

The 2010 United States National Security Strategy and the Obama Doctrine of 'Necessary Force'

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Abstract

On 27 May 2010 President Barack Obama released his administration's first National Security Strategy. After the controversial nature of his predecessor's Strategies of 2002 and 2006 where the Bush doctrine of self-defence was advanced, President Obama's was a notable publication. However, as this article argues, of more significance was the formal enunciation in this document of what is described here as the Obama doctrine of 'necessary force'. Whilst the two arms of the Bush doctrine, that is, pre-emptive self-defence and the 'harbouring' standard of attribution, failed to find a place within the *jus ad bellum* during the Bush presidency, President Obama has apparently continued to endorse them. Furthermore, the doctrine of 'necessary force' has incorporated unilateral forcible humanitarian intervention under what appears to be a revised version of the 'just war' doctrine. Indeed, whilst invoking the 'standards' governing the resort to force and the concepts of 'necessity' and 'last resort', the Obama doctrine, this paper argues, is more vague and open to unilateral possibilities than the Bush doctrine and ultimately cannot be reconciled with the contemporary limits imposed by the *jus ad bellum*. Furthermore, it invokes 21st century security threats in a rejection of the contemporary regime regulating the use of force.

Keywords: pre-emptive self-defence, harbouring standard of attribution, humanitarian intervention, Obama doctrine, US National Security Strategy, necessity, *jus ad bellum*

1. Introduction

The previous incumbent of the White House, President George W. Bush, was clear in occasionally dramatic terms when he was prepared to resort to the use of force. What became known as the 'Bush doctrine' comprised of two key elements. The first sought to expand the concept of 'imminence' in regards to the right of self-defence so as to enable the United States to exercise this right by acting 'pre-emptively'.¹ The second element was an attempted shift in the rules on the responsibility of states for the attacks of non-state actors so that there was to be 'no distinction between terrorists and those who knowingly harbour ... them'.² When the doctrine was set out neither of these elements constituted a part of the *jus ad bellum* with the former being particularly controversial. Furthermore, as this article discusses, neither subsequently found a place *lex lata* within the legal regime regulating the use of force.³

* Senior Lecturer in Law, Oxford Brookes University. This article is based upon the themes of a paper delivered at a conference held at the University of Westminster on 22 January 2010. As such the author would like to express his thanks to both the organizers and participants for their comments. Some of these themes are also found in *The Persistent Advocate and the Use of Force: The Impact of the United States Upon the Jus ad Bellum in the Post-Cold War Era* (Farnham: Ashgate, 2010) which was completed prior to the publication of the 2010 National Security Strategy.

¹ The White House, 'The National Security Strategy of the United States of America' (20 September 2002), 6, available at <http://www.commondreams.org/headlines02/0920-05.htm>. For a discussion as to the meaning of these terms see section 2 of this article.

² *Ibid.*, 5.

³ See sections 2 and 3 of this article.

Whilst since President Barack Obama took up residence in the Oval Office in 2009 there have been some notable positive shifts in policy and diplomacy, a troubling aspect of President Obama's first year in the White House has been the lack of clarity over his approach to the use of force and the permissible limits imposed by international law. This has been discernable through his response to a survey conducted by the American Society of International Law in which several questions were posed to the presidential candidates in the run-up to the elections in 2008,⁴ in a speech given at the West Point military academy on 1 December 2009,⁵ and in a speech in Oslo upon acceptance of the Nobel Peace Prize on 10 December 2009.⁶

Yet arguably the simplest and most formal way to discern a particular administration's position on the use of force is by examining its National Security Strategy. Indeed, this document outlines the major national security concerns perceived by the particular administration and how it plans to tackle them. Furthermore, the 2002 and 2006 National Security Strategies were the closest that the Bush administration came to setting out and justifying the Bush doctrine in legal terms.⁷ The 1986 Goldwater-Nichols Act requires the publication of this document by 15 June of a new administration,⁸ a deadline that President Obama failed to meet. However, he is not alone here as no administration has ever met this deadline.⁹

Nevertheless, on 27 May 2010 the White House published the Obama administration's first National Security Strategy.¹⁰ Whilst some within the media have questioned whether there is an 'Obama doctrine',¹¹ this article argues that a doctrine that could be described as 'necessary force' has emerged. Indeed, the 2010 National Security Strategy provided somewhat of a (anti-)climax to the establishment of this doctrine, firmly establishing it in following on from previous speeches given by the President, whilst offering very little expansion upon its breadth and limits. Furthermore, it is argued that although many of President Obama's initial actions whilst in the White House have been commendable and witness America trying, if not always successfully,¹² to move more in line with its international legal obligations, in many respects his position on the use of force, as witnessed most recently in the 2010 National Security Strategy, is more vague and open to unilateral possibilities than his predecessor's and ultimately cannot be reconciled with the contemporary limits imposed by the *jus ad bellum*.

In setting out these arguments, this article will be structured in the following way. It first examines in section two the notion of pre-emptive self-defence, most famously connected

⁴ 'International Law 2008 – Barack Obama', *American Society of International Law*, available at <http://www.asil.org/obamasurvey.cfm>.

⁵ 'Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan', *White House Office of the Press Secretary* (1 December 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan>.

⁶ 'Remarks by the President at the Acceptance of the Nobel Peace Prize' (10 December 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

⁷ See *supra* n. 1 and The White House, 'The National Security Strategy of the United States of America' (16 March 2006), available at <http://www.isn.ethz.ch/isn/DigitalLibrary/Publications/Detail/?ord516=OrgaGrp&ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=15462>.

⁸ See the Goldwater-Nichols Department of Defense Reorganization Act of 1986 Pub.L. 99-433.

⁹ See C. Henderson, 'The Use of Force after the "War on Terror": A Call for an Obama Doctrine', *Jurist: Legal News and Research* (29 October 2009), available at <http://jurist.law.pitt.edu/forumy/2009/10/use-of-force-after-war-on-terror-call.php>.

¹⁰ The White House, 'The National Security Strategy of the United States of America' (27 May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹¹ See, for example, 'America's Foreign Policy: Is There an Obama Doctrine?' *The Economist* (19 December 2009), 78.

¹² For example, the closure of Guantanamo Bay has yet to become a reality.

with the doctrine of President Bush but also apparently adopted by President Obama. Section three then looks at the ‘harbouring’ standard of attribution of the actions of non-state actors to states for the purposes of self-defence. This standard provided a key part of the justification for *Operation Enduring Freedom* in Afghanistan, an operation which commenced in 2001 but which officially continues today. The Bush doctrine has been much discussed and debated elsewhere and therefore neither of these sections will revisit it in any great detail.¹³ However, in order to set the Obama doctrine of ‘necessary force’ in a comparative context these elements will be briefly set out. Section four addresses a further and distinct aspect outside of the context of self-defence which can be identified as constituting a part of the Obama doctrine, that is, the use of force for humanitarian purposes. Throughout the article in setting out how the Obama doctrine of ‘necessary force’ has incorporated these elements attention will be given to the place and role of necessity in each of these areas. Furthermore, the important question of whether the United States, given its ‘superpower’ status, has had, or indeed can have, an impact upon the rules governing the use of force, will be addressed.

2. The Pre-emptive Use of Force

A. The Bush Doctrine: Attempts at Widening the Concept of ‘Imminence’

The first indication of the pre-emptive self-defence element of the Bush doctrine came in the justification for *Operation Enduring Freedom* on 7 October 2001 where, in addition to responding to the ongoing threat posed by al-Qaida and the Taliban, it was stated in its letter to the UN Security Council that the United States ‘may find that [its] self-defence requires further actions with respect to *other organizations and other states*’.¹⁴ Indeed, it was clear that on this occasion the United States was going beyond simply invoking the right of self-defence solely in regards to the perpetrator of the attacks of 11 September 2001, that is, al-Qaida, and its harbour state, Afghanistan.¹⁵ This ominous statement was given further context in the January 2002 State of the Union address (where President Bush infamously set out his ‘axis of evil’ comprising of Iraq, Iran, and North Korea)¹⁶ and the West Point military academy speech of June 2002, where it was stated that the United States must ‘be ready for pre-emptive action’ so as to ‘confront the worst threats before they emerge’.¹⁷ What came to be known as the ‘Bush doctrine’ finally took formal shape in the 2002 National Security Strategy where it was again asserted that the United States reserved the right to exercise its ‘right of self-defence by acting pre-emptively’.¹⁸

¹³ See, for example, R. Falk, ‘What Future for the UN Charter System of War Prevention’, (2003) 97 *AJIL* 590; R.N. Gardner, ‘Neither Bush Nor the “Jurisprudes”’, (2003) 97 *AJIL* 585; A.D. Sofaer, ‘On the Necessity of Pre-emption’, (2003) 14 *EJIL* 209; J. Brunnée and S. Toope, ‘The Use of Force: International Law and Iraq’, (2004) 53 *ICLQ* 785; C. Henderson, ‘The Bush Doctrine: From Theory to Practice’, (2004) 9 *JCSL* 3; M. Sapiro, ‘Iraq: Shifting Sands of Preemptive Self-Defense’, (2003) 97 *AJIL* 599; C. Gray, ‘The US *National Security Strategy* and the New “Bush Doctrine” on Preemptive Self-Defense’, (2002) 1 *Chinese JIL* 437; C. Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States Upon the Jus ad Bellum in the Post-Cold War Era* (Farnham: Ashgate, 2010), 137-193.

¹⁴ UN Doc. S/2001/946 (7 October 2001).

¹⁵ For more on the ‘harbouring’ standard of attribution as the second element of the Bush doctrine see section 3 of this article.

¹⁶ President George W. Bush, ‘State of the Union Address’ (29 January 2002).

¹⁷ ‘Remarks by the President at 2002 Graduation Exercise of the United States Military Academy at West Point’ (1 June 2002).

¹⁸ 2002 NSS, *supra* n. 1, 6.

The discourse surrounding forcible actions in self-defence prior to an armed attack having been sustained is not clear and precise in its terminology. Indeed, the terms ‘pre-emptive’, ‘anticipatory’, and ‘preventative’ are ‘not technical terms of art with clear meanings and they are used in different ways by different authors.’¹⁹ However, they are employed by those that use them as a means of differentiating the temporal nature of the different forms of action in self-defence. Whilst not of universal usage, perhaps the distinction most often employed in the literature and the one adopted in this article is as follows: ‘anticipatory’ self-defence is the most immediate form, taken in response to the threat of an armed attack which, although perhaps not yet launched, is deemed to be imminent;²⁰ ‘pre-emptive’ self-defence refers to action that is taken against a perceived threat of a more temporally remote nature;²¹ lastly, ‘preventative’ self-defence is a general term referring to either of the above forms.²²

Although the right of self-defence is an ‘inherent’ one,²³ by claiming the right to use force in self-defence against threats that are yet to even emerge it was clear that this was an attempt by the Bush administration to take a wide side-step around the requirement for the occurrence of an ‘armed attack’ before the right can be engaged, a requirement stated prominently in Article 51 of the UN Charter.²⁴ However, whilst Article 51 contains the treaty based form of the right of self-defence, this right is also one that exists in customary international law,²⁵ though as the International Court of Justice stated in the *Nicaragua* case in 1986, ‘[o]n a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content’.²⁶ This can be seen, for example, in that the requirement of an ‘armed attack’ before an action in self-defence can commence is found in Article 51 of the UN Charter, whereas the requirement that actions taken in self-defence be ‘necessary’ and ‘proportional’ emanate from customary international law.²⁷

Nevertheless, due to the fact that there has now been over sixty years of state practice subsequent to the introduction of the UN Charter and because the addressees of the Charter and those of customary international law almost completely coincide, there has been a ‘certain degree of uniformity and coherence in their respective development’.²⁸ As such, any modifications to the right of self-defence, or changes in the context of its application, are likely to have an impact upon the interpretation and modification of both sources of the right. Furthermore, in practical terms, when discussing forcible actions a distinction is not generally made by states between the two sources.²⁹

¹⁹ C. Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008), 211-212.

²⁰ See, for example, Gray, *ibid.*, 160-165; J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart Publishing, 2009), 28.

²¹ See, for example, N. Shah, ‘Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law’s Response to Terrorism’ (2007) 12 *JCSL* 95, 11; Henderson, *The Persistent Advocate*, *supra* n. 13, 171.

²² Green, *supra* n. 20, 28.

²³ Article 51 of the UN Charter provides: ‘Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations ...’. (emphasis added).

²⁴ *Ibid.*

²⁵ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep. 14, paras. 172-182.

²⁶ *Ibid.*, para. 175.

²⁷ See *infra* notes 79 and 80 respectively and related text.

²⁸ T. Gazzini, ‘The Rules on the Use of Force at the Beginning of the XXI Century’ (2007) 11 *JCSL* 319, 320.

²⁹ For example, the International Court of Justice noted in the *Nicaragua* case that ‘both Parties [in their pleadings] take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.’ See *Nicaragua Case*, *supra* n. 25, para. 188.

However, given the direct confrontation between the requirement for an ‘armed attack’ in Article 51 and the notion of pre-emptive self-defence, the 2002 Strategy avoided any reference to either this requirement or to Article 51 in general. Instead, in legally justifying the Bush doctrine, the 2002 National Security Strategy began by making reference solely to the customary form of the right of self-defence and to the way in which its limits had been interpreted by some:

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 pre-emption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.³⁰

Upon the terminology noted above, it appears that it was the right of anticipatory self-defence that was being referred to in this paragraph. This right, which as the 2002 National Security Strategy duly noted has had some support from legal scholars, perhaps most notably the late Sir Derek Bowett,³¹ is conditioned upon the notion of an ‘imminent’ threat, that is, whilst an armed attack has not actually been sustained at the time that the action in self-defence is launched, the trigger has already been, or is about to be, pulled by the adversary and to wait would be to suffer certain attack. Furthermore, when the 2002 Strategy talked of this right being recognised in international law ‘for centuries’, this is arguably a reference back to the *Caroline* incident of 1837 and the requirement that emerged from the correspondence between the British and Americans that there must be ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.’³² Of course, at the time of the *Caroline* incident there was no legal prohibition of the use of force and so this requirement formed more a part of the political discourse in justifying uses of force as opposed to a formal legal justification.³³

However, it was what followed in the 2002 Strategy which was of most significance. Indeed, the 2002 document went on to argue that ‘[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries’,³⁴ which had been identified as ‘shadowy terrorist networks with no nation or citizens to defend’³⁵ and ‘unbalanced dictators with weapons of mass destruction’.³⁶ As Ronzitti succinctly noted, ‘President Bush’s doctrine on “preventive war”, as spelled out in the 2002 National Security Strategy of the United States, [was] in reality a new and expanded interpretation of the notion of imminence of armed attack, which affords new possibilities to react in self-defence.’³⁷ A similar claim to such a right was persisted with by the Bush administration in its 2006 National Security Strategy.³⁸

³⁰ 2002 NSS, *supra* n. 1, at 15.

³¹ See D. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), 184-193.

³² See *The Caroline Case* (1837) 30 *BFSP* 195-196. For an extensive account of the *Caroline* case see, generally, R. Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 *AJIL* 82.

³³ See J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), 38-44.

³⁴ 2002 NSS, *supra* n. 1, at 15.

³⁵ West Point speech, *supra* n. 17.

³⁶ *Ibid.*

³⁷ See N. Ronzitti, ‘The Expanding Law of Self-Defence’ (2006) 11 *JCSL* 343, 347.

³⁸ See *supra* n. 7. For analysis see, generally, C. Gray, ‘The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA’ (2006) 5 *Chinese J.Int'l L.* 555; C. Henderson, ‘The 2006 National Security Strategy of the United States: The Pre-emptive Use of Force and the Persistent Advocate’ (2007) 15 *Tulsa JCIL* 1.

Although dressed up in language of ‘adapting’ the law to meet contemporary realities, this express attempt at modifying the *jus ad bellum* was in actual fact a sharp break from the accepted limits of the *jus ad bellum*. Indeed, in contrast to the notion of anticipatory self-defence, that of pre-emptive self-defence has traditionally found much less support from scholars and international jurists.³⁹ This is arguably due to the fact that whilst anticipatory self-defence and the notion of an ‘imminent’ armed attack can arguably, although perhaps somewhat tenuously, be temporally reconciled with Article 51’s stipulation for the occurrence of an ‘armed attack’, pre-emptive self-defence, and its trigger constituting of the mere perception of a temporally remote, albeit serious, threat, cannot. As the Chatham House Principles of International Law on the Use of Force in Self-Defence noted in 2005, ‘[a] threatened attack must be “imminent” and this requirement rules out any claim to use force to *prevent* a threat emerging.’⁴⁰

The claim in the 2002 National Security Strategy was significant not only for the conscious argument to shift traditionally more acceptable notions of what the law permits rather than simply assert a sharp break from them⁴¹ but also, by talking of ‘adapting’ the traditional law, the Bush administration was recognizing that it was operating within the *lex ferenda* which militates against any finding of *opinio juris* even on behalf of the doctrine’s proponent state.⁴² Indeed, by asserting that states ‘must adapt’ the concept of imminence to the nature of today’s adversaries, the United States was expressing *opinio necessitatis* as to the right of unilateral pre-emptive self-defence.⁴³

Whether this claim was to become a part of the *lex lata* or remain an argument *lex ferenda* depended upon a number of factors. Key amongst these was how it was received by other actors within the international community. Indeed, whilst the international legal system is of a decentralised and auto-interpretive nature, this does not, however, lead to the conclusion that each state can automatically interpret the shape of the law to meet its existing perceived needs and interests. This applies equally to the United States as although this state arguably holds greater *de facto* power than any other in terms of its political, economic, and military might, with the greater possibilities this presents for its voice and influence to be projected and felt, alongside certain forms of *de jure* power such as its permanent membership of the UN Security Council⁴⁴ and the possession of a veto within this organ,⁴⁵ this does not grant it any *de jure* additional powers in terms of the making and interpreting of general international law over and above those possessed by other states.

³⁹ A notable exception is perhaps found in the work of Myers McDougal and Florentino Feliciano. See M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961), 232-244.

⁴⁰ E. Wilmshurst, ‘The Chatham House Principles of International Law on the Use of Force in Self-Defence’ (2006) 55 *ICLQ* 963, 965.

⁴¹ There is nothing in the National Security Strategy to suggest that the doctrine of pre-emption is restricted to use by the United States. For the proposition that ‘pre-emptive self-defense is only an American doctrine’ see W.M. Reisman, ‘Assessing Claims to Revise the Laws of War’ (2003) 97 *AJIL* 82, 90.

⁴² As Paulus noted, ‘[e]ven the National Security Strategy does not consider “preemption” as part of international law on force.’ See A. Paulus, ‘The War Against Iraq and the Future of International Law: Hegemony or Pluralism?’ (2003-2004) 25 *MJIL* 691, 702.

⁴³ For more on this element in the process of customary normative change, see A. Cassese, *International Law*, 2nd ed., (Oxford: Oxford University Press, 2005), 157-158.

⁴⁴ Article 23, UN Charter (1945).

⁴⁵ Article 27(3), UN Charter (1945).

To be sure, in the context of the *jus ad bellum*, the notion of general agreement amongst states is of vital importance whether in terms of interpreting the UN Charter⁴⁶ or modifying customary international law.⁴⁷ Whilst the notion of ‘specially affected’ states has a place in customary international law formation and modification, this limited doctrine has been held to exist more in connection with the views of states which, for example, have a coast line when the law concerning maritime boundaries is in dispute,⁴⁸ than in connection with states who are generally more powerful and/or of greater military might with increased possibilities and, perhaps, propensity to use force when the parameters of the *jus ad bellum* is in question. This is not to say that the ‘specially affected’ state doctrine will not in the future be used to provide more rights to these states in forming and modifying the *jus ad bellum*, but this is not currently the context of its application. As things stand, the law may be modified, or force may be used with less fear of sanctions and negative repercussions, as a result of these states’ *de facto* power and influence, but it does not change in light of either their actions or views as a result of them being provided with the label of ‘specially affected’ states in connection with the use of force. Indeed, whilst the argument can be made that due to the fact that powerful states often engage more frequently in a broader range of activities they are more likely to be ‘specially affected’, there has been ‘no indication that their special status in customary law-making is recognized as a matter of law.’⁴⁹

Consequently, whilst the Bush administration expressly reserved the right for itself to take such action, any impact upon the *jus ad bellum* depended upon widespread acceptance by other actors within the international community, and particularly states, of this perceived necessity to take action in these circumstances and the attached shift in the *jus ad bellum*. The need for widespread agreement is particularly necessary given the often held view that the prohibition of the use of force, or at least aggressive force, is of *jus cogens* status and the consequent broadening, or perhaps disappearance altogether, of the prohibition that would occur if a right of pre-emptive self-defence was to find its place within the *jus ad bellum*.⁵⁰

⁴⁶ If the text of a treaty does not provide a clear interpretation the Vienna Convention on the Law of Treaties (1969) provides for other factors to be addressed. In particular, this includes ‘any subsequent *agreement* between the parties regarding the interpretation of the treaty or the application of its provisions’ (Art 31(3)(a) (emphasis added)) or ‘any subsequent practice in the application of the treaty which establishes the *agreement* of the parties regarding its interpretation’ (Art 31(3)(b) (emphasis added)).

⁴⁷ In the formation and modification of customary international law the International Court of Justice has required a ‘settled practice’ involving ‘widespread and representative participation’. See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep. 3, paras 77 and 73. However, this ‘practice’ and ‘participation’ is not restricted to physical acts, which would present more powerful states with more opportunities to form and modify customary international law. Instead, as the Court noted in the *Nicaragua* case, all that is required is that the legality of the practice in question should be ‘shared in principle’ by states. *Nicaragua Case*, *supra* n. 25, para 207.

⁴⁸ See *North Sea Continental Shelf Cases*, *ibid*, para. 74.

⁴⁹ G. Danilenko, *Law-Making in the International Community* (Hague: Martinus Nijhoff, 1993), 96.

⁵⁰ For the view that the prohibition of the use of force is *jus cogens* see, for example, I. Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Oxford University Press, 2008), 511. The International Law Commission expressed the view that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.’ See (1996-II) UNYBILC, 247. Furthermore, the International Court of Justice in the *Nicaragua* case noted that the prohibition of the use of force ‘is frequently referred to in statements by *state representatives* as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.’ *Nicaragua Case*, *supra* n. 25, para. 190 (emphasis added). Under this view, for any direct modification of this particular norm, and the acceptance of a norm which conflicts with it or the widening of the exceptions to it, it would have to be demonstrated that the proposed change had been ‘accepted and recognized by the international community of states *as a whole*’ as a preemptory norm. See Article 53, Vienna Convention of the Law of Treaties (1969) (emphasis added).

The problem is that states rarely pronounce doctrinally on use of force issues, particularly in the abstract as was required in light of the claims in the 2002 Strategy.⁵¹ However, in this instance both states and international civil servants entered the fold and addressed the issue.⁵² Furthermore, in assessing whether any shifts have occurred the observations and views of the International Court of Justice and scholars are also important.⁵³ On this occasion, the Bush doctrine of pre-emptive self-defence was exhaustively discussed and debated in the legal literature, with scholars on both sides of the debate not shy in casting their view⁵⁴ and the International Court of Justice has stated its position on the right of self-defence ‘to protect perceived security interests’.⁵⁵ Ultimately, from the discourse that took place amongst these actors, and the evident lack of support for the doctrine, the consensus emerged that it was not one that was, or likely to become, acceptable as a right under the *jus ad bellum*.⁵⁶ As the Chatham House Principles succinctly stated in 2005:

To the extent that a doctrine of “pre-emption” encompasses a right to respond to threats which have not yet crystallized but which might materialize at some time in the future, such a doctrine (sometimes called “preventive” defence) has no basis in international law.⁵⁷

Furthermore, the doctrine of pre-emptive self-defence has not been witnessed in practice since. On the few occasions when action has been taken exhibiting the hallmarks of this particular doctrine, they have either been justified on other legal grounds⁵⁸ or have been undertaken covertly.⁵⁹ In either case, *opinio juris* for a right of pre-emptive self-defence has not been witnessed.

B. The Obama Doctrine: Incoherent Attempts at Pushing the Boundaries?

In contrast to the 2002 and 2006 National Security Strategies of the Bush administration, the 2010 National Security Strategy’s direct reference to the use of force is confined to three short paragraphs on a single page.⁶⁰ ‘Military force, at times, may be necessary to defend our

⁵¹ As Christine Gray notes, ‘[s]tates using force against another state almost invariably invoke self-defence; in the vast majority of such claims this has not given rise to any doctrinal issues or to any differences between states as to the applicable law.’ Gray, *supra* n. 19, 114.

⁵² See, for example, ‘UK Attorney General’s Advice on the Iraq War: Resolution 1441’, (2005) 54 *ICLQ* 767, para. 3; Report of the UN Secretary-General, ‘In Larger Freedom: Towards Security, Development and Human Rights for All’ (21 March 2005) UN Doc. A/59/205 (2005), para. 124.

⁵³ Article 38(1)(d) of the Statute of the International Court of Justice states that ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’ are ‘subsidiary means for the determination of rules of law’.

⁵⁴ See *supra* n. 13.

⁵⁵ The Court, in the *DRC v Uganda* case in 2005, stated that ‘Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a state to protect perceived security interests beyond these parameters. Other means are available to a concerned state, including, in particular, recourse to the Security Council.’ See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) [2005] ICJ Rep. 168, para. 148.

⁵⁶ For a greater discussion of the factors that lead to this conclusion see Henderson, *The Persistent Advocate*, *supra* n. 13, 183-193.

⁵⁷ See Wilmschurst (The Chatham House Principles), *supra* n. 40, 968.

⁵⁸ For example, the justification for *Operation Iraqi Freedom* in 2003, whilst preceded by the establishment of the Bush doctrine, was ultimately justified on the enforcement of UN Security Council resolutions. See UN Doc. S/2003/351 (21 March 2003).

⁵⁹ For example, no justification was presented after a covert strike by Israel in 2007 on what were alleged to be nuclear facilities in Syria. See ‘Syria Air Strike Target “Removed”’, BBC News (26 October 2007), available at <http://www.bbc.co.uk>.

⁶⁰ 2010 NSS, *supra* n. 10, 22.

country and our allies' is the opening statement.⁶¹ In fact, the notion of force being 'necessary' is mentioned four times in these three paragraphs as well as in fleeting references elsewhere in the document.⁶² However, the Strategy does not offer any more as to what is meant by this statement or the situations when force will be deemed necessary. Nevertheless, as noted above, prior to the publication of this document the President spoke in connection with the use of force on a number of occasions. Whilst the notion of 'necessary force' holds a firm and important place in the Strategy, the prior references to this notion by the President may shed some light as to its meaning in this key document and, for the purposes of this section of the article, whether it includes the controversial right of pre-emptive self-defence, a notion which is not directly mentioned in the Strategy at any point.

The earliest, and to this day most direct, indication we have of Obama's position regarding the use of force and the legal limits imposed upon it is a response to a survey conducted by the American Society of International Law in which several questions were posed to the presidential candidates in the run-up to the elections in 2008.⁶³ In this respect, the key question posed to the candidates was: '[w]hat views do you have regarding any legal constraints on US use of force?'⁶⁴ In response, Barack Obama claimed that:

The U.S. has today and has always had the right to take unilateral military action, including the pre-emptive use of force, to eliminate imminent threats to our country and security. No nation or organization has a veto over our right of self-defense - and none ever will. In fact, Article 51 of the U.N. Charter recognizes this right of self-defense for every nation.⁶⁵

Furthermore, whilst Obama went on to recall 'the so-called Bush doctrine' and noted that '[t]he preventive use of force - in anticipation of potential threats that may not be imminent - is a different matter',⁶⁶ he also, and rather confusingly, was clear that '[s]ometimes, the preventive use of force may be necessary.'⁶⁷ However, Obama gave no indications of what conditions might make it 'necessary' or indeed the types of threats being referred to and what *his* interpretation of 'imminence' was.

Given a somewhat veiled criticism of pre-emptive force, or preventive force as Obama described it,⁶⁸ and the national security policy of his predecessor, whilst at the same time making it clear that it would be resorted to when 'necessary', it is arguable that this was the first signs of a broader and more vague Obama doctrine of 'necessary force' emerging. As confirmed by the recent publication of the 2010 National Security Strategy, there is nothing to suggest that President Obama has shifted from this position since taking up residence in the White House. Whilst at no point since becoming President has Obama expressly accepted the necessity of the pre-emptive use of force under international law, as he appeared to do in the ASIL survey, neither has he ruled it out. In fact, his position gives some cause for concern.

⁶¹ Ibid.

⁶² For example at 13 where it was stated that '[f]orce will sometimes be necessary to confront threats.'

⁶³ See *supra* n. 4.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Here, in relation to the terminological distinctions adopted in this article, the President was clearly using 'pre-emptive' in place of 'anticipatory' and 'preventive' in place of 'pre-emptive'. However, the President was not incorrect in doing so as, as noted above, there is no universally agreed terminology firmly attached to the different forms of self-defence.

It was noted in the previous section that some of the initial elements of the Bush doctrine were set out in President Bush's speech at the West Point military academy in 2002. By contrast, Obama did not choose to use his speech at West Point on 1 December 2009 to do the same.⁶⁹ Instead, in his speech, which was given over almost entirely to the war in Afghanistan, there were no direct references to when the use of force would be justified or 'necessary'.⁷⁰ More significant in this respect was his speech in Oslo upon acceptance of the Nobel Peace Prize on 10 December 2009 where he took the opportunity to speak 'at some length to the question that must weigh on our minds and our hearts as we choose to wage war.'⁷¹

On this occasion, President Obama was assertive in his belief 'that all nations -- strong and weak alike -- must adhere to standards that govern the use of force'⁷² and 'that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't'.⁷³ However, again, he was similarly assertive that he 'reserve[ed] the right to act unilaterally if *necessary* to defend [his] nation.'⁷⁴ This was affirmed in the 2010 National Security Strategy in which it was stated that '[t]he United States must reserve the right to act unilaterally if *necessary* to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force.'⁷⁵ Whilst on the face of it these statements, taken as a whole, are uncontroversial, and in many respects commendable, it is when one reads more into them that problems become apparent to the international lawyer.

(i) The 'standards' governing the use of force

The first of these problems was the failure to elaborate on the 'standards' that were being referred to. For example, were they of a political, moral or legal nature? If we are to assume that they were of a legal nature, talking about 'standards' in this context is meaningless unless one elaborates upon what one is referring to. Given not only the auto-interpretive and decentralised nature of the international legal system as a whole, but also that the *jus ad bellum* in particular 'is a notoriously uncertain area of international law',⁷⁶ clarity in the choice of terminology to convey meaning is required.

More specifically, in the context of the customary international legal regulation of the right of self-defence the notion of 'necessity', which President Obama has apparently incorporated into his doctrine on the use of force, has a particular historical meaning. Indeed, the idea that force is only necessary when there is no alternative to settling a dispute can be traced back to writers such as Vattel.⁷⁷ More recently, this has been referenced to the formula that emanated from the *Caroline* incident of 1837 as noted above, so that there must be a '*necessity* of self-defence' which is 'instant, overwhelming, leaving no choice of means and no moment for

⁶⁹ See *supra* n. 5.

⁷⁰ Although, as section 3 of this article highlights, there were indirect references of this nature in connection with the 'harbouring' standard of attribution for actions in self-defence.

⁷¹ See *supra* n. 6.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*, (emphasis added).

⁷⁵ 2010 NSS, *supra* n. 10, 22 (emphasis added).

⁷⁶ C. Henderson and J.A. Green, 'The *Jus ad Bellum* and Entities Short of Statehood in the Report on the Conflict in Georgia' (2010) 59 *ICLQ* 129, at 131.

⁷⁷ E. de Vattel, 'Le Droit de Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains', vol. III, trans. by C. Fenwick, in J. Scott (ed.), *The Classics of International Law* (Carnegie Institute, Washington DC, 1916), p. 305, para. 190.

deliberation'.⁷⁸ Whilst this formula itself is seldom employed in the contemporary discourse of either states or scholars in discussing the legality of forcible actions, the notion of 'necessity'⁷⁹ that emerged from it, along with that of 'proportionality',⁸⁰ and some would say 'immediacy',⁸¹ is very much a part of this discourse and legal doctrine.⁸² Indeed, these criteria along with the requirement for the occurrence of an 'armed attack', as found in Article 51 of the UN Charter,⁸³ form the key standards which are used to gauge the legality of uses of force in self-defence.

However, the discrepancy over the precise meaning of the principles of 'necessity' and 'proportionality' in the light of the actions of states,⁸⁴ along with the scope with which the 'armed attack' requirement of Article 51 of the UN Charter has been interpreted,⁸⁵ and the different interpretations given to the 'inherent' nature of self-defence in the same provision,⁸⁶ are illustrative of the vulnerability with which the *jus ad bellum* is to the proffering of subjective and differing interpretations. Without expansion, a simple claim to be adhering to 'standards' governing the use of force does not really tell us anything as to the Obama administration's perception of the legal restraints upon it. Indeed, moves such as referring to the 'standards' governing the resort to force could simply be taken as a 'sophisticated

⁷⁸ *The Caroline Case*, *supra* n. 32 (emphasis added).

⁷⁹ This notion, requiring that the use of force should be the only option for a state to defend itself against an armed attack, is often referenced by scholars today. See, for example, Gardam, *supra* n. 33, 5; M. Shaw, *International Law*, 5th ed., (Cambridge: Cambridge University Press, 2003), 1031; C. Greenwood, 'International Law and the United States Air Operation Against Libya', (1986-1987) 89 *West Virginia Law Review* 933, 945.

⁸⁰ The *Caroline* formula goes on to require that 'nothing unreasonable or excessive' is done. See *Caroline Case*, *supra* n. 31. Today, this is simply translated as the force used should be reasonable and do no more than repel the attack. See I. Brownlie, *International Law and the Use of Force by States*, (Oxford: Clarendon Press, 1963), at 434. In gauging proportionality, although some claim that '[t]he use of force in self-defence must be proportionate to the wrongful act to which it is a response' (Greenwood, *supra* n. 78, 946. See also Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed., (Cambridge: Cambridge University Press, 2005), 225), the better view is that proportionality refers more to what is required to halt or repel the attack as otherwise the right of self-defence could be turned into 'a justification for retributive force, or limit the use of force to less than what is necessary to repel the attack'. See Wilmschurst (The Chatham House Principles), *supra* n. 40, 969. See also T. Gazzini, *The Changing Rules on the Use of Force in International Law*, (Manchester: Manchester University Press, 2005), 148. In any case, conclusions as to this can only be drawn *a posteriori*. See Dinstein, *ibid.*, at 237.

⁸¹ There must not be an undue time-lag between the armed attack and the exercise of self-defence. See Dinstein, *ibid.*, at 210. See also Gazzini, *ibid.*, at 143. However, Franck claims that the application of this principle to traditional self-defence 'comes from a misunderstanding of the *Caroline* decision which deals only with *anticipatory* self-defence.' See T.M. Franck, 'Terrorism and the Right of Self-Defence', (2001) 95 *AJIL* 839, at 840. Other scholars also dismiss the idea that force has to be immediate. Gardam, for example, notes that 'State practice is generally not consistent with [a] narrow view of immediacy, and States are traditionally allowed a leeway of time in which to initiate their defensive action.' See Gardam, *supra* n. 79, 150.

⁸² For a discussion of these principles generally in the context of the *jus ad bellum* see Gardam, *supra* n. 78.

⁸³ See *supra* n. 23.

⁸⁴ For example, the International Court of Justice and the US took different views over their meaning in the aftermath of the US attacks on the Iranian oil platforms during the Iran-Iraq war. See *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Reports 161, paras. 73-77 and the views of William H. Taft IV, the US State Department Legal Adviser, in W.H. Taft, 'Self-Defense and the Oil Platforms Decision' (2004) 29 *Yale Journal of International Law* 295.

⁸⁵ For example, whilst the International Court of Justice has stated that attacks that would fall under the meaning of the term should be of a certain 'gravity', Dame Rosalyn Higgins, a former President of the Court, has asserted that the initial attack simply gauges the proportionality of any response in self-defence. See *Nicaragua Case*, *supra* n. 25, para. 191 and R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 250-51.

⁸⁶ See the classic debate on the nature and relevance of this term in Article 51 between Derek Bowett and Ian Brownlie. See Bowett, *supra* n. 31 and Brownlie, *supra* n. 80.

evasion[] of the much stricter limitations on the use of force set forth in the Charter and international law.’⁸⁷

By contrast, although references to international law were generally in short supply during the Bush era, the Bush administration, as noted above, was more open as to the interpretation that it was giving to the standard of ‘imminence’ in light of the new threats of terrorism and weapons of mass destruction. In this respect, President Obama’s reference to the ‘standards’ governing the use of force needed expanding upon, especially after claiming himself that the ‘new threats’ of terrorism and nuclear proliferation to terrorist groups have caused the ‘architecture to keep the peace’, including the ‘United Nations’ and ‘mechanisms to govern the waging of war’, to ‘buckle’.⁸⁸ This perception of the current state of the ‘architecture to keep the peace’ was reaffirmed in the 2010 National Security Strategy where it was stated that ‘the international architecture of the 20th century is buckling under the weight of new threats’.⁸⁹

The central premise of the Bush doctrine of pre-emptive self-defence was that standards had to shift to incorporate such a right due to the inadequacy of the existing limits upon self-defence and the existing collective security mechanisms to deal with the broadly articulated threats. The 2010 National Security Strategy’s reinforcement of President Obama’s claim that these threats have caused these mechanisms to ‘buckle’ raises questions over whether his administration shares, although perhaps in a less clear and express manner, the interpretation of the Bush administration as to the contemporary standards governing the use of force. That is, that they permit, or should permit, the use of pre-emptive force when deemed necessary. In less cautious tones, Falk has claimed that ‘[d]espite some eloquent language it was clear that in essential respects that (*sic*) Obama’s view of post-9/11 security imperatives was disturbingly similar to that of the Bush presidency.’⁹⁰

Nevertheless, despite the concerns as to the continued viability of the current architecture and mechanisms that have been expressed in many documents published by different individuals and bodies since the attacks of 11 September 2001 and the emergence of the Bush doctrine, the consensus remains both amongst the authors of these reports and the majority of states themselves that they are, whilst not perfect, capable of dealing with these threats.⁹¹ The Obama doctrine is far from clear as to the changes it is proposing in order to confront these ‘new threats’. If President Obama feels that modifications to the *jus ad bellum* are necessary, he needs to offer a far more coherent exposition of these for consideration by the international community as well as how the *jus ad bellum* could/should evolve to incorporate them. As things stand, we are left pondering if any changes are being proposed and, if so, what they are, or whether the buckling that Obama has identified leaves states to interpret the standards for themselves so that force, including that of the pre-emptive kind, is acceptable when subjectively deemed to be necessary.

⁸⁷ Richard Falk, ‘Foreword’ in B. Helmke, *Under Attack: Challenges to the Rules Governing the International Use of Force* (Farnham: Ashgate, 2010), at xi.

⁸⁸ Oslo speech, *supra* n. 6.

⁸⁹ 2010 NSS, *supra* n. 10, 1.

⁹⁰ Falk, *supra* n. 87, ix.

⁹¹ Report of the High-Level Panel on Threats, Challenges and Change, ‘A More Secure World: Our Shared Responsibility’ (2 December 2004) UN Doc. A/59/565 (2004), paras 190-91; In Larger Freedom, *supra* n. 52, para. 125; 2005 World Summit Outcome Document (15 September 2005) UN Doc. A/60/L.1 (2005), paras 79-80. Although there are proposals for reform of the UN Security Council. See, generally, N. Schrijver, ‘Reforming the UN Security Council in Pursuance of Collective Security’ (2007) 12 *JCSL* 127.

(ii) The concept of ‘necessity’

The second of the problems in connection with the Obama doctrine arises from the direct reference to the notion of ‘necessity’. The 2010 National Security Strategy states that ‘[w]hile the use of force is sometimes necessary, we will exhaust other options before war whenever we can’.⁹² It has been commented that ‘whether any given instance of self-defence can be considered to be “necessary” is extremely difficult to assess.’⁹³ Even so, the ‘necessity’ to use force is often considered to be conditional on it being resorted to as a last resort or after peaceful measures have been exhausted.⁹⁴

However, whilst in the context of a prior armed attack having been sustained ‘it appears that state practice is generally consistent with the desirability of pursuing peaceful means of resolving a dispute once an armed attack is over ... [t]here is reluctance ... to accept that the continued existence of the right of self-defence is dependent as a matter of law on so doing.’⁹⁵ In other words, there is no absolute requirement under international law for the exhaustion of peaceful or other measures before force can be deemed necessary. Instead, the better view, based upon state practice, is perhaps, as noted in the Chatham House principles, that ‘[t]here must be no *practical* alternative to the proposed use of force that is likely to be effective in ending or averting the attack’.⁹⁶ In this sense, the exhaustion of peaceful means ‘constitutes *evidence* that a legal requirement has been met, not a legal requirement in itself.’⁹⁷ As such, the Strategy’s reference to the Obama administration only exhausting peaceful means before resorting to the use of force ‘whenever [it] can’ appears to be relatively uncontroversial in the context of traditional self-defence actions when an armed attack is under way, has been sustained, or perhaps where there is an imminent threat of one. This is even more so if the target of the armed attack is the territory of the state, as opposed to the target being an extraterritorial emanation of the state.⁹⁸

The problem appears to be that President Obama is proposing a shift in the concept of necessity beyond the armed attack context to situations of simply confronting ‘evil’ actors in the world:

Evil does exist in the world. A non-violent movement could not have halted Hitler's armies. Negotiations cannot convince al Qaeda's leaders to lay down their arms. To say that force may sometimes be *necessary* is not a call to cynicism -- it is a recognition of history; the imperfections of man and the limits of reason.⁹⁹

Since coming to power, President Obama’s efforts in strengthening international diplomacy have been noted. Indeed, in his Oslo speech he also spoke of the need for ‘engagement with repressive regimes’,¹⁰⁰ rhetoric that is to be welcomed. However, given the controversy surrounding President Bush’s invocation of an ‘axis of evil’,¹⁰¹ the fact that Obama chose to characterize any as ‘evil’ is perhaps somewhat surprising. Of more significance is that it appears to be asserted that in the face of adversaries that can be categorized as such, a dilution

⁹² 2010 NSS, *supra* n. 10, 22.

⁹³ Green, *supra* n. 20, 86.

⁹⁴ See *supra* n. 79 and related text.

⁹⁵ Gardam, *supra* n. 79, 153

⁹⁶ See Wilshurst (Chatham House Principles), *supra* n. 40, 966 (emphasis added).

⁹⁷ Green, *supra* n. 20, 84.

⁹⁸ A distinction made by Green, *ibid*, 80-85.

⁹⁹ Oslo speech, *supra* n. 6 (emphasis added).

¹⁰⁰ Oslo speech, *ibid*.

¹⁰¹ See *supra* n. 16 and related text.

of the standard of ‘necessity’ in international law is required so that in confronting such actors not only is there no longer any requirement for a prior ‘armed attack’, or one that is imminent, but also that in the context of ‘evil’ actors, whether of a state or non-state nature, ‘non-violent’ measures have been pre-determined to be of no use thus opening the door to pre-emptive force.¹⁰²

Whilst President Bush at least hung the necessity for pre-emptive self-defence on serious, if not imminent, broadly articulated threats, President Obama seems to have rested the necessity for such action more simply on the presence of ‘evil’ adversaries. Indeed, although the Bush doctrine stretched the notion of imminence beyond breaking point, the Obama doctrine appears to have disregarded it completely. There can be little argument against defining both the Nazi and al-Qaida ideologies as general threats to civil society. But to base the necessity of the use of force upon the highly subjective categorization of ‘evil’, and before a concrete forcible threat from such actors has even become discernable, destroys the basis for any prohibition of the use of force and can only lead the international community down the road towards anarchy.

In these circumstances, a practical alternative to the use of force does not simply mean ‘negotiations’, as Obama appears to believe. Instead, this should include resort to the UN Security Council for either action of a non-forcible nature¹⁰³ or, if the will is present within this organ, for those of a forcible nature.¹⁰⁴ As Gardam has pointed out, ‘the need to establish that a forceful response is necessary is more onerous in the case of preventative action than in the case of a response to an armed attack. Not only would the futility of peaceful means to remove the threat need to be demonstrated but also that the threat is real.’¹⁰⁵ Indeed, only if these measures have been exhausted, and with the threat having been demonstrated to be a real and serious one, as opposed to the subject of any proposed action in self-defence simply being of an ‘evil’ nature, could any claim to pre-emptive self-defence even begin to take on any cogency.

In any case, whilst the notion of anticipatory self-defence, as set out above, is one that has traditionally had some,¹⁰⁶ and is arguably beginning to find more,¹⁰⁷ support within the international community, pre-emptive self-defence, whether against terrorist networks or rogue states, is not.¹⁰⁸ This is not to say that this could not change if, for example, Obama was to employ more subtle and acceptable means than those of his predecessor, and those which so far he has used himself, to persuade others within the international community that such action is necessary under certain circumstances. But unlike President Bush in the 2002 and 2006 National Security Strategies, President Obama in the 2010 Strategy has not even

¹⁰² As Richard Falk comments, Obama ‘compared *Al Qaeda* to the Nazis, insisting that neither challenge could be addressed via diplomacy and negotiation, leaving war as the only option.’ Falk, *supra* n 87, at ix.

¹⁰³ Article 41, UN Charter (1945).

¹⁰⁴ Article 42, UN Charter (1945).

¹⁰⁵ Gardam, *supra* n. 79, 154.

¹⁰⁶ See, for example, Bowett, *supra* n. 31, 184-93; T. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), 98.

¹⁰⁷ High-Level Panel report, *supra* n. 91, para. 188; In Larger Freedom, *supra* n. 52, para. 124. As the Chatham House Principles on self-defence noted, ‘the view that states have a right to act in self-defence in order to avert the threat of an *imminent* attack - often referred to as “anticipatory self-defence” - is widely, though not universally, accepted. It is unrealistic in practice to suppose that self-defence must in all cases await an actual attack.’ See Wilmshurst (Chatham House Principles), *supra* n. 40, 964.

¹⁰⁸ High-Level Panel report, *ibid.*, para. 190; In Larger Freedom, *ibid.*, para. 125. As Michael Bothe comments, the *Caroline* formula ‘is as far as pre-emptive self-defence possibly goes under current international law.’ M. Bothe, ‘Terrorism and the Legality of Pre-emptive Force’, (2003) 14 *EJIL* 227, 231. For more on this general rejection of the notion, see Henderson, *The Persistent Advocate*, *supra* n. 13, 183-190.

attempted to demonstrate how international law should/could evolve to meet the threat posed by these actors. Indeed, the President appears to have dismissed the need to make any real arguments of a *lex ferenda* nature and instead apparently opted for either implied *lex lata* claims or for non-legal arguments altogether.

3. The ‘Harbouring’ Standard of Attribution

A. The Bush Doctrine: Attempts at Lowering the Standard of Attribution of the Actions of Non-State Actors to States for the Purposes of Self-Defence

In responding to the attacks of 11 September 2001, the Bush administration launched military action in the form of *Operation Enduring Freedom* on 7 October 2001, a forcible action which was formally justified as self-defence under Article 51 of the UN Charter.¹⁰⁹ The United States reported to the UN Security Council that ‘[i]n accordance with Article 51 of the Charter of the United Nations’ and ‘following the armed attacks that were carried out against the United States on 11 September 2001’¹¹⁰ it was exercising ‘its inherent right of individual and collective self-defence’.¹¹¹

However, in the same letter to the Security Council it was asserted that this action would include forcible measures not just against the actual perpetrators of the attacks, al-Qaida, but also against Afghanistan, the state in which the perpetrators were located. Indeed, the letter stated that the action would ‘include measures against al-Qaeda terrorist training camps *and military installations of the Taliban regime in Afghanistan*.’¹¹² In fact, when force was actually launched, it was directed mostly against the governmental infrastructure of this particular state as opposed to against the terrorist organization which had actually perpetrated the attacks.¹¹³ This was the case despite the fact that the United States did not claim that the Taliban were guilty of anything more than passively supporting the attacks carried out by al-Qaida: ‘The attacks on 11 September 2001 ... have been made possible by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by this organization as a base of operation’.¹¹⁴ Furthermore, the exhaustion of non-forcible responses in an attempt to end this passive support was asserted: ‘Despite *every* effort by the United States and the international community, the Taliban regime has refused to change its policy’.¹¹⁵

¹⁰⁹ UN Doc. S/2001/946 (7 October 2001). See also letter to the UNSC from the UK, UN Doc. S/2001/947 (7 October 2001); *Keesing’s* (2001) 44334.

¹¹⁰ UN Doc. S/2001/946, *ibid*.

¹¹¹ *Ibid*. This article does not address whether the attacks themselves were sufficient to be considered an ‘armed attack’. See S.D. Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter’ (2002) 43 *Harv.Int’l L.J.* 41.

¹¹² *Ibid* (emphasis added). Indeed, both were viewed as legitimate targets of self-defence. See K. Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’ (2007) 56 *ICLQ* 141, 151.

¹¹³ C. Gray, *International Law and the Use of Force*, 2nd edn (Oxford: Oxford University Press, 2004), 168.

¹¹⁴ UN Doc. S/2001/946, *supra* n. 109.

¹¹⁵ *Ibid*. (emphasis added). These efforts included US demands that the Taliban unconditionally close al-Qaida training camps in Afghanistan, surrender Osama bin Laden to the US, and open Afghanistan to inspections. See *Keesing’s* (2001) 44337. For more on the concept of necessity following an armed attack upon the territory of a state see section 2(B)(ii) of this article above.

In one respect this claim was uncontroversial. Indeed, although the right of self-defence has traditionally been interpreted as excluding measures in response to attacks undertaken by non-state entities,¹¹⁶ this is not actually stated in the UN Charter or in customary international law. Although Article 51 requires an ‘armed attack’ against a member of the UN before the right of self-defence becomes operational nothing is mentioned in regards to the entity from which such an attack must emanate from and thus the permissible target of any self-defensive measures in response.¹¹⁷ In theory, so long as a response, taken in the context in which it arises, is necessary, proportionate and immediate, there is nothing in this provision to prevent a state from carrying out an act of self-defence in response to an attack regardless of the identity of the perpetrator.¹¹⁸

However, the non-state actors which carry out terrorist attacks are normally found on the territory of a state and ‘if one would accept that private attacks can in themselves amount to “armed attacks” in the sense of article 51 of the Charter, this would lead to the absurd result that states would be exposed to military force, even if they have not committed an internationally wrongful act of their own.’¹¹⁹ Consequently, forcible responses on the territory of a state have traditionally only been permissible if the actions of the non-state entities can be attributed to the territorial state.¹²⁰

Nevertheless, there is a distinction to be made between the establishment of a link between the non-state entity and the territorial state where it is located which is sufficient to justify the necessity of forcible action solely against the non-state entity, although in violation of the host state’s territorial sovereignty, and the establishment of a link which is sufficient to justify the necessity of forcible action against both the non-state entity *and* the territorial state itself.

In this respect, the link required for self-defence to become permissible in the former scenario has been said to be formed ‘where a state is unable or unwilling to assert control over a terrorist organization located in its territory’.¹²¹ Consequently, ‘the state which is a victim of the terrorist attacks would, as a last resort, be permitted to act in self-defence against the terrorist organization in the state in which it is located’,¹²² but not take action targeted towards the territorial state itself. Indeed, this link

actually intends to show that *no other means* are available for it to defend itself *against the non-state actors*. In other words, the harbouring state’s responsibility is invoked in order to conform with the condition of necessity of the law of self-defence,

¹¹⁶ J.L. Kunz, ‘Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations’ (1947) 41 *AJIL* 872, 879; T. Ruys and S. Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’ (2005) 10 *JCSL* 289, 290; E.P.J. Myjer and N.D. White, ‘The Twin Towers Attack: Unlimited Right to Self-Defence?’ (2002) 7 *JCSL* 5, 7.

¹¹⁷ O. Schachter, ‘The Lawful Use of Force by a State Against Terrorists in Another Country’ (1989) *Israel Y.B.Hum.Rts.* 209, 216. Greenwood accepts that the notion is ‘generally used with reference to the use of regular armed forces by states’ although argues that ‘there is no *a priori* reason why the term should be so confined.’ See C. Greenwood, ‘International Law and the “War Against Terrorism”’ (2002) 78 *International Affairs* 301, 307.

¹¹⁸ Murphy, *supra* n. 111, 50; J. Paust, ‘Use of Force Against Terrorists in Afghanistan, Iraq and Beyond’ (2002) 35 *Cornell Int’l L.J.* 533, 534; Franck, *supra* n. 81, 840.

¹¹⁹ Ruys and Verhoeven, *supra* n. 116, 312.

¹²⁰ As O’Connell notes, ‘[t]o take the attack to the territory of a state, the defending state must have evidence the territorial state is responsible for the acts.’ See M.E. O’Connell, ‘Evidence of Terror’ (2002) 7 *JCSL* 19, 30.

¹²¹ Wilmschurst (Chatham House Principles), *supra* n. 40, 970; R. Van Steenberghe, ‘Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?’ (2010) 23 *LJIL* 183, 199-202.

¹²² Wilmschurst (Chatham House Principles), *ibid.*

which indeed requires ... that any action in self-defence be taken only as a last resort.¹²³

There are many examples of states invoking the right of self-defence in responding forcefully to the attacks of non-state actors which are located in, or passively supported by, another state, although the infrastructure of the state where the actors have been located has not been the target of the forcible actions. For example, not long before 11 September 2001, in response to the bombing in 1998 of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, the United States carried out air strikes on a pharmaceutical plant in Sudan and a terrorist training camp in Afghanistan.¹²⁴ Whilst these strikes in response occurred within the territories of these states, the United States did not target its response towards the states themselves, but rather towards the 'terrorist facilities' located on their soil, despite accusations that these states had refused to 'shut down and to cease their cooperation with the Bin Laden organization'.¹²⁵

As an earlier example, in striking the PLO headquarters in Tunisia in 1985 Israel did not strike Tunisian state infrastructure. Instead, on this occasion Israel, in justifying its actions, claimed that whilst Tunisia 'knowingly harboured the PLO and allowed it complete freedom of action in planning, training, organizing and launching murderous attacks from its soil ...[i]t was against [the PLO] that our action was directed, not against their host country.'¹²⁶

In the context of *Operation Enduring Freedom*, it appears that the Bush administration was claiming that the Taliban were 'unable or unwilling' to cease its passive support for al-Qaida. Yet it went further than targeting its action merely against al-Qaida and instead, as noted above, employed most force against the Taliban and the state of Afghanistan. For this type of action to have become permissible, more was required in terms of the attribution of the actions to the territorial state. In this case, the traditional standard used for attributing the actions of non-state entities to states for the purposes of self-defence against the state itself is one of 'effective control',¹²⁷ that is, if the entity is 'sent by or on behalf of a state',¹²⁸ the entity is acting 'on the instruction of, or under the direction or control of a state',¹²⁹ or the territorial state 'acknowledges and adopts the conduct in question as its own'.¹³⁰ This standard would not arguably have been satisfied in the context of the relationship between the Taliban and al-Qaida and, in any case, was not asserted by the Bush administration.

Nevertheless, it was clear that after the attacks of 11 September 2001 President Bush, as part of the Bush doctrine, attempted to widen the scope of permitted response in self-defence in his newly pronounced 'war on terror' by claiming that the United States would now make 'no distinction between the terrorists who commit[] these acts and those who *harbour* them',¹³¹

¹²³ Van Steenberghe, *supra* n. 121, 202 (emphasis added).

¹²⁴ *Keesing's* (1998) 42434.

¹²⁵ UN Doc. S/1998/780 (20 August 1998); *Keesing's* (1998) 42435.

¹²⁶ UNSC 2611th meeting, 2 October 1985, UN Doc. S/PV. 2611 (1985), 22-25.

¹²⁷ *Nicaragua Case*, *supra* n. 25, para. 195.

¹²⁸ UNGA Res. 3314 (XXIX) (14 December 1974) UN Doc. A/RES/29/3314 (XXIX), Article 3(g) (as employed in the *Nicaragua* case, *ibid.*, at para. 195). See also ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) (hereafter DASR 2001), Article 4.

¹²⁹ DASR 2001, *ibid.*, Article 8.

¹³⁰ DASR 2001, *ibid.*, Article 11. See also *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), [1980] ICJ Reports 3, at para. 74.

¹³¹ 'Address to the Nation on the Terrorist Attacks', (2001) 37 *Weekly Compilation of Presidential Documents* 1301, at 1301 (emphasis added). See S.R. Ratner, 'Jus ad Bellum and Jus in Bello After September 11', (2002) 96 *AJIL* 905, at 906; *Keesing's* (2001) 44334. On 14 September, the US Congress approved a joint resolution that authorised the President to 'use all necessary and appropriate force' against those behind the attacks and

this assimilation thus permitting it to take measures not just against terrorist training camps and facilities but also against the ‘harbouring’ state where they are located and which is, perhaps, unable or unwilling to end the presence of the terrorists on its soil. Indeed, this was the basis upon which *Operation Enduring Freedom* was launched.

This standard of attribution was then given a formal place in the Bush doctrine of self-defence nearly a year later when it was stated by the Bush Administration in the 2002 National Security Strategy that ‘[w]e make no distinction between terrorists and those who knowingly harbor or provide aid to them’,¹³² distinguishing the provision of aid from the mere harbouring of the perpetrators of terrorist attacks as both permitting the right of self-defence against the state concerned. As opposed to the pre-emptive self-defence arguments in the Strategy,¹³³ there were no arguments made in an attempt to shift the contemporary limits of the *jus ad bellum* so as to incorporate the ‘harbouring’ standard of attribution. Indeed, in connection with this part of the Bush doctrine, there were no indications that the Bush administration believed that its ‘harbouring’ standard was *lex ferenda*.

However, this difference in the structure and nuance of the legal claims was arguably due to the reception that *Operation Enduring Freedom* had received. Indeed, when the ‘harbouring’ standard of attribution was relied upon after 11 September 2001 in attacking Afghanistan itself, it appeared to be generally, some might argue overwhelmingly, accepted by others within the international community.¹³⁴ The agreement required for a change in the *jus ad bellum* appeared to be present at this point.¹³⁵ For example, not only did the UN Security Council recognize the right of self-defence in this instance,¹³⁶ but the general support for an action in self-defence to incorporate the Taliban and the state of Afghanistan appeared strong with very few states dissenting.¹³⁷ At first glance this appeared to be a significant shift in the law governing the attribution of the actions of non-state actors to states for the purposes of self-defence.

However, whilst this reaction could be interpreted as constituting the formation of ‘instant’ customary international law,¹³⁸ caution must be taken in drawing such a conclusion as in order to show that the rules on state responsibility for the actions of non-state actors in the context of self-defence have changed, something more is required.¹³⁹ Indeed, whilst this reaction could have been generated through shock at the size and audacity of the attacks,

those who ‘harboured such organisations and persons ... in order to prevent any future acts of international terrorism against the United States by such nations, organization or persons’. See (2001) 40 *ILM* 1282 (emphasis added).

¹³² 2002 NSS, *supra* n. 1, at 5. See also 2006 NSS, *supra* n. 7, 12.

¹³³ See section 2(A) of this article.

¹³⁴ See Henderson, *The Persistent Advocate*, *supra* n. 13, 154-157. Although see M. Williams, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Farnham: Ashgate, 2009) for an alternative conclusion.

¹³⁵ On the requirement of agreement in the process of change see section 2(A) of this article.

¹³⁶ UNSC Res. 1368 (12 September 2001) UN Doc. S/RES/1368, preamble. Later, the UNSC unanimously adopted Resolution 1373 which ‘reaffirmed’ this right and contained measures to be taken in order to combat terrorism. UNSC Resolution 1373 (28 September 2001) UN Doc. S/RES/1373.

¹³⁷ See Henderson, *The Persistent Advocate*, *supra* n. 13, 154-156 for a fuller description of this reaction.

¹³⁸ Christine Gray has written that the ‘the massive state support for the legality of the US claim to self-defence could constitute instant customary international law and an authoritative reinterpretation of the UN Charter, however radical the alteration from many states’ prior conception of the right of self-defence.’ See C. Gray, ‘The Use of Force and the International Legal Order’, in M.D. Evans (ed.), *International Law*, 2nd ed., (Oxford: Oxford University Press, 2006) 589, at 602.

¹³⁹ M.G. Kohen, ‘The Use of Force by the United States after the End of the Cold War, and its Impact Upon International Law’ in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003) 197, 224.

sympathy and support for the United States at this particular time, or simply fear for one's own safety, for the rules under consideration to go through a process of modification it should be demonstrated that there has been a settled practice involving widespread and representative participation which, whilst not requiring the actual physical practice of other states, is consistently shared in principle by them.¹⁴⁰ As such, whilst there was undoubtedly *opinio necessitatis* generated in these arguably never to be repeated circumstances, it is only after the dust has well and truly settled that one is able to discern if this has solidified into *opinio juris* in connection with the potential changes to the *jus ad bellum* regarding forcible responses to terrorist actors and their harbour states.¹⁴¹ As Kohen correctly points out:

If the will of the international community is to review the existing rules regarding the use of force against terrorists, then one can expect the same attitude will be taken in other, similar situations. If it is not the case, then one has to conclude that what we are witnessing here is not a change in the rule or its interpretation, but rather a political attitude on the part of the majority of states supporting in one case only the political aims of one state.¹⁴²

Indeed, if there has been no subsequent repetition of the invocation of the harbouring standard of attribution 'in other, similar situations' then it is possible to argue that this is an implicit rejection of it. In this light, upon further examination it is clear that the standard has not been invoked by the United States on a separate occasion since, or witnessed in the practice of either other states¹⁴³ or the Security Council,¹⁴⁴ or been given support in the jurisprudence of either the International Court of Justice¹⁴⁵ or scholars,¹⁴⁶ thus militating against any serious claims that it is now a part *lex lata* of the *jus ad bellum*.

Given this absence of the standard from the practice and discourse of these actors, but with equally no express rejection of it, Gray is perhaps correct to conclude that it is not yet entirely clear whether the events of 11 September 2001 including the subsequent invocation of the harbouring standard of attribution by the United States 'have brought about a radical and lasting transformation of the law of self-defence or whether their significance should be narrowly construed in that *Operation Enduring Freedom* was essentially a one-off response to

¹⁴⁰ See *supra* n. 47.

¹⁴¹ See Henderson, *The Persistent Advocate*, *supra* n. 13, 158.

¹⁴² Kohen, *supra* n. 139, 225.

¹⁴³ For example, in justifying its use force in Lebanon in the summer of 2006, although Israel adopted the language of the United States and its 'war on terrorism' in claiming that Lebanon provided 'a base for terrorism' (UN Doc. S/2003/96 (27 January 2003)), in contrast to the actions of the United States in 2001, when Israel launched its action in self-defence it made clear that it was targeted at the non-state entity, Hezbollah, not the territorial state, Lebanon. Israel said in the UNSC: 'Although Israel holds the Government of Lebanon responsible, it is concentrating its response carefully, mainly on Hizbollah strongholds, positions and infrastructure.' UNSC 5489th meeting, 14 July 2006, UN Doc. S/PV. 5489 (2006), at 6. See also UNSC 5493rd meeting, 21 July 2006, UN Doc. S/PV. 5493 (2006), at 10-12. Indeed, '[a]s has been Israel's consistent practice, it claimed not to be acting against the territorial host state, but primarily against non-state terrorists'. Trapp, *supra* n. 112, 153-154.

¹⁴⁴ The UNSC has not made a similar reference to self-defence regarding the activities of non-state entities since, even in the context of al-Qaida terrorist attacks. See, for example, UNSC Resolution 1450 (13 December 2002) UN Doc. S/RES/1450, which deplored the claims of responsibility by al-Qaida for the terrorist attacks in Kenya but made no reference to self-defence.

¹⁴⁵ For example, in the *DRC v. Uganda* case, in a clear rejection of the United State's post-9/11 'harbouring' standard, the Court stuck with the traditional 'effective control' standard of attribution. See *DRC v. Uganda Case*, *supra* n. 55, paras. 131-135 and 146.

¹⁴⁶ See, for example, Paust, *supra* n. 118, 540-544.

a particular incident based on Security Council affirmation and (almost) universal acceptance by states.’¹⁴⁷

B. The Obama Doctrine: Endorsing the ‘Harbouring’ Standard

Despite this particular standard of attribution not having found a place, at least not yet, within the *lex lata*, President Obama has chosen not to disassociate himself from it. On the contrary, if anything, he has offered an endorsement of it. For example, in the President’s speech at the West Point military academy in December 2009 it was noted that ‘Al Qaeda’s base of operations was in Afghanistan, where they were *harbored* by the Taliban’.¹⁴⁸ The President went on to indicate that whilst the Taliban and the state of Afghanistan did not carry out the attacks, or send or control those that did, this did not prevent the use of force against it. Indeed, not only did Obama recall the fact that ‘Congress authorized the use of force against al Qaeda and those who *harbored* them -- an authorization that continues to this day’,¹⁴⁹ but also that ‘[t]he world rallied around America after the 9/11 attacks, and continues to support our efforts in Afghanistan, because of the horror of those senseless attacks and *the recognized principle of self-defense*.’¹⁵⁰ In further linking the pieces together it appears that Obama has incorporated the harbouring standard under his doctrine of ‘necessary force’ by his categorization of this conflict as a ‘war of necessity’.¹⁵¹

The harbouring standard of attribution presents the possibility of a radical shift in the permissible responses to terrorist attacks. The threat to international peace and security posed by widespread acceptance of this standard is clear with many states becoming possible targets of force. In this respect it opens up the possibility for far greater numbers of civilian deaths. Furthermore, whilst such a standard may have been workable against a governmental structure such as the Taliban, its utility, effectiveness and popularity should perhaps be doubted against those of a more established, legitimate, and powerful nature.

Nevertheless, although the Bush administration did not refine its proposed standard any further into a more coherent, and perhaps acceptable, regime for attribution, Obama has not only not taken the opportunity to do so but also neither officially endorsed the standard in the 2010 National Security Strategy. Whether or not this is due to recognition of its doubtful position within the contemporary *jus ad bellum* is unclear. However, as noted above, Obama was clear in the 2010 Strategy that ‘[t]he United States must reserve the right to act unilaterally if necessary to defend [its] nation and [its] interests, yet [it] will also seek to adhere to standards that govern the use of force’.¹⁵² Given that this was an assertion to the effect that the United States ‘must’ use force when necessary, but will merely ‘seek’ to adhere to the applicable standards, presumably including the ‘effective control’ standard of attribution described above, this does, after the apparent endorsement of the harbouring standard, leave a large amount of ambiguity over his position. Indeed, if Obama is willing to resort to this standard of attribution in other contexts and situations, it is still not clear the exact level of state support that will be sufficient before it is invoked as necessary under the Obama doctrine. In any case, as Kohen has remarked, ‘[h]arbouring terrorist groups acting abroad clearly constitutes a threat to international peace and security, which in turn can justify

¹⁴⁷ See Gray, *supra* n. 19, 194.

¹⁴⁸ West Point speech, *supra* n. 5 (emphasis added).

¹⁴⁹ Ibid. See *supra* n. 131.

¹⁵⁰ Oslo speech, *supra* n. 6 (emphasis added)

¹⁵¹ See ‘The Making of the President’s Foreign Policy: The Decider’ *The Economist* (28 November 2009), 51.

¹⁵² 2010 NSS, *supra* n. 10, 22.

forcible action as decided upon by the Security Council under Chapter VII of the Charter'.¹⁵³ As part of the doctrine of 'necessary force', this factor should be taken into account in any determinations as to the necessity of forcible measures, following, but certainly in the absence of, a prior armed attack.

Ultimately, what is clear from the 2010 Strategy is that the war against al-Qaida and the Taliban has the full support of the Obama administration. Combining this with the statements from the President noted above would appear to place this standard in the armoury of weapons he is willing to use in the future, regardless of its doubtful position *lex lata* under the *jus ad bellum*. Indeed, if it is deemed 'necessary' to resort to force by the Obama administration, the contemporary standards governing when force can be resorted to have officially been made a side issue. Whilst it awaits to be seen whether this standard will be invoked by the Obama administration, as clearly it has reserved the right to do so, it can only be hoped that the practice by other actors within the international community at least follows the trend that has been witnessed so far and continues to be dismissive of any shifts in the *jus ad bellum* so as to incorporate it.

4. Humanitarian Intervention and 'Just War'

Breaking away from self-defence, there appears to be another piece to the Obama doctrine, that is, the use of force that is 'not only *necessary* but *morally justified*.'¹⁵⁴ The concept of 'just war' dates back centuries and long before the current legal regulation of the use of force was born.¹⁵⁵ However, the historical basis of this concept did not elude President Obama who noted that 'for most of history, this concept of "just war" was rarely observed'.¹⁵⁶ Indeed, in his Nobel Prize speech the President, whilst omitting to mention the necessity of a 'just cause' or 'legitimate authority', noted the just war concept as 'suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence.'¹⁵⁷

In the context of his invocation of just war, Obama went on to claim that 'wars within nations' had also caused the original architecture to 'buckle'¹⁵⁸ and that this state of affairs required the international community to think '*in new ways* about the notions of just war and the imperatives of a just peace.'¹⁵⁹ Indeed, '*[m]ore and more*, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region.'¹⁶⁰ Thus Obama appeared to be suggesting that whilst the just war doctrine once existed as a means for states to justify their forcible actions this doctrine should be revived and adapted so as to be of use in justifying actions to prevent humanitarian crises within states. As he noted, a starting point in this endeavour would be to consider when force would be necessary, or as he put it 'waged as a last resort', or if it could be used in 'self-defence'.

¹⁵³ See Kohen, *supra* n. 139, 207

¹⁵⁴ Oslo speech, *supra* n. 6 (emphasis added).

¹⁵⁵ See Brownlie, *supra* n. 80, 1-18 for more on this concept.

¹⁵⁶ Oslo speech, *supra* n. 6.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid. (emphasis added).

¹⁶⁰ Ibid. (emphasis added).

Under the contemporary general prohibition of the threat or use of force there exists only the express exceptions of self-defence and authorization by the UN Security Council.¹⁶¹ As described in the above sections of this article, the concept of necessity has a firm place in the context of self-defence,¹⁶² whilst in resorting to forcible measures under Article 42 of the UN Charter, the Security Council should first ‘consider that [non-forcible] measures provided for in Article 41 would be inadequate or have proved to be inadequate’.¹⁶³

However, although some have controversially made the argument that the intervention in civil wars and humanitarian intervention can lawfully take place under the right of self-defence as a ‘defence of others’,¹⁶⁴ beyond saving the lives of nationals of the intervening state self-defence does not have an accepted role *lex lata* in this context.¹⁶⁵ Furthermore, whilst the UN Security Council has come to authorize the use of force for such humanitarian purposes,¹⁶⁶ given that Article 2(7) of the UN Charter prohibits interference with the domestic affairs of states it has had to justify these authorizations upon the basis that the incidents involved threats to *international* peace and security and were not wholly domestic in nature, even if for all intents and purposes this appeared to be the case.¹⁶⁷

In the UN Charter era, and under the general prohibition of the use of force, the ‘just war’ doctrine has been replaced with debate around the possible emergence of a doctrine of humanitarian intervention.¹⁶⁸ Nevertheless, there is no basis within the Charter to make the case for the legality of unilateral forcible measures to prevent ‘wars within nations’ and humanitarian catastrophes.¹⁶⁹ Furthermore, whilst there were arguable precedents for the emergence of a doctrine in customary international law with India’s intervention in East Pakistan (Bangladesh) in 1971,¹⁷⁰ Vietnam’s intervention in Cambodia (Kampuchea) in 1978-79,¹⁷¹ and Tanzania’s intervention in Uganda in 1979,¹⁷² ultimately these were justified on other grounds such as self-defence, thus limiting their precedential value. Although some

¹⁶¹ The prohibition of the threat or use of force is found in its textual form in Article 2(4) of the UN Charter: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’ The exceptions to this prohibition are found in Article 51 and Articles 39-50 of the UN Charter respectively.

¹⁶² See section 2(B)(i) and (ii) of this article.

¹⁶³ Article 42, UN Charter (1945).

¹⁶⁴ See, generally, G.P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why* (New York: Oxford University Press, 2008). Although see C. Henderson, ‘Book review of G.P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why*’ (2010) 15 *JCSL* 529 for the controversy surrounding such a claim.

¹⁶⁵ See, generally, D.W. Bowett, ‘The Use of Force for the Protection of Nationals Abroad’ in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force: Legal Restraints on the Use of Force 40 Years after the U.N. Charter* (Dordrecht: Martinus Nijhoff, 1986), 39-55.

¹⁶⁶ See, for example, UNSC Resolution 794 (3 December 1992) UN Doc. S/RES/794, para. 10.

¹⁶⁷ Because of the Chapter VII context in which they occurred, and the inapplicability of the domestic jurisdiction clause in Article 2(7) in connection with measures undertaken in such a context, ‘each of the instances in which the Council has used, or authorized coalitions of the willing to use collective measures in situations of civil war or against regimes engaged in egregious human rights violations can be fitted into the Charter text.’ See Franck, *supra* n. 106, 137.

¹⁶⁸ See P. Valek, ‘Is Unilateral Humanitarian Intervention Compatible with the UN Charter?’ (2004-05) 26 *Mich.J.Int’l L.* 1223.

¹⁶⁹ For example, whilst Article 2(4) requires all member states to ‘refrain’ from the threat or use of force, Article 1(3) merely talks of ‘promoting and encouraging respect for human rights’ and Article 55 states that the UN ‘shall promote universal respect for, and observance of, human rights’.

¹⁷⁰ See (1971) *UNYB* 146.

¹⁷¹ See *Keesing’s* (1979) 29613.

¹⁷² See *Keesing’s* (1979) 29669-73.

have argued that these interventions *could have* or *should have* been justified as humanitarian intervention this does not equate to *opinio juris* on the part of the acting states themselves.¹⁷³

More recently was NATO's *Operation Allied Force* to stop the Serbian ethnic cleansing of the Kosovan Albanians in the province of Kosovo.¹⁷⁴ This may have been the high point for some in their arguments regarding a doctrine of unilateral humanitarian intervention but still very few of the acting states, including the United States itself, justified it clearly as such and there has been many misgivings since about its legality, despite many perceiving it as a *legitimate* use of force.¹⁷⁵ Furthermore, whilst the notion of a 'responsibility to protect' has taken its place within international legal discourse,¹⁷⁶ this has not been interpreted as being enforceable unilaterally¹⁷⁷ and, in any case, the realities and limitations of such a responsibility in practice have been well witnessed in Darfur.¹⁷⁸

Nevertheless, President Obama was open in his belief not that he would like to see a principle *emerge* permitting the unilateral use of force on humanitarian grounds, but that:

force *can* be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.¹⁷⁹

After claiming that the international community would have to 'think in *new* ways' and 'more and more' about how to prevent humanitarian catastrophes through just wars, President Obama appears here to have put the cart before the horse in claiming that such action can already be justified. Of course, this may have been in terms of action being 'morally' justified and, as such, perhaps a claim *lex ferenda*, but there is some confusion on this point as such envisaged interventions were placed squarely within the doctrine of 'necessary force' in the 2010 National Security Strategy: 'Military force, at times, may be necessary ... to preserve broader peace and security, including by protecting civilians facing a grave humanitarian crisis.'¹⁸⁰ Consequently, it appeared that Obama was going beyond any claims *lex ferenda* in stating that, despite where the law currently stood, force would be used if it was deemed by the Obama administration to be necessary. Indeed, the President was clear that whilst the United States would 'seek' to adhere to standards that govern the use of force, it 'must' still reserve the right to act unilaterally 'if necessary'.¹⁸¹ As discussed above, the international legal standards governing the use of force do not currently permit the unilateral use of force for humanitarian purposes. Despite this prohibition, Obama has quite clearly stated that his determination as to the necessity of forcible means will take precedence over any prohibition which it merely seeks to adhere to.

¹⁷³ A point made by Christine Gray. See Gray, *supra* n. 19, 34.

¹⁷⁴ See B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1.

¹⁷⁵ *Ibid*, at 6.

¹⁷⁶ See The Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001), available at <http://www.iciss.ca/report-en.asp>.

¹⁷⁷ See High-Level Panel report, *supra* n. 91, para. 203; In Larger Freedom, *supra* n. 52, para. 125.

¹⁷⁸ As Christine Gray comments, '[t]he problems involved in the implementation of the "responsibility to protect", whether through the UN or, more controversially, through regional or unilateral humanitarian intervention, were all too apparent with regard to the humanitarian catastrophe in Darfur (Sudan).' Gray, *supra* n. 19, 53.

¹⁷⁹ Oslo speech, *supra* n 6.

¹⁸⁰ 2010 NSS, *supra* n. 10, 22.

¹⁸¹ *Ibid*.

Proposing that a right should emerge is one thing, and indeed can form a constructive contribution to the development of international law, but claims that one already exists, or worse still, that action can be taken if deemed necessary regardless, is another. Indeed, this demonstrates insensitivity to, and more likely a total disregard for, the legal limits imposed by the contemporary *jus ad bellum*. Any claims that force can be justified purely on moral grounds sweeps aside the prohibition of the use of force and the accepted contemporary exceptions to this.

Furthermore, whilst President Obama has made overtures to multilateralism and the standards governing the use of force, not only did the President not mention the collective security system in place within the UN Charter in his speeches but appeared to intentionally avoid referring to it in the context of humanitarian interventions by stating that these actions would take place either ‘individually or *in concert*’.¹⁸² Actions taken ‘in concert’ but not under the auspices of the UN Security Council possess no more legality than those taken individually. Without the Security Council’s authorization or agreement this is still a unilateral use of force prohibited under the *jus ad bellum* as it currently stands.

This controversial aspect of the ‘necessary force’ doctrine was reinforced in the 2010 National Security Strategy where it was stated that ‘[w]hen force is necessary ... we will seek broad international support, working with such institutions as NATO and the U.N. Security Council.’¹⁸³ As discussed above, the use of force for humanitarian purposes does not hold a place *lex lata* within the *jus ad bellum* and, as such, the concept of necessity is not one that has been developed in connection with it. However, given Obama’s reference to the just war condition of ‘last resort’, the ‘new way’ in which Obama claimed we should view this concept must be through the lens of the contemporary international framework for peace and security. This view provides that outside of the context of self-defence simply acting in concert but without the authorisation of the UN Security Council is unlawful. Furthermore, if there is time to ‘seek broad international support’, then, as a last resort, there is time to go to the Security Council and seek authorization before any action becomes legally justifiable. In this respect, it was noticeable that NATO was apparently given priority over the UN Security Council in its discussions as to the institutions that the United States intends to work with (and, notably, not *within*).

Overall, President Obama was unclear as to what his position exactly is. In some respects he appears to be making a call to unilateral action in situations of humanitarian emergency whilst in others he appears to think that a right to take action in such circumstances already exists or, if it does not, that the doctrine of ‘necessary force’ permits it to override the prohibition of the use of force. Although there are arguments to be made in favour of a doctrine of unilateral humanitarian intervention, there are equally many concerns regarding one, concerns which have ultimately prevented a doctrine from emerging within the *jus ad bellum*. Whilst the prospects for such a right under the *jus ad bellum* are not bright, the manner in which such a right has been placed within the Obama doctrine of ‘necessary force’ does not appear to have furthered them, at least not in any clear and coherent way.

5. Conclusion

¹⁸² Oslo speech, *supra* n. 6 (emphasis added).

¹⁸³ 2010 NSS, *supra* n. 10, 22.

President Obama has never claimed to be a pacifist. Indeed, despite the criticism regarding the Bush era concept of a 'war on terror',¹⁸⁴ the 2010 National Security Strategy is clear that the United States is at 'war against al-Qai'da and its affiliates.'¹⁸⁵ Furthermore, Obama's belief that the use of force will sometimes be 'necessary' has been made loud and clear. Indeed, from the evidence obtained, this article has argued that there is an identifiable Obama doctrine of 'necessary force'. Furthermore, it has been highlighted that in establishing this doctrine 'Obama was basically rejecting the relevance of the old legal regime of restraint as being incapable of offering appropriate guidance to uphold 21st century security.'¹⁸⁶

However, the central concern raised in this article is the lack of any expansion as to what is meant by the use of the term 'necessary' and whether, with the reference to the 'standards' governing the use of force, this is to be taken to be understood as it is in the context of the *jus ad bellum*. What is worrying about this doctrine is not the assertion of a wide right but the complete lack of clarity as to what is permissible under it. One could of course argue that it is politically wise not to provide too much information to your adversaries on when you are prepared to use force. However, if President Obama is serious about respecting the 'standards' of international law and the need for reciprocity here he needs to be clearer as to what he believes these standards to be before he can begin judging others. If he leaves the door so wide open as to what these are, as appears to be the case under the doctrine of 'necessary force', this encourages others, including potential adversaries, to do the same so that ultimately no one is clear as to what the 'standards' are that they are supposed to be respecting.¹⁸⁷

Without any link to its legal context, 'necessity' is an inherently subjective concept and Obama needs to give some reassurance as to his interpretation of it. For instance, as things stand, it remains to be seen whether force will be deemed 'necessary' if, for example, Iran continues to antagonize and provide confusion as to the ambitions of its nuclear program. Whilst initially willing to negotiate with this state, how long will this continue until force will be deemed necessary?¹⁸⁸ Furthermore, if the United States does decide that force is 'necessary', will it undertake such action with the other states that have shown concern over the issue, or will it be restrained if these other countries disagree with it?¹⁸⁹ Whilst his administration's overtures to multilateralism in other areas have been commendable, clearly he has not ruled out going it alone when he believes it 'necessary'. Ultimately, and as this article has attempted to demonstrate, the broad boundaries of the Obama doctrine arguably make it less acceptable under the *jus ad bellum* and open to broader interpretation than that of his predecessor.

¹⁸⁴ See F. Mégret, 'War? Legal Semantics and the Move to Violence' (2002) 13 *EJIL* 361.

¹⁸⁵ 2010 NSS, *supra* n. 10, 1.

¹⁸⁶ Falk, *supra* n. 87, ix.

¹⁸⁷ Henderson, *supra* n. 9,

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid*