

Thomas Remler  
Eichendorffring 106  
95447 Bayreuth  
Germany  
ThomasRemler@web.de  
Studentnumber: RMLTHO004

## **University of Cape Town**

### **LL.M. – Thesis**

**Supervisor: Professor Derry Devine**

**Topic: The Right of Anticipatory Self – Defense and the Use of  
Force in Public International Law**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. – degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M.- dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

# - Table of Content -

<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. THE USE OF FORCE IN PUBLIC INTERNATIONAL LAW .....</b>	<b>3</b>
<b>1. Historical Overview .....</b>	<b>3</b>
a) 19 <sup>th</sup> and early 20 <sup>th</sup> Century: the bellum justum doctrine .....	4
b) The Covenant of the League of Nations .....	4
c) The Kellogg-Briand Pact of 1928 and the Nuremberg Tribunal .....	5
d) The United Nations Charter .....	6
<b>2. Exceptions to the Prohibition of the Use of Force.....</b>	<b>9</b>
a) Security Council Authorization, Chapter VII of the Charter .....	10
b) Individual or Collective Self-Defense, Article 51 .....	11
c) Humanitarian Intervention .....	12
<b>III. THE RIGHT OF SELF-DEFENSE.....</b>	<b>15</b>
<b>1. Historical Background to the Right of Self-Defense.....</b>	<b>16</b>
a) The <i>Caroline Case</i> of 1837.....	16
(1) Facts of the Case .....	17
(2) Correspondence between Mr. Webster and Mr. Fox in 1841-42 .....	17
(3) Conclusions resulting from the <i>Caroline Case</i> .....	20
b) Article 51 of the Charter .....	22
c) The <i>Nicaragua Case</i> of 1986.....	23
(1) Facts of the Case .....	23
(2) The Court's Decision .....	24
d) Conclusions on the Traditional View on Self-Defense .....	27
e) Relationship between Article 51 and International Customary Law .....	29
(1) International Customary Law .....	29
(2) International Customary Law alongside Article 51?	
<b>2. The Right of Anticipatory Self-Defense .....</b>	<b>35</b>

a) Historical Backdrop .....	36
b) Article 51 and Anticipatory Self-Defense .....	39
(1) The Restrictive View on Article 51.....	40
(2) The Broader View on Article 51 .....	41
(3) Discussion: the Broader View is more Convincing .....	41
(4) The ICJ's View on Article 51 and Anticipatory Self-Defense .....	45
c) Customary International Law on the Right to Anticipatory Self-Defense: State Practice/ Historical Overview in Post-Charter Times prior to the Bush Doctrine... 47	
(1) Cuban Missile Crises of 1962 .....	47
(2) The 1967 Six-Day War in the Middle East.....	48
(3) The 1981 Bombing by Israel of the Osirik Reactor in Iraq.....	50
(4) U.S. and Terrorism: Libya, 1986.....	51
(5) U.S. and Terrorism: Iraq, 1993 .....	53
(6) U.S. and Terrorism: Sudan and Afghanistan, 1998.....	54
(7) Other Examples .....	54
(8) U.N. Authorities .....	55
d) Conclusion: Anticipatory Self-Defense coexists alongside Article 51 in International Customary Law .....	56
e) Legal Requirements for Anticipatory Self-Defense in Post-Charter Times .....	58
(1) Imminence and Necessity.....	59
(2) Proportionality.....	61
(3) Exhaustion or Impracticability of Peaceful Means .....	63
(4) No Affirmative Action by the Security Council and Breach of International Law.....	64

**IV. ANTICIPATORY SELF-DEFENSE AND THE BUSH DOCTRINE - EMERGENCE OF A NEW RULE? ..... 65**

**1. September 11, 2001: a New Dimension of Terrorism..... 65**

**2. Reactions to 9/11: Operation Enduring Freedom in Afghanistan..... 66**

a) Facts..... 66

b) Legal Aspects: Terrorist Attacks as Armed Attacks .....

**3. The Bush Doctrine of Preemptive Self-Defense ..... 71**

a) The Bush Doctrine .....	72
b) The War in Iraq of 2003 – First Application? .....	75
(1) Chronology of Events Leading to the Use of Force Against Iraq.....	75
(2) Legal Justification for Operation Iraqi Freedom.....	77
- Security Council Authorization.....	77
- Preemptive Self-Defense .....	81
c) Critical Analysis: Consistency with International Law or Emergence of a New Rule? .....	83
(1) Consistency with International Law - Critical Analysis .....	83
(2) Emergence of a New Rule? .....	85
<b>V. CONCLUSIONS .....</b>	<b>87</b>

# - Bibliography -

## 1. Statutes and Treaties

- *Charter of the Nuremberg International Military Tribunal August 8, 1945*
- *ICJ Statute*
- *League of Nations Covenant*, June 28, 1919, art. 12 ff reprinted in: J.A.S. Grenville & Bernard Wasserstein eds, *The Major Treaties of the Twentieth Century*, 2001
- *Treaty Providing for the Renunciation of War as an Instrument of National Policy, (Kellogg-Briand Pact)*, Signed in Paris, August 27, 1928, entered into force 24 July 1929 Stat.46, 2343, TS No. 796, 94 LNTS 57
- *United Nations Charter*

## 2. Cases

- *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226
- *Asylum Case*, ICJ Reports, 1950, p.266
- *Caroline Case* of 1837; facts taken from D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition, 1998
- *Corfu Channel Case* (U.K. v. Albania), ICJ Reports 1949, p. 4.
- *International Military Tribunal (Nuremberg), Judgment and Sentences*, Oct. 1, 1946, reprinted in 41 *Am. J. Int'l L.* 172, 205 (1947).
- *Judgment of the International Military Tribunal for the Far East* (Nov.1948), reprinted in R. John Pritchard ed., 101 *The Tokyo Major War Crimes Trial* 48494, 1998.
- *Nicaragua v United States*, [1986] ICJ Reports 14
- *North Sea Continental Shelf Cases*, ICJ Reports 1969, p.3
- *Rights of Passage over Indian Territory Case*, ICJ Reports, 1960, p.2
- *Tadic Case*, Prosecutor v. Tadic, 38 *I.L.M.* 1518, 1546, para. 145 (*Int'l. Crim. Trib. for the Former Yugoslavia -Appeals Chamber* 1999)

### **3. Resolutions**

- *United Nations Security Council Resolutions:*

- 242/ 1967
- 487/ 1991
- 678/ 1990
- 687/ 1991
- 1368/ 2001
- 1373/ 2001
- 1441/ 2002

- *United Nations General Assembly Resolution 41/38, 41st Sess., 78<sup>th</sup> plen. Mtg. (1986)*

- *U.S. Congress Resolution H.R.J. Res. 144, 107th Cong. (2002) (enacted)*

### **4. Other Official Documents**

- *United Nations, Annex Of The 12<sup>th</sup> Quarterly Report Of The Executive Chairman Of The United Nations Monitoring, Verification And Inspection Commission In Accordance With Paragraph 12 Of Security Council Resolution 1284, para. 7, available at <http://www.un.org/depts/unmovic/documents/2003-232.pdf>*

- *Letter of the United Kingdom to the Security Council, UN Doc.S/2003/350*

- *Letter of the United States to the Security Council, UN Doc. S/2003/351*

- *Nuremberg Trial Proceedings, volume 22, 217<sup>th</sup> day, 31 August 1946, at <http://www.yale.edu/lawweb/Avalon/imt/proc/09-30-46.htm>*

- *Verbatim Minutes of the Fourth Plenary Session, April 28, U.N.Doc.24 (1945), reprinted in The United Nations Conference on International Organisation, San Francisco, California, April 25 to June 26, 1945, Selected Documents 313 (1946)*

- *Report of June 13 of Rapporteur of Committee I/1 to Commission I, U.N. Doc.944 (1945), reprinted in The United Nations Conference on International Organisation, San Francisco, California, April 25 to June 26, 1945, Selected Documents 490, 498*

- *Report of the Committee on Use of Force in Relations Among States, 1985-86 Am Branch of the Int'l Law Ass'n 188, 203*

- *Report In Connection With Presidential Determination Under Public Law 107-243, reprinted in 149 Cong. Rec. H 1957, H 1958 ( march 19, 2003)*

- *U.S. National Security Council, The National Security Strategy of the United States (2002).*

- *The International Control of Atomic Energy: The First Report of the United Nations Atomic Energy Commission to the Security Council 19 (U.S. & U.N. Report Series No.8, 1946)*

- *President George W. Bush, West Point Graduation Speech* (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>
- *President George W. Bush, State of the Union Address* (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/iraq/20020129-11.html>
- *President George W. Bush, Address to the United Nations General Assembly in New York City* (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>
- *U.S. Secretary of State Colin Powell, Address to the UN Security Council* (Feb. 5, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html>
- *Verhandlungen des Deutschen Buntestages* 14/187 vom 19. 9. 2001, S. 18302A

## 5. Textbooks

- Antonio Cassese, *International Law* (2001)
- Clive Parry et. Al. eds., *Encyclopedic Dictionary of International Law* (1988)
- D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition (1998)
- Ellery Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice* (1931)
- Emmerich de Vattel, *The Law of Nations* (Joseph Chitty ed., 7th ed. 1849)
- Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict* (2002)
- Hugo Grotius and *International Relations* (Hedley Bull et al. eds., 1995)
- Hugo Grotius, *De Jure Belli Ac Pacis* (1625), reprinted in 2 *The Classics of International Law*, p. 172 (James Brown Scott ed., 1925)
- Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> Edition (2003)
- J.A.S. Grenville & Bernard Wasserstein eds, *The Major Treaties of the Twentieth Century* (2001)
- J.L. Brierly, *The Law of Nations* 157 (1928)
- Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition (1997)
- Myres S.McDougal & Florentino P.Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion*, (1961)

- Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism* (1989).
- Stanimir A. Alexandrow, *Self-Defense Against the Use of Force in International Law*, (1996)
- *The Law of Nations, Book II*, (1758) (T. & J.W. Johnson & Co., Law Booksellers 1863)
- *The United Nations Conference on International Organisation*, San Francisco, California, April 25 to June 26, 1945, *Selected Documents* (1946)
- Westlake, *International Law* 299 (1904)
- Yoram Dinstein, *War Aggression and Self-Defense*, 3<sup>rd</sup> Edition (2001)

## 6. Articles

- Amy E. Eckert, *Manooher Modifi, Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 *Tul. J. Int'l & Comp. L.* 117.
- Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 *AM.J.Int'l L.*, p. 584 (1983)
- Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: the United Nations' Emerging Role*, 45 *Naval L. Rev.* 217, 223 (1998)
- Carsten Stahn, *International Law under Fire: Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51 of the U.N. Charter and International Terrorism*, 27 *FALL Fletcher F. World Aff.* 33 (2003)
- Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 *USAFA J. Leg. Stud.* 27, 32 (2000)
- Claud H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, (1952) II *Recueil des Cours* 451
- David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in 2003*, *BYU Journal of Public Law*, 18 *BYUJPL* 1, 2003, p.9
- Davis Brown, *Use of Force against Terrorism After September 11<sup>th</sup> : State Responsibility, Self-Defense and other Responses*, 11 *Cardozo J. Int'l & Comp. L.* 1, 32-37 (2003).
- Gregor Schirmer, in *Frieden, Völkerrecht und die UN Charter*, AG *Friedensforschung an der Universität Kassel* (2004)
- John Kelly, *The Man Behind the Terror*, *Wash. Post*, Sept 27, 2001, at C 12
- John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel's Arab Territories?*, 2 *Duke J.Comp. & INT'L L.* 195, 203-13 (1992)

- John Quigley, A Weak Defense of Anticipatory Self-Defense, 10 Temp.Int'l & Comp. L.J. 255, 257 (1996)
- Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, p.70 (2003)
- Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.123, 2003
- Mary Ellen O'Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002
- Maureen F. Brennan, Comment, Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law, 59 La.L. Rev.1195, 1202 (1999)
- Michael Bothe, Der Irak-Krieg und das völkerrechtliche Gewaltverbot, Archiv des Völkerrechts, Bd. 1 (2003), p. 264
- Michael Byres, Terrorism, The Use of Force in International Law after 11 September, 51 Int'l & Comp. L. Q. 401, 410 (2002).
- Michael J. Glennon, Military Action Against Terrorists under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 HARV. J.L. & PUB. POL'Y, 539 (2002)
- Michael J. Glennon, The New Interventionism: The Search for a Just International Law, 78 Foreign Aff. 2 (1999)
- Michael Franklin Lohr, Legal Analysis of US Military Responses to State-Sponsored International Terrorism, 34 Naval L. Rev. 1, 17 (1985)
- Mike Allen & Karen De Young, Bush: U.S. Will Strike First at Enemies; in West Point Speech, President Lays Out Broader U.S. Policy, Wash.Post, 2 June, 2002, at A 01.
- Rabinder Singh QC, Alison Macdonald: Legality of use of force against Iraq, Opinion, Public Interest Lawyers on Behalf of Peacerights, Matrix Chambers, Gray's Inn, London WC1R 5LN, 2002, p.15
- Report of the Committee on Use of Force in Relations Among States, 1985-86 Am Branch of the Int'l Law Ass'n 188, 203
- R.Y.Jennings, The Caroline and McLeod Cases, 32 AM. J. INT'L., p. 91 (1938)
- Serge Schmemmann, U.S. Attacked, Hijacked Jets destroy Twin Towers and Hit Pentagon in Day of Terror, President Vows to Exact Punishment for "Evil", N.Y. TIMES, Sept. 12, 2001, at A1.
- Stanimir A. Alexandrow, Self-Defense Against the Use of Force in International Law,(1996),162; Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.170, 2003

- Steven R. Ratner, Terrorism and the Laws of War: September 11 and its Aftermath, Crimes of War Project: Expert Analysis (Sept. 2001) (arguing that the September 11 attacks may be analyzed as criminal acts under domestic and international criminal law), available at <http://www.crimesofwar.org/expert/attack-ratner.html>
- Timothy Kearly, Raising the Caroline, 17 Wis.Int'L.J. 325, p. 325 (1999)
- Todd S. Purdun, Bush Officials Say Time Has Come for Action on Iraq, N.Y. Times, Sept. 9, 2002, at A1
- William V. O'Brien, Reprisals, Deterrence and Self-Defense in Counterterror Operations, 30 VA.J.Int'L L. 421 (1990)

# **The Right of Anticipatory Self – Defense and the Use of Force in Public International Law**

## **I. Introduction**

On March 19, 2003, after weeks of diplomatic wrangling and expired ultimatums, the United States of America, together with the so called “coalition of the willing”, took military action against the sovereign state of Iraq. The “Operation Iraqi Freedom” as it was called, was the final result of a long chain of events that began after the terrorist attacks on the World Trade Center in New York and the Pentagon in Washington D.C. on September 11, 2001, committed by a terrorist organization called al Qaeda. After those terrible terrorist attacks the President of the United States, George W. Bush, declared that the United States would respond forcefully against those responsible for the attacks.<sup>1</sup>

The first forceful response in the aftermath of the 9/11 attacks was the “Operation Enduring Freedom” against Afghanistan of October 7, 2001. The justification for this attack, consisting of massive air strikes and some ground forces, was based on a study published by the British Government and showing the close ties between the al Qaeda and Afghanistan’s government, the Taliban. Both the United States and the United Kingdom notified the United Nations Security Council that the Operation Enduring Freedom was an exercise of individual and collective self-defense in compliance with

---

<sup>1</sup> Serge Schmemmann, U.S. Attacked, Hijacked Jets destroy Twin Towers and Hit Pentagon in Day of Terror, President Vows to Exact Punishment for “Evil”, N.Y. TIMES, Sept. 12, 2001, at A1.

the terms of the United Nations Charter Article 51, which permits the use of force in self-defense against an armed attack.<sup>2</sup>

After having accomplished Operation Enduring Freedom, on March 19, 2003 the next military response to the 9/11 attacks was launched against Iraq. The attack on Iraq, which included 200.000 soldiers as ground forces, was not expressly authorized by the United Nations Security Council. As a legal justification for the attack on Iraq President George W. Bush on behalf of the United States again relied on the right of self-defense, which is a recognized right in international law. As there was no actual Iraqi attack on the United States, President Bush addressed the United Nations (U.N.) refocusing international attention on the doctrine of anticipatory self-defense and, in particular, whether the United States could rely on, inter alia, this doctrine as a justification for the unilateral use of force against Iraq.<sup>3</sup> President Bush declared in an introduction to the ‘National Security Strategy of the United States’, which was published in September 2002, that the United States will act against ‘emerging threats before they are fully formed’.<sup>4</sup> Thus the justification announced by the United States for the use of force against other states is called ‘the Bush Doctrine’. This goes even further than the traditional, but not uncontested, right of anticipatory self-defense.<sup>5</sup> The central tenet of this ‘Bush Doctrine’ is preemptive action, undertaken unilaterally,

---

<sup>2</sup> Mary Ellen O’Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002, p.1.

<sup>3</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.123, 2003.

<sup>4</sup> The National Security Strategy of the United States of America, at <http://www.whitehouse.gov/nsc/nss.html>.

<sup>5</sup> Mary Ellen O’Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002,p.11 ff.

if necessary, against ‘hostile states’ and terrorist groups alleged to be developing weapons of mass destruction.<sup>6</sup>

Of course the allegation of the existence of this new right to preemptive self-defense is a highly controversial issue in public international law. The U.S. attack on Iraq raised protest all over the world. The question remains, how far-reaching the right to self-defense is in international public law, and if the U.S. acted within the rules of international law.

This paper examines the legal issues surrounding the right to self-defense and the use of force in public international law. A look at the history of self-defense and the use of force will lead to a critical analysis of the alleged right to preemptive self-defense and finally will answer the question if the Bush Doctrine of preemptive self-defense is to be seen as a new right in international law.

## **II. The Use of Force in Public International Law**

The rules governing the use of force form a central element within international law and, together with other principles such as territorial sovereignty and the independence and equality of states, provide the framework for international order.<sup>7</sup>

### **1. Historical Overview**

A brief look at the history of the law of recourse to force will show that it has changed dramatically over the centuries.

---

<sup>6</sup> Amy E. Eckert, Manooher Modifi, *Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 Tul. J. Int’l & Comp. L. 117.

<sup>7</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, 1997, p.777.

### **a) 19<sup>th</sup> and early 20<sup>th</sup> Century: the *bellum justum* doctrine**

The theory and practice of the use of force during the 19<sup>th</sup> and 20<sup>th</sup> centuries was that of *bellum justum*.<sup>8</sup> The *bellum justum doctrine*, which originated in the Middle Ages, legitimized the resort to violence in international law as a procedure of self-help only if certain criteria were met relating to a belligerent's authority to make war, its objectives and its intent.<sup>9</sup> A main characteristic of the law on the use of force was the thinking in balance of power mechanisms in order to maintain the status quo and to minimize the resort to force, or at least restrict its application.<sup>10</sup>

The supreme ecclesiastical authority of Rome supervised the justice of warfare until it lost its power after the Reformation.<sup>11</sup> After that the doctrine lost its influence and each belligerent was, in effect, solely responsible in respect of the *justum* aspect of war.<sup>12</sup>

### **b) The Covenant of the League of Nations**

The First World War marked the end of the balance of power system and through the creation of the League of Nations, a different approach to the use of force in international law was established.

---

<sup>8</sup> Myres S.McDougal & Florentino P.Feliciano, Law and Minimum World Public Order: the Legal Regulation of International Coercion, 131-32 (1961).

<sup>9</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, p.70 (2003).

<sup>10</sup> Malcolm N.Shaw, International Law, 4<sup>th</sup> Edition, 1997, p.783.

<sup>11</sup> Myres S.McDougal & Florentino P.Feliciano, Law and Minimum World Public Order: the Legal Regulation of International Coercion, 133 (1961).

<sup>12</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, p.70 (2003).

The Covenant of the League of Nations placed “resort to war” under international supervision, and rendered it unlawful in four situations:<sup>13</sup>

- (1) when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League;
- (2) when begun before the expiration of three months after the arbitral award or judicial decision or Council Report;
- (3) when commenced against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report;
- (4) under certain circumstances, when initiated by a non-member state against a member state.

Hence, the League of Nation System did not prohibit the use of force as such, but did set up a procedure designed to restrict it to tolerable levels.<sup>14</sup>

### **c) The Kellogg-Briand Pact of 1928 and the Nuremberg Tribunal**

Through the signing of the General Treaty for the Renunciation of War (the Kellogg-Briand Pact) of 1928, the real breakthrough to legally condemning war in international law was made. This Treaty provided, that the Parties –

---

<sup>13</sup> See League of Nations Covenant, June 28, 1919, art. 12 ff reprinted in: J.A.S. Grenville & Bernard Wasserstein eds, *The Major Treaties of the Twentieth Century*, 2001.

<sup>14</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, 1997,780.

*“solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations to one another.”*<sup>15</sup>

Thus for the first time war as such was to be seen as no proper and lawful instrument of national policy. The Pact did not of course prevent World War II. Nevertheless it had an effect, as it formed the basis for ‘crimes against peace’, which, after World War II, were described in the Charter of the Nuremberg Tribunal as those crimes aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.<sup>16</sup> The Nuremberg Tribunal observed that -

*“war is essentially an evil thing. Its consequences are not so confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”*<sup>17</sup>

#### **d) The United Nations Charter**

On October 24, 1945, the United Nations Charter (from now on referred to as ‘the Charter’) was brought into force. Since then the Charter provides the legal framework

---

<sup>15</sup> Treaty Providing for the Renunciation of War as an Instrument of National Policy, (Kellogg-Briand Pact), Signed in Paris, August 27, 1928, entered into force 24 July 1929 Stat.46, 2343, TS No. 796, 94 LNTS 57.

<sup>16</sup> Charter of the Nuremberg International Military Tribunal August 8, 1945.

<sup>17</sup> Nuremberg Trial Proceedings, volume 22, 217<sup>th</sup> day, 31 August 1946, at <http://www.yale.edu/lawweb/Avalon/imt/proc/09-30-46.htm>.

for the use of force in international law. Almost all States are parties to the Charter, including the United States and Iraq.

The Preamble to the Charter expresses a determination

*‘to save succeeding generations from the scourge of war’, ‘to practise tolerance and live together in peace with one another as good neighbours’, ‘to unite our strength to maintain international peace and security’, and to ensure ‘that armed force shall not be used, save in the common interest’.*

Article 1 of the Charter sets out the United Nations’ purposes, the first of which is:

*- to maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*

Further Article 2 of the Charter stipulates the key principles in respect of the use of force, which bind both the Organization and the signatory states. Article 2 (3) stipulates, that

*- All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*

Article 2 (4) of the Charter, which has been described as ‘the corner-stone of the Charter system’<sup>18</sup>, stipulates, that

*- All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.*

In *Nicaragua v United States* of 1986, the International Court of Justice (ICJ) described Article 2 (4) as a peremptory norm of international law, from which States cannot derogate.<sup>19</sup> Thus the effect of Articles 2 (3) and 2 (4) is that the use of force can only be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN’s purposes. The reference to ‘force’ instead of to ‘war’ covers situations in which violence is employed, not necessarily meaning that this violence fulfills the technical requirements of a state of war.<sup>20</sup>

Nevertheless, a few scholars have argued over the years that Article 2 (4) is not a general prohibition of force, but rather only a prohibition on force aimed at the territorial integrity and political independence of states or inconsistent with the purposes of the UN.<sup>21</sup>

---

<sup>18</sup> Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> edition, 2003, p.699.

<sup>19</sup> *Nicaragua v United States*, [1986] ICJ Reports 14, at para 190.

<sup>20</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, 1997,781.

<sup>21</sup> Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.4.

With this interpretation of Article 2 (4), a scholar for example tried to justify Israel's 1981 strike against the Iraqi nuclear reactor at Osirik.<sup>22</sup> Israel's strike in this case was to prevent Iraq from developing nuclear weapons and thus aimed at its own long-term security. It was argued, that the Israeli attack did not compromise the territorial integrity or political independence of Iraq, nor was it inconsistent with the purposes of the UN.<sup>23</sup> The conclusion, reflecting a narrow view of sovereignty, was that the strike did not violate the prohibition of force in Article 2 (4).

The Israeli strike and this legal interpretation however faced uniformly negative international reactions. The Security Council passed a unanimous resolution condemning it as a violation of the Charter.<sup>24</sup> The resolution can be seen as strengthening the general understanding that Article 2 (4) is a general prohibition on force, which is by far the predominant view today.

International law at present therefore clearly prohibits the use of force per se under the Charter, to which almost all states are parties.

## **2. Exceptions to the Prohibition of the Use of Force**

The Charter prohibits the use of force in general. Nevertheless there are exceptions to this rule, which have found their way into the provisions of the Charter. There are basically three possible exceptions in international law at present, namely Security Council authorization under Chapter VII of the Charter, the case of individual or collective self-defense under Article 51 of the Charter and, more contested, the case

---

<sup>22</sup> Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 *AM.J.Int'l L.*, p. 584 (1983).

<sup>23</sup> *Ibid.*

<sup>24</sup> S.C.Res. 487 (June 19, 1981).

of humanitarian intervention, which is not clearly regulated in the Charter, but which may be international customary law.

#### **a) Security Council Authorization, Chapter VII of the Charter**

Chapter VII grants the right to use force, if the Security Council authorizes it. Article 42 states that the

*“the Security Council ... may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”*<sup>25</sup>

Thus, an exception is created where the Security Council authorizes the use of force in a resolution. Such a resolution must comply with the constitutional principles of the United Nations, and with the objects and purposes of the Charter.<sup>26</sup> The Security Council must be convinced, that the state against which the force is to be used poses a ‘*threat to peace*’, and that this cannot be averted in any way other than by the use of force.<sup>27</sup> But if these criteria are fulfilled the Charter provides for the legal use of force.

---

<sup>25</sup> UN Charter, Article 42.

<sup>26</sup> Rabinder Singh QC, Alison Macdonald: Legality of use of force against Iraq, Opinion, Public Interest Lawyers on Behalf of Peacerights, Matrix Chambers, Gray’s Inn, London WC1R 5LN, 2002, p.15.

<sup>27</sup> UN Charter, Article 39.

## **b) Individual or Collective Self-Defense, Article 51**

Another exception to the prohibition of the use of force is stipulated in Article 51, which provides for the right of a state to individual or collective self-defense. A state does not require a Security Council resolution in order to defend itself by force but even the right to self-defense is subject to action by the Security Council, as is clear from the terms of Article 51:

*“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>28</sup>*

The right to self-defense will be examined closely in the chapters below.

---

<sup>28</sup> UN Charter, Article 51.

### **c) Humanitarian Intervention**

Besides the exceptions mentioned to the prohibition of the use of force provided in the Charter, another exception, the doctrine of humanitarian intervention has evolved in international law and still seems to be somewhat (if not universally) accepted.

Humanitarian intervention is classically defined as

*”the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.”*<sup>29</sup>

The legal status of humanitarian intervention has changed over the past 300 years. The 17<sup>th</sup> century scholar Hugo Grotius was one of the first to comment on the legal aspects of interventions. It was his contention that a sovereign committing atrocities against his own subjects could provide justification for others taking up arms against that sovereign in defense of all humankind.<sup>30</sup> This view of humanitarian intervention prevailed through the 19<sup>th</sup> and early 20<sup>th</sup> century.<sup>31</sup> Thus humanitarian intervention as a case of the legal use of force was accepted as customary international law in pre-Charter times.<sup>32</sup>

---

<sup>29</sup> Ellery Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice*, p. 349 (1931).

<sup>30</sup> Hugo Grotius and *International Relations*, p. 247 (Hedley Bull et al. eds., 1995).

<sup>31</sup> David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in 2003*, *BYU Journal of Public Law*, 18 *BYUJPL* 1, 2003, p.9.

<sup>32</sup> *Ibid.*

With the general prohibition of the use of force under the Charter, it became doubtful, whether humanitarian intervention was still an exception to this prohibition, as the Charter did not provide for it. Instead Article 2(4) enshrines the principle of non-intervention by foreign powers and affirms state sovereignty, especially territorial integrity. So the question was raised, whether the former right to humanitarian intervention was consistent with Article 2 (4) and thus still a valid rule of international law.

To justify humanitarian intervention, a '*territorial integrity argument*' has been raised to permit temporary violations.<sup>33</sup> According to this, humanitarian intervention is deemed to be in compliance with Article 2(4), because the altruistic intervention does not result in territorial conquest, against which the Charter was designed to protect.<sup>34</sup> Further the territorial boundaries of the target state remain unchanged and the intervener departs from the state invaded once the crisis is over.<sup>35</sup>

This, at first sight, compelling line of reasoning seems to be rather artificial, when subjected to a close examination: The argument, based on altruistic intervention, seems to be rather unrealistic, as states do not act in an altruistic manner, but follow their own interests.

Further an armed intervention in the target state surely does interfere with territorial boundaries and national policies, as the ruling government loses power over those parts of state territory, which are subjected to the intervention.<sup>36</sup>

---

<sup>33</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, 1997,802.

<sup>34</sup> David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in 2003*, *BYU Journal of Public Law*, 18 *BYUJPL* 1, 2003, p 11.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

Nevertheless, actual state practice has shown, that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved due to an outside intervention in circumstances of gross oppression by a state of its citizens.<sup>37</sup> Especially in cases where there is extreme humanitarian need, a right of humanitarian intervention might evolve.<sup>38</sup> In such extreme situations, the use of force is still deemed to be justified under the customary international law principle of humanitarian intervention.<sup>39</sup> The humanitarian interventions in Somalia (1992/3), Sierra Leone (1997/8), northern Iraq (1991), Kosovo (1999) and East Timor (1999) have shown acceptance of this rule and support for its further application.

Problematic about humanitarian intervention of course is the danger of abuse by powerful states to exploit weaker states. Further it is not clear why humanitarian interventions have occurred in some cases, while in other cases, where similar human catastrophes happened (Tibet, Chechnya, Angola, Sudan just to name a few), the international community remained silent.

Humanitarian intervention nevertheless still seems to be a valid exception to the prohibition of the use of force under customary international law, in an extreme humanitarian situation.<sup>40</sup> To deal with the specific problems of humanitarian intervention is not the aim of this paper and it remains reserved for further examination.

---

<sup>37</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, 1997,803.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

### III. The Right of Self-Defense

The right of self-defense has traditionally existed as a legitimate response to an attack under international law. In 1758, Emmerich de Vattel, writing on the ‘*right of resistance*,’ argued that ‘*[a] nation has a right to resist an injurious attempt, and to make use of force and every honorable expedient against whosoever is actually engaged in opposition to her.*’<sup>41</sup>

Self-defense under international law derives primarily from two sources: the Charter and customary international law. This follows the approach set out in Article 38 (1) of the Statute of the ICJ, which provides that:

*‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- (b) international custom, as evidence of a general practice accepted as law;*
- (c) the general principles of law recognized by civilized nations;*
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’*

As described above, Article 51 of the Charter, which is an international convention within the meaning of Article 38 (a) of the ICJ Statute, is the central provision on the

---

<sup>41</sup> Emmerich de Vattel, *The Law of Nations*, p. 291 (Joseph Chitty ed., 7th ed. 1849).

right of self-defense. Article 51 sets out the one clear exception to the general prohibition on the unilateral use of force. Despite the seemingly clear formulation of Article 51, there is room for different interpretations of this provision.

It is therefore useful to take a look at the historical background of the right of self-defense in international law in order to be able to define the content of this right in the light of Article 51, with special regard to the right to anticipatory self-defense. Further the question has to be asked, whether Article 51 is the only source of law as far as the right to self-defense is concerned. In this respect one particularly has to take into account the relationship between Article 51 and international customary law.

## **1. Historical Background to the Right of Self-Defense**

The historical backdrop to the right of self-defense will commence with a review of the definition of self-defense in customary international law prior to the Charter. The starting point will be the *Caroline Case* of 1837, which is seen as the central case stating the conditions under which force can be legitimately used in self-defense in modern times.<sup>42</sup> Then a close look at the *Nicaragua Case* will show the ICJ's interpretation of the right of self-defense under Article 51 of the Charter.

### **a) The *Caroline Case* of 1837**

The traditional definition of the right of self-defense in customary international law in pre-Charter-times occurs in the *Caroline*. The general rule stating the conditions under which the use of force in self-defense is deemed to be legitimate was set out in

---

<sup>42</sup> Timothy Kearly, *Raising the Caroline*, 17 *Wis.Int'L.J.* 325, p. 325 (1999).

a letter written in 1841 by the United States Secretary of State Daniel Webster to Henry Fox, the British Minister in Washington.

### **(1) Facts of the Case**

“The Case arose out of the Canadian Rebellion of 1837. The rebel leaders, despite steps taken by United States authorities to prevent assistance being given to them, managed on December 13, 1837, to enlist at Buffalo in the United States the support of a large number of American nationals. The resulting force established itself on Navy Island in Canadian Waters from which it raided the Canadian shore and attacked passing British ships. The force was supplied from the United States shore by an American ship, the *Caroline*. On the night of December 29-30, the British seized the *Caroline*, which was then in the American port of Schlosser and hence on American territory, fired her and sent her over Niagara Falls. Two United States nationals were killed.”<sup>43</sup>

### **(2) Correspondence between Mr. Webster and Mr. Fox in 1841-42**

The legality of the British acts was discussed in detail in correspondence in 1841 – 42 when Great Britain sought the release of a British subject, McLeod, who had been arrested in the United States on charges of murder and arson arising out of the incident.

The British defended the destruction of the *Caroline* on the ground of self-preservation and self-defense, whereas Webster focused on the right of a state to

---

<sup>43</sup> The Facts of the case are taken from: D.J. Harris, Cases and Marterials on International Law, 5<sup>th</sup> Edition, 1998, p.894

territorial integrity, as the *Caroline* was attacked on American territory. Webster stated that –

*‘the use of force in U.S. territory is of itself a wrong, and an offense to the sovereignty and dignity of the United States, being a violation of their soil and territory.’<sup>44</sup>*

In the context of this specific incident, and after making clear that his concern was for the territorial integrity of the United States, Webster then wrote his letter to Mr. Fox of April 24, 1842, which laid down the basic principles on self-defense, which constituted the core of what in the aftermath became known as the *Caroline Doctrine*.<sup>45</sup>

*‘It will be for ...[Her Majesty’s] Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it, It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown, that daylight could not be waited for; that there could be no attempt at discrimination*

---

<sup>44</sup> citation taken from Timothy Kearly, *Raising the Caroline*, 17 *Wis.Int’L.J.* 325, p. 329 (1999).

<sup>45</sup> Extracts from Mr Webster’s letter of April 24, 1841 are to be found in D.J. Harris, *Cases and Marterials on International Law*, 5<sup>th</sup> Edition, 1998, p. 895.

*between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her ... A necessity for all this, the Government of the United States cannot believe to have existed.'*

In the proper context, it is obvious that Webster directed his highly restrictive conditions only to uses of force by one state within the territory of another state which had violated no international obligations to the first state that might have justified that first state's use of force.<sup>46</sup>

This view was held by commentators until the Charter era. Webster's view in the aftermath was characterized by commentators as 'the importance of the principle of non-intervention and the narrow limits of the exceptions'<sup>47</sup>, though Webster himself did not have any intention of creating any general rules for the use of force by a state in self-defense, or in particular for the use of force by a state within its own territory against armed attack.<sup>48</sup> Nevertheless the statements made by Webster in his letters to Fox became the generally accepted basic definition on self-defense in international law, as the Encyclopedic Dictionary of International Law, for example, puts it:

*'(1) Under Customary International Law, it is generally understood that the correspondence between the USA and UK of 24 April 1841, arising out of The Caroline Incident... expresses the rules on self-defense.'*<sup>49</sup>

---

<sup>46</sup> Timothy Kearly, Raising the Caroline, 17 Wis.Int'L.J. 325, p. 330 (1999).

<sup>47</sup> R.Y.Jennings, The Caroline and McLeod Cases, 32 AM. J. INT'L., p. 91 (1938).

<sup>48</sup> Timothy Kearly, Raising the Caroline, 17 Wis.Int'L.J. 325, p. 330 (1999).

<sup>49</sup> Clive Parry et. Al. eds., 1988, Encyclopedic Dictionary of International Law, p. 361.

### **(3) Conclusions resulting from the Caroline Case**

Before drawing conclusions from the *Caroline* for present times, one has to take into account that the circumstances under which it is necessary to justify the use of force in international law have changed substantially since 1841. At that time recourse to war was considered open to all, against all and for whatever reason. States did not need legal justification to commence hostilities and the plea of self-defense was relevant to the discussion of State responsibility for forcible measures undertaken in peacetime.<sup>50</sup> This also was the exact context of the correspondence between Webster and Fox, as the reason for this correspondence was the criminal proceedings against the British citizen Alexander McLeod, who was arrested in 1840 in New York and charged with murder and arson for his part in the British action against the *Caroline*. As states did not need a justification to commence hostilities in general, it was clearly in accordance with the understanding of state sovereignty that there was absolutely no need to justify the use of force by a state on its own territory against invading forces of another state.<sup>51</sup> In addition the opinion even was that no nation was bound to tolerate the performance, within the places subject to its exclusive jurisdiction any act, official or unofficial, of any other nation.<sup>52</sup>

Further, back at the time of the *Caroline*, the terms of self-preservation, self-defense and necessity were not terms of art with clearly defined independent meanings. The term self-defense was used alongside, and sometimes interchangeably with, self-preservation and necessity: while Webster used self-defense in his letter, he also used

---

<sup>50</sup> Yoram Dinstein, *War Aggression and Self-Defense*, 3<sup>rd</sup> edition, 2001, p.176.

<sup>51</sup> Timothy Kearly, *Raising the Caroline*, 17 *Wis.Int'l L.J.* 325, p. 332 (1999).

<sup>52</sup> *Ibid.*

the term preservation in discussing how a just right of self-defense attaches always to nations as well as to individuals, and is equally necessary for the preservation of both.<sup>53</sup>

As previously stated, Webster in his letter initially was only talking about self-defense in the country's own territory against foreign invaders. In the aftermath of the *Caroline* incident, the preconditions which Webster stated for a legitimate use of force in self-defense were applied more widely to cases of self-defense outside of the country acting in self-defense.

Despite the ambiguities mentioned in the term self-defense, the classical definition in the *Caroline* is still relevant for self-defense today. The preconditions set in the *Caroline* have been extended to the right of self-defense in general.

The essential preconditions for self-defense in general, which can be deduced from the *Caroline*, are therefore 'necessity', 'proportionality' and 'immediacy', whether the act of self-defense is on a state's own territory or on that of the attacker.<sup>54</sup> Hence, according to the *Caroline* doctrine, a state must have an instant and overwhelming necessity for the use of force on grounds of self-defense. The *Caroline* doctrine thus establishes two main criteria for legitimate self-defense: first, the use of armed force must be strictly related to the protection of the territory or property and the population of the defending state. Second, the proportionality criterion precludes a state from using force beyond that necessary to repel an attack or "to preserve and restore the legal status quo." The defending state may not respond to an armed attack in an "unreasonable or excessive" manner, and force used in self-defense must discriminate between civilian and military targets, as required by the laws of armed conflict.

---

<sup>53</sup> R.Y.Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L., p. 91 (1938).

<sup>54</sup> Leo van den Hole, *Anticipatory Self-Defense under International Law*, 19 Am .U. Int'L. Rev. 69, p.97 (2003).

## **b) Article 51 of the Charter**

In 1944 the first preparatory talks for the creation of the UN were held at Dumbarton Oaks by the world's major powers in order to develop an early draft for the charter of the new UN. The Dumbarton Oaks draft did not include a provision on self-defense, because the right was never questioned.<sup>55</sup> As there was more and more concern about this issue by 1945, when the states gathered in San Francisco to revise the final draft of the Charter, the general sentiment was in favor of including a self-defense provision, Article 51. According to Article 51, force can be used, in self-defense in the event that an 'armed attack occurs against a Member of the UN'<sup>56</sup>. This exception is not without limits. Members acting in self-defense have to report their actions immediately to the Security Council. The Article 51 formulation however leaves room for interpretations, as the scope of the rule is contested. Under Article 51, an attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense.<sup>57</sup> Any earlier response requires the approval of the Security Council according to Article 51. Hence there is no unilateral right to attack another state because of fear that the state is making plans or developing weapons usable in a hypothetical campaign.<sup>58</sup> Nevertheless the main points which are problematic are the meaning of the phrase '*when an armed attack occurs*' and the use of the term '*inherent*' when it comes to the right of self-defense.

---

<sup>55</sup> Amy E. Eckert, Manooher Modifi, *Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 Tul. J. Int'l & Comp. L. 131.

<sup>56</sup> Article 51 of the Charter; the full wording of Article 51 is to be seen above.

<sup>57</sup> Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.5.

<sup>58</sup> *Ibid.*

The ICJ had several opportunities to define the scope of Article 51. It dealt with it for example in the *Corfu Channel Case* (U.K. v. Albania) of 1949<sup>59</sup>, where the ICJ stipulated the principle of non-intervention, and, most importantly, in the *Military and Paramilitary Activities against Nicaragua Case* (Nicaragua v. U.S.) of 1986 (from now on referred to as the *Nicaragua Case*)<sup>60</sup>. Especially in the *Nicaragua Case* the ICJ had to define the scope of the right to self-defense in international law and the relationship between international customary law and the Charter Article 51. A close look at this case will therefore help in the interpretation of Article 51 as it was prior to the terrorist attacks of 09/11/2001.

### **c) The Nicaragua Case of 1986**

#### **(1) Facts of the Case<sup>61</sup>**

In 1979, the right-wing Somoza Government in Nicaragua was overthrown in a revolution by the left-wing Sandinista Government. In 1981, U.S. President Reagan terminated economic aid to Nicaragua on the ground that it had aided guerillas fighting against the El Salvador Government, which enjoyed good relations with the United States, by allowing USSR arms to pass through its ports and territory en route for El Salvador. In the case, Nicaragua claimed, inter alia, that the United States had, contrary to customary international law,

---

<sup>59</sup> 1949 I.C.J. 4 (Apr.9).

<sup>60</sup> 1986 I.C.J. 14 (June 27).

<sup>61</sup> The Facts of the Case are taken from: D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition, 1998, p.866.

- (i) used direct armed force against it by laying mines in Nicaraguan internal and territorial waters, causing damage to Nicaraguan and foreign merchant ships, and attacking and damaging Nicaraguan ports, oil installations and a naval base and
- (ii) given assistance to the *contras*, Nicaraguan guerillas fighting to overthrow the Sandanista Government.

Nicaragua also claimed that the United States had acted in breach of the bilateral 1956 U.S.-Nicaraguan Treaty of Friendship, Commerce and Navigation.

The U.S. claimed that its use of force against Nicaragua was a lawful act of collective self-defense of El Salvador. The U.S. argued that Nicaragua had used unlawful force in the first instance by providing weapons and supplies to El Salvador rebels and had supported cross-border attacks on Costa Rica and Honduras. The U.S. therefore claimed that Nicaragua's actions constituted an 'armed attack'. The U.S. claimed to be acting in 'collective self-defense' under Article 51 when supporting the Nicaraguan *contras* and mining the surrounding harbors.

Further the U.S. contested the jurisdiction of the ICJ as it had made a reservation in its acceptance of the jurisdiction of the ICJ under Article 36 (2) of the ICJ Statute, which excluded 'disputes arising under a multilateral treaty'.

## **(2) The Court's Decision**

The U.S. argument on jurisdiction was partly rejected by the court, as it held that it did have jurisdiction as far as international customary law is concerned. The court found itself unable to decide whether the United States had infringed Article 2(4) of

the Charter or any other multilateral treaty provisions because of the United States reservation.<sup>62</sup>

In interpreting the term 'inherent' in Article 51, the court first considered the relationship between international customary law and the Charter, especially Article 51. Its observations will be dealt with later, when the relationship in question is examined.

The ICJ's decision was instructive, for it provided the first judicial interpretation of Article 51. The court held that no armed attack by Nicaragua had occurred against the United States, and therefore that the appeal to article 51 was untenable. It held that *'the exercise of the right of collective self-defense presupposes that an armed attack has occurred'*<sup>63</sup>. The Court further went on to state that Nicaragua was not shown to be responsible for providing weapons and supplies to Salvadorean rebels, and further that even if it had done so, the supply of weapons was not the same as an armed attack.<sup>64</sup>

*'The Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.'*

---

<sup>62</sup> D.J. Harris, Cases and Materials on International Law, 5<sup>th</sup> Edition, 1998, p.867.

<sup>63</sup> 1986 I.C.J.127.

<sup>64</sup> Ibid at 230.

Moreover, El Salvador had not reported to the Security Council, nor had it invited the U.S. to assist in its self-defense.<sup>65</sup> The Court defined an ‘armed attack’ as a state’s direct sending of troops, armed bands, irregulars or mercenaries into another state, which clearly was not the case with respect to Nicaragua.<sup>66</sup> According to the ICJ the prohibition includes the sending by a state of armed bands into the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.<sup>67</sup> The concept of armed attack, as defined in the *Nicaragua Case*, therefore requires both a quantitative and a qualitative element: Quantitatively, an attack must reach a certain threshold of force, with a sufficient level of gravity and severity, in order to qualify as an armed attack. Qualitatively, only the use of force through military means triggers the right of self-defense.

The ICJ however accepted, that assistance to rebels in the form of the provision of weapons or logistical or other support can be regarded as a threat or use of force, or can amount to an intervention in the internal or external affairs of other states, which might be prohibited under Article 2(4) of the Charter.<sup>68</sup> Nevertheless unilateral attack on Nicaragua was not permitted in international law, as the threshold of an Article 51 ‘armed attack’ was not fulfilled.

---

<sup>65</sup> Ibid at 233.

<sup>66</sup> Ibid at 103.

<sup>67</sup> Ibid at 233.

<sup>68</sup> 1986 I.C.J.233.

The conclusion thus can be drawn that where a state is threatened by force not amounting to an armed attack, it must resort to measures less than armed self-defense, or it must seek Security Council authorization to do more.<sup>69</sup>

#### **d) Conclusions on the Traditional View on Self-Defense**

The *Caroline* and the *Nicaragua Cases* both affirm the basic principles of the traditional view on self-defense in international law. Thus one can draw the following conclusions:

- First, the state invoking the right to use force in self-defense must be the victim of an armed attack. The definition of armed attack can be found in the *Nicaragua Case*, as described above. It does include not only an action by regular armed forces across international borders, but also an actual or threatened violation of substantive rights of the claimant state or an attack on nationals abroad.<sup>70</sup> Nevertheless, according to the *Nicaragua Case* it does not include ‘*assistance to rebels in the form of the provision of weapons or logistical or other support*’.

- Second, the attack must be ongoing, and the defending state may not claim self-defense after the attack has ended or after the "Security Council has taken measures necessary to maintain international peace and security."<sup>71</sup> Hence a time aspect is relevant to the right to self-defense. A state may not take action against another state

---

<sup>69</sup> Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.6.

<sup>70</sup> Amy E. Eckert, Manooher Modifi, *Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 Tul. J. Int’l & Comp. L. 135 (2004).

<sup>71</sup> Article 51 of the Charter.

in self-defense long after an armed attack has ended.<sup>72</sup> It is highly controversial, to what extent anticipatory actions in self-defense are permissible, or, to put it in other words, when the right to self-defense actually begins. This problem will be dealt with in detail later on.

- Third, the force used by the state victim of the attack must be necessary to protect its territory or property of the state or its inhabitants (for example a vessel on the High Seas) and must be proportionate to the injury threatened. This can be concluded from the *Caroline*, as described above. This conclusion was confirmed by the ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case*, where the ICJ stated that both necessity and proportionality must be respected in any decision to use armed force.<sup>73</sup> In this advisory opinion the Court emphasized, that ‘*the submission of the exercise of the right of self-defense to the condition of necessity and proportionality is a rule of customary international law.*’<sup>74</sup> To define what will be necessary and proportionate will always depend on the circumstances of the case. According to the ICJ, necessity restricts the use of military force to the attainment of legitimate military objectives.<sup>75</sup> Proportionality requires that possible civilian casualties must be weighed in the balance, meaning that if the loss of innocent life or

---

<sup>72</sup> William V. O'Brien, Reprisals, Deterrence and Self-Defense in Counterterror Operations, 30 VA.J.Int'L L. 421 (1990), p.422.

<sup>73</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para.41.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

destruction of civilian property is out-of-proportion to the importance of the objective, the attack must be abandoned.<sup>76</sup>

### **e) Relationship between Article 51 and International Customary Law**

The question remains, if Article 51 of the Charter ousts the traditional sources of law, in particular international customary law, as it is a special treaty rule on self-defense. It can be argued, that, in order not to dilute or eliminate Article 51 through the parallel existence of a wider international customary law regime, Article 51 must be seen as the only provision regulating armed self-defense.

#### **(1) International Customary Law**

First of all, one has to define the term customary international law. As mentioned above, Article 38, 1(b) of the statute of the ICJ stipulates, that the ICJ shall apply '*international custom, as evidence of a general practice accepted as law as a primary source of law.*'<sup>77</sup> This definition of international customary law is the most authoritative, although it is not undisputed, and reflects the widely held view that custom is made up of the two elements, *state practice* and *opinio juris*, the conviction that such practice reflects law:<sup>78</sup>

- *state practice* is an objective criterion, which is based on how states behave in respect to a certain issue. One can say that '*state practice covers any act or*

---

<sup>76</sup> Mary Ellen O'Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002, p.8.

<sup>77</sup> Article 38 1 (b) of the ICJ Statute.

<sup>78</sup> Antonio Cassese, International Law (2001), p.119.

*statement by a state from which views about international customary law can be inferred*'.<sup>79</sup> According to the ICJ in the *North Sea Continental Shelf Cases*<sup>80</sup>, state practice does not have to be completely uniform. This was confirmed in the *Nicaragua Case*.<sup>81</sup> In the *Asylum Case*<sup>82</sup>, the ICJ accepted the possibility of establishing customary rights between a limited number of states. Even only two states can create a local custom, which was confirmed by the ICJ in the *Rights of Passage over Indian Territory Case*<sup>83</sup>. State practice can be derived from official publications, official manuals on legal questions, diplomatic interchanges, opinions of national legal advisors or General Assembly Resolutions and the comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organizations, just to name a few.<sup>84</sup>

- *opinio juris* simply stated is the state's own view on practice in a certain matter, ergo if the state's activity is seen as legally obligatory or permissible for itself. If states have an *opinio juris* on a activity, they will behave in a certain way because they are convinced it is binding upon or permissible for them to do so.<sup>85</sup> Hence *opinio juris* is the subjective criterion, which often is

---

<sup>79</sup> Ibid.

<sup>80</sup> ICJ Reports 1969, p.3.

<sup>81</sup> ICJ Reports 1986, p.14.

<sup>82</sup> ICJ Reports, 1950, p.266.

<sup>83</sup> ICJ Reports, 1960, p.6.

<sup>85</sup> Malcolm N. Shaw, *International Law* (1997), p. 66, 67.

difficult to discover, as the reason underlying a state's adoption or acceptance of a particular practice is often not clear.<sup>86</sup>

## **(2) International Customary Law alongside Article 51?**

When it comes to the relationship between international customary law and Article 51, the key question is, whether Article 51 has become the only legal source of a state's right of self-defense in international law, or whether Article 51 only imposes certain conditions for the application of a pre-existing, inherent right to self-defense, ergo whether international customary law on self-defense can exist alongside Article 51. To answer this question, it is useful to have a look at the drafting history of the Charter and at the wording of Article 51, which states, that '*nothing in the present Charter shall impair the **inherent** right of ... self-defense...*'<sup>87</sup>. Further, the ICJ dealt with the meaning of the word 'inherent' in the *Nicaragua Case*.

As described above, war as an instrument of international policy was outlawed by the Kellogg-Briand- Pact of 1928 and this was repeated in Article 2 (4) of the Charter. However, the right of individual self-defense was regarded as so firmly established in international law that it was automatically excepted from the Kellogg-Briand Pact without any mentioning.<sup>88</sup> When negotiating the Kellogg-Briand Pact, the U.S. stated in a number of identical notes to several other governments inviting them to become parties to the Pact, that:

---

<sup>86</sup> D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> edition (1998), p. 41.

<sup>87</sup> Article 51 of the UN Charter.

<sup>88</sup> Michael Franklin Lohr, *Legal Analysis of US Military Responses to State-Sponsored International Terrorism*, 34 *Naval L. Rev.* 1, 17 (1985).

*‘There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right to self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.’*<sup>89</sup>

This view is further affirmed by the 1948 *Tokyo Judgment*, stating that *‘any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense.’*<sup>90</sup>

In the Dumbarton Oaks Proposals for the Charter, there was no provision on self-defense. Hence one could argue, that the mere existence of Article 51 proves that the drafters of the Charter intended to regulate the requirements for legitimate self-defense, thus ousting the above described traditional view and international customary law on self-defense. This argument can be rejected with the notion, that U.N. Members inserted Article 51 not for the purpose of defining the individual right of self-defense, but for the purpose of clarifying the position in regard to collective understandings for mutual self-defense.<sup>91</sup> This was necessary, because there was great concern that the Charter might affect the Pan-American treaty, also called the *Act of Chapultepec*, signed by all the American republics on March 8, 1945, declaring that aggression against one American State would be considered an act of aggression

---

<sup>89</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. 2001, p.164.

<sup>90</sup> Judgment of the International Military Tribunal for the Far East (Nov.1948), reprinted in R. John Pritchard ed., *101 The Tokyo Major War Crimes Trial* 48494, 1998.

<sup>91</sup> Verbatim Minutes of the Fourth Plenary Session, April 28, U.N.Doc.24 (1945), reprinted in *The United Nations Conference on International Organisation*, San Francisco, California, April 25 to June 26, 1945, Selected Documents 313 (1946).

against all.<sup>92</sup> Hence Article 51 was drafted to clarify this issue in respect of collective self-defense against armed attack.<sup>93</sup> It thus becomes clear, that the drafters of the Charter clearly intended the international customary law right of self-defense to remain unaltered. Moreover, the relevant San Francisco Conference Report that considered Article 2 (4) of the Charter contains the statement that '*the use of arms in legitimate self-defense remains admitted and unimpaired.*'<sup>94</sup> Article 51 therefore leaves unimpaired the right of self-defense as it existed prior to the adoption of the Charter.

Further the wording of Article 51 also supports the position that the Charter preserves the customary international law concept of self-defense. The use of the word 'inherent' in Article 51 emphasizes that the ability to make an exception to the prohibition on the use of force for the purpose of lawful self-defense against an armed attack is a prerogative of every sovereign state.<sup>95</sup> Hence Article 51 was not created to regulate directly every requirement for legitimate self-defense. This can be concluded from the fact, that Article 51 speaks of the 'inherent' right of self-defense and goes on with the vague criterion of 'when an armed attack occurs', without defining those terms. The use of the word inherent creates a link to the existing international customary law on self-defense. This is even strengthened through the use of rather vague requirements for self-defense and through the fact, that Article 51 remains

---

<sup>92</sup> Ibid, at 312.

<sup>93</sup> Ibid.

<sup>94</sup> Report of June 13 of Rapporteur of Committee I/1 to Commission I, U.N. Doc.944 (1945), reprinted in The United Nations Conference on International Organisation, San Francisco, California, April 25 to June 26, 1945, Selected Documents 490, 498.

<sup>95</sup> Michael Franklin Lohr, Legal Analysis of US Military Responses to State-Sponsored International Terrorism, 34 Naval L. Rev. 1, 17 (1985).

silent about the amount of force permitted in the legitimate exercise of self-defense.<sup>96</sup>

Because of this absence of exact definitions and regulations in Article 51 and through the use of the word inherent, which creates a link to international customary law, it still continues to be in existence alongside the treaty law of Article 51.<sup>97</sup>

Again a look to the *Nicaragua Case* is useful, as this judgment, when talking about the word ‘inherent’ in Article 51, affirms the view, that international customary law coexists besides Article 51. The ICJ has clearly established that the right of self-defense exists as an inherent right under customary international law as well as under the Charter. The ICJ stated that:

*‘Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right to self-defense and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content... It cannot, therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question...customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content... But ...even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that*

---

<sup>96</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int’L. Rev. 69, p.97 (2003).

<sup>97</sup> Ibid.

*the interpretation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm.*<sup>98</sup>

According to this interpretation of Article 51, customary law clearly exists alongside treaty law. Both sources of law do not necessarily have an exact overlap and the same content.<sup>99</sup>

## **2. The Right of Anticipatory Self-Defense**

As stated above, there is room for international customary law besides Article 51. The next question is, whether Article 51 itself, or international customary law includes the anticipatory use of armed forces before the actual attack has begun. The right of self-defense in its original meaning affects the case when a State A is under actual attack by State B and therefore takes armed and forceful action against the attacking State B. But does the attacked State have to wait with its armed response until the attack has already occurred, or is there a right to take anticipatory action before the attack has commenced (anticipatory self-defense)?

The term ‘anticipatory’ in the context of international law and *jus ad bellum* has been defined as referring to ‘*the ability to foresee the consequences of some action and take measures aimed at checking or countering those consequences.*’<sup>100</sup> ‘*An anticipatory act is able to visualize future conditions, foresee their consequences, and take*

---

<sup>98</sup> ICJ Reports, 1986, pp.14, 94.

<sup>99</sup> Malcolm N. Shaw, *International Law* (1997), p. 789.

<sup>100</sup> Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 USAFA J. Leg. Stud. 27, 32 (2000).

*remedial measures before the consequences occur.*<sup>101</sup> Anticipatory self-defense therefore is an action taken by State A in self-defense against State B in anticipation of an attack by State B, before State B could commence an armed attack on State A. Anticipatory self-defense has to be distinguished from armed reprisals. Factors for this distinction are the purpose of the action and the timing of the action.<sup>102</sup> Anticipatory self-defense, similar to traditional self-defense, is restorative and protective, whereas armed reprisals are retributive and punitive.<sup>103</sup> As far as timing is concerned, anticipatory self-defense must be immediate and necessary, whereas reprisals are not so temporally limited.<sup>104</sup>

#### **a) Historical Backdrop**

If one takes a look at the history of self-defense in international law, it becomes clear, that there was a scholarly discussion about anticipatory self-defense since the seventeenth century. Again, Hugo Grotius was one of the first jurists to recognize the doctrine of anticipatory self-defense as valid under *jus ad bellum*, the rules of international law that determine when a State (State A) is permitted to use force against another State (State B). In determining the scope of the ‘just cause’ requirement for a war to be permissible, Grotius stated that it was lawful to use force

---

<sup>101</sup> Ibid.

<sup>102</sup> Davis Brown, Use of Force against Terrorism After September 11<sup>th</sup> : State Responsibility, Self-Defense and other Responses, 11 *Cardozo J. Int'l & Comp. L.* 1, 32-37 (2003).

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

to respond to an '*injury not yet inflicted, which menaces either person or property*'.<sup>105</sup>

The danger, however, must be '*immediate and imminent in point of time*'.<sup>106</sup>

In the 18<sup>th</sup> century, Emmerich de Vattel noted that a nation has '*a right to resist an injurious attempt*' and to '*anticipate his machinations*', but warned that in doubtful cases, the state [State A] must exercise care '*not to attack him [State B] upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.*'<sup>107</sup>

The above described *Caroline Case* of 1837 with the resulting *Caroline Doctrine* of 1842 is the most cited legal source not only for 'traditional', but as well for anticipatory self-defense since the 19<sup>th</sup> century. From the above cited correspondence between Mr. Webster and Mr. Fox, one can conclude that there are four, partly overlapping, criteria for legitimate anticipatory self-defense:<sup>108</sup>

- First, there must be an imminent threat, a threat which is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation.'<sup>109</sup>
- Second, the response must be necessary to protect against the threat.<sup>110</sup>

---

<sup>105</sup> Hugo Grotius, *De Jure Belli Ac Pacis* (1625), reprinted in 2 *The Classics of International Law*, p. 172 (James Brown Scott ed., 1925).

<sup>106</sup> *Ibid.*

<sup>107</sup> *The Law of Nations*, Book II, 154, § 50, (1758) (T. & J.W. Johnson & Co., Law Booksellers 1863).

<sup>108</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.*130, 2003.

<sup>109</sup> Extract from Mr. Webster's letter of April 24, 1841, from: D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition, 1998, p.895.

<sup>110</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.*130, 2003.

- Third, the response must be proportionate to the threat; it must be '*limited by that necessity and kept clearly within it*' and cannot be '*unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity.*'<sup>111</sup>
- Fourth, the self-defensive action must be taken as a last resort, after peaceful means have been attempted or it is shown that such an attempt at peaceful means, including '*admonition or remonstrance ... was impracticable*' or '*would have been unavailing*'.<sup>112</sup>

This rather narrow view on anticipatory self-defense in the *Caroline* Doctrine was recognized by leading commentators of the early twentieth century<sup>113</sup> as well as by many pre-1945 treaties and alliances providing for collective security and defense.<sup>114</sup> After World War II, the International Military Tribunal stated in the Nuremberg judgments, that '*preventive action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation.*'<sup>115</sup> The Nuremberg Tribunal thus expressively referred to the *Caroline*, suggesting very high thresholds for anticipatory self-defense through the requirements of imminence, necessity, proportionality and exhaustion or impracticability of peaceful means.

---

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> for example: J.L. Brierly, *The Law of Nations* 157 (1928); Westlake, *International Law* 299 (1904)

<sup>114</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.*130, 2003.

<sup>115</sup> International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 *Am. J. Int'l L.*172, 205 (1947).

As a conclusion to this historical backdrop, one can state that within narrow limits, a right to anticipatory self-defense was recognized in international law. Hence, for example the U.S. would have been legally justified by anticipatory self-defense in attacking the Japanese fleet during World War II while the Japanese were en route to Pearl Harbor. By the time the Japanese fleet was en route, the requirements of the *Caroline* doctrine were fulfilled.<sup>116</sup> On the other hand it could be argued, that while the Japanese fleet was en route, the armed attack already had occurred, thus it could be seen as a case of traditional self-defense.

Nevertheless the question remains, if the right to anticipatory self-defense has changed after the emergence of the Charter and Article 51.

#### **b) Article 51 and Anticipatory Self-Defense**

Article 51 of the Charter is silent about whether ‘self-defense’ includes the anticipatory use of force, in addition to the use of force in response to an attack. Hence, Article 51 preserves a state’s right to act in self-defense, but it does not expressly provide for the doctrine of anticipatory self-defense. Article 51 therefore has been subject to varying interpretations and controversy among scholars. The essence of the controversy surrounds the meaning of the phrase ‘if an armed attack occurs’<sup>117</sup>. The issue is whether the reference to a state’s right to act in self-defense ‘if an armed attack occurs’ requires that the potential victim (State A) actually has to wait for the other side (State B) to strike first before State A can use force against State B. Broadly speaking, the disputants to the question may be grouped into two

---

<sup>116</sup> Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.9.

<sup>117</sup> Article 51 of the U.N, Charter.

camps: the restrictive view on Article 51 (also called the 'restrictionists'<sup>118</sup>, 'strict constructionists'<sup>119</sup> or 'restrictive school'<sup>120</sup>) and the broader view on Article 51 (also called the 'counter-restrictionists/adaptivists'<sup>121</sup>, 'liberal constructionists'<sup>122</sup> or 'expansive theory'<sup>123</sup>).

### **(1) The Restrictive View on Article 51**

According to the restrictive view, Article 51 and, in particular, the use of the words 'if an armed attack occurs', requires that an armed attack must have actually occurred before State A can act in self-defense.<sup>124</sup> Hence Article 51 restricts the pre-existing customary international law right of self-defense, which was described above, and states must wait until they are struck first before they can respond, while the right of that state to react in other, non forceful ways like economic sanctions, peaceful countermeasures or an appeal to the U.N. Security council remains untouched.<sup>125</sup>

---

<sup>118</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.133, 2003.

<sup>119</sup> Amy E. Eckert, Manooher Modifi, Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law, 12 Tul. J. Int'l & Comp. L. 137 (2004).

<sup>120</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, p.84 (2003).

<sup>121</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.133, 2003.

<sup>122</sup> Amy E. Eckert, Manooher Modifi, Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law, 12 Tul. J. Int'l & Comp. L. 137 (2004).

<sup>123</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, p.84 (2003).

<sup>124</sup> Anthony D'Amato, Israel's Air Strike against the Osiraq Reactor: A Retrospective, 10 Temp.Int'l & Comp. L.J. 29, 261 (1996).

<sup>125</sup> Ibid.

## **(2) The Broader View on Article 51**

According to the broader view, Article 51 itself, or at least customary international law alongside Article 51 permits anticipatory self-defense. This can be derived from the fact, that in Article 51 the word ‘inherent’ is used, thus reflecting an intention not to circumscribe the pre-existing customary right of anticipatory self-defense.<sup>126</sup>

## **(3) Discussion: the Broader View is more Convincing**

A discussion of the main arguments of both schools on Article 51, the restrictive and the broader, will show, that the broader view is more convincing:

- The restrictive view on Article 51 is first of all based on a textual argument. Proponents argue, that ‘there is not the slightest indication in Article 51 that the occurrence of an ‘armed attack’ represents only one set of circumstances (among others) in which self-defense may be exercised.’<sup>127</sup> According to this view, anticipatory self-defense, if legitimate under the Charter, ‘would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater.’<sup>128</sup> Further, Article 51 is not only silent about anticipatory self-defense, but even restricts the critical task assigned to the Security Council to the exclusive setting of counter-force employed in response to an armed

---

<sup>126</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.*134, 2003.

<sup>127</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. (2001), p.167.

<sup>128</sup> *Ibid.*

attack.<sup>129</sup> If anticipatory self-defense was justified, ‘it ought to be exposed to no less – if possible even closer – supervision by the Council.’<sup>130</sup>

The broader view, however, replies to this textual argument the notion that Article 51 speaks of the ‘*inherent* right of individual or collective self-defense’. As mentioned above, the drafting history and the wording of Article 51 reflect the intention of the drafters of the Charter to refer to a pre-existing, inherent right of self-defense. Hence the wording ‘if an armed attack occurs’ is no compelling argument for the restrictive view.<sup>131</sup>

Further to read ‘if an armed attack occurs’ as ‘after an armed attack has occurred’ goes beyond the necessary meaning of the words, as an armed attack can begin before the frontiers of a country have been passed and before any damage has been done to the target state (for example the armed attack had without doubt already begun, when the Japanese fleet was on its way to Pearl Harbor, although no damage had yet been done).<sup>132</sup>

Finally, Article 2 (4) of the Charter requires Members to refrain not only from the use of force, but also from the threat of force. If states had to wait for an armed attack to occur, then maintenance of international peace and security could not take place, but states would rather become responsible for the restoration instead of the maintenance of international peace and security.<sup>133</sup>

---

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int’L. Rev. 69, p.85 (2003).

<sup>132</sup> Claud H.M. Waldock, The Regulation of the Use of Force by Individual States in International Law, 1952 II Recueil des Cours 451, 496-497.

<sup>133</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int’L. Rev. 69, p.86 (2003).

- The restrictive view on Article 51 puts forward additional policy reasons against anticipatory self-defense. It is argued, that ‘determining with certainty that an armed attack is imminent is extremely difficult’, any error in judgment could lead to an unwarranted and unnecessary conflict.<sup>134</sup> This is especially confirmed by the fact, that governments will often make aggressive statements without having any intention for an actual attack, as for example could be seen in the case of the Soviet Premier Nikita Khrushchev who said to the U.S. that ‘we shall bury you’, although he did not mean this as an expression of his intention to destroy the U.S., but that socialism will outlast capitalism.<sup>135</sup> Nevertheless, this argument can be countered with the notion that the mere possibility of a misunderstanding can never be enough to limit a right, especially if it is a basic right such as the right of self-defense.

- Further it is argued, that there is a big danger of abuse if one accepts a right of anticipatory self-defense as ‘a jurisprudentially creative nation can use the right of self-defense to justify virtually any aggressive action.’<sup>136</sup> Hence a right of anticipatory self-defense constitutes a danger to international order. This argument can be countered with the argument that the right of anticipatory self-defense is not without limits, but is subject to strict requirements. The international community supervises cases of alleged anticipatory self-defense, as to whether those requirements are fulfilled and the act therefore lawful. Hence the right of self-defense is not arbitrary,

---

<sup>134</sup> Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism*, 138 (1989).

<sup>135</sup> Leo van den Hole, *Anticipatory Self-Defense under International Law*, 19 *Am .U. Int’L. Rev.* 69, p.86 (2003).

<sup>136</sup> Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: the United Nations’ Emerging Role*, 45 *Naval L. Rev.* 217, 223 (1998).

but is governed by rules. Furthermore there are no clear and precise guidelines for self-defense in general either. Moreover, the possibility of abuse is not a sufficient reason to discount the existence of the right.<sup>137</sup>

- One final argument of the restrictive school is that ‘the existence of nuclear missiles has made it even more important to maintain a legal barrier against pre-emptive strikes and anticipatory defense.’<sup>138</sup> This argument is not convincing. Where missile attacks are concerned, a state will only have a very short or even no time for reaction, and the damage will be devastating. To demand that a state wait until a ballistic missile attack has actually begun, although it has unquestionable evidence that such an attack is about to be launched, would not be comprehensible in the face of the devastating damage such an attack can cause. Moreover, a narrow reading of the right of self-defense would only facilitate first strikes by aggressors.<sup>139</sup> Limiting anticipatory self-defense to the time when a rocket is already in flight, does not seem to assure effective self-defense, as there are serious technical problems involve destroying a missile which is already in flight.

As a conclusion to this discussion, one has to say, that the broader view on Article 51 seems to be more convincing. Hence one should see anticipatory self-defense as a part of the traditional right of self-defense, which is not restricted by Article 51. However,

---

<sup>137</sup> Leo van den Hole, *Anticipatory Self-Defense under International Law*, 19 *Am .U. Int’L. Rev.* 69, p.88 (2003).

<sup>138</sup> Report of the Committee on Use of Force in Relations Among States, 1985-86 *Am Branch of the Int’l Law Ass’n* 188, 203.

<sup>139</sup> Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism*, 142 (1989).

the question remains, if customary international law has changed in the post-Charter era and if anticipatory self-defense still is part of the customary rule of self-defense.

#### **(4) The ICJ's View on Article 51 and Anticipatory Self-Defense**

Before examining state practice in the post-Charter era, one has to consider whether the matter has already been decided by the ICJ.

The Court has expressively considered Article 51 twice, once in the *Nicaragua Case*<sup>140</sup> and again in the *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*.<sup>141</sup> In the *Nicaragua Case*, the Court found that the parties had relied only on the traditional right of self-defense in the case of an armed attack that had already allegedly occurred.<sup>142</sup> Hence the issue of the lawfulness of a response to an imminent threat of an armed attack was not raised.

Nevertheless, in a detailed dissenting opinion, Judge Schwebel commented further on the issue stating that the ICJ had not expressed a view on the issue of anticipatory self-defense.<sup>143</sup> He stated that the Judgment, nevertheless, might 'be open to the interpretation of inferring that a state may react in self-defense...only if an armed attack occurs.'<sup>144</sup> Judge Schwebel made further going comments on the issue and stated:

---

<sup>140</sup> 1986 ICJ 14.

<sup>141</sup> 1996 ICJ 226.

<sup>142</sup> 1986 ICJ 14, 194.

<sup>143</sup> *Ibid*, at 347.

<sup>144</sup> *Ibid*.

*'I wish to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if, and only if, an armed attack occurs...' I do not agree that the terms or intent of Article 51 eliminate the right to self-defense under customary international law, or confine its entire scope to the express terms of Article 51.'*<sup>145</sup>

Further the Court interpreted the meaning of the word 'inherent' in Article 51, stating that *'it cannot, therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law.'*<sup>146</sup> Although the Court thus did not express a view on anticipatory self-defense, it did express the view that customary international law co-exists alongside Article 51.

In the *Advisory Opinion on Nuclear Weapons*, the Court again did not expressly consider the question of anticipatory self-defense.<sup>147</sup>

Hence one can conclude, that the ICJ up to now neither accepted nor rejected the doctrine of anticipatory self-defense in the post-Charter era, although the dissenting opinion of Judge Schwebel gives support for the acceptance of this doctrine. As the Court accepted the existence of international customary law alongside Article 51, one has to examine state practice and opinio juris concerning anticipatory self-defense in the post-Charter era to find out, if that right still exists.

---

<sup>145</sup> Ibid.

<sup>146</sup> Ibid, at 94.

<sup>147</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.133, 2003.

### **c) Customary International Law on the Right to Anticipatory Self-Defense: State Practice/ Historical Overview in Post-Charter Times prior to the Bush Doctrine**

As there is no clear position of the ICJ on the issue of anticipatory self-defense, but only the view, that international customary law does exist besides Article 51, whether there is state practice on the right to anticipatory self-defense in post-Charter times will be examined. From this conclusions can be drawn whether anticipatory self-defense can still be regarded as part of international customary law after the coming into force of the Charter. Unless there is opinio juris and state practice to suggest that States since 1945 have clearly rejected the doctrine of anticipatory self-defense, it remains a customary international law right alongside the Charter.

#### **(1) Cuban Missile Crisis of 1962**

“In mid-October 1962, the U.S. intelligence revealed that the Soviet Union had commenced constructing, delivering and installing intermediate-range nuclear missiles and missile sites in and to Cuba. On October 23, 1962, when the Soviet Union did not accept a U.S. request to desist from these activities, President Kennedy ordered a naval ‘quarantine’, which consisted of a naval blockade to inspect all ships going to Cuba, to prevent the transport of missiles and related material to Cuba and to compel the removal of the missiles already installed. The U.S. then brought the matter to the U.N. Security Council claiming that the delivery of such weapons to Cuba by the Soviet Union was a threat to international peace and security. As the world was on the edge of a nuclear war, the parties to the dispute, the U.S. and the Soviet Union found a way to resolve the dispute through bilateral negotiations, so that the Security Council did not pass a resolution. Nevertheless the Security Council discussions on this issue reflect the acceptance of most States that, in some circumstances, the

anticipatory use of force could be justified. These discussions focused on whether the Cuban missiles were offensive or defensive, with support for the U.S. quarantine generally falling along cold war lines.<sup>148</sup>

Although the U.S., in justifying their quarantine did not rely on Article 51, but on Article 52, most commentators refer to this crisis as an example of anticipatory self-defense, probably because the Security Council discussions, did show acceptance of anticipatory self-defense under some circumstances.<sup>149</sup>

## **(2) The 1967 Six-Day War in the Middle East**

“In June 1967 Israeli forces launched attacks on Egypt, Jordan and Syria on the basis that military measures by these three States against Israel were imminent. The anticipatory self-defense arguments with special regard to the imminence-requirement were supported by Israel. Israel pointed to the ejection of the U.N. peacekeeping force, UNEF I, which had been in place between Israel and Egypt since 1956, and the build-up of Egyptian forces along the frontier.”<sup>150</sup> Israel further stated that it had convincing intelligence that Egypt would attack and that Egyptian preparations were underway.<sup>151</sup> These Israeli claims have been questioned by commentators, with some concluding that there was little evidence of an imminent attack, only a ‘*collection of*

---

<sup>148</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.139, 2003.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Mary Ellen O’Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002, p.9.

*circumstantial evidence indicating that an armed attack might have been launched.'*

152

Most but not all States opposed the use of force by Israel in the subsequent Security Council debates, although there was no express condemnation of Israel in the ultimate resolution passed by the Security Council.<sup>153</sup> This resolution only expressed the Security Council's '*continuing concern with the grave situation in the Middle East*', and emphasized '*the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security*'. It called for the withdrawal of Israel armed forces from territories occupied in the recent conflict.<sup>154</sup> This example, however, can only be relied on partly in support of anticipatory self-defense, as Israel also argued that the totality of the actions of Egypt, Jordan and Syria in fact amounted to a prior attack, thus relying on traditional self-defense under Article 51.<sup>155</sup> Moreover in the aftermath of the conflict it became known that Israel acted on less than convincing evidence.<sup>156</sup> Hence the 1967 Arab-Israeli war does not provide an actual example of lawful anticipatory self-defense.<sup>157</sup>

---

<sup>152</sup> Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict*, 94 (2002).

<sup>153</sup> S.C.Res. 242, U.N. SCOR (1967). See *Reportoire of the Practice of the Security Council, 1966 – 1968* at 134-46 (1971).

<sup>154</sup> *Ibid.*

<sup>155</sup> Michael Byres, *Terrorism, The Use of Force in International Law after 11 September*, 51 *Int'l & Comp. L. Q.* 401, 410 (2002).

<sup>156</sup> John Quigley, *The United Nations Action Against Iraq: A Precedent for Israel's Arab Territories?*, 2 *Duke J.Comp. & INT'L L.* 195, 203-13 (1992); Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.9.

<sup>157</sup> *Ibid.*

### **(3) The 1981 Bombing by Israel of the Osirik Reactor in Iraq**

“On June 7, 1981, Israel bombed the Osirik nuclear reactor in Baghdad, and sought to justify this action on the basis that Iraq intended to use the reactor, which was not yet operational, to produce nuclear weapons that could ultimately be used to threaten the existence of Israel.”<sup>158</sup> Hence it was claimed, that the attack was justified under the right of anticipatory self-defense. Again the Security Council debate on this issue shows whether there was acceptance of the Israeli claim. The only State which implicitly indicated that it shared the Israeli view was the U.S.<sup>159</sup> In addition, although the U.S. voted for the Security Council resolution condemning Israel<sup>160</sup>, it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel’s failure to exhaust peaceful means for the resolution of the dispute which is an essential element of anticipatory self-defense according to the *Caroline Doctrine*.<sup>161</sup> All other members of the Security Council expressed their disagreement with the Israeli view, by unreservedly voting in favor of operative paragraph 1 of the resolution, whereby *[the Security Council] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct*.<sup>162</sup> Egypt and Mexico expressly refuted the doctrine of anticipatory self-defense.<sup>163</sup> From the statements of those States it can be concluded, that they were deeply concerned that an interpretation of self-defense which would allow

---

<sup>158</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.139, 2003.

<sup>159</sup> Cassese, International Law, (Oxford 2001), 310.

<sup>160</sup> S.C.Res. 487/ 1991.

<sup>161</sup> Cassese, International Law, (Oxford 2001), 310.

<sup>162</sup> S.C.Res. 487/ 1991.

<sup>163</sup> Cassese, International Law, (Oxford 2001), 310.

anticipatory action under certain circumstances might open the door to abuse. In contrast, the United Kingdom, while condemning ‘*without equivocation*’ the Israeli attack as ‘*a grave breach of international law*’, noted that the attack was neither an act of self-defense, nor could it be justified as a forcible measure of self-protection.<sup>164</sup> Besides the United Kingdom, Uganda, Sierra Leone, Malaysia and Niger also argued that the anticipatory use of force could be permissible under the Charter provided that it could be demonstrated that there was an imminent threat and that other means of addressing this threat had been exhausted, but that Israel had not met those criteria since there was no instant and overwhelming necessity of self-defense.<sup>165</sup> Hence it becomes clear, that most States involved in the Security Council debate seemed to accept the existence of anticipatory self-defense in international law in general, even if they disagreed on the scope of the doctrine and its application in this particular case.<sup>166</sup>

#### **(4) U.S. and Terrorism: Libya, 1986**

“On April 14, 1986, President Reagan of the U.S. ordered an air strike on five Libyan military targets allegedly used as bases for planning terrorist attacks on U.S. citizens abroad. The U.S. justified the strikes as traditional self-defense consistent with Article 51 in response to armed attacks, the December 1985 bombings at airports in Rome and Vienna that killed 19 people and injured 112 and the April 5, 1986 bombing of a West Berlin nightclub, known to be visited by U.S. citizens that killed 2 and injured

---

<sup>164</sup> Ibid.

<sup>165</sup> Stanimir A. Alexandrow, *Self-Defense Against the Use of Force in International Law*, (1996), 160-161.

<sup>166</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.*139, 2003.

230 people. The U.S. further justified the bombings in Libya with anticipatory self-defense, as the attacks were launched to prevent future terrorist attacks.”<sup>167</sup> For example, the U.S. Ambassador Vernon Walters declared in his statement to the Security Council on the day after the air strikes, that the U.S. action was ‘*designed to disrupt Libya’s ability to carry out terrorist acts and to deter future terrorist attacks by Libya.*’<sup>168</sup>

The U.S. actions against Libya did not remain uncontested by the international community, although the criticism was mainly not based on the assertion, that a right to anticipatory self-defense does not exist per se, but that the requirements for anticipatory self-defense were not fulfilled, namely necessity and proportionality, whether peaceful means had been exhausted and whether an imminent attack was aimed at the U.S.<sup>169</sup> The U.S., France, and the United Kingdom vetoed a resolution condemning the U.S. action. However, the General Assembly adopted a resolution censuring the U.S. by seventy-nine votes, with twenty-eight against and thirty-three abstentions.<sup>170</sup> This resolution stated that the General Assembly was ‘*gravely concerned at the aerial and naval military attack perpetrated against the cities of Tripoli and Benghazi on 15 April 1986, which constitutes a serious threat to peace and security in the Mediterranean region*’ and condemned the attack on Libya as ‘*a violation of the Charter of the United Nations and of international law.*’<sup>171</sup>

---

<sup>167</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.140, 2003.

<sup>168</sup> U.N. SCOR, 41<sup>st</sup> Sess., 2674 mtg., at 16, U.N. Doc. S/PV.2574 (1986); quotation taken from: Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.139, 2003.

<sup>169</sup> Stanimir A. Alexandrow, Self-Defense Against the Use of Force in International Law,(1996), 185-186.

<sup>170</sup> G.A. Res. 41/38, 41st Sess., 78<sup>th</sup> plen. Mtg. (1986).

<sup>171</sup> Ibid.

This resolution nevertheless does not seem to deny the right of anticipatory self-defense, because, as stated above, the requirements of that right were deemed not be satisfied anyway. This case can, on the contrary, support acceptance for anticipatory self-defense per se.

### **(5) U.S. and Terrorism: Iraq, 1993**

“On June 26, 1993, the U.S. fired twenty-three tomahawk missiles on Iraqi intelligence forces in response to a thwarted Iraqi plot to assassinate former President George Bush, Sr. during his visit to Kuwait in April, 1993. The U.S. justified its action on the basis of Article 51, but again also relied partially on anticipatory self-defense by asserting that the action ‘*was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism, and deter further acts of aggression against the U.S.*’<sup>172</sup> The matter again was put on the Security Council agenda for debate.”<sup>173</sup> Again there was criticism by the international community, mainly based on the grounds that the requirements for anticipatory self-defense were not satisfied, since there was no imminent attack or necessity and no attempt was made to resolve the matter peacefully.<sup>174</sup> Nevertheless no resolution was passed in this case. Moreover France, Germany, Russia, Canada and the U.K. all made statements to the effect that they ‘understood’ the U.S. action. Hence there is no indication resulting in this case that anticipatory self-defense is not accepted per se.

---

<sup>172</sup> Stanimir A. Alexandrow, *Self-Defense Against the Use of Force in International Law*, (1996), 186-187, quoting the U.S. representative to the Security Council.

<sup>173</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.* 142, 2003.

<sup>174</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.* 142, 2003.

## **(6) U.S. and Terrorism: Sudan and Afghanistan, 1998**

“On August 7, 1998, car bombs exploded outside the American embassies in Nairobi, Kenya and Dar es Salam, Tanzania, killing over 300 people and injuring more than 4500 others. Two weeks later, the U.S. fired seventy-nine tomahawk missiles on the alleged terrorist outposts of Osama bin Laden in Sudan and Afghanistan.”<sup>175</sup> The U.S. justification for these attacks was traditional self-defense under Article 51 and, again, partial reliance on the doctrine of anticipatory self-defense. President Clinton’s letter to congressional leaders justifying the U.S. action stated, that the strikes ‘*were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.*’<sup>176</sup> In this case the Security Council did not meet to debate the issue. International reactions to the incident were mainly supportive, although Russia, Pakistan and some Arab countries as well as China condemned the U.S. actions, again for the reason that the *Caroline* requirements were not fulfilled.<sup>177</sup>

## **(7) Other Examples**

Other examples of at least partial resort to anticipatory self-defense for justifying the use of force include the 1950 Pakistani invasion of Kashmir, the 1956 attack by Israel on Egypt, the 1980 Iran/Iraq war, the 1983 Swedish response to foreign submarines in

---

<sup>175</sup> Ibid at 143.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

Swedish waters and the 1999 NATO bombing operation in the Federal Republic of Yugoslavia (although NATO actually relied more on a humanitarian motive, there was an anticipatory aspect to prevent further humanitarian catastrophes).

### **(8) U.N. Authorities**

Besides the cases mentioned it is useful to examine consideration of anticipatory self-defense by organs of the U.N.

The views of the most authoritative organ of the U.N. interpreting international law, the ICJ, was already examined above. Besides the ICJ, the Atomic Energy Commission (AEC) has made, at least implicit, statements about anticipatory self-defense. In its First Report in December 1946 the AEC suggested that preparation for atomic warfare in breach of a multilateral treaty or convention would, in view of the appalling power of the weapon, have to be treated as an 'armed attack' within Article 51.<sup>178</sup> The AEC made the following recommendations to the Security Council about the control of nuclear energy and nuclear weapons: *'The development and use of atomic energy are not essentially matters of domestic concern of the individual nations, but rather have predominantly international implications and repercussions.'*<sup>179</sup> An *'effective system for the control of atomic energy must be international, and must be established by an enforceable multilateral treaty or convention which in turn must be administered and operated by an international organ or agency within the United Nations.'*<sup>180</sup> In case of a violation of this

---

<sup>178</sup> Claud H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 1952 II *Recueil des Cours* 451, 498.

<sup>179</sup> *The International Control of Atomic Energy: The First Report of the United Nations Atomic Energy Commission to the Security Council* 19 (U.S. & U.N. Report Series No.8, 1946).

<sup>180</sup> *Ibid.*

multilateral treaty or convention, the AEC stated that *'it should ... be borne in mind that a violation might be so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 ....'*<sup>181</sup> This statement reflects the AEC view that a right to anticipatory self-defense is recognized.

Further the representative of the U.S. submitted a memorandum to the AEC at the request of the Chairman of the AEC, stating:

*'[an armed attack under Article 51] is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define armed attack in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.'*<sup>182</sup>

#### **d) Conclusion: Anticipatory Self-Defense coexists alongside Article 51 in International Customary Law**

The examples above show, that some States, mainly the U.S. and Israel relied on and recognized and thus upheld, the doctrine of anticipatory self-defense. Other States seemed to accept the doctrine in theory, but rejected its application in particular cases, because its requirements were not deemed to be satisfied. Finally some States, especially Egypt and Mexico, rejected the doctrine entirely. Hence it becomes clear, that there was no universal agreement on the doctrine. The issue remained contested both by scholars and by states. Nevertheless the vast majority of States seemed to

---

<sup>181</sup> Ibid at 22.

<sup>182</sup> The First Report of the Atomic Energy Commission to the Security Council, U.N. SCOR, 2d Sess., Special Supp., Annex 4, at 109-10, U.N. Doc. 5/Supplements (1946).

accept the doctrine, at least in theory. The Security Council only passed a resolution of express condemnation in the case of the 1981 Israeli attack on the Osirik reactor. Further the General Assembly only passed a like resolution in the case of the 1986 U.S. strikes against Libya.

It is an interesting point though, that neither the Security Council nor the General Assembly expressly rejected the doctrine of anticipatory self-defense, but held that its requirements were not satisfied. This behavior can be interpreted as a tacit acceptance of the doctrine. Hence there is no such unambiguous and unequivocal *opinio juris* and state practice that one could assert that the international community clearly tried to abolish the customary law rule.<sup>183</sup> As a result, although contested by some scholars and few states, the doctrine of anticipatory self-defense seems to continue to exist in customary international law alongside Article 51.<sup>184</sup>

This view further is consistent with other non-Charter mandated, yet commonly claimed and/or generally accepted, justifications for the use of force, like interventions to protect nationals, intervention to rescue hostages believed to face imminent death or injury or the right of a people to assert self-determination.<sup>185</sup>

Further it is consistent with the ICJ's view in the *Nicaragua Case*, where, after stating that customary international law continues to exist alongside treaty law,<sup>186</sup> and that the two sets of rules did not have the same content in the context of self-defense, the Court continued, 'this could also be demonstrated for other subjects, in particular the

---

<sup>183</sup> Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict*, 91-94 (2002).

<sup>184</sup> Rabinder Singh QC, Alison Macdonald: *Legality of use of force against Iraq*, Opinion, Public Interest Lawyers on Behalf of Peacerights, Matrix Chambers, Gray's Inn, London WC1R 5LN, 2002, p.11.

<sup>185</sup> *Ibid*; Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 *UMKC L.Rev.*156, 2003.

<sup>186</sup> See above III. 1. e) (2).

principle of non-intervention.<sup>187</sup> Hence anticipatory self-defense remains unrestricted by Article 51 and exists alongside this provision, although it is subject to strict requirements which are hard to satisfy.<sup>188</sup>

#### **e) Legal Requirements for Anticipatory Self-Defense in Post-Charter Times**

When it comes to the legal requirements of anticipatory self-defense in post-Charter times, first of all reference is made to the above described *Caroline* Doctrine of 1841.<sup>189</sup> The preconditions set in the *Caroline* have been extended to the right of self-defense in general. This is quite logical, as the right of anticipatory self-defense is only a form of the more general customary right of self-defense, and the conditions for the application of both rights have to be more or less the same.<sup>190</sup> Hence the essential preconditions of self-defense in general are *imminence*, *necessity*, *proportionality* and *the exhaustion or impracticability of peaceful means*,<sup>191</sup> which were also confirmed by ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case*. Some scholars also want to add two further requirements in post-Charter times:<sup>192</sup> first, an action of anticipatory self-defense should only be justified *if the Security Council has not yet been able to take*

---

<sup>187</sup> 1986 I.C.J. 14, at 176.

<sup>188</sup> Malcolm N. Shaw, *International Law*, (1997), p. 790.

<sup>189</sup> Leo van den Hole, *Anticipatory Self-Defense under International Law*, 19 *Am .U. Int'L. Rev.* 69, 95 (2003).

<sup>190</sup> *Ibid.*

<sup>191</sup> see above, III.2.a).

<sup>192</sup> Leo van den Hole, *Anticipatory Self-Defense under International Law*, 19 *Am .U. Int'L. Rev.* 69, 95 (2003).

*affirmative action*, and second, the state against which the right of anticipatory self-defense is being exercised should act *in breach of international law*.

### **(1) Imminence and Necessity**

*Imminence* and *Necessity* in this respect mean, in accordance with the *Caroline*,<sup>193</sup> that the threat must be imminent, a threat which is ‘*instant, overwhelming, leaving no choice of means, and no moment for deliberation.*’ *Necessity* further means that the state threatened must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.<sup>194</sup> There must be clear and present danger of an imminent attack, and not mere general preparations by the enemy.<sup>195</sup> The elements of imminence and necessity are overlapping, and are the largest obstacle to any successful reliance on anticipatory self-defense. The mere fact that a State is a threatening presence, a powerful military force or a potential danger to another State is not sufficient; the threat of an attack must be demonstrably imminent and the use of force to respond must be necessary.<sup>196</sup> For example the mere possession of missiles or the building up of a large army per se are not sufficient; in addition there must be a declared or incontrovertibly implicit hostile intent.<sup>197</sup> On the other hand the existence of a hostile intent alone is also not sufficient. This can be

---

<sup>193</sup> See above, III. 1. a).

<sup>194</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, 3<sup>rd</sup> ed. 2001, p.208.

<sup>195</sup> Leo van den Hole, *Anticipatory Self-Defense under International Law*, 19 *Am .U. Int’L. Rev.* 69, 95 (2003).

<sup>196</sup> Stanimir A. Alexandrow, *Self-Defense Against the Use of Force in International Law*,(1996),162; Lucy Martinez, *September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 *UMKC L.Rev.*170, 2003.

<sup>197</sup> Lucy Martinez, *September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 *UMKC L.Rev.*170, 2003.

evidenced by the numerous statements of the Soviet Union and the U.S. during the Cold War, where it was postulated that 'many government leaders... make aggressive statements without harboring an actual plan to attack.'<sup>198</sup> Hence there must be both, the hostile intent and a mobilization of forces.

Furthermore imminence and necessity have a temporal requirement in traditional self-defense, meaning that an armed attack by another State must be met immediately with counter-force, and any delay would mean that the attacked State would then be unlawfully using force itself in form of reprisal.<sup>199</sup> Although this time element is more complicated in anticipatory self-defense, as there is not yet an armed attack, nevertheless there must be a temporal limitation: If there would for example have been enough time to consult the Security Council, the exercise of anticipatory self-defense was not justified, because of a lack of imminence.<sup>200</sup> Hence the further requirement demanded by some scholars that anticipatory self-defense should only be legitimate if *the Security Council has not yet been able to take affirmative action*<sup>201</sup>, overlap the imminence requirement and can therefore be neglected.

As an example of what is sufficient to establish imminence and necessity one can refer to Iraq's use of force against Israel during the first Gulf War in 1991. In January 1991, Iraq launched SCUD missiles against Israel, which was not a party to the conflict between the U.S.-led forces and Iraq. Israel tried to shoot down the SCUDs using U.S. supplied Patriot missiles. These attempted interceptions took place over

---

<sup>198</sup> John Quigley, A Weak Defense of Anticipatory Self-Defense, 10 Temp.Int'l & Comp. L.J. 255, 257 (1996).

<sup>199</sup> Hilaire McCoubrey & Nigel D. White, International Law and Armed Conflict, 96 (2002).

<sup>200</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.172, 2003.

<sup>201</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, 95 (2003).

Israeli territory, but Israel could have relied on anticipatory self-defense to shoot them down before they crossed the Israeli frontier; ‘*Indeed, given that the missiles passed over a third state's territory on the way to Israel, one could argue that Israel had the right, although it might not have had the technical ability, to knock the missiles out as they were being launched in Iraq.*’<sup>202</sup> Israel would also have been justified in taking out the missiles before they were launched, provided that there was credible, cogent and convincing evidence to show that they were being launched against Israel.

An example where an attack was not deemed to satisfy the requirements of imminence and necessity was the above described 1981 Israeli attack on the Iraqi Osirik reactor.

## **(2) Proportionality**

Proportionality is another requirement for anticipatory self-defense deriving from the *Caroline*. Hence, the action must not be ‘unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.’<sup>203</sup> In modern practice, the impact on civilian noncombatants and the strategic nature of targets are two factors customarily used to evaluate proportionality.<sup>204</sup> Some scholars find that proportionality under Article 51 refers to the targets, means, and methods of the acting state.<sup>205</sup> Acts done in self-defense must not exceed in manner or aim the necessity provoking them; acts in self-defense thus

---

<sup>202</sup> Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict*, 91 (2002).

<sup>203</sup> Extracts from Mr Webster’s letter of April 24, 1841 are to be found in D.J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition, 1998, p. 895.

<sup>204</sup> Amy E. Eckert, Manooher Modifi, *Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 *Tul. J. Int’l & Comp. L.* 136 (2004).

<sup>205</sup> *Ibid.*

cannot be used to capture and keep enemy territory, although such territory can be occupied for a short period while hostilities are finally brought to an end, but should be relinquished as soon as possible after that.<sup>206</sup> Targets that are selected based on their capacity to undermine the military strength of the aggressive state typically are acceptable, although civilian casualties may invalidate the claim of proportionality.<sup>207</sup> On the other hand, a state can use weapons of mass destruction, even when disproportionate to the aggressor's arsenal, if the aggressor menaces the very survival of the threatened state, as it is stated in the ICJ's *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* of 1996<sup>208</sup>. There the ICJ did not reject the possibility of resort to nuclear weapons '*in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.*'<sup>209</sup> Another formulation construes proportionality as requiring the response to be proportional to the armed attack and timed to respond immediately or to anticipate an immediate threat.<sup>210</sup> Of course in the context of anticipatory self-defense the issue of proportionality becomes more complicated, because there is no actual attack, but only an imminent threat which is to be answered. Hence proportionality requires a balance between the potential for damage the threat imposes and the imminence of the action.<sup>211</sup> The probability and size of the anticipated attacks must also be considered. In the context of terrorism it is even more complicated, as the target of the use of force in self-

---

<sup>206</sup> Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict*, 98 (2002).

<sup>207</sup> *Ibid.*

<sup>208</sup> 1996 I.C.J. 244.

<sup>209</sup> *Ibid.*, para. 105(2)E.

<sup>210</sup> Maureen F. Brennan, Comment, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 *La.L. Rev.* 1195, 1202 (1999).

<sup>211</sup> Lucy Martinez, September 11<sup>th</sup>, *Iraq and the Doctrine of Anticipatory Self-Defense*, 72 *UMKC L.Rev.* 172, 2003.

defense is only the terrorist group and the use of force must be proportionate to the terrorist acts which it anticipates.

As a conclusion it can be stated, that proportionality prohibits the use of force in self-defense from disproportionately exceeding the manner or the aim of the necessity that originally provoked the use of force.<sup>212</sup>

### **(3) Exhaustion or Impracticability of Peaceful Means**

This requirement again derives directly from the *Caroline*. There it was postulated, that the self-defense action must be taken as a last resort, after peaceful means have been attempted or it is shown that such an attempt 'was impracticable' or 'would have been unavailing'.<sup>213</sup> Further this requirement is consistent with Article 2 (3) of the Charter which stipulates that 'all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.'<sup>214</sup> In addition to that Article 33 of the Charter states that in the settlement of any dispute that may threaten international peace and security, an attempt must first be made to resolve the dispute by peaceful means. This requirement obliges a state to exhaust the full range of dispute settlement processes including negotiations, investigations, enquiries, diplomacy, mediation, arbitration, consultations, conciliation, possible ICJ action, resort to regional agencies or

---

<sup>212</sup> Amy E. Eckert, Manooher Modifi, Doctrine or Doctrinaire – The First Strike Doctrine and Preemptive Self-Defense under International Law, 12 Tul. J. Int'l & Comp. L. 136 (2004).

<sup>213</sup> Extracts from Mr Webster's letter of April 24, 1841 are to be found in D.J. Harris, Cases and Materials on International Law, 5<sup>th</sup> Edition, 1998, p. 895.

<sup>214</sup> Article 2 (3) of the U.N. Charter.

arrangements and trade and economic sanctions.<sup>215</sup> The state must first of all try to consult the Security Council for an authorization of the use of force.

Impracticability will be present when there is no time for the above measures thus reinforcing the imminence and necessity requirements, or when the Security Council's vote is vetoed or likely to be vetoed.

#### **(4) No Affirmative Action by the Security Council and Breach of International Law**

As stated above, the further requirement of failure by the Security Council to act can be neglected, affirmative action by the Security Council can be neglected, as it overlaps with, and is included in, the imminence requirement.

Some scholars further require that the aggressor state be acting in breach of international law to justify anticipatory self-defense by the defending state.<sup>216</sup> This criterion seems to be obvious, as self-defense against a lawful attack never seems to be legitimate.

Hence the two proposed new criteria for anticipatory self-defense do not seem to be necessary, as they are already included in the traditional requirements.

---

<sup>215</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.172, 2003.

<sup>216</sup> Leo van den Hole, Anticipatory Self-Defense under International Law, 19 Am .U. Int'L. Rev. 69, 95 (2003).

## **IV. Anticipatory Self-Defense and the Bush Doctrine - Emergence of a new Rule?**

### **1. September 11, 2001: a New Dimension of Terrorism**

On September 11, 2001, nineteen persons of non- U.S. nationality boarded four U.S. commercial passenger jets in Boston, Washington D.C., and Newark and, once airborne, allegedly hijacked the aircraft and crashed them into the Twin Towers of the World Trade Center in New York City, the Pentagon in Washington D.C., and the Pennsylvania countryside, thus killing thousands of civilians and destroying the World Trade Center entirely. Thereafter, the U.S. confirmed information that connected certain evidence that connected these people to a terrorist group based in Afghanistan (Al Qaeda) headed by a Saudi expatriate (Osama Bin Laden). Through these terrible terrorist attacks it became clear, that modern threats to states differ significantly from those faced during the Cold War. The Cold War logic of containment assumed that hostile regimes could be left to reform on their own initiative, as ultimately borne out by the former Soviet Union. Deterrence depended on a rational adversary, with weapons of mass destruction perceived by both sides as weapons of last resort.<sup>217</sup> The 9/11 attacks, by contrast, demonstrated the immediacy of the threats posed by terrorists and their supporters, and the willingness and capability of terrorists to wage previously unthinkable attacks. As President George W. Bush of the U.S. told the graduating class of 2002 at West Point:

*‘Enemies in the past needed great armies and great industrial capabilities to endanger the American people and our nation. The attacks of September 11 required*

---

<sup>217</sup> U.S. National Security Council, The National Security Strategy of the United States, p. 5 (2002).

*a few hundred thousand dollars in the hands of a few dozen evil and deluded men. All of the chaos and suffering they caused came at much less than the cost of a single tank.*<sup>218</sup>

In the face of this new dimension of aggression, it is unclear, whether the traditional concept of deterrence can be an effective option against terrorists or states supporting terrorists.

## **2. Reactions to 9/11: Operation Enduring Freedom in Afghanistan**

### **a) Facts**

The Al Qaeda attacks of September 11, 2001, had far reaching consequences on U.S. and international politics. After the attacks, the U.S. demanded that the Taliban government of Afghanistan turn over the leaders of Al Qaeda to the U.S., close all terrorist training camps in Afghanistan, and provide the U.S. with full access to the camps to confirm their disclosure. The Taliban rejected this. On October 2, 2001, the U.S. informed the Security Council that it was exercising its '*inherent right of individual and collective self-defense by actions against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan*', in a letter by the U.S. representative to the U.N. to the President of the Security Council.<sup>219</sup> The U.S., together with the U.K, on the same day started launching missile and bomber attacks on Afghanistan. This was the beginning of what has since been called

---

<sup>218</sup> President George W. Bush, West Point Graduation Speech (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

<sup>219</sup> Lucy Martinez, September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defense, 72 UMKC L.Rev.146, 2003.

Operation Enduring Freedom. Hence, the U.S. together with the U.K. justified Operation Enduring Freedom as an exercise of individual and collective self-defense in compliance with Article 51. The Allies have argued, that the September 11 attacks were part of a series of attacks on the U.S. which began in 1993, and that more attacks in the same series were planned.<sup>220</sup> The U.S. produced evidence tying bin Laden to the 1993 attack on the World Trade Center, the 1998 embassy bombings in Nairobi, the attack on the USS Cole in Yemen in 2000, and the attacks of September 11, 2001.<sup>221</sup> As the evidence provided by the allies was convincing, the Security Council passed two resolutions<sup>222</sup> in which it referred to the right to resort to self-defense in the face of the September 11 attacks, stating that the Security Council ‘*unequivocally condemned, in the strongest terms, the horrifying terrorist attacks ... on 11 September*’ and expressly recognized the ‘*inherent right of individual or collective self-defense in accordance with the Charter.*’<sup>223</sup> NATO’s nineteen members, too, found the attacks triggered the NATO’s provisions on collective self-defense. Hence the terrorist attacks have been qualified as ‘armed attacks’ against the U.S., justifying the exercise of self-defense.

#### **b) Legal Aspects: Terrorist Attacks as Armed Attacks**

The legal justification for Operation Enduring Freedom was traditional self-defense under Article 51 of the Charter. Hence it was not a question of anticipatory self-

---

<sup>220</sup> Mary Ellen O’Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002, p.10.

<sup>221</sup> John Kelly, The Man Behind the Terror, Wash. Post, Sept 27, 2001, at C 12.

<sup>222</sup> U.N. S.C. Res. 1368 (2001); U.N. S.C. Res. 1373 (2001).

<sup>223</sup> S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001).

defense, although the Security Council action after September 11 can be cited to support anticipatory self-defense in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned though not yet underway.<sup>224</sup> Further the legal justification for Operation Enduring Freedom seems to be interesting, as it was international terrorists, thus independent private actors, and not the State of Afghanistan that attacked the U.S. The term ‘armed attack’ was traditionally applied to states, but nothing in the Charter indicates that ‘armed attacks’ can only emanate from states. Further the international reactions to the September 11 attacks show almost unanimous official recognition in state practice that acts of terrorism carried out by private actors fit within the parameters of Article 51.<sup>225</sup> The Security Council, by passing Resolution 1368, affirmed the view that the September 11 terrorist attacks were triggering a right of self-defense under Article 51. Hence justification was given for an attack on Afghanistan, although Afghanistan itself did not attack the U.S., but was harboring al Qaeda activists. The support through harboring terrorists and the alleged close links between the Taliban and al Qaeda thus were deemed to be sufficient for an attack which is justified under Article 51. This justification appears to be doubtful if one examines the preexisting international law on the topic.

International law does recognize that states may have some affirmative duties regarding the conduct of non-state actors within their territory. However, in the *Nicaragua Case*, the ICJ rejected the U.S. claim that Nicaragua's state support of the rebels justified the use of force in self-defense by the U.S. against Nicaragua. The

---

<sup>224</sup> Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.11.

<sup>225</sup> Carsten Stahn, *International Law under Fire: Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51 of the U.N. Charter and International Terrorism*, 27 FALL Fletcher F. World Aff. 33 (2003).

Court noted that *‘assistance to rebels in the form of the provision of weapons or logistical or other support’*<sup>226</sup> could not be regarded as an armed attack under Article 51. Therefore, under the *Nicaragua Case*, the acts committed by a terrorist organization may not be imputed to a state unless that state gives specific instructions or directions to the attackers.<sup>227</sup> In the *Tadic Case*,<sup>228</sup> the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) offered an alternative to the ‘specific instructions’ test, known as the ‘overall control’ test:

*‘By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions whether or not such actions were contrary to international humanitarian law.’*<sup>229</sup> In *Tadic*, the Court found that the nexus between the Federal Republic of Yugoslavia (FRY) and the Bosnian Serb forces was sufficiently close to render the FRY responsible for all acts committed by the Bosnian Serbs, as it involved *"overall control going beyond the mere financing and equipping of such forces and involving ... participation in the planning and supervision of military operations."*<sup>230</sup> Nevertheless, whether the ‘overall control’ or the ‘specific directions’ test applies, toleration of or acquiescence in terrorist activities will not be sufficient to render the foreign state responsible for the terror acts of that organization. By harboring terrorists, a state does not commit an armed attack and thus cannot become the legitimate target of force used in self-

---

<sup>226</sup> 1986 ICJ 14, at para 195.

<sup>227</sup> Michael J. Glennon, *Military Action Against Terrorists under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y, 539 (2002).

<sup>228</sup> *Prosecutor v. Tadic*, 38 I.L.M. 1518, 1546, para. 145 (Int’l. Crim. Trib. for the Former Yugoslavia - Appeals Chamber 1999).

<sup>229</sup> *Ibid*, at 1546, para. 145.

<sup>230</sup> *Ibid*.

defense.<sup>231</sup> Similarly, in cases where no evidence linking terrorist acts to any sponsoring state can be found, the victim state will be barred from using force in self-defense against the alleged sponsoring state.<sup>232</sup>

Hence, in response to the September 11 attacks, the only legal option for the United States would have been to wait for Afghanistan to turn the attackers over for trial.<sup>233</sup>

This approach finds precedent in the 1988 bombing of the PanAm flight. After this incident, the United States did not respond through military force but instead demanded the extradition of the suspected terrorists.<sup>234</sup> Similarly, the 1993 bombings of the World Trade Center were treated by the United States as a law enforcement matter rather than as an armed attack requiring military action.<sup>235</sup> Moreover, the Nicaragua decision limits the right of self-defense to an armed attack of '*significant scale*.'<sup>236</sup> Under such standard, a low-intensity attack might not reach the high threshold of an armed attack, even though the cumulative effects of repeated terrorist attacks could amount directly to an attack of significant scale.

The almost unanimous official reactions of states to the September 11 attacks applying Article 51 to this situation, as well as resolution 1368 seems to have initiated a change in international law in respect of states harboring terrorists. For example, the German Chancellor Gerhard Schroeder stated in his official speech of September 19, 2001 that the Security Council with resolution 1368 has '*undertaken a further*

---

<sup>231</sup> Mary Ellen O'Connell, Lawful Self-Defense to Terrorism, 63 U. PITT. L. REV. 889, 902 (2002).

<sup>232</sup> Ibid, at 900.

<sup>233</sup> Steven R. Ratner, Terrorism and the Laws of War: September 11 and its Aftermath, Crimes of War Project: Expert Analysis (Sept. 2001) (arguing that the September 11 attacks may be analyzed as criminal acts under domestic and international criminal law), available at <http://www.crimesofwar.org/expert/attack-ratner.html>

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> 1986 ICJ 14, at para 195.

*development of previous public international law.*<sup>237</sup> Moreover, Chancellor Schroeder stated: ‘*With this resolution – that is the important news – the international law requirements for massive, also military actions against terrorism have been established.*’<sup>238</sup> It remains doubtful and contested, whether the opinion expressed in this statement of Chancellor Schroeder is true,<sup>239</sup> but it seems there is strong indication that international law is about to or even has already changed in respect of states harboring terrorists and the right to self-defense. Nevertheless this question will remain unanswered in this paper, as it is not a question about anticipatory self-defense per se.

### **3. The Bush Doctrine of Preemptive Self-Defense**

Operation Enduring Freedom was not the last answer to the September 11, 2001 attacks. U.S. President George W. Bush has emphasized that the war on terror will not stop with Afghanistan, but will extend to any state that supports terrorism.

The U.S. Government therefore created a new security strategy in September 2002, the National Security Strategy of the U.S., which outlines the U.S. government’s view on possible reactions to international terrorism.<sup>240</sup> The main tenets of this Strategy

---

<sup>237</sup> original text: Der Sicherheitsrat habe durch Resolution 1368 ‘*eine Weiterentwicklung des bisherigen Völkerrechts vorgenommen*’, Verhandlungen des Deutschen Bundestages 14/187 vom 19. 9. 2001, S. 18302A

<sup>238</sup> Ibid. original text: „Mit dieser Resolution - das ist das entscheidend Neue - sind die völkerrechtlichen Voraussetzungen für ein entschiedenes, auch militärisches Vorgehen gegen den Terrorismus geschaffen worden.“

<sup>239</sup> For example Gregor Schirmer, in Frieden, Völkerrecht und die UN Charter, AG Friedensforschung an der Universität Kassel, 2004, contests that international law has been changed through resolution 1368 and the international reactions to September 11.

<sup>240</sup> U.S. National Security Council, The National Security Strategy of the United States (2002).

include a new view on anticipatory self-defense, a doctrine which since then has become known as the *Bush Doctrine of Preemptive Self-Defense*.

### **a) The Bush Doctrine**

President Bush declared in an introduction to the National Security Strategy that the U.S. will act against ‘*emerging threats before they are fully formed*.’<sup>241</sup> The document states that:

*‘For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing an attack.*

*We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.’*<sup>242</sup>

Hence the statement implied that the U.S. in this new posture is willing to act beyond the constraints of international law and even beyond limits it has observed in the past. The distinction between preventive war and preemption in the new Bush Doctrine was described in a Bookings Institute report as follows:

---

<sup>241</sup> Ibid

<sup>242</sup> Ibid.

*'The concept is not limited to the traditional definition of preemption – striking an enemy as it prepares an attack – but also includes prevention – striking an enemy even in the absence of specific evidence of a coming attack. The idea principally appears to be directed at terrorist groups as well as extremist or 'rogue' nation states; the two are linked, according to the strategy, by a combination of 'radicalism and technology.'*<sup>243</sup>

At his 2002 speech at West Point, President George W. Bush indicated *'that not only will the U.S. impose preemptive, unilateral military force when and where it chooses, but the nation will also punish those who engage in terror and aggression and will work to impose a universal moral clarity between good and evil.'*<sup>244</sup>

Hence strikes under the Bush Doctrine are not limited to reprisals or self-defense, but may also include preemptive strikes. In the words of Condoleezza Rice, President Bush's former National Security advisor and now Secretary of State, the strategy of preemptive strikes necessarily involves some degree of uncertainty, but for example in the case of Iraq, *'we don't want the smoking gun to be a mushroom cloud.'*<sup>245</sup> To put it in other words, under the Bush Doctrine, the potential danger of a hostile state developing nuclear weapons, even where that development, as in the case of Iraq, is not imminent, alone compels a preemptive strike, regardless of whether there is solid evidence to justify the validity of the perceived danger. Such preemptive strikes play a key role in the Administration's approach to meeting the terrorist threat.

---

<sup>243</sup> Policy Brief 113, 'The New National Security Strategy and Preemption' by Michael E. O'Hanlon, Susan E. Rice, and James B. Steinberg, January 2003, at <http://brook.edu/comm/policybriefs/pb113.htm>.

<sup>244</sup> Mike Allen & Karen De Young, Bush: U.S. Will Strike First at Enemies; in West Point Speech, President Lays Out Broader U.S. Policy, Wash.Post, 2 June, 2002, at A 01.

<sup>245</sup> Todd S. Purdun, Bush Officials Say Time Has Come for Action on Iraq, N.Y. Times, Sept. 9, 2002, at A1.

The Bush Doctrine, as expounded in the National Security Strategy, emphasizes military action against other governments that harbor and support terrorists or that develop nuclear, chemical, or biological weapons that could be used in terrorist attacks on the U.S.<sup>246</sup> The military component of the National Security Strategy consists of several key tenets:

1. The focus of U.S. security policy is no longer exclusively on great powers but on smaller powers supporting terrorists or developing weapons of mass destruction;<sup>247</sup>
2. Preemptive strikes will be used to prevent harm to the U.S. or American citizens;<sup>248</sup> and
3. The U.S. will, if necessary, act alone without the support of the international community.<sup>249</sup>

Ultimately, the Bush Administration argues, uncertainty and a lack of solid evidence should not preclude preemptive action where a serious threat to America's existence is deemed to exist.<sup>250</sup>

In addition to its military aspects, the Administration's assault on international terrorism involves waging a so-called 'war of ideas' that includes the criminalization of terrorism, support for moderate Muslim governments, the promotion of freedom,

---

<sup>246</sup> U.S. National Security Council, *The National Security Strategy of the United States*, (2002) p.6.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*, at 15-16.

and efforts to diminish the conditions that spawn terrorism.<sup>251</sup> Together, the military and ideological aspects of the National Security Strategy are designed to reduce the terrorist threat to the U.S. by reducing the capacity of terrorists, or rogue states, to strike American targets and by addressing the underlying causes of terrorism.

## **b) The War in Iraq of 2003 – First Application?**

### **(1) Chronology of Events Leading to the Use of Force Against Iraq**

In the aftermath of September 11, tensions between the United States and Iraq mounted when President Bush's State of the Union speech identified Iraq as a '*grave and growing danger*,' constituting, along with Iran and North Korea, the '*axis of evil*.'<sup>252</sup> President Bush accused Iraq of developing weapons of mass destruction and supporting terrorist organizations and vowed that the United States '*[would] not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons*.'<sup>253</sup> Eight months later, on September 12, 2002, President Bush addressed the opening of the UN General Assembly and urged world leaders to confront '*the grave and gathering danger*' of Iraq.<sup>254</sup> Highlighting Iraq's continuing defiance of the Security Council during the last decade, President Bush promised to '*work with the UN Security Council*,' but warned that the U.S. was ready to act unilaterally if necessary.<sup>255</sup> The same month, the Administration released the above

---

<sup>251</sup> Ibid, at 6.

<sup>252</sup> President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/iraq/20020129-11.html>.

<sup>253</sup> Ibid.

<sup>254</sup> President George W. Bush, Address to the United Nations General Assembly in New York City (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

<sup>255</sup> Ibid.

mentioned U.S. National Security Strategy with its provisions on the Bush Doctrine. Congress adopted a joint resolution authorizing the use of force against Iraq and giving the President authority to take unilateral military action against Iraq ‘*as he determines necessary and appropriate.*’<sup>256</sup>

On September 16, 2002, Iraq announced that it would allow UN Monitoring and Verification Agency (UNMOVIC) and International Atomic Energy Agency (IAEA) inspectors to return to Iraq, but the United States and Britain rejected the agreement. On November 8, 2002, the Security Council unanimously adopted Resolution 1441.<sup>257</sup> This Resolution found Iraq to be in material breach of previous Security Council resolutions, yet it afforded Iraq ‘*a final opportunity to comply with its disarmament obligations*’ and threatened Iraq with ‘*serious consequences*’ should the Iraqi government fail to cooperate with the inspection process.<sup>258</sup> Weapons inspections resumed in Iraq on November 27. On December 7, Iraq submitted a declaration of almost twelve thousand pages to the United Nations, claiming it had no banned weapons. After reviewing the declaration, UNMOVIC Chairman Hans Blix stated that it contained ‘*little new significant information ... relating to proscribed weapons programs.*’<sup>259</sup> In January 2003, in his State of the Union address, President Bush suggested that Iraq had failed to meet UN demands, and he announced that the United States would lead a coalition to disarm Saddam Hussein, even without a UN

---

<sup>256</sup> H.R.J. Res. 144, 107th Cong. (2002) (enacted).

<sup>257</sup> U.N. SCOR Res. 1441, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002), reprinted in 42 I.L.M. 250 (2003).

<sup>258</sup> Ibid.

<sup>259</sup> United Nations, Annex Of The 12<sup>th</sup> Quarterly Report Of The Executive Chairman Of The United Nations Monitoring, Verification And Inspection Commission In Accordance With Paragraph 12 Of Security Council Resolution 1284, para. 7, available at <http://www.un.org/depts/unmovic/documents/2003-232.pdf>.

mandate.<sup>260</sup> Secretary of State Powell addressed the Security Council on February 5 and presented satellite images and intercepted telephone conversations between Iraqi military officers, all allegedly indicating that Iraq was evading its disarmament obligations.<sup>261</sup> Even though the UN inspectors found no evidence that Iraq was hiding illegal weapons, the U.K. and the U.S. submitted a second resolution on February 24 that sought to authorize the use of force against Iraq. France, China, and Russia threatened to veto the resolution and insisted on intensifying inspections. Unable to secure the votes needed to pass a second resolution despite intense lobbying efforts, the U.K. and the U.S. withdrew the resolution and assembled a '*coalition of the willing*.' On March 19 the coalition forces launched Operation Iraqi Freedom.

## **(2) Legal Justifications for Operation Iraqi Freedom**

The U.S. government officially justified Operation Iraqi Freedom with several reasons:

### **- Security Council Authorization**

First of all the U.S. and the U.K. contended that Operation Iraqi Freedom was authorized under the continuing effect of Security Council resolutions 678 (1990), 687 (1991), and Iraq's 'material breach' of resolution 1441 (2002). As a letter of the U.K. to the Security Council of 2003 puts it:

---

<sup>260</sup> President George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

<sup>261</sup> U.S. Sec. of State Colin Powell, Address to the UN Security Council (Feb. 5, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html>.

*‘The action follows a long history of non-cooperation by Iraq with the United Nation’s Special Commission (UNSCOM), the United Nation’s Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) and numerous findings by the Security Council that Iraq has failed to comply with the disarmament obligations imposed on it by the Council, including in Resolutions 678 (1990), 687 (1991) and 1441 (2002). In its Resolution 1441 (2002), the Council reiterated that Iraq’s possession of weapons of mass destruction constitutes a threat to international peace and security; that Iraq has failed, in clear violation of its obligations, to disarm; and that in consequence, Iraq is in material breach of the conditions for the ceasefire at the end of hostilities in 1991 laid down by the Council in its Resolution 687 (1991). Military action was undertaken only when it became apparent that there was no other way achieving compliance by Iraq.*

*The objective of the action is to secure compliance by Iraq with its disarmament obligations as laid down by the Council. All military operations will be limited to the minimum measures necessary to secure this objective.’<sup>262</sup>*

As the letter of the U.S. to the Security Council shows, the legitimation of the use of armed force against Iraq was seen in a breach of Resolutions 678 and 687, confirmed by Resolution 1441:

*‘The actions being taken are authorized under existing Council Resolutions, including its Resolution 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the*

---

<sup>262</sup> UN Doc.S/2003/350.

*ceasefire and revives the authorization to use force under Resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary General's public announcement in January 1993 following Iraq's material breach of Resolution 687 (1991) that coalition forces had received the mandate from the Council to use force according to Resolution 678 (1990).*

...

*In view of Iraq's material breaches, the basis for the ceasefire has been removed and the use of force is authorized under Resolution 678 (1990).<sup>263</sup>*

The reliance on Resolution 678 for justifying Operation Iraqi Freedom does not seem to be able to survive closer examination. Resolution 678<sup>264</sup> states that

*'The Security Council*

*Authorizes Member States cooperating with the government of Kuwait unless Iraq on or before 15 January 1991 fully implements as set forth in para. 1 of the above mentioned Resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant Resolutions and to restore international peace and security in the area;'*

The decisive provision in Resolution 660, which Resolution 678 is linked to, stipulates:

*'The Security Council,*

...

*Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait,*

---

<sup>263</sup> UN Doc. S/2003/351.

<sup>264</sup> In No.2 of U.N. SC Res. 678 (1990).

...

*Demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.'*

The final operative paragraph of Resolution 687 (1991) reads that the Security Council –

*'34. Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.'*

First a look at the wording of these resolutions shows that resolution 660, to which resolution 678 is linked, is clearly linked to the illegal occupation of Kuwait by Iraq. The Security Council thus authorizes the use of force only to restore the order that existed before Iraq invaded Kuwait.<sup>265</sup> Hence the aim of this authorization was fulfilled after the Iraqi occupation of Kuwait was over. A justification for the use of force therefore cannot be derived from resolutions 660 and 678.

Further, it is clear from Resolution 687, that it is the Security Council, and not individual Member States, that were to take further steps as may be required. This is entirely consistent with the prohibition on the use of force under Article 2 (4), and the provision that enforcement action is to be taken by the Security Council under Article 42 of the Charter.

Of course, on November 8, 2002, Resolution 1441 (2002) was passed by the Security Council to address the issue of weapons of mass destruction, which was the principal justification for the invasion. The passage of the resolution and the fact that the U.S. sought and failed to gain Security Council authorization for the use of force in Iraq

---

<sup>265</sup> Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot*, Archiv des Völkerrechts, Bd. 1 (2003), p. 264.

following Resolution 1441 in fact imply that the U.S. implicitly accepted that further authorization of the Security Council was required for the use of force.

Resolution 1441 specifically decided in operative paragraph 1 that Iraq was in material breach of its obligations under resolution 687, granted Iraq a final opportunity to comply and set up the enhanced inspection regime (in operative paragraph 2). It did not authorize the use of force by individual Member States, which is the reason why the U.S. and the U.K. sought a further resolution, after states like France, Germany, China and Russia stated that any invasion of Iraq required an additional resolution that would explicitly authorize the use of force.

Hence it can be concluded that nowhere in existing Security Council resolutions on Iraq is there an authorization for Operation Iraqi Freedom. Especially there is no authorization of the use of force by Member States relating to weapons of mass destruction, or, for that matter, relating to regime change.

### **- Preemptive Self-Defense**

Further, it has been argued that the intervention in Iraq was lawful as a legitimate exercise of the right of preemptive self-defense. The U.S. claimed, that Iraq was developing chemical and biological weapons of mass destruction and that it was actively supporting al Qaeda and terrorism. Iraq therefore was accused of being an imminent threat to the U.S. and the international community. President George W. Bush contended at the outset of the conflict that, *'including the nature and type of the threat posed by Iraq, the United States may always proceed in the exercise of its inherent right of self defense, recognized in Article 51 of the UN Charter.'*<sup>266</sup> The

---

<sup>266</sup> Report In Connection With Presidential Determination Under Public Law 107-243, reprinted in 149 Cong. Rec. H 1957, H 1958 ( march 19, 2003).

above cited U.S. letter to the Security Council besides its statements about the above mentioned Security Council Resolutions further stipulates that

*'...These actions are necessary steps to defend the United States and the international community from the threat posed by Iraq and restore international peace and security in the area.'*<sup>267</sup>

As there was no convincing evidence that Iraq was in possession of weapons of mass destruction, nor that Iraq had planned an attack on the U.S. or any of its allies, nor that Iraq participated in the planning or execution of the 9/11 attacks or actively supported al Qaeda, the notion of self-defense as a justification for Operation Iraqi Freedom does not seem to be convincing. This has even been confirmed by the fact that to date no weapons of mass destruction have been found in Iraq and U.S. Secretary of Defense, Donald Rumsfeld even had to admit that there was no convincing evidence for the existence of weapons of mass destruction in Iraq.

Moreover, the ICJ held in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* that for ordinary states, the mere possession of nuclear weapons is not illegal in international customary law.<sup>268</sup> As the Court held, *'in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake.'*<sup>269</sup> The mere possession without even a threat of use does not therefore amount to an unlawful attack. Hence a justification for Operation Iraqi Freedom on self-defense cannot be derived from the fact that Iraq was in possession

---

<sup>267</sup> UN Doc. S/2003/351.

<sup>268</sup> 1996 I.C.J. 226, 266.

<sup>269</sup> Ibid.

of weapons of mass destruction, which in fact it was not, as long as there is no actual threat of the use of those weapons.

**c) Critical Analysis: Consistency with International Law or Emergence of a New Rule?**

The question remains whether the Bush Doctrine of preemptive self-defense is consistent with international law, or, if not, whether it is a new rule in international law.

**(1) Consistency with International Law – Critical Analysis**

As described above, even traditional anticipatory self-defense is contested amongst legal scholars because of the wording of Article 51, speaking of ‘when an armed attack occurs’. But even those scholars arguing for the existence of this right demand the strict requirements of the *Caroline*, thus creating very narrow limits for that right. Imminence, necessity and exhaustion or impracticability of peaceful means are those requirements. The rationes for these limitations are to prevent undermining the Charter system on the use of force, to prevent abuse of armed force by way of alleged self-defense and thus to assure peaceful co-existence of states.

The Bush Doctrine in contrast, leaves a taste of uncertainty. It is based on vague criteria and on a black and white view that divides the world into ‘rogue states’, ‘axis of evil’ and the ‘free and civilized world’:

*‘The concept is not limited to the traditional definition of preemption – striking an enemy as it prepares an attack – but also includes prevention – striking an enemy even in the absence of specific evidence of a coming attack. The idea principally appears to be directed at terrorist groups as well as extremist or ‘rogue’ nation*

*states; the two are linked, according to the strategy, by a combination of 'radicalism and technology.'*<sup>270</sup>

The fact, that the Bush Doctrine allows preemptive action even in the absence of specific evidence of a coming attack is clearly not consistent with the traditional view of anticipatory self-defense with its *Caroline*-criteria. The cancellation of the requirements of imminence and the burden of proof on the state alleging an attack, show an obvious departure from the *Caroline*. Further the Bush Doctrine undermines the exclusive jurisdiction of the Security Council for authorizing the use of force. According to Article 51 and international customary law, the only exception is self-defense, where the attack has already occurred (restrictive view on Article 51) or at least is imminent, so that Security Council authorization in time is not possible (broader view on Article 51). Contrary to this, the Bush Doctrine authorizes the unilateral use of force even in absence of imminence, thus weakening the role of the Security Council and the whole Charter-system. According to the Bush Doctrine, unilateral U.S. preemptive self-defense shall be possible whenever the U.S. deems itself threatened, no matter whether the Security Council authorizes the action.<sup>271</sup>

Moreover, the Bush Doctrine not only undermines the restraint on *when* states may use force, but it also undermines the restraints on *how* states may use force.<sup>272</sup> The criterion of proportionality, one of the basic fundamentals of law, can only be taken into account, when it is possible to predict an action or when it is a reaction to an

---

<sup>270</sup> Policy Brief 113, 'The New National Security Strategy and Preemption' by Michael E. O'Hanlon, Susan E. Rice, and James B. Steinberg, January 2003, at <http://brook.edu/comm/policybriefs/pb113.htm>.

<sup>271</sup> See for example President George W. Bush's speech at West Point of 2002, cited above, footnote 243.

<sup>272</sup> Mary Ellen O'Connell, The Myth of Preemptive Self-Defense, Paper for the American Society of International Law, August 2002, p.19.

action. But how can proportionality be assessed in a response to a possible, undefined attack? The state acting preemptively is making a subjective determination about future events and will need to make a subjective determination about how much force is needed for preemption.<sup>273</sup> In contrast to traditional anticipatory self-defense the Bush Doctrine does not even require specific evidence. But when there is no evidence about what kind of attack is about to be launched, it seems to be almost impossible to react in a proportionate way. Ultimately, a state can defend itself from all possible attacks only by eliminating an unfriendly foreign regime entirely.<sup>274</sup>

Hence the Bush Doctrine is not in accordance with preexisting international customary law on anticipatory self-defense.

## **(2) Emergence of a New Rule?**

The question remains, whether the Bush Doctrine can be seen as an emerging new rule in international law. To answer this question, one must examine state practice and *opinio juris* on that question.

In the last decades, the U.S. has consistently opposed any general rule permitting unilateral armed force to remove threatening or unfriendly regimes.<sup>275</sup> The Reagan Doctrine suggested in political argument that the U.S. should consider the use of force to install prodemocratic regimes. But Ambassador Jeane Kirkpatrick has pointed out that the Reagan administration never used the doctrine to justify its actual uses of

---

<sup>273</sup> Ibid.

<sup>274</sup> Ibid, p.20.

<sup>275</sup> Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 *Foreign Aff.* 2 (1999).

force – it consistently invoked the Charter in its legal arguments.<sup>276</sup> President George Bush led the U.S. in the Gulf War coalition proclaiming, at the war's end, a 'new world order under the rule of law.' The exemplary conduct of that coalition war reinvigorated the Charter rules and the role of the Security Council.<sup>277</sup> The Bill Clinton administration never issued a legal justification for the use of force in Kosovo, and it also did not argue for changing the law and institutions of the Charter in respect of humanitarian intervention.<sup>278</sup>

Further, as shown above, the recent Bush administration invoked Article 51 of the Charter and consulted the Security Council and other governments of the world before commencing Operation Enduring Freedom in Afghanistan.

Even the official legal justification for Operation Iraqi Freedom was not based only on self-defense, but on Security Council resolutions allegedly authorizing the use of force.<sup>279</sup> Hence a conclusion can be drawn, that up to now there was no precedent where the U.S. relied only and explicitly on the Bush Doctrine for justifying the use of force.

Further it appears to be doubtful, whether there is any *opinio juris* on the Bush Doctrine. Recognizing this Doctrine as a rule of international customary law would mean that *any* state can justify the preemptive use of force when it deems itself threatened by another state, even in absence of specific evidence. For example, preemptive self-defense would thus provide legal justification for Pakistan to attack

---

<sup>276</sup> Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.17.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

<sup>279</sup> see above, IV.3.b)(2).

India, for Iran to attack Iraq, or for North Korea to attack South Korea and so on.<sup>280</sup> Nothing in U.S. official statements reflects the view, that the Bush Doctrine of preemption should be available to all states. Hence there is no *opinio juris* that the Bush Doctrine of preemption is a new right in international law, which every state can rely on.

## **V. Conclusions**

The scope of the right of self-defense, especially the question of anticipatory self-defense, in international law remains a contested issue, although anticipatory self-defense seems to be an accepted rule of international customary law. Nevertheless, anticipatory self-defense can only be in accordance with international law when the narrow requirements of imminence, necessity and exhaustion or impracticability of peaceful means are satisfied, which means that evidence should be available. The basic rule under the Charter-system is the prohibition of the unilateral use of force, with the only exception in Article 51.

The reaction to the 9/11 terrorist attacks invoked the Bush Doctrine of preemptive self-defense. This has not become a new rule in international law, as there is no state practice and *opinio juris* on the issue. Further, the Bush Doctrine is inconsistent with Article 51 of the Charter and international customary law on self-defense. Especially in the case of Operation Iraqi Freedom, the requirements of self-defense were not satisfied, as there was neither any actual armed Iraqi attack on the U.S., nor any evidence of any Iraqi plans for an attack or of Iraqi capability for such an attack. The

---

<sup>280</sup> Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, Paper for the American Society of International Law, August 2002, p.19.

new U.S. policy on preemptive self-defense appears to be very problematic in international law, as it stipulates a withdrawal from the security architecture of the Charter. Not only is the Bush Doctrine jurisprudentially suspect, it is also strategically questionable. The Bush Doctrine's expansion of the scope of anticipatory self-defense risks setting a dangerous precedent, which can easily be manipulated. It ignores state practice and reciprocity, a cardinal principle of international law. Are we prepared to accord China, India, Pakistan, or even North Korea the right to invoke a loose, unsubstantiated notion of 'preemptive self-defense'? To fashion a doctrine out of preemption encourages a perception of superpower arrogance and unilateralism. The danger of unilateralism is that it usurps the process of interpretation: a country that unilaterally interprets a legal norm - in this case, that of anticipatory self-defense - and acts upon that interpretation without any efforts at persuasion would reaffirm the law of power, rather than the power of law. The only way of creating a world in which peace and security prevail, is to emphasize multilateral, instead of unilateral action. The United Nations and most of all its Security Council should be the only authority for deciding on the use of force, except for the cases where an attack is that imminent that there is no time for a Security Council authorization, which must be based on solid evidence under the above described criteria. The result of the unilateral use of force in most cases is a worsening of the state of security, as reprisals are the most common answer and the gap between the parties is deepened. The case of Iraq shows this drastically. A superpower like the U.S. can overwhelm a proportionately small power like Iraq easily. But can it deal with the consequences? Is it willing to pay the high cost, monetarily and humanitarian, of an occupation which may be arguably illegal? The threat of terrorism surely is a huge challenge to the existing international security system. In my opinion, a solution can only be achieved, when there is

international agreement and authorization of actions to be taken. Unilateral actions of an arrogant superpower only strengthen support for terrorists.