Chapter §

# Jus ad Bellum: nuclear weapons and the inherent right of self-defence

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## Abstract

The lawfulness of a State’s recourse to the ‘nuclear option’ as a means of self-defence is still a discussion which, sits uncomfortably amongst most scholars, partly, because the seminal advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* delivered by the International Court of Justice in 1996 remains shrouded in legal uncertainty and, perhaps more importantly, because the threshold needed to lawfully invoke the doctrine of self-defence is set so high, and rightly so. Only under exceptional circumstances would a State meet the cardinal requirements of ‘necessity’ and ‘proportionality’. The use of a nuclear weapon as a means of self-defence lies at the very edge of the spectrum. That is not to say that recourse to conventional weapons automatically fulfils the necessity and proportionality requirements.

## Keywords

Necessity, Proportionality, Conventional Weapons, Nuclear Weapons, Self-defence

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# §.1 Introduction

The purpose of this Chapter is to examine at what point, and under what circumstances, a State is lawfully permitted to defend itself with nuclear weapons. Broadly speaking, there is no paucity of literature on the more general discussion of ‘at what point’[[2]](#footnote-2) but the more specific question of ‘under what circumstances’ has been neglected. Consequently, the Chapter will address the specifics and also assess the issue of a State using a threat of force as a means of self-defence—deterrence *par excellence*. Part §.2 will consider the right of self-defence under international law and the parameters that govern it. Part §.3 will specifically address how the ‘nuclear option’ fits within the overarching framework of self-defence. Part §.4 will consider the practice of deterrence—one State threatening another State with a nuclear attack as a means of self-defence—the lawfulness of such action will be assessed.

# §.2 The Law Governing Self-Defence

A State’s right of self-defence under international law is an area that continues to be attract regular scholarly scrutiny.[[3]](#footnote-3) Moreover, the perennial question concerning whether or not the present Charter regime (embodied under Article 51) overrides previous customary law is as present in the literature today as it ever has been.[[4]](#footnote-4) Given that this area is a ‘subject in itself’, the discussion in *this* Chapter will remain confined to examining the main parameters required to calibrate a lawful response of self-defence.

Article 2(4) of the United Nations Charter contains an absolute prohibition against the threat or use of force by one State against another. Academic opinion is divided however with regards to the status of Article 2(4)—there are those who deem that the prohibition has peremptory status—a violation of Article 2(4) equates to a violation of a *jus cogens* norm.[[5]](#footnote-5) Others, however, disagree that this conclusion should be adopted without question.[[6]](#footnote-6) Nevertheless, the effect of the prohibition contained in Article 2(4) is tempered alongside the ‘positive duty’ contained in Article 2(3)—that States settle their disputes via peaceful means.

Undoubtedly, there exist two well-known exceptions: the use of force in self-defence and an authorisation of force by the United Nations Security Council under its Chapter VII powers.[[7]](#footnote-7) For the purpose of this Chapter and indeed this overall discussion the focus is entirely on the first exception—self-defence.

### *§.2.1 Self-Defence as it Stands Today*

Today’s ‘regime’ governing the lawful invocation of self-defence lies partly in pre-existing customary international law (pre-Charter) and primarily of course in the text of Article 51 of the United Nations Charter. [[8]](#footnote-8) Compliance with Article 51 means that a State can only invoke its right of self-defence if it has suffered an ‘armed attack’—or as a minimum, be faced with a sufficiently serious and imminent threat of suffering an armed attack.[[9]](#footnote-9) Regrettably, Article 51 provides no further guidance as to what form an armed attack may take. However, the ICJ in the *Nicaragua* case[[10]](#footnote-10) and commentators both concur that an ‘armed attack’ constitutes ‘the most grave form of the use of force’—a qualitatively grave use of force—beyond a use of force simpliciter.[[11]](#footnote-11)

### *§.2.2 Necessity, Proportionality and the Cessation of Force*

The cardinal parameters of necessity and proportionality regulate the lawfulness of a State’s subsequent response. Necessity and Proportionality are grounded within customary international law as espoused in the well-trodden correspondence between the then US Secretary of State Daniel Webster, and his British counterpart Lord Ashburton with regards to and forming part of the *Caroline* incident.[[12]](#footnote-12) Daniel Webster’s formulation required that the following must be satisfied in order for a State to lawfully invoke self-defence:

[S] how a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that . . . [it] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.

Inherent within this Statement are the inextricably linked principles of necessity and proportionality.[[13]](#footnote-13) The current interpretation of necessity is two-fold: 1) the State must demonstrate that it exhausted all non-forcible measures[[14]](#footnote-14) and 2) it would be wholly unreasonable to expect the responding State to attempt a non-forcible response.[[15]](#footnote-15) In essence, necessity is a concept of last resort. Compliance with the principle of Proportionality requires that the ‘force employed must not be excessive with regard to the goal of abating or repelling the attack’.[[16]](#footnote-16) As Green and Grimal note, a State’s response need not ‘mirror’ the initial attack numerically speaking. For example, if State A fires 10 missiles at State B, State B is not constrained or confined to respond in kind—providing the force is not excessive in abating or repelling the attack.[[17]](#footnote-17)

At this point, it is perhaps useful to draw a distinction between the lawfulness of a defending states’ action taken during an on-going armed attack—the so called ‘cumulative effect’ (as coined by Garwood Gowers[[18]](#footnote-18)) and instances whereby force is used once the armed attack has ceased. In the context of the former, the position, according to Green, is that the responding state is placed under a temporal restriction—there must be a reasonable temporal proximity between the victim state’s response and the armed attack itself.[[19]](#footnote-19) Green is the first to concede that the ‘reasonableness’ parameter is somewhat nebulous, and is certainly open to interpretation along the lines of “a context-specific appraisal of the various factors that may delay a self-defence action: intelligence gathering, initial resort to negotiation, geographical disparity, and so on”.[[20]](#footnote-20) Broadly speaking, an ‘overly tardy’ response in Green’s view, would negate the necessity requirement and thus may render the action unlawful.[[21]](#footnote-21)

In the context of the latter (when force is used once the armed attack has occurred) it would be incorrect to set out so categorically that a ‘defending State’ must ‘cease and desist’—a forceful response against a non-attacker would no longer fall within the realm of necessity and would push the State’s behaviour into the unlawful territory or reprisals. Rather, there is certainly the notion that to a limited degree, states can extend “their response in self-defence beyond the moment where the attack being responded to terminated”.[[22]](#footnote-22) Moreover, as Green and Garwood—Gowers independently suggest, there is sense that there exists a ‘dual’ or ‘cumulative affect’ argument whereby a state not only needs to respond to the previous attack but be guarded against a future attack.[[23]](#footnote-23)

Before considering the lawfulness of a nuclear response in the section below, it is worth briefly considering the position as to whether it would be lawful to target nuclear facilities in self-defence. The argument ‘in favour’ of such action would presumably be grounded on the basis that such an attack is less ‘destructive’ and is a more realistic military option for a NNWS.[[24]](#footnote-24) Arman Sarvarian has covered this very question in some considerable detail in a recent article; so instead, the broad conclusions of the question will be outlined.[[25]](#footnote-25) State practice, endorsed by Sarvarian in his analysis undeniably rejects the possibility that self-defence can ever be employed to justify such an attack.[[26]](#footnote-26) Sarvarian draws our attention to two specific instances: the Cuban Missile Crisis (where nuclear warheads were deployed) and the Osirak attack (an attack against civilian nuclear facilities) and their subsequent state practice is used to underpin his analysis of a hypothetical attack by Israel against Iran.[[27]](#footnote-27)

For the purposes of this Chapter, the Iranian question so to speak will be avoided. Sarvarian himself concludes that action by Israel against Iran would be unlawful—primarily on the grounds that mere possession of nuclear weapons alone does not constitute an unlawful threat of force in violation of Article 2(4) and much less, that of ‘armed attack’. Sarvarian’s overall conclusion is that the rather hazardous nature of an attack against either deployed warheads or a civilian nuclear facility in terms of potential fallout, has led states to adopt “an especially cautious and restrictive interpretation of the temporal scope of self-defence”.[[28]](#footnote-28) Nevertheless, that does not necessarily and categorically, rule out the lawfulness in each and *every* instance. If, a state’s possession of nuclear weapons is combined with bellicose rhetoric that goes beyond mere sabre rattling, it’s behaviour may well fall within the remit of Article 2(4) and constitute an unlawful threat of force in turn potentially giving rise to anticipatory action.[[29]](#footnote-29)

# §.3 A Nuclear Response?

When it comes to assessing the lawfulness of self-defence via the ‘red button’ the difficulty lies in the inherent nature of the nuclear weapons themselves. The destructive nature of the payload invariably shifts the perspective both in terms of when such a response would be deemed necessary and, under what circumstances it would be deemed proportionate. Moreover, if State A attacks State B with 10 MOABs (GBU-43/B Massive Ordnance Air Burst—one of the most powerful ‘conventional’ ordnances) would State B lawfully be entitled to respond with a compact, low yield nuclear option which, has exactly the same destructive capacity?

Such a discussion is little aided or abetted by the ICJ’s seminal *Advisory Opinion* and the subsequent scholarly discussion centred on the ‘known unknowns’—the Court allowing a nuclear response under ‘exceptional circumstances’ without defining precisely what that entails.[[30]](#footnote-30) Paragraph 105(2) of the Advisory Opinion left open the possibility of self-defence under extreme/exceptional circumstances but neither the Court nor the literature addressed the ‘devil in the detail’.[[31]](#footnote-31) Indeed, as President Bedjaoui famously professed, ‘the *Advisory Opinion* does no more than place on record the existence of legal uncertainty’.[[32]](#footnote-32)

In the words of Sheldon, the Court was forthright it its avoidance of providing specific examples of when a State’s use of nuclear weapons would comply with the threshold parameters contained in Article 51.[[33]](#footnote-33) Indeed, as Greenwood notes and the Court pronounced, ‘the right of self-defence under Article 51 of the Charter was subject to the limitations of proportionality and necessity’—the proportionality element in particular is crucial to such a discussion.[[34]](#footnote-34) Gardam adopts a similar view of the Court’s pronouncement and notes the rather unhelpful discussion of proportionality—States must consider the unique nature of nuclear weapons when determining if a response is necessary and proportionate.[[35]](#footnote-35) The overwhelming consensus therefore within the literature is that for a nuclear response to have the slightest chance of being deemed lawfully, it must cross the well-trodden thresholds of necessity and proportionality.[[36]](#footnote-36) In effect, academic consensus goes much further—not only are those threshold parameters very difficult to lawfully ‘trigger’[[37]](#footnote-37), but really, it is only under exceptional circumstances that such action (a nuclear response) could ever be lawfully envisaged.[[38]](#footnote-38)

The purpose of this Part is to address the practical lacunae by reference to two practical if somewhat far-fetched hypothetical examples. This allows a more forensic approach to establish in concrete terms the precise nature of the ‘exceptional circumstances’ the Court hinted at in paragraph 105(2).[[39]](#footnote-39) As noted in Part §.2, necessity is the exhaustion of all non-forceful measures and for a response to be proportionate, it must not be excessive in abating or repelling the attack (while noting that a mirrored/identical numerical response is not a pre-requisite and is linked to defensive necessity).[[40]](#footnote-40)

### *§.3.1 Analysis*

In terms of the necessity element, if a State waits until it has actually suffered a nuclear ‘armed attack’, chances are, it will no longer be in a position to defend itself. Therefore, a reasonable interpretation of necessity would be along the *Caroline Incident* lines.[[41]](#footnote-41) In practical terms, once the missiles are either in the ‘free flight phase’ or ideally at the ‘boost phase’ (although it is difficult to determine exact trajectory in this phase) any response would fall within the realm of necessity. In other words, a State is acting anticipatorily—something that the Court in *Nicaragua* did not dismiss outright in paragraph 35 and, of course, if one accepts a more general right of anticipated self-defence under international law.[[42]](#footnote-42) A response under those set of circumstances against a nuclear launch (boost phase or free flight) would arguably fall within the necessity requirement.

Such a discussion is of course incomplete without interacting with the issue of what is understood by ‘imminence’ and clearly to note that it means different things to different commentators.[[43]](#footnote-43) And indeed, and as noted by Green few commentators if any, have actually provided definitive guidance.[[44]](#footnote-44) Nevertheless, both Lubell and Green seemingly agree that in order for imminence to be triggered, there must be “a *specific* and *identifiable* threat, which is *highly likely* to occur” and there must be “an objectively verifiable, concretely imminent attack”.[[45]](#footnote-45) In other words, it must effectively fall somewhere “between 1) absolute certainty of a future attack (which is impossible); and 2) a threat that is not specific, objectively verifiable and already being prepared (which would thus not be sufficiently ‘imminent’)”.[[46]](#footnote-46)

The greatest difficulty lies instead with satisfying the proportionality element. The use of a nuclear response must not be excessive in abating or repelling the attack—a State may be able to defend itself and repel a future attack without necessarily ‘wiping the other State off the map’. This is something that this Part will consider in more detail by way of two practical and highly hypothetical scenarios.

**Scenario 1**

The United Kingdom launches an unprovoked nuclear attack (using the Trident option) against State B, noting, that the UK’s ‘nuclear option’ is solely vested in its Vanguard Trident-Class submarines.[[47]](#footnote-47) Leaving all obvious criticisms aside, a perverse interpretation of proportionality would dictate that following such an attack, State B would be constrained into repelling a future attack i.e. defending itself, simply by nullifying the submarines (admittedly of which, there are not many). Therefore, one could conceivably argue that only an attack against the UK submarines would be a proportionate response. This last comment needs further clarification. Clearly, this would be under a perverse, overly restrictive and inaccurate interpretation of proportionality whereby, the ‘response’ would be limited to neutralising the submarines—something that would be both undesirable and impractical.

If we take this rather unlikely scenario a stage further, the key issue vis-a-vis proportionality is *really* to consider the abatement of a subsequent attack—once the initial attack is underway, a responsive attack will not stop it. However, if the UK’s nuclear strike has inflicted mass destruction on State B, then inflicting similar destruction on the UK may be the *only* way to convince the UK in refraining from another launch. Moreover, one would have to take a pragmatic view that one of the submarines may ‘escape’ and therefore the risk of a second attack against State B remains present. Under this analysis, a direct territorial attack may not be deemed excessive.

**Scenario 2**

The UK’s entire land based conventional capabilities are crippled by a ‘conventional’ armed attack, which, has taken out all defensive capabilities—a territorial attack. The UK’s only means of defending itself i.e. repelling or abating a further attack is to have recourse to the four Vanguard-Class submarines who can exercise the ‘Trident option’. The necessity elements are seemingly satisfied: this is a last resort option and there are no alternatives. However, given the intertwined nature of necessity and proportionality (proportionate to the defensive necessity is also there), it would certainly repel/abate any future attack but on the other hand, wiping that State off the face of the map might be deemed ‘excessive’. The question then becomes does the defensive necessity negate the slightly ‘disproportionate’ element?

The natural inclination is to conclude that wiping a State off the face of the map is more than likely to be disproportionate. Moreover, the ICJ’s *Advisory Opinion* again offers little concrete guidance and patently acknowledges that it “cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”.[[48]](#footnote-48) However, it is possible to distinguish between such an extreme use (obliterating an entire State) which is clearly disproportional, and one, which is more localised in terms of its effect*.* For example, the dropping of the two atomic bombs over Hiroshima and Nagasaki in World War Two were undoubtedly massively destructive but Japan was not obliterated (in the ‘complete’ sense).[[49]](#footnote-49) This is of course very much open to criticism and not without it’s detractors.[[50]](#footnote-50) Gazzini in particular argues that the necessity element of self-defence had not been fulfilled—Japan’s defeat was imminent and there were still other means available.[[51]](#footnote-51) Nonetheless, Singh in his article leaves the door ajar for the use of a nuclear weapon in self-defence when conventional weapons are ineffective.[[52]](#footnote-52) If one accepts the rather controversial view as espoused by Truman[[53]](#footnote-53)—that is to say that Japan’s defeat was not *fait accompli* and that conventional weapons were unlikely to yield surrender, then Singh’s position would seemingly allow this more ‘localised’ use of nuclear weapons. One must also stress that it may well be undesirable to discuss the lawfulness of the attacks on Hiroshima and Nagasaki in the sense that hostilities had already started which, would render this discussion within the realms of International Humanitarian Law / Jus in bello as espoused in the *Shimoda* Case.[[54]](#footnote-54)

### *§.3.2 Application*

Returning to the question posed at the outset of this Part: if State A attacks State B with 10 MOABs (GBU-43/B Massive Ordnance Air Burst—one of the most powerful ‘conventional’ ordnances) would State B be lawfully entitled to respond with one compact, low yield nuclear option which, has exactly the same destructive capacity? In other words, would a more limited (albeit still massively destructive) use may be able to meet the proportionality threshold?

Clearly if State B has no other military capabilities aside from the nuclear weapon (highly unlikely and most likely moot) then a nuclear response might be both necessary and proportionate. The objection within the literature to such a scenario is firmly on the application of proportionality.[[55]](#footnote-55) For example, Gazzini views that “the so called mini-nuclear weapons” can hardly satisfy the proportionality requirement.[[56]](#footnote-56) Here one could plausibly take the view that Gazzini is also erring on the side of the IHL consideration of proportionality, which, makes a quantum type assessment between the military gain and the potential damage caused rather than the ‘abate and repel’ of the *jus ad bellum*. However, if we take Singh’s argument to its natural conclusion—that is to say that the use of nuclear weapons is *permissible* when conventional weapons are ineffective, then if a State has no other military capabilities in the first place (other than the nuclear option), the use of a nuclear weapon would indeed be lawful.[[57]](#footnote-57)

# §.4 A Threatened Nuclear Response?

Extending this discussion into the realm of State A threatening another State with a nuclear response as a means of self-defence takes the analysis to its natural conclusion. The concept of threatened self-defence is one which, has recently surfaced within the literature.[[58]](#footnote-58) Its basic premise is that a State could conceivably threaten another State with force as a means of defending itself rather than having recourse to force itself. State B warns State A that should State A choose to launch an armed attack, State B will defend itself. The reason for including such a discussion within the context of this Chapter lies with the very nature of nuclear weapons. One of the inherent purposes of possessing such a weapon is existential deterrence.[[59]](#footnote-59) Strategically, the mere possession of a nuclear weapon may deter another State from attacking it.[[60]](#footnote-60) Unfortunately, the Court chose not to entertain such a discussion.[[61]](#footnote-61) Judge Shi’s remarks echoed the overall view taken by the Court that deterrence was a political doctrine rather than a legal one—a perhaps all too convenient policy view.[[62]](#footnote-62)

In March 2013 North Korea threatened to defend itself with nuclear weapons if attacked.[[63]](#footnote-63) This final Part of the Chapter will therefore examine this type of threat and assess whether the parameters discussed in Part §.3 would remain the same if a State chose to threaten another State with a nuclear response as means of self-defence. In order to undertake such a discussion it is necessary to briefly set out and define what is meant by a threat of force. However, such analysis will be relatively brief as this issue has been covered elsewhere in the literature. Rather the focus will be on the analytical section in terms of assessing under what circumstances a threatened nuclear strike as a means of self-defence would be deemed lawful.

### *§.4.1 Threats of Force*

Threats of force are strictly prohibited by Article 2(4) of the United Nations Charter, but the precise definition of a threat is one remains very much undefined. Commentators broadly accept that a threat is not confined to classical verbal ultimate—actions can also ‘speak louder than words’… The author of this Chapter maintains both here and elsewhere, that a full assessment of a threat of force cannot be conducted without reference to strategic considerations.[[64]](#footnote-64) Strategic considerations help explain the practical distinction between an empty threat—made by a State which does not possess the means of carrying it out (which out may well violate Article 2(4) but is ‘tolerated’) and, a threat which is all too ‘real’.[[65]](#footnote-65) The threatening State is militarily capable of carrying out its threat and the threat itself is both unlawful under Article 2(4) and intolerable in the eyes of the international community.[[66]](#footnote-66)

### *§.4.2 Legal Analysis*

The current test for determining the lawfulness of a threat of force, was articulated by the ICJ in the *Nuclear Weapons* advisory opinion[[67]](#footnote-67) and poses a retroactive test to the following hypothetical question. *If* the threat of force were carried out (in other words actual force and not threatened force were to be used) would that be lawful? If yes, that would legitimise the prior threat. If not, (actual force would be deemed unlawful) then so would the threat that precedes it.

The other issue to contend with is whether one can simply transpose the tapestry of necessity and proportionality from ‘traditional self-defence and apply them to an instance of threatened self-defence (or in this case, threatened nuclear self-defence). Opinion remains divided on this precise issue. While Green and Grimal both maintain that because a threat of self-defence has a different practical consequence (there is no *actual* force), it should therefore be treated differently, Roscini take an opposing view.[[68]](#footnote-68) For the purposes of reconciliation—at least in this Chapter, one could view that a threat of self-defence would have to be made in response to either an armed attack or a threatened armed attack which is *imminent* in nature.[[69]](#footnote-69)

With regards to necessity and proportionality the necessity requirement is the most difficult to satisfy as it creates a paradox—“it may well be necessary to threaten force when it is not necessary to use it”.[[70]](#footnote-70) Equally, the necessity to use force is only available if there are no other non-forcible measures available (such as a threat of force...).[[71]](#footnote-71) The solution? To interpret necessity along the lines of reasonableness or last resort.[[72]](#footnote-72) Proportionality is less problematic. For a threat to be proportionate, it must pose an effective deterrent—to stop or repel a future attack).[[73]](#footnote-73)

### *§.4.3 Application*

The North Korean example cited above is a useful example as it deals specifically with the declared concept of a nuclear attack. However, in order to make the analysis more plausible, it is preferable to use a neutral example. State A could threaten State B with a nuclear attack as a means of self-defence if State B had launched a prior conventional armed attack providing that a nuclear threat was the only reasonable means of deterring State B from continuing that attack.[[74]](#footnote-74) If it was reasonable, it would satisfy the necessity threshold and even if such a threat would not be commensurate, it would nonetheless fall within the parameter of proportionality.[[75]](#footnote-75)

# §.5 Conclusion

This Chapter has sought to re-dress an arguable deficiency within the literature—namely, the exact point at which a State can lawfully respond with recourse nuclear weapons with reference to practical examples. In conclusion, under certain limited circumstances, as set out in Part §.3, a nuclear response as a means of self-defence may indeed be possible. Furthermore, Part §.4 has extended the discussion to include the very real possibility of a threatened nuclear attack as a means of self-defence. Despite the brinkmanship of the Cold War, and in more recent times, posturing by States (albeit in terms of a ‘latent’ threat since they do not possess weapons capability) such a discussion on the lawfulness of a ‘nuclear response’ remains thankfully ‘hypothetical’.

# References

Alexandrov SA (1996) Self-defense against the use of force in international law, Kluwer Law International, The Hague, London

Antonopoulos C (2008) Force by armed groups as armed attack and the broadening of self-defence, Neth. Int’l L. Rev 55:159-180

Badr GM (1980) The exculpatory effect of self-defense in State responsibility, Ga. J. Int'l & Comp. L. 10:1-28

Bodansky D (1999) Non-liquet and the incompleteness of international law. In Boisson de Chazournes L and Sands P, eds, International law, the International Court of Justice and nuclear weapons, Cambridge University Press, pp. 153-170

Bowett D (1958) Self-defence in nternational law, Manchester University Press, Manchester

Brownlie I (1963) International law and the use of force by States, Oxford University Press, Oxford

Byers M (2003) Preemptive self-defense: hegemony, equality and strategies of legal change, Journal of Political Philisophy 11:171-190

Constantinou A (2000) The right of self-defence under customary international law and article 51 of the united nations charter, Ant. N. Sakkoulas; Bruylant, Athènes Bruxelles

Dinstein Y (2012) War aggression and self-defence, Cambridge University Press, Cambridge

Falk R (1965) The Shimoda case: a legal appraisal of the atomic attacks upon Hiroshima and Nagaasaki, AJIL 59.

Falk R (1997) Nuclear weapons, international law and the world court: a historic encounter, AJIL 91 pp.64-75

Gardam J (1999) Proportionality and necessity in the nuclear weapons case. In edited by Boisson de Chazournes and P Sands, International Law, the International Court of justice and Nuclear Weapons Cambridge University Press, pp.275-292

Gardam J (2004) Necessity, proportionality and the use of force by States, Cambridge: Cambridge University Press

Garwood-Gowers A (2004) self-defence against terrorism in the post-9/11 world, Vol 4 No 2 (QUTLJJ)

Gazzini T (2005) The changing rules on the use of force in international law, Manchester University Press, Manchester

Gray C (2008) International law and the use of force, Oxford University Press, Oxford

Green JA (2006a) Docking the Caroline: understanding the relevance of the formula in contemporary customary international law concerning self-defense, Cardozo J. Int'l & Comp. L. 14:429-480

Green JA (2006b) Docking the Caroline: understanding the relevance of the formula in contemporary customary international law concerning self-defense, Cardozo J. Int'l & Comp. L. 14:429-480

Green JA (2009a) Fluctuating evidentiary standards for self-defence in the international court of justice, International & Comparative Law Quarterly 58:163-178.

Green JA (2009b) The international court of justice and self-defence in international law, Hart Publishing, Oxford

Green JA (2010) Questioning the peremptory status of the prohibition of the use of force, Mich. J. Int'l L. 32:215-257

Green JA, and Grimal F (2011) The threat of force as an action in delf-Defense under international Law, The, Vand. J. Transnat'l L. 44:285-329

Green JA (2015) The *ratione temporis* elements of self-defence’ (forthcoming, 2015) Journal on the Use of Force and International Law, issue 2(1).

Greenwood C (1999) Jus ad bellum and jus in bello in the nuclear weapons advisory opinion. In edited by Boisson de Chazournes and P Sands, International Law, the International Court of justice and Nuclear Weapons Cambridge University Press, pp.247-266

Greig D (1991) Self-defence and the security council: what does article 51 require? International & Comparative Law Quarterly 40: 366-402

Grimal (2012) Threats of force: international law and strategy, Routledge, Abingdon

Kennedy P, and Andreopolous GJ (1994) The laws of war: some concluding reflections. In edited by Michael Howard, George Andreopoulos and Mark R Shulman,The Laws of War, Yale University Press pp 414-227

Kretzmer D (2005) Killing of suspected terrorists: extra judicial executions or legitimate means of defence?, Eur. j. int’l l. 16:171-212

Lubell, N (2015) The problem of imminence in an uncertain world’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press pp 697-720

Martinez L (2003) September 11th, Iraq and the doctrine of anticipatory self-defense, UMKC L. Rev. 72:123-182

Murphy S (2005) Doctrine of preemptive self-defense, the symposium: brave new world: U.S. responses to the rise in international crime, Vill. L. Rev. 50:699-748

Orakhelashvili A (2006) Peremptory norms in international law, Oxford University Press, Oxford

Pierson C (2004) Preemptive self-defense in an age of weapons of mass destruction: Operation Iraqi Freedom, Denv. J. Int'l L. & Pol'y 33:150-178

Rein Mullerson (1999) On the relationship between jus ad bellum and jus in bello in the general assembly advisory opinion. In edited by Boisson de Chazournes and P Sands,International Law, the International Court of justice and Nuclear Weapons pp-267-274

Roberts A (1994) Land warfare from Hague to Nuremberg. In edited by Michael Howard, George Andreopoulos and Mark R Shulman,The Laws of War, Yale University Press pp116-139

Rockefeller M (2004) Imminent threat requirement for the use of preemptive military force: is it time for a non-temporal standard, The 2004 Sutton Colloquium: 2003-2004 Leonard V.B. Sutton Award, Denv. J. Int'l L. & Pol'y 33:131-149

Roscini M (2007) Threats of armed force and contemporary international law, Neth. Int’l L. REV:45 229-274

Ruys T (2010) 'Armed attack' and article 51 of the UN charter : evolutions in customary law and practice, Cambridge : Cambridge University Press, Cambridge

Sadoff D (2009) Striking a sensible balance on the legality of defensive first strikes, Vand. J. Transnat'l L. 42:441-500

Sarvarian A (2014) The lawfulness of a use of force upon nuclear facilities in self-defence, Journal on the Use of Force and International Law, issue 1(2)

Sheldon JM (1996) Nuclear weapons and the laws of war: does customary international law prohibit the use of nuclear weapons in all circumstances? Fordham International Law Journal 20: 181-261

Singh N (1956) The Right of Self-Defence in Relation to the Use of Nuclear Weapons, Indian Yearbook Int. Affairs 5. 3-37

Spierman O (1999) Lotus and the double structure of international legal argument. In edited by Boisson de Chazournes and P Sands,International Law, the International Court of justice and Nuclear Weapons Cambridge University Press, pp.131-152

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2. *See* *infra* note **25**. Noting this chapter will confine itself to solely discussing the *jus ad bellum* and not the *jus in bello*. [↑](#footnote-ref-2)
3. *See* more recently, Green 2015; [Sadoff 2009](#_ENREF_36); [Green 2009a](#_ENREF_17); [Green 2006a](#_ENREF_15); [Murphy 2005](#_ENREF_28); [Rockefeller 2004](#_ENREF_33); [Pierson 2004](#_ENREF_30); [Martinez 2003](#_ENREF_27); [Byers 2003](#_ENREF_7). [↑](#footnote-ref-3)
4. *See* generally, [Gray 2008.](#_ENREF_14)  [↑](#footnote-ref-4)
5. [Orakhelashvili 2006.](#_ENREF_29)  [↑](#footnote-ref-5)
6. [Green 2010](#_ENREF_19). [↑](#footnote-ref-6)
7. On this, we can note Green 2015 who refers to the International Law Commission, *Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, included in the Report of the International Law Commission, 53rdsession, UN Doc A/56/10, 2001, Chapter IV, www.un.org/documents/ga/docs/56/a5610.pdf, Commentary to Article 22, 177 (‘the existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is *undisputed*’, emphasis added). [↑](#footnote-ref-7)
8. [Green and Grimal 2011,](#_ENREF_20) p. 299. [↑](#footnote-ref-8)
9. [Greig 1991,](#_ENREF_22)  pp. 366-402. [↑](#footnote-ref-9)
10. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 *I.C.J*. 14, para 191. [↑](#footnote-ref-10)
11. [Green and Grimal 2011](#_ENREF_20), p. 300, see also [Constantinou 2000.](#_ENREF_8)  [↑](#footnote-ref-11)
12. Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), in 29 *British and Foreign State Papers* (1841–1842), pp 1129–1139 (1857). [↑](#footnote-ref-12)
13. [Green and Grimal 2011,](#_ENREF_20) p. 300 and *see* generally [Green 2006b.](#_ENREF_16)  [↑](#footnote-ref-13)
14. Green and Grimal 2011. [↑](#footnote-ref-14)
15. *Id.* p. 301. [↑](#footnote-ref-15)
16. [Constantinou 2000,](#_ENREF_8)  pp. 159-161, [Badr 1980,](#_ENREF_3) pp. 25-26, [Kretzmer 2005,](#_ENREF_26) pp. 187-188. [↑](#footnote-ref-16)
17. [Green and Grimal 2011,](#_ENREF_20) p. 301 and also Judge Higgins’s Dissenting Opinion, para 5, p. 583 in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). [↑](#footnote-ref-17)
18. *See generally* Garwood-Gowers 2004. [↑](#footnote-ref-18)
19. See Green 2015 in his conclusion. [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.* And, as helpfully signposted by the anonymous reviewer, this would cover ‘Crimea-type’ scenarios whereby the ‘defending state’ has since been occupied. [↑](#footnote-ref-22)
23. *Id.* and see note 17. [↑](#footnote-ref-23)
24. I am grateful to the anonymous reviewer for this observation / question. [↑](#footnote-ref-24)
25. Savarian 2014, pp. 247-273. [↑](#footnote-ref-25)
26. *Id.* p. 271. [↑](#footnote-ref-26)
27. *Id.* [↑](#footnote-ref-27)
28. *Id.* [↑](#footnote-ref-28)
29. *See generally* Grimal 2012, in Chapter 5. [↑](#footnote-ref-29)
30. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). [↑](#footnote-ref-30)
31. [Bodansky 1999,](#_ENREF_4)  p. 153. [↑](#footnote-ref-31)
32. *See* the declaration of President Bedjaoui in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) para whose view was supported by Judges Schwebel and Higgins in their dissenting opinions. [↑](#footnote-ref-32)
33. [Sheldon 1996,](#_ENREF_37)  p.184. [↑](#footnote-ref-33)
34. [Greenwood 1999,](#_ENREF_21) pp. 258-263. [↑](#footnote-ref-34)
35. [Gardam 1999,](#_ENREF_11) p. 286. [↑](#footnote-ref-35)
36. See also [Rein Mullerson 1999,](#_ENREF_31) pp. 267-270; [Spierman 1999,](#_ENREF_39) p. 148. [↑](#footnote-ref-36)
37. *See* *generally* [Alexandrov 1996](#_ENREF_1); [Bowett 1958](#_ENREF_5); [Ruys 2010](#_ENREF_35); [Green 2009b.](#_ENREF_18)  [↑](#footnote-ref-37)
38. *See generally* [Gardam 2004](#_ENREF_12); [Green and Grimal 2011.](#_ENREF_20)  [↑](#footnote-ref-38)
39. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). [↑](#footnote-ref-39)
40. See *supra,* Part §.2. [↑](#footnote-ref-40)
41. *See* *supra,* Part §.2. [↑](#footnote-ref-41)
42. *See* for example, [Antonopoulos 2008](#_ENREF_2). [↑](#footnote-ref-42)
43. Dinstein (2012) at pp 203-204 Dinstein refers to ‘interceptive self-defence’. [↑](#footnote-ref-43)
44. *See generally* Green 2015 who refers back to Lubell (2015) p. 702 [↑](#footnote-ref-44)
45. *Id.* at pp 702-705. [↑](#footnote-ref-45)
46. Green 2015 and Lubell 2015. [↑](#footnote-ref-46)
47. <https://www.gov.uk/government/policies/maintaining-an-effective-independent-nuclear-deterrent> Accessed January 29th 2015. [↑](#footnote-ref-47)
48. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), paragraphs 90-97. [↑](#footnote-ref-48)
49. The author is grateful for a helpful discussion with James A. Green on this point. [↑](#footnote-ref-49)
50. For a full discussion on the lawfulness of action in Hiroshima and Nagasaki, please see [Gazzini 2005,](#_ENREF_13) p. 219; [Falk 1997,](#_ENREF_10) p. 69; [Falk 1965,](#_ENREF_9) p. 759. On the point concerning the devastating nature of the use of atomic weapons, see [Roberts 1994,](#_ENREF_32) pp. 131-132. The above literature is quick to note that Japan was not far off from being defeated, and that the use of atomic weapons was ‘unnecessary’ in the strict sense. [↑](#footnote-ref-50)
51. Gazzini 2005, p. 219. [↑](#footnote-ref-51)
52. [Singh (1956),](#_ENREF_38) pp. 32--34. [↑](#footnote-ref-52)
53. See [Kennedy and Andreopolous 1994,](#_ENREF_25) pp. 217-218. Again, I am grateful to the annyomous reviewer for this jelpful observation. [↑](#footnote-ref-53)
54. Shimoda Case (Compensation claim against Japan brought by the residents of Hiroshmina & Nagasaki), Tokyo District Court, 7 December 1963. Again, I am grateful to the anonymous reviewer for this helpful observation. [↑](#footnote-ref-54)
55. [Gazzini (2005),](#_ENREF_13) p. 219. [↑](#footnote-ref-55)
56. *Id.* [↑](#footnote-ref-56)
57. [Singh (1956),](#_ENREF_38) pp. 32-34. [↑](#footnote-ref-57)
58. See, for example, [Grimal 2012](#_ENREF_23). [↑](#footnote-ref-58)
59. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para 47 [↑](#footnote-ref-59)
60. [Grimal (2012),](#_ENREF_23) p. 61 and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para 47. [↑](#footnote-ref-60)
61. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para 47 [↑](#footnote-ref-61)
62. Judge Shi’s dissenting opinion in the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, [↑](#footnote-ref-62)
63. <http://www.reuters.com/article/2013/03/07/us-korea-north-attack-idUSBRE9260BR20130307> Accessed January 29th 2015. [↑](#footnote-ref-63)
64. [Grimal (2012),](#_ENREF_23) p. 61 [↑](#footnote-ref-64)
65. *Id.* [↑](#footnote-ref-65)
66. *Id.* [↑](#footnote-ref-66)
67. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para 47; [Brownlie (1963),](#_ENREF_6) 63; [Grimal 2012;](#_ENREF_23)  see the Introduction and Chapters 2 and 4 of Grimal 2012. [↑](#footnote-ref-67)
68. [Green and Grimal 2011](#_ENREF_20); [Roscini 2007,](#_ENREF_34) p. 245. [↑](#footnote-ref-68)
69. [Green and Grimal 2011,](#_ENREF_20) p. 321. [↑](#footnote-ref-69)
70. [*Id*.](#_ENREF_20) at p.322. [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. *Id.* [↑](#footnote-ref-72)
73. *Id.* atp. 324. [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. *Id.* [↑](#footnote-ref-75)