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The Legality or Illegality of Pre-Emptive Self-Defence

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Summary

The threat or use of force in international relations has been unlawful since the UN Charter entered into force in 1945. States still had the right, though, to protect themselves in self-defence. There has, from the start, been a discussion about the extent of this right to self-defence. In UN Charter article 51 it is stated that Members have an “inherent right of individual or collective self-defence if an armed attack occurs” against them. The question, though, is whether this means that self-defence can only be used if an armed attack has actually occurred, or whether it is possible that self-defence can be used at an earlier stage when there is only a threat of an armed attack. In other words, is anticipatory or perhaps even pre-emptive self-defence legal according to international law?

Anticipatory self-defence would be on the cards if there were an imminent danger of an armed attack, and pre-emptive self-defence gives even wider scope. In the latter there is no need for the presence of an immediate, direct threat, instead only that the situation, if left to grow, would be such that the cost of any later neutralisation action would be unacceptable. The excuse of anticipatory and even pre-emptive self-defence has been used by States numerous times, but the UN and its Members are very reluctant to recognise the legality of it. This thesis concentrates on pre-emptive self-defence, but the debate regarding anticipatory self-defence is included because of its relevance since it falls within the boundaries of pre-emptive self-defence.

The customary international law, that existed before the UN Charter was created, allowed anticipatory self-defence in certain circumstances. It has therefore been argued that this pre-existing customary right still exists parallel to the UN Charter, which would mean that self-defence is allowed in the presence of an imminent threat of an armed attack. It can probably be said from the doctrine, though, that article 51 is the only right of self-defence that is available for States today. Thus pre-emptive self-defence is not lawful according to current international law.

The US has in the past been opposed to the use of pre-emptive self-defence, but after the terror attacks on 11 September 2001, a change in attitude can be detected. In their 2002 National Security Strategy document they even claimed that in the future they will, if necessary, act pre-emptively to forestall or prevent attacks by their enemies. This attitude change has been brought on by terrorists, rogue States and weapons of mass destruction. Weapons of mass destruction and rogue States cannot be said to constitute a new threat, but when combined with terrorists they probably can. Terrorists as such are not a new concept, but some terrorist organisations have moved up into a different league. With more funding and better possibilities for communication, they have become greedier for power and influence. Instead of just trying to change a particular policy, they seriously threaten to destroy the structures and the values of today's world public order. Thus they have become more professional and sophisticated.

Is this “new” threat to international peace and security of such a degree that the concept of self-defence should be extended to include pre-emptive self-defence? The risk of abuse cannot be ignored. Pre-emptive self-defence could be used as a pretext for aggression, and, instead of decreasing the risk of armed conflicts between States, it could lead to more violence.

Indeed, terrorists in combination with rogue States and weapons of mass destruction pose a threat to international peace and security that has not been experienced before, but it still does not seem likely that the threat is so severe and extensive that the right to self-defence will be extended.

Preface

I would like to thank Professor Shiyan Sun for his help in setting me in the right direction in my researches. Likewise I am grateful to Simon Cox for his advice and scrutiny regarding the use of English.

Abbreviations

AMJIL	American Journal of International Law
AJICL	Arizona Journal of International and Comparative Law
CHIIL	Chicago Journal of International Law
EJIL	European Journal of International Law
FLFWA	Fletcher Forum of World Affairs
HVILJ	Harvard International Law Journal
ICLQ	International and Comparative Law Quarterly
INTJLI	International Journal of Legal Information
MILLR	Military Law Review
NATO	North Atlantic Treaty Organisation
UCHILR	University of Chicago Law Review
UK	United Kingdom
UN	United Nations
US	United States of America
YJIL	Yale Journal of International Law

1 Introduction

1.1 Purpose and Delimitations

Since the UN Charter came into force on 24 October 1945, there has been a discussion about the extent of the right to self-defence mentioned in article 51. In the article it is stated that Members have an “inherent right of individual or collective self-defence if an armed attack occurs” against them. The question, though, is whether this means that self-defence can only be used if an armed attack has actually occurred, or whether it is possible that self-defence can be used at an earlier stage when there is only a threat of an armed attack. The excuse of anticipatory and even pre-emptive self-defence has been used by States numerous times, but the UN and its Members are very reluctant to recognise the legality of it.

The US has in the past been opposed to the use of pre-emptive self-defence, but after the terror attacks on 11 September 2001, a change in attitude can be detected. In their 2002 National Security Strategy document they even claimed that in the future they will, if necessary, act pre-emptively to forestall or prevent attacks by their enemies.

The purpose of this thesis is to research and discuss whether pre-emptive self-defence is legitimate according to the UN Charter, and, if it is not, whether the law should be changed to include and justify the right of pre-emptive self-defence.

1.2 Methods and Materials

This thesis is both descriptive and analytical. The doctrine on pre-emptive self-defence is divided, and the different viewpoints thereof are described in chapter four.

The materials that have been used in this thesis are first of all books, but a large part is also based on fairly recent articles written on the subject. The reason for this is that the terror attacks on 11 September 2001 and the National Security Strategy of the US that was released in 2002 have brought the debate on pre-emptive self-defence to the surface. The articles are taken from a number of European and American law journals, but for the most part they are from the European Journal of International Law and the American Journal of International Law. Even the Internet has been used in the research to find resolutions from the UN Security Council and the UN General Assembly, and also to find sources from the US government.

1.3 Terminology

Both anticipatory self-defence and pre-emptive self-defence are mentioned in the thesis. These two terms have different meanings, which are explained in the introduction to chapter four. The debate regarding anticipatory self-defence is included because of its relevance since it falls within the boundaries of pre-emptive self-defence.

1.4 Outline

Chapter two will start with a short historical background to the right of self-defence. The development that led to the prohibition of the use of force with the exception of self-defence will be laid out.

In chapter three the legal framework will be mapped out. The different criteria for when self-defence can be used will be discussed. This will include the definition of the term “armed attack”, and an investigation into the circumstances under which an action can be considered to be one.

Chapter four will be divided into three sections. The first section will discuss whether pre-emptive self-defence is allowed according to international law. The second section will begin with the terror attacks on the 11 September 2001 and then follow with a discussion on whether the international law on self-defence should be amended. In the third section the UN and the Security Council’s construction and function will be explored, ending with discussions around state sovereignty, non-intervention and sovereign equality.

Finally, the conclusion will follow in chapter five.

2 Historical background to the right of self-defence

Hugo Grotius (1583-1645) is known to be the founder of modern public international law.¹ He was one of the developers of the Just War Theory, a theory based on the thoughts of St Thomas Aquinas that governed the use of force by States. The theory stated that unless the war was for a “just cause”, it was illegal.² Grotius considered that a “just cause” would be anything that would defeat violations of natural law.³ The Just War Theory and its limitation to the States’ right to use force against each other did not last for long, though. Indeed, by the end of the 17th century, the theory had already been refined.⁴ It was now up to the State itself to decide whether they had a just cause or not; if the State in question believed that they had a just cause, then that was the end of it. Needless to say, there was no objective test.

Not long after the refinement, the whole theory disappeared; the reason being that State practice became more important in international law. The development of international law did not stop there. State practice took precedence to the extent that by the 18th century every State had an unlimited right to resort to war whenever they wished. International law remained virtually unchanged on the matter until the formation of the League of Nations in the aftermath of World War I in 1919. It was recognised that if there is no limitation on a States’ right to resort to war, then there is no real need for any such justifications as “the force was used in self-defence”, for example. Even so, the States had started to try to categorise their use of force in similar groups as we have today.⁵ So, although it may seem as though the term “self-defence” was created at the beginning of the 20th century, it was in fact something that evolved over a much longer period of time.

The classic definition of customary self-defence actually comes from the Caroline incident of 1837.⁶ The incident took place in the Niagara River, which forms part of the border between Canada (which was at this time part of the British Empire) and the United States. A group of Canadians were on their way to commit rebellion against their own government, and many Americans supported these rebels with supplies and were willing to assist in a possible invasion of Canada. The US Government did nothing to stop this support. In the Canadian part of the Niagara River there is an island called Navy Island, which the rebels used as a base from which they launched

¹ J Nergelius, *Rättsfilosofi, Samhälle och moral genom tiderna* (2001), p 21.

² M Dixon, *Textbook on International Law* (1996), p 276. Nergelius, *supra note 1*, p 21.

³ Nergelius, *supra note 1*, p 21.

⁴ Dixon, *supra note 2*, p 278.

⁵ Dixon, *supra note 2*, p 278.

⁶ See Abraham D Sofer, *On the Necessity of Pre-emption* (2003) 14 EJIL, p 214-220, Dixon, *supra note 2*, p 283, Yoram Dinstein, *War, Aggression and Self-Defence*, 2nd ed (1994), p 182.

attacks on Canadian boats and facilities. The *Caroline* was a ship that was used to transport supplies from the US shore to the rebel base on this island. One night in December 1837, when the *Caroline* was moored on the US side of the river, British soldiers stormed the ship and destroyed it by setting it on fire, killing at least one American. The British Government claimed that they had a right to destroy the *Caroline* on the grounds of self-defence even if it was situated on US territory. The case was not settled in court, but by diplomatic correspondence between British officials and the US Secretary of State Daniel Webster. It is from this correspondence that we have the classic definition of customary self-defence.⁷

It is important to add that at this time the use of force against another State was still legal, so the classification had not so much to do with legal justification, it was merely a political excuse.⁸ States had become inclined to claim that their use of force did not amount to a war, but was instead “force short of war”, and self-defence was an example of it. The first attempt to outlaw war was in 1928 with the still valid General Treaty for the Renunciation of War, also known as the Kellogg-Briand Pact.⁹ In many ways, though, this was a toothless tiger. The intention with the Treaty was very good, but the Pact had a rather serious flaw. It outlawed “war” and not “force”, which gave the States an extensive loophole. The Kellogg-Briand Pact was, however, a very important step that eventually led to the total ban of the use of force in article 2(4) of the United Nations (UN) Charter in 1945 following World War II. The Kellogg-Briand Pact made no reference to self-defence, but that does not mean that it did not exist in international law. The explanation for it not being mentioned is probably that the right to defend a State was something that was considered to be so fundamental that it needed not to be included in the Pact, and the *travaux préparatoires* for the Treaty indicates just that.¹⁰ The unilateral use of force was not prohibited until the UN Charter was created, and without a general duty to refrain from the use of force, self-defence cannot be said to be a legal right. So, even if self-defence as such has been a political excuse for the use of force against another State since at least the *Caroline* incident in 1837, it did not become a legal right until 1945.

⁷ Dixon, *supra note 2*, p 283.

⁸ Dinstein, *supra note 6*, p 176.

⁹ 27 August 1928, 46 Stat 2343, TS No 796, 94 LNTS 57.

¹⁰ Dixon, *supra note 2*, p 279.

3 The Right to Self-Defence – UN Charter Article 51

3.1 UN Charter Articles 2(4) and 51

Article 2(4) of the UN Charter reflects a freestanding rule of customary law and is a formal treaty obligation as well, and it states a general prohibition of the unilateral use of force.¹¹ It reads:

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.

There is no question that all States shall refrain from the unilateral use of force. There is, however, an exception to this rule in article 51 of the Charter:

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

This means that all States have a right to self-defence by which the use of force is a legitimate exception to the general rule of prohibiting use of force. There is, however, a disagreement amongst the Member States regarding the circumstances under which force can be used lawfully in self-defence¹².

¹¹ Edward Gordon, *Article 2(4) in Historical Context* (1984-1985) 10 YJIL, p 275.

¹² Dixon, *supra note 2*, p 276. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed (1997), p 311.

3.2 When Can Force be Used in Self-Defence?

Self-defence is a form of “armed self-help”¹³ originally dependent on an illegal act being directed at the State from another State,¹⁴ although today the illegal act can also be committed by terrorist organisations.¹⁵ The purpose of the right is not for retaliation or any other form of reprisals, but to make sure that the legal status quo is preserved or restored.¹⁶ The State that is being attacked can decide on its own whether or not self-defence should be used, but it is ultimately the international community, in the form of the United Nations, that is the final judge in the matter. According to the UN Charter article 51, the Members may only exercise their right of self-defence until the Security Council has taken the necessary measures to maintain international peace and security, and the Members must immediately report to the Security Council the measures they have taken. It is important to remember that self-defence is not an obligation, but a right that the State can choose to exercise.¹⁷

3.2.1 Armed Attack

3.2.1.1 A Problematic Term

States have an inherent right to self-defence if an armed attack occurs against them.¹⁸ It is therefore important to establish what constitutes an “armed attack”. Unfortunately there is no definition of “armed attack” anywhere in the Charter¹⁹, and the term “aggression” is used elsewhere. There is not even an explanation of the term in the records of the San Francisco Conference. There is unfortunately no specific answer to why the definition was left out; one theory expressed is that perhaps the term “armed attack” was regarded as sufficiently clear.²⁰ It cannot be stressed enough that the definition of “armed attack” is vital for the understanding of the article, but it is still a much debated term and very difficult to determine.

The term raises a couple of crucial questions: what nature of violence is necessary for the violence to be considered an armed attack, and when is it actually an armed attack? Is it after the attack has occurred, is it when missiles have been launched but not reached their target, is it when the State has been threatened and there is an absolute certainty that the potential attack will become a reality, or is it simply when a so-called hostile State has in its possession weapons that could be used in an attack?

¹³ Dinstein, *supra* note 6, p 175.

¹⁴ DW Bowett, *Self-Defence in International Law* (1958), p 11.

¹⁵ See below 3.2.1.2 “Who is the Perpetrator?”

¹⁶ DW Greig, *International Law*, 2nd ed (1976), p 877.

¹⁷ Dinstein, *supra* note 6, p 179, Bowett, *supra* note 14, p 269.

¹⁸ UN Charter article 51.

¹⁹ Stanimir A Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996), p 98.

²⁰ Ian Brownlie, *International Law and the Use of Force by States* (1963), p 278, Alexandrov, *supra* note 19, p 96.

As mentioned, the drafting history of article 51 unfortunately does not give clear answers to these two difficult questions, and it is therefore in the first instance up to the States involved to determine whether or not an armed attack has occurred.²¹ The final word in the interpretation of the term obviously belongs to the United Nations²², but self-defence is a given right until the Security Council has taken measures necessary to maintain peace and security.

3.2.1.2 Who is the Perpetrator?

The Foreign Relations Committee of the US Senate stated shortly after the creation of the UN Charter that an “armed attack” clearly does not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another”.²³ Brownlie added to the discussion that he found it possible for powerful bands of irregulars to commit an armed attack against a State. Some sort of connection to the government of the State from which they operated was, though, a provision.²⁴ Today it is clearly not an assumption that the attack has to come from another State. After the terror attacks against the US on the 11th September 2001, even terrorist organisations can commit an armed attack.²⁵

3.2.1.3 The Nature of the Violence

It is uncertain what nature of violence is required for it to amount to an armed attack.²⁶ According to the International Court of Justice in the *Nicaragua* case²⁷, the violence must have some “scale and effects”. Isolated or sporadic armed incidents would not be sufficient.²⁸

Some writers are of the opinion that the force used in the attack must be of some gravity. It is also stated by some authors that most incidents on the frontier do not constitute armed attacks.²⁹

It was stated by the Foreign Relations Committee of the US Senate that some forms of State assistance to revolutionary groups in other countries could possibly amount to an armed attack.³⁰ Schachter agrees with that view. He stated that if a terrorist group has conducted an armed attack

²¹ Alexandrov, *supra note 19*, p 97-98, Bowett, *supra note 14*, p 262.

²² Bowett, *supra note 14*, p 262.

²³ US Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty, Exec Report no 8, p 13.

²⁴ Brownlie, *supra note 20*, p 279.

²⁵ Security Council Resolution 1368 (12 September 2001), UN Document: S/RES/1368 (2001), Security Council Resolution 1373 (28 September 2001), UN Document: S/RES/1373 (2001), see also Michael N Schmitt, *The Sixteenth Waldemar A Solf Lecture in International Law* (2003) 176 MILLR, p 385-387.

²⁶ Dinstein, *supra note 6*, p 192.

²⁷ Nicaragua Case (Merits) Nicaragua v United States (1986) ICJ Rep at p 14, paragraph 211.

²⁸ Carsten Stahn, *Terrorist Acts as “Armed Attack”: the Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism* (2003) 27-FALL FLFWA, p 46.

²⁹ Brownlie, *supra note 20*, p 366.

³⁰ US Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty, Exec Report no 8, p 13.

against a State and the attacker was supported on a substantial scale with “weapons, technical advice, transportation, aid and encouragement” by a government, that State can then be considered responsible for the attack together with the terrorist group.³¹ Brownlie did not agree with this completely. His intended meaning was that an armed attack suggested some form of trespass. It would not, in his opinion, be possible to commit such an attack without any offensive operations from the military.³² The statement also contradicts the International Court of Justice in the *Nicaragua* case. According to the Court, assisting rebels with weapons, logistical or other support does not constitute an armed attack. The assistance could, however, be regarded as a threat or use of force.

3.2.1.4 The Beginning of an Armed Attack

It is important to establish exactly when an armed attack begins, for the simple reason that it is at that moment that the attacked State has a lawful right to use force in self-defence. It would be very simple and convenient if the first shot could be regarded as the beginning, but unfortunately this is not always the case.³³

The term “aggression” has been defined by the General Assembly,³⁴ and this definition can be of help when deciding when an armed attack has begun. It must be kept in mind, though, that this definition has been met by criticism for being political and not precise enough, and it should therefore be borne in mind with some caution. The two terms may share some similarities, but “aggression” is not equal to armed attack. There are situations where the act is an aggression but it is not an armed attack, and there might also be situations where the act is not a form of aggression but still gives the State a right to respond in self-defence.³⁵ According to the definition, the first use of force is only *prima facie* evidence for aggression. Since an armed attack is a form of aggression, the first shot is consequently only a presumption for an attack.

An armed attack can actually occur before the first shot is fired. Article 3(a) of the Definition of Aggression states that an invasion of another State is a clear form of aggression. An army could hypothetically cross the border of another State, with the intention of invading the territory, without opening fire. It would be rather absurd not to classify this as an armed attack, though, which gives the invaded State a right to respond with armed force in self-defence.³⁶ The same principle applies if a foreign army, which has had permission to be stationed within a State’s border for a set period of time, refuses to leave when that time period has elapsed.³⁷

³¹ Oscar Schachter, see Greg Travalio, John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force* (2003) 4 CHIJIL, p 106.

³² Brownlie, *supra note 20*, p 278.

³³ Brownlie, *supra note 20*, p 366-367.

³⁴ General Assembly Resolution 3314 (XXIX) (14 December 1974), UN Document: A/RES/33/14 (1974).

³⁵ Bowett, *supra note 14*, p 257-258.

³⁶ Dinstein, *supra note 6*, p 188.

³⁷ See article 3(e) of the General Assembly’s Definition, see also Dinstein, *supra note 6*, p 235-237.

It is not difficult to understand that a State has a right to self-defence if their borders are being penetrated or their territory being occupied without permission even though the alien army has not fired the first shot. Situations can occur, though, according to some authors, where the act can be classified as an armed attack despite the fact that no weapons have been fired and no border has been crossed.

Dinstein³⁸ asserts that the “irreversible course of action” shall be the determinant. He mentions the Pearl Harbour bombings in December 1941 as a hypothetical example: if the US had managed to intercept and sink the ships that carried the Japanese aircrafts that later conducted the attack on their way to the US, then that would have been a lawful act of self-defence. Dinstein points out that this would not be a form of anticipation or prevention of an attack, but pure self-defence against an armed attack since the attack is practically unavoidable.³⁹ Thus, if it seems as though the armed attack is irrevocable then it has, according to Dinstein, begun.

Brownlie is of the opinion that generally the acts committed must in some way affect the territory of the State, and by territory he also means the airspace and the territorial waters of the State.⁴⁰ According to this view it would not have been a lawful act of self-defence for the US to sink the Japanese ships on their way to Pearl Harbour as long as they did not enter US territorial waters. The Japanese military ships could definitely have been a threat to international peace and security, but no attack would, in Brownlie’s opinion, have been present.⁴¹ The only situation where a State could use self-defence before their territory has been intruded in any form would be in the event of a rocket being launched by another State and it being on its way to the State’s territory. Brownlie expressly points out that the exception is not for fast aircrafts and other instruments, but for rockets in flight only.⁴²

It is important to remember that it is the information that is available at the time of the incident that determines whether or not it is an armed attack, and not future wisdom.⁴³

3.2.2 A Temporal Right

A State is only, according to article 51, allowed to use force in self-defence until the Security Council has taken measures necessary to maintain international peace and security. Nothing in the Charter implies that these measures must be military. It can, though, be difficult to decide what the necessary measures are. Some authors have claimed that it has to be decided when we have the final result in our hands, but that solution can perhaps be

³⁸ Dinstein, *supra note 6*, p 189-190.

³⁹ Dinstein, *supra note 6*, p 190.

⁴⁰ Brownlie, *supra note 20*, p 367.

⁴¹ Brownlie, *supra note 20*, p 367.

⁴² Brownlie, *supra note 20*, p 367.

⁴³ Dinstein, *supra note 6*, p 191.

questioned. It has been argued that such an interpretation would be against the wording and the philosophy of chapter VII.⁴⁴

Greig suggests that the State can continue to act in self-defence until the Security Council's actions are proven effective, or alternatively until the measures taken by the State itself are proven the same.⁴⁵ This leads us on to another problem, which is how long the right to self-defence lasts if the Security Council does not take necessary measures. According to the UN Charter article 39, the Security Council has the power to determine whether or not a State is acting in self-defence and when the right to respond to an armed attack ceases. Even if the Security Council has this power, the likelihood of them providing any decisive answers on the matter is, according to Greig, slight.⁴⁶ His opinion is that the right lasts as long as the aggressor continues with the hostilities, but he also points out that the duration of the self-defence is closely linked to the principle of proportionality. The effect of this is that if the victim State responds with more force than allowed according to the principle, then they lose their right to lawful self-defence within the meaning of article 51.⁴⁷

3.2.3 Necessity

The demand of necessity when exercising self-defence is not mentioned in article 51, but it is nevertheless a condition that must be fulfilled if the action shall be regarded as lawful.⁴⁸ The International Court of Justice stated in the *Nicaragua* case that this rule is well established in customary international law.

According to the classic definition⁴⁹, there must be “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”. This essentially means that peaceful means should, if possible, be used to solve the conflict and armed force should only be used if peaceful means are found wanting, or if they would be inadequate.⁵⁰ Thus the use of armed force in self-defence should be a last resort.

A State can, within the meaning of article 51, start a war in self-defence, but the question of necessity is then vital. The difficulty is not when a State is being invaded by another State; rather, it is when the State responds with war in self-defence after an isolated armed attack that the necessity of the response is in question. The responding State must show that an end to the conflict could not be reached via peaceful means.⁵¹

⁴⁴ Frédéric Mégret, “War”? *Legal Semantics and the Move to Violence* (2002) 13 EJIL, p 373.

⁴⁵ DW Greig, *Self-defence and the Security Council: What does Article 51 Require?* (1991) 40 ICLQ, p 389.

⁴⁶ Greig (1991), *supra note 45*, p 398.

⁴⁷ Greig (1991), *supra note 45*, p 392-393.

⁴⁸ Dinstein, *supra note 6*, p 202, Bowett, *supra note 14*, p 258, Malanczuk, *supra note 12*, p 316.

⁴⁹ See above 2 “Historical background to the right of self-defence”.

⁵⁰ Dinstein, *supra note 6*, p 202, Mégret, *supra note 44*, p 376.

⁵¹ Dinstein, *supra note 6*, p 231.

3.2.4 Proportionality

The force used in self-defence must be in proportion to the threatened harm, and not involve anything unreasonable or excessive.⁵² This principle of proportionality, which is essential for self-defence, also has its origin in the Caroline incident.⁵³ Although it is an extremely important principle, it is not always easy to establish what it signifies.

On-the-spot reactions are quite straightforward. The scale of force used in self-defence and the casualty and damage it causes should in some way mirror the unlawful attack. The comparison can consequently not be made until the fighting has ceased.⁵⁴

When it comes to war in self-defence though, the simple principle that the counterattack should mirror the preliminary attack is, according to Dinstein,⁵⁵ unsuited. If a State responds to a single armed attack with a war in self-defence, then the scale of force used in self-defence and the casualty and damage it causes will well exceed the unlawful attack. Even so, Dinstein asserts that that does not necessarily mean that the principle of proportionality is not complied with. Instead of considering the principle after the fighting has ceased, it should in a situation of war in self-defence be considered at the beginning of the conflict. If the attack is serious enough to justify the State's responding with war, then the principle is obeyed. Dinstein is also of the opinion that when the war is justified then it does not have to cease when the attacker is driven back, but can be fought to the end and all weapons allowed by the *jus in bello* can be used by the defending State. It is important to add that not all authors are in agreement with Dinstein.

Schachter is of the opinion that force beyond the principle of proportionality might be justified if there are good reasons for the victim State to expect further attacks from the same source. This form of self-defence would not be entirely anticipatory, according to Schachter, since a prior armed attack had occurred. It would not be a reprisal either, since the motive of the response would not be punitive but protective.⁵⁶

⁵² Bowett, *supra note 14*, p 258, Brownlie, *supra note 20*, p 261, Greig (1976), *supra note 16*, p 886.

⁵³ Ove Bring, *FN-Stadgan och Världspolitiken* (2002), p 151, Brownlie, *supra note 20*, p 261.

⁵⁴ Dinstein, *supra note 6*, p 231.

⁵⁵ Dinstein, *supra note 6*, p 231-235.

⁵⁶ Oscar Schachter, *The Lawful Resort to Unilateral Use of Force* (1984-1985) 10 YJIL, p 293.

3.2.5 Immediacy

If a State decides to respond to an armed attack with armed force, it must be done before too long a time has passed.⁵⁷ This is, as with necessity and proportionality, a principle that has its origin in the Caroline incident.⁵⁸ It is impossible to establish a precise time limit here, because different types of attacks render different types of self-defence and therefore obviously different time limits. It is an extremely important principle, though; if States were allowed to leave a long period of time between an attack and their subsequent response, the basic rule in article 2(4) would, according to Schachter, be completely swallowed up.⁵⁹

In an on-the-spot reaction, immediacy means that the self-defence must be integrated with the armed attack.⁶⁰ An example of this would be if a French force that is patrolling the French border was all of a sudden attacked by the Spanish military. The French troops must, if they intend to use force in self-defence, use it immediately. They cannot answer with fire days after the attack and the threat has ceased to exist and justify this as self-defence. It is important to point out that the picture here is one where the French force was being attacked during a time of peace, and the Spanish military did not invade France. It would be a totally different story if the countries were at war with each other and the Spanish military invaded or intended to invade France.

War in self-defence constitutes, according to Dinstein,⁶¹ two provisos to the demand of immediacy when responding to an armed attack. Firstly it takes time to start a war, so it would be unreasonable to demand that the State must respond within just a few days. The State must be permitted time to mobilise its forces and to deliberate over its options. Secondly, circumstances can exist where an even longer period of time can be accepted. If the State first tries to solve the conflict with what turns out to be fruitless negotiations, clearly its right to resort to war in self-defence cannot expire. It is also a possibility that the occupied territory is very distant, for instance, and therefore a response would demand a longer preparation time. This was the case in the Falkland Island conflict in 1982. It took one month before British forces were prepared to counter, but this was still considered to be an immediate response because of the geographical distance.⁶² According to Dinstein, a counterattack that is launched even as much as six months after the initial unlawful attack can, in some circumstances, be justified.

There may be situations where a victim State which had some of its territory occupied many years ago might want to reclaim it. It would have been totally lawful to use self-defence when the territory was first occupied, but several years down the road have deprived the victim State of that right.

⁵⁷ Schachter (1984-1985), *supra* note 56, p 292.

⁵⁸ Bring, *supra* note 53, p 171.

⁵⁹ Oscar Schachter, *In Defence of International Rules on the Use of Force* (1986) 53 UCHILR, p 132.

⁶⁰ Dinstein, *supra* note 6, p 215.

⁶¹ Dinstein, *supra* note 6, p 235-237.

⁶² Malanczuk, *supra* note 12, p 317.

According to Schachter it is not possible to allow such self-defence within article 51's basic meaning.⁶³

⁶³ Schachter (1986), *supra note 59*, p 132.

4 Pre-Emptive Self-Defence

4.1 Introduction

In the doctrine, both pre-emptive and anticipatory self-defence are mentioned. There is a difference between the two, but the meaning of both of them, in simple terms, is that a State uses force and classifies it as self-defence despite a lack of an actual armed attack. In this way the force would not be a violation of the prohibition to use force in article 2(4) of the UN Charter.

Anticipatory self-defence would be on the cards if there were an imminent danger of an armed attack, and pre-emptive self-defence gives even wider scope. In the latter there is no need for the presence of an immediate, direct threat, instead only that the situation, if left to grow, would be such that the cost of any later neutralisation action would be unacceptable.⁶⁴ The intention behind this is accordingly to nip any hostile plans in the bud. Since pre-emptive self-defence is broader than anticipatory self-defence and also encompasses it, the discussion around the latter is highly relevant for the validity of the prior. Arguments for and against anticipatory self-defence will therefore also be mentioned in the discussion of pre-emptive self-defence.

Historically, the excuses of anticipatory and pre-emptive self-defence have, since the UN Charter was created, been used numerous times by States, but the UN and its Members are very reluctant to recognise the legality of them.⁶⁵ The debate has been present since the birth of the Charter, but after the tragic attacks on the World Trade Center in New York and the Pentagon in Washington on the 11th of September 2001, it has certainly been brought to the surface.

4.2 Prior to 11 September 2001

4.2.1 Is Pre-Emptive Self-Defence Allowed According to Article 51?

As mentioned, Members have an inherent right of self-defence if an armed attack occurs against them. It is therefore of great importance for the debate surrounding pre-emptive self-defence to determine the precise meaning of the phrase “if an armed attack occurs”.

⁶⁴ W Michael Reisman, *Editorial Comment: Assessing Claims to Revise the Laws of War* (2003) 97 AMJIL, p 87.

⁶⁵ Alexandrov, *supra note 19*, p 149.

When interpreting article 51 of the UN Charter, article 31.1 of the Vienna Convention on the Law of Treaties⁶⁶, as a reflection of an applicable customary rules of international law, offers valuable help. According to the Convention, “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”.⁶⁷

The first step in determining the meaning of the phrase is to examine its ordinary meaning and, when determining the ordinary meaning of a phrase, it is usual to have recourse to a dictionary.⁶⁸ According to the Oxford English Dictionary, “attack” means to “take violent action against” or to “act harmfully on” and “armed” means “carrying or having to do with a firearm”. The word “occur” means “happen”. It seems, consequently, that an armed attack is something more concrete than a threat, and the literal meaning of “occur” does not really leave any questions either.

The next step is to look at the ordinary meaning in its context. Nowhere in article 51 are the words “or threatens” mentioned, and this is an important factor. Furthermore, article 51 is an exception to article 2(4), and it is therefore important that the exception does not undermine the main rule.⁶⁹ In order that this does not happen, exceptions must be interpreted restrictively. Article 2(4) mentions that both the threat and the use of force are prohibited, so it does not seem likely that the drafters simply forgot to mention “threat” in the exception.⁷⁰ According to Dinstein⁷¹ the words chosen in article 51 can even be considered to be “deliberately restrictive”. Bothe⁷², though, points out that the drafters *have* considered “threat” in article 39, and there it seems to be within the Security Council’s power to authorise actions against mere threats. Malanczuk⁷³ claims that if anticipatory self-defence were to be allowed then article 53, which authorises enforcement actions under regional arrangements against renewal of aggressive policy without the authorisation of the Security Council, would be unnecessary. The North Atlantic Treaty⁷⁴ is also mentioned in Malanczuk’s debate. This Treaty is based on UN Charter article 51, and in the Treaty’s article 5 it is stated that the parties to the Treaty have a right to self-defence if an armed attack occurs. Nothing is mentioned about defence against a threat. This is, according to Malanczuk, another fact that supports the opposition to anticipatory self-defence.

The last step is to look at the ordinary meaning in light of its object and purpose. The purpose of the UN is mentioned in chapter I of the UN Charter. According to article 1.1, the first purpose is “to maintain

⁶⁶ Is also customary international law.

⁶⁷ Vienna Convention on the Law of Treaties article 31.1.

⁶⁸ Michael Bothe, *Terrorism and the Legality of Pre-emptive Force* (2003) 14 EJIL, p 228-229.

⁶⁹ Vienna Convention on the Law of Treaties article 31, Bothe, *supra note 68*, p 229, Malanczuk, *supra note 12*, p 312.

⁷⁰ Bothe, *supra note 68*, p 229.

⁷¹ Dinstein, *supra note 6*, p183.

⁷² Bothe, *supra note 68*, p 229.

⁷³ Malanczuk, *supra note 12*, p 312.

⁷⁴ Washington DC – 4 April 1949, available at www.nato.int/docu/basic/txt/treaty.htm.

international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”.⁷⁵ In article 2 it is stated that “all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”⁷⁶ and that all Members shall also “refrain in their international relations from the threat or use of force”.⁷⁷ It is also mentioned in the UN Charter’s preamble that the peoples of the UN are determined to save generations from the suffering that war brings. It is stated that armed force should not be used and that all Members should, in cooperation, maintain peace and security. The drafting history of the Charter also confirms that the unilateral use of force should be an exception to the prohibition in article 2(4) that should not be used broadly.⁷⁸

From this discussion it seems quite clear that the purpose of article 51 was not to give States an extended right to use unilateral force against each other, but instead just to give the Members the opportunity to defend themselves if they were attacked. The conclusion that must be made, therefore, is that an armed attack must actually have occurred before force can be used legally in self-defence. The consequence of this is that pre-emptive or anticipatory self-defence can under no circumstances be justified under article 51 of the UN Charter.

All commentators do not agree, though. It is claimed by some that the conditions in article 51 are not exhaustive; if they were, it would imply that Members are prevented from protecting non-Members. This argument is fairly easy to dismiss, though.⁷⁹ The UN was created after the end of the Second World War, and the assumption made at the time was that most States would become Members in the foreseeable future. It is therefore fairly safe to claim that the omission of non-Members in the article probably was an oversight.

Other arguments that have been made are that the phrase “if an armed attack occurs” does not mean “if and only if”, and that the fact that the right to self-defence is referred to as an inherent right should exclude any restrictions on it.⁸⁰ Both of these arguments are discussed below.

⁷⁵ UN Charter article 1.1.

⁷⁶ UN Charter article 2.3.

⁷⁷ UN Charter article 2.4.

⁷⁸ Brownlie, *supra note 20*, p 275.

⁷⁹ Malanczuk, *supra note 12*, p 312.

⁸⁰ Malanczuk, *supra note 12*, p 312.

4.2.2 Is Pre-Emptive Self-Defence Allowed According to Customary Law?

The customary right to self-defence is, as mentioned, much older than the UN Charter and, when referring to customary right, the Caroline incident is always mentioned. The classic definition of customary self-defence is said to have arisen from the diplomatic correspondence between British officials and the US Secretary of State Daniel Webster.⁸¹ At the time, the use of force in self-defence was recognised as lawful if certain criteria were complied with: there had to be “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.⁸²

Self-defence is a form of self-help.⁸³ Up until the beginning of the First World War in 1914, the doctrine of self-help hardly separated self-defence from other forms of self-help. Another important fact is that it was the State itself that decided if it was entitled to use self-help.⁸⁴ It was not, as it is today, supervised by any international organisation. By the beginning of the First World War a customary right to anticipatory self-defence must be said to have existed, even if it was fairly vague. Thus the States could use force in self-defence if there was an imminent danger of an armed attack.⁸⁵

The customary right to anticipatory self-defence existed at least up until the creation of the UN Charter in 1945. The German defence in the Nürnberg Tribunal argued that Germany had merely acted in anticipatory self-defence when they attacked the Soviet Union in 1941. The Tribunal dismissed the claim on fact grounds. It can therefore be assumed that they would seem to have accepted this form of an extensive right to self-defence.⁸⁶

The general opinion is that under customary law a State was allowed to use force in self-defence in anticipation of an armed attack, under the presumption that imminent danger of such an attack was present.⁸⁷ This rule should be treated with caution according to some authors, though. It is argued that there was little support for a right to anticipatory self-defence in the time between the two World Wars and that several treaties, such as the Conventions for the Definition of Aggression of 1933 and the Pact of the Balkan Entente, denied anticipatory self-defence.⁸⁸ It has furthermore been argued that the customary rule only permits anticipatory acts in very rare cases, and very little information is provided in the rule itself and the Caroline incident of what these cases are.⁸⁹

The criticism does not change the fact that the customary rule recognised a right for States to anticipate an armed attack if there were an imminent threat of such an attack occurring. The right might have been restricted to relatively few cases, but it existed.

⁸¹ See above 2 “Historical background to the right to self-defence”.

⁸² State Secretary Webster, The Caroline Case 29 BFSP 1137-1138; 30 BFSP 195-196.

⁸³ Bowett, *supra note 14*, p 269.

⁸⁴ Bring, *supra note 53*, p 152.

⁸⁵ Bring, *supra note 53*, p 152-153.

⁸⁶ Bring, *supra note 53*, p 153, Brownlie, *supra note 20*, p 258.

⁸⁷ Brownlie, *supra note 20*, p 257.

⁸⁸ Brownlie, *supra note 20*, p 259.

⁸⁹ Brownlie, *supra note 20*, p 260.

4.2.3 Self-Defence as an “Inherent Right”

4.2.3.1 The problem

According to the first sentence of article 51, Members have an inherent right to self-defence. The “inherent” right in this context does not refer to *jus naturale*. In contrast to natural law, self-defence is a definite legal right imposed by the States, and it therefore belongs to positive law.⁹⁰

The word “inherent” has caused much debate. The reason for this is that the range of customary right that existed before the Charter was wider than in article 51.⁹¹ In other words, the customary right allowed preventative actions in some situations whilst article 51 may not allow them at all. It is therefore of great importance to establish whether or not the referral to the “inherent right” in article 51 means that the customary right has survived the Charter. It can be of interest here to take a closer look at the discussions around the matter that took place in the San Francisco conference in 1945, when the UN Charter was formalised.

Europe, and even America and Asia, had suffered from two World Wars in a relatively short time. The creation of the League of Nations after the First World War had failed in its purpose and it must therefore have been in everyone’s interest that the United Nations would not follow in the same footsteps. Use of armed force was to be totally banned and it was in the delegates’ interest to give the UN the sole right and authority to the use of armed force.⁹²

4.2.3.2 “Article 51 restricts customary law”

One interpretation of article 51 is that the reference to an “inherent right” basically means that the pre-existing right of self-defence in customary law is now incorporated in the Charter. The consequence of this interpretation would be that article 51 has restricted and modified the customary right and is now the only right of self-defence available for States.

Alexandrov fully supports this interpretation, and he finds support for this approach from one of the committees at the San Francisco Conference, which reported that “the use of arms in legitimate self-defence remains admitted and unimpaired”.⁹³

Bring also supports this interpretation,⁹⁴ as well as Brownlie, who even takes the approach a step further. He claims that there is a possibility that the customary law had gone through changes and that by 1945 it had the content that is expressed in the article. Thus article 51 would be a mere characterisation of customary law in 1945. Many supporters of the

⁹⁰ Dinstein, *supra note 6*, p 179-180, Bowett, *supra note 14*, p187.

⁹¹ Dinstein, *supra note 6*, p 182-183, Dixon, *supra note 2*, p 283, Greig (1976), *supra note 16*, p 887.

⁹² Bring, *supra note 53*, p 156.

⁹³ Alexandrov, *supra note 19*, p 93-95.

⁹⁴ Bring, *supra note 53*, p 158-159.

customary right to self-defence assume, according to Brownlie, that customary law stopped its development at around the time of the First World War, or possibly even earlier.⁹⁵

According to Alexandrov it is not of importance to decide whether the customary right was modified by the article or just characterised, because the result is the same. The right to self-defence has been extended to include not only individual but also collective actions, it has been restricted to situations where an armed attack has occurred, and it has also been restricted to being a temporary right until the Security Council has taken necessary measures.⁹⁶

Greig is of the opinion that article 51 restricts the customary right of self-defence, but he is not prepared to take it as far as to claim that article 51 is the only existing right of self-defence. In Grieg's opinion it is only if the State has been the victim of an armed attack that it can act immediately in self-defence. If, however, a State wishes to act before an armed attack has occurred, then it must first try to solve the conflict by peaceful means, and the Security Council is responsible for making sure that international peace and security is maintained. If the victim State has tried this method and found that it could not offer it adequate protection or that it was wanting, then the State has a right to resort to self-defence even if no armed attack has occurred.⁹⁷ Thus Grieg wants to keep the customary right as a safety net in case article 51 is found wanting.

The interpretation that article 51 restricts the customary right of self-defence finds support in the judgement in the *Nicaragua* case in 1986. The International Court of Justice stated that self-defence was a pre-existing right of a customary nature, and they had a desire, at least in essence, to preserve this right.⁹⁸ Later in the judgement the Court also stated that before a State has a right to self-defence, they must have been the victim of an armed attack.⁹⁹ Evidently the Court did acknowledge the customary right in a way, but they also supported a narrow interpretation of it. It is important to add that the issue of anticipatory self-defence was not specifically addressed in the Court's discussion. Conclusions that are too wide and bold should perhaps not be drawn from the judgement, but it could at least support the mentioned interpretation.

This interpretation of the "inherent right" in article 51 has been criticised. It has been argued that the intention of article 51 and article 2(4) was not to restrict the existing customary law on the subject, but to clarify a certain aspect of it.¹⁰⁰ Furthermore it has been argued that article 2(4) does not contain any prohibition of the customary right of self-defence, and it would not be correct to assert from article 51, which allows self-defence if an armed attack occurs, that self-defence is only allowed against an armed attack.

⁹⁵ Brownlie, *supra note 20*, p 274.

⁹⁶ Alexandrov, *supra note 19*, p 95.

⁹⁷ Greig (1976), *supra note 16*, p 893.

⁹⁸ Dinstein, *supra note 6*, p 181-182, Alexandrov, *supra note 19*, p 136.

⁹⁹ Nicaragua Case (Merits) *Nicaragua v United States* (1986) ICJ Rep at p 14, paragraph 211.

¹⁰⁰ Bowett, *supra note 14*, p 188.

The general tendency at the San Francisco Conference was, as mentioned, to be more restrictive in permitting the use of force.¹⁰¹ With this in mind it seems a bit eccentric to claim that the intention was not to restrict the wider right of self-defence, but instead to let it live on beside the newly created article in the UN Charter.

4.2.3.3 “Customary law exists parallel to article 51”

An alternative interpretation is that the pre-existing customary right of self-defence still exists parallel to article 51. The explanation is that the purpose of article 51 was not to restrict the right to self-defence, but to safeguard it.¹⁰² In other words the article should specifically safeguard the right to self-defence in the event of an armed attack, but it does not mean that self-defence is not available in other situations.

Bowett supports this opinion. He believes that the correct view on the matter is that since the right to self-defence existed in customary law long before the Charter was created, the right must still remain, and any restrictions on it must be mentioned in the Charter.¹⁰³ Thus anticipatory self-defence would be allowed because it is accepted under customary law and the Charter does not contain any restriction on it.

This interpretation has also been criticised. According to Brownlie this approach completely ignores the principle of effectiveness. Furthermore he states that the reference to an inherent right in the article suggests that the rule would have a more general application and that this would be ignored if the customary rule were still in use.¹⁰⁴

4.2.3.4 Conclusion

Unfortunately there is no clear answer to what the reference to self-defence as an “inherent right” in article 51 means. The evidence in the doctrine does point, though, towards the interpretation that article 51 is the only available right to self-defence. It just does not seem logical to have two parallel systems that actually, on the face of it, contradict each other.

Even if the most logical solution would be to accept article 51 as the single right to self-defence, the matter is far from solved. Article 51 does not allow anticipatory or pre-emptive self-defence, and some countries are not prepared to give up this right completely. On several occasions, well after the creation of the Charter, the customary right has actually been used in part by States to justify the use of force.¹⁰⁵

¹⁰¹ Brownlie, *supra note 20*, p 270.

¹⁰² Bowett, *supra note 14*, p 187-188.

¹⁰³ Bowett, *supra note 14*, p 192.

¹⁰⁴ Brownlie, *supra note 20*, p 273.

¹⁰⁵ T Hillier, *Sourcebook on Public International Law* (1998), p 604.

4.2.4 Self-Defence or Reprisal?

4.2.4.1 Definitions

An armed reprisal is a form of self-help that, like self-defence, is put into practice after an illegal act has been committed internationally against a State. The major difference between self-defence and reprisals is that self-defence is essentially defensive in its character and intended to mitigate harm whilst reprisals are punitive and not directed towards protection. Reprisals are also generally illegal.¹⁰⁶

There are situations where self-defence is exercised after an armed attack has occurred, but it is still classified as pre-emptive self-defence. The reason for this is that the counter-attack is not launched to avert the illegal attack, but to prevent future attacks from being launched. If no imminent threat of another illegal attack is present, however, then the counter-attack can have astonishing similarities with armed reprisals. Thus the line between pre-emptive self-defence and armed reprisals is consequently a very fine one.

Compliance with the demands of proportionality and immediacy is a big problem with reprisals. On the occasions where the Security Council or some of its Members have labelled an action as reprisals instead of self-defence, these criteria have always been mentioned.¹⁰⁷ If the counter-attack is far in excess of the initial one, then it may seem as though the attacked State is responding only with the intention of punishment. Self-defence is about averting an attack or possibly a threat of an attack, so consequently it should be exercised without delay from the original attack. If the counter-measures are taken after the attack has stopped, they cannot really be said to have the purpose of averting the attack.

It is worth mentioning that some authors regard defensive armed reprisals as a form of self-defence, as long as they fulfil the requirements of necessity, proportionality and immediacy. Most authors do not, however, agree with this opinion.¹⁰⁸ Furthermore the Security Council and the General Assembly have condemned reprisals on more than one occasion. The Security Council stated after the British air attack on Yemeni territory in 1964 and the attack by Israel on villages in southern Lebanon in 1969 that armed reprisals are “incompatible with the purposes and principles of the United Nations”¹⁰⁹, and the General Assembly stated in their Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations in 1970 that “States have a duty to refrain from acts of reprisals involving the use of force”.¹¹⁰

¹⁰⁶ Bowett, *supra* note 14, p 13, Roberto Barsotti in A Cassese, *The Current Legal Regulation of the Use of Force* (1986), p 79, Louis René Beres, *Israel and Anticipatory Self-Defense* (1991) 8 AJICL, p 94.

¹⁰⁷ Jean Combacau in Cassese, *supra* note 106, p 28.

¹⁰⁸ Dinstein, *supra* note 6, p 219-220.

¹⁰⁹ Security Council Resolution 188 (1964) of 9 April 1964 and Security Council Resolution 270 (1969) of 26 August 1969.

¹¹⁰ General Assembly Resolution 2625 (XXV) of 24 October 1970.

4.2.4.2 Example – Gulf of Tonkin in 1964

In 1964 the US suffered attacks on its naval vessels by North Vietnamese torpedo boats in the Gulf of Tonkin. The US responded immediately by repelling the attack and then followed up with military strikes deep into North Vietnam, justifying it by claiming they had exercised their right to self-defence according to article 51. The US admitted that the strikes in North Vietnam were carried out to prevent future attacks and not to counter the initial one. Thus they claimed that they had a right to pre-emptive self-defence against North Vietnam.¹¹¹

No resolution was passed in the Security Council, but the US action was only supported by the UK. In the discussion it became clear that several countries considered the act to be a reprisal.¹¹²

4.2.5 Accumulation of Events

The “accumulation of events” theory is used as an argument for pre-emptive self-defence. The basis of the theory is that a series of individual attacks can accumulate over time and eventually give the victim State a right to respond in self-defence. The purpose of a single response, to several perhaps quite minor attacks, is to punish the State for its previous actions and also to prevent further minor attacks from being launched.¹¹³ The element of prevention is what supports the pre-emptive self-defence. If the victim State is not allowed this prevention, further minor attacks will probably be directed at them that they will not be able to respond to individually. Thus the State would not be given an opportunity to defend itself, but would have to suffer the attacks just because they are individually of a minor scale.

The argument might seem fair, because a State should always be entitled to defend itself, but it is not that simple. A response in accordance with the “accumulation of events” theory can rather easily be regarded as a reprisal, the reason being the punitive element and also that it is conducted after the attack has ceased.¹¹⁴ There have been several claims of self-defence by States according to this theory, but the Security Council has rejected them.¹¹⁵

4.2.5.1 Example – Yemen 1964

The South Arabian Federation, which was a British protectorate, had in 1964 suffered a series of aggressions. The UK believed that there was a high probability of the aggressions continuing, so after request, the UK bombed a

¹¹¹ Alexandrov, *supra note 19*, p 171-172.

¹¹² Jean Combacau in Cassese, *supra note 106*, p 27-28.

¹¹³ Alexandrov, *supra note 19*, p 166.

¹¹⁴ Alexandrov, *supra note 19*, p 166.

¹¹⁵ One example is when Israel invoked self-defence against Lebanon, since they were suffering from continued acts of aggression – see Security Council Resolution 279 (12 May 1970), UN Document: S/RES/279 (1970). Another example is when the situation was repeated in September 1970 – see Security Council Resolution 285 (5 September 1970), UN Document: S/RES/285 (1970).

fort in Yemen from which the attacks were believed to have originated. The justification that was given was collective self-defence according to article 51.¹¹⁶

Naturally, the Security Council did not condemn the action since the UK is a permanent member. This does not mean, however, that they recognised the validity of it. The Security Council adopted a resolution that condemned “reprisals as incompatible with the principles and purposes of the UN” and furthermore they deplored the military action conducted by the UK.¹¹⁷ The Security Council did not explicitly label the action a reprisal, but the resolution serves as evidence that such an intention existed. The reasons for the action’s unlawfulness as self-defence were that it did not comply with the demands of necessity, proportionality and immediacy.¹¹⁸

4.2.6 State Practice

4.2.6.1 The Cuban Missile Crisis in 1962

The Cuban missile crisis took place in 1962, during the Cold War. The United States’ biggest enemy at the time was the former Soviet Union. The US suspected that Russian ships were being used to transport Russian nuclear missiles to Cuba. This, if true, could have been at least very uncomfortable for the US because of Cuba’s location, and the US claimed that they had sufficient evidence of the activity. The US announced that they would examine all ships headed to Cuba, and that if they found any nuclear missiles on board, that ship would not be allowed to continue its journey. After the announcement the US brought the issue to the Security Council, and they claimed that the suspected Russian operation was a threat to international peace and security. It is important to add here the fact that the US did not justify its action by referring to a right of anticipatory self-defence, but its permissibility was nonetheless discussed as a result of the US blockade.¹¹⁹

It was argued that the new technology, that is nuclear weapons, perhaps asked for an expansion of the scope of the right to self-defence. The argument is understandable, because an attack by nuclear weapons can have very severe consequences, not only for the people that are alive at the time but for several generations. An expansion is, though, not without risk. As mentioned, the US did not justify its actions by referring to article 51, and that was considered to be evidence of recognition from the US that going beyond the Charter was associated with danger.¹²⁰ Instead of decreasing the risk of an armed conflict by letting States use force in self-defence in situations where nuclear weapons are being deployed, there is a chance that

¹¹⁶ Alexandrov, *supra note 19*, p 170-171, Jean Combacau in Cassese, *supra note 106*, p 27-28.

¹¹⁷ Security Council Resolution 188 (9 April 1964), UN Document: S/RES/188 (1964).

¹¹⁸ Alexandrov, *supra note 19*, p 170-171, Jean Combacau in Cassese, *supra note 106*, p 27-28.

¹¹⁹ Alexandrov, *supra note 19*, p 154-159.

¹²⁰ Alexandrov, *supra note 19*, p 156.

the risk would increase. During the Cold War NATO had deployed nuclear weapons at strategic places near the Soviet border. If the US was to be allowed to use force against the Soviet Union for their deployment of missiles in Cuba, then the Soviet Union would in theory be allowed to do the same against Europe. By the same analogy, for instance, if France placed nuclear missiles close to the German border, then Germany would be allowed to use pre-emptive force against France. Of course, the world does not work in such a simple way, but it is easier to understand the fear of expanding the scope of self-defence if these scenarios are set up.

4.2.6.2 The War Between Israel, Egypt and Syria in 1967

Israel launched air strikes against Egypt in June 1967, with the justification that they acted in anticipatory self-defence. Both Egypt and Syria had, according to Israel, deployed their forces with the intention of attacking Israel.¹²¹

No resolution was passed in the Security Council or the General Assembly that condemned Israel's air strikes, and no discussion of anticipatory self-defence followed. Exactly what this means is fairly difficult to determine. Alexandrov states that it was clear that it signified little support for Israel's claim, basing his opinion on the fact that commentators that found Israel's action legitimate had trouble fitting it into article 51.¹²² Beres, on the other hand, sees the lack of censure from the UN as an approval of Israel's resorting to anticipatory self-defence.¹²³ This view is also supported by Higgins.¹²⁴

4.2.6.3 Israel's Bombing of an Iraqi Nuclear Reactor in 1981

In 1981 Israel attacked an Iraqi nuclear reactor in Osarik, near Baghdad, in what they claimed to be anticipatory self-defence. According to the Israeli Government, the nuclear reactor was to be used to construct an atomic bomb that Iraq would not hesitate to use against Israel. The nuclear reactor was not even completed when it was attacked, but Israel decided that they had better strike beforehand. Their stated purpose was to spare the Baghdad civilian population from even greater pain; they also added that technological development had broadened the scope of self-defence to include even forestallments of surprise attacks. It is rather unnecessary to add that Iraq rejected Israel's arguments and stated that self-defence is only lawful against an armed attack.

Discussions followed in the Security Council on both the legal concept of anticipatory self-defence and whether nuclear weapons could justify anticipatory self-defence. The discussions divided the delegations in two. Some argued that an armed attack must have occurred before self-defence is allowed, and others argued that force could be used in an anticipation of an attack if an imminent threat of an armed attack existed and this threat could

¹²¹ Alexandrov, *supra note 19*, p 153-154.

¹²² Alexandrov, *supra note 19*, p 154.

¹²³ Beres, *supra note 106*, p 93.

¹²⁴ Rosalyn Higgins in Cassese, *supra note 106*, p 443.

not be avoided by other means. Everyone was united in the opinion that Israel's actions were unlawful, though. The Security Council, without reservations, condemned Israel's actions since it was very clear that no imminent danger had been present.¹²⁵ The nuclear reactor that according to Israel would be used to create nuclear weapons was only under construction, so Iraq evidently did not have in its possession any weapons of the kind mentioned. The Security Council even rejected the argument made by Israel that nuclear weapons pose such a grave danger that they justify pre-emptive actions. It is important to add the fact that the Security Council did not condemn the use of anticipatory self-defence as such, even if that has been claimed.¹²⁶ It is interesting, though, that according to this statement pre-emptive self-defence would be unlawful since the Security Council condemned the use of force in self-defence if no imminent danger were present, and nuclear weapons did not make any difference.

4.2.6.4 The US Bombing of Libya in 1986

In 1986 the US carried out Operation El Dorado Canyon, which included the bombings of the cities of Tripoli and Benghazi in Libya, and claimed that it was conducted in self-defence. The reason for this was that the Libyan Government was declared responsible for the bombing of a Berlin Discothèque,¹²⁷ and the US had a whole list of justifications for its use of force. First of all they claimed that they had tried to resolve the issue by peaceful means, but without results. Secondly, they claimed that several terrorist events sponsored by Libya had accumulated to an armed attack. Thirdly, the US claimed that an immediate threat of future terrorist actions was present. Fourthly, it was claimed to be necessary to give Libya an incentive to stop further attacks by pre-emptive actions from the US. Fifthly, the US bombings complied with the principle of proportionality. The last justification is not relevant in this discussion, but it was that the scope of article 51 also included a right for a State to protect its own nationals.

A large number of States condemned the US bombing of Libya, and they did not accept their justifications. It was argued that the US did not have a right to claim self-defence since no armed attack had occurred, and no immediate threat had even been present.¹²⁸ No resolution was passed on the matter in the Security Council, however, due to vetoes from France, the UK and the US, but a resolution that condemned the bombings was instead passed in the General Assembly with 79 votes for, 28 against and 33 abstentions.¹²⁹ In the resolution the General Assembly expressed its concern over the fact that the Security Council had been prevented from fulfilling its responsibilities. They also stated that the bombings were a violation of the

¹²⁵ Security Council Resolution no 487 (19 June 1981), UN Doc No S/RES/487 (1981).

¹²⁶ Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan* (1999) 24 YJIL, p 539.

¹²⁷ Schmitt, *supra* note 25, p 380.

¹²⁸ Alexandrov, *supra* note 19, p 185.

¹²⁹ General Assembly Resolution, UN Document: A/RES/41/38 (20 November 1986).

UN Charter and that the US should refrain from the threat or use of force in the settlement with Libya.

4.2.7 Does pre-emptive self-defence comply with the demands of necessity, proportionality and immediacy?

According to Brownlie, it is almost impossible to make anticipatory self-defence comply with the principle of proportionality.¹³⁰ If it is almost impossible when it comes to anticipatory actions, then what must it be for pre-emptive actions? According to the principle, the force used in self-defence must be proportional to the injury suffered. In a situation where a State wishes to use pre-emptive self-defence, it has by definition not yet suffered any damage, so the proper proportional response to the threat of a possible armed attack would consequently be nothing.

The necessity of self-defence must, as mentioned, be “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.¹³¹ Quite obviously, this demand can cause trouble for pre-emptive self-defence. First of all, the threat in question is not always a concrete one. It can be uncertain from exactly whom, when and where a possible armed attack will come, and it is also a possibility that the threat will never actually be realised. Second of all, it is a further requirement that the use of armed force should be a last resort. The State must first try to avoid the threat through peaceful means, and this is a continuing duty.¹³² If it is only a threat of a possibility of an attack, it can hardly be asserted that the threat is instant and overwhelming. There would also seem to be plenty of time to resort to other forms of solutions of conflict than an armed response. According to this discussion, pre-emptive self-defence will not comply with the demand of necessity. It has, though, been argued that if weapons of mass destruction are likely to be used in the possible attack, the picture might be a bit different.¹³³

If a State wishes to respond to an armed attack with armed force, this must be done before too long a time has passed.¹³⁴ The problem with pre-emptive actions is that the response is not to an attack that has occurred, so the standard for immediacy cannot be applied in its original form. If it is instead claimed that the self-defence must be exercised in connection to the threat, that could possibly justify anticipatory self-defence in terms of immediacy, but would hardly justify pre-emptive self-defence. In a situation where there is only a threat of a possibility of an attack, it will probably be very difficult to determine when the threat started, and whether or not it really is a threat.

It is very difficult to try to make pre-emptive self-defence comply with the demands of necessity, proportionality and immediacy. The key factor

¹³⁰ Ian Brownlie in Cassese, *supra note 106*, p 498.

¹³¹ See above 3.2.3 “Necessity”.

¹³² Soafer, *supra note 6*, p 223.

¹³³ Soafer, *supra note 6*, p 226.

¹³⁴ See above 3.2.5 “Immediacy”.

that keeps appearing is that it is only a threat of a possibility of an attack. If it is not for certain that the threat will be realised, then how can an armed response be necessary? If there has not been an attack, then how can the response be immediate to the attack and in proportion to the injury suffered?

4.2.8 Conclusion

It can probably be said from the doctrine that article 51 is the only right of self-defence that is available for States today, but not all authors agree. The fairly simple explanation for the disagreement is that article 51 has limited the pre-existing customary right that allowed anticipatory self-defence.

It is not only authors that disagree, but also States. Several countries have, on one or more occasions, claimed they have a right to anticipatory or pre-emptive self-defence. All cases are not discussed in this thesis, only a few interesting examples. Israel is definitely the leader in these claims, but States such as the US¹³⁵, the UK¹³⁶, Portugal¹³⁷, South Africa¹³⁸ and Turkey¹³⁹ have also claimed a right to anticipatory or pre-emptive self-defence.

The Security Council has not once in the past acknowledged that States have a right to preventative actions within the meaning of self-defence.¹⁴⁰ They have condemned such actions on several occasions, but they have also refrained from making a statement numerous times. It is a sad fact that resolutions have been hindered by a veto from one or several of the permanent members on more than one occasion.

The Security Council condemned the Israeli bombing of the Iraqi nuclear reactor in 1981. The reason stated was that it was very clear that no imminent danger had been present. This could mean that the Security Council denies that a right to pre-emptive self-defence exists, since no imminent danger is present when it is exercised. The question is, though, how much significance can this condemnation be given? According to Combacau the precedents on this area are far too few and weak to make a legal regime.¹⁴¹

It is a fact that some States around the world are of the opinion that preventative attacks are lawful whilst other disagree, and it is also a fact that the Security Council has never acknowledged this right. That is unfortunately the only conclusion that can be drawn from State practice.

Most commentators agree that an armed attack must have occurred before the victim State has a right to use self-defence, according to article

¹³⁵ See above 4.2.6.1 “The Cuban Missile Crisis in 1962”, 4.2.4.2 “Gulf of Tonkin in 1964” and 4.2.6.4 “The US Bombing of Libya in 1986”.

¹³⁶ Against Yemen in 1964. See Alexandrov, *supra note 19*, p 170.

¹³⁷ Against Guinea, Senegal and Zambia in 1969. See Alexandrov, *supra note 19*, p 179.

¹³⁸ Against Mozambique, Zambia, Angola and Lesotho 1976-84. See Alexandrov, *supra note 19*, p 180.

¹³⁹ Against PKK in Iraq in 1995. See Alexandrov, *supra note 19*, p 180.

¹⁴⁰ Jean Combacau in Cassese, *supra note 106*, p 18.

¹⁴¹ Jean Combacau in Cassese, *supra note 106*, p 25.

51, and most of the UN Members are of the same opinion.¹⁴² Much of the debate surrounds whether or not to allow anticipatory self-defence, whereby a State is allowed to respond to an imminent threat. There are sincere doubts of the legality of anticipatory force, and with this in mind it is basically impossible to claim that article 51 would include a right to pre-emptive self-defence.

4.3 Post 11 September 2001

4.3.1 Bombing of Afghanistan After 11 September 2001

4.3.1.1 The Terror Attacks

On the 11 September 2001 four civilian aircrafts were used in a massive terror attack against the US. Two aircrafts were flown into the World Trade Center in New York, one aircraft was crashed into the Pentagon in Washington and one aircraft was crashed in Pennsylvania. More than 5,000 people of 81 different nationalities lost their lives.¹⁴³

The day after the terror attacks, the Security Council passed a resolution¹⁴⁴ that condemned the terror attacks and recognised the inherent right of individual or collective self-defence. Furthermore they stated that they regarded the attacks as a threat to international peace and security and that they would hold responsible not only the perpetrators themselves, but also those who aid, support or harbour the perpetrators. The Security Council also expressed “its readiness to take all necessary steps to respond to the terrorist attacks...and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations”.

The Security Council passed another resolution on the 28 September 2001¹⁴⁵ that reaffirmed resolution 1368 and developed the matter further. The Security Council mentioned a long list of acts and non-acts that they asked that all Members shall do. The list included the freezing of funds and financial assets of persons who are involved in terrorist activities, refraining from giving passive or active support to terrorists, preventing the commission of terrorist acts, denying safe haven for terrorists, assisting other States in criminal investigations regarding terrorist acts, preventing the movement of terrorists by effective border control, exchange of information with other States, implementing relevant conventions etc. It is a very interesting fact that nothing is mentioned in the resolution about using armed force against another State. The inherent right of self-defence is recognised, but the resolution is very quiet regarding against whom. The

¹⁴² Schachter (1986), *supra note 59*, p 133.

¹⁴³ UN Security Council Document S/2001/946 (7 October 2001).

¹⁴⁴ Security Council Resolution 1368 (12 September 2001), UN Document: S/RES/1368 (2001).

¹⁴⁵ Security Council Resolution 1373 (28 September 2001), UN Document: S/RES/1373 (2001).

fact that neither resolution 1368 nor 1373 mentions the term “armed attack” is also interesting.

4.3.1.2 The Response

On the 7 October 2001 the permanent representative of the US sent a letter to the UN addressed to the president of the Security Council.¹⁴⁶ The letter was written on behalf of the US Government, and it stated that the US “together with other States, [had] initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.” The letter further stated that the US Government had not been able to retain all relevant information, but that they had in their hands clear and compelling evidence that pointed towards the Al-Qaeda organisation as responsible for the terror attacks and that they were supported by the Taliban regime in Afghanistan. The letter finally stated that “in accordance with the inherent right of individual and collective self-defence, United States armed forces [had] initiated actions designed to prevent and deter further attacks on the United States”. By “actions” they meant the bombing of terrorist and military targets in Afghanistan.

The response to Al-Qaeda can be seen in two different ways. If the attacks were seen as a single campaign and there was no clear and convincing evidence for further attacks, then it was an act of pre-emptive self-defence and the legality of the response can therefore be questioned. If the attacks on the 11 September were instead seen as an episode in a series of attacks rather than a single campaign, then the story might be a different one. The strikes against training camps in Afghanistan could then be nothing but ordinary self-defence with the intention of trying to stop Al-Qaeda from moving forward with their “war” against America.¹⁴⁷ There are problems and dangers with the latter approach, however. One big problem is simply to try to establish when the “war” started and another, perhaps more important one, is when it will be considered to be over. Will the US have a right to self-defence until no more threats are coming from Al-Qaeda, or until all their training camps are destroyed and the organisation has been completely defeated? According to Mégret the “war-path” is a dangerous one to tread, because it could lead to a permanent justification of resorting to armed violence and this would clearly be against the purpose of article 51.¹⁴⁸

¹⁴⁶ UN Security Council Document S/2001/946 (7 October 2001).

¹⁴⁷ Schmitt, *supra note 25*, p 396. Ruth Wedgwood agrees that Al-Qaeda’s actions over the years can be qualified as a war, Ruth Wedgwood, *Al-Qaeda, Terrorism, and Military Commissions* (2002) 96 AMJIL, p 330.

¹⁴⁸ Mégret, *supra note 44*, p 378.

4.3.1.3 Should the US Action be Questioned?

The actions of the US can be questioned, and many international lawyers have found the actions unlawful under the UN Charter.¹⁴⁹ The Security Council did not give any authorisation for the use of force against Afghanistan or any other State in its two resolutions. The US waited almost a month before they acted, so there was plenty of time to seek approval for military actions from the Security Council, but they failed to do so. They did not even disclose the factual basis for their actions in self-defence.¹⁵⁰ In defence of the US it must be added that, according to article 51, all States have a right to act in self-defence and they do not have an obligation to seek approval for such an action.¹⁵¹ In this case, though, where it is questionable as to whether the requirements for self-defence really had been met¹⁵², it would perhaps have been wise to ask for permission. Supporters of the actions of the US might argue that the Security Council would not have authorised powerful enough actions to win the so-called war against international terrorism,¹⁵³ that their actions would have acted as a mere painkiller, temporarily relieving the symptoms of the situation without curing it. The US linked the terror attacks to previous attacks by Al-Qaeda, namely a prior attempted bombing of the World Trade Center, the destruction of US military housing in Saudi Arabia, the bombing of US embassies in Africa and the attack on the USS Cole in Yemen.¹⁵⁴ With that in mind it is probably safe to say that the US did not want to risk having to leave the Security Council with just a prescription for painkillers.

Even though many international lawyers have questioned the actions of the US, it must not be forgotten that several States supported them. It was only the UK who participated in the actual bombings, but NATO allies and nations such as Georgia, Oman, Pakistan, Qatar, Saudi Arabia, Turkey and Uzbekistan provided both airspace and facilities. China, Egypt and Russia did not in any way participate in the actions, but they announced their support for it. The fifty-six nations of the Organization for the Islamic Conference did not give their support as such, but instead said that as long as the US did not extend the actions beyond Afghanistan they did not express any criticism either.¹⁵⁵

4.3.1.4 “The End of the Beginning”

In January 2002 after the bombings of Afghanistan had ceased, President George W Bush delivered his State of the Union Address¹⁵⁶ to Congress. In

¹⁴⁹ Thomas M Franck, *Editorial Comments: Terrorism and the Right of Self-Defence* (2001) 95 AJIL, p 839, Tom J Farer, *Editorial Comment: Beyond the Charter Frame: Unilateralism or Condominium* (2002) 96 AJIL, p 359.

¹⁵⁰ Jonathan I Charney, *Editorial Comments: The Use of Force Against Terrorism and International Law* (2001) 95 AJIL, p 836.

¹⁵¹ Franck, *supra* note 149, p 843.

¹⁵² Charney, *supra* note 150, p 835.

¹⁵³ Charney, *supra* note 150, p 837.

¹⁵⁴ Charney, *supra* note 150, p 836.

¹⁵⁵ Sean D Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter* (2002) 43 HVILJ, p 49.

¹⁵⁶ President Delivers State of the Union Address (29 January 2002).

the speech he stated that the war against terrorism was only at its beginning, because “thousands of dangerous killers”, that had been trained at the same camps as the hijackers of the planes on the 11 of September, had spread throughout the world and were ready to commit acts of terrorism. Bush continued by emphasising that even if the terrorist camps in Afghanistan had been terminated, many still existed in other countries, and America’s goal should be to find and shut down terrorist camps and prevent terrorist and rogue States from threatening the world with weapons of mass destruction. The terrorists he was talking about were not only Al-Qaeda, but also other groups like Hamas, Hezbollah and Islamic Jihad, and the rogue States he mentioned were North Korea, Iran and Iraq. To use Bush’s own words he stated that “I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.” Thus the US was prepared to act pre-emptively before an actual armed attack had occurred and probably even before an imminent threat was present.

4.3.2 Weapons of Mass Destruction

Nuclear, biological and chemical weapons are, as a group, referred to as weapons of mass destruction, and these weapons are not in themselves a new concept. Nuclear and biological weapons were used in World War II, and chemical weapons were used as far back as World War I. Consequently the weapons have been on the market since before the creation of the UN Charter, but the weapons technology is constantly developing. It is a known fact that if weapons of mass destruction are being used, the consequences can be very severe. To use the Bush administration’s description, weapons of mass destruction are “weapons that can be easily concealed, delivered covertly, and used without warning”.¹⁵⁷ Thanks to advancement of the technology, increased availability of information and inadequate international safeguards, it has become increasingly easy to get hold of these weapons and also to manufacture and conceal them.¹⁵⁸

Perhaps these developments will ask for an expansion of the scope of self-defence. An argument for an expansion is that an attack with weapons of mass destruction can be so devastating that the opportunity for meaningful self-defence could be lost.¹⁵⁹

There is one issue that deserves to be mentioned regarding nuclear weapons. If a State wishes to acquire nuclear weapons, they could of course buy the radioactive material already processed and ready to use in weapons, but another option is to process the raw material themselves. The raw (impure) uranium must be enriched to give weapons grade uranium, or converted into plutonium by irradiation in a nuclear reactor. Both of these

¹⁵⁷ The National Security Strategy of the United States of America (Sept 17, 2002) p 15.

¹⁵⁸ Travalio, Altenburg, *supra note 31*, p 110.

¹⁵⁹ Reisman (2003), *supra note 64*, p 84.

products emit much higher radiation than the initial material. Thus an attack to such a nuclear facility could not only cause significant casualties but also widespread and long-term environmental damage. Consequently, to avoid this damage, a possible attack would have to be conducted before the facility is in use.¹⁶⁰

Discussions over whether nuclear weapons would present such a threat that the right of self-defence should be expanded have been held in the past. A debate followed the Cuban missile crisis in 1962 where the risks of expanding the right were highlighted.¹⁶¹ A discussion also followed the Israeli bombing of an Iraqi nuclear reactor in 1981, although the claim from Israel that nuclear weapons pose such a grave danger that they justify pre-emptive actions was rejected by the Security Council.¹⁶²

The US recognises the severity of weapons of mass destruction and has therefore adopted a rather aggressive strategy to battle those who threaten their use. When these weapons are involved, the US is prepared to, with force, “disrupt an imminent attack or an attack in progress, and eliminate the threat of future attacks”.¹⁶³ Thus they claim a right not only to anticipatory but also to pre-emptive self-defence if weapons of mass destruction are involved.

Naturally the technology has developed since 1981, but does this really change the attitude towards pre-emption? Has the technology really leapt so far forwards in its development as to change the Security Council’s opinion that nuclear weapons do not justify pre-emptive self-defence? After all, it would still be true that there is a grave risk of actually increasing the likelihood of an armed conflict if self-defence is allowed in situations where weapons of mass destruction are being deployed.

4.3.3 Change of “Enemy”

During the Cold War the Soviet Union was the biggest enemy of the United States. Both of the superpowers had up-to-date nuclear weapons and they both lived with the understanding that an attack would be followed by an immediate counterattack. Thus, it was a sense of mutual assured destruction that deterred the enemy from using its weapons.¹⁶⁴ The consequences that would be brought by the use of nuclear weapons was beyond all reasonable doubt thanks to the atomic bombs detonated over Hiroshima and Nagasaki that ended the Second World War. Furthermore, strategic specialists on both sides made sure that every possible scenario of the application of nuclear weapons was known.¹⁶⁵ It is rather safe to say that neither of the two

¹⁶⁰ David Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities* (2003) 4 CHIJI, p 45.

¹⁶¹ See above 4.2.6.1 “The Cuban Missile Crisis in 1962”.

¹⁶² See above 4.2.6.3 “Israel’s Bombing of an Iraqi Nuclear Reactor in 1981”.

¹⁶³ White House, National Strategy to Combat Weapons of Mass Destruction, p 3, available at www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.

¹⁶⁴ Security Strategy, *supra note 157*, p 13.

¹⁶⁵ Reisman (2003), *supra note 64*, p 84.

superpowers' intentions was to precipitate the use of either's nuclear weapons. The consequences were well known and far from desirable.

After the end of the Cold War, the Soviet Union dissolved, stepped down from the throne and left the US as the world's only remaining superpower. East and west were no longer enemies on the paper. Today the threats do not come from a superpower; instead they come from smaller countries like Iraq and North Korea and also non-State actors like Al-Qaeda. Weapons of mass destruction are no longer concentrated in the territorial elite; the truth today is that even non-State actors have them in their possession.

Non-State actors have recently changed their shape and have become very powerful. The development in technology has made it far easier for people to communicate across borders, with the Internet for instance, to travel between different States, and to launder and transfer money. The recent globalisation has in a way made the State's border more transparent and consequently more difficult to protect. On top of this, some of today's terrorist organisations are extremely well funded.¹⁶⁶ Some groups have also become greedier for power and influence, so instead of just trying to change a particular policy, they seriously threaten to destroy the structures and the values of today's world public order.¹⁶⁷ They have many supporters and are spread out over several States. Furthermore, as mentioned, some of them even have weapons of mass destruction in their possession.

Non-State actors are not affected by the "dynamic of reciprocity and retaliation"¹⁶⁸ as States are, and this makes them even more dangerous. They do not risk having their territory destroyed, because they simply do not have a territory of their own in the same way that a country has. Because of the above, and the fact that many are prepared to sacrifice their own life, the non-State actors can be very difficult to detect.¹⁶⁹ With this in mind it is almost unnecessary to add that non-State actors with significant arsenals of weaponry pose a serious threat to international peace and security.

There is no question that States are allowed to answer an armed attack with self-defence, even if the attack is made by a non-State actor.¹⁷⁰ The problem instead centres upon whether self-defence can be used before an armed attack has occurred. It has been argued that since there is such a desire to fight the terrorists, the States should perhaps be allowed more expansive measures than usual.¹⁷¹

Soafer argues that when it is necessary for deterrence, States have a right to use defensive measures to prevent possible attacks. He is also of the opinion that if a State allows terrorists to use their territory, then they are an accomplice and therefore also partly responsible for the terrorists' acts.¹⁷² Thus Soafer considers it to be a crime to harbour terrorists and that crime

¹⁶⁶ Travalio, Altenburg, *supra note 31*, p 109.

¹⁶⁷ Michael W Reisman, *Editorial Comments: In Defence of World Public Order* (2001) 95 AMJIL, p 833.

¹⁶⁸ Reisman (2003), *supra note 64*, p 86.

¹⁶⁹ Sofaer, *supra note 6*, p 210.

¹⁷⁰ Lobel, *supra note 126*, p 540.

¹⁷¹ Lobel, *supra note 126*, p 541.

¹⁷² Lobel, *supra note 126*, p 541.

can under some circumstances justify self-defence, even in the prevention of an armed attack from the terrorist group.

Alvarez suggests that the terror attacks on the 11 September 2001 might have changed the rules regarding self-defence. In his opinion it could now be acceptable to respond pre-emptively in self-defence with military force against terrorists and the States that harbour them. His explanation for this is that terrorists are unpredictable and their attacks or threat of attacks often remain clandestine.¹⁷³

4.3.4 The National Security Strategy of the US

The president of the United States has a duty to submit to Congress a yearly report on the country's national security strategy. The report given in September 2002, a year after the terror attacks on the World Trade Center and the Pentagon, has become very interesting, because of reasons that will be explained.

Rogue States and terrorists are both mentioned in the Strategy. These are considered to be the adversaries of today and they constitute a different enemy than the former Soviet Union during the Cold War. This different enemy needs to be fought by other means and the traditional concepts of deterrence will not work against them.¹⁷⁴ The Bush administration acknowledges that there is a link between rogue States and terrorists and in the Strategy they emphasise the need to stop these adversaries before they are able to threaten or use weapons of mass destruction.¹⁷⁵ Furthermore the Bush administration claims that the reactive posture the US has held in the past is no longer possible to uphold.¹⁷⁶ Because of the change in enemy, the increased likelihood of a threat being realised and the development of weapons technology, it is, according to the Strategy, in the US' interest not to let the enemy strike first.¹⁷⁷

According to the Bush administration, international law has for centuries acknowledged the right of a State to use force in self-defence if it is the subject of an imminent threat.¹⁷⁸ Thus it has never been expected of a State to await an attack like a sitting duck. Furthermore they emphasise the need to adjust the meaning of imminent threat to today's society.¹⁷⁹ In other words, the US wishes to be able to attack in self-defence before an armed attack has occurred, and even before an imminent threat of an armed attack manifests itself. To use the Bush administration's own words as stated in the Strategy:

¹⁷³ José E. Alvarez, *The UN's "War" on Terrorism* (2003) 31 INTJLI, p 243.

¹⁷⁴ Security Strategy, *supra* note 157, p 15.

¹⁷⁵ Security Strategy, *supra* note 157, p 14.

¹⁷⁶ Security Strategy, *supra* note 157, p 15.

¹⁷⁷ Security Strategy, *supra* note 157, p 15.

¹⁷⁸ Security Strategy, *supra* note 157, p 15.

¹⁷⁹ Security Strategy, *supra* note 157, p 15.

“The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.”¹⁸⁰

It is important to add here that they also point out that their intention is not to use force pre-emptively in all cases and they totally refrain from using this excuse to legalise any form of aggression.¹⁸¹

The three most interesting aspects of this Strategy are firstly that the Bush administration claims that international law has for centuries acknowledged the right of a State to use force in self-defence if they are subject of an imminent threat, secondly that they claim that we must adjust the meaning of imminent threat to today’s society, and lastly – and most interestingly – that nowhere in the Strategy is the UN and its system of collective security mentioned.

The Security Strategy might seem radical, but the opinion that they have a right to act pre-emptively against terrorists is hardly a new thought within the US Government. As far back as October 1984 US Secretary of State George Shultz presented in a speech a new anti-terrorist doctrine.¹⁸² Schultz claimed in his speech that the US had a right to use force pre-emptively to combat terrorist threats abroad, and that this included a right to strike in foreign States. The reason he gave was that if the US was to succeed in combating terrorist attacks effectively, the “element of unpredictability and surprise” was vital. Not everyone agreed with Shultz’s doctrine, though.¹⁸³ The Secretary of Defence, Casper Weinberger, was critical to it, and he discussed it comprehensively in a talk to the National Press Club on 28 November of the same year.¹⁸⁴

The Security Strategy has been heavily criticised for the reason that pre-emptive force contradicts established law. Another interesting fact is that Australia’s prime minister in 2002 suggested to the UN that the Charter should be changed so that it would allow pre-emptive self-defence. This is very strong evidence for the present unlawfulness of armed pre-emption. Even more interesting are the reactions from Asia and Europe on the proposal. The suggestion was heavily criticised by members of the

¹⁸⁰ Security Strategy, *supra note 157*, p 15.

¹⁸¹ Security Strategy, *supra note 157*, p 15-16.

¹⁸² The speech was held at the Park Avenue Synagogue in New York City on 25 October 1984. See Richard Falk, *The Decline of Normative Restraint in International Relations* (1984-1985) 10 YJIL, p 265.

¹⁸³ See Eugene V Rostow, *The Legality of the International Use of Force by and from States* (1984-1985) 10 YJIL, p 289.

¹⁸⁴ Falk, *supra note 182*, p 265-266.

Association of Southeast Asian Nations, and it found no support at all from the members of the European Union.¹⁸⁵

At the time of the announcement of the Security Strategy it was not known what effect this new doctrine of pre-emption would have in reality. Today there is no doubt, though, that the Bush administration will act rather than stay passive in their struggle to protect America and her friends. Indeed, the military action against Iraq in 2003 could be seen as their first application of the doctrine.¹⁸⁶ It is questionable, however, as to whether the strike against Iraq is consistent with international law. Graham shows deep concern for this and states that if the strike is an illustration and a correct interpretation of the Security Strategy, then he is in serious doubt as to whether or not it is compatible with international law. On the other hand it could be a possibility, even if it seems unlikely, that the strike against Iraq is an exception and not how the Security Strategy was meant to be interpreted. If so, and if the Bush administration meant that they were prepared to act pre-emptively within the UN Charter or with the Security Council's authorisation, then the Security Strategy would comply with international law.¹⁸⁷

Schmitt is of the opinion that pre-emption can be allowed within the rules of current international law. He bases this on the presumption that anticipatory self-defence is lawful. It is wrong, according to Schmitt, to assume that the criterion of imminence means that the right to self-defence is a temporal one, and can therefore only be exercised immediately preceding the anticipated armed attack. Such an interpretation does not work in modern society, with today's hugely advanced weapon technology. The standard should instead be "the last viable window of opportunity." The exact point at which the window closes may differ from case to case though, depending on the circumstances. For a threat from terrorists, the window can close well in advance because of the high likelihood of the terrorists staying mobile. One issue that must be treated with caution, though, is that the threshold for the risk of occurrence of an actual armed attack must not be lowered. It is mentioned in the Security Strategy that the greater the risk of the occurrence of an armed attack, the lower the certainty of when and where the attack will take place is required. According to Schmitt, this attitude is to move out onto dangerous ground. The threshold of certainty must not be lowered. Speculations of future attacks must not trigger pre-emption; the expectation must instead be very high.¹⁸⁸

¹⁸⁵ Richard B Bilder, Mary Ellen O'Connell, *Review Essay: Re-leashing the Dogs of War* (2003) 97 AMJIL, p 449.

¹⁸⁶ Thomas Graham Jr, *National Self-defence, International Law, and Weapons of Mass Destruction* (2003) 4 CHIJIL, p 12.

¹⁸⁷ Graham, *supra note 186*, p 16-17.

¹⁸⁸ Schmitt, *supra note 25*, p 393-395.

4.3.5 Should Pre-Emptive Self-Defence be Allowed?

What would the consequences be if pre-emptive self-defence were to be considered legal? Would it undermine the prohibition of the use of force according to article 2(4) in the UN Charter? These are difficult questions indeed. According to Alvarez and Bothe, a legalisation of pre-emptive self-defence could mean that a hole is punched in the UN Charter. It would be retrogression in the development of international law back to the time even before the Kellogg-Briand pact. Thus war could once again be allowed.¹⁸⁹

A fear exists regarding a possible abuse of the right to anticipatory self-defence, the fear that it could be used as an excuse to resort to violence against other States. If that fear manifests itself when it comes to situations where an imminent threat of an armed attack is present, would that not mean that the possibility of abuse of pre-emptive self-defence would be even bigger? It would seem reasonable to draw such a conclusion, because pre-emptive self-defence is used when there is only a threat of a possibility of an attack.

Reisman states that, on a case-by-case basis, the risk of the abuse of pre-emptive self-defence is not bigger than the risk of the abuse of anticipatory self-defence. An allowance of pre-emptive self-defence, however, will lower the threshold for the use of violence in such a way that more situations will reach the level where self-defence is allowed. States could also be encouraged to strike first instead of awaiting an attack, and that could lead to countries attacking in self-defence just in case.¹⁹⁰

Travalio agrees with Reisman's concern that a doctrine of pre-emptive self-defence can lead to more violence. He understands that although international law does need to be developed due to the changing circumstances in today's society, to allow States to use force pre-emptively would be to take it all too far. He fears that such a development would lead to an unfriendly and lawless world.¹⁹¹

Another concern, expressed by Stahn, is that a further widening of the scope of self-defence could disturb the Security Council's responsibility to maintain peace and security in the world.¹⁹² O'Connell takes this argument a step further and states that article 2(4) and the purpose of the UN could be totally overthrown if pre-emptive self-defence were to be allowed.¹⁹³

Sloss is a spokesman for pre-emptive force. His argument is based on the severity of nuclear weapons and the dangers of attacking nuclear facilities once they are in use.¹⁹⁴ He clearly states, however, that this pre-emption must be authorised by the Security Council, and that no unilateral form of pre-emptive self-defence from a State can be accepted. Moreover it would in fact, with regard to the UN Charter, be unlawful.¹⁹⁵

¹⁸⁹ Alvarez, *supra note 173*, p 245, Bothe, *supra note 68*, p 237-238.

¹⁹⁰ Reisman (2003), *supra note 64*, p 88.

¹⁹¹ Travalio, Altenburg, *supra note 31*, p 118-119.

¹⁹² Stahn (2003), *supra note 28*, p 41.

¹⁹³ Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, available at www.asil.org/taskforce/oconnell.pdf.

¹⁹⁴ See above 4.3.2 "Weapons of mass destruction".

¹⁹⁵ Sloss, *supra note 160*, p 54.

4.3.6 Conclusion

It seems quite clear from the reaction of the US after the terror attacks on the 11 September 2001 and their subsequent Security Strategy that the US is of the opinion that the concept of self-defence has changed. The Bush administration stated in the Security Strategy that they were prepared to act pre-emptively to forestall or prevent attacks from their enemies, and it must be concluded that it is the new forms of terrorist organisations that have brought on the change in the US attitude. It is not wrong, however, also to mention rogue States and weapons of mass destruction. The US suspects a connection between terrorists and rogue States. In their Security Strategy the Bush administration even refers to terrorists as rogue States' "clients".¹⁹⁶ The rogue States can supply terrorist organisations with weapons, funds and other aid and they can also use them to perform deeds by proxy. With the help of a State, a terrorist organisation can become much more powerful and consequently more dangerous. As mentioned before, non-State actors are not affected by the "dynamic of reciprocity and retaliation" and many of them are not afraid to sacrifice their lives for their cause.¹⁹⁷ Their having access to weapons of mass destruction results in a dangerous combination. Terrorists have in a way less to lose and their likelihood of actually using the weapons might therefore be considered to be higher. Since they are prepared to die themselves it can also be easier for them to accomplish an attack – they do not need an escape route and they have no worries about getting caught, they basically only need to place themselves as close to the target as possible.

It is clear that current international law does not allow pre-emptive self-defence. The only possibility for such unilateral actions to be lawful is to change the law. The risk of abuse cannot be ignored. Pre-emptive self-defence could be used as a pretext for aggression, and, instead of decreasing the risk of armed conflicts between States, it could lead to more violence.

Indeed, terrorists in combination with rogue States and weapons of mass destruction pose a threat to international peace and security that has not been experienced before, but it still does not seem likely that the threat is so severe and extensive that the right to self-defence will be extended.

4.4 A Step Away From the UN System

Pre-emptive self-defence is clearly not allowed according to article 51. Consequently, the Security Strategy represents a step away from the UN Charter. At this point it is not known exactly what this will mean for the future. There is a danger, though, that the US will create a precedent for other States. The result could possibly be unbearable. Quite a few countries

¹⁹⁶ Security Strategy, *supra note 157*, p 14.

¹⁹⁷ See above 4.3.3 "Change of "Enemy"".

are suspected to have weapons of mass destruction in their possession, and other States than the US have enemies. Just imagine what kind of world we would create for ourselves if it were legal for Pakistan to attack India, for Azerbaijan to attack Armenia, or for North Korea to attack South Korea, or vice versa.

It is a very interesting fact that the US is choosing to step away from the UN Charter. The question is why they are doing so. Have they lost their faith in the UN system? They are obviously of the opinion that they are entitled to, but does that mean that other States are allowed to follow in their footsteps? Could it actually be that the right to pre-emptive actions is the sole preserve of the US?

Maybe the UN Charter is not working according to its intentions, or maybe it has never worked. It is and has always been a requirement for a resolution to be passed in the Security Council that none of the permanent members use their veto right. From the creation of the UN Charter up until 1991, the Cold War has been on the table. It was a war between east and west, but the main adversaries were the US and Russia (as the former Soviet Union). Both of these countries are permanent members of the Security Council and could therefore easily prevent any potential resolution against them. This could consequently hinder the Security Council from performing its duty to maintain international peace and security. It is already known that resolutions have previously been prevented because of permanent members' involvement in the issue.

One excellent example where a resolution has been blocked is the US bombing of Libya in 1986.¹⁹⁸ Despite the fact that a large number of States condemned the US bombing of Libya, no resolution was passed in the Security Council, the reason being that the US, the UK and France vetoed it. In this particular case, a resolution was instead passed in the General Assembly. Included in the resolution was a concern over the fact that the Security Council had been prevented from fulfilling its responsibilities.

Is the UN a toothless tiger? It has been argued that the action of the Security Council “comes late, lacks force, and focuses on ‘neutral’ humanitarian tasks that do not resolve a conflict”.¹⁹⁹ It is not that the UN has remained passive or that it is afraid from interfering in conflicts, but that the help and the solution that has been offered is perhaps not always enough. Take resolution 1373, which was passed two and a half weeks after the 11 September 2001, as an example. A long list was included in this resolution with acts and non-acts that the Security Council urged the Members to follow. The list included freezing of funds and financial assets, refraining from giving support to terrorists, denying safe havens for terrorists and exchanging information.²⁰⁰ They are all very good suggestions, but would they really have prevented further attacks from Al-Qaeda?

On the other hand, due to the Security Council's construction, it is difficult to obtain authorisation from them to use armed force against

¹⁹⁸ See above 4.2.6.4 “The US Bombing of Libya in 1986”.

¹⁹⁹ Ruth Wedgwood, *Unilateral Action in the UN System* (2000) 11 EJIL, p 351.

²⁰⁰ See above 4.3.1.1 “The Terror Attacks”.

another State. This can be seen as something negative and frustrating, but it can actually also be something very positive as well. States are not supposed to use armed force against each other, but to try to resolve conflicts by peaceful means. By making it difficult to obtain a permission to use armed force, Members are forced to consider other alternatives. The fact that all permanent members need to agree can give a better insurance that no hasty decisions with questionable justification are made.

Three basic and very important rules in international relations are State sovereignty, non-intervention and equality between States. State sovereignty and non-intervention are, in this context, linked. The meaning of State sovereignty is that the jurisdiction of a State is exclusive. This does not, however, mean that the State within its jurisdiction can do whatever it pleases, because State sovereignty is limited by international law. The meaning of non-intervention is that States are not allowed to force other States to change their behaviour; they can only try to influence each other by diplomatic means.²⁰¹ These concepts are often mentioned in the debate over humanitarian intervention, but it is also highly relevant when discussing pre-emptive self-defence. The concentration is generally on the potential victim, and not on the potential offender. The opinion could be that that is perfectly reasonable, though. If you are planning an attack against another State, then you are actually planning a violation of the law and you should therefore be deprived of the protection that the law gives. The problem is, though, that the exercise of pre-emptive self-defence is at such an early stage of the possible violation of international law and it is not even for certain that the attack will be launched, thus it is not for certain that the law will be violated. Is it really right to yield the fundamental principles of State sovereignty and non-intervention if it cannot be said, without reasonable doubt, that an armed attack will be executed? The matter is made even more complicated by the fact that terrorists can launch armed attacks, and by the so-called harbouring doctrine. In short, the harbouring doctrine's content is that if terrorists are tolerated or harboured by a State, this State is under an obligation to take suppressive measures. If the State in question remains passive, the State that is threatened by the terrorists can take military action on the harbouring State's territory to stop the threat.²⁰² Terrorists operate from a territory that is not their own, but a State's, and it is not always the case that the terrorists are supported by the government of that State. Is it really permissible under international law to attack terrorists on another State's territory if the State in itself is innocent? Naturally the State in question can give permission, but what if it does not? It is also difficult to establish where to draw the line of harbouring. Is it harbouring terrorists if only a handful of them are situated on the State's territory?

According to UN Charter article 2(1) the UN "is based on the principle of the sovereign equality of all its Members", and this root principle is

²⁰¹ John Funston, *ASEAN and the Principle of Non-Intervention – Practice and Prospects* (2000), p 2, available at www.iseas.edu.sg/trends520.pdf (27 January 2004 17:15).

²⁰² Carsten Stahn, "*Nicaragua is dead, long live Nicaragua*" – *the Right to Self-defence under Art. 51 UN Charter and International Terrorism*, p 42, available at <http://edoc.mpil.de/conference-on-terrorism/present/stahn.pdf> (27 January 2004 16:45).

actually challenged by the Security Strategy.²⁰³ Pre-emptive military actions without authorisation from the Security Council are not lawful under international law. Despite this, the US in its Security Strategy claims that they do have a right. If this right should only be for the US and not for the rest of the Members in the UN, then the principle of State equality is obviously ignored. All States should have the same rights and also the same obligations. Only the incidence of a State performing unauthorised unilateral actions can challenge this principle. The Members have together come up with the international law that exists today and, according to that law, pre-emptive self-defence is unlawful. Since all States are equal one State cannot, just because it pleases, disregard the will of the international community. If a State wishes to change some principles of international law, they simply must be changed in accordance with the system that was set up to protect international peace and security. Thus the desire to revise the law must be collective.

Regardless of the legality of it, the Security Strategy is an indication that something is wrong with the current system for the protection of international peace and security. Thus, some kind of change seems desirable. The necessary change might be an expansion of the right to self-defence, or perhaps a reorganisation of the Security Council. The world has developed since 1945, and perhaps this should be shown amongst the permanent members. The UN has 191 Members,²⁰⁴ and the Security Council only has five permanent ones. Would it not be more just and effective if three of the permanent members were not allies and part of the western world, and if all continents were represented?

²⁰³ Farer, *supra note 149*, p 360.

²⁰⁴ UN, *List of Member States* (2003), available at www.un.org/Overview/unmember.html (28 January 2004 14:30).

5 Conclusion

There are uncertainties regarding the extent of the right to self-defence in the UN Charter article 51. In the article itself it is stated that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. Literally, according to this a State is allowed to defend itself against an attack. Some authors and some States, however, are of the opinion that the article also authorises anticipatory and pre-emptive self-defence. This assumption generally comes from the reference to the right as being an inherent one. It has been claimed that the pre-existing customary rule, which allowed preventive actions in certain circumstances, still exists parallel to article 51. The evidence in the doctrine, though, does point towards the interpretation that article 51 is the only available right to self-defence.²⁰⁵ Despite this, several countries have on more than one occasion claimed that they have a right to anticipatory or pre-emptive self-defence. The action has not always been condemned, but it has certainly not once even been acknowledged by the Security Council.²⁰⁶ One reason for the negative attitude in acknowledging the right to pre-emptive self-defence is that it can show similarities with reprisals, which are illegal according to international law.²⁰⁷ Another problem is that it is very difficult to make pre-emptive self-defence comply with the demands of necessity, proportionality and immediacy.²⁰⁸

Much of the debate surrounds whether or not to allow self-defence where an imminent threat is present, and most commentators and most States are of the opinion that an armed attack must actually have occurred before self-defence can be used. With this in mind it would be almost impossible to claim that pre-emptive self-defence is allowed according to article 51 in the UN Charter.

The terror attacks on the 11 September 2001 shook the world and made some States question the UN system for the protection of international peace and security. In the US Security Strategy, which was released a year after the attacks, the Bush administration stated that they would in the future, if necessary, act pre-emptively to forestall or prevent attacks by their enemies. This official attitude change has been brought on by rogue States, terrorists and weapons of mass destruction. The terrorists are the decisive factor, since some organisations have fairly recently moved into a different league and have become more professional and sophisticated.²⁰⁹

It almost goes without saying that if the Security Strategy seriously means that the US has a right to pre-emptive self-defence without authorisation from the Security Council, then it contradicts the established

²⁰⁵ See above 4.2.3 “Self-Defence as an ‘Inherent Right’”.

²⁰⁶ See above 4.2.6 “State Practice”.

²⁰⁷ See above 4.2.4 “Self-Defence or Reprisal?” and 4.2.5 “Accumulation of Events”.

²⁰⁸ See above 4.2.7 “Does Pre-Emptive Self-Defence Comply with the Demands of Necessity, Proportionality and Immediacy?”.

²⁰⁹ See above 4.3.4 “The National Security Strategy of the US”.

international law. The question that arises thereof is whether or not the law should be changed to include this type of unilateral action. Australia's prime minister actually suggested to the UN in 2002 that the Charter should be changed so that it would allow pre-emptive self-defence. This suggestion received no support at all from the members of the European Union and it was heavily criticised by members of the Association of Southeast Asian Nations.²¹⁰ Consequently, it does not seem like an extension of the right to self-defence will be forthcoming in the near future.

²¹⁰ See above 4.3.5 "The National Security Strategy of the US".

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