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and Its Impact on Human Rights
in the Aftermath of Armed
Response

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Summary

The inherent right of self-defence in international law is part of international customary law and reiterated in Article 51 of the United Nations Charter. The concept of self-defence has changed dramatically throughout legal history. Today's interpretation of what constitutes self-defence can be traced back to the *Caroline* case setting the basis for the understanding and limitations of the right of self-defence in the League of Nations and the subsequent Kellogg-Briand Pact, which formed the basis for jurisdiction for the crime of aggression in the Nuremberg Tribunal.

The prevailing definition of the right of self-defence was included in the UN Charter and based on state practice and *opinio juris*. The contemporary debate essentially relates to the interpretation of the elements that jointly constitute the understanding of the right of self-defence. It is imperative to have a unilaterally acknowledged interpretation of the law pertaining to self-defence, given that it is one of two exceptions to the use of force in international law, armed action authorised by the Security Council under Chapter VII of the UN Charter being the other. With terrorism, and particularly in the aftermath of September 11 2001, a need arose to re-evaluate the current interpretation of the right of self-defence, given the complex situation of invoking the right of self-defence against non-state actors. The Articles on state responsibility stipulate that an armed attack by non-state actors can be made attributable to a state if certain prerequisites are met. A lengthier analysis is dedicated to the definition of what constitutes an armed attack within the framework of Article 51 and in the light of the judgement by the International Court of Justice in the *Nicaragua* case. Examples of the prevailing definition of the right of self-defence being challenged are illustrated by frequent attempts by certain states, notably the USA and Israel as a result of numerous terrorist attacks, to justify use of force against other states within the ambit of pre-emptive self-defence, which is unlawful under international law due to its non-conformity with Article 51 of the UN Charter.

The failure of the doctrine of the right of self-defence to provide a unilateral interpretation of what actions may trigger a right of self-defence is a flaw in the current international legal system in that it fails to define what constitutes self-defence, its scope and the failure of the UN, particularly, the SC to efficiently perform its mandated functions within the ambit of Article 51 and Chapter VII.

In the aftermath of the September 11 attacks and undertaken armed response in self-defence, human rights were not a top priority. The Guantánamo Bay detainees were and still are deprived many of their human rights. Despite the possibility of derogation as stipulated in the ICCPR, the HRC has firmly established that such derogations may only be undertaken if strictly required by the exigencies of the situation.

Self-defence will always impact human rights, regardless of whether it is exercised within the ambit of Article 51 or legally disputed doctrines of self-defence, such as pre-emptive self-defence, that arguably may be part of customary law. Nonetheless, non-derogable human rights are applicable at all times to armed conflict. The HRC has moreover established that provisions in the ICCPR that are not recognised as non-derogable, still cannot be derogated from by states at will. Derogations are allowed to the extent strictly required by the exigencies of the situation. Furthermore, the principles of necessity and proportionality, as established by the ICJ in the *Nicaragua* case and considered part of international customary law, clearly act as limitations on the exercise of the right of self-defence. Finally, the Martens Clause reiterates the obligation of states to conform to certain fundamental human rights principles such as the principles of humanity and dictates of public conscience.

Preface

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Abbreviations

AJIL	American Journal of International Law
ASIL	American Society of International Law
EJIL	European Journal of International Law
GA	General Assembly
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICRC	International Committee of the Red Cross
POW	Prisoner of War
SC	Security Council
UN	United Nations
U.N.Y.B.	United Nations Yearbook
US	United States
USSR	Union of Soviet Socialist Republics

1 Introduction

The world saw one of the worst acts of terrorism committed on September 11, 2001, when 4 commercial aircrafts were hijacked by 19 terrorists and crashed into the World Trade Center, the Pentagon and, owing to the bravery of the civilians onboard the fourth aircraft, a forest area outside of Pittsburgh, Pennsylvania. After investigations by US authorities, the responsible party was identified as the terrorist organisation Al-Qaeda based in Afghanistan headed by Osama bin Laden.

One of many questions that arose in the aftermath of September 11 was whether the attack on the USA constituted an armed attack within the meaning of Article 51 of the UN Charter, which states that if an armed attack occurs against a member state of the UN, that state may take action against the state responsible for the initial violation of the prohibition of the use of force. With regard to September 11, it was ambiguous what state, if any, could be held accountable for the terrorist attacks. According to the laws on state responsibility, a state can be held accountable for actions performed by non-state agents if it can be established that an act or omission should be considered the conduct of the state. US authorities claimed that Al-Qaeda had close links to the Taliban regime in Afghanistan, *inter alia*, through state-sponsored training camps and funding and thus US authorities invoked its inherent right of self-defence and notified the UN Security Council (hereinafter SC) of actions being initiated in self-defence against Afghanistan.

The SC recognised in SC Resolution 1368 the inherent right of self-defence of the USA, but it is not self-evident that it explicitly authorised the use of force. This fact is corroborated by the wording of the SC in the resolution pertaining to self-defence, which was placed in the preamble and not in the operative part. As a consequence, there is room to suggest that the US single-handedly ostensibly broadened the scope of self-defence to possibly include a right to action in self-defence against non-state actors. Although the SC remained painfully silent on the legality of actions taken by the US, the world community rallied around the US, legitimising its armed actions in self-defence.

The inherent right of self-defence is part of international customary law and Article 51 of the UN Charter reaffirms and recognises the right as an exception to the prohibition of the use of force in Article 2(4). However, while exercising the right of self-defence, states are legally bound by the rules of international humanitarian law governing the conduct in war and by certain human rights that constitute specific limitations to the right of self-defence in international law.

As a consequence of the exercise of self-defence countless violations of human rights provisions occurred and are still occurring at the time of

writing. Detainees captured during the war in Afghanistan have still not had their status decided by a court of law and US authorities on a daily basis violate many of their basic human rights. The strategic transfer of the majority of the captured detainees from Afghanistan to the Guantánamo US naval base in Cuba has created a legal limbo that facilitates continuing violations of detainees' human rights.

1.1 Subject and Purpose

There has been extensive coverage of the topic of self-defence in international law: the underlying history, the scope and the potential mandate to broaden the existing legal interpretation of the right of self-defence. The academic debate with respect to the scope of self-defence has been highly controversial with varying opinions as to the elements constituting self-defence and the different doctrines promoting a more generous interpretation of the right of self-defence. Limits of the right of self-defence are in existence but the question is whether there is reason to reassess the existing limitations. Armed action taken in self-defence as a consequence of September 11 resulted in flagrant human rights abuses and it should be addressed whether such violations of human rights should constitute limitations to the right of self-defence in international law. In a world where the notion of armed attack has shifted from being acts committed exclusively by states, to becoming a new order where transnational networks of terrorist organisations are capable of the use of force against states amounting in severity to an armed attack within the ambit of Article 51 has become a fact. In a world where the aggressor is not as easily identifiable in shape, form and location, it is tempting for States victims of such terrorist attacks to stretch the limits of the law in order to make it conform to their own motives. The major purpose of this thesis is to establish whether the existing limits of the right of self-defence are adequate in order to encompass and constitute a genuine protection for human rights in the aftermath of armed response in self-defence.

The aim of this thesis is firstly to illustrate, by a descriptive approach, the current status of *opinio juris* and state practice and the ongoing attempts by certain states, mainly the USA and Israel, to challenge the current interpretation of the right of self-defence as it touches upon human rights issues. With focus on the legal problems arising after September 11, this thesis attempts to give the reader an insight into the increasing need for the USA to, by any means possible, justify the armed attack against Afghanistan under the auspices of Article 51 of the UN Charter. The intervention, which was legitimised by the USA as an act of self-defence, was met with criticism by several academic scholars. Should terrorist attacks authorise states to undertake military action in self-defence and broaden the scope of it to include action taken in pre-emptive and anticipatory self-defence at the expense of human rights? Are there any clear provisions in international law limiting the exercise of the right of self-defence if it would violate human rights norms? If so, are limitations applicable to all human rights or just to

certain human rights that may be invoked as delimiters for the exercise of the right of self-defence? If not, is there a need for explicit legislation regulating this area of international law or could it be implied from already existing regulations that human rights in specific circumstances constitute de facto limitations to right for state of self-defence? This thesis hopes to shed some light to these questions.

1.2 Limitations

As the topic of self-defence is broad and is analysable from several perspectives, I have narrowed the thesis down to only analyse the right of self-defence within the framework of Article 51 and international customary law. I have deliberately chosen not to focus too much on actions authorised by the SC. In addition, humanitarian law has only been dealt with where necessary, as the aim of this thesis is to focus on human rights. Furthermore, it is not the intention of the author to analyse the Israel-Palestine conflict in detail thus only when it has been deemed necessary for the progression of the thesis. For a lengthier analysis of the Middle East conflict, see Playfair, Emma, “International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip”, Oxford: 1992. Finally, the focus of this thesis will be on civil and political rights, thus excluding an analysis of potential abuses of economic, social and cultural rights in the context of self-defence, an issue well worth further exploring within the framework of a separate thesis.

1.3 Method and Material

The working method chosen consists of one descriptive part where the aim is to elaborate on the current understanding of the scope of self-defence, to elaborate on different positions taken by scholars and states with respect to the scope of self-defence. Subsequently, the aim is to introduce human rights in the context of self-defence.

The second part consists of a more analytical approach where I utilise the descriptive part to assess, analyse and draw conclusions based on the written material.

The chosen material for the historical elaboration is covered mainly by two authoritative books on the subject: *International Law and the Use of Force by States* by Ian Brownlie and *Self-Defence in International Law* by D.W. Bowett. For the chapter on the scope of self-defence, I have relied heavily upon three books: Yoram Dinstein’s *War, Aggression and Self-Defence*, Christine Gray’s *International Law and the Use of Force* and Bruno Simma’s *The Charter of the United Nations – A Commentary*. In addition, focus is also on the Nicaragua case as it is imperative for the definition of what constitutes an armed attack and for the understanding of the scope of self-defence. The chapter on countermeasures and reprisals is predominantly based on the International Law Commission’s Articles on

State Responsibility with commentaries by James Crawford and the work of Fritz Kalshoven, *Belligerent Reprisals*. The two final chapters are mainly based on legal articles from prominent law journals, legislation, case-law and reports from NGOs, mainly Amnesty International and Human Rights Watch.

1.4 Outline

The second chapter is a historical exposé of the development of self-defence in international law dating back to the period prior to the establishment of the United Nations. The *Caroline* Case is introduced as one of the pioneering precedents of the right of self-defence. Within the ambit of different time epochs, organisations and pacts like the League of Nations and the Kellogg-Briand Pact, followed by important documents like the Locarno Treaties are introduced to illustrate the prevailing understanding and scope of self-defence at the time.

The third chapter demonstrates the scope of self-defence as defined by international customary law and Article 51 of the UN Charter. Focus is on Article 51 and a description of the academic discourse of the currently prevailing interpretation of the right of self-defence. Two opposing sides are introduced, one agitating for a broader understanding of the concept of self-defence, the other upholding the importance of maintaining a strict definition in conformity with the Article 51 of the UN Charter. The purpose of this chapter is also to identify the elements that circumscribe the right of self-defence as stipulated in the Charter, and specific criteria that have to be fulfilled in order to trigger action in self-defence, such as the infected legal debate concerning what constitutes an armed attack, which is a prerequisite for action in self-defence. The chapter also introduces additional forms of self-defence; *inter alia*, collective self-defence and anticipatory self-defence and their importance in establishing the legal boundaries for the scope of the right of self-defence. The overall aim of this chapter is to introduce the different elements that together constitute self-defence in international law, taken together with a standpoint on arguable self-defence doctrines that some states and scholars would like to see incorporated in the accepted definition of the right of self-defence.

The fourth chapter aims to illuminate two types of actions that are not considered to be part of the self-defence doctrine, but are imperative for a comprehensive understanding of the right of self-defence in international law. The chapter on countermeasures, *inter alia*, touches upon specific limitations to countermeasure actions enshrined in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. The chapter moreover establishes a link between explicit human rights considerations taken into account when restrict the doctrine of countermeasure, which does not exist in any explicit form in the UN Charter. The ultimately difference between countermeasures and reprisals is that actions within the framework of countermeasures are undertaken by peaceful means, *e.g.*, economic

sanctions, whereas reprisals constitute armed action and more importantly are banned under international law. The section on reprisals highlights the intimate relationship between these outlawed actions and armed actions taken under the auspices of the right of self-defence.

The fifth chapter runs through the general limitations that exist to the right of self-defence. It moreover distinguishes between international humanitarian law and human rights law as limiting armed action.

The sixth chapter focuses on recent developments in international law pertaining to the right of self-defence. It delves into consequences of terrorist attacks for the interpretation of the scope of self-defence and the inclination of certain states to broaden the scope by embracing actions in pre-emptive self-defence, a doctrine not accepted in international law. Furthermore, one of the subchapters focuses in particular on the human rights implications occurring in the aftermath of September 11.

The seventh chapter presents concluding remarks and the author's own reflections and ultimately interlaces the entire thesis.

2 A Historical Exposé of the Right of Self-Defence in International Law

2.1 The *Caroline* Case

Until the *Caroline* case, self-defence was considered a political justification for what, from a legal perspective, were ordinary acts of war. The positivist international law of the nineteenth century rejected natural law distinctions between just and unjust wars. Military aggression was unregulated and conquest gave good title to territory, as shown by the British acquisition of the Falklands in 1833.¹

During the nineteenth century attempts were made to restrict the right to go to war to cases of direct and immediate danger. This is shown by the *Caroline* case,² which is generally regarded as a classic illustration of the right to self-defence.

During the rebellion in Canada in 1837, preparations for subversive action against the British authorities were made in United States territory. Although the U.S. government took measures against the organisation of armed forces on its soil, there was no time to halt the activities of the steamer *Caroline*, which supplied and reinforced the rebels in Canada from U.S. ports. A British force operating from Canada crossed the U.S. border, seized the *Caroline* in the State of New York, set her on fire and sent her to destruction down the Niagara Falls. Two U.S. citizens were killed during the skirmish. The British position was stated in these terms: “The piratical character of the steam boat *Caroline* and the necessity of self-defence and self-preservation, under which Her Majesty’s subjects acted in destroying that vessel, would seem to be sufficiently established.”³ The essential legal principal established in the *Caroline* case is that preventive action in foreign territory is justified only in case of an “instant overwhelming necessity for self-defence, leaving no choice of means and no moment for deliberation.”⁴ This definition suggests that the right can be sparked when an attack is imminent, which is a broader definition than the one found in Article 51 of the UN Charter which has the requirement of an armed attack having occurred.⁵

¹ Byers, Michael, “Jumping the Gun”. Available at: <http://www.lrb.co.uk/v24/n14/byer01_.html> Last visited 2003-12-08.

² *Caroline Case, The*, (1837), 29 BFSP 1137.

³ H. EX. Docs. 302 and 73, 25th Congr., Second Session.

⁴ *Caroline Case, The*, (1837), 29 BFSP 1137, para. 19.

⁵ *Charter of the United Nations*, Signed on 26 June 1945, San Francisco.

The *Caroline* case did nothing to prevent aggression, but it did draw a legal distinction between war and self-defence. As long as the act being defended against was not itself an act of war, peace would be maintained. The *Caroline* criteria of necessity and proportionality became widely accepted as customary international law – an unwritten set of rules formed through the behaviour and opinions of states.

2.2 The Interwar Period

It took another century, including the First World War, after the *Caroline* incident to convince statesmen of the need for constraints on military aggression. A first effort was made in 1919, when the League of Nations Covenant was adopted at Versailles.⁶ Under the Covenant the Council of the League could issue recommendations to states in danger of going to war. If the Council failed to agree, however, the disputing parties were free to take whatever action they deemed “necessary for the maintenance of right and justice.”⁷ The League also lacked the capacity to enforce decisions, while any hope that it would co-ordinate enforcement action by its members disappeared when the US senate rejected the Covenant in 1920. The Covenant’s partial prohibition of war needed to be changed into a total prohibition of war, which ultimately resulted in the General Treaty for the Renunciation of War (otherwise known as the Kellogg-Briand Pact, or the Pact of Paris) signed in 1928.⁸

The Pact prohibited “recourse to war for the solution of international controversies.”⁹ The Pact, which was eventually ratified by 62 states, made an exception for self-defence, but failed to define it – with the result that the customary criteria set out in the *Caroline* case remained the only legal basis for the use of force in international affairs. Strong on principle but again lacking an enforcement mechanism, the Pact had little practical effect. Some countries evaded it by avoiding formal declarations of war.¹⁰ Worth mentioning is the fact that the Pact enabled the creation of the notion of crime against peace which constituted a basis for convictions at the Nuremberg Tribunal.

The Locarno treaties¹¹ were a pact between Germany, France, Belgium, Britain and Italy (with the latter two acting as guarantors) in which the respective powers undertook “that they will in no case attack or invade each

⁶ 1919, Covenant of the League of Nations. Available at: <<http://www.tufts.edu/departments/fletcher/multi/www/league-covenant.html>> Last visited 2002-09-08.

⁷ Ibid. Article 15, para 7.

⁸ Text of the Treaty in 94 LNTS 57 (1929). Also available at:

<<http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>> Last visited 2003-11-20.

⁹ Ibid., Article 1.

¹⁰ Byers, Michael, “Jumping the Gun”. *Supra* note 1.

¹¹ Treaty of Mutual Guarantee, Locarno, October 16th, 1925. Text in *A.J.*, supp. (1926), p. 22.

other, or resort to war against each other”, in accordance with Article 2. The Locarno Pact applied two basic principles, a guarantee of territorial integrity, and a guaranteed process of arbitration.¹² The exception to Article 2 consisted of self-defence, stipulating that in the event of aggression by any of the first three enumerated states against another, all other parties to the treaty were to assist the country under attack.

A significant development during the post Locarno and Kellogg-Briand-period was the appearance of the Conventions for the *Definition of Aggression*.¹³ The definition of aggression¹⁴ was in terms of the use of force a mere declaration of war and support to armed bands.¹⁵

There was no express provision of the right of self-defence but most probably the right arose whenever an act of aggression, as defined in the Conventions, took place.¹⁶ The Saadabad Pact of 1937¹⁷ was a document trying to define acts of aggression and Article 4 stated that certain acts did not constitute acts of aggression, *inter alia*, “the exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression as defined above.” According to Brownlie, the text from these instruments support the view that legitimate defence was considered a reaction to some resort to force, or a declaration of an intention to resort to force, or aid to an aggressor.¹⁸

State practice during the period supported the view that resort to force in collective or self-defence is a reaction to an actual or imminent resort to force during the period.

2.3 Summary and Analysis

The perception of the scope of self-defence is divergent throughout the timeframe. In 1837 the *Caroline* Case established that pre-emptive self-defence on foreign territory was justified so long as there was a situation of an imminent threat of attack. This view of the borders of self-defence is not in conformity with the contemporary understanding enshrined in Article 51 of the UN Charter, which states that an armed attack has to occur in order to trigger legitimate action in self-defence.

The generous interpretation of the right of self-defence as seen in the *Caroline* Case was reflected in the Covenant for the League of Nations. As opposed to its successor, the UN Charter, the League Covenant did not

¹² Bowett, D.W., p. 127.

¹³ Signed at London, 3, 4, and 5 July 1933; 147 *L.N.T.S.*, p.67; 148 *L.N.T.S.*, p. 79; 148 *L.N.T.S.*, p. 211.

¹⁴ See Brownlie, Ian, p. 360, App. II..

¹⁵ Brownlie, Ian, p. 248.

¹⁶ *Ibidem*.

¹⁷ Signed at Tehran, 8 July 1937, *L.N.T.S.*, p. 21.

¹⁸ Brownlie, Ian, p. 248.

contain an explicit prohibition of the use of force but actually allowed Member states to resort to war in certain circumstances. Moreover, the right of self-defence was phrased as a *carte blanche* for states to utilise whatever necessary action they saw fit for the maintenance of right and justice unless the Council construed a unanimous report saying otherwise. Ultimately, the provisions of the League Covenant led states to make no justifications for their actions. The gaps in the League Covenant had to be filled in which eventually resulted in the Kellogg-Briand Pact – an attempt to construct a full-fledged prohibition of war. Since states were watchful of their right of self-defence, the Pact did not receive a warm acceptance, which ultimately led to the Pact not constituting a meaningful contribution to international order. The subsequent Locarno Pact restricted the notion of self-defence by simply depriving signatory states of their right to react instantly in self-defence and required such action to have the approval of the Council. Leeway was given during certain circumstances where flagrant violations of Article 2 occurred. This caused problems since there was a question whether an attacked state was in a position to respond immediately to an armed attack or was forced to await the decision of the Council. The problem moreover consisted in the fact that prior to the Locarno Pact, a prevailing definition of self-defence existed that advocated the immediate response and with the Locarno Pact, confusion arose as to what set of rules were applicable in a self-defence scenario. However, it seems strange that states were able to renounce a right that is firmly established in international customary law. That would suggest that laws part of international customary law are optional if eligible of being set aside by treaties.

3 Self-Defence in International Law

3.1 Customary Law

Under customary international law, the right of self-defence depends on both necessity and proportionality as set down by the *Caroline* case.¹⁹ It must be necessary to use armed force (rather than peaceful means) for a state to defend itself, and the use of armed force must be proportional under the circumstances. For a definition of the proportionality and necessity elements, see Chapter 3.4.2. below.

3.2 Self-Defence and the UN Charter

The disagreement among scholars as to the scope of self-defence generally concerns the interpretation of Article 51, which states:

“Nothing in this present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defence 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 to maintain or restore international peace and security.”

Some scholars²⁰ take the view of broadening the interpretation of the right of self-defence and argue that Article 51 of the UN Charter preserves the earlier customary international law right to self-defence through the wording “inherent” right in Article 51. The Charter does not abolish the pre-existing rights of states without an express provision. Second, they argue that at the time when the Charter was completed, there was an acceptance in international customary law for the right of anticipatory self-defence and protection of nationals.²¹ The opposing side maintains the idea that the meaning of Article 51 of the Charter is clear; the right of self-defence arises only if an armed attack occurs. The right is an exception to the prohibition of the use of force stated in Article 2(4) and as such, it should be interpreted restrictively. Article 2(4) states that “[a]ll 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

¹⁹ *Supra* note 4.

²⁰ For example, Bowett, D.W., *Self-Defence in International Law* (1958).

²¹ Bowett is advocating this wide interpretation of the right of self-defence.

inconsistent with the Purposes of the United Nations.” The limits imposed on the right of self-defence in Article 51 would be pointless if international customary law would ascribe the right of self-defence a meaning that goes beyond the restrictions stated in Article 51. Furthermore, the opposing side claims that at the time of the writing of the Charter, international customary law allowed only for a narrow interpretation of the right of self-defence.²²

3.3 The Security Council

3.3.1 Reporting Duty

The second paragraph of Article 51 of the Charter proscribes a duty for states to report immediately to the Security Council if measures are taken in self-defence. Also, the right of self-defence is temporary and is only valid until the Council “has taken measures to maintain international peace and security”.²³

The judgment in the *Nicaragua* case²⁴ made it subsequently clear that states in general do comply with the Article 51 obligation to report actions in self-defence to the SC. The Court stated that “absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”.²⁵ States seem to have taken the Court’s message seriously when it stated that failure to report would weaken the claim for self-defence.

Even before the *Nicaragua* case, states have used the argument that failure to report is evidence against a claim of self-defence. Failure to report was referred to by the United States against Libya during the clash between the two states regarding the Gulf of Sirte in 1986 where the United States asserted that Libya had not reported its actions to the SC and claimed that fact as an evidence that Libya was not acting in self-defence.²⁶ However, it should be pointed out that the reporting requirement is purely procedural; failure to comply does not nullify a state’s claim to self-defence.²⁷

According to Gray, there is now a tendency among states to over-report their claims of self-defence. This, according to Gray, is shown by the fact that states during prolonged conflict report, apart from reporting at the initial stage of the conflict, continuously report each episode separately.²⁸

²² See, *inter alia*, Brownlie, Ian, *International Law and the Use of Force by States*.

²³ Article 51 UN Charter.

²⁴ *Case concerning military and paramilitary activities in and against Nicaragua*, (Nicaragua v. United States of America), Judgement of 27 June 1986, 1986 ICJ p. 14.

²⁵ *Nicaragua* case, para. 200.

²⁶ Gray, Christine, *International Law and the Use of Force*, 2000, Oxford: University Press, pp. 90.

²⁷ Greig, D.W., “Self-defence and the Security Council: What does Article 51 require?” in 40 *ICLQ*, 1991, p. 366.

²⁸ Gray, Christine, p. 91.

This renders it more difficult for claiming states to show that each separate episode constitutes necessary and proportionate self-defence instead of simply take the campaign as a whole.

3.3.2 Self-Defence as a Temporary Right

As stated above, the right of self-defence is, according to Article 51 of the Charter, a temporary right. A state is allowed to initiate action and act in self-defence “until the Security Council has taken measures necessary to maintain international peace and security”.²⁹ However, since there is no express determination of the existence or continuation of the right to self-defence, this provision has created some controversy.³⁰ A famous example is the Falklands conflict. The SC in Resolution 502 determined that there had been a breach of peace by Argentina due to its invasion of UK territorial colonies. The Council also demanded an immediate cessation of hostilities; immediate withdrawal of all Argentine forces and called upon the Argentine and UK governments to seek a diplomatic solution to the conflict. The question could be raised whether this amounted to “necessary measures to maintain international peace and security”³¹ that terminated the UK right to use force in defence of the Falklands. According to the UK it did not since Argentina, the aggressor, remained in occupation of the islands.³² The question came up again in 1980-88 Iran/Iraq conflict. After the Security Council’s mandatory Resolution 598 (1987) calling for a cease-fire, Iran refused to accept the cease-fire and subsequently the question was posed whether Iran had exceeded its right of self-defence given that it had already regained by mid-1982 the territory earlier occupied by Iraq. Neither the United States nor the UK made any explicit arguments stating the above described, however they came close to it.³³

However, during the Iraq-Kuwait conflict the SC responded to Iraq’s invasion in terms of economic sanctions and made it clear that economic sanctions decided by the SC in no way terminated any right of states to use collective self-defence to help Kuwait.³⁴

3.4 The Scope of Self-Defence

3.4.1 What Constitutes an Armed Attack

There is a general agreement as to the right of self-defence if an armed attack occurs, the problem consists of disagreements as to what constitutes

²⁹ Article 51, UN Charter.

³⁰ Higgins, Rosalyn, p. 198.

³¹ Article 51 UN Charter.

³² 1982 UNYB 1320.

³³ Gray, Christine, p. 93.

³⁴ Security Council Resolution 661, 6 August 1990.

an armed attack. Some arguments focus on cross-border activity by irregular forces and other arguments concern the definition of the concept and the identification of the start of an armed attack from a weapon characteristics perspective.³⁵

An armed attack is a form of aggression. There is no generally recognised definition of what aggression constitutes, however the General Assembly made an attempt to draft a resolution defining some elements and actions which constitute aggression.³⁶ The *Definition of Aggression* resolution is not binding law since emanating from the GA and thus constituting a mere recommendation. The preparatory work of the Definition also discloses that the notions of “armed attack” and “act of aggression” do not coincide. The adoption by the GA of the *Definition of Aggression* did not constitute decisive progress in defining the phrase “armed attack”.

Consequently, the notion of “armed attack” has a narrower meaning than the phrase “use or threat of force” within the meaning of Article 2(4). Whereas an armed attack always presupposes a violation of Article 2(4), not all such violations constitute an “armed attack”.³⁷ Hence, mere frontier incidents, such as raids of an armed border patrol into another state’s territory may be defined as a use of force contrary to Article 2(4), but can hardly amount to an armed attack. This has been confirmed by the ICJ.³⁸

Article 3 of the Definition does however give some useful guidance as to the interpretation of the term “armed attack”. The provision lists examples of “acts of aggression”, all of which can, subject to certain qualifications, be taken to characterise armed attacks within the meaning of Article 51 as well.³⁹ The following sub-chapters illustrate acts that amount to armed attack within the framework of the *Definition of Aggression*.

Nonetheless, it is noteworthy that the equally authentic French version of article 51 uses the phrase “aggression armée”, meaning “armed aggression”, instead of the more restrictive term “armed attack” contained in the English version. The right to respond to armed aggression would include the right to respond to credible threats, since aggression can exist separate from and prior to an actual attack.⁴⁰ In subsequent subchapters, focus will remain on the English version of the Charter where the restrictive phrase “armed attack” is utilised.

³⁵ On the question of nuclear weapons and naval mines, see Gray, Ch. 4, note 41.

³⁶ United Nations General Assembly Resolution 3314 (XXIX), *Definition of Aggression*.

³⁷ Simma, Bruno, *The Charter of the United Nations – a Commentary*, 1995, p. 669.

³⁸ *Nicaragua case*, para. 195.

³⁹ Simma, Bruno, p. 670.

⁴⁰ Scharf, Michael, “Is Invasion of Iraq Lawful Under International Law?” in *Human Rights Tribune*, Vol p, No. 3, 2003.

3.4.1.1 Invasion and Cross-Border Incidents

This refers to the example given in Article 3(a) of the *Definition of Aggression*, the invasion or attack by the armed forces of a state on the territory of another state, as well as to the cross-border use of weapons or bombardment of foreign territory, stated in Article 3(b). These are classic cases of “armed attack”, provided that the military action amounts to a certain level of effect, and are thus not considered mere frontier incidents.⁴¹ These military actions can consist of either obvious storming of another state’s frontline with drawn guns or by crossing a frontier without resorting to exchange of fire.

3.4.1.2 Blockade and Attacks on State Positions Abroad

According to Article 3(c) of the *Definition of Aggression*, the blocking of a state’s ports or coasts by the armed forces of another state is considered an “act of aggression”. If the blockade is maintained effectively it is also amounts to an “armed attack”, regardless of whether the hindrance is carried out by land, naval or air forces.⁴²

Article 3(d) states that attacks by a state’s armed forces on the land, sea, or air forces or on the civilian marine and air fleets of another state are to be considered “acts of aggression”. If the use of force is not insignificant, the action amounts to an “armed attack”. Undoubtedly, warships and combat aircrafts have the right, when attacked by foreign forces, to defend themselves by resorting to the use of military force since this would constitute self-defence against an armed attack.⁴³

Diplomatic missions and individual nationals are not considered to be “external positions” of a state within the given meaning; and therefore these categories cannot be the objects of an armed attack. One line of legal argumentation suggests that coercive measure of a military nature against commercial vessels and aircrafts outside the territory of their home state cannot be equated with attacks on the state itself, and thus, such assaults are not regarded as “armed attacks”. However, if the assaults are targeted at the whole civilian marine or air fleet, as opposed to individual vessels or aircrafts, they are said to comprise a threat to the affected state as such and therefore to constitute “armed attacks”.⁴⁴

Article 3(d) of the *Definition of Aggression* does not include in the list attacks on nationals abroad as an example of an act of aggression. Hence, most states and academic writers agree that attacks on a state’s national residents abroad do not enable the state to use force in order to defend its nationals without the consent of the foreign government.

⁴¹ Simma, Bruno, p. 670.

⁴² Ibidem.

⁴³ Ibidem.

⁴⁴ Ibidem.

3.4.1.3 Actions of Irregular Forces and Armed Bands

The concept of “armed attack” was central in the judgement on collective self-defence in the *Nicaragua* case. The Court concluded that an armed attack must be understood as including not only action by regular armed forces across international borders, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’, *inter alia*, an actual armed attack conducted by regular forces, “or its substantial involvement therein”. The description given is enshrined in Article 3(g) of the *Definition of Aggression*, and can, according to the ICJ, be stated to reflect international customary law.⁴⁵ States today do not challenge the view that actions by irregulars can constitute an armed attack. However, the problem and controversy arises when focus is put on the degree of involvement that is necessary to make an action attributable to the state and to justify actions taken in self-defence in specific cases.

The Court held that assistance to the rebels in terms of provision of weapons and logistical support or other support did not qualify as an armed attack, it could however constitute an illegal intervention in the internal affairs of states.⁴⁶

The difficulty in defining the unclear situation when establishing the degree of state involvement necessary to trigger a right of using force in self-defence against the territory of the host state has proven to be a complicated issue. Still, the Court recognised in the *Nicaragua* case that in principle self-defence is permissible against attacks by irregular forces,⁴⁷ although in practice, claims by Portugal, South Africa and Israel to be acting in self-defence were generally not accepted by the SC mostly due to the fact that the mentioned states were regarded as being in illegal occupation of the territory they were claiming to defend.⁴⁸

3.4.2 The Necessity and Proportionality Criteria

All states agree that self-defence must be necessary and proportionate. The necessity and proportionality requirements can be traced back to the 1837 *Caroline* incident involving a preventive attack by the British forces in Canada on a ship containing Canadian rebels in the midst of planning an attack from the USA.⁴⁹

The *Nicaragua* case and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁵⁰ reaffirmed that necessity and proportionality

⁴⁵ *Nicaragua* case, para. 195.

⁴⁶ *Ibidem*.

⁴⁷ *Nicaragua* case, para. 195.

⁴⁸ 1969 UNYB 137, 140, 143. *Namibia* Advisory Opinion, ICJ Reports (1971) 16.

⁴⁹ For a summary of the case, see Jennings, “The Caroline and McLeod cases” in *AJIL* (1938) 86.

⁵⁰ ICJ Reports (1996) 226, para. 141.

are limits on all self-defence, individual and collective. These requirements are not expressed in the UN Charter, however they are a part of international customary law.⁵¹

A few basic principles have been able to stand uncontradicted. Necessity and proportionality mean that self-defence must not be retaliatory or punitive, the purpose and goal should be to halt and ward off the attack. This does, however, not hinder the defending state from using other weapons and means to its disposal than that used by the attacking state, nor is the defending state limited to action on its own territory.⁵²

In the *Nicaragua* case the Court treated these limitations as minor considerations. That is, the use of force by the USA was first held not to qualify as lawful self-defence on other grounds, however, the Court then confirmed its illegality, as the actions were not necessary or proportionate. Even if the arms supply from Nicaragua to opposition forces in El Salvador had amounted to an armed attack, the measures taken on part of the USA against Nicaragua were not necessary since they were taken several months after the major offensive of the opposition against the government of El Salvador had been completely repulsed. The mining by the USA of Nicaraguan naval ports and attacks on oil installations were also not considered proportionate to the aid received by the Salvadorian opposition from Nicaragua.⁵³

The principle of immediacy requires that the act of self-defence must be taken immediately following the armed attack. This is to prevent abuse and military aggression under the pretext of self-defence long after hostilities have ceased. But the requirement of immediacy must take the individual circumstances into account, such as geographic distance.⁵⁴

In the Falklands War, the UK actions were considered proportionate, necessary and immediate. Although a month passed before British forces were prepared to counterattack, in view of geographic distance, Britain's response was immediate by ordering the Royal Navy to leave for the area of conflict. Most claims of self-defence arise in circumstances that are less clear out. Their contribution to the ongoing development of international customary law turns on whether they are widely accepted by other states.⁵⁵

A recent ICJ judgment concluded that the issue of necessity placed the burden on the self-defence claiming state (US) to show that the attacks on its vessels "were of such a nature as to be qualified as 'armed attacks' within the meaning [...] of Article 51 [...] and as understood in customary

⁵¹ *Nicaragua* case, para. 176.

⁵² Gray, Christine, p. 106.

⁵³ *Nicaragua* case, para. 237.

⁵⁴ Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 8th ed., 2002, p 317.

⁵⁵ S/Res/502 (April 3, 1981), S/Res/505 (May 26, 1982).

law on the use of force.”⁵⁶ The Court indicates that an armed attack is a prerequisite to the right of self-defence, which in turn may have implications for future claims of a right of anticipatory or pre-emptive self-defence. However, the Court was not faced directly by an issue of analysing anticipatory or pre-emptive self-defence.

3.5 Collective Self-Defence

Article 51 allows both for individual and collective self-defence. Collective self-defence is not limited to a common, co-ordinated exercise of the right of individual self-defence by a number of states, as claimed by Bowett.⁵⁷ State practice has shown that the restricted interpretation of collective self-defence does not correspond to the history of Article 51. It is generally accepted that the right of collective self-defence authorises a non-attacked state to lend its assistance to the attacked state.⁵⁸

In the *Nicaragua* case, as mentioned above, the Court first considered what constituted an armed attack; namely the sending of armed bands rather than regular army could constitute an armed attack, provided that the scale and effects of the operation were considerably enough to be classified as an armed attack and not a mere frontier incident. Assistance to rebels in the form of provision of weapons or logistical or other support could amount to a threat or use of force or intervention, but it did not constitute an armed attack.⁵⁹ Second, the Court concluded that the state subject to attack must declare that it has been attacked. The Court stated that there is no rule in international customary law permitting another state to resort to collective self-defence based on its own assessment of the situation. Thus, the attacked state, which is benefiting from the right, has to declare itself victim of an armed attack.⁶⁰ Third, the Court held that there must be an express request from the state subjected to an armed attack for collective assistance.⁶¹ Moreover, the Court held that the duty of reporting to the SC when invoking individual or collective self-defence was not a customary law requirement, however, the absence of a report might be indicative of whether the state in question was itself convinced that it was acting in self-defence.⁶²

The judgment on the merits was controversial and subjected to criticism, especially among US writers.⁶³

⁵⁶ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, para. 51.

⁵⁷ Simma, Bruno, p. 675. See Bowett p. 216.

⁵⁸ Simma, Bruno, p. 675.

⁵⁹ *Nicaragua* case, para. 195.

⁶⁰ *Ibidem*.

⁶¹ *Ibid.*, paras. 196-198.

⁶² *Ibid.*, para. 200.

⁶³ Gray, Christine, p. 125.

3.6 Anticipatory Self-Defence

Pre-emptive self-defence is prohibited under Article 51 of the UN Charter. According to Professor Dinstein, there is no difference between anticipatory and pre-emptive self-defence, and therefore he treats them as equally unlawful if undertaken unilaterally.⁶⁴ Although Article 51 precludes anticipatory action, it may come within the ambit of legitimate self-defence under international customary law.⁶⁵

The wording of Article 51 does not lead to the conclusion that anticipatory self-defence is permitted. The words “if an armed attack occurs”, interpreted literally, imply that the use of force must have occurred before force can be used in self-defence. Hence, going by wording of Article 51, there is no right of anticipatory self-defence against an imminent danger of attack.⁶⁶

In evaluating whether anticipatory self-defence is incompatible with the Charter it should be noted that Article 51 is an exception to Article 2(4), and as such, it is a general rule of interpretation that exceptions in principle should be interpreted restrictively, so as to not undermine the principle.⁶⁷

Moreover, the actual invocation of the right of anticipatory self-defence in practice is rare. In practice, states rather adopt a broad view in defining an armed attack than openly claim anticipatory self-defence.⁶⁸

From a practical point of view, the exclusion of the right of anticipatory self-defence deprives the “innocent” state of the military advantage of striking the first blow. The problem consists of the uncertainty of the “innocent” state regarding the intentions of the other state. Should a crisis situation arise, there is little time to evaluate information suggesting that an attack is imminent. Is a nuclear power entitled to destroy a large portion of mankind just because its radar system mistakes a flight of geese for enemy missiles? Fortunately, during the tensions of the Cold War, neither superpower had to rely on anticipatory self-defence, since both powers had acquired a second-strike capacity – a capacity to make a devastating nuclear counter-attack on the other side, even after suffering the effects of a previous all-out nuclear attack launched by the other side.⁶⁹

The Soviet intervention to put an end to the Hungarian attempt to withdraw from the Warsaw Pact⁷⁰ and its request that the UN guarantee its neutrality

⁶⁴ Dinstein, Yoram, Presentation at the Conference entitled “Terrorism as a challenge for national and international law”, January 24-25 2003, p. 4. Available at: < <http://edoc.mpil.de/conference-on-terrorism/present/dinstein.pdf> > Last visited 2003-12-11.

⁶⁵ Dinstein, Yoram, *War, Aggression and Self-Defence*, p. 167.

⁶⁶ Malanczuk, Peter, p. 311.

⁶⁷ Malanczuk, Peter, p. 312.

⁶⁸ Gray, Christine, p. 112.

⁶⁹ Malanczuk, Peter, p. 313.

⁷⁰ *The Warsaw Security Pact*, May 14, 1955.

was justified by Soviet authorities at the time as an act in collective self-defence as stipulated by Article 4 of the Warsaw Pact Treaty. Furthermore, the Soviet coalition argued that the intervention was consistent with Article 51 of the UN Charter. However, this statement is not in compliance with the fact that the Hungarian Prime Minister Imre Nagy declared Hungary's withdrawal from the Pact. The Soviets claimed that Nagy's statement had no legal bearing since the entire Hungarian Parliament had ratified the Treaty and their consent would be necessary to withdraw.⁷¹ The Warsaw Pact, like other collective self-defence agreements, contemplates collective action in self-defence only upon the request by the government in need of defence. The legitimate government of Prime Minister Imre Nagy made no such request. However, it is clear that after the invasion, the government of János Kádár asked for Soviet assistance, but the Kádár government itself was established by assistance of Soviet arms. The consent of a state cannot be deduced from the request of a puppet government acting in its name set up by foreign intervention.⁷²

As had been the case during the Hungarian invasion 12 years earlier, the Soviets called forth their old standby justification from the 1956 Hungarian experience with respect to Czechoslovakia in 1968. The initial TASS⁷³ statement asserted: "This decision is fully in accord with the right of states to individual and collective self-defence envisaged in treaties of alliance concluded between the fraternal socialist countries."⁷⁴ In the months that followed the invasion and prior to the withdrawal of Soviet armed forces from Czechoslovak territory, the Prague government was more or less coerced into signing a treaty based on what was generally recognised as the "Brezhnev Doctrine". The Brezhnev Doctrine stated that "[w]hen forces that are hostile to socialism and try to turn the development of some socialist country towards capitalism, it becomes not only a problem of the country concerned, but a common problem and concern of all socialist countries."⁷⁵ This effectively meant that no country was allowed to leave the Warsaw pact, and the doctrine was used to justify the invasions of Czechoslovakia in 1968 and Afghanistan in 1979. The doctrine established a distinguished form of a right of self-defence applicable only within the framework of the Soviet Union and the Warsaw Pact states and the definition of the right of self-defence became perverted and in fact impaired states to withdraw from the Soviet Union and it violated the whole notion of self-determination in international law alongside the non-interference in the domestic affairs of a particular state.

⁷¹ Norton Moore, John, "International Law and the Brezhnev Doctrine" in *University Press of America*, 1987, p. 91.

⁷² *Ibid.*, p. 92.

⁷³ TASS is a news agency based in Russia and was one of the leading governmentally controlled news agencies during the Soviet regime.

⁷⁴ TASS Statement on Military Intervention. Reprinted from Soviet press release in 7 *Int'l Legal Materials*, 1968.

⁷⁵ Norton Moore, John, "International Law and the Brezhnev Doctrine" in *University Press of America*, 1987.

Fear of creating a dangerous precedent is probably the reason why states rarely invoke anticipatory self-defence in practice. Still, Israel's bombing of the nuclear reactor in Iraq in 1981 when Israel claimed anticipatory self-defence is a clear exemption to the general rule.⁷⁶ Israel held that it acted to remove a nuclear threat to its existence; the Iraqi reactor under construction was designed to produce nuclear bombs, which would later target Israel. The SC unanimously condemned Israel's action.⁷⁷

The clear trend in state practice is to try to bring the action within the framework of Article 51 and to claim an existence of an armed attack rather than to expressly rely on broadening the right of self-defence in international law.

In contrast to anticipatory self-defence, scholars, such as Dinstein, have advocated the notion of interceptive self-defence. According to this theory, interceptive, unlike anticipatory, self-defence takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack that is merely "foreseeable" (or even just "conceivable"), an interceptive strike counters an armed attack, which is "imminent" and practically "unavoidable. Dinstein is of the opinion that interceptive, as opposed to anticipatory, self-defence is legitimate even under Article 51.⁷⁸

According to Dinstein, a careful analysis of the events reveals that the Six Days War of 1967 was a case of interceptive self-defence by Israel. It still remains unclear, however, if a state could be precluded from labelling a merely threatening situation as an "imminent" attack and acting thereupon.⁷⁹

3.7 Summary and Analysis

The precise scope of the right of self-defence has always been the topic of heated doctrinal debate and a basis for divergent interpretations by states invoking the right to use force in self-defence. The right of self-defence does not, contrary to popular opinion of a few states, include a right of preemptive strikes against potential aggressor states or strikes against states that the innocent state anticipates are in the process of planning an armed attack. Since the prohibition of the use of force is recognised both in international customary law and treaty law, any exception to such a rule must be interpreted as strictly as possible. In order to claim an exception to the general prohibition of the use of force by invoking the inherent right of self-defence, states must report such actions to the SC. Failure to do so undermines the credibility of the state that it was actually acting in self-

⁷⁶ Gray, Christine, p. 114.

⁷⁷ Malanczuk, Peter, p. 313.

⁷⁸ Dinstein, Yoram, *War, Aggression and Self-Defence*, p. 172.

⁷⁹ *Ibid.*, p. 173.

defence. Moreover, a clear insight into the rationale behind a state's claim of the right of self-defence is imperative for the purpose of developing state practice on the topic. It facilitates a debate among states on the legitimacy of the propounded claims of self-defence. Other factors that delimitate the right of self-defence is the temporary aspect of the right. The right of self-defence is prevailing until the SC takes necessary measures to maintain international peace and security. The controversial question is when this actually occurs. Is it sufficient with a Resolution confirming a breach of peace and a call for immediate cessation of hostilities combined with utilising diplomatic means for the solution of the conflict? Of course, if it does put an end to the hostilities, the reason for claiming action in self-defence is unnecessary. But does a failure to end hostilities authorise the attacked state to resume its actions in self-defence against the hostile state? If the latter is regarded as legitimate, how much time does the SC have at its disposal in order to end hostilities before the attacked state is re-authorised to resume its right of self-defence? By way of example, the SC Resolution pertaining to the Falklands conflict,⁸⁰ does not contain a specific timeframe during which the SC expects an cessation of hostilities, which gives reason to assume that the attacked state itself, with the support of the world community, is in a position to decide such matters itself.

Since not every instance of armed action is considered to constitute an armed attack, the actual definition of what actions fall within the ambit of the precise interpretation of "armed attack", represents a delimitation of the right of self-defence. The *Nicaragua* case is of central importance when it comes to a legal definition of what constitutes an armed attack. It established that armed bands, groups, irregulars or mercenaries, sent out by a State and which carry out acts of armed force against another State may amount to an armed attack if the force can be considered to amount to that required to constitute an armed attack and this perception and is, according to the *Nicaragua* judgment, a reflection of international customary law. However, the corresponding phrase of "armed attack" in the French version of Article 51 literally translated reads "armed aggressions" and suggests that the right to respond to armed aggression would include the right to respond to credible threats, since aggression can exist separate from and prior to an actual attack.

Another important fact, which circumvents the right of self-defence, is the requirement for the self-defence to be necessary and proportionate as established by the *Caroline* case and the *Nuclear Weapons* case. The principles of necessity and proportionality are not upheld in Article 51 of the UN Charter but are recognised to be part of international customary law. In these principles is embedded the requirement for immediacy so as to prevent abuse and military aggression under the pretext of self-defence long after hostilities have ceased.

⁸⁰ Security Council Resolution 502, UN/Doc/SC/Res/1982/502.

The USSR attempted on two different occasions to invoke the right of self-defence in a perverted way by referring to the Brezhnev doctrine stating that aims to try and counter the development of socialism in a socialist country and agitate for capitalism concerns all socialist states and should be prevented. This rationale was used to justify the invasions in Hungary in 1956 and Czechoslovakia in 1968. The invasion under the auspices of the Warsaw Treaty Pact and the provision of collective self-defence coupled with the Brezhnev doctrine does not stand undisputable. The respective legitimate governments and prime ministers did not request aid in the form of self-defence from the Warsaw Pact countries and thus, actions taken both in Hungary and Czechoslovakia cannot be considered other than acts of aggression and violations of the right of self-determination of States.

The academic debate on anticipatory self-defence has become more heated than ever. The increasing number of terrorist attacks around the world and the subsequent escalation of terrorism prevention methods have contributed to a tendency among a rising number of states to attempt to broaden the existing limitations of the right of self-defence to include pre-emptive action. The danger with incorporating anticipatory and pre-emptive self-defence within the framework of Article 51 is the risk of states becoming too trigger-crazy and making hasty evaluations in tense situations. In the end, anticipatory and pre-emptive self-defence may lead to arbitrary decisions by states to initiate armed action against believed aggressor states. Legal justifications can only arise subsequent to armed action in anticipatory self-defence, or else the element of surprise is overthrown. Apart from the Israeli claim of anticipatory self-defence with respect to the bombing of the nuclear reactor in Iraq in 1981 (which was unanimously condemned by the SC), states rarely invoke this doctrine as means of justifying armed action. However, the mounting collective efforts in the war against terrorism may spark new fire to the discourse of legitimising action in anticipatory self-defence. The creation of such dangerous precedents may become detrimental due to its arbitrariness and the one-sided decision-making.

Finally, the theory of interceptive self-defence goes beyond the literal interpretation of Article 51. However, it might be inferred that the essence of the right of self-defence in a sense is undermined if a state in a given situation is not allowed to resort to use of force in self-defence when under imminent attack, meaning literally having missiles launched against the territory of the state. However, this legal doctrine would have to be clearly defined so as to avoid states from attempting to broaden its scope to include anticipatory self-defence.

4 Countermeasures and Reprisals in International Law

4.1 Countermeasures

The *Draft Articles on Responsibility of States for Internationally Wrongful Acts*,⁸¹ including commentaries, were finally adopted in 2001 after approximately forty years work by the International Law Commission.⁸² The need of taking countermeasures in international law arises when a state responsible for an internationally wrongful act, denies cessation or reparation. The taking of countermeasures arises from the purpose of implementing responsibility attributable to the state committing internationally wrongful acts.⁸³

The specific provisions dealing with countermeasures are to be found in Articles 22 and 49-54.

In certain circumstances, the commission by one state of an internationally wrongful act may justify another state injured by that act in taking *non-forcible* countermeasures in order to get a cessation of the wrongful act and to receive reparation for the injury caused.⁸⁴ Countermeasures are, however, not intended to be a form of punishment for wrongful conduct but instead countermeasures are intended to be an instrument for achieving compliance with the obligations of the responsible state.⁸⁵

Judicial decisions, state practice and doctrine confirm the argument that countermeasures meeting certain substantial and procedural criteria may be legitimate. The ICJ, in its *Gabcikovo-Nagymaros Project* case, held that countermeasures might justify otherwise unlawful conduct if “taken in response to a previous international wrongful act of another State and [...] directed against that State”,⁸⁶ provided that certain stipulations are met.

Where countermeasures are taken in conformity with Article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is prevented on account of its character as a countermeasure, but only so long as the necessary conditions

⁸¹ Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2.

⁸² Crawford, James, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, p. ix.

⁸³ Crawford, James, p. 47.

⁸⁴ Crawford, James, p. 168.

⁸⁵ Crawford, James, p. 284.

⁸⁶ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, para. 83.

for taking countermeasures are met. These conditions are to be found in Articles 49-54.⁸⁷

The conditions are entrusted to limit the taking of countermeasures. Article 49 basically states that countermeasures are essentially temporary and this is emphasised by the notion of suspension of performance of obligations. The provision of proportionality is also incorporated in Article 49, as formulated by the ICJ in the *Gabčíkovo-Nagymaros Project* case.⁸⁸

In addition to the principle of proportionality, Article 50 outlaws forcible countermeasures and states that countermeasures may not affect the obligation to protect fundamental human rights. In the *Naulilaa* arbitration, the Tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States.”⁸⁹ Since the *Naulilaa* arbitration the development of international human rights has taken place and in particular, relevant human rights treaties identify certain human rights as being non-derogable even in time of war or other public emergencies.⁹⁰

Moreover, Article 50 precludes a state from suspending or terminating for any material breach any treaty provision relating to the protection of the human person enclosed in treaties of humanitarian character, in particular outlawing all forms of reprisals aimed at persons protected by such treaties. This paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law as worded in the 1929 Hague and Geneva Conventions and Additional Protocol I.⁹¹

In addition, Article 50 outlaws countermeasures affecting obligations under peremptory norms of general international law. A peremptory norm cannot be derogated from by unilateral action in the form of countermeasures.

Article 51 establishes an important limit on the taking of countermeasures by an injured state based on considerations of proportionality. It is pertinent in determining what countermeasures may be applied and their level of intensity. Disproportionate countermeasures invoke responsibility upon the state taking such measures.

The question of countermeasures was central in terms of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-*

⁸⁷ Crawford, James, p. 168.

⁸⁸ ICJ Reports 1997, para. 85.

⁸⁹ *Naulilaa (Responsibility of Germany for damage caused in Portuguese colonies in the south of Africa)*, R.I.A.A., vol. 2, p. 1013 (1928).

⁹⁰ See International Covenant on Civil and Political Rights, Article 4, 16 December 1966, *U.N.T.S.*, vol. 999, p. 171; European Convention on Human Rights and Fundamental Freedoms, Article 15, 4 November 1950, *U.N.T.S.*, vol. 213, p. 221; American Convention on Human Rights, Article 27, 22 November 1969, *U.N.T.S.*, vol. 1144, p. 143.

⁹¹ Crawford, James, p. 290.

Nagyymaros Project case.⁹² The ICJ, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the 1977 Agreement, went on to say:

“The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube – with riparian area of the Szigetköz – failed to respect the *proportionality* [emphasis added] which is required by international law [...] The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.”⁹³

Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. Proportionality is sometimes linked to the purpose specified in Article 49; a clearly disproportionate measure may be deemed not necessary to induce the responsible state to comply with its obligations, but instead be judged as punitive and to fall outside the purpose of countermeasures stated in Article 49. However, proportionality may also be a limitation on legitimate countermeasures under Article 49. A countermeasure must correspond to the injury suffered.⁹⁴

Article 52 lays down procedural conditions relating to the taking of countermeasures by the injured state. The injured state is obliged to exhort the responsible state to comply with its obligations. Furthermore, the injured state is required to notify the responsible state of the commencement of countermeasures and to try to resolve the issue by negotiations before resorting to countermeasures. Notwithstanding, the injured state may take certain urgent countermeasures to preserve its rights. If the responsible state has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. Nevertheless, this does not apply if the responsible state fails to implement dispute settlement procedures in good faith. In such cases countermeasures do not have to be suspended and may be resumed.⁹⁵

4.2 Reprisals in International Law

Self-defence does not include a right of armed reprisals. So if, for example, terrorists enter one state from another, the first state may use force to arrest or expel the terrorist, but, having done so, it is not entitled to strike back by attacking the other state.⁹⁶

⁹² *Supra*, note 86.

⁹³ *Gabcikovo-Nagyymaros Project (Hungary/Czechoslovakia)*, ICJ. Reports 1997, p. 56, paras 85-87.

⁹⁴ Crawford, James, p. 296.

⁹⁵ *Ibid.*, p. 297.

⁹⁶ Malanczuk, Peter, p. 316.

According to Frits Kalshoven, the difference between self-defence and reprisals is that the essence of self-defence is to use armed force directly to ward off a physical danger threatening the state whereas reprisals have the function to apply coercion with a view to inducing the opponent to change his unlawful and prejudicial policy.⁹⁷ Kalshoven further holds that both types of actions, in practice, are closely related and sometimes intertwined. When, for instance, an armed attack of limited scope is countered not only at the front opened by the attacking state, but by a military operation against another part of its territory as well, it may be hard to decide whether the action constitutes an act of self-defence or a reprisal.⁹⁸

Recently, the term “reprisals” has been restricted to action taken in time of international armed conflict; in other words, it has been given the meaning equivalent to that of belligerent reprisals.⁹⁹

The difference consequently seems to be the motive; if the motive is self-protection, then the action may be classified as self-defence, however, if the motive is punishment for previous events it constitutes illegal reprisals – hence reprisals are punitive.

4.3 Summary and Analysis

There is an explicit difference between countermeasures and self-defence in international law. Countermeasures aims to remedy situation where a breach of contract between two or more states have occurred. The purpose is to induce the responsible state to comply with the obligations of the contract and countermeasures are not intended as punishment. The rules governing countermeasures are found in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which contains specific provisions regarding proportionality and a total exclusion of countermeasures in certain situations. Within the scope of countermeasures, a clear stance has been taken pertaining to the relationship between countermeasures and human rights. As established in the *Naulilaa* arbitration, countermeasures that affect the obligation to protect fundamental human rights are banned. The UN Charter does not contain an explicit provision limiting the right of self-defence with respect to human rights other than the closest provision constituting the proportionality requirement. However, no cases exist where states have been accused of acting disproportionately with respect to human rights while acting in self-defence. At least the link between armed action in self-defence and subsequent violations of human rights has not been brought before a judicial body.

⁹⁷ Kalshoven, Frits, *Belligerent Reprisals*, pp. 26-27.

⁹⁸ *Ibid.*, p. 27.

⁹⁹ Crawford, James, p. 281.

Reprisals are banned under international law and are not considered to be part of self-defence. However, the two types of action are closely related and sometimes intertwined. The basic distinction between reprisals and legitimate self-defence is that self-defence is used to ward off a physical danger, while the element of coercion to induce the attacking state to change its unlawful policy is characteristic for reprisals. Ultimately, the way of distinction between two types of closely intertwined action is the motive; if action is undertaken for self-protection then it should be classified as self-defence, however, if the motive punishment for previous incidents it constitutes illegal reprisals.

5 Self-Defence and Human Rights

5.1 General Limitations to the Right of Self-Defence

As mentioned above,¹⁰⁰ Article 51 of the UN Charter only confers upon states the right of self-defence until the SC has taken necessary measures to maintain international peace and security.

As set down by the ICJ in the *Nicaragua* case,¹⁰¹ force used in self-defence must be necessary, immediate and proportional to the gravity of the armed attack. The principle of immediacy requires that the act of self-defence must be taken immediately subsequent to the armed attack. The underlying rationale to this prerequisite is to prevent abuse and military aggression under the pretext of self-defence long after the hostilities have come to an end. However, the prerequisite of immediacy must take the individual circumstances into account. Hence, in the Falkland Islands conflict in 1982, the fact that the UK forces took almost a month to prepare for a counterattack due to the geographical distance was viewed as an immediate response and hence fulfilled the immediacy prerequisite.¹⁰²

The most important limitations to the right of self-defence are the traditional requirements of proportionality and necessity.¹⁰³ With regard to customary international law, the ICJ stated in the *Nicaragua* case that “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in international law.”¹⁰⁴ The ICJ confirmed, in its advisory opinion in the *Legality of Nuclear Weapons Case*,¹⁰⁵ that this twofold condition applies equally to Article 51 of the Charter. The Court further held:

“The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and the rules of humanitarian law.”¹⁰⁶

¹⁰⁰ See Chapter 3.3.2.

¹⁰¹ *Nicaragua* case, para. 176.

¹⁰² Malanczuk, Peter, p. 317.

¹⁰³ Malanczuk, Peter, pp. 271, 316-317.

¹⁰⁴ *Nicaragua* case, para. 176.

¹⁰⁵ ICJ Reports (1996) 226, para. 41.

¹⁰⁶ *Ibid.*, para. 42.

The permissible use of force under Article 51 is limited to the necessary minimum required to ward off an attack since retaliation and punitive measures are forbidden. In essence, proportionality seems to refer to what is proportionate to ward off the attack without requiring balance between the mode of the initial attack and the mode of response.¹⁰⁷

5.2 Self-Defence and Human Rights

The UN Charter states in Article 55 that the United Nations shall promote:

“...(c) a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁰⁸ The Charter goes on to say in Article 56 that:

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”¹⁰⁹

At an early date, UN organs took the first step in realising the programme enshrined in Article 55(c), which later on resulted in the adoption of the Universal Declaration of Human Rights (hereinafter UDHR).¹¹⁰ However, being a mere declaration,¹¹¹ it is not legally binding for states and due to this fact, two legally binding treaties emerged from the UDHR, the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR).¹¹²

The two Covenants constitute a bill of rights and also monitor the adherence of the human rights stipulated in the respective Covenants through state reporting,¹¹³ and in the case of the ICCPR, through a possibility of legal recourse via individual petition procedures enshrined in Optional Protocol 1.¹¹⁴

Most of the provisions contained in the ICCPR can be derogated from “[i]n time of emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present

¹⁰⁷ *Legality of Nuclear Weapons* Case, Dissenting Opinion of Judge Higgins, para. 5.

¹⁰⁸ Charter of the United Nations, Article 55 (c).

¹⁰⁹ *Ibid.*, Article 56.

¹¹⁰ Universal Declaration of Human Rights, GA Resolution 217A (III).

¹¹¹ Some scholars argue that the UDHR to a large extent has become international customary law.

¹¹² Simma, Bruno, pp. 776-792.

¹¹³ Article 40 of the ICCPR, Article 16 of the ICESCR.

¹¹⁴ GA Resolution 2200 (XXI) of 16 December 1966, Optional Protocol to the International Covenant on Civil and Political Rights.

Covenant to the extent strictly required by the exigencies of the situation, provided that are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”¹¹⁵

The aforementioned implies that certain human rights, provided that the certain criteria stipulated in the Article are satisfied, may be circumscribed in particular situations, for instance in situations that trigger action in self-defence. However, certain human rights are of non-derogable character (right to life; prohibition of torture, cruel or inhumane or degrading treatment; prohibition of slavery; prohibition of imprisonment due to inability to fulfil a contractual obligation; prohibition of retroactivity; recognition as a person before the law; freedom of thought, conscience and religion) and as such, they are to be complied with without exception.¹¹⁶

5.2.1 International Humanitarian Law and Human Rights – Limitations in a State of Armed Conflict

Ius in bello and ius ad bellum are two separate bodies of law. Ius ad bellum, the legality of force, is applicable to the point when armed conflict occurs. Subsequently, at the outbreak of armed conflict, the rules governing ius ad bellum are superseded by rules governing conduct of hostilities, ius in bello. In a situation of armed conflict, be it of international or non-international character, the rules of international humanitarian law regulate the conduct of hostilities.

Non-derogable human rights provisions pertaining to armed conflicts of international character are enshrined in Article 75 of Additional Protocol I to the Geneva Conventions. The Article guarantees that all persons who are in the power of a party to an armed conflict and who do not otherwise benefit from more favourable provisions are entitled to at least certain minimum guarantees of treatment. These fall within a general framework of human rights and guarantees of due process.¹¹⁷ The minimum rights conferred upon persons falling within the ambit of Article 75 include, *inter alia*, the right at all times to be treated humanely, without any adverse discrimination based on race, colour, sex, language, religious, political or other belief or opinion, wealth, status or any similar criteria. Their person, honour, convictions and religion must also be respected. Acts of violence and outrages to personal dignity and degrading treatment are especially prohibited. These include murder, torture (physical and/or mental), corporal punishment, mutilation, humiliating and degrading treatment, enforced prostitution, indecent assault, hostage-taking, collective punishment, and threats of any the afore-mentioned.

¹¹⁵ Article 4(1) ICCPR.

¹¹⁶ Article 4(2) ICCPR.

¹¹⁷ McCoubrey, Hilaire, *International Humanitarian Law*, 2nd edition, Aldershot: Dartmouth, p. 197.

Article 75 further ensures that penal offences and punishment can only be dealt with by an impartial and duly constituted court, which observes internationally recognised legal norms. According to Article 75, these include: information without delay about the details of the charge and the rights of the accused; conviction only upon grounds of individual responsibility under relevant international or municipal law applicable at the time of the alleged offence; a presumption of innocence pending proof of guilt; trial in person; non-compulsion to self-incrimination; the right to call and examine witnesses; absence of double jeopardy; public pronouncement of the judgment, and advice of rights of appeal. These procedural guarantees apply to all persons accused of crimes who do not benefit from other and more favourable provisions, including those accused of war crimes or of crimes against humanity.

The Martens Clause provides for additional fundamental guarantees. The Clause is characterised in that “[it] precludes any conclusions to the effect that what is not forbidden by the Regulations would be allowed.”¹¹⁸ However, no accepted interpretation of the Martens Clause is in existence. Therefore, it is subjected to a variety of interpretations, both narrow and expansive. At its most restricted, the Clause serves as a reminder that international customary law continues to apply after the adoption of a treaty norm. A wider understanding is that, as few international treaties pertaining to the laws of armed conflict are ever complete, the Clause provides that something which is not explicitly prohibited by a treaty is not *ipso facto* permitted. The widest interpretation is that conduct in armed conflicts is not only judged according to treaties and custom but also according to the principles of international law referred to by the Clause. Some scholars assert that the Martens Clause is not simply a reminder of the existence of other norms of international law not enshrined in a specific treaty; it has a normative status in its own right and therefore works independently of other norms.¹¹⁹

5.3 Summary and Analysis

It is firmly established that the only limitations that in some way may contain implicit human rights concerns are those pertaining to necessity and proportionality, which essentially dictates that the use of force must be necessary in a particular situation, but more importantly, it must, in order to be lawful, meet the law applicable in armed conflict which comprise in particular the principles and the rules of humanitarian law. One of these principles constitutes the principle of proportionality. During armed conflict, the rules of humanitarian law regulate the conduct of hostilities.

¹¹⁸ Kalshoven, Frits, *Constraints on the Waging of War*, Martinus Nijhoff: Dordrecht, 1987, p. 14.

¹¹⁹ Ticehurst, Rupert, “The Martens Clause and the Laws of Armed Conflict” in *International Review of the Red Cross*, No 317, pp. 125 – 134.

However, alongside the rules of humanitarian law, non-derogable human rights are applicable. Arguably, when a planned action in self-defence, be it armed action or in the aftermath of armed response, clashes with non-derogable human rights and the risk of potential violations of the same, the principle of proportionality supersedes the initial claims of armed action in self-defence. Moreover, the Martens Clause, part of international customary law, provides for additional protection that fall within the framework of human rights protection, which should be respected in the exercise of self-defence. The Martens Clause limits the right of parties to a conflict to inflict injury to an enemy. Moreover, it stipulates a distinction between persons participating in military operations and those belonging to the civilian population so that the latter be spared to the extent possible and finally, the Martens Clause proscribes an unequivocal ban on attacks against the civilian population as such.

6 Recent Developments

Since September 11 2001, the prevailing definition of self-defence has been questioned and primarily the identification of the limitations on the right of self-defence in international law has become more blurred than ever. However, the tendency of broadening the definition to include a right of self-defence against non-state actors, *i.e.* individuals who commit terrorist acts and are given shelter or facilities for military training on the territory of a given State, has given rise to human rights concerns. Notwithstanding, the question of armed attacks by non-state actors attributable to a certain state under Article 2(a) of the ILC's Articles on state responsibility and triggering action in self-defence by the victimised state has occurred prior to September 11.

In this context one should differentiate between effects in connection with potential violations deriving from the implementation of SC Resolutions taken under Chapter VII and the conduct of armed forces while exercising the inherent right of self-defence upheld both in the UN Charter and in international customary law. Enforcement action under Chapter VII may go beyond the scope of self-defence since it is based on authority delegated by the SC.¹²⁰ The focal point of this thesis is to elaborate on the latter situation.

6.1 Broadening the Right of Self-Defence in International Law as Motivated by Terrorist Attacks

As mentioned throughout this thesis, States are inclined to attempt to broaden the scope of the right of self-defence. The following subchapter will illustrate how states, in particular the USA and Israel, attempt to justify questionable armed actions by invoking the right of self-defence. All too often, these states do not invoke the doctrines of pre-emptive and anticipatory self-defence, but instead invoke the right of self-defence as understood under Article 51 of the UN Charter, although the actions clearly fall under the framework of either pre-emptive or anticipatory self-defence.

6.1.1 US Bombing of Libya

In 1986, a discotheque in Berlin popular among American soldiers was bombed and the attack killed three people, including two US servicemen. US officials held the Libyan Government responsible for the attack and as a consequence, the US response was to bomb Libyan territory and causing the

¹²⁰ Stahn, Carsten, "Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say" in *European Journal of International Law*. Available at: < http://www.ejil.org/forum_WTC/ny-stahn.html > Last visited 2003-12-02.

death of three-dozen civilians, among them close family relations to the Head of Government.¹²¹ The US reported the action to the SC as self-defence under Article 51 and stated that its action was a response to past terrorist attacks on nationals and that the action was intended to discourage such attacks in the future. A GA Resolution condemned the US bombings of Libyan territory; however, this view was not upheld in the SC due to the three negative votes from the permanent members UK, France and the US¹²² In fact, the US “self-defence” actions were widely condemned and the justifications, based on more or less pre-emptive self-defence, largely rejected. Some scholars assert the view that the action undertaken by the US in relation to Libya is to be considered not as self-defence, but rather as illegal reprisals owing to the fact that such action against terrorist attacks risks being unlawful if it is directed against objects which and persons who are not the source of an imminent threat.¹²³ Be that as it may, the more or less obviously retaliatory action in self-defence was the cause of numerous innocent casualties and when considering the general limits of self-defence the question arises whether or not the US action was proportionate.

6.1.2 Retaliation for Terrorist Attacks on US Embassies

When the US embassies in Kenya and Ethiopia in August 1998 were the targets of terrorist attacks, US authorities responded by missile attacks on a terrorist training camp in Afghanistan and a pharmaceutical plant in Sudan. The rest of the world adopted a silent attitude towards the American actions. The USA claimed that the camp had been used by the Osama Bin Laden organisation to support terrorism and that the pharmaceutical plant also produced chemical weapons designed for terrorist activities. US authorities reported its actions to the SC under Article 51 stating that the USA had exercised its right of self-defence as a response to a series of armed attacks against US embassies and nationals.¹²⁴ It stated that it acted in response to terrorist attacks and to prevent and deter their continuation. American attacks were carried out after recurring efforts to convince Sudan and the Taliban regime in Afghanistan to shut the terrorist facilities. The identified targets and the method of attack was claimed to be in accordance with international law including the rules governing necessity and proportionality.¹²⁵ The SC took no action on the issue and condemnations came from Arab states, Pakistan and Russia. Those who refrained from condemnation or expressed support carefully avoided adoption of the US doctrine of self-defence.¹²⁶

¹²¹ *Council on Foreign Relations*. Available at:

<http://www.terrorismanswers.com/sponsors/libya_print.html> Last visited 2002-12-05.

¹²² A/RES/41/38.

¹²³ Stahn, Carsten, p. 14.

¹²⁴ U.N. Doc. S/1998/780.

¹²⁵ *Ibidem*.

¹²⁶ Gray, Christine, p. 118.

All of the above mentioned episodes were justified by states using force as self-defence, but in terms of explanations given by the US and Israel the actions resemble reprisals due to their punitive effect rather than defensive motive. Even if the actions were aimed at those actually responsible for the terrorist attacks, and even if the response could be viewed as proportionate, the lingering question still arises as to the necessity of the use of force given that the attacks on the nationals had already taken place. The USA and Israel aimed to retaliate and deter and claimed that their actions were pre-emptive. However, all states agree that in principle forcible reprisals are unlawful.¹²⁷ The universal consensus that reprisals are not lawful led the USA and Israel to try and broaden the meaning of Article 51 of the UN Charter, while at the same time other states were not willing to condemn the USA for its attacks on Baghdad, Afghanistan and Sudan, nor did they accept the legal argument. The UK and Russia were the only states overtly supportive of the legality of the US action in 1993. Since then Russia has abandoned its wide interpretation of the right of self-defence and has adopted a more critical approach, and even the UK has become more hesitant in openly support US actions, as seen in 1998. Failure to condemn the USA might involve sympathy and understanding for a precarious situation rather than an explicit acceptance of a legal doctrine that destroys the distinction between reprisals and self-defence and which the USA would never consider being used against itself.

6.1.3 The Question of Self-Defence in the Middle East Conflict

The question of Israel and Palestine has ever since the birth of the Israeli state in 1948 been inflamed. The intention is to assess the Israeli claims of armed action in self-defence against the Palestinian authority without focusing in detail on the historical issues pertaining to the land.¹²⁸

Since the beginning of the second intifada, Israel has undertaken military actions to eliminate terrorist groups operating from Palestinian-administered territory in Gaza and the West Bank. These actions are claimed to be exercised under the right of self-defence.¹²⁹ To justify such a claim, Israeli authorities maintain that terrorist attacks occurring in Israel are not isolated attacks but part of an ongoing course of terrorist acts in Israel and against Israeli citizens. The question arises whether the course of actions amount to

¹²⁷ However, the doctrinal debate differs from state practice. Bowett has made the claim that it is unrealistic to outlaw reprisals. Bowett claims that certain reprisal may be legitimate, although technically illegal. Moreover, Bowett states that failure by the Security Council to condemn armed action taken in self-defence is an indication that the action is viewed permissible, Bowett, W.D., "Reprisals involving Recourse to Armed Force", in 66 *AJIL* (1972), p. 31.

¹²⁸ For a comprehensive analysis of the Middle East conflict, see Playfair, Emma, "International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip", Oxford: 1992.

¹²⁹ Kirgis, Frederic L, "Israel's Intensified Military Campaign Against Terrorism" in *ASIL Insights*, December 2001.

an attack on Israel. In this context, it should be noted that if the Palestinians should be considered to be national liberation movement, whether that fact would entitle the Palestinian authority a right of self-defence against the state of Israel. However, this latter issue may in itself constitute the topic of a separate thesis.

6.1.4 Israeli Air Raid against Syria

In October 2003, Israel carried out an air raid in Syria targeting the supposed Ein Saheb terrorist training camp run by Islamic Jihad. The air raid was a response to the suicide bombing the day before in the Israeli coastal town of Haifa that claimed 19 civilian deaths. The militant Palestinian organisation Islamic Jihad claimed responsibility for the suicide attack. Israeli authorities argued that the air raid fell within the ambit of self-defence.¹³⁰ However, the status of the camp may be questioned, since Syrian authorities insist that Islamic Jihad has no training camps in Syria and as a result of the differing views as to the status of the camp in question, Syria has drafted a resolution at the SC condemning the Israeli action as “military aggression”. At the time of writing,¹³¹ the SC has decided to postpone a vote and U.S. authorities have declared that they will veto any such resolution unless a resolution is drafted condemning the suicide bombing that took place in Haifa. Moreover, US authorities support the Israeli standpoint of invoking the inherent right of self-defence with respect to the suicide bombing in Haifa.

The attack raises international legal concerns. According to Article 51 of the UN Charter, the right to invoke self-defence is applicable when an armed attack occurs against a Member state of the UN. Israeli authorities held the Syrian government responsible for the attack due to alleged relations between the Syrian government and militant Islamic organisations or omissions on part of the government to prevent extremist organisations from settling and training on Syrian territory. However, the actual range of application of the camp in question is disputable, and Syrian media and authorities claim that it was a Palestinian refugee camp. The international community reacted with condemnation to the air raid attack, and the government of France described the attacks as “an unacceptable violation of both international law and rules of sovereignty”.¹³² Similar to the above-mentioned, the air raid against the alleged terrorist camp in Syria must be determined to constitute an act of anticipatory self-defence, a doctrine not recognised in international treaty law, customary law, state practice or *opinio juris*.

¹³⁰ *BBC News*, October 6, 2003. Available at: http://news.bbc.co.uk/1/hi/world/middle_east/3169402.stm Last visited 2003-10-28.

¹³¹ 2003-10-28.

¹³² *UN Ambassador: Israel Has the Right to Defend Her Citizens*. Available at: <http://www.israelnewsagency.com/israelunysyria.html> Last visited 2003-10-28.

6.1.5 Occupation of Iraq in Self-Defence?

The legal justification for US and British forces to attack Iraq in 2003 is somewhat ambiguous. The US and British governments claimed that previous UN resolutions on Iraq offered enough authority for the war, given Saddam Hussein's refusal to comply with obligations set forth in the resolutions.¹³³ The three most important already existing SC Resolutions that, according to the US and Great Britain, would support armed attack on Iraq are resolutions 678, 687 and 1441. Resolution 678 (passed in November 29, 1990) authorised member states co-operating with Kuwait "to use all necessary means to uphold and implement resolution 660 [demanding Iraq's withdrawal from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area."¹³⁴

Resolution 687 (passed on April 3, 1991) declared a ceasefire, dependent on Iraq accepting the terms of the resolution, and said that the SC decided "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."¹³⁵ The two aforementioned resolutions were designed to deal with a particular situation at the time and the problems they addressed ended with the ceasefire. To claim that any state member of a coalition more than ten years ago has a never-ending right to use force to restore peace in the Middle East must be considered absurd. However, some claim that the ceasefire declared by Resolution 687 was conditional on Iraq fulfilling the conditions required of it. A closer reading of the text reveals that the ceasefire will come into affect if Iraq simply accepts the terms of the resolution and moreover, the resolution goes on to state that it is then up to the SC to "take such further steps as may be required for the implementation of the current resolution."¹³⁶

A more recent resolution pertaining to Iraq, passed unanimously by the SC in November 2002, is 1441 and it states that Iraq "has been and remains in material" breach of its obligations under previous SC Resolutions. Further, it goes on to state that the SC decided to afford Iraq "a final opportunity to comply with its disarmament obligations." Moreover, the 1441 Resolution put down that the SC would convene immediately upon receipt of a report making clear that Iraq is still not complying with its obligations, "in order to consider the situation and the need for full compliance with all the relevant Council resolutions in order to secure international peace and security." The Resolution also pointed out that the SC recalls that it "has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations." Finally, 1441 declares the SC seized of the matter.

¹³³ U.N Doc. S/1990/678.

¹³⁴ Ibidem.

¹³⁵ U.N. Doc. S/1990/687.

¹³⁶ Ibidem.

The resolution was cautiously drafted to imply that authorisation to use force should be decided on a simply determinator, namely total Iraqi compliance with its disarmament obligations. Once it is clear that Iraq has not taken “its final chance”, “serious consequences” are likely to follow. In this context, “serious consequences” clearly infers the possibility of the use of force. Notwithstanding, nothing in the resolution authorises anyone apart from the SC itself to decide when the final chance has been exhausted.

Even if the SC were to agree that Iraq remained in material breach, there would still need to be a clear statement that the use of force is now authorised. The phrase “serious consequences” falls short of a clear and unambiguous statement that force may be used – it does not state that “all necessary means” may be taken to disarm Iraq. It hints that use of force may be decided on, but the resolution itself does not itself give authority for the use of force. The language on its own in Resolution 1441 does not authorise the use of force.

Seeing that most agree that any use of force requires SC authorisation based on another resolution explicitly stating such, the Bush administration developed a different justification, stating that the basis for an attack on Iraq would be an act of self-defence.¹³⁷ US authorities claim that because of the new threats US is facing, the understanding of the scope of the right of self-defence should extend to include pre-emptive attacks against potential aggressors, cutting them off prior to them being able to launch strikes against the US that in their scale and scope might prove to be devastating. There is an ongoing academic debate regarding pre-emptive self-defence. One side represents the view that even if there were some legal right of pre-emptive self-defence, the Bush doctrine was so far beyond it as to be transparently unlawful. The other side represents the view that the proliferation of weapons of mass destruction made the claims of the administration reasonable, when dealing with extreme cases like Iraq.¹³⁸ Experts who maintained that some forms of pre-emptive self-defence were legitimate took a middle position, but all academic debaters questioned whether the US attack on Iraq would meet the necessary test. Other leading scholars of international law reject the legal justifications of the US attack on Iraq.¹³⁹ These scholars reaffirm that the doctrine of pre-emptive self-defence has no merits in contemporary international law neither does the 1441 SC Resolution nor any prior resolution authorise the use of force under the circumstances.

¹³⁷ Dworkin, Anthony, “Iraq and the ‘Bush Doctrine’ of Pre-Emptive Self-Defence”, August 20, 2002. Available at: <<http://www.crimesofwar.org/print/expert/bush-introBush-print.html>> Last visited 2003-11-16.

¹³⁸ Ibidem.

¹³⁹ Joint letter to *The Guardian* of Marc 7, 2003 written by Prof. Ulf Bernitz, Dr Nicoals Espejo-Yaksic, Agnes Hurwitz, Prof. Vaughan Lowe, Dr Ben Saul, Dr Katja Ziegler, Prof. James Crawford, Dr Susan Marks, Dr Roger O’Keefe, Prof. Christine Chinkin, Dr Gerry Simpson, Deborah Cass, Dr Mathew Craven, Prof. Philippe Sands, Ralph Wilde and Prof. Pierre-Marie Dupuy. Available at: <<http://www.guardian.co.uk/print/0,3858,4620124-103550,00.html>> Last visited 2003-11-17.

In conclusion, whether the US administration invokes the pre-emptive self-defence doctrine to justify armed action in Iraq or if it refers to 1990-1991 Iraq SC resolutions as still being in effect today or the more recent 1441 resolution authorising use of force, the international community and the academic scholars are unanimous when rejecting the US justifications for war in Iraq.

6.2 September 11 2001

6.2.1 War in Afghanistan: An Armed Attack Legitimising Self-Defence under Article 51 of the UN Charter?

Terror struck the world on September 11 2001 when four civilian aircraft were hijacked by nineteen terrorists of non-US and crashed into the World Trade Center, the Pentagon, the White House and outside of Pittsburgh, Pennsylvania. The nineteen men were identified as having close connections to the terrorist group Al-Qaeda run by Osama Bin Laden and based in Afghanistan. Consequently, the US reported under Article 51 that it had initiated actions exercising its inherent right of individual and collective self-defence.¹⁴⁰

As has already been mentioned, Article 51 of the UN Charter provides a limitation to the right of exercising self-defence in that the right of self-defence is allowed to be exercised “until the Security Council has taken measures necessary to maintain international peace and security.”¹⁴¹

The SC in its Resolution 1368¹⁴² condemned the September 11 attacks and “regards such acts, like any act of international terrorism, as a threat to international peace and security”.¹⁴³ Additionally, the SC was determined “to combat by all means threats to international peace and security caused by terrorist acts”.¹⁴⁴ The SC moreover announced its willingness “to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations”.¹⁴⁵ Chapter VII measures under Article 39 and 41 had to be taken in order to obtain and restore international peace and security and this was confirmed in the follow-up resolution 1373.¹⁴⁶

¹⁴⁰ U.N. Doc. S/2001/946. Available at: <<http://www.un.int/usa/s-2001-946.htm>>
Last visited 2002-12-06.

¹⁴¹ Article 51 of the United Nations Charter.

¹⁴² S/RES/1368 (2001).

¹⁴³ *Ibid.*, para. 1.

¹⁴⁴ *Ibid.*, preamble.

¹⁴⁵ *Ibid.*, para. 5.

¹⁴⁶ S/RES/1373 (2001).

In SC Resolution 1373 the SC reaffirmed the inherent right of individual or collective self-defence as recognised by the Charter. According to Kirgis, this reaffirmation was not an approval by the SC of the use of armed force in self-defence as a response to the events of September 11, but it should be taken as an indication of the SC's recognition that the right of self-defence could arise from those events.¹⁴⁷ Notwithstanding, the ambiguous Resolution gave rise to different interpretations of the legal content. The US adopted a broad understanding of the scope of the right to self-defence in international law that developed through the pioneering SC Resolutions adopted in connection to the attacks of September 11 2001. The SC more or less broadened the scope to include Chapter VII measures against non-state actors and not, as has been the case up to this point, to be applicable only to States.

However, the US position did not stand uncontradicted. The legal justification for the attacks against Afghanistan was predicated on the claim that the Taliban regime was, as a formal matter, responsible for the acts of Al-Qaeda. The US defined the atrocious attacks in New York and Washington as an "armed attack" within the meaning of Article 51 of the UN Charter. Furthermore, the US maintained that international law permitted military action against the Taliban regime in Afghanistan because this "armed attack" was "made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organisation as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organisation continued to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad."¹⁴⁸

Thus, the US sought to justify military action against Afghanistan by attributing the hostile acts of the Al-Qaeda to the Taliban regime. According to Kirgis, even the SC was ambiguous in its definition of the September 11 attacks. The SC did not explicitly characterise the September 11 attacks as an "armed attack" (as required by Article 51) but instead described the events as a "terrorist attack."¹⁴⁹ This ambiguity is important given that the SC typically links its invocations of Article 51 with an explicit finding of an "armed attack."¹⁵⁰ The difference in wording becomes evident if one compares the wording of SC Resolution 1368 (2001) and SC Resolution 1373 (2001) with SC Resolution 660 (1990) in which the SC affirmed "the

¹⁴⁷ Kirgis, Fredric L, "Addendum: Security Council Adopts Resolution on Combating International Terrorism" in *American Society of International Law: Insights*, October 1 2001. Available at: <<http://www.asil.org/insigh77.htm>>. Last visited 2003-11-15.

¹⁴⁸ UN Security Council, *Letter Dated 7 October 2001 from the Permanent representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc No S/2001/946 (7 October 2001).

¹⁴⁹ Stahn, Carsten, "Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say", p. 4.

¹⁵⁰ UN Doc No S/RES/1373 (2001). See also UN Doc No S/RES/1368 (2001).

inherent right of individual or collective self-defence, in response to the *armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter*.¹⁵¹ [emphasis added] Moreover, the SC refrains from expressly attributing the September 11 attacks to the Taliban regime, as opposed to the Resolutions 1267 (1999) and 1333 (2000) in which the SC made explicit statements with respect to the Taliban, condemning the continuing use of Afghan territory, especially areas controlled by the Taliban “for the sheltering and training of terrorists and the planning of terrorist acts”,¹⁵² allowing Osama Bin Laden and others associated with him to “operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.”¹⁵³ The gravity of the Taliban activities has, according to the view adopted by the SC, not amounted to establish a link to state-sponsored armed attack. Consequently, it is not surprising that the SC was reluctant in holding the Taliban regime accountable for the mere harbouring of terrorists and thus, these actions did not constitute an “armed attack” within the meaning of Article 51 of the UN Charter. In the past, the SC has taken a rather restrictive view of armed responses to terrorism, condemning *inter alia* Israeli counter-terror operations as impermissible under international law.

Nevertheless, there may be other arguments in favour of the US position of regarding the attacks on American soil as an “armed attack”. The scale of the incidents may certainly be taken as akin to that of a military attack and the US interpretation of the incidents as armed attacks was largely accepted by other states.

Furthermore, it is imperative to mention that regardless of what conclusion is made concerning the authorisation or non-authorisation by the SC on action in self-defence against Afghanistan, does in no way preclude the lawfulness of US-led military action, since the exercise of self-defence is independent of a formal approval by the SC. Self-defence can be exercised under the auspices of a SC resolution, but it does not necessarily require such a measure. The only requirement in Article 51 is the reporting duty.

As a consequence of the US exercise of its inherent right of self-defence and the UN mandated measures taken under Articles 39 and 41 – the State implementation of the adopted resolutions - human rights concerns arose in terms of the legality and/or necessity of restrictions upon personal freedoms protected in numerous international human rights instruments.

A distinction has to be drawn between human rights implications arising from alleged human rights violations occurring when individual States are implementing the requirements of the respective SC resolutions and human

¹⁵¹ Para. 6 of UN Doc No S/RES/660 (1990).

¹⁵² Para. 5 of the Preamble to SC Resolution 1267 (1999), para. 7 of the preamble to SC Resolution 1333 (2000).

¹⁵³ Para. 6 of the Preamble to SC Resolution 1267 (1999).

rights implications arising from the actual conduct of armed forces of the individual State claiming a right of self-defence. The aim of this thesis is to focus on human rights implications arising from States exercising their inherent right of self-defence, thus, the latter scenario will not be analysed in the context of the present document.

6.2.2 Human Rights in Detention at Guantánamo Bay

As a consequence of the US armed interventions, motivated by the right of self-defence in Afghanistan following the September 11 attacks, some 660 people were taken into custody by US forces and transferred to the US naval base at Guantánamo Bay¹⁵⁴ in Cuba.¹⁵⁵ In addition, some 100 people are held in detention by US forces at Bagram Air Base in Afghanistan.¹⁵⁶

The question arises whether the transfer of detainees captured in Afghanistan to Guantánamo Bay was necessary in the first place. The Bush administration claims that US courts have no jurisdiction over the prisoners since they were captured in foreign military conflict and because Guantánamo Bay is Cuban, not American territory. The US government further claims that US domestic laws also do not apply.¹⁵⁷ A case filed in federal court argued that the US naval base at Guantánamo is, in fact, under US jurisdiction and US laws should apply. On March 11, the DC federal circuit court rejected that argument.

With truly Orwellian logic, this court upheld the US government's claim that it is not the US, but the Cuban government, that is legally "sovereign" at Camp Delta.

However, most scholars would admit that Cuba's government has no "sovereignty" over this base. The Guantánamo base was taken from Cuba, and Cuban laws have never applied there because of the US military occupation.

¹⁵⁴ A 1903 lease agreement between the two countries states that the USA shall lease Guantánamo Bay from Cuba for use as a coaling or naval station. The lease moreover states that while the USA recognises Cuba's "ultimate sovereignty" over Guantánamo Bay, Cuba "consents that during the period of occupation" by the USA, the latter "shall exercise complete jurisdiction and control over" the area in question. Under a 1934 treaty, the 1903 lease shall "continue in effect" until the two countries agree to modify or revoke it. See *Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, 23 Feb. 1903, art. III, T.S. No. 418 (Agreement) and *Treaty between the US and Cuba Defining Their Relations*, 48 Stat. 1682.

¹⁵⁵ Amnesty International: *Memorandum to the US Government on the Rights of people in US custody in Afghanistan and Guantánamo Bay*, p. 2. AMR 51/053/2002.

¹⁵⁶ Amnesty International, *United States of America – The Threat of a Bad Example: Undermining International Standards as the "War on Terror" Detentions Continue*. AMR 51/114/2003. August 2003, p. 15.

¹⁵⁷ Lane, Charles, "High Court to Hear Appeals from Guantánamo Prisoners" in *Washington Post* on November 10, 2003. Available at: < <http://www.why-war.com/news/2003/11/10/highcour.html> > Last visited 2003-11-17.

The situation of the people held in detention at the US naval base has given rise to questions concerning the fundamental rights bestowed upon human beings codified in numerous international human rights treaties and recognised under international customary law. All persons under any form of detention or imprisonment, including prisoners of war and other persons arrested, detained or interned for reasons related to armed conflict, have numerous fundamental rights recognised by international human rights law and international humanitarian law. These rights include: the right to be informed of one's rights;¹⁵⁸ the right to be informed of the reason for arrest and detention;¹⁵⁹ the right to prompt and confidential access to counsel of one's choice and to free legal assistance if one cannot afford counsel;¹⁶⁰ the right not to be questioned if suspected of a crime without one's lawyer being present;¹⁶¹ the right to be presumed innocent unless and until convicted by an independent and impartial court, established by law, under proceedings which meet international standards of fairness;¹⁶² the right to take proceedings before a court in order that a court may decide without delay on the lawfulness of the detention and to order release if that detention is unlawful;¹⁶³ if charged, the right to a public trial before an independent and impartial tribunal within a reasonable time, or release;¹⁶⁴ the right to appeal to a higher tribunal according to law;¹⁶⁵ the right to be treated with humanity and dignity; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;¹⁶⁶ the right to equality before the law¹⁶⁷ and to freedom from discrimination.¹⁶⁸

Of the above-enumerated rights only the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment is non-derogable. Hence, in times of public emergency that threatens the life of the nation and the existence of which is officially proclaimed, States Parties are prohibited to circumscribe rights, which are considered non-derogable by the treaty.¹⁶⁹

There has been a more or less conscious policy from the US to treat different detainees in different ways depending on their origin. For instance, a person held as a foreign national at the naval base at Guantánamo Bay faced interrogations without access to legal counsel and the possibility of trial by a military commission or indefinite detention at the naval base, until

¹⁵⁸ Article 9 of the *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Article 105 of Geneva Convention III on POWs.

¹⁵⁹ *Ibid.*, Article 9. Article 105 of Geneva Convention III on POWs.

¹⁶⁰ *Ibid.*, Article 14(3)(d), Article 105 of Geneva Convention III on POWs.

¹⁶¹ *Ibid.*, Article 14. Article 105 of Geneva Convention III on POWs.

¹⁶² *Ibid.*, Article 14(2), 14(1). Article 105 of Geneva Convention III on POWs

¹⁶³ *Ibid.*, Article 9(4). Article 105 of Geneva Convention III on POWs

¹⁶⁴ *Ibid.*, Article 14(1). Article 105 of Geneva Convention III on POWs

¹⁶⁵ *Ibid.*, Article 14(5). Article 106 of Geneva Convention III on POWs.

¹⁶⁶ *Ibid.*, Article 10(1) and Article 7. Article 13 of Geneva Convention III on POWs.

¹⁶⁷ *Ibid.*, Article 14(1) and Article 26. Article 105 of Geneva Convention III on POWs

¹⁶⁸ *Ibid.*, Article 26. Article 16 of Geneva Convention III on POWs.

¹⁶⁹ *Ibid.*, Article 4.

competent US authorities discovered his US citizenship. This situation needs to be contrasted to that of another detainee taken into custody in Afghanistan around the same time as the former, but whose US nationality was known at the outset. He was returned to the US to face an ordinary civil trial in the US on the charges of conspiring with the Taliban and the Al-Qaeda to kill US citizens.¹⁷⁰

At the time of writing,¹⁷¹ none of the foreign nationals held in custody at Guantánamo Bay or in Afghanistan have been granted access to legal counsel in connection to the ongoing interrogations with the possibility of ultimately resulting in prosecutions. In the words of a US Department of Defence spokesperson, “[...] as we have shown with John Walker, the US citizenship makes it a different case and a different kind of treatment.”¹⁷² The statement in itself is a violation of non-derogable non-discrimination provisions and the notion of equality before the law and before judicial tribunals as stated by numerous international human rights instruments ratified by the US.

By detaining people at the Guantánamo Bay naval base, the US Government appears to have effectively removed them from the reach of the US courts because US jurisprudence has limited the applicability of the Constitution in the case of federal government actions outside the US concerning foreign nationals.¹⁷³ However, international law, including customary law and the provisions of the ICCPR, which US ratified¹⁷⁴ in 1992, is applicable to persons subject to the jurisdiction of a State Party even abroad. Article 2(1) of the ICCPR states: “Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals* within its territory and *subject to its jurisdiction* the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” [emphasis added] The treaty monitoring body established under the ICCPR in its General Comment No. 3 concluded in regard to Article 2(1) that in addition to afford respect for the human rights enshrined in the Covenant, States Parties have also undertaken to ensure the enjoyment of the right to *all individuals under their jurisdiction*.¹⁷⁵

¹⁷⁰ AMR5105202, p. 4. Amnesty International.

¹⁷¹ 2003-11-03.

¹⁷² Victoria Clarke, Assistant Secretary of Defence for Public Affairs, *News Briefing*, April 4 2002. Available at: <http://www.defenselink.mil/news/Apr2002/t04042002_t0404asd.html> Last visited 2002-12-11.

¹⁷³ For example, see U.S. Supreme Court decision *United States v Verdugo-Urquidez*, 494 U.S. 259 (1990).

¹⁷⁴ Available at: <<http://www.unhchr.ch/pdf/report.pdf>> Last visited 2003-12-09. US reservations found at: <<http://www.unhchr.ch/udhr/index.htm>> Last visited 2003-12-09.

¹⁷⁵ Human Rights Committee, General Comment 3, para 1. 29 July 1981.

The Human Rights Committee has announced that the ICCPR applies also to places outside the territory of a State Party under its control.¹⁷⁶

The above described human rights concerns are a direct consequence of the US exercising its inherent right of self-defence recognised by SC Resolution 1368. The US proclaimed a state of public emergency¹⁷⁷ in connection to the September 11 attacks and by that proclamation US chose to derogate from its obligations under the ICCPR as stated in Article 4(1). However, Article 4(1) goes on to state that such derogations from obligations may only be taken to “the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [its] other obligations under international law and *do not involve discrimination* solely on the ground of race, colour, sex, language, religion or social origin.” [emphasis added] The treaty monitoring body in charge of interpreting the Covenant and monitor compliance, the HRC, states in its General Comment on article 4 that “[t]his condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation....[t]hey must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.”¹⁷⁸

If derogation from Article 4(1) occurs, one fundamental requirement that has to be satisfied is that measures taken are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.¹⁷⁹ The fact that some provisions in the Covenant are listed in Article 4(2) as non-derogable does not mean that the remaining articles in the Covenant are subject to derogations at will, even where a threat to the life of the nation exists. A duty lies upon States Parties and the HRC to conduct a thorough analysis of each article of the Covenant based on the objective assessment of the situation in accordance with the legal obligations to narrow down all derogations to those strictly required by the exigencies of the situation.¹⁸⁰

Furthermore, Article 4(1) stipulates that when a State Party is in the process of derogating from a specific Article, the measures taken to justify the derogability may not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. Even though the non-

¹⁷⁶ See, for example, Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add. 93, 18 August 1998, para 10.

¹⁷⁷ *Declaration of National Emergency by Reason Of Certain Terrorist Attacks*, 2001-11-14. Available at: <<http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html>> Last visited 2002-12-12.

¹⁷⁸ General Comment 29 on *States of Emergency (article 4)* CCPR/C/21/Rev.1/Add.11, CCPR, 31/08/2001, para., 5.

¹⁷⁹ *Ibid.*, para. 4.

¹⁸⁰ *Ibid.*, para. 6.

discrimination provision (Article 26) of the Covenant is not listed among the non-derogable provisions in Article 4(2), there are certain elements of the right of non-discrimination that cannot be derogated from in any circumstances. In particular, the provision in Article 4(1) must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.¹⁸¹

The HRC in its General Comment on Article 4, states that some of the non-derogable rights are to be interpreted as recognition of peremptory nature of fundamental rights (e.g., articles 6 and 7). Other rights listed to be non-derogable are seen as peremptory in nature simply due to the fact that it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Moreover, the peremptory nature extends to provisions in the Covenant not listed as non-derogable. States Parties may under no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.¹⁸²

As may be concluded by the above-described US conduct in relation to the detainees held at the naval base in Guantánamo Bay, some human rights - as recognised in international human rights instruments and, in some cases, recognised as peremptory norms – have been circumvented by the US authorities in their assiduity to exercise self-defence and also to fight the war against terrorism. Nonetheless, focus will remain on the implications on human rights in connection to measures taken in self-defence.

6.2.2.1 Presumption of Innocence

When President Bush referred to the detention of six Algerians in uncritical fashion in his State of the Union address on 29 January 2002 he displayed a disturbing lack of respect for the presumption of innocence by saying: “Our soldiers...seized terrorists who were plotting to bomb our embassy”.¹⁸³

A fundamental element of the right to fair trial under international human rights law is the right of everyone to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness. Article 14(2) of the ICCPR states that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. This right applies at all stages of proceedings, from arrest or detention until judgment.

¹⁸¹ Ibid., para. 8.

¹⁸² Ibid., para. 11.

¹⁸³ *President Delivers State of the Union Address*, 2002-01-29. Available at: <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>> Last visited 2002-12-29.

The right to presumption of innocence requires that judges and juries refrain from prejudging any case. It also means that public authorities should not make statements relating to the guilt or innocence of any individual before the outcome of a trial. As the HRC has stated in its authoritative interpretation of the right to presumption of innocence guaranteed under the ICCPR: “It is...a duty for all public authorities to refrain from prejudging the outcome of a trial.”¹⁸⁴

In relation to the Guantánamo detainees, several factors support the conclusion that there was in fact a violation on the part of US authorities to safeguard the presumption of innocence as recognised in the ICCPR. On numerous occasions US President George W. Bush publicly referred to the detainees held in Guantánamo as killers and terrorists. Moreover, US Secretary of Defence Rumsfeld described the Guantánamo detainees as “hard-core, well-trained terrorists”,¹⁸⁵ and again on 27 January as “among the most dangerous, best-trained, vicious killers on the face of the earth.”¹⁸⁶

Statements like the above-mentioned are inconsistent with the obligations under, *inter alia*, Article 14(2) ICCPR. The presumption of innocence seems to be part of the rights not necessary to derogate from, even when there exists a proclaimed threat to the life of the nation. When applying the principle of proportionality, the interest of maintaining the respect for human dignity by safeguarding certain rights bestowed upon individuals in their capacity of belonging to mankind, seem to outweigh an action taken by the authorities that is not necessary to derogate from even in a state of emergency.

6.2.2.2 Detention without Trial or after Acquittal

Closely linked to the presumption of innocence is the right to be tried within a reasonable time or to release from detention. The US Government is contemplating the indefinite detention without trial of an unknown number of people in Guantánamo Bay. The Military Order signed by President Bush on 13 November 2001 allows for detention without trial.¹⁸⁷ Moreover, the Government stated that “the ultimate course of action remains to be determined with respect to each of the detainees at Guantánamo, and may include any of a number of different possible options, including, *inter alia*,

¹⁸⁴ General Comment 13, para. 7.

¹⁸⁵ Secretary Rumsfeld media stakeout at NBC, January 20, 2002. Available at: < http://www.defenselink.mil/news/Jan2002/t01222002_t0120so.html > Last visited 2003-12-09.

¹⁸⁶ *Rumsfeld visits, thanks US troops at Camp X-Ray in Cuba*. American Forces Information Service. Available at:

< http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html > Last visited 2003-12-02.

¹⁸⁷ Section 2(b) of the *Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. Available at:

< <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> > Last visited 2003-12-09.

detention and trial pursuant to the Military Order, trial by other means such as a civilian court, repatriation, release, or *continued detention under legal authority other than the Order*.”¹⁸⁸

Under international law, including Articles 9(3) and 14(3)(c) of the ICCPR, criminal proceedings must be started and completed within reasonable time. Notwithstanding the fact that there is no uniform determination as to what constitutes “reasonable time”, indefinite detention without charge or trial must be considered to constitute a violation of international law.

The US position in relation to the detainees in Guantánamo was made clear by the Secretary of Defence by statements emphasising the need for continued detention despite acquittals seeing that “[this] is fully consistent with the Geneva Conventions and other war authorities. The detainees include dangerous terrorists who committed brutal acts and are sworn to go back to do it again”.¹⁸⁹

Again, the US position displayed disregard for the presumption of innocence and additionally, a pick-and-choose attitude towards international law. The Third Geneva Convention does allow for detention of prisoners until “the cessation of active hostilities”¹⁹⁰ (in this case the military conflict in Afghanistan), however, the US repeatedly refused to afford the detainees POW status, or even to bring any of them before a competent tribunal to resolve the dispute pertaining to their status, which is imposed by Article 5 of the Third Geneva Convention.

International law and standards, recognising the need to safeguard the right to liberty and freedom from arbitrary arrest or detention, and to prevent violations of fundamental human rights, require that all forms of detention or imprisonment must be ordered by or subject to the effective control of a judicial or other authority. Article 9(4) of the International Covenant on Civil and Political Rights states: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if that detention is not lawful.” As mentioned above, the Human Rights Committee has said that this principle applies to all prisoners and detainees, and is non-derogable even in times of emergency.

In 1998, the HRC expressed a concern that administrative detention on security grounds was still in use in Israel of which the consequence was that

¹⁸⁸ *Shafiq Rasul v George Walker Bush*. Respondents’ motion to dismiss petitioners’ first amended petition for writ of *habeas corpus*. 18 March 2002.

¹⁸⁹ “US ‘Has Every Right’ to Hold Detainees, Says Rumsfeld”, Department of Defense news briefing 2002-03-28. Available at: <http://www.defenselink.mil/news/Mar2002/n03282002_200203282.html> Last visited 2003-12-02.

¹⁹⁰ Article 118, *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949.

people were allowed to be held “for long and apparently indefinite periods of time in custody without trial”. The Committee also expressed its concern that “Palestinians detained by Israeli military order in the occupied territories do not have the same rights to judicial review as persons detained in Israel under ordinary law... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency”. The Committee stressed that “a State party may not depart from the requirement of effective judicial review of detention” as guaranteed under Article 9(4) of the ICCPR.¹⁹¹

6.2.2.3 Trial by a Military Commission

In connection to the terrorist attacks on September 11 2001, the US Government established - through a Military Order signed by the President – a Military Commission that is in risk of undermining human rights.

The Military order provides for a lower standard of justice for foreign nationals than for US nationals, which is in violation of international law prohibiting discriminatory treatment based on, *inter alia*, nationality. Only foreign nationals will be subjected to the jurisdiction of the military tribunal, while US nationals will be tried in ordinary civilian courts. As a consequence, the foreign nationals selected for trial will be afforded a lower standard of justice than their US counterparts. Furthermore, the right to appeal to a higher independent tribunal by those convicted by the military commission has been denied.¹⁹²

The differential treatment awarded to the detainees undergoing trial before the Military Commission and those US citizens accused of similar crimes before national courts does not seem to be justifiable by any reasonable and objective criteria. It is evidently discriminatory in nature and would violate the principle that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law” as recognised in Article 26 of the ICCPR, which prohibits any discrimination, including on the basis of national origin. In fact, it deprives persons tried by executive bodies like the Military Commission of their right to “be equal before the courts and tribunals”.¹⁹³ In its General Comment 18, the HRC stated that: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”¹⁹⁴

Additionally, discrimination based on race, colour, descent, or national or ethnic origin is prohibited under the *International Convention on the*

¹⁹¹ UN Doc. CCPR/C/79/Add.93. 18 August 1998.

¹⁹² See Section 7 of the Military Order. Available at: < <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> > Last visited 2003-12-09.

¹⁹³ Article 14(1), *International Covenant on Civil and Political Rights*.

¹⁹⁴ CCPR, *General Comment 18 – Non-discrimination*, 10/11/89.

Elimination of All Forms of Discrimination (hereinafter ICERD). The Convention requires that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”, including the “right to equal treatment before the tribunals and all other organs administering justice”.¹⁹⁵

6.2.2.4 Lower Standard of Evidence

The guidelines for the Military Commission confirm that a lower standard of evidence will be allowed before the Commission than otherwise required in ordinary courts. Such evidence, and the possible use of secret evidence and anonymous witnesses, is particularly worrying since the Commission will have the power to sentence individuals to the death penalty. The possible miscarriage of justice in cases of irrevocable death sentences based on judgments admitting lower standards of evidence and ultimately combined with a lack of the right of appeal must be seen as constituting a serious violation of the rule of law and a disrespect for fundamental rights bestowed upon all human beings.

Reports relating to the detainees in Bagram Air Base in Afghanistan indicate that US officials are interrogating the detainees with prohibited means.¹⁹⁶ Furthermore, the guidelines for the Military Commission do not expressly exclude statements extracted under torture or other coercive methods. Under international law, any statement made as a result of torture is inadmissible as evidence before a court of law.¹⁹⁷ In General Comment 20, the HRC has stated that the “law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.¹⁹⁸ The Military Order moreover stipulates that a defendant “shall not be required to testify during trial” with the exception that this “shall not preclude admission of evidence of prior statements or conduct of the Accused”.¹⁹⁹ Article 14(3)(g) of the ICCPR states that anyone charged with a criminal offence shall “[n]ot be compelled to testify against himself or to confess guilt”. In relation to this, the HRC has stated that in considering this safeguard, the provisions of Article 7 and 10(1) should be borne in mind. In order to force the accused to testify against himself or to confess to guilt, methods in violation of these provisions are used on a frequent basis. The HRC made the point that “[t]he

¹⁹⁵ Article 5 of the ICERD.

¹⁹⁶ See i.e. Washington Post, *U.S. Decries Abuse but Defends Interrogations – ‘Stress and Duress’ Tactics on Terrorism Suspects Held in Secret Overseas Facilities*, 2002-12-26. Available at: < <http://www.washingtonpost.com/wp-dyn/articles/A37943-2002Dec25.html>> Last visited 2002-12-27.

¹⁹⁷ Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), General Assembly resolution 39/46 of 10 December 1984.

¹⁹⁸ CCPR General comment 20, para. 12, 10 March 1992.

¹⁹⁹ Military Commission Order No. 1, 5(F).

law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.”²⁰⁰

A published report pertaining to the maltreatment of detainees occurring in Bagram Air Base describes how persons held in the CIA interrogation centre are being subjected to “stress and duress” techniques, including “standing and kneeling for hours” and “being held in awkward, painful positions.”²⁰¹ If true, such acts are clear violations of international human rights law that prohibits torture and other ill-treatment stipulated in, *inter alia*, CAT and ICCPR.

6.2.2.5 Lack of Independence of the Judiciary

The composition and the procedural rules of the Military Commission raise concerns regarding the independence of the judiciary in relation to the executive power. Article 14(1) of the ICCPR calls for all trials to be conducted by a “competent, independent and impartial tribunal established according to law”. The HRC has stated that the provision in Article 14(1) is “an absolute right that may suffer no exception”.²⁰² The Military Commission will not be independent due to, *inter alia*, the fact that the President or the Secretary of Defence will have power under the Military Order to exercise influence on the proceedings. This is not in conformity with the notion of the separation of powers, namely the executive and the judiciary. There is no possibility of guaranteeing the impartiality of the members in their capacity of executive officials. According to paragraph 4(a)(3) of the Presidential Order, the appointing authority has a possibility of removing judges “for good cause”²⁰³ which may impact the impartiality of the composition of members. Succinctly, the Military Commission will not comply with the requirement in Article 14 of the ICCPR, namely, it will not be a court “established according to law”, but rather an executive body set up by a presidential order.

In its case-law, the Inter-American Commission on Human Rights has declared that the Special Military Court in Peru was not a “competent, independent, and impartial tribunal” since it was controlled by the Ministry of Defence “making it a special court subordinated to an organ of the Executive Branch”.²⁰⁴

In its General Comment 13 on Article 14 of the ICCPR, the HRC has stated that:

“The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised. The Committee notes

²⁰⁰ CCPR General comment 13, para. 14, 13 April 1984.

²⁰¹ *Supra* note 149.

²⁰² *González del Río v. Peru* (263/1987), 28 October 1992.

²⁰³ Military Commission Order No. 1, 4(A)(3).

²⁰⁴ Inter-American Commission on Human Rights. Annual Report 1994. 17 February 1995. Reports on individual cases, Report No. 27/94, case 11.084, Peru. November 30, 1994.

the existence, in many countries, of military or special courts, which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”²⁰⁵

Furthermore, the HRC has stated that the law should strictly define the jurisdiction of special courts. In its concluding observations on Iraq in 1997, the HRC expressed concern that in addition to the list of offences, which were justiciable in special courts in Iraq, the Minister of the Interior and the Office of the President had discretionary authority to refer any other cases to these courts.²⁰⁶ The Presidential Military Order signed by Bush provides for a far-reaching military jurisdiction potentially encompassing a large number of individuals and is also open-ended. Moreover, the offences covered by the jurisdiction are not clearly spelled out in the Pentagon guidelines: “Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offences triable by military commission”.

6.2.2.6 Right of Appeal Denied

Section 7(2) of the Military Order states that any individual tried by the commissions “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal”.

Instead, any defendant convicted by the military commission will have his or her conviction and sentence reviewed by a three-member panel of military officers appointed by the Secretary of Defence,²⁰⁷ the official who approved the charges. This panel would review the record of the trial and make a recommendation. The Secretary of Defence would then review the record of the trial and the review body’s recommendation. The final decision on the case would reside with the President, the official who selected the suspect for trial by military commission, or the Secretary of Defence, if so designated by the President.²⁰⁸

Article 14(5) of the ICCPR stipulates that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. As mentioned above, Article 14 applies to

²⁰⁵ General Comment 13, para. 4.

²⁰⁶ UN Doc. CCPR/C/79/Add.84, 19 November 1997.

²⁰⁷ Section 6(H)(4), Military Commission Order.

²⁰⁸ Section 6(H)(6), Military Commission Order.

all courts and tribunals and additionally, the proceedings must “genuinely afford the full guarantees stipulated in article 14.”²⁰⁹

The creation of a separate system of trials before executive bodies for those who may face criminal charges is a direct consequence of the actions taken in self-defence by the US in relation to the attacks on September 11 2001. This separate system of trials before executive bodies is however contrary to international standards.

6.3 Summary and Analysis

This chapter deals with the numerous attempts by States to justify actions that would normally be in violation of international law and the prohibition of the use or threat of force as codified in the Article 2(4) in the UN Charter. In 1986, the US held the Libyan government responsible for an attack on a discotheque in Berlin popular among American soldiers and as a consequence responded by bombing Libyan territory, killing three-dozen civilians. The US action was widely condemned and the justifications rejected. Did the attack amount to an “armed attack” as understood by Article 51 of the UN Charter and the definition given by the ICJ judgment in the *Nicaragua* case? It would be difficult to argue that an attack against a discotheque in Berlin equates an armed attack against the US. Moreover, the US failed to attribute the attack to the Libyan government. Another issue revolves around the proportionality criteria where an attack against a discotheque with three casualties resulted in heavy bombardment of Libyan territory causing the death of three-dozen civilians hardly can be interpreted as proportionate action. The US action most accurately should be described as an illegal reprisal in that the action was aimed at objects not constituting the source of an imminent threat. It is a clear violation of the prohibition of the use or threat of force.

With respect to US actions in Afghanistan as a response to terrorist attacks on US embassies in Kenya and Ethiopia, the same line of rationale can be applied. US authorities used an unaccepted doctrine of pre-emptive self-defence in order to justify armed action against Afghanistan. One of the key elements of the US justification was that the military action in self-defence was undertaken as means of preventing and deterring possible continuation of such attacks.

The terrorist attacks occurring in the Middle East, namely under the auspices of the Israel-Palestine conflict, is a complex and complicated issue. Israel has proclaimed a type of continuous mode of self-defence throughout the whole conflict. Israeli authorities claim that all action directed at Palestinian refugee camps and at the Palestinian authority is in compliance with rules regulating the right of self-defence. Israeli authorities moreover claim that Yasser Arafat, as the head of the Palestinian authority, has not

²⁰⁹ General Comment 13, para. 4.

worked diligently enough in order to capture suspected terrorists and handing them over to be tried in Israeli courts. Israeli authorities have proclaimed that they do not consider Israel to be bound by the rules regulating humanitarian law essentially since Israel does not recognise Palestine as a warring party. Reports from various NGOs²¹⁰ indicate that suspected terrorists apprehended during the exercise of self-defence get numerous of their human rights reduced by Israeli authorities. Israeli forces are documented to have arbitrarily detained hundreds of Palestinians on "security" grounds. Hundreds are put under administrative detention, without being charged or sentenced, in violation of internationally protected due process rights. Some are kept in prison for years without ever being charged. Hundreds more are sent to prison for political reasons following trials that do not comply with international due process standards. Often the main evidence against prisoners is confessions extracted through torture. Torture was legalised in Israel in 1987 as means of combating terrorism within the framework of self-defence. In 1999, the Israeli Supreme Court banned the use of torture but established that torture was still allowed in "ticking-bomb" cases and is still practice in Israel. Detainees are regularly denied visits from their lawyers or family members.²¹¹

The most recent military action by Israeli authorities under the auspices of self-defence occurred in October 2003, when Israel carried out an air raid attack targeting a supposed terrorist camp in Syria as response to a suicide attack the day before in Israel killing 19 civilians. The Israeli government held the Syrian government responsible for the attacks by its implicit involvement due to an alleged omission by Syrian authorities to eradicate suspected terrorists on its territory. In retrospect, the alleged terrorist camp bombarded by Israel has been said by different sources to constitute a Palestinian refugee camp. The ambiguity surrounding the military action led the international community to condemn the air raid attack, possibly due to a fear of broadening the understanding of the term self-defence under Article 51 of the UN Charter. The air raid attack can rather be described as an act of anticipatory self-defence, which in turn is not recognised as legitimate action under international law.

Regarding the legal justifications for the war in Iraq, a similar trail of thought may be discerned. Firstly, US authorities tried to justify armed action in Iraq by referring to already existing SC Resolutions pertaining to the Gulf war. Secondly, the US argued that Iraq was in possession of weapons of mass destruction. Finally, the US argued a right of self-defence. The argument consisted of stating that the new threats facing the USA qualified the authorities to broaden the concept of the right of self-defence to include attacks of a pre-emptive character. The ultimate reason for the rejection of this argument was the question of the necessity of the attacks, which most scholars agreed on did not meet the necessity test. In addition,

²¹⁰ Amnesty International, available at: <<http://www.amnesty.org>> and Human Rights Watch, available at: <<http://www.hrw.org>> Last visited on 2003-12-01.

²¹¹ Amnesty International, *Combating Torture – A Manual for Action*, p. 29.

an authorisation of military action cannot with absolute certainty be deduced from the existing SC Resolutions.

The terrorist attacks of September 11, 2001, in truth put pre-emptive self-defence on the agenda of the international community more clearly than ever. It became evident to Western states that any democratic country could be next on the list for terrorist organisations aiming to spread fear among the general public by operating in clandestine movements and executing atrocious attacks against civil society. The SC Council immediately condemned the attacks and considered them to constitute a threat against international peace and security. Moreover, it reaffirmed the right of self-defence but did not explicitly approve of use of force as a response to the September 11 attacks, but rather as an indication that the right of self-defence could arise from those events. But self-defence against who or what? Early on, US authorities established with some certainty that the terrorist organisation Al-Qaeda was responsible for the September 11 attacks, and that Afghanistan and the Taliban regime by its omission to prevent terrorist training camps on its territory and refusal to apprehend and extradite suspected terrorist to the USA implicitly made the attacks on September 11 attributable to the state of Afghanistan.

US authorities claimed the attacks in New York and Washington to have entailed a degree of severity for it to amount to an armed attack within the framework of Article 51 of the UN Charter. The SC took an ambiguous stance, refraining from attributing the September 11 attacks to the Taliban regime but at the same time reaffirming the inherent right of self-defence. *Ex post facto*, Afghanistan was authorised, but not necessarily at the time. If so, the US was fighting back in self-defence against a non-state actor by referring to the rules of state responsibility. The ambiguous 1368 Resolution may have facilitated *opinio juris* in broadening the right of self-defence due to subsequent silence on part of the SC regarding the armed actions in Afghanistan. The lack of condemnation may suggest consent. Nevertheless, US military actions in self-defence commenced with numerous violations of human rights as a direct consequence. The transfer of some 660 detainees to the US naval base at Guantánamo Bay put the detainees in a legal limbo by the US claiming that US domestic laws do not apply since Guantánamo is under Cuban jurisdiction. This statement did not stand unchallenged among scholars rejecting the notion that Guantánamo is under Cuban jurisdiction. Nonetheless, international human rights law is still applicable to the detainees at Guantánamo Bay and certain provisions are of non-derogable character.

Human rights violations at stake concern, *inter alia*, the right to be presumed innocent until proven guilty in a court of law. A disturbing development took place when President George W Bush made public statements labelling the seized detainees as terrorist without having provided them with legal counsel, due process or fair trial. This, and similar statements made by the President and Secretary of Defence Rumsfeld, violate Article 14(2) of ICCPR and General Comment 13 by the HRC

calling on public authorities to refrain from prejudging the outcome of a trial. Linked to the presumption of innocence is the right to be tried within a reasonable time or to be released from detention. A Military Order was signed by the President, authorising indefinite detentions without trials. The US position is a blatant violation of human rights law, in particular Articles 9(3) and 14(3) of the ICCPR stating that criminal proceedings must be initiated and completed within reasonable time. An indefinite timeframe must be deemed to be in violation of the reasonability criteria. The Military Order taken on its own established a Military Commission, which is at serious risk of undermining, *inter alia*, the human right to a fair trial. It provides for a lower standard of justice for foreign nationals and as such is discriminatory in nature and violates the principle of equality before the law as stipulated in Article 26 of the ICCPR. Another problem with the Military Commission consists of secret evidence and anonymous witnesses, which also risks undermining the right to fair trial. It is particularly distressing given that the Commission is authorised to impose the death penalty. In addition, reports indicate that testimonies at the Bagram Air Base in Afghanistan have been extracted during coerced circumstances which, if true, is a flagrant violation of Article 15 of CAT stating that any statements made as a result of torture are inadmissible evidence before a court of law. Furthermore, the independence of the judiciary may stand the risk of becoming undermined by the establishment of a Military Commission. The President or the Secretary of Defence has the power to exercise a great influence during the proceedings and thus risk impacting the relationship between the executive and judicial branch in contravention of Article 14(1) of the ICCPR and the US Constitution. The inability for detainees to appeal a decision handed down by the Military Commission violates Article 14(5) of the ICCPR affirming the right of appeal.

Of the enumerated human rights none constitute non-derogable human rights, which implies that in a case of emergency threatening the very survival of a state, certain human rights may be curtailed. However, as with any exception, it should be applied restrictively. Thus, the possibility for derogation must be scrutinised and ultimately only utilised if the curtailment of a certain human right fulfils the necessity and proportionality criteria. The HRC has in its General Comment No. 4 established that derogations from provisions in the Covenant requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. Moreover, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.

7 Concluding Remarks

The failure of the doctrine of the right of self-defence to provide a unilateral interpretation of what actions may trigger a right of self-defence is a flaw in the current international legal system. The GA Resolution on the *Definition of Aggression* fails to specify and differentiate the interpretation on what constitutes aggression, which falls short of triggering a right of self-defence, and armed attack, the prerequisite for armed response in self-defence in accordance with Article 51 of the UN Charter. Since the Definition is merely a GA Resolution, not reflecting customary law, it is not legally binding upon states and thus, its primary effect is purely normative in character. Moreover, international customary law on self-defence, as embodied in the *Caroline* case, exists independently of treaty norms and it may stretch beyond the scope of Article 51. Due to the lack of a unilaterally established interpretation of self-defence, states may be in their right to invoke doctrines such as pre-emptive self-defence by referring to international custom.

The issue of state responsibility and self-defence in specific situations arises. The example given in the thesis is the case of Afghanistan in the aftermath of September 11. Arguably, the SC was reluctant in Resolution 1368 to attribute the September 11 attacks to the Taliban regime in Afghanistan within the framework on the law on State Responsibility. The US single-handedly determined that the attacks were attributable to the state of Afghanistan and the world community more or less was united in that assertion. Regardless of the fact that it at least *ex post facto* was authorised by the SC, the above suggests that a state is in a position to single-handedly decide on the attribution of an internationally wrongful act to a state, which ultimately would render the SC superfluous. However, in a situation where the *de jure* government of State A has lost *de facto* control of an area now controlled by an insurgent movement B and its armed forces and where these forces carry out border raids into neighbouring states, the attribution of responsibility to the *de jure* government is not clear. If government A by omission has failed in its efforts to repel the insurgent movement within its territory, the border raids, which are considered to constitute an armed attack, can be attributable to State A under the laws of state responsibility, and if so, a right of self-defence arises for the neighbouring state subject to attack and on the whole territory of state A. If the act cannot be attributable to government A, it may be inferred whether the act itself triggers a right of self-defence for the neighbouring state, and if so, whether the right of self-defence stretches only to the part of the territory under *de facto* control by the insurgent movement B or if it extends to the whole territory of state A. The answer to the above question may be to employ the generally accepted limitations to the right of self-defence, where armed response action has to meet the requirements of necessity and proportionality.

The principal flaw with the concept of self-defence as it stands today, is the inability of the international community to establish a unilaterally accepted definition of what constitutes self-defence, its scope and the failure of the UN, particularly, the SC to efficiently perform its mandated functions within the ambit of Article 51 and Chapter VII. It may be suggested that the veto power of the five permanent members of the SC, risks impeding the work of the SC in furthering the development of a unilaterally accepted definition of self-defence. Furthermore, proposed Chapter VII measures also stand the risk of being subjected to veto, with the ultimate result of states and/or collective defence organisations to implement actions determined outside the realm of the SC. The role of the SC in situations where a right of self-defence may arise and where questions of state responsibility are at issue, will continue to be redundant so long as the five permanent members of the SC to some extent are those very states frequently involved in one way or another in armed conflict.

Another impression is that within the framework of countermeasures in international law, one of the primary differences between the legal structure of ILC's Articles on state responsibility and the regulation of self-defence under the UN Charter, other than that use of force is prohibited as a countermeasure, is that there is an explicit reference to the inviolability of fundamental human rights whilst undertaking countermeasures. Such an explicit reference of fundamental human rights constituting a limitation on the right of self-defence is absent in the UN Charter. A general provision on the promotion of human rights pledges the member states to take joint and separate action with the UN in achieving universal respect for, and observance of, human rights. This provision appears more as a reminder for states of the importance of protecting human rights at all times, and it may be argued whether it was designed to deal directly with situations falling under Article 51.

Self-defence will always impact human rights, regardless whether it is exercised within the ambit of Article 51 or legally disputed doctrines of self-defence, such as pre-emptive self-defence, that arguably may be part of customary law. The legal framework of international human rights at first sight seem adequate and the enforcement mechanisms effective. However, human rights were construed to be applicable in peacetime but when permeating into armed conflicts, questions such as whether the human rights regime is equipped enough to master monitoring and enforcement of human rights in armed conflicts and in aftermath situations of armed response arise. As a consequence, human rights protection in the aftermath of armed response is weak. This fact is evident as shown by the human rights situation of detainees at; *inter alia*, Guantánamo Bay, Bagram Air Base and Israel.

During the exercise of self-defence, non-derogable human rights are applicable at all times to the armed conflict. The HRC has moreover established that provisions in the ICCPR that are not recognised as non-derogable, still cannot be derogated from by states at will. Derogations are

allowed to the extent strictly required by the exigencies of the situation. Furthermore, the principles of necessity and proportionality, as established by the ICJ in the *Nicaragua* case and considered part of international customary law, clearly act as limitations on the exercise of the right of self-defence. Moreover, the Martens Clause reiterates the obligation of states to conform to certain fundamental human rights principles such as the principles of humanity and dictates of public conscience.

The wars against terrorism have been used to justify invoking broader and legally disputable doctrines of self-defence such as pre-emptive self-defence, particularly by the US and Israel. It must be firmly established what constitutes self-defence and the scope of it, through unanimous state consensus and unanimous *opinio juris*. Moreover, the role of the ICJ as an enforcement mechanism needs to be strengthened through requesting it to deliver advisory opinions on disputable questions pertaining to the law of self-defence, but also to enforce compliance by states of already existing case law.

Seen in the aftermath perspective of armed response, wars against terrorism as used to legitimate pre-emptive self-defence, have had a clear impact on human rights, resulting in massive abuses of civil and political rights. In order to avoid situations such as the present situation of the detainees at Guantánamo Bay and Bagram Air Base, situations that deny individuals status before the law resulting in inadequate legal protection must be opposed. Since the right to be considered a person before the law with a definable status, is the right upon which all other rights flow from and as such this deplorable measure needs to be condemned by the international community. The NGOs play a major part in monitoring human rights in such, and other, situations. There might be room to suggest a possibility to take legal action within the framework of a collective complaints procedure under the ICCPR, which entitles selected NGOs to file complaints on behalf of a group of individuals subjected to alleged human rights violations similar to the procedure enshrined in the Revised European Social Charter. Nevertheless, the ICRC, due to its neutral position, has been allowed visitation rights on occasion to the detainees in Guantánamo Bay. The recent capture by US armed forces of Saddam Hussein, the former dictator of Iraq, raises questions pertaining to jurisdiction and the protection of human rights. It is debatable whether the International Criminal Court has jurisdiction, considering that it has no jurisdiction over crimes that occurred prior to July 1, 2002, and also due to the fact that Iraq was not a signatory to the Convention that established the Court. If so, it may rightly be implied that jurisdiction will be claimed by Iraq. Serious concerns pertaining to the Iraqi justice system's capability of rendering fair and effective justice for violations of human rights, humanitarian law and other serious criminal offences involving the prior regime are at hand.

Finally, the capture of Saddam Hussein, also raises the question of the legality of the US armed action to be justified as a humanitarian intervention. It is highly unlikely that the SC will *ex post facto* recognise the

actions in Iraq as falling within the ambit of Article 51 or self-defence as recognised by international customary law. However, it nevertheless raises the question of a possibility of legitimising the action as a humanitarian intervention. If so, it might be inferred that the international legal system is moving away from the concept of self-defence as understood by the UN Charter, violating Article 2(4) of the UN Charter and ultimately re-introducing an ancient doctrine dictating that war may be used to punish evildoers, right wrongs and restore the status quo, namely the doctrine of “just war”.²¹²

²¹² Dinstein, Yoram, *War, Aggression and Self-Defence*, pp. 59-68.

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