CHAPTER SEVEN

7.1. Introduction

Self-defence as embodied in Article 51 of the U.N. Charter represents the main exception to the general prohibition against the use of force in international relations contained in Article 2(4) of the Charter.\(^1\) There is general agreement, both in literature and in practice, on the admissibility of the use of armed force in self-defence, even though, the scope of the principle and the conditions for its application are rather controversial.\(^2\)

This principle has been invoked as justification in nearly all cases of armed intervention over the last twenty years. As is well known, the general prohibition of the use of force as set forth in Article 2(4) only refers to “international relations”.\(^3\)

The prohibition and its corresponding exception of self-defence therefore become relevant to internal conflicts only when they acquire an international dimension.\(^4\) No body questions that the concept of the self-defence retains its crucial important even in “disguised” international conflicts.\(^5\) It is particularly in these situations, however, that the exact content, scope and the problems relating to the application of the concept prove unclear.

Moreover, literal and contextual analyses of Article 51, even taking into account all the interpretations provided by literature on the subject, are not sufficient to clarify the problems. After providing an overview of the debate on the controversial aspects of the principle of self-defence. This Chapter proceeds to examine the relevant cases, with the purpose of determining whether one can perceive some kind of trend towards the development of a coherent application of the principle of self-defence by individual states.

The concept of self-defence, the origin of which are extremely old, can be found in very legal system. In broad terms, it can be defined as residual from of direct

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1. U.N. Charter, Articles. 51, 2(4). The Charter contains, however, other exceptions, whose relevance is very limited in practice.
2. That even states themselves were unable to agree on a formulation of the principle of self-defence more explicit than Article 51 is confirmed by the drafting of the principle(a) on the use of force in the declaration on friendly relations(UNGR Res.2625-XXV), and by the rather vague mention of it in the 1974 Definition of Aggression (Res.3314-XXIX). See G Arangio-Ruiz, ‘The Normative Role of the General Assembly of the UN’, HR,(1972),III, p.431 at 524.
4. P.L. Lamberti Zanardi, La Legittima difesa nel diritto internazionale,(Giuffre, 1972), p.148. This assertion is prejudice to the more complex question of whether the prohibition applies to relations between ‘States and National Liberation Movements’.
5. What is in fact central to all cases of internal conflicts and armed intervention is the tendency of all States to claim the existence of an external threat as one of the causes justifying of recourse to external intervention. In so doing the armed action always appears as a reaction against another unlawful activity.
self-help permitted to a private individual whenever timely intervention by the centralised authority is impossible.\(^6\)

In contemporary international law, the concept enjoys primary impotence and is set forth in Article 51 of the U.N. Charter. Apart from the fact that self-defence constitutes the main exception to the general prohibition against the use of force, it is according to most authorities, which individual states can resort to armed force without previous authorization by the centralised authority.\(^7\) There is little doubt, however, that the concept existed in customary international law long before the coming into force of the Charter. It existed in the period immediately before the First World War, when the first limitations on the freedom of states to go to war were introduced, although some authors have doubted its existence as autonomous concept in customary international law prior to that period.\(^8\)

Article 51 is the channel through which every individual state must pass if its use of coercion is to be deemed legal by the international community. Article 51 plays this screening role for the following reasons: it is the main exception to Article 2(4), the centralised enforcement machinery foreseen in Chapter VII of the Charter was never set up, and the Security Council has very often failed to reach a decision. It is not surprising therefore, that its interpretation is quite controversial both in literature and in practice.

The September 11\(^{th}\) atrocities in the U.S. brought the threat of international terrorism sharply into focus for the entire world. Following September 11, states have found themselves faced with the unenviable problem of finding a balance between the need to adequately secure themselves against this threat and the imperative to ensure that any action taken in combating terrorist activities conforms to the principles of international law. Recent controversial uses of force in Afghanistan (2001) and Iraq (2003) have highlighted the extreme difficulties in finding such a balance. One lawful means of responding to international terrorism may, in certain circumstances, be to resort to the inherent right of self-defence, upon which the U.S. based (Operation

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\(^7\) According to the prevailing view, all other hypotheses of use of coercion in international relations must be directly undertaken or previously authorized by the Security Council. The only exceptions to this principle, besides Article 51, are constituted by actions against ex-enemy State, provided for in Articles 53(1), 106 and 107 of the Charter.

\(^8\) Bowett, supra note 7, at 13.
Enduring Freedom) in Afghanistan. However, the events of 9/11 clearly suggest the need to re-articulate international law of self-defence.

7.2. The Right to Self-Defence as a Higher Norm of International Law

The right of self-defence is at least part of customary international law. Other theorists argue that the right to self-defence has long been regarded as a “higher norm”. Norms that are considered to be of this “higher normativity” must be treated differently than normal concepts of international law because they represent a core bundle of human values. The prohibition of recourse to aggression is one such norm, and self-defence, as a reaction to aggression, is another such norm. There are various explanations offered by jurists as to why the right to self-defence is a higher norm in international law. For example, Grotius argued that the right is so tied to the instinct of self-preservation that it must transcend simple customary international norms.

The right of self-defence as a higher norm has also been explained in terms of natural law principles drawn from the “Thomastic School of Scholasticism”. This line of reasoning relies on the “divine prescription” interpretation of natural law (meaning that there are concepts which are unchangeable and eternal that God has determined and human beings cannot understand). Later theorists moved away from the strict scholastic tradition, but still relied on notions of divine influence. Even Grotius, for instance, based his recognition of defence as one of the three justifiable causes for war on a quasi-religious foundation. While Grotius theorized that natural law could exist independent of a particular theological framework, he was undeniably linked to the prevailing Protestant theology. Whereas the Scholastics viewed natural law as a set of immutable dictates codified by God, the Protestant theologies of Luther

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13 Hugo Grotius, De Jure Belli Ac Pacis, (1625), reprinted in 2nd, The Classics of International Law, James Brown Scott ed.,(Carnegie Institution, 1925), p.24. This sentiment is evidenced by Grotius's statement that the “right of self-defence derives its origin primarily from the instinct of self-preservation, which nature has given to every creature”.
15 These are identified by Grotius to be: (1) self-defence; (2) recovery of property; and (3) punishment for some wrong. Grotius, supra note 75, bk. II, ch. I, para. 2.
and Calvin, of whom Grotius was a follower, understood natural law as “the promptings of conscience”. Under this Protestant formulation, principles of natural law are those that must be observed in order for humans to live together in society.

Once a principle of natural law has been established (presumably by the church), all men are obligated to respect it.\textsuperscript{17}

While there may be debate concerning the proper place of such religious-based theories in the widely diverse and varied international legal system that now exists, the real importance of these early expressions of self-defence is the recognition of their transcendental nature. Emmerich de Vattel, for example, repudiated the religious foundations for “natural rights”, but maintained that the principles espoused as such were nonetheless fundamental to international comity. This evolving preference for reason over theology has led to the development of peremptory norms of international law (\textit{jus cogens}). Peremptory norms of international law are analogous to natural law because both impose universal obligations and neither requires state consent to be binding.\textsuperscript{18}

The conscience of the international community demands that certain principles be regarded as fundamental. Self-defence is one of these principles. Today, a peremptory norm of international law is one which is “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted”. Such a norm transcends all positive expressions of law.

In effect, a peremptory norm is one which lies at the foundation of the international community itself, meaning that some principles are so fundamental to the very functioning of the state system that their existence is presupposed and cannot be overridden by positive law.\textsuperscript{19} The universal respect for the right of self-defence is based on the principle of self-preservation. The right to self-preservation is a peremptory norm, and constitutes the essence of the state system. In effect, the notion of sovereignty is ultimately dependent on the acceptance of a state's right to preserve its very existence. In some instances, it is necessary for a state to engage in the use of force for purely defensive purposes. In this sense, self-defence and self-preservation are mutually dependent almost to the point of being synonymous. To view it another way, self-defence and self-preservation are opposite sides of the same coin. Therefore,

\textsuperscript{17} Grotius was most like the ‘Scholastics’ in that regard. He relied on deductive proofs to determine what principles Christians should conscientiously adhere to.
\textsuperscript{18} Higgins, supra note 90, at 22.
self-defence is itself a peremptory norm of international law, which exists as (an absolute right, lying at the foundation of all of the other rights of states). Several treaties and conventions\(^\text{20}\) that followed the First World War either implicitly or explicitly recognized the right of self-defence as a “higher norm”.\(^\text{21}\)

While self-defence is a peremptory norm of international law,\(^\text{22}\) the operation of the right has been effected by several positive law acts during the 20\(^{th}\) century. The most significant of these was the drawing up of the Charter of the U.N. The right of self-defence is codified in Article 51 of the Charter. The framers of the Charter envisioned, in terms of Articles 51 and 39, that the Security Council would investigate and determine when a claim of self-defence was valid.\(^\text{23}\) Chapter VII of the Charter also constructs a collective security apparatus to be used to help victims of unlawful aggression.

7.3. Historical Background of the Right of Self-Defence

The historical backdrop to the right of self-defence will commence with a review of the definition of self-defence 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-defence in modern times.\(^\text{24}\) The general rule stating the conditions under which the use of force in self-defence is deemed to be legitimate was set out in a letter written in 1841 by the U.S. Secretary of State Daniel Webster to Henry Fox, the British Minister in Washington.

7.3.1. Facts of the Caroline Case

Case arose out of the Canadian Rebellion of 1837. The rebel leaders, despite steps taken by U.S. authorities to prevent assistance being given to them, managed on December 13, 1837, to enlist at Buffalo in the U.S. 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.

\(^{21}\)Ibid. at 54-56.
\(^{22}\)Higgins, supra note 90, at 21
\(^{23}\)Article 39 states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”, U.N. Charter, Article. 39.
The force was supplied from the U.S. 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 U.S. nationals were killed.25

7.3.1.1. 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 U.S. 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-defence, whereas Webster focused on the right of a state to 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).26

In the context of this specific incident, and after making clear that his concern was for the territorial integrity of the U.S., Webster then wrote his letter to Mr. Fox of April 24, 1842, which laid down the basic principles on self-defence, which constituted the core of what in the aftermath became known as the Caroline Doctrine:27

“It will be for … [Her Majesty’s] Government to show a necessity of self-defence, 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-defence, 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 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”.

26 Kearly, supra note 22, at 329.
27 Harris, supra note 44, at 895.
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.\(^{28}\)

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)\(^{29}\), though Webster himself did not have any intention of creating any general rules for the use of force by a state in self-defence, or in particular for the use of force by a state within its own territory against armed attack.\(^{30}\) Nevertheless the statements made by Webster in his letters to Fox became the generally accepted basic definition on self-defence 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-defence”.\(^{31}\)

### 7.3.1.2. 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-defence was relevant to the discussion of State responsibility for forcible measures undertaken in peacetime.\(^{32}\) 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

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\(^{28}\) Kearly, supra note 22, at 330.
\(^{30}\) Kearly, supra note 23, at 331.
invading forces of another state. 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.

Further, back at the time of the Caroline, the terms of self-preservation, self-defence and necessity were not terms of art with clearly defined independent meanings. The term self-defence was used alongside, and sometimes interchangeably with, self preservation and necessity: while Webster used self-defence in his letter, he also used term preservation in discussing how a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both.

As previously stated, Webster in his letter initially was only talking about self-defence 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-defence were applied more widely to cases of self-defence outside of the country acting in self-defence.

Despite the ambiguities mentioned in the term self-defence, the classical definition in the Caroline is still relevant for self-defence today. The preconditions set in the Caroline have been extended to the right of self-defence in general. The essential preconditions for self-defence in general, which can be deduced from the Caroline, are therefore ‘necessity’, ‘proportionality’ and ‘immediacy’, whether the act of self-defence is on a state’s own territory or on that the attacker. Hence, according to the Caroline doctrine, a state must have an instant and overwhelming necessity for the use of force on grounds of self-defence.

The Caroline doctrine thus establishes two main criteria for legitimate self-defence: 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

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33 Kearly, supra note 23, at 332.
34 Ibid. at 333.
35 Jennings, supra note 67, at 91.
force used in self-defence must discriminate between civilian and military targets, as required by the laws of armed conflict.

7.4. Article 51 of the Charter

In 1944 the first preparatory talks for the creation of the U.N. were held at Dumbarton Oaks by the world’s major powers in order to develop an early draft for the Charter of the new U.N. The Dumbarton Oaks draft did not include a provision on self-defence, because the right was never questioned. 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-defence provision, Article 51.

According to Article 51, force can be used, in self-defence in the event that an “armed attack occurs against a Member of the United Nations”. This exception is not without limits. Members acting in self-defence 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-defence. 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.

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-defence. 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, where the ICJ stipulated the principle of non-intervention, and, most importantly, in the Nicaragua Case (Nicaragua v. U.S.) of 1986. Especially in the Nicaragua Case the ICJ had to define the scope of the right to self-defence in

40 1986 I.C.J. 14 (June 27).
international law and the relationship between international customary law and the Charter Article 51.

### 7.4.1. 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-defence in international law, or whether Article 51 only imposes certain conditions for the application of a pre-existing, inherent right to self-defence, ergo whether international customary law on self-defence 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-defence”. Further, the ICJ dealt with the meaning of the word ‘inherent’ in the *Nicaragua Case*.

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-defence was regarded as so firmly established in international law that it was automatically accepted from the Kellogg-Briand Pact without any mentioning.

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:

“There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right to self-defence. 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-defence”.  

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-defence”.

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41 U.N. Charter, Article 51.
43 Dinstein, supra note 88, at 164.
In the Dumbarton Oaks Proposals for the Charter, there was no provision on self-defence. 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-defence, thus ousting the above described traditional view and international customary law on self-defence. 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-defence, but for the purpose of clarifying the position in regard to collective understandings for mutual self-defence.\(^{45}\) 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 against all. Hence Article 51 was drafted to clarify this issue in respect of collective self-defence against armed attack.\(^{46}\)

It thus becomes clear, that the drafters of the Charter clearly intended the international customary law right of self-defence 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-defence remains admitted and unimpaired”.\(^{47}\) Article 51 therefore leaves unimpaired the right of self-defence 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-defence. 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-defence against an armed attack is a prerogative of every sovereign state.\(^{48}\) Hence Article 51 was not created to regulate directly every requirement for legitimate self-defence. This can be concluded from the fact, that Article 51 speaks of the ‘inherent’ right of self-defence 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-defence. This is even strengthened through the use of rather

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\(^{46}\) Ibid. at 313.


vague requirements for self-defence and through the fact that Article 51 remains silent about the amount of force permitted in the legitimate exercise of self-defence.

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 51.49

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-defence 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-defence 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 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”.50

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.51

7.4.2. The Right of Anticipatory Self-Defence

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-defence 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).

49 Leo van den Hole, supra note12, at 69.
50 ICJ Reports, 1986, pp.14, 94.
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-defence)?

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”. “An anticipatory act is able to visualize future conditions, foresee their consequences, and take remedial measures before the consequences occur”.

Anticipatory self-defence therefore is an action taken by (State A) in self-defence against (State B) in anticipation of an attack by (State B), before (State B) could commence an armed attack on (State A). Anticipatory self-defence has to be distinguished from armed reprisals. Factors for this distinction are the purpose of the action and the timing of the action. Anticipatory self-defence, similar to traditional self-defence, is restorative and protective, whereas armed reprisals are retributive and punitive. As far as timing is concerned, anticipatory self-defence must be immediate and necessary, whereas reprisals are not so temporally limited.  

If one takes a look at the history of self-defence in international law, it becomes clear, that there was a scholarly discussion about anticipatory self-defence since the 17th century. Again, Hugo Grotius was one of the first jurists to recognize the doctrine of anticipatory self-defence 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 to respond to an “injury not yet inflicted, which menaces either person or property”. The danger, however, must be “immediate and imminent in point of time”.

In the 18th 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”.

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53 Hugo Grotius, supra note 44, at 172.

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-defence since the 19th 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-defence:\footnote{55}

- First, there must be an imminent threat, a threat which is “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.
- Second, the response must be necessary to protect against the threat.
- 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-defence, must be limited by that necessity”.
- Fourth, the self-defencive 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”\footnote{56}.

This rather narrow view on anticipatory self-defence in the Caroline Doctrine was recognized by leading commentators of the early 20th century\footnote{57} as well as by many pre-1945 treaties and alliances providing for collective security and defense.\footnote{58}

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-defence, leaving no choice of means and no moment for deliberation”.\footnote{59} The Nuremberg Tribunal thus expressively referred to the Caroline, suggesting very high thresholds for anticipatory self-defence through the requirements of imminence, necessity, proportionality and flouting of international law.

As a conclusion to this historical backdrop, one can state that within narrow limits, a right to anticipatory self-defence was recognized in international law. Hence, for example the U.S. would have been legally justified by anticipatory self-defence in

\footnote{56} Ibid. at 131.
\footnote{58} Lucy Martinez, supra note 13, at 131.
attacking the Japanese fleet during World War II while the Japanese were on route to Pearl Harbor. By the time the Japanese fleet was on route, the requirements of the Caroline doctrine were fulfilled. On the other hand it could be argued, that while the Japanese fleet was on route, the armed attack already had occurred, thus it could be seen as a case of traditional self-defence. Nevertheless the question remains, if the right to anticipatory self-defence has changed after the emergence of the Charter and Article 51.

7.4.2.1. Article 51 and Anticipatory Self-Defence

Article 51 of the Charter is silent about whether ‘self-defence’ 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-defence, but it does not expressly provide for the doctrine of anticipatory self-defence. Article 51 therefore has been subject to varying interpretations and controversy among scholars. The essence of the controversy surrounds the meaning of the phase ‘if an armed attack occurs’. The issue is whether the reference to a state’s right to act in self-defence ‘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 camps: the restrictive view on Article 51 and the broader view on Article 51.

7.4.2.1.1. The Restrictive View

Under the restrictive interpretation of Article 51, the context of the relationship between states is ignored and the legality of self-defence measures are judged in light of specific acts of aggression by the target state. In other words, the claimant state must be able to point to a specific act of aggression which provoked its response.

A popular argument advanced in support of the restrictive view is that Article 51 restricted any pre-Charter customary right of self-defence. Under customary law, the legitimacy of a claim of self-defence was considered in light of the standards enunciated in the Caroline: the necessity for force must be “instant and overwhelming, and leaving no choice of means and no moment for deliberation”.

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61 U.N. Charter, Article 51.
Many writers contend, however, that the adoption of the U.N. Charter and Article 51 changed the customary standard.

These writers have argued that the addition of the phrase “if an armed attack occurs” limited the circumstances under which self-defence may be appropriately used to situations where a prior attack has already occurred.\(^{62}\) Professor Brownlie, for instance, argued that it makes no logical sense to include a specific treaty provision on the subject if there was no intent to restrict the customary law. Moreover, Professor Brownlie asserted that writers, who argue that pre-Charter customary rights were preserved, incorrectly “assume that the customary law became static by 1920 or earlier, and ignore the possibility that the customary right may have received some more precise delimitation in the period between 1920 and 1945”. Instead, according to Brownlie, any rights which did exist were undefined, extremely vague and subject to arbitrary application.\(^{63}\)

There are also pragmatic considerations which support the restrictive view. By restricting the unilateral use of force, the ability of states to justify military action, from a legal standpoint, is greatly reduced. Where states have used the claim of self-defence, for example, the result has generally been a finding that the claim was disingenuous.\(^{64}\)

The restrictive view of self-defence does not address the practical problems associated with terrorist activities. Given that terrorist tactics are almost without exception unorthodox, the restrictive view appears to have little applicability to the modern terrorist dilemma. Moreover, adoption of the restrictive view reduces the number of valid responses to terrorist attacks thus minimizing any deterrent effect that these responses might achieve. State-sponsors of terrorism can be assured that virtually every military response to terrorism will incur community condemnation.

### 7.4.2.1.2. The Broad View

The fundamental premise of the broad view is that Article 51 created an exception recognizing the existence of a customary right of self-defence which pre-

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63 Ian Brownlie, International Law and the Use of Force by States, (Oxford, Clarendon Press, 1963), p.273. Professor Brownlie advanced this argument in response to the following statement: “We must presuppose that rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter . . . It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; . . . except and in so far as they have surrendered them under the Charter”.

dated the U.N. Charter. The scope of this customary right, according to some authorities, included the right to defence in anticipation of an attack.

A number of arguments have been asserted which support the view that Article 51 preserved the customary right of self-defence. First, Professor Bowett has argued that, “by 1945, the customary law included a right of anticipatory self-defence”. Second, it has been argued that since the addition of Article 51 was an “afterthought to reassure states that the right of self-defence was not being removed”, it is probably the case that the framers of the Charter did not intend to restrict the customary right. Finally, the plain language of Article 51 has been cited as supporting the conclusion that the customary right was preserved.

Those who would adopt the broad view of self-defence under the U.N. Charter also recognize that special circumstances often legitimately sanction the use of force.

Former U.N. Ambassador Jean Kirkpatrick, for example, took the position that: “the prohibitions against the use of force in the Charter are contextual, not absolute . . . the Charter does not require that people submit supinely to terror, nor that their neighbors be indifferent to their terrorization”.

Similarly, Professor Stone has argued that, although the narrow view of Article 2(4) may possibly be the correct view, it is not the only possible interpretation of state obligations under the Charter. In Stone’s opinion, the “steady and repeated stress on the requirements of justice, on respect for the obligations of treaties and international law, and on the principle of the sovereign equality of all its Members” is an important consideration in an analysis of Article 2(4).

The lack of effective collective peacekeeping may also be an important consideration in determining whether the broad view is appropriate. Professor Stone has noted that state’s obligations arising under the Charter unclear. Essentially, the Charter obligates states to take collective measures to prevent the use of force and to remove

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66 Bowett, supra note 112, at 188-92.  
69 Julius Stone, Aggression and World Order, A Critique of United Nations Theories of Aggression, (The Lawbook Exchange, Ltd., 2006), p. 97. Professor Stone points out that it ‘would be a strange application of these principles to require law-abiding Members of the Organization to submit indefinitely to admitted and persistent violations of rights’.

threats to peace.\textsuperscript{70} However, as Stone argues, (any implied prohibition on Members to use force seems conditioned on the assumption that effective collective measures can be taken under the Charter . . .). Where collective measures are not possible, the duties of states under the Charter become less apparent if they exist at all.\textsuperscript{71}

The Security Council's formulation of legitimate self-defence should acknowledge extraordinary factual situations. Requiring immediacy of response raises unique problems when the initial aggression is a terrorist attack. First, although ordinary military precautions may be in place, the nature of the terrorist act does not usually permit the utilization of conventional means of protection. Terrorist targets, while predictable in some cases, are in most cases unpredictable and, thus, impossible to protect. Second, it is often time-consuming to gather the information necessary to place responsibility on a given actor. Third, removing the option of force from state practice may create unacceptable security problems for states targeted for terrorist activities. Finally, in the absence of other viable alternatives, no deterrent exists which would make the cost of supporting terrorism higher than the benefits received.

7.4.2.2. Conditions for the Exercise of the Right of Anticipatory Self-Defence

The classical definition of the Caroline case is still relevant for anticipatory self-defence today.\textsuperscript{72} Moreover, the preconditions set in the Caroline case have been extended to the right of self-defence in general, which is quite logical, as the right of anticipatory self-defence is only a form of the more general customary right of self-defence, and the conditions for the application of both rights have to be more or less the same.

Roberto Ago came to a similar conclusion as Secretary of State Daniel Webster when he wrote that the essential preconditions of ‘self-defence in general’ are ‘necessity’, ‘proportionality’ and ‘immediacy’.\textsuperscript{73} These principles are moreover followed by the ICJ, when it held that “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and

\textsuperscript{70} Ibid. at 97. See also, U.N. Charter, Article 1(1), which provides: “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”.

\textsuperscript{71} J. Stone, supra note 175, at 97.


necessary to respond to it, a rule well established in customary international law”.  

The preconditions for anticipatory self-defence are, therefore, ‘necessity’, ‘proportionality’, and ‘immediacy’. However, it seems reasonable to add two more conditions: first, an action of anticipatory self-defence will only be justified if the U.N. Security Council has not yet been able to take affirmative action, and second, the state against which the right of anticipatory self-defence is being exercised has to be in breach of international law.

7.4.2.2.1. Capacity of the Security Council

The last part of the first sentence of Article 51 reads that states can only exercise their inherent right of self-defence (including anticipatory self-defence) “until the Security Council has taken the measures necessary to maintain international peace and security”. It goes without saying that this recognition of liberty for the state acting in self-defence (or in anticipatory self-defence) would likewise disappear, under the system contemplated by the U.N. Charter, as soon as the U.N. Security Council took it upon itself to employ the enforcement measures necessary for ensuring the full respect of a situation jeopardized by this aggression. This is a clear limitation, imposed by the U.N. Charter, upon the inherent customary right of anticipatory self-defence in international law.

However, if the action of the U.N. is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow.

7.4.2.2.2. Flouting International Law

Second, a state finds itself in a position of anticipatory self-defence when it is confronted by an unlawful armed attack or an unlawful threat of force by another state.

This state of affairs exonerates a state from the duty to respect, vis-à-vis the aggressor, the general obligation to refrain from the use of force. “It was the first state which created the danger and created it by conduct which is not only wrongful in international law, but which constitutes the most serious and unmistakable...”
international offence of recourse to armed force in breach of the general existing prohibition of such recourse”, under customary international law and under Article 2(4) of the U.N. Charter.  

7.4.2.2.3. Necessity

The third condition for the application of the right of anticipatory self-defence is the necessity-test. The state threatened with imminent attack must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. There must be clear and present danger of an imminent attack, and not mere general preparations by the enemy. If a state “had been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force”.  

The decision to use force in anticipatory self-defence is generally a conditioned reflex to stress. Probably the situation that fits this necessity-test best is the 1967 attack by Israel against the Arab States in the region.  

After the Soviet Union falsely reported to the UAR that Israel was planning a major attack on the UAR, President Gamal Abdel Nasser took several very provocative actions: the UAR moved a force large enough to conduct offensive operations into the Sinai; Nasser publicly made statements that he intended to eliminate Israel; the UAR dismissed the U.N. emergency force from the Sinai; and the UAR closed the Straits of Tiran to Israel.  

Palestinian forces simultaneously infiltrated along the border between Israel and Syria. In June of 1967, Israel mounted a massive air campaign against UAR airfields and eventually captured the Sinai, the West Bank, and the Golan Heights in ground maneuvers against the UAR, Jordan, and Syria. Israel argued that the attack was justified because the UAR's decision to close the (Straits of Tiran) was an act of war by the UAR, and the massing of the UAR troops on the borders of Israel posed a serious and imminent threat to Israel's security. Israel struck pre-emptively against

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80 Ibid. at 53-54.
82 Ago, supra note 11, at 69, para. 120.

A special factor to consider in terms of the necessity test is the nature of the weapon. For instance, the U.S. imposed ‘quarantine’ on Cuba in 1962, subsequent to the installation of Soviet missiles on the island, because this installation of missiles could only be considered as a direct nuclear threat to the U.S. Even in the absence of an armed attack, the threat of nuclear warfare was a sufficient ground for the anticipatory self-defence measure of the quarantine.

One can apply the same principle to the Israeli raid on the Osirak Iraqi nuclear reactor under construction at Tuwaitha in 1981. Israel claimed it had a right to ‘preemptive’ self-defence, asserting that this reactor would be a direct step toward Iraq developing nuclear weapons that could be used against it.\footnote{Louis Rene Beres & Colonel Yoash Tsiddon-Chatto, ‘Reconsidering Israel's Destruction of Iraq's Osirak Nuclear Reactor’, \textit{9 TEMP. INT'L & COMP. L.J.}, (1995), p.437, at 437-438.} For years, Iraq had not recognized Israel’s status as a state and had openly endorsed action against Israel.

Despite this, the U.N. Security Council, including the U.S., publicly decried Israel's claims to self-defence, and even recommended that Israel pay reparations to Iraq.\footnote{Ibid. at 438. In fact, Iran had attacked the reactor the previous year in the Iraq-Iran War, and had slightly damaged it. See also, Rebecca Grant, ‘Osirak and Beyond’, \textit{Air Force Magazine}, Aug, (2002), pp. 74-75, available at http:// www.afa.org/magazine/ aug2002/0802osirik.pdf. (on1Sep, 18,2010). In response, the official Iraqi, government-controlled news agency issued the following statement: “The Iranian people should not fear the Iraqi nuclear reactor, which is not intended to be used against Iran, but against the Zionist entity”.

\textbf{7.4.2.2.4. Proportionality}

Another condition for an action taken in anticipatory self-defence is the requirement of proportionality. War is generally waged to bring about the destruction of the enemy's army regardless of the condition of proportionality, but the doctrines of
self-defence and anticipatory self-defence, require a symmetry or an approximation between the action and its purpose, namely that of preventing the attack from occurring.89

It would be mistaken, therefore, to think that there must be necessarily proportionality between the conduct constituting the armed force and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself.

The ICJ’s 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons did not reject the possibility of resort to nuclear weapons “in an extreme circumstance of self-defence, in which the very survival of a state would be at stake”.90 In other words, when the very existence of the state is menaced, the state can employ weapons of mass destruction, irrespective of their disproportionate character to the aggressor's arsenal.

7.4.2.2.5. Immediacy

Finally, anticipatory self-defence to the threat of force should take place immediately (i.e., while the threat is still going on, and not after it has ended). If, however, the threat or the attack in question consisted of a number of successive acts, and there is sufficient reason to expect a continuation of acts from the same source, the international community should view the requirement of the immediacy of the self-defencive action in the light of those acts as a whole.91 At all events, practice and doctrine seem to endorse this requirement, which is not surprising in view of its plainly logical link with the whole concept of self-defence. Such an attack would be one of anticipatory self-defence and not of reprisal, since its prime motive would be protective, not punitive.92 A reprisal for revenge or as a penalty (or a ‘lesson’) would not be lawful.

90 Legality of the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 244 (July 8) para. 105,(2)E (stating the Court's decision).
91 Ago, supra note 11, at 70.
92 See Report of the Committee on Use of Force in Relations Among States, supra note 38, at 206, (noting that if a state can reasonably assume that it will suffer continuous attacks an action against the attacking state would be protective, not punitive); (such an attack would not be anticipatory, but protective).
7.4.2.3. Precedents and Reactions in the U.N. to Anticipatory Self-Defense

Instances of anticipatory self-defence have elicited varying responses in the past from the international community and the U.N., with some cases having been tacitly allowed by the U.N. For example, when Israel conducted a ‘preventive’ attack on Egypt in 1956, the U.N. did not criticize the action, but in fact authorized the stationing of U.N. peacekeepers in the Sinai region. The U.N. “apportioned no blame for the outbreak of fighting and specifically refused to condemn the exercise of self-defence by Israel”.

When the U.S. imposed a naval quarantine on Cuba to compel the removal of Soviet missiles that were perceived to pose a threat to American security, the doctrine of anticipatory self defence prevailed. The Cuban Missile Crisis occurred in October 1962, and, as is widely known, information disclosed by President John F. Kennedy indicated that the Soviets were assembling delivery systems for intermediate range ballistic missiles in Cuba.93 Regarding this development as “a deliberately provocative and unjustified change in the status quo”, Kennedy ordered a naval blockade, which he termed a ‘quarantine’, to prevent the transport of missiles and related materiel to Cuba. Under an accepted norm of international law, a blockade, whether termed quarantine or not, constitutes a violation of Article 2(4). As such, it could only be considered permissible if it could be demonstrated that it fell into an exception to the Article 2(4) prohibition.94 At the time, the question of anticipatory self-defence was widely discussed in legal scholarship. During the course of debates on the matter in the U.N. Security Council, members differed as to whether the missiles in question were defensive or offensive, but no one rejected the concept of anticipatory self-defence. There seemed to be a consensus that in certain situations the preemptive use of force could be justified.95

When a U.S. aircraft attacked bases in Libya in 1986, allegedly used for terrorist attacks on its citizens abroad, the doctrine of self-defence under Article 51 was invoked, and a resolution condemning the U.S. action was introduced in the Security Council, but was vetoed by the U.S., France, and the U.K.96 However, the


There was widespread criticism of the Libya raid, in part due to Cold-War politics. In addition, critics based legitimate concern over the following: what evidence existed to link the West Berlin discotheque bombing to terrorist activities in Libya, what legal basis existed for an armed response against a state for the actions of terrorists under Article 51, how could an ‘armed attack’ exist in the isolated murder of American servicemen abroad, and related arguments that U.S. actions were retaliatory in nature, unnecessary and disproportionate. Often enough, international criticism of particular moves, as occurred in the wake of the U.S attack on Libya in 1986, changes over the course of time.

In the Libya incident, “as in others, an elongation of the time horizon yields a different picture of international responses. After the immediate reaction to the raid and the regional and national condemnations, Western European nations began to adopt economic and diplomatic sanctions against Libya”.\footnote{Francis A. Boyle, ‘Military Responses to Terrorism’, 81 Proc. Am. Soc’y Int’l L., (1987), p. 288, at 294. (“The April 14 devastation wreaked upon Tripoli and Benghazi by the Reagan Administration was a classic case of what international law professors call actions of military retaliation and reprisal”).}

In 1993, when the U.S. launched a cruise missile attack on Iraq's Intelligence Service in Baghdad, in response to a failed assassination attempt against former President Bush, causing a number of civilian deaths and destroying much of the complex, again justifying the move under Article 51, most states either supported the move or did not object to it, although most of the Arab world expressed regret regarding the attack. Only China questioned the attack. The General Assembly took no action.\footnote{Stephen Robinson, ‘UN Support for Raid on Baghdad’, Daily Telegraph, (London), June 28, 1993, p. 1. (“Countries in the United Nations Security Council including Britain and France queued up last night to support America's missile attack on Iraqi intelligence headquarters in Baghdad. There was a widespread feeling at the Council's emergency meeting in New York that yesterday's predawn raid ... was justified following evidence that Iraq had been deeply involved in an attempt to assassinate former President Bush”).}

In 1998, when the U.S. launched retaliatory cruise missile strikes against Osama bin-Laden's training camps in Afghanistan and a Sudanese pharmaceutical plant that the U.S. had identified as a ‘chemical weapons facility’, following terrorist bombings of the U.S. embassies in Tanzania and Kenya, it justified this move as an

Article 51 exercise of self-defence in response to an armed attack.\(^{100}\) World reaction was mixed, with the most intense criticism directed on the Sudan attack. Western European states supported the U.S. actions to varying degrees, while Russian President Boris Yeltsin said that he was ‘outraged’ by the ‘indecent’ behavior of the U.S. Japan issued a statement saying it “understood American's resolute attitude towards terrorism”.

Most (Arab and Muslim Governments) remained silent or equivocal about their views on the missile strikes. The U.N. Security Council discussed the matter briefly, and deferred requests to send an international team of inspectors to the bombed plant in Khartoum to search for evidence of chemical weapons after the U.S. had declined a request from Sudan to produce such evidence. No action was taken either by the Security Council or the General Assembly.\(^{101}\)

Turkey has moved forces to occupy areas in Iraq used by Turkish Kurds to fight for their independence, and Russia has threatened to attack Afghanistani bases that support Chechen rebels- again with little or no comment at the U.N. There have been numerous instances of Israeli occupation and outright destruction of PLO base areas in the ongoing conflict in the Gaza strip, often enough with little discussion at the U.N., suggesting that the doctrine of anticipatory self-defence has become firmly entrenched in customary international law.\(^{102}\)

On the other hand, in June 1981, the (Israeli Air Force) destroyed an Iraqi nuclear reactor near Baghdad, basing its action on anticipatory self-defence. In the Security Council, Israel's ambassador argued that Israel had attempted to use diplomatic channels to solve the problem, but these efforts proved ineffective, so that the only recourse was the use of force. Israel was roundly condemned for the attack, and even those who supported the idea of anticipatory self-defence seemed to suggest that the threat of an armed attack by Iraq was not shown to be imminent, and therefore self-defence was not justified.\(^{103}\)

The U.S. and the U.K. have invoked the doctrine of anticipatory self-defence in the no-fly zones in Iraq to permit response not only to actual attacks on their

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\(^{102}\) See Franck, supra note 28, at 61

\(^{103}\) Arend & Beck, supra note 201, at 78-79.
aircraft, but to cover the locking-on of Iraqi radar onto U.S. and U.K. planes. There has been no substantive objection from the international community.104

After terrorists attacked the U.S. on September 11th, 2001, the international community agreed that even under a restrictionist reading of Article 51, self-defence on the part of the U.S. was justified. The U.N. Security Council, for the first time in its history, approved a resolution explicitly invoking and reaffirming the inherent right of a nation's self-defence in response to the terrorist attacks.105 The Security Council implicitly described the September 11th terrorist attacks as an ‘armed attack’ under Article 51.106 The U.S. affirmed its inherent right of self-defence under customary international law in a letter that the U.S. Government sent to the U.N. Security Council on October 7, 2001, stating that it had “initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the U.S. on 11th September 2001”. The U.S. Government further stated, “Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States”.107

This assertion was predicated on the belief that the September 11th terrorist attacks were not isolated acts. They were part of an ongoing terrorist campaign waged over a period of years, orchestrated by the Al Qaeda leadership against the U.S., including the 1993 attack on U.S. military personnel in Somalia, the 1998 bombings of U.S. embassies in Kenya and Tanzania, unsuccessful attempted bombings in Jordan and Los Angeles in 1999, and the attack on the USS Cole in 2000 that killed seventeen crew members and injured forty others. Al Qaeda and Taliban leaders have persisted in their vow to destroy America. Clearly, in these instances, the U.N. has responded benevolently or at least by silent acquiescence, when anticipatory force has been used to prevent a demonstrably imminent and potentially overwhelming threat to a state's security, as in the (Cuban Missile Crisis).

105 U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Furthermore, Security Council Resolution 1368, which stated that the terrorist attacks of September 11, 2001, constituted “a threat to international peace and security”, made it clear that the responsibility for terrorism of “sponsors of these terrorist attacks” included those “supporting or harbouring the perpetrators”.

Thus, there appears to be no shortage of instances in which the observance of Article 51’s constraint on the use of force has collapsed in actual practice. Article 51’s limitation on the use of force in self-defence has become increasingly ignored and is therefore “no longer regarded as obligatory by states”. However, once an international rule is no longer observed by a significant number of states, its standing as part of customary international law is called into question. That is when a paradigm shift occurs in science as well as in politics. As Michael Glennon observes:

“The international system has come to subsist in a parallel universe of two systems, one de jure, and the other de facto. The de jure system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The de facto system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored de jure system. The decaying de jure catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct”.

7.5. Attacks by Private Actors and the Right of Self-Defence

Over the past decade, as threats to international peace and security have undergone important shifts, the legality of self-defence against attacks by nonstate actors directed from abroad has become a timely and controversial issue. At present, the debate is governed by two extreme positions. On the one hand, some argue that pursuant to Article 51 U.N. Charter, the right of self-defence can be exercised whenever an attack reaches a certain scale and effect. Others, however, state that the right of self-defence is restricted to situations where the attack can be attributed to a state.

The horrendous attacks of 9/11 demonstrated to the world the immense destruction that armed groups of private individuals are capable of causing. This brought to the forefront an important question regarding the unilateral use of force between states: when is it lawful for states to exercise their right of self-defence in response to attacks by private actors operating from abroad?

At first sight, nothing in the language of Article 51 of the U.N. Charter - which provides for the right of self-defence “if an armed attack occurs” - limits the exercise

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108 Brown, supra note 127 at 215.
109 Beard, supra note 231 at 589.
of this right to attacks committed by states. Nevertheless, the provision has traditionally been interpreted as excluding measures of self-defence against private attacks, unless a certain degree of state involvement could be inferred.

In recent years, legal scholars have begun to question the restrictiveness of this approach, claiming that it does not grant states sufficient margin of action against the emergence of trans-national terrorism.\textsuperscript{111} These authors argue that grave attacks by nonstate actors trigger the right of self-defence regardless of the existence of state involvement. The acceptance of this idea will have enormous repercussions that require careful scrutiny. International tension is well underway: the Russian Federation has threatened to invade the Pankisi Gorge in Georgia because of alleged terrorist activities of Chechen rebels;\textsuperscript{112} Australia has threatened to launch preemptive strikes against terrorist bases in neighbouring countries;\textsuperscript{113} finally in December 2004, Rwanda deployed troops in the DRC in response to border attacks by Hutu militias operating from eastern Congo.\textsuperscript{114}

7.5.1. Direct Versus Indirect Military Aggression

Although Article 51 of the U.N. Charter does not in any way define or restrict the scope of ‘armed attacks’, legal scholars agree that this concept has traditionally been reserved to acts of states.\textsuperscript{115} Already during the \textit{travaux préparatoires}, delegates remarked that it would be useful to incorporate in the Charter a provision on the right of self-defence “to respond to an attack by another state”. Early literature affirms the view that in principle an armed attack should not only be directed against a state, it should also be made by a state. At the same time it was accepted that ‘armed attacks’ included attacks by private actors for which states shared a certain degree of responsibility.\textsuperscript{116} The latter type was sometimes described as “indirect military aggression”, as opposed to ‘direct’ military aggression, carried out by state agents.

This dual approach is reflected in the declaration of the U.S. “Foreign Relations Committee” which pointed out ‘that the words ‘armed attack’ clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack


by one state upon another .... However, if a revolution were aided and abetted by an outside power, such assistance might possibly be considered an armed attack”.

7.5.2. State Practice in a Period of Decolonization

State practice during the first forty years of the Charter era makes clear that states had very different conceptions of what was to be understood under “indirect military aggression”. This is evidenced by the multitude of formulas used to define the link between states and private actors. Three levels can be discerned.

The first level is the active support provided to nonstate actors - in the form of training facilities, weapons, tactical advice and so on - which was sometimes termed ‘aiding and abetting’. This is without a doubt the justification most frequently invoked in justifying self-defence against “indirect military aggression”. Thus, when French troops undertook military actions in Tunisia in 1958, France claimed that the Tunisian government aided and abetted Algerian rebels, enabling them to carry out incursions into French territory. Active state support was also the central justification for most Israeli border incursions in neighbouring countries. In 1968 for example, Israel justified the firing on Jordanian positions, arguing that Jordan was responsible for assisting armed infiltrators in carrying out acts of terrorism and sabotage. Israel gave several illustrations of state support: assisting in determining the best timing and route for crossing the cease-fire line, sharing military intelligence and giving covering fire.

South Africa and Southern Rhodesia similarly invoked active state support to justify incursions into neighbouring countries in response to attacks by national liberation movements and groups fighting the apartheid regime. On several occasions, states resorting to the use of force against private attacks did not invoke active, but merely passive state support, i.e. the ‘knowingly harbouring’ of armed bands, or the “unwillingness to prevent” private attacks. In 1969 Portugal indeed invoked the right of self-defence in response to armed attacks by anti-Portuguese organizations that were allowed to operate from bases inside Senegal. In a similar vein, Israel argued that by consenting the presence of terrorist bases on its soil, Lebanon became an accomplice in the terrorist’s campaign. These arguments were reiterated by Israel with regard to the air raid on the PLO Headquarters in Tunisia in 1985 and by South Africa and Southern Rhodesia with regard to incursions in Botswana, Zambia and Angola.


The third level of linkage between states and private actors relates to situations where states are incapable of preventing attacks by nonstate actors. During the first forty Charter years, Israel was the only state to invoke this as a ground of justification.

It did so during the late 1970s and early 80s with regard to terrorist groups operating from Southern Lebanon. Israel argued that Lebanon was unable to prevent these attacks, given the absence of law and order and stressed that it would use force if states were unwilling or unable to prevent terrorists from operating out of their countries. Israel used the same line of reasoning with regard to the hostage rescue operation at the airport of Entebbe in Uganda.

These examples illustrate that states invoking self-defence against private attacks have continuously placed the role of states at the core of their justification (albeit in very divergent language). Only one state has resorted to the use of force without making reference to one of the three models of linkage described above.

This was the case when South African forces entered Angolan territory on the basis of the doctrine of ‘hot pursuit’ or ‘hot trail’, arguing that states have the right to respond to hit-and-run-tactics by armed bands by pursuing retreating bands over a frontier.

The hot pursuit doctrine dates back to the end of the 19th century, when a number of states concluded networks of treaties expressly providing for this possibility on a basis of reciprocity and only under special conditions. The doctrine was invoked for example by the U.S. in 1916 when a military force was sent into Mexico to disperse the bands of Pancho Villa. During the Charter era, however, South Africa was the only state to rely upon this doctrine unilaterally. It is therefore not surprising that the Security Council rejected its arguments, denouncing the “racist practice of ‘hot pursuit’ to terrorize and destabilize countries in southern Africa”.

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Only following express agreement of another state, can it be permitted to pursue invaders into that state's territory. After 1985, South Africa abandoned the doctrine and returned to invoke state involvement.  

This being said, it is not easy to draw conclusions from state practice during the first forty Charter years. Not only have states used very different formulas in describing involvement in private attacks, but the international community has condemned the claims made by Israel, Portugal and South Africa on virtually all occasions. The problem is that the condemnations were mainly based on political, rather than on legal grounds: all three states were considered to be illegally occupying territory, denying peoples the fulfilment of their right of self-determination.

The issue of state involvement was only addressed very rarely. In 1982, Lesotho, Togo and Zaire argued that the presence of “African National Congress freedom fighters” was a matter within the exclusive sovereignty of Lesotho, which had the right to shelter on its territory anyone it wished. On the other hand, at least one Security Council member seemed mildly supportive of Israel’s argument regarding the prevention of attacks by private groups. The U.S. indeed abstained in the Council voting with regard to the attack on the PLO Headquarters in Tunis, because each state bore the responsibility to “take appropriate steps to prevent persons or groups within its territory from perpetuating terrorist activities”. The U.S. moreover defeated several draft resolutions condemning Israeli attacks on Lebanon in 1988 for similar reasons.

7.5.3. State Practice after the Cold-War

In recent years, active state support to irregular armed bands has remained the primary justification for the use of force in response to attacks by private actors. In 1993 for example, Tajikistan claimed the right to defend itself against cross-border attacks by anti-government troops supported by the (Afghan Ministry of Defence).

Again in 1996, Sudan complained of armed aggression perpetrated by Eritrea because Eritrea was sponsoring and hosting elements of the rebel movement in southern Sudan, with a view of overthrowing the Sudanese government.

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later, Burundi attempted to justify territorial incursions into Tanzania on the ground that Tanzania provided Burundian exiles with military training and weapons.\footnote{125}

State involvement was moreover invoked during border tension between Burma and Thailand, between the CAR and Chad, between Iran and Iraq, between Senegal and Guinea-Bissau\footnote{126} and between India and Pakistan.\footnote{127}

On the other hand, states have continued to rely on the unwillingness of states to prevent private attacks on several occasions. Thus, acquiescence in the presence of irregular armed bands was invoked during Security Council debates regarding border tension between Liberia, Guinea, Burkina Faso and Sierra Leone.\footnote{128} Passive state support was moreover the justification for the U.S. missile attacks in 1998 on a terrorist training camp in Afghanistan and a pharmaceutical plant in Sudan, following two weeks after the terrorist bombings of the American embassies in Nairobi and Dar es Salaam.

The U.S. argued that Afghanistan and Sudan had continuously provided a safe haven to terrorist groups, despite warnings to stop harbouring terrorists.\footnote{129} Several Arab countries issued protests against the missile attacks, as did Russia and Pakistan.

The attack on Sudan was moreover condemned by the League of Arab States. Nevertheless, the incidents were not put on the Security Council agenda. Several states showed support, or at least understanding, for the U.S. response, including Australia, France, Germany, Japan, Spain and the U.K.\footnote{130} A final example relates to the complaint lodged by Israel with the Security Council in 2003, charging that Lebanon and Syria had been unwilling to restrain Hezbollah and warning that serious consequences would result if it was allowed to continue carrying out attacks. This warning was implemented shortly afterwards, when Israeli forces attacked an alleged training camp for “Palestinian” in Syria in October 2003.\footnote{131} The U.S. urged restraint, yet at the same time called on Syria to stop harbouring terrorists.

\footnote{125} Statement S/26341; (1996) UNYB, p. 133;; these allegations were repeated in 2002: (2002) UNYB, p.217.
\footnote{126} (1997) UNYB, pp. 89-90.
\footnote{131} Murphy, supra note. 47, at 164.
\footnote{132} KRWE (2003), p. 45673.
Much more recently, in July–August 2006, the Security Council failed to act for over a month while a devastating conflict was being fought out between Israeli armed forces and the Hezbollah militia in Lebanon. The conflict broke out on July 12, 2006, when Hezbollah crossed Lebanon’s border with Israel, killed eight Israeli soldiers and kidnapped another two, and simultaneously launched Katyusha rockets against Israeli communities near the border.\textsuperscript{132}

A number of states have, moreover, occasionally relied on the incapability of states to prevent attacks by nonstate actors operating from their territory, thereby copying the reasoning used by Israel with regard to the situation in Southern Lebanon.

This was the case with Turkish and Iranian violations of Iraqi territory during the 1990s in response to guerrilla attacks by the PKK.\textsuperscript{133} Turkey argued that its actions could not be regarded as a violation of Iraq’s sovereignty, as Iraq had not been able to exercise authority over its northern part and could therefore not be asked to prevent the use of its territory for the staging of cross-border terrorist attacks.\textsuperscript{134} Iran did not rely on Iraqi assistance to the PKK either, but simply declared that it had carried out necessary and proportionate operations in accordance with Article 51 of the U.N. Charter.

The reaction of the international community was rather mixed. In 1995, a Turkish offensive in Northern Iraq was condemned by the Arab League and the Gulf Co-operation Council (GCC). European states similarly called on Turkey to withdraw its troops without delay.

The U.S.’s ‘State Department’ on the other hand stressed that Turkey had the right to defend itself against attacks from a neighbouring country, although it later called on Turkey to withdraw its troops. In any case, the issue was not put on the agenda of the Security Council, despite Iraqi complaints.\textsuperscript{135}

Again in December 2004, Rwanda invoked the DRC’s failure to prevent attacks by Hutu rebel groups as a ground for military operations of the Rwandese

\textsuperscript{132} Israel’s Ambassador to the U.N, Dan Gillerman, reported on the hostilities to the Security Council on July 14, 2006, describing the events of July 12 and stating that “Israel had no choice but to react …. Having shown unparalleled restraint for six years … Israel had to respond to this absolutely unprovoked assault whose scale and depth was unprecedented in recent years”. See Statement from Dan Gillerman, Israeli Ambassador, to the UN Security Council (July 14, 2006), available at http://www.mfa.gov.il/mfa/foreign%20relations/israel%20and%20the%20un/speeches%20-% 20statements/ (follow “Statement by Israeli Amb Gillerman to the UN Security Council” hyperlink). (on Aug, 28, 2010)


\textsuperscript{135} Gray & Olleson supra note 44, 389.
army in Eastern Congo. Rwanda did not accuse the DRC of supporting the rebels, yet argued that Congo and MONUC (the United Nations Mission in the DRC) had not complied with their obligations under Resolution 1565 (2004) to disarm these groups. Therefore, Rwanda would take whatever means necessary to protect its borders, even if this meant attacking rebels inside the DRC. Rwanda did promise, however, not to attack Congolese troops. Again, a mixed reaction was the result.

On the one hand, the Secretary-General and the Security Council - fearful of jeopardizing the fragile peace process in the region - demanded that Rwanda withdraw without delay any forces it might have in Congolese territory. On the other hand, the Council showed sympathy for the Rwandan concerns. It stopped short of formally condemning Rwanda and recognized that the presence of armed groups in the Eastern DRC constituted a source of instability, demanding that they disarm and disband immediately and urging that Congo do all possible to effectuate disarmament.

The present overview of state practice illustrates a trend towards easing the restrictions on self-defence against (indirect military aggression). Indeed, the number of occasions where states have relied on either passive state support or the incapacity to prevent private attacks seems to have increased, rather than diminished. Moreover, in doing so, states have frequently escaped condemnation by the Security Council and have even received occasional support from other states. On the other hand, the divergence in state practice illustrates that self-defence against private attacks has remained a very controversial issue, governed by a great amount of uncertainty. In recent years, this uncertainty has grown considerably worse as a result of the Security Council response to the attacks of 9/11/2001.

7.5.4. The Impact of 9/11/2001

On 11th September 2001, al-Qaeda shocked the world by launching terrorist attacks of unprecedented scale against targets on American soil, killing approximately three thousand persons. The next day, the Security Council adopted Resolution 1368 (2001), which not only unequivocally condemned the attacks, but also recognized the inherent right of individual or collective self-defence in accordance with the Charter.

138 Secretary-General disturbed by increasing tension between Democratic Republic of Congo, Rwanda, Press Release SG/SM/9631 AFR/1076; S/PRST/2004/45.
This recognition is remarkable, as the Resolution did not make any reference to possible state involvement: indeed, at that time it had not yet been established who was responsible for the attacks. Two weeks later, the Security Council adopted Resolution 1373 (2001), which reaffirmed the right of self-defence (again without identifying state involvement in the al-Qaeda attacks) and called upon all states to prevent and suppress terrorist activities. In the wake of these resolutions, both the OAS and NATO (for the first time in its history) invoked the right of collective self-defence. NATO Council specifically stated that the attack against the U.S. “was directed from abroad and shall therefore, be regarded as an action covered by Article 5 of the Washington Treaty”.

When the U.S. launched “Operation Enduring Freedom” in Afghanistan on 7 October, 2001 it did not rely on a Security Council authorization, but on Article 51 of the U.N. Charter, stating it acted in response to “armed attacks that were carried out against the U.S. on 11th September 2001”. The U.S. furthermore declared that “the attacks of 11th September 2001 ... had been made possible by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by (al-Qaeda) as a base of operation”. This justification was accepted by the president of the Security Council as well as by the vast majority of U.N. Members (including China and Russia). Only Iran and Iraq challenged the legality of the operation.

The events of 9/11 have had enormous repercussions in terms of the awareness of states as to the danger posed by groups of private individuals. This is evidenced by the adoption of new security doctrines, such as the American National Security Strategy (NSS), the European Security Strategy (ESS), the report of the U.N. High Level Panel on Threats, Challenges and Change and the 2005 Report of the Secretary-
All of these documents acknowledge the dangers posed by trans-national terrorism and organized crime, especially in combination with the presence of ‘failing states’ and the proliferation of weapons of mass destruction. The boldest language can be found in the NSS, which declares that the U.S. “will make no distinction between terrorists and those who knowingly harbour or provide aid to them”. Moreover, the U.S. will not hesitate “to act alone, if necessary, to exercise its right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against its people and its country”.

The U.S. is not the only country that has explicitly pledged a right of self-defence against terrorist attacks. Indeed, in December 2002 (following the Bali bombing which killed over eighty Australian tourists), the Australian Prime Minister suggested that the provisions regarding self-defence should be rewritten and announced that his country should have the right to attack terrorist groups or bases in neighbouring countries when there would be credible evidence that these groups were planning to attack Australia or Australian citizens abroad. Russia took a similar position in 2002, when President Putin announced that Russia reserved the right to defend itself against attacks by pro-Chechen rebels operating from Georgia, warning military actions if the Georgian authorities failed to prevent incursions into Russia.

Following the Beslan school siege in 2004, Russia moreover declared that it would launch pre-emptive strikes against terrorist bases “in any region of the world”.

These statements inevitably lead to the following question: Does self-defence against private attacks still require a link to a state or has customary international law abandoned this condition?

### 7.5.5. Self-Defence and State Responsibility

It is clear that the attacks of 9/11 have shaken up the traditional understanding of Article 51 U.N. Charter and the already confusing state practice in the field of indirect military aggression. As a result, several scholars have begun to argue that state involvement is not a prerequisite for self-defence. Others, however, have applied the principles of state responsibility in the case of the terrorist attacks of 9/11 and

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have tried to attribute the acts of Al Qaeda to the state of Afghanistan in order to examine if it could be considered a legitimate target of actions of self-defence.\textsuperscript{149}

The latter approach seems to have been endorsed by the ICJ in its advisory opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories}\textsuperscript{150} (\textit{Palestinian Wall}). In this section, I will examine whether the law of state responsibility offers a guideline to solve the various conundrums, in particular the problem of the required standard of state involvement and the issue of state failure to prevent private attacks, as well as the question whether there are other justifications for the use of force in response to private attacks than the right of self-defence.

\textbf{7.5.5.1. The Relevance of the Rules on State Responsibility to the Law of Self-Defence}

In the past, some scholars have argued that the rules regarding attributability in the framework of the law on state responsibility have no bearing on the law of self-defence.\textsuperscript{151} This argument cannot be retained because it blurs the essential nature of the attributability mechanism - namely to determine whether a state has embarked on a certain conduct - and fails to take account of the fact that the regimes of state responsibility and self-defence are different tools to enforce compliance with certain obligations of international law.\textsuperscript{152} Furthermore, the rules on state responsibility codified in the ILC’s (ARSIWA) are ‘secondary rules’ or rules that establish the general requirements for states to be held responsible under international law for actions or omissions and the legal effects thereof.\textsuperscript{153} Hence, these rules do not address the issue of substantive international law or ‘primary rules’. This entails that whenever a breach of a substantive provision of international law occurs (such as a breach of the prohibition on the use of force), the common rules of the ARSIWA come into play, unless a specific regime exists to establish state responsibility.\textsuperscript{154}


\textsuperscript{150} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, reprinted in (2004) 43 ILM 1009-1098.


\textsuperscript{154} Article 55 ILC DASR 2001; a fine example is provided for in the Convention on International Liability for Damage Caused by Space Objects, UN GA Res. 2777 (XXVI).
Because this is not the case for the law on the use of force, the general rules of the ARSIWA apply. Moreover, Article 8 ARSIWA specifically originates from the *Nicaragua Case*,\(^{155}\) dealing with this area of law. As a result, the rules on state responsibility crystallized in the ARSIWA are fully applicable to the use of force.

### 7.5.6. Self-Defence Against States Involved in Private Attacks

#### 7.5.6.1. The Attributability of Private Conduct to States

In general, international law is very restrictive in attributing private conduct to a state. As a rule, only the acts of state organs, acting in their official capacity are imputable to a state;\(^{156}\) actions of private actors conversely do not entail state responsibility.\(^{157}\) However, the ARSIWA provides for two major exceptions in this regard. The first is enshrined in Article 8, which states that the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that state in carrying out the conduct. This Article covers two possible scenarios. The first deals with a state giving specific instructions to individuals to perform a certain conduct. This is the least problematic, because it is universally accepted that such conduct is attributable to a state regardless of whether the individual is a private person or not and whether the acts concerned are within or outside governmental authority. The second possibility, dealing with private persons acting under the direction or control of a state, is more troubling, as it raises the question to what extent this direction or control has to be exercised. In this respect, the litmus test appears to be the effective, control or direction, in accordance with the decision of the ICJ in the *Nicaragua Case*. “Effective direction or control”, the Court declared, necessarily entails that the conduct complained of was an integral part of the operation directed or controlled by a state. On the other hand, conduct which is only incidentally or peripherally associated with an operation by a state escapes the state's direction or control and does not lead to state responsibility.\(^{158}\)

In the *Tadic case*, the ICTY seems to have lowered the threshold by merely requiring an ‘overall’ control, going beyond the mere financing, training or equipping. However, it must be admitted that the ICTY's competence is limited to establishing

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\(^{155}\) ILC, supra note 83, at 105-107.

\(^{156}\) Article 7 DASR 2001.


\(^{158}\) ILC, supra note 83, at 104(2),(3).

individual criminal responsibility and that the facts of the case were considerably different from those in the *Nicaragua case*. Furthermore, the Tribunal was more concerned to establish whether Bosnian Serb forces were under the control of Yugoslavia in order to internationalize the armed conflict.\(^{159}\) Hence, it is uncertain whether the ‘overall control’ test of Tadic has replaced the previously adopted effective control standard by the ICJ.\(^{160}\)

In any event, the ICTY has endorsed the standard of the ICJ in cases where the controlling state is not the territorial state and the armed private groups perform their attacks abroad.\(^{161}\) Consequently, since this contribution focuses on armed attacks carried out against another state, which involves mostly armed clashes outside the territory of the controlling state, the attribution of the private conduct will only be possible if it is demonstrated that the controlling state had effective control.

The second exception to the rule that private acts do not entail state responsibility can be found in (Article 11 ARSIWA). According to this Article, private conduct will be considered an act of that state (if and to the extent that the State acknowledges and adopts the conduct as its own). Both requirements have to be fulfilled cumulatively in order to distinguish this option from mere approval or endorsement, which does not attribute the private conduct of individuals to a state.

The threshold of Article 11 is quite high: factual acknowledgement and endorsement of private acts are insufficient; states explicitly have to recognize the private conduct as their own. A fine example can be found in the U.S. Diplomatic and Consular Staff in Tehran (*Tehran case*).\(^{162}\) In this case, the ICJ decided that the mere approval of the actions of the hostage takers was insufficient, but concluded that the policy of not ending the hostage taking in order to put pressure on the U.S. and the compliance to this policy by various Iranian authorities which endorsed the policy on several occasions, transformed the occupation of the American embassy into acts of Iran. From this it was clear that Iran did not solely acknowledge the factual situation of the occupation of the embassy and approve it, but used this fact to pressurize the U.S. and further its own policy. As a result, it truly adopted the private conduct as its own.

\(^{159}\) Crawford & Olleson, supra note. 122, at 456-457.

\(^{160}\) The ILC followed the stricter test of the Nicaragua case in adopting Art 8 DASR 2001; others state that the ‘overall control’ of the Tadic case has become the relevant standard.

\(^{161}\) Prosecutor drop. Tadic, Case no. IT-94-1-A, p. 90, para. 138.

7.5.6.2. Substantial Involvement of Target States as a Prerequisite to Exercise Self-Defence

As we have seen, Articles 8 and 11 ARSIWA both involve a high attributability threshold. But the question arises whether attributability of private conduct is the only option open to states resorting to self-defence against private attacks. Indeed, one must not ignore the wrongful conduct of the involved state, which can in itself breach the prohibition of (indirect aggression) as defined in Article 3(g) of the (Definition of Aggression).\(^{163}\)

The (Definition of Aggression) was incorporated in a resolution of the General Assembly in 1974, after long debates regarding the degree of state involvement needed to establish ‘aggression’.\(^{164}\) Initially states were in head-on conflict. Some delegations wanted to include ‘support’, ‘acquiescence’ and ‘encouragement of organization’ of armed bands. Others wanted to reserve ‘aggression’ for cases of ‘open and active participation’. In the end, aggression was defined as “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition” (Article 1). Article 3 of the annex listed acts which qualified as acts of aggression, all of which referred to actions undertaken by states, except for Article 3(g).

The latter Article states that “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein” shall also qualify as an act of aggression.

In most cases, states involved in the “sending of armed groups” will have effective control and the conduct concerned will be attributable to the state pursuant to Article 8 ARSIWA. However, if a state is only ‘substantially involved’ this is not likely, yet the state as such will have committed an act of aggression, which breaches the prohibition of the use of force.\(^{165}\)

The sole problem remaining is the following: can substantial involvement in the acts of private armed groups qualify as an armed attack and thus justify measures of self-defence against the state involved? In this regard it should be noted that the

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drafters of the Charter intentionally used two different terms. Indeed, as the concept of aggression developed during the Second World War to include forms other than armed force, namely economic and ideological aggression, the expression ‘armed attack’ in Article 51 was used to limit the scope of self-defence to armed aggression.

Moreover, the travaux préparatoires of the ‘Definition’ illustrate that a definition of ‘armed attack’ was not intended; attempts to include the latter term were rejected inter alia by the Soviet Union and the U.S. The text of the ‘Definition’ furthermore states that (nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful).

The relationship between ‘aggression’ and ‘armed attack’ was eventually clarified by the ICJ in the 1986 Nicaragua Case. In its decision, the ICJ distinguished between ‘the most grave forms of the use of force (those constituting an armed attack)’ and other ‘less grave forms’. The Court moreover used the (Definition of Aggression) - which was considered to reflect customary international law - as a yardstick to determine what amounts to an armed attack. It declared that action by regular forces across an international border could clearly qualify as an armed attack.

An armed attack could also consist in the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries in the sense of Article 3(g) of the (Definition of Aggression), including substantial involvement therein (provided the scale and effects of such an attack would exceed a mere frontier incident).

By applying Article 3(g) to the exercise of the right of self-defence against private attacks, the ICJ made clear that this right is not confined to situations where the conditions of Article 8 or 11 ARSIWA are fulfilled, but also exists in situations where there is merely substantial involvement of a state in the actions of private armed bands.

On the other hand, the Court took a very narrow approach to the concept of ‘substantial involvement’. The Court indeed explicitly rejected the idea that assistance to rebels in the form of the provision of weapons or logistical or other support could amount to an ‘armed attack’. Such assistance could be regarded as a threat or use of force, but could not justify measures of self-defence. Apart from excluding mere “provision of weapons and logistical and other support”, the ICJ did not elaborate on the concrete meaning of ‘substantial’ involvement. The picture that emerges is as

166 Case Concerning Military and Paramilitary Activities in and Against Nicaragua, p. 3.
follows: an ‘armed attack’ constitutes a specific form of ‘aggression’, which again falls within the broader category of ‘use of force’.  

The Court's view of an armed attack was severely attacked, especially by American scholars. The object of these criticisms was not whether state involvement was a necessary ingredient of an armed attack, but rather the degree of state involvement that was needed. This is also apparent from the separate and (Dissenting Opinions) attached to the Court's judgment. Judge Singh for example favoured a narrow approach, stressing that, even regular and substantial arms supplies would not amount to an armed attack. Judges Schwebel and Jennings on the other hand, accused the Court of denying states their rightful protection by adopting an overly restrictive approach. According to the former, the concept of ‘substantial involvement’ could also include financial and logistical support. Judge Jennings found that the provision of arms could constitute a very important element in what might amount to an armed attack, when coupled with other kinds of involvement.

He also stressed that by excluding “logistical or other support”, “it becomes difficult to understand what it is, short of direct attack by a state's own forces, that may not be done apparently without a lawful response in the form of ... self-defence”. The discussion between these two approaches resembles the conflict of views between Western and developing states preceding the adoption of the (Definition of Aggression), of which the text of 1974 constituted a compromise.

Of course, one could argue that the ICJ has chosen to depart from its previous stance in Nicaragua by its findings in Palestinian Wall Case. In this advisory opinion, rendered shortly after the 9/11 attacks and the adoption of the controversial Resolutions 1368 and 1373, the Court addressed the issue of self-defence against attacks by nonstate actors. The Court rejected the idea that the construction of the so called Palestinian wall could be justified as a measure of self-defence, in virtue of the fact that Article 51 of the Charter “recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state” (para. 139).

Israel, however, had not claimed that the attacks it suffered were in fact “imputable to a foreign state” ergo the right of self-defence could not be invoked. The

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167 See Gray, supra note 8, at 109.
171 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, p. 80.
Court added a second argument to its rebuttal of Israel's pleas. The Court noted that the terrorist threat invoked by Israel originated within, and not outside its territory.

The situation was therefore found to be different from that ‘contemplated by Security Council Resolutions 1368 (2001) and 1373 (2001)’. Therefore Israel ‘could not in any event invoke those resolutions’ in support of its claim to be exercising a right of self-defence.

At first sight, the ICJ indeed seems to boldly indicate that an armed attack has to be imputable to a state, end of story. So short after the attacks of 9/11, this certainly is a remarkable statement, as the Court seems to raise the threshold spelled out in Nicaragua by demanding imputability of the attack, rather than merely ‘substantial involvement’.

To interpret the first argument otherwise would run counter to the (Separate Opinions and Declarations) of the individual Judges. Judge Kooijmans, for example, affirmed that it “has been the generally accepted interpretation for more than 50 years” that an armed attack must come from a state.172

Furthermore, Judges Buergenthal173 and Higgins174 disagreed with the Court, stating that nothing in Article 51 makes the right of self-defence “dependent upon an armed attack by another state”. The latter added that such a qualification did not result from Article 51, but from the Court's determination to this end in the Nicaragua case.

The Court's approach is hopelessly obfuscated by the second argument. Here the Court seems to indicate that Security Council Resolutions 1368 and 1373 purport a general right of self-defence with regard to acts of international terrorism (originating from abroad). On the other hand, the separate opinion of Judge Kooijmans suggests that, this is not what the Court meant to say. Judge Kooijmans indeed seems to advocate a right of self-defence against acts of international terrorism on the basis of Resolutions 1368 and 1373 - which entail a new element, not excluded by Article 51, “the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence” - but he regrets that the Court “has by-passed this new element”.175

175 Separate Opinion of Judge Kooijmans, p. 108, para. 35.
In view of the separate opinions and declarations, it is not clear how the Court's two findings can be reconciled. The only fact that is apparent from the Advisory Opinion is that the Members of the Court disagree on the issue. Quite significantly, contrary to what was the case in Nicaragua, the discussion did not simply focus on the degree of state involvement needed for an armed attack to occur, but rather on the question whether ‘armed attacks’ required state involvement or not.

It must finally be noted that Judges Higgins and Buergenthal also rejected the distinction made by the Court between attacks emanating from a foreign or from an occupied territory as an awkward formalism.\footnote{Separate Opinion of Judge Higgins, p. 110, para. 34; and Declaration of Judge Buergenthal, p. 109, para. 6.}

In the end, the Advisory Opinion raises more questions than it solves by requiring that private attacks have to be imputable in order to exercise the right to self-defence under Article 51 of the U.N. Charter. This finding is inconsistent with the Court's own judgment in Nicaragua and state practice before and after 9/11. As a result, it is very doubtful that the findings in Palestinian Wall have to be regarded as the new direction of international law in the field of self-defence against private attacks.

**7.5.7. The Problem of Non-prevention of Armed Attacks by Private Actors**

A second problem, apart from the issue of the required involvement threshold, is the exercise of the right of self-defence against a state which has failed to prevent an attack by private individuals. As demonstrated above, the international community has had mixed reactions towards such claims. However, some guidance can be found in the framework of the due diligence rule, which forms part of international law and plays an important role in the security of foreign states. In accordance with this rule, whenever a state is under a duty to protect - as opposed to an obligation to abstain - this duty has to be carried out due diligently. If not, the state will have committed an internationally wrongful act, entailing state responsibility. The due diligence rule is of importance with regard to private attacks emanating from abroad, as international law has long recognized that states have a duty to protect other states from attacks conducted by private individuals from their territory by combating the hostile use of force of private individuals against foreign states.\footnote{R.B. Lillich and J.M. Paxman, ‘State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities’, 27 AUL Rev, (1977), p. 261.} This duty flows from the (Declaration on Friendly Relations), which proclaims that “no state shall organize,
assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state”, as well as from similar more recent resolutions.\textsuperscript{178} It must be stressed that this duty must be exercised due diligently and does not require the absolute prevention of actions of the private individuals.\textsuperscript{179}

The due diligence rule only applies to duties to protect, not to obligations to abstain. Consequently, if a state engages actively in the organizing and sending of armed private actors to carry out an armed attack against another state, it can not shield itself behind the due diligence rule because it is in fact breaching a duty to abstain from a certain conduct, in particular the use of force against another state.

Such conduct is explicitly prohibited under international law, whether or not the actual conduct of the private actors will be considered attributable to the state pursuant to Article 8 of the ARSIWA. Again, the due diligence rule does not apply to situations where the state provides for different kinds of support (financially, logistically, or militarily). Apart from extreme cases such support will never attribute the actions of the private actors to the state. In the past, legal literature was divided on the question whether the supporting state breached a duty to abstain or a duty to protect another state, in which circumstances the duty of due diligence would apply.

However, in the \textit{Nicaragua Case} the ICJ provided the answer by condemning the U.S. organs active involvement in the supporting of the Contra's itself as a specific breach of international law, namely the principle of non-intervention in the internal affairs of Nicaragua. Hence, the Court regarded the active support to private actors as a duty to abstain, and not as a duty to protect other states against armed attacks of private actors.

In the end, the due diligence rule only matters to situations of negligence or mere toleration of the conduct of private actors in a state's territory. In such situations, whether a state has in a specific case fulfilled the requirement of due diligence is a purely factual matter as was demonstrated in the \textit{Nicaragua Case}: the Court decided that Nicaragua has not breached its due diligence duty to stop the arms traffic to the opposition in El Salvador taking inter alia into account the geographical obstacles.\textsuperscript{180}


Moreover, in the case the state has not acted due diligently, for example by merely tolerating the presence of armed private actors, then still it cannot be subjugated to actions of self-defence: it is only responsible for the breach of the customary duty to protect foreign states, governed by the due diligence rule, which cannot be qualified as an act of aggression.\textsuperscript{181} Furthermore, the state concerned is not responsible for the actions of the private individuals. This is evidenced by the Tehran case in which Iran was not held responsible for the initial attack, although it failed to take appropriate steps to prevent it, but only for the due diligence duty to care for the diplomatic and consular premises, its staff and property. It was only when the Iranian state adopted and acknowledged the conduct of the private actors as its own, that it became responsible for the occupation of the embassy and consulates.\textsuperscript{182}

One last issue nevertheless remains. To exercise its due diligence duty to protect other states against armed attacks of individuals from its territory, a state needs to have a functioning governmental apparatus in order to combat these individuals. But what if the state apparatus has collapsed? Indeed, it is possible that terrorist or other armed groups seek refuge in failed states and operate from there to launch their attacks. According to Article 9 ARSIWA in the absence or default of the official authorities, the conduct of individuals will be considered an act of a state if these individuals are in fact exercising elements of the governmental authority and in circumstances such as to call for the exercise of those elements of authority.

This provision presupposes that a partial or total collapse of the regular government has occurred, which led to individuals performing conduct which normally would be exercised by governmental authorities.\textsuperscript{183}

In this regard, the nature of the conduct is of the most importance. For example, in the \textit{Yeager Case} groups of individuals were in fact acting as customs officials during the revolution in Iran,\textsuperscript{184} a task which is in reality performed by the government. Furthermore, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise governmental functions in the absence of any authority.\textsuperscript{185} Consequently if

\textsuperscript{181} Pisillo-Mazzeschi, supra note 41, at 116-117.
\textsuperscript{182} Case Concerning United States Consular and Diplomatic Staff in Tehran, supra note 94, para. 61-74-86.
\textsuperscript{183} ILC, supra note 83, at 110-111(4-5).
\textsuperscript{184} Yeager v Islamic Republic of Iran, (1987) 17 Iran-United States Claims Tribunal 104.
\textsuperscript{185} ILC, supra note, 111 at 6.
such groups start sending armed groups to carry out armed attacks against another state or become substantially involved therein - conduct which is normally exercised by a government - the conduct will be attributable to the (collapsed) state which can become the target of actions of self-defence. It can furthermore be argued that individual groups exercising elements of governmental, in particular police powers, have to act due diligently in the combating of armed groups in the territory which perform armed attacks against foreign states.

7.5.8. Self-Defence or State of Necessity?

Actions undertaken pursuant to the right of self-defence preclude the wrongfulness of the conduct and hence bar state responsibility (Article 21 ARSIWA).

The question arises whether there are other circumstances precluding wrongfulness which can be applied in the case of private attacks. In the past, the ILC has made a distinction between the right of self-defence and the state of necessity (Article 25 ARSIWA), dealing with the use of force against private attacks in relation to the concept of ‘state of necessity’. If on the one hand, the acts of the private individuals were attributable to a state and constituted a breach of that state of an international law obligation owed to the victim state, then the victim state could exercise its right of self-defence. If on the other hand, the actions of the private individuals would not be attributable to any state, justified reactions against those attacks, infringing the rights of another state would fall under the scope of necessity.

The ILC listed several actions that might be justified on this ground: incursions into foreign territory to forestall harmful operations by private individuals preparing an attack on the territory of another state, the transboundary pursuit of armed individuals or criminals and the protection of nationals who are held captive by hostile groups not under the direction and control of a foreign state. Interestingly, the 1837 Caroline incident, which was called the ‘locus classicus’ of the law of self-defence by Robert Jennings, involving attacks against Canada by U.S. citizens, was considered to fall under the scope of a state of necessity.

It must, however, be conceded that the state of necessity has always been a very controversial and contested concept, both in state practice, legal literature and in the debates of the ILC itself. It can only be invoked under very stringent conditions.

Thus, necessity is excluded if the actions seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.\textsuperscript{187}

As regards the question whether necessity can ever justify violations of the prohibition on the use of force, enshrined in Article 2(4) of the U.N. Charter, the ILC considered that it was not competent to address this issue. Some seem to answer the question in the positive.\textsuperscript{188} Most authors, however, agree that the prohibition on the unilateral use of force is part of \textit{jus cogens} and that self-defence is the only lawful exception to this principle.\textsuperscript{189} Moreover, as necessity can not be invoked in relation to violations of peremptory norms of international law, pursuant to (Article 26 ARSIWA), it follows that it does not provide an alternative exception to Article 2(4).

For this reason, and by virtue of a state of necessity, a state has the right to launch armed countermeasures when it is being attacked by private individuals located on the high seas or in a plane above the high seas,\textsuperscript{190} but that this concept can not serve as a ground for military incursions into neighbouring states.


7.6.1. 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 NSS of the U.S., which outlines the U.S. government’s view on possible reactions to international terrorism.\textsuperscript{191} The main tenets of this strategy include a new view on anticipatory self-defence, a doctrine which since then has become known as the (Bush Doctrine of Preemptive Self-Defence).

7.6.1.1. The Bush Doctrine

President Bush declared in an introduction to the NSS that the U.S. will act against “emerging threats before they are fully formed”.\textsuperscript{192} The document states that:

\begin{footnotesize}
\begin{enumerate}
\item Article 25(1) (b) ILC DASR 2001.
\item Schmalenbach, supra note. 8, at 7.
\item Ibid. at 3.
\end{enumerate}
\end{footnotesize}
“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 (WMD) - weapons that can be easily concealed, delivered covertly, and used without warning”.

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:

“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’”.

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”.

Hence strikes under the Bush Doctrine are not limited to reprisals or self-defence, but may also include preemptive strikes. In the words of Condoleezza Rice, President Bush’s former National Security advisor and 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.”

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193 Ibid. at 4.
cloud”. 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.

The Bush Doctrine, as expounded in the NSS, emphasizes military action against other governments that harbor and support terrorists or that develops nuclear, chemical, or biological weapons that could be used in terrorist attacks on the U.S. The military component of the NSS 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 WMD;
2. Preemptive strikes will be used to prevent harm to the U.S. or American citizens; and
3. The U.S. will, if necessary, act alone without the support of the international community.

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. 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, and efforts to diminish the conditions that spawn terrorism. Together, the military and ideological aspects of the NSS 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.

7.6.1.2. The War in Iraq of 2003 - First Application?

7.6.1.2.1. Chronology of Events Leading to the Use of Force Against Iraq

In the aftermath of September 11th, tensions between the U.S. 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’.  

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198 Ibid. at 6-15-16.
President Bush accused Iraq of developing WMD and supporting terrorist organizations and vowed that the U.S. “would not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons”. Eight months later, on September 12, 2002, President Bush addressed the opening of the U.N. General Assembly and urged world leaders to confront “the grave and gathering danger” of Iraq.

Highlighting Iraq’s continuing defiance of the Security Council during the last decade, President Bush promised to “work with the U.N. Security Council”, but warned that the U.S. was ready to act unilaterally if necessary. The same month, the Administration released the above mentioned U.S. NSS 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”.

On September 16, 2002, Iraq announced that it would allow the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and International Atomic Energy Agency (IAEA) inspectors to return to Iraq, but the U.S. and Britain rejected the agreement. On November 8, 2002, the Security Council unanimously adopted Resolution 1441.

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. Weapons inspections resumed in Iraq on November 27.

On December 7, Iraq submitted a declaration of almost twelve thousand pages to the U.N., claiming it had not banned weapons. After reviewing the declaration, UNMOVIC Chairman Hans Blix stated that it contained “little new significant information ... relating to proscribed weapons programs”. In January 2003, in his

State of the Union address, President Bush suggested that Iraq had failed to meet U.N. demands, and he announced that the U.S. would lead a coalition to disarm Saddam Hussein, even without a U.N. mandate.\textsuperscript{204} Secretary of State Powell addressed the Security Council on February 5\textsuperscript{th} and presented satellite images and intercepted telephone conversations between Iraqi military officers, all allegedly indicating that Iraq was evading its disarmament obligations.\textsuperscript{205} Even though the U.N. 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 (OIF).

\textbf{7.6.1.2.2. Legal Justifications for Operation Iraqi Freedom}

The U.S. government officially justified OIF with several reasons:

\textbf{7.6.1.2.2.1. Security Council Authorization}

First of all, the U.S. and the U.K. contended that OIF 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, “The action follows a long history of non-cooperation by Iraq with the United Nation’s Special Commission (UNSCOM), (UNMOVIC) and (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 WMD, 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”. 206

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 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). 207

The reliance on Resolution 678 for justifying OIF does not seem to be able to survive closer examination. Resolution 678 208 states that “the Security Council Authorizes Member States cooperating with the government of Kuwait unless Iraq on of 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 that, “The Security Council, Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait, 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 - (Decides to remain seized of the matter and to take such further steps as

207 UN Doc. S/2003/351.
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. 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 WMD, 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 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), that’s 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 OIF. Especially there is no authorization of the use of force by (Member States) relating to WMD, or, for that matter, relating to regime change.

7.6.1.2.2.2. Pre-emptive Self-Defence

Further, it has been argued that the intervention in Iraq was lawful as a legitimate exercise of the right of preemptive self-defence. The U.S. claimed that Iraq

210 Ibid. at 265.
was developing chemical and biological WMD 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 U.S. may always proceed in the exercise of its inherent right of self-defence, recognized in Article 51 of the U.N. Charter”.\(^{211}\)

The 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 U.S. and the international community from the threat posed by Iraq and restore international peace and security in the area).\(^{212}\)

As there was no convincing evidence that Iraq was in possession of WMD, 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-defence as a justification for OIF does not seem to be convincing. This has even been confirmed by the fact that to date no WMD have been found in Iraq and then U.S. Secretary of Defence, Donald Rumsfeld even had to admit that there was no convincing evidence for the existence of WMD 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. 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-defence, in which the very survival of the state would be at stake”.\(^{213}\) The mere possession without even a threat of use does not therefore amount to an unlawful attack. Hence a justification for OIF on self-defence cannot be derived from the fact that Iraq was in possession of WMD, which in fact it was not, as long as there is no actual threat of the use of those weapons.


\(^{212}\) UN Doc. S/2003/351.

\(^{213}\) 1996 I.C.J. 226, 266.
7.6.1.3. Pre-emptive Self-Defence in the 2006 National Security Strategy

In his letter introducing the 2006 Strategy, President Bush says, “We fight our enemies abroad instead of waiting for them to arrive in our country”, and the 2006 NSS makes a continuing strong commitment to pre-emptive action.

It asserts that “The place of preemption in our NSS remains the same”. This approach may be seen also in the policy of ‘active defence’ set out in the Department of Defence (National Defence Strategy) of March 2005 and in the emphasis on the need for actions in self-defence to pre-empt adversaries before they can attack in the 2004 National Military Strategy of the USA.

But the discussion of the use of force in the 2006 Strategy is no more detailed than it had been in 2002. Many questions are still left unanswered. What is new and very striking is the absence of any express reference to international law. As before, it is Goals III and V which deal with the use of force. Goal III remains the same as it had been in 2002: to strengthen alliances to defeat global terrorism and work to prevent attacks against us and our friends. The 2006 Strategy repeats the 2002 position that in fighting terrorism, the U.S. can no longer rely on deterrence; the fight must be taken to the enemy. However, the 2006 NSS no longer refers merely to the threat posed by “shadowy networks of individuals” as President Bush's introduction to the 2002 version had done; it now attempts to identify much more precisely the nature of the terrorist threat. It discusses the causes of terrorism at some length and contests the view that the invasion and occupation of Iraq led to an increase in terrorism.

Goal V, to prevent our enemies from threatening us, our allies and our friends with WMD, repeats the 2002 principle that the duty to protect the American people obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The summary of the 2002 strategy says:

“The greater the threat, the greater is the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. There are few greater threats than a terrorist attack with WMD”. This language is exactly the same as in 2002. But then comes a slight shift: “To forestall or prevent such hostile

215 Department of Defence website www.defenselink.mil/(on Nov, 4,.2010).
216 Ibid. at 2.

acts by our adversaries, the U.S. will, if necessary, act pre-emptively in exercising our inherent right of self-defence”. The words in italics are new and were not present in the 2002 version. They make it clear that the basis for pre-emption is self-defence.

This may be taken as an implicit reference to Article 51 of the U.N. Charter and to the controversial doctrine of the preservation of an inherent right of self-defence going beyond the right to act in self-defence against an armed attack.\(^{218}\)

But the Strategy does not consider the compatibility of U.S. policy with international law. The claim of a right to take pre-emptive action in self-defence is not expressed in terms of a call for a change in the law, nor is it expressly based on the existing law. There is no explicit reference to international law in the 2006 Strategy.

In 2002, the NSS had famously said that international law recognized that the use of force against imminent attack was permissible and had gone on “We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries”. Now there is nothing at all on international law in the sections on the right of pre-emptive action, an apparent reflection of the hostility, indifference or contempt for international law felt by many neo-conservatives influential in the Bush administration.

The 2006 NSS repeats the words of the 2002 Strategy: “If necessary, however, under long-standing principles of self-defence we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack” and then adds “The reasons for our actions will be clear, the force measured, and the cause just”.\(^{219}\) These new words do not give any specific guidance on the use of force. This section is no more informative on the limits of pre-emptive action than it had been in 2002; it is still not clear what will trigger pre-emptive force and what is the proper scope of such action.

Not only is there no mention of international law on the law of force, but also there is almost no reference to the U.N. in the 2006 Strategy. As in the 2002 Strategy, there is no recognition of the primary role of the Security Council in the maintenance of international peace and security.\(^{220}\) Goal VIII reaffirms the 2002 aim to develop


\(^{220}\) The Strategy mentions the U.N's Democracy fund and the need to work with the U.N and regional organizations to help implement their democratic commitments. In Goal 5, it highlights the role of the USA in securing passage of SC Resolution 1540, but there is nothing else on the U.N in this section. At end, the Strategy stresses the need to promote reform of the U.N.
agendas for cooperative action with the other main centers of global power, but there is no emphasis on the U.N. or other traditional alliances here.

There is less, and generally less favourable, reference to NATO than there had been in 2002; there is, moreover, a strong call for it to accelerate its internal reform, as demanded in 2002. The main focus is on \textit{ad hoc} coalitions such as the (Proliferation Security Initiative).

\textbf{7.6.1.3.1. Rogue States-2002 and 2006}

In 2002, the Strategy identified the most serious challenges to U.S. national security as emanating from the dual threat of rogue States developing WMD and of terrorists who might acquire such weapons. It singled out Iraq and North Korea, and said “We must be prepared to stop rogue States and their terrorist clients before they are able to threaten or use weapons of mass destruction against the U.S. and our allies and friends”. In the 2006 Strategy, the focus shifts to Iran and Syria as state sponsors of terror: “Some states such as Syria and Iran continue to harbor terrorists at home and sponsor terrorist activity abroad”. In the context of proliferation of WMD, the strategy from Iran. This is not only because of its attempts to develop nuclear weapons, singles out Iran again: “We may face no greater challenge from a single country than but also because of broader concerns. The Iranian regime sponsors terrorism; threatens Israel; seeks to thwart Middle East peace; disrupts democracy in Iraq; and denies the aspirations of its people for freedom”\textsuperscript{221}

In several important aspects - the support for pre-emptive self-defence, the lack of respect for international law, the failure to acknowledge a role for the U.N. and the express identification of rogue states - there is a marked contrast between the 2006 U.S. NSS and the 2003 ESS.


The ESS issued its first joint security strategy in December 2003.\textsuperscript{222} This 14-page document was designed to be a counterpart to the U.S. NSS, and there are many similarities between the two documents. Under the heading Key Threats, it says “Large-scale aggression against any member state is now improbable. Instead, Europe faces new threats which are more diverse, less visible and less predictable”.

The ESS identifies five threats: terrorism, the proliferation of WMD, regional conflicts, state failure and organized crime. In its discussion of (Strategic Objectives),


\textsuperscript{222} \textit{EU Security Strategy} 2003.\textit{available at www.ue.eu.int/uedocs/cmsUpload/78367.pdf.\textit{(on Nov, 14, 2010).}
the strategy says: “Our traditional concept of self-defence - up to and including the Cold-War, was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. The new threats are dynamic. The risks of proliferation grow over time; left alone, terrorist networks will become ever more dangerous.

State failure and organized crime spread if they are neglected - as we have seen in (West Africa). This implies that we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early”. But the ESS still is not prepared to adopt the doctrine of pre-emptive self-defence. It did accept that the law may need to be adapted to meet new needs; the strategy includes the general statement: “It is a condition of a rule-based international order that law evolves in response to developments such as proliferation, terrorism and global warming”. But there is nothing more express. This is a clear indication that the doctrine of pre-emption is not generally accepted international law. Whereas the U.S. singled out Syria and Iran, the ESS did not identify them by name, saying only that “A number of states have placed themselves outside the bounds of international society”.223

In marked contrast to the U.S. 2006 NSS, the European instrument emphasizes international law and the role of the U.N. It includes a section on (World Order) based on Effective Multilateralism: “We are committed to upholding and developing international law. The fundamental framework for international relations is the U.N. Charter. The U.N. Security Council has the primary responsibility for the maintenance of international peace and security”.224 Even if this is mere lip-service, it still represents a quite different approach from that of the U.S.

7.6.3. The Contribution of the Reports Prepared by the U.N. Secretary General and the High-Level Panel

The evolution of the rules of force has been summarily treated in the reports recently prepared by the U.N High-level panel225 and the U.N. Secretary General.226

Regrettably, the problems related to the use of force authorized by the Security Council or intended to enforce its resolution, as well as the content of the right to self-defence have not been adequately addressed.

223 Ibid, at 3-6-10.
Both reports rightly stress that “the task is not to find alternatives to the Security Council as a source of authority but to make it work better”. However, there is very little guidance on how such an objective may be achieved. The main proposal concerns the establishment of a set of criteria for the authorization to use force. Although the criteria themselves are undisputed, one may wonder whether their detailed elaboration is feasible and necessary. Furthermore, the language used and the reference to their ‘subscription’ by member states and to their ‘adoption’ by the Security Council, in fact, may convey the impression of a political agreement or a self-constraint exercise. Quite the contrary, the criteria reflect limits already legally defining the powers of the Security Council, and their treatment from the perspective of legality - and not of legitimacy - would have been more appropriate.

The real problems lie elsewhere. It is undisputed that the Security Council powers are to be exercised within certain limits. This implies that these limits can be breached. There is nothing in the reports on the remedies against Security Council violations of these limits. This is extremely important if we consider that the Security Council can make lawful the use of force against a given state. The reports also neglect the problem of the lack of effective control by the Security Council over the authorized use of force, especially when permanent members are involved. One way to solve the problem may be to allow the General Assembly, the Security Council members or states to request during the operations a new Security Council Resolution confirming the authorization to use force. Such a resolution would guarantee that force is still supported by the qualified majority of the Security Council and presumably used in the common interest of the Organization.

However, the reports are silent on the lawfulness of military enforcement measures not authorized by the Security Council. Here, the reports should have considered the authorization as a legal requirement and stressed the collective character of the decision to deprive a state from the legal protection against threat or use of force.

Equally disappointing is the analysis of the legality of the use of force in self-defence. If the conclusion reached in both reports that there is no need to reconsider

227 Paras. 198 and 126, respectively. See however the unfortunate passage on preventive self-defence contained in the High-level panel report, infra text fn. 111.
229 The Secretary General “recommended that the Security Council adopt a Resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force”, p.106, para 126.

Article 51\textsuperscript{230} is sound, the arguments supporting it are not fully developed. The High-level panel report summarily refers to preventive self-defence as the use of force ‘against a non-imminent or non-proximate threat’, without offering any definition of such threats.

Instead, it was maintained that, “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment - and to visit again the military option”. \textsuperscript{231}

The only evidence relied upon to reject the admissibility of preventive self-defence is the obvious risk that the unilateral action implies for the global order and the norm of non-intervention.\textsuperscript{232}

7.7. Conclusion

The right of nations to defend their citizenry, their sovereignty, and their existence has existed throughout history. States not only have a duty to ensure basic human rights are enforced; they also have an obligation to protect their citizens and residents from crime. A standard of justifiable self-defence, requiring a nation to wait for an armed attack on its soil, was a reasonable and stabilizing rule.

Under Article 51 of the U.N. Charter, self-defence may validly be claimed if a state suffers an armed attack and the response to the attack is timely (necessary) and proportionate to the original armed attack. The scope of the right of self-defence, especially the question of anticipatory self-defence, in international law remains a contested issue, although anticipatory self-defence seems to be an accepted rule of international customary law. Nevertheless, anticipatory self-defence 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.

\textsuperscript{230} Paras 192 and 122-125 respectively. The conclusion was shared by the Workshop on Article 51 of the U.N. Charter in Light of Future Threats to International Peace and Security, organized by the Swiss Federal Department of Foreign Affairs, Geneva, 23 April 2004.

\textsuperscript{231} A More Secure World, p. 105, para. 190.

\textsuperscript{232} Ibid. at para 191.
With the end of the Cold-War, terrorism has emerged as the gravest threat facing national and international security. There is a global consensus that nations that suffer a terrorist attack are entitled to defend themselves in a timely and proportionate manner. The attacks of September 11th, the response by the U.S., and the international community's approval of the military action in Afghanistan represent a new paradigm in international law relating to the use of force. Self-defence against private attacks has been a controversial issue ever since the inception of the U.N. Charter. In recent years, shifts in state practice, security doctrines and legal literature seem to support a loosening of the conditions hereof. The exact nature of these conditions nevertheless continues to be governed by a great amount of uncertainty.

The reaction to the 9/11 terrorist attacks invoked the (Bush Doctrine) of preemptive self-defence. 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-defence. Especially in the case of OIF, the requirements of self-defence 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.

To end with, in my view self-defence either exists or not. There is no category in between. Once there is ‘imminent threat’, always the right to self-defence can be invoked. It is only a question of evidence. However, I have to admit that giving the rapid expansion of technology a threat may not always be visible. Nevertheless, it is our duty as scholars to draw the theory regardless the event, but never articulate a theory in light of the event. But, as Winston Churchill once argued: “This is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning”.

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