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The Legality of Anticipatory Self-Defence in International Law

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Summary

The maintenance of world peace and security depends importantly on there being a common global understanding, and acceptance, of when the application of force is both legal and legitimate. One of these elements being satisfied without the other will always weaken the legal order-and thereby put both State and human security at greater risk.¹

The *Caroline* Case with its principles of necessity, proportionality and immediacy is alleged to be part of customary international law consider anticipatory self-defence, but a closer examination views that it can not be, mostly because of States are not convinced that it is the correct behaviour. Even if Article 51 of the UN Charter has been expanded to include acts of terrorism as armed attacks, it still does not give the right for States to act in self-defence when there is a mere threat of force. This situation would not have appeared if there would have been an explanation of the notion 'armed attack', but interpretation of Article 51 shows that there was no intention to include anticipatory self-defence.

State practice, UN documents and decisions from the International Court of Justice can all be evidence of practice and if there is *opinio juris*, the behaviour becomes customary international law. The United States promote for pre-emptive and preventive self-defence. Compared to anticipatory self-defence the 'Bush-doctrine' is wider and includes self-defence against general or specific armed attack that State believes will occur.

The UN is of the opinion that the Security Council can authorize anticipatory self-defence if a State puts the matter to them, but the principle of non-intervention is too great to accept the legality that States can act anticipatory on their own device. There must appear an imminent threat of armed attack and the use of force in self-defence still has to be proportionate. This is in correspondence with the objects and purpose of the UN Charter. Article 2(4) of the Charter prohibits the threat or use of force and if a situation is put to the Security Council it is up to them to decide what kind of action is required to maintain international peace and security. The ICJ confirmed the criteria of proportionality as being part of customary international law in the cases of *Nicaragua*, *Nuclear Weapons Case* and *Oil Platforms Case*. The *Nicaragua* Case also stated that the words 'an armed attack occurs' speak of the actual commencement of physical violence by armed forces and separated grave use of force and less grave use of force as in the General Assembly Resolution 3314.

The prominent writers agree that it is not legal for States to act anticipatory, unless the Security Council authorizes it. There is a gap between the legality and the legitimacy when force may be used. If a State act in self-defence against a threat of force or aggression that does not reach the threshold of armed attack, it is illegal if not viewed to the Security Council and given

¹ Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change in its Report *A more secure world: Our shared responsibility* on December 1st. See p.62, note. 184 at <http://www.un.org/secureworld/report2.pdf>

authorization. But, it can still be legitimate in the eyes of the community who have the choice to condemn or omit to condemn. Kofi Annan suggested a resolution setting out principles relating to use of force and when Security Council would authorize or mandate the use of force, but the World Summit in 2005 did not adapt it.

Abbreviations

| | |
|---------|--|
| Art. | Article |
| GA | General Assembly |
| GA Res. | General Assembly Resolution |
| IAEA | International Atomic Energy Agency |
| ICJ | International Court of Justice |
| NATO | North Atlantic Treaty Organisation |
| SC | Security Council |
| The US | United States of America |
| The UK | United Kingdom |
| UN | United Nation |
| UNCIO | United Nation Conference of International Organisation |
| UNEF | United Nations Emergency Force |
| UNMOVIC | United Nation Monitoring, Verification and Inspection Commission |
| VCLT | Vienna Convention on the Law of Treaties |

1 Introduction

1.1 Purpose and delimitations

The purpose of this thesis is to investigate whether there exists a right of anticipatory self-defence in international law or if the right of self-defence is limited to 'if an armed attack occurs'. Since self-defence is linked to an armed attack, it is important to investigate what would constitute an armed attack. The main legal questions that will be answered are:

- What constitutes 'armed attack'?
- Is anticipatory self-defence legal according to international law?

Because of the limited space and in advantage for the main subject, there will not be any deeper history of the various situations. This thesis considers the more contemporary thoughts of writers and situations and the exclusion of a historical report will not be of decisive significance.

It will be limited to the situations of international armed conflicts between States on their territory of land.

General principles of law as a source, are excluded because the situations used to illustrate the topic of this thesis are applicable to the other sources of international law.

The main-focus is set to what constitutes an armed attack and the limitations of the right of self-defence according to the different sources in international law.

1.2 Method and Material

The sources used to evaluate the legality of anticipatory self-defence are those of international law; international conventions, international custom, judicial decisions and the teachings of the most highly qualified publicists. The use of these sources gives a reliable picture of the current situation since they are the most prominent available.

1.3 Terminology

Different authors use the notions of anticipatory, pre-emptive and preventive self-defence in various ways. In this thesis, the notion of anticipatory self-defence is limited to self-defence when an armed attack is *imminent*. It is a narrower doctrine that would authorize armed response to *specific* attacks that are on the brink of launch, or where an enemy attack has already occurred and the victim learns more attacks are planned. The victim state has the *knowledge* of the attacks.

Pre-emptive self-defence (also called the 'Bush-doctrine') is self-defence against a possible armed attack that has not yet occurred. The possible attack is still *specific*, but the victim-State does not know for sure about the attack; they *believe* it will occur.

Preventive self-defence is armed force against a *general* threat of armed attack that is non-imminent. The victim-State *suspect* there will be an attack.

1.4 Outline

The different sources of international law as found in the Statute of International Court of Justice, Article 38(1) are the starting point to determine the notion of armed attack and the status of anticipatory self-defence. Treaty law, customary law, general principles and judicial decisions are divided in different chapters for the reader to get a better view and separate the sources from each other. The academic writings of different prominent authors are also a source of international law and their opinion gives guidance in the matter.

The present writer concludes the work in Chapter 8.

2 Sources of international law

There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule. There are sources available from which the rules may be extracted and analysed. Article 38 (1) of the Statute of the International Court of Justice is widely recognised as the most authoritative statement as to the sources of international law.²

2.1 Statute of International Court of Justice, Article 38(1)

The article provides that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b) international custom, as evidence of a general practice accepted as law;
 - c) the general principles of law recognized by civilized nations;
 - d) judicial decisions and the teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law.

By virtue of UN Charter Article 93, all member states are *ipso facto* parties to the Statute. A non-member can become a party to the Statute on conditions to be determined in each case by the General Assembly upon the recommendations of the Security Council. Because of the extensive number of members, there is no doubt that Article 38(1) of the Statute expresses the universal perception of sources of international law.

² M. Shaw, p. 66

3 Treaties

Treaties are expressed agreements by states and known by a variety of differing names such as Conventions, International Agreements, Pacts, General Acts, Charters, Declarations, Statutes and Covenants. Only states that ratified the treaty are bound by its terms, but when a treaty reflects a rule of international customary law, non-parties will also be bound by its provisions.

The pre-existing international customary law about interpretation of treaties is codified in the Vienna Convention on the Law of Treaties, 1969. Article 31 expresses the general rule for interpretation;

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

3.1 The UN Charter

The United Nations grew out of a series of wartime declarations and conferences, culminating in the San Francisco conferences of 1945, which finally adopted the UN Charter. Membership in the UN is open to all other peace-loving states, which accept the obligations contained in the UN Charter.³ It means that a member to UN becomes part to the UN Charter after ratification.⁴ The UN has 192 members as the General Assembly approved admission of Montenegro 28 June 2006.⁵

³ Art 4(1), UN Charter

⁴ Art 110, UN Charter

⁵ <http://www.un.org/News/Press/docs/2006/org1469.doc.htm>

‘To save the succeeding generations from the scourge of war` and ‘to live together in peace` are two of the objects stated in the Preamble of the UN Charter. Another object is to ensure that armed force shall not be used through acceptance of principles and the institution of methods.

The purposes of the United Nations are to maintain international peace and security by taking effective and collective measures for the prevention and removal of threats to the peace, acts of aggression or other breaches of the peace.⁶ All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.⁷

UN Charter Article 2(4) declares that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.

The wording of Article 2(4) states a prohibition against ‘use or threat of force`, not against ‘armed attack`. The notion ‘armed attack` has a narrower meaning whereas it always presupposes a violation of Article 2(4), but a violation against Article 2(4) does not always constitute ‘armed attack`.⁸ The terminology of ‘force` means military force, economic sanctions or termination of diplomatic relations is not use of force in this meaning.⁹ When force is used on a relatively large scale and with substantial effects, it is to be regarded an armed attack.¹⁰

The prohibition of use of force is universally accepted as *jus cogens*, a peremptory norm of general international law from which no derogation is allowed.¹¹

Article 2(4) of the Charter covers the threat of use of force as illegal. Prohibition of the use of force is binding for member states to the UN Charter and according to customary law.¹² The article is not applicable in situations of civil war, but only in ‘their international relations`, that is to say, in relation between states.

Article 2(6) of the Charter provides that UN shall ensure that non-member States act in accordance with the principles so far as may be necessary for the maintenance of international peace and security.

The parties to any dispute shall, first of all, seek a solution by peaceful means and when necessary, the Security Council shall call upon the parties to settle their dispute by such means.¹³

There is a prohibition against all threat or use of force against the territorial integrity or political independence of any state as manifested in the UN Charter Article 2(4), but there are two situations exempted; Security Council enforcement action and self-defence.

⁶ Art. 1(1), UN Charter.

⁷ Art 2(3), UN Charter.

⁸B. Simma, p. 796, note 20

⁹ I. Brownlie p. 269.

¹⁰ See Chapter 4.3.1, infra

¹¹B. Asrat, pp 44, 51

¹² Nicaragua Case (1986), para. 187

¹³ Art. 33, UN Charter.

A) If the Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression, it shall make recommendations or decide what measures should be taken to maintain or restore international peace and security.¹⁴ Non-international armed conflicts as civil war are not included in these situations as long as it does not threaten international peace or security. The Security Council may decide what measures not involving the use of armed force that should be employed to maintain international peace. It may as well call upon the Members of UN to apply such measures. Such non-military measures could be for example interruption of economic relations or the severance of diplomatic relations.¹⁵ If the measures provided in the UN Charter Article 41 would be inadequate or have proved to be inadequate to maintain or restore international peace and security, the Security Council may take military actions. Such actions may be demonstrations, blockades and other operations by air, sea or land forces of Members of the United Nations.¹⁶

A recommendation or decision of non-use of force in Article 41 made by the Security Council is legally binding to the Member States of UN. A decision to use military measures in Article 42 is not legally binding upon states, the state will get a mandate to use force, not an order.

B) The other exemption is set in UN Charter Article 51:

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

3.1.1 Ordinary meaning of Article 51

To determine the true meaning of Article 51 of the Charter, there is a need for interpretation according to VCLT Article 31. A good faith interpretation must include, not only the ordinary meaning of the article itself, but also relevant provisions in their context to be seen in the light of its object and purpose.

The object and purpose of the Charter is to maintain international peace and security by prohibiting the use of force. The prevailing view refers to restrict as far as possible the use of force by the individual State and legitimate self-defence only in response to an armed attack.¹⁷ Disputes shall be settled by peaceful means if the Security Council does not decide anything else.¹⁸

¹⁴ Art 39, UN Charter

¹⁵ Art 41, UN Charter

¹⁶ Art 42, UN Charter

¹⁷ I. Brownlie, pp 272-5

¹⁸ See Chapter 3.1, *infra*

The creation of Article 51 started at the San Francisco Conference in 1945. A draft text on self-defence was introduced as an amendment agreed to by China, France, the UK, the US and the USSR and dealt with by the Committee III/4, whose task was the preparation of draft provisions on regional arrangements. The Committee approved a draft passed by the Subcommittee III/4/A,¹⁹ which was later unanimously adopted by the Commission III.²⁰

'Inherent right` and `Individual or Collective Self-defence`

The designation in Article 51 of the right of self-defence as `inherent` means that UN-members and non-members may give assistance to a non-member being exposed to an armed attack. Nothing can be drawn from the *travaux préparatoires*, either in favour of this interpretation or against, but this view is supported by the prevailing doctrine.²¹ Even if that term were absent, it is submitted that the right of self-defence would still have been implied under Article 2(4), and under the manner and extent of its exercise regulated by customary international law, preferably the Nicaragua Case.²²

'Armed Attack`

The term `armed attack` represents the key notion of the concept of self-defence pursuant to Article 51.²³ There is no explanation for the phrase `armed attack` in the records of the San Francisco Conference.²⁴ Taken literally, Article 51 would make armed attack the sole ground for the exercise of self-defence.²⁵

A contemporary interpretation of the notion would be `the act of using weapons against an enemy in war` or `to start using guns, bombs etc against an enemy in war`.²⁶

'Occurs`

It is though ambiguous, if the right to self-defence should be restricted to when an armed attack occurs or if situations where the attack is only directly imminent should be included.²⁷

3.2 Reprisals and Self-Defence

In the preamble to the GA Resolution 2625²⁸, the General Assembly confirmed the principle that States shall refrain in their international

¹⁹ See 12 UNCIO, p. 680

²⁰ See 11 UNCIO, p. 60

²¹ B. Simma, p 792, note 10

²² B. Asrat, p. 211

²³ B. Simma, p 794, note 16

²⁴ I. Brownlie, p. 278.

²⁵ B. Asrat, p. 219

²⁶ Longman Dictionary of Contemporary English

²⁷ B. Simma, p.792, note 10

²⁸ UN GA/RES/2625 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/5217 at 121, 24 October 1970

relations from the threat or use of force. States have, *inter alia*, a duty to refrain from acts of reprisals involving the use of force.²⁹ The provisions of the UN Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.³⁰ Reprisals are acts adopted by one State in retaliation for the commission of an earlier illegal act by another State. Reprisals are unlawful acts that become lawful self-defence in that they constitute a reaction to a delinquency by another State. If the State against which reprisals are taken had not in fact breached international rules, the State resorting to reprisals can be held responsible for a violation of international law.³¹

The Special Arbitral Tribunal in the *Naulilaa* Case determined the notion of reprisals. The origin was the killing of two German officers in the Portuguese post of Naulilaa. German troops were sent to destroy Portuguese posts and kill Portuguese soldiers as a reprisal. The Special Arbitral Tribunal determined in 1928 that reprisals comprise acts which would normally be illegal but are rendered lawful by the fact that they constitute a reaction to an international delinquency. They must be 'limited by consideration of humanity and the rules of good faith applicable in the relations between States'. They must not be excessive, although they need not to be strictly proportionate to the offence. They must be preceded by a request for peaceful settlement and 'seek to impose on the offending State reparation for the offence, the return to legality and the avoidance of new offences'. The Tribunal held that Germany had violated international law since the killing of the German officers was not a wilful incident. The Germans had not requested for peaceful settlement and the force used, was excessive and not proportionate.³²

²⁹ Preamble, UN GA/RES/2625 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/5217 at 121, 24 October 1970.

³⁰ I. Brownlie, p. 281

³¹ A. Cassese, p. 299

³² A. Cassese, pp.300-1

4 Customary law

Together with the context, subsequent practice shall also be taken into account, when interpreting a treaty (Art. 31(3)(b) VCLT).

The practice and behaviour performed by states leads to custom. Custom becomes customary law if states are convinced that the custom is the correct behaviour and is binding upon them, *opinio juris*. *Opinio juris* can be proved by indications that the custom is general, constant and uniform.

Article 38 (1) of the Statute says that international custom shall be evidence of a 'general practice accepted as law'.³³ In international law there is no time element when practice turns into a customary rule, instead, it will depend upon the circumstances of the case and the usage in question.³⁴

The rule that customary law should be continuous were laid down in the *Asylum* case where the International Court of Justice in year 1950 declared that a customary rule must be 'in accordance with a constant and uniform usage practiced by the State in question'.³⁵ The importance of uniform usage was emphasised by the ICJ in the *Anglo-Norwegian Fisheries* case.³⁶ In the *North Sea Continental Shelf* cases the ICJ said that state practice had to be 'both extensive and virtually uniform in the sense of the provision invoked'.³⁷ In the *Nicaragua* Case, the ICJ emphasised that it was not necessary that the practice in question had to be 'in absolute rigorous conformity' with the purported customary rule.³⁸

The existence of customary law does not subsume or replace treaty law, but the sources continue to appear parallel.

4.1 State Practice

The practice and behaviour performed by states in general, lead to custom if it is unambiguous. Custom becomes customary international law if states are convinced that the custom is the correct behaviour and is binding upon them, *opinio juris*. *Opinio juris* can be proved by indications that the custom is general, constant and uniform.

4.1.1 The Caroline Case (1837)

The status of the *Caroline* Case in international law is ambiguous. It is often considered as part of customary international law with references to anticipatory self-defence.³⁹ The principles to justify anticipatory self-defence in the *Caroline* Case are imminence, necessity and proportionality.

³³ See Chapter 2.1, supra

³⁴ M. Shaw, p. 72.

³⁵ ICJ Reports, 1959, pp. 276-277

³⁶ ICJ Reports, 1951, pp. 116, 131 and 138

³⁷ ICJ Reports, 1969, p. 3

³⁸ ICJ Reports, 1986, p. 14

³⁹ With: Malcolm M. Shaw (see Chapter 6.3, infra). Against: Y. Dinstein (see Chapter 6.6, infra).

In Upper Canada, a former province of the Dominion of Great Britain, rebels made revolution because of the political system. In 1837 the rebels fled to the United States and tried to recruit help for the invasion of Upper Canada. A headquarter was set up at Navy Island, a small island part of British territory across the Niagara River where the shores between Canada and the United States are at a very close point. The Headquarter was expanded by armed men and given supplies by the vessel *Caroline*. The British Lieutenant-Governor of Upper Canada send a message to the Governor of the State of New York to inform him of the situation, but there was no reply on that message. The officer commanding British forces, came to the conclusion that of destroying *Caroline*, it would stop further reinforcement to the Navy Island. When the vessel was docked in the American port of Fort Schlosser, a British force bordered the vessel. Later, they towed her into the current of the river, set her on fire and let her descend the current towards the Niagara Falls, where she was destroyed. The fragile relation between the states led Great Britain to send a Special Minister to Washington for negotiation in 1841. The following exchange of notes became the foundation for the right of anticipatory self-defence. To justify the action, Great Britain had to demonstrate a

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada,-even supposing the necessity of the moment authorized them to enter the territories of the United States at all,-did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be strewn that admonition or remonstrance to the persons on board the "*Caroline*" was impracticable, or would have been unavailing; it must be strewn that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror.⁴⁰

The British Special Minister Ashburton assented to the conditions presented by Webster as general principles of international law applicable to the case. He fully recognised the inviolability of the territories of independent nations for the maintenance of peace and order amongst nations. However, he adds that there are occasional practices, including that of the United States, where this principle may and must be suspended.

Ashburton declared that the expedition was not planned with the intent of invading American territory. The British force had tried to seize the vessel in British waters at Navy Island, but the order was disobeyed of the rebel leaders and, according to Ashburton, there was not a moment left for

⁴⁰ Letter of Secretary of State Daniel Webster to Special Minister Ashburton, dated 27 July 1842, note 21, reproduced at www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm

deliberation. There was a necessity of preventing the rebels from further use of the *Caroline* as a mean of invasion.⁴¹ He responded further that the time was purposely chosen to ensure the least loss of life. It was also necessary to set the vessel on fire to prevent her from entering the Canadian territory.

4.2 Evidence of Practice by Individual States

Statements performed by individual states can be evidence of practice. Practice and behaviour can lead to custom, which can lead to customary international law if the requirements are achieved.⁴²

4.2.1 Israel v. Arab Countries, Six-Days War (1967)

When Israel was announced as an independent State with help from the UN in 1948, the surrounding Arab countries rejected Israel and pronounced a will to extinct the State by military means. The four main contributory factors which led inevitably to the Six-Days War where:

A. The Al Fatah raids, organised from Syria, which subjected Israel`s villages. This led to Israel`s massive retaliations at El Samu in November 1966 and its air strikes over Syria in April 1976.

B. Public and private statements made by Israeli officials in mid-May, to deter Syria from continuing the Al Fatah raids. Syria invoked its joint defence pact with Egypt on the grounds that a full scale attack was imminent. Syria also drew the attention to the SC to the threatening statements made by Israeli leaders which evidenced an intent to launch military action against it.

C. Egypt continued to reject the State and during May 1967, Egyptian forces marched towards the border of Israel and on 18 May, Egypt demanded the UN Peacekeeping forces to leave their territory. Since 1957, UNEF had constituted the only military presence in the Sinai, acting as a buffer between the Egyptians and the Israelis.⁴³

D. President Nasser of Egypt announced on 23 May that the Strait of Tiran should be closed. It led to a blockade of the Gulf of Aqaba for Israeli shipping and transportation of oil to the Israeli bay of Eilat. Israel had earlier declared that a blockade of the Gulf of Aqaba would be regarded as an act of war. The following days, Egypt, Jordan and Iraq entered in to a defence agreement.

⁴¹ Letter from Special Minister Ashburton to Secretary of State Webster, dated 28 July 1842, reproduced at www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm

⁴² See Chapter 4 about *opinio juris*, supra

⁴³ J.R. Gainsborough, p. 129-130

On 5 June, the Israeli air force attacked Egypt, Jordan, Syria and Iraq which fell to the benefit of Israel. The war had come to an end by 11 June, with the acceptance of a cease-fire brought about by the UN SC. The consequences of the war was, that Israel had enormously enlarged its territory by the whole Sinai, East Jerusalem, West Bank and the Golan Heights.⁴⁴ After five months of diplomatic effort, the SC Resolution 242 was adopted to prevent a further outbreak of war, but no condemnation was made by the UN.

4.2.2 Israel v. Iraqi Nuclear Reactor (1981)

Israel tried to justify the attack on the Iraqi nuclear installations on 7 June 1981 as a measure of self-defence. Israel explained they had knowledge from 'sources whose reliability is beyond doubt' that the reactor was designed to produce atomic bombs and the target would be Israel.⁴⁵ Israel expected the reactor to be operational within a short period of time, the Government of Israel had decided to act without delay to 'ensure its people's existence'. During the deliberations of the Security Council it was stated that Israel had violated international law by the attack against the Iraqi nuclear installations. Israel maintained that it had acted in the exercise of its inherent right of self-defence as 'understood in general international law' and as preserved in Article 51 of the Charter, in order to counter a threat of nuclear obliteration which had been made against it by Iraq. The representative of Iraq underscored that his country's nuclear programme was intended solely for peaceful uses and was fully in compliance with the Treaty on the Non- Proliferation of Nuclear Weapons as well as the safeguards administered by the IAEA. The Israeli attack on Osirak, therefore, was a 'clear-cut act of aggression'. The attempt by Israel to justify the attack as preventive was rejected and the representative asserted that the Charter recognized the right of self-defence only against an armed attack and pending action by the Council to restore peace. The representatives opined that self-defence was justified only when the reason for it was 'instant, overwhelming, leaving no choice of means and no moment for 'deliberation'. The Israeli attack, to the contrary, was preceded by months of planning and was plainly inconsistent with the requirements of self-defence. Israel, by its armed attack, had dangerously challenged the international system under the Treaty and the right of all States to develop nuclear energy for peaceful purposes.⁴⁶ At the 2288th meeting, on 19 June 1981, the Security Council adopted resolution 487⁴⁷ by which the Council expressed concern about the danger to international peace and security created by the premeditated Israeli air attack on Iraqi nuclear installations on

⁴⁴ J.R. Gainsborough, pp 126-9

⁴⁵ Letter from the representative of Israel to the Security Council, dated 8 June 1981. A/36/313 (S/14510).

⁴⁶ For the text of relevant statements, see Security Council (36), 2280th mtg and 2288th mtg

⁴⁷ SC Res 487. Available at:

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/418/74/IMG/NR041874.pdf?OpenElement>

7 June 1981; strongly condemned the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct; called upon Israel to refrain in the future from any such acts or threats thereof; considered the attack as a serious threat to the entire safeguards régime of the IAEA, which was the foundation of the Treaty on the Non-Proliferation of Nuclear Weapons; fully recognized the inalienable sovereign right of Iraq and all other States, especially the developing countries, to establish programmes of technological and nuclear development to develop their economy and industry for peaceful purposes in accordance with their present and future needs and consistent with the internationally accepted objectives of preventing nuclear-weapons proliferation; and called upon Israel urgently to place its nuclear facilities under the safeguards of the International Atomic Energy Agency.

4.2.3 Post 9/11 (2001-2003)

USA v. Afghanistan (2001) *Operation Enduring Freedom*

The perpetrators from the attack on 11 September were all members of the al Qaeda terrorist organization, known to operate out of Afghanistan. On 4 October, the British governments released a study showing the close links between al Qaeda and the government of Afghanistan.⁴⁸

Even though the US and the UK opted the right of individual and collective self-defence, they cited its right to self-defence to the community of states and the UN before targeting Afghanistan.⁴⁹

In a speech on 20 September 2001, President Bush requested every nation in every region to make a decision 'Either you are with us, or with the terrorists' .⁵⁰

Most states agreed that the countermeasures constituted by Operation Enduring Freedom, launched against Afghanistan on 7 October 2001, were in accordance with international law. This consensus was underlined by the governing body of NATO, the North Atlantic Council. On 12 September, the Council agreed that:

...if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.⁵¹

During September, the Security Council adopted two Resolutions and condemned the terrorist attacks by the strongest.⁵² The Security Council would probably have permitted the use of force under UN Charter Chapter VII, as they expressed its 'readiness to take all necessary steps to respond to the terrorist attacks' in accordance with its responsibilities under the UN Charter.⁵³ Another indication that they would have permitted the use of

⁴⁸ Available at: www.eaglelink.com/law-review/m3/uk-doss.htm

⁴⁹ United Nation Document S/2001/946

⁵⁰ Available at: www.whitehouse.gov/news/releases/2001/09/20010920-8.html

⁵¹ Available at: www.nato.int/docu/pr/2001/p01-124e.htm

⁵² Para 1, UN S/RES/1368 (2001), adopted on 12 September.

⁵³ Para 5, *ibid*

force is the decision for states to, inter alia, act preventive and deny safe havens to those who are involved with terrorism.⁵⁴ The day after the military invasion of Afghanistan, the Security Council declared that 'the members of the Council were appreciative of the presentation made by the United States and the United Kingdom'.⁵⁵

USA v. Iraq (2003) *Operation Iraqi Freedom*

The invasion of Iraq in 2003 by the US and its coalition has its origin in the early 90's when Iraq invaded Kuwait on 2 August 1990. The Security Council adopted Resolution 660⁵⁶ where it condemned the invasion and regarded it as a breach of international peace and security. It demanded Iraq to withdraw all its forces and to negotiate with Kuwait. Despite all efforts by the UN, Iraq refused to comply with the obligation outlined in Resolution 660. The Security Council gave Iraq one final opportunity as a pause of goodwill, to comply fully with the previous resolutions.⁵⁷ They also gave authority to Member States to use all necessary means to uphold and implement Resolution 660, if Iraq did not fully implemented its obligations before 15 January 1991.⁵⁸ In April 1991, the Security Council was aware of the use by Iraq of ballistic missiles in unprovoked attacks and indications that Iraq had attempted to acquire materials for a nuclear weapons programme.⁵⁹ The Security Council decided that Iraq should, under international supervision, unconditionally accept the destruction, removal, or render harmless all chemical weapons, all stocks of agents and all related subsystems and components.⁶⁰ All ballistic missiles with a range greater than 150 kilometres and related major parts, should also be destroyed.⁶¹ Because of Iraq's non-compliance with earlier resolutions, the Security Council adopted Resolution 1441 on 8 November 2002⁶² where they gave Iraq 'a final opportunity to comply with its disarmaments obligations under relevant resolutions'.⁶³ Iraq was obliged to cooperate fully in every respect with UNMOVIC and IAEA. UN inspectors were allowed to Iraq by Saddam Hussein in November 2002 to investigate alleged chemical and biological facilities, but did not find any weapons of mass destruction.⁶⁴

⁵⁴ Paras 1,2, UN S/RES/1373 (2001), adopted on 28 September

⁵⁵ AFG/152; SC/7167. Available at:

<http://www.un.org/News/Press/docs/2001/afg152.doc.htm>

⁵⁶ UN S/RES/660 (1990). Available at:

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510.pdf?OpenElement>

⁵⁷ Para 1, UN S/RES/0678 (1990). Available at:

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/28/IMG/NR057528.pdf?OpenElement>

⁵⁸ Para.2, ibid

⁵⁹ Preamble, UN S/RES/0687. Available at:

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/23/IMG/NR059623.pdf?OpenElement>

⁶⁰ Para 8(a), UN S/RES/0687

⁶¹ Para 8(b), ibid

⁶² UN/S/RES 1441. Available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement>

⁶³ Para 2, ibid

⁶⁴ H. Blix speech on 7 March, 2003. Available at:

www.un.org/Depts/unmovic/SC7asdelivered.htm

The Security Council did not give any explicit authorization to use force, but the US President Bush interpreted Resolution 1441 to give authority to move without any second resolution.⁶⁵ He also stated that the strategic view of the US changed after 11 September, now they had to 'deal with threats before they hurt the American people again'.⁶⁶

On 20 March 2003, the US and their supporters decided to pursue the invasion of Iraq without authorization from the UN. Two days after, the US President Bush pronounced the mission of the invasion 'to disarm Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people'.⁶⁷

4.2.4 Graduation Speech & National Security Strategy (2002)

On June 1st 2002, the President of the United States announced to the graduating class of the United States Military Academy at West Point, and to the world at large, that his Government will continue the fight against threats of the security and will use pre-emptive war if necessary. President Bush said:

For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence -- the promise of massive retaliation against nations -- means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.

We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long. (...) Our security will require transforming the military you will lead -- a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.⁶⁸

The following *National Security Strategy* reflected the changes from deterrence to a more defensive strategy which gives a right to anticipatory self-defence.

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

⁶⁵ President Bush meets with Prime Minister Blair, 31 January, 2003. Available at: www.whitehouse.gov/news/releases/2003/01/20030131-23.html

⁶⁶ *ibid*

⁶⁷ President discusses beginning of Operation Iraqi Freedom, 22 March, 2003. www.whitehouse.gov/news/releases/2003/03/20030322.html

⁶⁸ White House, News Release, 20020601-3, "President Bush Delivers Graduation Speech at West Point", (1 June 2002). Available at: www.whitehouse.gov/news/releases/2002/06/20020601-3.html

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

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.

The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.⁶⁹

A new version of the US National Security Strategy was issued on 13 March 2006, but it contains no novelty about the concerned discussed here.⁷⁰

4.3 General Assembly Resolutions and Declarations & International Conferences

General Assembly Resolutions and Declarations are 'soft law' and not binding for states, but they are to be regarded as authoritative instruments. If states apply the UN outcome frequently and act the way recommended, it becomes custom for states. Custom can turn in to customary international law if *opinio juris* exist, which can be proved by indications that the custom is general, constant and uniform.

4.3.1 GA Res. 2625 & GA Res. 3314

There is no definition of the notion 'armed attack' in the UN Charter, but the General Assembly stipulated that 'a war of aggression constitutes a crime against the peace, for which there is responsibility under international law'.⁷¹ Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.⁷²

⁶⁹ United States, *National Security Strategy of the United States of America*, Chapter V (September 2002). Available at: www.whitehouse.gov/nsc/nss.pdf

⁷⁰ Available at www.whitehouse.gov/nsc/nss/2006/nss2006.pdf

⁷¹ Preamble Art.1, UN GA/RES/2625 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/5217 at 121, 24 October 1970.

⁷² Art. 1, GA Res 3314 (XXIX), UN Doc A/3314, 14 December 1974.

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression according to the Resolution.⁷³

The GA Res. 3314 does not as such define the notion of 'armed attack' but its Article 3 gives a non-exhaustive list that indicates on how to interpret this term. *Invasions, Bombardment, and Cross-Border Shooting* comprised in Articles 3(a) and 3(b) represents armed attacks, provided that the military actions are on a certain scale and have a major effect, and are not considered as mere frontier incidents.⁷⁴ GA Res. 3314 constitutes mini-rules for small-scale attacks and the Security Council is to decide whether such action constitutes 'acts of aggression' or not.⁷⁵ In *Blockades* as stated in Article 3(c) and *Attack on State Positions Abroad* in Article 3(d), the use of force must be significant to constitute an 'armed attack'. If the action constitutes 'armed attack', countermeasures by the territorial State in turn would be justified according to Article 51. Minor violations of a stationing agreement may not be considered an armed attack, but an act of aggression of *Breach of Stationing Agreements* in Article 3(d). Only if the breach of terms of the agreement has the effect of an invasion or occupation can 'armed attack' trigger the right of self-defence.

If a State is *Placing Territory at Another State's Disposal*, Article 3(e), to be used by the other State for perpetrating an act of aggression against a third State, it will be an act of aggression performed by the acting State and the State allowing its territory. The only situations covered are voluntary placing of territory at another State's disposal, not when State does not prevent acts of aggression from being carried out on its territory by another State.⁷⁶

The indirect force of *Participation in the Use of Force by Military Organized Unofficial Groups* in Article 3(f) is covered by the prohibition of use of force.

4.3.2 Report of the SC's High-Level Panel & Report of the Secretary-General (2004)

A position on the lawfulness of the right of anticipatory self-defence was taken in the Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change in its Report *A more secure world: Our shared responsibility* on December 1st.⁷⁷ The Panel supports the theory of anticipatory self-defence, which allows for reaction when the attack is imminent if the Security Council authorizes it.⁷⁸ It says that the non-intervention principle is too great to accept the legality of unilateral preventive action for states that does not put the matter to the Security

⁷³ See the first part of Art. 2, *ibid*.

⁷⁴ B. Simma, p 796, note 21

⁷⁵ Art.2, GA Res 3314 (XXIX), UN Doc A/3314, 14 December 1974.

⁷⁶ B. Simma, p 799, note 29

⁷⁷ A/59/565

Available at: www.un.org/secureworld/report2.pdf

⁷⁸ Note 190, *ibid*

Council.⁷⁹ The Report rejects the notion stated by US President George W. Bush in the National Security Strategy from 2002, which allowed pre-emptive action against 'rogue States', terrorists and States possessing weapons of mass destruction.⁸⁰

Existence of a mere threat to the international security is not sufficient to make an armed attack reaction legitimate. The threatened attack has to be imminent and the action has to be proportionate. The Report illuminates the role of the Security Council that has the authority to act preventively, but has rarely done so. The Report suggests that the Security Council should be prepared to be more proactive in the future and take decisive action earlier.⁸¹ It declares, when states fear the emergence of distant threats, they are obliged to bring these concerns to the Security Council, which can authorize a preventive military action, if it chooses to. The preventive military use of force is not applicable in the case of collective action authorized under Chapter VII.

Secretary-General Kofi Annan endorsed this point of view in his subsequent report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, New York, 2005.⁸²

K. Annan recognised the issue of when and how force can be used to defend international peace and security, has deeply divided Member States in recent years:

They have disagreed about whether States have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats; and whether they have the right — or perhaps the obligation — to use it protectively to rescue the citizens of other States from genocide or comparable crimes.⁸³

K. Annan interpreted Article 51 to fully cover imminent threats, which safeguards the inherent right of sovereign States to defend themselves against armed attack.⁸⁴ He went further:

Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?⁸⁵

The Secretary-General pointed out the significance of the Security Council and suggested that it should adopt a resolution setting out the principles to be applied in decisions relating to the use of force. This resolution would

⁷⁹ Note 191, *ibid*

⁸⁰ See note 35, *supra*

⁸¹ Note 194, www.un.org/secureworld/report2.pdf

⁸² A/59/2005

Available at: <http://www.un.org/largerfreedom/chap3.htm>

⁸³ Note 122, *ibid*

⁸⁴ Note 124, *ibid*

⁸⁵ Note 125, *ibid*

also express the intention of the Security Council when deciding whether to authorize or mandate the use of force.⁸⁶

4.3.3 World Summit 2005

The Heads of States and Governments gathered for the World Summit in New York in September 2005 to take decisions in the area of United Nation. The agenda where based on the proposals outlined by the Secretary-General Kofi Annan in his report *In Larger Freedom*.⁸⁷ In the Resolution⁸⁸, the States emphasized the obligation to settle disputes by peaceful means in accordance with Chapter VI of the Charter and to act in accordance with the Friendly Relations Declaration.⁸⁹ The Report did not mention the suggestion from the report *In Larger Freedom*, that the Security Council should adopt a resolution to set the principles of the use of force.⁹⁰ The States stressed the importance of prevention of armed conflicts and the settlements of disputes and the need for the Security Council to coordinate their activities within their Charter mandates.⁹¹ They also reaffirmed that the Security Council has the primary responsibility in the maintenance of the purposes, *inter alia*, to maintain international peace and security.

⁸⁶ Note 126, *ibid*

⁸⁷ See Chapter 4.3.2, *supra*

⁸⁸ A/RES/60/1

Available at: www.un.org/summit2005

⁸⁹ See note 37, *supra*.

⁹⁰ See Chapter 4.3.2, *supra*

⁹¹ See para. 75, A/RES/60/1, *ibid*

5 General Principles of Law

Analogies from already existing rules or general principles that guide the legal system are used as a source of international law.⁹² In international law, this source is rarely used and in this thesis there are no general principles applicable because the potential cases and situations already used fall within the other sources of international law.

⁹² See Chapter 2.1, *supra*

6 Judicial Decisions

Decisions by the Court, has no binding force except between the parties and in the respect of that particular case.⁹³ Despite the fact that the doctrine of precedent does not exist in international law, the Court strives to follow their previous judgements.⁹⁴ The terminology 'judicial decisions' in UN Charter article 38(1)(d) also comprise international arbitral awards and the rulings of international courts.⁹⁵

In several cases, the Court has confirmed certain behaviour having status as customary international law.

6.1.1 Military and Paramilitary Activities in and Against Nicaragua⁹⁶ (1986)

Even if the *Nicaragua Case* did not considered the question of anticipatory self-defence, it is still of value as the ICJ confirmed that the prohibition of the use of force in UN Charter Article 2(4) is customary international law.⁹⁷ The Court also established that the right of self-defence, as an exemption from Article 2(4), is inherent under customary international law as well as under the UN Charter.

In 1981 the United States gave economic aid to the Government of Nicaragua, which was later terminated because of Nicaragua providing guerrillas in El Salvador with arms. The states of El Salvador considered itself of being the victim of an armed attack by Nicaragua, and had asked the US to exercise for its benefit the right of collective self-defence. During 1981-82 trained fighting forces called 'contras' operated in Nicaragua along the borders with Costa Rica and Honduras, to whom US was giving support. The claim filed by Nicaragua, alleged that the US was responsible for the military capacity of the contra forces and had violated its charter and treaty obligations to Nicaragua. The US defended the support given to the contras as using the inherent right of collective self-defence, provided for in UN Charter Article 51.

The right of self-defence is inherent to states, in the event of an armed attack and this right covers both collective and individual self-defence as customary international law.⁹⁸ The Court considered it necessary to distinguish the most grave forms of use of force (those constituting an armed attack) from other less grave ones. The examples given in GA Res

⁹³ UN Charter Article 59.

⁹⁴ Malcolm M. Shaw, p. 103.

⁹⁵ P. 104, *ibid*

⁹⁶ Merits, Judgment, ICJ. Reports 1986, p.14.

Available at: <http://www.icj-cij.org/doCKET/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>

⁹⁷ Para. 190, *ibid*

⁹⁸ Para. 193, *ibid*

3314⁹⁹ refers to the less grave ones and the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force.¹⁰⁰ The ICJ noted that there is no definition of 'armed attack' in Article 51 and they did not define the term. Instead, the ICJ gave an example to illustrate the existence of an armed attack and stipulated that 'armed attack' comprises both unspecific cross-border actions by regular forces, and the participation of a State in the use of force by unofficial armed bands, as described in Article 3(g) of GA Res. 3314.^{101 102} Whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Even though the rules of proportionality and necessity are well established in customary international law, the Court declared that Article 51 does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it.¹⁰³ To the question of necessity and proportionality, the Court stated that the US measures was taken several months after the major offensive of the armed opposition against the El Salvador had been completely repulsed (in January 1981), and the actions of the opposition considerably reduced in consequence.¹⁰⁴ The Court concluded that self-defence could not be invoked if the threshold of actual armed attack was not reached. The provision of weapons and ammunition to El Salvador guerrillas by Nicaragua was not sufficient to reach that threshold.¹⁰⁵ Accordingly, the United States had violated the principle prohibiting the threat or use of force by its assistance to the contras to the extent that this assistance involved a threat or use of force.¹⁰⁶

6.1.2 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion ¹⁰⁷ (1996)

On request by the General Assembly, the Court gave an advisory opinion regarding the legality of possession, threat of use and use of nuclear weapons in the *Nuclear Weapons* Case. The ICJ concluded that the use of force of nuclear weapons in self-defence must at least meet the requirements of UN Charter Article 2(4) and Article 51.

The General Assembly asked the ICJ for an advisory opinion to determine the legality or illegality of the threat or use of nuclear weapons.

⁹⁹ See Chapter 4.3.1, *supra*

¹⁰⁰ Para 191, *ibid*

¹⁰¹ Para 195, *ibid*

¹⁰² See Chapter 4.3.1, *supra*

¹⁰³ Para. 176, Merits, Judgment, ICJ. Reports 1986, p.14.

¹⁰⁴ Para. 237, *ibid*

¹⁰⁵ Para. 195, *ibid*

¹⁰⁶ Para. 238, *ibid*

¹⁰⁷ Advisory Opinion, ICJ Reports, 1996, p. 226.

Available at: www.icj-

[cij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p3=5](http://www.icj-cij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p3=5)

Because of the lack of *opinio juris*, there is no customary international law to prohibit the threat or use of nuclear weapons. The Court used the UN Charter as applicable law and pointed out the prohibition of use of force in Article 2(4) and its exemptions in Article 42 and Article 51. These provisions apply to any use of force, regardless of the weapons employed since the Charter neither prohibits, nor permits, the use of any specific weapon.¹⁰⁸

The mere possession of nuclear weapons is not illegal and does not of itself constitute a threat. A signalled intention to use such force could constitute a threat of force which is illegal according to Article 2(4).

The Court could not reach a definite conclusion whether the use of nuclear weapons by a state in an extreme situation of self-defence, in which its very survival would be at stake, would be legal or illegal. Unanimously, the Court concluded that if the threat or use of nuclear weapons is in contrary to Article 2(4) and fails to meet all the requirements of Article 51 of the UN Charter, it is unlawful. The Court confirmed that the right to use self-defence under Article 51 is subject to the conditions of necessity and proportionality as stated in the *Nicaragua Case*¹⁰⁹. The proportionality principle does not in itself exclude the use of force of nuclear weapons in self-defence, but the use must be proportionate to both the law of self-defence and humanitarian law.

6.1.3 Case Concerning Oil Platforms¹¹⁰ (Iran v. United States of America, 2003)

The main task for ICJ was to adjudicate on the breach of freedom of commerce and navigations between the parties, but the Court dealt extensively with the question whether the United States' actions could be justified as lawful measures of self-defence.

Iran brought the case against the US for the attack and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988. Iran contended that these attacks constituted a breach of the bilateral 1955 Treaty as well as of international law.

In the first attack, the US claimed self-defence due to the Iranian missile attack on the Sea Isle City.¹¹¹ The US defended the second attack as response to the alleged mining of a US naval vessel in international waters of the Persian Gulf performed by Iran.¹¹² In both situations, the US failed to establish that Iran was responsible for the attacks on the US-flagged vessels and aircraft.

¹⁰⁸ Paras 37-50, *ibid*

¹⁰⁹ See Chapter 4.4.1, *supra*

¹¹⁰ Available at:

www.icj-cij.org/docket/index.php?sum=634&code=op&p1=3&p2=1&case=90&k=0a&p3=5

¹¹¹ Paras. 46-64, *ibid*

¹¹² Paras. 65-72, *ibid*

The Court considered whether the actions by the US naval forces were justified under the 1955 Treaty as measures necessary to protect the essential security interests of the US. The Court interpreted the provision of the relevant rule of the 1955 Treaty in the light of the relevant rules of international law. It concluded that the US was only entitled to have recourse to force under the provision in question if it was acting in self-defence. The US could exercise such a right of self-defence only if it had been the victim of an armed attack by Iran and the Court made it clear that, if so, the action taken by the US had to be necessary and proportional to the armed attack against it. In both attacks, the court was not satisfied that the attacks on the platforms were necessary as response to the incidents. As to the requirements of proportionality, neither of the attacks by the US could be regarded as a proportionate use of force in self-defence.¹¹³ The Court concluded that the alleged attacks of Iran did not amount to an armed attack triggering the right of self-defence.¹¹⁴ The Court concluded that the US had not succeeded in showing that the various conditions were satisfied in the present case and the US was therefore not entitled to the attacks of the Iranian oil platforms.¹¹⁵

¹¹³ Paras. 73-77, *ibid*

¹¹⁴ Para 61, *ibid*

¹¹⁵ Para 78, *ibid*

7 Academic Writings

The teachings of the most highly qualified publicists of the various nations are used subsidiary to determine the rules of law.¹¹⁶

7.1 Ian Brownlie¹¹⁷ (1963)

'Armed Attack'

There is no explanation of the phrase 'armed attack' in the records of the San Francisco Conference, perhaps because the words were regarded as sufficiently clear. Since the phrase strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the force of a state. Sporadic operations by armed bands would also seem to fall outside the concept of 'armed attack'. Brownlie regard organised campaigns by irregulars deduced to a State as a probable armed attack.¹¹⁸

'Anticipatory Self-Defence and Customary Law'

According to Brownlie, the general opinion is that the customary law permitted anticipatory action in face of imminent danger as stated in the *Caroline Case*. 'There can be little doubt that the right of self-preservation and the doctrine of necessity comprehended anticipatory action'.¹¹⁹ The *Caroline* doctrine permitted preventive action in a context in which self-defence was synonymous with self-preservation. In many works, preventive action are regarded as an aspect of self-preservation but the customary rule permitting anticipatory action must be treated with caution.¹²⁰ The customary rule is usually stated to permit action only in exceptional cases but little guidance is available as to what situations justify anticipatory action beyond the verbal formula of Webster in the *Caroline Case*.¹²¹ Brownlie concludes that Webster's formula is exceptionally elastic and necessarily permits anticipatory self-defence and if one relies on it, it is to ignore the actual development of State practice since 1920.¹²²

'Anticipatory Self-Defence and the UN Charter'

Although the classical or customary law recognized a right of anticipatory action, considerations of principle were unfavourable to it and the customary rule had lately been under attack. It is believed that the ordinary

¹¹⁶ UN Charter Article 38(1)(d).

¹¹⁷ Professor of Public International Law in the University of Oxford. Fellow of All Souls College, Oxford. Associate Member of the Institute de Droit International. Member

¹¹⁸ I. Brownlie, p. 278

¹¹⁹ p. 257, *ibid*

¹²⁰ *ibid*

¹²¹ I. Brownlie, p. 367

¹²² I. Brownlie, p. 429

meaning of the phrase of Article 51 precludes action which is preventive in character.¹²³

'Proportionality'

The customary right of self-defence assumed that the force used must be proportionate to the threat.

7.2 Michael Akehurst¹²⁴ (1991)

'Self-Defence'

There is disagreement about the circumstances in which the right of self-defence may be exercised. The words 'if an armed attack occurs', interpreted literally, imply that the armed attack must have already occurred before force can be used in self-defence, hence there is no right of anticipatory self-defence against an imminent danger of attack.¹²⁵

A criteria to use force in self-defence is that the attack is directed against a State's territory. Self-defence does not include a right of armed reprisals. Akehurst gives an example about terrorists entering one State from another, the first State may use force to arrest or expel the terrorists, but are not entitled to retaliate by attacking the other State. The force used in self-defence must be necessary and proportionate as stated in the *Nicaragua Case*.¹²⁶

'Anticipatory Self-Defence'

Supporters of a right of anticipatory self-defence, according to Akehurst, claim that Article 51 does not limit the circumstances in which self-defence may be exercised 'they deny that the word "if", as used in Article 51, means "if and only if"'. Akehurst cannot see why the drafters of the Charter bothered to stipulate conditions for the exercise of the right of self-defence unless they intended those conditions to be exhaustive.¹²⁷

Anticipatory self-defence is incompatible with the Charter since Article 51 is an exception to Article 2(4) and it is a general rule of interpretation that exceptions to a principle should be interpreted restrictively, so as not to undermine the principle. What more indicates on a prohibition of anticipatory self-defence is that treaties based on Article 51, such as the North Atlantic Treaty provide only for defence against armed attacks. Fear of creating a dangerous precedent is probably the reason why States seldom invoke anticipatory self-defence in practice. Akehurst considers Israel's attack on the Iraqi nuclear reactor in 1981 as a clear example when a State has invoked it, but the act was unanimously condemned by the Security Council.¹²⁸

¹²³ p. 275, *ibid*

¹²⁴ MA, LLB, Docteur de l'Université de Paris, of the Inner Temple, Barrister-at-Law, Reader in Law at the University of Keele

¹²⁵ M. Akehurst, p. 261

¹²⁶ p. 267, *ibid*

¹²⁷ p. 262, *ibid*

¹²⁸ See Chapter 4.2.2, *supra*

The trouble about anticipatory self-defence is that a State can seldom be absolutely certain about the other sides intentions; in moment of crisis there are rarely time for research the imminence of the alleged attack.¹²⁹

7.3 Rosalyn Higgins¹³⁰ (1994)

'Armed Attack and the Nicaragua Case'

Higgins is critical to the case since it does not say anything whether anticipatory self-defence is legal or not. Higgins refers to the *Nicaragua* Case and considers the key to determine an armed attack is the scale of activity.¹³¹ 'If it is not very substantial, it may still be an unlawful use of force, but it will not be an armed attack-and hence no self-defence may be used against it'.¹³² Higgins is critical when the Court refer to the GA Resolution of Aggression, because it does not say how much force is required by regular bands to be considered as an armed attack and allows self-defence. According to Higgins, the question of level of violence by regular forces is rather a question of proportionality than of determining what is an armed attack.¹³³

'Anticipatory Self-Defence'

The UN Charter is intended to provide for a watertight scheme for the contemporary reality on the use of force. Article 2(4) explains what is prohibited and Article 51 what is permitted, but Higgins consider almost every phrase in both articles are open for several interpretations. Article 51 does not provide for any self-defence against a threat of force, although the threat is a violation against Article 2(4). For self-defence to be a legitimate response to a threat of force, the threat would have to meet the Webster tests in the *Caroline* Case.¹³⁴ Even if the Charter has its own procedures for dealing with international threats compared to customary international law, Higgins consider the Webster formula of the *Caroline* Case to be significant in several ways for the UN Charter system. If the threat is one that could reasonably be contained or turned aside through calling an emergency meeting of the Security Council, the criteria of the *Caroline* probably will not be met. On the other hand, in a nuclear age, Higgins is of the opinion that common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a State passively to accept its fate before it can defend itself.¹³⁵ Since a prohibition of self-defence unless an armed attack has occurred would have devastating consequences, Higgins prefer to see customary international law as to allow acts of self-defence even before an armed attack has occurred. Higgins does note if interpreting Article 51 literally, another conclusion may be reached.

¹²⁹ M. Akehurst, p. 263

¹³⁰ President of the ICJ since 6 February 2006

¹³¹ R. Higgins, p. 250

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ R. Higgins, p. 248

¹³⁵ R. Higgins, .242

Higgins do believe that the Webster formula, allowing anticipatory self-defence only in cases where the necessity 'is instant, overwhelming, and leaving no choice of means, and no moment for deliberation', is giving a balance between allowing a State to be obliterated and encouraging abusive claims of self-defence. Higgins refer to the formula as having 'a great operational relevance and is an appropriate guide to conduct'.¹³⁶

7.4 Bruno Simma¹³⁷ (2002)

'Terrorism as Armed Attack'

Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Article 51. But, if large scale acts of terrorism of private groups are attributable to a State, they are an armed attack in the sense of Article 51. The attack on 9/11, 2001, are to be considered as an armed attack as far as the intensity of these acts of terrorism are concerned.¹³⁸ The act was attributable to Afghanistan. If a State gives shelter to terrorists after they have committed an act of terrorism within another State, the action is attributable to that State. If a State is not reluctant, but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to that State, the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State.

'Anticipatory Self-Defence'

There is no consensus in international legal doctrine over the point in time from which measures of self-defence against an armed attack may be taken. Some authors interpret Article 51 to merely confirm the pre-existing right of self-defence to comprehend anticipatory self-defence if the conditions set up by Webster in the Caroline Case exists. That recourse to traditional customary law does not lead to a broadening of the narrow right of self-defence laid down in Article 51. An anticipatory right of self-defence would be in contrary to the wording of Article 51 ('if an armed attack occurs') as well as its object and purpose, which is to cut to a minimum the unilateral use of force in international relations. Since the alleged imminence of an armed attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion on the State concerned. The manifest risk of an abuse of that discretion which thus emerges would de facto undermine the restriction to one particular case of the right of self-defence. Therefore, Article 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defence. Self-defence is thus permissible only after the armed attack has already been

¹³⁶ p. 243. *ibid*

¹³⁷ Former President of the European Society of International Law. Associate Member of the Institute de Droit International. Member of the UN ECOSOC, the UN ILC, the Advisory Boards on International Law, UN Issues of the German Foreign Ministry. Expert at the Council of Europe, Expert for the Human Dimension Mechanism of the OSCE and for Conflict Prevention Activities of the Secretary-General of the UN. Consulante in cases before the European Commission. Co-edited the European Journal Of International Law.

¹³⁸ Simma, *The Charter of the United Nation, A Commentary*, p 802, note 34

launched. Only in the implausible event that one State gives prior notice to another State of an armed attack would defensive measures involving the use of force be compatible with Article 51. This interpretation corresponds to the predominant State practice, as a general right to anticipatory self-defence has never been invoked under the UN Charter. No support for the present author's view can be drawn, however, from Article 2 of the GA Res 3314.(definition of Aggression).¹³⁹ According to that provision, the first use of armed force shall be taken as *prima facie* evidence of an act of aggression. Yet this does not amount to an absolute prohibition of any pre-emptive strike, since the SC may 'in the light of other relevant circumstances' deny the existence of an act of aggression. This point not being relevant to the case before it, the ICJ did not pronounce upon anticipatory self-defence all in the Nicaragua Judgement.

'Nuclear and Anticipatory Self-Defence'

Finally, it must be pointed out that the prohibition of anticipatory self-defence embodied in Article 51 is compatible with the nuclear strategy of the Super-powers only as long as States are able to defend themselves against pre-emptive strikes launched against them. Should this so called second strike capability become void, the prohibition of anticipatory self-defence would not be removed as such, but it would nevertheless be diminished in its observance by States.

'Self-Defence and Customary International Law'

Individual and collective self-defence is an inherent right under customary law, stated in the Nicaragua Case. In the *Nicaragua Case*, it is said that the customary right of self-defence may be resorted to solely in case of an armed attack. At the time when the UN Charter entered into force the traditional right of self-defence covered not only the case of an armed attack, but also may areas of self-help as a rule of customary law. That right could only have been replaced or amended if, as from a certain moment in time, its voidness or modified existence had been commonly assumed, so that a new rule of law could emerge, based upon the uniform practice of States. Such a development, however, cannot be claimed to have occurred with regard to the right of self-defence. Though the founding members of the UN had at first waived the broad concept of self-defence by adopting Article 51, subsequent State practice did not confirm that position in such a way as to amount to a uniform pattern of behaviour. Since 1945, various States, occasionally with the approval of others, have invoked a wide concept of self-defence under customary law allegedly not restricted by Article 51, and have carried out actions involving the use of force which were not directed against armed attacks.

Owing to its inconsistency, this State practice was not capable of restricting the scope of Article 51 itself; nonetheless, it has so far prevented the narrow reading of the right self-defence laid down in Article 51 from becoming established in customary international law. Yet the continuing existence of the wide customary law is of practical impact merely for the few non-

¹³⁹ See Chapter 4.3.1, *supra*

members of the UN. As regards UN members, it stands that Article 51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence. Article 51 is also seen as a *lex specialis* prevailing over the controversial customary international law.¹⁴⁰

'The US in Iraq (after Iraq invaded Kuwait)'

Article 51 gives the right to self-defence until the SC has taken necessary measures. In order to enable the SC to step in as soon as possible, Article 51 stipulates that measures taken in self-defence are to be immediately reported to the SC. When Iraq had invaded Kuwait and the SC began to adopt the necessary measures (through resolutions 660, 661, 665), the US did not have the right to continue their self-defence under Article 51, because of action taken by the SC.¹⁴¹

'Necessity and Proportionality'

The principles of necessity and proportionality are of outstanding legal and practical importance for the right of self-defence. Although Article 51 does not expressly state that these principles limit the right of self-defence, it does not follow that these principles, which are recognized for the traditional right of self-defence (*Nicaragua Case*), have been rendered inapplicable by the Charter provision. According to the better and prevailing view, any recourse to the right of self-defence laid down in Article 51 is likewise subject to these principles of proportionality and necessity (*Nuclear Weapons Case*, note 41). Consequently, lawful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions. The means and extent of the defence must not be disproportionate to the gravity of the attack. The principle of proportionality does not, however require that the weapons used in self-defence must be on exactly the same level as those used for the attack. Thus, a general prohibition of the first use of nuclear weapons cannot be derived from the principle of proportionality (*Nuclear Weapons Case*, para 193). Furthermore, it would be a false conception of the principles of proportionality and necessity to argue that a State, victim of an armed attack, is generally limited to expelling the foreign troops from its territory in exercising its right to self-defence, but is banned from pursuing them across the border into their territory.¹⁴²

'About Oil Platform Case'

Simma had a separate opinion in the judgement in the *Oil Platform Case*. He suggested that the court should have had the courage to reconfirm the fundamental principles of law of the UN as well as customary international law on the use of force in the way of clarity set by the Court already in the *Corfu Channel Case*. Simma consider it to be unfortunate that the Court did not clarify what kind of defensive countermeasures that would have been available to the United States. Hostile military action not reaching the threshold of an armed attack within the meaning of Article 51 of the

¹⁴⁰ B. Simma, pp 505-6, paras 43-45

¹⁴¹ B. Simma, pp 804-5, para 41

¹⁴² B. Simma, p 805, para 42

Charter, like that by Iran in the present case, may be countered by proportionate and immediate defensive measures equally of a military character. However, the United States actions against the oil platforms did not qualify as such proportionate countermeasures.¹⁴³

7.5 Thomas M. Franck¹⁴⁴ (2003)

'Anticipatory Self-Defence'

Franck asks the question whether the *Caroline* Case has been preserved or repealed by the Charter and considers common sense, rather than textual literalism, to be a better guide to interpretation of international legal norms. Franck refers to the *Nicaragua* Case where the Court could not conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defence, in which the very survival of a State would be at stake. Despite of the ambiguity of the Case, the Court appears to have recognized a State's claim to use means necessary to ensure its self-preservation, which Franck believes is logic. He thinks that no law, and certainly not Article 51, should be interpreted to compel the absurd situation when States has to await a first military strike before using force to protect themselves.¹⁴⁵ On the other hand, a general relaxation of Article 51 could lead to another absurd situations according to Franck; the law cannot have intended to leave every State free to resort to military force whenever it perceived itself endangered by another State.

In the Six-Days War in 19767, Franck concludes that there is no endorsement of a general right of anticipatory self-defence, but the situation demonstrates that in situations of extreme necessity, anticipatory self-defence may be legitimate exercise of a State's right to ensure its survival.¹⁴⁶ Most States understood that a very small, densely populated State cannot be expected to await a probable, potentially decisive attack before availing itself of the right of self-defence'.¹⁴⁷ He believes that evidence, rather than abstract principles, seems to determine the response when a State claims the right to use force in anticipatory self-defence. States seem willing to accept strong evidence of the imminence of an attack to allow the victim-State to respond under Article 51 as if the attack had already occurred or at least mitigate the judgement of that anticipatory response. Franck believes that mitigation of the judgement is more likely if the response is proportionate and avoids collateral damage.¹⁴⁸ Franck concludes that the practice of UN organs makes it clear that it is for them

¹⁴³ Separate opinion by Judge Simma in the *Oil Platform* Case. Available at: <http://www.icj-cij.org/docket/index.php?sum=634&code=op&p1=3&p2=1&case=90&k=0a&p3=5>

¹⁴⁴ Professor of Law and Director at Center for International Studies at New York University School of Law.

¹⁴⁵ M. Franck, p. 98

¹⁴⁶ p. 105, *ibid*

¹⁴⁷ p. 107, *ibid*

¹⁴⁸ *ibid*

and not for an attacking State to determine the propriety or culpability of anticipatory use of force.

7.6 Malcolm N. Shaw¹⁴⁹ (2003)

'Anticipatory Self-Defence'

The traditional definition of self-defence in customary international law occurs in the *Caroline* case.¹⁵⁰ There is extensive controversy as to the precise extent of the right of self-defence in the light of Article 51. Considering anticipatory self-defence, Shaw considers it unlikely if one adopted the notion that self-defence is restricted to responses to actual armed attacks. The concept of anticipatory self-defence is of particular relevance in the light of modern weaponry that can launch an attack with tremendous speed, which may allow the target State little time to react to the armed assault.¹⁵¹ When Israel attacked the Arab Countries in 1967¹⁵², it could be argued that the Egyptian blockade itself constituted the use of force, thus legitimising Israeli actions without the need of 'anticipatory' conceptions self-defence.¹⁵³

The concept of anticipatory self-defence involves fine calculations of the various moves by the other party, which may constitute some trouble. In these situations, Shaw views the international system as a problem when leaving such determinations to be made by States themselves, and in the absence of an acceptable, institutional alternative, it is difficult to foresee a modification of this.¹⁵⁴

'Necessity and Proportionality'

The concepts of necessity and proportionality are at the heart of self-defence in international law and the circumstances in each case will decide what might constitute necessity and proportionality. It is essential to demonstrate that the armed attack that has occurred or is reasonably believed to be imminent, requires the response that is proposed. Proportionality as a criterion of self-defence also require an analysis of the principles of international humanitarian law when consider the type of weaponry to be use. The nature of the weapons to be used and the profound risks associated with them would be a relevant consideration.¹⁵⁵

7.7 Christine Gray¹⁵⁶ (2004)

'Armed Attack'

¹⁴⁹ Professor in International Law, University of Leicester. Practicing barrister.

¹⁵⁰ M. Shaw, p.1023

¹⁵¹ p. 1028, *ibid*

¹⁵² See Chapter 4.2.1, *supra*

¹⁵³ p. 1029, *ibid*

¹⁵⁴ *ibid*

¹⁵⁵ p. 1031, *ibid*

¹⁵⁶ Fellow of St John's College and Reader in International Law at the University of Cambridge

All states agree that if there is an armed attack the right to self-defence arises, but there are disagreements as to what constitutes an armed attack. The concept of modern missiles and naval missiles has given rise to special questions. Gray concludes that the description of the scope of armed attack in the Nicaragua Case is consistent with state practice and with the practice of the Security Council.¹⁵⁷ The sending of armed bands rather than regular army could constitute an armed attack, provided that the scale and effects of the operation were such as to be classified as an armed attack and not a mere frontier incident. Assistance to rebels in the form of the provision of weapons or logistical or other support could amount to a threat or use of force or intervention, but did not constitute an armed attack.¹⁵⁸

'Use of force and Terrorism'

Before the 9/11, the right to use force in self-defence against terrorist attacks was controversial¹⁵⁹ but the massive terrorist attack led to a fundamental reappraisal of the law of self-defence. For some this is just a continuation of the existing wide right of self-defence; for others it is a new right based on a re-interpretation of Article 51 of the Charter, justified by the fiction of instant custom or, more realistically, by universal acceptance by States of a new legal rule.¹⁶⁰ The Security Council Resolution 1368 affirmed the right of self-defence in response to terrorist attacks for the first time. NATO invoked Article 5 of its treaty for the first time in history and declared that attack on the US was an attack on all member States.¹⁶¹

'Necessity and Proportionality'

As part of the basic core of self-defence, all states agree that self-defence must be necessary and proportionate.¹⁶² The requirements are often traced to the Caroline incident that has become a mythical authority. Some writers still refer to it, generally to support their own wide claims to self-defence, but also to support the necessity and proportionality limitations. Other authors regard it as an episode of self-help pre-dating the modern law on the use of force and as a single incident of pre-emptive action not of relevance to the conduct of wider scale conflict. No matter the status of the Caroline Case, the principles of proportionality and necessity have played a crucial role. The Nuclear weapons Case, Nicaragua and the Oil Platform Case all reaffirmed the importance of the principles that limit the right of self-defence, individual or collective. The requirements are not established in the UN Charter, but are part of customary international law.

Commentators agree that necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack. This does not mean that the defending State is restricted to

¹⁵⁷ C. Gray, pp. 108-9

¹⁵⁸ Nicaragua Case, para. 195

¹⁵⁹ C. Gray, p. 164

¹⁶⁰ *ibid*

¹⁶¹ C. Gray, p. 159

¹⁶² C. Gray, p. 120

the same weapons or the same number of armed forces as the attacking State: nor is it necessarily limited to action on its own territory.¹⁶³

If terrorist actions trigger the right to self-defence, then Gray views a problem with necessity and proportionality. If force is used in response to *past* attacks, it is not necessary self-defence as the harm has already been done. In so far as self-defence against terrorism is designed to deter and prevent *future* terrorist acts it is difficult, if not impossible, to employ these central criteria of self-defence in the absence of detailed evidence about specific threatened attack. But, if these criteria are not applicable then there are no limits on self-defence.¹⁶⁴

'Anticipatory Self-Defence'

States prefer to rely on self-defence in response to an armed attack and invokes anticipatory self-defence where no conceivable case can be made that there has been an armed attack that they resort to. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force.¹⁶⁵

The Israeli attack in 1967 was apparently a pre-emptive strike, but Israel did not seek to rely on anticipatory self-defence. It argued that the actions of the Arab states in fact amounted to prior armed attack. To the Security Council it claimed that the blocking by Egypt of the Straits of Tiran to passage by Israeli vessels amounted to an armed act of war; it was an armed attack justifying self-defence under Article 51.

The reluctance to rely on anticipatory self-defence even by the US and Israeli is not conclusive evidence that they did not believe that it was illegal, as it is natural for States to choose the strongest grounds to justify their claims. It is though a strong evidence of the controversial status of this justifications for the use of force, as is the deliberate avoidance of the issue of the legality of anticipatory self-defence by the ICJ in the Nicaragua Case. States prefer to argue for an extended interpretation of armed attack and to avoid the fundamental doctrinal debate. The clear trend in State practice before 9/11 was to try to bring the action within Article 51 and to claim the existence of an armed attack rather than to argue expressly for a wider right under customary law.¹⁶⁶

'Pre-emptive Self-Defence'

The controversial doctrine of pre-emptive self-defence is regarded with considerable suspicion by most States.¹⁶⁷ In *Operation Enduring Freedom* the US has apparently indicated that force may be used even when there has been no actual attack, purely in order to pre-empt future attacks.¹⁶⁸

¹⁶³ p. 121, *ibid*

¹⁶⁴ C. Gray, p. 167

¹⁶⁵ p. 130, *ibid*

¹⁶⁶ p. 133, *ibid*

¹⁶⁷ C. Gray p. 175

¹⁶⁸ In the *National Security Strategy of the United States*, September 2002, President Bush says: 'we will not hesitate to act alone if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists...'. Available at: www.whitehouse.gov/nsc/nss.pdf

The UK and Australia (the only other States to contribute forces at the start of *Operation Iraqi Freedom*) did not use pre-emptive self-defence as any part of their legal case for the invasion of Iraq. Grey interprets their will to rely on the Security Council authorization as an indication of the doubt over the doctrine of pre-emptive action.¹⁶⁹ As there was no weapons of mass destruction found in Iraq, there was neither an imminent threat, and force could only be used in self-defence under a very wide 'Bush-doctrine'.¹⁷⁰

7.8 Antonio Cassese¹⁷¹ (2005)

'Armed Attack and Self-Defence'

Self-defence is the lawful reaction to 'armed attack', that is, to massive armed aggression against the territorial integrity and political independence of a State that imperils its life of government.¹⁷² Cassese refers to the *Nicaragua* case where the ICJ held that less grave forms of the use of force may not be considered as armed attacks.¹⁷³ A State that is victim of the threat or use of force not amounting to an 'armed attack' is not entitled to the right of individual or collective self-defence.¹⁷⁴

Article 51 grants any Member State of the UN the right to use force in support of another State which has suffered an armed attack. The intervening State must not be a victim of the armed attack by the aggressor. What is required is a prior bond between the two States acting in self-defence or, if such a bond is lacking, an express request by the victim of the attack.¹⁷⁵

'Necessity and Proportionality'

Cassese concludes that the victim of aggression must use an amount of force strictly necessary to repel the attack and proportional to the force used by the aggressor, as stated in the *Nicaragua Case* and the *Oil Platform Case*.¹⁷⁶

'Cessation of Armed Attack'

Self-defence must be terminated as soon as the Security Council steps in and take over the task of putting an end to the aggression. This, however does not imply that self-defence must cease if the SC simply pronounces on the matter; self-defence may continue until the SC has taken *effective* action rendering armed force by the victim State unnecessary and inappropriate, and hence no longer legally warranted. If the SC fails to take action, self-

¹⁶⁹ C. Gray p. 182

¹⁷⁰ p. 183, *ibid*

¹⁷¹ Professor of International Law, University of Florence. Former President of the Council of Europe Committee for the Prevention of Torture. Former Judge and President of the ICTY. Chairman of the UN International Commission of Enquiry into Violations of Human Rights and Humanitarian Law in Darfur. Member of the Institut de Droit International

¹⁷² A. Cassese p. 354

¹⁷³ *Nicaragua Case*, para 191

¹⁷⁴ A. Cassese p. 57

¹⁷⁵ A. Cassese, p. 365

¹⁷⁶ p. 355, *ibid*

defence must cease as soon as its purpose, that is repelling the armed attack, has been achieved.¹⁷⁷

'Anticipatory Self-Defence'

Often States tend to 'adjust' the facts to the needs for their justification of use of force in self-defence. In any case, if the matter is submitted to judicial review, the burden of proof rests on the State that seeks to justify its use of force as an instance of self-defence.¹⁷⁸

By anticipatory self-defence, Cassese means a pre-emptive strike once a State is certain, or believes, that another State is about to attack it militarily.¹⁷⁹ Cassese exemplifies situations where anticipatory self-defence has been invoked; Israel bombing the Iraqi nuclear reactor in 1981. In 2003, the US and the UK invoked pre-emptive self-defence to justify their attack on Iraq.¹⁸⁰ Those States who advocates the doctrine of anticipatory self-defence assert in an era of missiles and nuclear weapons, it would be naïve and self-defeating to contend that a State should await the attack by another country, in the full knowledge that it is certain to take place and likely to involve the use of very destructive weapons. One of the leading proponents of this view is M. McDougall who wrote about the *Soviet-Cuban Quarantine and Self-defence* that it could not be required by States 'confronted with necessity for defense to assume the postures of "sitting ducks"'.¹⁸¹

Analysis of State and UN practice shows that the overwhelming majority of States firmly believe that anticipatory self-defence is not allowed by the UN Charter. However, a number States take the opposite view, among them Israel and the US. Given the importance and the role of these States, one may not conclude that there is universal agreement as to the illegality under the UN Charter of anticipatory self-defence. Pre-emptive strikes should be banned, since they may easily lead to abuse, being based on subjective and arbitrary appraisals by individual States¹⁸²

Cassese consider it being more judicious to regard anticipatory self-defence as legally prohibited, while knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnations. This may in particular occur when the relevant State offers to the world community or to the UN convincing evidence of the impending attack, which it felt justified to pre-empt by use of force, and in addition shows that the anticipatory strike and the subsequent military action has been proportionate to the threat, and limited to removal of such threat.¹⁸³

From the viewpoint of making anticipatory self-defence legal, Cassese suggest following strict conditions:(i) the State that decides to resort to such self-defence must have available compelling evidence that another State or a terrorist organization abroad is about to unleash an armed attack; this

¹⁷⁷ *ibid*

¹⁷⁸ A. Cassese, p. 357

¹⁷⁹ p. 358, *ibid*

¹⁸⁰ *ibid*

¹⁸¹ The American Journal of International Law, Vol 57, No 3, July 1963, p. 601. Available at: <http://www.jstor.org/stable/2196083>

¹⁸² A. Cassese, p.361

¹⁸³ p.362, *ibid*

evidence must be all the more determinative when monitoring inspection procedures, or conciliation mechanisms are operating with regard to the State or organization suspected to be about to set off aggression. Cassese consider it was the case with Iraq in 2003 before the US and UK attack; (ii) the attack is not only imminent and inevitable but also massive, such as seriously to jeopardize the population or even imperil the life or the survival of the State; (iii) the use of force in anticipatory self-defence must be proportionate (iv) the self-defence must only forestall no other goals than the specific attack; (v) the action has to be immediately reported to the Security Council and as soon as the armed clash is over, it must be produced convincing evidence to the SC showing that the attack was necessary; (vi) the State at issue must accept the SC subsequent political assessment; (vii) if the SC or a conciliatory or arbitral body concludes that anticipatory self-defence was not warranted or disproportionate, the State concerned must be ready to pay compensation to the State attacked.¹⁸⁴

Terrorism as Armed Attack

To qualify as an armed attack, terrorist act must form part of a consistent pattern of violent terrorist action rather than just being isolated or sporadic uses of violation. Sporadic or minor strikes or raids do not warrant such a serious and conspicuous response as the use of force in self-defence.¹⁸⁵

7.9 Yoram Dinstein¹⁸⁶ (2005)

The Right of Self-Defence

The right of self-defence is engendered of and embedded in the fundamental right of States to survival.¹⁸⁷ Dinstein regard the allegation that the prerogative of self-defence is inherent in the sovereignty of States to such an extent that no treaty can derogate from it. 'It is by no means clear whether the right of self-defence may be classified as *jus cogens*'.¹⁸⁸ No matter, both the prohibition of the use of force and the right of self-defence are parcels of customary international law. It is of importance because Article 2(4) and Article 51 addresses only to Member States of the UN, when being part of customary international law, non-members are also included of the rights and duties.¹⁸⁹ The author interprets Article 51 to be restrictive, limiting the right of self-defence to the occurrence of an armed attack. 'Any other interpretation of the Article would be counter-textual, counter-factual and counter-logical'.¹⁹⁰

¹⁸⁴ A. Cassese pp. 362-3

¹⁸⁵ p. 469, *ibid*

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¹⁸⁷ Y. Dinstein, p.175

¹⁸⁸ p. 181, *ibid*

¹⁸⁹ p. 180, *ibid*

¹⁹⁰ p. 183, *ibid*

'Armed Attack'

There is no doubt that, for an illegal use of force to acquire the dimensions of an armed attack, a minimal threshold has to be reached. An armed attack presupposes a use of force producing or liable to produce, serious consequences, human casualties or considerable destruction of property. When no such results are engendered by (or reasonably expected from) a recourse to force, Article 51 does not come into play. Only an armed attack—and nothing short of an armed attack—can precipitate a forcible reaction by way of self-defence pursuant to Article 51.¹⁹¹ The notion of 'armed attack' in Article 51 does not refer to specific weapons, it applies to any armed attack regardless of the weapon employed as concluded in the *Nuclear Weapons Case*.

'The Caroline Case'

It is frequently stated that the concept of anticipatory self-defence has its origin in the *Caroline* incident, but Dinstein consider it to be misplaced to rely on that incident in the context of anticipatory self-defence.¹⁹² There was nothing anticipatory about the British action against the *Caroline* steamboat on US soil, inasmuch as use of the *Caroline* for transporting men and materials across the Niagara River. The issue addressed at the time related exclusively to the use of force by Britain 'short of war'. The question was not whether Britain had a right to go to war against the US in the exercise of self-defence (since any State had the right to go to war against another State for any reason during the 19th century).¹⁹³ The question was whether Britain could use forcible measures of self-defence within US territory without plunging into war.

'Preventive and Interceptive Self-Defence'

Preventive self-defence of a latent armed attack that is merely foreseeable or conceivable is illegal according to Dinstein. Interceptive action taken against an armed attack already in progress where the blow is imminent and practically unavoidable is lawful, even under Article 51 of the Charter.¹⁹⁴ The latter form of self-defence is called 'interceptive self-defence' by Dinstein, but has the same requirements as 'anticipatory self-defence' (see Chapter 1.3, supra).

Self-defence cannot be exercised merely on the ground of assumptions, expectations or fear. It has to be demonstrably apparent that the other side is already engaged in carrying out an armed attack, even if the attack has not yet fully developed.¹⁹⁵ Since the right of self-defence arises under Article 51 only 'if an armed attack occurs', the burden of proof showing the existence of an armed attack rests on the State justifying its own use of force as self-defence, as concluded in the *Oil Platform Case*.¹⁹⁶

¹⁹¹ p. 192, *ibid*

¹⁹² p. 184, *ibid*

¹⁹³ p. 185, *ibid*

¹⁹⁴ p. 191, *ibid*

¹⁹⁵ p. 192, *ibid*

¹⁹⁶ p. 183, *ibid*

The requirement of armed attack as a condition of legitimate self-defence precludes both threats of armed attack and declarations of war.¹⁹⁷ When a State feels menaced by the threat of an armed attack, all it is free to do is make necessary military preparations and bring the matter forthwith to the Security Council. Dinstein concludes that 'the option of a preventive use of force is excluded by Article 51'.¹⁹⁸

'Israel v. Arab Countries, (Six-Days War, 1967)'

A study of the background may be required before the situation can be classified as lawful or unlawful self-defence. Israel was the first to open fire in the Six-Days War in 1967. After analysis of the events surrounding the actual outbreak of the hostilities, Dinstein conclude that the Israeli campaign amounted to an interceptive self-defence, in response to an incipient armed attack by Egypt (joined by Jordan and Syria). No real armed attack had been performed by Egypt, but when all of the measures taken by Egypt were assessed in the aggregate, it seemed to be crystal-clear that Egypt was bent on an armed attack, and the sole question was not whether war would materialize but when. In these circumstances, Israel did not have to wait idly by for the expected shattering blow, but was entitled to resort to self-defence as soon as possible.¹⁹⁹

'Necessity and Proportionality'

Before a State act in a war of self-defence, it is obliged to verify that a reasonable settlement of the conflict in an amicable way is not attainable.²⁰⁰ Proportionality points at a symmetry in scale and effects between the unlawful force and the lawful self-defence. Self-defence may not be undertaken long after an isolated armed attack. The requirement of immediacy cannot be compared to when a human being under attack having 'no moment for deliberation' because of practical circumstances such as the government has to approve to the attack and there has to be an attempt to peaceful settlement.²⁰¹

¹⁹⁷ p. 186, *ibid*

¹⁹⁸ p. 187, *ibid*

¹⁹⁹ p. 192, *ibid*

²⁰⁰ p. 237, *ibid*

²⁰¹ p. 242, *ibid*

8 Conclusion

The *Caroline* Case is often alleged to be of customary international law when consider anticipatory self-defence, that is when States know they will be exposed to a specific armed attack by another State. The *Caroline* Case might have had the status of customary international law during the time of 1837, but it is not the case in the 21st century.

First of all, it could not have survived the UN Charter because of Article 2(4) being a rule of *jus cogens*, a peremptory norm of general international law from which no derogation is allowed. Any use of force is prohibited if not explicitly allowed under Chapter VII of the Charter and the pre-existing doctrine of anticipatory self-defence does not fulfil the requirements of 'armed attack' under Article 51 because the victim-State has not yet been exposed to an armed attack. Since anticipatory self-defence is in contrary to Article 2(4) of the Charter it is null and void and without any legal effect. Exceptions shall be interpreted restrictively as not to undermine the ordinary meaning, which in Article 51 is the right of self-defence when an armed attack has occurred; in a restrictive interpretation, anticipatory self-defence cannot be included. The *travaux préparatoires* probably thought the meaning of 'armed attack' being obvious as they did not give any explanation of what it constitutes. If they did not have the intention to make the article exhaustive, they would not have stipulated the conditions for self-defence. If other situations than the occurrence of an armed attack was intended to trigger the right of self-defence, they would normally have exemplified those.

Even if customary international law has extended the phrase of 'armed attack' to include acts of terrorism, it has not changed the ordinary meaning of Article 51 to give an inherent right of States to act in anticipatory self-defence. After the terrorist attack on 9/11 President Bush declared 'either you are with us, or with the terrorists' and the community of States and UN agreed that the countermeasures against Afghanistan were in compliance with international law. That this action was in accordance with international law was also confirmed by the SC Resolution 1368 that expressed its readiness to take all necessary steps to respond the terrorist attacks.

Resolution 1373 encouraged States to deny safe havens to those who are involved with terrorism. *Opinio juris* can be proved by indications that the custom is general, constant and uniform, but the *opinio juris* of the invasion of Afghanistan must have appeared immediately. There is no time element when practice turns into a customary rule instead, it depends upon the circumstances in each situation and the action taken against Afghanistan had an extensive support. That large-scale terrorist acts constitute armed attacks are in conjunction with the opinion of the prominent writer B. Simma who consider the attack on 9/11 to have an intensity to be classified as such. The scope of the attack is of crucial importance if the attack should be considered as an armed attack. A. Cassese qualifies terrorist acts as armed attacks if they form part of a consistent pattern of violent attacks and not just isolated or sporadic uses of violation.

In the *Nicaragua* Case the Court did not define 'armed attack' but gave examples of what it could constitute and concluded that self-defence could not be invoked if the threshold of actual armed attack was not reached. The Court distinguished the most grave forms of use of force from the less grave ones. The first form constitutes armed attack and the latter ones are acts of aggression that are exemplified in the GA Resolution 3314. Resolution 3314 does not as such define 'armed attack' but its Article 3 gives a non-exhaustive list that indicates on how to interpret this term. The resolution constitutes mini-rules for small-scale attacks and the Security Council is to decide whether such action constitutes 'armed attack' or not. R. Higgins is critical to the case since it does not answer the question of the legality of anticipatory self-defence. She is also critical when the Court refer to the GA Resolution 3314, because it does not say how much force regular bands can use for it to be regarded as an armed attack. She prefers to see to the proportionality in the force used rather than determining what constitutes an armed attack.

In the *Oil Platform* Case, the Court once again concluded that States can exercise their right of self-defence only if they are victim of an armed attack. The burden of proof lies on the State claiming that they have been exposed to an armed attack. The cases also points out the important principle of proportionality as being part of customary international law. In the *Nuclear Weapons* Case the Court concluded that the mere possession of nuclear weapons is not illegal and does not of itself constitute a threat of force. The proportionality rule in itself does not exclude the use of force of nuclear weapons in self-defence, but the use must be proportionate to both the law of self-defence and humanitarian law. It might be difficult to see the use of nuclear weapons as proportionate seen to the large destruction it gives. But in situations when the very survival of a State is at stake, it might be proportionate and even necessary to use nuclear weapons. C. Gray views a problem with necessity and proportionality if terrorism attacks trigger the right of self-defence. If force is used to past attacks, it is no longer necessary to use self-defence as the harm has already been done. If self-defence is used to deter or prevent future terrorist attacks, it is difficult to make the self-defence proportionate because one can not predict the scope of the terrorist attack. C. Gray is of the opinion that proportionality and necessity has to exist, because without these criterions there are no limits on self-defence.

The ordinary meaning of Article 51 does not give a right of anticipatory self-defence but state practice, UN documents and decisions from the ICJ can all be evidence of practice and if there is *opinio juris*, the behaviour becomes customary international law.

The US promotes for pre-emptive and preventive self-defence much because of acts of terrorism and States regarded as 'rouge' possess nuclear weapons. Compared to anticipatory self-defence the 'Bush-doctrine' is wider and includes self-defence against general or specific armed attack that State believes will occur. In his graduation speech for the Military Academy in 2002, President Bush claimed that deterrence means nothing to terrorists and viewed his fear for 'unbalanced dictators' to deliver weapons of mass destruction to them. In the *National Security Strategy*, President Bush

confirmed that the US has maintained the option of pre-emptive actions against sufficient threats. Even if there is uncertainty to time and place of the attack, there are reasons for anticipatory action if there is a great threat. In 2003, the US alleged that Iraq possessed weapons of mass destruction and invaded. Since Iraq invaded Kuwait, the SC had adopted several resolutions, but none of them gave the explicit go ahead of invasion in 2003. President Bush interpreted Resolution 1441 to give authority to move without any second resolution and must have been affected of the horrible attacks on 9/11 and determined to 'deal with the threats before they hurt the American people again'. The problem is the invasion of Iraq was an act in self-defence against the alleged weapons of mass destruction, but the weapons were not found. The US had no right to continue their 'self-defence' since the SC had already taken necessary measures. Article 51 gives a right to self-defence until the SC has taken action, which they did through Resolutions 660, 661 and 665 right after Iraq invaded Kuwait. This cannot be justified even in the widest 'Bush-doctrine' and absolutely not legal according to Article 51. The invasion can neither be considered as part of customary international law since there is no comprehensive support for the action.

Another powerful State who has tried acts in self-defence against a threat of armed attack is Israel. The outbreak of the Six-Days War were the sum of different situations leading to Israel feeling an imminent threat since the Arab countries had an intention to destruct Israel. Israel had declared that a blockade of the Gulf of Aqaba would be regarded as an act of war, but the blockade did not reach the threshold of an armed attack. The situations leading Israel to take action against the Arab countries were acts of aggression, not reaching the threshold of an armed attack that gives the right of self-defence. Had the Arab forces mounted a substantial armed attack, there would be no question about Israel's right to self-defence, but then the question of proportionality would rise. No matter of the status of the *Caroline* Case in customary international law the criterions declared by Webster are well established in customary international law and is dependent on circumstances in each specific situation.

When Israel attacked the Iraqi nuclear reactor in 1981 they tried to justify it as an act of anticipatory self-defence, alleged the threat of the nuclear reactor as imminent and interpreted Article 51 in an extensive way, allowing self-defence even when not exposed to an armed attack. The mere possession of nuclear weapons is not illegal, but the threat of use is illegal if the use is illegal as stated in the Nuclear Weapons Case.

If the nuclear reactor would have been intended for other than peaceful use and not complied to the Treaty of Non-Proliferation of Nuclear Weapons or IAEA's safeguards, the UN would have noticed and taken action. It was intended for peaceful use and neither necessity nor immediacy was at the hand. What indicates on the wrongfulness of the action taken by Israel is the condemnation by UN and the world at large. Nothing could have prevented Israel from going through the Security Council to address this issue. The UN considers it to be valid that the Security Council can take preventive action when it deems there is a threat to international peace and security.

The above mentioned actions taken in alleged self-defence is in contrary of the UN that embrace to existence of a mere threat is not enough to make an armed attack legitimate. In the report of the Secretary General's High Level Panel, the panel support anticipatory self-defence if authorized by the SC. There is nothing that indicates that the UN would consider it to be legal of States to take anticipatory action on their own device. It requires an imminent threat and the action taken has to be proportionate to trigger the right of self-defence for States. Kofi Annan endorsed this point of view and interpreted Article 51 to fully cover imminent threats, which safeguards the inherent right of sovereign States to defend themselves against armed attack, but States can still not act anticipatory on their own device.

Prominent writers confirm the doubtfulness of anticipatory self-defence when the Security Council has not given authorization. The reluctance of States to expressive invoke anticipatory self-defence is a clear indication of the doubtful status of the legality of anticipatory self-defence as praxis. To rely on the *Caroline* Case as part of customary international law would be to ignore the actual development of State practice since there is a lack of *opinio juris* among States and it has not been general, constant and uniform over time. Even if anticipatory self-defence would be part of customary international law, Article 51 is *lex specialis* prevailing over it.

R. Higgins defend the use of anticipatory self-defence because we live in a nuclear age, but she does not reflect over the status of the *Caroline* Case in customary international law. She believes that Article 51 is ambiguous and does not provide for self-defence when there is a threat of force, but it cannot be interpreted in a way that requires States to sit and wait for an armed attack to launch before they can defend themselves. To Higgins, the *Caroline* Case is significant to the UN Charter and as long as the criterions of the Webster formula are met the risk for abuse is not overwhelming because the criterions are balanced.

Most writers do not conclude to the opinion of R. Higgins. They require a real armed attack to trigger the right of self-defence, but the Security Council can authorize anticipatory self-defence even if the armed attack is imminent. If States were the one to decide when it is legal to act anticipatory it would easily lead to abuse; once the attack has launched, the harm is already a fact. A gap appears between the legality and the legitimacy when force may be used. If a State act in self-defence against a threat of force or aggression that does not reach the threshold of armed attack, it is illegal if not viewed to the SC and given authorization. But it can still be legitimate in the eyes of the community who have the choice to condemn or omit to condemn it. M. Franck illuminated the gap between legality and legitimacy; to him it seems that the actual circumstances in each case are more important than the textual literalism in Article 51. He believes that States are willing to mitigate the judgement against a State who acted in anticipatory self-defence if it can prove of imminence and as long as the force used is proportionate. Kofi Annan's suggestion that the SC should adopt a resolution setting out the principles relating to when the Security Council would authorize the use of force or not was not dealt with at the World Summit in 2005, which is a defeat. It seems that States does not want to have it black on white, but prefer to judge each case upon the certain

circumstances. The present writer concludes to Kofi Annan, that a common global understanding of when the application of force is both legal and legitimate will strengthen the maintenance of international peace and security. If a State feels a threat of an imminent armed attack, they should turn to the SC and it is up to the SC to decide what measures to be taken. That decision should not lie in the hands of objective States. Anticipatory self-defence, performed on States own device if not authorized by the SC, is illegal according to Article 51 since it requires an armed attack. An armed attack is a graver form of aggression and is depending on the scope of it. Anticipatory self-defence is neither part of customary international law because there is no *opinio juris*, States are not convinced that the behaviour is the correct and binding upon them.

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