

*DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* BY GEORGE P FLETCHER AND JENS DAVID OHLIN (NEW YORK, US: OXFORD UNIVERSITY PRESS, 2008) 268 PAGES. PRICE US\$27.95 (HARDBACK) ISBN 9780195183085.

## I INTRODUCTION

One of the most sacred trusts placed in the government of any state is to defend that country from its enemies. The classical jurist Emmerich de Vattel declared in 1758 that '[s]elf-defense against an unjust attack is not only a right which every Nation has, but it is a duty, and one of its most sacred duties'.<sup>1</sup> Even ultra-conservative proponents of a 'minimal state', in which governmental functions are severely limited, see the *raison d'être* of the government as one of protection of the citizens in the territory of the state.<sup>2</sup> As states have been the subjects of international law since before the 17<sup>th</sup> century, the rights and duties recognised in customary international law have included the right to defend the nation if attacked.<sup>3</sup> However, before a regulation of the use of force in international law emerged with the *Covenant of the League of Nations* of 1919, the doctrine of self-defence was just one of many justifications put forward by states when using military force against another state (others included armed reprisals to punish another state for breach of international law).<sup>4</sup> I have stated elsewhere that:

It cannot be said that the concept had any precise juridical content because it was contained within the much wider doctrines of self-preservation and self-help, which were recognized in the period leading up to the First World War.<sup>5</sup>

Nevertheless, what George P Fletcher and Jens David Ohlin are pointing to in *Defending Humanity*<sup>6</sup> is that the notion of self-defence transcends law and legal systems, in that it is not possible to imagine a legal order that did not allow the subjects of that order to defend themselves from attack. In the minimal conditions of a legal order, what Hart identified as the '*minimum content of Natural Law*'<sup>7</sup> embodied in the international legal order in the concept of *jus cogens*,<sup>8</sup> there are basic laws protecting persons (states) and property (territory) which are fundamental for the survival of that legal order as well as the actors within it. No matter how centralised the use of force becomes, no police force will be able to supplant the right to defend oneself from attack. In this sense, self-defence is a 'natural' or 'inherent' right, which is the approach taken by

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<sup>1</sup> Emmerich de Vattel, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G Fenwick trans, 1916 ed) 246 [trans of: *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, first published 1758].

<sup>2</sup> Robert Nozick, *Anarchy, State and Utopia* (1974) 15–17, 113.

<sup>3</sup> Vaughan Lowe, *International Law* (2007) 8–10.

<sup>4</sup> Hilarie McCoubrey and Nigel D White, *International Law and Armed Conflict* (1992) 87.

<sup>5</sup> *Ibid.*

<sup>6</sup> George P Fletcher and Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* (2008).

<sup>7</sup> H L A Hart, *The Concept of Law* (1961) 189 (emphasis in original).

<sup>8</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (2006) 38.

Fletcher and Ohlin in *Defending Humanity*. This review essay will first recount some of the existing debate in international law on the right of self-defence, and then consider how Fletcher and Ohlin's approach might help resolve some of the issues.

## II INTERNATIONAL LEGAL DEBATE ON SELF-DEFENCE

### A *The Right of Self-Defence*

Putting aside for the moment arguments about natural rights, self-defence in international relations is fundamentally a factual condition arising whenever a state is under attack by another state. The doctrine of self-defence only began to take shape as a legal concept after the adoption of the *Covenant of the League of Nations*, when the modern regulation of the use of force began in earnest. This casts some doubt on the relevance of state practice prior to 1919, such as the oft-quoted *Caroline* incident of 1837, although of course (if viewed as an attempt to capture the essence of a timeless natural right) the *opinio juris* of states in the 18<sup>th</sup> and 19<sup>th</sup> centuries has continuing relevance. Certainly, the proposition of a customary right of anticipatory self-defence arising out of the *Caroline* incident seems to capture the essence of self-defence in a way that is still relevant to today's world. Arguably, though, the modern law of self-defence could be said to have finally emerged once there was a clear prohibition on the use of force, and that only occurred with the *Charter of the United Nations* in 1945. Given that self-defence is a right to respond to an unlawful attack against a person or state, or in other words, a victim's response to an attacker's breach of a legal duty not to attack,<sup>9</sup> self-defence as a precisely defined legal right will depend on there being a clear prohibition on using force in the international legal order. As Yoram Dinstein makes clear, '[t]he thesis of self-defence as a legitimate recourse to force by Utopia is inextricably linked to the antithesis of the employment of unlawful force by Arcadia (its opponent)'.<sup>10</sup>

A certain amount of controversy surrounded the embodiment of the right of self-defence in the *UN Charter*. In particular, it is often stated that art 51 does not contain the pre-existing (customary) right of self-defence, which, it is argued, is much wider, and encapsulated in the phrase 'inherent right' in the English language version of the *UN Charter*.<sup>11</sup> However, there are indications that states had previously accepted the narrower version of the right that was to be embodied in art 51.<sup>12</sup> They did so bearing in mind United States Secretary of

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<sup>9</sup> See David Rodin, *War and Self-Defense* (2002) 29–30.

<sup>10</sup> Yoram Dinstein, *War, Aggression and Self-Defence* (4<sup>th</sup> ed, 2005) 178.

<sup>11</sup> See Derek Bowett, *Self-Defence in International Law* (1958) 187; Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961) 232–41.

<sup>12</sup> Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (1985) 770–1.

State Kellogg's restriction of the right to a response to attack and invasion<sup>13</sup> in his explanation of the absence of the right from the text of the 1928 *Pact of Paris*.<sup>14</sup> The fact that art 51 of the *UN Charter* was inserted at a late stage, and that there was no similar provision in the Dumbarton Oaks proposals of 1944 (which were a precursor to the *UN Charter*) are indications of hasty drafting and can thus be used to limit the impact of art 51 on international law. The main aim of art 51 was to preserve the freedom of action by regional organisations to act in collective self-defence 'without prior approval of the Security Council but in deciding to allow this the delegates then had to incorporate the right of self-defence into the Charter'.<sup>15</sup> The words chosen to embody the right, and subsequently objected to by some writers (particularly the phrase 'if an armed attack occurs'), were not the subject of any particular challenge during the negotiations at San Francisco<sup>16</sup> — though of course those believing that a wider right was still permitted would point to the word 'inherent'.

It follows from a narrow interpretation of art 51 that there is no right of self-defence against acts that, though seemingly aggressive, do not amount to armed attacks, such as threats of force, minor border transgressions or support for rebels by arming them. This view has been supported by the International Court of Justice and expressed in cases such as the *Corfu Channel Case* of 1949 involving the United Kingdom and Albania,<sup>17</sup> *Nicaragua* involving Nicaragua and the US in 1986<sup>18</sup> and *Oil Platforms* of 2003 involving Iran and the US.<sup>19</sup> The Court's views expressed in these cases can be seen as out of touch with the realities of state practice, where there seems to be evidence of a wider right of self-defence. Certainly, the US and the UK argued this in the above cases (but lost). Furthermore, in relation to the Cuban Missile Crisis of 1962, Myres McDougal tried to justify the American quarantine of the island by arguing that it was a legitimate defensive response to the threat of force represented by the Cuban acquisition of missiles from the Soviet Union.<sup>20</sup> The orthodox response to this argument is that although threats of force are prohibited by art 2(4) of the *UN Charter*, they do not give rise to the right of self-defence, as the right is restricted to 'armed attacks' in art 51. The debate then becomes one of whether a

<sup>13</sup> Frank Kellogg, 'Mr Kellogg's Note of 23<sup>rd</sup> June 1928' in James Shotwell, *War as an Instrument of National Policy and Its Renunciation in the Pact of Paris* (1929) 286, 286–7:

There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in any sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.

<sup>14</sup> *General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 27 August 1928, [1929] ATS 1 (entered into force 24 July 1929) ('*Pact of Paris*').

<sup>15</sup> McCoubrey and White, above n 4, 89. Though art 51 of the *UN Charter* states that the right of self-defence only exists 'until the Security Council has taken measures necessary to maintain international peace and security'.

<sup>16</sup> Ruth Russell and Jeanette Muther, *A History of the United Nations Charter: The Role of the United States, 1940–1945* (1958) 699–706.

<sup>17</sup> *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4.

<sup>18</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, [101]–[103], [118]–[127].

<sup>19</sup> *Oil Platforms (Islamic Republic of Iran v US) (Merits)* [2003] ICJ Rep 161.

<sup>20</sup> Myres McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' (1963) 57 *American Journal of International Law* 597, 602–3.

‘wider’ customary or inherent right recognises that self-defence can be exercised anticipatorily in response to a threat.

### B *Anticipatory and Interceptive Self-Defence*

The *Caroline* incident in the 19<sup>th</sup> century certainly suggests that defensive force can be used in response to an attack that is imminent, though not yet fully materialised. The phrase used in the diplomatic exchanges between the US and the UK was that the state exercising the right of self-defence had to ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.<sup>21</sup> During the Cuban Missile Crisis, there was no evidence of an imminent attack coming from Cuba against the US. If anything, Cuba could have made a stronger case that it was in danger of being attacked by the US, given the attempted CIA-backed Bay of Pigs invasion of the previous year. This usefully highlights a weakness in the anticipatory self-defence or pre-emptive self-defence argument, which can have catastrophic consequences when applied in international relations. When two states are facing each other, and are involved in a spiralling arms race (India and Pakistan would be a modern example), both are under threat from the other and both could make arguments that they are entitled to strike first if the law allowed a degree of anticipation.

The possession of nuclear weapons, and other weapons of mass destruction capable of being launched from great distances, is often used in support of the argument that states must be allowed to launch first strikes in the face of an imminent attack, as otherwise they would be easy targets.<sup>22</sup> Such an argument would seem to be in contradiction with the strict wording of art 51, which requires that an ‘armed attack occurs’.<sup>23</sup> To strike first without being under attack would turn the state from being the victim to being the aggressor. Nevertheless, to interpret art 51 as meaning that a state must wait for the missiles to cross its frontiers before it can respond would appear to condemn that state, a victim of an aggression, to destruction in whole or in part.<sup>24</sup> It would be an unfair law that restricted a victim state’s right of self-defence to waiting for the strike to hit its territory. In attempting to resolve this paradox, the word ‘occurs’ in the phrase an ‘armed attack occurs’ can be interpreted to mean that an armed attack has been launched, either when the missiles leave their launch pads but have not yet crossed the frontiers of the victim state, or even earlier when the victim state has clearly detected that the firing sequence has been initiated — to put it more bluntly, when the button has been pressed. It can safely be said that the armed attack is occurring when the aggressor state has clearly committed itself to the attack, a commitment which is not shown by mere preparations for war but is

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<sup>21</sup> *The Caroline (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)*, Letter from Mr Webster to Mr Fox (24 April 1841) (1842) 29 *British and Foreign State Papers* 1129, 1138.

<sup>22</sup> See Humphrey Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’ (1952) 81 *Recueil des Cours* 455, 498.

<sup>23</sup> *UN Charter* art 51 (emphasis added).

<sup>24</sup> The ICJ did not help resolve this dilemma in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

present in the launch of missiles or perhaps earlier when the launching sequence has been irrevocably started.

This allows for what Dinstein calls an ‘interceptive’ right of self-defence.<sup>25</sup> He gives the hypothetical example of the US using force against the Japanese fleet on its way to Pearl Harbor in 1941, thus preventing a devastating attack from materialising.<sup>26</sup> Beyond this, the argument that to deny a state the right to take wider anticipatory or pre-emptive action would render it an easy target seems to ignore the fact that, if there is a danger of an attack, a state can and should prepare for it and indeed, invite in its allies to assist in preparations. The newly independent state of Kuwait perceived a threat from Iraq in 1961 and invited in British troops to defend it in case of attack. The threat subsided — a lesson that was not learnt in 1990.

### C *The Right of Individual Self-Defence*

The basic core of the right of individual self-defence is that the response to an armed attack must be both necessary and proportionate. Christine Gray states that ‘necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack’.<sup>27</sup> Dinstein identifies ‘immediacy’ as a separate requirement from ‘necessity’ and ‘proportionality’, with the proviso that a ‘State under attack cannot be expected to shift gear from peace to war instantaneously’.<sup>28</sup> David Rodin approaches the matter somewhat differently. He identifies ‘three intrinsic limitations to the right [of self-defence] necessity, imminence, and proportionality’<sup>29</sup> — though acknowledges that imminence is a ‘component and corollary of the requirement of necessity’.<sup>30</sup> Thus, necessity ‘refers to indispensability and unavoidability rather than inevitability’.<sup>31</sup> Rodin adopts Fletcher’s understanding of ‘imminence’ that a ‘pre-emptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late. Legitimate self-defence must be neither too soon nor too late’.<sup>32</sup> Rodin goes on to say that:

If necessity and imminence require a particular relationship between the defensive act (the content of the right) and the aggressive or attacking act, proportionality requires us to balance the harmful effects of the defensive action against the good to be achieved.<sup>33</sup>

He makes the point that proportionality does not require that the means of force deployed in self-defence must somehow balance the aggressive force used.<sup>34</sup> For instance, a missile strike against military targets does not require a response by counter-strike using similar weapons. Rather, ‘the proportionality that is required

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<sup>25</sup> See Dinstein, above n 10, 187–92.

<sup>26</sup> Ibid 190–1.

<sup>27</sup> Christine Gray, *International Law and the Use of Force* (1<sup>st</sup> ed, 2000) 106.

<sup>28</sup> Dinstein, above n 10, 242.

<sup>29</sup> Rodin, above n 9, 40.

<sup>30</sup> Ibid 41.

<sup>31</sup> Ibid 40.

<sup>32</sup> George Fletcher, *Basic Concepts of Criminal Law* (1998) 133, as cited in Rodin, above n 9, 41.

<sup>33</sup> Rodin, above n 9, 41.

<sup>34</sup> Ibid 41–2.

is between the harm inflicted and the good to be preserved'.<sup>35</sup> So that if all the defending state has available in response to a missile attack is bombardment from naval vessels against military targets, then the use of such force is proportionate.

As a philosopher, Rodin is sceptical about whether the moral basis underpinning the right of individual self-defence is to be found at the international level. On the individual level, the innocent victim is faced by a wrongful aggressor, while at the international level the victim is often far from innocent since there is likely to be a whole history of poor relations between the two states in question.<sup>36</sup> In this regard, he makes a challenging point in relation to the Falklands War of 1982, which he concedes was 'undeniably a defensive one, but in a deeper sense we cannot but be troubled by the question of whether Britain had a right to be there in the first place'.<sup>37</sup>

The moral basis of the personal right of self-defence is not easily transferable to the international plane, where there are numerous actors involved in government's decisions to go to war. It is in this sense that Rodin's thesis constitutes a serious challenge to the legitimacy of self-defence in international law. Rodin does admit, however, that his sceptical thesis is more difficult to sustain when faced with aggressive regimes 'as repugnant as Nazi Germany or Stalinist Russia'.<sup>38</sup> Further, he states that, 'by locating the conditions which could potentially justify military action, we can identify those forms of military action which are, if not perfectly justified, then closer to being just than others'.<sup>39</sup>

Despite his doubts about the legitimacy of the right of self-defence by a state, Rodin's analysis of the limitations upon the right at a conceptual level do amount to a clear conception of when the right is being exercised justly, whether at the level of individual self-defence or national defence. The requirements of necessity and imminence signify that a state is only entitled to legitimately rely on the right in the face of an armed attack. In such a situation, it has no choice but to act, as the attack is about to hit or has just hit the territory or fleets of the defending state. If the state strikes too early in response to what appears to be a threat, or if it strikes too late in response to an attack that has already passed, then it is not legitimately exercising its right of self-defence (despite what it might claim). Rather, it is claiming some form of pre-emptive or retaliatory right, both of which lack a moral basis despite having been practised by states, and even expressly claimed by the US and Australia in the post-September 11 era.<sup>40</sup>

### III LESSONS FROM CRIMINAL LAW

Fletcher and Ohlin mount a challenge to the way in which international lawyers have considered the right of self-defence, though it can be seen from the above discussion that some international lawyers are not averse to looking at

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid 190–1.

<sup>37</sup> Ibid 190.

<sup>38</sup> Ibid 198.

<sup>39</sup> Ibid 199.

<sup>40</sup> Nigel D White, 'Self-Defence, Security Council Authority and Iraq' in Richard Burchill, Nigel D White and Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 235, 236, 255.

other disciplines and approaches, whether by philosophers like David Rodin or criminal legal theorists such as George Fletcher. Though these authors have large areas of agreement, at least in their conclusions, Fletcher and Ohlin do not consider (at least to any significant extent) the development of international law or the distillation of *opinio juris*, or indeed, in any profound sense, the nature of the international legal order (all things that international lawyers focus on). Rather, they approach the concept of self-defence both from a philosophical and a criminal law perspective. ‘The solution’, they write, ‘is to draw on the leading domestic legal systems, which have a very rich jurisprudence of statutes and decisions on the permissibility of self-defense’.<sup>41</sup> But their approach is not simply a comparative one, for it is influenced by liberal social contractarian approaches of writers such as John Rawls (whose 1971 classic, *A Theory of Justice*, is cited at a number of crucial points).<sup>42</sup> Hence, for the authors, ‘[t]he right of individual self-defense exists in natural law because it is the right that all individuals enjoy in a state of nature before a social contract creates a functioning government’.<sup>43</sup> From this they argue that:

Similarly, one might think of nations as having existed in a state of nature with each other, forming a social contract that created the Westphalian international legal order. But nations retain the inherent right to self-defence, just as individuals do.<sup>44</sup>

Thus, for Fletcher and Ohlin, the right of self-defence ‘is a function of natural law, in the highest sense of the expression, not man-made law’.<sup>45</sup> In this way, they follow ‘Wolff’s and Vattel’s defence of the possibility of a rationally grounded, Enlightened law of nature based on principles of freedom and equality, the rights of man transfigured into the rights of states’.<sup>46</sup> However, they seem to admit that the detail, in other words, the framing of this natural right, is an issue for man-made law:

By studying the debates in domestic law, we will uncover sources of knowledge and understanding that, by and large, have been ignored in the literature of international law — as though there were a hidden manuscript containing the secrets of life but no one had bothered to read it.<sup>47</sup>

In so doing, they not only tackle the conditions under which a state is allowed to defend itself from attack, but also when it is allowed to defend others (states and individuals). So while international lawyers tend to examine state practice and *opinio juris* for the existence of a separate right of humanitarian intervention, Fletcher and Ohlin consider whether such action is justified as self-defence, or what the authors prefer to call ‘legitimate defense’.

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<sup>41</sup> Fletcher and Ohlin, above n 6, 6.

<sup>42</sup> See, eg, *ibid* 12–3, 20–1, 23, 145–6.

<sup>43</sup> *Ibid* 145.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> Edward Keene, ‘The Age of Grotius’ in David Armstrong (ed), *Routledge Handbook of International Law* (2009) 126, 130.

<sup>47</sup> Fletcher and Ohlin, above n 6, 8.

A *Autonomy and Self-Defence*

In criticising Rodin's approach to self-defence, the authors make the point that:

The key to thinking about the right of self-defense ... is not the relationship with the aggressor but the autonomy of the victim/defender. The defender is morally permitted to do what is necessary to restore his autonomy (or external freedom).<sup>48</sup>

Thus according to this view, it was not the rather complex relationship between the UK and Argentina and their competing claims to title that were relevant in assessing the legitimacy of the exercise of the right of self-defence by the UK in relation to the Argentinian invasion of the Falklands, but the fact that the UK's autonomy (or territorial integrity) was compromised by the attack. Here the 'right' in question does not conform to the classic conception of rights,

but rather [it is] an expression of the Law (the Right) seeking to reestablish itself against external aggression. To put it another way, the defender's lawful autonomy is compromised by the attack, and using defensive force is a way of vindicating his autonomy and reestablishing the supremacy of the law. This is the sense in which the defender has a right to use force — the sense that the Right is on his side.<sup>49</sup>

However, in the case of the Falklands, often seen as a paradigmatic case of self-defence in modern international law, the claim of legitimate title to the territory is important and, therefore, the relationship between the UK and Argentina cannot be ignored, for if the UK had no clear title to the Falklands then it cannot be said to have been unequivocally protecting its autonomy when it acted to repel the invaders. Although arguments about the self-determination of the 2000 or so inhabitants are used to support the UK's claim, it is equally plausible to see these people as an imported, rather than an indigenous, population,<sup>50</sup> and therefore perhaps no more entitled to the right of self-determination than the Argentinian occupiers of 1982. Bearing in mind that the cause of so many conflicts is disputed territory, the clear lines found in the right of individual self-defence are not always to be found in international relations. The authors admit that their 'vision of autonomy depends on an analogy between persons and states'.<sup>51</sup> They state that:

The individual is an island, self-reflexively sovereign, as nations are sovereign over their territory. Indeed, the individual right of self-defense makes sense as an extension of the idea that nations can use force to maintain dominance over their own people and their own territory.<sup>52</sup>

But this statement does not convince. It could be argued that states are not like individuals but more like abstract legal entities, such as corporations, in that states have many component parts — territory, population, government and

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<sup>48</sup> Ibid 29.

<sup>49</sup> Ibid 45.

<sup>50</sup> See generally UN Special Committee on Decolonization, *Question of the Falkland Islands (Malvinas)*, UN Doc A/AC.109/2003/24 (16 June 2003). See also *Question of the Falkland Islands (Malvinas)*, GA Res 2065 (XX), UN GAOR, 20<sup>th</sup> sess, 1398<sup>th</sup> plen mtg, UN Doc A/RES/1398 (XX) (16 December 1965).

<sup>51</sup> Fletcher and Ohlin, above n 6, 59.

<sup>52</sup> Ibid.

independence from other states. But this analogy is not wholly convincing either, since it fails to capture the level of structural complexity within a state, or the legal order within which the state operates where a largely contractual regime is slowly being supplemented by constitutional norms.

Therein lies a wider problem with using domestic analogies in international law: they may be helpful, but they cannot be determinative, since the international legal order and its subjects are so very different from domestic legal orders. Nevertheless, Fletcher and Ohlin point to the collapse of the strict division between national and international legal orders, especially in the evolution of international criminal law.<sup>53</sup> While international criminal law has developed significantly since the Nuremberg trials in 1946, it remains focused on the responsibility of individuals for war crimes, crimes against humanity and genocide. Conceptually, as well as practically, it has proved much more difficult to subject states themselves to criminal law, to the extent that when Bosnia accused Serbia of genocide before the ICJ, the Court dealt with the issue as a violation of a treaty by a state not as a violation of international criminal law by that state.<sup>54</sup> Admittedly, the development of individual criminal responsibility in international law seems to break down the distinction between domestic and international legal orders, and this seems to be the argument of Fletcher and Ohlin. As the authors discuss, international criminal law is very much based on domestic law concepts of individual liability, even though the crimes are likely to be committed collectively.<sup>55</sup>

In the international legal order of states, a state, even when clearly attacked, is unlikely to be able to act instantly, unlike an individual under attack. Further, there are going to be issues such as whether it is invading another state's autonomy or actually reclaiming part of its lost autonomy. In 1961, India invaded the Portuguese enclave of Goa on the premise that it was a response to a conquest that had occurred 450 years ago.<sup>56</sup> India argued that it had delayed the recapture of lost territory because for 430 years it had itself been the subject of colonial domination.<sup>57</sup> From this, one might ask whether Arab states unlawfully attacked Israel in 1973, or whether they were merely defending their autonomy that was compromised by Israel in the Six Day War in 1967. When a state is subject to multiple 'pin-prick' attacks, how can it be expected to respond to each one? From Israel's perspective, it is only possible to defend its autonomy from the many limited terrorist attacks to which it is subjected by launching 'cleansing' operations such as those directed against Hezbollah in Lebanon in 2006 and Hamas in Gaza in 2009. Indeed, there seemed to be some acceptance that Israel had the right to defend itself from terrorist attacks, though it carried it

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<sup>53</sup> Ibid 8–12.

<sup>54</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* [2007] ICJ [167]–[170]. The Court observed 'that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature': at [170].

<sup>55</sup> See the interesting discussions of international criminal law in Fletcher and Ohlin, above n 6, 8–11, 121–5, 186–93.

<sup>56</sup> UN SCOR, 16<sup>th</sup> sess, 987<sup>th</sup> mtg, UN Doc S/PV.987 (18 December 1961) [37].

<sup>57</sup> Ibid [46].

out disproportionately.<sup>58</sup> The legal arguments cannot be fully appreciated without looking at Middle Eastern relations and history. These are issues to which domestic criminal law, or even international criminal law, have limited relevance. Though the language is shared with domestic criminal law, the solutions cannot be the same. In other words, we can look to domestic concepts for inspiration but not for determination.

### B *Defence of Others and Collective Self-Defence*

Fletcher and Ohlin though do not simply pluck domestic legal concepts out of the ether or from the realms of natural law. Rather, they put emphasis on the French language version of the *UN Charter*, which uses the phrase '*le droit naturel de légitime défense*' in contrast to 'the inherent right of self-defence' in the English language version.<sup>59</sup> The French formulation, so the argument goes, has a different (wider) meaning, since under French domestic law the concept of legitimate defence includes defence of others, actions that are not dependent upon the consent of those being aided.<sup>60</sup> The authors thus criticise the requirement in international law that if a 'victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect', identified by the ICJ in *Nicaragua*.<sup>61</sup> But this is a controversial element, inserted as a safeguard against unwarranted interventions (which is a legitimate fear of many small states), and one that may well be waived if the attacked state is in danger of annihilation. The authors mistakenly assume that there are other differences between the idea of legitimate defence of other states and the concept of collective self-defence as recognised in art 51 of the *UN Charter*, which they inaccurately restrict to situations of pre-existing defence pacts or to situations of self-interest on the part of the assisting states.<sup>62</sup> Whilst this may explain some of the instances of states coming (or not) to the defence of others, there are no such restrictions in international legal doctrine. The US may have come to the aid of Kuwait in 1991 to protect its oil interests, but it may also (at least according to different elements of the administration at the time) have come to the aid of Kuwait to uphold the law.

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<sup>58</sup> See, eg, the Security Council debate of 21 July 2006: *The Situation in the Middle East, Including the Palestinian Question*, UN SCOR, 61<sup>st</sup> sess, 5493<sup>rd</sup> mtg, UN Doc S/PV.5493 (21 July 2006); Debate of the European Parliament, 'Situation in the Middle East/Gaza Strip', vol 52 (2009) OJ Debates, 66, 14 January 2009; the G8 statement on the Middle East made at the St Petersburg Summit on 16 July 2006 in which the leaders declared that:

These extremist elements and those that support them cannot be allowed to plunge the Middle East into chaos and provoke a wider conflict. The extremists must immediately halt their attacks. It is also critical that Israel, while exercising the right to defend itself, be mindful of the strategic and humanitarian consequences of its actions. We call upon Israel to exercise utmost restraint, seeking to avoid casualties among innocent civilians and damage to civilian infrastructure and to refrain from acts that would destabilize the Lebanese government.

G8 Summit, *Middle East Declaration* (16 July 2006) <<http://en.g8russia.ru/docs/21.html>>.

<sup>59</sup> Fletcher and Ohlin, above n 6, 36.

<sup>60</sup> *Ibid* 66–7.

<sup>61</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [232]. For an account of the criticism made by the authors about this element, see *ibid* 44–5.

<sup>62</sup> Fletcher and Ohlin, above n 6, 67–8.

The authors argue that '[t]he differences between the English concept of self-defense and the French concept of *légitime défense* are deep and far-reaching'.<sup>63</sup> But is it possible to assume that, in adopting this language in the *UN Charter*, the French Government was intending to incorporate French domestic law while the British Government was intending English law standards? Surely, when governments are debating key international legal concepts, they are using standards found in the discourse between states. If indeed self-defence was a new concept in 1945, then it would have been understandable for the delegations to the San Francisco Conference to have referred to their own domestic legal concepts at least as guides. But even then, as statesmen, they would have realised that these domestic standards would have to be modified for the very different legal and political order existing between states. But such arguments are irrelevant given that there was a significant amount of state practice and *opinio juris* on the right of individual and collective self-defence before 1945. Nonetheless, the authors try to refocus their argument that there was a straight transposition of domestic law into international law when they refer to the fact that the French delegation argued for wider rights at the San Francisco Conference, in particular the right of all members 'to act in the interests of "peace, right and justice" in the event of Security Council inaction'.<sup>64</sup> Although this failed, they argue that some of that idea was preserved (at least in the French version of the *UN Charter*) in the phrase '*légitime défense*'.<sup>65</sup>

The Continental notion of *légitime défense*, encompassing as it did the notion of defense of others and defense of property, was much closer to their original proposal allowing military interventions in support of what was just and right. Indeed, one might even say that the French proposal survived, albeit covertly, in the French-language concept of *légitime défense*.<sup>66</sup>

While provocative, this argument is by no means conclusive, and indeed is not supported by any evidence that this is how the French Government has subsequently interpreted art 51. The fact that 'even French scholars of international law fail to realize the significance of the distinction' between self-defence and legitimate defence<sup>67</sup> should have told the authors something.

The authors widen the concept of legitimate defence (allowing for defence of others) beyond what international lawyers would recognise as collective self-defence (states coming to the aid of an attacked state) when they include within it the defence of individuals in other states; what international lawyers would see as humanitarian intervention.<sup>68</sup> This is problematic. To argue that legitimate defence means, in the French system, defence of others and those 'others' are individuals under attack, and then to posit the same interpretation at the international level, conveniently assumes that the same concept of 'others' is applicable in both systems. In reality, legitimate defence of 'others' on the international stage would simply mean coming to the aid of attacked states, a

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<sup>63</sup> Ibid 63.

<sup>64</sup> Ibid 73.

<sup>65</sup> Ibid 76.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid 78.

<sup>68</sup> Ibid 67–71.

concept already present in the form of the right of collective self-defence in art 51. Admittedly, individuals have seen their status elevated on the international stage corresponding to an increasing emphasis on human as well as national security,<sup>69</sup> thereby making it possible to argue for an emerging responsibility to protect civilians under threat.<sup>70</sup> But this will be established by the processes of international law, not by the straightforward transposition of a domestic law concept on to the international stage. To declare that:

Just as anyone on the street has the right to come to the defense of a victim of an violent attack and need not wait for a formal request, so too any member of the world community should have the right to engage in defense of others when a violent attack has occurred,<sup>71</sup>

can only be an argument and not a statement of international law, particularly if the ‘others’ referred to are not just states but individuals or groups within another state.

### C *The Right of Self-Defence of Nations*

However, the authors not only argue that defence of others captured in the continental notion of legitimate defence signifies that states can come to the aid of other states and people within such states, they also strengthen their concept of humanitarian intervention by arguing that the right of self-defence does not simply belong to states but to ‘nations’. This view is based on the ‘collective right of self-determination recognized by the UN Charter’.<sup>72</sup> In other words, the ‘people’ — or the ‘nation’ — are not simply the beneficiaries of a right exercised by outside states, they are themselves the holders of that right. If correct, this removes the difficulty of only relying on the continental criminal law standard of legitimate defence (which includes defence of others) as a justification for humanitarian intervention. The authors state that because of the ‘international prohibition on the use of force, which is the centrepiece of the international legal order ... any theory of humanitarian intervention must [come] within the four corners of Article 51 and its standards for the use of force’.<sup>73</sup> The authors are right to say that ‘[o]nce people start arguing that Article 51 is not the sole standard for justifying the use of force, the door is opened for all kinds of arguments about the use of force’.<sup>74</sup> But interpreting art 51 so widely, and contrary to any international consensus, surely has the same effect. The authors argue that their theory of legitimate defence provides a ‘convincing rationale for humanitarian intervention’ given that ‘the inherent right of self-defence belongs not just to member states of the UN but to national groups as well’, so that

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<sup>69</sup> See generally Fen Hampson, *Madness in the Multitude: Human Security and World Disorder* (2002).

<sup>70</sup> For discussion of the responsibility to protect, see generally Emma McClean, ‘The Responsibility to Protect: The Role of International Human Rights Law’ (2008) 13 *Journal of Conflict and Security Law* 123; Carlo Focarelli, ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’ (2008) 13 *Journal of Conflict and Security Law* 191.

<sup>71</sup> Fletcher and Ohlin, above n 6, 70–1.

<sup>72</sup> *Ibid* 129.

<sup>73</sup> *Ibid* 134.

<sup>74</sup> *Ibid*.

'[w]hen these national groups are attacked, they have the right under international law to defend themselves; moreover, other nations have the right to come to their defense consistent with legitimate defense'.<sup>75</sup> One problem, as the authors recognise, is the lack of clarity over the term 'nation': it has 'something to do with "peoples" and with "culture"', but as there are many nations in the world, unlike states, they are 'difficult to count'.<sup>76</sup> The other problem, though, is that the international legal consensus on what constitutes a 'people' for the purposes of the right of self-determination is quite narrow, confined to (neo)colonial or similar situations.<sup>77</sup> Further, General Assembly resolutions recognise that such a 'people' have the right to struggle to achieve their goal and to receive 'support' to that end, but states are divided as to whether that 'support' includes armed force.<sup>78</sup>

The Palestinians, for example, are generally considered to constitute a 'people' having the right to self-determination, but there is certainly very little support for the idea that other states can come to their aid in their struggle to achieve that right. There was no attempt to come to the defence of the people of Gaza in the face of an Israeli attack in January 2009, though Fletcher and Ohlin would probably see the Israeli offensive as an act of legitimate defence against repeated Hamas rocket attacks.<sup>79</sup> It is interesting though that no state came to the defence of the people of Gaza or claimed that they had the right of self-defence — when the Palestinians have a clear right to self-determination — and have, at least in the West Bank and Gaza, a relatively clear territorial entity that can be defended. Surely this is strong evidence that a 'people' struggling for self-determination have no right of self-defence in the sense of art 51.

#### D *The Elements of the Right of Legitimate Defence*

Apart from the issue of defence of 'others', the six elements of legitimate defence identified by the authors are not dissimilar to the content of the existing international legal right as discussed in the first section above. They talk about an attack that has to be overt, unlawful and imminent, and a response that must be necessary, proportional and taken intentionally in response to the attack.<sup>80</sup> Of course, the controversy comes back to the meaning of 'imminent'. Though they repeat the phrase coined by Fletcher that 'legitimate self-defence must neither be too soon nor too late',<sup>81</sup> they, like Dinstein, apply it to cover uses of force that are controversial and not clearly accepted as acts of self-defence, principally the

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<sup>75</sup> Ibid 136.

<sup>76</sup> Ibid 137.

<sup>77</sup> *Declaration on the Granting of Independence to Colonial Territories and Peoples*, GA Res 1514 (XV), UN GAOR, 15<sup>th</sup> sess, 947<sup>th</sup> plen mtg, UN Doc A/RES/1514 (XV) (14 December 1960) 66; David Harris, *Cases and Materials on International Law* (6<sup>th</sup> ed, 2004) 112.

<sup>78</sup> See, eg, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, UN Doc A/RES/1883 (XXV) (24 October 1970) 121. The Resolution in part states that in 'their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter': at 124.

<sup>79</sup> See Fletcher and Ohlin, above n 6, 137.

<sup>80</sup> Ibid 86–7.

<sup>81</sup> Fletcher, above n 32.

Israeli pre-emptive strike against hostile Arab nations in the 1967 Six Day War.<sup>82</sup> It is misleading for the authors to state that '[m]ost observers concur that Israel's action was justified under the Charter of the United Nations', and further, that '[i]n a rare showing of solidarity in the United Nations, the Security Council ... tacitly approved of [Israel's] defensive action'.<sup>83</sup> At best, it could be said that both states and commentators were divided.<sup>84</sup> The authors' discussion of the US response to September 11 is at best ambivalent, admitting that the motive was retaliation, but the reason given was defence against future attacks.<sup>85</sup> But how does this fit into the idea that defensive force 'must neither be too late nor too soon'?

In Chapter 7, on 'Preemptive and Preventive Wars',<sup>86</sup> the authors tackle this issue more convincingly. Here they take a similar line to the one outlined above, drawn from domestic criminal law, that while

[a] military response in the absence of an armed attack is illegal under international law unless authorized by the UN Security Council ... no one could reasonably propose a doctrine of self-defence that was limited to striking back only after being struck by a phalanx of bombers or guided nuclear missiles.<sup>87</sup>

It must be true that the 'battleground for this debate is the correct definition of imminence'.<sup>88</sup> Their parameters are the parameters of international law; so that allowing the tanks to cross a frontier before the right is triggered would in many cases be too late, but including preparations for war within the definition of imminent attack would 'grant the defender license to attack every strategic enemy'.<sup>89</sup> That there must be an 'imminent threat of harm' is a useful phrase that should be attractive to governments and commentators in trying to reshape the law of self-defence in the post-September 11 era.<sup>90</sup> Though the authors consider whether instances in domestic criminal law where battered wives commit acts of self-defence when their spouses are sleeping or eating their dinner should be applicable to 'battered nations' such as Israel,<sup>91</sup> they thankfully conclude that this sort of analogy is not suitable for the international arena. As '[t]he community of democratic states does not have the power to designate some nations insiders and others outsiders',<sup>92</sup> the authors thereby dismiss the liberal interventionist penchant for regime change.

Clearly, Fletcher and Ohlin are motivated to cast the right of self-defence in a way that defends humanity, so that groups within states can be protected from attack, but also so that states cannot be permitted to wage war prematurely

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<sup>82</sup> Fletcher and Ohlin, above n 6, 90–1.

<sup>83</sup> Ibid 91.

<sup>84</sup> See generally Amos Shapira, 'The Six-Day War and the Right of Self-Defence' (1971) 6 *Israeli Law Review* 65; Richard B Parker (ed), *The Six-Day War: A Retrospective* (1996).

<sup>85</sup> Fletcher and Ohlin, above n 6, 95.

<sup>86</sup> Ibid 155–76.

<sup>87</sup> Ibid 155.

<sup>88</sup> Ibid 156.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid 161. For recent efforts by international lawyers, see Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963, 967.

<sup>91</sup> Fletcher and Ohlin, above n 6, 165.

<sup>92</sup> Ibid 168–9.

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against threats that are not imminent, which, if allowed, would legitimate attacks that would inevitably lead to the loss of civilian life — the loss of humanity. Morally appealing, this is an intriguing and provocative book that should make international lawyers re-appraise their view of self-defence. They may ultimately reject some (but not all) of the conclusions reached by the authors as unworkable, or indeed unacceptable in the international arena, but they cannot, in all honesty, deny the impact the book has had on their thinking.

NIGEL D WHITE\*

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\* MA (Hons) (Oxford); PhD (Nottingham); Professor of International Law, University of Sheffield.