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Interceptive Self-Defence

When the Trigger Has Been Pulled

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1 Summary

In a world labouring under the perceived threats of rogue states, international terrorism and weapons of mass destruction, opinions are frequently uttered about the expansion of the right to take military action in order to eliminate these threats. The UN Charter prohibits the use of force by states with only two exceptions: authorization by the Security Council and self-defence. The great disagreement on the definition and delimitation of self-defence, codified in article 51 of the UN Charter has led to widely differing views on the subject.

On the one hand, there is the preventive self-defence doctrine as proposed by the United States of America, and on the other, a very literal approach that would require a state to remain a 'sitting duck', waiting for an attack to impact before attempting to respond. When faced with the massive destructive power of today's weapons, waiting is not an option.

Article 51 gives a state a right to use force to respond against an aggressive state "*if an armed attack occurs*". Interceptive self-defence stands for the interception of an armed attack before it impacts. It is legal, according to Professor Yoram Dinstein, because it is a response to an armed attack that is in progress, i.e. when the trigger has been pulled. It stands to reason that an armed attack has begun at some point before it impacts. The real question is when has an armed attack begun? Dinstein's asserts that when a state has "*committed itself to an armed attack in an ostensibly irrevocable way*" the target state has the right to resort to forceful measures to defend itself.

Examples of interceptive self-defence would be responding to a missile in flight or bombing a fleet en route towards its target. In theory, interceptive self-defence poses no objections but in practice, it seems there are some contradictions. An armed attack is clearly underway when a missile is in flight, but when a fleet is on the high seas, no matter its intentions, it would be to stretch the concept to claim that an armed attack had begun. Neither the aggressive state's intention, nor its preparatory steps taken, is decisive. If there is still time to settle the conflict peacefully, which is the purpose of the prohibition of force, an armed attack has not yet begun.

State practice shines little light on the subject. In some cases it seems states are ready to accept self-defence if the armed attack is imminent, but so far no armed attack has been found to be imminent. The answer to when an armed attack has begun lies in the combination of treaty law and customary law. Article 51 requires an armed attack, and customary international law in the form of the Caroline case, which is still applicable, can be used to determine when it has begun, i.e. when it is "*overwhelming, leaving no choice of means, and no moment for deliberation*". When waiting for the aggressor's next step would mean accepting the blow, regardless of it being the sinking of a ship or a nuclear explosion, an armed attack has begun.

Abbreviations

AJIL	American Journal of International Law
CHIJIIL	Chicago Journal of International Law
EJIL	European Journal of International Law
ICBM	Inter-continental ballistic missiles
ICJ	International Court of Justice
IHL	International Humanitarian Law
ILC	International Law Commission
MAD	Mutual Assured Destruction
RCADI	Recueil des Cours de l'Académie de Droit International
UK	United Kingdom
UN	United Nations
UNEF	United Nations' Emergency Force
USA	United States of America
WMD	Weapons of mass destruction

2 Introduction

*“It has taken almost a decade for us to comprehend the nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option. We cannot let our enemies strike first.”*¹

The quote is from a speech by the American president George W. Bush. Many feel that the world we live in today is an unsafe one. The technology for unleashing unthinkable destruction is no longer the privilege of the richest and smartest. Since the 9/11 bombings the debate on self-defence has been hotter than ever. The USA has decided to take on a foreign defence strategy that completely goes against regulations agreed upon by the UN and the vast majority of the world. It has been suggested that the problem is that the drafters of the UN Charter designed the system to win the last war, not the next.² This means that it is a regime developed to prevent large interstate conflicts. It envisioned that member states would place military force at the disposal of a UN armed force. However, no nation ever did, and fortunately interstate conflicts have been few the past 50 years. What threaten the world today are not interstate conflicts.

The argument that there is a right to stop a threat before it materializes, so called preventive self-defence, has risen because those that propose it perceive the world as changing and threatening to them. International terrorism, rogue states and the proliferation of nuclear weapons are the reasons invoked to justify this change. Many states, supported by writers, agree that these new threats require a change in the law, albeit not as drastic a change as suggested by the USA. For many it is important that the right to self-defence is wider than what a first look at the UN Charter would imply. Among those is Professor Yoram Dinstein. In his book *“War, Aggression and Self-Defence”*, he puts forward the concept of interceptive self-defence, an alternative to the controversial preventive, pre-emptive and anticipatory self-defence modes so popularly proposed. The reasons justifying it are the same as those listed by the American president, and the solution is to strike first. On top of policy consideration as to the realism of adopting a narrow or wide approach to self-defence, arguments focus on treaty interpretation and the position of customary international law.³ There are many that seek and suggest a definition, and delimitation, of self-defence but the opinions are countless and seldom cover all aspects. The problem surrounding self-defence is well described by Joyner:

¹ President Delivers State of the Union Address (29 January 2002).

² Yoo, J, *Using Force* (2004), p. 736

³ Gray, Christine, *International Law and the Use of Force* (2004), p. 98

“The safest conclusion on self-defence is that the precise parameters of the concept remain open to debate among legal commentators. A rather broad right of self-defence appears evident under preserved customary law, but that conclusion runs counter to the interpretation of article 51 by many governments since 1945. Clearly, policy arguments supporting broader interpretation of the right of self-defence reflect the views of powerful states who wish to preserve their freedom of action in a rapidly globalizing international society, particularly since international law is such an imperfect system. The majority of states with less military capability argue for a narrower right of self-defence, one that may be exercised only if an armed attack occurs against a state’s territory. Self-defence for them is an exceptional right to be used in exceptional circumstances, which can be defined in relatively objective terms by an armed attack against state territory.”⁴

Behind Joyner’s conclusion lies a worm’s nest of opinions and arguments. Somewhere in this mess is where interceptive self-defence belongs. It could be that it is simply another attempt at expanding article 51 and as such should be disregarded. It could also be that there is a valid point to be taken and that it should be considered legitimate.

2.1 Purpose and Delimitation

The purpose of this thesis is to determine the legal position of interceptive self-defence in international law. The main questions I will attempt to answer are:

- Is interceptive self-defence legal under article 51?
- Is interceptive self-defence legal under customary international law?
- When does an armed attack begin?

To achieve this I will examine what the law on self-defence consists off and try to make sense of arguments and opinions from writers and states. Weight will be on the interpretation of article 51 and especially the concept of armed attack. Customary international law and policy considerations are the primary concerns that writers’ arguments revolve around and it is mainly there I will try to find my answers. I prefer to cover as many aspects as possible instead of delving deeper into any particular one since the legal position of interceptive self-defence hinges on many different factors that together determine its place, whether it be among the anticipatory self-defences or in contemporary international law. My aim is at the same time to present my own solution to when self-defence becomes legitimate, i.e. the beginning of an armed attack. Even though a part of this thesis will be aimed at unravelling the before-mentioned worm’s nest that is self-defence,

⁴ Joyner, Christopher C, *International Law in the 21st Century* (2005), p. 172

interceptive self-defence is the focus of the thesis and if some part of the doctrine of self-defence does not contribute to its clarification, or the point in time when self-defence is activated, it will be briefly dealt with.

2.2 Methods and Materials

For me to find a place for interceptive self-defence its surroundings must be depicted and outlined. A large part of the thesis is descriptive. It is mainly from the work of others that I will find my answers. Several writers have over the years debated self-defence in articles and books and I will rely on the collective thoroughness of the thinkers on the subject.

The majority of material consists of books and articles, many by writers with very strong opinions on self-defence. I have become aware of a strong emotional involvement in the topic and have tried to stay objective as I have found myself in the middle of a raging battle.

2.3 Outline

Chapter 2 will summarize the history of self-defence up until the drafting of the UN Charter. Chapter 3 is a description of the text and criteria stipulated by article 51, and will be followed by a chapter introducing the doctrine of interceptive self-defence. The chapter on interceptive self-defence identifies most of the problems that the remainder of the thesis will try to answer.

The following three chapters will then dig into state practice, interpretation of armed attack and customary international law, in that order. The chapter dealing specifically with armed attack would logically come after the more general chapters but an analysis of the concept of armed attack will be done before the chapter on customary law because the later chapter contains several references to armed attack. A thorough description of said concept before this description will facilitate the understanding of the argument of wider customary self-defence.

The chapter on customary international law covers the important Caroline case as well as various writers arguments for and against a wider parallel right to self-defence existing in customary law. Before reaching a conclusion, a chapter addressing the new threats so strongly put forward as the reasons why article 51 and the traditional approach to self-defence is insufficient today.

3 The History of Self-Defence

*“War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”*⁵

This quote was uttered at the Nuremberg trial over fifty years ago and is a matter of course for us today. The strife of the United Nations, and most of the civilised world, has since been to extinguish war completely. Strangely, the resort to violence to solve conflicts has not been looked upon as a last option until the beginning of the last century. War has been a part of human kind’s history as far back as we can remember. With the first large-scale societies, brought forth around 4000 B.C. by the invention of agriculture and domestication of animals in Egypt and Mesopotamia, what we would call war has plagued mankind.⁶ For thousands of years to come, the use of violence under the umbrella of ‘war’ has been something people have had to accept as a part of everyday life.

The first standing army along the lines of our modern military society/culture was created in Sumer, 2700 B.C.⁷ Societies would go to war for the slightest reasons. Differences in culture and ways of thought, access to trade and resources, for territorial gain, honour, greed, prestige and grandeur. Throughout history, civilizations all over the world have tried to make up rules for engaging in war. In China, between 722-481 B.C. war could only exist between equal states, not between states and dependents or barbarians, and in ancient Greece the practice was not go to war unless there was a cause.⁸

3.1 Just War Period

The earliest, more serious, attempts, to put restrictions on the right to go to war, dates back to about 330 B.C. and is the start of what is called the Just War Period.⁹ At the beginning of the Just War period Aristotle (384-322 B.C.) in Greece, and Cicero (106-43 B.C.) later in Rome, identified morally just causes for starting a war. If a state was wronged by another state, the

⁵ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, 41 AJIL (1947), Number 1, p. 186

⁶ Almond, Harry H Jr. & Burger, James A, *The History and Future of Warfare* (1999), p. 3

⁷ *Ibid.* p. 4

⁸ Brownlie, *International Law and the Use of Force Between States* (1963), p. 3

⁹ Arend & Beck, *International Law and the Use of Force* (1993), p. 11

wronged state had a right to respond with forceful measures. Self-defence was one such legitimate reason to go to war.¹⁰

St Thomas of Aquinas (160-254 A.D.) continued on this line of thought and set up conditions for waging a just war that were widely accepted in medieval times.¹¹ Although these conditions, in theory, were only morally binding, in practice they were lawfully binding. Christian thinkers during this period believed that God's eternal law ruled and only through reason could humankind understand part of that law.¹² Therefore, just war theory was part of God's law, as far as man could understand it.

Hugo Grotius (1583-1645) refined the Just War doctrine and he is generally recognized as the founder of modern public international law.¹³ Without a just cause, a war would be unlawful. The defending of life or property was one such just cause that would allow the starting of a war.¹⁴ He even allowed anticipatory self-defence, if the danger was immediate and imminent, in point of time.¹⁵

3.2 Positivist Period

In the 17th century, things changed. Catholicism waned, international trade increased, and the concepts of state and sovereignty evolved. Monarchs were no longer subservient to any higher law. Positivism developed and governments created their own laws. States now had a sovereign right to wage war. The only restriction left was the warmongers own sense of morals, and that the attack had to be preceded by a declaration of war. There was no objective criterion.

In the 19th century rules concerning what methods to use when fighting, 'jus in bellum', were developed, but for a while longer a state had the option of attacking another state when it saw fit.¹⁶ During this period, an incident in Canada, in 1837, called the Caroline incident, came to define the right to self-defence, and still resonates loudly in the doctrine of self-defence (see chapter 7.3).

¹⁰ Ibid. p. 12

¹¹ Ibid. p. 13

¹² Ibid. p14

¹³ Nergelius, *Rättsfilosofi, Samhälle och moral genom tiderna* (2001), p. 21.

¹⁴ Arend & Beck, *supra note 8*, p. 15

¹⁵ *ibid.* p15

¹⁶ Joyner, *supra note 4*, p. 163

3.3 The Kellogg-Briand Pact

During World War I, twice as many people were killed than in all wars from 1790 to 1913 combined.¹⁷ In 1919, the League of Nations was created with the aspiration that the horrific scenes of World War I would never be repeated. Unfortunately, it contained too many obvious gaps, one of those being an adequate regulation for the use of force short of war. Governments began to categorize uses of force to avoid entering into full-scale war when taking military action outside their borders. Such uses of force short of war were, among others, self-defence.¹⁸

The first attempt to outlaw war completely was the Kellogg-Briand pact in 1928. It condemned war as a solution to conflicts and called for peaceful settlements of disputes. It contained 63 member-states that managed to agree on a ban on war as a legally binding obligation. Self-defence was not mentioned in the pact but through diplomatic notes, the member states assured their right to use force in self-defence. Again, the world community failed to address force short of war and the agreement was far from a success. However, it did sow the seeds for what was to turn into a complete outlawing of force in the UN Charter.

3.4 The UN Charter

After two World Wars and the development of incredibly devastating war technology, it was time to finally outlaw force completely. In 1945 delegates from 49 states met in San Francisco to create a regulation of the behaviour of states, and especially concerning the use of force, in the drafting of the UN Charter. The most important provision is that of article 2(4), the prohibition of the use of force:

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

This provision outlaws all forms of interstate force. Even the threat of force is illegal. War, as well as force short of war, can only be legitimate in special circumstances. States can resort to force in three ways: when the United Nations authorizes it; when it is done in self-defence; and illegally.¹⁹ When a state takes military action without the authorisation of the Security Council, or in the absence of an armed attack (see chapter 3.2), it does so against the obligations it has committed itself to in the UN Charter.

¹⁷ Arend & Beck, *supra* note 8, p. 19

¹⁸ Joyner, *supra* note 4, p. 163

¹⁹ Yoo, *supra* note 2, p. 738

Only the Security Council can authorize the use of force against a state, and only in cases where there is a threat to international peace and security. This first exception can be found in article 39 of the UN Charter, where the Security Council is empowered to take measures in accordance with articles 41 and 42 if there is a threat to international peace and security. Article 42 lets the Security Council decide whether the use of force is necessary.

The other exception to article 2(4), the right to use force in self-defence, is manifested in article 51. A state is permitted to take forceful action against another state if that first state has been the victim of an armed attack. Unfortunately, history provides several examples of abuse of article 51. On numerous occasions, states have indulged in the use of force across borders and justified it, often quite farfetched, with reference to self-defence.²⁰

In some of these cases, the dissension on the requirements of self-defence is striking. It has been made painfully obvious that there are issues that have to be settled if self-defence is not going to be an excuse for any state with a dominant military power to abuse for furthering its national interests internationally.

²⁰ AIV and CAVV, *Pre-Emptive Action* (2002), p. 17

4 UN Charter Article 51

This chapter will deal with the requirements stipulated by article 51. All states agree that there is more to self-defence than expressed in the Charter. The requirements of proportionality and necessity, which are derived from customary international law, are two criteria that are part of self-defence today but are not accounted for in the Charter. States, and writers, have widely different opinions on what the provisions in article 51 actually entail, and a description of the criteria set up by article 51 is necessary to understand the different opinions and interpretations.

In one of the proposals to the UN Charter a provision, forbidding states from taking enforcement action without the authorization of the Security Council, was suggested. From fear of permanent members using their veto to prevent states from acting in self-defence, members of the Pan-American Act of Chapultepec expressed their concern that they would be hindered to fulfil their obligations in that treaty and achieved the wording that article 51 now contains.²¹ Article 51 was added, not to define self-defence, according to many, but to clarify the position with regard to collective self-defence.²² All the same, article 51 is part of international law and plays a vital role in international armed conflicts. Article 51 stipulates:

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

Article 51 has to be read in conjunction with article 2(4) of the UN Charter, which is the absolute prohibition on the use of force.²³ Article 51 is an exception in that it allows a Member State to respond with force at the suffering of an armed attack. When a state takes recourse to force in self-defence, the State against which the force is used must have committed an unlawful act of force against the former. Opposing states cannot both be acting lawfully in a self-defence scenario.²⁴ One of the states is the aggressor and the other is the victim of an armed attack. In other words, for self-defence to be legal, one side must fulfil the criteria for an armed attack,

²¹ Bowett, Derek William, *Self-defence in International Law* (1958), p. 182-4

²² Waldock, C.H.M, *The regulation of the Use of Force by Individual States in International Law* (1952), p. 497

²³ Dinstein, Yoram, *War, Aggression, and Self-Defence* (2005), p. 177

²⁴ *ibid.* p. 178

and the other side must fulfil the criteria of a necessary and proportionate response.

The following will explain what inherent right, armed attack, collective self-defence and temporal right mean. Focus will be on armed attack since that is, as will soon be apparent, the crux of the matter. What actions that a state can take in self-defence will also be addressed.

4.1 Inherent Right

The passage “...*nothing in the present Charter shall impair the inherent right...of self-defense...*” has sparked some debate. It can be interpreted as referring to self-defence as a natural right. In the French text the words “*droit naturel*” confirm such notion.²⁵ However, such ideas belong to the past and Kelsen, for one, rejected this interpretation in 1950, suggesting that the answer to what the drafters meant by an inherent right should be established within the doctrine of positive international law.²⁶

The International Court of Justice (ICJ) presented a plausible solution in the Nicaragua case stating that the words referred back to self-defence in customary international law.²⁷ This way ICJ concluded that the drafters must have wanted to affirm and preserve the right to self-defence outside the UN Charter so that the exception of self-defence to the unlawfulness of using force against another state is available for non-Members equally.²⁸ It also means that there exists a right to self-defence in customary international law independent of article 51. Self-defence would therefore exist as treaty law and as customary international law. Whether or not they are identical is subject to much debate.

4.2 Armed Attack

All states agree that if a state suffers an armed attack, that state has a right to resort to force in self-defence.²⁹ Whether an armed attack is a necessary requirement is another issue and the source of a lot of discord. Armed attack is the most controversial aspect of article 51. Article 51 allows for the use of force “...*if an armed attack occurs...*”, and there is no further explanation to what that means in the UN Charter. The absence of a definition of armed attack results in that it is up to the states involved to determine what

²⁵ Chartre des Nations Unies, available at <http://www.un.org/french/aboutun/charte/txt.html> (last accessed 30/10 2007)

²⁶ Kelsen, Hans, *Principles of International Law*, pp. 791-92

²⁷ Nicaragua Case (Merits) Nicaragua v United States (1986) ICJ Rep at p. 14, p. 94

²⁸ Dinstein, *supra note* 23, pp. 181-2

²⁹ Gray, *supra note* 3, p. 108

constitutes an armed attack.³⁰ An armed attack is not the same as aggression, but it is a type of aggression, an armed aggression.³¹ Aggression covers much more than armed attacks whereas an armed attack will always be an act of aggression. The concept of armed attack can be divided in 5 parts: the actors, i.e. who is the aggressor and who is the victim; what acts that constitutes an armed attack; when it is an armed attack; and where an armed attack can occur or originate from.

4.2.1 The Aggressor

The drafters of the Charter clearly had interstate conflicts in mind when they created article 51, but whereas the provision clearly states that the victim of an armed attack needs to be a state, the perpetrator can be a non-state actor.³² Simply because the attack originated from the territory of a state does not automatically mean that that state is responsible for the attack. Only in certain circumstances is the state responsible for non-state actors (see ILC Draft Articles on State Responsibility, articles 4-11).

ICJ in the Nicaragua case stated, and referred to article 3(g) of the Definition of Aggression, that the sending of armed bands, whether regulars or irregulars, could constitute an armed attack.³³ At the same time, they ruled out the supply of arms as amounting to an armed attack. If the support of arms is to terrorists, however, the terrorist's actions can be attributed to the state supporting them, which can give rise to the right of self-defence and that state can in turn become responsible for an armed attack.³⁴ Even the harbouring of terrorists within state borders can confer responsibility on the state.³⁵ The attack has to have an external element otherwise it is an internal armed conflict and article 51 is not applicable.³⁶

4.2.2 The Victim

Targets of armed attacks are normally the territory of a state, persons, property or military units of that state.³⁷ According to Dinstein, under certain conditions attacking public installations belonging to one state located in another can be an armed attack.³⁸ Whether or not an attack on nationals abroad constitutes an armed attack is a more difficult issue. In Dinstein's opinion if the person is a diplomat the state has a right to self-

³⁰ Alexandrov, Stanimir A, *Self-Defence Against the Use of Force in International Law* (1996), p. 98

³¹ Dinstein, *supra note 23*, p. 184

³² Dinstein, *supra note 23*, p. 204

³³ Nicaragua case, *supra note 27*, p. 103

³⁴ Dinstein, *supra note 23*, p. 203

³⁵ *ibid.* p. 206; Security Council Resolution 1368 (2001)

³⁶ Dinstein, *supra note 23*, pp. 204-5

³⁷ *ibid.* p. 199

³⁸ *ibid.*

defence, but if he is holding an official position, the answer is not as clear.³⁹ Some writers believe that protecting nationals abroad would be equivalent to protecting the state but several writers disagree.⁴⁰ It is primarily the territory of the state that is referred to but in individual cases the target can consist of something else.

4.2.3 The Attack

States and writers generally agree on what kind of action amounts to an armed attack.⁴¹ Not all uses of force are included. Acts, containing elements of force, such as opening another states diplomatic bag, or unlawfully detaining a foreign ship, are interferences that will not justify self-defence.⁴² The force used must lead to territorial violation, human loss or considerable property damage to amount to an armed attack.⁴³ Economic aggression or cultural imperialism is not considered armed attack, as they simply do not amount to force in the meaning of the Charter.⁴⁴ Brownlie is of the opinion that activities that do not affect the territory, airspace and waters included, do not justify counter-force.⁴⁵ According to Cassese only massive armed aggression against the territorial integrity and political independence of a state that imperils its life or government amounts to armed attack.⁴⁶

In the Nicaragua case the court stated that sending armed bands into another states territory may amount to an armed attack, as an indirect armed attack.⁴⁷

The weapons a state uses are of little importance. In the Legality of the Threat or Use of Nuclear Weapons, the ICJ found that article 51 does not differentiate between weapons.⁴⁸ An armed attack is an armed attack regardless of weapons used; it is the consequences that matter. It seems agreed that what is required is a certain degree of severity for an attack to legitimise self-defence, any violent transgression will not be sufficient.

4.2.4 When

If read literally article 51 requires a state to suffer an armed attack before having the right to use counter-force legitimately in self-defence. The French text uses a wording that translates: “a state can be the object of an

³⁹ *ibid.* p. 200

⁴⁰ *ibid.*

⁴¹ Nicaragua case, *supra* note 27, pp. 103-4

⁴² Dinstein, *supra* note 23, p193, Brownlie, Ian, *International Law and the Use of Force by States* (1963), p. 365

⁴³ Dinstein, *supra* note 23, p. 193

⁴⁴ Joyner, *supra* note 4, p. 166

⁴⁵ Brownlie, *supra* note 42, p. 367

⁴⁶ Cassese, Antonio, *International Law* (2005), p. 354

⁴⁷ Nicaragua case, *supra* note 27, p. 103

⁴⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, p. 244

attack before the attack occurs”. The Spanish text is, however, closer to the English.⁴⁹

It is important to ascertain exactly when an armed attack begins because it is from that moment the right to launch counter-force arises. It is also at this moment the identification of aggressor and victim takes place.⁵⁰ Since there are obvious differences in a land invasion and a missile attack the starting point will vary between modes of attack.

In determining which state was responsible for the initiation of force, some suggest the ‘first shot’-approach, also called the ‘priority principle’, and can be found in the General Assembly’s Definition of Aggression, article 2.⁵¹ The first shot approach puts the burden of proof on the party that was first to use force. However, is not the crossing of another states border by soldiers clearly an armed attack although it may so happen that those soldiers are not the ones who actually open fire first?⁵² Brownlie suggests a somewhat less narrow approach in that a fleet entering a state’s territorial waters and aircrafts entering its airspace are armed attacks.⁵³ The question of when an armed attack has begun is an important issue to solve, as mentioned above, and there are many different approaches suggested.

4.2.5 Where

The typical case of an armed attack is that of a cross-border invasion. It is the primary case of aggression listed in article 3(a) of the General Assembly’s Definition of Aggression. The aggressor crosses the victim state’s borders by military means. However, the armed attack can originate from within the victim state’s territory. If for example military units of the aggressor state are stationed within the victim states borders, with permission, and attacks in violation of that permission, it is clearly an armed attack.⁵⁴

An armed attack can originate from the territory of the victim state, the aggressor state, a third country or the high seas. It is of little consequence from where it comes, as long as the responsible state can be identified. It can be aimed at the victim state’s territory, and according to some, nationals abroad, installations abroad or even satellites in space.⁵⁵

⁴⁹ Malanczuk, Peter, *Akehurst’s Modern Introduction to International Law* (1997), p. 311

⁵⁰ Dinstein, *supra note 23*, pp. 187-8

⁵¹ *ibid.* pp. 188-9; Brownlie, *supra note 42*, p. 367

⁵² for more examples Dinstein, *supra note 23*, p. 189

⁵³ Brownlie, *supra note 42*, p. 367

⁵⁴ Dinstein, *supra note 23*, p. 196

⁵⁵ *ibid.* pp. 196-7

4.3 Acts in Self-Defence

It does not matter what the scale of the force used as a response amounts to, as long as it is proportional to the attack suffered (see chapter 7.3). Whether it is an immediate response by a military unit patrolling the borders or it is the launching of inter-continental ballistic missiles, article 51 is applicable equally.⁵⁶ Proportionality is the key issue when determining how to respond forcefully to an armed attack.

Dinstein calls the situation where the response to an armed attack is at a later time and different place than the armed attack that instigated the situation an armed defensive reprisal.⁵⁷ It is a measure all five of the permanent members of the Security Council have taken at some time and it is controversial.⁵⁸ Although these reprisals do not seek only to end or neutralise the armed attack they have been allowed. This is because they are future-oriented; they are aimed at stopping a threat that did not end with the armed attack suffered. If the reprisal is motivated by the urge to punish, it is illegal. Defensive armed reprisals are still subject to the requirements of proportionality, necessity and immediacy.⁵⁹

Prima facie, no type of weapon is ruled out as a means of carrying out a legitimate self-defence. Even in *the Legality of the Threat or Use of Nuclear Weapons*, no definite outlawing of the use of nuclear weapons in self-defence could be concluded.⁶⁰ In the extreme situation of self-defence, where the survival of the state is at stake, the use of nuclear weapons in self-defence could constitute a lawful resort to force in self-defence.

4.4 Collective Self-Defence

What is meant by individual self-defence is easy to grasp. One state is attacked by another state and replies with force. Collective self-defence, on the other hand, can be performed by several states responding to attacks they have all suffered individually or it can be several states responding, jointly, to an attack suffered by one state alone.⁶¹ It is basically one, or more, states helping another state. The term collective self-defence can be misleading if read literally but what is actually meant by it is unambiguous. ICJ confirmed in the Nicaragua case that the right to collective self-defence is established in both article 51 and customary international law.⁶²

⁵⁶ *ibid.* p. 220

⁵⁷ *ibid.* p. 222

⁵⁸ *ibid.* pp. 228-9

⁵⁹ *ibid.* p. 224

⁶⁰ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 48, p. 244

⁶¹ Dinstein, *supra* note 23, pp. 253-4

⁶² *ibid.* p. 256; Nicaragua case, *supra* note 27, pp. 102-4

4.5 The Security Council

The right to self-defence is a temporal right. This means that a state can only carry out its self-defence until the Security Council has taken measures necessary to “*maintain international peace and security*”. In the first instance, the state determines by itself whether self-defence is justified or not.⁶³ After that, it is the responsibility of the international community as a whole to ensure that the right to use self-defence has not been abused. The state claiming self-defence decides whether to use force or not but the propriety of the decision is determined by the Security Council.⁶⁴ In other words, a state acts in self-defence at its own risk.

If the Security Council fails to take “*measures necessary to maintain international peace and security*”, the right to self-defence continues and the state exercising its right to employ counter-force can continue doing so. Not just any step taken by the Security Council will end the right to self-defence though. According to Dinstein, the resolution taken must be of the legally binding character.⁶⁵ Even so, it is not clear who decides when the measures taken by the Security Council can be deemed to have resolved the situation. There is also a duty to report to the Security Council immediately when taking action in self-defence. This has seldom been made by states and it is not a requirement that will render the self-defence unlawful if ignored.⁶⁶

4.6 Conclusion

Both states and non-state actors, e.g. terrorists, can be the aggressor, and the typical victim is property, or population of the victim state. There is no disagreement on the legal consequences of attacking within the victim state’s territory, but whether or not self-defence is legitimate when the target is outside a state’s territory is not clear. As for the force used it seems that it requires a certain degree of violence from the aggressor to legitimize self-defence. It takes serious damage or violation to activate article 51. If it does not amount to an armed attack the rules on state responsibility are applicable and a whole other set of provisions regulate what counter-measures the victim has to resort to.

One of the most important questions is to determine at what time the armed attack starts. Naturally, it will vary in practice depending on the mode of attack, but to establish an objective test for when a state becomes an aggressor is of the utmost importance. It is of little consequence from where the attack originates as long as the attacker can be identified as another state or a non-state actor supported by another state. The response to an armed attack does not have to match it, in terms of means used. Proportionality and

⁶³ Green, Leslie C. *Essays on the Modern Law of War* (1999), p. 123

⁶⁴ Waldock, C.H.M, *supra note 22*, p. 495

⁶⁵ Dinstein, *supra note 23*, p. 211

⁶⁶ *ibid.* pp. 217-18

necessity limit what a state can do in return. That means that even nuclear weapons can be used legitimately. The right to self-defence ends when the Security Council take over. It is not clear what action is required by the Security Council but hopefully it becomes apparent in each individual case.

Article 51 leaves its readers with many questions. Unfortunately it has been drafted in such an open manner that interpretations vary from the seemingly absurd conclusions that, on the one hand, a state actually has to suffer damage before responding, and on the other, that article 51 only serves as a reminder that self-defence is still an inherent right of every state and an armed attack is only one of many scenarios that will activate the right to self-defence. The former interpretation would have a state standing by as missiles rained in over its territory, possibly rendering it incapable of ever recovering, before responding. That cannot possibly have been the intention of the drafters. Their hopes were of course that the UN would have its own military capabilities to handle heated conflicts. But even if such were today's reality, the UN would not be able to handle every situation where conflicts quickly escalate into violence. That is where article 51 comes in. It is obvious that its purpose was to ensure states of the right to hold back an aggressor while the UN mobilized a solution, and at the same time, to restrict military superiors from abusing their position and opportunists from abusing a precarious situation. The problem remains of where the line for legal armed response is drawn.

Many concepts need a definition that states can agree upon. Maybe the drafters intentionally left the provision flexible, foreseeing changing circumstances in the world of warfare. Maybe they even realised the schism it would create but figured that, even though there would be extremes, the world community would settle on a sensible middle-way. It all results in a constant struggle among states and writers, each pulling the doctrine in a different direction for unknown purposes.

Article 51 thus leaves numerous issues to be further resolved. For the last thirty years or so, the proponents of anticipatory self-defence have claimed that the world has changed so as to justify a move away from the wording of article 51 towards a wider right of self-defence. To determine the legal status of interceptive self-defence the first thing to do is compare it with the requirements of article 51. Since self-defence exists in customary international law parallel to article 51 a look at state practice and *opinio juris* will follow the chapter on interceptive self-defence.

5 Interceptive Self-Defence

This chapter will explain the concept of interceptive self-defence as described by Professor Yoram Dinstein. It has come into existence because of the new challenges that face the international community with regards to international violence. The justification for it is that in a world with intercontinental ballistic missiles (ICBM's) and weapons of mass destruction (WMD) the need to strike first when faced with threats that can annihilate an entire state becomes essential for that state's survival. This is what several authors refer to as a right not to be a sitting duck, a right to strike before struck. The problem is that if the state that feels threatened strikes too early it is in breach of article 2(4) of the UN Charter and thus becomes the aggressor. What Dinstein suggests is to nip the attack in the bud so that the state, although striking first, is still acting in self-defence to an armed attack.

5.1 When the Trigger Has Heen Pulled

Interceptive self-defence is not the same as anticipatory self-defence. The difference consists, according to Dinstein, in that anticipatory self-defence is a response in anticipation of an armed attack that is foreseeable, whereas interceptive self-defence “*counters an armed attack which is in progress, even if still is incipient; the blow is “imminent” and practically “unavoidable”*”.⁶⁷ This way the action taken will be consistent with article 51 and customary international law. By making a wide interpretation of armed attack there is no need to look for justification in customary international law. The attempt to make a wider interpretation of armed attack finds support with other writers (see chapter 7.4).⁶⁸

Dinstein uses a gun analogy to describe what he means. Once the trigger has been pulled the armed attack has begun, and the requirements of article 51 have been fulfilled. The impact of the bullet is merely a technicality and should not be a requirement for resorting to force in self-defence. In other words, once the aggressor has “*committed itself to an armed attack in an ostensibly irrevocable way*” a state can take forceful action against that state within the boundaries set by the UN Charter.⁶⁹

Dinstein is of course careful to explain that it has to be apparent that the other side has committed to an armed attack before interceptive self-defence becomes an alternative.⁷⁰ Just as in the case of anticipatory self-defence, information has to be acquired and carefully analysed before striking and claiming self-defence.

⁶⁷ *ibid.* p. 191

⁶⁸ Dixon, Martin, *Textbook on International Law* (1996), pp. 163-164

⁶⁹ Dinstein, *supra* note 23, p. 191

⁷⁰ Dinstein, *supra* note 23, p. 192

5.2 Pearl Harbour

By breaking down the attack by the Japanese on Pearl Harbour in 1941 into three different scenarios, Dinstein illustrates how interceptive self-defence works. The examples are based on the Americans having convincing information about the Japanese's plans.

If the Americans were to shoot down the Japanese bombers after they had left their carrier, but before the bombs fell, it would have been a case of legal interceptive self-defence.

If the Americans were to sink the Japanese fleet after it had left its port, but before the launch of the bombers, it would have been a case of legal interceptive self-defence.

If the Americans were to destroy the Japanese fleet before it had left for Pearl Harbour it would not have been a legal interception.

The first example is a typical case of interceptive self-defence, whether legal or not. The second example is perhaps closer to anticipatory self-defence (classical response to an imminent armed attack) than interceptive self-defence. And the third scenario is an act of preventive self-defence. The notion of interceptive self-defence hinges on that if state A has made up its mind that he is going to attack state B; is acting accordingly; and state B is convinced that the attack is coming, state B may strike first to prevent that attack from dealing damage.

One scenario can be added for the sake of clarifying the different modes of self-defence. If the Americans were to shoot down the Japanese bombers after the bombs had impacted it would have been a legal act of self-defence. This would be the only legal self-defence for those reading article 51 in the most restrictive way.

Interceptive self-defence works best when applied to the threat of an enemy in possession of missiles. Many would agree that a response when a rocket is in flight would not be unreasonable. Another good example is that of a fighter 'locking on' to its target. At that point, interceptive self-defence is legitimate. Dinstein probably wanted to show by the Pearl Harbour example that interceptive self-defence will work whatever weapons a state has to face. But how would it work in relation to rogue states in possession of WMD or against state sponsored terrorism?

5.3 Against New Threats

Imagining a scenario of a state in possession or producing weapons of mass destruction the following four scenarios would give different results. The

examples are based on the condition that the state has sufficient knowledge of the rogue states' hostile intent towards it.

If the state were to respond to an ICBM impacting on the state territory it would be legal self-defence.

If a state were to respond to an ICBM in flight towards the state territory it would be a case of legal interceptive self-defence.

If a state were to respond to a state preparing the launch of ICBM's it would be anticipatory self-defence.

If a state were to respond to a state producing ICBM's it would be preventive self-defence.

When faced with a missile attack interceptive self-defence makes most sense. Then it is easy to see what Dinstein is trying to convey. Other factors, such as the nature of the force used in self-defence and the potential damage of the armed attack, are of course still essential to consider before the actions taken in self-defence can be regarded as legal. When set against land invasion or terrorist attacks it is no longer easy to see how interceptive self-defence works since there is such a short period of time between the beginning of the attack and the impact of it.

If a person were to detonate a bomb in a building within state A's territory the scenarios could look something like the following. The scenarios are based on the condition that state A knows of a connection between this person and state B, and of state B's hostile intent towards state A.

If state A were to respond with force against state B after the explosion it would be self-defence according to all positions.

If state A were to respond with force against state B after capturing the person delivering the bomb it would be interceptive self-defence.

If state A were to respond with force against state B after capturing the person entering the country it would be anticipatory self-defence.

If state A were to respond with force against state B for allowing a terrorist group to function in its territory it would be preventive self-defence.

There is no question about the legality of resorting to self-defence in the first scenario if, on top of the occurrence of an armed attack, the other criteria for legal self-defence have been fulfilled. An armed attack has occurred and the right to respond with force is apparent. In the second case, there is obviously a crime being committed but is it sufficient to say that an armed attack has occurred? The third and fourth scenario will not activate self-defence. In many cases, interceptive self-defence in practice becomes very similar to anticipatory self-defence.

5.4 Conclusion

Dinstein claims that interceptive self-defence can be reconciled with article 51 because the responsive force used comes after an armed attack has commenced. In his interpretation, the armed attack begins when the aggressor state has decided on a course of action and has taken sufficient steps to make the action irrevocable. But what exactly amounts to sufficient steps? And how does one determine when an act is irrevocable in an objective way? In Dinstein's words, the blow has to be imminent and 'practically unavoidable'. It goes without saying that the standard of reliable intelligence has to be very high.

Unfortunately, article 51 does not specify at what point an armed attack begins as this would require too lengthy an exposition, and future development of warfare would almost certainly render that definition obsolete. Thus, article 51 does not answer the question of when an armed attack has begun which is an important question to be answered.

It is worth mentioning that Dinstein is not alone in this line of thought. Writers have shown support for interceptive self-defence, even those not in favour of anticipatory self-defence. Alexandrov finds that an armed attack that has been mounted but has not yet passed the frontier will be sufficient for self-defence, if a state has 'pulled the trigger', meaning that there is no possibility the aggressor will change its mind.⁷¹ Therefore, an armed response will be legitimate.

Interceptive self-defence raises a number of questions. The customary law requirements of proportionality and necessity still restrict the recourse to force. How will interceptive self-defence fulfil these requirements? If the attack has not yet impacted how will the state defending itself know what measures will be proportionate? Dinstein uses the terms imminent and practically unavoidable. Proponents of pre-emptive self-defence also use this rhetoric. Is interceptive self-defence perhaps closer to anticipatory self-defence than it is to article 51? And what exactly does imminent mean?

The justification for interpreting armed attack wider is that modern technology and new threats to peace and security require it. Is interceptive self-defence applicable to all kinds of threats or is it just against certain threats? What are these threats that require a wider right to self-defence? Is interceptive self-defence just another way for states to achieve the freedom of action they seek, another way of formulating anticipatory self-defence, or is it actually valid under article 51? These are the issues that will be addressed in the following and to reach answers the starting point will be state practice.

⁷¹ Alexandrov, *supra note* 30, p. 164

6 State Practice

Although the rules are relatively clear and simple as such they have never effectively restrained states from using force against other states. The USA has, since the end of World War II, been involved in violent conflicts in Korea, Cuba, the Dominican Republic, Vietnam, Grenada, Panama, Libya, the Sudan, Lebanon, the Persian Gulf, Yugoslavia, Afghanistan and Iraq.⁷² The UN only authorized action in Korea, and most of the other interventions could not be justified by self-defence.

The following cases are cases that are used in discussions concerning anticipatory self-defence. Since interceptive self-defence is a new term and never discussed as such in a case, anticipatory self-defence will be used as reference. From the discussions surrounding anticipatory self-defence hopefully arguments can be found to highlight states' view of the requirements proposed by Dinstein in interceptive self-defence. In many ways they are alike. They are both similar ways to extend self-defence from a restrictive reading of article 51.

States rarely refer to the doctrine of anticipatory self-defence. They prefer to make a wide interpretation of armed attack. The biggest proponents of anticipatory self-defence are the writers, not the states themselves.⁷³ In 1980, seven states (Mexico, Romania, Iraq, Mongolia, Trinidad and Tobago, Poland and Yugoslavia) expressed in the General Assembly that article 51 only warrants action when an armed attack is under way, and the majority of states agree.⁷⁴ But the importance of the states supporting a wider view of self-defence is of such magnitude that it must be taken seriously.

When analysing this aspect of self-defence there are five incidents of special interest: the 1962 Cuban missile crisis; the Six Day War of 1967; the 1981 bombing of the Osirak reactor; the recent invasion of Afghanistan in 2001; and Operation Enduring Freedom in Iraq in 2003.

6.1 1962 The Cuban Missile Crisis

In October 1962, the USA discovered that their 'archenemy' at the time, the Soviet Union, was shipping nuclear missiles to Cuba and therefore announced that all ships going to Cuba were to be searched. This blockade would not allow any ships carrying nuclear weapons to pass. A naval blockade is a violation of article 2(4) and an act of aggression. The USA claimed that the deployment of Soviet nuclear weapons was an imminent threat to US security, considering the geographical proximity of Cuba, as

⁷² Yoo, *supra note 2*, p. 741

⁷³ Gray, *supra note 3*, p. 130

⁷⁴ Cassese, Antonio, *International Law* (2005), p. 360

well as a threat to international peace and security. The US named their response ‘quarantine’ in an attempt to avoid the branding of their action as unlawful use of force. No ships were actually seized since no ships tried to run the blockade.⁷⁵

Cuba considered the actions taken by the USA as constituting an act of aggression. The Soviet Union went so far as to claim that the deployment of nuclear weapons in Cuba was necessary for the self-defence of Cuba since the USA had threatened and provoked Cuba throughout its existence.⁷⁶ The installation of nuclear weapons in Cuba was, according to the Soviet Union, for defensive purposes only.

In the discussions that followed the positions taken by states could be sorted in Cold War alliances.⁷⁷ Chile, Nationalist China, France, Ireland, The UK and Venezuela expressed support for the quarantine, and supporting the Soviet view were Ghana, Romania and the United Arab Republic.⁷⁸ But not even those in support of the USA’s actions could find the existence of an armed attack or even a threat thereof.⁷⁹ There was no indication that the Soviet Union had any intention of using the weaponry in the near future.⁸⁰

The discussions contained no specific rejection of the concept of anticipatory self-defence.⁸¹ Much of the debate concerned the nature of the purpose of the missiles. If they were for defensive purposes, the USA would have no support for claiming to act in self-defence. There would be no imminent threat of an armed attack. Many interpreted the reluctance of the USA to invoke self-defence as an acknowledgement of the limits set by article 51.⁸² The mere deployment of nuclear weapons cannot justify self-defence for it would be a too broad interpretation of article 51 and would increase the risk of armed conflict dramatically.⁸³

It was also stated that nuclear weapons had changed the perception of what is to be considered a threat to the peace, and, at the time of the incident, particularly when it came to tilting the balance of power.⁸⁴ In this case, however, the result of the deployment of the missiles would have been a levelling of the balance, since the balance was very much in favour of the USA.⁸⁵ The USA argued for an expansion of the right to self-defence because of the severe consequences new technology, like nuclear weapons,

⁷⁵ Franck, Thomas D, *Recourse to Force: State Action against Threats and Armed Attacks* (2006), p. 99

⁷⁶ Alexandrov, *supra note 30*, p. 156

⁷⁷ *ibid.* p. 156

⁷⁸ Arend & Beck, *International Law and the Use of Force* (1993), p. 75

⁷⁹ Alexandrov, *supra note 30*, p. 159

⁸⁰ Yoo, *supra note 2*, p. 763

⁸¹ Arend & Beck, *supra note 79*, p. 75

⁸² Alexandrov, *supra note 30*, p. 156

⁸³ *ibid.* p. 156

⁸⁴ *ibid.* p. 157

⁸⁵ *ibid.* p. 159

can have.⁸⁶ Nothing conclusive was reached concerning the nature of self-defence.

6.2 1967 The Six Day War

In May 1967, Israel expressed concern to the Security Council that Egypt was planning to initiate aggression against Israel. Massive troop concentration and threats of President Nasser to interfere with shipping in the Straits of Tiran were the basis of this concern. Soon after, Egypt demanded that the United Nations' Emergency Force (UNEF) should be removed from the Sinai, where they had kept the peace between Israel and Egypt since the war of 1956. Israel interpreted the request of Egypt to the UN as a signal for revival of belligerence.⁸⁷ Now, being directly confronted with Egyptian forces, Israel was convinced that the Egyptians, together with the Syrians, and Iraqis, were about to attack Israel. Israel, faced with a force larger than ever assembled in the Sinai, therefore launched air strikes against Egypt on June 5, completely destroying the Egyptian air force, claiming they acted in self-defence.⁸⁸

Egypt, on the other hand, claimed that Israel was violating the principles of the UN Charter and the armistice agreements. Israel's build-up of armed forces near the Syrian border was interpreted by Egypt as an impending attack on Syria. For the purpose of defending 'the Arab nation', Egypt requested the withdrawal of the UNEF. Israel continued their military advance and occupied East Jerusalem, the Golan, the West Bank and Gaza, altogether four times Israel's size before the war. This is hard to justify by reference to self-defence.

The Security Council adopted resolution 242, putting blame on none of the parties involved, requiring the withdrawal of Israeli troops and the termination of all claims or states of belligerency.⁸⁹ Since the UN presence in the area had been removed, it was difficult for the Security Council to determine who had initiated hostilities. Some states saw Israel's first strike as clear proof that Israel was the aggressor.⁹⁰ No conclusion on the permissibility of anticipatory self-defence can be deducted from the case. Even the states in support of Israel's actions refrained from commenting the permissibility of anticipatory self-defence.⁹¹

⁸⁶ *ibid.* p. 157

⁸⁷ *ibid.* p. 153

⁸⁸ Eban, A (Israel), UN Security Council Document S/PV.1348 (6 June 1967)

⁸⁹ Security Council Resolution 242 (XXII) of November 22, 1967

⁹⁰ Morocco, *supra note*, p. 122; Syria and the Soviet Union, UN Security Council Resolution Document S/PV.1351 (8 June 1967)

⁹¹ Arend & Beck, *supra note* 79, p. 77

6.3 1981 Israeli Airstrike Against Osirak

In one of the few cases involving an actual claim of anticipatory self-defence, Israel felt threatened by the Iraqi construction of nuclear facilities and decided to take action in force.⁹² In 1981, Israeli aircrafts bombed a nuclear reactor near Baghdad. Israel claimed they had bombed the Osirak nuclear reactor because they were convinced that Iraq was developing nuclear weapons to be used against the Israeli people within weeks. Israel based their conviction on the amount of uranium purchased by Iraq and on Iraq's aggressive stance towards Israel.⁹³ By bombing the reactor, Israel had removed the threat before it became imminent.

Israel's argument for anticipatory self-defence consisted in that with the advances of modern weaponry the scope of self-defence had broadened. Self-defence was legitimate to neutralise a surprise attack. Israel's argument could be construed as meaning that when nuclear weapons are involved the consequences of an attack can be total annihilation and therefore it is justified to stop the attack before it starts.⁹⁴ The same facts can, on the other hand, be used as an argument for not allowing anticipatory self-defence, since a mistake would have such grave consequences.

Iraq, supported by several states, claimed that in the absence of an armed attack there could be no legitimate self-defence. In discussing anticipatory self-defence many delegates were of the opinion that anticipatory self-defence had no place in the Charter (e.g. Mexico, Guyana, Syria, Egypt, Pakistan, Spain and Yugoslavia), where others would accept the use of force in response to an imminent threat along the lines of the Webster formula (e.g. Sierra Leone, the UK, Malaysia, Niger and Uganda).⁹⁵ There is obviously a decisive difference in whether the threat of harm is potential or imminent. The former is clearly not accepted, whereas the latter seems to have too many supporters to dismiss.⁹⁶

All members disagreed with Israel's reading of article 51 and supported a resolution condemning the actions taken by Israel.⁹⁷ Although Israel's idea of self-defence was unanimously rejected, no conclusion of what is allowed when faced with an imminent attack was reached.

6.4 2001 Invasion of Afghanistan

The terrorist attacks on the World Trade Center and the Pentagon were planned and executed by the al-Qaida terrorist organisation. Nineteen al-

⁹² Alexandrov, *supra note* 30, pp. 158-160

⁹³ Franck, *supra note* 75, p. 105

⁹⁴ Alexandrov, *supra note* 30, p. 162

⁹⁵ *ibid.* p. 161; Arend & Beck, *supra note* 79, p. 78

⁹⁶ Alexandrov, *supra note* 30, p. 165, Arend & Beck, *supra note* 79, p. 78

⁹⁷ Security Council Resolution 487 (June 19 1981)

Qaida terrorists hi-jacked four American commercial airplanes and crashed two of them into the twin towers of the World Trade Center; one in the Pentagon; and one unsuccessful attempt ended up in Shanksville, Pennsylvania. Over 3300 people were declared dead or missing by the US government.⁹⁸ Al-Qaida had been attacking US targets since 1993 but never on such a scale.

The USA demanded that the Taliban regime closed terrorist training camps in Afghanistan and opened the borders for inspections by the USA. Their demands were refused, and with the support of the UK and other states, Operation Enduring Freedom in Afghanistan commenced. Both the UK and the USA explained in letters to the Security Council that they were acting in self-defence.⁹⁹

The USA explained that the Taliban regime in Afghanistan supported the al-Qaida organisation and by allowing them freedom to operate within their territory, the Taliban regime played a central role in the attacks.¹⁰⁰ The UK stated that it was thanks to the support given by Afghanistan that al-Qaida was able to commit the atrocities.¹⁰¹ Exactly how much and what kind of support would be required to attack a state supporting a terrorist organisation is uncertain though. In both the USA letter to the Security Council, and the UK letter, the states refer to the armed attack as giving rise to the self-defence, but also claim a right to preventive actions.¹⁰² The Security Council condemned the attacks and passed resolution 1368, affirming the USA's right to self-defence against the terrorist attack. States all around the world supported the USA with unprecedented solidarity.

6.5 2003 Operation Iraqi Freedom

By linking the 9/11 attacks by the al-Qaida to Saddam Hussein, despite information to the contrary by both US and UK intelligence agencies, the USA extended the scope on their 'war on terrorism' to include Iraq. Legal actions taken in self-defence against the al-Qaida seem to have legitimised action against Iraq. In 2002, the Security Council believed that Iraq was continuing to develop WMD, and that they were concealing the endeavour. This was according to the Security Council a threat to international peace and security.¹⁰³

With justification found in resolution 1441, joined with resolutions 678 and 687, the USA, the UK, Australia and other countries took military action against Iraq in March 2002. They claimed that it was necessary because Iraq

⁹⁸ Alexander, Dean C & Alexander, Yonah, *Terrorism of Business: The impact of September 11*, (2001), p. xi-xii

⁹⁹ UN Security Council Document S/2001/946 (7 October, 2001)

¹⁰⁰ *ibid.*

¹⁰¹ Alexandrov, *supra note* 30, p. 166

¹⁰² UN Security Council Document S/2001/946 (7 October 2001),

¹⁰³ UN Security Council Resolution 1441 (8 November, 2002)

was developing nuclear weapons in breach of their obligations. Not all states relied on American intelligence and proposed continued weapons inspections by the UN. Very soon after the invasion, it became apparent that Iraq did not have any WMD, nor were they producing any.

Only the USA claimed to be acting in anticipatory self-defence.¹⁰⁴ The other states justified the intervention by referring to the Security Council resolutions. By changing the regime in a state that is considered dangerous and having ambitions of developing WMD a state can claim to be acting in preventive self-defence, although this would be a very wide interpretation.

Many states rejected the rhetoric used by the USA, and the attempt to extend the war on terrorism to stop certain states from developing WMD.¹⁰⁵ One of the justifications for invading Iraq was to protect the USA against the continuing threat posed by Iraq.¹⁰⁶ At the time, it was difficult to judge the probability of an attack. Even if Iraq would have had nuclear weapons, it lacked the capacity to reach the USA with them.¹⁰⁷

The other states taking part in the use of force against Iraq did not claim the action was taken in self-defence. They relied on authorization by the Security Council.¹⁰⁸ States opposing the action against Iraq expressly rejected the legality of anticipatory self-defence (e.g. Yemen, Malaysia, Vietnam, Iran and Lebanon).¹⁰⁹ According to many states there did not exist an imminent threat nor was the action necessary, especially since the nuclear inspections could find no evidence of weapons of mass destruction existing or being constructed.¹¹⁰ Although 45 states were willing to support the USA in its actions against Iraq, the all out support around the world that was shown after 9/11 did not help the USA this time. No state was willing to go along with the USA's idea of anticipatory self-defence in this case. Three permanent members of the Security Council claimed that it would be an illegal use of force to attack Iraq and justify it with self-defence.¹¹¹

6.6 Conclusion

Already in 1962, the USA claimed that new technology in warfare warranted a wider regime of self-defence. There was clearly no support for such notion but several states sympathized with their actions nevertheless. States also expressed condemnation of the situation but the entire case seems to be coloured by political agendas. The 1962 case showed that none

¹⁰⁴ Gray, Christine, *The use of force and the international legal order*, p. 609, in Evans, Malcolm D, *International law* (2003); UN Doc. S/PV. 4644, 8 November 2002, p. 3

¹⁰⁵ Gray, *supra note 3*, p. 181

¹⁰⁶ UN Security Council Document S/2003/351 (21 March, 2003)

¹⁰⁷ Yoo, *supra note 2*, p. 774

¹⁰⁸ UN Security Council Document S/2003/350 (21 March 2003)

¹⁰⁹ Security Council 4726th meeting, SC/7705 (26-27 March 2003)

¹¹⁰ Gray, *supra note 3*, p. 183

¹¹¹ Yoo, *supra note 2*, p. 791; Shaw, *supra note 124*, p.1087

outside the Soviet bloc relied on a strict interpretation of art 51. The West supported USA, and African and Asian states supported the neutral initiative of the Secretary-General.¹¹² Arend and Beck interpret the non-rejection of anticipatory self-defence as acquiescence to the existence of the concept. That the discussion revolved around the nature of the missiles, i.e. were they offensive or defensive, can be seen as an acceptance of the Webster formula.¹¹³

It seems that evidence, not principle, in the individual case determines the validity of the self-defence. Again, in 1967, states refrain from discussing anticipatory self-defence and instead support or reject the actions taken by Israel without further motivation. In this case, however, there seems to be a lot more understanding for Israel's exposed situation than there was for the USA in 1962. Should a small state such as Israel faced with several neighbours' manifested hatred (President Nasser even stated that if the situation escalated to war his object would be the complete annihilation of the Israeli state) and aggressive behaviour be expected to sit by and take a crippling blow before attempting to defend itself? In this case, the opinions went both ways.

The Six Day War is according to Dinstein an example of interceptive self-defence.¹¹⁴ Considering the steps taken by Egypt prior to Israel's attack, it was not far-fetched of Israel to assume that an armed attack was in the making. On the contrary, Dinstein seems convinced that, with the information available to Israel at the time, it was just a question of time before Egypt attacked Israel. If Israel's first strike, after assessing the situation in good faith, was a response to the steps taken by Egypt, Israel was acting in self-defence under article 51.¹¹⁵ Maybe this is part of the reason why the Security Council did not condemn Israel's actions, but merely ordered them to retreat. That, in reality, Egypt probably was not about to attack Israel is apparently of little consequence. It is the information available at the moment that matters.

In the Osirak case, the evidence in favour of Israel's claim of self-defence was insufficient. But with Iraq's invasion of Kuwait in 1990, it was clear that Iraq had developed WMD and had an aggressive nature. In hindsight, Israel's actions may not have been as rash as concluded in 1981. What was concluded was the illegality of anticipatory self-defence where there is no imminent attack. The requirement of an imminent attack was a minimum requirement in 1981 as it was in 1842, according to the Webster formula.

The attack on World Trade Center changed the world in many ways. Whether it did it for self-defence is still unclear. The world community would probably have supported anything the USA decided to do the weeks after the attack. In their letters to the Security Council both the USA and the

¹¹² Franck, *supra* note 75, p. 101

¹¹³ Arend & Beck, *supra* note 79, pp. 75-76

¹¹⁴ Dinstein, *supra* note 23, p. 192

¹¹⁵ *ibid.* p. 192

UK claim rights that contain preventive elements and they are not expressly rejected. The basis of self-defence is the armed attack that the USA has suffered and the target, Afghanistan has supported the non-state actors, the terrorists, thus making the state of Afghanistan the legitimate aggressor.

If states had shown their support for more than just the American people in 2001 it was gone in 2003. Hardly any state would agree that the invasion of Iraq was legitimate based on self-defence. If there is not even an imminent attack, there can be no question of self-defence. In the cases of 1962, 1981 and 2003 states rejected the legality of the actions taken by the USA and Israel, but many states added that there was no imminent attack. Clearly several states support the notion of legitimate self-defence when faced with an 'imminent armed attack'. The world made it clear that preventive self-defence is not permitted and anticipatory self-defence, if legal, requires an imminent attack at the least. Why else discuss it if it is not relevant?

State practice gives no clear indication towards the legitimacy of interceptive self-defence either way. Gray points out that the tendency of writers to focus on the controversial cases gives an unbalanced view and distorts our perception to believing that claims of creative self-defence from the likes of Israel and USA are common rather than exceptional.¹¹⁶ Writers interpret the cases in completely different ways. Bothe claims that nothing in state practice indicate that there exists a wider right than that of article 51, whereas Yoo sees an apparent tendency in states to adjust the right to self-defence as the threats to them change shapes.¹¹⁷

Especially the threat of a nuclear attack seems to be one of the major reasons to widen the rules of self-defence. The question is at what point is self-defence allowed against a nuclear attack. A nuclear attack is an armed attack so at one point self-defence will be legitimate. The answer is, as the Osirak case shows, obviously not at the deployment phase. To minimize the risk of nuclear confrontation Alexandrov thinks that self-defence should be restricted to when the missiles are in flight.¹¹⁸ It seems however that there is a greater willingness to accept self-defence against imminent attacks when there is a threat of great danger or destruction. One could say that the greater the consequences of an armed attack the more relaxed become the rules. Part of why states supported the USA with such solidarity in their actions against Afghanistan was probably because of the horrendous consequences of the attack on the World Trade Center. But knowing beforehand what the consequences of a potential attack will be is to say the least difficult.

If the expanding threat of WMD has changed the law on self-defence, such conclusion cannot be deduced from the cases above. With this concluded the next step would be a look at armed attack. It is clearly the most controversial part of article 51. Can "*if an armed attack occurs*" be

¹¹⁶ Gray, *supra note 3*, p. 95

¹¹⁷ Bothe, Michael, *Terrorism and the Legality of Pre-Emptive Force* (2003), p. 232; Yoo, *supra note 2*, pp. 761 and 764

¹¹⁸ Alexandrov, *supra note 30*, p. 159

reconciled with interceptive self-defence? Is it possible to make wide interpretation of the term as it stands in article 51 according to the rules of interpretation?

7 Interpretating Armed Attack

Scholars that suggest that there has been, or should be, an expansion of the concept of armed attack have a limited number of means at their disposal. One way is to interpret the text and meaning of article 51 as giving wider rights than a literal reading of the text would allow. The focus will then mainly be on how far the concept of armed attack can be stretched. The requirement of an armed attack is the major obstacle for the promoters of a wider right to self-defence since it confines forceful measures only as a reaction to an act of violence that is already present. In the absence of an exact definition, however, there is plenty of room for suggestions on how to interpret armed attack.

If states want to define the requirements stated in article 51 in a new way, the provision of article 51 has either to be amended or re-interpreted. According to international customary law, an amendment to a treaty is made when the parties to the treaty enter another treaty. The original treaty is still in force but amended by the new treaty provisions.¹¹⁹ However, if the former treaty contains a provision on how to amend it, the procedure is not that simple. Articles 108 and 109 of the UN Charter are such provisions. Both articles 108 and 109 require the ratification of the amendment by all five permanent members of the Security Council. Since these five states have widely different views on the scope of article 51 it is highly unlikely that an amendment to the right to self-defence in the UN Charter will be adopted. A closer look at an interpretation of article 51 and armed attack is therefore warranted.

7.1 Interpretation Rules

The customary international rules on interpretation of treaties are codified in articles 31 and 32 of the Vienna Convention on the Law of treaties. Article 31(1) contains the general rule:

“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“

Three main elements are to be given equal weight when applying the rule: *“the ordinary meaning”* of the term, the *“context”*, and *“its object and purpose”*. Bothe has made an attempt to sort out the concept of armed attack in article 51 by interpreting it according to the general rule of interpretation.¹²⁰ Bothe finds ‘the ordinary meaning’ by consulting the dictionaries. In Webster’s Encyclopaedic Unabridged Dictionary, an attack

¹¹⁹ Kelsen, *supra note 26*, pp. 816-817; Aust, Anthony, *Handbook of International Law* (2005), p. 212

¹²⁰ Bothe, *supra note 122*, pp. 228-229

is defined as “*a beginning of hostilities*” or “*to begin hostilities against*”. The Oxford Advanced Learner’s Dictionary reads “*an act of trying to kill or injure the enemy...*” From the ordinary meaning of the word attack one can conclude that an attack is a start of an act that causes damage. The actual damage or completion of the effort is not part of the definition of an attack.

To find the context in which the term resides one has to look at the treaty as a whole. Article 51 is an exception to article 2(4). Article 2(4) mentions both the use of force and the threat of force. From that, one can assume that the drafters of the UN Charter chose not to include the threat of force in article 51 deliberately. Acts that are not armed attacks but still threats to peace, such as acts of aggression, fall under the Security Council’s responsibility according to article 39 of the UN Charter. Such acts fall short of legitimising self-defence. Another thing that one has to take into consideration at this point is state practice. As has been shown above there is great disagreement between states regarding the interpretation, and even the application of article 51.

The “*object and purpose*” of the UN Charter is to safeguard peace as far as possible, and to achieve this through the use of a collective and public mechanism to prevent states from using violence unilaterally. It has to be under very specific conditions that states are to be allowed to resort to force without the authorisation of the Security Council, as peace is the ultimate goal. According to Malanzcuk, a general rule of interpretation is that exceptions should be interpreted restrictively, so as not to undermine the principle.¹²¹ The principle, being article 2(4), the prohibition of force, should not be circumvented by states referring to self-defence in arbitrary cases. And since article 51 should be narrowly construed the limits set by it would become meaningless if anything slacker than armed attack survived unfettered in customary international law, according to Gray.¹²²

7.2 The Beginning of an Armed Attack

By studying doctrine, one becomes very conscious about the great disagreement between writers as to the definition of armed attack and the identification of when an armed attack starts, especially when it comes to particular weapons such as nuclear weapons, naval mines, missiles, computer warfare.¹²³ Since states are generally not at ease with anticipatory self-defence, interpreting armed attack in a more flexible manner opens up possibilities.¹²⁴ Does article 51, and the words “*if an armed attack occurs*”, require a state acting in self-defence to wait for a first strike before responding? Is article 51 a principle of a second blow? Does “*if an armed*

¹²¹ Malanzcuk, *supra note* 49, p. 312

¹²² Gray, *supra note* 3, p. 98

¹²³ Gray, *supra note* 32, p. 108

¹²⁴ Shaw, Malcolm, *International Law* (2003), p. 1029-1030

attack occurs” mean *after* an attack has occurred? These are some of the questions scholars try to answer.

The fact is that article 51 does not say that self-defence is available only *after* an armed attack occurs.¹²⁵ Waldock believes that it would be a travesty of the purposes of the Charter to allow the innocent party to suffer the first and possibly fatal blow, which cannot be the intention of the Charter.¹²⁶ Almost all writers agree that a state does not actually have to wait for impact before protecting itself. However, they still do not agree on at what time the armed attack begins.

In relation to missiles, Gray concludes that an armed attack begins when the radar guiding the missile has locked on to its target.¹²⁷ Others believe that the missile has to be fired first for the attack to have commenced.¹²⁸ According to Alexandrov and Dinstein, the armed attack would begin as soon as the aggressor pulled the trigger, i.e. when missiles are shot, or when a submarine leaves its territorial waters. In other words, when there is no possibility of the aggressor changing its mind.¹²⁹ There is a significant difference, however, in the firing of a missile and a submarine leaving its territorial waters when it comes to revoking those actions. A submarine can easily be called back before it gives another state the impression of really being under attack. An infringement of the state’s rights has occurred but one cannot seriously say that a state is under attack simply because a submarine has entered its territorial waters. It is much easier to claim that an armed attack has begun when a missile is in flight.

Many writers are of the opinion that a literal reading of article 51 may lead to absurd results. A state threatened by a nuclear attack would appear to have to wait until it has actually been hit before responding in self-defence. Smaller states like Israel would have its existence threatened, even when threatened by non-nuclear attacks.¹³⁰ A state should not have to be left a ‘sitting duck’, i.e. awaiting target that may or may not be able to respond after the damage has been done. Waiting for a missile to cross borders would be condemning itself, the victim of aggression, to destruction in part, or in whole.¹³¹

Those in favour of a wide interpretation of article 51 claim that the contents of article 51 cannot be interpreted as being exhaustive, the result then being that the words “*if an armed attack occurs against a member*” would mean that members would be prohibited to defend non-members.¹³² Collective

¹²⁵ Dixon, *supra note* 68, p. 284; Waldock, *supra note* 22, p. 497

¹²⁶ Waldock, *supra note* 22, p. 497-498

¹²⁷ Gray, *supra note* 3, p. 96; Dinstein, *supra note* 23, p. 190

¹²⁸ Greig, D.W., *International Law* (1976), p. 893

¹²⁹ Alexandrov, *supra note* 30, p. 164

¹³⁰ Franck, *supra note* 75, p. 266-67

¹³¹ McCoubrey, Hilaire & White, Nigel D, *International Law and Armed Conflict* (1992), p.

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¹³² Malanzcuk, *supra note* 49, p. 312

self-defence would then mean that a UN member is constrained to help only other members of the UN.

Another view is that since there is no global police force or international judiciary states must enforce the law themselves. Therefore states may use force in other, albeit extreme, situations than self-defence to correct unjust wrongs.¹³³ They see the complete ban against the use of force as an obstacle to justice because it is weakening the state's ability to defend itself when mistreated. Dinstein believes that the use of armed attack instead of aggression in article 51 was deliberate to exclude cases of anticipatory self-defence.¹³⁴ It is only in response to an armed attack that counter-force can be allowed, not against threats or even declarations of war.¹³⁵ All a state can do is prepare and contact the Security Council.

7.3 Conclusion

According to the interpretation rules, an attack has surely begun when the aggressor launches his missiles. But it is still difficult to say when "*the beginning of hostilities*" takes place. A mere threat is certainly not enough. Some sort of action has to be taken.

A look at the context reveals that self-defence is only supposed to be a way out when there is grave danger. Acts of aggression do not, per se, amount to grave dangers. Self-defence is only to be resorted to when there are serious interests at stake. It is clear that the mere existence of article 51 prevents states from 'jumping the gun'. As long as there is a provision in international law that restrains the use of force states must at least try to circumvent it before taking military action. The purpose of the UN Charter is to eradicate interstate violence and war completely. A more lenient approach to the use of force in self-defence could easily be seen as counter-acting that objective. On the other hand, if self-defence were used at an early stage, in good faith, only to promote such objectives, a too restrictive approach would not do international peace and security much good.

The scholars are apparently not ready to see eye to eye on armed attack. The views vary from not allowing responses until the armed attack has had its effects to when submarines leave their territorial waters. It seems that there is consensus among writers that a state does not have to wait for the impact of an armed attack before responding. The big question is when an armed attack can be deemed to have started. Unfortunately, there are too many different opinions. One thing is clear though, and that is that the general opinion among writers lies further towards a non-restrictive interpretation than the general opinion among states. Writers are clearly more in favour of a wide interpretation of armed attack than states have expressed.

¹³³ Joyner, *supra note 4*, p. 167

¹³⁴ Dinstein, *supra note 23*, p. 184

¹³⁵ *ibid.* p. 186

It is clear to see that pre-emptive and preventive self-defence cannot be legitimised by a wide interpretation of the concept of armed attack along the interpretation rules. The inclusion of the requirement of an armed attack in article 51 confines states' military activities to responses to serious damage that is on the way. Threats or imminent attacks are not enough. The attack must have begun in some way. Article 51 does not permit anything else. Interceptive self-defence, in theory, is always consistent with article 51 since the use of force comes at the beginning of an attack. If an attack has begun self-defence is permitted. But when has an armed attack begun? It is impossible to answer that question by examining the Charter. The answer to that question can only be found in state practice and doctrine, and state practice leaves the question open at present.

What can be concluded about armed attack is that it would be absurd to require of a state to sit by while missiles strike or bombs explode before responding. At some time before the damage has been dealt a point has been reached where self-defence becomes legitimate. Where that point lies is the problem. Clearly, an armed attack has begun when a missile is fired. When taking forceful action against another state and claiming to act in self-defence that state takes a risk of being an aggressor. When an attack has gone as far as a missile in flight the target state should no longer be expected to adhere to an international provision when its own survival and population's safety is at stake. Fortunately that is not something article 51 requires of a state.

Perhaps the missile can be aborted, or perhaps the launch is a mistake, but the state against which the missile is approaching should not have to wait any longer to ensure that it is not aborted or a mistake. The state launching it is culpable for doing so, mistakes in handling missiles cannot be excused, and has acted in a way that attributes it the title of aggressor in the context of self-defence. When it comes to submarines in territorial waters it is not as easy. If a single submarine enters a state's territorial waters it has broken its obligations according to international law but is it reasonable to say it constitutes an armed attack. Firing a torpedo, yes, but simply spying, probably not. Maybe these are issues that have to be looked at in conjunction with international law in general. A submarine entering territorial waters of another state, submerged, has committed a violation of the right to innocent passage.¹³⁶ This is codified in the United Nations Convention on the Law of the Sea, and a state is allowed to take necessary steps to prevent passage that is not innocent.¹³⁷ This may serve as an indication that the trespass is not as severe as some of the writers above like to portray it. Alternatively, perhaps these 'necessary steps' include some form of force against other objects of the trespassing state than the submarine, but it seems unlikely. The only answer so far as to when an armed attack has begun can only be that it depends on the situation in each individual case. The state resorting to self-defence assumes a risk and it is

¹³⁶ Art 20 UNCLOS

¹³⁷ Art 25 UNCLOS

up to the Security Council to determine the legitimacy of the action afterwards.

8 Customary International Law

Until 1945, the right to self-defence was mainly based on customary international law. The UN Charter refers to “*the inherent right of self-defence*” in article 51 and exactly what that means has caused a lot of controversy. Nevertheless, the ICJ, in the Nicaragua case, explained that it can hardly be anything else than a reference to customary international law¹³⁸, and that customary international law on the subject exists alongside article 51.¹³⁹ Even though article 51 sets the conditions for the right to self-defence, customary international law on the subject is still unquestionably relevant.

In the Nicaragua case, the court concluded that inherent right in article 51 referred to international customary law. Therefore, it is important to determine what the customary rule says and what role it plays. Dinstein claims legitimacy directly under article 51 but refers to imminence, which resides solely in customary law. It has never been connected to article 51 in the way proportionality and necessity has. Most writers and states agree that customary international law on self-defence originates from the Caroline incident. The communications between the governments of the USA and the UK set the conditions for the right to resort to forceful action in self-defence. Some writers disagree, as will be evident in this that the Caroline case can be referred to as stating customary international law on the subject but propose no viable alternative.

Before recounting the Caroline case, a short distinction between the different modes of self-defence would be in order since a lot of the discussion in this chapter will be about anticipatory self-defence. Interceptive self-defence is quite a narrow concept and the idea is that it exists somewhere between anticipatory self-defence and restrictive self-defence. The only way to understand interceptive self-defence is to interpret the discussions on anticipatory self-defence and determine whether the arguments for and against anticipatory self-defence can be applied to interceptive self-defence. Just as the proponents of anticipatory self-defence need to establish a wider interpretation of self-defence so does proponents of interceptive self-defence. There is a strong link between anticipatory self-defence and interceptive self-defence, and some writers actually seem to refer to the same thing although under different names.

¹³⁸ Gray, *supra note* 4, p. 121; Shaw, *supra note* 124, p. 1026

¹³⁹ Nicaragua case, *supra note*, p. 94

8.1 Preventive and Anticipatory Self-Defence

The cases of anticipatory self-defence can be divided in three: anticipatory, pre-emptive and preventive self-defence. Some try to justify their legality by a wide interpretation of article 51, others claim that there is a broader customary international law concerning self-defence that gives a right to anticipatory self-defence.¹⁴⁰ The difference between anticipatory and pre-emptive self-defence is not enough to warrant a separate treatment in this thesis so ‘anticipatory self-defence’ will be represent both. There is, however, a clear distinction between preventive self-defence and anticipatory self-defence.

Anticipatory self-defence is a response to the danger of an attack that is imminent. It is a response to a threat that is present. Often the requirement of imminence is mentioned but not always. Although seldom claimed, states such as the USA, the UK, Australia and Israel are proponents of a right to self-defence before an armed attack occurs.¹⁴¹ Preventive self-defence, on the other hand, is the elimination of a possible threat. A state may feel threatened by another states’ construction of weapons and strike against that state to prevent them from using those weapons in the future.

Since the 9/11 bombings the policy statements of the American government has highlighted the issue of preventive self-defence. For fear of WMD coming into the hands of terrorists, by the production of rogue states, the USA asserted a right to strike first, even before posed with a threat.¹⁴² Some claim that the invasion of Iraq in 2003 was an example of preventive self-defence.¹⁴³ According to the UN Charter, preventive action can only be taken by the Security Council.¹⁴⁴

Gray describes the difference between anticipatory self-defence and preventive self-defence as rather than trying to pre-empt specific, imminent threats the goal of preventive self-defence is to prevent threats from materialising.¹⁴⁵ This includes eliminating the threat from states that are perceived of as accepting or encouraging terrorist activities on their territory and stopping rogue states from obtaining WMD.¹⁴⁶ Preventive self-defence is dangerous because the devastation by a potential terrorist action can always be hypothesized in apocalyptic terms. If a state perceives a rogue state as intending to use WMD against civilians the counter-measures that can be justified by such rhetoric can reach equally devastating heights. The

¹⁴⁰ Dinstein, *supra note 23*, p. 183; Gray, *supra note 3*, p. 133

¹⁴¹ Gray, *supra note 3*, p. 177

¹⁴² *ibid.* p. 177

¹⁴³ *ibid.* 175

¹⁴⁴ article 42, UN Charter

¹⁴⁵ Gray, *supra note 3*, p. 175

¹⁴⁶ *ibid.* p. 175

requirements of proportionality and necessity (see Chapter 7.3), however, still set standards that would prevent the worst abuse to occur.

There is a wide gap between these two concepts, and preventive self-defence finds support in only a very few states and with almost as few writers. Anticipatory self-defence is still under debate, and although it leans towards it not being legal it is impossible to discount it definitely.¹⁴⁷ Naturally, there are many opinions on what is required for an armed response before an armed attack occurs, but these mostly range between the response to an imminent attack and a general feeling of antagonism.

8.2 The Caroline Case

The legal conditions for using force in self-defence were expressed in the Caroline case, the first important case of self-defence where the self-defence was aimed at a strong state.¹⁴⁸ Even though customary international law on self-defence may have evolved since the Caroline incident, most proponents of a wider interpretation of self-defence refer to the Caroline case as the authority for the right to use force in self-defence. On several occasions, states have justified violent acts by referring to the criteria dictated in the Caroline case, and not to article 51. Even the most restrictive thinkers cannot deny the importance of the Caroline case.

In 1837, several non-governmental groups supported a rebellion against the British government in Canada. A steamboat called the Caroline helped supply the rebels with arms and men across the Niagara River to the rebel's stronghold in Canada. One night when the Caroline was docked at an American port, British troops crossed the river, set the ship on fire and sent it over the Niagara Falls, shooting two American citizens to death. The US protested and claimed that Great Britain had infringed on American sovereignty. The British government replied that they had been acting in self-defence. Diplomatic correspondence between the US and Great Britain ensued and letters were exchanged between the US Secretary of State and the British minister in Washington. The dispute was settled peacefully and their correspondence resulted in the formulation of the conditions of the right to self-defence.

In a letter dated 1842, the US Secretary of State Daniel Webster expressed the requirements the British Government had to fulfil to be able to invoke self-defence. The British government had to show a:

“...necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United

¹⁴⁷ Alexandrov, *supra note* 30, p. 165

¹⁴⁸ Jennings Robert Y, *The Caroline and MacLeod Cases*, (1938), p. 92

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.”

Although the parties disagreed on the facts the British minister in Washington, Lord Ashburton, did not dispute the principles. The case did not have much impact on the legal doctrine at the time since there existed no real prohibition on the use of force. A state not at war had only to justify the use of force against another state for it to be lawful, unless the force used constituted an act of war.¹⁴⁹ The case has, according to Gray, attained mythical authority.¹⁵⁰

Three important conditions can be derived from Webster’s letter: immediacy; necessity; and proportionality.¹⁵¹ The limits set by Webster concerning the scope of the force used in self-defence were: “*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*”, i.e. the force used had to be proportionate to the threat. In the Caroline case, the US government considered the British actions disproportionate to the danger.¹⁵²

The passage: “...*necessity of the moment...*” means that the state claiming self-defence must show that, from the facts reasonably attainable, the response used, was necessary.¹⁵³ The forceful action had to be necessary to defend the state from the attack. The action taken by the defending state may not do more than what is required to halt and repel an attack. The requirements of proportionality and necessity hinder self-defence from being retaliatory and punitive.¹⁵⁴ Exactly where the limits go will depend very much on the circumstances of the situation. Proportionality and necessity are a part of self-defence today. No one disputes that fact. Hence, there can be no doubt of the importance of the Caroline case.

After an incident, giving rise to a right to resort to force, the requirement of immediacy puts an obligation on the offended state not to wait unreasonably long before taking action.¹⁵⁵ How long depends on the situation at hand. The Webster formula has been advanced as justification for responding with force to an imminent threat.¹⁵⁶ Nothing in Webster’s letter requires an attack or damage to have taken place only that the response is based on something “...*instant, overwhelming, leaving no choice of means, and no moment for deliberation.*” This could very well be a threat of force to come. The US explained after the 9/11 bombings that they believed in a right to respond

¹⁴⁹ Wallace, Rebecca M.M, *International Law* (2005), p. 277

¹⁵⁰ Gray, *supra* note 3, p. 105

¹⁵¹ Dinstein, *supra* note 23, p. 249

¹⁵² Brownlie, *supra* note 8, p. 261

¹⁵³ Shaw, *supra* note 124, p. 1031

¹⁵⁴ Gray, *supra* note 3, p. 121

¹⁵⁵ Dinstein, *supra* note 23, p. 210

¹⁵⁶ Brownlie, *supra* note 8, p. 248

with force to prevent possible attacks.¹⁵⁷ The right to preventive self-defence goes well beyond the Webster formula. Webster's imminence is more like a reflex, like putting up your hands to defend yourself when you see no other way out. It is a last moment act.

These conditions have been widely accepted, but are not entirely uncontroversial. Some writers claim, for different reasons, that Webster's formula cannot be accepted as customary international law. But none opposes that the principles of necessity and proportionality are a part of self-defence and as applicable as article 51.

8.2.1 Conclusion

The impact of the conditions derived from the Caroline case cannot be trivialized. Its importance cannot be exaggerated even though some claim it has been, but without presenting a plausible alternative. Proportionality and necessity are today widely accepted as two important restrictions to acts in self-defence. Any controversies concerning these requirements refer to their contents, not their existence and position in international law. Apart from the requirements of proportionality and necessity, Webster gave birth to imminence and by doing so created an undeniable bellows for the proponents of anticipatory self-defence. Some writers strongly push for imminence as a given part of self-defence. It comes into play when a state no longer sees an option other than to strike back. "*If an armed attack occurs*" cannot be interpreted as including imminent threats in general.

Some claim that the customary law on self-defence has evolved since 1842, but those are not many. More than a century after the Caroline incident the Tribunal in the Nuremberg case concluded that it had not.¹⁵⁸ What customary self-defence looks like today is more difficult to say. Wallace figures that with the evolution of the outlawing of force Webster's formula has become even more significant.¹⁵⁹ Whether or not the Webster formula represents the customary rule of self-defence or not is difficult to answer. If not the alternative is that customary law is identical to article 51, a third alternative simply does not exist. In the cases above, states had the opportunity to express their opinion but reached no common ground.

8.3 Parallell Right

Article 51 contains a narrow approach to self-defence. It requires an armed attack to occur before responding. But self-defence naturally carries an element of pre-emption in that one aims to prevent the approaching danger

¹⁵⁷ US note to UN 7 October 2001, UN Security Council Document S/2001/946 (7 October 2001)

¹⁵⁸ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, 41 AJIL (1947), Number 1

¹⁵⁹ Wallace, *supra note* 156, p. 277

from dealing damage. Defending yourself means halting the attack while there is something to defend. The Webster formula is in this manner more allowing. It permits a state to respond to an approaching threat, something quantifiable but not yet causing damage. If the ICJ claimed that both are part of international law, but how does one reconcile these two?

Arend & Beck divide scholars in two: restrictionists and counter-restrictionists.¹⁶⁰ Restrictionists (e.g. Dinstein, Brownlie, Shaw, Jessup) believe that article 51 is the only contemporary source of law on self-defence and does not allow anticipatory self-defence. Counter-restrictionists (e.g. Waldock, Bowett, McDougal, Greig), on the other hand, believe that there is an international customary rule alongside article 51 that is not restricted by article 51. It is far from fair to divide the scholars in two camps since they all argue for their sides to various degrees. It creates a picture in black and white, which is far from reality. But the counter-restrictionists have in common that they do not accept article 51 as the only source of the right to self-defence. They believe there is a wider right in customary international law.

The most convincing argument they pose is based on the reference to inherent right in article 51.¹⁶¹ Article 51, according to the proponents of this view, only deals with self-defence in cases where there is a preceding armed attack.¹⁶² Where there is no armed attack customary self-defence is still applicable. In the Nicaragua case, Judge Schwebel claimed, in his dissenting opinion, that article 51 only refers to self-defence in response to armed attacks, and that customary international law ensured states other options.¹⁶³ He meant that the interpretation of article 51 as meaning *if, and only if*, an armed attack occurs would be erroneous. Judge Jennings makes a valid point in his dissenting opinion saying:

*“it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the UN’s employment of force, which was intended to fill that gap, is absent”.*¹⁶⁴

In Joyner’s opinion self-defence is permitted in three cases;

- in response to an ongoing armed attack;
- as a response to an anticipated armed attack, or threat to a state’s security;
- as a response to an attack against a state’s interests

¹⁶⁰ Arend & Beck, *supra note* 79, p. 73; Damrosch, Lori F, Louis Henkin, Richard C. Pugh, Oscar Schachter, and Hans Smit. *International Law: Cases and Materials* Schachter, p. 928

¹⁶¹ Gray, *supra note* 3, p. 98

¹⁶² Shaw, *supra note* 124, pp. 1025-1026

¹⁶³ Dinstein, *supra note* 23, p. 183; Nicaragua case, *supra note* 27, Dissenting Opinion of Judge Schwebel, p. 347

¹⁶⁴ Nicaragua case, *supra note* 27, Dissenting Opinion of Judge Jennings, p. 544

This is a conclusion he draws based on a co-existing customary right according to the Caroline case.¹⁶⁵ He stretches the right to lawful action to anticipated attacks and the vague ‘attack against a state’s interests’.

The only reason, according to Brownlie, why article 51 was incorporated into the Charter was to clarify the position of collective defence treaties concerned only with external attack situations.¹⁶⁶ Self-defence would then not be restricted to article 51, since article 51 only deals with the specific case of armed attack and there is a broader scope in customary international law. What they are saying is that article 51 is just an example of one situation that gives rise to self-defence. Since customary international law is still applicable, and wider than article 51, situations that do not contain an armed attack would still give rise to self-defence, as long as they fall under the Webster formula.

Dixon sees the customary right to self-defence as a wide exception to the prohibition of the use force.¹⁶⁷ He identifies four situations where customary international law, based upon the Caroline incident, allows the use of force in self-defence:

- as a response to, and directed at, an ongoing armed attack against state territory
- in anticipation of an immediate threat to the state’s security, to neutralise it
- as a response to either of the above directed against nationals, property and rights guaranteed under international law
- where the attack consists of something other than armed force, such as economic aggression and propaganda

Dixon believes that self-defence is legal against economic aggression and propaganda. That a state has the right to use force against another state, destroying property and even killing people, to end propaganda seems absurd. It is generally accepted that after the Caroline incident anticipatory self-defence was permitted when faced with an imminent attack.¹⁶⁸ In fact, some writers are convinced that if the Caroline criteria are fulfilled there is a right to pre-empt an attack.¹⁶⁹ Such a conclusion requires a wide reading of the requirements in the Webster formula but it is not impossible that such conclusion was the purpose.

Wallace finds, through a more reasonable interpretation of the Webster formula, certain circumstances under which self-defence can be justified.¹⁷⁰ Those circumstances are when:

¹⁶⁵ Joyner, *supra note 4*, p. 171

¹⁶⁶ Brownlie, *supra note 42*, p. 269

¹⁶⁷ Dixon, *supra note 68*, pp. 283-284

¹⁶⁸ Brownlie, *supra note 8*, p. 257, Arend & Beck, *supra note 79*, p. 72

¹⁶⁹ Joyner, *supra note 4*, p. 169

¹⁷⁰ Wallace, *supra note 156*, p. 282

- a state is the target of hostile activities of another state;
- the threatened state has exhausted all alternative means of protection;
- the danger is imminent;
- the defensive measures are proportionate to the pending danger.

Wallace covers the necessary requirements according to the Webster formula of proportionality, necessity and imminence and requires only that another state engages in hostile activities, whatever that may be. No armed attack is required, not even any military activity. It is easier to relate to this reading of the Webster formula than the former two. A UN panel, dated 2004, concurs with such interpretation of the law.¹⁷¹

“[A] threatened state , according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.”

As mentioned, some claim article 51 was never intended to be a definite statement of the right to self-defence since it was only included in the Charter in order to clarify the relationship of regional organisations to the Security Council. What they refer to is the Pan-American treaty known as the Act of Chapultepec. The customary right to self-defence was to be maintained and with it anticipatory self-defence.¹⁷² This argument clearly has its flaws since there is no reason why the drafters of the Charter would not just have stated that and saved space, and confusion, by adding the requirement of armed attack.

One of the most popular and attractive arguments for anticipatory self-defence is a very logical one, considering the common perception of the concept of self-defence. An occurrence of an armed attack is not a necessity. States should not have to wait until the attack against them has caused damage before responding.¹⁷³ Especially in the light of modern weaponry and the devastation it can cause, a state could perish if forced to wait for the damage to be dealt.¹⁷⁴ This is the sitting duck argument. It is especially relevant when it comes to smaller states such as Israel, where a nuclear strike could make it incapable of ever recovering. At the same time, a more lax self-defence would allow states the freedom of attacking states as it pleased. Franck summarizes the problem:

“...no law – and certainly not article 51 – should be interpreted to compel the reductio ad absurdum that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves. On the other hand, a general relaxation of Article 51’s

¹⁷¹ High-Level Panel on Threats, Challenges, and Change, *A more Secure World: Our Shared Responsibility* (2004), p. 188

¹⁷² McDougal, Myres S and Feliciano, Florentino P, *The International Law of War* (1994), p. 235

¹⁷³ Gray, *supra note* 106, p. 601

¹⁷⁴ Shaw, *supra note* 124, p. 1029

*prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threatened could lead to another reductio ad absurdum.”*¹⁷⁵

The problem with anticipatory self-defence is that in the right circumstance it can extinguish the fuse of a powder keg, but in the wrong circumstance it can cause the very calamity it anticipates.¹⁷⁶ Although not strictly a legal argument, it makes a valid point. Should one have to obey the law if it leads to absurd results?

According to Bowett article 51 is only declaratory, and article 2(4) and article 51 have no effect on the customary right of self-defence at all.¹⁷⁷ Other scholars agree that art 51 must be read as recognizing, but not regulating, the right of self-defence and that its meaning is to be derived from customary international law.¹⁷⁸ What these scholars are saying is that when our reality is changing the law must follow for it not to be absurd. But at the drafting of the Charter nuclear weapons were a reality and the devastation a nuclear strike can cause was in the world’s mind more than it is today. It is the recent rhetoric of rogue states and the fear of international terrorism that have strengthened these arguments.

Many members of the UN have been reluctant to encourage the doctrine of anticipatory self-defence for fear that it may be too fraught with danger. In only a very few cases has the use of anticipatory self-defence been accepted, and that is when the attack is imminent and the use of force in self-defence is necessary to stop it.¹⁷⁹

8.3.1 Counter-Arguments

Opponents of anticipatory self-defence focus on the risk of mistakes and escalation of hostilities.¹⁸⁰ Anticipatory self-defence requires a state to make judgements of the certainty of an attack and the intentions of another government.¹⁸¹ If responding too early, or mistakenly, the alleged self-defence turns into an act of aggression. As Malanczuk puts it, is a nuclear power entitled to destroy most of mankind because a radar system mistakes a flight of geese for enemy missiles?¹⁸² Waiting for an attack to occur adds precision and objectivity. Cassese states that even if it is unrealistic to expect a state to be a sitting duck, peace is the ultimate goal and to allow anticipatory self-defence would be to accept a too great risk of abuse.¹⁸³

¹⁷⁵ Franck, *supra note 75*, p. 98

¹⁷⁶ *ibid.* p. 107

¹⁷⁷ Bowett, Derek William, *Self-Defence in International Law* (1958), p. 188

¹⁷⁸ Yoo, *supra note 2*, p. 739

¹⁷⁹ Alexandrov, *supra note 30*, p. 163

¹⁸⁰ Schachter, Oscar & Joyner, Christopher, *United Nations Legal Order* (1995), p. 258

¹⁸¹ Brownlie, *supra note 8*, p. 259

¹⁸² Malanczuk, *supra note 49*, p. 313

¹⁸³ Cassese, *supra note 46*, p. 310

Another response to the supporters of a wider customary international law focus on the fact that states very rarely invoke anticipatory self-defence. Malanzcuk suggests that the USA refrained from doing so in the Cuban missiles crisis because of a fear that it would create a precedent, which the Soviet Union could have used against American military facilities in Europe.¹⁸⁴ All this really proves is that the US believed they had a right to do what they did and if their actions were not justified in another manner, they would give their enemies an incentive to remove American installations in Europe. The USA had much to lose by creating such a precedent.

Even if several scholars (Bowett, Waldock, McDougal, Green, Arend & Beck) believe that anticipatory self-defence is legal, plenty of writers would not agree with them.¹⁸⁵ One problem, according to them, lies in proving the existence of such customary international law.¹⁸⁶ The Webster formula is often referred to as the basis of the rule allowing anticipatory self-defence. Opponents usually try to shoot that argument down by explaining that the Caroline case is not applicable because it was either a case of self-help or a situation where the British government was trying to show they had a right to use force without starting a war against the USA.¹⁸⁷

Those who deny the relevance of the Caroline case claim that because the use of force was not prohibited at the time, the incident was not a case of what today is self-defence, the legitimisation of forceful actions against another state, but a completely different situation.¹⁸⁸ The UK only wanted to show that their actions were justifiable uses of force short of war. Such an argument is difficult to adhere to because of two things. Firstly, proportionality and necessity, both given birth to by the Caroline incident, are without a doubt part of the law on self-defence. In that respect, its relevance cannot be ignored.

Secondly, whether it is trying to avoid having actions categorised as war or as aggression, the basic principles are the same. The state is trying to justify its actions by referring to a need to protect vital interests; everything else is just splitting hairs. On the other hand, as Schachter notices, it does not seem plausible that the drafters aimed to keep customary law on self-defence unimpaired since they included the term armed attack.¹⁸⁹ But he still believes in a broader right to self-defence existing in parallel customary right.

Another counter-argument is that at the time of the drafting of the Charter, the customary international law on self-defence was a narrow one, not like

¹⁸⁴ Malanzcuk, *supra note* 49, p. 312

¹⁸⁵ Dinstein, *supra note* 23, p. 183

¹⁸⁶ *ibid.* p. 184

¹⁸⁷ *ibid.* p. 185

¹⁸⁸ *ibid.*

¹⁸⁹ Damrosch et al., *supra note* 168, p. 926

at the time of the Caroline incident.¹⁹⁰ Customary law was narrower at the drafting. The customary international law is then basically the same as article 51 and requires an armed attack. Therefore, no anticipatory self-defence can be allowed. Even if customary international law was broader in 1945, state practice shows a shift from the Webster formula to article 51.¹⁹¹

As for the argument that armed attack is only one of several instances of when self-defence becomes activated, the ICJ in the Nicaragua case stated that “[s]tates do not have a right of ‘collective’ armed response to acts which do not constitute an armed attack”.¹⁹²

That article 51 refers to an armed attack that has been mounted and is not just imminent should be apparent by the fact that article 2(4) distinguishes between the threat to use force and the actual use of force, but there is only a mentioning of armed attack, and not imminent attack, in article 51.¹⁹³

Some claim article 51’s only *raison d’être* is to clarify the relationship to regional arrangements. It is an incredible conclusion considering its wording. Why should the writers mention armed attack in that text if such was the case? It is clear that not all international delicts give rise to self-defence, but only those severe enough to be considered armed attack. Other forms of wrongs are to be handled by the Security Council under article 39. If the intention of the writers were only to clarify “collective self-defence” then they would have left it at that. Every state has the right to defend itself against the attacks of others. That which does not constitute an attack sufficient to legitimize self-defence is a matter for the Security Council. Dismissing article 51 as only a clarification of a right to continue regional arrangements seems like a lack of faith in the drafters and in the Security Council’s capability to handle its assigned task.

8.3.2 Exceptional Circumstances

Although rejecting anticipatory self-defence in general, Malanczuk finds a way to incorporate, under the Charter, a form of anticipatory self-defence based on the Webster formula, if a state is faced with a manifestly imminent armed attack, and all diplomatic attempts have failed.¹⁹⁴ The only justification for such a conclusion is that a state cannot be expected to be a sitting duck and wait until the damage is done.

Cassese and Franck similarly come to the conclusion that all anticipatory self-defence is legally prohibited, but can in certain mitigating circumstances be justified on moral and political grounds.¹⁹⁵ So if an

¹⁹⁰ Gray, *supra note 3*, p. 98

¹⁹¹ *ibid.* p. 99

¹⁹² Nicaragua case, *supra note 27*, p. 110-111

¹⁹³ AIV and CAVV, *supra note 20*, p. 16

¹⁹⁴ Malanczuk, *supra note 49*, p. 314

¹⁹⁵ Cassese, *supra note 46*, p. 310-11; Franck, Thomas D, *Fairness in International Law and Institutions*, p. 267

imminent and extreme danger can be demonstrated objectively a state would be exculpated if resorting to force in self-defence.

The interception of an attack can only be allowed in the case of rockets in flight, according to Brownlie.¹⁹⁶ The difference between an attack and an imminent attack has been made insignificant by the development of long-range missiles.

These writers reject anticipatory self-defence based on a parallel right but acknowledge the need for such an alternative. As an exception, they can easily conceive force being used against states before an armed attack has occurred but only in special circumstances. It is a subjective approach but it takes into consideration the complexity of international relations and the extreme situations that sometimes can materialise when states do not see eye to eye. All of these would accept interceptive self-defence under special circumstances.

8.3.3 Conclusion

The debate on the existence of a parallel right to self-defence is a bewildering mess of different opinions. There is no lack of arguments and some of them are difficult to dismiss. There is too much debate to rule out either interceptive self-defence or anticipatory self-defence, at least if based on the Webster formula.

The writers try to minimize the importance of article 51 by claiming it was included in the Charter for the purpose of securing already existing rights, or to ensure members that previous rights and obligations would not be impaired by their membership of the UN. Others find that unlikely based on the importance of the provision. The best argument seems, however, to be a quasi-legal one, the right not to be a sitting duck in a world of WMD. It is the core of self-defence. If no other help is available, to safeguard yourself and your own, you must be allowed to intercept an attacker before he injures you. This is especially true when a state is faced with WMD. The response focuses on the risk of making mistakes and the potential of abuse. If military responses are allowed before an attack occurs the risk of making mistakes increases and militarily stronger states will find opportunities to further their own interests under the pretext of self-defence. Both sides use WMD as an argument to accept or reject any other form of self-defence than article 51.

What is more interesting is the willingness to make exceptions under special circumstances. The world contains such destructive forces that in extreme situations one has to accept digression from legal rules if peace and security shall prevail. This indicates that there is a general opinion of the inadequacy of article 51.

¹⁹⁶ Brownlie, *supra note* 8, pp. 367-368

The writers supply confusing additions to the solution. They cannot agree on the position and meaning of customary law. Even when they reject a wider customary right, they admit that in exceptional cases there can arise a right to strike first. However, as state practice reveals, states have a tendency to let political interests take priority, and not legal considerations, when taking a stand after a claim of self-defence. The probability of states taking an objective approach to an 'exceptional case' seems like a bad bet. Such discussions would be fraught with political agendas, unless the incident amounted to something like the 9/11 bombings.

That article 51 should only be declaratory seems unlikely. Clearly, it was added to restrict and clarify the exception to article 2(4). The inclusion of inherent right adds flexibility to the right in that it allows self-defence to adapt when new threats arise. While article 51 sets the necessary requirements, which remain the same, customary law, which is flexible, adapts to the changing conditions of the world we live in. The regulation of the use of force is far too important to be locked down in an article in the UN Charter. It is essential that the law on self-defence can keep up with the speed of technological advances. WMD were around at the drafting of the Charter, computer networks, however, were not. An armed attack can be performed by a computer.¹⁹⁷ If the law on self-defence as it was before computer networks were not equipped to handle that threat, customary law, if existing parallel, can adapt quickly and minimize the danger.

Writers who reject anticipatory self-defence still make vague implications about the necessity in some cases to nip attacks in the bud. The lack of clarity in their revered article 51 sends them defending it against their own common sense. Dinstein puts interceptive self-defence right in between the blow and the imminent threat. How does one reconcile imminent attack with article 51? One way could be interceptive self-defence. In theory it is a brilliant solution, but in practice? And what does imminence mean? It is a vague enough term to easily be abused unless a definition is agreed upon. States claimed in the cases above that the absence of an imminent attack rendered actions illegal. That would mean that the presence of an imminent attack could legalise the same action.

Another question that arises out of interceptive self-defence is how to satisfy the requirements of proportionality and necessity.¹⁹⁸ If no damage has yet been dealt, no blow has been taken, how do you decide what is necessary and determine what is proportional?

8.4 Imminence

The line: "...instant, overwhelming, leaving no choice of means, and no moment for deliberation." in the Webster formula gave birth to the idea that

¹⁹⁷ Dinstein, *supra note 23*, p. 34

¹⁹⁸ Gray, *supra note 3*, p. 171

a right to resort to self-defence when faced with an imminent threat was permitted. The concept has become a very popular argument for proponents of the wider sense of self-defence and it is clear that what they refer to is a threat that within a short period of time almost certainly will result in an attack. The Webster formula refers to such a threat. Whether an attack is imminent is a question of opinion and degree, and as such subjective and easily abused. A 'short period of time' is relative and 'almost certainly' has several degrees.

Although Dinstein wants to focus his notion of interceptive self-defence on a wider interpretation of armed attack, he also mentions imminence in the doctrine of interceptive self-defence. He claims that interceptive self-defence is consistent with article 51 because the response comes when the armed attack has begun, i.e. when it has occurred. If the armed attack has occurred, can it be imminent at the same time? The actual damage can be imminent when the armed attack has begun and in such a case most would readily accept a claim of self-defence. In the second Pearl Harbour example above the harm cannot be said to be imminent even if the armed attack may have begun. If the trigger of a gun has been pulled there is no doubt that the armed attack has begun and the harm is imminent, but if the Japanese fleet has left its waters heading for Pearl Harbour has the attack already begun, and is it even imminent?

The line to what is imminent is extremely difficult to draw without including subjective factors such as fear. Dinstein wants interceptive self-defence to be based on reliable, objective intelligence, but what state would remain objective when it feels imminently threatened by foreign military advances? If Dinstein is looking to include imminence in article 51 a closer look at what imminence can entail is warranted. The traditional view is based on the Webster formula. An imminent attack is a threat that almost inevitably will result in an attack. Time is of importance since Webster's formula contains the words: 'instant', 'overwhelming', 'leaving no choice of means', and 'no moment for deliberation'. The threat is so urgent that there simply is no time for any other alternative than to strike. It is a last resort to avoid the attack impacting. An imminent attack is favourably illustrated as a missile in flight. Stop it now or get hurt.

Yoo, however, wants to see international law move away from a strictly temporal assessment of imminence to include probability and magnitude of destruction.¹⁹⁹ According to his approach a state would be allowed to take advantage of windows of opportunity even if the attack is not about to occur. States would not be restricted to wait with 'responding' until the attack was about to occur if more weight was put on the probability of an attack and potential magnitude of destruction of the attack. The more likely the attack and the more harm the attack may cause, the less required to wait for the attack a state should be. This is especially the case in the light of the 'new threats' such as terrorism and WMD.

¹⁹⁹ Yoo, *supra* note 2, p. 751

Yoo uses an example of a person chained to a wall and told that he will be killed in a week. That person would be in his right not to wait until the end of the week before using force in self-defence. This is perfectly sensible since the chaining to a wall itself would give rise to self-defence. In an international scenario, a state that is forcibly incapacitated has a right to act with force in self-defence. But if the person, or a state, is told by the aggressor that in one week he, or it, will be attacked, the option available to them is contact the proper authorities, i.e. the police, or on the international plane, the Security Council. The argument against Yoo would be exactly this. If there is time to let the Security Council handle the situation, before the attack is launched, then that is what the UN Charter proposes. The Security Council is in charge of international peace and security. Only in the exceptional circumstance of an armed attack can a state, on its own accord, use force against another state.

The line between a legitimate first strike and an act of aggression is not a question of the point of imminent attack; instead, it is at the point of sufficient threat, according to Walzer's theory.²⁰⁰ A sufficient threat covers three things:

- a manifest intent to injure;
- a degree of active preparation that makes that intent a positive danger;
- and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.

Walzer claims that his approach focuses on the present instead of the immediate moment (Webster Formula) or the past and future (preventive self-defence).²⁰¹ Walzer agrees with Dinstein in that the Six Days War of 1967 was a case of legitimate self-defence. He concedes that it would mean a revision of the paradigm and describes the new formula as: states may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence.²⁰² Israel was forced to fight and a victim of aggression. What Walzer is stating is basically that when a state feels threatened enough by another state it may strike at that state. But it has to be backed up by objective evidence, such as a manifest intent to injure and a degree of preparation that affirms the other state's hostile intent. A logical point Walzer makes is that since there is no police at states' service, the point at which self-defence becomes legal comes sooner than it would for an individual in national legislations. A state under threat is to Walzer like a person being hunted by someone who has expressed his intention to kill him. Both have a right to surprise their potential attacker.

²⁰⁰ Walzer, Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2006), p. 81

²⁰¹ *ibid.*

²⁰² *ibid.* p. 85

8.4.1 Conclusion

Imminence is a difficult requirement to come to terms with. There is always a subjective element. Self-defence is all about responding to a threat or damage. At some point, the threat becomes so imminent there is reason to attack. Responding to an imminent attack, according to the Webster formula, is like a reflex action when the blow is approaching, like putting up one's hands to avert a fist. This is the traditional, common view.

The 'last minute' reflex action that Webster described has been rejected in recent times as not being part of article 51. Still Dinstein uses the terminology to describe a situation where an armed attack has begun, no damage has been dealt, but legitimate self-defence is activated. Amongst others, Yoo and Walzer have seen the problem imminence causes and have given their suggestions to a solution. Their attempts serve to illustrate the problem more than they serve as a solution.

Yoo wants more focus on the probability of the strike coming and he especially wants consideration to be taken to the weapons used. The more probable that an attack is coming, the more can one justify military action in response. If the aggressor has WMD, a state is even more justified in attacking that aggressor. He highlights that a state can face many different kinds of threats and that it is necessary to treat them differently. The 'probability of an attack' gives the impression that a state can objectively predict the imminence of an attack by analysing different factors of the threat. The probability of the attack is an essential determination to be made before responding with force.

Walzer wants an imminent attack to represent a prediction based on the aggressor's statements and connected actions. If a government is declaring its dislike of another state or expresses its intention to attack, combined with some military action in line with his statements, then the state victim of those intentions may strike first. He points out that manifested hostile intention is a warning sign of an attack to come. But if not even a declaration of war gives rise to self-defence the hostile intentions of a state may only lead to preparations. If a state acquires intelligence of a nuclear attack being prepared against them by a state known to have malicious intention towards that state naturally a response will be launched sooner than if the imminent attack consists of armed troops of a neutral neighbour in the vicinity of its borders. The suggested approach is far too arbitrary and would certainly be abused by states that would post-construe intention with some military activity. Both alternatives move the legitimate point of response to an imminent attack far from throwing up one's hands in defence the way Webster imagined it.

8.5 Proportionality and Necessity

The ICJ, in the Nicaragua case, concluded that the measures taken in self-defence need to be proportionate to the attack suffered and necessary to respond to it, and that these two conditions are applicable to article 51.²⁰³ There is no real disagreement concerning this and it has subsequently been reaffirmed in the advisory opinion of the ICJ in the Legality of the Threat or Use of Nuclear Weapons²⁰⁴ and later in the Oil Platforms case.²⁰⁵ The requirements of proportionality and necessity originate from the Caroline case. State practice and *opinio juris* is in agreement with the notion that, no matter what the legal basis for launching actions in self-defence, those actions need to be necessary and proportionate.²⁰⁶

The purpose of these conditions is to ensure that the action taken in self-defence is not punitive or excessive.²⁰⁷ In relation to interceptive self-defence, proportionality and necessity become interesting when discussing the response to something that has not yet occurred. The state must be convinced, based on objective information, that a forceful response is necessary. It is of course very difficult to determine what a proportionate measure is when all the state has to compare with is a potential consequence. A closer look at necessity and especially proportionality may give answers on how to approach such difficulties.

8.5.1 Necessity and Immediacy

The second step, after determining the existence of an armed attack, is to answer the question of whether forceful response is necessary.²⁰⁸ In a time when interstate force was legal unless amounting to an act of war, necessity acted as a limiting factor on violence. The UN Charter has successfully assumed that role. Necessity is, however, still an important aspect of the right to self-defence. The principle requires that the necessity of self-defence is overwhelming, in the sense that important rights and interests of the state are at risk. This means that not just any attack will give the victim state the right to strike back with force. The attack must be of a sufficiently severe character so as to jeopardize something of great importance to the state if not terminated.

Further, the requirement of instancy, or immediacy, must be accommodated. In fact, instancy is inbuilt in article 51, as it requires the self-defence to stop when the Security Council takes the necessary action that end the right to self-defence. In international customary law, as put by the US Court of

²⁰³ Nicaragua case, *supra* note 27, p. 94

²⁰⁴ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 48, p. 245

²⁰⁵ *Case concerning Oil Platforms* (2003), p. 161

²⁰⁶ Gardam, Judith A, *Necessity, Proportionality and the Use of Force by States* (2004), p. 186

²⁰⁷ Schachter & Joyner, *supra* note 193, p. 260

²⁰⁸ Gardam, *supra* note 214, p. 138

Claims in 1904, immediacy means; “...when the act is accomplished, damage suffered, and the danger passed, then the incidents of self-defence cease”²⁰⁹. If immediacy is to be interpreted in this sense, the right to self-defence may be over as soon as the armed attack has ended. Gardam cannot find that state practice supports this interpretation.²¹⁰

By immediacy, Webster also meant that the response should not be unduly delayed.²¹¹ There need to be a temporal link between an armed attack and the action taken in self-defence. The court in the Nicaragua case found that the actions taken by the USA against Nicaragua were taken several months after the involvement of Nicaragua in the opposition against the government in El Salvador and thus failed to amount to necessary measures because of the delay in time.²¹² Depending on the circumstances of the case, naturally, a state cannot wait too long before initiating counter-force. In some circumstances, however, a delay of time can be warranted. One such circumstance could be to allow time for negotiations.²¹³

Finally, necessity requires that the state resorting to self-defence has no other choice of means but to use force to end the armed attack. State practice supports that all peaceful alternatives must be futile for a state to legitimately resort to self-defence.²¹⁴ It must be clear that there is no other realistic solution for the state than to repel the attack by force.²¹⁵ Force is the absolute last resort. Whether or not the decision to resort to force is necessary will depend on the circumstances of the case at hand. The state has to show that it had good reason to believe that the course taken was necessary.²¹⁶

8.5.2 Conclusion

For self-defence to be legitimate necessity requires an armed attack to be of such severity that it can be considered a threat to serious interests of the state. There is also a requirement of a temporal link between the response and the armed attack. And most important of all, the armed response must be a last resort. As an initial limitation on the use of force in anticipatory self-defence, necessity requires the existence of a quantifiable threat before a state can take responding action.²¹⁷ When claiming a right to interceptive self-defence necessity is not one of the more difficult issues. Of course, a state will have to use other means than force to avert the attack if possible

²⁰⁹ *The Ralph*, 1904 US Court of Claims, 204, p. 207, cited in Gardam, *supra note* 214, p. 150

²¹⁰ Gardam, *supra note* 214, p. 150

²¹¹ Dinstein, *supra note* 23, p. 210

²¹² Nicaragua case, *supra note* 27, Dissenting Opinion of Judge Schwebel, pp. 362-367

²¹³ Dinstein, *supra note* 23, p. 210

²¹⁴ Gardam *supra note* 214, pp. 153-154

²¹⁵ Dinstein, *supra note* 23, pp. 209-210

²¹⁶ Shaw, *supra note* 124, p. 1031

²¹⁷ Gardam, *supra note* 23, p. 179

but if the armed attack has begun the requirement of necessity will be applicable and handled in the same manner as if the attack had already had its impact.

8.5.3 Proportionality

If a state finds itself to be the target of an armed attack, and finds it necessary to respond with force, it has the right to take forceful measures to counter the attack. What measures the state is allowed to use will have to pass the requirement of proportionality. Proportionality plays no role in the determining of the grounds of the legitimacy of resorting to self-defence. It is not a question of equivalence between the force of the armed attack and the force used as a response in self-defence. The focus should not be on the nature of the armed attack but on the goals conferred by the UN Charter. In self-defence, the criterion to which the response has to be proportionate is the halting and repelling of the armed attack.²¹⁸ Simply comparing weapons or the scale of force used would not be sufficient. In Brownlie's opinion, slightly more force is allowed for when responding to an armed attack, as a guarantee of decisiveness.²¹⁹

When a state is faced with an armed attack, what it needs to do, in order to fulfil its responsibilities under the principle of proportionality, is to determine what actions are proportionate to achieve its legitimate ends.²²⁰ When a state has clearly identified the aim of the self-defence, Gardam supposes that the limits on the means and methods become apparent.²²¹ It is important to recognize that proportionality is relevant throughout the conflict. A state cannot assess the situation after the attack, launch a proportionate response and think it has fulfilled its obligation under the principle of proportionality. Everything the state does from the beginning of the self-defence to the end of it needs to be proportionate. Naturally, the situation can change and actions that were once proportionate have to be re-evaluated. It is impossible to make an exact equation of casualties and damage, especially since there is no way to be a hundred percent sure what result the counter-force will have.

The established issues to consider when assessing the proportionality of the planned response in self-defence are the geographical and destructive scope of the response; the duration of the self-defence; the selection of means and methods of warfare and targets; and the effects on third states.²²² The actions taken in self-defence should, if possible, be geographically limited to the area where the attack that gave rise to the self-defence occurred.²²³ If a state is the victim of an invasion, the actions taken in self-defence should

²¹⁸ Gardam, *supra note* 214, p. 158 and 160

²¹⁹ Brownlie²⁶⁴

²²⁰ Gardam, Judith A, *A Role for Proportionality in the War on Terror* (2005), p. 5

²²¹ Gardam, *supra note* 214, p. 186

²²² *ibid.* p. 162

²²³ *ibid.* p. 165

be limited to expelling the invaders, unless it is necessary to enter the territory of the aggressor to completely halt the attack. Going as far as occupying the aggressor state's territory is not allowed unless it is necessary to keep the state in check.²²⁴ How far a state is permitted to go in terms of destroying the enemy forces depends on the situation. In some circumstances, to achieve an end to the attack, a total defeat of the enemy's military capabilities may be necessary.

The right to self-defence ends when the Security Council takes the necessary steps to secure international peace and security, or when the attack has been repelled. If a state were to continue its military campaign against the aggressor state after repelling the attack, it can no longer be considered a proportionate response, and thus no longer self-defence.

When deciding what means and methods to use in response the anticipated overall civilian and enemy combatant casualties, and territorial destruction, including the impact on the environment, must be calculated.²²⁵ International humanitarian law (IHL) plays a significant role in determining what a state can legitimately target, but it is not a guarantee that this will suffice.²²⁶ IHL is primarily focused on collateral damage to civilians and civilian objects. A military action can satisfy the requirements of IHL but still be considered disproportionate as self-defence. For example, the use of a weapon that is permitted under IHL can still be considered disproportionate under self-defence because of the circumstances of the case at hand, but the use of a weapon prohibited by IHL can never be proportionate in self-defence.²²⁷ As stated by the court in the Nuclear Weapons Advisory Opinion even the use of nuclear weapons can be legitimately used in self-defence, if the circumstances are right.²²⁸

Some targets that are legitimate under IHL may be of vital importance to the civilian population so as to render attacks on those targets disproportionate in self-defence. The safety of the civilian population is one of the most important factors to assess before launching a response. When it comes to limiting the enemy combatant casualties, however, the same consideration has yet to be shown.²²⁹

The rights of third states must also be respected when fighting off an aggressor state. States must refrain from over-flying third states' territories with missiles and aircrafts, and take measures to assure that no damage is caused to the territory of third states by the choice or mishandling of weapons. The damage that warfare inevitably causes the environment of both third states and the aggressor state must also be appreciated.²³⁰

²²⁴ Cassese, *supra note* 46, p. 305

²²⁵ Gardam, *supra note* 214, p. 168

²²⁶ Shaw, *supra note* 124, p. 1031

²²⁷ Gardam, *supra note* 214, p. 169

²²⁸ *Legality of the Threat or Use of Nuclear Weapons*, *supra note* 48, p. 263

²²⁹ Gardam, *supra note* 214, p. 172

²³⁰ *Legality of the Threat or Use of Nuclear Weapons*, *supra note* 48, p. 242

The more dubious the arguments validating the use of force in the first place, the more rigorous the requirements of necessity and proportionality become.²³¹ Proportionality is of even greater importance when it comes to anticipatory self-defence. If there is doubt to the nature of the threat, proportionality becomes a process of speculation. If, however, the legality of anticipatory self-defence is assumed, Gardam identifies two steps that need to be taken to assess the proportionality when planning the course of action.²³² First, the aim of the self-defence has to be established, i.e. what is needed to do to halt or repel the threatened attack. Secondly, the nature and magnitude of the armed attack will determine what alternatives, in terms of scale and mode, are available to the state. The state has to take temporal and geographical considerations, as well as the impact the means and methods used will have on civilians, enemy combatants, the environment and third states.

8.5.4 Conclusion

Although there is a great divide among states and scholars on the scope of article 51 there is a general agreement on the requirement of proportionality. Proportionality is not a question of *lex talionis*²³³, it is a weighing of what measures will be proportionate to achieve an end to the armed attack. There are certain aspects that need to be considered when calculating what is proportionate and among them the principal concern is given to civilian casualties and damage. The safekeeping of innocents is vital, both in terms of keeping them out of harm's way and in terms of ensuring that their access to amenities is not impaired unnecessarily.

Proportionality poses a problem if a state would claim to act in interceptive self-defence. When there is no attack and no damage, speculation is the only way to find a proportionate response. Gardam's solution transfers the focus to halting the attack. It makes the determination of action easier because all that has to be determined is how to stop the attack. It is the nature of the attack, not the consequences, that determines the response.

Proportionality becomes a big problem in interceptive self-defence if you view the requirement as limiting a response to be equivalent to the armed attack. Such an approach seems absurd when you think about it. As an exception to a complete ban on the use of force, a state is permitted to stop a hostile state that is in breach of such a ban as the aforementioned from inflicting serious damage. The rule of self-defence is not there to ensure that the states fight it out on equal terms; it is there to ensure that the victim state's rights are not impaired by an aggressor. Proportionality works to limit the response from excess, from retaliation. A state is allowed to respond with force to halt the armed attack and may use what means and

²³¹ Gardam, *supra note* 214, 187

²³² Gardam, *supra note* 214, pp. 179-180

²³³ "an eye for an eye"

methods that will achieve a stop to the aggression, but no more. If the aggressor kills one thousand soldiers that does not mean that the victim state may kill one thousand soldiers of the aggressor. The victim state may perhaps have to kill more soldiers, or less, to end the armed attack, and the compensation for damage caused will have to be settled after the fighting has ended. Civilians are especially exposed and states should avoid punishing them for their government's behaviour.

9 New Threats

“The gravest danger to freedom lies at the crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends—and we will oppose them with all our power.”²³⁴

In the above chapters, both states and writers justify the need for a change, or re-interpretation, of self-defence by reference to new warfare technology, international terrorism and rogue states. This chapter will address these issues for the purpose of determining whether it is relevant of states and writers to include them in their arguments. All law is created for a reason and under certain conditions. If the conditions under which the rules of self-defence were created have fundamentally changed then that certainly is a reason to revise the law on self-defence. The problems of international terrorism and rogue states are very complex ones so this chapter will be limited to a basic exposition to see if they may be justification for a new order.

The UN Charter was conceived to prevent interstate aggression with Germany’s invasion of Poland in mind, which was for the purpose of territorial gain. Since the end of World War II traditional war between states has not been the major concern of the Security Council. Its efforts have instead been focused on civil wars, humanitarian disasters, rogue states and international terrorism. There are figures that estimate 80% of war casualties between 1944 and 1995 to be from intrastate wars, and 90% of these civilians.²³⁵ Interstate conflicts have been at a minimum since the drafting of the UN Charter. In Yoo’s opinion, the UN Charter was not designed to handle other issues.²³⁶ The world has changed since 1945. War is no longer waged for territorial gain.

International terrorism is by no means a new phenomenon. So why is it widely referred to as one of the primary reasons to change a 60 year old law? International terrorism and rogue states are not concepts that are new to our decade. Neither are WMD. Why are they now the biggest threats to the world and the reason to change the law? The answer lies in the combination of all of them.

²³⁴ President George W Bush Delivers Graduation Speech at West Point, New York, 1 June, 2002

²³⁵ Yoo, *supra* note 2, p. 745

²³⁶ *ibid.*

9.1 The War on Terrorism

The events of 9/11 2001 changed the world for many people. It shook their sense of security to the core, especially in the USA. Although living in a world where terrorist acts had been in the news weekly, the events of 9/11 appeared to have been unthinkable. Before 9/11 terrorist showed no effort towards causing mass destruction. Their attempts generally threatened a maximum of a few hundred lives.²³⁷ The Security Council condemned the 9/11 bombing and identified it as ‘a threat to international peace and security’, and ‘recognized the inherent right of individual or collective self-defence in accordance with the Charter’.²³⁸

A ‘war on terrorism’ was initiated by the USA and was supported by a vast number of states and organisations. Resolution 1373 encourages states to cooperate with other states and fight every possibility for terrorists to function within their borders.²³⁹ The resolution created a Counter-Terrorism Committee to facilitate the implementation of anti-terrorist measures internationally. The EU has discarded the threat of large-scale interstate aggression as the biggest threat to Europe in favour of terrorism, proliferation of WMD and failing states in combination with organized crime.²⁴⁰ Terrorism is not only being fought with military measures, economic sanctions and developmental aid are among the important non-military measures being used. The nature of international terrorism requires states to cooperate. Without cooperation, terrorism will find places to flourish and hide.

The war on terrorism replaced, in a way, the Cold War and gave the world a new global enemy. In the absence of a nation state worthy of being called an adversary, international terrorism has taken the place of the Western world’s greatest threat. Although international terrorism in itself is not a new threat to the world, it has taken new proportions and does not have the same medial competition as it did in the past. Some terrorist organisations are very well funded.²⁴¹ Terrorist acts have become more and more targeted towards larger numbers of people in less protected places, like stations and markets.

One major difference to the Cold War situation is that against terrorism there is no deterrence. The mutual assured destruction (MAD) situation deterred both sides from starting aggression. Suicide bombers have nothing to fear from their victims except failure. Therefore, terrorism could be considered a greater threat to civilians in cities of the west than the Soviet Union ever was.

²³⁷ Betts, Richard K, *The New Threat of Mass Destruction*, Foreign Affairs , Volume 77, Number 1 p. 28

²³⁸ Yoo, *supra note 2*, p. 790; Security Council Resolution 1368 of 12 September 2001

²³⁹ Security Council Resolution 1373 (28 September 2001)

²⁴⁰ *A Secure Europe in a Better World*, European Security Strategy, 12 December, 2003 p. 3

²⁴¹ Travalio, Altenburg, *supra note 31*, p. 109

Self-defence against terrorism in international law becomes irrelevant unless there is a state involved. If a state takes action against a terrorist group within its borders it is not self-defence in the sense article 51 describes. Self-defence in international law is against another state. Self-defence against terrorism on an inter-state level can become relevant, however, as Afghanistan in 2001 and Iraq in 2003 illustrate. Explicitly consenting to or supporting terrorist activities, or simply having insufficient control leading to not being able to prevent terrorists from roaming within their borders can get a state involved.²⁴²

The problem with terrorism and self-defence is that there is not necessarily an address on the attack. When there is no government claiming responsibility behind the attack a counter-strike becomes difficult. Terrorists that remain hidden or anonymous make it very difficult for their victims to retaliate. This is a strong argument for anticipatory action. During the Cold War, states firmly opposed anticipatory self-defence, according to Betts, but when dealing with rogue states and terrorists most states hope to launch a disarming attack when faced with threats of WMD.²⁴³

9.2 Rogue States

A rogue state is a relatively new term developed by the US State Department for the post-Cold War era. A rogue state is a state that:

- brutalise their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law, threaten their neighbours, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve aggressive designs of their regimes;
- supports terrorism around the globe;
- reject basic human values and hate the United States and everything for which it stands²⁴⁴
- stir up regional or international tensions and are, therefore, menaces to world peace and stability.²⁴⁵

The definition is not an established one and several writers have their own additions. Yoo, for example, adds to the definition the requirements of human rights abuses and being, in general, a dangerous ideological regime.²⁴⁶ Rogues are, according to Rotberg, states that rank high on two parallel scales: repression and aggression. States that systematically oppress

²⁴² ILC Draft on State Responsibility articles 4-11

²⁴³ Betts, *supra note* 245, p. 30

²⁴⁴ The National Security Strategy of the United States of America (2002), pp. 13-14

²⁴⁵ Ismael Hossein-Zadeh, *Economic Foundation of the "Rogue State"* (2001)

²⁴⁶ Yoo, *supra note* 2, p. 783

their own people, deny human rights and civil liberties, severely impair political freedom, and prevent meaningful individual economic opportunity are easy to stigmatize.²⁴⁷ Aggression-wise many of the repressive states in the world rank high. Sponsoring terrorism and acquiring WMD give high points on the aggression scale. States that attack neighbour states and deals in narcotics, arms and so on are also on the aggressive side. The general idea of what is meant by a rogue state is easy to understand.

Those who have studied the rhetoric of the rogue threat have linked it to the Pentagon's desire for a post-Cold War 'quest' that would justify keeping military budgets and force levels the same as during the Cold War.²⁴⁸

One such critic is Ismael Hossein-Zadeh. He claims that if one were to go by the USA's definition of a rogue state the Americans would by far top all other states, and is therefore, according to its own definition, the 'roguest' state.²⁴⁹ But since the USA considers itself to have a global policing obligation they are exempt from such definitions. What Hossein-Zadeh argues is that the existence of rogue states depends on powerful social and economic interests in the USA that have become dangerously dependant on strong military spending and, therefore, on the maintenance of either actual wars or of a tense international atmosphere that requires a constant military presence. The situation has become all the more dangerous as states around the world, including the UN, have successfully defined US national interests in terms of their own interests. He claims that regional or local wars are often the products of strong, but submerged, socio-economic interests of the USA.²⁵⁰

The term rogue states has existed in international relations since the 1980's and described states whose international behaviour deviated from international standards, by sponsoring terrorism or developing WMD. But most significantly they were states that openly went against the wishes of the major powers. By 1991, the rogue term was firmly in place: a rogue state was an aggressive developing country that militarily threatened its neighbours and its region while seeking to overturn the international order through the sponsorship of terrorism and the pursuit of WMD.²⁵¹ In the 1990's, Argentina, Brazil, Cuba, Egypt, India, Iran, Iraq, Israel, Libya, North Korea, Pakistan, South Korea, Syria, and Taiwan got the Pentagon's attention when there was no major power to use as an excuse to keep budgets at cold war levels.²⁵² There was even an apolitical list, based on potential capabilities, which included American allies such as Israel and South Korea.²⁵³

²⁴⁷ Rotberg, Robert I, *The Threat from Rogue States* (2004)

²⁴⁸ Caprioli, Mary and Trumbore, Peter F, *Rhetoric versus Reality: Rogue States in Interstate Conflict* (2005), p. 772

²⁴⁹ Ismael Hossein-Zadeh, *supra note 252*

²⁵⁰ *ibid.* p. 4

²⁵¹ Caprioli, *supra note 251*, p. 777

²⁵² *ibid.* p. 775

²⁵³ *ibid.*

Rothberg lists Belarus, Burma, Equatorial Guinea, Iran, North Korea, Saudi Arabia, Uzbekistan, and Zimbabwe as rogue states in 2004, based on his repression-aggression definition.²⁵⁴ North Korea and Iran are at the top of the list, followed by Syria. These three rogue states count as big disturbances to the stability of world peace. Less threatening but still aggressive states are Saudi Arabia, Uzbekistan, and Zimbabwe. Mostly dangerous to their own population are Belarus, Burma, Equatorial Guinea, Togo, Tunisia and Turkmenistan. Other states that narrowly avoid rogue status, such as Libya are not considerably oppressive to their people but have had an aggressive nature, and states such as Sudan that are not aggressive externally but very oppressive to their own people.

In the 2002 National Security Strategy of the United States of America, rogue states are specified as the primary threat to their national security.²⁵⁵ The USA left forces in Saudi Arabia five years after the end of the Gulf War as a deterrent to rogue states, reminding them that the USA will fight to defend its vital interests in the region. Three states were identified in 2002 by the USA as the 'axis of evil'; Iran, Iraq and North Korea.²⁵⁶ This is obviously a way of instilling fear into the world since the apparent reference to World War II is inherent in the term axis. However, there is no cooperation or common interest between these three states to warrant the term axis.

North Korea admitted in 2002 to having a nuclear programme and suffered sanctions from the USA. North Korea then stepped up its nuclear activities and withdrew from the Nuclear Non-Proliferation Treaty. In 2003 North Korea test-fired missiles and violated its sea-borders with South Korea. North Korea is very erratic in its diplomatic relations and that is of course one reason they are considered a rogue state. They have even claimed to have a right to take anticipatory action against the USA because of the threats made towards them.²⁵⁷ The danger posed by North Korea's nuclear capability has again highlighted the options when faced with nuclear threats. The discussion has focused on imposing sanctions rather than using force, though.²⁵⁸

Iran has always had an aggressive stance towards the West and especially the USA. Iran agreed to accept UN inspections of its nuclear programme in 2003 after an initial rejection. Their endeavours to construct nuclear facilities irritate the USA and causes unstable relations. Iraq found itself the target of a dubious invasion lead by the USA in 2003. Cooperation with the UN and the USA might have lead to avoiding an invasion but refusing to do so resulted in the deposing of Saddam Hussein and a lengthy, ongoing pursuit by the USA to democratise and pacify Iraq. The events of 9/11 served to further set the assumptions of rogue states in concrete, and the

²⁵⁴ Rothberg, *supra note* 254

²⁵⁵ The National Security Strategy of the United States of America, *supra note* 251, p. 14

²⁵⁶ President Delivers State of the Union Address, *supra note* 1

²⁵⁷ Gray, *supra note* 3, p. 185

²⁵⁸ Alexandrov, *supra note* 30, p. 163

invasion of Iraq represented the culmination of the American policy response developed during twenty years of planning and debate over the best way to handle rogue states.²⁵⁹

9.3 Weapons of Mass Destruction

Modern warfare, such as weapons of mass destruction, missiles and air power, that can cause extreme devastation in an instant have made the world quite fragile. WMD do not have to be delivered by missile but can be easily concealed, delivered covertly, and used without warning. Since they can be constructed in secret, they are sometimes difficult to trace. This contributes greatly to making the world today feel unsafe for civilians.

The world was not a safe place for people during the Cold War either. During the Cold War, nuclear arms hovered in the background of every major issue in East-West competition. The fear of World War III could be linked to most foreign policy priorities of the Western governments.²⁶⁰ In the beginning of the Cold War, the USA was the dominant nuclear power. It had a strategy of anticipatory nuclear strikes, which kept the Soviet Union and its allies in check. But as the Soviet Union developed their nuclear capability the USA had to abandon its strategy in favour of a less offensive stance.

The Cold War era, and the MAD days, has left the USA with an arsenal capable of wiping out the nuclear arsenals of both China and Russia in a first strike.²⁶¹ Since the end of the Cold War, the USA's nuclear arsenal has improved. The USA is about to attain total nuclear domination. What the USA and the West fear today is not the attack from a major nuclear power, but the indiscriminate killing that 9/11 caused, in even greater scale. Several governments of the West seem convinced that it will happen unless measures are taken against terrorist networks and rogue states. The primary concern for states today is not that the enemy would launch an attack against battalions or ships, but against civilians in cities.²⁶²

The USA's entire weapons arsenal can do nothing against a single person infiltrating a major city and detonating a nuclear device. The weapons can be used as a response but the damage may already be extremely extensive. As for a similar incident happening in a small country like Israel there is a fear that there may never arise an opportunity to respond. Modern weaponry can cause such overwhelming damage that it warrants the use of a first strike to save lives. A nuclear explosion causes damage through blast, thermal radiation and nuclear radiation. Degrees of several tens of millions centigrade develop in the nearby area. In an atmospheric detonation, the

²⁵⁹ Caprioli, *supra note* 251, p. 777

²⁶⁰ Betts, *supra note* 245, p. 27

²⁶¹ Lieber, Keir A & Press, Daryl G, *The Rise of U.S. Nuclear Primacy*, Foreign Affairs, Volume 85, Issue 2, 2006

²⁶² Betts, *supra note* 245, p. 28

heat is so extreme that it forms a hot sphere of air and gas that grows and rises. This fireball expands to over 2000 meters within ten seconds. As it cools down the mushroom cloud is created and soon distributes radioactive materials to its surroundings.²⁶³

The fear of a terrorist group gaining access to a nuclear weapon is perhaps the most frightening of the plausible threats facing the world today. Hundreds of thousands could die from a single nuclear explosion.²⁶⁴ Since nuclear devices are difficult to acquire, the only means for terrorists to acquire them are by stealing or buying an existing weapon, or constructing one from highly enriched uranium or plutonium. All that is needed is 4 kilograms of plutonium, and once acquired the production is no longer that complicated. Tactical nuclear weapons exist, some small enough to be carried by a person, and would be devastating in the hands of a terrorist. One major difference from the Cold War era is that before nuclear weapons were weapons of necessity, now they are the weapons of choice for terrorists and rogue states.

Today biological and chemical weapons compete with nuclear arms. The concern has moved from complete annihilation to mass destruction. The nuclear arsenals are smaller around the world but access to nuclear, chemical and biological weapons is easier than it used to be.²⁶⁵ The roles WMD play today are different compared to during the Cold War days. First, these weapons are not the technological frontier anymore. They are the weapons of the weak. States who are poor and have a second rate military develop a nuclear arsenal. Secondly, in terms of danger, nuclear weapons have lost their number one position to biological weapons. Biological weapons pose a greater threat than nuclear weapons, followed by chemical weapons. And lastly, deterrence and arms control do not have the same significance as they used to.²⁶⁶

Until the 1980's, nuclear weapons were the primary WMD of concern internationally. Chemical and biological weapons were in the periphery. Chemical weapons received attention in the 1980s when they were used in the Iran-Iraq war. Today they are far more available than nuclear weapons due to their easy production. They are, however, not as dangerous as the other WMD because of their inability to inflict massive destruction in a single attack. It would require logistics far beyond the capabilities of most terrorist organisations. The reason to fear biological weapons more than the other WMD two is their availability combined with the potential to create enormous destruction.²⁶⁷

²⁶³ Federation of American Scientist, *Nuclear Weapon Effect*, available at <http://www.fas.org/nuke/intro/nuke/effects.htm>

²⁶⁴ Union of Concerned Scientists, *Global Security*, available at http://www.ucsusa.org/global_security/nuclear_terrorism

²⁶⁵ Betts, *supra note* 245, p. 27

²⁶⁶ *ibid.* p. 27

²⁶⁷ *ibid.* p. 29

Nuclear weapons kill many people but are difficult to come by, chemical weapons are easy to get but do not kill as many, biological weapons are easy to produce and kill huge numbers of people. Betts describes a scenario of 100 kilograms of anthrax spores dropped by aerosol from an airplane over Washington DC as an example of its destructiveness. On a calm and clear night, it would kill between 1-3 million people. That is 300 times more casualties than 10 times more sarin gas dropped from the same airplane would have caused.²⁶⁸

A nuclear attack by terrorists is far less likely than an attack by biological means. And an attack on civilian population by terrorists or rogue states seems more likely today than an interstate nuclear confrontation during the Cold War. Betts does not believe that the world is under threat from ballistic missiles loaded with WMD, but that airplanes, ship-launches and unconventional measures such as smuggling pose the realistic threat.²⁶⁹

9.4 Conclusion

Exactly what a rogue state consists of is hard to determine. It seems it is mostly not being in the USA's favour. Although these states clearly possess ideologies and values that the West find primitive and oppressive a lot of their aggressiveness can be explained by Western oppression and interference. The rogue states constitute a threat to world peace and stability as long as they refuse to be open with their intentions and support terrorist activities. However, their dangerousness seem to be exaggerated, at least when trying to generalize between them. North Korea's illisiveness and Iran's open contempt for the West clearly warrants attention but in relation to other rogue states it is difficult to see how they are a sufficiently bigger and different threat now than 50 years ago.

WMD are easier to come by nowadays. There are less of them than there used to be but they are not as heavily guarded as before. During the Cold War the technology for producing nuclear weapons were new and difficult. Today any state can create their nuclear arsenal and it is the anti-West states that are most interested in doing so. These states have expressed sympathy with international terrorism and imagining these states in possession of nuclear weapons is disturbing.

There are even worse, and harder to detect, WMD than nuclear devices in the biological weapons. The smaller the weapon the bigger the threat, it seems, since few today expect a missile or other conventional mean of attack to strike their country. It is the covert acts that need to be detected before they succeed because there are too many difficulties in responding to such attacks.

²⁶⁸ Betts, *supra note* 245, p. 29

²⁶⁹ *ibid.* p. 31

Terrorism has taken on a new face compared to 10 years ago. With the help from governments and by use of WMD they can cause such enormous and unexpected damage that something must be done. The world sees international terrorism as a huge threat, and validly so. There is no deterrence to terrorism. To stop an act of terrorism the person about to perform the act has to be physically stopped because he is often not concerned over what consequences that might follow. The rhetoric of rogue states may be exaggerated and more than a little biased but as long as states support international terrorism, they must be treated harshly.

Clearly, laws have to be created and changed to dismantle the ticking bomb that is terrorism, the question here is whether changing self-defence is one of them. Efforts have been taken in the UN and in the EU, and states all around the world agree on cooperation to battle terrorism. There can be no question as to the impact international terrorism has had on the world in recent years. The world has changed and is faced with new threats. But expanding the right to self-defence is not the solution.

10 Conclusion

It is easy to see that there is no clear-cut answer to the question of the scope of self-defence. But in this concluding chapter I will try to make sense of what has been presented above and give my opinion to whether or not there is any validity in Dinstein's statements. Interceptive self-defence is, by all means, not a new concept; it is only naming it that is new. In 1956 Dr Singh wrote the following:

*“...if the provisions of article 51 are closely examined, it would appear that what is necessary to invoke the right of self-defence is an armed attack and not the actual, physical violation of the territories of the state...as long as it can be proved that the aggressor state with the definite intention of launching an armed attack on a victim member-state has pulled the trigger and thereby taken the last proximate act on its side which is necessary for the commission of the offence of an armed attack, the requirements of article 51 may be said to have been fulfilled even though physical violation of the territories by the armed forces may as yet have not taken place”.*²⁷⁰

For over fifty years the question of “*if an armed attack has occurred*” has been left open. This shows that there has always been some discontent with article 51. Moreover, it seems that the problem lies with how to respond to threats of massive destruction such as those accompanied by weapons of mass destruction. Repeatedly the deficiency of article 51 to handle threats of large devastation is commented. When does an armed attack begin?

When a state is convinced of the nature of a threat so as to objectively determine the threat as a potential armed attack they have to await its commencement. That “*an armed attack has occurred*” clearly does not mean *after* an armed attack has occurred. Only the most restrictive reading of article 51 suggests that and only in exceptional circumstances has it been proposed. At some point, before the attack is finalized the victim state has a right to take forceful counter-measures. Nothing in the text of article 51 implies otherwise, states seem to be open for imminent attacks, most writers certainly are, and the Webster formula basically invented it. As many writers suggest it would be absurd to require a state to be a sitting duck.

So far, so good, but does this mean that a state can start military action against another state whose submarine is entering the first state's territorial waters, or when an aggressive state's fleet is leaving its harbour? There can be numerous of dubious reasons for these transgressions but automatically concluding that it is an armed attack would be exaggerated. In hindsight, as

²⁷⁰ Singh, Nagendra M, *The Right of Self-Defence in Relation to the Use of Nuclear Weapons*, 5 Indian Yearbook of International Affairs 3 (1956), in McDougal, Myres S and Feliciano, Florentino P, *supra note* 130, p. 239

with the Pearl Harbour examples, the attack began when the Japanese took the first actual step in performing the attack. But that does not help us determine the point of beginning of an armed attack, at the moment when it is happening. An armed attack has not yet occurred when a submarine is leaving its territorial waters. However, if radar detects an approaching missile then without a doubt an armed attack has occurred. The question is then wherein lies the difference?

The answer can only be proximity. No manifested intention or aggressive amassing of troops can warrant anything more than preparation. The Webster formula is the absolute widest interpretation conceivable. The UN Charter restricted self-defence to apply solely against armed attacks, and only armed attacks that have begun. If an armed attack has begun; it is “*overwhelming, leaving no choice of means, and no moment for deliberation*”, but has not yet impacted, the target state has become a victim in accordance with article 51 and are excluded from the prohibition of the use of force. This is a situation of a trigger that has been pulled.

So far, Dinstein makes no wild assumptions and I find no reason to disagree with him. If we return to his example of the Pearl Harbour attack, the above scenario is equivalent to the activation of self-defence at the moment when the Japanese bombers left their carriers for Pearl Harbour. The trigger has been pulled even though in theory the bombers could have been ordered back to the carriers. Self-defence becomes necessary because of the short period of time left before the attack has reached its mark. But if the Americans were to attack the Japanese fleet en route for the attack the Americans would become the aggressors. At this moment, there would still be time for the UN and the world community to convince the Japanese to cease their aggressive behaviour. After all, the scenarios are based on the condition that the Japanese intention is known.

It is when non-violent courses of action to maintain peace has passed that self-defence is activated. When there is no time for the legal and political measures to solve the situation then a state, or several states, can take it upon themselves to return the status quo by force. Whether or not there are any realistic prospects of negotiations succeeding is of no consequence, as long as there is time. Once there is only one step left before self-defence becomes ‘too late’, i.e. when the next step means impact, then self-defence is warranted. An example of this would be when an aircraft locks on to a target the next step would practically mean impact and at that point it constitutes an armed attack.

State practice is limited and unclear but shows that in the cases above there was a rejection of self-defence based on the time and nature of the claimed armed attack. Not all imminent attacks would give rise to self-defence but some would, if they are sufficiently close to completion.

If we turn to the new threats, some writers claim that proximity in time as a scale would be insufficient in an age of WMD, rogue states, and

international terrorism. A nuclear ICBM has to be intercepted before it impacts but destroying a nuclear plant in a far off country just to be safe would be illegal. Rogue states are still sovereign states and should be treated as such. These are not difficult issues however. The real danger is the combination: terrorists supported by rogue states in possession of WMD. The easy answer is that expanding self-defence simply is not the best way to handle these issues. A state cannot claim to act in self-defence if they are taking military preventive action against facilities in other countries developing WMD, or intervening in regimes suspected of supporting terrorists.

Such action could only be justified after a complete re-evaluation of the whole concept of self-defence. Obviously, some states feel threatened by the development since 9/11 and want to seek justice and prevent the re-occurrence of such deeds by intervening in locations where the hatred that undermines such exploits are being fed. That is not the purpose of self-defence and therefore other, peaceful, solutions must be found. An armed attack is still an unavoidable requirement.

The negativity surrounding the capability of the UN Charter to handle the use of force is misplaced. The lack of interstate armed conflicts since its conception proves that the UN Charter has quite successfully dealt with what it was designed to deal with. It seems it is less equipped to handle international terrorism but the system will hopefully accommodate itself to changing circumstances. The Caroline criteria, whether still valid as a wider parallel right or not, is a valuable tool to help adjust to new threats. Leaving a reference to an "*inherent right*" in article 51 may have been a way to secure flexibility in a rapidly changing world. When article 51 falls short, the Webster formula can be used to ensure that state's rights are cared for. There can be no doubt as to the survival of the Caroline case in public international law, but to what extent and in what form remains to be seen. Unfortunately, the Caroline case has as many different interpretations as article 51.

In summary, interceptive self-defence is legal as long as we are talking about the response to an armed attack that has begun. Sometimes the beginning of an attack is obvious, but often it is not. Depending on how one interprets article 51 and the Webster formula there need not be such a difference. Article 51 requires an armed attack and the Caroline case can be used to determine when it has begun, i.e. when it is "*overwhelming, leaving no choice of means, and no moment for deliberation*". This is the answer to when an armed attack begins, and together, article 51 and the Caroline case, form what I believe to be the contemporary right to self-defence in public international law.

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