NON-FORCIBLE MEASURES AND THE LAW OF SELF-DEFENCE

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Abstract: The right of self-defence is usually presented as an exception to the principle of non-use of force. Conventional wisdom therefore holds that the right of self-defence can only be relied on to justify those measures constituting a threat or use of force. This article rejects that claim. It argues that self-defence is a general right under international law and, as such, can be invoked to justify all measures necessary to repel an armed attack regardless of whether they are forcible or non-forcible in nature. To support this argument, this article examines the genesis of the right of self-defence under customary international law, the text of Article 51 of the United Nations Charter, the structure of the United Nations Charter and State practice on Article 51.

Keywords: public international law, self-defence, self-help, non-forcible measures, collective security, countermeasures

I. Introduction

The right of self-defence is conferred on States by treaty and customary international law.[1] At the same time, treaty and customary law impose a number of restrictions on the exercise of this right: self-defence is limited to those circumstances in which an 'armed attack' occurs;[2] defensive action must not go beyond what is necessary and proportionate to repel an armed attack;[3] instances of self-defence must be reported to the Security Council (SC) of the United Nations (UN);[4] and the right of self-defence is suspended as soon as the SC adopts measures necessary to maintain international peace and security.[5] Ordinarily, States rely on the right of self-defence to justify measures that would otherwise contravene the prohibition on the threat or use of force under Article 2(4) UN Charter and customary law.[6] In this context, measures are forcible where they involve the threat or use of 'violence',[7] that is, where they cause (or threaten to cause) 'destruction to life and property'.[8] Given that States usually invoke the right of self-defence to justify forcible responses to armed attacks, the prevailing view among international lawyers is that this right is subject to an additional restriction; namely, that it can

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[1] See Art. 51 UN Charter and *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits) [1986] ICJ Rep. 14, para 176.
[2] Art. 51 UN Charter.
[3] *Nicaragua* (n 1) para 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep. 226, para 41; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (Merits) [2003] ICJ Rep. 161, para 76.
[4] Art. 51 UN Charter.
[5] ibid.
[6] *Nicaragua* (n 1) para 34 (confirming that the principle of non-use of force is established in customary law).
[7] Y Dinstein, *War, Aggression and Self-Defence* (CUP 2017) 90.
[8] I Brownlie, *International Law and the Use of Force by States* (OUP 1963) 362.

be engaged only when States threaten or use *force* to resist an armed attack.[9] In this way, the right of self-defence is presented as an exception to the principle of non-use of force.

This conception of the right of self-defence is problematic because States may respond to armed attacks with non-forcible measures. For example, and as discussed in detail below, during the 1982 Falklands War certain States imposed economic sanctions against Argentina and justified them as acts of collective self-defence on the basis that they were designed to halt and repel Argentina's armed attack against the United Kingdom (UK). In 2002, Israel built a security wall within occupied Palestinian territory and justified it as an act of self-defence, claiming the wall was necessary to protect its population from armed attacks that were being launched by pro-Palestinian groups. More recently, States have indicated their willingness to launch cyber operations under the banner of self-defence in order to counter armed attacks.

Economic sanctions, security barriers and cyber operations are unlikely to rise to the level of a use of force given that they do not usually cause death, injury, destruction or damage to people or property. Yet importantly, they may run into conflict with other rules of international law such as the principles of territorial sovereignty and non-intervention or, with regard to economic sanctions, they may breach international trade, economic or investment law. If States have an 'inherent right' to defend themselves against armed attacks as Article 51 UN Charter explains, the question arises as to how such non-forcible measures can be justified under international law. As this article reveals, many international lawyers take the position that non-forcible responses to armed attacks should be classified as *countermeasures*. But this classification is inappropriate given that the doctrine of countermeasures is a law enforcement mechanism and, as such, it is subject to a range of conditions and restrictions that would prevent States from defending themselves effectively against armed attacks.

The core claim of this article is that self-defence is a general right under international law and can be invoked to justify all measures necessary to repulse an armed attack regardless of whether they are forcible or non-forcible in nature. In practical terms, reconceptualising self-defence as a general right is important for two main reasons. First, it enhances the effectiveness of the right of self-defence by broadening the response options available to victim States – in short, it enables them to confront armed attacks with a range of non-forcible and forcible measures. Second, it can help prevent the unnecessary escalation of crises by allowing victim States to respond to armed attacks with non-forcible measures. By contrast, construing self-defence as an exception to the principle of non-use of force would require victim States to use force to resist armed attacks, which runs the risk of unnecessarily aggravating crises if non-forcible measures would be sufficient to counter them.

In making the claim that self-defence is a general right under international law, this article adheres to the following structure. To set the scene, Section II reveals that the conventional wisdom among international lawyers is that the right of self-defence is only available where States respond to armed attacks with force. Rejecting this mainstream account, Section III presents the doctrinal evidence to support the argument that the right of self-defence also permits States to use non-forcible measures to fight off an armed attack. This evidence includes an examination of the genesis of the right of self-defence under customary law, the text of Article 51 UN Charter, the structure of the UN Charter and State practice on Article 51. Section IV focuses on countermeasures since, according to many international lawyers, non-forcible responses to armed attacks should be accommodated within this doctrine. While the doctrines of countermeasures and self-defence may overlap insofar as they can apply to the same set of circumstances, Section IV demonstrates that there are nevertheless compelling

[9] See Section II.

conceptual, theoretical and doctrinal reasons for why the use of non-forcible measures to repel an armed attack should be characterised as an act of self-defence rather than a countermeasure. Section V provides conclusions.

II. Conventional Wisdom: Self-Defence as Counter-Force

As we have seen, in 2002 Israel built a security wall within occupied Palestinian territory to protect its population from terrorist attacks.[10] While members of the international community alleged that the construction of the wall breached international human rights law and international humanitarian law,[11] Israel justified it as an act of self-defence under Article 51 UN Charter.[12]

In December 2003, the UN General Assembly (GA) requested an Advisory Opinion from the International Court of Justice (ICJ) on the legal consequences arising from Israel's construction of the wall.[13] In its Advisory Opinion to the GA, the ICJ found that the construction and permanence of the wall breached international human rights law and international humanitarian law.[14] Moreover, the Court rejected Israel's claim of self-defence on the grounds that, first, this right cannot be engaged against a non-State actor and, second, the author of the armed attack cannot be located within the victim's State's territory or territory under its occupation.[15] Having dismissed Israel's claim to self-defence on these bases, the Court did not have to examine whether this right can be invoked to justify the use of non-forcible measures such as the building of a security wall. However, in her Separate Opinion Judge Higgins turned her attention to this question and, in a brief but important passage, she explained:

> I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood.[16]

It is notable that Judge Higgins did not provide any legal justification or cite any authority to substantiate her statement. This notwithstanding, her argument is shared by numerous international lawyers.

Special Rapporteurs for the International Law Commission's (ILC) project on the law of State responsibility construed the right of self-defence as an exception to the principle of non-use of force, even if they held different views on how these provisions interact. For Roberto Ago (the project's second Special Rapporteur), the right of self-defence operates as a secondary rule of international law insofar as it precludes State responsibility for breaches of the non-use of force principle.[17] By contrast, James Crawford (the project's final Special Rapporteur)

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[10] For an overview of Israel's construction of the wall see Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13, UN Doc. A/ES-10/248 (November 24, 2003).
[11] UNGA A/ES-10/PV.21 (October 20, 2003).
[12] ibid 5-8 (remarks of the Israeli representative to the UN).
[13] UNGA Res. ES-10/14 (December 8, 2003).
[14] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion [2004] ICJ Rep. 136, para 137.
[15] ibid para 139.
[16] ibid para 35 (Separate Opinion of Judge Higgins).
[17] 'The State finds itself in a position of self-defence when it is confronted by an armed attack against itself in breach of international law. It is by reason of such a state of affairs that, in a particular case, the State is exonerated from the duty to respect, vis-à-vis the aggressor, the general obligation to refrain from the use of force'; International Law Commission, *Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur - The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1)*, UN

regarded self-defence as being so closely related to the prohibition on the threat or use of force that he saw it as forming an integral part of the prohibition itself.[18] Crawford therefore argued that Articles 2(4) and 51 UN Charter must be read together as a singular primary rule of international law: States cannot threaten or use force in their international relations except in self-defence. According to this approach, '[a] State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4'.[19]

Importantly, Crawford's view that self-defence under Article 51 UN Charter is an exceptional right intrinsic to the non-use of force principle was adopted by the ILC in its Commentary to Article 21 of the Articles on State Responsibility (ASR),[20] which explains:

> Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Art 2, paragraph 4.[21]

Article 21 ASR also governs the matter of self-defence but must not be confused with Article 51 UN Charter. Article 21 ASR is a secondary rule of international law and precludes State responsibility for ancillary or incidental violations of international law that occur as a result of defensive measures being taken under Article 51 UN Charter, such as breaches of the principles of territorial sovereignty and non-intervention, a treaty of amity, a trade treaty, etc. As the Commentary to Article 21 ASR explains, '[s]elf-defence [under Article 21 ASR] may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision'.[22] As this quotation makes clear, Article 21 ASR cannot be relied upon independently of Article 51 UN Charter to justify the use of non-forcible defensive measures.[23]

The claim that self-defence (as a primary rule) can only be relied on to justify forcible responses to armed attacks is also widely supported in the academic literature.[24] Expressly

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Doc. A/CN.4/318/Add.5-7 (1980) para 87.

[18] International Law Commission, *Second Report on State Responsibility by Mr James Crawford*, UN Doc. A/CN.4/498 and Add 1-4 (1999) para 298.

[19] ibid.

[20] The UN General Assembly has on several occasions commended the ILC's ASR to UN member States; UNGA Res. 56/83 (2001); UNGA Res. 59/35 (2004); UNGA Res. 62/61 (2007); and UNGA Res. 65/19 (2010).

[21] International Law Commission, *Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries* (2001) Commentary to Art. 21, para 1.

[22] ibid Commentary to Art. 21, para 2. On the relationship between self-defence under Article 51 UN Charter and Article 21 ASR see N Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 LJIL 801.

[23] '[Article 51 UN Charter and Article 21 ASR] are, of course, not independent: self-defence's role as a secondary rule is merely incidental to its role as a primary rule. Therefore, to exonerate the breach of other obligations, self-defence must have been lawfully exercised in accordance with the primary law to begin with'; F Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) 85 BYIL 90, 107.

[24] 'Self-defense is the use of force by a person illegally attacked by another. The attack against which the use of force as an act of self-defense is permitted must have been made or must be intended to be made by force'; H Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' (1948) 42 AJIL 783, 784. '[Self-defence] is the concrete, subjective, eventual and transitory right of the State to use force in order to repel an attack against its territory and its sovereignty'; RJ Alfaro, 'The Rights and Duties of States' (1959) 97 Recueil des Cours 91, 102-3. 'The reference to self-defense in Article 51 is a justification for otherwise illegal violence for the simple reason that self-defense has always been a defense in international law for using military force'; GP Fletcher and JD Ohlin, *Defending Humanity: When Force is Justified and Why* (OUP 2008) 66. 'The right of self-defence is an exception to the prohibition of force, so that if the prohibition is

defending Judge Higgins's conclusion that the right of self-defence does not cover non-forcible measures, Scobbie explains that it:

> is clearly supported by both the development of the prohibition on the use of force in international relations and by the logic of the UN Charter. Self-defence is universally regarded as one of the two exceptions to the prohibition on the use of force provided by the UN Charter … Any measure short of force cannot therefore be classified as amounting to self-defence undertaken in pursuit of Article 51 of the UN Charter.[25]

As already indicated, the central thesis of this article is that the right of self-defence permits the use of forcible and non-forcible measures to fend off an armed attack. While a small number of commentators have made this argument, they do so *en passant* and, because their focus is on other aspects of the right of self-defence, they do not advance any theoretical or doctrinal justification to support their claim.[26]

III. Self-Defence and Non-Forcible Measures

This section demonstrates that, as a matter of *lex lata*, the right of self-defence can be relied on to justify all measures necessary to ward off an armed attack. This argument is made through an examination of the origins of the right of self-defence under customary law, the text of Article 51 UN Charter, the structure of the UN Charter and State practice on Article 51.

A. The Origin of Self-Defence: The Duty of Self-Preservation

Article 51 UN Charter describes self-defence as an 'inherent right' and, as the ICJ has explained, this phrase refers to the 'pre-existing customary international law' basis of this doctrine.[27] As

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limited to military force (direct or indirect as it may be) then the exception must be about the use of military force as well: the whole point of an exception is to exclude the application of the (general) rule from conduct which would otherwise fall within the domain of that (general) rule'; Paddeu (n 23) 110. '[L]a letter et l'esprit de l'article 51 de la Charte des Nations Unies indiquent qu'au contraire la légitime défense consiste en une réaction á la force par la force et plus particuliérement en une ripsote armée face á une agression armée. L'idée d'une adéequation qualitative entre le fait et la riposte déborde par ailleurs le régime de la Charter et se retrouve en droit coutumier contemporain'; L-A Sicilianos, *Les Reactions Decentralisees a L'illicite* (LGDJ 1990) 292. 'Article 51, as such, is an exception to the prohibition on the use of force laid down in Article 2(4) of the Charter and thus encompasses only forcible measures'; R O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' (2004) 37 Revue Belge de Droit International 92, 142 (citations omitted). '[Article 51 UN Charter] is a limited exception to Article 2(4) allowing self-defense in a situation in which it can be shown by the tangible evidence of an armed attack that a state may respond'; ME O'Connell, *The Power and Purpose of International Law* (OUP 2008) 165.

[25] I Scobbie, 'Smoke, Mirrors and Killer Whales: The International Court's Opinion on the Israeli Barrier Wall' (2004) 5 German Law Journal 1107, 1128-29 (citations omitted). Also defending Judge Higgins's statement, Kritsiotis explains that '[t]he right of self-defence was there to justify the application – that is, the threat or the use – of force in international law; it was not there as a default argument for all manner of actions that states may devise or deem necessary to ensure [self-defence]'; D Kritsiotis, 'A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence under International Law' in ND White and C Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Elgar 2013) 173.

[26] See e.g., DW Bowett, *Self-Defence in International Law* (MUP 1959) 270 (and, later, DW Bowett, 'Economic Coercion and Reprisals by States' (1972) 13 Virginia Journal of International Law 1, 7); CJ Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2006) 16 EJIL 975, footnote 75; Solon Solomon, 'Legitimate Non-Forcible Measures of Self-Defence: The Post-Disengagement Israeli Measures towards Gaza as a Case Study' (2010) 9 Chinese Journal of International Law 501.

[27] *Nicaragua* (n 1) para 176.

nothing within Article 51 'impairs' the inherent right of self-defence, the objective of this provision is to preserve the customary right of self-defence and carry it forward into the Charter era, albeit subject to certain modifications. Thus, an inquiry into the customary practice of the right of self-defence prior to the adoption of the UN Charter is essential if we are to understand the content of this right under contemporary international law.

Historically, the right of self-defence was part of the duty of self-preservation.[28] Self-preservation was a natural law duty that required States to take all measures necessary to preserve their essential interests: 'the so called right of self-preservation was … the virtually unrestricted freedom it gives to a state to act contrary to any norm of International Law, if such action is deemed necessary for its own preservation'.[29]

States refined the duty of self-preservation during the nineteenth century. What emerged was a right of self-defence and, being a product of State practice and *opinio juris*, it was a legal right conferred by way of customary law.[30] Over time, States developed customary law and placed limits on when and how the right of self-defence could be exercised – for example, by the mid-nineteenth century it was accepted that defensive action could not go beyond what was necessary and proportionate to avert the threat of harm.[31] Importantly, States did not restrict the right of self-defence to the use of forcible measures exclusively. As a review of State practice reveals, in pursuit of self-defence States were free to take all measures necessary to protect themselves from harm irrespective of which rules of international law they breached.

During the nineteenth century, the United States (US) regularly conducted military operations in Mexico to prevent Native Americans conducting attacks within US territory. In July 1836, suspecting that Native Americans in Texas (then part of Mexico) were planning raids within the US, the US sent troops into Mexico and occupied parts of its territory and justified this action on the basis of 'the immutable principle of self-defense'.[32] Mexico's Minister to the US concluded that the US's invocation of self-defence was not warranted in the circumstances and determined that '[t]he honour and rights of my Country are … greatly compromised by the violation of its territory and subsequent occupation' by US forces.[33] In response, the US explained:

> The present inability of Mexico to restrain the Indians within her territory from hostile incursions upon the citizens of the United States, if they should once be engaged in hostility near the frontier, and the barbarous character of their warfare which respects neither the rights of nations nor of humanity, renders it imperative on the United States

[28] M Roscini, 'On the 'Inherent' Character of the Right of States to Self-Defence' (2016) 4 Cambridge Journal of International and Comparative Law 634.
[29] H Kelsen, *Principles of International Law* (Rinehart and Co. 1952) 59. 'In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation'; WE Hall, *A Treatise on International Law* (Clarendon Press 1884) 244. 'From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States'; L Oppenheim, *International Law: A Treatise, Vol. 1 (Peace)* (Longmans, Green & Co. 1912) 184.
[30] RY Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 AJIL 82.
[31] The *Caroline* incident in 1837 – discussed in detail below – is often seen as subjecting the right of self-defence to the principles of necessity and proportionality.
[32] 'John Forsyth, Secretary of State of the United States, to Powhatan Ellis, Unites States Chargé d'Affairs at Mexico City, December 10, 1836' in WR Manning (ed), *Diplomatic Correspondence of the United States: Inter-American Affairs 1831–1860* (1937) Vol. 8 (Mexico 1831–1848 (Mid-Year)) 73.
[33] 'Manuel Eduardo de Gorostiza, Mexican Minister to the United States, to Asbury Dickens, Acting Secretary of State of the United States, October 10, 1836', ibid 367.

> to adopt other means for the protection of their citizens. What those means should be, must depend upon the nature of the danger. Should that require the temporary occupation of posts beyond the frontier, the duty of self-preservation gives them the right to such occupation.[34]

As this correspondence reveals, neither the US nor Mexico discussed the right of self-defence in the context of the use of military force. Instead, the question was whether self-defence could be relied on to justify a State's non-consensual intrusion into another State's territory, that is, whether self-defence could be invoked to justify a violation of the principle of territorial sovereignty. By answering this question in the positive, both States accepted that – as a matter of legal principle – self-defence was a general right under international law and could be invoked to justify the use of all measures necessary to avert the threat of harm.

In December 1837, British forces entered US territory to destroy the *Caroline*, a steamer being used to ferry weapons and other supplies to rebel groups in Upper Canada who were revolting against British rule. British forces killed at least one American national and, subsequently, fired the steamer and set it sail over Niagara Falls. This incident precipitated a significant diplomatic fallout between the UK and US which, over several years, exchanged correspondence debating the legality of the former's actions.

Usually, the *Caroline* incident is discussed in relation to whether the right of self-defence can be engaged to neutralise threats of anticipated harm or to confront threats posed by non-State actors. What is often overlooked is that the right of self-defence was discussed in the context of the UK's violation of the US's territorial sovereignty generally rather than the UK's use of force against the US specifically.[35] For example, the US Minister in London protested against the UK's actions and claimed that international law prohibits non-consensual 'entry into the territory of an independent state', although he recognised that such entry is permitted 'in cases of extreme state necessity'.[36] Similarly, the US Secretary of State explained:

> The President sees with pleasure that your Lordship fully admits those great principles of public law, applicable to cases of this kind, which this Government has expressed; and that on your part, as on ours, respect for the inviolable character of the territory of independent states is the most essential foundation of civilization. And while it is admitted on both sides that there are exceptions to this rule, he is gratified to find that your Lordship admits that such exceptions must come within the limitations stated and the terms used in a former communication from this Department to the British Plenipotentiary here. Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation".[37]

Responding to the US Secretary, the British Special Minister agreed that respect for territorial inviolability was a foundational principle of international law and that, exceptionally, trespass into another State's sovereign territory was permitted where necessary to achieve self-

[34] 'Asbury Dickins, Acting Secretary of State of the United States, to Manuel Eduardo de Gorostiza, Mexican Minister to the United States, October 13, 1836', ibid 67.
[35] 'In this regard the incident that became the classic exposition of the criteria for legally justified self-defence was not perceived as occurring during a war and was thus technically irrelevant to the laws of war'; C Chinkin and MK Kaldor, *International Law and New Wars* (CUP 2017) 133.
[36] 'Letter from Stevenson to Palmerston (22 May 1838)' in Manning (n 32) 454.
[37] 'Letter from Webster to Fox (24 April 1841)', ibid 145.

defence.[38]

In 1867, the US extended its jurisdiction over the Bering Sea after it purchased Alaska from Russia. The US alleged that Canadian vessels were hunting seals that were migrating through the Bering Sea, which it saw as unlawfully interfering with the commercial rights of US companies as guaranteed by US law. In 1886, US authorities apprehended a number of Canadian vessels while they were hunting for seals. As Canada was under British rule at the time, it was the UK who protested against the seizure of the vessels. After diplomatic efforts to resolve the dispute ended unsuccessfully, the UK and US signed a treaty of arbitration and a Tribunal was established to consider a number of issues, one of which was: 'Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit [that falls with a State's territorial sea]'.[39]

During the proceedings, the US asserted its right of self-defence to seize the Canadian vessels on the basis that such action was necessary to protect its essential interests:

> [T]he right of self-defense on the part of a nation is a perfect and paramount right to which all others are subordinate, and which upon no admitted theory of international law has ever been surrendered; that it extends to all the material interests of a nation important to be defended; that in the time, the place, the manner, and the extent of its execution it is limited only by the actual necessity of the particular case ... and that whenever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, even though such act would be otherwise justifiable, the right of the individual must give way, and the nation will be entitled to protect itself against the injury by whatever force may be reasonably necessary, according to the usages established in analogous cases.[40]

As can be seen, the US saw self-defence as a right 'to which all others are subordinate' and, in this particular instance, could be invoked to justify an interference with the principle of the freedom of the high seas. Ultimately, the Tribunal did not have to address the doctrine of self-defence, instead finding the US liable for its apprehension of the Canadian vessels on the basis that its territorial sea did not extend to the waters in which the vessels were seized and thus it did not have a right to protect seals in that area.[41]

The use of force is of course bound up with these instances of State practice insofar as the US's incursion into Mexico and the UK's intervention in the US involved military personnel crossing the borders of other States and using force and, in the Bering Sea incident, the US Coast Guard boarded Canadian fishing vessels and apprehended their crews. The reason why these States engaged the right of self-defence to justify breaches of the principles of territorial sovereignty and the freedom of the high seas rather than the non-use of force was because, in the nineteenth century, there was no specific prohibition on the use of force (or even war) under international law. As Brownlie demonstrates, the prohibition on the use of force crystallised as a rule of customary law at some point between 1928 and 1945.[42] Thus, during the nineteenth century the legality of military interventions within States was assessed according to other rules of international law, such as the principles of territorial sovereignty

[38] 'Letter from Ashburton to Webster (28 July 1842)', ibid 767.
[39] *Fur Seals Arbitration* (1893) 1 Moore Arbitrations 755, 906.
[40] ibid 839-40.
[41] ibid 938-9.
[42] 'It is submitted that the practice of states between 1920 and 1945, and more particularly between 1928 and 1945, provides adequate evidence of a customary rule that the use of force as an instrument of national policy other than under a necessity of self-defence was illegal'; Brownlie (n 8) 110.

and non-intervention. What this shows is that the right of self-defence pre-dates the principle of non-use of force and that, critically, these provisions developed at different points in time and in different contexts.

As the above case studies illustrate, during the nineteenth century the right of self-defence was seen as a general right under customary law that could be asserted to justify any conduct irrespective of which rule of international law it breached, provided of course the defensive action was necessary to protect the essential interests of the State. The principle of non-use of force was grafted onto international law via customary and treaty law at a later date and, as we shall see below, in the years that followed States did not reformulate the right of self-defence as an exception to the principle of non-use of force – rather, States maintained the position that self-defence is a general right under international law.

B. Text of Article 51 UN Charter

The UN Charter was adopted in 1945 and, as explained previously, Article 51 preserves the right of self-defence under customary law. At the same time, Article 51 integrates the right of self-defence into the collective security system and makes it suitable for the Charter era. To do so, Article 51 subjects the customary right of self-defence to a number of restrictions. For example, to enable the collective security system to function effectively, Article 51 requires States to report their invocations of the right of self-defence to the SC and suspends this right where the SC adopts measures necessary to restore international peace and security. The question that arises is whether Article 51 places limits on the *types* of measures a victim State can undertake in the name of self-defence; namely, whether Article 51 restricts the right of self-defence to the threat or use of force.

Article 51 explains that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs'. As is apparent, the text of Article 51 does not limit the customary right of self-defence to forcible measures. As Tams observes:

> There is little indication in Art. 51 that measures of self-defence has [sic] to involve the use of force; where the defending state seeks to defend itself by measures not involving recourse to force (e.g., blockades), these will *a fortiori* be justified.[43]

This reading of Article 51 UN Charter is supported by the interpretative maxim *in eo quod plus sit semper inest et minus* ('in the greater is always included the lesser'),[44] which is designed to give effect to the ordinary meaning of treaty provisions.[45] This maxim is often used to determine the scope of rights and powers granted by treaties. For example, in the *Application*

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[43] Tams (n 26) 975, footnote 75. See also J Rohlik, 'Some Remarks on Self-Defense and Intervention: A Reaction to Reading Law and Civil War in the Modern World' (1976) 6 Georgia Journal International and Comparative Law 395, 415-16 and E Gross, 'Combatting Terrorism: Does Self-Defense Include the Security Barrier – The Answer Depends on Who You Ask' (2005) 38 Cornell International Law Journal 569, 577.

[44] AX Fellmeth and M Horwitz, *Guide to Latin in International Law* (2009) 127 ('"In the greater is always included the lesser" … meaning that a reference to a composite or more general thing always encompasses a reference to its subdivisions or components').

[45] As the ILC concludes, these types of interpretative maxims 'are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document'; Reports of the Commission to the General Assembly, *Report of the International Law Commission on the Work of its Eighteenth Session*, *Law of Treaties*, UN Doc. A/ 6309/Rev.1 (1966) 218.

for Review case Judge de Castro relied on this maxim to conclude that, because the UN Charter confers on the GA the power to request advisory opinions and authorises other organs and specialised agencies to do so, and grants the GA the power to establish subsidiary organs, the GA must have the power to bestow on these organs the right to seek advisory opinions.[46] If the 'greater includes the lesser', as this maxim prescribes, the right to use force in self-defence must include the right to use non-forcible measures in self-defence.[47] In fact, Israel's representative to the UN appeared to invoke the maxim *in eo quod plus sit semper inest et minus* when concluding that, as a matter of interpretative logic, Article 51 must permit the use of non-forcible and forcible measures:

> International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.[48]

C. Structure of the UN Charter

The structure of a treaty can be used to interpret the meaning of its provisions.[49] Importantly, the principle of non-use of force under Article 2(4) UN Charter appears in Chapter 1 of the Charter, which enumerates the UN's purposes and principles. By contrast, the right of self-defence is contained in Article 51 and this provision is located within Chapter VII of the Charter, which regulates the UN's collective security system. If self-defence can be engaged only in the context of forcible responses to armed attacks – that is, Article 51 is a built-in exception to Article 2(4) – we must question why these provisions appear in different chapters of the Charter and why they are not connected in any structural manner. Rather than being an exception to Article 2(4), the structure of the Charter indicates that Article 51 is an exception to the UN's collective security system.

To explain, while the SC has primary responsibility for the maintenance of international peace and security, where an armed attack occurs States have a right under Article 51 to engage in defensive action independent of SC approval and this right persists up to the moment that the Council adopts measures necessary to restore international peace and security. Importantly, the *travaux préparatoires* reveal that the drafters of the UN Charter saw Article 51 as constituting an exception to the collective security system rather than Article 2(4).[50] For example, commenting on a draft of Article 51 the Chinese delegate to the San Francisco

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[46] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* [1973] ICJ Rep. 166, para 7 (Dissenting Opinion of Judge de Castro).

[47] 'Although collective self-defence is normally discussed as involving the use of force, there is no reason why it should not be limited in certain cases to economic measures. *Qui peut le plus, peut le moins*'; PJ Kuyper, 'Community Sanctions against Argentina: Lawfulness under Community and International Law' in D O'Keefe and HG Schermers (eds), *Essays in European Law and Integration* (Kluwer 1982) 162.

[48] UNGA A/ES-10/PV.21 (n 11) 6.

[49] International courts have frequently used the structure of treaties to inform their interpretation of treaty provisions. See, for example, *Acevedo Buendia et al. (Discharged and Retired Employees of the Comptroller) v. Peru*, Inter-American Court of Human Rights, Judgment (Preliminary Objection, Merits, Reparations and Costs) (July 1, 2009) para 100.

[50] 'States simply did not discuss article 51 in relation to the prohibition of force. They only discussed the article in relation to the authority of the Security Council and the permissibility of regional arrangements'; AA Haque, *The United Nations Charter at 75: Between Force and Self-Defense – Part Two* (June 24, 2020) Just Security, https://www.justsecurity.org/70987/the-united-nations-charter-at-75-between-force-and-self-defense-part-two/.

conference explained that 'this article amounts to an exception to the enforcement arrangements decided upon by the Security Council'.[51]

D. State Practice on Article 51 UN Charter

Under Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969, State practice subsequent to a treaty coming into force can be used to interpret that treaty where it establishes the agreement of the parties. Since the inception of the UN Charter, State practice on Article 51 confirms that the doctrine of self-defence encompasses the right to deploy non-forcible and forcible measures to counter an armed attack.[52]

1. Regional Security Arrangements

The Inter-American Treaty on Reciprocal Assistance (otherwise known as the Rio Treaty) was signed in 1947 and Article 3(1) establishes a collective self-defence pact:

> The High Contracting Parties agree that an armed attack by any State against a State Party shall be considered an attack against all the States Parties and, consequently, each of them undertakes to assist in meeting any such attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

Where members come to the assistance of an attacked member, Article 3(2) provides:

> [E]ach of the States Parties may determine, according to the circumstances, the immediate measures it may take individually in fulfillment of the obligation set forth in the preceding paragraph.

Finally, Article 3(6) explains:

> Measures of self-defense provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security.

As we can see, Articles 3(2) and (6) refer to 'measures' taken in exercise of the right of self-defence, indicating that defensive action can involve measures generally rather than the use of force specifically. Importantly, Article 3(1) explicitly states that its articulation of the right of self-defence is consistent with this right as it is enshrined in Article 51 UN Charter. Indeed, the right of individual and collective self-defence was expressly included in the UN Charter at the behest of Latin American States who were keen to preserve the Act of Chapultepec, which was a regional mutual assistance arrangement adopted two months before

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[51] Documents of the United Nations Conference on International Organization, San Francisco (1945) Vol. XVII, Documents of the Coordination Committee Including Documents of the Advisory Committee of Jurists, Part I (1954) 287. The Soviet delegate also explained that 'the only reason for this Article was that it was an exception to the general rule provided in Chapter VII'; ibid. Similarly, the US delegate 'insisted that [Article 51] was a general exception to the Council machinery and belonged where the powers of the Security Council were stated, in Chapter VII'; ibid 288.

[52] '[T]he criterion of force is an arbitrary one which does not find support in state practice'; Bowett, 'Economic Coercion and Reprisals by States' (n 26) 23. Bowett reaffirms this view when he explains that 'the right of self-defence, though chiefly relevant as an exception to the prohibition of force and as a reaction to a delictual use of force, cannot be and has not been by state practice confined to this context'; ibid 24.

the signing of the UN Charter and was later formalised by the Rio Treaty.[53] Accordingly, it can be said that members of the Rio Treaty perceive Article 51 UN Charter as affording victim States the right to use all measures necessary to combat an armed attack.

In 1949, the North Atlantic Treaty was signed and the North Atlantic Treaty Organization (NATO) was thereby established. Like the Rio Treaty, the North Atlantic Treaty establishes a collective self-defence pact and Article 5 provides:

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

The language employed by the North Atlantic Treaty is even clearer than the Rio Treaty. Article 5 requires a member to come to the assistance of an attacked member and, when requested, permits it to take 'such action as it deems necessary, including the use of armed force'. The critical word here is 'including', which indicates that members can render assistance to a fellow member including but not limited to the use of armed force.

During the drafting of the North Atlantic Treaty the US Senate expressed concern over an earlier draft of Article 5 that would have required member States to provide *military* assistance to fellow members in the event that they fell victim to an armed attack.[54] At the same time, the US remained committed to the overarching objective of NATO, which was to create a collective self-defence pact where members are required to come to the assistance of other members when they are attacked. By way of compromise, the US advocated for a formulation of Article 5 that retained the mutual assistance obligation but which allowed members to decide for themselves what type of support they would render to an attacked member and, in particular, whether they would provide military or non-military assistance. The product was Article 5, which allows a NATO member to provide the assistance 'it deems necessary, including the use of armed force'.

That Article 5 covers the use of non-forcible measures is also supported by the practice of NATO and its member States. After the 9/11 terrorist attacks against the US, NATO determined that an armed attack had been committed against a member State and, for the first time in its history, engaged Article 5 of the North Atlantic Treaty. Pursuant to Article 5, NATO agreed a number of measures to support the US:

- Enhance intelligence sharing and cooperation between NATO members;
- Increase security for US facilities on the territory of NATO members;
- Provide blanket overflight clearances for US military aircraft related to operations against terrorism;
- Provide the US with access to ports and airfields on the territory of NATO members for operations against terrorism; and

[53] UNCIO, Vol. 12, 680.

[54] Memorandum of Conversation with Senator Tom Connally and Senator Arthur Vandenburg (February 5, 1949), Acheson Papers, https://perma.cc/K8SM-WM2S. For the US, the declaration of war is a national decision which, under Article 1(8) of the Constitution, requires congressional approval.

- Affirmed its readiness to deploy NATO's Standing Naval Force and Airborne Early Warning Force to support US operations against terrorism.[55]

Evidently, the measures agreed under Article 5 include non-forcible measures. Some of these measures were put into practice in October 2001 when NATO launched operation Active Endeavour, which involved its Standing Naval Force patrolling the eastern Mediterranean and monitoring shipping in order to detect and deter terrorist activity, including illegal trafficking. This operation was expanded in March 2004 to include the entire Mediterranean.[56]

Importantly, as with the Rio Treaty, Article 5 of the North Atlantic Treaty expressly situates its discussion of the right of self-defence within the framework of Article 51 UN Charter, indicating that NATO members regard the definition of collective self-defence under Article 5 of the North Atlantic Treaty as mirroring the definition of this right under Article 51 UN Charter.[57] Moreover, Article 7 of the North Atlantic Treaty explicitly declares that nothing in the agreement affects the rights and obligations arising under the UN Charter.[58] That the right of self-defence as outlined in Article 5 of the North Atlantic Treaty is consistent with the right of self-defence as set out in Article 51 UN Charter is further indicated by the drafting history of the North Atlantic Treaty. For example, States such as the US made it clear that their accession to NATO was on the understanding that the terms of the North Atlantic Treaty were compatible with the 'purposes, principles, and provisions of the [UN] Charter'.[59]

In 1950, Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria and Yemen signed the Treaty of Joint Defense and Economic Cooperation. Article 2 of this agreement affirms the right of individual and collective self-defence where a member falls victim to armed aggression. More specifically, Article 2 recognises that the right of self-defence permits States 'to take, individually or collectively, all steps available, including the use of armed force, to repel the aggression and restore security and peace'. As with the North Atlantic Treaty, the language of this provision is significant. By permitting States to take 'all steps available' to confront acts of armed aggression 'including' the use of armed force, Article 2 makes it clear that the right of self-defence covers the use of non-forcible and forcible measures. Article 2 also explains that the parties to this agreement must act '[i]n conformity' with Article 51 UN Charter by, for example, notifying the SC when they invoke the right of self-defence. This reference to Article 51 UN Charter indicates that the members of the Treaty of Joint Defense and Economic Cooperation see this agreement's articulation of the right of self-defence as aligning with the definition of the right of self-defence under Article 51 UN Charter. If this is the case, it is

[55] North Atlantic Treaty Organization, 'Collective Defence – Article 5', https://www.nato.int/cps/en/natohq/topics_110496.htm#:~:text=NATO%20invoked%20Article%205%20for,of%20the%20Russia%2DUkraine%20crisis.

[56] ibid.

[57] 'Article 5 thus merely gives effect to the inherent right of collective self-defence recognized by Article 51 of the Charter'; A Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats' (2019) 10 Harvard National Security Journal 405, 412. See also H Kelsen, 'Is the North Atlantic Treaty in Conformity with the Charter of the United Nations?' (1950) 19 Kansas City Law Review 1 and R Buchan and N Tsagourias, *Regulating the Use of Force in International Law: Stability and Change* (Edward Elgar 2021) 165.

[58] Article 103 UN Charter also reinforces the idea of compatibility between the UN Charter and the North Atlantic Treaty because it accords primacy to UN obligations over obligations arising under any other international agreement. Thus, it can be assumed that, as UN members, NATO members formulated (and have subsequently interpreted) Article 5 of the North Atlantic Treaty compatibly with Article 51 UN Charter because any incompatibility between them would have to be resolved in favour of Article 51 anyhow.

[59] S. Res. 239, 80th Cong., 94 Cong. Rec. 7791 (1948).

reasonable to assume that the members of this treaty see Article 51 UN Charter as permitting the use of all measures necessary to counteract an armed attack.

2. Economic Sanctions: The Falklands War

On 2 April 1982 Argentina invaded the Falkland Islands, which is territory under British sovereignty. The following day the SC adopted Resolution 502 (1982), declaring that the situation constituted a 'breach of the peace', condemning Argentina's 'invasion' and demanding the 'immediate withdrawal' of Argentinian forces. That said, the SC did not authorise enforcement action against Argentina.

The UK invoked Article 51 UN Charter and commenced military action against Argentina. At the request of the UK,[60] on 10 April 1982 ten European States imposed a temporary general import embargo on Argentinian goods.[61] Days later, the European Economic Community (EEC) imposed a comprehensive embargo on goods being imported from Argentina,[62] as did Australia,[63] Canada[64] and New Zealand.[65] Argentina subsequently lodged a complaint before the GATT Council of Representatives, arguing that the embargoes breached the General Agreement on Tariffs and Trade (GATT) 1947.[66] In response, Australia, Canada and the EEC issued a joint communiqué conceding that their embargoes ran into *prima facie* conflict[67] with Argentina's rights under the GATT but justified any infraction on the basis of 'their inherent rights of which Article XXI of the General Agreement is a reflection'.[68]

Article XXI GATT permits States to derogate from this agreement where necessary to protect their 'essential security interests … in time of war or other emergency in international relations'. However, two factors militate against the conclusion that the embargoes were deployed pursuant to this treaty-specific provision. First, the communiqué's assertion that the legal basis of the embargoes was a 'reflection' of Article XXI indicates that the source of their legal authority was located in general international law and which had been codified in the GATT.[69] As the EEC representative explained during the debates, '[t]he exercise of these rights constituted a *general exception* to the GATT'.[70] Second, as well as violating the GATT, the EEC's embargo breached obligations it owed to Argentina under two sectoral agreements on trade in textiles and trade in lamb and mutton.[71] Evidently, the EEC could not invoke the

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[60] *Keesing's* (1982) 31532.
[61] UN Doc. S/14976 (April 14, 1982) (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands and the UK).
[62] Council Regulation (EEC) No. 877/82 in OJ L.102/1 (April 16, 1982). The embargo was extended by Council Regulations (EEC) No. 1176/82 in OJ L.136/1 (May 18, 1982) and No. 8254/82 in OJ L.146/1 (May 25, 1982).
[63] *Australian Practice in International Law 1981 to 1983* (1983) 10 Australian Yearbook of International Law 573.
[64] *Canadian Practice in International Law during 1982* (1983) 21 Canadian Yearbook of International Law 337.
[65] *Keesing's* (1982) 31533.
[66] GATT Doc. L/5317 (April 30, 1982).
[67] Whether economic sanctions breach international law has long divided international lawyers. However, for present purposes what is important is that these States regarded such measures as constituting a *prima facie* breach of international law and sought to justify them as acts of self-defence.
[68] Joint Communiqué (EEC, Canada, Australia), *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, GATT Doc. L/5319/Rev.1 (May 18, 1982) para 1b.
[69] CJ Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005) 216.
[70] GATT Doc. C/M/157 (June 22, 1982) 10 (emphasis added).
[71] See OJ 1979, L/298/2 (November 26, 1979; textiles) and OJ 1980, L/275/14 (October 14, 1980: lamb and mutton). These agreements do not contain security exceptions.

national security exception contained in Article XXI GATT to justify its breach of these agreements, which means their legal basis must have resided elsewhere.

It has been argued that the embargoes against Argentina were deployed as collective countermeasures in support of the UK.[72] The doctrine of countermeasures is discussed in detail below and, as we shall see, injured States can take countermeasures against wrongdoing States. Some international lawyers go further and argue that States can take countermeasures against wrongdoing States where there has been a breach of an obligation owed to the international community as a whole (obligations *erga omnes*), a doctrine known as collective countermeasures.[73] If this argument is correct, it may be the case that Argentina's armed attack against the UK constituted an act of aggression and, given that the prohibition on aggression is typically regarded as an *erga omnes* obligation,[74] this conduct permitted States to engage in collective countermeasures against Argentina.

Whether collective countermeasures are permissible under international law is very much contested. While the ILC found that State practice in favour of collective countermeasures is too 'sparse' and 'limited' to conclude that the doctrine of collective countermeasures is established in customary law,[75] commentators have claimed that this practice is thicker than the ILC realised and, consequently, collective countermeasures are lawful.[76] But even if we assume *arguendo* that States can take collective countermeasures in order to protect collective legal interests, it is important to highlight that the joint communiqué justified the embargoes on the basis of 'inherent rights'.[77] Similarly, New Zealand explained that it 'had an inherent right to take such action as a sovereign State'.[78] This language seems to exclude the possibility that countermeasures constituted the legal basis of the embargoes because, as we shall see below, countermeasures operate as excuses rather than justifications and, as such, it is inaccurate to refer to them as the exercise of an inherent right. Self-defence, however, is unmistakably known as an inherent right and, in fact, this is how Article 51 UN Charter refers to it. The language of 'inherent right' therefore points to the conclusion that these actors justified their embargoes against Argentina on the basis of the collective self-defence of the UK.[79] Importantly, Canada seemed to justify its embargo as an act of collective self-defence. According to the Canadian Secretary of State for External Affairs:

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[72] Paddeu (n 23) 110-1.

[73] M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017); EK Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010).

[74] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment [1970] ICJ Rep. 3, para 34.

[75] ASR (n 21) Commentary to Art. 54, para 6. The ICJ has also ruled out the use of collective countermeasures; *Nicaragua* (n 1) para 249. This paragraph was endorsed in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment [1997] ICJ Rep. 7, para 83.

[76] Dawidowicz (n 73); Proukaki (n 73); Tams (n 69) Chapter 6.

[77] Note that these States used the plural – 'inherent rights'. Presumably, this was because multiple States were invoking the right of self-defence, rather than the fact that multiple, separate legal rights were being advanced.

[78] GATT Doc. C/M/157 (June 27, 1982) 9.

[79] 'Article XXI is mentioned as a reflection of unspecified inherent rights, quoting not coincidentally the formulation of article 51 of the UN Charter. It is on these inherent rights that the EC based its action, and not on article XXI, which was mentioned almost as an afterthought'; MJ Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan Journal of International Law 558, 573. See also J-L Dewost, 'La Communaute les Dix et les "Sanctions" Contre L'Argentine - De la Crise Iranienne á la Crise des Malouines' (1982) 28 Annuaire Français de Droit International 215, 231 and Kuyper (n 47) 159-62. Tams concludes that the embargoes can be justified on the basis of the right of collective self-defence and as collective countermeasures; Tams (n 69) 216.

> What is of great concern to Canada and to other peace abiding countries is that Argentina has chosen to try to settle a dispute over territory by recourse to force of arms and that the United Kingdom has had to have recourse to self-defence in order to regain those islands. That is the position that Canada has taken. It is in pursuance of that position that we have banned the export of war material to Argentina and that we have, like the members of the Common Market, imposed similar kinds of restrictions with respect to the entry of Argentinian imports to Canada.[80]

Furthermore, when the ten European States deployed embargoes against Argentina on 10 April 1982, they informed the SC that they were engaging in this action.[81] This is important because Article 51 UN Charter requires that 'measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council'. Admittedly, the report of the ten European States did not expressly identify the right of self-defence as the legal basis of the embargoes. However, Article 51 does not prescribe what format a report should take or what its contents should be[82] – instead, all Article 51 requires is that States make the SC aware of the measures they have taken pursuant to the right of self-defence, and in doing so they can expressly identify self-defence as the legal justification for their measures or this can be inferred from the context of the notification. Thus, the fact that the ten European States saw it as necessary to report their deployment of the embargoes to the SC, coupled with the report's determination that this action was justified on the basis 'of the invasion of the Falkland Islands by Argentina',[83] indicates that these measures were imposed pursuant to the right of collective self-defence. By contrast, States do not have to notify the SC when they resort to countermeasures.

3. Security Wall: Israel

As we have seen above, in 2002 Israel sought to protect its population from armed attacks by constructing a security wall within occupied Palestinian territory. Israel did not regard its construction of the wall as involving a use of force within the meaning of Article 2(4) UN Charter.[84] Rather, Israel characterised the wall as a non-forcible measure and expressly justified it as an act of self-defence under Article 51 UN Charter. Before the GA, Israel's representative to the UN explained that:

> [A] security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter.[85]

Israel was therefore unambiguous in its contention that the right of self-defence can be relied on to justify the use of non-forcible measures. Interestingly, while members of the GA were highly critical of Israel's decision to build a wall, no State within the GA criticised (let alone rejected) Israel's determination that the right of self-defence extends to the use of non-forcible

[80] 'Canadian Practice in International Law during 1982' (n 64) 337.
[81] UN Doc. S/14976 (n 61).
[82] DW Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?' (1991) 40 ICLQ 366.
[83] UN Doc. S/14976 (n 61).
[84] It is also apparent from the discussions in the GA that members of the international community did not regard the construction of the wall as a prohibited use of force; UNGA A/ES-10/PV.21 (n 11).
[85] ibid 7. '[I]f Israel can resort to forcible measures towards Gaza, this will hold true for any non-forcible measures'; Solomon (n 26) 504.

measures, which seems to indicate their acceptance of this interpretation of the doctrine of self-defence.

4. Cyber Operations: USA

International law applies to cyberspace and the activities occurring within it.[86] While States agree that cyber operations can breach the principle of non-use of force, they disagree as to the threshold at which this occurs. For example, some States maintain that it is only those cyber operations producing offline, physical damage that constitute a use of force, while others hold that cyber operations causing online harm can qualify as a use of force where they seriously impact upon the functionality of a computer system or network.[87] Conceivably, a State may attempt to fight off an armed attack by launching a cyber operation that does not rise to the level of a use of force, but which nevertheless breaches other rules of international law such as the principles of territorial sovereignty and non-intervention.

Consider, for instance, a situation in which a State seeks to counter an armed attack by launching a cyber operation that temporarily disrupts the attacking State's military communications systems. Most commentators agree that this type of cyber operation constitutes a *prima facie* breach of the non-intervention principle but, given that it only causes temporary disruption to the computer systems of the attacking State, it does not qualify as a breach of the non-use of force principle.[88] Given that the victim State is responding to an armed attack, the question arises as to how these types of defensive, non-forcible, *prima facie* unlawful cyber operations are to be appraised under international law.

The US Department of Defense (DoD) has adopted a strategy of 'defend forward' when it comes to confronting adversaries in cyberspace. According to the DoD, 'defend forward' means to 'disrupt or halt malicious cyber activities at its source, including activity that falls below the level of armed conflict', and it often includes extraterritorial operations.[89] The DoD further explains that this strategy 'seeks to pre-empt, defeat, or deter malicious cyber activity targeting U.S. critical infrastructure that could cause a significant cyber incident … Our primary role in this homeland defense mission is to 'defend forward' by leveraging our focus outward to stop threats before they reach their targets'.[90]

The DoD's 'defend forward' strategy covers non-forcible and forcible cyber operations, but it does not explain what their legal basis is when they run into conflict with international law. Where the US falls victim to a breach of international law and engages in non-forcible cyber operations that are *prima facie* unlawful, they can qualify as countermeasures if they meet the conditions of this doctrine. Importantly, however, where these non-forcible cyber operations are in response to an armed attack, the DoD's language indicates that they can be justified as acts of self-defence because, after all, the strategy is called '*defend* forward' and its

[86] Group of Governmental Experts on Advancing Responsible State Behaviour in the Context of International Security, UN Doc. A/76/135 (July 14, 2021) para 69; Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc. A/AC.290/2021/CRP.2 (March 10, 2021) para 34.
[87] For a discussion of this practice see M Roscini, 'Cyber Operations as a Use of Force' in N Tsagourias and R Buchan (eds), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2021).
[88] See MN Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) Rule 69 and accompanying commentary.
[89] US Department of Defense, *Summary, Department of Defense Cyber Security Strategy* (2018) 1.
[90] ibid 2.

aim is to 'stop threats' and protect 'targets'.[91] As such, the DoD's strategy implies that the US regards the right of self-defence as extending to non-forcible as well as forcible measures.

IV. Distinguishing the Doctrines of Countermeasures and Self-Defence

Most commentators claim that, where a State suffers an armed attack and responds with non-forcible measures that are *prima facie* unlawful, it must rely on the doctrine of countermeasures to shield itself from international legal responsibility. For example, Sicilianos rejects Bowett's claim[92] that States can invoke the right of self-defence to justify the use of non-forcible measures such as economic sanctions:

> [Ceci] ne signifie aucunement toutefois que l'Etat victime d'une agression armée (ou ses alliés) ne pourraient réagir cumulativement par la force *et* par des mesures économiques ou autres. Ces derniéres, si elles sont en soi illicites, seront justifiées au titre de contre-mesures.[93]

Under general international law, countermeasures are otherwise unlawful acts that are exceptionally permitted on the basis that they are designed to induce wrongdoing States into law compliance.[94] On the face of it, it may seem appropriate to rely on the doctrine of countermeasures to preclude State responsibility for non-forcible responses to armed attacks given that such attacks will usually qualify as unlawful uses of force.[95] However, while the doctrines of countermeasures and self-defence may overlap insofar as they can apply to the same set of circumstances,[96] countermeasures will rarely provide a suitable legal mechanism to address non-forcible responses to armed attacks. As we shall see, there are sound conceptual, theoretical and doctrinal reasons for why such responses should be characterised as acts of self-defence.

A. Distinguishing the Aims and Objectives of Countermeasures and Self-Defence

Conceptually, the doctrines of countermeasures and self-defence describe different phenomena and serve different aims and objectives. Notwithstanding the global reach of the UN's collective security regime, international law remains a de-centralised system and much of its

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[91] See Buchan and Tsagourias (n 57) 128-30.
[92] See the references to Bowett in footnote 26.
[93] Sicilianos (n 24) 295 ('This does not mean, however, that the State that is the victim of armed aggression (or its allies) could not react cumulatively by force and by economic or other measures. The latter, if they are in themselves unlawful, will be justified as countermeasures' (author's translation)). 'The key feature of the right of self-defence by states is using significant armed force against another state, beyond the defender's own territory. Defensive action not involving significant force is better referred to by other terms, such as intervention, retorsion, and countermeasures'; ME O'Connell, *The Art of International Law in the International Community* (CUP 2019) 158. 'If these measures [non-forcible acts of self-defence] involve a breach of the acting State's international obligations then, *prima facie*, they must purport to be countermeasures'; Scobbie (n 25) 1129. See also Paddeu (n 23) 113.
[94] As the ILC explains, a State can engage in 'countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations'; ASR (n 21) Art. 49(1).
[95] T Ruys, *'Armed Attack' and Article 51 of the United Nations Charter: Evolutions in Customary International Law and Practice* (CUP 2010) 162; H Kelsen, 'Unrecht und Unrechtsfragen in Völkerrecht' (1932) 12 Osterreichische Zeitschrift fur Offentliches Recht 481.
[96] Tams (n 69) 215-6.

enforcement lies in the hands of those who believe they have been wronged.[97] The doctrine of countermeasures is therefore a mechanism by which injured States can enforce compliance with international law and protect their legal rights.

Like countermeasures, self-defence is a form of self-help but, unlike countermeasures, self-defence is not a law enforcement mechanism. The purpose of self-defence is to enable States to protect themselves from armed attacks and, as such, it evokes a war-like paradigm.[98] Consequently, it is conceptually erroneous to describe non-forcible responses to armed attacks as countermeasures. Instead, this type of reaction is more accurately characterised as an act of self-defence.

B. Justifications and Excuses

Theoretically, countermeasures operate as excuses whereas self-defence is a justification. States can raise different types of defences when they are accused of breaching international law and they are typically categorised as justifications or excuses. In essence, the difference between a justification and an excuse is that the former arises from the properties of the *act* whereas the latter arises from the properties of the *actor*. Justification defences describe State conduct that is warranted and therefore lawful *per se*. Excuse defences, on the other hand, concede that the impugned conduct is unlawful but maintain that, given the exigencies of the circumstances, the State is not to blame for its actions and, consequently, legal responsibility should not be assigned.[99]

There is little doubt that the right of self-defence acts as a justification.[100] The ILC casts self-defence as a primary rule of international law and this means that defensive action does

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[97] 'Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act'; ASR (n 21) Commentary to Chapter II, para 1.

[98] 'There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisal' [or a countermeasure]; the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack'; United Kingdom (1964) cited in Bowett, 'Economic Coercion and Reprisals by States' (n 26) 8. '[C]ountermeasures are also distinct from the notion of self-defence … [T]heir purposes are different: countermeasures are a law enforcement tool, whereas self-defence is a defensive reaction designed to restore a certain military balance vis-à-vis an attacking State'; Dawidowicz (n 73) 20. '[T]here is undeniably a common element, in that in both cases [of countermeasures and self-defence] the State takes action after having suffered an international wrong, namely, the non-respect of one of its rights by the State against which the action in question is directed or at least in the face of such a danger. But any possible resemblance or true analogy stops at this point … "Self-defence" and "sanction" are reactions relevant to different moments and, above all, are distinct in logic'; Eighth Report (n 17) paras 89-90.

[99] In the criminal law context, Husak provides a useful distinction between justifications and excuses: 'Justifications are defenses that arise from properties or characteristics of acts; excuses are defenses that arise from properties or characteristics of actors. A defendant is justified when his *conduct* is not legally wrongful, even though it apparently violates a criminal law. A defendant is excused when *he* is not blameworthy or responsible for his conduct, even though it apparently violates a criminal law'; DN Husak, 'Justifications and the Criminal Liability of Accessories' (1989) 80 Journal of Criminal Law and Criminology 491, 496 (footnotes omitted). '[T]he distinction between warranted and unwarranted action is the critical distinction between justification and excuse'; K Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49 Law and Contemporary Problems. 89, 92. For a similar approach see F Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) Chapter 3.

[100] '[S]elf-defence is recognized as a primary rule in customary law and in Article 51 of the UN Charter which recognizes self-defence as an inherent right. As a right, it empowers states to use force and such force is lawful

not 'even potentially' breach the principle of non-use of force.[101] As has already been mentioned, the ILC erroneously concludes that self-defence is an exception to the non-use of force principle. But for present purposes, what is important is that the ILC regards self-defence action as inherently lawful due to its very nature. This view is supported by the fact that Article 51 UN Charter describes self-defence as an 'inherent right' and, in the equally authoritative French version of this provision, self-defence is referred to as a 'droit naturel', that is, a natural right.

Whether countermeasures constitute justifications or excuses is a trickier question because, while self-defence as embodied in Article 51 UN Charter is a primary rule of international law, countermeasures are governed by secondary rules. The ASR identify various defences to the imposition of State responsibility and they are referred to as 'circumstances precluding wrongfulness'. As circumstances 'precluding wrongfulness' the implication is that, when present, the impugned conduct is not unlawful. Given this language, commentators have claimed that the defences enumerated by the ASR (including the doctrine of countermeasures) constitute justifications for the non-performance of international legal obligations.[102]

However, the ILC's use of the phrase 'circumstances precluding wrongfulness' is not intended to cast all the defences identified in Chapter V of the ASR as justifications.[103] This is illustrated by the fact that the Commentary to the ASR expressly states that the circumstances precluding wrongfulness listed in Chapter V can take the form of justifications or excuses.[104] In its discussion of countermeasures, the ILC avoids taking a firm stance on whether countermeasures are justifications or excuses. The ILC's failure to be pinned down on this issue chimes with the views of Special Rapporteur Crawford when he refers to countermeasures as 'possibly' being a justification (rather than an excuse), whereas when discussing other circumstances precluding wrongfulness he is more exact.[105] Fundamentally, and to emphasise

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per se; it is not a prima facie violation of the prohibition of the use of force enshrined in Article 2(4) of the UN Charter which is subsequently exonerated'; Tsagourias (n 22) 813. See also Paddeu (n 99) Chapter 5 and GM Badr, 'The Exculpatory Effect of Self-Defense in State Responsibility' (1980) 10 Georgia Journal of International and Comparative Law 1.

[101] ASR (n 21) Commentary to Art. 21, para 1 ('a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4').

[102] S Wittich, 'The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading' (2002) 15 LJIL 891, 898.

[103] 'Throughout the draft articles, the Commission has made clear its conviction that a distinction must be drawn between the idea of wrongfulness, expressing the fact that certain conduct by a State conflicts with an obligation imposed on that State by a "primary" rule of international law, and the idea of responsibility, indicating the legal consequences which another, "secondary" rule of international law attaches to the act of the State that such conduct consists of. On the basis of that conviction, there is no reason, at least in theory, why certain circumstances should not preclude responsibility without at the same time precluding wrongfulness'; International Law Commission, *Eighth Report on State Responsibility by Mr Roberto Ago*, UN Doc. A/CN.4/318 and Add 1-4 (1976) para 50. 'Taking stock of the ILC work on the classification of defences reviewed earlier, it is reasonable to conclude that the title 'circumstances precluding wrongfulness' in the text of the ARS does not entail that the listed defences all operate as justifications'; Paddeu (n 99) 50.

[104] ASR (n 21) Commentary to Chapter V, para 2 ('[The circumstances precluding wrongfulness] do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists'). See also para 8 ('Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct').

[105] 'At the outset of this discussion of chapter V, it was noted that the circumstances dealt with probably fell into several categories, and that at least with respect to certain of them it might be more appropriate to speak of circumstances precluding responsibility than wrongfulness. At least with respect to *force majeure*, distress and necessity, an alternative formulation for the purposes of chapter V might be "A State is not responsible for its failure to perform an international obligation if the failure is due to" one of those circumstances. This could contrast with the formulation in the case of self-defence, and possibly countermeasures, where it could be said

what was said above, it is the nature of the act that determines whether a defence is a justification or an excuse: a defence is a justification when the act is warranted and a defence is an excuse when the act is wrongful but legal responsibility is absolved given the circumstances.

In her study of this topic, Paddeu maintains that countermeasures are justifications on the basis that 'the wrongdoing State has, by its conduct, forfeited the legal protection of its rights' and, consequently, the injured State has a Hohfeldian liberty-right to take countermeasures against it.[106] Understood in this way, countermeasures are lawful *ab initio* because they do not run into conflict with an operative rule of international law.[107]

A more compelling theory to explain the doctrine of countermeasures begins with the recognition that countermeasures constitute a breach of international law. At the same time, this theory recognises that the State taking countermeasures has had its legal rights breached by the wrongdoing State and, on this basis, it is exceptionally permitted to engage in otherwise unlawful conduct in order to induce the wrongdoing State into compliance with its legal obligations. Thus conceived, it is the properties of the actor – namely, that the injured State has been wronged – that excuse State responsibility for the employment of a countermeasure, rather than the countermeasure being justified on the basis of its internal properties. According to this theory, countermeasures operate as excuses rather than justifications.[108]

For Paddeu, the 'acid test' proving that countermeasures are justifications rather than excuses lies in the fact that States rarely request or pay compensation for material loss suffered as a result of countermeasures.[109] In her view, this proves that countermeasures are justifications because States are not obliged to pay compensation for material loss caused by lawful acts but compensation is due where the act is unlawful and responsibility is excused.

Paddeu is correct that States do not have to provide compensation for justified behaviour because, after all, there has been no breach of international law. However, it is not necessarily the case that States *must* provide compensation for internationally wrongful conduct for which responsibility is excused. As the ILC explains, there is no hard and fast rule as to whether compensation is owed when a circumstance precluding wrongfulness is established – instead, whether compensation is required is determined on a case-by-case basis.[110] Moreover, and as will be seen below, the law on State responsibility permits States to take countermeasures that produce irreversible effects where no other option is reasonably available. It is therefore difficult to argue that, where a non-reversible countermeasure is taken as a last resort, the injured State must provide compensation for the material loss caused. In

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that the circumstance precludes wrongfulness'; *Second Report on State Responsibility by Mr James Crawford* (n 18) para 355.

[106] '[T]he legality of countermeasures derives from the fact that the wrongdoing state has, by its conduct, forfeited the legal protection of its rights. As a result, when the injured state adopts countermeasures against it, it does not breach the target state's rights since the target state has forfeited the law's protection of those rights'; Paddeu (n 99) 276.

[107] ibid 227 ('countermeasures can *only* be classified as justifications: the countermeasure constitutes at most *prima facie* or apparent breach of the obligation affected, a breach that is precluded by the circumstances in which the measure is adopted').

[108] O'Connell (n 24) 249 ('Arguably, these [countermeasures] are better thought of as excuses rather than "circumstances precluding wrongfulness"'). France has also endorsed this view: see UN Doc. A/C.6/56/SR.11 (November 9, 2001) para 70.

[109] Paddeu (n 99) 282.

[110] 'Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case'; ASR (n 21) Commentary to Art. 27, para 6.

sum, the fact that States do not usually request or provide compensation for material loss does not point inexorably to the conclusion that a countermeasure is a justification rather an excuse.

Why does it matter whether countermeasures are classified as justifications or excuses? For Franck, 'the distinction between what is justified (exculpated) and what is excusable (mitigated) is so fine as to be of pure (yet also considerable) academic interest'.[111] The point Franck is making is that, regardless of whether we classify countermeasures as a justification or an excuse, the legal effect is the same: the State will not be held legally responsible for lawfully deployed countermeasures.

While this may be the case, there are nevertheless significant political and legal differences between justifications and excuses. In political terms, the distinction is a 'fundamental one for moral judgment' and this has important implications for a State's standing and reputation in the international community.[112] In short, it is far more preferable for a State to establish that its conduct is justified and therefore did not involve a breach of international law than to admit that it acted unlawfully but assert that its responsibility is excused given the exceptional nature of the circumstances. This is the point made by Lowe when he explains that the distinction between justifications and excuses 'is the very stuff of classical tragedy. No dramatist, no novelist would confuse them. No philosopher or theologian would conflate them'.[113] As we shall see in the following discussion, that a countermeasure is an excuse and self-defence a justification also accounts for important legal differences between these doctrines.

C. The Legal Differences between Countermeasures and Self-Defence

Doctrinally, the legal regimes regulating countermeasures and self-defence differ in a number of important respects. First, where a wrongdoing State breaches the legal rights of an injured State, the latter cannot invite non-injured States to take countermeasures on its behalf in order to protect its legal interests and enforce compliance with international law (a doctrine known as third-party countermeasures).[114] By contrast, where a State falls victim to an armed attack and engages its right of self-defence, it can request third States to take defensive measures on its behalf against the aggressor State (a doctrine known as collective self-defence).[115] The rationale for why international law prohibits third-party countermeasures but permits collective self-defence lies in the distinction between countermeasures as an excuse and self-defence a justification.

As we have seen, countermeasures are exceptionally permitted on the basis that the injured State has had its legal rights infringed. Countermeasures are thus personal to the injured State, which means the injured State's right to take countermeasures against a wrongdoing State cannot be passed on or extended to third States. In contradistinction, self-defence action

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[111] TM Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002) 191.
[112] K Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 Columbia Law Review 1897, 1898.
[113] V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 405, 406.
[114] Third-party countermeasures must be distinguished from collective countermeasures. While there is legitimate debate as to whether States can take collective countermeasures to defend community obligations, there is no suggestion within State practice that injured States can request non-injured States to take countermeasures on their behalf in order to enforce compliance with bilateral obligations; Dawidowicz (n 73) Chapter 4.
[115] Art. 51 UN Charter; *Nicaragua* (n 1) para 194.

is inherently lawful and a victim State can therefore invite other States to assist in the lawful exercise of its right. As Ohlin explains:

> Since justifications are general in nature and negate the wrongfulness of the act, it stands to reason that the justified actor engaging in defensive force has performed no wrongful action in defending himself. If the action itself is not wrongful, then third parties are entitled—by logical extension—to come to the aid of the original victim. In this way, justifications always flow down to third parties, who by definition receive the benefits of the original actor's justification. Excuses, by contrast, do not flow down to third parties.[116]

Secondly, as countermeasures must be designed to induce compliance with international law, it stands to reason that they can be deployed only against those actors who have breached international law, which invariably means States given that they are the principal subjects of international law.[117] As a result, non-State actors such as armed groups cannot be made the object of countermeasures. Yet, as history shows, non-State armed groups are capable of launching violent attacks against States. Thus, where States resort to non-forcible measures to counter armed attacks by non-State actors, they cannot rely on the doctrine of countermeasures. Crucially, these complications do not arise in the context of self-defence because Article 51 UN Charter permits States to take defensive action against armed attacks irrespective of whether the author is a State or non-State actor,[118] a position that has been confirmed by the SC and abundant State practice.[119]

Thirdly, countermeasures are available only in response to prior violations of international law.[120] Hence, it is a misnomer to talk of anticipatory countermeasures. But what about a situation where a State faces an imminent threat of an armed attack and responds with non-forcible measures? In this scenario, countermeasures are unavailable. While there is disagreement among States as to whether self-defence can be engaged against latent, embryonic and emerging threats (a doctrine known as pre-emptive self-defence), it is widely accepted that self-defence can be invoked to avert an imminent threat of an armed attack (often referred to as anticipatory self-defence).[121] It could be said that an imminent threat of an armed attack constitutes an unlawful threat of force and, as such, a non-forcible response to that attack can be treated as a countermeasure against an internationally wrongful act. This argument is

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[116] JD Ohlin, 'The Doctrine of Legitimate Defense' (2015) 91 International Law Studies 119, 141 (citations omitted). 'In international law, then, it seems that justification and excuse can have an impact on the responsibility of accessories: justifications affect the responsibility of accessories to it and, in this sense, they have a universalist tendency; excuses, in contrast, are individualist in tendency, insofar as they attach only to the invoking state'; Paddeu (n 99) 70.

[117] 'The wrongfulness of an act of a state not in conformity with an international obligation *towards another State* is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State'; ASR (n 21) Art. 22 (emphasis added).

[118] '[There is] nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State'; *Wall* (n 14) para 33 (Separate Opinion of Judge Higgins).

[119] UNSC Res. 1368 (2001); UNSC Res. 1373 (2001). For a review of this State practice see TD Gill and K Tibori-Szabó, 'Twelve Key Questions on Self-Defense against Non-State Actors' (2020) 95 International Law Studies 467, 479-90 and, more generally, CJ Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359. But for a different view see *Wall* (n 14) para 139 (where the ICJ held that Article 51 UN Charter 'recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State').

[120] 'In the first place it must be taken in response to a *previous* international wrongful act of another State'; *Gabčíkovo-Nagymaros* (n 75) para 83 (emphasis added).

[121] 'Imminent threats are fully covered in Article 51, which safeguards the inherent right of sovereign States to defend themselves against an armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened'; Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All*, UN Doc. A/59/2005 (March 21, 2005) para 124.

difficult to sustain, however, because Article 51 UN Charter is not a legal rule as such but is instead designed to preserve and affirm the customary right of self-defence where an armed attack occurs. The notion of armed attack therefore describes a factual state of affairs – has a grave use of force been used against the victim State?[122] Thus, an armed attack does not automatically or necessarily constitute an unlawful use of force,[123] which means that an imminent threat of an armed attack does not automatically or necessarily constitute an unlawful threat of force.

Fourthly, the law on State responsibility requires States to notify wrongdoing States before countermeasures are commenced,[124] the rationale being that wrongdoers must be afforded the opportunity to rectify their unlawful conduct and, by bringing their conduct into compliance with international law, obviate the need for countermeasures. Exceptionally, an injured State is permitted to dispense with prior notification where 'urgent countermeasures' are 'necessary to preserve its rights',[125] although in this situation the burden falls on the injured State to demonstrate that urgent countermeasures are necessary or, in other words, that prior notification is not an option given the circumstances. Patently, the requirement of notification is unrealistic where a State is responding to an incident that poses a grave threat to its national security, such as where it falls victim to an armed attack. Additionally, when responding to an armed attack, notification is problematic: making aggressors aware that defensive action is about to be undertaken may undermine the effectiveness of the riposte. For these reasons, and unlike countermeasures, the law of self-defence does not require victim States to notify attacking parties that they are about to resort to defensive measures or demonstrate why prior notification is not possible.[126]

Fifthly, '[c]ountermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question'.[127] The expectation, then, is that the effects of countermeasures are reversible,[128] and the reason for this is because the purpose of countermeasures is to restore the legal *status quo*. As the ILC explains, the effects of countermeasures must be reversible 'as far as possible' or, said differently, 'the duty to choose measures that are reversible is not absolute'.[129] This means that, if a range of countermeasures is available and each would be equally effective in pushing a wrongdoing State into complying with its legal obligations, the injured State must opt for the countermeasure that is reversible. If only non-reversible countermeasures would be effective, they can be deployed but it is incumbent upon the injured State to demonstrate that it was not possible to select a

[122] 'Reprisals are only legitimate in response to an international delinquency on the part of another State. For self-defence it is enough that there should be a threat of injury which it is impossible otherwise to avert in time'; HM Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 Recueil des Cours 464.
[123] Armed attacks by non-State actors, for example, may not qualify as unlawful uses of force.
[124] ASR (n 21) Art. 52(1)(b).
[125] '[An] injured State may take such urgent countermeasures as are necessary to preserve its rights'; ibid Art. 52(2).
[126] While Article 51 UN Charter requires States to notify the SC when they engage their right of self-defence, this obligation applies only *after* defensive action has been taken.
[127] ASR (n 21) Art. 49(3).
[128] 'Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question'; ibid Art. 49(3). 'States should as far as possible choose countermeasures that are reversible'; ibid Commentary to Art. 49, para 9. '[S]ince countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States'; ibid Introduction to the Commentary to Chapter II (Countermeasures), para 6.
[129] ibid Commentary to Art. 49, para 9.

countermeasure with reversible effects. When it comes to self-defence, there is no requirement that the effects of defensive measures are reversible.

Sixthly, and as has been seen, the doctrines of countermeasures and self-defence are subject to the principle of necessity: countermeasures must be necessary[130] to induce compliance with international law and acts of self-defence must be necessary[131] to halt and repel an armed attack. Moreover, countermeasures[132] and acts of self-defence[133] must be proportionate to meeting these objectives. Importantly, the principle of proportionality takes on a different meaning in the context of countermeasures than it does with self-defence.

With regard to countermeasures, the principle of proportionality requires that the response 'must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[134] To ensure that an appropriate balance is struck between the harm sustained and the harm inflicted, the proportionality principle requires a qualitative assessment of the rules and rights breached by the countermeasure as well as a quantitative assessment of the harmful effects produced.[135] While countermeasures do not have to be identical to the wrongful act to which they respond, there must be 'equivalence'[136] between them and countermeasures are disproportionate where the harm caused is 'excessive' when compared to the harm sustained.[137]

When it comes to measuring the proportionality of self-defence, some commentators maintain that this principle requires a quantitative assessment of the harm caused by the defensive action. In short, their argument is that defensive action is disproportionate where the harm inflicted (on the target State, third States, civilians, the environment, etc.) goes beyond what is needed to repulse the armed attack.[138] However, this interpretation of the principle of proportionality is not supported by State practice.[139] Whether the harm caused by defensive action is within permissible limits is not regulated by the *jus ad bellum* principle of proportionality, but instead determined by other international law regimes such as international humanitarian law and international human rights law. In the *ad bellum* context, the only restriction imposed by the principle of proportionality is that victim States do no more than achieve the specific objective of defending themselves. Thus, providing the riposte is designed to achieve self-defence – which is established where there is a 'rational connection'[140] between the defensive action and repelling the attack – the principle of proportionality is satisfied.

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[130] ibid Art. 49(1).
[131] *Nicaragua* (n 1) para 176; *Nuclear Weapons* (n 3) para 41; *Oil Platforms* (n 3) paras 76-7.
[132] ASR (n 21) Art. 51.
[133] *Nicaragua* (n 1) para 176; *Nuclear Weapons* (n 3) para 41; *Oil Platforms* (n 3) paras 76-7.
[134] ASR (n 21) Art. 51. See also *Gabčíkovo-Nagymaros* (n 75) para 85.
[135] ASR (n 21) Commentary to Art. 51, para 6.
[136] 'It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule'; *Air Service Agreement of 27 March 1946 between the United States of America and France* (December 9, 1978) Vol. XVIIII 417, para 83.
[137] '[E]ven if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them'; *Portuguese Colonies Case* (Naulilaa incident), UNRIAA, Vol. II (Sales No. 1949.V.1) 1011, 1028. See also ASR (n 21) Commentary to Art. 51, para 6.
[138] '[Proportionality] calls for a balance to be struck between the need to repel the attack and the harm that defensive military action is likely to result in for other values and interests at stake, such as values of a humanitarian nature'; E Cannizzaro, 'Contextualising Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War' (2006) 88 International Review of the Red Cross 779, 784.
[139] Ruys (n 95) 110-23.
[140] D Kretzmer, 'The Inherent Right of Self-Defence and Proportionality in *Jus Ad Bellum*' (2013) 24 EJIL 235, 278.

Whether a rational connection exists is invariably answered by the principle of necessity insofar as it requires that defensive action must be necessary to attain self-defence or, in other words, defensive action must be undertaken as a 'last resort' to halt and repel an armed attack.[141] In practice, then, when it comes to the law of self-defence the principles of necessity and proportionality converge and 'are truly two sides of the same coin'.[142] This means that the principle of proportionality in the context of the law on countermeasures is more demanding than the principle of proportionality under the law on self-defence, and the reason for this is because countermeasures are exceptional measures designed to restore law and order within the international community whereas self-defence is an inherent right of victim States to defend themselves against grave violence.

V. Conclusion

Rejecting conventional wisdom, this article has demonstrated that self-defence is a general right under international law and, as such, permits States to take all measures necessary to counter an armed attack regardless of whether they amount to a threat or use of force. This article has presented the doctrinal evidence to support this claim. Prior to the signing of the UN Charter, State practice revealed an acceptance within the international community that the right of self-defence permitted recourse to non-forcible and forcible measures. Through customary and treaty law, States have placed strict limits on when the right of self-defence can be engaged. At no point, however, have States restricted the right of self-defence to the use of forcible measures exclusively. As we have seen, neither the text of Article 51 nor the structure of the UN Charter limits the right of self-defence to forcible measures. Moreover, State practice on Article 51 confirms that the right of self-defence can be invoked to justify all measures necessary to fight off an armed attack.

Countermeasures and self-defence are distinct legal doctrines insofar as they are triggered by different events and subject to their own conditions and restrictions. This article has argued that, while there may be circumstances in which a non-forcible response to an armed attack may satisfy the conditions necessary to engage the doctrine of countermeasures, there are important conceptual, theoretical and doctrinal reasons for why such a response should be characterised as an act of self-defence (provided, of course, that it meets the other treaty and customary conditions required by the law of self-defence). Fundamentally, the reason why there are such significant differences between these doctrines lies in the fact that countermeasures are responses to illegality (and thus law enforcement mechanisms) whereas self-defence is a response to grave violence (and thus an act of self-preservation).

Since the establishment of the UN in 1945, there have been various attempts to expand the right of self-defence.[143] For example, there have been claims that any unlawful use of force constitutes an armed attack and therefore engages the right of self-defence,[144] and that the right

[141] D Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 770, 775.
[142] Ruys (n 95) 123; Kretzmer (n 140) 282; G Nolte and A Randelzhofer, 'Article 51' in B Simma, D-E Khan, G Nolte and A Paulus (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 1425.
[143] For an overview see N Ronzitti, 'The Expanding Law of Self-Defence' (2006) 11 Journal of Conflict and Security Law 343.
[144] U.S. Department of State, Harold H. Koh (Legal Advisor), *International Law in Cyberspace* (September 18, 2012). For academic support for this approach see R Higgins, *Problems and Process: International law and How We Use It* (Clarendon Press 1994) 221.

of self-defence can be invoked pre-emptively to counter emerging or embryonic threats.[145] Rightly so, efforts to broaden the law of self-defence have given rise to considerable apprehension within the international community.[146] The reason for this is because the right of self-defence usually operates as a justification for measures that would be otherwise internationally wrongful and, consequently, an overly broad reading of this doctrine risks undermining respect for international law. Moreover, an expansive reading of the right of self-defence confers on States greater latitude for unilateral action, which risks sidelining the UN's collective security system notwithstanding the fact that, as we have seen, the SC can always suspend the right of self-defence by taking measures necessary to restore international peace and security.

Some may argue that interpreting the right of self-defence to include non-forcible measures represents another attempt to expand its application beyond acceptable limits, and to do so would further challenge the authority of international law and the centrality of the UN's collective security system. These concerns are misplaced. Regardless of whether a State deploys forcible or non-forcible measures to fight off an armed attack, it must be emphasised that all types of defensive action are subject to the law of self-defence's well established restrictions: self-defence must be in response to an armed attack; defensive measures must be necessary and proportionate in the circumstances; invocations of self-defence must be reported to the SC; and the right of self-defence is suspended as soon as the SC takes measures necessary to maintain international peace and security. These restrictions circumscribe the deployment of defensive *non-forcible* measures in the same way and to the same extent as they circumscribe the use of defensive *forcible* measures. Ultimately, these restrictions ensure that the law of self-defence maintains an appropriate balance between preserving the inherent right of States to defend themselves from armed attack and preventing unilateral action that undermines respect for the international rule of law.

In fact, accepting that self-defence permits the use of non-forcible measures may even have a de-escalatory effect on hostilities. Consider, for example, a situation where a State falls victim to an armed attack and determines that non-forcible measures would be effective at halting and repelling it. If the law of self-defence does not permit a victim State to resort to non-forcible measures, its only option may be to use force and, by doing so, run the risk of unnecessarily escalating the crisis. A reading of the law of self-defence that permits the use of non-forcible as well as forcible measures is therefore sound as a matter of international law and policy.

[145] Office of the White House, *The National Security Strategy of the United States of America* (September 2002). For academic support for this argument see M Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25 Harvard Journal of Law and Public Policy 539.

[146] See e.g., J Kammerhofer, 'The Resilience of the Restrictivist Rules of Self-Defence' in M Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2014).