

**Anticipatory self-defense in
international law: legal or just a
construct for using force?**

By V.A.V. Andreias
ANR 267515

Table of contents

	Page
I. Introduction	3
II. Historical background	4
III. Treaty law – the United Nations Charter	7
IV. Customary international law	14
V. ICJ case law	24
VI. Relevant documents of other UN bodies	33
VII. Conclusions	37

Bibliography

Anticipatory self-defense in international law: legal or just a construct for using force?¹

By V.A.V Andreias
ANR 267515

I. Introduction

The never ending saga continues. Anticipatory self-defense (or pre-emptive self-defense) is still disputed. Some are for its existence and some are against it. Those who are for it claim that the world we presently live in poses greater dangers than what was faced in 1945. They argue that classical notion of warfare does not apply anymore, that States fighting amongst each other would employ devastating weapons. Living in a nuclear era would make anticipatory or pre-emptive self-defense a necessary must, as States cannot afford to absorb the first strike of an enemy attack as it might lead to their total destruction. Those who argue against it focus on the fact that this concept has no legal basis in international law. They assert that the United Nations Charter, which contains the right of self-defense, does not allow States to act pre-emptively. In addition, they affirm that it is because we live in a time when the destructive potential of weapons is so high that anticipatory self-defense should not be employed as it may have regrettable consequences². In the end, the question remains: is anticipatory self-defense legal under current international law? Does treaty law allow it? If not, can customary international law be invoked to prove its legality? And what about the opinion of the main or subsidiary bodies of the United Nation? How has the International Court of Justice approached the problem? These are the questions this paper will focus on and attempt to answer.

As the title mentions, this paper will deal with the legality of anticipatory self-defense in international law. It will try to find if current international law allows for States to have recourse to anticipatory self-defense in case they are confronted with an imminent attack. To do so, the paper plans on examining the sources of this branch of law. Article 38(1) of the Statute of the International Court of Justice³ reveals these sources as being treaty law, customary law, general principles of law

1 The starting point of this work was a paper submitted to Professor Willem van Genugten of Tilburg University Law School called "A short overview of the legality of anticipatory self-defense". I must give thanks to my supervisor, Evgeni Moyakine, for providing me with valuable insight necessary to finish this paper.

2 A detailed analysis will be given in Section III.

3 "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by

and, as subsidiary means, judicial decisions and the writings of experts in the field. Therefore, this paper will be structured as follows: Section II will provide a historical background of self-defense in general which has the task of showing that this concept has not remained stagnant, Section III will deal with treaty law, in this case, the treaty being the United Nations Charter, Section IV will analyze customary international law; it will look at the relevant state practice and try to discern if the requirement of *opinio iuris* is met; Section V will explore the relevant decisions of the International Court of Justice in the field, Section VI will present the opinions of other UN bodies and it ends with Section VII where it will provide conclusions and attempt to predict possible causes for this concept's appearance on the international level.

II. Historical background

The concept of self-defense is a very old one that can be traced back to ancient times. It is linked with the power and prerogative of States to wage wars. Wars were classified as "just" or "unjust". This classification was present in Ancient Greece and Ancient Rome⁴. In the old Roman Empire the law had a very religious aspect to it. Priests were the ones who knew the "secrets" of law and they would be the ones who could declare if an action was right or wrong. The priests called *fetiales* had the power to determine whether a State had breached its obligations to Rome and if that was the case, the custom practice was that that State had the duty to repair the damage done, to pay for its mistake. If it refused to do so, the *fetiales* would inform the Roman Senate that there was a reason for 'just war'⁵.

With the Christianization of the Roman Empire, Christians have abandoned their pacifist ways and embraced the concept of 'just war'. St. Augustine defined 'just wars' as those which

the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. "

The Statute of the ICJ can be found at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

⁴ Coleman Phillipson, *The International Law And Custom Of Ancient Greece And Rome*, London, 1911, at 179.

⁵ Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge University Press, 2005, at 63.

avenged the injuries that were caused by the State towards which war-actions were taken⁶. Furthermore, the concept of 'just wars' implied the tacit consent of God.

St. Thomas Aquinas took the concept further and asserted that certain conditions must be fulfilled to wage a 'just war': besides the wrongful act there was also a need to punish the wrongdoer for his guilty mind as well. We can see that a subjective condition is added, that the intentions of the wrongdoer are also punished, that his interior beliefs must be atoned for. A 'just war' can only be fought by a sovereign nation with the intent of promoting good or avoiding evil⁷.

The international relations and the law which governed these relations at that time was very religion centric. It was believed that wars were fought with the consent of God, that a nation which considered itself to be wronged by another State and the intention of advancing 'good' was entitled to go to war to punish the wrongdoer, not only for his actions, but also for his interior beliefs.

Things changed with the rise of European sovereign States. The prerogative of declaring war was now based on the sovereignty of the States. A new problem arose in this period: Christian States going to war with each other. The concept of 'just war' began to lose its power, as Christian States invoked that they had intentions of advancing good and the tacit consent of God to wage war. This was a very big dilemma because it meant that both sides in a war could claim resorting to 'just war' as a means to punish the other side for its alleged wrongdoings. It was soon realized that a certain degree of right might be on each side which led to the legality of the recourse to war as being seen to depend upon the formal processes of law⁸. Grotius tried to redefine the concept of 'just war' as being linked to self-defense, the protection of property and the punishment for wrongs suffered by the citizens of the particular state⁹.

The peace of Westphalia in 1648 brought a new balance of power in Europe. Sovereign States now enjoyed equality amongst each other and could no longer be the judge of another State's action. States had the duty to honor¹⁰ the obligations which they contracted on the international level and to respect the independence and integrity of other countries, but more importantly, they had the obligation to settle differences through peaceful means. Thus, the concept of 'just wars' was eliminated from international law.

But war was not eliminated from the international plane. It was regulated by a set of conditions. It was linked to the sovereignty of States and an infringement on that sovereignty could be a very good reason to go to war. The killing of the Austrian Archduke at Sarajevo represented

⁶ St. Augustine, *De Civitate Dei Contra Paganos*, Book XIX, x VII (6 Loeb Classical ed. 150–1 (W. C. Greene trans., 1960)).

⁷ St. Thomas Aquinas, *Summa Theologiae*, Secunda Secundae, Quaestio 40, 1 (35 Blackfriars ed., 80–3 (1972)).

⁸ Malcolm M. Shaw, *International Law*, 6th edition, Cambridge University Press, 2008, at 1121.

⁹ *Ibid.*

¹⁰ *Ibid.*, at 1120.

one such reason that started the First World War which ultimately brought down the balance system on the European continent.

The end of the First World War gave rise to the need of having a system that would attempt to solve disputes without directly resorting to war. The birth of the League of Nations represented a new step on the path to an international community governed by peace. It was declared in the Preamble of the Covenant that the Members were striving for international peace and security by not resorting to war. The Covenant imposed a set of obligations on Member States. First, if any dispute arose between them, they would submit it for an arbitrary or judicial decision to the Council of the League. Second, if they did not agree with the decision, the Members could not go to war until after 3 months from the arbitral award or judicial decision. This was seen as a cooling-off period and to give Members a chance to change their minds and not start a war¹¹. It can be seen that although it was a step in the right direction, the League of Nations system did not prohibit war, it only regulated it, imposing obligations on Member States to try and solve their problems peacefully. But if everything else failed, they could resort to war. So, war was still seen as a legitimate way to settle disputes between States. This and other gaps in the system led to its failure.

Another attempt at ensuring international peace was the Kellogg-Briand Pact or the General Treaty for the Renunciation of War. The parties condemned the recourse to war and agreed to settle their disputes through peaceful means only¹². This became a principle of international law and was emphasized in the organization that replaced the League of Nations: the United Nations.

The scope of the UN was laid down in the Preamble of its Charter: "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind [...]". Article 1 illustrates the purposes of the organization: to maintain international peace and security, to develop friendly relations between states and to achieve international co-operation.

The principle of solving disputes by peaceful means is contained in Articles 2(3)¹³. Article 2(4)¹⁴ prohibits not only war but force in general and also the threat of force. This prohibition has two exceptions in the Charter: self-defense as stated in Article 51 and the actions taken by the Security Council under Chapter VII.

Since the entry into force of the Charter, the institution of self-defense has evolved. The Charter expressly gives Member States the right to defend themselves in case they come under

11 The League of Nations Covenant, Articles 10-16.

12 The Kellogg-Briand Pact, Articles 1 and 2.

13 "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

14 "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."

'armed attack'. Article 51 allows States to use force as a last resort to protect their integrity. This right has a limit: measures taken by the defending state must be reported to the Security Council; furthermore, once the Council has decided to act, the defending state must cease the measures taken in response to the armed attack. This concept is known as "reactive"¹⁵ self-defense or the traditional paradigm of self-defense. But we can also talk about concepts such as interceptive self-defense, anticipatory self-defense or preventive self-defense.

Interceptive self-defense is employed when the physical attack has not crossed the defending State's border, but it has commenced. The defending State does not wish for the enemy attack to cross its borders and launches an interceptive strike in order to prevent it from reaching its territory. Such a case would be the destruction of the Israeli destroyer *Eilat* by the forces of the United Arab Republic. The destroyer was found in UAR territorial water, in clear contradiction with the ceasefire¹⁶.

Anticipatory self-defense deals with an attack that has not happened yet, but there is proof that it is imminent. The aggressor State is in the final preparations for launching the attack. The defending State has solid proof that there will be an attack and decides to strike first and not wait for the attack to commence. There is a similarity to interceptive self-defense as the threat actually exists. This concept has its roots in the Caroline doctrine which will be discussed in Section IV.

Preventive self-defense (or the Bush doctrine) is anticipatory self-defense taken a bit further in that the threat is not imminent, there is only a general state of anxiety but it is not for certain that it will lead to an armed attack against a State. This doctrine has its roots in the 2002 US National Security Strategy (NSS) as an aftermath of the events on September 11 and it is a response to the terrorist threat. A known example of the application of the Bush doctrine is the invasion of Iraq by US forces in the operation "Iraqi Freedom".

III. Treaty law – the United Nations Charter

The treaty law in question is represented by the provisions of the United Nations Charter. Article 51 of the Charter states that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-

¹⁵ See Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, 2010, at 124.

¹⁶ See UN Doc. S/8205, 22 October 1967 (UAR).

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."

In analyzing the concept of anticipatory self-defense under Article 51 it is important to remember the provision of Article 31(1) of the 1969 Vienna Convention on the Law of Treaties:

"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."

In interpreting the provision of Article 51 of the UN Charter we must look at it from the whole perspective of the treaty and using the ordinary meaning of its wording.

In perspective, Article 51 is tied to Article 2(4). Article 2(4) states that:

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

Article 2(4) creates a total ban on the threat or use of force in inter-state relations. States cannot use force or the threat of force to settle their disputes. I believe it is a principle that has its roots in the Kellogg-Briand Pact¹⁷. In international law it has attained the status of a *jus cogens* (peremptory¹⁸) norm¹⁹. The character of the prohibition on the use of force in international law has been illustrated in the *Nicaragua*²⁰ case. It is interesting to note that the wording of Article 2(4) is

17 Before the entry into force of the Briand-Kellogg Pact, war still represented an accepted way to settle disputes. As shown in the Section II, even the Covenant of the League of Nations did not abolish war; it only imposed procedural obstacles to waging war. The right to wage war was not impaired; it was only more difficult to exercise it.

18 The definition of a peremptory norm is contained in Article 53 of the Vienna Convention on the Law of Treaties: "[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

19 See Malcolm M. Shaw, *op.cit.*, at 126; also see Dominika Svarc, *Redefining Imminence: The Use Of Force Against Threats And Armed Attacks In The Twenty-First Century*, in 13 ILSA J. Int'l & Comp. L. 171 2006-2007, at 175.

20 A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work

different that the prohibition used by the Kellogg-Briand Pact which outlaws "war". The UN Charter uses the terminology 'threat or use of force' to encompass a wider range of actions that could not amount to war. Article 51 represents an exception to this provision as it grants States the right to use force to defend themselves if they come under attack from another State. Because it is an exception to a peremptory norm, it too has the status of *jus cogens*²¹. Seeing as to how Article 2(4) bans not only the use of force but also the threat of using force, States would have the right to defend themselves from such kind of threats and not let them escalate to actual uses of force. At first glance, one would be of the opinion that, when taken together with the provisions of Article 2(4), Article 51 may grant the option of using anticipatory self-defense. However, it will be shown below that this is not the case.

Now, looking at the wording of Article 51, it was identified that the main points of interest are "armed attack" and "inherent right". There is an ongoing debate between scholars as to if the wording of Article 51 grants the States the right to use anticipatory self-defense. They are separated in two groups: the restrictive school, which believe that Article 51 grants only the option of using self-defense only in the case of an armed attack, and the expansionist school, which believe that Article 51 grants States the option of using anticipatory self-defense.

The expansionist²² school focuses on the wording "inherent right". They are of the opinion that a State should not wait for an attack to reach its territory, as the traditional self-defense paradigm dictates, and could act before it does and believe that Article 51 has not abrogated the pre-existing customary right of self-defense which allowed for States to respond to imminent attacks²³. This might lead to the conclusion that the right of self-defense is customary in nature and that the

on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens* (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-11, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case States that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*". See Gordon A. Christenson, *The World Court and Jus Cogens*, in *The American Journal of International Law* Vol. 81, No. 1 (Jan., 1987), at 93.

21 See e.g. Eustace Chikere Azubuike, *Probing The Scope Of Self-Defense In International Law*, in 17 *Ann. Surv. Int'l & Comp. L.* 129 2011, at 144. I believe this affirmation is based on the principle of *lex specialis*. Since the prohibition set in Article 2(4) of the UN Charter represents the general regime (which has the status of *jus cogens*) and Article 51 represents the special norm which derogates from the general regime, its rank must be the same or higher in the hierarchy of the norms.

22 See e.g. Leo van den Hole, *Anticipatory self-defence under international law*, in 19 *Am. U. Int'l L. Rev.* 69 2003-2004, at 80-88.

23 See e.g. Andrew Garwood-Gowers, *Self-Defence Against Terrorism in the Post-9/11 World*, (2004) 4(2) *QUEENSLAND U. L. & JUST. J.* 3, at 3; Hannes Herbert Hofmeister, *Neither the Caroline Formula nor the 'Bush Doctrine'- An Alternative Framework to Assess the Legality of Preemptive Strikes*, 2 *U. NEW ENG. L.J.* 31 40 2005, at 40-41.

right contained by Article 51 covers only one aspect of the concept of self-defense (to defend itself in case it comes under armed attack). The customary right of self-defense has its roots in the Caroline doctrine, which will be discussed in Section IV. The expansionists believe that the customary right of self-defense exists alongside the Charter²⁴. It would be unwise to believe that States could defend themselves only if an armed attack occurs²⁵ and for the other cases they should resort to peaceful means of settling the dispute or ask to Security Council to intervene. What happens if all the other methods fail and the Security Council cannot intervene due to, let's say, a veto from a permanent Member? Should a State just wait for the attack to happen and then react? In the expansionist opinion this is contrary to the purposes illustrated in the Charter, in its Preamble²⁶. Wouldn't waiting for an attack to happen and then reacting in self-defense shift the purpose from maintaining peace to restoring peace? To act in anticipatory self-defense to counter an imminent attack would be in line with the purpose of maintaining peace declared in the Charter.

Another argument for the expansionist school comes from an analysis of the phrase "if an armed attack occurs". Some proponents²⁷ argue that the above mentioned phrase is not equivalent to "if, and only if, an armed attack occurs"²⁸. Moreover, it would appear that the Military Tribunal of Nuremberg has accepted the legality of anticipatory self-defense²⁹. The Nuremberg Military Tribunal has affirmed regarding the invasion of Denmark and Norway that: "It must be remembered that preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation""³⁰. It is clear that the Tribunal has made reference to the Webster formula born after the *Caroline* incident. While not mentioning it expressly, it could be interpreted as an implicit recognition of the legality of anticipatory self-defense.

The final argument of the supporters of this school is the rapid pace at which technology evolves³¹. At the time of the signing of the Charter, only a few countries had access to nuclear weapons or other weapons of mass destruction. But with the progress of technology, weapons of mass destruction become more and more available. In such cases, 'reactive' self-defense would

24 See Niaz A. Shah, *Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism*, in 12 J. Conflict & Sec. L. 95 2007, at 101.

25 D. Bowett, *Self-Defence in International Law*, 1958.

26 "[...] to unite our strength to maintain international peace and security [...]"

27 M.S. McDougal and F.P. Feliciano, *Law and minimum world public order: the legal regulation of international coercion*, New Haven, CT: Yale University Press, 1961, at 237, note 261. Also see Judge Schwebel's dissenting opinion in the *Nicaragua* case.

28 *Nicaragua* case, Judge Schwebel's dissenting opinion, *infra*, note 75.

29 See, e.g., G.K. Walker, *Anticipatory collective self-defense in the Charter era: what the treaties have said*, (1998) 31 Cornell ILJ at 321–76.

30 Judgment of the International Military Tribunal (Nuremberg), 1 October 1946, reproduced in (1947) 41 AJIL 172–333, at 205.

31 Tom Ruys, *op cit.*, at 257.

mean that a State should receive the kinetic attack first and then could invoke the right to self-defense. But the destructive potential of such weapons might mean that after such a strike, the defending State would find itself suffering massive damage, or even its annihilation. In its First Report to the Security Council, the UN Atomic Energy Commission has stated that "a violation [of a treaty or convention on atomic energy matters] might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations"³².

The restrictionists³³ believe that self-defense can only be used in the case of an armed attack. They³⁴ focus on the ordinary meaning of the wording of Article 51 and believe that 'armed attack' is the only condition under which states may use force on their own³⁵, without informing the UN Security Council beforehand. To give States the right to use self-defense before the attack has happened is dangerous as States might use it as a pretext of using force against another State and invoking it as a measure of defending themselves. Such a pretext would go against the purposes of why the United Nations was created: "to save succeeding generations from the scourge of war" and "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest [...]"³⁶. The provision was introduced so as to limit the right of States of using force only in the situation in which a physical (or kinetic) has crossed their borders³⁷. In their opinion, the Security Council is the only one entrusted by the Charter to authorize the use of force against States before they have begun an attack³⁸. Another argument against anticipatory self-defense would be, in my opinion, that it is not expressly mentioned in the article, therefore the drafters did not intend for this concept to be approved by the Charter.

The supporters of the restrictionist school of thought contend that the expansionist rely on a very old incident (the *Caroline*) which happened more than a 100 years before the signing of the Charter (the incident happened in 1837), in a time when States were free to wage wars with each other and the regime of self-defense was very unclear³⁹.

32 See UN Doc. AEC/18/Rev.1, at 24.

33 See e.g. Abdul Ghafur Hamid, *The legality of anticipatory self-defence in the 21st century world order: a re-appraisal*, in NILR 2007, at 449-461

34 See, in general, Q. Wright, *The Cuban quarantine*, in 57 AJIL 546-65 1963; J. de Arechaga, *International law in the past third of a century*, (1978-I) 159 RdC 1-344; L. Henkin, *How nations behave. Law and foreign policy*, 2nd edn., New York: Columbia University Press, 1979.

35 E. Gross, *Thwarting Terrorist Acts by Attacking the Perpetrator or their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to protect its Citizen*, 15 Temple International and Comparative Law Journal 195-245 2001, at 213.

36 Preamble of the UN Charter.

37 J. Kunz, *Individual and Collective Self-defence in Article 51 of the Charter of the United Nations*, 41 AJIL 1947, at 877-8.

38 See P. C. Jessup, *A modern law of nations: an introduction*, New York: MacMillan, 1948, at 166.

39 See, e.g., Ian Brownlie, *The principle of non-use of force in contemporary international law*, in W. E. Butler, *The non-use of force in international law*, Dordrecht: Martinus Nijhoff, 1989, at 18-19.

Second, the proponents of this school argue that, even if anticipatory self-defense was permitted before the entry into force of the Charter under customary international law, the Charter would have changed any pre-existing right⁴⁰. Taking into account the normative position of treaty law and customary law and also the *lex posterior* principle⁴¹, the provisions of the Charter have replaced any incompatible pre-existing custom. Furthermore the restrictionists argue that an existing 'armed attack' is a *sine qua non* under Article 51 of the UN Charter. The goal of the drafters was to limit the unilateral use of force of States. Since Article 51 represents an exception to the ban instated by Article 2(4) it should be interpreted in a restrictive manner⁴². The UN Security Council is the one who could authorize the use of force⁴³ and any knowledge of an imminent attack should be reported to it.

Even supporters of anticipatory self-defense believe that evidence to the concept's legality must be searched amongst State practice which took place after the entry into force of the Charter⁴⁴.

Regarding the other arguments of the expansionist school, the restrictionists believe that the report of the UN Atomic Energy Commission and the decision of the Nuremberg IMT were of little importance. One writer⁴⁵ objects to the report of the Commission as being issued by a subsidiary organ of the United Nations and having no relevance to self-defense. Regarding the decision of the Nuremberg IMT, the counter-arguments are that it dealt with the law before the Charter and that a criminal prosecution took place against an individual and not against a State⁴⁶. Also, the North Atlantic Treaty Organization which is based on Article 52 of the Charter allows Member States to defend themselves in case of an armed attack and not an imminent threat⁴⁷.

Finally, the restrictionists invoke other arguments against anticipatory self-defense. First, they relate the problem to the proportionality test⁴⁸. If in case of 'reactive' self-defense the

40 See Tom Ruys, *op.cit.*, at 259.

41 The principle according to which the more recent law abrogates an earlier inconsistent law.

42 See G. Abi-Saab, 'Cours general de droit international public', (1987-III), in Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press 2010, at 259, note 34.

43 Article 39 taken together with Article 42 of the UN Charter.

44 See, e.g., M. Bothe, *Terrorism and the legality of pre-emptive force*, (2003) 14 EJIL 227–40, at 229, A. Shapira, *The Six-Day War and the right of self-defence*, (1971) 6 Israeli Lrev at 65–80.

45 See Ian Brownlie, *International law and the use of force by States*, Oxford University Press, 1963, at 276-7.

46 *Ibid.*, at 258.

47 See G.K. Walker, *op. cit.*, at 359. The wording of Article 5 of the NATO Treaty is: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security." It can be clearly seen that the treaty uses the term 'armed attack'.

48 Brownlie, *op.cit.*, at 259-260.

proportionality requirement is already hard to analyze when, taking into account that an armed attack has occurred and has caused material damage or even casualties, would not this requirement be even harder or even close to impossible to analyze in the case where the attack has not happened yet and has not caused any material effects? Even more, anticipatory self-defense entails that the attack will happen soon. The defending State must prove the intention of the 'aggressor State', a subjective element in this equation. Second, if a State has evidence that the threat of an imminent attack exists, it should report it to the Security Council which is invested by Articles 39, 41 and 42 of the Charter to take action against the would-be aggressor State.

Although I support the concept of States to act pre-emptively in case they are threatened by the existence of an imminent attack, I must conclude the UN Charter does not provide any legal basis for anticipatory self-defense. Article 51 gives Member States the right to defend themselves if they suffer an 'armed attack' from another State. The phrasing "if an armed attack *occurs*" can only lead me to believe that the attack is either ongoing or has already happened. This conclusion is supported by the fact that Article 51 represents an exception to the ban imposed by Article 2(4). The ban on the threat or use of force by States represents the general juridical regime, while Article 51 represents the exception to this regime. According to the general rule of law *exceptiones sunt strictissimae interpretationis*⁴⁹, exceptions should only be interpreted restrictively and not loosely otherwise their field of application could be expanded against the original intentions of the lawmakers. The question might arise, what happens to the threat of using force? Article 51 constitutes an exception to using force. It would appear that a gap is created and States cannot defend themselves against threats. However, that is not the case. Inside their own borders, States can take measures to prepare themselves in case of a future attack. Nevertheless, they are forbidden to take unilateral armed action against a perceived aggressor State. If Member States have information about an imminent attack and have exhausted all peaceful means of 'disarming' the situation they should inform the Security Council about it which is empowered by the provisions of Article 39, 41 and 42 to act in case of "any threat to the peace, breach of the peace, or act of aggression[...]"⁵⁰. The UN Security Council was entrusted by the drafters with all the matters relating to world peace and security. Even the right of self-defense under Article 51 is limited by the decision of the Security Council to act.

Second, I must agree with the restrictionist school in the matter of using the *Caroline* incident as evidence that pre-existing customary international law allowed the use of anticipatory

49 Exceptions are to be interpreted in a restrictive manner.

50 Article 39, The UN Charter.

self-defense. As will be shown in Section IV, the *Caroline* incident took place almost a hundred years before the entry into force of the UN Charter, in a time where self-defense was not regulated and States based their actions on the theory of self-help⁵¹ and it is not a good example of customary international law. The expansionists should be looking at post-Charter State practice and determine whether or not customary international law allows for anticipatory self-defense.

Third, regarding the decision of the Nuremberg IMT, I must again side with the restrictionist school. The Nuremberg Military Tribunal was using law which pre-dated the provisions of the Charter. It made implicit referral to the *Caroline* incident and to Webster's formula for self-defense which was believed to form the customary international law of self-defense. More than that, the Nuremberg IMT was tasked to assess individual criminal responsibility and not the conduct of a State.

Still, I must side with the expansionists and their argument that present technological advances regarding weaponry and their destructive potential might make 'reactive' self-defense inefficient and obsolete. In an age dominated by smart weapons and weapons of mass destruction States cannot afford to receive the attack and then take action in self-defense. Care must be taken though as the requirements of necessity and proportionality play a much bigger role than in the case of 'reactive' self-defense. Since the attack has not occurred yet and the material effects are not existent, taking pre-emptive action will be very difficult. In case of an imminent attack, States can only predict the effects of receiving the initial strike and must take action proportionally. Moreover, a subjective factor is involved: to determine the will of the 'aggressor State' if it will launch an attack in the immediate future. This added requirement makes determining the necessity condition even more difficult. States must have reliable information backed by solid proof of intent on behalf of the "belligerent" State before launching a pre-emptive strike.

IV. Customary international law

In line with the provision of Article 31(3)(b) of the Vienna Convention on the Law of Treaties⁵², this section will present the relevant State practice with regard to anticipatory self-defense, starting with the well-known *Caroline* incident, the Cuban Missile Crisis, the Six Day War,

⁵¹ Stephen C. Neff, *War and the Law of Nations – A General History*, Cambridge University Press 2005, at 231.

⁵² The interpretation of any treaty must also include "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [...]"

the Osirak Nuclear Reactor attack, the US air strikes on Libya, but also with other cases that have usually been overlooked, and finally Operation 'Iraqi Freedom'. The *Caroline* incident is believed to be the starting point of anticipatory self-defense by the expansionist school⁵³. The next three cases (the Cuban Missile Crisis, the Six Day War and the attack on the Osirak) are said to represent good examples of States resorting to pre-emptive self-defense⁵⁴. I have also included the the US air strikes on Libya as clues might exist in this case to establishing the status of pre-emptive self-defense⁵⁵. Operation 'Iraqi Freedom' will be taken into consideration as the United States have always advocated for anticipatory self-defense⁵⁶. The cases will be analyzed to see if there is State practice accompanied by *opinio juris*⁵⁷, these being the requirements to form customary international law⁵⁸.

The *Caroline* incident⁵⁹ revolves around the Canadian insurrection in 1837 against the British colonial rule. This rebellion gained the support of sympathetic American nationals, mostly those close to the Canadian border. The US government tried to enforce the neutrality laws but it did not succeed. After gathering enough manpower, around 1000 troops, the leaders of the sympathetic group decided to move into Canadian territory and occupy Navy Island, situated in Upper Canada. There they established a provisional regional government in the hopes of overthrowing the British colonial rule.

The *Caroline* was a steamer flying the US flag. It was used to ferry reinforcements and supplies to the insurgents. After several incidents in which the British troops encamped at Chippewa were fired upon by the insurgents, the British forces decided to cut off the rebels' supply line. They boarded the *Caroline* while it was docked on the US side of the Niagara River, burned it and sent it over the Niagara Falls.

The American government complained about the destruction of the *Caroline* to the British Foreign Secretary, who sent Lord Ashburton to New York to deal with the situation. In a letter addressed to Ashburton, US Secretary of State Daniel Webster stated that:

"It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local

53 See Abdul Ghafur Hamid, *op.cit.*, at 462.

54 See David A. Sadoff, *A Question Of Determinacy: The Legal Status Of Anticipatory Self-Defense*, in 40 Geo. J. Int'l L. 523 2008-2009, at 563.

55 P. Malanczuk and M. Akehurst, *Akehurst's modern introduction to international law*, 7th edn, London: Routledge, 1997, at 313.

56 As it is shown in the 2002 NSS, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>.

57 *Opinio juris sive necessitatis* or just *opinio juris* means that an action is carried out with the belief that it is a legal obligation. This subjective element represents an important condition on creating customary international law.

58 See *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, I. C.J. Reports 1985, at 27.

59 Case taken from the site of the Avalon Project, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

authorities of Canada,- even supposing the necessity of the moment authorized them to enter the territories of the United States at all,-did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."⁶⁰

This was the basis for two principles of anticipatory self-defense: necessity and proportionality. Necessity implies that no other action taken could have prevented the development of the situation and proportionality implies that the actions taken do not escalate the situation even further.

This case is seen as the platform for anticipatory self-defense in customary international law. However, as one writer has noticed and argued⁶¹, there are certain problems with this affirmation. First, in his opinion, the occupation of Navy Island by the insurgents represented an ongoing attack against the British sovereignty. Anticipatory self-defense implies the existence of an imminent attack, meaning the actual physical attack has not happened yet, but its occurrence in the very near future is not doubted. Therefore, one cannot talk about the British forces acting in anticipatory self-defense when the attack is currently taken place. Second, the attacks were carried out by American individuals. The US government did not condone the actions of the rebels and tried to prevent them from acting, although they did not succeed. The concept of self-defense implies actions taken by the defending State against the hostile actions of another State. Since that was not the case here, the *Caroline* incident can only prove that a State can take preventive actions against non-state actors. Third, even if the *Caroline* incident is seen as having happened between two States, it is not enough to say that anticipatory self-defense is an institution of customary international law. Customary international law entails the widespread and systematic practice of States⁶² accompanied by *opinio juris*.

The Cuban Missile Crisis incident involves the delivery of armaments by the Soviet Union to Cuba in 1962⁶³. Initially, US intelligence perceived that the shipments involved only stationary defensive systems, but later discovered that the systems were mobile and could deploy nuclear missiles⁶⁴. At that moment the United States considered two options: either a strike against Cuban territory to eliminate the missile systems or a naval blockade to stop further shipments to Cuba and

60 Extract from the note sent by Webster to Lord Ashburton, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1.

61 Abdul Ghafur Hamid, *op. cit.*, at 464-465.

62 See North Sea Continental Shelf, Judgement, I.C.J. Reports 1969, p. 3. The ICJ observed that state practice had to be "both extensive and virtually uniform in the sense of the provision invoked".

63 See Bram Chayes, *The Cuban Missile Crisis: International Crisis And The Role Of Law*, 1974, at 8.

64 *Ibid.*

the pressure the Soviets into removing the existing weapon systems. It is interesting to note that the US did not base their actions on Article 51 of the UN Charter but on Article 52 regarding regional arrangements for maintaining international peace and security⁶⁵. In their efforts to stop the weapon shipments to Cuba, the United States gained the regional support of the OAS (Organization of American States) by way of resolution⁶⁶ and also invoked the provisions of the Rio Treaty⁶⁷.

In 1967 Israel was under a lot of pressure by the newly forged military alliance between Egypt, Syria, Iraq and Jordan. Troops were massing along Israel's borders, accompanied by reconnaissance missions into its territory⁶⁸. In Egypt, President Nasser evicted the UN peacekeeping corps from the Sinai Peninsula and the Gaza Strip. Threatening statements by Arab state officials in which they proclaimed the destruction of Israel were increasing⁶⁹. To top it all off, Egypt imposed a naval blockade on the Straits of Tiran to cut off Israel's only access to the Red Sea⁷⁰. With all the aggressive actions piling up, Israel decided not to wait and launched an air strike on Egyptian, Syrian and Jordanian military airfields, neutralizing these countries' air capabilities which ultimately led to Israel defeating their armies in a matter of days⁷¹.

Initially, Israel based its actions on anticipatory self-defense⁷². When this argument failed, in part due to the fact that, after the victory against the Arab forces, they continued annexing land, Israel argued that the Egyptian naval blockade was an act of war and the eviction of the UN troops was further proof that they had hostile intentions.

Although the majority of States sided with Israel⁷³ and somewhat approved the way it exercised the right to self-defense⁷⁴, they however did not base their support for Israel's actions on anticipatory self-defense grounds⁷⁵.

65 See David A. Sadoff, *op.cit.*, at 565.

66 See OAS Council, *Resolution on the Adoption of Necessary Measures to Prevent Cuba From Threatening the Peace and Security of the Continent*, Annex A, OEA/Ser.G/V/C-d-1024 Rev.2 (Oct. 23, 1962)

67 Article 6 of the Rio Treaty: "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent. "

68 See William V. O'Brien, *The Conduct Of just And Limred War*, 1981, at 133.

69 For example, on May 26, Egyptian President Nasser stated: "Our basic objective will be to destroy Israel." in Charles Pierson, *Pre-emptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV.J. INT'L L. & POL'Y, 2004, at 150, 166.

70 See A. Mark Weisburd, *The Use Of Force: The Practice Of States Since World War II*, 1997, at 136.

71 *Ibid.*, at 137.

72 See Christine Gray, *International Law And The Use Of Force*, 2nd ed., 2004, at 130-1.

73 States such as Morocco, Syria, and the Soviet Union objected to Israel's action. See Stanimir A. Alexandrov, *Self-Defense Against The Use Of Force In International Law*, 1996, at 154.

74 See Thomas M. Franck, *Recourse To Force: State Action Against Threats And Armed Attacks*, 2002, at 105.

75 See Alexandrov, *op.cit.*, at 154.

In 1981 Iraq was building a nuclear reactor with French assistance codenamed Osirak, claiming it was for peaceful research purposes⁷⁶. Israel suspected that it was not the case as Iran was purchasing higher quantities of uranium than it would have required for just scientific research alone. That and coupled with Iraq's hostile attitude against Israel, having fought in three wars with Israel, continuing to deny its existence, plus the fact the Iraq declared its intention for acquiring nuclear weapons and using them against Israel, prompted Israel to launching an air strike on the reactor and destroying it. Only the reactor was targeted and there were only four casualties⁷⁷.

In justifying its actions, Israel explicitly invoked anticipatory self-defense⁷⁸ and argued that the threat of the use of nuclear weapons entitled it to act pre-emptively. "Israel contended that technological advances had effectively broadened the scope of self-defense as stated under the Charter and that it should now encompass the right to attack pre-emptively to thwart a surprise nuclear attack"⁷⁹. The opinions of the international community were divided. Some States, like Iraq, Mexico, Egypt, Syria, Guyana and Pakistan⁸⁰, rejected the concept of anticipatory self-defense. Others, like the UK, Malaysia, Sierra Leone, Niger and Uganda⁸¹, accepted it but argued that Israel failed to meet the conditions necessary of invoking it, mainly that of an instant and overwhelming need for self-defense. The UN Security Council found Israel guilty of violating the provisions of the UN Charter but did not take a stand on the concept of anticipatory self-defense⁸².

In 1986 the US bombed Libyan territory. This was a response by the United States to a bomb explosion that happened on April 5 1986 in a discotheque in West Berlin which killed an American soldier and wounded several other people. The US administration of that time blamed the attack on Libyan terrorists⁸³. President Reagan characterized the US response as being pre-emptive with the purpose of deterring terrorist acts by Libya⁸⁴. The UN Security Council failed to condemn the attack. Even though the draft resolution won the nine votes necessary to be passed it was vetoed by the US, France and the UK⁸⁵. Could this imply that the international community implicitly accepted

76 See Weisburd, *op.cit.*, at 287-8.

77 See Sadoff, *op.cit.*, at 568.

78 See UN Doc. S/PV.2280.

79 Stanimir A. Alexandrov, *Self-Defense Against The Use Of Force In International Law*, 1996 at 160, in Sadoff, *op.cit.*, at 569.

80 See Anthony Clark Arend & Robert J. Beck, *International Law And The Use Of Force*, 1993, at 78.

81 *Ibid.*, at 79.

82 Sadoff, *op.cit.*, at 570.

83 President's Address to the Nation, United States Air Strike Against Libya, 1986 PUB. PAPERS 491 (April 14, 1986). President Reagan described the targets as "headquarters, terrorist facilities and military installations that support Libyan subversive activities." Letter from President Reagan to Congress, 1986 PUB. PAPERS 499 (April 16, 1986).

84 *Ibid.*

85 Draft S.C. Res. Condemning 1986 Libya Strike, UN Doc. S/10784.

the option of States using pre-emptive action against imminent threats taking into account that 7 years later the US deployed similar air strikes in Iraq?

One author⁸⁶ suggests that another case would be Pakistan's action in the region of Kashmir in 1950. Pakistan reasoned its action on the fact that "India was mounting an offensive to clear the State of all military resistance"⁸⁷, that the action taken was to "to avoid the imminent danger that threatened [its] security and [its] economy". India objected and affirmed that Article 51 "imposes two limitations upon the right of self-defence: first, there must be an armed attack upon the Member that exercises the right; and, secondly, measures taken . . . must be immediately reported to the Security Council. In the present instance there was no armed attack on Pakistan, and admittedly the sending of the army into Kashmir was not reported to the Security Council"⁸⁸.

Another case, this time evoked by Bowett⁸⁹ concerns the conflict erupted between Egypt and Israel in 1951 resulting from restrictions imposed to Israeli ships on the Suez Canal. This was classified as a hostile act which contravened the Armistice Agreement signed in 1949⁹⁰. Israel requested that the Security Council should intervene⁹¹.

Egypt presented two arguments. In the first place, the armistice signed with Israel only suspended the state of war between the two countries, therefore it has not ended and it fell within Egypt's rights as a belligerent country to visit and inspect goods on Israeli ships⁹². Second, it relied on the "right of self-preservation and self-defence, which . . . transcends all other rights"⁹³. It stated further that "the provisions of Article 51 do not necessarily exclude [the] right of self-defence in situations not covered by this Article"⁹⁴. Israel rejected these arguments. It contended that the agreement did not merely suspend the hostilities between the two countries, but it imposed the renunciation of all hostile acts. Israel did not perceive itself in a state of war with Egypt⁹⁵. It further affirmed that "Article 51 allows a nation to undertake action of self-defence only on two conditions . . . One of them is that that country shall be the victim of armed attack, and not even the Egyptian himself has invoked such prospect"⁹⁶. The Security Council agreed with the arguments presented by

86 D. P. O'Connell, *International law*, Vol. I, 2nd edn, London: Stevens 1970, at 317.

87 UN Doc. S/PV.464, 8 February 1950, at 27–30.

88 UN Doc. S/PV.466, 10 February 1950, at 4–5.

89 D.W. Bowett, *Self-defence in international law*, Manchester University Press, 1958, at 191.

90 See 1951 UNYB 293–4.

91 See UN Doc. S/2241.

92 See UN Doc. S/PV.549, at 61–8.

93 *Ibid.*, para. 78.

94 UN Doc. S/PV.550, at 39.

95 UN Doc. S/PV.549, at 11–47.

96 UN Doc. S/PV.551, at 36.

Israel and adopted a resolution⁹⁷ which held that neither parties are in a state of war, that Egypt could not justify its actions on self-defense and that Egypt is to terminate its imposed restrictions on the Suez Canal.

The final case examined is Operation 'Iraqi Freedom'. On 18 March 2003 the United States led a coalition in Iraq which resulted in the overthrowing of Saddam Hussein's regime. A brief presentation of this regime will ensue. "The reign of terror by Saddam Hussein in Iraq has secured him a prominent place in the pantheon of heinous tyrants in history."⁹⁸ Hussein's regime is guilty of many international crimes. Saddam has committed genocide against his own people, is guilty of crimes against humanity and breaches of the laws of war and international law. He used chemical weapons in the conflict with Iran but also against people in Iraqi Kurdistan. He sought to acquire nuclear weapons, in clear violation of the Nuclear Non-Proliferation Treaty⁹⁹. Iraq is guilty of aggression against Iran¹⁰⁰, in 1980 and against Kuwait, in 1990. In Iran, Hussein authorized the use of chemical weapons¹⁰¹. After the war with Iran ended, Hussein turned his attention to his own people and began a genocidal campaign against the Iraqi Kurds¹⁰², starting with the city of Halabja. Human Rights Watch compared Hussein's action with that of the Nazi genocide¹⁰³.

In August 1990 Iraqi forces invaded Kuwait. The United Nations labeled this as an act of aggression and the UN Security Council adopted several resolutions. Resolution 660, adopted on 2 August 1990 condemned the Iraqi invasion of Kuwait¹⁰⁴. Resolution 678 allowed States to use "all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security to the area."¹⁰⁵ After establishing a provisional government, a brutal regime began. Amnesty International described the situation in a very grim way¹⁰⁶.

97 SC Res. 95 (1951) of 1 September 1951.

98 Christopher Clarke Posteraro, *Intervention In Iraq: Towards A Doctrine Of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, in 15 Fla. J. Int'l L. 2002-2003, at 151.

99 Article II of the treaty states: "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices." Text of the treaty available at <http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml> .

100 See Scott Ritter, *Endgame*, Simon & Schuster, 1999, at 68.

101 See Captain Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 1999, at 115, 142.

102 See V. Schofield, *Kashmir: the origins of the dispute*, BBC News, available at http://news.bbc.co.uk/2/hi/south_asia/1762146.stm .

103 See Human Rights Watch report, available at <http://www.hrw.org/reports/1994/05/01/iraq-s-crime-genocide-anfal-campaign-against-kurds> .

104 See Security Council Resolution 660, available at <http://www.un.org/Docs/scres/1990/scres90.htm> .

105 See Security Council Resolution 678, available at <http://www.un.org/Docs/scres/1990/scres90.htm>

106 See Amnesty International, *Iraq/Occupied Kuwait Human Rights Violations Since 2 August*, Excerpted from

Saddam Hussein's regime is guilty of using terrorism as a tool of statehood¹⁰⁷, of using weapons of mass destruction, of genocide against his own people and of conducting research into nuclear weapons with the purpose of defeating the United States¹⁰⁸.

The United States based its intervention in Iraq on two arguments, one of them being self-defense¹⁰⁹. Saddam's regime was linked to activities of terrorist organizations. International terrorism represents a great threat to the international community, especially if it is sponsored by States. One problem that arises is that not always State agency¹¹⁰ could be determined. The presented case was a fortunate one as actions taken by the terrorists were supported by the state itself therefore Iraq was internationally responsible for the terrorist attacks. Self-defense could be invoked as the terrorist attack was considered to be an Iraqi attack.

The traditional paradigm of self-defense is understood as one State defending against the attack of another State¹¹¹ and interpreting Article 51 as saying that Members of the Charter have come under 'armed attack' from another state. While in 1945 this was seen as the case, the World Court has given its opinion that such an attack could come from somewhere else as well¹¹², for example from terrorist organizations. Plus Security Council resolutions 1368 and 1373 both refer to States' right to self-defense in combating international terrorism.

Second, the question arises whether a terrorist attack would amount to the intensity and scale of an 'armed attack'. In the *Nicaragua* case, the ICJ concluded that self-defense could be employed as a response to the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular armed forces, or its substantial involvement therein"¹¹³. If a terrorist attack reaches that scale of intensity, it can amount to an armed attack and States can invoke the right to self-defense.

This case presents one major flaw and thus cannot be accepted as a good example for

Amnesty International Document, Dec. 19, 1990 in *International Law And The Use Of Force* (Thomas Ehrlich & Mary Ellen O'Connell eds., 1993).

107 Michele L. Malvesti, *The New World Disorder: Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF., 2002, at 17, 20; also David Rose, *Iraq's Arsenal of Terror*, VANITY FAIR, May 2002, at 124.

108 Director Of Central Intelligence, Unclassified Report To Congress On The Acquisition Of Technology Relating To Weapons Of Mass Destruction And Advanced Conventional Munitions, 1 January Through June 2001, available at <http://www.fas.org/irp/threat/>.

109 See Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, in 36 Cornell Int'l L.J. 435 2003-2004, at 436.

110 Article 8 of the ILC Draft Articles on State responsibility: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

111 Niaz A. Shah, *op.cit.*, at 104.

112 S. Murphy, *Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter*, 43 Harvard International Law Journal 41-51 2002, at 51.

113 *Nicaragua* case, at 195.

anticipatory self-defense, or for the traditional paradigm of self-defense in that matter. The US administration made clear before the war started “that the U.S. policy regarding Iraq involved changing Saddam Hussein's regime and disarming Iraq.”¹¹⁴ The result of the coalition led by the US was the overthrowing of Saddam's regime, which goes beyond the proportionality requirement of invoking the right to self-defense, be it 'reactive', interceptive or anticipatory¹¹⁵. “Proportionality likely does not support the invocation of the doctrine of self-defense for interventions where the explicit purpose is the ouster of a threatening regime.”¹¹⁶

Looking at the presented cases, we can see that the opinion of the expansionist school according to which they represent examples establishing that customary international law supports anticipatory self-defense is flawed. The Caroline incident, which is believed to be the central starting point of anticipatory self-defense, does not provide a clear background. First, the incident did not take place between two sovereign States, but between a sovereign State (the British Empire) and private individuals, as the US did not condone the actions of the rebels. Anticipatory self-defense is between the defending State and the aggressor State. Second, the occupation of Navy Island represented an ongoing attack. Anticipatory self-defense actions are deployed against an imminent attack, not one that has already happened. Third, even if we perceive that the *Caroline* incident took place between two States, it is not sufficient to say that it became customary international law, as this was the practice between only those two states.

Looking at the Cuban Missile Crisis, it can be observed that the United States did not base their actions on Article 51, but on Article 52 regarding regional cooperation in maintaining international peace and security. Therefore, the US did not invoke self-defense.

The Six Day War and the Osirak Nuclear Reactor Attack are cases which both involved Israel and in which it affirmed that its actions were based on anticipatory self-defense. In the first case, the argument failed as Israel continued to annex land even after the armed forces of the Arab military alliance were defeated, therefore becoming the aggressor. In the second case, the international community was divided. There were States that rejected the concept of anticipatory self-defense and States that accepted it but found that Israel did not demonstrate the condition of an instant and overwhelming need to take those actions.

114 Mahmoud Hmoud, *op.cit.*, at 436.

115 *Ibid.*, at 444.

116 Christopher Clarke Posteraro, *op.cit.*, at 181.

Regarding to the Libyan bombings by the United States, I am of the opinion that a rejected Security Council resolution does not necessarily represent a tacit approval for pre-emptive actions. Let us not forget the fact that the UN Security Council is a political organ. The fact that the resolution did gain the votes of 9 members of the Security Council should be *prima facie* evidence that the international community did not condone the actions of the US and did not agree with classifying its action as pre-emptive in nature. The resolution did not pass since it was vetoed by the United States and two other permanent members of the Council. It would have been a bit hilarious if the US incriminated itself and declared itself guilty of violating international law. In addition, two days before the raid took place Libya filed a complaint with the UN Security Council, informing it that "[US] aircraft-carriers and other [US] naval units are now proceeding towards the Libyan coast for the purpose of staging military aggression against [Libya]"¹¹⁷ and it considered itself "as of this moment, in a state of legitimate self-defence under Article 51 of the [UN] Charter". *Prima facie*, it would appear that Libya is invoking anticipatory self-defense. However, it took no military action before the US attacks and the subject was not debated within the Security Council¹¹⁸. In my opinion, this case does not constitute a clear example of state practice for anticipatory self-defense.

Concerning the military actions of Pakistan in the region of Kashmir it could be deduced that Pakistan invoked anticipatory self-defense¹¹⁹. But "apart from India, no other State made any reference to the right of self-defence"¹²⁰ and it "can be explained by the disputed territorial status of Kashmir and the underlying issue of self-determination"¹²¹. The conflict in the region resides in the fact that Pakistan wants to annex it on the grounds that it would be logical to do so since the Muslim population represents the majority in the area. To defend itself from Pakistani incursions the Maharajah of Jammu and Kashmir asked for Indian support and also signed a temporary accession to India¹²². In light of these events, I believe that the actions of Pakistan could be seen as not taken in "good-faith" and in accord even with the requirements of self-defense. Another argument *contra* this case being an example of anticipatory self-defense is the fact that Pakistan has rejected this doctrine stating that "even when Member States are facing a threat, it is imperative that they first resort to the United Nations"¹²³.

117 UN Doc. S/17983.

118 UN Docs. S/PV.2672–2673.

119 See *supra*, note 44.

120 See Tom Ruys, 'Armed Attack', at 288.

121 *Ibid.*

122 See V. Schofield, *Kashmir: the origins of the dispute*, BBC News, available at http://news.bbc.co.uk/2/hi/south_asia/1762146.stm.

123 See UN Doc. S/PV.2281, at 70.

The Suez Canal incident is another bad example for supporting anticipatory self-defense. Israel and the Security Council both rejected the arguments advanced by Egypt. I can see this as a denial by the international community of the concept that self-defense can be exercised beyond the conditions imposed by Article 51 of the UN Charter. But looking at the arguments adduced by members of the United Nations could be interpreted as leaving the possibility open for states to have recourse to pre-emptive self-defense. For example, the UK stated that "Egypt is not being attacked and is not under any imminent threat of attack, and we therefore cannot agree that these measures are necessary for the self-defence . . . of Egypt"¹²⁴. Brazil expressed that there was "no imminent danger to the existence of Egypt", nor any evidence that Israel was 'preparing an armed attack'¹²⁵. The most prominent argument that this case is not a good example for anticipatory self-defense is that Egypt, like Pakistan, has rejected to possibility of States acting pre-emptively¹²⁶.

Taking into account the above presented cases, it can be stated that there is no concrete evidence shown in the practice of States which might lead to the affirmation that anticipatory self-defense is customary in nature, as customary international law requires both a widespread and systematic State practice accompanied by *opinio juris*. It can be observed that in all of the cases, States are very cautious regarding anticipatory self-defense. Only a few States are in favor of it (the US, the UK, Israel, Brazil) while most are against it. It is my belief that the fact according to which the major powers agree with the concept does not imply that the whole international community agrees with it. As long as there is a major opposition for States to act pre-emptively, the requirement of *opinio juris* is not fulfilled.

V. ICJ case law

This section is dedicated to analyzing the case law of the International Court of Justice, the judicial body of the United Nations, and to observe if the Court has produced any decision with regards to anticipatory self-defense. The cases which will be analyzed in this section are Nicaragua v. The United States (or the *Nicaragua* case), the *Oil Platforms* case, the *DRC v. Uganda* case, the *Nuclear Weapons* Advisory Opinion and the *Israeli Wall* Advisory Opinion. I have chosen the first

¹²⁴ UN Doc. S/PV.552, at 10.

¹²⁵ UN Doc. S/PV.552, at 58.

¹²⁶ UN Doc. A/C.6/SR.1269, at 17.

three cases and the *Israeli Wall Advisory Opinion* as they are always invoked by scholars as providing proof to the existence of anticipatory self-defense¹²⁷. It is my belief that the *Nuclear Weapons Advisory Opinion* might provide further insight on the existence of pre-emptive self-defense as it deals with one of the reasons invoked by the expansionist school as to why anticipatory self-defense should be legal in international law. These five cases represent instances where the World Court has ruled with regards to the right to self-defense and should be analyzed as they might show the stance of the ICJ regarding this topic.

The *Nicaragua* case¹²⁸ was filed before the ICJ on 9 April 1984 by Nicaragua against the United States of America, alleging that the US had been financing, training and supplying the 'contra' forces in resisting the current Nicaraguan government. They have claimed that these actions form a continuous indirect use of force and were in breach of international law. The Nicaraguan authorities have also claimed that the US also used direct force by mining Nicaraguan ports and by using aerial incursions into Nicaraguan territory, done by agents on the US payroll and under the direct command of US personnel that have been taking part in the operation.

In its response, the US claimed its actions were grounded on collective self-defense and were the response to the armed interventions by Nicaragua in El Salvador, Costa Rica and Honduras. While the Court did find evidence that Nicaragua has indeed intervened in El Salvador, this intervention was of minimal importance and consequence and did not call for the United States using indirect and direct force against Nicaragua. The Court found that the US was guilty of violating international law, more specifically, the principles of non-intervention and the prohibition on the use of force.

While not directly approaching the concept of anticipatory self-defense, the Court did stop at the term 'armed attack'. It stated that:

"In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised. Accordingly, the Court expresses no view on this issue."¹²⁹

We can observe that the Court refrains itself from discussing if a State can use anticipatory self-defense and only limits itself to stating that self-defense can be invoked by a defending State if

127 See Sadoff, *op.cit.*, at 576.

128 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ.

129 *Ibid.*, at 103.

it was subject to an armed attack:

"In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."¹³⁰

It can be seen that the World Court takes the route of the restrictive interpretation of Article 51, as it will also do in the *Israeli Wall* Advisory Opinion when it asserted that "Article 51 of the Charter ... recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state"¹³¹.

I believe an important side of this case is the dissenting opinion of Judge Schwebel. He observed that the Court did not deal with the aspect of self-defense where the armed attack is missing because it was not asked to do so. Nevertheless, he goes on saying that:

"[...] I wish, *ex abundanti cautela*, to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs..."¹³².

Apparently Judge Schwebel suggests that the right to self-defense is not limited to only one case, in which the defending State must suffer from an armed attack or absorb the first strike. Indeed, in a nuclear era, letting the aggressor State make the first move and hit its target might prove catastrophic for the defending State as it might endanger its very existence. Fighting between States has taken a whole new turn with the development of weapons of mass destruction, especially nuclear weapons. But, in my opinion, such thinking might turn out to be very hazardous. Let us take a simple theoretical example. State A and State B are both nuclear powers. State B decides that State A has inconvenienced it quite enough and decides to plan an attack against the latter using nuclear weapons. State A finds out about this plan and has information that an attack would be imminent. It has not yet suffered an attack but absorbing the initial strike might lead to its destruction. According to Schwebel's interpretation State A may act in self-defense pre-emptively. If it does, it will most likely resort to nuclear weapons as well which will lead to a very tragic ending for the international community. Although this is only a theoretical example, a very pessimistic one

¹³⁰ *Ibid.*

¹³¹ The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2003 ICJ, para. 139.

¹³² *Ibid.*, Judge Schwebel's dissenting opinion, at 247-48.

at that, let us not forget that the United States, the United Kingdom, France, Russia, China and, possibly, several other countries are nuclear powers. The threat of a nuclear incident, no matter how small it is, still exists. To allow States to use unilateral force in this nuclear age is very dangerous. That is why, I believe, in such cases Article 51 should be read in a restrictive manner. If states have information about an imminent attack they should report it to the Security Council which can take action under the provisions of Chapter VII of the UN Charter.

The *Nuclear Weapons Advisory Opinion*¹³³ was delivered by the International Court of Justice following a request that the UN General Assembly has made in December 1994. The question was:

"Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

The ICJ answered this question by relating it to the provisions of Article 2(4) of the UN Charter and found that neither it nor customary international law prohibited the use of nuclear weapons as such but did imply that the threat or use of such weapons would constitute *prima facie* a violation of international law. When applying it to self-defense, the Court concluded that the threat or use of nuclear weapons could potentially constitute a lawful action of self-defense, but the conditions that had to be met are quite difficult to establish¹³⁴.

Though the Court did not expressly touch the topic of anticipatory self-defense I believe that a few remarks must be made. While stating that neither UN Charter provisions nor customary international law contained prohibitions on the use of nuclear weapons, relating it to Article 2(4) of the Charter, a threat or use of nuclear weapons might be regarded at first glance to be a violation of the above mentioned article. The Court concluded that nuclear weapons might be used in self-defense under certain conditions. I must draw attention to these conditions. Hypothetically, if we accept that anticipatory self-defense is rooted in customary international law and, therefore, it is legal then the conditions which must be fulfilled for its implementation are necessity, proportionality and imminence of the attack. Let us look again at the theoretical example mentioned above with State A and State B as nuclear powers. State A is confronted with a nuclear attack from State B and has reliable information that the attack is imminent; therefore the condition of imminence is fulfilled. State A has tried to solve the matter by exhausting every peaceful way of negotiation and it is ultimately left with the choice of using armed force. The necessity condition

133 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ.

134 *Ibid.*, at 43-105.

has been met. Since State B is planning on using nuclear weapons capable of creating massive material destruction in an instant and a great number of victims in the long run because of the radiation poisoning, the proportionality condition will dictate that the response coming from State A should be roughly equal. Acting in anticipatory self-defense, State A will launch a pre-emptive nuclear strike against State B. Although I recognize that the presented construct is very simple and the situations occurring in international relations are never black or white, nevertheless I believe that members of the expansionist school should not invoke lightly the fact that in the current era of nuclear weapons anticipatory self-defense is needed. The expansionists invoke the fact that the Charter was drafted and signed in an age when warfare was classical. States mobilized their forces at the borders and then attacked. They affirm that the drafters only took into account this classical way of waging war and that the UN Charter is a pre-atomic document, which it did not take into account that the number of nuclear capable states would grow. I am of the belief that the argument invoked by the expansionists, that we live in an atomic age, could very well work both ways: for or against pre-emptive self-defense. Looking at the Charter, it can be easily deduced that the Security Council was invested with great powers to protect the international community. Since the use of nuclear weapons not only affects the parties involved, but also the stability of the international community, States should not be allowed to use them in anticipatory self-defense and even in reactive self-defense. If there is evidence that an aggressor State is planning on using its nuclear arsenal to attack, the Security Council should be immediately informed so it could act. And if the attack is imminent or has already been launched, the defending State must have recourse to counter-measures only, either preparing them or utilizing them against the attack. But it should certainly not use atomic weapons in self-defense if it has access to them because otherwise the situation might escalate and the end result would be very dramatic.

The *Oil Platforms* case¹³⁵ involved the US and its military actions in the Persian Gulf. The US Navy attacked Iranian offshore oil production facilities which led to the destruction of several and the damaging of others. The attacks took place on 19 October 1987 and on 18 April 1988. Iran instituted proceedings against the United States at the International Court of Justice. Regarding the first attack, the Court discerned the facts:

"On 19 October 1987, four destroyers of the United States Navy, together with naval support craft and aircraft, approached the Reshadat R-7 platform. Iranian personnel were warned by the United States forces via radio of the imminent attack and abandoned the facility. The United States forces

135 *Oil Platforms* (Iran v. U.S.), 2003 ICJ.

then opened fire on the platform; a unit later boarded and searched it, and placed and detonated explosive charges on the remaining structure. The United States ships then proceeded to the R-4 platform, which was being evacuated; according to a report of a Pentagon spokesman, cited in the press and not denied by the United States, the attack on the R-4 platform had not been included in the original plan, but it was seen as a "target of opportunity". After having conducted reconnaissance fire and then having boarded and searched the platform, the United States forces placed and detonated explosive charges on this second installation. As a result of the attack, the R-7 platform was almost completely destroyed and the R-4 platform was severely damaged. While the attack was made solely on the Reshadat complex, it affected also the operation of the Resalat complex. Iran states that production from the Reshadat and Resalat complexes was interrupted for several years".¹³⁶

On the day the attack occurred, the US president sent a letter to the UN Security Council in which he justified the attack: "United States forces have exercised the inherent right of self-defence under international law by taking defensive action in response to attacks by the Islamic Republic of Iran against United States vessels in the Persian Gulf."¹³⁷

The alleged attack invoked by the US took place on 16 October 1987. The incident involved the Kuwaiti tanker *Sea Isle City*, reflagged to the US, which was allegedly hit by a missile near Kuwait. According to the submissions of the United States, this was the seventh attack involving Iranian anti-ship missiles in that area in the course of 1987. After analyzing the evidence brought before it, the Court asserted "that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City* is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, has not been discharged"¹³⁸. The US then submitted that the attack perpetrated on the *Sea Isle City* was one in a series of attacks perpetrated against the US by Iran. But even "taken cumulatively these incidents do not seem to the Court to constitute an armed attack on the United States"¹³⁹.

Regarding the second attack which took place on 18 April 1988, the Court established that:

"United States naval forces attacked the Salman and Nasr complexes on 18 April 1988. Two destroyers and a supply ship were involved in the attack on the Salman complex: shortly before 8

¹³⁶ *Ibid.*, para. 47.

¹³⁷ *Ibid.*, para. 48.

¹³⁸ *Ibid.*, para. 61.

¹³⁹ *Ibid.*, para. 64.

a.m., local time, the United States forces warned the personnel on the platforms that the attack was due to begin; some of them began to evacuate the installation, while others opened fire. A few minutes later, shelling on the complex commenced from United States ships, warplanes and helicopters. United States forces then boarded some of the platforms (but not that containing the control center), and placed and detonated explosives. Iran states that the attack caused severe damage to the production facilities of the platforms, and that the activities of the Salman complex were totally interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993¹⁴⁰.

The US again presented a letter to the UN Security Council in which it justified its attack: "United States forces have exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf"¹⁴¹. The incident that made the United States take military action involved the mining of US navy vessel USS *Samuel B. Roberts*. The court found that Iranian agency in this case was not conclusive¹⁴².

While this case involved the use of the right of self-defense by the United States, it did not expressly touch the issue of anticipatory self-defense. But there are some clues as to indicate an implicit reference to anticipatory self-defense. In my opinion, there are two main indicators that might point out to the US acting pre-emptively against Iranian military actions. First, the United States affirmed with regards to both attacks that it had acted according to the inherent right of self-defense existing in international law. The use of the word "inherent" may lead to the assumption that the United States has acted in accordance with the right of self-defense that still existed in customary law and resided in the *Caroline* incident. The second issue concerns the fact that cumulative action might be considered as an armed attack. The ICJ found that in this case cumulative action did not amount to an actual armed attack. But I must take into account the following hypothesis: what if, in this case, cumulative actions failed to amount to an armed attack, but could be seen as an attack that was to happen, namely an *imminent* attack? If it is acknowledged that cumulative actions could amount to an armed attack, then surely it may be interpreted that cumulative actions might point out that an attack is imminent. These two factors combined with the stance of the US regarding the right to self-defense in international law¹⁴³ might indicate that the

140 *Ibid.*, para. 66.

141 *Ibid.*, para. 68.

142 *Ibid.*, para. 72.

143 2002 National Security Strategy of the United States: "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an

United States could have acted in anticipatory self-defense. However, not invoking this argument before the Court might show that the US is reluctant to ask the International Court of Justice in taking a stand and settling the matter of pre-emptive self-defense. But this is just a personal supposition and even if the US would endorse States having recourse to anticipatory self-defense, the practice of one State does not create customary international law, even if that State is the present and only superpower of the world.

*The Congo v. Uganda*¹⁴⁴ case began on 23 June 1999 the Democratic Republic of Congo (DRC) filed three applications against Uganda, Burundi and Rwanda, instituting proceedings against these countries at the ICJ. In short, it was alleged that the armed forces of these countries aided the rebels who opposed the DRC government and were accused of armed aggression against the territory of Congo, thus violating the provisions of the UN Charter. Uganda tried to justify its actions as being taken in self-defense.

While the Court was asked to deal with the other issues presented in the case, the paper will focus only on the self-defense aspect. The ICJ considered whether the fact that Ugandan military troops were still present in DRC territory after the consent of President Kabila was withdrawn could be justified on the grounds that Uganda was acting in self-defense. A first argument presented by Ugandan representatives was that, according to official documents¹⁴⁵, the DRC has given military and logistic support to anti-Ugandan rebels which operated outside of its territory. So there was a reason to believe that State agency existed. The second argument was based on the creation of a political and administrative vacuum in the eastern part of the country which, according to Uganda, raised security concerns. It argued that the military presence was necessary to neutralize the threats and protect the territory of Uganda. The Court dismissed the arguments on account that action taken by Uganda was disproportionate¹⁴⁶, that it did not have enough evidence to support the existence of State agency¹⁴⁷ and that the right of self-defense can be invoked only if armed forces of a state attack the defending state¹⁴⁸.

I believe the important aspect of this case regarding anticipatory self-defense is represented by the second argument invoked by Uganda regarding self-defense. Uganda affirmed that the

imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack."

144 *Armed Activities on the Territory of the Congo*, 2005 ICJ.

145 Position of the High Command of Uganda on the Presence of the Uganda Peoples Defence Forces in the DRC, 11 September 1998 (Counter-Memorial of the Government of Uganda, vol. 1, 21 April 2001 Annex 27).

146 *Congo v. Uganda*, at 147.

147 *Ibid.*, paras. 131-5 and 146.

148 *Ibid.*, para. 147.

political and administrative vacuum born in the eastern part of the DRC created a regime of instability which concerned Ugandan authorities about the security of its territory. The presence of Ugandan military forces in the DRC had the objective of stabilizing the situation. Uganda took action in response to a threat. That threat was connected with armed rebel activities in the area which may have taken advantage of the instability and have incursions in Ugandan territory. Uganda perceived that such attacks could happen at any given time, therefore they should be considered imminent.

However, the Court omitted in this case to discuss the legality of anticipatory self-defense, although the facts point out that Uganda has acted in this manner. Since Uganda has not made any claims to have acted in anticipatory self-defense, but only asked the Court to give a decision looking only at attacks that have happened, the ICJ did not take the chance on settling the matters regarding this much disputed concept, otherwise it may have acted *ultra vires*.

The *Israeli Wall*¹⁴⁹ Advisory Opinion originated in resolution ES-10/14 adopted by the UN General Assembly on 8 December 2003. In the previously adopted resolution ES-10/13 the General Assembly demanded that "Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law"¹⁵⁰. The construction of the wall was a response to the increased suicide bombings and other attacks against the citizens of Israel. Although the opinion deals much with human rights and humanitarian aspects, Israel invoked that the building of the wall was in accordance with its inherent right of self-defense under Article 51 of the UN Charter and Security Council resolutions 1368 and 1373, both adopted in 2001 in response to the terrorist attacks of 11 September 2001¹⁵¹. The Court found that Article 51 applies only to an attack by a State against another State and considered that expanding to right enshrined in the article to take defensive measures against terrorists would go against the scope for which it was created¹⁵². Judge Buergenthal dissented with the Court's reading of Article 51 as applying only to inter-state conflicts. He argued that the security climate present at the time, which was accepted by the Security Council, extended the inherent right to self-defense of a state to combat non-state actor attacks from the occupied territories¹⁵³.

Israel contended before the International Court of Justice that, in building the wall in the Occupied Territories, it was acting in accordance to its inherent right of self-defense under Article

149 The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2003 ICJ.

150 *Ibid.*, para. 1.

151 *Ibid.*, para. 139.

152 *Ibid.*

153 Judge Buergenthal, para. 6.

51 of the UN Charter. It should be recalled that together with Article 2(4) of the Charter, these two articles represent the rule (of not threatening or using force in international relations) and the exception to the rule (States are allowed to use force in self-defense). However, taken by itself, Article 51 does not mention that the armed attack must necessarily come from another State but generally affirms 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 Nation** [...]" (emphasis added)". I believe it is common knowledge that the situation in the Occupied Territories is very tense and "Palestinians" aggressively oppose the Israeli occupation. It is my opinion that Israel could have perceived the threat of suicide bombings, that they could happen at any moment (therefore they are imminent). So in response to an imminent attack they have decided to act in self-defense and build the wall. However, this is only a speculation and the real intention of Israel central authorities remains known only to them.

The conclusion of this section is that the International Court of Justice has not provided decisions directly related to anticipatory self-defense. The evidence is inconclusive and left open for debate. The ICJ has failed or omitted on purpose to give a ruling on this matter.

VI. Relevant documents of other UN bodies

This section will deal with documents adopted by other UN bodies, documents that are relevant to anticipatory self-defense. These are First Report of the UN Atomic Energy Commission to the UN Security Council¹⁵⁴, the 2001 Security Council resolutions 1368 and 1373¹⁵⁵ and the 2004 Report of the High-level Panel on Threats, Challenges and Change¹⁵⁶ done at the request of the UN Secretary-General. It is my opinion that these four documents should be analyzed as the first one has been considered by the expansionist school to support the notion of pre-emptive self-defense¹⁵⁷, the second and third represent the opinion of the Security Council, the main organ which can authorize the use of force in international law and the last document expressly deals with this concept.

154 Available at www.un.org/law/repertory/, UN Repertory of Practice (1945–54), Vol. 2, at 427-435.

155 Available at <http://www.un.org/Docs/scres/2001/sc2001.htm>

156 Available at <http://www.un.org/secureworld/>

157 Tom Ruys, *op.cit.*, at 257.

The First Report of the UN Atomic Energy Commission to the Security Council was given following a memorandum submitted by the United States within the framework of the Commission which called for a more flexible interpretation of the right to self-defense:

"Interpreting its provisions [Article 51 of the Charter] with respect to atomic energy matters, it is clear that if atomic weapons were employed as part of an 'armed attack', the rights reserved by the nations to themselves under Article 51 would be applicable. It is equally clear that an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define 'armed attack' in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action."¹⁵⁸

The Commission made the recommendation that an international system be created with regard to atomic energy, but also concluded that:

"(...) In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations."¹⁵⁹

It can be clearly observed that the United States recognized the threat of atomic energy, in particular atomic weapons. It argues that with the introduction of nuclear weapons into the notion of 'armed attack', the equation changes. Given the destructive potential of nuclear weapons, States cannot afford for an atomic bomb to actually drop and then invoke the right to self-defense. It asserts that States should take preliminary measures, which I believe it could be interpreted as pre-emptive measures given the danger posed by the use of atomic weapons. The Commission recognized that the use of atomic energy represents a serious problem, that it should be regulated strictly by a treaty or convention and that breaches of said treaty or convention might be so grave that it will give states the right to act in self-defense.

Security Council resolutions 1368 and 1373 have been adopted in 2001 in response to

158 UN Repertory of Practice (1945–54), Vol. 2, at 434.

159 *Ibid.*, at 435.

international terrorism and the attacks of 11 September 2001.

Resolution 1368 affirms that it is:

"(...) *Determined* to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. And Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security (...)"¹⁶⁰

It represents a first step taken by the Security Council in recognizing the threat which international terrorism poses to the international community and affirms that States have the right to defend themselves against such threats. The traditional paradigm of self-defense involves that States must suffer from an armed attack before being able to act in (reactive) self-defense. But it can be deduced that States should not wait for a terrorist attack to happen before they can act and could take pre-emptive action against the terrorist threat. This could be seen as an endorsement of anticipatory action.

Security Council resolution 1373 is more elaborate than the first. It is:

"(...) *Reaffirming* its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter

¹⁶⁰ Security Council resolution 1368.

of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts (...)"¹⁶¹.

Resolution 1373 has the task of enforcing the idea that international terrorism is a serious threat and States are allowed to defend themselves from such threats (anticipatory self-defense). As a personal opinion, both resolutions make reference to the right of self-defense enshrined in Article 51 of the UN Charter but do not elaborate on it. It can be left to open interpretation and one interpretation could be that States are allowed to act in self-defense in order to pre-empt terrorist attacks which, due to their nature of being unpredictable, might happen at any moment.

The last document is the 2004 Report of the High-level Panel on Threats, Challenges and Change. Amongst other issues discussed it touches the subject of self-defense under international law. It asserts that:

"The language of this article is restrictive: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security". However, a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weaponsmaking capability."¹⁶²

The report of the experts makes specific reference to anticipatory self-defense, in the ability of States to act in self-defense when threatened with an imminent attack. They are of the opinion that this right of States is rooted in 'long established international law'. I believe that their reasoning is wrong, as it can be deduced from treaty law that there is no express mentioning of anticipatory self-defense, customary international law presents flaws in this aspect, starting with the *Caroline* incident which is believed to be the starting point of anticipatory self-defense, the International Court of Justice has avoided giving a ruling on the legality of this concept and State practice in

161 Security Council resolution 1373.

162 The 2004 Report of the High-level Panel on Threats, Challenges and Change, at 63, para. 188.

those incidents is still vague and can be open for interpretation. While I do concur with the fact that a UN body has agreed with anticipatory self-defense, I must point out nonetheless that its reasoning is flawed. Current customary international law does provide solid proof for States being able to invoke self-defense to an imminent attack.

VII. Conclusions

The conclusion of this paper is that anticipatory self-defense has no legal basis under current international law. The United Nations Charter allows for self-defense only if Members come under attack, customary international law, starting with the *Caroline* incident, does not indicate that State practice in this matter is accompanied by *opinio juris*, the International Court of Justice has avoided discussing the issue and the incidents do not provide clear proof for supporting the concept, the opinions of other UN bodies regarding this matter are open for interpretation and the US military operation in Iraq in 2002 cannot be justified by saying it was a case of pre-emptive self-defense.

It is my opinion that one author has found the reasons for this construct appearing in international law can be summed up as following:

"Twenty-first-century security needs are different from those imagined [at the founding of the United Nations].

First, ... the intended safeguard against unlawful threats of force - a vigilant and muscular Security Council – never materialized

Second, modern methods of intelligence collection, such as satellite imagery and communications intercepts, now make it unnecessary to sit out an actual armed attack to await convincing proof of a state's hostile intent.

Third, with the advent of weapons of mass destruction and their availability to international terrorists, the first blow can be devastating - far more devastating than the pinprick attacks on which the old rules were premised.

Fourth, terrorist organizations "of global reach" were unknown when Article 51 was drafted. To flourish, they need to conduct training, raise money, and develop and stockpile weaponry - which in turn requires communications equipment, camps, technology, staffing, and offices. All this requires a sanctuary, which only states can provide - and which only states can take away.

Fifth, the danger of catalytic war erupting from the use of pre-emptive force has lessened with the end of the Cold War. It made sense to hew to Article 51 during the [Cold War] It makes less sense today, when safe-haven states and terrorist organizations are not themselves possessed of pre-emptive capabilities."¹⁶³

One of the main reasons why this construct appeared was due to the inability of the Security Council to act as was intended by the drafters. The Cold War was a period of stalemate between the two main rival powers, the United States of America and the Soviet Union. The Security Council, being a political body was always deadlocked when interests of these two major players were involved. The Security Council was unable to act because of the right to veto and states wanted to deal with the situation on their own. So far, only a hand few have embraced it: the United States, the United Kingdom and Israel, while the other States have rejected it. It is my opinion that this construct serves only the powerful and gives them the option to go around the Security Council.

The other argument invoked is the development and increase availability of weapons of mass destruction, especially nuclear weapons. This is coupled with international terrorism which achieved new levels of intensity and poses a much bigger threat that it did in the past. The fear that terrorists might acquire weapons of mass destruction and use them would provide the incentive for states to use pre-emptive action. However, I believe that self-defense cannot be used as an effective tool to combat terrorism. As mentioned in the previous section, the conditions to satisfy the right to self-defense (necessity, proportionality and imminence, in the case of pre-emptive action) would only prove to be restrictions in combating terrorism effectively. Not to mention the fact that states have to demonstrate that they have suffered from an 'armed attack' or that such an attack is imminent. If state agency cannot be demonstrated, states cannot invoke the right to self-defense (and even less so pre-emptive self-defense) against terrorist attacks.

¹⁶³ Michael Glennon, *Preempting Terrorism; The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24-6.

Bibliography

- Coleman Phillipson , *The International Law And Custom Of Ancient Greece And Rome*, London, 1911;
- Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge University Press, 2005;
- St. Augustine, *De Civitate Dei Contra Paganos*, Book XIX, x VII (6 Loeb Classical ed. 150–1 (W. C. Greene trans., 1960));
- St. Thomas Aquinas, *Summa Theologiae*, Secunda Secundae, Quaestio 40, 1 (35 Blackfriars ed., 80–3 (1972));
- Malcolm M. Shaw, *International Law*, 6th edition, Cambridge University Press, 2008;
- Gordon A. Christenson, *The World Court and Jus Cogens*, in *The American Journal of International Law* Vol. 81, No. 1 (Jan., 1987);
- Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, 2010;
- Dominika Svarc, *Redefining Imminence: The Use Of Force Against Threats And Armed Attacks In The Twenty-First Century*, in 13 *ILSA J. Int'l & Comp. L.* 171 2006-2007;
- Eustace Chikere Azubuike, *Probing The Scope Of Self-Defense In International Law*, in 17 *Ann. Surv. Int'l & Comp. L.* 129 2011;
- Leo van den Hole, *Anticipatory self-defence under international law*, in 19 *Am. U. Int'l L. Rev.* 69 2003-2004;
- Andrew Garwood-Gowers, *Self-Defence Against Terrorism in the Post-9/11 World*, (2004) 4(2) *QUEENSLAND U. L. & JUST. J.* 3;
- Hannes Herbert Hofmeister, *Neither the Caroline Formula nor the 'Bush Doctrine'- An Alternative Framework to Assess the Legality of Preemptive Strikes*, 2 *U. NEW ENG. L.J.* 31 40 2005;
- Niaz A. Shah, *Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism*, in 12 *J. Conflict & Sec. L.* 95 2007;
- D. Bowett, *Self-Defence in International Law*, 1958;
- M.S. McDougal and F.P. Feliciano, *Law and minimum world public order: the legal regulation of international coercion*, New Haven, CT: Yale University Press, 1961;
- G.K. Walker, *Anticipatory collective self-defense in the Charter era: what the treaties have said*, (1998) 31 *Cornell ILJ*;
- Abdul Ghafur Hamid, *The legality of anticipatory self-defence in the 21st century world order: a re-appraisal*, in *NILR* 2007;
- Q. Wright, *The Cuban quarantine*, in 57 *AJIL* 546–65 1963;

- J. de Arechaga, *International law in the past third of a century*, (1978-I) 159 RdC 1–344;
- L. Henkin, *How nations behave. Law and foreign policy*, 2nd edn., New York: Columbia University Press, 1979;
- E. Gross, *Thwarting Terrorist Acts by Attacking the Perpetrator or their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to protect its Citizen*, 15 Temple International and Comparative Law Journal 195-245 2001;
- J. Kunz, *Individual and Collective Self-defence in Article 51 of the Charter of the United Nations*, 41 *AJIL* 1947;
- P. C. Jessup, *A modern law of nations: an introduction*, New York: MacMillan, 1948;
- W. E. Butler, *The non-use of force in international law*, Dordrecht: Martinus Nijhoff, 1989;
- M. Bothe, *Terrorism and the legality of pre-emptive force*, (2003) 14 *EJIL* 227–40;
- A. Shapira, *The Six-Day War and the right of self-defence*, (1971) 6 *Israeli Lrev*;
- Ian Brownlie, *International law and the use of force by States*, Oxford University Press, 1963;
- Stephen C. Neff, *War and the Law of Nations – A General History*, Cambridge University Press 2005;
- David A. Sadoff, *A Question Of Determinacy: The Legal Status Of Anticipatory Self-Defense*, in 40 *Geo. J. Int'l L.* 523 2008-2009;
- P. Malanczuk and M. Akehurst, *Akehurst's modern introduction to international law*, 7th edn, London: Routledge, 1997;
- Bram Chayes, *The Cuban Missile Crisis: International Crisis And The Role Of Law*, 1974;
- William V. O'brien, *The Conduct Of just And Limred War*, 1981;
- Charles Pierson, *Pre-emptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 *DENV.J. INT'L L. & POL'Y*, 2004;
- A. Mark Weisburd, *The Use Of Force: The Practice Of States Since World War II*, 1997;
- Christine Gray, *International Law And The Use Of Force*, 2nd ed., 2004;
- Thomas M. Franck, *Recourse To Force: State Action Against Threats And Armed Attacks*, 2002;
- Stanimir A. Alexandrov, *Self-Defense Against The Use Of Force In International Law*, 1996;
- Anthony Clark Arend & Robert J. Beck, *International Law And The Use Of Force*, 1993;
- D. P. O'Connell, *International law*, Vol. I, 2nd edn, London: Stevens 1970;
- D.W. Bowett, *Self-defence in international law*, Manchester University Press, 1958;
- Christopher Clarke Posteraro, *Intervention In Iraq: Towards A Doctrine Of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, in 15 *Fla. J. Int'l L.* 2002-2003;
- Scott Ritter, *Endgame*, Simon & Schuster, 1999;
- Captain Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 *MIL. L. REV.* 1999;
- Michele L. Malvesti, *The New World Disorder: Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 *FLETCHER F. WORLD AFF.*, 2002, at 17, 20; also David Rose, *Iraq's Arsenal of*

Terror, VANITY FAIR, May 2002;

Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, in 36 Cornell Int'l L.J. 435 2003-2004;

S. Murphy, *Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter*, 43 Harvard International Law Journal 41-51 2002;

Michael Glennon, *Preempting Terrorism; The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002.

The 2002 National Security Strategy of the United States of America.

Treaties

The Statute of the International Court of Justice;

The Covenant of the League of Nations;

The Kellogg-Briand Pact;

The Vienna Convention on the Law of Treaties;

The Charter of the United Nations;

The Rio Treaty of 1947.

UN Documents

UN Doc. S/8205, 22 October 1967 (UAR);

UN Doc. AEC/18/Rev.1;

UN Doc. S/10784;

UN Doc. S/PV.464, 8 February 1950;

UN Doc. S/PV.466, 10 February 1950;

UN Doc. S/2241;

UN Doc. S/PV.549;

UN Doc. S/PV.550;

UN Doc. S/PV.551;

SC Res. 95 (1951) of 1 September 1951;

UN Doc. S/17983;

UN Docs. S/PV.2672–2673;

UN Doc. S/PV.2281;

UN Doc. S/PV.552;

UN Doc. A/C.6/SR.1269;

The First Report of the UN Atomic Energy Commission to the UN Security Council;
Security Council resolution 1368;
Security Council resolution 1373;
The 2004 Report of the High-level Panel on Threats, Challenges and Change;
Security Council Resolution 660;
Security Council Resolution 678;
Security Council Resolution 687;
The International Law Commission Draft Article on Responsibility of States for internationally wrongful acts.

ICJ cases

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ;
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ;
Oil Platforms (Iran v. U.S.), 2003 ICJ;
Armed Activities on the Territory of the Congo, 2005 ICJ;
The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2003 ICJ;
Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, ICJ Reports 1985;
North Sea Continental Shelf, Judgement, ICJ Reports 1969.