

Original Paper

The Just War and the Mystry of Self Defense

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Abstract

The theory of the Just War initiated by St. Augustine must absolutely seek peace. To avoid this being the case, two phases are defined: Jus ad Bellum; the Jus in Bello. Thus, self-defense as a just cause is a concept often addressed in international law and its explicit recognition in Article 51 of the United Nations Charter has made it even more present. But, from the adoption of the Charter to today, there are many examples of actions or arguments of states based on self-defense that are more or less in phase with each other. The most recent references to the concept of self-defense have developed in a particularly volatile international context since the attacks of September 11, 2001, and the consequences that ensued. The relationship between the just war and self-defense raises some questions: can the anti-terrorism war, the preventive war and the war against non-state actors be considered part of the principle of self-defense? What are the criteria for Jus ad Bellum and Jus in Bello considered during the Self- defense?

Keywords

Just War, Jus ad Bellum, Jus in Bello, self-defense, terrorism, Preventive war, the war against non-state actors

1. Introduction

The possibility of just war offers three necessarily related series of questions. There are issues encompassing the states of the reasonable turn to war, which surmise that war is a honest to goodness method of direct. These are inquiries of Jus ad Bellum, and conjure the deontological standards of just cause, the legitimate authority and right intention. Every one of these criteria might be met, yet it might at present be hasty or foolhardy to take up arms. Thus, the outcomes can't be totally disregarded—offering ascend to inquiries of last resort and proportionality. Furthermore, there are issues identifying with the

direct of war, inquiries of Jus in Bello, all the more regularly alluded to as the laws of war or the laws of armed conflict (Boucher, 2011, pp. 92-93).

The self-defense is the pillars of armed conflict. That is why the decision of military intervention should be made in accordance with the rules of international law. Article 51 of the Charter of Nations expresses the common law of self-defense. It is opposable to all States as a constituent element of the mandatory rule of the prohibition of the use of force, both on a contractual basis and, subject to its purely procedural aspects, as customary. Its purpose is to regulate the relations between States, the relations between individuals putting at stake self-defense to another title, to determine according to the material right applicable. The jus contra bellum, under which Article 51 of the Charter must be placed, presupposes that one is in the hypothesis of the attack of one State against another State (Tsagourias & Politis) (Note 1). If, on the other hand, it is a question of protecting not a State but its life or its security on an individual basis, the self-defense is understood in a different sense, with conditions of application which do not necessarily correspond to those applicable between States. Thus, it was noted that the United Nations Forces could respond in self-defense under conditions defined in specific provisions (Corten, 2014, pp. 653-654).

The use of armed force involves also the protection from terrorism against aggression by non-state actors. This aggression is characterized by a serious breach of the obligation to respect the fundamental rights of individuals, by the creation of measurable damage, and by a connection between the breaches of the obligation and the damage. The army intervenes only in case of self-defense and if there is damage. There is not fundamentally a difference between a States' aggression, potential aggression and an aggression organized by non-state actors or terrorist group. This is a simple and unambiguous answer to the question of what is the difference between the US intervention in "Afghanistan 2001", "Iraq in 2003" and that of 1991 called the "Desert Storm" (Yoo, 2003, p. 564) (Note 2) following the invasion of the Kuwait and "Syria 2014" (Note 3). According to the theory of just war, one can go from *Jus ad Bellum* to the practical rules of the use of weapons jus in bello. The use of an army in its strike is never so selective. However, self-defense is a response to aggression against property and/or people. The first constraint imposed by self-defense is the proportionality of the response and the necessity. The second constraint imposed by self-defense is that the response does not strike third parties (principle of discrimination).

2. The Majors' Aspects of Just War and Its Applications

2.1 The War Should Begun Justly by Legitimate Sovereign Authority Acting on a Just Cause (Jus ad Bellum)

Jus ad Bellum can be summed up in an extremely basic articulation put forward by Thomas Aquinas. On the chance that a war is started fairly it is done as such by sovereign authority following up on a just cause with right aim. Aquinas, a disciple of Augustine's composition, destitute down the fundamental components of Augustine's work and arranged it into the trinity of Jus ad Bellum. Every component of

Aquinas' announcement is of basic significance to the comprehension of *Jus ad Bellum* in all. The request of necessities that Aquinas states is critical, the first being sovereign authority. A sovereign authority is a properly constituted power concerning the pursuing of war. A war can't be viewed as just except if it has been announced by a pioneer or leader formally put into control by the population it administers universally perceived as having the inborn authority to do as such (Holmes, 2011, p. 14).

Furthermore, *Jus ad Bellum* is customarily seen as the assortment of law which gives grounds supporting the change from peace to war (Stahn, 2007, p. 926), in other words, to reinforce peace by restrict war (Hakimi, 2017, p. 43). The just cause is one of the requisites of *Jus ad Bellum* that is, one of the requirements for the turn to armed force. Contemporary Just war scholars frequently accept, thusly, that the necessity of worthwhile Just cause applies just to the underlying resort to war, and that after war has started the only thing that is important is the means by which the war is led. In any case, this can't be correct. It is conceivable that a war can start without a noble motivation and just cause yet turn out to be exactly when a worthwhile just cause emerges throughout the battling and assumes control as the objective of the war (Macmhan, 2005, p. 2).

Without a doubt, the just cause is, constantly required for taking part in war. Just cause determines the limits for which it is reasonable to take part in war, or that it is allowable to seek after by methods for war. One vital ramifications of the possibility that any commitment in war requires a just cause is that when it has been accomplished, continuation of the war lacks reasons and is along these lines impermissible. The just cause in this manner decides the conditions of the end of war (Macmhan, 2005, p. 2).

But defender a worthy cause is not enough to legitimize military intervention. Governments at war must also demonstrate that their true intentions are just and honest. This is the second criterion of just war (Benjamin, 2007, p. 11). Moreover, just wars are just waged by sovereign authority for the expressed causes and not for concealed reasons. All through history numerous sovereign authorities have gone to war guaranteeing that their expectation was to bring equity, when in certainty their shrouded motivation was to secure power for themselves. This is the genuine importance of right intent (Holmes, 2011, pp. 15-16). It is, however, quite difficult to know the real intentions behind a declaration of war. It is for this reason that it is almost always preferable for a military operation to be conducted by a coalition, such as NATO in Kosovo, rather than by a state alone. In this respect, one must avoid confusing the legitimacy of a war with the legality of war (Corten, Delcourt, 2000, p. 20) (Guicherd, 1999, pp. 19-20) (Note 4). The third condition of a just war is that the use of armed force is decided by a legitimate authority. This statement gave the impression that the only legitimate authority authorized to authorize a military intervention is the United Nations. This interpretation is however questionable. If the authorization of the Security Council is preferable, it is not always obligatory at the outbreak of a just war. When the Security Council is paralyzed because of rivalry among the permanent members, it may be acceptable not to seek the consent of the UN to respond to an emergency situation (Benjamin, 2007, p. 12). In 1950, a resolution authorizing a military operation against North Korea was

defeated because of a USSR boycott of the Security Council, protesting against the non-recognition of Chinese Communist membership in the United Nations. The United States was calling then the United Nations General Assembly, which invokes an exceptional provision to support the intervention (Neuhold, 2000, p. 78) (Note 5).

The legitimacy of a war then depends on a fourth criterion: the last resort. War must be waged only if all reasonable peaceful means have been exhausted. There will always be people for whom the use of violence is decided too hastily. In 2003, France was also probably right to demand more time to allow the UN inspectors team to do its work in Iraq. But on the contrary, it is not desirable that the principle of last resort should always be observed in a scrupulous way. The best example of this is probably the appeasement policy of the Western powers at the German border on the eve of the Second World War. With hindsight, it is possible to say that France should not have remained passive at the time of the rearmament of Germany and the occupation of the Rhineland by the armies of Hitler in 1936. On the other hand, the reasons for not intervening are sometimes very serious. According to the fifth principle of just war, that of reasonable chances of success, an armed intervention must be undertaken only if it has good chances of eliminating the threat or at least reducing its scope. Some wars are better not to be carried out and they would be too risky. A war against Russia in favor of the Chechens would probably help to accelerate the acts of violence against the Chechen population, not to mention the danger of triggering a nuclear war with Russia, which do not take place or are interrupted because it is too difficult to consider an outcome to the conflict, as in Algeria or Somalia in the 1990s. The last criterion of *Jus ad Bellum* is the proportionality of the response. The response to a threat must be proportional to the severity of the offense (Benjamin, 2007, pp. 12-13).

2.2 *The Justice of Waging War (Jus in Bello)*

The second fundamental doctrine of Just War Theory is *jus in bello*. It means the equity of taking up arms or how the viciousness of war is restricted and sensibly connected keeping in mind the end goal to meet political and military points. *Jus in Bello* really discovers its underlying foundations in the medieval chivalric code. Knights and honorability of the time distinguished a need to confine their battle just to each other and to endeavor to restrict the contribution of outside Personnel or non combatants. This was viewed as a piece of the knight's *jus in duellum*, or equity in private battle. *Jus in Bello* focus particularly on the methods for war. These methods incorporate, however are not constrained to, the weapons that are utilized, the impacts these weapons cause, and the strategies and systems through which battle is pursued (Holmes, 2011, pp. 17-18).

In addition to the reasons for resorting to war, the moral judgment of war must also take into consideration the manner in which it is conducted. On the one hand, countries at war must guarantee the immunity of non-combatants. Under the Geneva Conventions of 1949, violence must spare civilians, that is, those who do not take part in hostilities and those who do not carry weapons. In history, this principle has often been flouted. During the Second World War, the German army massacred almost all the inhabitants of the small village of Oradour in retaliation for the activities of

the French resistance (Benjamin, 2007, p. 14).

The United Nations Charter does not prohibit civil war and it is recognized that every state has the right to use force to preserve its integrity and to crush a rebellion. On the other hand, the United Nations Charter and a long series of General Assembly resolutions recognize the right of peoples to self-determination. The exercise of this right may include the use of armed force to carry it out. There is, therefore, a set of rules governing the use of force in non-international armed conflicts, although these rules are still rudimentary and state practice lacks coherence. There is no doubt that the notion of *Jus in Bello* applies to non-international armed conflicts. The content of these rules is more rudimentary than the rules applicable to international armed conflicts, but the existence of a set of conventional and customary rules applicable to non-international armed conflicts is no longer in doubt. There is as well a set of conventional and customary rules governing the relations of parties to the conflict in the event of non-international armed conflict. In its judgment of 2 October 1995 in the Tadic case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia expressly recognized that the concept of serious violations of the laws and customs of war applied to conflicts as well as international conflicts (Note 6). Similarly, the Statute of the International Criminal Court, adopted on 17 July 1998, allows the Court to sanction war crimes committed in non-international armed conflicts as well as war crimes committed during international armed conflicts (Bugnion, 2003, pp. 170-171) (Note 7).

As well, the law of occupation, the main branch of the *Jus in Bello* which bargains unequivocally with post-struggle relations, is ill-suited to fill in as a system of administration. Both The Hague and the Geneva law are imagined as lawful structures to address brief power-vacuum after clash. Their emphasis lies on the support of open security and arrange and the insurance of the interests of residential performing artists. These requisites drive possessing forces to practice limitation in the forming of the law and organizations of involved domains (Stahn, 2007, p. 928).

In addition, the groups in conflict must undertake to respect the principle of the proportionality of means. Belligerent must not use means under warfare techniques that are excessive or that are not necessary for victory. The most tragic example of this is the atomic bombing of Hiroshima and Nagasaki. In some cases, pushing the war beyond the limit where it could reach its proper conclusion is tantamount to committing the crime of aggression again (Benjamin, 2007, pp. 15-17). These few examples of the practical application of the categories of just war make it possible to show that it is not always impossible to justify war. The classic scheme of the just war is a first useful analytical tool for debating the legitimacy of the use of violence in inter-state conflicts.

2.3 Applicability of the Just War Theories: Some Cases Studies

2.3.1 The Gulf War: 1990-1991

The attack of Iraq is an in all likelihood case as it was the biggest US power to be submitted anyplace since. The desire is that the president would refer to national interest, national security, and the majority of the Just war standards so as to legitimize putting the lives of such a large number of

American administration people in danger. A great part of the writing on Just War Theory refers to the Gulf War of 1991 as the quintessential case of admirable motivation in current occasions, in this manner reinforcing the determination of this case (Fisher, 2014, p. 25).

The international community, as competent authority, talked on the issue of the intrusion of Kuwait with phenomenal solidarity. Indeed, even the couple of supporters of Iraq, for example, Yemen and Cuba, dismissed the implied extension of the domain as illicit and bolstered wholeheartedly the interest for the reclamation of the regional power and political autonomy of Kuwait. Indeed, international law gave the point of convergence of understanding which enabled the United Nations to act conclusively. In spite of the fact that the actions did for the sake of the UN may be liable to basic discourse, the underlying objectives of the organization in this emergency were uncontested and all around concurred. These objectives were characterized definitively by the Security Council (Weller, 2015, p. 23).

By taking action against Kuwait, we can say without any doubt that Iraq interfered with the recognized independence of Kuwait and violated its sovereignty, hence breached the rules of international law (De Lucka, 1991, p. 271). The just cause in the Gulf War case was the forceful conduct of Iraq in attacking Kuwait. Front and center in the discourse, President Bush expresses that “the tyrant of Iraq attacked a little and powerless neighbor, Kuwait—an individual from the Arab League and an individual from the United Nations”. Later in the talk, as appeared in different cases, the president makes reference to the insidiousness executed by Saddam’s powers who “assaulted, looted, and ravaged” and specifies that “among those debilitated and murdered”. Later in the discourse, the president attests that “no country will be allowed to ruthlessly strike its neighbor”. Just motivation, again not unequivocally expressed in those terms, discovers abundant help in President Bush’s 16 January, 1991 location to the country (Fisher, 2014, pp. 27-28).

Right intention contentions are various. For instance, the real administration of Kuwait will be reestablished to its legitimate spot, and Kuwait will be free. Another goal is that once harmony is reestablished, Iraq will likewise return the overlap, in this manner upgrading the security and soundness of the Gulf (Fisher, 2014, pp. 28-29).

As a last resort argument, President Bush referenced the discretionary endeavors of the United States, United Nations, Arab leaders, the US Secretary of State, and the General Secretary of the United Nations, which were all unfit to influence Saddam Hussein to pull back his powers from Kuwait. Every single sensible exertion to achieve tranquil goals had been attempted, and that the alliance nations “must choose the option to drive Saddam from Kuwait by using force”.

In applying Just War Theory to the Gulf War Case, every one of the five of jus ad bellum standards are upheld by President Bush’s location. The right intention and last resort contentions are the most strong, the competent authority contention is clear and unequivocal, and the worthwhile motivation for this situation is one frequently referred to in the Just war writing as excellent. The proportion contention exists, however, it inclines toward insurance of US and unified powers and makes no notice of how US military power will be separate (Fisher, 2014, p. 30).

2.3.2 The Bosnian War: 1995

The Bosnian War was one portrayed by ruthlessness and endeavors at ethnic purging that had not been felt in Europe since World War II. The loathsomeness of the circumstance in the Republic of Bosnia and Herzegovina stunned the still, small voice of humanity. Be that as it may, the size of enduring in the Republic and in different pieces of the previous Yugoslavia remained in sharp differentiation to the clear insufficiency of the international reaction to this case as it unfurled gradually and with edgy consistency before the eyes of the international community for a time of more than three years (Weller, 1996, p. 70). It is a no doubt case as a result of the predominant patterns in US thought in 1995 and the hesitance of the United States, before that date, to submit any sizeable power to what many saw as an European issue (Fisher, 2014, p. 31).

The competent authority for Bosnia, was that “the Presidents of Bosnia, Croatia, and Serbia all requested to take an interest. The Bosnia mission was to be a NATO driven mission, and the United States was the pioneer of NATO. In the event that the NATO plan meets with the endorsement of the US and was sent quickly to Congress. At the season of the discourse notwithstanding, the authority referred to was the Dayton Peace Agreement, expedited by the United States, and the solicitation by the pioneers of the three warring states that the United States take part. There is no notice of the UN security board in the discourse; however the notice of 25 different countries promising help infers universal approval (Fisher, 2014, p. 34).

The wrong to be corrected in Bosnia was, the murdering of civilians in the vicinity of the Bosnian town (Ryngaert & Schrijver, 2015, pp. 220-221). The actualizing the understanding in Bosnia can end the awful enduring of the general population, the fighting, the mass executions, the ethnic purifying, the battles of assault and dread. Set back shirking had delayed this key need by 10 years at the expense of thousands of European lives, and the United States had been one of the appeasers”. The United States couldn’t constrain tranquility on Bosnia’s warring ethnic gatherings yet by the by, in 1995 IFOR was planned to do precisely that. The major contrast was that the war in Bosnia had finished up with a US expedited harmony understanding, and now the United States would play a functioning job in actualizing that peace (Fisher, 2014, pp. 34-35).

The right intentions for this situation were to help harmony and guarantee stability in Central Europe. Majority rule government in Central Europe would without a doubt be a counter to any future Soviet reappearance of intensity, yet Russia had filled positive role as an accomplices in verifying the peace (Fisher, 2014, p. 35).

NATO is the main power equipped for doing the mission, and as the pioneer of NATO, the United States must be a piece of the undertaking. Along these lines, as a state with an influential position, the United States must choose the option to be a part of the mission. Because of the idea of the mission, the nuance of the contention, and the way that the United States let the war continue for a long time and the belligerents consent to a peace before US ground contribution, last resort does not element into this case (Fisher, 2014, p. 35).

The idea of the dedication of US ground forces to Bosnia, to execute the Dayton Peace Agreement, may represent irrelevant contentions of last resort and proportionality (Fisher, 2014, p. 35).

2.3.3 The Iraq War: 2003

The Iraq War of 2003 is a no doubt case for this article in light of the fact that the American president submitted US forces to activity in Iraq while there were at that point US forces submitted in Afghanistan. Initially, the Security Council embraced Resolution 1441, which observed Iraq to be in material violation of past Security Council Resolutions and compromised genuine ramifications for further obstinacy. At the point when Iraq declined to completely consent to these goals, the United States drove a specially appointed alliance called “coalition of the willing” that attacked Iraq on March 19, 2003, immediately crushed Iraq’s military, and finished Saddam Hussein’s regime. The United States has preferred the self-defense argument because it lets the US less grateful to the UN and because it corresponds to the international law rules that prohibits the out of law (Simpson, 2005, p. 171). Regardless of this action, other countries numerous international researchers and scholars have contended that international law did not legitimize the war in Iraq (Yoo, 2003, p. 563).

Contentions of competent authority are both various and fairly conflicting in President Bush’s 17 March location. To begin with, the US president expresses that “the United States of America has the sovereign authority to utilize force in guaranteeing its very own national security”. Then the president proceeds to state that “the United States Congress casted a ballot overwhelmingly a year ago to help the utilization of power against Iraq”. Concerning the international community, President Bush expresses that the resolutions 678 and 687 of the UN from the early are still in actuality, and that “the United States and our partners are approved to utilize power in freeing Iraq of weapons of mass destruction”. The president tells the country and the world “this isn’t an issue of power, it is an issue of will”. President Bush at that point refers to UN goals 1441 which discovered Iraq “in material break of its commitments” and promised “genuine results if Iraq did not completely and promptly disarm” (Fisher, 2014, p. 40).

The just cause in the Iraq case is hazardous on the grounds that it to a great extent figures on seizure. In the customary sense, President Bush basically refers to self preservation as the worthy motivation. The president says that the Iraq routine “has a history of neglectful hostility” and tells the country that insight accumulated by this and different governments leaves almost certainly that the Iraq routine keeps on having and cover the absolute most deadly weapons ever devised. Unlike conventional noble motivation contentions of self protection in any case, this case is a preemptive self preservation contention, as observed when President Bush states before the day of awfulness can come, before it is past the point where it is possible to act, this risk will be expelled. Military activity dependent on preemptive self preservation as an admirable motivation contention, as indicated by the simply war convention, would require an immanency of threat to be available. President Bush counters this in saying that reacting to such foes simply after they have struck first isn’t self protection, it is suicide. As well, the conceivable the risk of Saddam Hussein utilizing weapons of mass decimation against the

United States has prompted a great part of the discussion about the Iraq War (Fisher, 2014, p. 41).

The right intentions bolster the topics of liberating the Iraqi individuals from an oppressive routine, evacuating a risk to harmony to the locale and the world, and ensuring American natives. The Iraqis are meriting and equipped for human freedom, and that the United States will help construct another Iraq that is prosperous and free. The danger to regional and world peace is that, the intensity of Iraq to incur hurt on every free country would be duplicated many occasions over (Fisher, 2014, pp. 41-42).

While never utilizing the particular contention that the United States has been compelled to act or must choose between limited options, President Bush went to some length in examining every one of the methods other than war that the United States and the global network endeavored to use before turning to furnished activity. The president referred to diplomacy and the resolutions in the United Nations Security Council (Fisher, 2014, p. 42).

In applying Just War Theory to the 2003 Iraq War case, every one of the five of the *jus ad bellum* standards are upheld by the US. The able specialist and worthwhile motivation contentions are not as perfect as in different cases, however both element a portion of the regular legitimizations permitted. The preemptive idea of the military action for this situation has caused a ton of discussion, and the disappointment of US powers to find any weapons of mass destruction in the wake of attacking additionally impelled analysis of the activity. The competent authority contention is likewise one of a kind for this situation as President Bush recognizes the craving for an UN Security Council resolution however demonstrates dissatisfaction at the failure to get one (Fisher, 2014, p. 43).

2.3.4 Syria Case: 2013

The just war standards, utilized frequently to legitimize action bad habit inaction, could give a medium to demonstrate that the utilization of US military force isn't defended in the Syria case (Fisher, 2014, p. 45). In 1997, The United States Senate overwhelmingly endorsed a worldwide understanding denying the utilization of substance weapons, presently joined by 189 governments (Fisher, 2014, p. 47).

At the point when the circumstance in Syria started spiraling crazy in the progress from boundless dissents against Al-Assad regime to full scale civil war, concerns were raised about Syria's store of chemical weapons and of the potential outcomes both of the weapons being utilized by the al-Assad regime or of those weapons falling under the control of terrorist groups (McCormack, 2016, p. 516). In addition, the conflict extended all through 2013. The Commission of Inquiry fourth report, dated February 5, 2013, revealed Hezbollah involvement, and the utilization of chemical weapons in four extra assaults in 2013. Early 2013 likewise denoted the inception of action by ISIS inside Syria (Ford, 2017, p. 8).

The sovereign authority in the Syria case is the international community and the United States as to substance weapons. The ordinarily looked for authority of an United Nations Security Council goals is muddled in the Syria case because of solid ties among Russia and the Assad Regime (Fisher, 2014, p. 47).

The just cause in the Syria case, was the utilization of chemical weapons. This case is additionally the first in this article where the US explicitly makes reference to just cause, yet transformed. When tending to the Congressional right, the president requests that they “accommodate your promise to America’s military may with an inability to act when a reason is so evidently just. The US is unmistakably showing that there is a just cause and utilization the real words, however incomprehensibly utilizes them in clarifying why no action will be made for the occasion” (Fisher, 2014, p. 48).

The right intention in the Syria case is spelled out in President Obama’s clarification of the reason for a military action against the Assad regime. The motivation behind this strike is deflect Assad from utilizing chemical weapons, to debase his regime’s capacity to utilize them, and to clarify to the world that US won’t endure their utilization. Another right intention contention could likewise bolster national interest and is identified with United States allies in the Syria district. It cannot be overlooked that the potential multiplication of synthetic weapons could undermine partners and in sketching out a possibility of inaction (Fisher, 2014, pp. 48-49).

Since the United States did not make hostile military action in Syria in 2013, it isn’t sudden that there is no notice of the United States being compelled to act or having no way out. The last resort factors in the US contention for not making a move, in spite of the qualities of the recently examined contentions for supported action. Obama’s administration has attempted strategy and authorizations, cautioning and dealings however substance weapons were as yet utilized by the Assad regime (Fisher, 2014, p. 49).

In applying Just War tradition to the Syria case, the jus ad bellum standards are upheld by the US argument. The contentions utilized for every one of the standards are in accordance with the just war custom, and are really more grounded, increasingly vigorous, and utilize real just war theory dictionary (Fisher, 2014, p. 50).

3. Analytical Overview of the Article 51 of the UN Charter

3.1 The Qualification of Inherent Rights/Droit Naturel

The self-defense is an inherent right and not reliant or subjunctive on a mandate or mission. While Article 51 of the UN Charter explicitly consecrates the “natural” or “inherent” right in the English text of self-defense, it does not specify, or at least hardly, the rules. These, on the whole relatively well established, fundamentally determine the conditions under which a State can unilaterally resort to armed force, the material or temporal limits of its use and the procedural obligations that accompany its exercise. Each of these issues deserves special attention (Verhoeven, 2002, p. 51).

Some scholars consider that this characterization of the right of self-defense, which merely restates the term used in the US Note in relation to the Paris Pact negotiations, has “no legal importance”, it cannot be regarded as a recognition of natural law or as a reference to natural law and conclude that “this expression was chosen to emphasize the fundamental character of a right that belongs to each state” (Roscini, 2015, p. 643). In other words, self-defense is a natural right in the sense of a self-evident right.

This doctrinal approach to the inherent character of self-defense is also reflected in the state approach in terms of the justification given for the use of self-defense. For example, in order to protect nationals at risk abroad, some States consider that the self-defense invoked for this type of protection is natural in the sense of customary or legal which belongs to each state beyond the law of the Charter (Sierpinski, 2006, pp. 90-91).

The use of the terms “droit naturel” or “inherent right” is without effect on the nature of the right of self-defense. In this regard, there is no doubt that before the adoption of the United Nations Charter there was a customary law which limited the lawful use of force and also provided for the right to use the force as a means of self-defense. This is, moreover, suggested by the adjective natural in Article 51 of the Charter of the United Nations. It follows that this right “must be considered as a right that exists independently of the Charter for and by all States. Therefore, member states can also defend non-member states, so that they can assist members if they are the object of armed aggression” (Detais, 2007, pp. 78-79).

In its preamble “resolution 1368” (Note 8) recognizes the inherent right of individual or collective self-defense in accordance with the Charter, natural right reaffirmed in “resolution 1373” (Note 9). These words seem to have caused some confusion. Some have found resolution 1368 ambiguous and contradictory. However, there is no contradiction in reaffirming the indisputable existence of a right of self-defense which justifies a unilateral recourse to armed force if its conditions are fulfilled, while noting that a situation presents the characteristics of a threat to international peace and security that allows the Security Council to take the coercive measures provided for in the Charter (Verhoeven, 2002, p. 53).

Then Article 51 refers to the natural right of all States to self-defense and this means that the persons who drafted this Charter: their intention was not to restrict or neglect this inherent right associated with each country. International precedents have confirmed this trend through several practices that have continued for a long time and have become stable in customary international law. This means also that customary international law governing self-defense through its scope and scope of work has not changed or been affected (Al-Haj, 2015, p. 20). It is therefore appropriate to return briefly, as a preliminary matter, to the customary character of self-defense.

3.2 The Customary Character

The inherent right of self-defense (droit naturel) is characterized by its customary character (Linnan, 1991, p. 102) (Note 10); its benefit cannot therefore be reserved only for States which are parties to the Convention which technically constitutes the Charter of the United Nations, whatever may be in other respects the singularity. In the case of military and paramilitary activities in Nicaragua, the ICJ did not fail to emphasize this, which ensured the conformity to the only customary law of the American behaviors denounced by Nicaragua after being prohibited, as a result the strange reservation of the United States in 1946 to accept its acceptance of the optional clause of compulsory jurisdiction, to verify its compatibility with the United Nations Charter. In so doing, the Court finds that Article 51 has no

meaning unless there is a right of natural or “inherent self-defense, which is hard to see how it would not be of a customary nature” (Verhoeven, 2002, p. 53). The Court recognized the existence in international customary law.

There is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defense must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defense must be “immediately reported” to the Security Council (Note 11).

It is noted that countries in general should respond to the requirement provided for in article 51 that “the actions taken by Members in the exercise of the right of self-defense should be reported immediately to the Security Council” (Gray, 2018, p. 219). The absence of a report might be the motivation to question that the state truly follows up in the right of self-defense (Petreski, 2015, p. 7).

The right to self-defense is obviously cherished in the United Nations Charter’, so it would most likely go too far to translate this section as saying that the right of self-defense exists just in customary international law and that Article 51 does close to allude to this customary right special case to the prohibition on the use of force. However, some asks whether the Court thinks about the right to self-defense, as revered in Article 51, to constitute an incomplete treaty standard which, keeping in mind the end goal to be legitimately connected requires alluding to specific parts of the customary right to self-defense. While the above reference makes this impression, a second structure of the Court’s position would be that the last parts of the right of self-defense, while having been of an absolutely standard nature in the first site, have been consolidated into the settlement govern in Article 51 on the right to self-defense. Seen thusly, a total arrangement direction on the privilege to self-defense exists nearby its customary corollary (Kreß, 2015, pp. 567-568).

At a time when the use of force was not prohibited, self-defense was not necessary to protect oneself from aggression, which was “just” in other respects in employment. It was sufficient not to be in one of the hypotheses where it would have been exceptionally prohibited. It is only with the prohibition of the principle of the use of armed force that legitimate self-defense becomes legally meaningful: it normally becomes the only eventuality where its unilateral use can be allowed. The changeover is unquestionably affected by the United Nations Charter, which sets up a system of collective security. One does not go without the other. It would therefore be important to discuss the individual or collective character of self-defense (Verhoeven, 2002, p. 52).

3.3 Individual and Collective Feature

The individual self-defense of a State would be the transposition at the international level of the self-defense of an individual. An attacked State must be able to react immediately in the absence of the intervention of the international structure empowered to implement collective security, as domestic law accepts for an individual. But here the transposition stops, because in domestic law, an individual can see

the implementation of his self-defense controlled by a court, without his consent, which is not the case in international law. In this sense, since, for various reasons, a certain number of States wanted self-defense to be expressly provided for in the Charter, it seemed hard to imagine only recognizing collective self-defense. But this collective character of self-defense allowed for a broad approach, especially during the Cold War (Sierpinski, 2006, p. 91). It is also worth mentioning, the right of individual self-defense has a subsidiary, since it cannot be invoked as long as the Security Council has not taken the necessary measures to maintain peace and international security (Ben Flah, 2008, p. 20).

Under a nation's inherent right of collective self-defense, a State's conduct permitted the others States to undertake "necessary actions" to support third state (Modabber, 1988, p. 450) (Note 12). For different authors, the collective character is the most important, because it would be at the origin of the recognition of the self defense as it was seen previously with the regional approach of the collective security. However, it is necessary to ask whether the representatives of the States participating in the drafting of the Charter did not have in mind, in addition to the search for regional participation in collective security, a more traditional view of self-defense (Sierpinski, 2006, p. 91).

As we have mentioned above, Article 51 sets forth the inherent right of individual or collective self-defense in the event of a real armed attack by a rogue entity against one of the members of the Charter. Therefore, the use of force by one State against another in the name of the realization of the right to individual or collective self-defense is one of the most important foreign policy decisions that any State can take (Abbasi, 2018, p. 182). In any case, there are still inquiries concerning when an armed conflict starts for self-defense purposes. The Security Council and governments have cleared up a few issues since September 11, 2001. An attack must be in progress or should as of now have needed to trigger the right of unilateral self-defense. Any previous answer must be endorsed by the Security Council. There is no self-designated appropriate to attack another state for expect that the state designs or creates weapons that can be utilized in a hypothetical battle (Smith, 2006, p. 16). Moreover, self-defense, whether individual or collective, must comply with the conditions of proportionality and necessity. In the case of Military Activities, the ICJ stated that the specific rule that self-defense would only justify measures proportionate to armed aggression is well established in customary international law. It should be noted that the examination of proportionality can only be decisive in assessing the lawfulness of an action for self-defense if the other conditions mentioned above are fulfilled. The principle of proportionality cannot, under any circumstances, transform an illicit reaction in itself into a lawful response (Note 13).

It remains to know whether there is a case of self-defense under Article 51 of the Charter which may be a basis for the use of force, or in a case of collective threat to peace, or in a situation other and in principle excluded by the system of the Charter. In international law, self-defense is allowed only in case of aggression year. Moreover, for there to be aggression, several conditions must be fulfilled.

3.4 A Conditional Self Defense *Ratione Materiae* and *Ratione Temporis*

Article 51 may be applied when a member of the United Nations has been subject to “armed attack”. This last wording corresponds to “aggression armée” in French. Now and then, the two authentic texts seem to have allowed various assessments of Article 51. As an example, in 1956 the Netherlands looked over the definition of armed attack given by the Article 51. Many states refused to recognize the concept of the armed attack the same as aggression and they instead acknowledged a wide interpretation of aggression. Whereas others states such as Soviet Union deemed the armed attack the most grave then the aggression and others such as Colombia and Mexico recognized the reasonable grounds of the right to self-defense under Article 51 only if a state is object of armed aggression. In Nicaragua Case, the International Court of Justice embraced a limited point of view of the notion without providing a particular definition. The Court proclaimed that the term “armed attack” has a narrower meaning than the words “threat or use of force” and “aggression”.

The obvious meaning is that while all use of force is prohibited against the territorial integrity or political independence of another State, not all use of this force will constitute an armed attack or aggression (Kretzmer, 2013, p. 242). Whatever, in view of these different, even contradictory, approaches to the conclusion on the problem of divergences due to the different language versions concerning Article 51, it should not be given more importance (Sierpinski, 2006, p. 93). In any case, only armed attack or aggression justifies the use of force in self-defense (*ratione materiae*). Armed attack is often an easily identifiable catalyst, at least in theory, “eliminate uncertainty as to its application in specific circumstances” (Waxman, 2013, pp. 159-160). It was nearly thirty years after the entry into force of the Charter that aggression was defined by General Assembly resolution 3314. This definition is incomplete because the General Assembly does not establish an exhaustive list of the acts of aggression, including the invasion, the territorial attack, the Bombardment, the blockade of ports or coasts and the attack by the armed forces of one State against the armed forces of another State (Maoggota, 2002, pp. 302-304; Weisbord, 2008, p. 18, p. 179). The right of self-defense, whether exercised individually or collectively, allows a State that is not directly affected to intervene on behalf of a defense agreement binding it to the State attacked.

As such, the ICJ recognized this by stating that “the Charter does not directly regulate substance in all its aspects and does not include the specific, yet well-established rule in customary international law, that self-defense would only justify measures which are proportional to the armed aggression suffered, and necessary to put an end to it. The Court reaffirmed that the features of necessity and proportionality constituted two essentials conditions (*sine qua non*) in the exercise of self-defense” (Taft, 2004, p. 303, p. 305; Ruiz & Salamanca, 2005, pp. 518-521) (Note 14), while implicitly excluding, as it does not allude to it, the concept of preventive self defense.

These conditions reinforce the exceptional character of self-defense which can only be invoked as long as the Security Council has not taken the necessary measures to maintain the peace, by virtue Article 51 of the Charter. Being only provisional, self-defense is, therefore, also limited *ratione temporis*. The

drafters of the United Nations Charter have conceived of self-defense as a kind of limited time parenthesis, allowing States to respond immediately to armed aggression until the Security Council has had time to take action measures necessary for the maintenance of peace, whether coercive or not. In addition, and still in accordance with Article 51 of the Charter, the measures taken by Members in the exercise of this right of self-defense must be immediately brought to the attention of that body so that it may exercise control over these measures. Nevertheless, practice shows that the exercise veto has had the effect of block his action, rendering him incapable of qualifying a situation or taking the necessary steps to restore peace (Halberstam, 1996, p. 234). These measures are yet strongly framed.

3.5 The Inclusion of Self-Defense into Collective Security

The concept of collective security had appeared as early as the end of the nineteenth century, in reaction to the European Concert of the Great Powers established since 1815. The small powers were less and less satisfied with a system that gave them little voice, not more than the foreign nationalities in multiethnic countries, such as Austria or Russia, which were pillars of the European Concert, which they used to stifle in the name of balance between the powers. Collective security was also a reaction against the permanent alliances of peacetime, which led to the weaving of wartime in 1914, by a seemingly inexorable mechanism that had greatly influenced contemporaries. In particular, the Franco-Russian alliance of 1891-1893 (secret alliance, automatic) had left a very bad memory, also among the leaders, even if they could not say it too publicly because of the controversies of the twenties and thirties on the French and Russian responsibilities in the war (Georges-Henri Sourou, 2011, p. 179).

Professor Serge Sur defined collective security as “a global vision of international security, which aims to undermine security for all on the basis of the equality of everyone in terms of security” (Sur, 2000, pp. 413-416). Thomas Cusack and Richard Stool see that “A minimum adherence to the collective security ideal requires states both to renounce the unilateral use of force for their own ends, and to come to the aid of other states that are the targets of aggression. Thus, force is sanctioned as a means to preserve the system and to punish those that would harm it, but force is not to be used for self-interested gain” (Cusack, 1994, p. 36). With the adoption of the Charter of the United Nations, Article 51 raises the problem of the insertion of self-defense into collective security by limiting the application of self-defense in time, since its use can only be done “until the Security Council has taken the necessary steps to maintain international peace and security”. This wording puts into perspective the ambiguity of the notion of self-defense as adopted by the drafters of the Charter. Article 51 poses a problem both in this part of its wording and in its place in chapter VII, which deals with the competence of the Security Council in the case of threat to peace, breach of peace and aggression (Sierpinski, 2006, p. 91). The will of the drafters of the Charter was therefore to create a powerful body, with the means to carry out effective actions in case of need. That is why the Security Council has been given considerable powers, particularly those under Chapter VII of the Charter. Article 39, which opens Chapter VII, empowers the Security Council to ascertain the existence of a threat to the peace, a

break-up of the peace or aggression. It then provides that the Security Council, having noted one of the three situations mentioned, make recommendations or decide on measures to maintain or restore international peace and security. Now this section organizing collective security ends with Article 51 on self-defense. As it is in conjunction with the regional approach to collective security and the fears of certain States, related to the right of veto (Samuel Barkin, 2006, p. 69) (Note 15).

Rethinking about Article 51, we find that the drafters of the text structuring the new international organization wanted to meet all the States participating in its development: the great victorious powers, the States in favor of a regional approach to security, states fearing great powers, but still wanting an organization, States skeptical about the possibility of achieving collective security, etc. Everyone must find what they are looking for in this formulation that allows both an immediate response from a state that is the object of armed aggression or armed attack, which may be almost immediate, of the organ responsible for peacekeeping.

The believability of collective security is likewise subject to there being legal standards and principles overseeing the connection between the U.N. what's more, different entities in the field of collective security-regional, sub-regional organizations. In thinking about the connection between the U.N. also, these actors it is germane to ask whether we have a collective security framework in which widespread international and regional act in congruity to add to more prominent collective security, or do we have rivalry between them? The Kosovo question raised the issue of the use of force by regional organizations. The Charter of the United Nations appears to be very clear on these issues. While collective defense is safeguarded for such agencies, any implementation activity past the simply cautious, to manage a threat to the peace, requires the approval of the Security Council. It could be contended that Article 51 of the U.N. Charter was embedded to guarantee that regional organizations had the privilege to protect themselves in crisis circumstances when faced with an armed attack. The defy for the U.N. what's more, regional Organizations is to create an adequate legal system that takes into account regional activities and activities however in the meantime directs them. Cooperation between the international and regional levels has occurred. This was found in Bosnia after Dayton in 1995 and in Kosovo after Serbian withdrawal in 1999, where the NATO military works under U.N. approval (White, 2002, p. 246, p. 248) (Note 15).

Proportionality and necessity as characteristics of self-defense must also be recalled since, as noted above, the ICJ considers these two features important. The motivation of self-defense was restricted to repulsing an attack in progress. The principle of necessity implies that lone that use of force which is essential keeping in mind the end goal to repulse an assault constitutes lawful self-defense. On the off chance that an equipped an armed attack is ended, there is no further need to repulse it. Consequently, self-defense is restricted to an "on-the-spot reaction", the necessary, immediate reaction to an armed attack. Therefore, the condition of necessity is associated with the standard of immediacy. It implies that the employment of counter-force must be transiently interlocked with the armed attack activating it. On account of the invasion of another State's territory, on a basic level an attack still exists as long as

the occupation proceeds. In any case, in the instances of single armed attacks, the attack is ended when the incident is finished. In such a case the resulting use of counter-force constitutes a backlash and not self-defense. In the case of Oil Platforms, both the attack on the Sea Isle City and that on the Samuel B. Roberts had ended when the counter-force was worked out. Therefore, the counter-force did not constitute a demonstration of self-defense inside the importance of Article 51 (Ruiz & Salamanca, 2005, p. 518).

The question of proportionality implies considering the appropriateness between an armed attack/aggression and the subsequent reaction. The doctrine has shown two conceivable understandings of proportionality: it could be either estimated against the size and extent of the hostility, or the genuine needs of self-preservation. Following Roberto Ago's perspective, Iran kept up the second interpretation, and in this manner proportionality ought to be comprehended as far as the measures taken to stop and repulse the attack. Therefore, the decision of the wrong target and the disproportionality of the measures taken would propose that they were of outfitted retaliations as opposed to self-defense (Ruiz & Salamanca, 2005, p. 520).

By taking a more global view of Article 51, we see that its logic still mystery. This text does not present an approach that could be described as strictly chronological, which would seem however appropriate to this concept. Article 51 begins by binding droit natural/inherent right of self-defense and armed attack/aggression, then immediately limits its exercise in time, while correlatively imposing the information of the Security Council and recognizing its competence to act.

4. Are There Requirements of Just War in Case of Self Defense?

Jus in Bello, provides rules dealing with various aspects of the conduct during armed conflict, in particular on how to protect persons who do not or no longer take part in hostilities what means and methods of warfare may or may not be used and the rights and obligations of neutral States. IHL distinguishes between international armed conflict and non international armed conflict whatever armed conflict between the State armed forces and an armed group or between different armed groups, and the applicable rules of IHL differ between the two. In any case, compared to *Jus ad Bellum*, *Jus in Bello* consists of a vast amount of treaty provisions and customary rules (Okimoto, 2012, pp. 47-48).

In spite of the fact that the two lawful systems manage the use of force by States and different performing actors, they both work in an altogether different manner, which has been the source of the strain between *Jus ad Bellum* and *jus in bello*. *Jus ad Bellum* normally makes a sharp qualification between a legal gathering and an unlawful gathering. An infringement of the forbiddance on the prohibition on the use of force can result in different approvals against the unlawful party. Then again, the assaulted State is permitted to take counter-measures in self-defense against the unlawful party, gave that the earlier the use of force added up to a aggression. Besides, States can use force against the illegitimate party in the event that they are so approved by the Security Council under Chapter VII of the Charter of the United Nations (Okimoto, 2012, pp. 48-49).

Partition between *Jus ad Bellum* and *Jus in Bello*. This guideline is the most crucial one administering the connection between the two legitimate systems. What this rule implies practically speaking is, initially, that the legitimate status of the clashing gatherings under *Jus ad Bellum* does not influence the utilization of IHL to the clashing parties and, furthermore, that the use of IHL does not legitimize any unlawful use of force under *Jus ad Bellum*. The point of this sharp qualification between *Jus ad Bellum* and *Jus in Bello* is accurately to secure the simply philanthropic purpose of IHL, which is to ensure all people influenced by armed attack or aggression with no refinement, including the qualification between people having a place with the legitimate party and the unlawful party as far as *Jus ad Bellum* (Okimoto, 2012, p. 50).

A concise overview of significant international armed conflicts after the adoption of the UN Charter additionally exhibits that the legitimate status under *Jus ad Bellum* does not influence the enforcement of *Jus in Bello*. In the international armed conflicts, the appropriateness of IHL was reliably perceived by both or any parties, despite the fact that *Jus ad Bellum* recognized a legitimate party and an illegitimate party or despite the fact that the lawful statuses of the conflicting parties as far as *Jus ad Bellum* were not obvious (Okimoto, 2012, pp. 51-53) (Note 17).

Simultaneous use of *Jus ad Bellum* and *Jus in Bello* depends on the introduce that the division of the two principles best jam the correct utilization of *Jus in Bello* which is gone for protecting all people not or never again partaking in threats. In any case, these two standards are presently supplemented by the trend of the simultaneous use of *Jus ad Bellum* and *Jus in Bello* (Okimoto, 2012, p. 56).

The practice of self-defense to the case of necessity and proportionality is a customary international law. The use of force that is proportionate under the law of self-defense, must, keeping in mind the end goal to be legitimate, additionally meet the requisites of the law relevant armed conflict which contain specifically the standards and principles of international humanitarian law. As well, the use of nuclear weapons should meet the requisites of both the right of self-defense and international Humanitarian law. Besides, the use of force by methods for nuclear weapons that neglects to meet every one of the requisites of Article 51 is illegal. It ought to likewise be perfect with the conditions of the rules of international law applicable in conflict, especially those of the standards and rules of international humanitarian law (Note 18).

Jus ad Bellum especially the law of self-defense and *Jus in Bello* can apply at the same time and that the two are combined necessities that must be met all together for an use of force to be legal under international law. As a matter of fact, the forbiddance in war is a zone *Jus ad Bellum* manages only. Be that as it may, once a State resorts to war, the lead of dangers from there on isn't only directed by *Jus in Bello* yet in addition by *Jus ad Bellum*, to be specific the standards of necessity and proportionality with regards to self-defense. In this sense, *Jus in Bello* and *Jus ad Bellum* are one group of principles managing the lead of threats in self-defense (Okimoto, 2012, p. 56). In addition, the defensive force can be utilized just keeping in mind the end goal to counter armed conflicts beginning from a specific limit of force. Beneath that limit, the utilization of minor sorts of force misses the mark regarding the

thought of armed attack and can't be met with a coercive reaction. This is likely on the grounds that the self-defense does not safeguard the interest of individual states in reacting to any hostile use of force, yet sees coercive measures as fitting just in light of demonstrations of animosity which impartially imperil their security, and just to the degree important to repulse them. This implies the arrangement of *Jus ad Bellum* predetermines the interests for which force can legally be utilized, and additionally their standard of safeguard and that proportionality serves just to decide the methods suitable to achieve that purpose (Cannizzaro, 2006, pp. 278-279).

At the point when an armed attack starts, the domain of force is inherently open-finished on the two sides and open to heightening. In such a circumstance each side may do what is important to debilitate the military limit of its adversary, compelled just by the standards of *jus in bello*. As indicated by a few perspectives, at this stage proportionality is judged exclusively by those standards and has no importance in *Jus ad Bellum*. These perspectives would appear to be founded on the presumption that evaluation of proportionality in *Jus ad Bellum* is for the last time choice, settled on ahead of time when the choice to use force for the sake of the armed conflict is made (Kretzmer, 2013, p. 267). Nevertheless, the rule of proportionality in self-defense entails certain points of segregation on the selection of targets, impacts on civilians and geological and transient degree of self defense measures. In the meantime, IHL gives various duties and tenets in regards to objects that can or can't be assaulted, how military aims can be assaulted and which weapons can or can't be utilized, or as Michael Meier and James Hill call it "Targeting Duties" (Meier, 2018, pp. 787-796). All together for specific measures in self-defense to be legal, both the principles in the law of "self-defense" and "IHL" (Camins, 2016, p. 139) (Note 19) must be conformed to. At the end of the day, if specific measures in self-defense damage either *Jus ad Bellum* or *jus in bello*, those measures wind up unlawful and subsequently, must be stopped promptly (Okimoto, 2012, p. 58).

A specific use of force may include infringement of IHL however might be viewed as legal under *Jus ad Bellum*. For instance, if an objective that was attacked amid a specific military task over the span of self-defense was not a military target inside the significance of IHL, as gave in Article 52 of 1977 Additional Protocol I, this specific use of force damages IHL however might be viewed as proportionate self-defense and thus, legal under the right of self-defense. Moreover, presuming an act qualifies as an armed attack, Article 52(2) expects it to be restricted entirely to "military objectives" (Neuman, 2018, p. 820). For this situation, a State can't swing to the law of self-defense keeping in mind the end goal to proceed with measures in self-defense that had officially disregarded IHL. Once the measures disregard *Jus in Bello*, they should be ended instantly regardless of whether they are legitimate under *Jus ad Bellum*. In the event that *Jus ad Bellum* and *Jus in Bello* are both damaged, it only adds further to the individual criminal responsibility and State obligation, and does not change the way that the use of force ought to be ceased (Okimoto, 2012, p. 58).

At the point when *Jus ad Bellum* and *Jus in Bello* are exercised simultaneously, the detachment standard keeps the two from being befuddled and protects the best possible utilization of the separate

legitimate system, especially that of *jus in bello*. The simultaneous application henceforth does not signify blending of *Jus ad Bellum* and *Jus in Bello* rules, yet rather implies use of the two next to each other. For instance, measures in self-defense can be managed by *Jus ad Bellum* and *Jus in Bello* in the meantime, yet the lawfulness of those measures is surveyed independently from the point of view of *Jus ad Bellum* and *jus in Bello*. The simultaneous application likewise implies that once *Jus ad Bellum* and *Jus in Bello* apply all the while, the requisites of *Jus ad Bellum* and *Jus in Bello* end up aggregate and along these lines both must be conformed to all together for the measures in self-defense to be legitimate under international law (Okimoto, 2012, p. 59).

5. Can Anticipatory Self Defense or Preventive War Be Justified in the Doctrine of Just War?

Preventive war is a resort to force that countries are not supposed to employ because it is prohibited by international law, and more specifically by the United Nations Charter. This prohibition is based on the ambiguity of this strategy which remains, above all, an attack. However, since the establishment of the United Nations, some countries have resorted to it in order to prevent a danger, acting in self-defense. This is considered an inalienable right for all countries. The questions that then arise and which we will focus on in this chapter are the following: would it be possible to frame a preventive war, since it would appear that, despite everything, some countries adopt this strategy as an act of legitimate defense?

The facts of the post-September 11 period drove the Bush administration in 2002 to explain, in extremely solid and open terms, the doctrine and ideology of “Anticipatory self-defense” or “preemptive self-defense”. Through different things, the doctrine emphasized an advanced directly under international law for the United States to utilize military force preventively against the risk postured by terrorists who retain a Weapon of Mass Destruction (WMD) (Murphy, 2005, pp. 700-701) (Note 20). Acquiescence with international law on the use of armed force presents remarkable issues, for such law embroils center national security interests of states. None the less, All things considered, policy-makers must focus on whether a specific demonstration of “anticipatory self-defense” would almost certainly be viewed as breaching international law, in light of the fact that there might be critical political, monetary and military repercussions (Murphy, 2005, p. 702).

Indeed, the preventive war is presented with the primary intention of self defense; however, as it is a question of attacking first, of a feeling of threat, it is not clear whether to consider it as an act of self-defense, or as an offensive gesture. It was first generally accepted in this theory since considered from a defensive, self-defense point of view. The dominant idea in the legal literature of the day is that states always have the right to fight. Then it was officially banned by the United Nations Charter, through Chapter VII (Walzer, 2006, p. 145).

It is legitimately and deliberately untenable to require a state to endure a armed attack before it might react, and trust that international law enables a state to turn to force in anticipatory self-defense. Defenders of this point of view contend that Article 51 particularly protects the “inherent” right of

self-defense, which they decipher to mean the right existed before states drafted the Charter. That right grasped the rule caught most obviously in the popular Caroline incident of 1837 (Arend, 2003, pp. 90-91) (Note 21). Worth mentioning, a numerous States have conjured anticipatory self-defense to legitimize their own employments of force or that of different states. Various researchers recognize Israel's utilization of force against Egypt in 1967 as a classic case of anticipatory self-defense where Israel attacked Egyptian air force corps after Egypt massed its powers on the Israeli frontier and shut the Straits of Tiran. In the meantime, a few states request a noteworthy level of conviction about the danger of the approaching attack and a brief span skyline in which the threat will emerge. For those who consider pre-emptive self-defense legitimate, drawing a reasonable divide between pre-emptive self-defense and unlawful preventive self-defense is a test, ensnaring inquiries concerning what sorts of knowledge ought to be required and what level of certainty a state must have about the precision of that insight. Various states support the legitimacy of pre-emptive self-defense. Surely, a portion of their announcements may be perused to defend preventive self-defense. Most broadly, in 2002 the US created a National Security Strategy that plainly contended for the respectability of pre-emptive self-defense (Deeks, 2015, pp. 666-667).

Some scholars claim that “the right of defense” incorporates a right of “anticipatory self-defense”, a right that can be practiced just when three criteria are fulfilled. To begin with, there is a standard of intent. It means that “There must be a reasonable significance with respect to the charged attacker to armed conflict”. Second, there is a standard of imminence which imply “There must be satisfactory confirmation that elaboration for the armed attack have progressed to the point where it is imminent”. Third, there is a foundation of proportionality: “The benefits of a preemptive attack must be proportionate to the dangers of encouraging a war that may be kept away from”. Presumably, his approach standard serves to separate pre-emptive attacks from preventive wars. For the additionally guaranteed incidentally that “Defense does not go so far as to legitimize preventive war” (Lango, 2005, pp. 256-257).

To sum up, there is a worthy just cause for UN preventive military act when there is a threat to the peace that fulfills both the threat and extent conditions. Obviously, when there is a risk threatens the peace that fulfills the danger condition yet not the greatness condition, there still could be sufficient legitimization for UN non-military measures. As well, the unimportant ownership of WMD, or even the endeavor to retain WMD, constitutes a threat to the peace. The threat per se is, an obvious threat of harm. However, there is a just cause for UN preventive military activities simply if the greatness of such a threat is adequately vast to make the danger an outrageous threat. Regardless of whether a preventive war approved by the Security Council would fulfill the just cause principle, it would not be a just war in the event that it didn't likewise fulfill the last resort standard. Measures other than military force must be attempted first. It is particularly a direct result of the last resort rule that there is extensive doubt about whether a preventive war could be a just war. For, since the peace is just undermined—and the threatened isn't approaching—doubtlessly there is adequate time to attempt non-military measures

initially—until the point when the threat winds up and coming or the peace is ruptured (Lango, 2005, p. 260). Also, preventive war would not be a Just war on the off chance that it didn't likewise fulfill the proportionality principle. It may be imagined that the just cause and last resort principles, are excessively lenient, that permitting to preventive war readily. A general purpose of just war theories is to restrict war, and the specific aim is that UN preventive military activities ought to be constrained (Lango, 2005, p. 263).

Remain saying, use of force in preventive self-defense unilaterally is much more disputable than the Security Council-approved preventive employments of power. However, it has its defenders. In the first place, the United States position is frequently portrayed as favoring preventive self-defense; the US has enunciated its right to use force despite apparent dangers and threats postured by WMD, regardless of whether vulnerability stays with regards to the time and place of the enemy assault (Iraq case). The US see is driven by a worry that confining state activity until the risk of assault poses a potential threat may mean previous the chance to react to the attack by any stretch of the imagination—an unsatisfactory result when that risk includes fear based terrorists, WMD, or both. Besides, a few researchers acknowledge preventive employments of force since they see the UN Charter as dead. Others who defend anticipatory or pre-emptive self-defense yet dismiss preventive self-defense trust that “the danger to the worldwide order and the standard of non-intervention on which it keeps on being based is purely extraordinary for the legitimacy of unilateral preventive act to be agreeable” (Deeks, 2015, p. 669).

It should ultimately understand the terrorism commit by non-state actors. As a new form of threat to which many countries have declared war, and more precisely the United States. We also want to look at the elaboration of the criteria discussed above, in comparison with this type of very specific threat: can we fight a fight against this new form of threat in the same way that we lead a preventive war or anticipatory self defense? Indeed, we would like also to answer the question whether the importance of self-defense in the context of aggression by non-state actors is related to the failure of the Security Council to respond to such threats?

6. Self Defense against Non State Actors: Whether the State Is Willing or Unable the *Jus ad Bellum* and *Jus in Bello* Has to Be Taken into Account

In history, whether before or after the reduction of the right of recourse to armed force, self-defense or anything similar to it did not concern in principle the actions of individuals, those through which one could not detect state responsibility. Thus, the consideration that acts of non-state entities, such as terrorist groups, would be the basis of self-defense action was strongly opposed. The reaction of the United States and its allies in Afghanistan after the attacks of September 11, 2001 has often been seen as lacking a valid argument under self-defense, unless it is seen through the attacks an act of Afghanistan. From a general perspective on non-state entities, it has been argued that there can be no aggression without the involvement of a state (Daboné, 2012, pp. 402-403). But, sometimes the

presence of non-states entities is not at the will of the State, which legitimizes the military intervention of another State in the event of consent of the State in which such entities are located (Christakis, 2016, p. 756) (Note 22).

The advisory opinion of the ICJ in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, emphasized obviously that “Article 51” applies “in the case of an armed attack by one State against another State” (Note 23). Likewise, the Armed Activities judgment mentions that Uganda could not legitimately use defensive force against the Democratic Republic of Congo (DRC) because the foremost attacks were not imputable to the DRC (Hakimi, 2015, pp. 5-6; De Souza, 2015, pp. 227-228). However, aggression by a state through a non-state actor is an indirect armed aggression. In this type of situation, it is not only the aggression itself that constitutes armed aggression from the point of view of Article 51 of the Charter, but it is the participation of the State, the support given to the non-state actor, which allows the application of self-defense. The application of Article 51 of the United Nations Charter to the aforementioned situations is controversial. *Ratione materiae*, it is generally accepted that a non-State actor may use force in a sufficiently serious manner to be characterized as armed aggression within the meaning of Article 51. *Ratione personae*, the application of self-defense in response to assaults by non-state actors is controversial. The use of force against a non-state actor can take two different forms: it can only target the non-state actor, as well as its bases of operations; the use of force can also (or only) target the state from which the non-state actor is acting. As of late, States depend on the “unable or unwilling” test to legitimize the use of force defensively on the domain of a state against non-state attack (Tzagourias, 2016, p. 808) (Note 24). As a recent example, in 2015 fifteen states contributed in the US-drove alliance besieging the Syrian domain. Among those states, it appears that just four have expressly summoned the “unwilling and unable” test in the letters sent to—or in the discussions that occurred inside the UN (Corten, 2016, p. 780). However, different entrants of the alliance did not allude to any “unwilling or unable” test. For this sole reason, the presence of a typical *opinio juris* for this standard shows up rather dubious. More particularly, four comments can be made in help of this statement (Corten, 2016, p. 780).

The required relationship was one of direct proxy which implies the non-State actor must be controlled by the State against which defensive act was pondered. This approach necessitates else that the State be either unwilling or unfit to restrain the armed attack or aggression led by the non-State actor in its domain. Presently, some contend for an expansion of that standard, recommending that a State can be presented to self-defense act on the off chance that it is unwilling, or just unfit, to act in counteractive action of a real or imminent armed attack executed by non-State performing actors from its domain. The unwilling or unable characterization ought to be viewed as a part inside the previous necessity rule. The standard of necessity can be perused as demonstrating that power in force in self-defense must be a last resort. The unwilling or unable test is certifiably not another or elective course to widen the required conditions for applying of self defense; on the off chance that anything, it is an extra constraint inside the test of necessity that must be seen while guaranteeing the right of self- right of self-defense

against non state actors in the domain of another State (Brunnée & Toope, 2017, pp. 264-265).

Finally, any justification for allowing defensive force against non-State actors may be additionally constrained by different conditions that join to Article 51. Two conceivable outcomes show up. One is to allow defensive force just if the underlying attack is particularly grave. The second is to allow such force simply after the State is given an important chance to coordinate with the operation. The second conceivable confinement lies in the necessity conditions. This necessity joins to Article 51 as an issue of customary international law and by and large requests that defensive force be the choice of last resort; the Casualty State must fume the plausible choices for tending to an issue before depending on defensive force (Hakimi, 2016, p. 16, p. 18).

Beside all the important *Jus ad Bellum* issues, the ascent of the Islamic State or the Islamic State of Iraq and the Levant, ISIL and the military tasks directed against it by remote states in both Iraq and Syria additionally bring a few fascinating inquiries up in connection to the utilization of *Jus in Bello*. The ICRC's view is that IHL is appropriate to the region of belligerent states associated with an extraterritorial NIAC. In spite of the fact that the ICRC recognizes that state practice is uncertain, it conjures the standard of the equality of belligerents as a proof for the application of IHL to the territory of the considerable number of states associated with the NIAC, in light of the fact that "helping States engaged with an extraterritorial NIAC ought not have the capacity to shield themselves from the employment of the rule of equality of belligerents under IHL once they host turn into a party to this sort of armed conflict outside their borders" (Koutroulis, 2016, p. 828, p. 849) (Note 26).

There are as well persuading contentions that sure of these essential principles ought to be connected to particular classes of non-state actors, for example, armed resistance group and terrorist groups. For instance, Article 3 common to the Geneva Conventions is applied to armed groups in their ability as parties to a non-international armed conflict (Pejic, 2011, pp. 14-16; Fischer, 2006, pp. 517-518; Aolain, 2007, pp. 1072-1075; Detter, 2007, pp. 1072-1075). Other essential standards of international humanitarian law is applied expressly to composed armed groups (Junod, 1987, pp. 1320-1474), including the "1977 Additional Protocol II to the Geneva Conventions", the "Hague Conventions" (Howe, 2012, pp. 408-412), "the Convention for Protection of Cultural Property in the Event of Armed Conflict" (Keane, 2004, pp. 12-17), and customary international law. Also, there is a large group of instruments outside the law of armed conflict that force commitments on non-state performing artists, including the Terrorism Suppression Conventions and the Genocide Convention (Lanovoy, 2017, p. 564).

As mentioned above, looking for limits on hostility and protection of civilian, a just war holds fast to two all inclusive statements. To start with, utilizing force requires fulfilling in any event a few, and ideally all *Jus ad Bellum* components before the armed attack starts. Filling in as a pre-conflict structure, *Jus ad Bellum* associates the regimes' longing to utilize viciousness with the need to accomplish peace and maintain security. *Jus ad Bellum* isolates the contradictions and the complaints happening from contrasts of supposition or prideful recklessness from issues that are not kidding in

nature and may require utilization of power to determine. Second, once in strife, rules oversee military direct and activities in battle. *Jus in Bello* fills in as compliment to *Jus ad Bellum*, and both work to accomplish a pacific endstate through evading pointless conflict, minimization of brutality, and acting suitably amid war (Smith, 2015, pp. 1-2).

7. Final Remarks

Self-defense appears to be an ambiguous notion. But does this ambiguity come only from the current crisis in the international community or does it not follow intrinsically from the concept of self-defense when it applies in this context? Thus, in parallel with the taking into account of the evolution of the international society, the study of the self-defense will necessarily tend to continue.

Preventive war is prohibited by all the bodies representing international law. Attacking a State-on the mere assertion that it would be capable of an attack- is not a sufficient or necessary reason. Defense becomes necessary only when the threat is imminent. The example of the Iraq war of 2003 allowed us to apply different criteria which, as we have pointed out, were mainly based on what was developed in the theories of just war. Whether imminence, last resort, just cause, proportionality or competent authority, it is interesting to note that the issues relating to the study of war remain substantially the same since the criteria are still adapted to our method. The just cause, in a case of self-defense, means that the state is limited to the defense of its country and should not engage in actions other than those necessary and minimal to the defense.

Designed for conventional international conflicts involving states, Article 51 of the United Nations Charter can only respond to its new challenges through an evolving interpretation. Since the attacks of 11 September 2001, the response of the international community to the few States claiming self-defense against a non-State actor has changed. The international community seems more and more inclined to admit this possibility. Although this represents the first signs of an evolution, the limited state practice and the fragile acceptance of the international community do not seem to be sufficient to assert that these have emerged from new norms of international law.

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Notes

Note 1. The assumption of armed action by irregular forces will be considered here in interstate relations, especially in the context of what has been called indirect aggression. The concept of indirect aggression, which has turned into a vital part of present day definitions and of international jurisprudence, but one that has offered ascend to numerous debates.

Note 2. The Resolution 678 approves member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area". Iraq declined to pull back from Kuwait before the January fifteenth due date, and Operation Desert Storm started the following day. The use of force by the United States and its allies was justified as an exercise of self-defense.

Note 3. In August, the United States started airstrikes against the Islamic State in Iraq, at the Iraqi government's demand. However even as the United States acted in Iraq, the Islamic State was seizing a more area in Syria. In September, a U.S.-driven alliance started striking the Islamic State in Syria. In the meantime, the United States started hitting the Khorasan group in Syria.

Note 4. The position of Kosovo poses the question of whether the military intervention of NATO member states, formally implemented in the name of protecting human rights and humanitarian law, is not a precedent the traditional prohibition of the use of force between States. The Kosovo war has indeed reopened the debate on the advent in international law of a "right of humanitarian interference" which would authorize armed actions in exceptional situations justifying a setting aside of the two traditional exceptions of self-defense or the authorization of the United Nations Security Council. In this sense, the precedent of Kosovo is the best indication. This indication stems from two elements. The first relates to the position taken by States on the legality of armed action by NATO member states. The second refers to more general pronouncements which, beyond the particular case of Kosovo, express the relevance of the traditional principles of non-intervention and non-use of force.

Note 5. After North Korea's invasion of South Korea on June 25, 1950, the United Nations Security Council described the action as a "breach of peace" called for the "immediate cessation of hostilities" and called for the authorities of North Korea to immediately withdraw their armed forces. The Soviet delegate had been absent since 13 January to protest the retention of representatives of the Republic of China on the Security Council. As this first resolution was not implemented, the Council voted a second on 27 June, which called for urgent military action to restore international peace and security and recommended that UN members to the Republic of Korea all the help needed to repel the attackers and restore international peace and security in this region. The Soviet delegate was absent, although he might very well have come back. By remaining absent on the 25th, the USSR, in the event that it had its veto, avoided appearing as the accomplice of the aggression.

Note 6. The tribunal confirms that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife". *Prosecutor v Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, case no 134 IT-94-1, 1995.

Note 7. In virtue of Article 7 (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Note 8. UNSC, resolution on Threats to international peace and security caused by terrorist acts on 12 September 2001 UN Doc S/RES/1368.

Note 9. UNSC resolution on Threats to international peace and security caused by terrorist acts on 28 September 2001, UN Doc S/RES/1373.

Note 10. Nicaragua's view of the UN Charter was not credible because of its solution to the issue of the exclusion of a multilateral treaty, which seemed to regard article 15 as an independent source of textual interpretation with regard to limitations on self-defense. Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment of 27/6/1986, *ICJ Report 1986*, p. 103.

Note 11. Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America), *op.cit.*, p. 200.

Note 12. In the case of military and paramilitary activities in Nicaragua, the United States argued that under a nation's inherent right of collective self-defense, Nicaragua's conduct permitted the United States to undertake "necessary actions" to support El Salvador.

Note 13. Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America), *op.cit.*, p. 237.

Note 14. Oil Platforms (Islamic Republic of Iran v. United States of America), Judgments of 6/11/2003, *ICJ Report 2003*, p. 76.

Note 15. The veto undermined the role of the Security Council in international life during the cold war undermined the conflicting interests of the superpowers, at least to some extent, in most international conflicts. The voting structure is designed to give States that necessarily play the largest role in maintaining international security because of their military power. Perhaps the most important role to be played is to determine the use of force. To avoid the dynamics of the League of Nations between the two world wars, when the League seeks military action to combat threats to peace, but no country with significant military forces is really ready to provide the necessary forces.

Note 16. NATO was at the core of the tasks against the FRY in 1999. It appears to be odd that NATO was in activity in an collective security mold outsider to its birthplaces against the FRY in 1999.

Note 17. For example: Korean War: 1950-1953, India-Pakistan Conflict: 1971, China-Vietnam Conflict: 1979, Iran-Iraq War: 1980-1988, Gulf War: 1991, Eritrea-Ethiopia Conflict: 1998-2000, Kosovo Conflict: 1999, US-Afghanistan: 2001, Gulf War: 2003, Lebanon Conflict: 2006, Georgia Conflict: 2008, Gaza Conflict: 2009, Libya Conflict: 2011. *Ibid*, pp. 51-53.

Note 18. Nuclear Weapons case (Request for Advisory Opinion), Advisory Opinion of 8/7/1996, 1996, p. 245, p. 256, p. 266.

Note 19. IHL allows-inside limits-militarily necessary conduct, and there are varied things within which wide suffering could also be caused by the legitimate conduct of a belligerent party.

Note 20. According to the Bush administration, “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning”.

Note 21. In 1837, settlers in Upper Canada rebelled against the British occupation government. The United States took a neutral stance on the insurgency, but American sympathizers helped the rebels supply the men and supplies that were transported aboard a ship called *Caroline*. In response, a British force penetrated overnight from Canada into United States territory, seized *Caroline*, set fire to it and dropped it over the Niagara Falls, killing at least one American. Britain claimed that the attack was self-defense, and in his speech to the British ambassador, US Secretary of State Daniel Webster said that the self-defense attorney must appear: the need for self-defense was immediate and compelling. The British forces, assuming that the moment would have allowed them to enter areas of the United States at all, did nothing unreasonable or excessive; the act justified by the need for self-defense should have been limited with such necessity.

The terms “self-defense”, “pre-emptive self-defense” and “Anticipatory self-defense” usually refer to the right of the state to attack first in self-defense when facing an impending attack. To justify this action, *Caroline’s* test requires two important requirements:

- The need to use force is imminent, and therefore the search for peaceful alternatives is no longer an option (necessity).
- The proportionality between the response and the corresponding threat should be proportionate.

In the original Webster formulation, the necessity criterion is described as “urgent and compelling so as not to leave an opportunity for the choice of means or time for consultation and deliberation”.

Note 22. The developing danger from ISIL’s essence in Libya raised the issue of the lawful reason for past and potential future military interventions in this State. In February 2015, Egypt utilized the theory of consensual military intervention to legitimate its strikes against ISIL in Libya. On 16 February 2015, six Egyptian F16 warrior planes, in coordination with the Libyan air force, 66 propelled airstrikes against ISIL in Libya, after the decapitation by ISIL of 21 Coptic Christians from Egypt. Such States as U.S respected Egypt’s right to self-defense After Libya Airstrikes.

Note 23. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for Advisory Opinion), Advisory Opinion of 9/7/2004, p. 139.

Note 24. For example, the US, Australia, Canada and Turkey among others depended on this test to legitimize their military activity against ISIL in Syria.

Note 25. The US, Australia, Canada and Turkey among others depended on this test to legitimize their military activity against ISIL in Syria.

Note 26. Vaios Koutroulis noted “that the principle of equality of belligerents does not benefit much the rebel groups (in this case, the ISIL fighters) operating in the territory of an enemy state”. Even when the attack by the rebels is directed against a military objective, lawful as this attack may be under IHL, it will still constitute a crime under national law, since IHL rules applicable in NIACs do not give to non-state actors a right to participate in hostilities. In other words, the state does not really suffer any severe consequences from “exposing” itself to IHL and the equality of belligerents’ principle rather than “shielding” itself from it. This is not to say that the application of IHL may not have any consequence whatsoever.