FROM AUGUSTINE TO TRUMP: HAS SELF-DEFENCE AND PROPORTIONALITY IN JUST WAR THEORY EVOLVED BEYOND ALL RECOGNITION?[1]

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INTRODUCTION

There is much to be said about the concepts of self-defence and proportionality in the law of war, and many different theories providing varied lenses through which to examine them. This paper critically examines the two concepts from the perspective of Just War theory, a theory which originated in the writings of Saint Augustine, and was carried on by several great thinkers like Saint Thomas Aquinas, Francisco de Vitoria and Hugo Grotius.[3]

In Part I of this paper, the author first examines the origins and evolution of self-defence and proportionality, within the context of Just War theory. Drawing particular attention to the 3 branches of the law of war – *jus ad bellum*, *jus in bello* and *jus post bellum* – the author highlights the importance of grasping what sets them apart, as well as how they relate to each other, leading to a *"unified theory of the overall justice of war"*.[4] The author then zeros in on *jus ad bellum* proportionality, which will guide much of the discussion that follows. This form of proportionality has surprisingly been subjected to the least rigorous legal analysis by jurists, despite its primacy within the law of war.[5] Part I concludes with a critical examination of self-defence and *jus ad bellum* proportionality in modern international law.

As would be evident from the analysis in Part I, self-defence was envisaged as a right that arises upon an "armed attack" by an aggressor. *Jus ad bellum* proportionality, in the context of self-defence, was thus meant to be applied retrospectively in that the proportionality of the intended war of self-defence had to be measured against the harm already suffered. This view is supported not only by the writings of early Just War theorists, but in the modern-day context by a plain reading of Article 51 of the United Nations ("UN") Charter and the decision by the International Court of Justice ("ICJ") in the 1984 *Nicaragua* case.[6]

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3 Michael Newton & Larry May, *Proportionality in International Law* (New York: Oxford University Press, 2014) at Chapter 4. (Hereinafter referred to as "Newton & May (2014)".)

4 Newton & May (2014) at Page 80.

5 Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Reissued Ed. (New York: Cambridge University Press, 2011) at Page 20. (Hereinafter referred to as "Gardam (2011)".)

6 *Nicaragua v United States of America* (Case Concerning Military and Paramilitary Activities in and Against Nicaragua) (ICJ Judgment on the Merits, 26 November 1984). (Hereinafter referred to as "the *Nicaragua* case".)

In Part II, therefore, the author examines the inherent incompatibility between the concepts of anticipatory self-defence and *jus ad bellum* proportionality. In particular, how this theory became part of modern international law through the Caroline Doctrine in 1842, and how it further evolved with the formulation of the Bush Doctrine in 2002. The author then explores the advent of modern warfare and the further complications it presents to the analysis. After providing a flavour of the various ways in which modern warfare compounds the problem, the author posits that proportionality in all 3 forms continues to play an indispensable role as a safeguard against the excessive use of force in the commencement and conduct of war, and against excess by the victor(s) in its aftermath. Part II concludes with a reluctant acknowledgement by the author that whilst technically illegal, anticipatory self-defence is nonetheless gaining acceptance as a necessary evil in the age of modern warfare.

In Part III of this paper, the author puts the analysis in the context of case studies from the past and present. Drawing on the lessons from the Iraq War fiasco, the author analyses the ongoing North Korea crisis. This analysis is undertaken both from a Just War theory and modern international law perspective. The author concludes that an attack on North Korea on the basis of *jus ad bellum* proportionality and self-defence, anticipatory or otherwise, is not justifiable.

I. PART I: THE ORIGINS AND EVOLUTION OF SELF-DEFENCE AND PROPORTIONALITY

(a) Just War Theory and Self-Defence

Just War theory consists of several overlapping traditions having their roots in Roman and early medieval Christian thinking about the justifiability of armed conflict and killing.[7] Augustine has long been considered the founder of Just War theory,[8] and it is in his time that our discussion on self-defence and proportionality begins. According to Augustine, there were two just causes to go to war, i.e. self-defence or the defence of others.[9] While Augustine did speak of a possible war *"to*

[7] Newton & May (2014) at Page 61.

[8] Though some have suggested that Just War theory can be traced back to Marcus Tullius Cicero, i.e. pre-Christianity. See Newton & May (2014) at Page 63.

[9] St. Augustine, *The City of God*, as translated by Henry Bettenson, Reprint (London: Penguin Classics, 1984) at Page 874.

correct or to punish… sins" of non-believers,[10] this form of war has since been rejected in its entirety and is beyond the ambit of the present discussion.

This concept of a "just war" was a continuing theme throughout the subsequent writings of Aquinas, Vitoria and Grotius. Vitoria unequivocally declared that, *"[t]here is a single and only just case for commencing a war, namely, a wrong received"*,[11] quoting both Augustine and Aquinas as authority for the proposition. Although upon a closer examination, it would appear that Vitoria actually accepted a myriad of other justifications for war against the natives, the point to note here is that a defensive war in response to a wrong received was the most widely accepted justification for war amongst early Just War theorists.

Before examining proportionality according to these Just War theorists, it is important to note another continuing theme running through their writings, i.e. that of necessity in the initiation of war. Inherent in the view that war is only justifiable on the basis of self-defence or the defence of others is the idea that the initiation of war is necessary for such defence to be effective, and must be conducted only to such extent as would be necessary to achieve this aim.

Vitoria stated in his lecture *that "only under compulsion and reluctantly should [a prince] come to the necessity of war"*,[12] and *"since it is… lawful… to wage defensive war or even if necessary offensive war, therefore, everything necessary to secure the end and aim of war, namely, the obtaining of safety and peace, is lawful"*.[13] Aquinas, who came 2 centuries before Vitoria, similarly stated that it is unlawful if a man, even in self-defence, *"uses more than necessary violence"*.[14] The role of necessity within the context of self-defence and proportionality will become more apparent in the discussion that follows.

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10 *Ibid.* at Page 875.

11 Francisco de Vitoria, *De Indis et De Jure Belli*, as translated by John Pawley Bate (Washington DC: The Carnegie Institution, 1917) at Page 170. (Hereinafter referred to as "Vitoria (1917 Translation)".)

12 Vitoria (1917 Translation) at Page 187.

13 Vitoria (1917 Translation) at Page 155.

14 St. Thomas Aquinas, *The Summa Theologica*, translated (London: Burns, Oates & Washburn, 1936) at Page 1464. (Hereinafter referred to as "Aquinas (1936 Translation)".)

(b) Proportionality in Just War Theory: Jus ad Bellum, Jus in Bello and Jus Post Bellum

Just War theory is concerned with setting acceptable limits in the 3 branches of war: *jus ad bellum*, *jus in bello* and *jus post bellum*. *Jus ad bellum* concerns the justice of commencing war, *jus in bello* concerns the justice of conducting war (now referred to as "international humanitarian law" or "IHL"[15]), and *jus post bellum* concerns the justice at the end of war.[16] Each of these branches involve a weighing of different forms of proportionality. While the last of these forms – *jus post bellum proportionality* – has only recently gained more attention from jurists,[17] an examination of the writings of early Just War theorists confirms that all 3 proportionalities were recognised and addressed, though the use of such terms were anachronistic to that time.

Vitoria was amongst the first of the Just War theorists to acknowledge the 3 proportionalities. He stated:

> *"When war for a just cause has broken out, it must not be waged so as to ruin people against whom it is directed, but only so as to obtain one's rights and the defence of one's country and in order that from that war peace and security may in time result… When victory has been won and the war is over, the victory should be utilised with moderation and Christian humility, and the victor… will deliver the judgment whereby the injured state can obtain satisfaction, and this, so far as possible should involve the offending state in the least degree of calamity and misfortune, the offending individuals being chastised within lawful limits…"*[18]

Francisco Suarez, who came shortly after Vitoria's time, articulated these distinct proportionalities with even more clarity and concision. He stated, "*due proportion must be observed in the beginning, during its prosecution, and after victory*",[19] citing this as a continuation of Vitoria's work. These citations prove that the 3 distinct proportionalities have existed long before the terms *jus ad bellum*, *jus in bello* and *jus post bellum* were used in modern times.

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15 Gardam (2011) at Page 1.
16 Newton & May (2014) at Page 61.
17 Newton & May (2014) at Page 74.
18 Vitoria (1917 Translation) at Page 187.
19 Francisco Suarez, *On War*, in *Selections from Three Works Disputation XIII*, as translated by Gladys L. Williams, Ammi Crown, and John Waldron (Oxford: Clarendon Press, 1944) at Page 805.

It is important to understand the distinction amongst these 3 proportionalities, as they are each meant to address different sets of concerns, and are governed by different sets of principles. While the author acknowledges that it is often difficult to clearly demarcate when a war starts and ends, for the purposes of legal analysis, however, such distinction is not only advisable, but necessary.

Another reason to clearly distinguish the 3 proportionalities is that it will circumscribe our discussion on self-defence and anticipatory self-defence. In particular, the author posits that whilst the measurement of *jus in bello* and *jus post bellum* proportionality involves some prospective determination of the likely consequences of an intended action, *jus ad bellum* was never meant to apply prospectively.

Instead, if it is accepted that the only just war is a defensive one, then it must necessarily follow that *jus ad bellum* proportionality measures what would be a proportionate response to an armed attack that has already occurred, and a harm that has already been inflicted. This is evident in the writings of Grotius, where he explains the limits of a proportionate response to a wrong suffered:

> *"Nevertheless, it is possible that he who in turn inflicts an injury on such a ground should be considered unjust particularly if he exceeds the rule of equality and proportion in his reprisal."*[20]

The final important point to be made in relation to the 3 proportionalities is that an appreciation of what separates them is only half the picture. Too often, the views on the subject fall along 2 extreme ends of the spectrum. While some overly theoretical writers address the 3 proportionalities as concepts that operate in silos, independently of each other, overly practical writers at the other end of the spectrum use these concepts interchangeably, co-mingling them beyond what was originally intended.

Instead, the author proposes a more holistic understanding of the 3 proportionalities as complementary concepts that regulate the beginning, middle and end of war.[21] In this approach, while it is acknowledged that the 3 proportionalities address different concerns and are governed

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[20] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, as translated by Francis W. Kelsey (Oxford: Clarendon Press, 1925) at Book III Page 726. (Hereinafter referred to as "Grotius (1925 Translation)".)

[21] Newton & May (2014) at Page 80.

by different principles, it does not deny the realities and constraints of war and military strategy. In the words of Newton & May:

> *"Given the assumption that war must end justly to be proportionate, those contemplating the initiation of a war should consider the conditions and results at the end of that war in weighing what will be lost or risked… The justice of war's end thus becomes relevant for the justice of war's initiation as well as the conduct of war… The beginning, middle, and end of war will each have effects on the other, leading to a unified theory of the overall justice of war."*[22]

(c) The 5 Principles of Jus ad Bellum

Having established the 3 proportionalities in Just War theory, the focus of the discussion now shifts to *jus ad bellum* proportionality, the proportionality that guides the remainder of our discussion on self-defence. To understand *jus ad bellum* proportionality, we must first understand its place within the broader *jus ad bellum* principles.

For war to be justly initiated, the following 5 principles must be satisfied:

(i) Just cause;

(ii) Right intention;

(iii) Legitimate authority;

(iv) Last resort; and

(v) Proportionality.[23]

Of the above 5 principles, it has been said that *"[j]ust cause may be the most important consideration of all the conditions of just war, but proportionality is nearly as significant especially since it can greatly restrict what counts as a just cause, or how just cause is limited"*.[24] We will explore each of these principles in turn.

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[22] Newton & May (2014) at Pages 78 – 80.

[23] Newton & May (2014) at Page 63. For completeness' sake, it should be added that the principles that govern *jus in bello* are: (i) Distinction; (ii) Necessity; and (iii) Proportionality, while the principles that govern *jus post bellum* are: (i) Retribution; (ii) Reconciliation; (iii) Rebuilding; (iv) Restitution; (v) Reparations; and (vi) Proportionality. Newton & May (2014) at Pages 68 and 75.

[24] Newton & May (2014) at Pages 67 – 68.

Just Cause

Just cause has been addressed in detail in Part I(a) above, and it suffices for our purposes to reiterate that self-defence *"remains the paramount, if not the only just cause to initiate war"*.[25] Vitoria had also explicitly ruled out the following as just causes for war:

(i) Difference of religion;

(ii) Extension of empire; or

(iii) Personal glory of a prince or other advantage to him.[26]

Right Intention

The principle of right intention was most eloquently put by Aquinas where he argued that a condition of a just war was rightful intention of *"the advancement of good, or the avoidance of evil"*, and not *"the passion for inflicting harm, [or] the cruel thirst for vengeance"*.[27] However, it should be noted that jurists today have placed less significance on this principle given that motives are often mixed, and it would be difficult to establish subjective intentions, and to restrict just wars to only those with altruistic motives.[28]

Legitimate Authority

The principle that only a legitimate authority can initiate a just war was also championed by Aquinas, giving the example of *"the authority of a sovereign"*.[29] In the modern-day context, Article 51 of the UN Charter (which we will explore in greater detail) acknowledges such authority as belonging to sovereign states, though there remains considerable debate over who exactly within those states is entitled to declare war.

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25 Newton & May (2014) at Page 63.
26 Vitoria (1917 Translation) at Page 170.
27 Aquinas (1936 Translation) at Page 1354.
28 Newton & May (2014) at Page 64.
29 Aquinas (1936 Translation) at Page 1354.

Last Resort

Last resort is necessity in another form. Under this principle, even if war is resorted to as a form of self-defence, it is not justified unless all peaceful means of resolving the conflict have been exhausted. This is most evident in Vitoria's lecture, where he argues that a just war can only be initiated *"after recourse to all other measures"*, and after having *"used all diligence, both in deed and in word"* to reason with the natives, yet the natives persist in their hostility.[30]

Proportionality

Finally, we come to the principle of *jus ad bellum* proportionality, the crucial lens through which we shall view and critically analyse the concepts of self-defence and anticipatory self-defence. It is important to note that proportionality only comes into play once a just cause for initiating war has been established.

If just cause (or *casus belli*) is not satisfied, the issue of whether initiating such a war would be proportionate to the wrong done or harm suffered does not even arise.[31] Thus, one cannot use the reason that the likely consequences of war are sufficiently proportionate to justify the very initiation of war. This is a common misconception which has led to misapplication of the *jus ad bellum* proportionality.[32]

With that understanding in mind, we turn our attention to the substantive test for *jus ad bellum* proportionality. Traditional Just War theory requires the weighing of what the entire war is expected to achieve, against the expected losses of war. The crux of the test can be articulated as follows:

> *"A provocation sufficient to trigger a right to use military force in self-defence must be designed to eliminate the threat presented and carefully calibrated to achieve that objective."*[33]

In other words, a state can only exercise its right to self-defence to the extent necessary to defend itself, and whatever military strategy that is adopted must be calculated to achieve that effect.

30 Vitoria (1917 Translation) at Page 155.
31 Newton & May (2014) at Pages 66 – 67.
32 Gardam (2011) at Page 20.
33 Newton & May (2014) at Page 67.

Although in recent times, there has been a call to broaden or "liberalise" this test to any reasonable amount of force, this goes well beyond what was envisaged by Vitoria and Grotius.

Vitoria spoke of the need, whilst fighting a just war, to do so *"with observance of proportion as regards the nature of the circumstances and of the wrongs done to them"*,[34] and *"always with a regard for moderation and proportion, so as to go no further than necessity demands"*.[35] Grotius further argued that *"it is not for man to put his fellow man to a wasteful use"*,[36] thereby calling into question whether the initiation of war (which had the inevitable consequence of wasteful destruction of life) was even a proportionate response which should be resorted to.

It is clear, therefore, that from a Just War theory perspective, the weighing of *jus ad bellum* proportionality is more than just a crude numbers game. The real and potential consequences of war must be considered, including what is likely to be achieved and the costs of pursuing such aims.

The Interconnectedness of the 5 Principles of Jus ad Bellum

The inherent overlaps and interconnectedness amongst the principles is also evident in the analysis of Just War theorists. Aquinas argued that even if the principle of last resort could be satisfied, it was nonetheless unlawful to kill an innocent person. He further argued that even where one proceeded from a good intention, "*an act may be rendered unlawful, if it be out of proportion to the end*".[37]

The above quote by Vitoria that having regard for proportion entailed going *"no further than necessity demands"* also demonstrates that the principles are intended to work in tandem, though each has a conceptually distinct basis in the analysis of a just war.

34 Vitoria (1917 Translation) at Page 155.
35 Vitoria (1917 Translation) at Page 157 – 158.
36 Grotius (1925 Translation) at Ch. 2577, as quoted in Newton & May (2014) at Page 66.
37 Aquinas (1936 Translation) at Pt. II-II, Qu. 49, Art. I, as quoted in Newton & May (2014) at Page 65.

(d) Self-Defence and Jus ad Bellum Proportionality in Modern International Law

The UN Charter

In modern international law, the prohibition on the *"the threat or use of force"* by states against other sovereign states is enshrined in Article 2(4).[38] Other than Security Council authorisation under Article 42, the only other explicit exception to this prohibition is found in Article 51, which provides for *"the inherent right of individual or collective self-defence if an armed attack occurs against a Member… until the Security Council has taken the measures necessary to maintain international peace and security"*.[39]

There are 3 preliminary points to be made in relation to the wording of these provisions. First, it should be noted that the general prohibition on the threat or use of force by states, coupled with the sole exception of self-defence, is a clear continuation of *jus ad bellum* in Just War theory. Second, not only is self-defence the only named exception to the prohibition on the use of force, but it is also described as an *"inherent right"*. Whether this is in reference to an existing right within customary international law, in reference to a human right under natural law or a nod to Just War theory is not entirely clear on the face of Article 51. Third, whatever the nature of this inherent right of self-defence, such right is meant to be a temporary entitlement. Here, the provision weaves in the concept of necessity and limits the exercise of one's right of self-defence to the time taken for the Security Council to implement the necessary measures to maintain international peace and security. It is clear from the wording of these provisions, therefore, that the right of self-defence is not something to be exercised carte blanche.

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[38] UN Charter (1945). The full Article 2(4) states:
"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."

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

As for the proper interpretation of Articles 2(4) and 51, the author takes the view that the different phrasing in the two provisions was intended by the drafters. This argument is based on the linguistic presumption in statutory interpretation that where the words of a provision are changed, the intention is to change its meaning. Specifically, every member state owes an obligation under Article 2(4) to refrain from *"the threat or use of force"* against other states, whilst the right of states to self-defence under Article 51 can only be resorted to in the event of an *"armed attack"*, and the mere *"threat or use of force"* cannot justify such self-defence. This is an important distinction because the term *"force"* is not defined in the Charter and could be interpreted broadly.

A counter-analysis might be that the UN Charter was never meant to serve as a comprehensive regulatory regime for the use of force, and is merely *"a starting point for jus ad bellum analysis"*.[40] Resort may thus be had to other sources of law, such as *"customary international law, general principles of law accepted by states, and basic principles of legality that are constitutive of international legal order"*.[41] The author's response to such an argument is that whilst the UN Charter was not meant to be a codifying statute, it nonetheless amounted to a binding contract amongst all member states. As such, obligations could only be contracted out of in the form of express reservations or declarations. Absent such express reservations or declarations, a state's rights and obligations were to be determined by the provisions as stated.

The second point to be made on the proper interpretation of Article 51 is that the requirement is not only that the self-defence must be against an *"armed attack"*, but such *"armed attack"* has to have occurred. The use of the present tense *"occurs"* presumably refers to the right of self-defence to a continuing armed attack, but the fact remains that the aggressor must have initiated the armed attack before the right of self-defence arises. The author posits that another rule of statutory interpretation, that one is not to resort to purposive or other interpretations when the language of the statute is clear, supports this as the right and only interpretation of Article 51. Such an interpretation will undoubtedly have an impact on the legitimacy of anticipatory self-defence, which is explored in Part II.

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[40] Evan J. Criddle & William C. Banks, "Customary Constraints on the Use of Force: Article 51 with an American Accent" (2016) Leiden Journal of International Law, Vol. 29(1) 67 – 93 at Pg 15 of Draft Version. (Hereinafter referred to as "Criddle & Banks (2016)".)

[41] *Ibid.*

The ICJ's Decision in Nicaragua

The author's interpretation of self-defence in modern international law is not only supported on a plain reading of Articles 2(4) and 51 and on the rules of linguistic and statutory interpretation, it is further buttressed by the ICJ's decision in the *Nicaragua* case.[42] The case involved an action by Nicaragua against America for the recruitment, training, arming and financing of military and paramilitary activities against the Nicaraguan government, in an attempt to effect regime change. America challenged the jurisdiction of the ICJ and further argued that its acts were necessitated by collective self-defence.

Following the ICJ's dismissal of its challenge on jurisdiction, America refused to participate further in the proceedings. Nevertheless, the case proceeded and the ICJ held that America was in breach of its treaty and customary international law obligations owed to Nicaragua. The Court made several crucial findings:

(i) The Court clarified that Article 51 was based on customary international law, as was the *"inherent right"* of self-defence contained therein. The Court further held that Article 51 was not a provision which subsumes and supervenes customary international law. Rather, it demonstrated the importance of customary law which continued to exist alongside treaty law.[43]

(ii) The Court stated unequivocally that:

> *"The exercise of the right of… self-defence presupposes that an armed attack has occurred…"*[44]

(iii) To establish the necessity of the self-defence, it must be found to have occurred within close proximity of the timing of the *"armed attack"*. The Court found that the long delay between the alleged *"armed attack"* and America's actions militated against a finding of both the belief that an act amounted to an *"armed attack"*, and the justification of self-defence.[45]

(iv) The principles of necessity and proportionality only came into play after an *"armed attack"* which would justify self-defence had been established. If no *"armed attack"* had occurred, *"even if the United States activities in question had been carried on in strict compliance with the canons of*

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42 *Supra* note 4.

43 *Nicaragua* case at Para 176

44 *Nicaragua* case at Para 232.

45 *Nicaragua* case at Paras 233 and 237. In fact, any request for US assistance by El Salvador only took place after the US had begun its activities which were purported to be in collective self-defence.

necessity and proportionality, they would not thereby become lawful".[46] In any event, the Court opined that on the facts of the case, America had clearly exceeded the limits of proportionality.

The ICJ's findings clearly support the author's arguments on the proper interpretation and intended scope of self-defence under Article 51 (and under customary international law). Additionally, insofar as self-defence and proportionality in modern international law are an evolution of self-defence and *jus ad bellum* proportionality in Just War theory, they have clearly not evolved beyond recognition. Instead, the ICJ's findings demonstrate a coherent continuation of the principles of *jus ad bellum* as envisaged by early Just War theorists.

II. PART II: THE ORIGINS AND EVOLUTION OF ANTICIPATORY SELF-DEFENCE

(a) The Inherent Incompatibility Between Anticipatory Self-Defence and Jus ad Bellum Proportionality

As evident from Part I, the right to initiate war in self-defence, whether according to the early Just War theorists or in modern international law, only arises after an aggressor has initiated an *"armed attack"*. As also established in Part I, anything short of an *"armed attack"*, including *"the threat or use of force"*, would also not suffice. *Jus ad bellum* proportionality, in the context of self-defence, thus applies retrospectively in measuring the appropriate proportionate response to the wrong already committed, and the harm already inflicted. Needless to say, this flies in the face of the legitimacy of anticipatory self-defence.

The other more obvious, objection to anticipatory self-defence as a basis for initiating war is that pushes *jus ad bellum* proportionality completely into the hypothetical realm. How does one measure a harm that has not yet occurred? How does one justify initiating war on the basis of wrongs not yet committed? Without the requirement of an *"armed attack"*, what purpose does proportionality serve? If the response is that proportionality applies in determining whether the potential consequences of war makes it the best resort, we would have fallen into the trap of misapplying the concept of *jus ad bellum* proportionality to seek to justify a war which was inherently unjust.

[46] *Nicaragua* case at Para 237.

Nevertheless, we now examine the origins and evolution of anticipatory self-defence, given its increasing use by powerful states such as America, and its creeping but gradual acceptance in the advent of modern warfare.

(b) The Caroline Doctrine

The first articulation of the concept of anticipatory self-defence came in the aftermath of the Caroline Affair.[47] The Caroline Doctrine stated that to qualify as a legitimate act of self-defence, the state had to show the *"necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation"*, and that *"the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it"*.[48]

While the last part of the Doctrine made a reference to proportionality, it is clear that the Doctrine's primary focus was the principle of necessity. What is also important to note is that this Doctrine was formulated in 1843, more than 100 years before the UN Charter, and over 140 years before the *Nicaragua* case. Had the drafters wanted to include such a concept, it could have clearly done so within Article 51. Yet, no such inclusion was made. The ICJ in *Nicaragua* also did not comment on the Doctrine, nor the validity of anticipatory self-defence. Arguably, this was because America was asserting collective self-defence in response to an *"armed attack"*. Nonetheless, the author laments the missed opportunity for the Court to address the issue.

(c) The Bush Doctrine

The Caroline Doctrine continued to operate on the fringes of international law, but this distortion of self-defence in modern international law did not end there. In 2002, the Bush administration formulated a National Security Strategy, which later came to be known as the Bush Doctrine, recognising the right to use pre-emptive force against "emerging" threats, in addition to "imminent" ones. It was accepted, however, that such a right was often conditioned upon preparations by an

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47 A diplomatic crisis involving the United States, Britain, and the Canadian independence movement, which lasted from 1837 – 1842.

48 Letter from Daniel Webster to Henry Stephen Fox, in K.E. Shewmaker, Ed., *The Papers of Daniel Webster*, (1843) 62, as quoted in James Crawford, *Brownlie's Principles of Public International Law*, 8th Ed. (Oxford: Oxford University Press, 2012) at Page 751. (Hereinafter referred to as "Crawford (2012)".)

aggressor for an attack against US interests, e.g. *"a visible mobilisation of armies, navies and air forces preparing to attack"*.[49] This new Doctrine also expanded the scope of such threats to not only terrorists, but states who had expressed a desire to develop or acquire weapons of mass destruction ("WMDs").

As commented by Gardam, *"[t]he identification of states with such aspirations as posing a threat warranting pre-emptive force is a considerable expansion of the existing boundaries of international law"*.[50] As further warned by UN Special Rapporteur Philip Alston, America's *"broad and novel theory that there is a 'law of 9/11' that enables it to legally use force… [in] self-defence"* anywhere in the world *"threatens to destroy the prohibition on the use of armed force contained in the UN Charter, which is essential to the rule of law"*.[51]

It should be noted that the Bush Doctrine came after the US invasion of Afghanistan, which amounted to America's unilateral attribution of state responsibility to Afghanistan for the acts of Al-Qaeda, a non-state actor. America's justification was that the Afghan government had allowed Al-Qaeda to operate within its boundaries. Nothing was done to stop this unsanctioned invasion, as the world sympathised with America in the aftermath of 9/11, and lacked the political will to challenge the superpower.

(d) The Complications of Modern Warfare

It has been observed that *"the law of war lags far behind the technologies of war"*.[52] The advent of modern warfare has seen the development of modern weapons with devastating capabilities (such as longer-range missiles, and nuclear, chemical and biological weapons) and the development of weapons that allow for remote warfare (such as drones capable of targeted killing). While the legality of such

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[49] *National Security Strategy of the United States of America*, 17 September 2002, as quoted in Gardam (2011) at 147.

[50] Gardam (2011) at 147.

[51] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (28 May 2010), as quoted in Criddle & Banks (2016) at Page 29. See also M Sornarajah, "The Role of the BRICS in International Law of the Multipolar World" in Vai Io Lo and Mary Hiscock, Eds., *The Rise of the BRICS in the Global Political Economy* (Cheltenham: Edward Elgar Publishing Limited, 2014), 288 – 307 at Pg 292. (Hereinafter referred to as "Sornarajah (2014)".)

[52] David Akerson, "Applying Jus in Bello Proportionality to Drone Warfare" (2014) 16 Oregon Review of International Law 173 – 224 at Page 224.

weapons is the subject of debate,[53] there is no denying that modern wars are a far cry from the days of bayonets, rifles and trench warfare. The advancement of technology which made communication instantaneous has now provided for the instantaneous capability to destroy. America boasts combat-ready armies all over the world, and are militarily unmatched and present in the oceans, on land and in the skies.

The potential extent of harm posed by modern weapons further compounds the problem of anticipatory self-defence and *jus ad bellum* proportionality. In this regard, Professor James Crawford says:

> *"The central difficulty in applying Article 51 is the term 'armed attack'. The drafters likely interpreted the term as encompassing the kind of conventional attack characteristic of the Second World War. The evolution of modern weapons, however, makes any rigid typology difficult to maintain. Modern warfare also tends to feature increased participation of irregular forces alongside or instead of state armies…"*[54]

Another potential complication is created by the non-state actors referred to above. Such paramilitary groups, be they rebels or terrorists, operate within close proximity to civilian-populated sites, thereby making it necessary for responding states to take into account the potential risk of harm to such civilians, in their overall analysis on necessity and proportionality. This problem also illustrates the interaction between the principles of *jus ad bellum* and those of *jus in bello* (IHL).

Moreover, these non-state actors tend to operate transnationally, meaning that a state intending to initiate a defensive war against such actors would have to either seek permission to do so from other states with whom they are not at war, or rely on other doctrines such as the "unwilling or unable" doctrine, which once again involves an attribution of state responsibility for failure to prevent paramilitary groups from operating within its boundaries.

In the face of all these challenges posed by modern warfare, the author acknowledges that her argument for a textual reading of Article 51 has taken a blow. That said, the author maintains that

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53 For e.g. the debate in relation to the use of drone warfare. *Ibid.* and Lynn E. Davis, Michael McNerney & Michael Grrenberg, "Clarifying the Rules for Targeted Killing" (2016 RAND Report)

54 Crawford (2012) at Page 748.

trying to fit further exceptions to the requirements of Article 51 would necessarily open cans of worms in relation to the lack of accountability of stronger states.[55]

In particular, America's unrelenting sense of entitlement to intervene in the territories of other sovereign states is not only highly disturbing, but almost tacitly accepted as a reality in the modern "war on terror". The author posits that while the advent of modern warfare poses new and unexpected threats, the singular greatest threat to the rule of law and the continued relevance of international law is perhaps the callous disregard of it by the strongest states. This can be seen not only from America's refusal to participate in the ICJ proceedings in *Nicaragua*, but its subsequent refusal to comply with the Court's decision which effectively rendered it nothing more than a paper judgment.[56]

III. PART III: CASE STUDIES FROM THE PAST AND PRESENT

Finally, in this Part, the author draws from lessons learnt in the Iraq War and applies those lessons to an analysis of the proportionate response to the North Korean crisis.

(a) Case Study from the Past – The Iraq War

A Spectacular Disregard for Jus ad Bellum Principles

The Bush Doctrine was relied upon by America for its next invasion, this time of Iraq and by way of coalition forces with its Western allies. But while the war against Afghanistan was arguably within the confines of Article 51 in view of the 9/11 attack on US soil (albeit by a non-state actor), the Iraq War clearly was not. America justified this latest invasion on the basis that Iraq was precisely one of the so-called *"rogue states"* stockpiling WMDs to be used against America and its allies. What

[55] In this regard, it should be acknowledged that Sir Daniel Bethlehem QC has made a laudable attempt at suggesting principles that should apply to self-defence by states against *"imminent or actual armed attack by non-state actors"*,[55] though his listed exceptions to the consent required from states within which such non-state actors operate do provide some cause for concern, especially on the part of weaker states which do not possess the military prowess to defend against military superpowers. See Sir Daniel Bethlehem QC, "Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors" (2012) 106 The American Journal on International Law 1 – 8.

[56] China, a new superpower or a revived superpower (depending on how you look at it) is taking a similar stance with respect to the PCA decision on the South China Sea dispute.

happened next was no secret. The Iraq War turned out to be a colossal mistake and miscalculation. It was also the perfect (albeit extremely unfortunate) illustration of the problems in applying *jus ad bellum* proportionality to a war initiated in anticipatory self-defence.

When it turned out, post-invasion, that America was sorely misconceived about the existence of such WMDs,[57] America changed its tune and suggested that the invasion was justified on humanitarian grounds in that the coalition forces were freeing the people of Iraq from a cruel dictator. In the words of Professor Sornarajah:

> *"The hollowness of the justification was evident as the intervening states had had past dealings with Saddam Hussein and had contributed through supply of arms to the repression he effected. It was evident that the intervention was grounded in the national interests of the US and its allies rather than for purely altruistic objectives."*[58]

In the aftermath of the Iraq War, one of the strongest condemnations of America's actions came from UN Secretary-General Kofi Annan in 2004. Annan declared that the Iraq War was illegal and violated the UN Charter[59]. He also condemned human rights violations against civilians and excessive use of force by American troops during the war, along with their torture and mistreatment of Iraqi prisoners.[60] In one fell swoop, and in the course of a single war, America had violated all 3 branches of *jus ad bellum*, *jus in bello* and *jus post bellum*.

Annan's subsequent comment in 2006 that Iraq was safer under Saddam shows the extent of wanton violence and devastation that Iraq and its people suffered as a result of the US-led war.[61] Yet, nothing was done to bring America to justice for this blatant violation of international law, and the only real "punishment" America received was in the court of public opinion. US dominance permeated all major international institutions and, with America making the rules and applying them selectively in its favour, it was untouchable.

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57 A fact which had, all along, been vehemently denied by its head of state, Saddam Hussein.

58 Sornarajah (2014) at Pg 300.

59 Ewen MacAskill & Julian Borger, "Iraq War was Illegal and Breached UN Charter, Says Annan", *The Guardian* (16 September 2004).

60 Adam Jay, "Annan Condemns US Abuses in Iraq", *The Guardian* (21 September 2004).

61 "Annan: Iraq was Safer Under Saddam", *The Guardian* (4 December 2006).

Lessons Learnt from the Iraq War Fiasco

The author acknowledges that the Iraq War fiasco was just as much a failure of the law of war as it was a failure of the international system. While President Bush escaped relatively unscathed in American public opinion, the same could not be said of his UK counterpart. Prime Minister Tony Blair's reputation suffered a massive blow from which he has yet to recover long after leaving office. The recent Chilcot Report released in 2016 was the final nail in a coffin of endless condemnation that engulfed Blair.

Some notable findings of the Report which are relevant for our purposes include:

(i) The UK chose to join the Iraq invasion before all peaceful options for disarmament had been exhausted. Military action at the time was not a last resort.

(ii) While military action might have become necessary later, in March 2003, there was no "imminent" threat from Saddam Hussein. A strategy of containment could have been adapted and continued for some time until a Security Council majority supported continuing UN inspections and monitoring.

(iii) Judgments about the severity of the threat posed by Iraq's alleged WMDs were presented with a certainty that was unjustified. Intelligence had *"not established beyond doubt"* that Saddam had continued to produce chemical and biological weapons.

(iv) The circumstances in which it was decided that there was a legal basis for UK military action were *"far from satisfactory"*. Attorney General Lord Goldsmith's advice that there was such legal basis was never supported by written documentation of its precise grounds.

(v) The UK's actions undermined the authority of the Security Council, and represented a failure by the UK of its obligations to uphold such authority.

(vi) Despite explicit warnings, the consequences of the invasion were underestimated, resulting in preparations being wholly inadequate.

(vii) The government failed to achieve the stated objectives it had set for itself in Iraq, resulting in great suffering for the Iraqi people.

(viii) In future, all aspects of any intervention shall be calculated, debated and challenged with vigour.[62]

[62] "Chilcot Report: Findings at-a-glance" *BBC News* (6 July 2016).

The above findings reinforce the importance of:

(i) Initiating war as a last resort;

(ii) Establishing an "imminent" threat beyond doubt, and based on unequivocal evidence and intelligence;

(iii) Articulating a legal basis (or just cause) for military intervention;

(iv) Thoroughly weighing the *jus ad bellum* proportionality of clearly stated objectives of the intended war and the likely consequences in achieving such aims; and

(v) Avoiding unilateral or even collective action in favour of UN Security Council authority.

What is immediately apparent from the above lessons are that all the principles of *jus ad bellum* from early Just War theory were present in some form. This demonstrates that such principles continue to guide the law of war in modern times.

(b) Case Study from the Present – The North Korean Crisis

Is an Attack on North Korea Justified?

Applying the lessons learnt from the Iraq War fiasco, it is clear that America and its allies (this time, its Asian allies) would not be justified in initiating an attack on North Korea. First, not all peaceful options for disarmament have been exhausted. As clearly articulated in the Chilcot Report, the initiation of war must be a last resort, when all other peaceful means have failed. At present, apart from antagonising speeches and tweets, America has made no real attempt to diffuse the situation and explore peaceful settlement. Seen in the context of increased US military presence in the waters surrounding North Korea, and the stepping up of joint military drills involving America, Japan and South Korea,[63] Trump's latest invitation for North Korea to *"come to the table and make a deal"* is more of a veiled threat than a sincere overture.[64]

[63] See for e.g. "US, South Korea Conduct Joint Navy Drills to Counter North Korea Threat" *Channel NewsAsia* (16 October 2017) and "US Carrier Patrols Off Korean Peninsula in Warning to Pyongyang" *Channel NewsAsia* (19 October 2017).

[64] "'Come to the Table and Make a Deal.' President Trump Changes His Tune on North Korea", *Time* (7 November 2017).

Second, an "imminent" threat has not been established beyond doubt. In fact, based on Russian intelligence, North Korea remains 2 – 3 years away from acquiring a missile with capabilities to hit America.[65] This is more than sufficient time for the Security Council to act in accordance with Article 51.

Third, this also provides America with sufficient time to properly articulate its legal basis (or just cause) for initiating war, including furnishing unequivocal evidence and intelligence of the alleged "imminent" threat.

Finally, there has yet to be a thorough weighing of the *jus ad bellum* proportionality of clearly stated objectives of the intended war and the likely consequences in pursuing such aims. What is important to note in this weighing of *jus ad bellum* proportionality is that it is not only America's views that matter. All states whose interests may potentially be impacted by a military intervention in North Korea should be allowed to raise their concerns and offer their perspectives on the proportionality or otherwise of such an intervention. In particular, the author posits that South Korea and Japan, along with other Asian states whose interests may be adversely impacted by a US-led war in the region should be given a voice.[66]

As clearly demonstrated by the Rohingya crisis, violence in one state has consequences on neighbouring states. An attack by America on North Korea has the potential to destabilise the entire region. Whilst it is open to America, post-attack, to return to the other part of the world, Asia will have to grapple with the aftermath of the war, the displacement of citizens resulting in an influx of refugees, providing aid etc. Worse yet, what if America decides to stay and occupy North Korea, the way it did with Afghanistan and Iraq? How would that bode for the rest of Asia? Would we see a new wave of imperialism, one in which Asian states live in fear of offending a superpower with military presence at their doorstep, thereby unwillingly subjugating their economic and other interests to those of America (more so than before)?

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65 "North Korea 2 to 3 years from missile that could hit US, Russia says", *The Straits Times* (8 November 2017).

66 E. Tammy Kim, "In the Debate Over North Korea, Does Anyone Care What South Korea Thinks?" *The New York Times* (10 November 2017).

2 Final Perspectives on the North Korean Crisis

There are 2 final perspectives to be offered. First, it might be open to America to argue that it need not satisfy the principles of *jus ad bellum* simply because it is not "initiating" a war with North Korea. This is because the Korean War ended in a truce, not a peace treaty.[67] As such, military intervention would not be the commencement of a war, but the resuming of armed hostilities in an ongoing war. It remains to be seen if America makes this technical argument.

The last perspective the author offers is an alternative argument that it is America that is the aggressor and North Korea who is exercising its right to self-defence. Under the Bush Doctrine, evidence of *"a visible mobilisation of armies, navies and air forces preparing to attack"*[68] would give rise to the right of anticipatory self-defence. The increased military presence by America in the waters surrounding North Korea, the mobilisation of more military capabilities to the region, and its elaborate and intentional displays of its military might through joint drills would meet these criteria.

This must further be seen in light of Bush's prior identification of North Korea as part of the "Axis of Evil" which must be eliminated, and Trump's shocking threat in his UN speech to *"totally destroy"* North Korea (which was arguably everything short of a formal declaration of war).[69] Certainly, by a "culmination of events" theory of self-defence,[70] North Korea could well be justified in feeling threatened.

IV. CONCLUSION

The author has sought to provide a comprehensive analysis of the origins, evolutions and constants of self-defence and *jus ad bellum* proportionality within the law of war. Additionally, the author has demonstrated that applying *jus ad bellum* proportionality (and indeed other *jus ad bellum* principles) to the concept of anticipatory self-defence, the international law of war becomes unstable to the point of total failure, resulting in disastrous consequences. Whilst it then arguably falls to IHL to step in,

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67 Ron Huisken, "This is Why the Korean War Never Really Ended" *The National Interest* (17 July 2017).

68 *Supra* note 47.

69 Julian Borger, "Donald Trump Threatens to 'Totally Destroy' North Korea in UN Speech" *The Guardian* (19 September 2017).

70 Gardam (2011) at 146.

a *"unified theory of the overall justice of war"*,[71] requires all 3 branches of the law of war to act as safeguards against abuse and excess. It is hoped that this paper serves as a sombre and necessary reminder of the importance of adherence to these timeless principles, for the sake of all humanity.

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