Interdependency between 'Primitiveness' and 'Change' in International Law: International Law of Self-Defence and the Overuse of 'Exception' after September 11

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I. Introduction

The legal principle of self-defence has been developed through customary international law and Article 51 of the UN Charter. Until the early 20th century, the decentralised character of international law has recognised the right of self-defence in international society to be self-evident. It was only after the establishment of international organisations that the right of self-defence has been transformed into the 'subject of the most fundamental disagreement between states and between writers.'(1) The principal question arises upon the relationship between the prohibition of the use of force and the right of self-defence. The first position starts with an assumption that there exists a general agreement among jurists that the UN Charter prohibits self-help and armed reprisals.(2) However, at the same time, they share the same interpretation in common that Article 51 of the Charter legitimises the use of force for 'the necessity of safeguarding the integrity and inviolability of the territory of the state.'(3) This implies that the right of self-defence is 'engendered by, and embedded in, the fundamental right of States to survive.'(4) With regard to this point, common explanations perceive the controversy between the prohibition of the use of force and the exercise of self-defence as a relationship between norms and the 'exception' in international law.(5) They neglect the fact that the essence of self-defence is 'self-help' and even rationalise it in the name of necessity.(6) In contrast, the second position claims that 'no true law exists as long as the principle of self-help prevails.'(7) They insist that the establishment of the United Nations is a process of bringing the

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centralisation to international law where the use of force is restricted except 'the execution of the sanction.'[8] For the latter position, the right of self-defence prescribed by Article 51 evinces the fact that international law is nothing more than 'primitive law.'[9]

Up to the present time, no agreement has been settled over the fundamental character of the right of self-defence under Article 51. However, there exists a 'common perception' of international lawyers' that international law of self-defence has been changed fundamentally after the attacks of September 11.[10] Immediately after the events, two resolutions, 1368 and 1373, condemned the attacks as 'an act of international terrorism' and reaffirmed 'the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations.'[11] The events appeared to be a turning point of international law which 'have changed the context of UN activities.'[12] In short, this arises a fundamental question about whether legal approach is capable of identifying 'change' in international law. Legal debates on the exercise of self-defence against terrorism, however, remain to be the 'never-ending story.'[13] Most international lawyers criticise the legal unclearness of the definition of terrorism only to discuss whether the exceptional character of self-defence under Article 51 authorises the use of force against terrorism. This brought about a further question possible to recognise the 'change' of international law without any consensus of the legal character of self-defence against terrorism.

Sara Davie proposes a typical response to this question. Legalists, she says, are unable to determine whether the continual breach of law manifests the legal change or not, while they seek 'to bring the law back in as a challenge to'[14] the delegation of international law. She concerns the possibility that legalists fail to distinguish the detainment of international law from a legal, non-exceptional, and justified acts.'[15] On one side, she develops her theory to compete with the advocators of 'exception' in international law. On the other side, however, she implied that legalists were unable to evaluate whether self-defence against terrorism was the breach of law or the creation of new phenomena.

The purpose of this paper is to demonstrate the legal possibility of identifying

'change' in international law. This paper insists that the disregard of the primitive character of international law results in the contemporary deadlock of legal debates over the exercise of self-defence against terrorism. To this end, this paper first analyses the historical development of the concept of self-defence in international law. This will define the relationship among the primitive character of international law, the right of self-defence, and the prohibition of the use of force. Second, legal debates over the exercise of self-defence against terrorism will be outlined in order to clarify the point of discrepancy among writers after the attacks of September 11. Finally, the recent revival of the 'state of exception' will be examined. The 'state of exception' was first theorised by Carl Schmitt and his theory attracts more attention in the context of post-9/11 World. By re-interpreting the 'state of exception' as a critique against the deception of liberal order, the advocators claim that the use of force against terrorism, namely the War on Terror, represents the delegation of international law in the name of self-defence. In response to these movements, this section purports to elucidate the validity of referring the 'state of exception' as an explanation of the legal character of self-defence after the events of September 11. Overall, this paper argues that the main issue of legalists lies not in their inability but in their easy-going recognition of 'change' in international law without analysing its conceptual and structural framework. It is the arbitrary characterisations of self-defence that would legitimise the derogation from international legal order in the name of 'change.' Rather, accepting the 'primitiveness' of international legal order is the very point of departure that enables international law to identify its 'change.' Hence, the significance of 'change' involves overcoming the 'primitiveness' of international law throughout 'monopolisation' and 'centralisation' of 'legitimate violence.'(16)

II. Prohibition of the Use of Force and the Transformation of Self-Defence

According to Ian Brownlie, the right of self-defence was equivalent to the idea of self-preservation which 'asserted parallel to, or a form of a doctrine of necessity.'(17) The preceding event of self-defence was the *Case of the Caroline*

(1837) with which two basic elements, 'necessity' and 'proportionality,' were 'aptly set out'.[18] At the negotiating table between the United States and Britain in 1842, the US Secretary Daniel Webster demanded evidence from Britain that the attack on the *Caroline* met the criteria of unreasonableness and excessiveness.[19] This formula is now known as the Caroline Test, which stands out the distinction between 'war' and 'self-defence,' and becomes more attractive after the Second World War.[20] Dinstein points out that the three conditions of self-defence proposed by Webster, 'necessity', 'proportionality,' and 'immediacy', remain to be valid as fundamental bases for 'all the categories of self-defence.'[21] On the other hand, Brownlie puts more emphasis upon the different connotation of self-defence at the time of the *Case of the Caroline* where the self-defence was recognised as a form of 'self-preservation' or 'a particular instance of it.'[22] This implies that the 'classical' right of self-defence was analogous to so-called natural right, the right to survive, that have all individuals. Regarding this point, Ryoichi Taoka criticised that few legal scholars have paid attention to the original context of self-defence in international law that appeared first in the *Case of Caroline*. Taoka said, all the legal enquires on self-defence have to start with analysing two arguments proposed by the British government; 1) the *Caroline* was a pirate ship 2) the use of force against the *Caroline* was a form of self-defence in response to insufficient legal enforcements by the United States in that region.[23] This reveals the important fact that the British government had never made an attempt to claim that the attack against the *Caroline* was a legitimate response to the breach of international law by the United States. In fact, as Taoka emphasises, 'the necessity of preserving national interest in the emergency' was the driving force that motivated the British government to attack the *Caroline* in the name of self-defence.[24] It is the preservation of vital interests of each state that underlies all the 'classical' cases of self-defence including the *Case of Amelia Island* (1817), the *Case of Virginius* (1873), and the *Case of Danish Fleet* (1805). Accordingly, Taoka concludes that the 'classical' right of self-defence was akin to *état de nécessité* in municipal law.[25]

A turning point was the criminalisation of war after the First World War.[26] At

the sight of the catastrophic destruction of modern warfare, the League of Nations was established in 1919 ripe for the sake of the general prohibition of use of force. Brownlie claims that the League Covenant 'appeared to provide qualifications' that the right to resort 'war' was 'exceptional.'(27) Article 16 of the League Covenant provides as follows; '[s]hould any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League.' In fact, the main awareness of the League Covenant was headed for the establishment of mechanical procedure for the peaceful settlement of disputes.(28) As Brownlie explains, the League Covenant imposed the prohibition of aggression against member states as a treaty obligation.

In 1928, the Kellogg-Briand Pact progressed in the criminalisation of war with its comprehensive attempt to prohibit the use of force. Dinstein evaluates the Pact as a point of change in international law from '*jus ad bellum*' to '*jus contra bellum*.'(29) Article 1 of the Pact declared 'solemnly' war as a 'solution of international controversies' and renounced it 'as an instrument of national policy in their relations with one another.' In parallel with the general prohibition of the use of force, Article 2 stipulates that 'the settlement or solution of all disputes or conflicts' shall 'never be sought except by pacific means.' Considering these two provisions interdependently, international lawers assume that the normative framework of the Kellogg-Briand Pact can be said as the total abolishment of the use of force in international law.(30) Contrary to its earnest ideal, however, the Pact also had a serious defect. In fact, the Pact ended up with authorising the 'lawful' use of force which took a form of a legitimate response against the breach of international conventions. The major great powers interpreted that Article 1 of the Pact authorised member states to recourse to 'war as an instrument of international policy.' For instance, France and the United States exchanged diplomatic documents confidentially with which they agreed to consider that the Pact legitimised the use of force on the basis of the League Covenant and the Locarno Treaties. In this regards, Carl Schmitt criticised that the Pact was merely an instrument of 'modern imperialism' which engaged only in 'just wars' serving for

international politics.[31] For Schmitt, the 'jurisdification of international relations' was nothing more than the legal justification of an imperialistic principle which concealed particular interests in the language of universality.[32]

Moreover, the Pact was compelled to admit that each party state had a right to recall military force against an act of aggression. This was specified in the Preamble of the Pact which provided as follows; 'any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.' In this context, the right of self-defence had its meaning changed. '[I]n the diplomatic exchanges prior to signature of the treaty,'[33] major states issued their interpretive notes in order to confirm that they reserved their right of self-defence. Indeed, the Pact knew 'neither the nature of the right nor the instances in which it could be invoked.'[34] To make matters worse, the lack of a central organ, which determines if the use of force by a state was qualified as an act of self-defence, let each member state to claim on their right to self-defence.[35] Another consequence of the Pact was a conversion of the legal character of self-defence from *état de nécessité*. Taoka claims that the Kellogg-Briand Pact turned the right of self-defence into a legal justification for member states to exceed the general prohibition of the use of force.[36] Thus, the right of self-defence became 'a right to resort physical power against physical attacks.'[37] In short, it was 'the reservations of signatories, though not the text' that endangered the comprehensive prohibition of the use of force.[38]

In this regard, the establishment of the United Nations performed no definitive role to prohibit the use of force legitimised in the name of self-defence. Rather, Article 51 of the UN Charter prescribes clearly as follows; '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.' In fact, the law of self-defence under the UN Charter remains to be the same form as the one under the Kellogg-Briand Pact. While Article 2(4) declares the general prohibition of the use of force, Article 51 ascertains that each state have an 'inherent' right to use military forces against an act of aggression. Neither the *Declaration on Friendly Relations* (1970) nor the *Definition of Aggression* (1974)

succeeded in defining the right of self-defence in international law. The *Declaration on the Non-Use of Force* (1987) reconfirmed that every member states of the UN Charter have 'the inherent right of individual or collective self-defence if an armed attack occurs.' In short, no international convention has refined the concept of the right of self-defence. Instead, according to Albrecht Randelzhofer, 'an exclusive regulation' of the right of self-defence has been 'confirmed by the ICJ's Nicaragua Judgment.'[39] In the *Nicaragua Case*, the ICJ judged that the right of self-defence under Article 51 'can only be exercised in response to an "armed attack" by referring to 'the criteria of the necessity and the proportionality of the measures taken in self-defence.'[40] Accordingly, Randelzhofer argues that the ICJ succeeds in establishing rigid requirements for the right of self-defence that 'supersedes and replaces' the traditional notion of self-defence.[41]

Nevertheless, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* identified the indispensability of 'the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter.'[42] Marcelo Kohen concerns that the reference to the notion of state survival encourages international law to justify violation of law, when 'supreme' or 'vital' interests are at stake, in the same way as 'the *rasion d'Etat* in municipal law.'[43] He argues that 'the resurgence of the idea of the state of nature in its Hobbesian sense' in 'the Court's approach'; however, this matter is what Hans Kelsen anticipated already in 1950s.[44] Kelsen criticises that the 'fundamental problems' of the UN Charter is its inadequacy of replacing the exercise of self-help by a state with an enforcement of judicial dispute mechanism.[45] He argues that the abolishment and the restriction of 'the principle of self-help' must fulfil 'two requirements'; (1) having all disputes to be settled by International Organisation (2) establishing enforcement action of the Organisation.[46] On one side, he acknowledges that the primacy of law is guided not by 'the science of law' but by 'ethical and political preferences.'[47] On the other side, Kelsen insists that the failure of the UN Charter in satisfying two fundamental requirements subordinates 'a monopoly of force' in 'international

society' with which the state of nature is overcome.[48] For Kelsen, it is indispensable for international law to interpret 'a sanction' in the sense of 'just war.' His concern is the possibility that the deficit of the UN Charter would result in the entire extinguishment of international law in the political context of the cold war. In short, Kelsen criticises against optimistic outlooks for international law which neglect insufficient development of dispute mechanism under the UN Charter. While international law has experienced grave transformation of international political structure for last 50 years, the primitive character of international law, as well as the right of self-defence, remains to be untouched. Therefore, it is argued that the appropriateness of Kelsen's critique lasts out so long as international law lacks a centralised dispute mechanism, which abolishes the principle of self-help.[49]

III. Legal Responses to Self-Defence after 9/11 and the War on Terror

The destructive scale of the attacks of September 11 2001 was beyond the compass of the imagination, and it was more than enough to make that day as 'a day when consciousness changed.'[50] Before examining the legal character of the events, however, international law was urged to condemn the attacks as 'international terrorism.'[51] Immediately after the events, on 12 September, the UN Security Council approved Resolution 1368 which declared that 'any act of international terrorism is a threat to international peace and security.' On the same day, the General Assembly passed Resolution GA Res. 56/1 which called for 'international cooperation to bring justice the perpetrators, organizers, and sponsors of the outrages of September 11 2001' and to 'prevent and eradicate acts of terrorism.'[52] Finally, on 28 September, the Security Council adopted Resolution 1373 unanimously. With this issuance, all the UN member states were authorised to take 'all necessary steps to respond to the terrorist attacks of September 11 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.'[53] From that time, 'War on Terror' became a legal principle that was now 'backed by SC obligations.'[54] On one side, Resolution 1373 does not impose any new legal obligations but reaffirms the

principles 'set out in the 1999 Convention for the Suppression of the Financing of Terrorism.'(55) However, on the other side, Resolution 1368 and 1373 assure that all necessarily responses against 'international terrorism' are comprised of 'the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations.'(56)

The adoption of Resolution 1373, according to Christopher Greenwood, indicates that the United Nations considers 'the terrorist attacks' to be 'armed attacks' which recalls the right of self-defence under Article 51 of the Charter.(57) His enquiry starts with a question whether 'a decision by the council to take non-military action can restrict or prevent the exercise of the right of self-defence.'(58) In response to that point, he makes an assertion that 'terrorist atrocities perpetrated in the United States on that date were plainly illegal.'(59) In spite that the illegality was grounded not on the violation of Article 2(4) but on the breach of 'crimes against humanity,' Greenwood concludes that the act of terrorism constitutes both 'crimes against humanity' and 'armed attacks.'(60) It denotes that crimes against humanity' and 'armed attack' consist with each other, and September 11 was the very that were characterised 'not only as criminal offences but also as a threat to international peace and security and an armed attack.'(61) While his opponents are anxious about the uninterrupted application of the right of self-defence, Greenwood asserts that the preamble of Resolution 1373 admits the counter use of force against terrorism to be taken 'by way of self-defence.'(62)

Dinstein deems the attacks of September 11 to be 'amounted to an armed attack' so that the reference to self-defence pursuant to Article 51 is legitimate.(63) He detects an indication that the traditional meaning of the right to self-defence has been 'dispelled as a result of the response of the international community.'(64) Since he perceives that the 'original outrage of 9/11 could not be imputed to Afghanistan *ex post facto*,' Dinstein focuses on the Government of Afghanistan being accused of complicity in the attacks.(65) Given that, the legality of the use of force against Afghanistan is based not on the terrorist attacks themselves but on the failure of Afghanistan in implementing their legal responsibilities. Sean Murphy notices that the overlap of terrorist attacks of September 11 with 'armed

attacks' animated the principle of Article 51.[66] He focuses on the fact that Article 51 provides no clear condition on 'who or what might commit an armed attack' that can be justified by self-defence.[67] Murphy considers that Resolution 1973 admits a 'right prior to' the UN Charter, because the right of self-defence under Article 51 is an 'inherent right.'[68]

Some writers look upon Article 51 as not sufficient to legalise the use of force against terrorists. Thomas Frank highlights the drafting profess of Article 51 in order to reaffirm that the right of self-defence is distinguished from 'international sanctions.'[69] He stands in a position that the Security Council legitimised the exercise of the right of self-defence against terrorism. Meanwhile, he raises a question about the 'the potential coexistence of collective measures with the continued measures in self-defence', and argues that the relationship between them relies primarily upon 'subsequent practices of states.'[70] Byers expressed a similar opinion that the US attacks against Afghanistan are 'widely accepted as a legal basis for intervention under customary international law.'[71] He infers from 'a two pronged legal strategy' adopted by the United States that the use of force against terrorism fulfils two necessarily legal requirements of the right of self-defence, necessity and proportionality.[72] Considering from international responses after September 11, Byers evaluates that the US strategy is widely supported by the world by which the use of force against terrorism has been elevated to the status of a legal principle.[73] Overall, most international lawyers consent to the point that Resolution 1373 makes a 'pioneering' and 'ambitious' contribution towards a rise in the 'average level of government performing against terrorism across the globe.'[74]

Peter Rowe questions the legal unclearness of the right of self-defence against terrorism. It is the way of its 'classification' that he considers to be problematic.[75] Regardless of his conclusion that the US-led military operation in Afghanistan 'was in conformity with article 51,' he argues that 'the precedential value for the future of such a response should be such as to confine it to its own special facts.'[76] Resolution 1373 authorises the right of self-defence against terrorists group without defining 'war' and 'terrorism. Nevertheless, it neglects to draw 'lines

between an executive (military) and a judicial response.'[77] The unanticipated form and scale of September 11 makes the United Nations take exceptional measurements. Nevertheless, Rowe regards that the event was insufficient to settle the legal compatibility of the 'War on Terror' with international humanitarian law.[78] Carsten Stahn is sceptical to the legality of the 'War on Terror' and criticises that 'the reaction to the September 11 attacks represented a rigorous change in the law.'[79] In contrast to Rowe, he admits that 'the Council's determinations under Article 51 of the Charter read in conjunction with the right to self-defence would set the framework for the permissible scope of self-defence.'[80] Resolution 1373 fails to provide 'permissible scope of self-defence', and Stahn cautions against 'uncertainty and indeterminacy of the limits of self-defence.'[81] For Rowe and Stahn, the fundamental problem of the right of self-defence after September 11 is the possible abuse of international law in the name of self-defence, but not the legal status of the 'War on Terror.'

Some international lawyers find the fundamental difficulty of defining 'terrorism' in the language of law. Even before the attacks of September 11, the United Nations had expressed its condemnations against 'international terrorism.' In 1994, the General Assembly adopted Resolution 49/60 which urged member states to 'take all appropriate measures at the national and international levels to eliminate terrorism.'[82] In 1999, Resolution 1267 was adopted by the Security Council in order to confirm international condemnation of 'all acts of terrorism, irrespective of motive, wherever and by whomever committed.'[83] It reaffirms that all acts of terrorism are 'criminal and unjustifiable', and constitute a 'threat to international peace and security.'[84] Yet, Happold points out that there exists crucial difference between resolutions prior to September 11 and Resolution 1373. He argues that Resolution 1373 is the first resolution that determines the acts of terrorism as a 'threat to peace' in the context of a particular situation.[85] Security Council is 'the initial judge of the legality of its own acts', and its resolutions are treated as 'being legal' as long as they are 'valid.'[86] Referring to that point, Happold claims that the 'real issue' of Resolution 1973 is its influence towards Security Council 'as a precedent' for future legislation, but not the fact

that it acted '*ultra vires*.'[87] His concern is directed to 'general and temporarily undefined obligations on states' that would result in the entire destruction of 'the principle of sovereign equality.'[88] Durfy criticises that 'the political currency of the language of terrorism' naturalises the disregard of international law.[89] He takes issue with the increase of exclusion and marginalisation of 'objective safeguards' through judicial oversight after the events of September 11 'in the name of security'.[90] Antonio Cassese emphasises the necessity of strict interpretation of Resolution 1373 which identifies terrorism not as an 'armed attack' but as a 'threat to the peace.'[91] He deems that Resolution 1373 intends to 'authorise military and other action' with a collective basis.[92] Cassese accepts that 'global terrorism' would recall the use of force based on the right of self-defence. However, it is the role of 'international community' that decides on the legal changes based on the 'generally accepted principles', and he criticised that this is what the 'War on Terror' fails to satisfy.[93] In short, most critiques put in question the lack of UN initiative bypassed by the right of self-defence, but not the legal character of 'War on Terror' itself.

Overall, most international lawyers agree that the events of September 11 evoked the right of self-defence, and it formula was reconfirmed by Resolution 1373. However, international law knows no means to determine whether the use of force against terrorism formulates a new legal principle in place of the law of self-defence. In this context, legal debates after September 11 fall into 'a never-ending story.'[94]

IV. Questions about the Exceptionality of Self-Defence against Terrorism

In contrary to legal struggles, politics is the main driving force behind immediate responses of 'international society' against the attacks of September 11. No sooner had the UN Security Council adopted Resolution 1368, the US Congress passed the Bill entitled 'Authorization of the Use of Force.' When the then US President George W. Bush signed the Bill on 18 September, he declared that it was 'necessarily and appropriate that the United States exercise its rights to

defend itself and protect United States citizens both at home and abroad.'[95] Subsequently to the adoption of Resolution 1373, the United States executed *Operation Enduring Freedom* on 7 October, and this 'widening of the right of self-defence' was widely accepted by 'international society.'[96] The search for political legitimacy puts more emphasis on 'wider international participation' rather than its 'initial basis in self-defence.'[97] However, the longer the operation continues, the more difficult it becomes to explain it in the range of self-defence. Then, some political theorists start expressing their doubts about juristic approaches to the right of self-defence after September 11. Unlike legalists, these political theorists grasp the legal issues of the right of self-defence against terrorism within a broader context of liberalism. They assume that the crisis of contemporary international order is resulted from 'the unexpected links' between international law and liberal cosmopolitanism. This comes down to a question whether the exercise of self-defence after September 11 stands between legal norms and politics in 'international society.' Meanwhile, it leads re-evaluation of Carl Schmitt who developed a theory of legal exception which is based on his critiques against liberalism.[98] Regarding this point, it will then be asked how the principle of self-defence is located in the framework of liberalism. In short, the question is whether the right of self-defence after September 11 is carried out within or outside from international legal order based on liberalism.

As is well known, the core argument of Schmitt is that the ultimate foundation of a legal order is 'sovereign' who 'decides on the state of emergency.'[99] For Schmitt, decision in 'the state of emergency' has a particular importance for jurisprudence because it sheds light on the essential authority of a state derived outside from general norms.[100] 'All law is situational law', Schmitt claimed, and it is 'sovereign' who 'produces and guarantees the situation as one in its totality.'[101] However, liberal rationalism neglects to examine 'the state of emergency' as a matter of jurisprudence, and abandons legal explanation for 'a gap of law' where 'Staatsrecht [public law] ends.'[102] Schmitt criticised the withdrawal of legal positivists from crises of legal order, and empathises the juristic importance of the 'exception' because the existence of a normal condition

relies upon clear recognition of the 'exception.'[103] By facing with legal crises in Weimar republic, Schmitt sought to introduce the concept of 'political' into jurisprudence in order to theorise the suspension of law in a constitutional order.[104] In fact, his approach has two consequences. First, it identifies that the principal role of public legal studies is to reveal entire dependence of all the conceptions and formulas upon 'prior situations', namely, bourgeois ideology over liberalism.[105] Second, it discloses that constitutional legal order is founded upon 'political unity' of a constitution.[106] The concept of the 'political' is presupposition of 'the concept of states', which is based on the distinction between 'enemy and friend.'[107] To this end, Schmitt argued that the 'measures of the state of emergency' serves precisely to preserve the political existence of a constitution whose authority and legitimacy is grounded on the 'political will' of people.[108] Given that, it raised a question about the applicability of 'the state of emergency' in international law. As the foundational principle of international law is the coexistence of different political units, the theory of the 'state of emergency' itself has difficulty in providing an analytical framework for a legal order that does not presuppose single political unity.

Nevertheless, the actuality of international order in crisis turns 'supporters of Schmitt's work' to focus on the resemblance between liberal states and totalitarian states, once they are threatened. These writers learn from Schmitt that liberal states would deny liberty and legitimise 'legal black holes' if they face with a threat for their survivals and necessity of constituting 'power beyond the discretionary norm of a liberal society.'[109] For instance, William E. Scheuerman argued that 'Schmitt's study is disturbingly relevant to the political and legal world' after September 11 because it provides a warning to unilateral behaviour of the United States against terrorism.[110] For Scheuerman, the Bush Administration exemplified Schmitt's concern which considerers 'the weaknesses of the existing legal regime for terrorism' not as 'a lamentable reminder of the limits of statutory law' but as 'a fundamentally norm-less realm of decision making.'[111] In spite of his hostility towards the 'surrender the rule of law', Scheuerman insists that learning from Schmitt is important to detect 'a misguided quest' of international

law in search of integrating 'incongruent models of interstate relations.'[112] By referring Schmitt, Scheuerman seeks to figure out the limits of 'state-centered Westphalian system' in face with the rise of non-states actors. He concludes that the re-establishment of 'a legal universe' needs to be the priority of international law in order to 'preserve our basic political and legal ideals' without legal 'black holes.'[113] Following Scheuerman, William Hooker considers that the 'contemporary debate in international relations and public international law' recalled the relevance of 'Schmitt's language.'[114] Based on his comprehensive analyses of the writings of Schmitt in the field of international politics, Hooker argued that Schmitt provides critical insight into 'the challenges of irregular violence' to 'regular politics.'[115] He indicated that irregularity was the very essence of regular politics likewise exception under the legal order. Oren Gross claims that theories of Schmitt have potential for an entire settlement of 'pathological cases of legal and political orders.'[116] While he cautions about a disregard for the existence of normal, Gross notices that Schmitt's critique against liberalism is the very opportunity to examine critically the existing order 'insofar as real world practice is concerned.'[117] Overall, 'legal state of exception' is critical of the paradox of liberalism with which liberal states are unable to cope with their threats without suspending the rule of law.[118] It reveals that liberal states have not succeeded in taming violence with the establishment of modern legal order.

Some writers attempt to elicit immanent criticism of liberalism from Schmitt, and focus on the concept of the political inherent in the 'state of emergency', namely, the 'political state of exception.'[119] Giorgio Agamben argues that the 'state of exception' is 'a space of anomie' where 'law does not apply, because of the existence of derogation.'[120] By giving an example of Guantanamo Bay, he criticised the Bush Administration for claiming "Commander in Chief of the Army" and legitimising 'sovereign powers in emergency situation.[121] In other words, the 'War on Terror' is 'a fiction sustained through military metaphor'.[122] The real harm of the 'state of exception' lies in the banishment of the distinction between 'peace' and 'war', or 'foreign' and 'civil war.'[123] This destruction is a

result of 'a suspension of order' where the law remains in force but without its application.[124] In fact, 'the state of exception' signifies 'the separation of "force of law" from the law', and this is the point that 'the modern theory of the state of exception cannot resolve.'[125] By re-examining the 'state of exception' in the context of a long history of legal tradition in Europe, Agamben warns against the equation of law with primitive type of violence based on the personality of authority. In short, 'War on Terror' appears to be 'pure violence' separated from international law with which the 'state of exception' is transformed into a 'paradigm of government.'[126]

Rob Walker points out the fundamental controversy of modern states that they presuppose a 'trade-off' between liberty and security. Walker penetrates the essence of modern politics as 'a very precise and intricately articulated system of discrimination', which consists the foundation of sovereign power differentiating 'the exception' from the 'general rule.'[127] This line of discrimination distinguishes legal and illegal, and it legitimises constitutional states to put 'freedom' under 'necessity' on the basis of law.[128] Slavoj Žižek regards the events of September 11 as 'direct attacks on the US or other representatives of the new global order.'[129] By quoting the words of John Ashcroft, 'terrorists use America's freedom as a weapon against us,' Žižek seeks to reveal the ironic destruction of the traditional distinction 'between a state of war and a state of peace.'[130] He insists that the world after the attacks of September 11 has entered into 'a time in which a state of peace can at the same time be a state of emergency,' that is to say, states restricted 'our freedom' in the name of the protection of civilians.[131] Louiza Odysseos points out the rhetorical analogy between the 'state of nature' and 'the War on Terror.' She argues that the War on Terror was 'an exceedingly exemplary manifestation of the paradox of liberal modernity and war.'[132] She defects two interconnections between the liberal cosmopolitanism and the War on Terror, and argued that the War on Terror was 'the quintessential liberal cosmopolitan war.'[133] Regarding the War on Terror as in connection with liberal cosmopolitanism identifies the limitation of the modern conception of war that it knows no limitation on the elimination of its enemies. That brings about a single formula;

the War on Terror will continue until terrorism is annihilated. Moreover, Odysseos is also critical against the 'production and spreading of modern liberal subjectivity' by the War on Terror.(134) She criticises that the War on Terror driven by liberal cosmopolitanism removed the difference between 'war practices' and 'peace practices.'(135) In short 'the political state of exception' was critical against the elimination of fundamental distinction between war and politics, which was the ground of modern sovereign states. It shed light on the limitation of liberalism in face with the attacks of September 11.

In face with these critiques, Davies claims that legalists needed to aware the derogation from law and to recognise it not as 'the absence of legal norm' but as 'a political lack of will to enforce the laws as they should be enforced.'(136) Her critique was directed to the confusion between the lack of political will and the defect of international law. For those arguing the 'legal state of exception,' the preservation of international legal order exceeds the legal order based on its necessity. However, legalists assume that international law lacks any central authority authorised to exceed the legal framework no matter how it is necessarily. The problem of legalists, however, is that they lack capacities to determine whether the abuse of legal norm by states signifies 'a shift of legal precedent' or not.(137) Davies considers that legalists were unable to answer whether the right of self-defence was transformed to legitimise the War on Terror. In this regard, her answer was that legalists were doomed to regard law as politics.(138) This implies that legalists are unable to distinguish legal and political changes in international law because they lack immanent legal insights for its judgement.

Since the scale of the events were unprecedented, many international lawyers regard September 11 as 'a watershed in terms of international law.'(139) From legal perspectives, the impact of the attack did not accelerate the centralisation of the legal authority in international law; rather, it legitimised states to use force against terrorism on the basis of the right of self-defence. Davies considered that legalists failed to offer counterarguments against the advocators of 'exception' arguing for legal changes in international law. However, the War on Terror has not transformed any legal structure in international law on the basis of either the necessity or the

limitation of liberalism. Davies tries to pose a question the resignation of international lawyers that they fail to offer 'a sufficient change' against the derogation of law.(140) Nevertheless, it is the question international lawyers are to execute policy debates when they face with derogation of legal principles. Contrary to Davies, Taoka considers that the role of international legal studies is to indicate the scope of legal principles such as the right of self-defence. Regarding this point, this paper emphasises that the legal structure has not been changed by the attacks of September 11. Since the right of self-defence remains to be the legal principle under international law on the basis of its decentralised character, the role of international lawyers is to examine whether the War on Terror overcomes the primitive character of international law. In this regard, this paper argues that international law has not been changed by the War on Terror because it brought about no legal structural change. Davies points out correctly that legalists are not capable to provide policy changes related to international law. However, she fails to notice that legalists are able to identify change in international law in reference to its legal structure, namely the primitive character of international legal order. This paper claims that the War on Terror changes no international legal principle in the name of politics because it does not transform the primitive character of international law. It remains to be important for international law to distinguish what it is from what it ought to be even though, as Davies says, this does not provide any effective policy outcomes.

V. Conclusion

This paper argues that the War on Terror after the attacks of September 11 does not bring about structural changes in international law. Since the principle of self-defence is grounded on the primitive character of international law, it is the primary step for legalists to enquire whether the War on Terror has resulted in transforming the structure of international legal order. Without these analyses, international legal studies are unable to distinguish legal changes from the derogation of law, and they even legitimise the derogation in the name of politics. While this paper considers that 'change' in international law means no more than

the structural departure from the primitiveness of international law, it is possible for legalists to examine the possible alternatives to the centralisation of legal authority. Yasuaki Onuma poses a question whether the way of thinking international law can be analogous to that of domestic legal order. This paper agrees to the importance of critical insights towards international legal order; however, it does not reduce the importance of distinguishing what it is and what it ought to be from international law. For legal enquires, it is important to put the existing legal structure at the centre so that legalists are able to identify if the practical events result in transforming the primitive character of international law. Otherwise, international law will loose a guiding principle to counter against the derogation of law in the name of necessity.

Notes

(1) Gray, International Law and the Use of Force, 95.
(2) Bronwlie, International Law and the Use of Force by States, 265.
(3) Jennings & Watts, Oppenheim's International Law, 417
(4) Dinstein, War, Aggression and Self-Defence, 175.
(5) Jennings & Watts, *supra* note 5, 421
(6) Dinstein, *supra* note 4, 175; Brownlie, *op cit*. *supra* note 2, 275.
(7) Kelsen, Principles of International Law, 16.
(8) Ibid., 15.
(9) Ibid., 16; Taoka, Kokusaihou-jyou-no Jieiken, 339-346.
(10) Quéntivet, The World after September 11: Has It Really Changed?, 562.
(11) S/RES/1373 (2001).
(12) Rostow, Before and After, 489.
(13) Quéntivet, *supra* note 10, 562.
(14) Davies, International Law and the State of Exception, 79.
(15) *Ibid*.
(16) Kelsen, Law and Peace in International Relations, 56. 'Legitimate violence' refers to Weber's definition of modern states. He defines state as a 'human community' succeeded in proclaiming its 'monopoly of legitimate use of physical force within a particular territory.' See Weber, Politics as a Vocation, 33.
(17) Brownlie, *supra* note 2, 42
(18) Jennings & Watts, *supra* note 3, 420; See also Taoka, *supra* note 9, 32-33.
(19) Byers, War Law, 54; Taoka, *supra* note 9, 34-35; Brownlie, *supra* note 2, 43.
(20) Byers, *supra* note 19, 54
(21) Dinstein, *supra* note 4, 249.
(22) Brownlie, *supra* note 2, 43.
(23) Taoka, *supra* note 9, 37-38.
(24) *Ibid*. 41.
(25) *Ibid*. 110
(26) See Dinstein, *supra* note 4, 177.
(27) Brownlie, *supra* note 2, 66.
(28) *Ibid*. 67
(29) Dinstein, *supra* note 4, 83.
(30) See Taoka, *supra* note 9, 162-164. See also, Distein, *supra* note 4, 84.
(31) Schmitt, Modern Imperialism in International Law, 42.
(32) *Ibid*. 43.
(33) Brownlie, *supra* note 2, 81
(34) Byers, *supra* note 19, 55.
(35) Dinstein, War, *supra* note 4, 84.

(36) Taoka, *supra* note 9, 174.
(37) *Ibid*. 268.
(38) Brownlie, *supra* note 2, 90
(39) Randelzhofer, Article 51, 793.
(40) ICJ Reports, Nicaragua v. United States, para.188.
(41) Randelzhofer, *supra* note 39, 806.
(42) Advisory Opinion at para. 96.
(43) Kohen, The Notion of "State Survival" in International Law, 314.
(44) *Ibid*. 313.
(45) Kelsen, The Law of the United Nations, 270.
(46) *Ibid*.
(47) Kelsen, General Theory of Law and State, 388.
(48) Kelsen, *supra* note 16, 38; 54.
(49) See Taoka, Kokusaihou III, 179-180, Taoka, *op cit*. *supra* note 9, 332.
(50) Wheatcroft, Two years of Gibberish
(51) Durfy, The 'War on Terror' and the Frameworks of International Law, 17.
(52) The target scope of these two resolutions overlaps each other, and this fact reinforces the legitimacy of international actions against terrorism within the legal framework of self-defence.
(53) S/RES/1368 (2001); A/RES/56/1 (2001).
(54) McGoldrick, From '9-11' to the 'Iraq War of 2003', 24.
(55) Happold, Security Council Resolution 1973 and the Constitution of the United Nations, 594.
(56) S/RES/1373 (2001).
(57) Greenwood, International Law and the 'War Against Terrorism', 308.
(58) *Ibid*. 313.
(59) *Ibid*. 301; 305.
(60) *Ibid*. 305.
(61) *Ibid*. 308.
(62) *Ibid*.
(63) Dinstein, *supra* note 4, 206.
(64) *Ibid*. 207.
(65) *Ibid*. 236-237.
(66) Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter, 51.
(67) *Ibid*. 50.
(68) *Ibid*.
(69) Frank, Recourse to Force, 50.
(70) *Ibid*. 49-50
(71) Byers, *supra* note 19, 64
(72) *Ibid*. 65.

(73) *Ibid*. 67.
(74) Szasz, The Security Council Starts Legislating, 905; Rosand, Security Council Resolution 1373, 334.
(75) Rowe, Responses to Terror.
(76) *Ibid*.
(77) *Ibid*.
(78) *Ibid*.
(79) Stahn, Terrorist Acts as "Armed Attack", 35.
(80) *Ibid*. 39.
(81) *Ibid*. 51.
(82) A/RES/49/60 (1994)
(83) S/RES/1269 (1999)
(84) *Ibid*.
(85) Happold, Security Council Resolution 1373, 595.
(86) *Ibid*. 609.
(87) *Ibid*.
(88) *Ibid*. 610.
(89) Durfy, *supra* note 51, 17; 45.
(90) *Ibid*. 447.
(91) Cassese, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, 996.
(92) *Ibid*.
(93) *Ibid*. 1001
(94) Quéntivet, *supra* note 10, 562.
(95) White House, President Signs Authorization for the Use of Force Bill.
(96) Gray, *supra* note 1, 166.
(97) *Ibid*. 169
(98) Odysseos and Petito, Introduction, 13. See also, Ohtake, Seisen to Naisen, 473-475; Nagao, Carl Schmitt Chosaku-shu I, 465-467; Gross, Exception and Emergency Powers, 1827-1828; Hooker, Carl Schmitt's International Thought, 185.
(99) Schmitt, Politische Theologie, 11 (=Political Theology, 5). Even though he shows his special interest upon 'the exception', Schmitt employs the term Ausnahmezustand not to emphasise its exceptionality but to criticise legal positivists. In addition, Schmitt refers to Ausnahmezustand in his later work *Verfassungslehre* when he explains the suspension of constitutional laws under Article 48 (2) of the Weimar Constitution. In short, Ausnahmezustand means a situation where the power of law was suspended in order to secure the inviolability of a constitution. Translating it as a 'state of exception' would hide its emergently character, therefore, this paper translates Ausnahmezustand as a 'state of emergency.' Nevertheless, considering the fact that some writers put emphasis on 'exception'

itself, this paper continues using a 'state of exception' occasionally in accordance with the context of each writer.

(100) *Ibid*. (= Political Theology, 6).
(101) *Ibid*. 20 (=Political Theology, 13)
(102) *Ibid*. 22 (= Political Theology, 14)
(103) *Ibid*. (=Political Theology 15)
(104) Obuki, Kenpou-no-Kisoriron to Kaishaku, 9. See also Higuchi, Hikakukenpou, 190-191.
(105) *Ibid*.; Schmitt, Verfassungslehre, XIII (= Constitutional Theory, 54)
(106) *Ibid*. 20 (=Constitutional Theory, 75).
(107) Schmitt, Der Begriff des Politischen, 20 (=The Concept of the Political, 19)
(108) Schmitt, supra note 105, 26-27; 75-76. (=Constitutional Theory, 80; 125)
(109) Steyn, Guantanamo Bay, 1; Davies, *supra* note 11, 75; Scheuerman, Carl Schmitt and the Road to Abu Gbraib, 118.
(110) Scheuerman, *supra* note 109, 108.
(111) *Ibid*. 118.
(112) *Ibid*. 117.
(113) *Ibid*. 117; 122.
(114) Hooker, *supra* note 94, 185.
(115) *Ibid*. 180
(116) Gross, *supra* note 98, 1866.
(117) *Ibid*.
(118) Davies, *supra* note 14, 76.
(119) *Ibid*. 77.
(120) *Ibid*. 78.
(121) Agamben, State of Exception, 22.
(122) Humphreys, Legalizing Lawfulness, 680.
(123) Agamben, *supra* note 121, 22.
(124) *Ibid*. 31.
(125) *Ibid*. 39; 41.
(126) *Ibid*. 1
(127) Walker, After the Globe, Before the World, 110; 112.
(128) *Ibid*. 119.
(129) Žižek, Are we in War? Do We Have an Enemy?
(130) *Ibid*.
(131) *Ibid*.
(132) Odysseos, Crossing the Line?, 137.
(133) *Ibid*. 136.
(134) *Ibid*. 137.
(135) *Ibid*. 138

(136) Davies, *supra* note 14, 79.

(137) Davies, *supra* note 14, 79.

(138) *Ibid*. 91.

(139) Quénivet, *supra* note 10, 577.

(140) Davies, supra note 14.

References

Agamben, Giorgio, *State of Exception*, translated by Kevin Attell, Chicago: University of Chicago Press, 2005.

Behnke, Andreas, 'Terrorising the Political: 9/11 within the Context of the Globalisation of Violence', *Millennium: Journal of International Studies*, 33 (2), 2004, pp.279-312.

Brownlie, Ian, *International Law and the Use of Force by States*, Oxford: Oxford University Press, 1963.

———————. *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2007.

Byers, Michael, 'Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change', *The Journal of Political Philosophy*, 11 (2), 2003, pp.171-190.

———————. *War Law: Understanding International Law and Armed Conflict*, New York: Grove Press, 2005.

Cassese, Antonio, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law*, 12 (5), 2001, pp.993-1001.

Davies. Sara E., 'International Law and the State of Exception', Alex J. Ballamy, Roland Bleiker, Sara E. Davies and Richard Devetak eds., *Security and the War on Terror*, Abington: Routledge, 2008.

Dinstein, Yoram, *War, Aggression and Self-Defence*, 4th ed., Cambridge: Cambridge University Press, 2005.

Duffy, Helen, *The 'War on Terror' and the Framework of International Law*, Cambridge: Cambridge University Press, 2005.

Frank, Thomas M., *Recourse to Force: State Action Against Threats and Armed Attack*, Cambridge: Cambridge University Press, 2002.

Gray, Christian, *International Law and the Use of Force*, 2nd ed., Oxford: oxford University Press, 2004.

Greenwood, Christopher, 'International Law and the 'War Against Terrorism'', *International Affairs* 78 (2), 2002, pp.301-317.

Gross, Oren, 'Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency powers and the 'Norm-Exception' Dichotomy', *Cardozo Law Review*, 21, 2000, pp. 1825-1868.

Happold, Matthew, 'Security 'Council Resolution 1373 and the Constitution of the United Nations',

Leiden Journal of International Law, 16, 2003, pp.593-610.

Higuchi, Yoichi, *Hikakukenpou*, 3rd ed., Tokyo: Seirin Shoin, 1992.

Hooker, William, *Carl Schmitt's International Thought: Order and Orientation*, Cambridge: Cambridge University Press, 2009.

Humphreys, Stephen, 'Legalizing Lawfulness: On Giorgio Agamben's State of Exception', *The European Journal of International Law*, 17 (3), 2006, pp.677-687.

Jennings, Robert and Watts, Arthur eds., *Oppenheim's International Law Volume 1 Peace*, 9th ed., Oxford: Oxford University Press, 2008.

Kelsen, Hans, *Law and Peace in International Relations*, Cambridge: Harvard University Press, 1942.

————————. *General Theory of Law and State*, Cambridge: Harvard University Press, 1945.

————————. *Principles of international law*, New York: Rinehart, 1952.

————————. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, New York: F.A. Praeger, 1954.

Kohen, Marcelo G, 'The Notion of "State Survival" in International Law', Laurence Boisson de Chazounes and Philippe Sands, *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press, 1999.

Marks, Susan, 'State-Centrism, International Law, and the Anxieties of Influence', *Leiden Journal of International Law*, 19 (2), 2006, pp.339-347.

McGoldrick, Dominic, *From '9-11' to the Iraq War 2003: International Law in an Age of Complexity*, Portland: Hart Publishing, 2004.

Murphy, Sean D., 'Terrorism and the Concept of "Armed Attack" in article 51 of the U.N. Charter', *Harvard international Law Journal*, 43 (1), 2002.

Nagao, Ryuichi ed., *Carl Schmitt Chosaku-shu I*, Tokyo: Jigakusha, 2007.

Obuki, Yoshito, *Kenpou-no-Kisoriron to Kaishaku*, Tokyo: Shinzansha, 2007.

Odysseos, Louiza, 'Carl Schmitt on the 'Spaceless Universalism' of Cosmopolitanism and the War on Terror', Louiza Odysseous and Fabio Petito eds., *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order*, Abington: Routledge, 2007.

Odysseos, Louiza and Petito, Fabio, 'Introduction: The International Political Thought of Carl Schmitt', Louiza Odysseous & Fabio Petito eds., *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order*, Abington: Routledge, 2007.

Ohtake, Shinji, *Seisen to Naisen: Carl Schmitt no Kokusai-Chitsujyo-Kousou*, Tokyo: Ibunsha, 2009.

Onuma, Yasuaki, "Kokusaihou-to Chikara, Kokusaihou-no Chikara", Yasuaki Onuma ed., *Kokusaihou-niokeru Hou-to Chikara*, Tokyo: Nihon Hyouron sha, 2008.

Quénivet, Noëlle, The World after September 11: Has It Really Changed?, *European Journal of International Law*, 16 (3), 2005, pp.561-577.

Randelzhofer, Albrecht, "Article 51", Bruno Simma ed., *The Charter of the United Nations: A Commentary Volume I*, 2nd ed., Oxford: Oxford University Press, 2002.

Rosand, Eric, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight

against Terrorism', *The American Journal of International Law*, 97(2), 2003, pp.333-341.

Rostow, Nicholas, 'Before and After: The Changed UN Response to Terrorism since September 11th', *Cornell International Law Journal*, 35, 2002, pp.475-490.

Rowe, Peter, 'Responses to Terror: The New 'War'', *Melbourne Journal of International Law*, 3 (2), 2002. Available at: http://www.law.unimelb.edu.au/mjil/issues/issue-archive/volume-3-2 [last access: 05/Jan./ 2014].

Scheuerman, William E., 'Carl Schmitt and the Road to Abu Ghraib', *Constellations*, 13 (1), 2006, pp.108-124.

Schmitt, Carl, *Politische Theologie: Vier Lapitel zur Lehre von der Souveränität*, 2. Ausg., München and Leipzig: Duncker & Humblot, 1932. (=*Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab, Chicago: The University of Chicago Press, 2005.

————. *Der Begriff des Politischen*, Berlin: Duncker & Humblot, 1963. (=*The Concept of the Political*, translated by George Schwab, Chicago: University of Chicago Press, 1996).

————. *Verfassungslehre*, 8. Aufl. Berlin: Duncker & Humblot, 1993. (=*Constitutional Theory*, translated by Jeffrey Seitzer, Durham: Duke University Press, 2008)

————. 'Forms of Modern Imperialism in International Law", translated by Matthew Hannah, Stephen Legg ed., *Spatiality, Sovereignty and Carl Schmitt*, Abington: Routledge, 2011.

Stahn, Carsten, 'The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism, *The Fletcher Forum of World Affairs*, 27 (2), 2003, pp.35-54.

Steyn, Johan, 'Guantanamo Bay: The Legal Black Hole', *The International and Comparative Law Quarterly*, 53 (1), 2004, pp.1-15.

Stürchler, Nikolas, *The Threat of Force in International Law*, Cambridge: Cambridge University Press, 2007.

Szasz, Paul C., 'The Security Council Starts Legislating', *The American Journal of International Law*, 96 (4), 2002, pp.901-905.

Taoka, Ryoichi, *Kokusaihou III*, Shin-ban, Tokyo: Yuhikaku, 1973.

————. *Kokusaihou-jyou-no Jieiken*, Shinsou-ban, Tokyo; Keisoushobou, 2014.

Wani, Akira, *Kyoukai Kouhougaku Kokka: Shoki Carl Schmitt no Kouhougaku*, Tokyo: Tokyo-Daigaku Shuppankai, 1990.

Weber, Max, 'Politics as a Vocation,' David S. Owen and Tracy B. Strong (eds.), *The Vocation Lectures: Science As a Vocation, Politics As a Vocation*, translated by Rodney Livingstone, Indianapolis: Hackett Pub Co Inc., 2007.

Wheatcroft, Geoffery, 'Two Years of Gibberish', *Protest Magazine*, 20 Sep., 2003, Available at: http://www.prospectmagazine.co.uk/features/twoyearsofgibberish [last access: 02/Jan./2014].

White House, *President Signs Authorization for the Use of Military Force Bill: A Statement by the President*, 18 September 2001, Available at: http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html [last access: 27/Dec./2013].

Yasuaki, Onuma, *A Transcivilizational Perspective on International Law*, Leiden: Martinus Nijhoff,

2010

Žižek, Slavoj, 'Are We in War? Do We Have an Enemy?', *London Review of Books*, 24 (10), 2002, Available at, http://www.lrb.co.uk/v24/n10/slavoj-zizek/are-we-in-a-war-do-we-have-an-enemy [last access: 04/Jan./2014].

Interdependency between 'Primitiveness' and 'Change' in International Law: International Law of Self-Defence and the Overuse of Exception after September 11

<Summary>

Ryo Watanuki

This paper examines the legal debates concerning the right of self-defence after the attacks of September 11, 2001. Historically, the right of self-defence has been employed to legitimise the use of force in accordance with necessity. The general prohibition of war after the First World War has made the concept of self-defence a legitimate response to illegal use of force namely the war of aggression by an aggressor state. However, the UN Security Council authorises its member states to use their military forces against terrorists immediately after the event of September 11. From a legal point of view, this decision raised a fundamental question whether the event was crucial enough to transform the legal principle of the right of self-defence. Many international lawyers have discussed the issue only to find that the debate is a 'never-ending story' (Quéntivet 2005). Contrary to these struggles of international lawyers, some political theorists assume that the international response against terrorism illustrates the limitation of liberalism as a foundational principle of international order. They criticise that to legitimise the War on Terror paradoxically results in justifying recourse to violence in the name of protection of liberty. This paper explores the legal possibility of identifying 'change' in international law by investigating the historical development of the right of self-defence. This paper argues that legalists' inability of recognising change in international law is attributed to their relative neglect of the 'primitiveness' of international law. This paper proposes

to focus more on the latter in order to perceive the structure of international politics more correctly.