of affairs. Former US Secretary of Defence, Donald Rumsfeld’s famous treatment of uncertainty is indicative of the importance of uncertainty to US policy making.³² It is suggested that the lack of common facts, the siting of security dangers in what is not known, intensifies the Hobbesian attitudes of security decision-makers.

²⁸ See examples given by Sadurska in “Threats of Force” 82(2) *AJIL* (1988) 239, pp. 242-4.

²⁹ Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 864.

³⁰ It has been said that Hobbes’ description of the state of nature is characterised by uncertainty. C. Daase and O. Kessler, “Knowns and Unknowns in the ‘War on Terror’: Uncertainty and the Political Construction of Danger”, 38(4) *Security Dialogue* (2007) 411, p. 423. (Hereinafter, ‘Daase and Kessler, “Knowns and Unknowns”’.)

³¹ Nardin, *Law, Morality and the Relations of States*, p. 38.

³² See “Rumsfeld in his Own Words”, BBC, 8 November 2006. Available at: <http://news.bbc.co.uk/1/hi/world/americas/6130316.stm>

As has been asserted, the National Security Strategy (NSS) of the former Bush Administration responds to an apparent “profound transformation” in the global security environment by “adapt[ing] the concept of imminent threat” in the doctrine of anticipatory self-defence.³³ Following 9/11, many commentators have agreed that ‘the strategic reality’ has changed.³⁴ What they tend to disagree about is the ability of the UN Charter to accommodate the changes.³⁵ In particular argument is made about the continuing relevance of the phrase “armed attack” in article 51.³⁶ However, the changed strategic environment also adds to the uncertainty states feel with regard to their security. This has two facets; owing to the identities and methods of the actors perpetrating them, threats to national security can be uncertain in time, place or shape. Secondly, in a world that was stunned by the terrorist attacks on the World Trade Centre and the Pentagon in 2001, states’ feelings of uncertainty, can construct threats.³⁷ 9/11 seemed to change the prism through which intelligence data and other facts were viewed.³⁸

It has been said that there are two aspects to what is known: The “ontological” aspect is empirical and relates to what we know, while the “epistemological” aspect relates to how we know.³⁹ After 9/11 it was the epistemology that changed rather than the ontology; what there was to know remained the same, but the techniques by which it was known differed and consequently so did the substance of the knowledge. This

³³ National Security Strategy of the United States of America, 2002, p. 15. Available at: <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>. (Hereinafter, ‘US National Security Strategy (2002)’.)

³⁴ See Chapter I, at p. 40.

³⁵ See e.g. Chapter II, at pp. 106-109.

³⁶ C. Gray, *International Law and the Use of Force*, 2nd ed. (2004) Oxford University Press, p. 98. (Hereinafter, ‘Gray, *International Law and the Use of Force*.’)

³⁷ To clarify: To hold that a threat is constructed does not necessarily mean that it is illusory.

³⁸ K. Whitelaw, “Remarks” 98 ASIL Proc (2004) 156, p. 156.

³⁹ Daase and Kessler, “Knowns and Unknowns”, p. 413.

point will be dealt with more thoroughly below when the probability of intelligence estimates will be examined.⁴⁰ Suffice it to say for now that the context in which data is analysed (interpreted) affects the conclusions that are drawn from such facts as to whether an actionable threat exists.⁴¹

According to some commentators, when it comes to national security, “uncertainty drives the process”.⁴² For instance, Amore says that rather than place limits on the usefulness of risk, the “sheer unpredictability or incalculability” of security threats have “made radical uncertainty the very basis for action via risk calculations”.⁴³ In the case of the ‘War on Terror’, the subjects of security action were outside the recognised terms of international of national systems and devastating attacks could be launched out of the blue. The logic of the operations of “rogue states and their terrorist clients”⁴⁴ was alien to the system, and the strangeness of their rationales and the uncertainty of their future plans could engender fear.⁴⁵ Wedgwood refers to the “unworldly motivations” of terror networks and the heedlessness of rogue states to the wellbeing of their people.⁴⁶

When fear is apprehended by a society or system that bases its responses on a rational-purposive logic of prediction, it is likely to assume the worst. Thus, it has been written that the “classic calculation of risks from terror...tends to overestimate

⁴⁰ *Infra*, at pp. 301-309.

⁴¹ See Chapter IV, at p. 209.

⁴² N. C. Crawford, “The False Promise of Preventive War: The ‘New Security Consensus’ and a More Insecure World” in H. Shue and D. Rodin (eds), *Preemption: Military Action and Moral Justification* (2007) Oxford University Press 89, p. 98. (Hereinafter, ‘Crawford, “False Promise”’.)

⁴³ L. Amore, “Risk before Justice: When the Law Contests its Own Suspension” 21(4) *LJIL* (2008) 847, p. 852. (Hereinafter, ‘Amore, “Risk before Justice”’.)

⁴⁴ US National Security Strategy (2002), pp. 13, 14 and 15.

⁴⁵ See Chapter IV, at p. 241-264.

⁴⁶ R. Wedgwood, “The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense” 97(3) *AJIL* (2003) 576, p. 582

and to dramatize terror”.⁴⁷ This is because attempting to understand the risk in terms of potential lives lost and in terms of the probability that an out-of-the-blue event like 9/11 will occur means “[t]he improbability of the risk’s manifestation becomes irrelevant, as the costs would reach infinity”.⁴⁸ Another reason is that “in an anarchical order, understanding the intentions and capabilities of other actors has always been an important part of statecraft”;⁴⁹ terrorists and rogue states are conceived of as irrational,⁵⁰ which renders their decision-making processes unfathomable.

In short, the complexity and unpredictability of the “security landscape”⁵¹ renders knowledge elusive. For similar reasons, several commentators have noted the importation of environmental law’s “precautionary principle” into security discourse.⁵² The logic of this principle is that uncertainty is no reason for inaction. The presumption is that action should be taken and to rebut it requires proof of a negative.⁵³ It should be clear that from the perspective of self-defence claim evaluation, uncertainty effectively excludes demonstration of a claim. Thus, Lobel wrote that in the context of terrorism, US officials have tended to presume that

⁴⁷ Daase and Kessler, “Knowns and Unknowns”, p. 424.

⁴⁸ Ibid.; The UK National Security Strategy, Security in an Interdependent World, March 2008 “accept[s] the need to get better at predicting future threats” but “recognise[s] that shocks are inevitable”, p. 9. Available at:

http://interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf. (Hereinafter, ‘UK Strategy, Security in an Interdependent World’.)

⁴⁹ S. Chesterman, “The Spy Who Came in from the Cold War: Intelligence and International Law” 27(4) Mich JIL (2006) 1071, p. 1076. (Hereinafter, ‘Chesterman, “The Spy Who Came in from the Cold War”’.)

⁵⁰ A.D. Sofaer, “On the Necessity of Preemption,” 14(2) EJIL (2003) 209, p. 222. (Hereinafter, ‘Sofaer, “Pre-emption”’.) He explains that “Saddam’s policies have not been based on rational calculation”.

⁵¹ UK Strategy, Security in an Interdependent World, p. 3.

⁵² F. Johns and W.G. Werner, “The Risks of International Law” 21(4) LJIL (2008) 783, p. 784. (Hereinafter, ‘Johns and Werner, “The Risks of International Law”’.); L. Amoore, “Risk before Justice”, p. 852 citing R. Suskind, *The One Percent Doctrine* (2006); R. Urueña, “Risk and Randomness in International Legal Argumentation” 21(4) LJIL (2008) 787, p. 809.

⁵³ It is possible to see Operation Iraqi Freedom in this light.

evidentiary standards can be watered down.⁵⁴ To state the obvious, it might be said that the evidenceability of a threat lies in direct proportion to its materiality, and this materiality is often a function of the passage of time.

The doctrine of pre-emption relies on assessments of what the future will hold.⁵⁵ This is problematic because assessments of what will be the case in the future depend heavily on epistemological techniques to generate knowledge because of the lack of empirical data available. It has been written that “predictions that violence may occur are generally more subject to bias and error than observations that it is already occurring”.⁵⁶ This is not because its system of prediction demonstrates the likelihood of devastating attack, but because the system of prediction is in the dark. This means that mistakes can be made. It also means, to the extent that techniques of prediction invoke the legitimacy of science, that probabilistic assessments can be exploited to legitimate claims.

It has been written that “the article 51 requirement of an ongoing armed attack serves as a restraint against uses of force based on pretext, misunderstanding and erroneous factual determinations”.⁵⁷ It is hard to see how a permanent or future threat might play a similar role: “A fatal flaw in the co-called doctrine of preventive self-defence is that it excludes by definition any possibility of an ex post facto judgment of lawfulness by the very fact that it aims to deal in advance with threats that have not yet

⁵⁴ J. Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan” 24(2) *YJIL* (1999) 537, p. 548. (Hereinafter, ‘Lobel, “The Use of Force to Respond to Terrorist Attacks”’.)

⁵⁵ Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 864.

⁵⁶ A. Buchanan and R.O. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Proposal” 18(1) *Ethics & Int. Affs.* (2004) 1, p. 9. (Hereinafter, ‘Buchanan and Keohane, “The Preventive Use of Force”’.)

⁵⁷ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 542.

materialised”.⁵⁸ However it may be that as long as little pressure is put on a state to explain itself, the option of claiming an international legal justification without having participated in international legal processes remains attractive for many states.

In the face of such analyses, it is not hard to see how the doctrine of pre-emption may appear reasonable from the perspective of certain states. Crawford has explained that “[t]he content of the now dominant international security imaginary is the Hobbesian nightmare”.⁵⁹ It should not be supposed that the Hobbesian tendencies visible in the Bush Administration are limited to it. Lobel says that the Clinton Administration, like that of Reagan, has a “willingness to use military might before the facts have been established”.⁶⁰ The costly new strategic environment has also brought with it benefits, however. The right to pre-empt “sufficient threats” is circumscribed by the caveat “if necessary”.⁶¹ The evaluation of whether armed action is necessary is left to the claimant state, as it is in most exercises of self-defence.⁶²

However, unlike most cases of self-defence, this national evaluation does not then become susceptible to international evaluation; in effect the national claim and the international decision are telescoped because the exceptionality of pre-emption puts it outside the system.⁶³ Secondly, owing to the uncertainty of the threats which it counters, pre-emptive force is unlikely to be based on incontrovertible evidence.⁶⁴ Finally, the seriousness of the potential threat gives states the opportunity to withhold

⁵⁸ Wilmschurst, “The Chatham House Principles”, p. 968.

⁵⁹ Crawford, “False Promise”, p. 115.

⁶⁰ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 548.

⁶¹ US National Security Strategy (2002), p. 15.

⁶² Perhaps with the exception of the initial stages of Operation Enduring Freedom: SC resolutions 1368 and 1373 might be read as having “authorised” the exercise of self-defence.

⁶³ See Chapter IV, at pp. 229-232.

⁶⁴ *Infra*, at p. 279.

evidence from those evaluating their claims because of the sensitivity of intelligence.⁶⁵ This gives states a blank cheque with which to redeem their self-defence claims. It will be argued in this vein that the key distinction between decision-making and decision-justification is mirrored in the difference between intelligence and evidence: The latter presupposes an audience and the former does not.

It is to be emphasised that the doctrine of pre-emption needs to be read in the context of the Bush Administration's response to the current security environment as a whole. A necessary implication of pre-emption is that it is difficult to evidence, but – in the context of the 'War on Terror' - the obligation on a state to evidence anything is displaced. Firstly, this is because a context of war is an exceptional state of affairs.⁶⁶ Thus Anghie suggests that the doctrine of pre-emption is reminiscent of the system that existed between European states in the late nineteenth century; that the declaration of war was the ultimate prerogative of the sovereign.⁶⁷ Secondly this is because the use of force in war is governed by a different legal regime.

As to the first point, this US justification for withdrawing from the Nicaragua proceedings is informative. It was argued, *inter alia*, that evidence in an on-going conflict could jeopardise US sources.⁶⁸ As to the second point, questions about the validity of uses of force can be dealt with by the *ius in bello*, a pragmatic body of law that seeks to regulate armed violence rather than to prevent it. For instance, referring

⁶⁵ R. Wedgwood, "Responding to Terrorism: The Strikes against bin Laden" 24(2) *YJIL* (1999) 559. (Hereinafter, 'Wedgwood, "Responding to Terrorism"'.) See also, *Infra*, at pp. 293-301.

⁶⁶ See Chapter IV, at p. 229.

⁶⁷ A. Anghie, "The War on Terror and Iraq in Historical Perspective" 43 *Osgoode Hall LJ* (2005) 45, p. 50. (Hereinafter, 'Anghie, "The War on Terror"'.)

⁶⁸ See US State Department, "US Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ" 85 *Dep't St. Bull.* (1985) 64, p. 64. See also Letter Dated 18 January 1985 to the President of the Court.

to Lobel's concerns about evidence in Operation Infinite Reach (OIR), Wedgwood wrote that "[t]he suggestion that military targeting decisions should, *ex ante* or *ex post*, always be subject to the review of a multilateral body is simply unrealistic". She also implied that in a situation of "war" the cost-benefit analysis will never prefer the intelligence-sharing option.⁶⁹ War is characterised by isolationism, urgency and anomia; it is no surprise that Hobbes characterised his anarchy as war "of every man against every man".⁷⁰ The designation of a state of affairs as war also confuses the issue as regards the operative legal regime. It is hard to disagree with Wedgwood insofar as the strike on the al-Shifa pharmaceutical plant could be seen as a targeting decision for the *ius in bello*, rather than a policy decision for the *ius ad bellum*. On the other hand, it is hard to see why Operation Infinite Reach should have been taken as tactical rather than a policy decision.⁷¹

This section aimed to show that the Bush doctrine of pre-emption not only had consequences for when force can be used, but also for when uses of force could be evaluated. It was suggested that for various factors relating to the exceptionality of armed violence, the uncertainty of today's security threats and methodological attempts to quantify them using risk analysis, collective security system evaluation of claims to have used force in self-defence are excluded. In the next section it will be shown that some of the same features apply to propositions that self-defence claims should be evaluated according to their proportionality. This principle relies on findings of fact to be applied and is interesting because it is invoked by formalists and

⁶⁹ Wedgwood, "Responding to Terrorism", p. 567.

⁷⁰ T. Hobbes, *Leviathan*, (1985) Penguin, p. 185 (Part I, Ch. 13).

⁷¹ UN Doc. S/1998/780 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 (1998) The US justified the strikes as an act of self-defence. See also, J. Lobel, "The Use of Force to Respond to Terrorist Attacks", p. 554, n. 84 criticising the classification.

realists alike. It is preferred to armed attack because it is far more flexible; rather than refuse states the right to counter threats that do not take the form of an armed attack, the proportionality principle enjoins states simply to tailor their responses to the threat. However, it is worth noting that this implies, *inter alia*, that the size and shape of the threat must be knowable.

PART ONE: A COMMON STANDARD OF PROPORTIONALITY?

A. Flexible Standards not Rigid Rules.

Previously in the thesis, it has been written that some supporters of the Bush doctrine preferred flexible standards over rigid rules.⁷² They took inspiration from older theories that the requirement of the occurrence of an “armed attack” is “a trap for the innocent and a signpost for the guilty”.⁷³ The argument was that specific rules are inflexible and can be either over- or under-inclusive, while broad principles can accommodate the justice of the case because they give appliers more discretion to react to the facts of particular cases.⁷⁴ We will now look more closely at the implications of such theories.

Such writers argue that the relatively rigid rules of doctrine can be managed or even replaced by more flexible principles. However, as Thomas Franck showed in his comparison between “idiot” and “sophist” rules, complex norms that give a broad

⁷² See Chapter I. at p. 50.

⁷³ J. Stone, *Conflict Through Consensus: United Nations Approaches to Aggression*, p. 41 This argument was reiterated by Koskenniemi in his review of the ICJ’s Nuclear Weapons Advisory Opinion. M. Koskenniemi, “Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons”, 10(1) *LJIL* (1997) 137 p. 152. (Hereinafter, ‘Koskenniemi, “Faith”’.)

⁷⁴ J. Yoo, “Using Force”, 71(3) *Univ. Chi. LR* (2004) 729, p. 759. (Hereinafter, ‘Yoo, “Using Force”’.)

discretion to the evaluator require sophisticated machinery for their application.⁷⁵ It is unsurprising that the move to flexible standards has drawn objections from those fearing the law could be used as a pretext for aggression.⁷⁶ The concern is still more pressing where the individual perspective in question is that of today's most powerful state. In Glennon's view, the US is moving towards a new paradigm of the legal rule. Apparently, this is because the US views categories and rules as flexible and adaptable so that they can be the subject of cost-benefit analysis and resource balancing operations.⁷⁷

Appeal to case by case analysis guided by flexible principles,⁷⁸ implies the use of 'objective' fact to pave over the subjectivity of norms. The discussion begins to look like a cat-and-mouse game between facts and ideas; the justification of one requires resort to the other.⁷⁹ In order to prevent the right of pre-emptive self-defence from being easily abused, it has been circumscribed by some writers who have broken down what it may mean that the US will act pre-emptively "if necessary".⁸⁰ Sofaer's relevant factors are; the nature and magnitude of the threat faced, the likelihood that the threat will be realised notwithstanding preventive action, the exhaustion of alternatives to the use of force and consistency with the UN Charter and other international agreements.⁸¹ Similarly, Yoo uses the probability of an attack, the existence of a window of opportunity and the magnitude of the harm.⁸²

⁷⁵ T.M. Franck, *The Power of Legitimacy Among Nations* (1990) Oxford University Press, Chapters V and VI pp. 67-90.

⁷⁶ E.g. M. Bothe, "Terrorism and the Legality of Pre-emptive Force" 14(2) EJIL (2003) 227.

⁷⁷ M.J. Glennon, "The Emerging Use-of-Force Paradigm" 11(3) JCSL (2006) 309 p. 313.

⁷⁸ Sofaer, "Pre-emption", p. 213.

⁷⁹ Koskenniemi, *From Apology*, p. 517.

⁸⁰ US National Security Strategy (2002), p. 15.

⁸¹ Sofaer, "Pre-emption", p. 220.

⁸² Yoo, "Using Force", p. 757.

According to Sofaer without such safeguards, pre-emption “would allow a state to attempt to ensure its own security by attacking states without proof” of any attack or its preparation.⁸³ A similar impetus can be seen in the rationale of Yoo for this proposal: “[i]t permits more information to be brought to the decision through the analysis of probability and magnitude of harm”.⁸⁴ The key point is that the process of bringing and presenting the information for collective scrutiny cannot be taken for granted. Later in the chapter we will consider the matter of probability in more detail. For the present, let it be noted that both Sofaer and Yoo both employ criteria that appear to refer to the world of fact but that in effect rely on the subjective perceptions of the interpreter.

The principles of necessity and proportionality are arguably the most well-known alternatives to ‘armed attack’. Although there are those who argue that the principles have been wrongly excluded from the public policy debate about the use of force in foreign affairs,⁸⁵ necessity and proportionality are said by many academics to condition the use of force in self-defence.⁸⁶ The principles are used by realist and doctrinal writers alike because while they can be shown to satisfy the doctrine of sources, they are also flexible enough to respond to social change. They are said to have originated in the Caroline case⁸⁷ which Gray says has attained “mystical authority”.⁸⁸ More recently, the International Court of Justice (ICJ) affirmed their continued relevance to self-defence after 1945 as part of customary international

⁸³ Sofaer, “Pre-emption”, p. 221.

⁸⁴ Yoo, “Using Force”, p. 760.

⁸⁵ Wedgwood, “Proportionality and Necessity”, p. 58.

⁸⁶ Gray, *International Law and the Use of Force*, p. 120; Sofaer, “Pre-emption”, p. 220; Yoo, “Using Force”, p. 741 arguing that this is the establishment position.

⁸⁷ J. Gardam, “A Role for Proportionality in the War on Terror” 74(1) *Nordic JIL* (2005) 3, p. 3. (Hereinafter, ‘Gardam, “A Role for Proportionality”’.)

⁸⁸ Gray, *International Law and the Use of Force*, p. 120.

law.⁸⁹ Indeed, Gray writes that state practice casts the principles as “the only factors” relevant to validity.⁹⁰

However, their application – owing to the lack of both consistency and a doctrine of precedent – tends to be more realist than doctrinal because “questions of necessity and proportionality are dependent on the facts of the particular case”.⁹¹ Franck has stated that “[v]ague principles....tend to invite scofflawry”.⁹² This need not be a problem if, as Gray assumes, there is “universal agreement” about the facts.⁹³ There is little inter-state discussion of these principles in doctrinal terms; rather they are applied in specific cases because the question “is almost exclusively one of fact” eschewing doctrinal questions that might engender expectations of consistent application in the future.⁹⁴ It is argued that in themselves necessity and proportionality mean very little and that once a scholar begins to elaborate on them, their advantages of flexibility are lost.

While on the surface it seems that necessity and proportionality figure heavily in state practice, we might question how useful the principles prove as a means of critiquing

⁸⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment. ICJ Rep. 1986, p. 14, para. 237 (Hereinafter, ‘Nicaragua (Merits)’); See also Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Reports 2003, p. 161, para. 43 (Hereinafter, ‘Oil Platforms’) and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 141.

⁹⁰ Gray, *International Law and the Use of Force*, p. 124 Sources confirm the centrality of the principles to state practice. E.g. Yoo gives the example of Operation Eldorado Canyon, stating that the US justified its action by arguing it was necessary and proportionate, Yoo, “Using Force”, p. 767; The principles are joined by imminence in the UK Government’s conception of valid self-defence, HL Deb 21 April 2004 vol 660 c356, at c370 per the Attorney General Lord Goldsmith; Gray says that South Africa and Israel have both been condemned by other states on these grounds when they took pre-emptive action, Gray, *International Law and the Use of Force*, p. 125 citing a statement by the US condemning a cross-border strike against Angola in UN Doc. S/PV.2616 (1985) Meeting of the Security Council of 7 October 1985.

⁹¹ Gray, *International Law and the Use of Force*, p. 122.

⁹² T.M. Franck, “On Proportionality of Countermeasures in International Law” 102(4) *AJIL* (2008) 715, p. 717. (Hereinafter, ‘Franck, “Proportionality”’.)

⁹³ Gray, *International Law and the Use of Force*, p. 134.

⁹⁴ *Ibid.*, p. 121.

or vindicating self-defence claims. Gardam has warned that “necessity and proportionality played no real role in debates over the legitimacy of the use of force” but rather that they “were referred to almost as an incantation”. If the principles are merely alluded to and not substantiated on the facts of a particular case, this suggests that they are not being evidenced properly. The superficial consensus therefore seems misleading because the principles are hollow; particularly because although the ICJ has mentioned them it has never really considered them in detail.⁹⁵ Owing to the thinness of the principles, it is submitted that there is a danger that they may be exploited to garnish self-defence claims. This is because they can be seen in a rational-instrumentalist light; where the ends justify the means, the ultimate end of protecting the nation can render almost any action necessary, particularly in conditions of uncertainty.⁹⁶

The principle of proportionality will be taken as an illustration of the problems of using flexible standards. Franck admits that since proportionality has not been defined, “[t]his obscurity can undermine its credibility”.⁹⁷ It will be argued that the proportionality of a given use of force is not an objective measurement. This is because it depends on putting the force purportedly used in self-defence in a relation with another factor. The identity of this other factor differs according to whether one takes a broad approach to the right of self-defence where proportionality is judged from the claimant state’s perspective, or a narrow approach where the judgment is made from the system perspective. These will be known as the validation-view and the constraint-view, respectively. Although judgments about proportionality cannot be made without reference to the facts, it is not an objective standard. This is because the

⁹⁵ Gardam, “A Role for Proportionality”, p. 4.

⁹⁶ *Supra*, at pp. 263-274.

⁹⁷ Franck, “Proportionality”, p. 716.

choice of matrix within which to make the calculation of proportionality affects the choice of relevant facts and the weight that will be assigned to them.

B. Proportionality.

The principle of proportionality will be examined as an illustration of the problems of a merely allusive approach to facts; where facts are invoked but not examined. The proportionality principle is said to stem from the decentralised nature of the response to wrongful conduct between states.⁹⁸ One disadvantage attendant on the advantageous flexibility of the principle of proportionality is that it can lack either critical bite or persuasive potential. Arguments are made against those who assume that because proportionality appears as *prima facie* a matter of fact, it acquires determinacy on the facts of each case. Another problem with proportionality is that it describes the state of one thing relative to another. This means that writers must decide on what is held to be proportionate to what. For instance, whether a use of force is proportionate will depend on whether it is judged according to the amount of force necessary to repel an attack, to the harm actually caused by the threat, or to the potential harm that could have been caused by it.

On this view, the principle has its limits: If a claim of pre-emptive self-defence were to be judged according to proportionality, it is submitted that such facts would be lacking because proportionality would have to be measured according to an immaterialised threat. However, the principle of proportionality can also be measured according to the positive aims of the claimant state; for instance, to ensure national

⁹⁸ E. Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" 12(5) EJIL 889, p. 890. (Hereinafter, 'Cannizzaro, "The Role of Proportionality"'.)

security. On this view, the doctrine of pre-emption could be viewed as proportionate. Franck has suggested that in the “primitive” society of the states, “proportionality assumes a central role, both permitting and limiting discretionary reprisal and other countermeasures” that fill the void left by lack of centralised enforcement.⁹⁹ It is therefore argued that proportionality can be exploited by states and does not yield a single authoritative answer when applied to the facts.

Proportionality is used by both doctrinal and realist writers.¹⁰⁰ According to Gardam, although the law on the use of force is plagued by controversy and disagreement, there is “unanimous agreement on the need for the forceful action to be proportionate”.¹⁰¹ Apparently this is because of “its neutral role in the contentious task of determining the legitimacy of the grounds for resorting to force”.¹⁰² Its interpretation tends to be a function of whether the system perspective or the individual state perspective is taken. Thus, it will be seen either as validating, or as constraining states’ exercise of self-defence. The constraint view tends to characterise proportionality as a secondary consideration that may invalidate a *prima facie* valid claim to have used force in self-defence if a state uses excessive means to repel an (imminent) armed attack;¹⁰³ proportionality is contextualised by the Charter and the article 51 condition of an ‘armed attack’. In contrast, the validation view sees proportionality through the prism of just war theory; in this case proportionality can be judged according to the importance of the ends pursued. The validation view is so-called because it also involves the idea that proportionality is (among) the primary

⁹⁹ Franck, “Proportionality”, p. 763.

¹⁰⁰ *Supra*, at p. 276.

¹⁰¹ J. Gardam, “Proportionality as a Restraint on the Use of Force” 20(1) *Aust. YBIL* (1999) 161, p. 164. (Hereinafter, ‘Gardam, “Proportionality as a Restraint”’.)

¹⁰² Gardam, “A Role for Proportionality”, p. 6.

¹⁰³ *Nicaragua (Merits)*, para. 237.

standards against which the validity of a use of force is judged, it would therefore provide a means of validating pre-emptive self-defence claims.

The argument will be made that although many writers point to the unusual degree of consensus over the applicability of proportionality,¹⁰⁴ the principle is not necessarily a useful, non-exploitable means of distinguishing valid from invalid claims of self-defence because of the indeterminacy caused by its contested character. This is not merely academic pedantry: The readings of proportionality are contested by states as well as writers. Thus Gardam compares the approaches of Iran and the US in the Oil Platforms case; Iran had taken the constraint-view while the US argued from validation that it was entitled to remove continuing threats to its security.¹⁰⁵ This tends to show how proportionality can fail to provide a useful common point of reference according to which valid from invalid claims to have used force in self-defence can be distinguished.

Writers differ over the requirements of proportionality, but in large part they seem to agree that there must be a threat that action taken in self-defence is proportionate to. Koskenniemi writes that an assessment of proportionality would include “the foreseeable consequences of a strike, the types of weapon employed, the gravity and foreseeability of the threat..., the timing of the strike, the quality of the target..., what other means are available, and the costs or consequences of non-use”.¹⁰⁶ On this view, almost none of these factors could be evidenced in the case of pre-emption of an embryonic threat where “uncertainty remains as to the time and place of the enemy’s

¹⁰⁴ *Supra*, at p. 276.

¹⁰⁵ J. Gardam, “A Role for Proportionality”, p. 7, n. 15; Memorial submitted by the Islamic Republic of Iran, 8 June 1993 and Counter-Memorial and Counter-claim submitted by the United States of America, 23 June 1993.

¹⁰⁶ Koskenniemi, “Faith”, p. 150.

attack”.¹⁰⁷ Gardam also notes that the delimitation of the threat that is required for the calculation of the necessity of the forcible response is problematic because “there may still remain a great deal of uncertainty regarding the exact nature of the threat, a state of affairs that will not facilitate the operation of the equation”.¹⁰⁸

While states, like Israel, have attempted to infer the size of the threat from the posture of the target state,¹⁰⁹ it is submitted that it is not enough to use indirect evidence from which to infer the threat. Relying on the demonstration of an *animus belligerendi* in the target state is extremely problematic because intentions are not easy to prove.¹¹⁰ Thus O’Connell says that “[t]he law should require that inferences be drawn from objective facts only”.¹¹¹ In effect this would rule out the role of intention in the designation of the size of the threat faced by a claimant state.

Approaches based on the constraint view are likely to lead to opposite conclusions to approaches based on the validation view. As for the constraint view, the ICJ has affirmed the place of necessity and proportionality in the evaluation of self-defence claims several times.¹¹² Its position is that self-defence allows “measures which are proportional to the armed attack and necessary to respond to it”.¹¹³ This clearly

¹⁰⁷ National Security Strategy of the United States of America, 2006, p. 23. Available at: <http://www.strategicstudiesinstitute.army.mil/pdffiles/nss.pdf>. (Hereinafter, ‘US National Security Strategy (2006)’.)

¹⁰⁸ Gardam, “A Role for Proportionality”, p. 11.

¹⁰⁹ UN Doc. S/PV.2280 (1981) Meeting of the Security Council on 12 June 1981, para. 69.

¹¹⁰ ElBaradei has said ‘I don’t judge intention. It’s very difficult to judge.’ D. Dombey, ‘FT interview: Mohamed ElBaradei’, Financial Times, 19 February 2007. Available at: <http://search.ft.com/ftArticle?queryText=ElBaradei+Interview&y=3&aje=true&x=14&id=070219008008&ct=0> (last visited 24 July 2009).

¹¹¹ M.E. O’Connell, “Evidence of Terror” 7(1) JCSL (2002) 19, p. 36 citing Brownlie’s Principles of Public International Law 5th ed. (1998) pp. 444-446. (Hereinafter, ‘O’Connell, “Evidence of Terror”’.)

¹¹² See note 89, *supra*.

¹¹³ Nicaragua (Merits), para. 176.

contextualises proportionality within the Charter¹¹⁴ and limits it to the repulsion of an armed attack. Accordingly it would be difficult to extend the rationale to cover pre-emptive force because there would as yet be no attack to repel. This may render the constraint-view esoteric because it ties proportionality too closely to the existence of an armed attack, thus recapitulating the perceived problems of article 51. The benefits of proportionality as a flexible standard rather than a rigid rule, are not available where proportionality is a secondary factor which can only invalidate a claim.

Thus, the relationship between constraint-view proportionality and the facts of the case it relates to is established in the abstract because the measurement need only be made once it has been established that the use of force was in response to an (imminent) armed attack.¹¹⁵ Brownlie's explanation of the situation is instructive:

It is possible that in a very limited number of situations force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately. However in the great majority of cases to commit a State to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality.¹¹⁶

The implication of this is that where a threat is emergent and not yet temporally imminent, it is unlikely that evidence will exist according to which it could be

¹¹⁴ Ibid, "Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter".

¹¹⁵ Nicaragua (Merits), para. 210.

¹¹⁶ I. Brownlie, "The Use of Force in Self-defence" 27 BYIL (1961) 183, p. 227.

calculated what sort of use of force, if any, would be needed to allay the threat.¹¹⁷ It is suggested that the constraint-view of proportionality can be seen as part of what might be called a minimising approach to the use of force.¹¹⁸ This can seem to render the law esoteric because proportionality, on this view, is not responsive to changing social circumstances or novel situations. Instead, it is tied to the occurrence of an armed attack.

Despite these limitations, the constraint approach can still give rise to ambiguity. For instance, what is the position as regards a pattern of pin-prick attacks? The US and Israel have both appeared to argue that proportionality should be measured against the “accumulation of events”.¹¹⁹ While some scholars have dismissed this approach as tantamount to reprisal,¹²⁰ it is said that there does not appear to be stable agreement between states as to whether the accumulation of events argument is acceptable or not.¹²¹ The US Operation Eldorado Canyon against Libya in 1986 was reported to the Security Council (SC) under article 51 of the Charter. The right of self-defence was invoked to respond “to an ongoing pattern of attacks by the Government of Libya”.¹²² The SC is said to have rejected this justification.¹²³ It did not reject a similar justification made by the US of Operation Enduring Freedom where potential future attacks deflected the charge of reprisal, but their connection with the destruction of

¹¹⁷ Gray, *International Law and the Use of Force*, p. 167.

¹¹⁸ D. Bederman, “Counterintuiting Countermeasures” 96(4) *AJIL* (2002) 817, pp. 820-1.

¹¹⁹ Israeli action against Lebanon in 2006 followed “pin prick” attacks from Hezbollah. E. Cannizzaro, “Contextualizing Proportionality: *ius ad bellum* and *ius in bello* in the Lebanese War” 88 *Int. Rev. Red Cross* (2006) 779, p. 783. (Hereinafter, ‘Cannizzaro, “Contextualizing Proportionality”’.); See also *Oil Platforms (Iran v. USA) Counter-Memorial and Counter-claim submitted by the United States of America*, 22 June 1997, p. 130, para. 4.10.

¹²⁰ Alexandrov, *Self-Defense*, p. 167

¹²¹ Cf. Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (2005) Cambridge University Press, p. 231 and Gray, *International Law and the Use of Force*, p. 125.

¹²² UN Doc. S/17990 (1986) Letter dated 86/04/14 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council

¹²³ Including Argentina, (UN Doc. S/PV.1644 Meeting of the Security Council of 27/8 February 1972 p. 3) France and the Sudan (UN Doc. S/PV.1650 Meeting of the Security Council of 26 June 1972 p. 2 and 19) over Israeli incursions into Lebanon.

the World Trade Centre made them appear material rather than embryonic.¹²⁴ Foreshadowing this, Greenwood had suggested that the SC was wrong to reject the accumulation of events thesis and suggests that in the case of modern day terrorism it is more sensible to measure the proportionality of a defensive response against the accumulated raids and not every particular one.¹²⁵

Contrary to this limited view of proportionality is the validation approach. According to scholars who wish to take a more flexible approach to the validation of claims to have used force in self-defence, the validity of an exercise would not be dependent on the occurrence or imminence of an armed attack. This is because, they argue, the current security environment contains threats that are too large and too unpredictable to wait for. The logic of this approach is teleological; the proportionality of the means is to be judged by the importance of the ends sought. This has been called an ‘absolute’ approach to proportionality that may have the effect of allowing “responses [that] greatly exceed[...] the magnitude of the original breach”.¹²⁶

There are, indubitably, cases in which the validation approach overlaps with the constraint approach. For instance, where the aim happens to be the repulsion of an ongoing attack or the quashing of an incipient attack: In these sorts of cases, the validation approach to proportionality operates in a similar way to the constraint-approach because in such cases the size and character of the threat faced is demonstrable. However in the new strategic environment where uncertainty

¹²⁴ UN Doc. S/2001/946 (2001) 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.

¹²⁵ C. Greenwood, “International Law and the United States’ Air Operation Against Libya”, 89(4) W. Va. LR (1987) 933, pp. 954-6. (Hereinafter, ‘Greenwood, “Air Operation Against Libya”’.)

¹²⁶ Cannizzaro, “The Role of Proportionality”, p. 892.

characterises threats to security,¹²⁷ Reisman and Armstrong rightly point out that with pre-emption; “[t]he nature and quantum of evidence that can satisfy the burden of proof resting on the unilateralist becomes less and less defined and is often, by the very nature of things, extrapolative and speculative”.¹²⁸ If proportionality is judged in terms of ending uncertainty anything, beyond regime change, becomes an option.

The application of the principle of proportionality is where the danger lies. Gardam points out that “[p]roportionality is a complex concept to apply in particular cases”.¹²⁹ This is because self-defence situations are complicated and the distillation of their pertinent facts into a workable shape involves selections and preferences that affect the perception of the situation. It is submitted that Sofaer’s argument that evaluations of pre-emptive self-defence should take place on a case-by-case basis according to what is “necessary in the relevant circumstances”¹³⁰ is fundamentally undermined by the complexity of such “relevant circumstances”.

Furthermore, the workability of a distinction between valid and invalid uses of force in self-defence based on proportionality, will open the door to exploitation to the extent that the “relevant circumstances” are not made public. Greenwood has noted that evaluating the calculation of proportionality in the context of anticipatory force is problematic because the intelligence on which such a calculation is based is often undisclosed: Thus, “[t]he United States administration has refused to make public the details of the terrorist attacks which it claimed Libya was about to carry out. While

¹²⁷ *Supra*, at p. 263-274.

¹²⁸ W. M. Reisman and A. Armstrong, “The Past and Future of the Claim of Pre-emptive Self-Defense” 100(3) *AJIL* (2006) 525 p. 526.

¹²⁹ Gardam, “Proportionality and Force”, p. 405.

¹³⁰ Sofaer, “Pre-emption”, p.212 ; see also McDougal and Feliciano, *Law and Minimum World Public Order*, p. 243.

this refusal is perfectly understandable in view of the need to protect intelligence sources, it makes it impossible to determine whether the air strike satisfied the requirement of proportionality”.¹³¹ This key point will be discussed in more detail below.¹³² Suffice it to say that unwillingness to share intelligence implies that the evaluation of a self-defence claim is ultimately for the state using force.

If the measure against which proportionality is calculated is flexible rather than fixed at armed attack, the potential of self-defence to justify uses of force is greater. The constraint-approach allows proportionality to limit the means used because the end is fixed and narrow, but the validation view subordinates the means used to the ends sought. In the US NSS the ends of an exercise of self-defence are the protection of “the United States, the American people, and our interests at home and abroad”.¹³³ These ends are positive rather than negative like the aim of repulsion and they are also very broad. Accordingly, the US reserves the right to respond to threats with “overwhelming force”.¹³⁴

This shows how the validation-view of proportionality is to be read with the proactive approach to the use of force: Rather than force being used as little as possible, such a view encourages an active pursuit of situations in which force could be used.¹³⁵ Thus where a risk-averse government takes action to pre-empt an emergent threat, the details of which are sketchy, proportionality would be measured in the light of the importance of protecting the US and its citizens. Thus in Yoo’s conception,

¹³¹ Greenwood, “Air Operation Against Libya”, p. 946.

¹³² *Infra*, at pp. 293-301.

¹³³ US National Security Strategy (2002) p. 6.

¹³⁴ US National Security Strategy (2006), p. 22.

¹³⁵ The assumption underlying this is that a use of force is always the most effective means of safeguarding national security.

“[p]roportionality asks whether the costs of the pre-emptive use of force are outweighed by the probability of the attack and magnitude of its harm”. He suggests that a state may minimise collateral damage by striking earlier.¹³⁶ This was one of the arguments of Israel in its bombing of the Osiraq nuclear reactor.¹³⁷

The validation-view is connected to theories of just war. According to Gardam just war scholars “have consistently focused on proportionality as a component of the *ius ad bellum*”.¹³⁸ The normative framework which anchors such proportionality gives a broad discretion to states in determining the existence of a just cause. This emphasises that proportionality is to be judged according to positive ends sought and not according to a negative factor such as the repulsion of an armed attack. It has been suggested that the “practice of states in [the recent Gulf conflict] reveals that the legality of a state’s resort to force has a subtle impact on the perception by that state of the means that can legitimately be used to achieve its goal”.¹³⁹ Gardam notes that “it can be argued that to transpose the complexity and overt subjectivity of the balancing process in just war theory into a legal regime is unworkable”.¹⁴⁰

The operation of proportionality in a just war matrix would depend on a widespread sharing of moral values. This is highlighted by McDougal and Feliciano who suggest that just war doctrine fell out of fashion when the centralising authority of Rome was diminished.¹⁴¹ The doctrine of sovereign equality would have meant that conflicts of opinion as to the justice of a cause would have ended in stalemate. During the

¹³⁶ Yoo, “Using Force”, p. 757.

¹³⁷ UN Doc. S/PV.2280 (1981) Meeting of the Security Council of 12 June 1981, para. 95.

¹³⁸ Gardam, “Proportionality and Force”, p. 393, n. 8.

¹³⁹ *Ibid.*, p. 393.

¹⁴⁰ Gardam, “Proportionality as a Restraint”, p. 169.

¹⁴¹ McDougal and Feliciano, *Law and Minimum World Public Order*, p. 133.

nineteenth century, when war was used as an instrument of national policy, it was not used.¹⁴² It is suggested that a just-war dependent concept of proportionality would be subject to exploitation. Thus Gardam complains that as far as self-defence is concerned, proportionality “serves as a rhetorical tool to support whatever view is taken as to the morality of a particular use of force”.¹⁴³

The principle of proportionality is not only potentially exploitable because it can be interpreted broadly. The exploitability of the principle is intensified by its appearance in two separate bodies of law: The *ius in bello* and the *ius ad bellum*. The difference in treatment of proportionality even in doctrinal approaches to law is marked. Proportionality in the *ius ad bellum* is said to have two roles; signalling both when force can be used and how much is permitted.¹⁴⁴ In the *ius in bello* proportionality balances military advantage and humanitarian concerns.¹⁴⁵ Insofar as proportionality is an on-going measurement rather than a one-off assessment, it is easy to see how these might be confused,¹⁴⁶ particularly in the context of the so-called ‘War on Terror’. The proportionality requirement in the *ius in bello* is the more permissive; it is not restricted to the restoration of the status quo ante. Once hostilities have started, the *ius in bello* has to take account of the objective of both belligerents to win.¹⁴⁷ The

¹⁴² Gardam, “Proportionality and Force”, p. 396.

¹⁴³ Gardam, “Proportionality as a Restraint” p. 170.

¹⁴⁴ E. Cannizzaro, “Contextualizing Proportionality: *ius ad bellum* and *ius in bello* in the Lebanese War” 88 *Int. Rev. Red Cross* (2006) 779, p. 782. (Hereinafter, ‘Cannizzaro, “Contextualizing Proportionality”’.)

¹⁴⁵ Cannizzaro, “Contextualizing Proportionality”, p. 785.

¹⁴⁶ R. Wedgwood, “Proportionality and Necessity in American National Security Decision Making” 86 *ASIL Proc.* (1992) 58, p. 60. (Hereinafter, ‘Wedgwood, “Proportionality and Necessity”’.)

¹⁴⁷ It should be noted that there are those who take a broad view of restoring the status quo ante: J. Gardam, “A Role for Proportionality”, p. 7. “[T]here is significant support for the view that self-defence against an armed attack also includes action designed to prevent a recurrence of the armed attack and to restore the security of the victim state”, citing the US justification of Operation Enduring Freedom and also the US argument in *Oil Platforms* that it was justified to prevent future attacks on shipping.

ius in bello proportionality takes account of the positive ambitions of states and not just the negative repulsion of an armed attack.

It has been said that the line separating these two conceptions of proportionality “tends to blur in practice”.¹⁴⁸ For instance, Wedgwood has written that “[s]trategic proportionality asks that civilian casualties be weighed against the justification for using force in the first place”.¹⁴⁹ This is problematic because it can lead to the case where a state can validate its use of force as self-defence on the grounds that the number of (target state) civilians killed did not outweigh the number of claimant state citizens which might otherwise have been harmed. The use of ius in bello proportionality to evaluate uses of force in self-defence effectively lowers the standard of validity for uses of force. This is because while the ius ad bellum seeks to minimise resort to force, the ius in bello seeks to regulate it. This implies that it accepts the resort to force.

This section of the thesis has attempted to show that the principle of proportionality is capable of supporting both narrow and broad conceptions of self-defence. The constraint and validation views of proportionality take differing perspectives on proportionality and consequently measure the proportionality of self-defence against different referents. It was said that the constraint view of proportionality tends to recapitulate rather than adapt the narrow article 51 approach to self-defence. On the other hand, the validation view showed the ways in which a flexible standard such as proportionality can be exploited by states to validate their claims of self-defence. The ambiguity of the principle can be resolved by placing it within a frame of reference,

¹⁴⁸ Cannizzaro, “Contextualizing Proportionality”, p. 781.

¹⁴⁹ Wedgwood, “Proportionality and Necessity”, p. 59.

for instance the *ius in bello* or the new strategic reality where the attitudes of states can be characterised as Hobbesian. This can enable proportionality to be measured without the existence of a concrete threat to national security but instead according to concrete aims.

This means that while facts are not incapable of distinguishing valid from invalid uses of force in self-defence, evaluators must share the same frame of reference.¹⁵⁰ This is problematic where self-defence is concerned because, as Franck points out, in self-defence contexts both sides tend to claim self-defence.¹⁵¹ States' qualms about or objections to, self-defence claims will remain as a disruptive force in the collective security system unless they are dealt with either by coercion or by a more detailed process of vindication which could create new understanding of what occurred in a given situation. This thesis takes the position that the creation of new understandings is a preferable process to coercion. The next section will focus on ways in which processes of understanding-creation have been over-looked on the grounds that facts 'speak for themselves'.

PART TWO: REDEMPTION THROUGH INTELLIGENCE?

We will now turn to look at the role that intelligence plays in the vindication of claims to have used force in self-defence. It will be argued that the use of intelligence is problematic for several reasons. Although it alludes to facts and to the objective world, intelligence, of itself, cannot vindicate claims to have used force in self-defence. This is for two main reasons. Firstly, the nature of intelligence is not

¹⁵⁰ See Chapter IV, at p. 209.

¹⁵¹ T.M. Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States" 64(4) *AJIL* (1970) 809, p. 811. (Hereinafter, 'Franck, "Who Killed Article 2(4)?"'.)

compatible with an open approach to communication; sources must be protected and intelligence sharing is limited to tight alliances. Secondly, intelligence produces estimates and not proof. Its goal is often to foretell what will happen rather than to establish what has happened.

Intelligence was at the centre of the national security strategies of the UK and the US.¹⁵² Its usefulness in determining the existence of threats to national security is particularly useful with regard to the development of Weapons of Mass Destruction (WMD) by rogue states.¹⁵³ Intelligence is, inter alia, crucial to the operation of the doctrine of pre-emption. This is because intelligence not only deals with past and present facts, but also with future ones.¹⁵⁴ In the second section of this part the place of probability in the vindication of self-defence claims will be questioned. In the first section, the unavailability of intelligence to scrutiny will be examined. It will be argued that each of these factors prevent any direct analogy between intelligence and evidence.

The US National Intelligence Council has stated that intelligence is not about proof: “assessments and judgments are not intended to imply that we have “proof” that shows something to be a fact or that definitively links two items or issues”. Instead, they have underlined that intelligence analyses are intended to guide decision-makers.¹⁵⁵ However this has not stopped the products of intelligence being

¹⁵² See e.g. UK Strategy, Security in an Interdependent World, para. 4.5; US National Security Strategy (2006), p. 23-4.

¹⁵³ US National Security Strategy (2006), p. 23.

¹⁵⁴ G. Sulmasy and J. Yoo, “Counterintuitive: Intelligence Operations and International Law” 28 Mich JIL (2006-7) 625, p. 633. (Hereinafter, ‘Sulmasy and Yoo, “Counterintuitive”’); Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 864.

¹⁵⁵ US National Intelligence Council, “Iran: Nuclear Intentions and Capabilities” (November 2007), Available at: http://www.dni.gov/press_releases/20071203_release.pdf, pp. 1 and 4. (Hereinafter, ‘US National Intelligence Council, “Iran: Nuclear Intentions and Capabilities”’.)

increasingly invoked in international forums.¹⁵⁶ The idea that the positive force of claims implies their availability for critique is central to this section of the chapter, as is the related idea that justification implies a collective process, not merely an individual statement.

A. Facts but not Positive Ones: Lack of Critical Potential.

Recourse to intelligence can be seen as another ineffective allusion to facts that does not permit sufficient scrutiny or the adoption of critical attitudes. It is not enough to reference facts as though they could be taken for-granted as universally valid and understood, particularly where issues of trust are at stake. If the ability of factual statements to gain intersubjective understanding is to be mined, it is necessary to demonstrate the facts concerned. This is because self-defence claims are essentially contested; for every Colin Powell presentation, there is an Iraqi declaration like that of 7 December 2002 in which Iraq attempted to demonstrate that it was complying with its SC obligations.¹⁵⁷

Processes of critical inquiry into claims to have used force in self-defence depend on the claimant producing reasons that can be subjected to scrutiny.¹⁵⁸ This is particularly important where claimant states and target states make very different assertions about the capabilities and intentions of the latter. Koskenniemi was wise to suggest that in cases of conflicting propositions, “the solution must be arrived at through an open (uncoerced) discussion of the alternative material justification” and

¹⁵⁶ Chesterman, “The Spy Who Came in from the Cold War”, p. 1075-6.

¹⁵⁷ Referred to by Mohammed ElBaradei, Director General of the IAEA, UN Doc. S/PV.4692 (2003) Meeting of the Security Council 27 January 2003, p. 4.

¹⁵⁸ See Chapter IV, at pp. 203-209.

that the “critical process must continue” and be applied to the rival conception.¹⁵⁹ This contains the crucial implication that contestation must be inclusive and visible. This means that where states allude to ‘the facts’ to redeem a self-defence claim, such facts must be made criticizable and this means that they must be made visible.

One of the major sources of fact in national security matters is, inevitably, secret intelligence. One of the distinguishing factors of intelligence is that it is protected from scrutiny: It has been defined as “[i]nformation developed through secret processes to address a nation’s most profound security concerns”.¹⁶⁰ Intelligence is often not public information that can be used as evidence.¹⁶¹ It is seen as “a black box that spews out results” and that cannot therefore be closely scrutinised.¹⁶² There are two other key subsidiary problems with the use of intelligence. One is that intelligence does not deal with facts, it deals with probability and the other is that intelligence, owing to its impunity from critique and cloaks and daggers reputation,¹⁶³ makes for stirring rhetoric. These factors also tend to diminish its criticizability and therefore increase the exploitability of the self-defence claim.

It is to be stressed that intelligence cannot be seen as a simple alternative to giving evidence in support of a claim. Intelligence and evidence are fundamentally different as regards their ability to redeem a self-defence claim. National security is often

¹⁵⁹ Koskenniemi, *From Apology*, p. 545.

¹⁶⁰ E. Rindskopf-Parker, “Intelligence and the Use of Force in the War on Terrorism” 98 *ASIL Proc* (2004) 147, p. 147. (Hereinafter, ‘Rindskopf-Parker, “Intelligence and the Use of Force in the War on Terrorism”’); Sulmasy and Yoo, “Counterintuitive”, p. 632.

¹⁶¹ So-called “open-source information” is publicly available and is not the focus of this section.

¹⁶² D. Feith, “Remarks” 98 *ASIL Proc* (2004) 155, p. 155. (Hereinafter, ‘Feith, “Remarks”’.)

¹⁶³ The website of the UK Security Service, MI5, includes a page entitled “Myths and Misunderstandings”. Available at: <http://www.mi5.gov.uk/output/myths-and-misunderstandings.html>.

thought of as too important to be subject to public scrutiny.¹⁶⁴ Intelligence is particularly important, it is said “to contend with uncertainty” in our new strategic environment.¹⁶⁵ It seems that intelligence has an important prospective role to play in informing policy choices. Evidence, on the other hand is primarily retrospective. It speaks to an audience in justification of a particular proposition. It should be underlined at this point that what is argued is not that intelligence is worse than evidence, but simply that it is functionally different. To underline the point, it has been said that “Iraq has proved beyond any reasonable doubt that intelligence cannot provide evidence reliable enough to justify war on such a speculative basis”.¹⁶⁶

It is sometimes argued that to share intelligence with other nations would undermine national security by revealing intelligence agencies’ methods and sources and that it may even jeopardise the safety of agents in the field.¹⁶⁷ In the ‘War on Terror’ the use of intelligence, rather than evidence, to ground a use of force tended to imply the withholding of information. For instance, in 2003 Colin Powell told SC members that “I cannot tell you everything we know”.¹⁶⁸ The problems encountered by international lawyers when they are excluded from knowing the facts are illustrative of the problems that may face other evaluating audiences. Thus, writing about Operation Eldorado Canyon, Greenwood has written that “much of the evidence of alleged

¹⁶⁴ This is a theme of former Chief Prosecutor at The Hague, Richard Goldstone’s remarks at ASIL. R. Goldstone, “Remarks” 98 ASIL Proc (2004) 148, p. 148. (Hereinafter, ‘Goldstone, “Remarks”’.)

¹⁶⁵ US National Security Strategy (2002), p. 29.

¹⁶⁶ R. Cook, “We would have made more progress against terrorism if we had brought peace to Palestine rather than war to Iraq” Independent, 19 March 2004. Available at: <http://www.independent.co.uk/opinion/commentators/robin-cook-who-died-on-saturday-was-one-of-the-most-principled-and-eloquent-politicians-of-our-time-here-in-a-column-he-wrote-for-the-independent-in-march-last-year-he-holds-the-government-to-account-for-its-war-on-saddam-his-strikingly-prescient-words-are-more-relevant-than-ever-501907.html>.

¹⁶⁷ M. Jacobsson, “Evidence as an Issue in International Legal Practice” 100 ASIL Proc. (2006) 40, p. 43. (Hereinafter, ‘Jacobsson, “Evidence as an Issue”’.); Wedgwood, “Responding to Terrorism”, p. 567.

¹⁶⁸ UN Doc. S/PV.4701 Meeting of the Security Council 5 February 2003, p. 3.

Libyan involvement in terrorism, as opposed to revolutionary rhetoric, is necessarily secret and thus cannot be evaluated by those, like the present writer, not privy to the secrets of the intelligence community”.¹⁶⁹

Without this evidence it is not, however, possible to come to evaluate that use of force because there are gaps in the factual landscape to which the law should apply. In the same article, Greenwood wrote that his assessment was “based on the assumption that the United States did indeed possess convincing evidence that Libya was directly responsible for some terrorist attacks...If that assumption proves false, the entire justification for the airstrike collapses”.¹⁷⁰ The episode is a nice illustration of the problems of attempting to validate a claim to have used force in self-defence in the absence of evidence.

The US claimed that the use of force, in April 1986, was in self-defence.¹⁷¹ A White House statement suggested that part of the rationale of the strikes had been to pre-empt future Libyan attacks on US nationals and interests.¹⁷² On the day of the attacks, President Reagan addressed the nation and described Operation Eldorado Canyon as a “pre-emptive action against terrorist installations”.¹⁷³ The US claimed that it had “irrefutable proof” of Libyan involvement in the Berlin Discothèque bombing that was thought to have been aimed at US service-personnel.¹⁷⁴ Addressing the nation, Reagan stated “[o]ur evidence is direct; it is precise; it is irrefutable”.¹⁷⁵ However, the

¹⁶⁹ Greenwood, “Air Operation Against Libya”, p. 935.

¹⁷⁰ *Ibid.*, p. 935.

¹⁷¹ UN Doc. S/17990 Letter dated 14 April 1986 from the acting permanent representative of the United States of America to the United Nations Addressed to the President of the Security Council.

¹⁷² White House Statement, 86 Department of State Bulletin, no. 2111, June 1986.

¹⁷³ *President's Address to the Nation*, 14 April 1986, p. 2.

¹⁷⁴ Greenwood, “Air Operation Against Libya”, p. 934.

¹⁷⁵ *President's Address to the Nation*, 14 April 1986, p. 1.

intelligence on which this ‘evidence’ was based was not released. Libya categorically denied involvement.¹⁷⁶ However, when questioned about the proof of Gaddafi’s guilt, Secretary of State Shultz stated that “we hesitate always to be too explicit because being too explicit tends to dry up your intelligence” and therefore undermine the fight against terrorism.¹⁷⁷

The invocation of intelligence as a justification for a particular action has not always been well received. This is particularly the case where it turns out to have been mistaken, a risk attendant of probabilistic prediction. O’Connell has written that “[t]he US evidence for bombing Libya was seriously questioned”.¹⁷⁸ The Reagan Administration was not alone in its reluctance to disclose evidence. O’Connell adds that when the Clinton Administration invoked self-defence in 1998 in response to attacks on US embassies in Africa, its evidence for bombing Sudan was also “heavily criticised” and “derided”.¹⁷⁹ Lobel explains that the Clinton Administration “failed to disclose the evidence upon which it relied in ordering” Operation Infinite Reach and it would not “allow any international fact-finding or public discussion with regard to that evidence”.¹⁸⁰ When states do not disclose the factual grounds for their belief that a use of force was necessary, there is no critical bite. It is not possible for evaluators to decide whether the claim was well-founded or not.

In addition to failure to disclose facts on the grounds of secrecy, intelligence can have other adverse effects for the transparency and critical-force of a process of justification. The rhetorical effect of intelligence can be devastating. The prime

¹⁷⁶ UN Doc. S/PV.2673 (1986) Meeting of the Security Council of 14 April 1986, p. 6.

¹⁷⁷ *Worldnet* Interview with Secretary Shultz, 86 Dept. St. Bull., no. 2111, June 1986, p. 9.

¹⁷⁸ O’Connell, “Evidence of Terror”, p. 20.

¹⁷⁹ *Ibid.*

¹⁸⁰ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 552.

example of this was former US Ambassador to the UN, Adlai Stevenson's dramatic unveiling of reconnaissance plane images of Soviet installations in Cuba in the SC.¹⁸¹ Former US Secretary of State, Colin Powell attempted to recapture this success in February 2003 by presenting a medley of satellite imagery, intercepted communications and eye witness accounts to the SC.¹⁸² It might be better to call such a presentation of intelligence a "performance".¹⁸³ In the context of a formal attempt to justify invading a sovereign state and deposing its leader, "performance" is pejorative because it implies a subjective and sensational presentation.

Yet more damningly, it could be seen as part of a widespread charade: Franck has accused the Bush Administration of "merely pretend[ing] to ["play by the rules"]".¹⁸⁴ More interesting than the presentation itself was its reception by other members of the SC. Although Powell's presentation was one-way and involved no exchange,¹⁸⁵ several SC members mentioned that they wished to further scrutinise the evidence.¹⁸⁶ This is encouraging because it suggests an appreciation of intelligence as the starting point for building a case, rather than indisputably "solid grounds" for a case per se. There seemed to be a stark divide between those states who believed the presentation concluded the case for intervention and those states who viewed it as a useful starting point for consideration.¹⁸⁷ Other states thought the presentation should be taken in the

¹⁸¹ It is alluded to by several of the contributors to the American Society of International Law Panel "The Laws of Force and the Turn to Evidence" 100 ASIL Proc. (2006) 39.

¹⁸² UN Doc. S/PV.4701 (2003) Meeting of the Security Council 5 February 2003.

¹⁸³ Jacobsson, "Evidence as an Issue", p. 40 citing Bob Woodward, *Plan of Attack* (2004) Pocket Books, London.

¹⁸⁴ T.M. Franck, "Reflections on Force and Evidence" 100 ASIL Proc. (2006) 51, p. 52. (Hereinafter, 'Franck, "Reflections on Force and Evidence"')

¹⁸⁵ Mr Aldouri, the Iraqi representative complained that he was given insufficient time to rebut the allegations. UN Doc. S/PV.4701 (2003) Meeting of the Security Council on 5 February 2003 , p. 37

¹⁸⁶ *Ibid.*, Russia, pp. 20-1; France p. 23; Guinea p. 35; Germany p. 36.

¹⁸⁷ Compare the statements of the UK and France in this regard. Straw said that "[w]e have just heard a most powerful and authoritative case against the Iraqi regime" (p. 18) and de Villepin said that

context of the investigations of the International Atomic Energy Agency (IAEA) and UN Monitoring, Verification and Inspection Commission (UNMOVIC).¹⁸⁸ Indeed, many states urged the US to share its intelligence with these dedicated monitoring and verification agencies,¹⁸⁹ as did the heads of these agencies.¹⁹⁰ The drive was for the US to adopt a more open approach.

One of the chief arguments against reliance on the work of the IAEA and UNMOVIC was that the success of their investigations depended on the cooperation of Iraq, the host state. In contrast, intelligence gathering operates without regard to the sanctity of the territorial integrity and political independence of a sovereign state.¹⁹¹ As such, it is seen as a way of penetrating beyond what the host state is willing to show and to come up with more decisive answers. The safeguards agencies' directors, Hans Blix and Mohamed ElBaradei, had given a presentation to the SC a week before Powell's. Although the reports evidenced desultory cooperation and even the existence of chemical rocket warheads, it was also stated that whether the rockets are "the tip of a submerged iceberg" was not yet known.¹⁹² ElBaradei went even further saying that "within the next few months [it should be possible] to provide credible assurances that Iraq has no nuclear weapons programme".¹⁹³ In response, the French representative at the SC suggested that inspections might be strengthened.¹⁹⁴ However, this more measured approach to information-gathering was not compatible with the urgency of the US approach to removing the potential threat.

Powell's presentation contained "information, indications and questions that deserve further exploration" (p. 23).

¹⁸⁸ *Ibid.*, Angola (p. 31).

¹⁸⁹ *Ibid.*, Germany (p. 36); Syria (p. 33); Pakistan (p. 27); China (p. 18), Russia (p. 21).

¹⁹⁰ E.g. ElBaradei: UN Doc. S/PV.4692 (2003) Meeting of the Security Council 27 January 2003, p. 11.

¹⁹¹ For this reason, spies are not afforded international legal protection. Sulmasy and Yoo, "Counterintuitive", p. 628.

¹⁹² UN Doc. S/PV.4692 (2003), p. 5.

¹⁹³ *Ibid.*, p. 12.

¹⁹⁴ UN Doc. S/PV.4701 (2003), p. 24.

Franck wrote that the February 2003 presentation to the SC by Powell was “not proof of our superior information-gathering capability, but just of our willingness to mislead”.¹⁹⁵ Franck pointed out that the veracity of the information the Secretary of State presented had already been questioned in the Administration and that some had already been falsified by the IAEA and contradicted by Vaclav Havel, president of the Czech Republic.¹⁹⁶ However the SC process prevents effective engagement with this sort of presentation.¹⁹⁷ The SC is not a court and any analogy between its members and a jury is tenuous at best; where parties to a given dispute use the SC as a forum to make presentations there is little chance for engagement or critique of what is said. In large part this is because the ‘real’ business of the SC goes on outside the gaze of the public.¹⁹⁸ Another factor which prevents the SC from effectively scrutinising states’ claims is that it lacks the fact-finding and analysing capacity that would enable it to compare narratives. This will be returned to below.¹⁹⁹

The possibility of distinguishing valid from invalid claims is only a valuable distinction for the collective security system if it is the case that a reason given in redemption of a claim could persuade a critical hearer with an attitude open to understanding to accept the claim.²⁰⁰ This means that where differing accounts of facts exist, an audience cannot choose between them if they are closed to criticism. Lobel argues that unless the collective security system is to be “rendered a nullity” it must not be possible for a nation to present a self-serving version of the facts “not

¹⁹⁵ Franck, “Reflections on Force and Evidence”, p. 52.

¹⁹⁶ *Ibid.*, p. 52-3.

¹⁹⁷ See Chapter III, at p. 175-178.

¹⁹⁸ *Ibid.*.

¹⁹⁹ *Infra*, at pp. 328.

²⁰⁰ See Chapter IV, at pp. 203-209.

subject to multilateral investigation”.²⁰¹ It has been argued that intelligence cannot be taken as a pure account of ‘the facts’. As far as the sort of intelligence that might lead a nation to resort to force is concerned this is said to be an even firmer proposition:

[W]hen it comes to strategic decision, issues of war and peace, for example, the kinds of assessments we are most interested in usually depend least on specific nuggets of information. Instead, they tend to hinge on analyses and speculations about how foreign leaders and institutions may in the future act or react.²⁰²

B. Probability.

In this section it will be argued that the calculation of probability is not a neutral process. It is argued that the use of intelligence in attempts to redeem self-defence claims is therefore vulnerable to exploitation. As Chesterman colourfully puts it, “policy-makers soon learn that intelligence can be used the way a drunk uses a lamp-post – for support rather than illumination”.²⁰³ Calculating the probability of the emergence of a threat to national security is a way of managing risk in a security environment characterised by uncertainty.²⁰⁴ Projections based on intelligence data and analyses can then be used as a starting point for decision-making. However, the probability that a given threat will materialise cannot by itself necessarily justify a use of force as self-defence. Aside from practical objections such as the availability of other means of tackling a merely emergent threat, there are conceptual problems.

²⁰¹ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 539.

²⁰² Feith, “Remarks”, p. 155.

²⁰³ Chesterman, “The Spy Who Came in from the Cold War”, p. 1100, citing T.L. Hughes, “The Fate of Facts in a World of Man: Foreign Policy and Intelligence Making”, *Headline Series*, Dec 1976, p. 24.

²⁰⁴ *Supra*, at pp. 263-274.

Conceptually, the calculation of probability is not a neutral, scientific process that yields an objective answer.

Intelligence analysts produce estimates, they do not divine fact.²⁰⁵ It has been explained that intelligence is not a homogeneous thing; it might refer to nuggets of hard fact and it might refer to convergent analyses.²⁰⁶ This means that what is referred to under the umbrella of “intelligence” is not necessarily the sort of ‘objective fact’ that might redeem a self-defence claim. It has been said that there are “inherent limitations of intelligence reliability and credibility”.²⁰⁷ This is particularly the case with the “low-probability, high-risk” scenarios of the sort encouraged by a Hobbesian mentality.²⁰⁸ It is suggested that when intelligence services are geared to warning about everything, they make it easier for executives to justify preconceived policy choices simply because they provide a larger field of probability. It has been suggested that the problem with Hobbesian risk-aversion is that “when you warn about everything, you warn about nothing”.²⁰⁹

Some writers have demonstrated a preference for a risk-assessment approach to self-defence that would depend on calculating the probability of attack and does not therefore require that an armed attack is imminent.²¹⁰ Glennon has suggested that “the gravity of the threat and the probability of its occurrence” are enough for the distinction between valid and invalid claims of self-defence.²¹¹ For Yoo, “temporal

²⁰⁵ US National Intelligence Council, “Iran: Nuclear Intentions and Capabilities”, p. 2, stating that National Intelligence Estimates are “primarily estimative”.

²⁰⁶ Feith, “Remarks”, 155.

²⁰⁷ Rindskopf-Parker, “Intelligence and the Use of Force in the War on Terrorism”, p. 147.

²⁰⁸ *Supra*, at p. 268.

²⁰⁹ T. Gati, “Remarks” 98 ASIL Proc (2004) 150, p. 150. (Hereinafter, ‘Gati, “Remarks”’.)

²¹⁰ *Supra*, at p. 268-270.

²¹¹ Glennon, “The Emerging Use-of-Force Paradigm”, p. 312.

imminence has set the bar too high on how probable an attack may be”; he argues for a reconceptualization of imminence based on the magnitude of the harm and the probability of the risk. He argues that today’s threats cannot be countered by waiting until an attack has been launched, but he also says that pre-emption can reduce the number of casualties and therefore may be preferable in cost-benefit terms.²¹²

The problem is that while this calculus may work in the abstract, in practice the outcomes reached can only be as good as the data inputted. This data is often composed of information about potential threats’ capabilities and their intentions.²¹³

While capability may be directly evidenced, intention can only be inferred. The reliability of probability assessments relies on the identification of a hostile intent or a rogue state.²¹⁴ Ascertaining the intention of another state is problematic,²¹⁵ particularly where that state’s logic is said to be “alien to rational thought” as is purportedly the case for rogue states and their terrorist clients.²¹⁶

It is submitted that these writers’ conceptions of probability are based on what Kessler calls the quantitative approach to risk assessment. He says that this approach to

²¹² Yoo, “Using Force”, p. 751; Buchanan and Keohane, “The Preventive Use of Force”, p. 7 pointing out that the threshold would have to be high in this case.

²¹³ Yoo, “Using Force”, p. 758 arguing that hostile intention distinguishes Iran and the DPRK from e.g. France. See also US National Intelligence Council, “Iran: Nuclear Intentions and Capabilities”; UK National Security Strategy, March 2008, pp. 12, 15 and 43; Wilmshurst, “The Chatham House Principles”, p. 965; the UN High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, (2004) para. 195. (Hereinafter, ‘High-level Panel, *A More Secure World*’.); C. Greenwood, “International law and the Pre-emptive Use of Force against Afghanistan, al Qaeda and Iraq” *San Diego ILJ* (2003) 7 p. 16.

²¹⁴ Yoo, “Using Force”, p. 758; Sofaer, “Pre-emption”, p. 221.

²¹⁵ O’Connell, “Evidence of Terror”, p. 36 citing Brownlie’s *Principles of Public International Law* 5th ed. (1998) Oxford University Press pp. 444-446; IAEA DG ElBaradei has said “I don’t judge intention. It’s very difficult to judge.” Dombey, “FT interview: Mohamed ElBaradei” *Financial Times* 19 February 2007; J. McCreary and R.A. Posner, “The Latest Intelligence Crisis” *23(3) Intel and Nat Sec* (2008) 371, p. 373.

²¹⁶ Sofaer, “Pre-emption”, p. 210.

probability is based on scientific positivism.²¹⁷ This introduces connotations of objectivity or neutrality which cannot be borne out in practice because intelligence is usually fragmentary and dependent on the context provided by the evaluator.²¹⁸ Since the “relativity of scientific knowledge” is said to be publicly recognised,²¹⁹ it is submitted that quantitative probability does not provide an incontrovertible (or even, conceivably, plausible) means of redeeming a claim to have used force in self-defence.

It has been suggested that many commentators confuse this sort of quantitative probability based on relative frequency with qualitative probability based on degree of belief.²²⁰ Rather than requiring a distinctive and exhaustive set of possible states of the world, degree of belief requires qualitative assessments to be made about what is the case. This second approach to probability attempts to convert unstructured uncertainty into manageable risk.²²¹ Daase and Kessler say in the degree of belief notion of probability, a different sort of rationality is required that relies on “norms and values not instrumental knowledge”.²²² This means that the plausibility or acceptability of probability calculations depends on the evaluators and claimants sharing the same normative framework. For the reasons already given, this leaves nothing for dissenters to oppose to claimants’ assertions of valid claims to have used force in self-defence.

²¹⁷ Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 866

²¹⁸ UK Intelligence Community Online, “UK Government Intelligence: Its Nature, Collection, Assessment & Use”, October 2008. Available at:

http://www.intelligence.gov.uk/central_intelligence_machinery/intelligence_collection.aspx

(Hereinafter, ‘UK Intelligence Community Online’.)

²¹⁹ Johns and Werner, “The Risks of International Law”, p. 784

²²⁰ Daase and Kessler, “Knowns and Unknowns”, p. 418

²²¹ According to Kessler this is equivalent to Rumsfeld’s “unknown unknowns”. Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 869

²²² Daase and Kessler, “Knowns and Unknowns”, p. 418

Another problem with justifying a self-defence claim on the basis of intelligence is that estimates based on probability have proved to be wrong in the past. The possibility of mistake is not only real, it is a fresh memory. The US and the UK infamously invaded Iraq on the strength of a so-called “dodgy dossier” and even the US admitted “that pre-war intelligence estimates of Iraqi WMD stockpiles were wrong” after the Iraq Survey Group reported.²²³ It was thought by the Bush Administration and by certain academics, that this can be overcome simply by improving intelligence institutions.²²⁴ However others are more sceptical.

One of the most notorious uses of intelligence to justify a use of force in self-defence was Operation Infinite Reach. In 1998 the Clinton administration claimed that firing Tomahawk missiles at a pharmaceutical factory in Khartoum and training facilities in Afghanistan was an exercise of self-defence. The claim was that the pharmaceutical factory in Sudan was being used to provide chemical weapons for Osama bin Laden’s terrorists. The US justification of self-defence continued; “[t]hat organization [bin Laden’s] 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”.²²⁵ FBI agents were dispatched to Dar-es-Salaam and Nairobi to search for forensic evidence.²²⁶ Lobel says that if the US could have shown that it was producing chemical weapons for bin Laden who was conducting a systematic terror campaign against the US, then

²²³ US National Security Strategy (2006), p. 23 The Comprehensive Report of the Special Advisor to the Director of Central Intelligence on Iraq’s Weapons of Mass Destruction was released on 30 September 2004. Available at: https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html.

²²⁴ US National Security Strategy (2006), p. 43; Yoo, “Using Force”, p. 760; E. Rindskopf-Parker, “Intelligence and the Use of Force in the War on Terrorism”, p. 147.

²²⁵ 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 S/1998/780 (1998).

²²⁶ Wedgwood, “Responding to Terrorism”, p. 560.

the US could have argued that it was targeting an instrument of the campaign.²²⁷ The US also suggested that it had information that the factory owner was an associate of Osama bin Laden and that traces of VX nerve gas had been found in soil samples collected near the factory.²²⁸

The claim that the factory in question produced chemical weapons, as the US alleged, is now widely disbelieved. Lobel reports that French, German, Italian and British officials had been alarmed at the poor evidence on which the US took action.²²⁹ But he says that this argument was built of “faulty premises”.²³⁰ For instance at first the Clinton Administration stated that the factory did not produce medicines and that it was heavily guarded. Lobel says that these claims were quickly forgotten subsequently.²³¹ In large part this was because of the high-profile nature of the factory which was a show-case regularly visited by foreign dignitaries, school children and Americans.²³² There were also problems with the soil sample²³³ and the bin Laden connection.²³⁴

Nevertheless, the US did not seem to be orientated to finding out whether the factory was in fact involved. Apparently the Clinton Administration refused to look at a separate analysis of the El Shifa pharmaceutical plant which showed that bombing it

²²⁷ Ibid., p. 566-7.

²²⁸ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 545.

²²⁹ Ibid., p. 546, n. 49.

²³⁰ Ibid., p. 544.

²³¹ Ibid., p. 544.

²³² UN Doc. S/1998/792 (1998) Letter Dated 22 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council.

²³³ The chemical EMPTA that was found in the soil samples is used only for nerve gas. However it is apparently easily mistaken for an agriculture insecticide called FONDOS. Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 545.

²³⁴ UN Doc. S/1998/793 Letter Dated 23 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council.

would be a mistake.²³⁵ Sudan, backed by the Islamic Group of States, the Arab League, the Group of African States and the Non-Aligned Movement, sought an international investigation.²³⁶ The US “successfully blocked Sudan’s efforts to initiate a Security Council fact-finding investigation of [its] claim that the El Shifa plant had produced a precursor of lethal VX gas”.²³⁷ The inscrutability demonstrated by this was in stark contrast to the openness of Sudan which inundated the SC with documentation. As well as offering evidence as to the factory’s ownership and use, Sudan said it was “ready to receive a mission from the Council to visit the site, consult the documentation and establish all the various aspects of the facts”.²³⁸

The episode indicates not only the benefit that a culture of evidence can give to accused states, but also the dangers of analysing intelligence in the light of preconceived policy-choices.²³⁹ In such cases intelligence does not enlighten policy-makers, it justifies their independent decisions.²⁴⁰ Intelligence has a powerful role in legitimizing reliance on probability because intelligence analyses are compiled by experts. This helps to justify the proposition that force can be used pre-emptively before a specific threat has materialised; pre-emption is by its nature probabilistic. The relative independence of intelligence agencies from executive bodies also means

²³⁵ Gati, “Remarks”, p. 152.

²³⁶ UN Doc. S/1998/791(1998) *Letter Dated 21 August 1998 from the Chargé d’Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council*; UN Doc. S/1998/804 (1998) *Letter Dated 25 August 1998 from the Permanent Representative of Colombia to the United Nations Addressed to the President of the Security Council S/1998/804*; UN Doc. S/1998/802 *Letter Dated 25 August 1998 from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council*; UN Doc. S/1998/790 (1998) *Letter Dated 21 August 1998 from the Chargé d’Affaires A.I. of the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council*.

²³⁷ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 538.

²³⁸ UN Doc. S/1998/786 (1998) *Letter Dated 98/08/21 from The Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council*, para 4.

²³⁹ Lobel suggests that warnings by US Attorney General Janet Reno were ignored, Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 548 citing S. Hersh, “The Missiles of August”, *The New Yorker* 12 October 1998.

²⁴⁰ Franck, “Reflections on Force and Evidence”, p. 53.

that intelligence can be used as a “shield to absolve the policy maker from responsibility”.²⁴¹ Against this, Gati stresses that the responsibility is always with the policy maker even where he relies on intelligence. This is because it is he who makes the leap from intelligence to action.²⁴² Invoking intelligence so as to avoid having to account for one’s action in detail can lead to the exploitation of self-defence. Statements of facts are not always innocent in the hands of interpreters and claimants. The non-objective nature of facts rests in their expression and presentation to others.

There are at least three factors that differentiate intelligence from evidence fundamentally. The first is that the *raison d’être* of evidence is to demonstrate to an audience in justification of a proposition; its function – vindication or redemption – necessitates sharing. The second is that in evidence - rather than intelligence- frameworks, it is the audience and not the progenitor of intelligence that has ‘control’ over the information. The third is that intelligence is not fact.²⁴³ It has been said that assessments of risk resemble norms in their counterfactual nature.²⁴⁴ Where intelligence is used to support the veracity or accuracy of a proposition, it is being used to evidence the factual validity of that proposition and not merely its qualified probability. The problems with this are illustrated by Colin Powell’s presentation to the SC.²⁴⁵

²⁴¹ Gati, “Remarks”, p. 150.

²⁴² *Ibid.*, p. 151.

²⁴³ S. Chesterman, *Shared Secrets: Intelligence and Collective Security*, (2006) Lowry Institute for International Policy, p. 69 citing Lt. Gen. Michael V. Hayden, Director of the US National Security Agency, 2002 quoted in Bob Woodward, *Plan of Attack*, (2004) New York. (Hereinafter, ‘Chesterman, *Shared Secrets*’.)

²⁴⁴ Kessler, “Is Risk Changing the Politics of Legal Argumentation?”, p. 869.

²⁴⁵ *Supra*, at p. 298-300.

Where intelligence data is used as evidence, its shortcomings should be made plain.²⁴⁶

The weight that evaluators do or ought to give to a particular piece of information will depend on the probability that the target state posed an actionable threat to the claimant and the confidence with which such an assessment was made. This leads to the conclusion that a datum of knowledge cannot be both intelligence and evidence at once. Granted, intelligence can become evidence, but this necessitates a core change in the matrix in which the information is dealt. In short, states cannot have it both ways: They cannot claim to be demonstrating propositions while simultaneously withholding any useful information from evaluators on the grounds of national security.

What has been said in criticism of the use of intelligence in the justification of self-defence claims in international law should not be taken to suggest that intelligence is useless in the process. While intelligence cannot be wholly relied on to vindicate a self-defence claim, it can be a useful starting point for evaluating claimants' renditions of the facts.²⁴⁷ In this section on the use of intelligence in the vindication of self-defence claims it has been argued that secret intelligence by definition lacks the positive or visible element that allows the scrutiny or critique of factual claims. It was also suggested that attempts to analyse national security in terms of risk and regulation will depend on the calculation of probability. It was argued that calculating the probability of an act of aggression in abstracto, where no particular threat has been identified is problematic. The language of probability helps to affirm the Hobbesian culture of anarchy in which the doctrine of pre-emption would operate. This is because where nothing is known, anything is possible.

²⁴⁶ UK Intelligence Community Online.

²⁴⁷ Goldstone, "Remarks", p. 149.

PART THREE: REDEMPTION THROUGH CRITIQUE.

It is argued that the ability to distinguish valid from invalid claims to have used force in self-defence depends on a common frame of reference existing for evaluators and claimants. It was suggested in the previous chapter that insufficient common understanding about norms exists in the collective security system to enable this to occur.²⁴⁸ The possibility of using states' shared experiences of the material world as a point of commonality was then considered instead. It was argued that using flexible standards as a measure for facts about the world can be dangerous where the content of those standards is not spelt out. Similarly, it has been said that the use of secret intelligence to vindicate self-defence claims is problematic because it is not easy to scrutinise.

It is suggested that while alluding to particular facts in support of a claim might provide a point of commonality, the usefulness of that potential depends on its ability to be tested, or criticised. It is suggested that the much maligned phrase "armed attack" found in article 51 lends the benefits of visibility and contestability to international law.²⁴⁹ However it is thought that it may be possible to identify other phrases that are also testable. For instance, it is suggested that in most cases, it should be possible to demonstrate that an attack was "imminent" insofar as imminence suggests that a threat had actually materialised. In short, it seems that a factual

²⁴⁸ See Chapter IV, at pp. 213-220.

²⁴⁹ For instance, it has been used as a paradigmatic example of a case where there is "little or no semantic ambiguity". Koskeniemi, *From Apology*, p. 591; See also, *infra* at p. 314.

standard can be flexible in as much as it still relates to a visible element that exists in the external world and not the internal perceptions of states.²⁵⁰

In this section, it will be emphasised that the conditions of distinguishing valid from invalid self-defence claims using facts are that the facts are capable of ostensive demonstration and that the evaluation is an experiential process in the hands of the evaluators and not a pro-forma exercise to be completed by the claimant. Having, in the previous sections of this chapter, suggested how the treatment of facts should not look, it will finally be considered how the treatment of facts might look. The proposals made are mere sketches because it is beyond the remit of the present thesis into the theory of communicative evaluation to produce a fully operational model. It will be suggested that the collective security system make use of fact-finding in order to produce commonly held understandings of the facts in a particular case.

A. Standards of Evidence.

In order to distinguish valid from invalid claims to have used force in self-defence, it is necessary to bring direct evidence of a material and present threat to national security. This is because in self-defence cases, it is not unusual for both sides to make self-defence claims. Franck explains that without fact-finding, culpability cannot be “made manifest”.²⁵¹ This approach is supported elsewhere in the literature: Lobel wrote that in the Nicaragua case the ICJ can be seen to have set a minimum of evidence obligations; that the claimant state carefully evaluates the evidence, that this evidence is made public and that the facts are subjected to international scrutiny and

²⁵⁰ *Supra*, at p. 213.

²⁵¹ Franck, “Who Killed Article 2(4)”, p. 811.

investigation.²⁵² Indeed, Franck says that the obligation to evidence claims is imposed by the Charter.²⁵³ It is submitted that the emphasis in this process should not be on the existence of facts so much as the availability of these facts to processes of scrutiny.

Various scholars have suggested that the claimant of self-defence must satisfy certain standards of evidence. On one hand this acknowledges the importance of evidence in processes of distinguishing valid from invalid claims to have used force in self-defence. On the other hand, in some cases consideration of the standard of proof has been at the expense of consideration of what exactly must be proved and whether it might be possible to do so.²⁵⁴ For instance, O’Connell says that international legal tribunals seem to agree that “evidence should be ‘clear and convincing’”.²⁵⁵ Wellens distinguishes two standards of evidence; “preponderant” and the higher level of “clear and convincing”.²⁵⁶ Greenwood suggested “sufficiently convincing” or “convincing evidence”²⁵⁷ and Lobel suggested a “clear and stringent” standard of evidence.²⁵⁸ The Secretary General’s high Level Panel on Threats, Challenges and Change also cites the need for “credible evidence” not only that a threat exists but also that a military response is appropriate.²⁵⁹ The problem is that these abstract formulations do not tell us much about what would be needed to identify a given self-defence claim as valid. Except insofar as these standards are compared inter se, for instance a “beyond reasonable doubt” standard is higher than a “balance of probabilities” one, it is not easy to see what “clear and convincing” evidence looks like.

²⁵² Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 547.

²⁵³ Franck, “Reflections on Force and Evidence”, p. 53.

²⁵⁴ See e.g. O’Connell, “Evidence of Terror”.

²⁵⁵ O’Connell, “Rules of Evidence”, p. 45.

²⁵⁶ K. Wellens, “The UN Security Council and New Threats to the Peace” 8(1) JCSL (2003) 15 p. 23.

²⁵⁷ Greenwood, “Air Operation Against Libya”, p. 935.

²⁵⁸ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 547.

²⁵⁹ High-level Panel, A More Secure World, para. 195.

Accordingly, O'Donnell rightly points out that “the texture of such standards” of evidence as ‘clear’, ‘convincing’, ‘stringent’ or ‘preponderant’ is ambiguous.²⁶⁰ The attempts to validate Operation Eldorado Canyon are illustrative of this. The US was unwilling to release its evidence of Libyan involvement in acts of terrorism for general evaluation.²⁶¹ This is reminiscent of the Bush Administration safeguard to the doctrine of pre-emption: “The reasons for our actions will be clear, the force measured, and the cause just”.²⁶² When the reasons for US action are based on intelligence that it does not release²⁶³ and risk assessments based on a Hobbesian conception of the other,²⁶⁴ the clarity of those reasons is unlikely to be apparent to many evaluators.

The rhetorical force of the familiar language of evidentiary standards may be exploited for purposes of spurious justification. It is argued that the claimant state cannot be the ultimate interpreter of what “convincing” evidence is, but that this standard is a question for the evaluator of a particular claim. Franck has written that a state wishing to invoke article 51 must demonstrate “to the satisfaction of the world’s governments that there is good and clear evidence that an overwhelming danger...is a realistic expectation” and that a pre-emptive strike is the only means of preventing the realisation of that expectation.²⁶⁵ This sort of approach has the benefit of flexibility as the standard of proof required depends on the recognition of external evaluators. Such a non-formalistic approach to standards of evidence is preferable to one that attempts

²⁶⁰ O'Donnell, “Naming and Shaming”, p. 49.

²⁶¹ *Supra*, at pp. 295-297.

²⁶² US National Security Strategy (2002), p. 16.

²⁶³ *Supra*, at pp. 293-301.

²⁶⁴ *Supra*, at pp. 263-274.

²⁶⁵ Franck, “Reflections on Force and Evidence”, p. 53.

to classify potential demonstrations in abstracto. It should be added that the force of an evaluation lies in its ability to command intersubjective understanding. As has already been explained, intersubjective understanding is constructed through processes of evaluation of criticizable validity claims. The convincing or implausible nature of the evidence is therefore not an intrinsic quality of the facts presented, but of the perceptions and understandings of the audience involved.

Henkin warned that self-defence should only be used where the evidence is “clear, unambiguous, subject to proof and not easily open to misinterpretation or fabrication”.²⁶⁶ While he concluded that consequently this standard can be provided by an armed attack, it is submitted that by putting the emphasis on what can be accepted if good enough evidence can be produced produces a more flexible standard that is not guarded against exploitation. The test is that an evaluating audience, with good reasons – these reasons to be accepted or rejected by subsequent evaluating audiences, does in fact find that the self-defence claim is valid. Before this can happen, institutional reform will be necessary to minimise the strategic nature of discussions about self-defence, to encourage open attitudes to the process of evaluation and to maximise the potential for scrutiny. Thus, Lobel refers to “the international community’s need to develop rules and mechanisms to address the factual assertions upon which a nation employs armed force”.²⁶⁷

²⁶⁶ L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (1979) Columbia University Press, New York., p. 142 citing L. Henkin, “The United Nations and its Supporters: A Self Examination” 78 *Pol. Sci. Q.* (1963) 504, p. 532 Henkin, like Brownlie, deals with the sitting duck argument of anticipatory self-defence by saying that it can form an exception to the rule; “[t]he Charter need not make a principle of it”.

²⁶⁷ Lobel, “The Use of Force to Respond to Terrorist Attacks”, p. 539.

B. Common Understandings about the External World.

In this section, reference to facts is problematized. It is argued that shared understandings about the world cannot be taken for-granted. Instead, a common understanding of the facts of a particular case must be constructed in discourse before normative questions about whether a self-defence claim was valid or not can be discussed. Central to evaluators' ability to establish such understandings is their ability to scrutinise assertions of fact and to test them. This means that the information on which assertions are made should be shared and the information itself should be testable.

The commonality of "reality" cannot be assumed.²⁶⁸ Therefore claims about it should not be exempted from scrutiny on the grounds that they are obvious. Wendt has explained that there are three dominant theories of reference, theories which explain the relation of mind and world, in *International Relations: The realist causal theory, the empiricist description theory and the postmodern relational theory*. Relational theories assert that meaning is produced by relations of difference within a discourse,²⁶⁹ and descriptive theories suggest that it is produced by descriptions existing within a language. By contrast in realist theories, meaning is determined by discourse (how words are used) and nature; thus meaning "is regulated by an extra-linguistic world".²⁷⁰ In other words, realist theories tend to minimise or ignore the

²⁶⁸ See Wendt, *Social Theory*, p. 49.

²⁶⁹ Koskenniemi, *From Apology*, p. 525, "facts are constructed as they are perceived through language". See also, D. Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity*, Rev'd ed. (1998) University of Minnesota Press.

²⁷⁰ Wendt, *Social Theory*, pp. 53-7.

effect of expression on statements about the world. To express a fact about the world is to mediate the objectivity of the external with the subjectivity of the internal.²⁷¹

This distinction is important in order to understand why certain scholars assume that a ‘case by case’ analysis of self-defence claims could produce incontrovertible assessments about the validity of the given use of force.²⁷² McDougal and Feliciano wrote that self-defence claims could be decided according to “reasonableness in the particular context”.²⁷³ This assumes that what constitutes a particular context is unproblematic. Insofar as those scholars adopt a realist “causal” view of the world of fact, their faith in fact’s ability to redeem a self-defence claim without opening the law to abuse is understandable.²⁷⁴ It is hoped that the foregoing sections have demonstrated that such faith is misplaced. As Fuller explains, at base the realists do not appreciate that “in the moving world of fact, as in the moving world of law, the is and the ought are inseparably mixed”.²⁷⁵ The point is that a description of fact is not neutral; subjectivity is introduced in the person of the describer and in the person of the audience. It is said that an interpretative process converts “sense data” into “knowledge”.²⁷⁶

The context in which a statement of fact is presented or understood shapes the substance of that understanding.²⁷⁷ This context can be formed by a certain narrative in which facts are given a certain significance. Gray gave a good example of this in

²⁷¹ See Chapter IV, at p. 203-204.

²⁷² In proposing a new “epistemic unit” for international law, the “incident”, Reisman acknowledged that writers inevitably produce biased accounts of facts. However, he dismissed the problem, saying that such biases are worse in courts. W.M. Reisman, “The Incident as a Decisional unit in International Law” 10(1) Yale JIL (1984) 1, pp. 17-18.

²⁷³ McDougal and Feliciano, *Law and Minimum World Public Order*, p. 218.

²⁷⁴ See e.g. Sofaer, “Pre-emption”, p. 13.

²⁷⁵ L.L. Fuller, *The Law in Quest of Itself* (1940) Fountain Press, Chicago, p. 64.

²⁷⁶ Koskenniemi, *From Apology*, p. 517.

²⁷⁷ *Ibid.*, p. 523: See also Chapter IV, at p. 205.

the Cameroon v. Nigeria case where “a fundamental division between the two states was apparent in their categorization of events”.²⁷⁸ Cameroon’s narrative was a tale of annexation and Nigeria’s was one of a boundary dispute.²⁷⁹ Additionally, Charlesworth has questioned international lawyers’ approaches to the facts of the Kosovo crisis, emphasising that the “discipline does not encourage the weighting up of competing versions of events”.²⁸⁰ An intersubjective process of understanding creation would engage reflectively with the matter of the contextualisation of facts. The process of criticism and testing would encourage participants to remain aware of the partiality and particularity of their positions.

It is important that the context is shared between participants in an evaluative discourse. Habermas drew a distinction between communicative action in a weak sense and in a strong sense.²⁸¹ He used the weak sense where “reaching understanding applies to facts” among other things. Communicative action in the strong sense connotes processes where “understanding extends to the normative reasons for the selection of the goals themselves”.²⁸² In the case of weak communicative action claims the participants are not orientated to “intersubjectively recognised rightness claims” as they are in the context of communicative action in the strong sense.²⁸³ Similarly, Kratochwil draws a distinction between assertoric and normative statements: Assertoric statements depend on a reference to shared external

²⁷⁸ C. Gray, “The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua” 14(5) EJIL (2003) 867 p. 882.

²⁷⁹ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, compare e.g. para. 25 where Cameroon’s requests are set out and Counter-Memorial of the Federal Republic of Nigeria, 21 May 1999.

²⁸⁰ H. Charlesworth, “International Law: A Discipline of Crisis” 65(3) MLR (2002) 377, p. 384.

²⁸¹ J. Habermas, “Some Further Clarifications of the Concept of Communicative Rationality” in *On the Pragmatics of Communication* (2002) Polity Press, Cambridge, p. 326.

²⁸² *Ibid.*

²⁸³ *Ibid.*, p. 326-7.

phenomena,²⁸⁴ while normative ones reference shared expectations.²⁸⁵ Instead of making reference to an intersubjectively shared understanding of the normative requirements for valid self-defence, participants will make reference to the shared external world of fact. It is suggested that participants should endeavour to establish shared understandings about factual questions, for instance about whether a missile had been launched, a nuclear installation had begun to produce weapons-grade uranium, or whether the defensive force resulted in civilian casualties. These elements can then serve as referents in a discourse about the normative question of whether the claim of self-defence was valid or not.

‘Facts’ or ‘data’ about the world do not have an autonomous existence apart from the speakers and hearers in a discourse. This means that when two people refer to the same ‘fact’ it is not certain that they mean the same thing. The inevitability of an element of subjectivity in the expression of things-in-the-world does not, however, mean that all assertions of fact are radically subjective. Subjectivity is mitigated where participants in a discourse can test whether they understand the same thing. It is necessary to move to a more basic level of commonality wherein the materiality of the commonality can be established by testing.

This means that the process by which a self-defence claim is redeemed through testing cannot be implicit. The criticizability of a self-defence claim is the obverse of its redeemability.²⁸⁶ To redeem a claim means to give good reasons for its validity. The effectiveness of these reasons depends on their being capable of being

²⁸⁴ Or rather the observer assumes there are shared understandings about them because questions are never raised about them.

²⁸⁵ F. Kratochwil, *Rules, Norms and Decisions* (1995) Cambridge University Press, p. 34.

²⁸⁶ Habermas, *The Theory of Communicative Action Vol II*, p. 178.

understood; the possibility of this understanding renders the reasons criticizable.²⁸⁷ MacCormick called this the principle of defeasibility. However he stressed that most things that are defeasible are not in fact defeated – perhaps because they are never questioned.²⁸⁸ In contrast, in situations of contestation like evaluations of self-defence claims, participants are unlikely to take claims about the world of facts for-granted.

The process of testing is not simply intended to weed out spurious factual assertions it is also intended to have a positive function of establishing common understandings about given phenomena in the world. Habermas has written that “[t]he world gains objectivity only through counting as one and the same world for a community of speaking and acting subjects”.²⁸⁹ Contested propositions will ‘count’ as valid once they have been intersubjectively tested and accepted by participants in a discourse. In terms of the claim to use force in self-defence, it would be necessary for the claimant to show what it was defending itself against. This implies that the threat can be shown in the shared ‘objective’ world between speaker and hearer and not totally in the subjective world of the speaker.²⁹⁰

O’Connell differentiates between (valid) anticipatory self-defence and (invalid) pre-emptive action on the grounds that there is an attack involved in the former but not in the latter.²⁹¹ It seems likely that in many cases preparations for the attack will be in evidence. Thus, Simma’s suggestion that because of the “manifest risk” of abuse,

²⁸⁷ See Chapter IV, at pp. 199-202.

²⁸⁸ N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) Oxford University Press, p. 164.

²⁸⁹ J. Habermas, *The Theory of Communicative Action, Vol. I: Reason and the Rationalisation of Society* T McCarthy (trans) (1984) Polity Press, Cambridge, p. 12-3 italics in the original. (Hereinafter, ‘Habermas, *The Theory of Communicative Action Vol I*’.)

²⁹⁰ See Chapter IV, at p. 213.

²⁹¹ M-E O’Connell, “The Myth of Pre-emptive Self-defence” August 2002 ASIL Task Force on Terrorism p. 9.

article 51 must be interpreted “as containing a prohibition of anticipatory self-defence”. His argument was that “the (alleged) imminence of an attack cannot be assessed by means of objective criteria”²⁹² It is submitted that this is overly exacting. A preferable approach is Brownlie’s suggestion that anticipation would be valid in situations where there is a clear intention to attack and where this is “accompanied by measures of implementation not involving the crossing of the boundary of the target state”.²⁹³ While the standard of ‘armed attack’ may provide the ideal situation in which self-defence could be exercised, it is possible to conceive of situations in which waiting for an attack to be launched jeopardises the lives of too many citizens. In such a case, self-defence will be justifiable to the extent that the claimant state can demonstrate at the international level the reasons its decision was made at the national level.

Firstly, this represents a departure from the appeal to secret evidence. This is because common understandings cannot be created when access to information is reserved to a select few. Where states wished to make the claim that a certain event was likely to occur, they would have to produce the grounds on which this assessment was made in order for an intersubjective understanding about whether the projected event was likely or not. Secondly, this approach provides broad concepts such as “necessity” and “proportionality” with a concrete referent. Thus, where a state claims that its use of force was proportionate, it should be possible to ascertain the referent for this proportionality. This technique, it is hoped, should at least limit the potential for

²⁹² B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (2002) Oxford University Press, p. 803.

²⁹³ Memorandum to the Foreign Affairs Committee by Professor Ian Brownlie “The Legality of Using Force against Iraq” 24 October 2002 in House of Commons Foreign Affairs Committee, *Foreign Policy Aspects of the War on Terrorism: Second Report of the Session 2002-3*. He also asserts that the US doctrine of pre-emptive action is “qualitatively different”, p. 22.

familiar terms in the self-defence discourse such as proportionality or necessity to be misused.

Exploitability can be reduced by rendering the process as visible as possible, to maximise opportunities for scrutiny. The visibility of an object is linked to its potential to be a shared object of reference in a discourse. As a “shared external phenomenon”, it is capable of being tested because it does not rely purely on the subjectivity of a particular participant.²⁹⁴ This minimises the possibility that risk-assessments made under Hobbesian conditions will be viewed as plausible by other states which have not adopted this attitude. Where the nature of the threat resides more in the internal apprehension than in the external cause, a claimant of self-defence will lack a visible referent with which to provide good reasons for its action.

It might be said that the difference between the occurrence and the imminence of an armed attack is a question of degree and not kind. It is submitted that while the planning and launching of an attack may ipso facto be less visible than the manifestation of the attack, it nevertheless must be material. Once attacks become more temporally remote, material evidence becomes scarcer and more tenuous. In part this is because of the uncertainty that still characterises non-imminent threats to security. Anghie held that “pre-emption must be based on sound, if not overwhelming evidence, for it is only such a threshold that could justify the extraordinary measure of the pre-emptive use of force”²⁹⁵ militates against the possibility of such a doctrine ever being workable. The discretion to infer conclusions from pieces of data decreases

²⁹⁴ This is similar to the standard of ‘falsifiability’ made by analytic philosophers. See K. Popper, *The Logic of Scientific Discovery*, (2002) Routledge.

²⁹⁵ Anghie, “The War on Terror”, p. 56.

in proportion to the strength of these inferences; the stronger the inference, the less latitude the evaluator had in reaching it.

C. Some Reflections on Institutionalisation.

It is beyond the ambit of this thesis to provide an institutional model for proceeding with a communicative approach to the evaluation of self-defence claims. However, it may be useful to provide some reflections on how it might operate in practice. So far in this chapter, we have looked at how a communicative approach based on the assessment of facts would not work. This negative approach to outlining communicative evaluation was thought to be the most effective way of underlining what would and what would not be conducive to collective understanding of the facts of each case.

Two major themes have emerged. The first is that the use of abstract standards that refer to external facts, whether they be the necessary and proportionate use of force or the clear and convincing standard of evidence, do not of themselves give rise to specific understandings about self-defence. The principles are capable of a variety of interpretations, the colour of which depends on the context in which they are set. This suggests that the context must be made explicit before interpretations of such principles are attempted. The second theme flows from the first. If the context of interpretation is to be made explicit, the facts that led an individual nation state to exercise its right of self-defence in the first place must be available for scrutiny. It was said that assessments based on secret intelligence could not be excused from collective scrutiny at the international level. To attempt to do so would be to make an

assertion and refuse to account for it; even if other perceived a criticizable validity claim, attempts to scrutinise the assertion would lack a clear object of critique.

An attempt to institutionalise the process of redeeming and evaluating the criticizable validity claim that force has been used in self-defence therefore depends on constructing a collective understanding of the facts. In the previous section it has been argued that since a common understanding of ‘reality’ cannot be taken for-granted, it should be constructed by the participants in a particular discourse. It was suggested that assertions of fact made by the claimant state would be tested through a process of ostensive demonstration. To ostensively demonstrate something means, literally, to show it or to point it out.²⁹⁶ It is therefore necessary to think about who would participate in the discourse and how this process of testing might work in practice.

It is to be emphasised that the institutionalisation of the process could not work without the participants in a given discourse coming with the expectation that an assertion of self-defence raises a criticizable validity claim and adopting an attitude open to understanding. In viewing a state’s assertion that it has exercised the right of self-defence as a criticizable validity claim, the evaluating audience is mobilised in the project of criticism and the onus lies with the claimant to justify his assertion. In turn, this relies on the claimant state feeling that it ought to give good reasons to redeem the claim that it has made.²⁹⁷ Any institutionalisation of this discourse should therefore be facilitative rather than directive and controlling. Structural bias could be minimised if evaluation was not institutionalised in a single discourse, but was rather

²⁹⁶ The Oxford English Dictionary gives its etymology thus: “classical Latin ostendere to show, reveal, exhibit, point out, indicate, (reflexive) to show oneself, appear < obs-, extended form of ob- prefix + tendere”.

²⁹⁷ See Chapter IV, at pp. 233-237.

the outcome of overlapping discourses evaluating one another as well as the self-defence claim at issue.²⁹⁸

The collective security system is what Habermas calls a “meta-institution”; the *ius ad bellum* is a “kind of insurance against breakdown” of less formalised social systems of understanding.²⁹⁹ In large part this is a function of the positivity of its norms.³⁰⁰ This means that discourse about law tends, by its nature, to be controversial because positive norms have been violated. This means that there is a presumption of criticism and also that this criticism will take place positively rather than take the form of a negative assent by acquiescence. Although the sovereign claimant of self-defence loses control of his utterance by yielding it up to criticism, the claimant can be protected by rendering this process public so as to reveal the reasons behind another state’s acceptance or rejection of his claim. What is required is therefore that the process of criticism which separates individual claim and collective decision is overt, accessible and comprehensible.

The first important factor is that the state which has used force in self-defence makes a claim and that this is received by the evaluating audience. Habermas explained that any utterance can be taken as a criticizable validity claim because the act of expression renders an idea material and therefore criticizable.³⁰¹ It may be possible to view states’ obligation to report their uses of force to the Security Council in this way.³⁰² This report could form the starting point for debate. However, this debate would not necessarily have to take place in the SC. Indeed, there are good reasons for

²⁹⁸ Ibid., at p. 207-208.

²⁹⁹ Habermas, *The Theory of Communicative Action Vol II*, p. 178.

³⁰⁰ Ibid.

³⁰¹ Ibid., p. 124.

³⁰² UN Charter article 51.

rejecting the SC as a suitable body for evaluating self-defence claims.³⁰³ States' reports are circulated as documents of the Council and as such are a matter of public record. They would be available to other discourses as well. Reports that a state has used force in self-defence are not usually attended with the assumption that the Council will meet to discuss the matter, as is the case that complaints that force has been used are.³⁰⁴ It is suggested that there is no necessary reason why interested parties, be they other states, non-governmental organisations or even, perhaps, international lawyers, should not use such a report as a jumping-off point for inquiry outside the Council.

It is submitted that a preferable state of affairs would be if the report of self-defence triggered a meeting of the Council or other body. While in national courtrooms, self-defence is pleaded in response to a criminal charge this reactive sort of evaluation may be ineffective at the international level. This is because in domestic legal systems, like that of the UK, criminal charges are mostly brought by the state and not by individual UK citizens. The evaluation of self-defence claims is not part of an international criminal process in which an evaluative discourse should be seen as a courtroom. It is important to emphasise that the communicative approach to evaluation would still primarily be a political process, albeit tamed by communicative rationality.

³⁰³ See Chapter III, Part II, *passim*.

³⁰⁴ The events between Lebanon and Israel of July 2006 are illustrative of this. In UN Doc. S/2006/515, Israel wrote to the SC reserving the right to use self-defence in response to Hezbollah rocket attacks emanating from Lebanon (whom it held responsible for these attacks). Israel did not demand a meeting of the SC. In contrast, in UN Doc. S/2006/517 the Lebanese government requested such a meeting. This resulted in a meeting in which both parties participated to defend their positions.

At this stage, it would be important to hear both the claimant state and the target states' versions of events. This would mean that so-called 'rogue states' could not be excluded from the discourse.³⁰⁵ The project of furthering a common understanding of the facts would be aided if these states could reach agreement on basic facts, thus highlighting particular contested areas that communicative discourse could focus on. The importance of both parties participating in this process is highlighted by the Nicaragua case.³⁰⁶ It is to be expected, however, that in many self-defence cases there will be few uncontested facts. Indeed, the parties' lack of agreement on the facts was one of the chief stumbling blocks for the ICJ in Nicaragua.³⁰⁷ It will therefore be necessary to rely on some independent fact-finding, of the sort that the ICJ was criticised for failing to do in Nicaragua.³⁰⁸

The collective security system must take advantage of its capacity for fact-finding. Such bodies could not only provide relatively independent information about a given factual situation, but they could also provide information that could be used to test claimants' statements about the self-defence situation and they could be staging-houses for the collection of information from third states and open sources. In effect, such a fact-finding body would act as a repository of common knowledge. The advantage of this is that an intersubjective discourse was not dominated by the findings of the intelligence services of particular states. The big disadvantage of such an approach is that the evaluative discourse would be removed to this technical arena and away from the political arena of states. This is disadvantageous because it would mean that the states were not directly involved in constructing their own

³⁰⁵ See Chapter IV, at pp. 237-246

³⁰⁶ Nicaragua (Merits), Dissenting Opinion Judge R.Y. Jennings, p. 528.

³⁰⁷ Nicaragua (Merits), para. 57.

³⁰⁸ Nicaragua (Merits), Dissenting Opinion Judge S. Schwebel, para. 73.

understandings. It would therefore be necessary to establish a dialogue between the technical fact-finding commission and the organ considering the self-defence claim.

According to some commentators, the present fact-finding capacity of the collective security system is flawed not only in the collection of facts, but also their analysis. However, the Council has developed techniques of fact-finding and these will be considered below. The UN has no intelligence capacity of its own. In the same way that it relies on its member states to take action, it relies on its member states for its knowledge. Franck has suggested that “until the UN develops an intelligence capability of its own, using personnel in situ, or gains its own surveillance capability, it will have to be guided by information selectively provided by interested parties”.³⁰⁹ However, it has been suggested that this “is neither feasible nor desirable for [international] organisations to develop an independent capacity to collect intelligence” because of “the understandable wariness on the part of states of authorising a body to spy on them”, the reluctance of the United Nations “to assume functions that might undermine its actual or perceived impartiality” and “a larger anomaly in the status of intelligence under international law as an activity commonly denounced but almost universally practised”.³¹⁰ It is submitted that this assessment is persuasive.

Another argument against the UN acquiring intelligence-gather capacity is that it will not always be necessary to rely on evidence brought by the parties, for instance, in the Hostages case, the Court stated that “[t]he essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in

³⁰⁹ Franck, *Fairness in International Law and Institutions* p. 292.

³¹⁰ Chesterman, *Shared Secrets*, p. 8.

the world press and in radio and television broadcasts...”. The Court treated this as a “massive body of information” available for its deliberations.³¹¹ If the UN had the capacity to create its own understandings about a given self-defence claim independent of the parties involved, these parties may feel less inclined to take part in a collective process of coming to an understanding about whether it was valid or not.

It is more important, in this writer’s opinion, that the UN develop a means of processing the information it receives. Thus, Chesterman suggests that the UN should at least develop a capacity to assess intelligence given by states in evidence of their self-defence claims.³¹² He writes that “[t]he history of Council decisionmaking when authorizing military action does not inspire confidence”.³¹³ *Mutatis mutandis*, the same applies to its evaluations of self-defence claims. A fact-finding commission comprised of experts could assist in the processing of information. Anomalies and inconsistencies could be identified by such a body, assessments of the probity of given statements could be made, and regular reports could be produced for the evaluating entity.

The presentation of information in a more digestible form would not necessarily exclude the evaluating entity from participating in the creation of understanding. Part of the purpose of the regular reports and open dialogue between the technical and political organs would be to ensure that evaluators could in practice criticize the claimant states’ validity claims. While participants could question assertions that they doubted in the political discourse, this should lead to the presentation of the technical

³¹¹ United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p. 3, paras 12 and 13. The Court attached a caveat to such use in Nicaragua however, questioning the worth of a plethora of reports where a single source is used to derive them all, para. 63.

³¹² Chesterman, *Shared Secrets*, p. 4.

³¹³ Chesterman, “The Spy Who Came in from the Cold War”, p. 1106.

body with the grounds for these concerns. The importance of this sharing of information is highlighted by the experience of the IAEA and UNMOVIC during the run-up to Operation Iraqi Freedom.³¹⁴

A two-tier process of evaluation is being proposed. An attempt is being made to integrate the technical and the political. The IAEA is an example of an existing institution that contains separate political and technical elements. The IAEA consists of a Secretariat run by the Director General and policy-making bodies, the General Conference and the Board of Governors. Amongst other things, the Director General is in charge of the process of inspecting nuclear installations pursuant to Comprehensive Safeguards Agreements (CSAs) called for under the Treaty on the Non-Proliferation of Nuclear Weapons 1970.³¹⁵ The Director General makes regular reports to the Board of Governors and has, on occasion, been asked to report to the SC.³¹⁶ While the IAEA is not a model institution,³¹⁷ it is submitted that the separation of technical and political aspects of fact-finding and analysis may accommodate a flexible approach to evaluation while anchoring that flexibility in technical competence.

An alternative to a permanent fact-finding body like this would be the use of ad hoc commissions of inquiry into specific incidents. These may be said to have taken inspiration from the ‘truth commissions’ used in the Human Rights field to investigate

³¹⁴ *Supra*, at pp. 298-300.

³¹⁵ Article III NPT.

³¹⁶ For instance, the SC requested the Director General to report to it over Iran’s non-compliance with its Safeguards Agreement UN Doc. S/Res./1696 (2006).

³¹⁷ For instance, the Board of Governors is structurally biased in favour of dominant western states: IAEA Statute article VI(A)(1).

past abuses.³¹⁸ Indeed, one of the roles of truth commissions is to provide a cathartic acknowledgement of the past.³¹⁹ It is suggested that one of the major reasons for evaluating self-defence claims is that the finding that one of the parties was the aggressor and one the defender could put a stop to escalating violence between states that have conceived one another to be in a Hobbesian relation with one another.³²⁰ It is to be hoped that such a finding would put a stop to the inimical behaviour that reinforces the impression of an enemy-relation.

The collective security system has made use of fact-finding for some time. Successive Secretary Generals have taken a very broad interpretation of their Charter powers and these have often included fact finding.³²¹ While the Secretary General has undertaken fact-finding on its own initiative,³²² these days the SC also makes use of commissions of inquiries. It has requested that the Secretary General establish commissions on several occasions. Such panels of experts considered the situation in Darfur,³²³ the Rwandan genocide,³²⁴ violations of humanitarian law in the former Yugoslavia,³²⁵ and the assassination of the President of Burundi,³²⁶ to name but a few. In many cases these commissions act as centralising bodies which collect and collate the findings

³¹⁸ P. Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations" 3(3) JICJ (2005) 600, p. 601. (Hereinafter, 'Alston, "The Darfur Commission".')

³¹⁹ P.B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" 16(4) HRQ (1994) p. 600.

³²⁰ See Chapter IV, at p. 237.

³²¹ M-C, Bourloyannis, "Fact-Finding by the Secretary-General of the United Nations" 22(4) NYUJIL&P (1989-90) 641, p. 646.

³²² *Ibid.*, p. 649.

³²³ UN Doc. S/Res. 1564 (2004) Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.

³²⁴ UN Doc. S/Res./935 (1994). UN Doc. S/1994/1405 Final Report of the Commission of Experts, 9 December 1994.

³²⁵ UN Doc. S/Res./780 (1992). UN Doc. S/1994/674 Final Report of the Commission of Experts, 27 May 1994.

³²⁶ UN Doc. S/Res./1012 (1995). UN Doc. S/1996/682, Final Report of the Commission, 22 August 1996.

and reports of various agencies. This was the case for the Commission of Inquiry in Darfur.³²⁷

Indeed, in the case of the Darfur commission, the SC specifically requested it to “investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations”. The purpose of this was to ensure “that those responsible are held accountable”.³²⁸ The commission was praised for the comprehensive and detailed report that it produced.³²⁹ The work of the Darfur commission has also been welcomed, in part because it “promote[d] an element of transparency and accountability in the work of the Security Council”.³³⁰

The use of fact-finding commissions would have the benefit of flexibility; the size, shape and specialisms of the commission could be tailored to the particular case. In 1991 the General Assembly passed the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security.³³¹ The rationale behind the declaration was that “acquiring detailed knowledge about the factual circumstances of any dispute of situation” is crucial for the UN to maintain international peace and security. While it was affirmed that sending a fact-finding mission requires the consent of the territorial state,³³² the resolution also said that any state refusing should give reasons for its refusal.³³³ According to Berg, this issue was contested during the debates of the Special Committee on the Charter of the UN and

³²⁷ UN Doc. S/Res. 1564 (2004), para. 12.

³²⁸ *Ibid.*

³²⁹ Alston, “The Darfur Commission”, p. 604.

³³⁰ *Ibid.*, p. 606.

³³¹ UN Doc. A/Res/46/59 (1991).

³³² *Ibid.*, Op. para. 6.

³³³ *Ibid.* Op. para. 20.

of the Strengthening of the Role of the Organisation (the Charter Committee) that drew it up. Nevertheless, it seems that only in the case of a Chapter VII resolution of the SC would fact finding be compulsory.³³⁴

Interestingly, Berg identifies a general policy “to induce member states to take a more positive attitude” to fact finding.³³⁵ Indeed, it should be acknowledged that encouraging states to cooperate with fact-finding missions will not be easy. However, it is hoped that the involvement of both claimant and target states in the process of fact-finding will make them less wary of such commissions. The parties would not be ‘object-ified’ by the commission, as it were.³³⁶ Instead, the contributions of the parties would form an integral part of the commission’s investigations. For one means of doing this, we can look to the IAEA for inspiration once again. The IAEA inspections process is led by the production of reports by member states that are then verified by IAEA inspectors on the ground.

One drawback with the traditional IAEA process is that it depends on the completeness of declarations by the host state.³³⁷ The “traditional” safeguards approach confines inspectors to verifying these declarations, while strengthening measures enable the Agency to identify any undeclared nuclear activities and thereby validate what is not said.³³⁸ The openness in attitude that this wider approach implies is commensurate with the communicative approach to evaluation. The critical nature

³³⁴ A. Berg, “The 1991 Declaration on Fact-Finding by the United Nations” 4(1) EJIL (1993) 107, p. 108.

³³⁵ *Ibid.*, p. 109.

³³⁶ See Chapter IV, at pp. 236.

³³⁷ The on-going situation regarding Iran’s development of nuclear fuel cycle technology revolves around almost two decades of concealment on the part of Iran. See e.g. the UK representative to the SC in UN Doc. S/PV.5500 (2006) Meeting of the Security Council of 31 July 2006.

³³⁸ P. Goldschmidt, “The IAEA Safeguards System Moves into the 21st Century” 41(4) Suppl. IAEA Bull. (1999) 1, p. 3.

of the process of evaluating a validity claim would enable a participant to query the omissions from an assertion about a self-defence claim. In this case, rather than testing the claimant state's information for falsity, the fact finding commission would be testing the validity of the evaluating state's counter-assertion.

Whether the findings of the fact-finding commission would be 'binding' would be for a more comprehensive modelling of this approach to determine. However, it is submitted that the persuasive force of the fact-finding commission will depend on the extent to which it engages with the concerns of evaluating states and on the perception that it has acted competently and impartially. Franck has written that the probity of evidence depends in part on the impartial identity of whoever presents it.³³⁹ However, crucially, the persuasiveness of the evaluation of the fact-finding commission would depend on how well it stood up to evaluation at the hands of political organs. Any assertion can be taken as a criticizable validity claim, and the evaluations of fact-finding commissions are no different. This is one of the reasons that a two-tier system of evaluation is desirable: Each body can provide a critical check on the other. It is submitted that it is the fact that these evaluations are, or at least can be, scrutinised in which their authority lies. It is therefore crucial that as much as possible of the evaluation process is reported and made publicly available.

D. Beyond Esotericism and Exploitation?

In order to avoid being hoist by my own petard, it would seem necessary to show that requiring states to redeem their self-defence claims by adducing evidence would not

³³⁹ Franck, "Who Killed Article 2(4)?", p. 811.

render the law esoteric. At the beginning of this thesis a dilemma was raised: The further the logic and scope of the right of self-defence veered from the interests and practice of states, the less relevant it seemed. On the other hand the narrower the 'credibility gap', the less constraining force the prohibition on the use of force would retain. It was indicated that arguments made by international lawyers vacillate between the poles of esotericism and exploitation trying to accommodate both of these concerns.

The dilemma between an effective and an exploitation-proof right of self-defence was translated into a dilemma between the individual state and the collective security system. While the present thesis has by no means eradicated the initial dilemma, it has refused to reprise it in the language of individual/system or subjective/objective. Instead, the concept of intersubjective evaluation has been used as a means of countering the individualism of realist criticisms of self-defence.

Intersubjectivity is not open to the same criticisms that objectivity is. For a start, it is not susceptible to being appropriated by individual states in the same way that abstract norms are. Secondly, it is responsive to the imperative to adapt to changing social circumstances. The strength of the argument from intersubjectivity is that it opposes the individual subjectivity with that of multiple, connected subjectivities. It should be emphasised that this is not the same as the abstract collective. It is for this reason that the practical application of intersubjective understanding proposed in this thesis applies in a case-by-case manner and applies to factual questions rather than normative ones.

As the project progressed, it became clear to the author that, although the dilemma of esotericism and exploitation could not be escaped and although it would always be possible to critique the thesis from one perspective or the other, it was possible to find a better way forward. Indeed, the idea of the better argument rather than the correct answer is at the heart of Habermas' work.³⁴⁰ It is submitted that the present thesis, while vulnerable to the charge of esotericism, is nevertheless a strong counter-argument to realist criticisms. This is because instead of uncritically adopting dogmatic realist assumptions about the behaviour of rationally-self interested states and putting the onus on international lawyers to 'save' the right of self-defence, it has put the onus on states.

The esoteric arguments addressed in chapters II and III often involved the dislocation of normativity from state practice. For instance, international lawyers relied on the *opinio iuris* element of customary law and on system-perspective interpretations of the Charter text. In consequence, international law risks becoming a language of international lawyers that cannot reach outside discourses populated by international lawyers and, in consequence, cannot reach the very political and social actors whose behaviour it seeks to constrain or regulate.

In order to emphasise the difference between the approach advocated in this thesis, and esoteric approaches wherein the law is withdrawn from the is of social reality in order to insulate it from abuse, it is appropriate to say a few words on the subject of Koskenniemi's 'culture of formalism'. For Koskenniemi, international law can be

³⁴⁰ J. Habermas, *Between Facts and Norms* (trans. W. Rheg) (1997) Polity Press, Cambridge, p. 226.

thought of primarily as “what international lawyers do or think”.³⁴¹ He developed the idea of international law being a language with its own distinctive rules or grammar.³⁴² However the language of international law is presented as the preserve of those with “competence” to produce “good legal arguments”.³⁴³

Koskenniemi wrote that his book “assumes that there is no access to legal rules or legal meaning of international behaviour that is independent from the way competent lawyers see those things”.³⁴⁴ Certainly, it is not argued that an international lawyer could view state behaviour independently from his identity as such. However, it is felt that other actors in the international legal system feel that they can and should make legal arguments. While some of these can be dismissed as mere ‘rhetoric’,³⁴⁵ others can be seen as attempts to hold decision-makers to account for their decisions. In the examples that follow, it can be seen that state officials have held one another to account and, in some cases, have expected to have to account for their uses of force.

The practice of states has included the presentation of evidence in order to justify the classification of their action as self-defence. Thus, it has been pointed out that “evidence did matter enough to President Bush for the United States and its allies to wait until 7 October to strike back” following 9/11.³⁴⁶ The same writer suggested that lack of evidence has prevented the US carrying out forcible responses to terrorist attacks on the USS Cole, the Khobar Towers, or the WTC bombing of 1993.³⁴⁷ It

³⁴¹ Koskenniemi, *The Gentle Civilizer*, p. 7.

³⁴² Koskenniemi, *From Apology*, p. 566.

³⁴³ *Ibid.*, pp. 567-8.

³⁴⁴ *Ibid.*, pp. 568-9.

³⁴⁵ J.L. Goldsmith and E.A. Posner, *The Limits of International Law*, (2005) Oxford University Press, p. 169.

³⁴⁶ M.E. O’Connell, “Evidence of Terror” 7(1) *JCSL* (2002) 19, p. 19.

³⁴⁷ *Ibid.*, p. 27.

could be argued that the same logic saw Colin Powell give his infamous presentation to the Security Council in February 2003.³⁴⁸ It seems, then, that even powerful states see the value in giving reasons for their claims. There are also ‘costs’ for strategically minded states involved in walking away from an evaluation process, particularly when it is regarded as legitimate by others. The practical consequences of a state’s refusing to give evidence in its defence were demonstrated in the Nicaragua case. The US famously withdrew before the merits stage. Stressing that “questions of fact may be every bit as important as the law” in the case, Judge Jennings indicated that by failing to appear at the merits stage the US had forfeited its ability to “expound and explain...the material”.³⁴⁹

It is submitted that international law might not be best seen as a language. Instead, it might be better viewed as a mode of communication. Language can be seen as relatively inert. A language, words and grammatical instructions for their use, can exist without being spoken.³⁵⁰ In contrast, communication is a wider concept; one need not use language to communicate. Communication is, above all, something that people do. In this way, the language of UN Charter norms would be protected from exploitation without depriving the language of international law from state actors. The essence of such a mode of communication is explained above; it would consist in taking responsibility for one’s assertions and holding others to account for them. Characteristic of discourses in which this could occur would be that they themselves are open to critique. This would require transparency and accessibility.

³⁴⁸ *Supra*, at pp. 298-300.

³⁴⁹ *Nicaragua (Merits)*, Dissenting opinion of Judge Sir Robert Jennings, p. 544.

³⁵⁰ Ancient languages like Greek and Latin demonstrate this.

This conception of law is social. It shares a motivation with Koskenniemi's 'culture of formalism': "[T]hat those who are in positions of strength must be accountable" and that there can be "a meaningful distinction between lawful constraint and the application of naked power".³⁵¹ Koskenniemi's culture of formalism, like Habermas' attitude open to understanding, is identified "in opposition to something that it is not".³⁵² In Koskenniemi's case, this was the 'culture of dynamism' that permeated the work of certain international lawyers.³⁵³ If international law, or formalism, is to shake off its esotericism, it is suggested that the society in which this culture should inhere is that of state decision-makers and not international lawyers. My thesis has attempted to show that states need to take responsibility for the redemption and evaluation of self-defence claims.

CONCLUSION.

In the foregoing chapter, an attempt has been made to imagine how a communicative approach to the evaluation of self-defence claims based on evidence might look. At first, this was achieved by examining some of the ways in which facts are currently involved in self-defence claims and critiquing them. It was argued that merely alluding to facts without opening them to scrutiny or making it clear precisely what facts were indicated may lead to the exploitability of the system.

The principle of proportionality was taken to illustrate the dangers of a 'factual' approach to justification that does not really engage with particular facts. It was argued that it is not enough to refer to "the context" in the abstract, if self-defence

³⁵¹ Koskenniemi, *The Gentle Civilizer*, p. 503.

³⁵² *Ibid.*, p. 507.

³⁵³ *Ibid.*, p. 496.

claims are to be judged proportionate, it must be clear precisely what it proportionate to what.

Secondly, the allusion to secret intelligence to support self-defence claims was criticised. It was argued that intelligence cannot masquerade as evidence. Evidence connotes scrutability because to evidence something is to demonstrate it and not simply to restate its truth. Indeed, since the infamous Colin Powell presentation in the SC, it is submitted that the use of intelligence to vindicate claims has lost credibility once and for all. While it was acknowledged that states can and do make national level decisions to use force based on intelligence, if the validity claims raised for such uses of force are to be redeemed at the international level then it is necessary to provide good reasons that can be tested for the collective evaluators of the claim.

The testability of the reasons provided was emphasised in this chapter. In the previous chapter it was said that criticizability depends on a claim being available for scrutiny. In this chapter, this was interpreted as a claim being capable of being ostensibly demonstrated. This very basic level of vindication of a claim flows from the problematic nature of rhetorical means of vindication using normative and expressive statements. It was argued that the process of ostensive demonstration could be aided by the use of a fact finding commission. This commission would be in charge of collecting and marshalling information involved in the evaluation of a claim to have used force in self-defence. It would take statements from the parties concerned and open a dialogue with them regarding the validity of particular claims they were making in support of their assertions that the use of force was or was not defensive.

Indeed, the involvement of the parties concerned was considered vital for the process of coming to an understanding. It is thought that by involving the parties concerned, the conclusions of the evaluating discourse have more weight with those parties, hopefully leading to a scaling-down of tension. The wider membership of the collective security system could also be involved, it was suggested, in a second tier of evaluation that would use the factual conclusions gleaned by the fact-finding commission as the basis for its evaluation of the normative claim that force was used in self-defence. The factual evaluation would form the common referent for normative statements about necessity and proportionality, for instance, and thereby anchor them in common understanding, or at least make statements about them criticizable.

An approach based on intersubjective understanding about whether a use of force was made in self-defence or not would not provide a perfect answer to the question. However, it is submitted that by focusing on accountability, scrutability and transparency, the communicative approach to the evaluation of self-defence claims represents a step forward in the reconciliation of flexibility and integrity in the collective security system.

CONCLUSION.

This thesis has attempted to offer an alternative answer to the problem of identifying uses of force in self-defence. In order to do this, it first set up a problématique. Accepting that it is sometimes necessary for the rules on the use of force to respond to changes in the strategic environment, the problem was in preserving the collective security system from exploitation. It was argued that the ultimate authority to interpret the right had to be removed from the hands of the claimant state.

In order to do this, it was suggested that other actors in the collective security system should conceive of a report that self-defence has been used as a “criticizable validity claim”. In Habermas’ Theory of Communicative Action (TCA) such claims can be redeemed by the construction of intersubjective understanding through discourse. It was suggested that the most fruitful avenue for such understanding lies in the world of facts and the vindication of self-defence claims with ostensible evidence.

A. Review of the Argument.

In the first chapter realist criticisms of self-defence within the UN collective security system were set out. The realist criticisms were important because they were said by some to lie behind the approach to international law of former US President G.W. Bush.¹ In order to understand these criticisms, it was felt necessary to discuss some of the central assumptions and techniques of realist thought. One of the most important assumptions, for the purposes of this thesis, is that individuals are autonomous actors who rationally pursue their own self interest and, in doing so, seek to minimise costs and maximise benefits. This assumption was joined by a methodology that sought to

¹ T.M. Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Disequilibrium” 100(1) AJIL (2006) 88, p. 89.

draw a veil of objective inquiry over the business of proposing the best means to pursue individual interests.

These characteristics of realist thought lead such scholars to reject the value of legal systems insofar as they are conceived of as containing rules that constrain state behaviour. The narrowly conceived right of self-defence as it appears in article 51 of the UN Charter is anathema to realists. Although it appears as an exception to the absolute prohibition on the use of force contained in article 2(4), realist scholars have sought to argue that it must be interpreted from the perspective of the individual nation-state and not that of the collective security system in order to respond more effectively to the dictates of necessity. This puts all the authority to interpret the exception in the hands of the individual state and allows that state to exploit the legal claim of self-defence.

The thesis then turned to look at responses by international lawyers sympathetic to the UN collective security system. These international lawyers used two main tracks to counter realist criticisms of the system. One track tended to render the law esoteric. Such international lawyers downplayed the imperative for change and highlighted the formal validity of the law. At one stage it was believed that the validity of the law lies in its formal objectivity.² The more common view these days is that valid law must also be relevant to some degree; indeed, it has been called an “obsession” of international lawyers.³ Thus, some international lawyers make arguments that

² Thus Kelsen rejects the proposition that the validity of international law is connected to its effectiveness. H. Kelsen, *Principles of International Law* (2003) The Lawbook Exchange, New Jersey, p. 95.

³ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002) Cambridge University Press, p. 483.

acknowledge the self-interested nature of states and the inevitability of their acting against the formal rule.

Certain writers argue that state practice should be taken into account in interpretations of the right of self-defence, either through the doctrine of subsequent practice or through the intermingling of customary rules with those of the Charter. This reduces the 'credibility gap' between state practice and the formal rule, but as it does so it either approaches the realist conflation of the descriptive is and the prescriptive ought or it simply reasserts the formal rule in another guise without addressing underlying concerns about formal inflexibility. The former approach leaves the collective security system exploitable and the latter renders it esoteric.

In contrast to realist writers, most defenders of the collective security system deny that the individual state has the ultimate right to interpret self-defence. Chapter III therefore examined the practice of the Security Council (SC). On the one hand, a conception of the SC as constrained by normative imperatives could seem detached from the experience of Council practice. On the other hand, locating the authority to evaluate self-defence claims in the Security Council (SC) could render the system exploitable. This is because its authority comes from the presence of those same powerful states, a presence which is guaranteed by the privileged status of permanent member and the veto power. It was argued that the SC was inconsistent, selective and opaque; a prime breeding ground for abuse of power.

After this discussion of counter-arguments to realist criticisms of the collective security system, we were left with some insights into the reasons why these

approaches did not seem to escape the dilemma of esotericism/exploitation. On the one hand, esoteric arguments often sought to avoid exploitability by relying on “secondary rules” of interpretation or official procedure, for instance. However such secondary rules meant that the realist criticism of inflexibility could simply reform itself at the secondary level: The intentions of the Charter drafters are outdated, or the procedural rigour of the ICJ cannot adapt to rapidly changing, complex factual situations concerning self-defence, for instance. Locating the force of the law in formal objectivity did not seem to engage with realist concerns enough to counter them.

On the other hand, exploitable arguments often engaged too readily with realist premises and conceded too much. These arguments were too ready to read contrary state practice as evidence of an evolution of the right of self-defence that cemented the continuing relevance of the Charter framework. The concentration on state practice over the formal credentials of particular interpretations meant that the prescriptive force of self-defence was in danger of giving way to its descriptive relevance. In a similar vein, it was sometimes argued that the SC had implicitly evaluated a self-defence claim by acquiescence. This sort of theory is bolstered by the practice of the SC and the fact that international lawyers often overlook, and are excluded from viewing, the processes by which certain decisions came about.

It therefore seemed that any new approach to reconciling flexibility and lack of exploitability should probably not be based in the force of formal norms. It appeared that two of the greatest factors increasing the likelihood of exploitation were the lack of a really engaged process of evaluation of a claim and the lack of transparency in,

and publicity of, the process of evaluation. It therefore seemed sensible to propose a means of evaluating self-defence claims that focused on claimant states' responsibility to redeem these claims and evaluating states' responsibility to accept or reject them for good reasons.

Accordingly, the second half of the thesis borrowed certain concepts from Habermas' Theory of Communicative Action. It stated that the identification of valid self-defence claims could emanate from states' undertaking responsibility to, on the one hand, take self-defence reports as criticizable validity claims and, on the other hand, to vindicate such claims with good reasons that could be accepted or rejected by evaluators. It was argued that the evaluation of claims on the basis of their merits depended on actors in the evaluation discourse, including the claimant state, target state and third party evaluating states, required the parties to find common ground from which to determine the validity of the claim. Suggesting that common ground would be difficult to find in the field of norms, it was argued that facts could provide such a common point of reference.

In the final chapter, the use of facts was problematized. Caution was urged regarding the sorts of facts that were presented in vindication of a claim and it was held that such facts should, ideally, be capable of ostensive demonstration. Probable 'facts' and facts grounded in intelligence, in particular, would not vindicate a self-defence. This was because they could not, for different reasons, be demonstrated. It was also submitted that, while experts could play an important role in establishing these facts, they would benefit from the participation of the states concerned. This links back into the Habermasian idea of intersubjective understanding and the communicative

attitude oriented to understanding. Where states adopted the incompatible strategic attitude of self-interested, autonomous actors, facts established were unlikely to provide a common understanding of the factual circumstances of a given self-defence claim.

The thesis ended with an admission that, given the inability of the evaluation discourse to provide an absolute or objectively valid evaluation of a self-defence claim, the communicative approach to evaluation may only provide weak medicine. In reply, it can be said that if third party states begin to view self-defence reports as criticizable validity claims, it is possible that a culture of justification will build up in the collective security system. The attitudes of distrust among states could be used as a catalyst to encourage states to take a critical attitude to one another's claims – whether they be claims of self-defence or rejections of such claims.

Further it may be possible to encourage states to accept the 'better argument' if that argument is couched in hard-to-deny fact, rather than interpretable norms. If such a process is visible it is also capable of external scrutiny, another factor that may dissuade states from rejecting good arguments or accepting weak ones. If a culture can be encouraged whereby states see justification as more than a pro forma affair, a virtuous circle could be created. It may be that international lawyers have a role to play in encouraging such attitudes by being less forgiving of the adoption of strategic attitudes by states.

The aim of this thesis was to find a more effective way of answering realist criticisms of the collective security system. In examining previous attempts to do this, the

conclusion was reached that at present the identification of valid self-defence claims is piecemeal and opaque. It was concluded that the fault lay not with the collective security framework in the Charter, so much as the attitudes of the states that act within that framework. In so concluding, this thesis puts the onus on states to take responsibility for the identification of valid self-defence claims.

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