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Evaluation of Right of Use of Force in Self-Defense

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Abstract

Self-defense is lawful under international law. Meanwhile an absolute prohibition against the inter-state threat of force is contained in Article 2(4) of the UN Charter. Like the prohibition of the use of force, the prohibition of the threat of force is binding on all members Stated. Ban of the threat or use of force has also been reaffirmed, though a soft law format, in international instruments like, the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States, 1970 and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 1987. However, neither of these soft law instruments goes beyond Article 2(4) of the Charter nor in conflict with it rather the same are in aid. The 1970 Declaration emphasizes that every state has the obligation to abstain in its international relations from the threat or use of force against the territorial veracity or political independence of any State, or in any manner in contradiction of the United Nations. It proceeds to establish that such a threat or use of force comprises of breach of international law and the United Nation's Charter shall never be employed as a source of resolving international issues. Likewise, Declaration, 1987 affirmed that every State has the obligation to abstain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner contradictory with the purposes of the UN. Interestingly noted that neither the declarations nor Article 2(4) of the UN Charter reinforce prohibition give any clear guidance as to when a threat of force is against the law or under what circumstances it would be lawful. Self-defense exercised in response to a prior use of military force is universally established as an exception to the prohibition of the use of force, assuming that such action meets certain criteria. These criteria curtail from both conventional and customary international law and are well known. Admittedly, their accurate scope and application have been-and continue to be extensively debatable.

Keywords: *International law, Self defense, UN charter, Pre-emptive right, Rough state*

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1. International Law and Use of Force

The rules governing the use of force form a fundamental component within international law and together with other principles like territorial sovereignty and the independence and equality of States provide the framework for international order.

1.1. Historical Nexus

Law of recourse to force demonstrates that it has changed considerably over the centuries due to many factors and aspects as described hereunder:

1.1.1. 19th and Early 20th Century

The theory and practice of the use of force was that of ***bellum justum*** during the 19th and 20th centuries. The doctrine of *bellum justum*, which originated in the Middle Ages, legalized the course to violence in international law as a method of self-help only if certain criteria were met relating to an authority of an aggressor to make warfare, its objectives and its intent. Key characteristic of the law on the use of force was to make balance of power, status quo etc. The highest ecclesiastical authority of Rome, supervised the justice of warfare until it lost its power after the reformation. After that the doctrine lost its influence and each aggressive was, in effect, exclusively responsible in respect of the *justum* aspect of war.

1.1.2. The Covenant of the League of Nations

The First World War marked the end of the balance of power system and through the establishment of the League of Nations, a different approach to the use of force in international law was established. The Covenant of the League of Nations determined "resort to war" under international supervision, and accepted its legitimacy in four situations:

(1) When made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League;

(2) When started before the expiration of three months after the arbitral award or judicial decision or Council Report;

(3) When started against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report;

(4) Under certain conditions, when started by a non-member state against a member state.

Therefore, the League of Nation did not forbid the use of force as such, but did set up a procedure designed to limit it to tolerable levels.

1.1.3. The Kellogg-Briand Pact and the Nuremberg Tribunal

After signature of General Treaty for the Renunciation of War (the Kellogg-Briand Pact) of 1928, the actual breakthrough to lawfully condemning warfare in international law was determined. It was adopted in this treaty that the parties:

> *Seriously declare in the names of their respective peoples that they condemn way out to warfare for the resolution of international conflicts, and give up it, as an instrument of national policy in their relations to one another.*

After this, warfare was to be noticed as no proper and legitimate instrument of national policy, however, the Pact failed to prevent Second World War. Nevertheless it had an effect, as it produced the foundation for 'crimes against peace', which, after Second World War, were expressed in the Charter of the Nuremberg Tribunal as those crimes aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties. It was observed by the Nuremberg Tribunal that:

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

1.1.4. United Nations Charter

United Nations Charter was brought into force on October 24, 1945. Since then the Charter provides the legal framework for the use of force in international law. The Preamble to the Charter expresses a determination to save succeeding generations from the scourge of war, 'to practice forbearance and live together in peace with one another as good neighbors', 'to join our strength to maintain international peace and security', and to make sure 'that armed force shall not be used, save in the common interest' Therefore UN charter in its first Article expressed the purpose of the United Nations which is:

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

Further expressing strong determination on peace, UN Charter in Article 2 stipulates the main principles in respect of the use of force, which bind both the organization and the states signatory to it that:

> *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
>
> *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.*

International Court of Justice (ICJ) in Nicaragua v United States of 1986 described Article 2(4) as a peremptory norm of international law, which could not be derogated by the states. Thus the effect of Articles (3) and (4) is that the use of force can only be justified as expressly mentioned in the Charter, and only in circumstances where it is consistent with the UN's purposes. The reference to 'force' instead of to 'war' covers circumstances in which violence is used, not necessarily meaning that this violence fulfills the technical requirements of a state of war. Nevertheless, a few scholars have argued over the years that Article 2(4) is not a general prohibition of force, but rather only a prohibition on force aimed at the territorial integrity and political independence of states or inconsistent with the purposes of the UN. With this interpretation of Article 2(4), a scholar for example tried to rationalize Israel's 1981 strike against the Iraqi nuclear reactor at Osirik. Strike of Israel in this case was to prevent Iraq from making nuclear weapons and thus aimed at its own long-term security. It was argued, that the Israeli attack did not compromise the territorial integrity or political independence of Iraq, nor was it against the purposes of the UN. The conclusion, reflecting a narrow view of sovereignty, was that the strike did not violate the prohibition of force as mentioned in Article 2(4).The Israeli strike and this legal interpretation however faced uniformly negative international reactions. The Security Council passed a unanimous resolution condemning it as a violation of the Charter. The resolution can be seen as strengthening the general understanding that Article 2(4) is a general prohibition on force, which is by far the predominant view today. International law at present therefore clearly prohibits the use of force per se under the Charter, to which almost all states are parties.

1.2. Exceptions to the Prohibition of the Use of Force

Generally charter of the United Nations prohibits the use of force. Nevertheless there are exceptions to this rule, which have found their way into the provisions of the Charter. There are basically three possible exceptions in international law at present, namely authorized by the Security Council under Chapter VII of the UN Charter, the case of individual or collective self-defense under Article 51 of the Charter and, more contested, the case of humanitarian intervention, which is not clearly regulated in the Charter, but which may be international customary law.

1.2.1. Authorized by the Security Council

Chapter VII validates the right to use force, if authorized by the Security Council. Article 42 describes that:

> *"The Security Council … may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security".*

As a result, an exception is formed where authorized by the Security Council the use of force in a resolution. Such a resolution must be with limitation of objects and purposes of the Charter and comply with the principles of the United Nations. The Security Council must be convinced, that the state against which the force is to be used poses a '*threat to peace*', and that this cannot be averted in any way other than by the use of force. But if these criteria are fulfilled the Charter provides for the legal use of force.

1.2.2. Article 51 of the Charter: Individual or Collective Self-Defense

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

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

1.2.3. Humanitarian Intervention

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

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

It is fact that legal status of humanitarian intervention has dramatically changed. The 17th century scholar Hugo Grotius was one of the first to comment on the legal aspects of interventions. It was his contention that sovereign committing atrocities against his own subjects could provide justification for others taking up arms against that sovereign in defense of all humankind. This view of humanitarian intervention prevailed through the 19th and early 20th century. Thus humanitarian intervention as a case of the legal use of force was accepted as customary international law in pre-Charter times. With the general prohibition of the use of force under the Charter, it became uncertain, whether humanitarian intervention was still an exception to this prohibition, as the Charter did not provide for it. Instead Article 2(4) enshrines the principle of non-intervention by foreign powers and affirms state sovereignty, especially territorial integrity. So the question was raised, whether the former rights to humanitarian intervention was consistent with Article 2(4) thus still a valid rule of international law. To justify humanitarian intervention, a 'territorial integrity argument' has been raised to permit temporary violations. According to this, humanitarian intervention is deemed to be in compliance with Article 2(4), because the altruistic intervention does not result in territorial conquest, against which the Charter was designed to protect. Further the territorial boundaries of the target state remain unchanged and the intervener departs from the state invaded once the crisis is over. This, at first sight, compelling line of reasoning seems to be rather artificial, when subjected to a close examination: The argument, based on altruistic intervention, seems to be rather unrealistic, as states do not act in an altruistic manner, but follow their own interests. Further an armed intervention in the target state surely does interfere with territorial boundaries and national policies, as the ruling government loses power over those parts of state territory, which are subjected to the intervention. Nevertheless, actual state practice has shown that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved due to an outside intervention in circumstances of gross oppression by a state of its citizens. Especially in cases where there is extreme humanitarian need, a right of humanitarian intervention might evolve. In such extreme situations, the use of force is still deemed to be justified under the customary international law principle of humanitarian intervention. Problematic about humanitarian intervention of course is the danger of abuse by powerful states to exploit weaker states. Further it is not clear why humanitarian interventions have occurred

in some cases, while in other cases, where similar human catastrophes happened (Tibet, Chechnya, Angola, Sudan just to name a few), the international community remained silent. Humanitarian intervention nevertheless still seems to be a valid exception to the prohibition of the use of force under customary international law, in an extreme humanitarian situation.

2. The Right of Self-Defense

The right of self-defense has traditionally existed as a legitimate response to an attack under international law. In 1758, Emmerich de Vattel, writing on the 'right of resistance,' argued that a nation has a right to resist a detrimental attempt, and to make use of force and every honorable expedient against whosoever is actually engaged in opposition to her. Self-defense under international law derives primarily from two sources: the Charter and customary international law. This follows the approach set out in Article 38(1) of the Statute of the ICJ, which describes that The Court, whose prime purpose is to adjudicate disputed submitted to it in accordance with international law and shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) The general principles of law accepted & recognized by civilized nations;

(c) International custom, as evidence of a general practice accepted as law;

(d) Aubject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists.

As described above, Article 51 of the Charter, which is an international convention within the meaning of Article 38(a) of the ICJ Statute, is the central provision on the right of self-defense. Article 51 sets out the one clear exception to the general prohibition on the unilateral use of force. Despite the seemingly clear formulation of Article 51, there is room for different interpretations of this provision. It is therefore useful to take a look at the historical background of the right of self-defense in international law in order to be able to define the content of this right in the light of Article 51, with special regard to the right to anticipatory self-defense.

2.1. Right of Self-Defense: A Historical Background

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

2.1.1. The Caroline Case of 1837

The traditional definition of the right of self-defense in customary international law in pre-Charter-times occurs in the Caroline. The general rule stating the conditions under which the use of force in self-defense is deemed to be legitimate was set out in a letter written in 1841 by the United States Secretary of State Daniel Webster to Henry Fox, the British Minister in Washington.

Facts of the Case

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

Letters Between Mr. Webster and Mr. Fox

The legality of the British acts was discussed in detail in correspondence in 1841-42 when Great Britain sought the release of a British subject, McLeod, who had been arrested in the United States on charges of

murder and arson arising out of the incident. The British defended the destruction of the Caroline on the ground of self-preservation and self-defense, whereas Webster focused on the right of a state to 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'.*

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

> *'It will be for …[Her Majesty's] Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the Canadian local authorities even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it, It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown, that day-light 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'.*

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. 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', though Webster himself did not have any intention of creating any general rules for the use of force by a state in self-defense, or in particular for the use of force by a state within its own territory against armed attack. Nevertheless the statements made by Webster in his letters to Fox became the generally accepted basic definition on self-defense in international law, as the Encyclopedic Dictionary of International Law, for example, puts it:

> *"In the light of the Customary International Law it is generally understood that the correspondence between the USA and UK of 24 April 1841, arising out of The Caroline Incident… expresses the rules on self-defense".*

Conclusions Arising from the Caroline Case

Before drawing conclusions from the Caroline for present times, one has to take into account that the circumstances under which it is necessary to justify the use of force in international law have changed substantially since 1841. At that time recourse to war was considered open to all, against all and for whatever reason. States did not need legal justification to commence hostilities and the plea of self-defense was relevant to the discussion of State responsibility for forcible measures undertaken in peacetime. This also was the exact context of the correspondence between Webster and Fox, as the reason for this correspondence was the criminal proceedings against the British citizen Alexander McLeod, who was arrested in 1840 in New York and charged with murder and arson for his part in the British action against the Caroline. As states did not need a justification to commence hostilities in general, it was clearly in accordance with the understanding of state sovereignty that there was absolutely no need to justify the use of force by a state on its own territory against invading forces of another state. 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-defense and necessity were not terms of art with clearly defined independent meanings. The term self-defense was used alongside, and sometimes interchangeably with, self-preservation and necessity: while Webster used self-defense in his letter, he also used the term preservation in discussing how a just right of self-defense attaches always to individuals as well as nations and is equally essential for the safeguarding of both. As previously stated, Webster in his letter initially was only talking about self-defense in the country's own territory against foreign invaders. In the aftermath of the Caroline incident, the preconditions which Webster stated for a legitimate use of force in

self-defense were applied more widely to cases of self-defense outside of the country acting in self-defense. Despite the ambiguities mentioned in the term self-defense, the classical definition in the Caroline is still relevant for self-defense today. The preconditions set in the Caroline have been extended to the right of self-defense in general. The essential preconditions for self-defense in general, which can be deduced from the Caroline, are therefore 'necessity', 'proportionality' and 'immediacy', whether the act of self-defense is on a state's own territory or on that 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-defense. The Caroline doctrine thus establishes two main criteria for legitimate self-defense: first, the use of armed force must be strictly related to the protection of the territory or property and the population of the defending state. Second, the proportionality criterion precludes a state from using force beyond that necessary to repel an attack. A state which is defending itself should not respond to an armed attack in an "unreasonable or excessive" manner, and force used in self-defense must discriminate between civilian and military targets, as required by the laws of armed conflict.

2.1.2. Article 51 of the Charter

In 1944 the first preparatory talks for the creation of the UN were held at Dumbarton Oaks by the world's major powers in order to develop an early draft for the charter of the new UN. The Dumbarton Oaks draft did not include a provision on self-defense, because the right was never questioned. As there was more and more concern about this issue by 1945, when the states gathered in San Francisco to revise the final draft of the Charter, the general sentiment was in favor of including a self-defense provision, Article 51. According to Article 51, force can be used, in self-defense in the event that an 'armed attack occurs against a Member of the UN'. This exception is not without limits. Members acting in self-defense have to report their actions immediately to the Security Council. The Article 51 formulation however leaves room for interpretations, as the scope of the rule is contested. Under Article 51, an attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense. 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-defense.

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 Military and Paramilitary Activities against Nicaragua Case (Nicaragua v. U.S.) of 1986 (from now on referred to as the Nicaragua Case). Especially in the Nicaragua Case the ICJ had to define the scope of the right to self-defense in international law and the relationship between international customary law and the Charter Article 51. A close look at this case will therefore help in the interpretation of Article 51 as it was prior to the terrorist attacks of 09/11/2001.

2.1.3. The Nicaragua Case of 1986

Facts of the Case

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

(i) Used direct armed force against it by laying mines in Nicaraguan internal and territorial waters, causing damage to Nicaraguan and foreign merchant ships, and attacking and damaging Nicaraguan ports, oil installations and a naval base and

(ii) Given assistance to the contras, Nicaraguan guerillas fighting to overthrow the Sandanista Government.

Nicaragua also claimed that the United States had acted in breach of the bilateral 1956 U.S.-Nicaraguan Treaty of Friendship, Commerce and Navigation. The U.S. claimed that its use of force against Nicaragua was a lawful act and further supported its contention by arguments that Nicaragua had used unlawful force in the

first instance by providing weapons and supplies to El Salvador rebels and had supported cross-border attacks on Costa Rica and Honduras. The U.S. therefore claimed that Nicaragua's actions constituted an 'armed attack'. The U.S. claimed to be acting in 'collective self-defense' under Article 51 when supporting the Nicaraguan contras and mining the surrounding harbors. Further the U.S. contested the jurisdiction of the ICJ as it had made a reservation in its acceptance of the jurisdiction of the ICJ under Article 36(2) of the ICJ Statute, which excluded 'disputes arising under a multilateral treaty'.

The Court's Ruling

The U.S. argument on jurisdiction was partly rejected by the court, as it held that it did have jurisdiction as far as international customary law is concerned. The court found itself unable to decide whether the United States had infringed Article 2(4) of the Charter or any other multilateral treaty provisions because of the United States reservation. In interpreting the term 'inherent' in Article 51, the court first considered the relationship between international customary law and the Charter, especially Article 51. Its observations will be dealt with later, when the relationship in question is examined. The ICJ's decision was instructive, for it provided the first judicial interpretation of Article 51. The court held that no armed attack by Nicaragua had occurred against the United States, and therefore that the appeal to article 51 was untenable. It held that the exercise of the right of collective self-defense presupposes that an armed attack has occurred. The Court further went on to state that Nicaragua was not shown to be responsible for providing weapons and supplies to Salvadorean rebels, and further that even if it had done so, the supply of weapons was not the same as an armed attack. The Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.' Moreover, El Salvador had not reported to the Security Council, nor had it invited the U.S. to assist in its self-defense. The Court defined an 'armed attack' as a state's direct sending of troops, armed bands, irregulars or mercenaries into another state, which clearly was not the case with respect to Nicaragua. According to the ICJ the prohibition includes the sending by a state of armed bands into the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. The concept of armed attack, as defined in the Nicaragua Case, therefore requires both a quantitative and a qualitative element: Quantitatively, an attack must reach a certain threshold of force, with a sufficient level of gravity and severity, in order to qualify as an armed attack. Qualitatively, only the use of force through military means triggers the right of self-defense. The ICJ however accepted that assistance to rebels in the form of the provision of weapons or logistical or other support can be regarded as a threat or use of force, or can amount to an intervention in the internal or external affairs of other states, which might be prohibited under Article 2(4) of the Charter. Nevertheless unilateral attack on Nicaragua was not permitted in international law, as the threshold of an Article 51 'armed attack' was not fulfilled.

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

2.1.4. Conclusions on the Traditional View on Self-Defense

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

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

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

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

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

2.1.5. Link between Article 51 and International Customary Law

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

International Customary Law

First of all, one has to define the term customary international law. As mentioned above, Article 38, 1(b) of the statute of the ICJ stipulates, that the ICJ shall apply international custom, as evidence of a general practice accepted as law as a primary source of law. This definition of international customary law is the most authorative, although it is not undisputed, and reflects the widely held view that custom is made up of the two elements, state practice and opinio juris, the conviction that such practice reflects law: However, state practice is an objective criterion, which is based on how states behave in respect to a certain issue. One can say that 'state practice covers any act or statement by a state from which views about international customary law can be inferred'. According to the ICJ in the North Sea Continental Shelf Cases, state practice does not have to be completely uniform. This was confirmed in the Nicaragua Case. In the Asylum Case, the ICJ accepted the possibility of establishing customary rights between a limited numbers of states. Even only two states can create a local custom, which was confirmed by the ICJ in the Rights of Passage over Indian Territory Case. State practice can be derived from official publications, official manuals on legal questions, diplomatic interchanges, opinions of national legal advisors or General Assembly Resolutions and the comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organizations, just to name a few. Meanwhile, opinio juris simply stated is the state's own view on practice in a certain matter, ergo if the state's activity is seen as legally obligatory or permissible for itself. If states have an opinio juris on an activity, they will behave in a certain way because they are convinced it is binding upon or permissible for them to do so. Hence opinio juris is the subjective criterion, which often is difficult to discover, as the reason underlying a state's adoption or acceptance of a particular practice is often not clear.

International Customary Law alongside Article 51?

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

instrument of international policy was outlawed by the Kellogg-Briand-Pact of 1928 and this was repeated in Article 2(4) of the Charter. However, the right of individual self-defense was regarded as so firmly established in international law that it was automatically 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-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense*'.

This view is further affirmed by the 1948 Tokyo Judgment, stating that any law, international or municipal, which bans way out to force, is necessarily restricted or limited by the right of self-defense. In the Dumbarton Oaks Proposals for the Charter, there was no provision on self-defense. Hence one could argue, that the mere existence of Article 51 proves that the drafters of the Charter intended to regulate the requirements for legitimate self-defense, thus ousting the above described traditional view and international customary law on self-defense. This argument can be rejected with the notion, that U.N. Members inserted Article 51 not for the purpose of defining the individual right of self-defense, but for the purpose of clarifying the position in regard to collective understandings for mutual self-defense. 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-defense against armed attack. It thus becomes clear, that the drafters of the Charter clearly intended the international customary law right of self-defense to remain unaltered. Moreover, the relevant San Francisco Conference Report that considered Article 2(4) of the Charter contains the statement that the use of arms in legitimate self-defense remains admitted and unimpaired. Article 51 therefore leaves unimpaired the right of self-defense as it existed prior to the adoption of the Charter. Further the wording of Article 51 also supports the position that the Charter preserves the customary international law concept of self-defense. The use of the word 'inherent' in Article 51 emphasizes that the ability to make an exception to the prohibition on the use of force for the purpose of lawful self-defense against an armed attack is a prerogative of every sovereign state. Hence Article 51 was not created to regulate directly every requirement for legitimate self-defense.

This can be concluded from the fact, that Article 51 speaks of the 'inherent' right of self-defense and goes on with the vague criterion of 'when an armed attack occurs', without defining those terms. The use of the word inherent creates a link to the existing international customary law on self-defense. This is even strengthened through the use of rather vague requirements for self-defense and through the fact that Article 51 remains silent about the amount of force permitted in the legitimate exercise of self-defense. 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.

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

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

Keeping in mind this interpretation of Article 51 it becomes more evident that customary law undoubtedly survives beside treaty law. Both legal sources do not have an exact overlap and the identical content.

3. Anticipatory Self-Defense

3.1. Introduction

In the community of states, peace, order and good governance are primary values. These must be reached and sustained with the help of international law that constitute a fundamental tool for structuring and regulation of relations between states. Though, international law attempts to cover all issues and to provide solutions to most of the problems, this process in never ending. New events bring new problems that seek solution. Under international law anticipatory self-defense/use of force is permitted only in circumstances when an armed attack is imminent. It is argued herein that from peace perspective this requirement is costly because it prevents pre-emptive use of force in situations where the costs of waiting for an imminent attack are high. A pre-emptive use of force that comes sooner rather than later may reduce the overall costs of war. This is particularly so given the growing threats associated with proliferation of nuclear weapons. Furthermore, the imminence concept is vague when applied to nuclear weapons since it is difficult to detect when an attack is about to occur. It is, therefore, suggested that the law needs reformulating to emphasis probabilistic rather than just temporal considerations.

3.2. The Right of Anticipatory Self-Defense

The next issue is, whether Article 51 itself or international customary law includes the anticipatory use of armed forces before the actual attack has begun. The right of self-defense in its original meaning affects the case when a State A is under actual attack by State B and therefore takes armed and forceful action against the attacking State B. But does the attacked State have to wait with its armed response until the attack has already occurred, or is there a right to take anticipatory action before the attack has commenced (anticipatory self-defense)?. The term 'anticipatory' in the context of international law and jus ad bellum has been defined as referring to

> *'The ability to foresee the consequences of some action and take measures aimed at checking or countering those consequences.' 'An anticipatory act is capable to visualize future conditions, anticipate their consequences, and take remedial step before the consequences take place'.*

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

3.2.1. Historical Nexus

If one takes a look at the history of self-defense in international law, it becomes clear, that there was a scholarly discussion about anticipatory self-defense since the seventeenth century. Again, Hugo Grotius was one of the first jurists to recognize the doctrine of anticipatory self-defense as valid under jus ad bellum, the rules of international law that determine when a State (State A) is permitted to use force against another State (State B). In determining the scope of the 'just cause' requirement for a war to be permissible, Grotius stated that it was lawful to use force 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 unclear and unsure uncertainties, lest state should refrain from becoming an unjust aggressor. The above described Caroline Case of 1837 with the resulting Caroline Doctrine of 1842 is the most cited legal source not only for 'traditional', but as well for anticipatory self-defense since the 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-defense:

Firstly, there must be an imminent threat, a threat which is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation. Secondly, the response must be necessary to protect against the threat. Thirdly, the response must be proportionate to the threat; it must be 'within the boundaries of that necessity and kept clearly within it' and cannot be unreasonable or excessive. Fourthly, the self-defensive action must be taken as a last resort, after peaceful means have been attempted or it is shown that such an attempt at peaceful means, including 'admonition or remonstrance … was impracticable' or 'would have been unavailing'.

This rather narrow view on anticipatory self-defense in the Caroline Doctrine was recognized by leading commentators of the early twentieth century as well as by many pre-1945 treaties and alliances providing for collective security and defense. After World War II, the International Military Tribunal stated in the Nuremberg judgments, that 'preventive action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, in order that such shall in urgent nature that no option of means and no minute for deliberation could be availed. The Nuremberg Tribunal thus expressively referred to the Caroline, suggesting very high thresholds for anticipatory self-defense through the requirements of imminence, necessity, proportionality and exhaustion or impracticability of peaceful means. As a conclusion to this historical backdrop, one can state that within narrow limits, a right to anticipatory self-defense was recognized in international law. Hence, for example the U.S. would have been legally justified by anticipatory self-defense in attacking the Japanese fleet during World War II while the Japanese were en route to Pearl Harbor. By the time the Japanese fleet was en route, the requirements of the Caroline doctrine were fulfilled. On the other hand it could be argued, that while the Japanese fleet was en route, the armed attack already had occurred, thus it could be seen as a case of traditional self-defense. Nevertheless the question remains, if the right to anticipatory self-defense has changed after the emergence of the Charter and Article

3.2.2. Article 51 and Anticipatory Self-Defense

Article 51 of the Charter is silent about whether 'self-defense' includes the anticipatory use of force, in addition to the use of force in response to an attack. Hence, Article 51 preserves a state's right to act in self-defense, but it does not expressively provide for the doctrine of anticipatory self-defense. Article 51 therefore has been subject to varying interpretations and controversy among scholars. The essence of the controversy surrounds the meaning of the phase 'if an armed attack occurs'. The issue is whether the reference to a state's right to act in self-defense 'if an armed attack occurs' requires that the potential victim (State A) actually has to wait for the other side (State B) to strike first before State A can use force against State B. Broadly speaking, the disputants to the question may be grouped into two camps: the restrictive view on Article 51 (also called the 'restrictionists', 'strict constructionists' or 'restrictive school') and the broader view on Article 51 (also called the 'counter-restrictionists/adaptivists', 'liberal constructionists' or 'expansive theory').

The Restrictive View on Article 51

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

The Broader View on Article 51

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

Discussion: The Broader View is More Convincing

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

Firstly that the restrictive view on Article 51 is first of all based on a textual argument. Proponents argue, that 'there is not the slightest indication in Article 51 that the occurrence of an 'armed attack' represents only

one set of circumstances (among others) in which self-defense may be exercised.' According to this view, anticipatory self-defense, if legitimate under the Charter, 'would require regulation by lex scripta more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater.' Further, Article 51 is not only silent about anticipatory self-defense, but even restricts the critical task assigned to the Security Council to the exclusive setting of counter-force employed in response to an armed attack. If anticipatory self-defense was justified, 'it ought to be exposed to no less—if possible even closer–supervision by the Council.'

The broader view, however, replies to this textual argument the notion that Article 51 speaks of the 'inherent right of individual or collective self-defense'. As mentioned above, the drafting history and the wording of Article 51 reflect the intention of the drafters of the Charter to refer to a pre-existing, inherent right of self-defense. Hence the wording 'if an armed attack occurs' is no compelling argument for the restrictive view. Further to read 'if an armed attack occurs' as 'after an armed attack has occurred' goes beyond the necessary meaning of the words, as an armed attack can begin before the frontiers of a country have been passed and before any damage has been done to the target state. Finally, Article 2(4) of the Charter requires Members to refrain not only from the use of force, but also from the threat of force. If states had to wait for an armed attack to occur, then maintenance of international peace and security could not take place, but states would rather become responsible for the restoration instead of the maintenance of international peace and security.

On the Other hand, the restrictive view on Article 51 puts forward additional policy reasons against anticipatory self-defense. It is argued, that 'determining with certainty that an armed attack is imminent is extremely difficult', any error in judgment could lead to an unwarranted and unnecessary conflict. This is especially confirmed by the fact, that governments will often make aggressive statements without having any intention for an actual attack, as for example could be seen in the case of the Soviet Premier Nikita Khrushchev who said to the U.S. that 'we shall bury you', although he did not mean this as an expression of his intention to destroy the U.S., but that socialism will outlast capitalism. Nevertheless, this argument can be countered with the notion that the mere possibility of a misunderstanding can never be enough to limit a right, especially if it is a basic right such as the right of self-defense. Further it is argued; that there is a big danger of abuse if one accepts a right of anticipatory self-defense as 'a jurisprudentially creative nation can use the right of self-defense to justify virtually any aggressive action.' Hence a right of anticipatory self-defense constitutes a danger to international order. This argument can be countered with the argument that the right of anticipatory self-defense is not without limits, but is subject to strict requirements. The international community supervises cases of alleged anticipatory self-defense, as to whether those requirements are fulfilled and the act therefore lawful. Hence the right of self-defense is not arbitrary, but is governed by rules. Furthermore there are no clear and precise guidelines for self-defense in general either. Moreover, the possibility of abuse is not a sufficient reason to discount the existence of the right.

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

As a conclusion to this discussion, one has to say, that the broader view on Article 51 seems to be more convincing. Hence one should see anticipatory self-defense as a part of the traditional right of self-defense, which is not restricted by Article 51. However, the question remains, if customary international law has changed in the post-Charter era and if anticipatory self-defense still is part of the customary rule of self-defense.

Article 51 and Anticipatory Self-Defense in the view of ICJ

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

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

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

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

Further the Court interpreted the meaning of the word 'inherent' in Article 51, stating that 'it cannot, therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law.' Although the Court thus did not express a view on anticipatory self-defense, it did express the view that customary international law co-exists alongside Article 51. In the Advisory Opinion on Nuclear Weapons, the Court again did not expressly consider the question of anticipatory self-defense. Hence one can conclude that the ICJ up to now neither accepted nor rejected the doctrine of anticipatory self-defense in the post-Charter era, although the dissenting opinion of Judge Schwebel gives support for the acceptance of this doctrine. As the Court accepted the existence of international customary law alongside Article 51, one has to examine state practice and opinio juris concerning anticipatory self-defense in the post-Charter era to find out, if that right still exists.

3.2.3. Right to Anticipatory Self-Defense: State Practice

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

3.2.3.1. 1962 Cuban Missile Crisis

In mid-October 1962, the U.S. intelligence revealed that the Soviet Union had commenced constructing, delivering and installing intermediate-range nuclear missiles and missile sites in and to Cuba. On October 23, 1962, when the Soviet Union did not accept a U.S. request to desist from these activities, President Kennedy ordered a naval 'quarantine', which consisted of a naval blockade to inspect all ships going to Cuba, to prevent the transport of missiles and related material to Cuba and to compel the removal of the missiles already installed. The U.S. then brought the matter to the U.N. Security Council claiming that the delivery of such weapons to Cuba by the Soviet Union was a threat to international peace and security. As the world was on the edge of a nuclear war, the parties to the dispute, the U.S. and the Soviet Union found a way to resolve the dispute through bilateral negotiations, so that the Security Council did not pass a resolution. Nevertheless the Security Council discussions on this issue reflect the acceptance of most States that, in some circumstances, the anticipatory use of force could be justified. These discussions focused on whether the Cuban missiles were offensive or defensive, with support for the U.S. quarantine generally falling along cold war lines. Although the U.S., in justifying their quarantine did not rely on Article 51, but on Article 52, most commentators refer to this crisis as an example of anticipatory self-defense, probably because the Security Council discussions, did show acceptance of anticipatory self-defense under some circumstances.

3.2.3.2. Six-Day War in the Middle East of 1967

In June 1967 Israeli forces launched attacks on Egypt, Jordan and Syria on the basis that military measures by these three States against Israel were imminent. The anticipatory self-defense arguments with special regard to the imminence-requirement were supported by Israel. Israel pointed to the ejection of the U.N. peacekeeping force, UNEF I, which had been in place between Israel and Egypt since 1956, and the build-up of Egyptian forces along the frontier. Israel further stated that it had convincing intelligence that Egypt would attack and that Egyptian preparations were underway. These Israeli claims have been questioned by commentators, with some concluding that there was little evidence of an imminent attack, only a collection of circumstantial evidence indicating that an armed attack might have been launched. Most but not all States opposed the use of force by Israel in the subsequent Security Council debates, although there was no express condemnation of Israel in the ultimate resolution passed by the Security Council. This resolution only expressed the Security Council's 'continuing concern with the grave situation in the Middle East', and emphasized 'the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security'. It called for the withdrawal of Israel armed forces from territories occupied in the recent conflict. This example, however, can only be relied on partly in support of anticipatory self-defense, as Israel also argued that the totality of the actions of Egypt, Jordan and Syria in fact amounted to a prior attack, thus relying on traditional self-defense under Article 51. Moreover in the aftermath of the conflict it became known that Israel acted on less than convincing evidence. Hence the 1967 Arab-Israeli war does not provide an actual example of lawful anticipatory self- defense.

3.2.3.3. Bombing by Israel of the Osirik Reactor in Iraq in 1981

On June 7, 1981, Israel bombed the Osirik nuclear reactor in Baghdad, and sought to justify this action on the basis that Iraq intended to use the reactor, which was not yet operational, to produce nuclear weapons that could ultimately be used to threaten the existence of Israel. Hence it was claimed, that the attack was justified under the right of anticipatory self-defense. Again the Security Council debate on this issue shows whether there was acceptance of the Israeli claim. The only State which implicitly indicated that it shared the Israeli view was the U.S. In addition, although the U.S. voted for the Security Council resolution condemning Israel, it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel's failure to exhaust peaceful means for the resolution of the dispute which is an essential element of anticipatory self-defense according to the Caroline Doctrine. All other members of the Security Council expressed their disagreement with the Israeli view, by unreservedly voting in favor of operative paragraph 1 of the resolution, whereby the Security Council strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct. Egypt and Mexico expressly refuted the doctrine of anticipatory self-defense. From the statements of those States it can be concluded, that they were deeply concerned that an interpretation of self-defense which would allow anticipatory action under certain circumstances might open the door to abuse. In contrast, the United Kingdom, while condemning 'without equivocation' the Israeli attack as 'a grave breach of international law', noted that the attack was neither an act of self-defense, nor could it be justified as a forcible measure of self-protection.

Besides the United Kingdom, Uganda, Sierra Leone, Malaysia and Niger also argued that the anticipatory use of force could be permissible under the Charter provided that it could be demonstrated that there was an imminent threat and that other means of addressing this threat had been exhausted, but that Israel had not met those criteria since there was no instant and overwhelming necessity of self-defense. Hence it becomes clear, that most States involved in the Security Council debate seemed to accept the existence of anticipatory self-defense in international law in general, even if they disagreed on the scope of the doctrine and its application in this particular case.

3.2.3.4. U.S. and Terrorism: Libya, 1986

On April 14, 1986, President Reagan of the U.S. ordered an air strike on five Libyan military targets allegedly used as bases for planning terrorist attacks on U.S. citizens abroad. The U.S. justified the strikes as traditional self-defense consistent with Article 51 in response to armed attacks, the December 1985 bombings at airports in Rome and Vienna that killed 19 people and injured 112 and the April 5, 1986 bombing of a West Berlin nightclub, known to be visited by U.S. citizens that killed 2 and injured 230 people. The U.S. further justified

the bombings in Libya with anticipatory self-defense, as the attacks were launched to prevent future terrorist attacks. For example, the U.S. Ambassador Vernon Walters declared in his statement to the Security Council on the day after the air strikes, that the U.S. action was designed to disrupt Libya's ability to carry out terrorist acts and to deter future terrorist attacks by Libya. The U.S. actions against Libya did not remain uncontested by the international community, although the criticism was mainly not based on the assertion, that a right to anticipatory self-defense does not exist per se, but that the requirements for anticipatory self-defense were not fulfilled, namely necessity and proportionality, whether peaceful means had been exhausted and whether an imminent attack was aimed at the U.S. The U.S., France, and the United Kingdom vetoed a resolution condemning the U.S. action. However, the General Assembly adopted a resolution censuring the U.S. by seventy-nine votes, with twenty-eight against and thirty-three abstentions. This resolution stated that the General Assembly was 'gravely concerned at the aerial and naval military attack perpetrated against the cities of Tripoli and Benghazi on 15 April 1986, which constitutes a serious threat to peace and security in the Mediterranean region' and condemned the attack on Libya as a violation of the Charter of the United Nations and of international law. This resolution nevertheless does not seem to deny the right of anticipatory self-defense, because, as stated above, the requirements of that right were deemed not be satisfied anyway. This case can, on the contrary, support acceptance for anticipatory self-defense per se.

3.2.3.5. U.S. and Terrorism: Iraq, 1993

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

3.2.3.6. U.S. and Terrorism: Sudan and Afghanistan, 1998

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

3.2.3.7. U.N. Authorities

Besides the cases mentioned it is useful to examine consideration of anticipatory self-defense by organs of the U.N. The views of the most authoritative organ of the U.N. interpreting international law, the ICJ, were already examined above. Besides the ICJ, the Atomic Energy Commission (AEC) has made at least implicit, statements about anticipatory self-defense. In its First Report in December 1946 the AEC suggested that preparation for atomic warfare in breach of a multilateral treaty or convention would, in view of the appalling power of the weapon, have to be treated as an 'armed attack' within Article 51. The AEC made the following recommendations to the Security Council about the control of nuclear energy and nuclear weapons:

> *'The development and use of atomic energy are not essentially matters of domestic concern of the individual nations, but rather have predominantly international implications and repercussions.' An 'effective system for the*

control of atomic energy must be international, and must be established by an enforceable multilateral treaty or convention which in turn must be administered and operated by an international organ or agency within the United Nations'.

In case of a violation of this multilateral treaty or convention, the AEC stated that it should be borne in mind that a violation might be so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter. This statement reflects the AEC view that a right to anticipatory self-defense is recognized. Further the representative of the U.S. submitted a memorandum to the AEC at the request of the Chairman of the AEC, stating:

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

On the basis of these examples, that some States, mainly the U.S. and Israel relied on and recognized and thus upheld, the doctrine of anticipatory self-defense. Other States seemed to accept the doctrine in theory, but rejected its application in particular cases, because its requirements were not deemed to be satisfied. Finally some States, especially Egypt and Mexico, rejected the doctrine entirely. Hence it becomes clear, that there was no universal agreement on the doctrine. The issue remained contested both by scholars and by states. Nevertheless the vast majority of States seemed to accept the doctrine, at least in theory. The Security Council only passed a resolution of express condemnation in the case of the 1981 Israeli attack on the Osirik reactor. Further the General Assembly only passed a like resolution in the case of the 1986 U.S. strikes against Libya. It is an interesting point though, that neither the Security Council nor the General Assembly expressly rejected the doctrine of anticipatory self-defense, but held that its requirements were not satisfied. This behavior can be interpreted as a tacit acceptance of the doctrine. Hence there is no such unambiguous and unequivocal opinio juris and state practice that one could assert that the international community clearly tried to abolish the customary law rule. As a result, although contested by some scholars and few states, the doctrine of anticipatory self-defense seems to continue to exist in customary international law alongside Article 51. This view further is consistent with other non-Charter mandated, yet commonly claimed and/or generally accepted, justifications for the use of force, like interventions to protect nationals, intervention to rescue hostages believed to face imminent death or injury or the right of a people to assert self-determination. Further it is consistent with the ICJ's view in the Nicaragua Case, where, after stating that customary international law continues to exist alongside treaty law and that the two sets of rules did not have the same content in the context of self-defense, the Court continued, this could also be demonstrated for other subjects, in particular the principle of non-intervention. Hence anticipatory self-defense remains unrestricted by Article 51 and exists alongside this provision, although it is subject to strict requirements which are hard to satisfy.

3.3. Anticipatory Self-Defense in Post-Charter Times& Legal Requirements

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

3.3.1. Imminence and Necessity

Imminence and Necessity in this respect mean, in accordance with the Caroline, that the threat must be imminent, a threat which is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation.'

Necessity further means that the state threatened must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. There must be clear and present danger of an imminent attack, and not mere general preparations by the enemy. The elements of imminence and necessity are overlapping, and are the largest obstacle to any successful reliance on anticipatory self-defense. The mere fact that a State is a threatening presence, a powerful military force or a potential danger to another State is not sufficient; the threat of an attack must be demonstrably imminent and the use of force to respond must be necessary. For example the mere possession of missiles or the buildings up of a large army per se are not sufficient; in addition there must be a declared or incontrovertibly implicit hostile intent. On the other hand the existence of a hostile intent alone is also not sufficient. This can be evidenced by the numerous statements of the Soviet Union and the U.S. during the Cold War, where it was postulated that many government leaders… make aggressive statements without harboring an actual plan to attack. Hence there must be both, the hostile intent and a mobilization of forces.

Furthermore imminence and necessity have a temporal requirement in traditional self-defense, meaning that an armed attack by another State must be met immediately with counter-force, and any delay would mean that the attacked State would then be unlawfully using force itself in form of reprisal. Although this time element is more complicated in anticipatory self-defense, as there is not yet an armed attack, nevertheless there must be a temporal limitation: If there would for example have been enough time to consult the Security Council, the exercise of anticipatory self-defense was not justified, because of a lack of imminence. Hence the further requirement demanded by some scholars that anticipatory self-defense should only be legitimate if the Security Council has not yet been able to take affirmative action, overlaps the imminence requirement and can therefore be neglected. As an example of what is sufficient to establish imminence and necessity one can refer to Iraq's use of force against Israel during the first Gulf War in 1991. In January 1991, Iraq launched SCUD missiles against Israel, which was not a party to the conflict between the U.S.–led forces and Iraq. Israel tried to shoot down the SCUDs using U.S. supplied Patriot missiles. These attempted interceptions took place over Israeli territory, but Israel could have relied on anticipatory self-defense to shoot them down before they crossed the Israeli frontier; 'Indeed, given that the missiles passed over a third state's territory on the way to Israel, one could argue that Israel had the right, although it might not have had the technical ability, to knock the missiles out as they were being launched in Iraq. Israel would also have been justified in taking out the missiles before they were launched, provided that there was credible, cogent and convincing evidence to show that they were being launched against Israel. An example where an attack was not deemed to satisfy the requirements of imminence and necessity was the above described 1981 Israeli attack on the Iraqi Osirik reactor.

3.3.2. Proportionality

Proportionality is another requirement for anticipatory self-defense deriving from the Caroline. Hence, the action must not be unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. In modern practice, the impact on civilian noncombatants and the strategic nature of targets are two factors customarily used to evaluate proportionality. Some scholars find that proportionality under Article 51 refers to the targets, means, and methods of the acting state. Acts done in self-defense must not exceed in manner or aim the necessity provoking them; acts in self-defense thus cannot be used to capture and keep enemy territory, although such territory can be occupied for a short period while hostilities are finally brought to an end, but should be relinquished as soon as possible after that. Targets that are selected based on their capacity to undermine the military strength of the aggressive state typically are acceptable, although civilian casualties may invalidate the claim of proportionality. On the other hand, a state can use weapons of mass destruction, even when disproportionate to the aggressor's arsenal, if the aggressor menaces the very survival of the threatened state, as it is stated in the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996. There the ICJ did not reject the possibility of resort to nuclear weapons 'in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.' Another formulation construes proportionality as requiring the response to be proportional to the armed attack and timed to respond immediately or to anticipate an immediate threat. Of course in the context of anticipatory self-defense the issue of proportionality becomes more complicated, because there is no actual attack, but only an imminent threat which is to be answered. Hence proportionality requires a balance between

the potential for damage the threat imposes and the imminence of the action. The probability and size of the anticipated attacks must also be considered. In the context of terrorism it is even more complicated, as the target of the use of force in self-defense is only the terrorist group and the use of force must be proportionate to the terrorist acts which it anticipates. As a conclusion it can be stated, that proportionality prohibits the use of force in self-defense from disproportionately exceeding the manner or the aim of the necessity that originally provoked the use of force.

3.3.3. Exhaustion or Impracticability of Peaceful Means

This requirement again derives directly from the Caroline. There it was postulated, that the self-defense action must be taken as a last resort, after peaceful means have been attempted or it is shown that such an attempt 'was impracticable' or 'would have been unavailing'. Further this requirement is consistent with Article 2(3) of the Charter which stipulates that 'all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. In addition to that Article 33 of the Charter states that in the settlement of any dispute that may threaten international peace and security, an attempt must first be made to resolve the dispute by peaceful means. This requirement obliges a state to exhaust the full range of dispute settlement processes including negotiations, investigations, enquiries, diplomacy, mediation, arbitration, consultations, conciliation, possible ICJ action, resort to regional agencies or arrangements and trade and economic sanctions. The state must first of all try to consult the Security Council for an authorization of the use of force. Impracticability will be present when there is no time for the above measures thus reinforcing the imminence and necessity requirements, or when the Security Council's vote is vetoed or likely to be vetoed.

3.3.4. No Positive Action by the Security Council

As stated above, the further requirement of failure by the Security Council to act can be neglected; affirmative action by the Security Council can be neglected, as it overlaps with, and is included in, the imminence requirement. Some scholars further require that the aggressor state be acting in breach of international law to justify anticipatory self-defense by the defending state. This criterion seems to be obvious, as self-defense against a lawful attack never seems to be legitimate. Hence the two proposed new criteria for anticipatory self-defense do not seem to be necessary, as they are already included in the traditional requirements.

4. Anticipatory Self-Defense and the Bush Doctrine

4.1. Introduction

The Bush Doctrine is a phrase used to portray various related foreign policy principles of Ex: United States president George W. Bush. Doctrine basically introduced United States policy for the right to protect itself from the terrorist attacks as well as countries that harbor or give aid to non-state actors, which was used to legalize the attack on Afghanistan in 2001. Afterward it came to include additional elements, including the controversial policy of preventive war, which held that the United States should oust foreign regimes that represented a potential or perceived threat to the United States security, even if that threat was not imminent; as a strategy for combating terrorism; and a willingness to pursue U.S. military interests in a unilateral way. Some of these policies were codified in a National Security Council text entitled the National Security Strategy of the United States published on September 20, 2002.

The main elements of the Bush Doctrine were delineated in a document, the National Security Strategy of the United States, published on September 17, 2002. This document is often quoted as the definitive statement of the doctrine. It was updated in 2006 and is stated as follows:

> *"The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the U.S. citizens and U.S. interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. 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 Weapons of Mass Destruction (WMD). To forestall or prevent such*

hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense.

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

4.2. New Dimension of Violation

Terrorist on September 11, 2001 hijacked the aircraft and crashed them into the Twin Towers of the World Trade Center in New York City, the Pentagon in Washington D.C., and the Pennsylvania countryside, thus causing the loss of thousands of innocent civilians and destroying the World Trade Center completely. Thereafter, the U.S. on base of authentic information confirmed that connected these people to a terrorist group based in Afghanistan (Al Qaeda) headed by Osama Bin Laden. Through these dreadful terrorist attacks it became apparent, that contemporary threats to states vary drastically from those faced during the Cold War. The Cold War logic of containment assumed that hostile regimes could be left to reform on their own initiative, as ultimately borne out by the former Soviet Union. Deterrence depended on a rational adversary, with weapons of mass destruction perceived by both sides as weapons of last resort. Terrible attacks on World Trade Centre, by contrast, demonstrated the immediacy of the threats posed by terrorists and their supporters, and the willingness and capability of terrorists to wage previously unimaginable attacks. In the face of this new dimension of violence, it is ambiguous, whether the traditional perception of deterrence can be an effective option against terrorists or states supporting terrorists in wither shape.

4.3. United States Response to attack on Twin Towers

4.3.1. Facts

After the attacks, the U.S. demanded that the government of Taliban to hand over the Al Qaeda leaders to the U.S., shutdown all terrorist training camps in Afghanistan, and provide the U.S. with full access to the camps to confirm their disclosure subsequently said demand was rejected by the Taliban Government. U.S. government on 2nd October, 2001 informed the Security Council that it was exercising its 'inherent right of individual and collective self-defense by using force against Al Qaeda terrorist training camps and military installations of in Afghanistan', in a letter by the U.S. representative to the U.N. to the President of the Security Council. The U.S. with collaboration of government of UK started launching missile and bomber attacks on Afghanistan. This was the commencement of what has since been called Operation Enduring Freedom. Operation Enduring Freedom was justified by the U.S. and UK as an exercise of individual and collective self-defense in compliance with Article 51. It is argued by the Allies that the Twin Towers attacks were part of a series of attacks on the U.S. which started in 1993 and that more attacks in the same series were expected as planned by the terrorists. Hence evidence had been produced by the he U.S. wherein tying Osama bin Laden to the 1993 attack on the World Trade Center, the attack on the USS Cole in Yemen in 2000 and 1998 embassy bombings in Nairobi. Moreover, evidence produced by the allies was convincing, two resolutions were passed by the Security Council wherein it referred to the right to resort to self-defense in the face of the Twin Towers attacks, stating that the Security Council 'unambiguously condemned, in the strongest terms, the horrifying terrorist attacks on Twin Towers' and explicitly recognized the inherent right of individual or collective self-defense in accordance with the Charter. Hence the terrorist attacks on Twin Towers have been qualified as 'armed attacks' against the U.S., justifying the exercise of self-defense.

4.3.2. Legal Aspects

It is evident that the validation for Operation Enduring Freedom was traditional self-defense under Article 51 of the Charter. Thus it was not a question of anticipatory self- defense, although action after September 11 by Security Council can be quoted to support anticipatory self-defense in cases where an armed attack has occurred and credible evidence exists that more attacks are planned though not yet started. Further the legal justification advanced for Operation Enduring Freedom appears to be interesting, as it was international terrorists and attacks committed independent private actors while it is clear that Afghanistan never attacked

on the U.S. and term 'armed attack' mentioned in the Charter was traditionally applied to states, but nothing in the Charter point out that 'armed attacks' can only emanate from states. Further the international reactions to the Twin Towers attacks show almost undisputed official recognition in state practice that acts of terrorism done by private actors falls within the parameters of Article 51. By passing Resolution 1368 Security Council affirmed the view that the Twin Towers terrorist attacks were triggering a right of self-defense under Article 51. Hence justification was given for an attack on Afghanistan, although Afghanistan itself did not attack the U.S., but was harboring private actors, i.e., al Qaeda activists. Harboring terrorists and the alleged close links between the Taliban and al Qaeda thus were considered to be sufficient for use of force which is justified under Article 51. This justification appears to be hesitant if one examines the preexisting international law on the topic. It is not recognized by the International law that states may have some affirmative duties regarding the conduct of non-state actors within their territory. However, the ICJ in the Nicaragua Case rejected the U.S. claim that Nicaragua's state support of the rebels justified the use of force in self-defense by the U.S. against Nicaragua. The Court noted that 'assistance to rebels in the form of the provision of weapons or logistical or other support' is out of the preview an armed attack as discussed under Article 51. Therefore, under the Nicaragua Case, the violence done by a terrorist organization may not be imputed to a state unless that state gives definite instructions or directions to the terrorist. Hence, in response to the Twin Towers attacks, the only lawful option for the United States would have been to wait for Afghanistan to turn the attackers over for trial as a precedent in the 1988 bombing of the Pan Am Flight. In the response of this incident the United States did not react through use of force but instead demanded the extradition of the suspected terrorists. Similarly, bombings of the World Trade Center in 1993 were treated by the United States as a law enforcement matter rather than as an armed attack requiring military action. Moreover, the ICJ ruling in Nicaragua case limits the right of self-defense to an armed attack of 'significant scale.' Under such standard, a low-intensity attack might not reach the high threshold of an armed attack, even though the cumulative effects of repeated terrorist attacks could amount directly to an attack of significant scale. The almost undisputed official reactions of states to the Twin Towers attacks applying Article 51 to this situation, as well as resolution 1368 seems to have commenced a dramatically change in international law in respect of states harboring terrorists. For example, Gerhard Schroeder German Chancellor on 19/09/2001 in his official speech stated that the Security Council with resolution 1368 has 'undertaken a further development of previous public international law.' Moreover, he stated: 'With this resolution—that is the important news—the international law requirements for massive, also military actions against terrorism have been recognized.' It remains uncertain and disputed; whether the opinion expressed in this statement of Chancellor Schroeder is true, but it seems there is strong indication that international law is about to or even has already changed in respect of states harboring terrorists and the right to self-defense.

4.4. Preemptive Self-Defense: Bush Doctrine

Response to Twin Tower attacks in the shape of Operation Enduring Freedom was not the last answer. It was emphasized by George W. Bush U.S. President that the war on terror will not stop with Afghanistan, but will extend to any state that supports terrorism in either shape. The U.S. Government in September 2002 created a new security strategy the National Security Strategy of the U.S., which indicates the U.S. government's view on possible response to international terrorism. The key tenets of this Strategy include a new view on anticipatory self-defense, a doctrine which since then has become known as the Bush Doctrine of Preemptive Self-Defense.

4.4.1. The Bush Doctrine

It was declared by the U.S. President Bush in an introduction to the National Security Strategy that the U.S. will act against 'emerging threats before they are completely formed.' The document states that:

> *'For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing an attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction that can be easily concealed, delivered covertly, and used without warning'.*

Therefore the statement implied that the U.S. in this new posture is willing to act beyond the limitation of international law and even beyond limits it has observed in the past. Bookings Institute report describes the distinction between preventive war and preemption in the new Bush Doctrine 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'.*

President George W. Bush in his 2002 speech at West Point stated 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 use of force under the Bush Doctrine are not limited to reprisals or self-defense, but may also include preemptive actions. In the words of Condoleezza Rice, President Bush's former National Security advisor, the strategy of preemptive strikes necessarily involves some level of vagueness, but for example in the case of Iraq, 'we don't want the smoking gun to be a mushroom cloud.' To put it in other words, in the light of the Bush Doctrine, the probable threat of aggressive state developing nuclear weapons, even where that development, as in the case of Iraq, is not imminent, alone forces a preemptive strike, regardless of whether there is authentic proof to justify the legality of the perceived danger. Such preemptive strikes play an important role in the Administration's approach to responding the threats advanced by the Terrorists. The Bush Doctrine, discussed in the National Security Strategy, urges use of force against other governments that harbor and support terrorists or those engage themselves in developing nuclear, chemical, or biological weapons that could be used in terrorist attacks on the U.S. The military component of the National Security Strategy consists of several key tenets:

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

Ultimately, it was argued by the Bush Administration that uncertainty and a lack of strong or solid evidence should not rule out preemptive action where a serious threat available to the existence of the U.S. 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 lessen the conditions that generate terrorism. Together, the military and ideological aspects of the National Security Strategy are designed to diminish the terrorist threat to the U.S. by reducing the capacity of terrorists, or rogue states, to strike U.S. targets and by addressing the underlying causes of terrorism.

4.4.2. The War in Iraq of 2003

In the aftermath of Twin Towers, tensions between the Iraq and U.S. A escalated when President Bush's State of the Union speech declared Iraq as a 'grave and growing danger,' constituting, along with Iran and North Korea, the 'axis of evil.' In this regard, Iraq was accused by President Bush for developing weapons of mass destruction and supporting terrorist organizations and declared that the United States 'would not allow the world's most dangerous regimes to threaten us with the world's most destructive weapons.' On September 12, 2002, President Bush addressed the opening of the UN General Assembly and urged world leaders to tackle 'the grave and gathering danger' of Iraq. Highlighting Iraq's continuing disobedience of the Security Council during the last decade, thought it was promised by the President Bush 'to work with the UN Security Council,' but warned that the U.S. was prepared to act alone if necessary. The same month, the Administration released the above mentioned U.S. National Security Strategy with its provisions on the Bush Doctrine. A joint resolution was adopted by Congress authorizing the use of force against Iraq and giving the President power to take unilateral military action against Iraq 'as he determines necessary and appropriate.' Iraq on 16, September, 2002 announced that it would permit UN Monitoring and Verification Agency (UNMOVIC) and International Atomic Energy Agency (IAEA) inspectors to return to Iraq, but the agreement was rejected by the U.S. and UK.

Security Council on 8th November, 2002 unanimously adopted Resolution 1441. In this resolution Iraq was declared to be in material breach of previous Security Council resolutions, yet it afforded Iraq 'a last chance to comply with its disarmament obligations' and threatened Iraq with 'grave consequences' if the government of Iraq fails to cooperate with the inspection process. Resultantly on 27th November, 2002 Weapons inspections resumed in Iraq. Iraq on 7th December submitted a declaration of almost twelve thousand pages to the United Nations, claiming it had no banned weapons. After reviewing the declaration, UNMOVIC Chairman Hans Blix stated that it contained 'little new significant information relating to proscribed weapons programs.' President Bush in January 2003 in his State of the Union address suggested that Iraq had failed to meet UN demands, and he announced that the United States would lead a coalition to disarm Irqa, even without a UN mandate. Secretary of State Powell addressed the Security Council on February 5 and presented satellite images and intercepted telephone conversations between Iraqi military officers, all allegedly indicating that Iraq was evading its disarmament obligations. Even though the UN inspectors found no evidence that Iraq was hiding illegal weapons, the UK 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 UK and the U.S. withdrew the resolution and assembled a 'coalition of the willing.' On March 19 the coalition forces launched Operation Iraqi Freedom.

4.4.2.1. Operation Iraqi Freedom and Legal Justifications

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

Security Council Authorization: First of all the U.S. and the UK contended that Operation Iraqi Freedom was authorized under the continuing effect of Security Council resolutions 678 (1990), 687 (1991), and Iraq's 'material breach' of resolution 1441 (2002). As a letter of the UK 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), the United Nation's Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) and numerous findings by the Security Council that Iraq has failed to comply with the disarmament obligations imposed on it by the Council, including in Resolutions 678 (1990), 687 (1991) and 1441 (2002). In its Resolution 1441 (2002), the Council reiterated that Iraq's possession of weapons of mass destruction constitutes a threat to international peace and security; that Iraq has failed, in clear violation of its obligations, to disarm; and that in consequence, Iraq is in material breach of the conditions for the ceasefire at the end of hostilities in 1991 laid down by the Council in its Resolution 687 (1991). Military action was undertaken only when it became apparent that there was no other way achieving compliance by Iraq. The objective of the action is to secure compliance by Iraq with its disarmament obligations as laid down by the Council. All military operations will be limited to the minimum measures necessary to secure this objective'.*

As the letter of the U.S. to the Security Council shows, the legitimating 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)'.*

The reliance on Resolution 678 for justifying Operation Iraqi Freedom does not seem to be able to survive closer examination. Resolution 678 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:

'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 may be required for the implementation of the present resolution and to secure peace and security in the area'.

Careful reading 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 weapons of mass destruction, which was the principal justification for the invasion. The passage of the resolution and the fact that the U.S. sought and failed to gain Security Council authorization for the use of force in Iraq following Resolution 1441 in fact imply that the U.S. implicitly accepted that further authorization of the Security Council was required for the use of force. Resolution 1441 specifically decided in operative paragraph 1 that Iraq was in material breach of its obligations under resolution 687, granted Iraq a final opportunity to comply and set up the enhanced inspection regime (in operative paragraph 2). It did not authorize the use of force by individual Member States, which is the reason why the U.S. and the UK sought a further resolution, after states like France, Germany, China and Russia stated that any invasion of Iraq required an additional resolution that would explicitly authorize the use of force. Hence it can be concluded that nowhere in existing Security Council resolutions on Iraq is there an authorization for Operation Iraqi Freedom. Especially there is no authorization of the use of force by Member States relating to weapons of mass destruction, or, for that matter, relating to regime change. Further, it has been argued that the intervention in Iraq was lawful as a legitimate exercise of the right of preemptive self-defense. The U.S. claimed, that Iraq was developing chemical and biological weapons of mass destruction and that it was actively supporting al Qaeda and terrorism. Iraq therefore was accused of being an imminent threat to the U.S. and the international community. President George W. Bush contended at the outset of the conflict that, including the nature and type of the threat posed by Iraq, the United States may always proceed in the exercise of its inherent right of self-defense, recognized in Article 51 of the UN Charter. 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 United States and the international community from the threat posed by Iraq and restore international peace and security in the area.

As there was no convincing evidence that Iraq was in possession of weapons of mass destruction, nor that Iraq had planned an attack on the U.S. or any of its allies, nor that Iraq participated in the planning or execution of the 9/11 attacks or actively supported al Qaeda, the notion of self-defense as a justification for Operation Iraqi Freedom does not seem to be convincing. This has even been confirmed by the fact that to date no weapons of mass destruction have been found in Iraq and U.S. Secretary of Defense, Donald Rumsfeld even had to admit that there was no convincing evidence for the existence of weapons of mass destruction in Iraq. Moreover, the ICJ held in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that for ordinary states, the mere possession of nuclear weapons is not illegal in international customary law. As the Court held, in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the state would be at stake. The mere

possession without even a threat of use does not therefore amount to an unlawful attack. Hence a justification for Operation Iraqi Freedom on self-defense cannot be derived from the fact that Iraq was in possession of Weapons of Mass Destruction, hence there was no actual threat of the use of those weapons.

5. The Law on the Use of Force: Current Challenges

Issue No. 1: Efficacy of Rules on the Use of Force in Contemporary World

International law rules on the use of force (*jus ad bellum*) are comparatively easy to state, though they can be complicated to apply in concrete cases. Meanwhile, the Charter of the UN puts a clear embargo on the threat or use of force. The United Nation's Charter indicates to two not unconnected circumstances in which states are not under obligation to not apply threat or use of force. First, required steps may be adopted or sanctioned by the Security Council, performing under Chapter VII of the Charter. Second, considering the right of individual and collective self-defense, as recognized by the Charter in Article 51, force may be used in the exercise of that right. Further potential exception 'though not discussed in the Charter, is the use of force to prevent an irresistible humanitarian catastrophe (now and again referred to as 'humanitarian intervention'). It has rarely been suggested, most frequently in the United States, that the rules of international law on the use of force are not effective, or that there is some basic gulf between the United States and other states in this matter. Recently, Professor Franck pointed out to a rising approach among law of professors United States and practitioners that international law as a disposable instrument of diplomacy, its system of rules only one of many considerations to be taken into mind by government. As for the leaders of the executive division, it materializes to be the common intuition that international law is to be seen as an inconsistency, a myth publicized by weak states to thwart the powerful states maximizing their influence advantage. Similarly, there is increasing concern at the failure to respond sufficiently to contemporary security threats (not least, transnational terrorism and the propagation of weapons of mass destruction) and to humanitarian catastrophes (for instance in Rwanda in 1994 and Darfur, Sudan). Such concerns have guided to press on the limitations of the law, supporting and favoring for a one-angle right to use force preventively or for humanitarian cause, and for indirect or retrospective the Security Council's authorization for the use of force. Intervention in Kosovo in 1999 involved a key issue of principle: was there a right of unilateral 'humanitarian intervention?' Recourse to use of force in 2001 against Al Qaida in Afghanistan (after the attacks of 11 September 2001 known as 9/11) also raised an imperative issue: exercise of the right of self-defense against attacks by non-State actors. Generally opined the use of force in March 2003 against Iraq politically and legally debated the most controversial, involved no great legal issue. As indicated by then Attorney General of UK for the Britain, the legality of the invasion turned exclusively on whether it had been authorized by the Security Council. It is apparent that the Security Council may authorize the use of force. The only question was whether it had been authorized by the SC. That issue ultimately turned on the construction of a series of Security Council resolutions. Whatever one's opinion on the merits, these cases demonstrate that the United Kingdom Government gives vigilant consideration to the relevant questions of the international law on the use of force. Key issue, not often discussed, that was exactly raised in the Attorney General's advice of March, 7th 2003, is how strong the legal foundation has to be before a State embarks upon a use of force. Therefore, Attorney General said:

> *I am still of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorize the use of force. Nevertheless, I recognize that a reasonable case can be made out that resolution 1441 is capable in principle of reviving the authorization in 678 without a further resolution. Concluding the remarks, I have taken account of the fact that on several of earlier occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in armed operation on the base of advice from predecessors that the validity of the action under international law was no more than rationally arguable. But a "reasonable case" does not mean that if the matter ever came before a court I would be convinced that the court would agree with this vision.*

How strong a legal base is essential before a State recourse to armed force is ultimately a policy question rather than one for Government legal advisers? Another vital but little discussed point is the question of proof of the relevant facts. At least after the event, a State which has opted and used armed force may be required to demonstrate that the facts as known to it prior to the use of force were obliged to give good reason for the recourse to armed force under the circumstances. This can raise complicated problems where evidence relies

on intelligence. Both these issues—the strength of the legal base, and the question of evidence or proof—could become serious in the United Kingdom in light of the Government's latest proposal to make provision for the support of House of Commons to 'considerable, non-routine Forces' deployments into armed conflict'. Amore essential question is whether there are noteworthy deficiencies in the traditional body of rules on the use of force by States. Is the law as it is the law as it ought to be? Are existing rules adequate to deal contemporary threats, i.e., terrorist groups and weapons of mass destruction?

However, at the level of Heads of State and Government General Assembly of the United Nation addressed to this question in the 2005 World Summit Outcome. It was reaffirmed by the Heads of State and Government that the applicable provisions of the Charter are adequate to address the full range of threats to international peace and security. Further it was reaffirmed that the authority of the Security Council for authorization coercive action to preserve and restore international peace and security. It was urged upon the importance of acting in accordance with the purposes and principles of the United Nation Charter. It notices that, in the opinion of the Heads of State and Government, the rules on the right of use of force as mentioned in the Charter (and in customary international law), when suitably construed and applied, are satisfactory to meet new challenges. What is desired are not new rules, but political determination and will on the part of States, including members of the Security Council and potential armed units-contributors. The 2005 World Summit Outcome thus presented a reply to a debate that took off after September 2001 questioning the efficacy, the relevance, and even the continuation of rules of international law on the use of force. The response of the UK Government in July 2004 to the Foreign Affairs Committee was along alike lines: In the view of the Government the true approach is to continue to look for to build a political agreement on the circumstances in which it is appropriate to recourse to armed action within the current legal framework rather than looking for to alter existing rules of international law on the use of force. Prevailing rules on the right of use of force are adequately flexible to meet the new threats faced today. The role of the Security Council is central to that procedure. Seeking to widen the rules of international law other than on a case-by-case base would be very complicated, and probably fruitless.

Issue No. 2: Issue of Weapons of Mass Destruction and Transnational Terrorist Groups

Before discussing the question of right of self-defense against transnational terrorist groups, an expression such as 'war against terrorism' or 'global war on terror' may be employed in this regard. When inquired whether the use of the term 'war against terrorism' meant that UK government was righteous on the issue of war as explained by the UK government that:-

> *"The term "the war against terrorism" has been used to explain the whole campaign launched to defeat the terrorism, which covers political, financial, legislative, military, and law-enforcement measures".*

The United States has in recent times gone on record in a somewhat alike prudence. Meanwhile, John B Bellinger III, Legal Adviser of State Department of USA, stated that:

> *"The phrase 'the global war on terror' – to which some has objected is not intended to be proclamation of legal nature. It is not believed by the United States that it is engaged in a legal state of armed conflict at all times with every terrorist group in the world. The concept of 'global war on terror,' it primarily means that the curse of terrorism is a global problem that must recognized and worked together to eliminate it collectively by the international community".*

While careful study of Article 51 of the United Nations Charter which provides that:

> *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations".*

Thus United Nation charter in the light of Article 51 recognizes the inherent right of self-defense under customary international law. Right of self-defense as recognized in the United Nation charter is sometimes recommended too limiting for the modern age. Such recommendations overlook, or at least down play, the potential role of the Security Council in authorizing States to use force preventively to turn away terrorist threats. Three most important questions arise in relation with self-defense against terrorist attacks. Does the right of self-defense in response to attacks by non-State actors, as well as transnational terrorist groups available? Whether right of anticipatory self-defense available in response to attacks by the non-state actors? And, if

answers of these questions are in the affirmative, then what are the criteria of imminence apply in relation to attacks by terrorists or with weapons of mass destruction? Yet without delay after the terrorist attacks of 11 September 2001, on 12 September the Security Council approved Security Council resolution 1368 (2001), recognizing 'the inherent right of individual and collective self-defense in the light of United Nation Charter. Also resolution 1373 (2001) was adopted Security Council soon after two weeks later, which similarly confirmed 'the inherent right of individual and collective self-defense as recognized by the Charter of the United Nations'. Whilst others have tried to argue the different, it is difficult to scrutinize these resolutions as doing other than accepting the right of self-defense in response to attacks by non-State actors. It is obvious that State practice and the North Atlantic Treaty Organization members the practice, the members of the Organization of American States and others, strongly supports right of self-defense in response to attacks by the non-state actors. While International Court of Justice's interested declaration in the Wall advisory opinion and its (possibly important) silence in Armed Activities on the Territory of the Congo case on such right of self-defense. It is clear that terrorists in general function from outside the State from the targeted state; the issue arises whether the right of self-defense may be exercised against terrorists based and functions in another State, and if sounder what circumstances. Some have recommended that such action is only acceptable if the State concerned bears international responsibility for the acts of the terrorists. The question of State responsibility for terrorist functions or acts is essential, but such responsibility is neither necessary nor satisfactory for force to be exercised in self-defense.

It is noteworthy to discuss that the question as whether the United Nation Charter recognizes a right of anticipatory self-defense in the circumstances mentioned above, however, it is obvious that it remains controversial among States as well as among academics. USSR during the Cold War and its friends seemed to take the point that action in self-defense was only legitimate if an armed attack had actually been occurred not otherwise. The Caroline approach has been adopted by the United States, the United Kingdom and some allies, that is, that force may be exercised in self-defense in the face of an imminent attack. It is pertinent to note here that International Court of Justice has not yet taken the chance to address the matter. With the end of the Cold War, and the new threats, have not yet led to general agreement between States on the question of anticipatory self-defense in the circumstances. Yet in general States are perhaps somewhat closer in their opinion of the law than before. However, States often appear to agree on the validity of particular actions, the unfavorable reaction of many to the categorical affirmation of a right of anticipatory self-defense in the circumstances.

Issue No. 3: Ambiguities in Standards Advanced by Treaty and Customary International Law

A pervasive issue within the legal framework on the right of self-defense is that the content of article 51 of the Charter and the companion customary international law standards has not been elucidated.

A. Meaning of "Armed Attack" in Article 51: Even the prerequisite of an "armed attack," which the International Court of Justice, concludes and academics uniformly agree does trigger a right to self-defense under customary international law and article 51 of the UN Charter, is vulnerable to a variety of constructions, as to who must carry out the "armed attack" and what the content of the "armed attack" must be, which in turn affect when self-defense may be used.

B. Who must Carry Out the "Armed Attack": Considering that the Charter of the United Nation is a treaty among States, it is rational that the condition of an "armed attack" in article 51 includes attacks by States. However, contemporary global issue, i.e., terrorism so whether terrorist groups or individuals can be said to includes "armed attacks" under this article as well The International Court of Justice has favored a definition of "armed attack," which it claims is considered from customary international law, and which is based upon the concept of traditional armed forces connected to a State. ICJ in its ruling regarding to Military and Paramilitary Activities, the Court concluded that an "armed attack" contains "not merely action by regular armed forces across an international boundary, but also "the deploying or sending by or on behalf of a State of armed forces or groups, which functions and carry out acts of armed force against another State." It was concluded by the International Court of Justice in case of Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory in 2004, that Israel does not possess a right to self-defense as the occupied Palestinian territory is not a State and therefore, t Palestinians actions could not be considered to be "armed

attacks in this regard." Keeping in mind decision of the ICJ, it could be concluded that armed attacks of non-traditional nature done by small groups or individuals which are not under the control of a State, such as rebel or terrorists, are not deemed and unqualified as "armed attacks" since the individuals or groups are not under authority or sent by or on behalf of the State. As a result, attacks without the required connection to the State do not establish an adequate basis for self-defense under article 51 or customary international law according to the Court. Therefore, it quite crystal from the ruling of International Court of Justice is the underlying scheme that to be internationally responsible, a State must have started the action or the acts must be attributable to the State in some manner. As the Court elucidated, the State would basically required efficient control of the military or paramilitary operations in the course of which the alleged breach were committed. On the contrary, some academics stated that article 51 does not particularly talk about that the attack must be by a State, as compared with article 2(4), and others have considered it from resolutions No 1373 and 1368 of the Security Council, which were adopted shortly after 9/11 incident, as support for the plea that an "armed attack," can be committed by a non-State actors are deemed under article 51 of the UN Charter. Moreover, supporter of his plea also has produced Caroline case in the support of their opinion.

C. Nature of the "Armed Attack": Ruling of International Court of Justice in the Military and Paramilitary Activities case introduced a series of questions, regarding to the armed attack. Issue of killing, as who must be targeted or killed? Whether citizens are enough or officials needed to be targeted? What number of the affected are required, i.e., one person on the territory of another State and level of killing, bluntly put, would be essential? Whether damage to infrastructure or property in the targeted territory of the State and if so, what is the level of such damages? Whether targeting a State's nationals or property on the high seas or in another State establishes an armed attack and in such situations, who and what would have to be attacked and what would have to be the level of such attack? In other words, substantial vagueness exists as to who and what must be targeted, where such things or persons must be targeted, and the level of the attack. Meanwhile, either we don't find any answer or find small number of points of reference on these questions in the Military and Paramilitary Activities case and the Oil Platforms case. It is concluded that attack on commercial vessels of a State as well as vessels of another State, which under the flag of the State that was attacked, might establish satisfactory targets. While ruling in the Oil Platforms case disproves this contention. International Court of Justice in Oil Platforms, Military and Paramilitary Activities, and Armed Activities on the Territory of the Congo cases judgments has concluded that the theory could be adopted by a State to defend the use of force in self-defense, but in Security Council in 1964 in Harib Fort resolution opposed with this approach. In addition, there is no internationally recognized method for determining the aggressor and victim states, so as to spell out which state has right to use force in self-defense.

D. Reaction to "Armed Attack": The necessities, expressed in letter of Mr. Webster relating to the Caroline case, that the steps opted in response to the armed attack must be essential and reasonable in order to be legitimate, are not entirely unambiguous either. In Nicaragua case although the court concluded that there was no "armed attack and determined that the conditions of necessity and reasonability in connection to the U.S. response were not found. It is pertinent to note here that the Court, however, did not detail the content of the legal principles, but instead applied them to the facts. Moreover, court in its advisory opinion in the Legality of the Threat or Use of Nuclear Weapons case and in its ruling in the Oil Platforms and Armed Activities on the Territory of the Congo cases, while quoting the criteria for necessity and reasonability, did not clarify their content. Some researcher regarding to the necessity requirement claimed that this means that attempts at attaining a peaceful resolution have already been exhausted. It is understood that force is only to be used as a last option and as a severe measure. However, others scholars find that such an approach cannot be opted in all circumstances.

Therefore, the criteria in connection to the response to an "armed attack" must be reasonable and proportionate is even less well defined than that of necessity. However, main question related to the principle of reasonability and proportionality is whether, in deciding what steps of force should be exercised in response. According to Gray, these concepts have not been discussed much by scholars since the determination in actual cases is normally a factual one. However, without any direction on the application of the principles of necessity and proportionality, States are free to interpret them to keeping in mind suitability matching their needs, as was confirmed in military action in Afghanistan the U.S. Furthermore, just as there is no method for determining

whether a State is empowered to use self-defense, there is no method for determining whether the steps opted in self-defense congregates the necessity and proportionality requirements as discussed above.

E. Other Issues: It is also provided in Article 51 that self-defense is acceptable "until the Security Council takes action." Thus, there is an obligation to suspend using force in self-defense once the Security Council has acted. However, this expression raises questions as to what means "action." While debatably, the Security Council does not have to sanction armed steps in order to have taken "action," it is not unambiguous whether a normally phrased Security Council resolution demanding that the parties come to an end warfare would suffice or whether the resolution would have to refer to a termination of the right to self-defense or empower or require States to take measures.

When it is not clear to States that the Security Council has undertaken action then they would feel free to continue their armed action in self-defense. The right to use collective self-defense invites many of the same issues discussed above, but also introduces numerous particular ones. While in the Military and Paramilitary Activities case International Court of Justice concluded that an "armed attack" does not comprise assistance to rebels in the shape of the provision of arms or logistical or in any form other support. The Court did not detail further, thus leaving a considerable gray area as to whether other kinds of assistance and if so which ones, by a third State to a non-State body, such as rebels or a terrorist group, attacking another State could establish an "armed attack." In addition, it is ambiguous, following the ruling in the *Military and Paramilitary Activities* case, whether the injured party must make a timely declaration of an attack and properly request assistance from a third State.

Issue No. 4: Issue of Humanitarian Intervention

Government of United Kingdom was a principal supporter of an exceptional and firmly limited right of States to use force to turn away an overwhelming humanitarian catastrophe. First of all this claim was made concerning to the establishment of the safe havens in northern Iraq in 1991. It was 'the fundamental justification of the No-Fly Zones' in northern and southern Iraq. Moreover, it was reiterated in 1998 in the following terms in connection with the events unfolding in Kosovo. It is noteworthy to mention here that international law does not possess any general doctrine of humanitarian intervention. Cases have nevertheless took place (as in northern Iraq in 1991) when, in the light of all the situation, a limited use of force was justifiable in favor of purposes laid down by the Security Council but without the Security Council's clear authorization when that was the only means to turn away an imminent and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would rely on an objective appraisal of the factual situation at the time and on the terms of relevant ruling of the Security Council bearing on the circumstances in question. A more supportive statement of the standard was set out in a note of 7 October 1998 and circulated by the Britain within NATO:

(a) That there is credible evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, demanding an urgent and instant relief;

(b) That it is objectively obvious that there is no practicable alternative to the use of force if lives are to be saved;

(c) That the proposed use of force is necessary and proportionate to the object (the relief of humanitarian need) and is firmly limited in time and scope to this object i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this standard.

Baroness Symons' response, a double reference to the Security Council though not in the note for NATO. But is it necessary, under the doctrine articulated by Baroness Symons, that the Security Council has pronounced on the matter? He draws a clear lines 'between the use of force in the defense of purely national interests, and the use of force in the common interest', and recommended that States may, provided that the 'conditions and limitations' are properly consideration, use force unilaterally in circumstance that they do so 'in pursuit of purposes the Council itself has already laid down.' In the course of developing his argument, Sir Franklin observed that:

> *"The common supposition has been that what was being put forward [by Baroness Symons] represented a deceitful attempt to give operative force to non-binding Security Council resolutions; or that it was an unlawful way of constructing the grant by the Council of implied authority to act. Neither of those could be further from the truth*".

What the commentators left was that this element, one of several in a composite argument, was not being advanced as a constructive empowering factor in its own right, but in a purely unconstructive sense; in other words, it was there to make clear that the States in question were exactly not claiming for themselves the right to lay down the purposes of the international community in whose name they were acting, but were functioning in aid of common purposes laid down by the only duly empowered organ, the Security Council. This clarifies that for the Security Council to lay down the general purpose is an essential, but not sufficient, condition for States to act unilaterally. Yet there is certainly a risk that, if this were recognized, the Security Council work could be inhibited because of fears that if it laid down a 'common purpose' this could be construed as indirectly sanctioning the unilateral use of force. Advice of 7 March 2003 advanced by the Attorney General's suggests that the doctrine [of a right to intervene to turn away an overwhelming humanitarian catastrophe] remains controversial. Has State practice now developed to the point where a right to intervene to turn away an overwhelming humanitarian catastrophe can be considered to have been recognized in customary international law, regardless of the silence of the United Nations Charter and in the face of the general prohibition on the use of force?

United Kingdom's legal position in 1991 on intervention was a somewhat remote one. In earlier cases which might have been experienced as humanitarian interventions for instance India-East Pakistan 1971; Vietnam-Cambodia 1978; Tanzania-Uganda 1979 the concerned States justified and legalized their actions on other grounds, primarily self-defense. Furthermore, operation launched by NATO in Kosovo could have been a key element of State practice (though factually it was less than clear cut, since many participating States—including the United States—were not at all clear as to the legal base for their operation). It is pertinent to mention that much the development of a right to intervene on humanitarian grounds may have been welcomed in some quarters, it is not easy to reveal that State practice since the intervention over Kosovo in 1999 or since the safe havens in northern Iraq in 1991, has moved in the direction of those claiming the existence in law of right of humanitarian intervention. The claim has not secured much 'attraction' so far. Since 1999 there are no examples of States seeking to rely on it. The Secretary-General's report In larger freedom of 2005 and the High-level Panel's report Our common future of 2004, did not discuss such a right. General Assembly debate in April 2005 offered no support to this right; those who addressed the issue of humanitarian intervention found it as an issue to be decided upon, if at all, by the Security Council, not one where unilateral action was allowed. Moreover, the 2005 World Summit Outcome is silence on the issue. In the final analysis, it may be desirable to opine the claims made in 1991 and 1999 as based on some exceptional defence or rationalization of necessity, such as is found in national legal systems, rather than on a positive rule of law. The United States has, to this point, not welcomed such a right. It justified its actions to guard and protect the Kurds in northern Iraq and the Shia in the south, and the NATO operation over Kosovo, on 'a range of other factors. Former State Department Deputy Legal Adviser Mr. Michael Matheson, has explained the position of America that: the declaration by states or regional organizations of a *legal right* to carry out such "benign" uses of force on their own authority could create precedents for future interventions by others that might be destabilizing and risky. This is one of the key grounds the United States has never asserted the doctrine.

State Legal Advisor goes on to point out that: But there is a much stronger legal and political base for forcible humanitarian intervention under the permission of the Security Council under Chapter VII or VIII. It is, in fact, along these lines that the Great Britain and others have been working since shortly after Kosovo action. Back in 2001, the Government of United Kingdom sought to promote standard for the situation in which the Security Council should be ready to authorize the use of force in the face of an overwhelming humanitarian catastrophe. This was an effort to develop the underlying policy for Security Council action, not the law. The initiative did not cause or lead to immediate results. Other initiatives followed, motivated by concern at the unilateralism inherent in the Kosovo operation. The most prominent was the International Commission on Intervention and State Sovereignty, constituted by the Government of Canada, whose report of 2001 was entitled. The Responsibility to Protect. The Secretary-General's High-level Panel had plenty to goon. The Panel approved (at paragraph 203): the rising norm that there is a collective international responsibility to protect, exercisable by the Security Council sanctioning military intervention as a last option, in the event of genocide and other large-scale killing, ethnic cleansing or grave breach of international humanitarian law which sovereign Governments have demonstrated powerless or unwilling to prevent. It was proposed by the Panel

that the Security Council adopt guidelines (not unlike those recommended in 2001 by the British Government) as to when it should act. This was proposed clearly to make sure the legitimacy of the Security Council's actions, not their legality. The Secretary-General's report in larger freedom was in similar stipulations. In the case, Security Council did not adopt such guidelines and nor did the General Assembly favor their adoption.

2005 World Summit Outcome in its paragraphs 138 and 139 as concluded by the Heads of State and Government that each individual State has the responsibility to guard and protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. They also suggested that 'the international community, through the United Nations' also had the responsibility to use appropriate peaceful sources, in accordance with Chapters VI and VIII of the United Nations Charter, to assist protect nationals. Moreover main passage then follows: In this circumstance, we are ready to take collective action, immediately and in decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are noticeably failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This sentence merits cautious analysis. The first question is whether, by using the word 'responsibility,' the Assembly was declaring that either 'each individual State' or 'the international community, through the United Nations' has an international legal obligation and duty to protect populations. The reply to this question, definitely, is 'no'. Although individual States have constructive obligations under human rights law that would be encompassed in the concept of a 'responsibility to protect', it does not follow that 'responsibility to protect' amounts to a new international legal obligation, created by General Assembly fiat. So to claim might even limit recognition of the political principle. States, particularly those who would bear the main burden of action, are not likely to be willing to agree to a legal obligation to act to attained objectives that may need huge resources and where, depending on the situation, success may be doubtful. As a political assurance, the passage on 'responsibility to protect' in the 2005 World Summit Outcome is potentially important, and suggests that States have come quite far. As noted down by Mr. Simon Chester man, in his article in the 2006 volume of this Year Book: The Secretary-General exactly called this aspect of the Outcome Document a "revolution in international affairs". The test of its relevance is not whether states are obliged to intervene in response to humanitarian crises, but whether it is difficult to say "no". Yet even as a political commitment the sentence in the World Summit Outcome is restricted in scope. As stated by the Heads of State and Government as they were 'ready to take collective action' (unspecified). Action is to be exercised and taken 'through the Security Council' and 'in accordance with the Charter.

What is noteworthy, legally as well as politically, is that in the 2005 World Summit Outcome that it was confirmed by the General Assembly in the serious fashion, that enforcement action to guard populations from genocide, war crimes, ethnic cleansing and crimes against humanity is within the ambit of the Security Council. Such a position was already well maintained in the practice of the Security Council, and any remaining uncertainties should have been removed by the 2005 World Summit Outcome. In fact, the General Assembly, that is to say, the membership of the United Nations as a whole, went further. It noticeably said that it expected the Security Council to take action in appropriate cases, and the Security Council itself has recognized this. Having said that, the rationale given in January 2007 by certain members of the Security Council for contrasting action over Myanmar do not augur well for the practical application of a 'responsibility to protect'. Therefore, it is obvious that the doctrine of a right to intervene to turn away an overwhelming humanitarian catastrophe remains controversial with the global community.

5. Conclusion

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

The reaction to the 9/11 terrorist attacks invoked the Bush Doctrine of preemptive self-defense. This has not become a new rule in international law, as there is no state practice and opinio juris on the issue. Further, the

Bush Doctrine is inconsistent with Article 51 of the Charter and international customary law on self-defense. Especially in the case of Operation Iraqi Freedom, the requirements of self-defense were not satisfied, as there was neither any actual armed Iraqi attack on the U.S., nor any evidence of any Iraqi plans for an attack or of Iraqi capability for such an attack. The new U.S. policy on preemptive self-defense appears to be very problematic in international law, as it stipulates a withdrawal from the security architecture of the Charter. Not only is the Bush Doctrine jurisprudentially suspect, it is also strategically questionable. The Bush Doctrine's expansion of the scope of anticipatory self-defense risks setting a dangerous precedent, which can easily be manipulated. It ignores state practice and reciprocity, a cardinal principle of international law. Are we prepared to accord China, India, Pakistan, or even North Korea the right to invoke a loose, unsubstantiated notion of 'preemptive self-defense'? To fashion a doctrine out of preemption encourages a perception of superpower arrogance and unilateralism. The danger of unilateralism is that it usurps the process of interpretation: a country that unilaterally interprets a legal norm—in this case, that of anticipatory self-defense—and acts upon that interpretation without any efforts at persuasion would reaffirm the law of power, rather than the power of law. The only way of creating a world in which peace and security prevail, is to emphasize multilateral, instead of unilateral action. The United Nations and most of all its Security Council should be the only authority for deciding on the use of force, except for the cases where an attack is that imminent that there is no time for a Security Council authorization, which must be based on solid evidence under the above described criteria. The result of the unilateral use of force in most cases is a worsening of the state of security, as reprisals are the most common answer and the gap between the parties is deepened. The case of Iraq shows this drastically. A superpower like the U.S. can overwhelm a proportionately small power like Iraq easily. But can it deal with the consequences? Is it willing to pay the high cost, monetarily and humanitarian, of an occupation which may be arguably illegal? The threat of terrorism surely is a huge challenge to the existing international security system. In my opinion, a solution can only be achieved, when there is international agreement and authorization of actions to be taken. Unilateral actions of an arrogant superpower only strengthen support for terrorists.

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