To what extent does a State have the right to claim self-defence towards a non-state actor acting either within or outside of that State's territory?
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INTRODUCTION

The events of 7th October 2023 marked a significant escalation in the Israeli–Palestinian conflict, characterised by a large-scale operation initiated by Hamas and other armed groups from Gaza.¹ This offensive commenced in the early hours of the morning, involving a coordinated barrage of rockets targeting southern and central Israel.² Armed groups breached the Gaza perimeter fence at multiple points, infiltrating Israeli territory by land, air, and sea.³ These incursions resulted in the deaths and injuries of Israeli forces and civilians, including over 260 individuals attending a music festival near Re’im and residents of nearby Kibbutz.⁴ The situation escalated into gun battles and hostage crises within southern Israeli towns, culminating in a State of war alert declared by the Israeli military.⁵ Israeli forces regained control by 9 October, but indiscriminate rocket attacks, including on key locations like Ben Gurion Airport, persisted in the subsequent weeks.⁶

The toll of this conflict was severe. Israeli and foreign nationals in Israel suffered over 1,200 fatalities and more than 5,400 injuries, with more than 200 individuals, including babies, children, and the elderly, taken hostage to Gaza.⁷ The Gaza Ministry of Health reported catastrophic losses in Gaza, with 11,078 Palestinians killed, including 4,506 children and 3,027 women, and 27,490 others injured.⁸ This tragic episode not only underscores the devastating human cost of the conflict but also highlights the complex and deep-rooted nature of the Israeli–Palestinian dispute.⁹

The intricate fabric of international law is continually tested and reshaped by the evolving dynamics of global conflict, especially in scenarios involving State and non-state actors.¹⁰

² ibid.
³ UN Office for the Coordination of Humanitarian Affairs, ‘Escalation in the Gaza Strip and Israel: Flash Update #1 as of 18:00, 7 October 2023 - Occupied Palestinian Territory’ (ReliefWeb, 7 October 2023) <https://reliefweb.int/report/occupied-palestinian-territory/escalation-gaza-strip-and-israel-flash-update-11-1800-7-october-2023> accessed 11 December 2023
⁴ ibid.
⁵ ibid.
⁷ ibid.
⁸ ibid.
⁹ ibid.
This thesis delves into one such complex scenario: the legal scrutiny of Israel's right to self-defence in its engagements with Hamas, particularly focusing on the significant events of 7th October. This date marks not just a moment of heightened conflict but serves as a lens through which the multifaceted nature of modern asymmetric warfare and its legal ramifications can be examined.

At the heart of this inquiry lies *jus ad bellum*, as encapsulated in Article 51 of the United Nations Charter. This article affords States the right to self-defence in response to an armed attack, forming a pivotal legal basis for State actions in the international arena.

However, the principle of self-defence is intricately balanced against the prohibition of the use of force against the territorial integrity or political independence of any State, a cornerstone of international law enshrined in Article 2(4) of the Charter. The interplay between these two articles forms a critical legal backdrop against which Israel's actions are evaluated. This study seeks to unravel the legal complexities inherent in this interplay, particularly in the context of State responses to non-state actors like Hamas.

A significant dimension of this analysis is the dual character of Hamas and the territory of Gaza. Hamas, while recognized as a terrorist organisation by parts of the global community, also wields significant political and administrative control over the Gaza Strip.

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14 United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51


16 ibid.


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In international law, the Israeli–Palestinian conflict, particularly Israel's engagements with Hamas, presents a distinct challenge. This thesis adopts a dual perspective on Hamas's identity: as a non-state actor and as a de facto governing authority in Gaza. This bifocal approach is not merely academic; it is crucial to understand the legal implications of Israel’s self-defence actions within this complex framework.

Traditionally, viewing Hamas as a non-state actor aligns with established international law principles, focusing on state versus non-state dynamics. This perspective is essential for examining Israel's military strategies and their compliance with international legal norms. However, recognizing Hamas as a governing authority in Gaza introduces a different set of legal considerations, potentially altering the legal assessment of the interactions between Israel and Hamas.

This duality has profound implications. If Hamas is viewed as a non-state actor, Israel's self-defence claims are framed within a certain set of legal guidelines. Conversely, if Hamas is seen as a governing authority, these claims enter a more intricate legal territory, intersecting with issues of territorial sovereignty and governance.

Engaging with this debate, this research aims to illuminate the intricate balance between a state's right to national security and the principles of international peace and stability. The key tenets of jus ad bellum, necessity, and proportionality are critically analysed in this context. This approach not only assesses the legality of Israel's self-defence claims but also explores how these principles are applied in contemporary, evolving conflict scenarios.

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23 Tareq Baconi (see footnote 19)
24 ibid.
26 Tareq Baconi (footnote: 19)
27 ibid.
28 Mary Ellen O’Connell, Christian J. Tams, and Dire Tladi (footnote: 10)
30 ibid.
31 ibid.
This study, therefore, contributes to the field of international law by examining the challenges posed by entities like Hamas in global conflicts.\textsuperscript{32} It navigates the intersection of legal theory and modern geopolitics, aiming to shed light on broader ethical and legal questions in the international community.\textsuperscript{33} The findings are intended to inform and enrich the discourse among international law practitioners, policymakers, and scholars, addressing the evolution of legal norms in a world marked by increasingly complex forms of conflict.\textsuperscript{34}

**SECTION I: SELF-DEFENCE UNDER INTERNATIONAL LAW**

This section critically examines the concept of self-defence within the framework of international law, focusing particularly on State interactions with non-state actors.\textsuperscript{35} The legal analysis is centred around the Israel–Hamas conflict, a scenario that presents complex challenges under international law.\textsuperscript{36} This section will break down the legal parameters for self-defence as stipulated in key instruments like the United Nations Charter, specifically analysing their application and interpretation by States in response to threats.\textsuperscript{37} This discussion is crucial for understanding the legal justifications and limitations of State actions in scenarios of asymmetric warfare, a context increasingly prevalent in contemporary international relations.\textsuperscript{38}

I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law

Self-defence, as a principle enshrined in international law, finds its explicit legal expression in Article 51 of the United Nations Charter.\textsuperscript{39} This article acknowledges the inherent entitlement of states to defend their sovereignty in the case of an armed attack, establishing a crucial legal basis for state activities in the context of international relations.\textsuperscript{40}

However, the application of this principle goes beyond its treaty-based manifestation in the UN Charter, embodying a long-standing norm deeply


\textsuperscript{33} Shaw MN, *International Law* (Cambridge University Press 2022)


\textsuperscript{35} Henderson C, ‘Chapter 8; The Use of Force against non-state actors’, *The use of force and international law* (2nd edn, Cambridge University Press 2024) pp.400-113

\textsuperscript{36} ibid.


\textsuperscript{38} Henderson C, ‘The Use of Force against non-state actors’, *The use of force and international law* (Cambridge University Press 2018) pp.400-113

\textsuperscript{39} United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51. [Hereinafter: UNC art.51]

\textsuperscript{40} Henderson C, ‘Chapter 6; General Aspects of the Right of Self-Defence’, *The use of force and international law* (2nd edn, Cambridge University Press 2024) pp.259-261
embedded in customary international law. Customary international law comprises practices that, due to their widespread and consistent application among states, have gained recognition as binding legal norms, independent of specific treaty provisions.

This dual legal foundation of self-defence – rooted in both treaty law and customary international law – underscores the principal's multifaceted nature. In particular, the role of customary international law is pivotal when addressing scenarios not explicitly covered by Article 51. For example, situations involving anticipatory self-defence against non-imminent threats or responses to attacks by non-state actors like Hamas, are areas where customary international law can provide essential guidance and fill potential legal gaps. The customary aspect of self-defence under international law is significant because it reflects the collective understanding and practices of the international community over time, shaped by state responses to various threats and informed by international jurisprudence.

The evolution of customary international law in the context of self-defence is particularly relevant in modern conflicts, where traditional concepts of warfare are challenged by the emergence of influential non-state actors. The growing prominence of entities such as Hamas in global conflicts has necessitated a reevaluation of what constitutes an 'armed attack' and the conditions under which states can lawfully exercise their right to self-defence. This evolution includes an examination of how states have historically responded to threats posed by non-state actors, as well as corresponding judicial interpretations, which collectively influence the understanding and application of Article 51.

In the case of Israel’s self-defence actions against Hamas, this dual legal framework becomes crucial. The assessment of Israel’s claims must consider both the treaty-based provisions of the UN Charter and the broader, more nuanced

43 Yoram Dinstein,(see footnote 17)
47 Lubell N (see footnote 47)
interpretations offered by customary international law.\textsuperscript{50} This approach acknowledges that the legitimacy of Israel’s self-defence claims against Hamas involves not only a direct application of Article 51 but also an in-depth analysis under the overarching principles and evolving practices of customary international law.\textsuperscript{51}

Therefore, the concept of self-defence in international law, as it applies to the Israeli–Palestinian conflict, is not only about interpreting a specific article of a treaty but also about understanding a dynamic and historically grounded legal norm that has adapted and evolved to address the challenges of asymmetric warfare and the significant roles played by non-state actors in contemporary international conflicts.\textsuperscript{52} This comprehensive approach underscores the complexity of applying the principle of self-defence in the current international legal landscape and highlights the need for a balanced and contextually informed application of legal norms.\textsuperscript{53}

In the realm of international law, the principles of self-defence are anchored by key concepts like proportionality and necessity.\textsuperscript{54} These principles not only form the core of understanding self-defence within \textit{jus ad bellum} but also play a critical role in assessing State actions in response to threats, especially in situations involving non-state actors such as Hamas.\textsuperscript{55}

The concept of necessity in self-defence, particularly the aspect of immediacy, poses unique challenges in modern conflict scenarios.\textsuperscript{56} A notable instance illustrating this complexity is the United States’ response to the 9/11 attacks. Despite a six-week interlude before initiating military action in Afghanistan, the U.S.’s approach was still framed within the context of self-defence.\textsuperscript{57} This example underscores the nuanced interpretation of the immediacy requirement in


\textsuperscript{51} Tareq Baconi (see footnote 19)


\textsuperscript{53} Henderson C, ‘The Use of Force against non-state actors’, \textit{The use of force and international law} (Cambridge University Press 2018) pp.400-113


\textsuperscript{56} Henderson C, ‘Chapter 6; General Aspects of the Right of Self-Defence; 6.3 The Customary Requirement of Necessity and Proportionality’, \textit{The use of force and international law} (2nd edn, Cambridge University Press 2024) pp. 296-322

international law, where strategic considerations and ongoing threats can influence the timing and nature of a state’s response.58

This becomes particularly pertinent when a State’s response is intended to deter future threats, which may be difficult to quantify or predict with certainty.59 Without concrete evidence of an imminent attack, applying the principles of necessity and proportionality becomes a nuanced endeavour.60

Furthermore, when States, like Israel in its conflicts in Lebanon and Gaza, interpret these threats as existential, the traditional constraints of proportionality can be perceived as less applicable.61 This broad interpretation of necessity and proportionality challenges the conventional boundaries of these principles in international law.62

Customary international law, unlike treaty law, is not codified in specific texts but evolves from the consistent practices and legal beliefs of states. In the case of Israel's self-defence actions against Hamas, the focus is on customary international law principles, particularly as they relate to the right of self-defence as understood in the practice of states and affirmed in international jurisprudence.63

In the contemporary context, the relevance of necessity in the use of force by States is primarily seen in its application to jus ad bellum64. This reflects a shift from its historical usage in various legal contexts, emphasising its current critical role in legitimising forceful State actions. Such interpretations and applications underscore the evolving nature of these concepts in international law, especially in the complex dynamics of modern conflicts.65

The principle of necessity in the context of self-defence, requires that the use of force must be a last resort, employed only when an immediate and significant

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58 ibid.  
60 ibid.  
62 ibid.  
65 ibid.
threat is present. For Israel's claim of self-defence against Hamas, this necessitates a critical analysis of the imminence and severity of the threat posed by Hamas. Given Hamas's dual nature as both a non-state actor and a de facto governing entity, the concept of necessity is intricately tied to the nature and scale of Hamas's actions. In scenarios where Hamas's operations present an imminent threat to Israel's security, Israel's right to self-defence is invoked. However, this right is circumscribed by the need to ensure that such defensive actions are indeed necessary and are not excessive in relation to the threat posed. This assessment of necessity, particularly in asymmetric warfare situations involving a powerful state actor and a less-equipped non-state entity, is central to addressing the main research question of whether Israel can legitimately claim self-defence in its engagements with Hamas.

Assessing the conditions and legal justifications for a State to claim self-defence against a non-state actor, such as Hamas, necessitates a thorough examination of the principle of proportionality. Proportionality, a cornerstone in international law, mandates that any self-defensive action must be commensurate with the level of threat posed. This principle becomes particularly nuanced when considering the context of asymmetric warfare, as is the case with Israel and Hamas. If for the purposes of this thesis, that Palestine is perceived under a dual-status framework, where it is both an occupied territory and simultaneously treated as an autonomous State, the legal analysis of actions, particularly by groups like Hamas within its borders, enters a realm of heightened complexity. This dual-status approach

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67 ibid.


71 ibid.


necessitates a nuanced assessment of proportionality, balancing the principles of State sovereignty and the legalities associated with occupation.\textsuperscript{76} Israel’s actions in response to perceived threats from Hamas should be strictly assessed within the framework of jus ad bellum, focusing on the legitimacy of these actions as self-defence measures and their compliance with international legal standards for state conduct in cross-border engagements\textsuperscript{77}.

In assessing the proportionality of Israel’s actions under jus ad bellum, it is crucial to refer to primary sources and authoritative interpretations of international law, particularly those from the International Court of Justice.\textsuperscript{78} The concept of proportionality, while not explicitly detailed in Article 51 of the United Nations Charter, is a well-established principle in customary international law, as evidenced in key ICJ cases.\textsuperscript{79} Notable examples include the 'Legality of the Threat or Use of Nuclear Weapons' advisory opinion, where the ICJ recognized proportionality as an essential condition of lawful self-defence.\textsuperscript{80}

This principle mandates that the scale, nature, and duration of Israel’s self-defence actions must be proportionate to the threat posed by Hamas.\textsuperscript{81} In this context, the ICJ’s jurisprudence serves as a crucial reference point for evaluating whether Israel’s responses to immediate threats are proportionate, taking into account not just the direct impact of these actions, but also their broader consequences.\textsuperscript{82}

This careful assessment of proportionality is vital for determining the legality of self-defence claims under international law, aligning state actions with the

\textsuperscript{78} Henderson C, ‘Chapter 6; General Aspects of the Right of Self-Defence; 6.2 The Concept of an “Armed Attack”’, \textit{The use of force and international law} (2nd edn, Cambridge University Press 2024) pp. 316-322
\textsuperscript{80} International Court of Justice, ‘Legality of the Threat or Use of Nuclear Weapons’ (\textit{Legality of the threat or use of nuclear weapons, 22 December 2023}) \url{https://www.icj-cij.org/case/95} accessed 22 December 2023
\textsuperscript{81} Baker A: The Legal War: Hamas (see footnote 77)
\textsuperscript{82} Henderson C, ‘Chapter 6; General Aspects of the Right of Self-Defence; 6.2 The Concept of an “Armed Attack”’, \textit{The use of force and international law} (2nd edn, Cambridge University Press 2024) pp. 292-29
established norms and standards set by customary international law and the ICJ’s interpretations.\(^83\)

I:II: Article 2(4) of The United Nations Charter
I:II:I Article 2(4)’s Constraints on the Exercise of Self-defence

Article 51 of the United Nations Charter, recognizing the right of states to exercise self-defence in the event of an armed attack, functions as a distinct exception to the prohibition delineated in Article 2(4).\(^84\) This latter article prohibits the use of force that could undermine the territorial integrity or political independence of any state. Thus, the provisions of Article 51 should be understood not as a balancing factor but rather as a specific legal carve-out within the broader non-aggression framework established by Article 2(4).\(^85\)

In international law discourse, the interpretation of Article 51 often considers the limitations imposed by Article 2(4), especially in scenarios where self-defence actions could be perceived as infringing upon another State’s sovereignty.\(^86\) In the context of Israel’s self-defence actions against Hamas in Gaza, it is essential to navigate the legal principles in Article 2(4) of the United Nations Charter with specific attention to regional implications.\(^87\) While Israel may assert self-defence, such actions must be evaluated for their potential impact on the sovereignty of neighbouring states, particularly Egypt, given Gaza's geographical proximity.\(^88\) This nuanced analysis ensures that Israel’s self-defence measures against Hamas not only address security concerns but also respect the territorial integrity and political independence of surrounding nations, as mandated by Article 2(4).\(^89\)

Consequently, the delineation of Article 51 as an exception to Article 2(4)’s general prohibition against the use of force suggests a need for a cautious and circumspect approach in its application, particularly in situations involving non-state actors where the risks of violating another State’s territorial integrity are heightened.\(^90\)

\(^84\) United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4)
\(^85\) Grant J, ‘8 USE OF FORCE’, *International Law Essentials* (Edinburgh University Press 2014) pp.81-96
\(^86\) ibid.
\(^89\) Grant J, ‘8 USE OF FORCE’, *International Law Essentials* (Edinburgh University Press 2014) pp.81-96
\(^90\) Mary Ellen O’Connell, Christian J. Tams, and Dire Tladi (footnote: 10)
I:II: Interplay with Article 2(4) of the UN Charter

Israel's right to self-defence, as articulated under Article 51 of the UN Charter, must be carefully weighed against the prohibitions outlined in Article 2(4). This article strictly prohibits the use of force against the territorial integrity or political independence of any State. This creates a legal dichotomy, especially when considering Israel's military actions in territories like Gaza, which do not constitute an independent State but are nevertheless regarded as distinct territories under international law. The interpretation of Article 2(4) in these circumstances becomes pivotal in assessing the legality and legitimacy of Israel's actions, as it challenges the traditional understanding of State sovereignty and the use of force in international relations.

I:III: State Practice and Legal Principles in Asymmetric Warfare:

This section has delineated the intricate legal parameters that define the right to self-defence under international law, illustrating the multifaceted ways these parameters are interpreted in State responses. An examination of Articles 51 and 2(4) of the UN Charter has been conducted, considering the interpretative guidance of the Vienna Convention on the Law of Treaties, to understand how legal doctrines are applied and adapted in the evolving dynamics of global conflict. The role of non-state actors and the State-centric nature of international law have been underscored, highlighting the evolving interpretations of self-defence in a world where traditional legal paradigms are in constant flux.

This analysis not only contributes to our understanding of the legal standing of States like Israel in their self-defence claims but also sheds light on the broader implications of such actions within the international legal framework. In doing so, it draws parallels with State practice in other conflicts, notably the NATO intervention in Kosovo. In the Kosovo case, NATO's military intervention in 1999, undertaken without United Nations Security Council authorization, was justified by NATO members as a necessary and proportionate response to avert a humanitarian catastrophe due to the actions of the Federal Republic of Yugoslavia against ethnic

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91 United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4)
92 ibid.
93 Mary Ellen O'Connell, Christian J. Tams, and Dire Tiadi (footnote: 10)
94 See Section I: Foundational Principles of Self-Defence under Jus ad bellum: Necessity and Proportionality in International Law
96 Henderson C, 'The Use of Force against non-state actors', The use of force and international law (Cambridge University Press 2018) pp.400-113
Albanians in Kosovo.\textsuperscript{99} This intervention has been widely debated in international law for its reliance on the doctrine of humanitarian intervention, challenging traditional interpretations of necessity and proportionality in self-defence.\textsuperscript{100} Similarly, the U.S. actions in Afghanistan post-9/11, conducted as a response to the immediate threat posed by Al-Qaeda and the Taliban harbouring terrorists, reflect the application of these principles in a different context.\textsuperscript{101} Together, these examples provide valuable insights into how principles of necessity and proportionality are applied and interpreted in various scenarios, demonstrating a trend in international law towards accommodating the realities of asymmetric warfare and complex state–non–state interactions.\textsuperscript{102}

Such comparative analysis reveals the nuanced application of jus ad bellum in varied scenarios, offering a broader perspective on the challenges and considerations that states face in asserting self-defence.\textsuperscript{103} This contextual understanding is vital for comprehending the complexities inherent in modern conflict settings and for shaping the ongoing evolution of legal norms in international relations.\textsuperscript{104}

**SECTION II: SELF–DEFENCE AGAINST A NON–STATE ACTOR**

**II:I: Self–defence Against non–state actors:**
The United Nations Charter largely focuses on conflicts between sovereign nations, as stipulated by traditional international law. The rise of potent non–state actors (NSAs), however, calls for a reassessment of the notion of self–defence within this novel framework. It is necessary to interpret the concept of self–defence, as stated in Article 51 of the UN Charter, in consideration of the difficulties presented by NSAs. This involves establishing the conditions under which a State might legitimately assert self–defence in reaction to activities by a non–state actor, a situation that is essential to the Israel–Hamas conflict.\textsuperscript{105}

**II:II: Non–state actor**
The complicated framework of international law creates a diverse and convoluted environment for the legal standing and concerns regarding non–state players in modern conflicts.\textsuperscript{106} This section embarks on a comprehensive exploration of the complex legal terrain in which non–state actors operate within the framework of

\textsuperscript{99} ibid
\textsuperscript{100} ibid.
\textsuperscript{102} ibid.
\textsuperscript{103} Yoram Dinstein (see footnote 17)
\textsuperscript{104} ibid.
\textsuperscript{105} See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
\textsuperscript{106} Henderson C, ‘The Use of Force against non-state actors’, *The use of force and international law* (Cambridge University Press 2018) pp.400-113
international law.\textsuperscript{107} Central to this examination is the fundamental question of how States, such as Israel, interpret and apply international legal principles when faced with non-state actors, particularly in the context of asserting their right to self-defence\textsuperscript{108}.

The relevance of this inquiry is underscored by the evolving dynamics of modern asymmetric warfare, where non-state actors like Hamas play pivotal roles in armed conflicts.\textsuperscript{109} In the case of the Israeli-Hamas conflict, the legal status of Hamas as a non-state actor is inextricably linked to Israel’s justifications for its military actions. Therefore, this section seeks to unravel the legal intricacies that define the status of non-state actors and the corresponding legal considerations, offering a crucial backdrop for understanding Israel’s claims to self-defence against Hamas, an entity operating from Gaza, beyond Israeli territory.\textsuperscript{110}

II:II:I Understanding non-state actors
An important and critical issue in international law is the difficulty of applying the concept of self-defence when encountering non-state actors, primarily when they are based in a foreign country, frequently referred to as the host State. According to Mary O’Connell, this circumstance requires a careful and detailed analysis of the United Nations Charter’s rules regarding the use of force.\textsuperscript{111}

The crux of the issue lies in the State-centric nature of the UN Charter regime. Traditionally, the principles governing the use of force were designed with inter-State conflicts in mind\textsuperscript{112}. However, the emergence of powerful non-state actors like Hamas operating from territories such as Gaza, which may or may not be recognized as independent States, presents a legal conundrum. In such scenarios, self-defence actions against these non-state actors become complex due to the potential implications on the sovereignty and territorial integrity of the host State\textsuperscript{113}.

According to O’Connell, when a State, like Israel, claims self-defence against a non-state actor, such as Hamas, the problem is not solely the direct engagement with the non-state actor but also the indirect implications for the host State\textsuperscript{114}. In this case, the host State is Gaza, controlled de facto by Hamas. This situation becomes problematic under international law because actions taken in self-defence against non-state actors could be interpreted as violating the prohibition against

\textsuperscript{107} Blair A and Curtis S (see footnote 50)
\textsuperscript{108} ibid.
\textsuperscript{110} ibid.
\textsuperscript{111} ibid.
\textsuperscript{112} ibid.
\textsuperscript{113} ibid.
\textsuperscript{114} ibid.
the use of force as outlined in the UN Charter, particularly in relation to the host State's territorial sovereignty.\textsuperscript{115}

II:II:I:I Legal Status and Considerations for non-state actors

Non-state actors (NSAs) represent a broad and varied spectrum in international relations, comprising groups and entities that operate independently of traditional nation-State frameworks.\textsuperscript{116} This category includes a range of organisations such as guerrilla groups, insurgent factions, terrorist organisations, multinational corporations, and international non-governmental organisations (NGOs).\textsuperscript{117} These entities are distinct from sovereign States, as they do not possess formal State recognition or the privileges that come with Statehood, such as United Nations membership.\textsuperscript{118} As defined by Noam Lubell, NSAs are characterised primarily by their independence from State control and absence from State apparatuses, maintaining their identity and existence separate from State entities.\textsuperscript{119}

Understanding NSAs requires acknowledging their diverse nature and functions, ranging from armed conflict involvement by insurgent groups to humanitarian efforts undertaken by NGOs.\textsuperscript{120} This diversity poses challenges in developing a uniform legal approach to NSAs within the framework of international law. The legal status of NSAs is multifaceted and complex.\textsuperscript{121} While they are not traditional subjects of international law, lacking legal personality and sovereignty, NSAs often play influential roles, especially in conflict and post-conflict situations.\textsuperscript{122}

International law's indirect application to NSAs is evident in the realms of humanitarian law and human rights law.\textsuperscript{123} For instance, the Geneva Conventions and their Additional Protocols, while primarily addressing States, also impose obligations on all parties in a conflict, including non-state armed groups.\textsuperscript{124} This is indicative of the increasing recognition of the significant impact NSAs can have.\textsuperscript{125}

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\textsuperscript{115} Ibid.

\textsuperscript{116} Trapp KN, ‘Can non-state actors Mount an Armed Attack?’ [2016] The Oxford Handbook of the Use of Force in International Law 679-696

\textsuperscript{117} Moir L, ‘Action against Host States of Terrorist Groups’ [2016] The Oxford Handbook of the Use of Force in International Law 720-736

\textsuperscript{118} Henderson C, ‘The Use of Force against non-state actors’, \textit{The use of force and international law} (Cambridge University Press 2018) pp.400-113

\textsuperscript{119} Lubell N (see footnote 47)

\textsuperscript{120} Ibid.

\textsuperscript{121} Ibid.

\textsuperscript{122} Ibid.

\textsuperscript{123} Henderson C, ‘The Use of Force against non-state actors’, \textit{The use of force and international law} (Cambridge University Press 2018) pp.400-113

\textsuperscript{124} Ibid.

\textsuperscript{125} Ibid.
In the intricate legal landscape of international relations, the role and definition of non-state actors (NSAs) are of paramount importance.\textsuperscript{126} This is particularly evident in the context of Israel's engagements with Hamas, where the legalities of self-defence against a non-state actor are central to the discourse.\textsuperscript{127}

The Wall Advisory Opinion, provided by the International Court of Justice (ICJ), addressed the legality of Israel's construction of a barrier within the Occupied Palestinian Territory.\textsuperscript{128} The ICJ ruled that this construction was contrary to international law, and it could not be justified by Israel's right to security or a state of necessity.\textsuperscript{129} This decision is pivotal in understanding how international law assesses State actions affecting NSAs. In the context of Hamas, an NSA with significant control over a territory but lacking State recognition, the Wall opinion provides a critical framework for evaluating the legal consequences of Israel's measures against such entities.\textsuperscript{130} The ICJ's findings underscore the complex balance between a State's right to security and the rights of individuals in territories influenced by NSAs. This balance is crucial in assessing Israel's actions in Gaza, particularly in light of international humanitarian law and human rights law, which, as seen in instruments like the Geneva Conventions, impose obligations not only on States but also on all conflict parties, including NSAs.\textsuperscript{131} The Wall Advisory Opinion, along with other key legal precedents and principles such as the Nicaragua Case and the Caroline Test, offers essential insights into the legalities of self-defence against non-state actors in international relations, particularly in the Israeli-Hamas context.

In a similar vein, the Nicaragua Case, adjudicated by the ICJ, established a foundational precedent regarding 'armed attacks' by non-state actors, pivotal to understanding self-defence claims.\textsuperscript{132} In this landmark ruling, the ICJ determined that the United States' military actions against Nicaragua did not constitute lawful collective self-defence, as the level of force used by the Nicaraguan contras, supported by the U.S., did not meet the threshold of an 'armed attack' justifying such a defence under international law.\textsuperscript{133} This decision is critical in examining Israel's self-defence claims in response to Hamas' actions. The Nicaragua ruling provides a legal framework to evaluate what constitutes an 'armed attack' by a non-state actor and the acceptable scope of a State's response under international

\textsuperscript{126} Robinson K (see footnote 20)
\textsuperscript{127} ibid.
\textsuperscript{129} ibid.
\textsuperscript{130} ibid.
\textsuperscript{131} ibid.
\textsuperscript{132} Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICJG 111 (ICJ 1984), 26th
\textsuperscript{133} Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICJG 111 (ICJ 1984), 26th
law.\textsuperscript{134} It emphasises the necessity of distinguishing between different levels of force employed by non-state actors and the proportionate response required by states. This insight is particularly relevant to the Israel–Hamas conflict, as it sheds light on the legal parameters within which Israel's actions can be assessed as legitimate self-defence.\textsuperscript{135}

Further enhancing this legal exploration is the application of the Caroline Test to Israel's military actions against Hamas. The Caroline Test, originating from the 19th-century diplomatic correspondence following the Caroline incident, establishes the necessity and proportionality criteria in the use of force for self-defence.\textsuperscript{136} This principle remains profoundly relevant in current international law discussions. In applying the Caroline Test to the Israel–Hamas context, a critical examination is required to assess whether Israel's actions satisfy the criteria of necessity, as a response to an imminent threat, and proportionality, ensuring the response is not excessive in relation to the threat posed. This assessment is crucial to determine the legality of Israel's claim of self-defence under international law principles.\textsuperscript{137}

In addressing the extent to which a state can claim self-defence against a non-state actor, the legal analyses from the Wall Advisory Opinion, the Nicaragua Case, and the Caroline Test are highly relevant. The International Court of Justice's Wall Advisory Opinion highlights the legal complexities when a state like Israel takes action against a non-state actor such as Hamas.\textsuperscript{138} This ruling emphasises the balance between a state's right to security and its responsibilities under international humanitarian and human rights law.\textsuperscript{139} The Nicaragua Case, by defining 'armed attacks' by non-state actors, sets a precedent for evaluating state responses, including Israel's actions against Hamas.\textsuperscript{140}

\textsuperscript{134} ibid.
\textsuperscript{135} Erakat N, ‘Chapter 5: FROM OCCUPATION TO WARFARE’, Justice for some: Law and the question of Palestine (1st edn, Stanford University Press 2021) pp. 175-190 [Hereinafter: Erakat N]
\textsuperscript{139} Henderson C,‘The Use of Force against non-state actors’, The use of force and international law (Cambridge University Press 2018) pp.400-113
\textsuperscript{140} Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICGJ 111 (ICJ 1984), 26th November 1984, United Nations [UN]; International Court of Justice [ICJ] [hereinafter: Nicaragua v. United States]
The Caroline Test's focus on necessity and proportionality further elucidates the criteria for legitimate self-defence. The non-state status of Hamas significantly influences the assessment of the legality and legitimacy of Israel's self-defence claims, particularly when considering the intensity and scale of Hamas's activities. These legal principles and cases collectively suggest that while states may have the right to defend themselves, this right is conditional and must align with international law's standards of necessity and proportionality. This nuanced framework is essential for assessing a state's right to self-defence against non-state actors, ensuring a balanced approach that respects both state security and international legal norms.

II:III: Article 51 of The United Nations Charter
II:III:I The Immediate Context of Article 51 and its Implications for non-state actors
While Article 51 of the UN Charter does not explicitly identify the attacker, merely stating that the attack must be against a 'Member of the United Nations,' the interpretation of this provision in the context of non-state actors has evolved significantly.

Historically, before 2001, the prevalent view, as often reflected in United Nations Security Council resolutions, was that self-defence under Article 51 could not be invoked against non-state actors. Israel, for example, frequently faced international condemnation for its actions against non-state entities, illustrating the then-dominant interpretation that self-defence was strictly limited to state actors.

As previously elucidated in Section I:I, concerning Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law; the events of September 11, 2001, marked a turning point in this doctrinal stance. Post-2001, there has been a noticeable shift in international law's approach, gradually accepting the premise that states may invoke the right of self-defence against non-state actors. This doctrinal evolution reflects a response to the changing nature of global security threats, where non-state actors have increasingly played significant roles in armed conflicts.

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142 Lubell N (see footnote 47)
143 United Nation Charter art. 51
144 Mary Ellen O’Connell, Christian J. Tams, and Dire Tladi (footnote: 1)
145 See Section I:I: The Legal Principles for Self-Defence
146 Mary Ellen O’Connell, Christian J. Tams, and Dire Tladi (footnote: 1)
147 ibid.
The ambiguity in Article 51's language has thus been interpreted more broadly in recent years, allowing states to argue for the right to self-defence in response to attacks perpetrated by non-state entities.\footnote{148}

This interpretation has significant implications for how States respond to threats from such actors, potentially expanding the scope of what is considered a legitimate self-defence under international law\footnote{149}.

II:III:II Interplay Between Articles 51 and 2(4) in the Context of Armed Attacks by non-state actors
The relationship between Articles 51 and 2(4) of the United Nations Charter is crucial in understanding the legal scope of self-defence, especially when considering the concept of 'armed attack' by non-state actors.\footnote{150} This interplay raises complex legal questions about the legitimacy of State actions against non-state entities, particularly when these actions occur within the territory of another State.\footnote{151} The interpretation of an 'armed attack' within the Charter's framework can influence whether States can lawfully use force in self-defence against non-state actors without violating the principles of territorial integrity and political independence enshrined in Article 2(4).\footnote{152}

II:III:III Article 51 and the Israel–Hamas Conflict
Interpreting Article 51 in the context of Israel's conflict with Hamas involves navigating a complex legal terrain.\footnote{153} A fundamental question is whether Hamas' actions, marked by rocket fire and incursions, meet the legal threshold of an armed attack, thereby legitimating Israel's responsive measures as self-defence. This analysis becomes even more intricate given Hamas' unique status and the international community's varied recognition of it as a terrorist organisation.\footnote{154}

II:III:IV The State-Centric Approach of the UN Charter and Its Implications
The State-centric nature of the UN Charter regime has significant implications for understanding Israel's claim to self-defence, especially in its conflict with Hamas.\footnote{155} This approach dictates that an analysis of self-defence must consider not only the immediate threat posed by Hamas but also the broader legal implications

\footnote{149} ibid.
\footnote{150} Henderson C, 'Chapter 6; General Aspects of the Right of Self-Defence; 6.2 The Concept of an “Armed Attack”, \emph{The use of force and international law} (2nd edn, Cambridge University Press 2024) 261-271
\footnote{151} Lubell N (see footnote 47)
\footnote{153} United Nations Charter: article 51 (see footnote 58)
\footnote{154} O'Connell, M., Tams, C., & Tladi, D (see footnote 10)
\footnote{155} ibid.
on the territory from which Hamas operates, namely Gaza. Such dual consideration is indispensable for a comprehensive understanding of the legal challenges posed by State responses to non-state actors in modern conflict settings. In this context, the actions of Israel, a member State, are subject to scrutiny under the provisions of the UN Charter, particularly when these actions have repercussions on the sovereignty and territorial integrity of another territory, even if it is not recognized as an independent State.

II:IV: Hamas as a non-state actor

The emergence of Hamas, formally known as Harakat al-Muqawama al-Islamiya (Islamic Resistance Movement), can be traced back to the efforts of Sheikh Ahmed Yassin. Yassin, initially engaged in Islamic scholarship in Cairo, transitioned into activism within the Muslim Brotherhood's local branches. His work gained momentum in the late 1960s, focusing on preaching and charitable activities in the West Bank and Gaza, particularly following Israel's occupation after the 1967 Six-Day War.

This backdrop sets the stage for understanding Hamas's ascension in the Palestinian political landscape, particularly highlighted by their significant victory in the January 2006 parliamentary elections. This electoral win was not merely a political shift but represented a broader sentiment among the Palestinian electorate. Disillusionment with the long-standing rule of Yasser Arafat's Fatah party, criticised for its ageing leadership and allegations of kleptocracy, played a crucial role in this political realignment. The results underscored a readiness among Palestinians to support Hamas, suggesting an openness to embrace alternative leadership under conducive circumstances. This pivotal moment in Palestinian history marked a distinct change in the political preferences of the population, indicating a shift in their support towards new political dynamics.

II:IV:I The Dual Status of Hamas and Gaza’s Implications

The unique legal situation of Hamas, functioning both as a non-state actor and a de facto governing authority in Gaza, introduces significant complexities into the international law analysis. When regarded solely as a non-state actor, Hamas falls within the traditional frameworks of international law, which influences the

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157 Robinson K (see footnote 20)
159 Robinson K (see footnote 20)
160 ibid.
161 ibid.
162 Levitt M:Hamas: Politics, Charity, and terrorism in the service of Jihad pp.1-7
163 Levitt M: Hamas: Politics, Charity, and terrorism in the service of Jihad pp. 8-16
164 Levitt M: Hamas: Politics, Charity, and terrorism in the service of Jihad pp. 10-20
165 Levitt M: Hamas: Politics, Charity, and terrorism in the service of Jihad pp. 12-17
166 Filiu J-P (see footnote 49)
legal interpretation of Israel's actions from a jus ad bellum perspective. However, acknowledging Hamas's governance role in Gaza adds a layer of complexity, affecting the assessment of Israel's self-defence claims under international law. This consideration does not imply a shift into the domain of International Humanitarian Law, but rather underscores the nuanced legal challenges in applying jus ad bellum principles to a scenario involving an entity with a dual character.

Milanovic's analysis provides valuable insights into the complex legal status of Gaza and the application of Article 2(4) of the United Nations Charter in the context of Israel's use of force. He argues that the ambiguous status of Gaza and Hamas role as a non-state armed group raise questions about the direct applicability of Article 2(4)'s prohibition against the use of force. This ambiguity suggests that actions by Hamas or Israel may not fall squarely within the traditional understanding of this article. However, an alternative perspective exists in the academic debate, which posits that the ongoing nature of the Israel–Hamas conflict might render the concept of self-defence under jus ad bellum less relevant. This viewpoint suggests that if Gaza is considered under Israeli belligerent occupation, as per Geneva Convention IV, the situation could be construed as an ongoing armed conflict, thus necessitating the application of jus in bello principles. While acknowledging this perspective, the analysis of this thesis remains focused on exploring the implications of jus ad bellum, specifically the right to self-defence as outlined in Article 51, in the context of the Israeli–Hamas conflict.

SECTION III: TERRITORY

III:1: Exploring a Theoretical Framework: The Territorial Status of Palestine (Gaza and West Bank)

III:1:1: Palestine: A Historical Background

The history of Palestine, a region of profound religious and historical significance, has seen diverse rulers, from ancient Egyptians to Ottomans. Post World War I, under British Mandate, the Balfour Declaration of 1917 supported a Jewish homeland in Palestine, increasing Jewish settlement and heightening Arab tensions. This led to the UN’s 1947 proposal to partition Palestine into Jewish and

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167 Tareq Baconi (footnote: 19)
168 Baker A: The Legal War: Hamas (see footnote 77)
169 ibid.
171 ibid.
172 Milanovic M (see footnote 169)
173 Ginat A, 'British Mandate for Palestine' (2018) 1 The British Mandate for Palestine (1918-1948) was the outcome of several factors: the British occupation of territories previously ruled by the Ottoman Empire, the peace treaties that brought the First World War to an end, and the principle of self-determination that emerged after the war. 1 [Hereinafter: British Mandate for Palestine]
174 Gudrun Krämer (see footnote 18)
Arab states, rejected by Arab leaders.\textsuperscript{175} The subsequent 1948 Arab–Israeli War expanded Israeli territory, causing significant Palestinian displacement.\textsuperscript{176}

Israel's acquisition of the territories known as the Gaza Strip, West Bank, and East Jerusalem during the 1967 Six-Day War intensified the Israeli–Palestinian conflict.\textsuperscript{177} The Palestine Liberation Organization, advocating Palestinian statehood, was established in 1964.\textsuperscript{178} Despite the 1993 Oslo Accords\textsuperscript{179}, which initiated mutual recognition between Israel and the PLO\textsuperscript{180} and aimed for a two–state solution, peace has been elusive.\textsuperscript{181} Political rifts, notably between Fatah and Hamas (which gained control of Gaza in 2007), and ongoing Israeli settlement expansion, have continually disrupted the peace process.\textsuperscript{182}

### III:I:II: Palestine in the Present: Before and After 7th October 2023

Today, Gaza and the West Bank present two distinct political and geographical realities within the Palestinian context.\textsuperscript{183} The Gaza Strip, blockaded and economically isolated, is governed by Hamas and has been the site of several conflicts with Israel.\textsuperscript{184} In contrast, the West Bank features a complex administrative mix of Palestinian Authority governance and Israeli settlements, with East Jerusalem as a particularly contentious point given its significance to both Israelis and Palestinians.\textsuperscript{185} The history of Palestine, thus, is a tapestry of ancient civilizations, religious significance, political upheavals, and modern-day conflicts, reflecting a longstanding struggle over land, identity, and nationhood in one of the world’s most historically rich and contested regions.\textsuperscript{186}

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\textsuperscript{175} Samuel H., “Future of Palestine” Memorandum by British Cabinet Member, Herbert Samuel - Question of Palestine’ (United Nations, January 1915)  
Accessed 11 December 2023


\textsuperscript{177} ‘Mandate for Palestine - League of Nations Official Journal (Excerpts) - Question of Palestine’ (United Nations, 22 June 1922) [Hereinafter: Quigley JB]


\textsuperscript{182} ‘West Bank’ (Encyclopædia Britannica, 9 December 2023)  
Accessed 11 December 2023

\textsuperscript{183} ‘Human Rights in Israel and Occupied Palestinian Territories’ (Amnesty International)  
Accessed 11 December 2023 [Hereinafter: Amnesty International: Occupied Palestinian Territories]

\textsuperscript{184} Erakat N (see footnote 134)

\textsuperscript{185} Gudrun Krämer (see footnote 18)
The Palestinian territories have endured a complex and challenging situation, marked by political division and recurring hostilities.\(^{187}\) The Gaza Strip, under Hamas control since 2007 and facing an Israeli blockade, has experienced significant humanitarian crises, with economic struggles and limited access to basic services being persistent issues.\(^{188}\) This period has seen three major escalations of conflict between Israel and armed Palestinian groups in Gaza - in December 2008 to January 2009, November 2012, and July to August 2014 – each resulting in significant civilian casualties and infrastructure damage, exacerbating the already dire humanitarian situation.\(^{189}\) In the West Bank, including East Jerusalem, Israeli settlement expansion, home demolitions, and restrictions on Palestinian movement continue to fuel tensions, with the Israeli military presence being a significant aspect of life.\(^{190}\)

The peace process remains largely stagnant, with no substantial progress made due to deep-seated disagreements and a lack of sustained negotiations, while internal Palestinian political rifts impede unified representation.\(^{191}\) These factors, combined with the economic hardships marked by high unemployment and poverty, especially in Gaza, highlight the urgent need for humanitarian aid and developmental support.\(^{192}\) The past decade and a half have thus encapsulated the volatility and ongoing struggles faced by the Palestinian territories, reflecting a landscape where political solutions remain elusive, and civilian populations bear the brunt of the protracted conflict.\(^{193}\)

III.II: Theoretical Analysis: Hypothetical Israeli Occupation of Palestine

Under the theoretical assumption that Palestine is an occupied State rather than a participant in a two-State solution, the legal and diplomatic implications for Israel’s self-defence claims under international law would shift significantly. This hypothetical scenario posits that if Palestine were to be recognized as an occupied State, it would necessitate reevaluating Israel’s actions under the framework of occupation law and the broader principles of international law.

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191 Quigley JB (see footnote 157, 178, 179 & 180)
192 ibid.
193 Amnesty International: Occupied Palestinian Territories. (See footnote 183)
In such a context, the criteria for Statehood as outlined in the Montevideo Convention of 1933\(^{194}\) – including a permanent population, a defined territory, a government, and the capacity to engage in diplomatic relations – become central to understanding the nature of the Israeli–Palestinian conflict.\(^{195}\) This perspective transforms the conflict from one involving a State and a non-state entity to a situation of military occupation, where Israel is the occupying power.\(^{196}\)

The application of Article 51 of the UN Charter, which permits self-defence against armed attacks, would be profoundly affected.\(^{197}\) The recognition of Palestine as an occupied State would place Israel's military actions and policies under scrutiny to determine whether they comply with the obligations of an occupying power under international humanitarian law, particularly the Fourth Geneva Convention.\(^{198}\) In this framework, the principles of necessity and proportionality take on a different dimension, focusing on whether Israel's actions are justified as legitimate security measures of an occupying power and whether they are proportional to the threat posed, according to jus in bello framework.\(^{199}\)

This reclassification would likely draw significant international attention, potentially leading to a shift in the response of international entities, including the United Nations.\(^{200}\) It would compel a more traditional approach to conflict resolution, emphasising diplomatic negotiations and international legal frameworks.\(^{201}\) Ultimately, this scenario underscores the complexities and nuances in evaluating Israel's self-defence claims in the context of an occupation, significantly impacting the discourse on the legitimacy and legality of its actions in the Palestinian territories.\(^{202}\)

III:II:1: Assessing Statehood in Palestine: The Montevideo Convention Perspective
Exploring Palestinian Statehood through the Montevideo Convention of 1933’s lens presents a complex scenario.\(^{203}\) The Convention outlines four criteria for Statehood:

\(^{194}\) Montevideo Convention on Rights and Duties of States’ International Law Documents, LEAGUE OF NATIONS Treaty Series Treaties and international Engagements registered with the Secretariat of the League of Nations VOLUME CLXV 1936 Nos. 3801-3824

\(^{195}\) The Montevideo Convention (1933) established the recognized requirements for Statehood, including the need for a State to have a government, a defined territory, a permanent population, and the ability to engage in international affairs. In Shaw M, ‘States in International Law’ (Encyclopædia Britannica) <https://www.britannica.com/topic/international-law/States-in-international-law> accessed 6 December 2023

\(^{196}\) Quigley JB (see footnote 157, 178, 179 & 180)

\(^{197}\) United Nation Charter art.51


\(^{199}\) Gardam J, Necessity, Proportionality and the Use of Force by States (see footnote 18)


\(^{201}\) ibid.

\(^{202}\) Milanovic M (footnote: 169)

\(^{203}\) Montevideo Convention on Rights and Duties of States’ International Law Documents, LEAGUE OF NATIONS Treaty Series Treaties and international Engagements registered with the Secretariat of the League of Nations VOLUME CLXV 1936 Nos. 3801-3824
a permanent population, a defined territory, a government, and the capacity to enter into diplomatic relations.\footnote{ibid.} Palestine’s case meets the first criterion with a permanent population.\footnote{ibid.} However, the defined territory criterion is contentious due to border disputes in the West Bank and Gaza Strip and the presence of Israeli settlements, especially in the context of Jerusalem’s status.\footnote{ibid.} The governance criterion is complicated by the Palestinian Authority’s limited control in the West Bank and Hamas’s governance in Gaza, highlighting the challenge of a unified government.\footnote{ibid.} Palestine's international engagement is evident through its United Nations observer status and recognition by several States, yet full Statehood recognition remains elusive.\footnote{ibid.}

Recognizing Palestine as a State today would necessitate a reevaluation of these criteria, considering the Israeli–Palestinian conflict’s geo-political complexities.\footnote{ibid.} Such recognition would significantly alter Palestine’s international status and its legal rights and obligations, impacting self-defence rights, territorial integrity, and international negotiations.\footnote{ibid.} This shift could potentially open new paths for peace negotiations and conflict resolution under international law. In 1988, the (PLO) unilaterally declared Palestinian Statehood, which was recognized by over 100 nations, though borders remained unspecified.\footnote{ibid.} The Palestinian Authority (PA) has since pursued further international recognition and legal status, including attempts to gain full United Nations membership as a State along pre-1967 lines with Jerusalem as its capital.\footnote{ibid.}

However, this process requires overcoming potential vetoes from permanent members of the UN Security Council, such as the United States.\footnote{ibid.} Alternatively, the


\footnote{ibid.} Montevideo Convention on Rights and Duties of States’ International Law Documents, LEAGUE OF NATIONS Treaty Series Treaties and international Engagements registered with the Secretariat of the League of Nations VOLUME CLXV 1936 Nos. 3801-3824

\footnote{ibid.} Holm J, ‘The Legal Ramifications of Palestinian Statehood - Occupied Palestinian Territory’ (ReliefWeb, 17 November 2011) \url{https://reliefweb.int/report/occupied-palestinian-territory/legal-ramifications-palestinian-Statehood} accessed 19 December 2023


\footnote{ibid.} United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 27
PA could seek a UN General Assembly resolution to be recognized as a "non-member" State based on pre-1967 borders, enhancing the legitimacy of Palestinian territorial claims and participation in various UN forums.\(^{214}\)

Additionally, seeking an advisory opinion from the International Court of Justice on Palestinian Statehood rights and the legality of Israeli settlements could further legitimise Palestinian claims, despite such opinions being advisory.\(^{215}\) Israeli officials argue that these unilateral Palestinian actions would contravene existing agreements, including UN Security Council Resolutions 242 (1967)\(^{216}\) and 338 (1973)\(^{217}\), and the 1995 interim agreement on the West Bank and Gaza Strip\(^{218}\), emphasising the need for direct negotiations to achieve recognized boundaries and arguing against unilateral changes to territory status or borders.\(^{219}\)

III:II:II: Legal Dynamics of Self-defence Under Occupation:

In the realm of international law, the legal dynamics of self-defence under occupation present a uniquely complex scenario.\(^{220}\) When a territory is under occupation, as is the case in certain areas of Palestine, the traditional understanding of self-defence, typically framed within the context of sovereign States, undergoes a significant shift.\(^{221}\)

In the context of occupation, the legal discourse evolves from the principles of Jus ad Bellum to the realm of Jus in Bello, marking a significant shift in the legal perspective.\(^{222}\) This transition fundamentally alters the applicability and relevance of self-defence as traditionally understood. Under Jus ad Bellum, the focus is primarily on the legality of the use of force and the right to self-defence in initiating a conflict.\(^{223}\)


\(^{215}\) International Criminal Court, ‘Situation in the State of Palestine’ (16 March 2020 ) No. ICC-01/18


\(^{221}\) Ibid.

\(^{222}\) See Section I:II The Legal principles of Self-Defence

\(^{223}\) Ibid.
However, once an armed conflict is underway and an occupation is established, the legal framework transitions to Jus in Bello, which governs the conduct of parties during the conflict. In this phase, the emphasis is no longer on the right to engage in conflict (as in self-defence) but rather on the manner in which the conflict is conducted, emphasising adherence to humanitarian principles and the protection of civilians.

As such, the ongoing nature of an armed conflict under occupation renders the initial justifications of self-defence less pertinent, shifting the focus to compliance with the laws of war and the responsibilities of occupying powers. While this is an important aspect, it extends beyond the delimited scope of this thesis. This dynamic is particularly evident in the Israeli–Palestinian conflict, where the legalities of actions taken by Israel and the responses from Palestinian territories under occupation continue to be a focal point of international legal scrutiny and debate.

III:II:III: Self-defence in the Context of Occupied Palestinian Territories

The International Court of Justice’s ruling in the "Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)" case provides key insights into the complexities of occupation, offering parallels to the Israeli–Palestinian conflict. This ruling emphasised the importance of actual control over territory for defining an occupation, an aspect that has relevance to Israel’s control over Palestinian territories.

The case also opens up discussions on how modern conflicts may redefine occupation. For instance, effective control might not always necessitate continuous physical presence, as seen in Israel's influence over Gaza post-disengagement through its control of airspace, maritime zones, and border entry points. This challenges traditional notions of occupation and suggests a form of ongoing Israeli influence in Gaza.

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225 ibid.
227 Amnesty International: Occupied Palestinian Territories (see footnote 183)
229 Tareq Baconi (footnote: 19)
231 ibid.
Additionally, the legal intricacies stemming from agreements like the Oslo Accords, which outline the relationship between Israel and the Palestinian territories, reflect the complexities in determining the status of occupation. This is in line with the ICJ’s stance on effective authority being a key factor in classifying an area as occupied.\textsuperscript{232}

Incorporating these legal interpretations helps to contextualise the nature of Israel’s involvement in the Palestinian territories.\textsuperscript{233} It highlights the evolving nature of international law in recognizing forms of control and influence that extend beyond traditional occupation.\textsuperscript{234} This comprehensive understanding is crucial for assessing the responsibilities and legal status of Israel in relation to the Palestinian territories,\textsuperscript{235} emphasising the need for context-specific applications of international law in complex and evolving conflict scenarios\textsuperscript{236}

Incorporating these insights into the theoretical analysis of a hypothetical Israeli occupation of Palestine under international law provides a richer and more comprehensive understanding of the conflict. It accentuates the multifaceted nature of occupation, highlighting the varied legal, diplomatic, and ethical considerations that come into play.\textsuperscript{237} This comparative approach not only contextualises Israel’s self-defence claims within the broader spectrum of international legal standards but also underscores the importance of a nuanced and context-sensitive application of these principles in addressing the unique dynamics of the Israeli-Palestinian conflict.\textsuperscript{238}

In the complex arena of international law, particularly under the principles of jus ad bellum, the issue of self-defence against non-state actors such as Hamas operating in occupied Palestinian territories poses intricate legal challenges.\textsuperscript{239} Article 51 of the United Nations Charter explicitly recognizes the right of States to individual or collective self-defence in response to an armed attack.\textsuperscript{240}

However, the application of this principle to situations involving non-state actors like Hamas is subject to considerable legal debate.\textsuperscript{241} This is especially pertinent in

\begin{footnotesize}
\begin{enumerate}
\item[234] Filiu J-P (see footnote 49)
\item[236] ibid.
\item[237] Erakat N (see footnote 134)
\item[238] Erakat N (see footnote 134)
\item[239] Lubell N (see footnote 47)
\item[240] United Nation Charter art. 51
\item[241] Levitt M: Hamas: Politics, Charity, and terrorism in the service of Jihad (see footnote 136)
\end{enumerate}
\end{footnotesize}
assessing whether the actions of Hamas constitute an 'armed attack' that justifies self-defence measures by Israel.\textsuperscript{242}

The determination of what qualifies as an armed attack by a non-state actor, and whether such attacks provide legal grounds for a State's use of force in self-defence, requires a careful analysis of the intensity and scale of the non-state actor's actions, as well as the immediacy of the threat they pose.\textsuperscript{243}

Further complicating this analysis is the context of these interactions occurring in occupied territories. The occupation adds a layer of complexity to the legal status of the parties involved and the applicability of jus ad bellum.\textsuperscript{244} It raises questions about the extent to which State actions in self-defence align with the principle of proportionality, a key tenet in the assessment of lawful self-defence.\textsuperscript{245} This principle necessitates that any military response be proportional to the threat posed, avoiding excessive or indiscriminate use of force.\textsuperscript{246}

Additionally, the legal interpretations of self-defence in the context of occupation must consider the historical and political dimensions of the Israeli-Palestinian conflict.\textsuperscript{247} The longstanding nature of the conflict and the evolving dynamics of the parties' engagements contribute to diverse interpretations of legal principles under jus ad bellum.\textsuperscript{248} Legal scholars and international jurists often debate the application of these principles to the unique circumstances of the conflict, with some arguing for more restrictive criteria in the use of force against non-state actors in occupied territories.\textsuperscript{249}

In analysing Israel's engagements with Hamas, the core question emerges: how far can Israel legitimately claim self-defence against a non-state actor like Hamas under international law?\textsuperscript{250} The principles of necessity and proportionality are central in this debate. Israel's response to Hamas, marked by its intensity and civilian impact, must be carefully evaluated against these principles, especially considering the occupied context.\textsuperscript{251} Thus, while Israel's self-defence claims are acknowledged, they are bounded by the nuanced demands of international law, emphasising the complex interplay of state rights and responsibilities in occupied territories\textsuperscript{252}

\begin{thebibliography}{99}
\bibitem{242} Yoram Dinstein (see footnote 17)
\bibitem{243} ibid.
\bibitem{244} Amnesty International: Occupied Palestinian Territories. (See footnote 183)
\bibitem{245} See Section I:II:II Proportionality under \textit{Jus ad bellum}
\bibitem{246} See Section I:II:II Proportionality under \textit{Jus ad bellum}
\bibitem{247} See Section I:VII Article 31-33 Vienna Convention on the Law of Treaties
\bibitem{248} ibid.
\bibitem{249} Lubell N (see footnote 47)
\bibitem{250} See Section II:I Self-defence Against non-state actors
\bibitem{251} ibid.
\bibitem{252} ibid.
\end{thebibliography}
DISCUSSION
In examining the Israeli–Palestinian conflict within the scope of international law, this thesis adopts a theoretical assumption that Israel is occupying Palestinian territories. This hypothetical framework is essential for a focused analysis of Israel’s claims to self-defence, particularly in relation to jus ad bellum as outlined in Article 51 of the United Nations Charter.

Under this theoretical lens, the scrutiny of Israel’s military actions in the Palestinian territories necessitates a nuanced examination of the principles of jus ad bellum. The central question is whether, within this assumed context of occupation, Israel’s actions can be justified as necessary and proportionate responses under international law. This approach involves critically assessing the legitimacy of self-defence claims by a State within an occupied territory, a scenario that presents unique legal and ethical challenges.

The interplay of these legal doctrines forms a complex terrain where the principles of necessity and proportionality, essential to the lawful exercise of self-defence, are meticulously balanced against the responsibilities of an occupying State. The principle of necessity in international law, particularly within the context of self-defence, requires that any use of force must be a direct response to an immediate and substantial threat.

This analysis of necessity and proportionality directly addresses the core of the thesis question, illustrating the nuanced considerations a state must navigate when claiming self-defence against a non-state actor within its territory. This criterion is particularly contentious when assessing the nature and extent of threats posed by Palestinian armed groups like Hamas. Hamas’s dual character as both a non-state militant group and a de facto governing body in Gaza complicates the traditional legal paradigms of State versus non-state engagement in armed conflict. Israel's interpretation and application of the necessity principle in asserting its right to self-defence have been subjects of significant international debate, often critiqued for potentially overstretching the bounds of what constitutes an immediate and ongoing threat.

253 Amnesty International: Occupied Palestinian Territories. (See footnote 183)
254 See Section II:III: Article 51 and the Israel-Hamas Conflict
255 See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
256 ibid.
257 See Section III:II:III: Self-defence in the Context of Occupied Palestinian Territories
258 See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
259 ibid.
260 See Section II:I Self-Defence Against Non-State-Actors
261 See Section II:III: Hamas as a non-state actor
262 ibid.
263 See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
Concurrently, the principle of proportionality, a fundamental aspect of the doctrine of self-defence, mandates that any military response be proportionate to the level of threat faced.\textsuperscript{264} In the scenario of Israeli operations within Palestinian territories, this principle gains additional layers of complexity.\textsuperscript{265} Israel's military strategies, characterised by aerial bombardments and ground incursions, especially in response to aggression from Gaza, have drawn international attention and concern regarding their proportionality.\textsuperscript{266} These critiques often focus on the high civilian casualties and widespread destruction of civilian infrastructure, questioning the proportionality of such responses to the threats posed by rocket fire or other forms of aggression from Palestinian factions.\textsuperscript{267}

Moreover, the legal interpretations and applications of these principles in the unique context of the Israeli–Palestinian conflict must be contextualised within the broader historical and geopolitical dynamics that have shaped the region.\textsuperscript{268} The enduring nature of the conflict in Israeli–Palestinian, punctuated by recurrent violence and entrenched political and territorial disputes, adds a significant layer of complexity to the legal discourse surrounding self-defence and occupation.\textsuperscript{269} The actions of Israel, as an occupying power, in response to Palestinian groups, demand analysis not only through the lens of international humanitarian law but also in light of the historical grievances and aspirations of both parties.\textsuperscript{270}

Ultimately, the legitimacy of Israel's self-defence claims in the occupied Palestinian territories, under the purview of international law, necessitates a nuanced and comprehensive analysis.\textsuperscript{271} This analysis must reconcile the principles of necessity and proportionality with the distinct responsibilities and constraints imposed by the laws of occupation.\textsuperscript{272} It underscores the importance of a balanced approach that emphasises the protection of civilian populations while addressing legitimate security concerns.\textsuperscript{273} This balance is critical in determining the legality of self-defence actions in one of the world’s most persistent and intricate conflicts.\textsuperscript{274}

In the detailed legal landscape of international law, the application of the principles of necessity and proportionality to the Israeli–Palestinian conflict, especially

\textsuperscript{264} ibid.
\textsuperscript{265} ibid.
\textsuperscript{266} ibid.
\textsuperscript{267} ibid.
\textsuperscript{268} ibid.
\textsuperscript{269} Lubell N (see footnote 47)
\textsuperscript{271} Amnesty International: Occupied Palestinian Territories (see footnote 183)
\textsuperscript{272} See Section I.I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
\textsuperscript{273} ibid.
\textsuperscript{274} ibid.
regarding Israel's self-defence claims in occupied territories, presents a complex and layered legal challenge. The necessity principle, grounded in the notion that force must only be used as a last resort against an imminent threat, requires careful interpretation in the context of asymmetric warfare. Meanwhile, the principle of proportionality, which demands a response commensurate with the threat level, is critically relevant in examining Israel's military operations in Gaza. These operations, marked by extensive aerial bombardments and ground incursions, have faced international scrutiny for their alleged disproportionality, evidenced by high civilian casualties and extensive infrastructure damage.

Hamas's dual role as an insurgent group and a governing entity in Gaza blurs conventional distinctions in State and non-state actor engagement, posing unique challenges in evaluating the immediacy and severity of threats. Meanwhile, the principle of proportionality, which demands a response commensurate with the threat level, is critically relevant in examining Israel's military operations in Gaza. These operations, marked by extensive aerial bombardments and ground incursions, have faced international scrutiny for their alleged disproportionality, evidenced by high civilian casualties and extensive infrastructure damage.

This scrutiny is intensified given the conflict's asymmetric nature, where the disparity in military capabilities between Israel and Palestinian groups, along with the dense urban settings of hostilities, necessitates strict adherence to proportionality to minimise civilian harm and uphold international humanitarian law.

This thorough legal analysis of Israel's self-defence claims, framed within the ongoing occupation and the unique dynamics of asymmetric warfare, demands a sensitive and discerning interpretation of international law. While Israel interprets these threats as necessitating immediate action, some international law experts argue that this interpretation may be overly broad, not aligning with the traditional understanding of an 'immediate and substantial threat'. This counter-perspective invites a broader consideration of the legal thresholds for self-defence in asymmetric conflicts.

Striking a delicate balance between Israel's legitimate security needs and the Palestinian civilian population's protection and rights is imperative. The

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275 ibid.
276 ibid.
277 Levi M: Hamas: Politics, Charity, and terrorism in the service of Jihad (see footnote 136)
278 ibid.
279 ibid.
280 See Section Introduction
281 See Section Introduction
282 Baker A: The Legal War: Hamas (see footnote 77)
283 See Section I: I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
intricate interaction between occupation legalities, asymmetric conflict nature, and necessity and proportionality requirements underscores the profound legal and ethical challenges in the Israeli–Palestinian conflict. This highlights the need for a judicious and principled application of international law principles.

In contemporary international law, the complex role of non-state actors, as exemplified in the Israeli–Palestinian conflict through Hamas's actions, calls for a detailed and thorough legal analysis, particularly in assessing Israel's self-defence claims. Hamas, represents a unique instance, transcending typical non-state actor categorizations by operating as both an insurgent group and a quasi-governmental entity in Gaza. This dual role significantly complicates the traditional State-centric paradigms of international law, posing intricate challenges in applying established norms and principles, particularly regarding the use of force and self-defence.

The complexity emerges from the need to critically assess Hamas's actions against the legal benchmark of an armed attack by a non-state actor, a concept that is not uniformly defined and remains a topic of extensive debate in international legal circles. This ambiguity is further pronounced when considering Israel's responses, a state actor bound by necessity and proportionality under international law.

The necessity principle requires a rigorous evaluation of whether force use is a response to an immediate and substantial threat, a criterion that becomes particularly challenging against the backdrop of the sporadic and unconventional nature of threats posed by groups like Hamas.

Additionally, the principle of proportionality, central to the self-defence doctrine, dictates that any aggression response must align with the threat’s scale and nature. In the context of Israeli military responses to perceived threats from the Palestinian territories, especially Gaza, this principle necessitates a comprehensive examination of the extent and impact of military actions. Israel’s military

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285 See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
286 ibid.
288 See Section II:IV: Hamas as a non-state actor
289 Tareq Baconi (footnote: 19)
290 Robinson K (see footnote 20)
291 Lubell N (see footnote 47)
292 See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
293 ibid.
strategies, often involving significant use of force, are subject to critical scrutiny, with the international community frequently raising concerns about these actions' proportionality, considering the reported high civilian casualties and extensive destruction of civilian infrastructure.295

The conflict's asymmetric nature, defined not only by the disparity in military capabilities but also by the conflicting parties' legal status and operational methods, profoundly influences the application and interpretation of international legal standards.296 Israel, as a recognized state actor, faces explicit international legal obligations that differ from those applicable to a non-state actor like Hamas. This disparity significantly impacts the evaluation of Israel's military responses' proportionality and necessity.297

The rise of non-state actors like Hamas in global conflicts has led to calls for evolving international legal frameworks.298 The Israeli-Palestinian conflict exemplifies the urgent need for a dynamic and contextually sensitive application of international law, carefully balancing States' rights to defend themselves with the overarching principles of international humanitarian law.299

The analysis of Israel's self-defence claims in its conflict with Hamas, a non-state actor, underscores the crucial balance a state must maintain between its security needs and adherence to international law. This directly relates to the core question of our thesis, emphasising the complexities encountered by a state when justifying self-defence actions in situations that go beyond traditional state-to-state conflict dynamics.300 This balancing act is crucial in navigating the complex legal landscape shaped by non-state actors' actions and the responses they provoke, emphasising the need for a judicious application of international law principles in conflicts involving asymmetric warfare.301 Within the intricate framework of international law, especially as it applies to the context of the Israeli-Palestinian conflict, the concept of occupation emerges as a pivotal and intricate legal construct, significantly influencing the legitimacy and scope of Israel's self-defence claims.302

295 See Section I: Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
296 ibid.
297 See Section II: Self-Defence Against non-state actors
299 See Section III: Palestine in the Present: Contemporary Dynamics Before and After 7th October 2023
300 See Section II:IV Hamas as a Non-State Actor
301 Blair A and Curtis S (see footnote 50)
302 Holm J, 'The Legal Ramifications of Palestinian Statehood - Occupied Palestinian Territory' (ReliefWeb, 17 November 2011)
This perception of occupation, widely recognized within the international legal community, brings Israel’s military operations and its self-defence assertions under acute scrutiny, particularly in light of the Fourth Geneva Convention’s explicit prohibitions against collective punishment and its mandate to safeguard civilian populations within occupied territories. This legal background presents formidable challenges to the validation of Israel’s military responses in these territories, often subjected to criticisms for their repercussions on Palestinian civilians and necessitating an assessment through the lenses of proportionality and necessity – principles central to the doctrine of international humanitarian law.

The principle of necessity in this context demands a critical evaluation of whether Israel’s use of force constitutes a response to an immediate and substantial threat, a criterion often blurred by the unconventional and sporadic nature of threats posed by Palestinian armed groups.

The principle of proportionality, equally crucial, requires that any military response be commensurate with the level of threat, a stipulation that becomes exceedingly complex given the dense civilian populations in areas like Gaza. The asymmetric nature of the conflict, marked by the disparity in military capabilities and the contrasting operational methodologies between Israel and Palestinian factions, further complicates the application of these principles, necessitating a nuanced interpretation that is sensitive to the realities of asymmetric warfare.

Moreover, the perspectives and jurisprudence of key international legal entities, including the International Court of Justice and the United Nations, have significantly contributed to shaping the discourse on occupation and self-defence. Advisory opinions, resolutions, and declarations from these bodies have underscored the complexities of applying the right to self-defence in occupied territories, highlighting the need for an approach that meticulously balances the security imperatives of the occupying power with the fundamental rights and protections of the occupied populace.

This complex interplay between the legalities of occupation, the principles of international humanitarian law, and the right to self-defence underscores a

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304 See Section I:II: Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
305 ibid.
306 ibid.
307 ibid.
308 See Section I:II: Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
309 See Section II:II:I: Legal Status and Considerations for non-state actors
broader challenge within international law – the need for adaptable and context-specific applications that can address the unique dynamics of modern conflicts, particularly those involving prolonged occupations and asymmetric warfare.\textsuperscript{310} In this regard, the Israeli–Palestinian conflict serves as a quintessential example, demonstrating the intricacies and the imperative for a judicious application of international law that aligns the legitimate self-defence concerns of a State with its overarching obligations towards civilian protection and the sustenance of international peace and stability.\textsuperscript{311}

CONCLUSION
In conclusion, the legitimacy of Israel's self-defence claims in the occupied Palestinian territories, under the scrutiny of international law, is far from straightforward. It demands a multifaceted analysis that reconciles the principles of necessity and proportionality with the unique responsibilities and constraints imposed by the laws of occupation. This thesis asserts that while Israel may have legitimate security concerns that warrant defensive actions, these must be balanced against its obligations as an occupying power, ensuring the protection of civilian populations and adherence to international legal standards. The complexities and challenges inherent in applying international law to modern conflicts, particularly those involving prolonged occupations and asymmetric warfare, are clearly demonstrated in the Israeli–Palestinian conflict. This conflict serves as a critical case study, highlighting the intricacies and the imperative for a judicious application of international law that aligns the legitimate self-defence concerns of a State with its overarching obligations towards civilian protection and international peace and stability.

\textsuperscript{311} See Section I:I Foundational Principles of Self-Defence under Jus Ad Bellum: Necessity and Proportionality in International Law
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