

# Revisiting the Concept of Defence in the Jus ad Bellum

The Dual Face of Defence

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## II. THE DUAL FACE OF DEFENCE—OPENING REMARKS

Regrettably, the *jus ad bellum* cannot presently keep step with modern warfare because the face of defence is ridden with inconsistency and ambiguity. Here Bellona presently reigns, and the law suffers recurrent

<sup>39</sup> The title of the work in full is: *Hugonis Grotii De Jure Belli et Pacis Libri Tres, in quibus Jus Naturae et Gentium, item Juris Publici praecipua explicantur* (Amsterdam, 1625).

<sup>40</sup> W. Whevell, *Grotius on the Rights of War and Peace—An Abridged Translation* (Cambridge University Press, 1853) 62.

<sup>41</sup> For more on norms and the legal order, see generally: H. Kelsen, *Reine Rechtslehre*, 2nd edn (Verlag Österreich, 1960) 3–59.

misapplication and manipulation; all the more so because of the indisposed face of collective security. In contrast, the legal face of unlawful force displays authority, for little room is left for misapplied or manipulative interpretations of the content or scope of the prohibition on force. Here, then, reigns Minerva, and abuse of the law is met with calls to justice. For the *jus ad bellum* to endure in the regulation and governance of modern warfare, all faces of war should be equally consistent and authoritative.

The face of defence has long been veiled by controversy, given the fact that the lawfulness of unilateral force nowadays *de jure* rests upon its *de facto* defensive nature. Contemplating the duality of modern unilateral defence, responsive self-defence upon the occurrence of an armed attack is irrefutably legal and legitimate under both the UN Charter and customary international law. The notion of lawfully resorting to responsive force in self-defence is indeed 'inherent' as one of the most fundamental rights of man and beast and State: the natural and inviolable right to defend oneself against unjust and unlawful attack. Yet, in the light of modern warfare, it would appear equally evident that a recognised right of responsive unilateral defence only does no longer suffice. Given that the collective security system under the governance of the United Nations regrettably never became fully reliable or operational, can it then be considered fair or just today to compel a victim State to patiently await the armed attack to occur without any legally recognised and undisputed right of interceptive unilateral defence in order to repel a grave and urgent threat of an armed attack?<sup>42</sup>

At first glance, a *bona fide* reading of the UN Charter would seem to preclude interceptive unilateral force invoking self-defence. Yet, the opponents of a regulatory or restrictive interpretation of the UN Charter contend that the word 'inherent' in Article 51 should be construed so as not to restrict or affect the customary right of self-defence, but rather as merely providing a particular emphasis, in a declaratory manner, for the case of an armed attack.<sup>43</sup> The underlying reason for this reluctance to regard Article 51 of the UN Charter as restrictive of the customary right of self-defence is evidently the conviction that resorting to interceptive unilat-

<sup>42</sup> It may be apposite to clarify here that there are 3 temporal phases employed in the present study, to wit: 'response' when an armed attack has occurred; 'interception' when the threat of an armed attack is inevitable or imminent; and 'prevention' when the threat of an armed attack is non-imminent. It must also be acknowledged that the concept of interception featuring in the present study is a variation of the concept of 'interceptive self-defence' coined by Yoram Dinstein. However, whereas 'interception' according to Dinstein denotes a 'reaction to an event that has already begun to happen (even if has not fully developed in its consequences)', 'interception' in the present study will denote a reaction to an event that has not yet occurred but is on the brink of occurring. Dinstein (n 6) 203–05.

<sup>43</sup> Randelzhofer (n 34) 792–93.

eral defence is, if not explicitly legal, then at the very least implicitly legal because inherently legitimate in the modern *jus ad bellum*.

A long smouldering *opinio juris* appears to have gained momentum that a State nowadays must have a right to resort to unilateral (individual or collective) force not only in response to an armed attack that is occurring, but also in interception of an inevitable or imminent armed attack. Faced with the urgency and gravity emblematic of modern warfare, the modern *jus ad bellum* should accordingly provide the victim State with a lawful space of interceptive unilateral defence against an inevitable or imminent armed attack, lest defence be no more than a delusion. Then, whereas prevention cannot claim legitimacy, let alone legality, interception can conceivably claim legitimacy within the contemporary *jus ad bellum*. The question that remains is exceedingly controversial, namely whether and to what extent a right of interceptive unilateral defence exists apart from or beyond, or even within, the existing UN Charter structure.<sup>44</sup>

The present study posits that the UN Charter deliberately recreated the pre-existing law on force and delimited the legal concept of self-defence in Article 51, and in so doing legally foreclosed interception from its modern scope. Self-defence as a purely responsive right is in exquisite compliance with the modern regulation of force in international law; it is a round peg of legitimate defence fitting beautifully into a round hole of legality. The present study will pragmatically demonstrate that in order to incontestably accommodate interception, the contemporary legal concept of self-defence may have to be interpretatively stretched to or beyond its legal breaking point, which could cause cataclysmic ripples under the surface of the *jus ad bellum*. However justified or legitimate, interception would not seem to be readily or unambiguously compatible with Article 51 of the UN Charter, and forsaking legal reason and resorting to artificial legal constructions in order to fit a square peg into a round hole may undermine and imperil the legality and legitimacy of the *jus ad bellum*.<sup>45</sup>

<sup>44</sup> See, eg: N Lubell, 'The Problem of Imminence in an Uncertain World' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015).

<sup>45</sup> Koskenniemi speaks of 'cynic tyranny' when the system is tilted in favour of order (power), seeing justice (authority) merely as a means to this end. It is a strategy of paying lip service to normative standards while constantly adjusting them in response to the requirements of the maximal effectiveness of power. 'Cynic tyranny' emerges when the Temple of Justice becomes merely a vehicle for buttressing the police; M Koskenniemi, 'The Police in the Temple—Order, Justice and the UN: A Dialectical View' (1995) 6 *European Journal of International Law* 325, 328–30. The present author speaks of 'artificial legal constructions' very much in the same vein; artificial legal constructions seem often to be engineered with a purpose of clouding or sidestepping authority by politically fitting a certain event or action under the umbrella of law by paying lip service to its legal standards. The legality of the construction is accordingly 'artificial', rather than 'genuine'. The concept of self-defence is currently fraught with such artificial legal constructions and thus plainly under the thumb of a 'cynic tyranny'.

The concept of defence in the modern *jus ad bellum* is thus endowed with a dual face: an explicitly legally recognised face of response and an implicitly legitimate yet still legally unrecognised face of interception. In order to incontestably and unambiguously fit legitimate interception into the architecture of the *jus ad bellum* a formal-material revision clarifying the law would therefore seem to be needed, or would at the very least be warmly welcome. For whereas interpretation is a traditional and often efficient method of developing international law, continuous and irreconcilable reinterpretations may nevertheless slowly but surely blur the faces of force and undermine the *jus contra bellum*, with potentially dire consequences. Will not the concept of self-defence eventually become irreparably blurred or even warped if it is arbitrarily and artificially expanded beyond its legal parameters? If old law needs to be stretched by interpretation so far that it ends in artificiality, it may be more prudent to replace it with new law.

Even so, the present author is well-aware of the politico-legal enormity of a formal-material revision of the concept of unilateral defence. Even facing the inescapable fact that international law, akin to all law, must evolve or defeat its purpose, even the mere suggestion of revisiting or reconsidering the international law on war is often hastily dismissed as an utterly utopian endeavour. The present author considers it far more utopian to believe that the current legal regulation will endure to the end of time without modernisation or revision. After all, international law must govern present and future worlds, and not worlds long gone or worlds that will never be.

The present study will therefore revisit the concept of unilateral defence, considering whether the modern *jus ad bellum* should legally recognise a dual face of defence: responsive unilateral defence upon the occurrence of an armed attack, and interceptive unilateral defence upon the occurrence of a grave and urgent threat of an armed attack. The study will further contemplate whether a bipartite legal division of the concept of defence into responsive defence and interceptive defence would be a better method of revision than an extension of the existing legal concept of self-defence so as to explicitly and unambiguously accommodate both legitimate response and interception.

It would seem plain that without a modernising revision, the concept of defence will eventually become irreparably blurred until ultimately completely dissolved into the ever shifting sands of war. For the sake of legal clarity and in the forbidding light of modern wars and armed conflicts, the present study proposes that the right of interceptive defence should preferably be consciously legally regulated as a new and autonomous exception to the comprehensive prohibition on force. A revision of the concept of unilateral defence into two autonomous parts, response and interceptive-

tion, would through formal legal regulation, purge the *jus ad bellum* of at least some of the de jure inconsistencies and ambiguities that so often lend themselves to de facto unjust interpretations and applications.

The argument that interceptive unilateral defence—where the harm by definition is future—should preferably be legally regulated separately from self-defence—where the harm is occurring, is lent further weight by the patent fact that ‘threat of force’ is not implicitly included in the concept of a ‘use of force’ in Article 2(4) of the UN Charter, but explicitly mentioned as a separate legal wrong. A ‘threat of an armed attack’ should therefore not be implicitly read into the concept of an ‘armed attack’, nor should interceptive defence be implicitly included in the right of self-defence in Article 51 of the UN Charter.

Hence, the present study does not propose a division of the concept of self-defence into responsive and interceptive self-defence, but submits a proposal for a legal division of the concept of unilateral defence in the *jus ad bellum* into two autonomous parts, to wit: responsive self-defence and interceptive necessity-defence, each with its own legal structure comprising primary and secondary prerequisites. As launched by the present study, the structure, scope and content of interceptive necessity-defence would rest upon a legal synthesis between the intersecting concepts of defence, interception and necessity in contemporary international law.

The concept of self-defence features in two international legal orders, to wit: as an exception to the prohibition on force within the architecture of the *jus ad bellum*; and as a circumstance precluding wrongfulness within the architecture of State responsibility.<sup>46</sup> Likewise, the concept of necessity features alongside self-defence as a circumstance precluding wrongfulness within the architecture of State responsibility. The architecture of State responsibility is fundamentally parallel to the architecture of the *jus ad bellum* in the sense that both international legal orders in exceptional circumstances excuse certain conduct which in ordinary circumstances would constitute a legal wrong. In the architecture of the *jus ad bellum*, certain circumstances exceptionally sanction such resorts to force that would otherwise constitute a breach of the comprehensive prohibition on force; and in the architecture of State responsibility, certain circumstances exceptionally preclude the wrongfulness of such acts of State that would otherwise constitute a breach of an international obligation. Then, whilst autonomous in every legal inference, these two international legal orders are nevertheless parallel and even partly overlapping.

<sup>46</sup> A product of nearly 40 years work, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR) were finally adopted by the International Law Commission on 9 August 2001.

Wedding interceptive unilateral defence to the legal concept of necessity<sup>47</sup> is not as far-fetched a notion that it may at first appear, fundamentally because interception would seem to be an inherent and defining element of the contemporary concept of necessity in international law. Within the international law on State responsibility, a State may invoke necessity as a circumstance precluding wrongfulness only to safeguard an essential interest against a grave and imminent peril. Accordingly, necessity is legally contingent on interception, for by definition the harm cannot yet have been realised if a State is to lawfully invoke a 'state of necessity'. The concepts of interception and necessity would therefore seem to be indissolubly intertwined in contemporary international law, which indicates that interceptive unilateral defence should lend some of its elemental legal components from the modern concept of necessity as featured within the international law on State responsibility, rather than being summarily assumed as inherent in the concept of self-defence.

The term 'necessity-defence' accordingly seems appropriate for the autonomous concept of interceptive unilateral defence because it would terminologically and conceptually bridge the gap between necessity and defence, being at the same time both sufficiently comparable to yet sufficiently distinct from the pre-existing and interrelated legal concepts. In seamless congruity between these intersecting legal concepts, if invoking 'self-defence' highlights that force is used in defence of the self, invoking 'necessity-defence' would highlight the pressing necessity of interceptive defence.<sup>48</sup>

Some may fear the revival of the concept of necessity; it would seem primarily because of the old adage 'necessity knows no law'. Still, necessity as a legal defence is no contemporary conception; its roots go back hundreds of years as a part of the right of self-preservation that is the very essence of statehood. Akin to the concept of self-defence, the concept of necessity was originally linked to the notion of self-preservation. When a threat to self-preservation arose, it was considered justified to resort to any measures necessary to preserve the existence of the self, even if such measures would have been unlawful had they been resorted to in

<sup>47</sup> Within the ambit of the present study 'necessity' will represent the overarching term denoting any form of necessity featuring in international law; 'state of necessity' will refer exclusively to necessity as a circumstance precluding wrongfulness within the regime of State responsibility; and 'necessity-defence' will portray the proposed legal form of legitimate interceptive unilateral defence exclusively within the regime of the *jus ad bellum*.

<sup>48</sup> As an additional terminological argument, since the term 'self-defence' is non-temporal, the term 'necessity-defence' would seem most suitable to name the autonomous right of interceptive defence, as this term is also non-temporal. If, however, this name does not for some reason please the present reader, permit the present author to turn Shakespearean for a moment and retort: 'What's in a name? That which we call a rose by any other name would smell as sweet'; William Shakespeare, *Romeo and Juliet* Act II, Scene II.



the absence of a threat to the self. However, following the evolutionary path of self-defence, in the end the concept of necessity divorced itself from the right of self-preservation.<sup>49</sup> It may, moreover, be noted here that the notion of necessity has perhaps required a mostly undeserved stigma in the international legal discourse. Rather than constituting ‘an insidious doctrine invoked to justify almost any outrage’, the concept of necessity may also be portrayed as possessing a dual face; it is both enabling and constraining, allowing force that is necessary but only force that is indeed necessary.<sup>50</sup>

Then, even as necessity—akin to self-defence—was originally rooted in self-preservation and therefore without doubt often invoked as a mere smokescreen for *raisons d'état*, both concepts coexist today as legal circumstances precluding wrongfulness in the modern international law on State responsibility. Given that the concept of self-defence is perfectly viable in two separate yet intersecting international legal architectures,<sup>51</sup> the present study proposes that there exists no compelling legal reason why the legal concept of necessity could not follow suit. Akin to self-defence, the legal concept of necessity already exists as a circumstance precluding wrongfulness within the international law on State responsibility, whence it is but a small step to institute it as a new and autonomous exception to the prohibition on force within the *jus ad bellum*, in the form of necessity-defence invocable unilaterally in interception of an inevitable or imminent armed attack.

Then, whereas not—at least yet—formally recognised as an autonomous exception to the prohibition on force, necessity nevertheless permeates the concept of defence in the *jus ad bellum*, implicitly claiming legitimacy and calling for legality. It may therefore be well within legal reason to submit that the legal concept of necessity could be fitted quite seamlessly into a revisited concept of defence in the *jus ad bellum* by forming the square hole of legality for the square peg of legitimate interceptive defence, presently trapped in legal limbo. However, since interception would always be more prone to abuse than response, a qualified or consistently higher threshold of application would evidently be called for with regard to necessity-defence. The core argument of the present study may therefore be framed as follows: even if the modern concept of self-defence is defined

<sup>49</sup> R Boed, ‘State of Necessity as a Justification for Internationally Wrongful Conduct’ (2000) III *Yale Human Rights & Development Law Journal* 1, 4–5.

<sup>50</sup> Studied from a *jus in bello* perspective, a revision of the necessity principle creating an equilibrium between humanity and military necessity is advocated by Beer; Y Beer, ‘Humanity Considerations Cannot Reduce War’s Hazards Alone: Revitalizing the Concept of Military Necessity’ (2015) 26 *European Journal of International Law* 801, 801–08 and 827.

<sup>51</sup> As an exception to the prohibition on force in the *jus ad bellum*, in Art 51 of the UN Charter; and as a circumstance precluding wrongfulness under the international law on State responsibility, in DASR, Art 21.

and delimited by Article 51 of the UN Charter so as to rule out interception, it does not necessarily follow that the concept of defence in the *jus ad bellum* must forever be confined to self-defence only.

To end these introductory reflections, the decision that faces us today is the very same that the ancient Romans had to make on the battlefield: whom shall we invoke, Bellona or Minerva? The first may grant easy victory for rules of warfare are liberal, or perhaps no more than nominal, but victory comes drenched in disorder and insecurity. The latter enforces regulatory rules of warfare, but victory may be bittersweet and sometimes clad in the raiment of defeat.

Whitherward warfare?