

## **Self-Defense in Operation: The Anticipatory and Preemptive Use of Military Instrument**

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### **Abstract**

This article's main thrust is to explore distinct features of the legality of the use of armed force as an exercise of the right to self-defense in international law. The focus is on contexts that transcend the traditional operation of the use of military instrument in self-defense. The aim is to go beyond the classic notion of self-defense, meaning the use of military instrument by a state against another state after the attack has occurred. In contrast, the task here is to appraise the legality of the use of force in anticipatory and preemptive self-defense. More specifically, the two scenarios that will be appraised in greater detail involve (1) the anticipatory self-defense in cases of terrorist threats or threats to, or use of, nuclear weapons; and (2) the use of force in self-defense in cases when the source of attack has been a non-state actor rather than an independent and sovereign state.

***Keywords:*** *use of force, self-defense, nuclear weapons, state responsibility, non-state actors*

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### INTRODUCTION

The key question to be explored in this article relates to the legality of the use of armed force in self-defense. The focus, however, goes beyond what could be conceived as a classic notion of self-defense, meaning the use of military instrument by a state against another state after the attack has occurred. In contrast, the ultimate aim here is to appraise the legality of the use of force in anticipatory and preemptive self-defense.

More specifically, two scenarios or situations will be particularly examined: (1) the anticipatory self-defense in cases of terrorist threats or threats to, or use of, nuclear weapons; and (2) the use of force in self-defense in cases when the source of attack has been a non-state actor rather than an independent and sovereign state.

Under the first question, the case of the 2003 Iraqi invasion by the United States and its allies, principally the United Kingdom and Australia, will be analyzed in particular. The notion of anticipatory self-defense will be considered in light of the *Caroline* doctrine. In order to determine and evaluate the criteria that furnish the legal use of force in anticipatory self-defense, a number of other cases will be discussed, including the Israeli attack on Osirak nuclear reactor in Baghdad in 1981, the 1962 Cuban Missile Crisis, the Israeli attacks in Egypt in the Six-Day War in 1967, as well as the US attacks in Afghanistan and Sudan in 1998 in response to the Embassy bombings in Kenya and Tanzania. In this connection, the article considers a whole set of criteria that could be used to measure the test of legality of the force used in self-defense. Considerations will also be given to the report of the Secretary-General's High-Level Panel on Threat, Challenges and Change, entitled "A More Secure World: Our Shared Responsibility."

With regard to the second question, the article will appraise the use of force in response to attacks originating from non-state actors, taking as a lead example the use of military force against Afghanistan in the aftermath of the September 11 (2001) attacks in the United States. This very context dictates the need for addressing the notion of attribution of state responsibility in international law over the acts of non-state actors or entities. First, however, a general discussion about the principles that define the use of force in self-defense will be offered.

### I. USE OF FORCE IN SELF-DEFENSE

A right exercised for centuries, and known in different times with different labels and regulated under different rules, is both a fundamental instrument in the world constitutive process and yet a subject of much debate and controversy. Although constantly present in the world practice, the bases for initiating the use of force or the *jus ad bellum* in contemporary international law is mostly codified in the United Nations Charter. Article 51 of the Charter is its spirit:

*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 necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>1</sup>*

There is no difficulty in understanding that there ought to be an armed attack. The focus of debate is around the point whether the individual or collective resort to force can be exercised against an attack which has not yet taken place but is reasonably likely to happen in an immediate future.

Read within its ordinary meaning, Article 51 does not require the occurrence of an armed attack. It does not stipulate the right of self-defense “after an attack has occurred,” or “once an attack occurred”; rather, “if an armed attack occurs.”

Going back to the preparatory work of the UN Charter, Professor Bowett finds that this work suggests “[o]nly that the article [51] should safeguard the right of self-defense, not restrict it.”<sup>2</sup> Further, Committee 1/I pointed out in its report, which received the approval of both Commission I and the Plenary Conference that “[t]he use of arms in legitimate self-defense remains admitted and unimpaired”<sup>3</sup> by the UN Charter.

Moreover, the UN Secretary-General in its report, entitled *In larger freedom: towards development, security and human rights for all*—a substantial plan for reform at the United Nations, presented in September 2005 to the UN Summit—concluded that “[i]mminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”<sup>4</sup> The report addressed preemption, as well. In cases “[w]here threats are not imminent but latent, the Charter gives all authority to the Security Council to use military force, including preventively, to preserve international peace and

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<sup>1</sup> *Charter of the United Nations*, art. 51, ¶ 1, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993 (Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945) [hereinafter U.N. CHARTER].

<sup>2</sup> Cited by Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597 (1963).

<sup>3</sup> Report of Rapporteur of Committee 1 to Commission I, 6 Doc. U.N. Conf. Int’l. Org. 446, 459 (1945).

<sup>4</sup> The Secretary-General, *Report of the Secretary-General: In larger freedom: towards development, security and human rights for all*, ¶ 124, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter REPORT OF THE SECRETARY-GENERAL] See also Kofi Annan, “*In Larger Freedom*”: *Decision Time at the UN*, FOREIGN AFF. May/June 2005, where the Secretary-General held the view that “[m]ost lawyers recognize that the provision [Article 51] includes the right to take preemptive action against an imminent threat; it needs no reinterpretation or rewriting.”

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security.”<sup>5</sup> In fulfilling this mission—which it had failed to do in many cases in the past—the Report suggests, “[t]he [Security] Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion.”<sup>6</sup> A number of criteria when considering whether to authorize or endorse the use of military force are being put forward in the Report, namely:

- 1) the Council should come to a common view on how to weigh the seriousness of the threat;
- 2) the proper purpose of the proposed military action;
- 3) whether means short of the use of force might plausibly succeed in stopping the threat;
- 4) whether the military option is proportional to the threat at hand; and
- 5) whether there is a reasonable chance of success.<sup>7</sup>

The Security Council should henceforth adopt a resolution, declaration of commitment or a code of conduct, employing the stated principles. This notwithstanding, the customary practice of the world community of states with regard to self-defense should be also honored. More on this will follow in the following section.

### 1. The anticipatory and preemptive self-defense

#### 1.1. *Caroline Doctrine* and customary international law

Legal arguments on anticipatory self-defense are usually based on the criterion of *imminency*. Moreover, the international law requires that an act of self-defense be proportional and necessary to an armed attack that is either imminent or underway. This is also known as the *Caroline* doctrine, dated from an 1837 incident involving the *Caroline*, a vessel used to supply Canadian rebels fighting British rule during the Mackenzie Rebellion.

In this case, British forces crossed into the United States—since they asked the US to put an end to rebel activities on its territory, and it had no results—captured the *Caroline*, set it ablaze, and sent it over Niagara Falls. As a result, two US citizens died. It was later on followed by an exchange of diplomatic notes between the US Secretary of State Daniel Webster and his

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<sup>5</sup> REPORT OF THE SECRETARY-GENERAL, ¶ 125. In his article in *Foreign Affairs*, the Secretary-General further notes: “[Y]et today we also face dangers that are not imminent but that could materialize with little or no warning and might culminate in nightmare scenarios if left unaddressed. The Security Council if fully empowered by the UN Charter to deal with such threats, and it must be ready to do so.” *Id.*

<sup>6</sup> REPORT OF THE SECRETARY-GENERAL, ¶ 126.

<sup>7</sup> *Id.*

British counterpart, Lord Ashburton. Webster argued that defensive actions require “[a] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation ... [and must be] justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”<sup>8</sup> This was also accepted by Lord Ashburton and, later on, cited and used as reflection of a principle of customary international law.

*In concreto* and in line with the *Caroline* doctrine, the general international acceptance of the Israeli pre-emptive attacks in the Six-Day War—known also as the June War or the 1967 Arab-Israeli War—has been viewed as a lawful resort to force in anticipatory self-defense.<sup>9</sup>

In its decision in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* and the *Case Concerning Oil Platforms (Iran v. U.S.)*, the ICJ endorsed the view that in customary law “[w]hether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defense.”<sup>10</sup> The same was held in the Court’s advisory opinion in the case of *Legality of the Threat or Use of Nuclear Weapons*: “[t]he submission of the exercise of the necessity and proportionality is a rule of customary international law...”<sup>11</sup>

The origins of anticipatory self-defense can be traced back to the writings of earlier “publicists” of international law. Emmerich de Vattel has described it in the following terms:

*On occasion, where it is impossible, or too dangerous to wait for an absolute certainty, we may justly act on a reasonable presumption. If a stranger presents his piece at me in a wood, I am not yet certain that he intends to kill me; but shall I, in order to be convinced of his design, allow him to fire? What reasonable casuist will deny me the right of preventing him? But presumption becomes nearly equal to certainty, if the prince, who is on the point of rising to an enormous power, has already manifested an unlimited pride and insatiable ambition.*<sup>12</sup>

Consider also Cicero from a natural law perspective, arguing around 2,000 years ago:

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<sup>8</sup> Daniel Webster, Secretary of State, Letter to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), reprinted in John Basset Moore, *2 A Digest of International Law* 412 (1906).

<sup>9</sup> See Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, in A. CASSESE (ED.), *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 435, 443 (1986) (noting that “[t]here appeared to be a general feeling, certainly shared by the Western states, that taken in context this was a lawful use of anticipatory self-defense, and that for Israel to have waited any longer could well have been fatal to her survival.” See also ROSALYN HIGGINS, *UNITED NATIONS PEACEKEEPING* (vol. I) (1969).

<sup>10</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27) (Merits). *Case Concerning Oil Platform (Iran v. U.S.)*, ¶ 74, 2003 I.C.J. (Nov. 6) (Merits), available at <http://212.153.43.18/icjwww/idocket/iop/iopframe.htm>.

<sup>11</sup> *Legality of the Threat or Use of Nuclear Weapons*, ¶ 41, 1996 I.C.J. 226 (Judgment).

<sup>12</sup> EMMERICH DE VATTEL, *3 THE LAW OF NATIONS* 465 (Luke White 1792).

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*There exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too and meanwhile they must suffer injustice first.<sup>13</sup>*

### **1.2. The Case of Iraq: An Inquiry into the legality of the Operation “Iraqi Freedom”**

In the case of 2003 intervention against Iraq, the fulfillment of the criteria of imminence can hardly be substantiated as now weapons of mass destruction were found and Iraq was not about to launch an attack on or against the United States in the immediate future. Nor there were any compelling evidence that Iraq was distributing weapons of mass destruction to the terrorist organizations or in any other way supporting or harboring Al Qaeda or any other terrorist organization. Namely, there were no imminent attacks either by Iraq itself or any other terrorist organization operating under the direction or with the instructions of the Iraqi Government, as no nexus has been found between the regime of Saddam Hussein and Al Qaeda or any other terrorist group. The *Caroline* test is therefore rendered inapplicable to this case.

The war in Iraq was, however, charged with justifications combining elements of: (a) preemptive self-defense (the war on terror); (b) humanitarian intervention (the regime’s abuses with basic human rights and fundamental freedoms); and (c) invocation of an implied authority from earlier Security Council resolutions on Iraq. This approach is in line with the multi-factor approach, used by the United States in the course of its military actions in the past.

The first claim thus concerns preemptive self-defense as opposed to anticipatory self-defense. Although different definitions had been advanced, the line between the two is often drawn on the nature and the level of threat. Preemptive self-defense is perceived as broader and includes such circumstances, where the threat is not yet imminent or operational, “[h]ence not *directly* threatening, but that, if permitted to mature, could then be neutralized only at a higher and possibly unacceptable cost.”<sup>14</sup> On the other hand, a claim to anticipatory self-defense

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<sup>13</sup> Marcus Tullius Cicero (106-53 BC) (cited in James L. Hirschen, *Law, Morality and Our Nation’s Self-defense*, Newsmax.com, Sept. 24, 2001. See also STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT, 17 (1984).

<sup>14</sup> W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003).

“[m]ust point only to a palpable and imminent threat,”<sup>15</sup> whereas the claim for preemptive self-defense “can point only to a possibility, a contingency.”<sup>16</sup> For example, the claim to engage, in certain circumstances, in a “regime change” is portrayed as a corollary of preemptive self-defense “[f]or if a regime that is animated by unlawful ambitions against its neighbors continues to develop the ABC weapons, and especially if it does so in violation of international commitments, the deprivation of those weapons in a single instance may only reinforce the regime’s intentions to try even harder the next time to develop and deploy the weapons so that it can then paralyze subsequent efforts to control it.”<sup>17</sup>

Since most of the authors find this action illegal from the point of view of present-day international law, the intention on the side of the US administration has been to “[p]lace the attack within a broader moral, cultural, and humanistic framework.”<sup>18</sup> With obvious difficulties to bring arguments for the war against Iraq within the limits of self-defense it is opted for a more mixed reasoning and the just war framework,<sup>19</sup> which is reflected in the following key dimensions:

(a) As indicated in the National Security Strategy: “The United State has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction - and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”

(b) Gross violations of human rights - either against Iraqi religious and ethnic minorities or Iraqis in general - has provided one of the most frequently invoked justifications for waging the war. In countless instances President Bush talked of human rights violations by Iraqi regime of Saddam Hussein. “The dictator who is assembling the world’s most dangerous weapons has already used them on whole villages... by torturing children while their parents are made to watch. International human rights groups have catalogued other methods used in the torture chambers of Iraq: electric shock, burning with hot irons, dripping acid on the skin, mutilation with electric drills, cutting out tongues, and rape.”

(c) In his 2003 State of the Union address, President Bush pointed out to the conduct of the Iraqi regime that poses a threat to the authority of the United Nations and a threat to peace. Few months later (March 17, 2003), President Bush elaborated further on

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<sup>15</sup> *Id.* at 87.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Richard Falk, *Legality to Legitimacy*, 26 HARV. INT’L REV. 40, 43 (2004).

<sup>19</sup> According to traditional just war framework several elements are used to establish *jus ad bellum*: a just cause; an honest intention; war as a last resort; reasonable probability of success and proportionality between the ends sought and the predictable harm.

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this point while arguing that past Security Council resolutions provide a sufficient authorization and added that “the Security Council has not lived up to its responsibilities.”

The use of force during last decades and arguments behind the same, mark a new paradigm in formation in international law. It is the paradigm of a waning of the sovereign state and more frequent targeting states that turn against their own citizens or which by harboring and supporting terrorism pose a threat to international peace and security. Due to peculiarities of processes in which international law is made and absence of sanctions as we know them in national law, we are likely to see a continuation of formally conceived illegal use of force. Such actions will continue to be driven not only by value-blind interests, but also by genuine moral goals aimed at ending grave humanitarian crisis. In addition, from the point of view of the current state of affairs in international law, these actions are also likely to be driven by genuine, yet uneasy, efforts to reform international law. The UN Secretary General’s initiative is such an effort. The extent to which these efforts will be followed by the general State practice is a different and most probably also a difficult matter.

### ***1.3. Resort to force in preemptive self-defense in cases of state and/or terrorist threats to, or use of, nuclear weapons***

Arguments favoring preemptive resort to force have been often made in light of the contemporary threats posed by terrorist networks and nuclear proliferation. The new technologies and the determination of terrorist groups to achieve their goals and produce as much harm as one could to their targeting states is a frightening and often a real world materialized scenario. The same holds true with rogue states acquiring nuclear weapons. With this in mind, this section will observe a number of pertinent cases in the field seeking to define the current international legal framework into a more practical-oriented fashion, and modes of responses to possible future threats.

The key operative provision of the ICJ Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* legitimizes the use of nuclear weapons. Even though the Court did not reach a definitive conclusion, it did not rule against the use of nuclear weapons. The Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable to armed conflict in any circumstances. Thus, the Court held:

*“Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the*



*legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.*”<sup>20</sup>

The decision, *inter alia*, is considered to be an undermining force of the non-proliferation of nuclear arms. On the other hand, the Treaty on the Non-Proliferation of Nuclear Weapons—which as of 2015 numbers 190 States as parties—controls and prohibits the spread of nuclear weapons technology. Article 1 of the NPT stipulates:

*“Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”*<sup>21</sup>

Article 2 of the NPT puts restrictions on non-nuclear weapon State Parties not to develop in any way nuclear weapons:

*“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.”*<sup>22</sup>

However, the Treaty does not prohibit States to develop, produce and use nuclear energy for peaceful means. Article 4 of the NPT provides:

*“1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty.*

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<sup>20</sup> *Legality of the Threat or Use of Nuclear Weapons*, ¶ 97, 1996 I.C.J. 226 (Judgment).

<sup>21</sup> Treaty on the Non-Proliferation of Nuclear Weapons, art. 1, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970), *extended* May 11, 1995, 34 I.L.M. 959 [hereinafter NPT].

<sup>22</sup> *Id.* art. 2.

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*2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy...*<sup>23</sup>

Beyond these formal considerations related to the legal infrastructure concerning the production or use of nuclear weapons, one should pay particular attention to how the state practice has developed and evolved.

In a related situation, on June 7, 1981, Israeli warplanes struck the Osirak nuclear facility near Baghdad. This action by Israel was a pre-emptive strike to deny Iraq the capability of producing nuclear weapons; weapons Israeli intelligence believed was in the works. The Israeli actions raised negative responses and condemnation by the international community. The UN General Assembly in its resolution 40/6 (November 1, 1985) strongly condemned “[a]ll military attacks on all nuclear installations dedicated to peaceful purposes, including the military attacks by Israel on the nuclear facilities of Iraq.” In the 2286<sup>th</sup> meeting of the UN Security Council, ten days after the attack, most of the countries condemned the attack, though the United States blocked the prescription of the act as “aggression” in the wording of relevant Security Council resolution.<sup>24</sup>

The Association of South-East Asian Nations in a statement presented by the representative of Philippines said:

*“The Foreign Ministers condemn the recent unwarranted Israeli air attack on Iraqi nuclear installations near Baghdad and regard it as a serious violation of the Charter of the United Nations and international law. They express grave concern that this dangerous and irresponsible act would escalate existing tension in the area and pose a serious threat to international peace and security.”*<sup>25</sup>

The Permanent Representative of Hungary made the following comment:

*“All people of good sense throughout the world learned with profound indignation the news of the unjustifiable and unprecedented attack carried out by the Israeli Air Force against a nuclear installation near the Iraqi capital.”*<sup>26</sup>

The Representative of Italy stated as follows:

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<sup>23</sup> *Id.* art. 4, ¶¶ 1 - 2.

<sup>24</sup> See S.C. Res. 487, U.N.Y.B. 282, U.N. Sales No. E.84.I.1 (1981).

<sup>25</sup> Statement by the Permanent Representative of Philippines to the Security Council, Summary Record of 2286<sup>th</sup> mtg. ¶ 4, U.N. Doc. S/PV.2286 (June 17, 1981).

<sup>26</sup> Statement by the Permanent Representative of Hungary to the Security Council, Summary Record of 2286<sup>th</sup> mtg. ¶ 58, U.N. Doc. S/PV.2286 (June 17, 1981).

*“My Government views the Israeli military action against the Tamuz nuclear center with the outmost concern and firmly condemns it as an unacceptable breach of international law.”<sup>27</sup>*

From a more a contemporaneous perspective, judging illegal actions and failures to comply with its international obligations of the Iraqi regime under Saddam Hussein and their condemnation and actions that were taken by the international community, such as the intervention in the Gulf War and regime’s further noncompliance, there is at least a general reluctance to not accepting the bombing of nuclear facility in 1981 as a justifiable action. As Professor Reisman notes, “[w]ithin a decade, many of the states who had voted to condemn Israel in the General Assembly, including many of the members of the Arab League, must surely have revised their view of action. Scholars still debate the lawfulness of the Israeli action, though I believe that now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action.”<sup>28</sup>

Contrary to this, in another event, in year 1967, the institutions of the international community did not condemn the initiation of the Six-Day War by an Israeli attack on Egyptian airports. According to Professor Reisman, the relation that prevailed between Egypt and Israel at the time may have already been one of belligerency, so that the air attack could have been seen as anticipatory or even reactive, rather than preemptive, self-defense. There is a common understanding within the scholars community that, “[i]f a state of war exists, a belligerent need not wait until its adversary strikes in order to respond militarily, but is entitled, itself, to select the moment of initiation or resumption of overt conflict.”<sup>29</sup> Similarly, Professor Dinstein argues that Israel’s actions in attacking Egypt, Jordan, and Syria in 1967 were legally justified based upon the hostile measures these states had taken against Israel.<sup>30</sup>

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<sup>27</sup> Statement by the Permanent Representative of Italy to the Security Council, Summary Record of 2286<sup>th</sup> mtg. ¶ 72, U.N. Doc. S/PV.2286 (June 17, 1981).

<sup>28</sup> W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 17 - 18 (1999). Professor Reisman further states that, “[t]he attack is also instructive in that it cautions scholars to defer inferences until a certain period of time has elapsed. In the nature of these attacks, the targeted state is often able to command instant sympathy, while the preemptive attacker may require more time to publicize its intelligence information and elaborate its justifications, both of which may ultimately prove to be more persuasive to the international decision process.” *Id.* at 18. See also W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003). Rivkin et al. conclude that, “[t]he international inaction strongly suggests a fundamental recognition that Israel acted in accordance with her rights under international law to anticipate, and foil, attacks before they are launched.” David B. Rivkin, Jr., Lee A. Casey, and Mark Wendell DeLaquil, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT’L L. 467, 480 (2005).

<sup>29</sup> See W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003).

<sup>30</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 172 (2001).

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A number of other cases during the 1980s were framed around the borderline between anticipatory and preemptive self-defense. These include the Great Britain's action of 1982 for a two-hundred mile exclusion zone, directed toward all non-British vessels, around the Falkland Islands. One year later, Sweden declared the right to use military force against any submarine sailing within twelve miles of her territorial sea. President Ronald Reagan attacked terrorist targets within Libyan territory to prevent any future terrorist attack against the United States citizens and interests and, in 1989, President George H.W. Bush intervened in Panama. The Administration argued that Panama's Manuel Antonio Noriega posed a threat to the United States service members that were serving in Panama at the time and their families.

From all these cases, however, the 1962 Cuban Missile Crisis is widely viewed as the most prominent example of an anticipatory self-defense. As a preventive measure to the installation of Soviet's short-and intermediate-range offensive nuclear missiles in Cuba, President John F. Kennedy imposed a "quarantine" on the island. The missiles have been supposedly able to reach the United States within a minute's time. The US action in fact intended a blockade of the Soviet ships delivering nuclear missiles and installing them in Cuba. In October 22, 1962, President Kennedy delivered a speech to the nation:

*This Government, as promised, has maintained the closest surveillance of the Soviet military buildup on the island of Cuba. Within the past week unmistakable evidence has established the fact that a series of offensive missile sites is now in preparation on that imprisoned island.*

*This urgent transformation of Cuba into an important strategic base - by the presence of these large, long-range, and clearly offensive weapons of sudden mass destruction - constitutes an explicit threat to the peace and security of all the Americans, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this nation and hemisphere, the joint Resolution of the 87<sup>th</sup> Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4, and 13 [1962]<sup>31</sup>*

The Kennedy Administration publicly justified its actions as an act of self-defense. On October 23, 1962, President Kennedy ordered by Proclamation the US forces to stop the delivery of offensive weapons to Cuba. Aiming "to defend the security of the United States," the Proclamation reads *inter alia* that:

*The forces under the President's command were ordered, beginning at 2 p.m. Greenwich time October 24, 1962, to interdict the delivery of offensive weapons*

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<sup>31</sup> 4 WHITEMAN, DIGEST OF INT'L LAW 523 - 24.

*and associated materiel to Cuba. To enforce this order, the Secretary of Defense was ordered to take appropriate measures to prevent the delivery of the prohibited materiel to Cuba, “employing the land, sea, and air forces of the United States in cooperation with any forces that may be made available by other American States.”*<sup>32</sup>

Speaking of the action, Professor Myres S. McDougal commented that “[t]he use by the United States of the military instrument was as limited as could have been fashioned, extending only to the selective interdiction of certain types of weapons. The United States acted openly, after advance warning that the establishment of an offensive military base in Cuba would be regarded as a threat to its security. The United States immediately reported its action to the United Nations Security Council, asking for appropriate measures from that body.”<sup>33</sup> In response to Professor Quincy Wright’s comments that “[u]nder general principles of international law and several treaties, the United States was in principle bound to respect the sovereignty of Cuba in its airspace,”<sup>34</sup> and that, “[i]t is difficult to find that the Soviet Union violated any obligation of international law in shipping missiles to, and installing them in Cuba at the request of the Castro government,”<sup>35</sup> Professor McDougal stated: “[t]he position taken by Professor Wright that Article 51 of the United Nations Charter must be construed to limit the customary right of self-defense by states to reactions against ‘actual armed attack’ would not appear to be supported by any of the commonly accepted principles for the interpretation of international agreements.”<sup>36</sup> He recalled that the appropriate goal in interpreting great constitutional agreements, such as the United Nations Charter, is that of ascertaining the genuine expectations, created by the framers and by successive appliers of the agreement, in contemporary community members about what future decisions should be; the words and behavior in the past are relevant only as they affect contemporary expectations about the requirements of future decision.<sup>37</sup> Further, Professor McDougal notes that, there is not the slightest evidence that the framers of the United Nations

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<sup>32</sup> Proclamation No. 3504 of Oct. 23, 1962, at 717, 27 Fed. Reg. 10, 401 (1962).

<sup>33</sup> Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597 (1963). He further noted that, “[i]n a better organized world, mankind might be able to dispense with a conception of self-defense which confers upon a claimant target state as much initial discretion as does the conception so long honored in customary international law. Until that better organization is more nearly achieved, the task which confronts free peoples is, however, that of clarifying and applying a conception of self-defense which will serve their common interests in minimum order without imposing upon them paralysis in the face of attacks from community members who do not genuinely accept the principles of minimum order. The importance of the Soviet-Cuban quarantine is in its indication that such a clarification and application can effectively be made and that free peoples do not, as some have insisted, have to choose between the rhetoric restraints of international law and their own survival.” *Id.*

<sup>34</sup> Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT’L L. 546 (1963).

<sup>35</sup> *Id.*

<sup>36</sup> Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597 (1963).

<sup>37</sup> *Id.*

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Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states.<sup>38</sup> If Webster and Ashburton would be alive, they could well agree that the *Caroline* test is met in the *Cuban Quarantine*.<sup>39</sup>

In another event in early 1999, after the massacre of tourists, including Americans in Uganda by Hutu guerrillas, who operated from the Democratic Republic of the Congo, there appears to have been no protest over Ugandan President Museveni's decision to pursue the guerrillas into Congolese territory and to kill them.

The US attacks against paramilitary training camps in Afghanistan in 1998, after the Embassy bombings in Kenya and Tanzania, have also received a degree of support by the international community. Australia, France, Germany, Japan, Spain, and the United Kingdom all responded to a certain extent in positive manner. In addition, the League of Arab States, which condemned as a violation of international the attacks against a pharmaceutical plant in Sudan that the US identified as a chemical weapons facility having ties with Osama bin Laden, did not react against the attacks on Afghanistan. President Clinton explained the attacks in the following manner:

*I ordered this action for four reasons: First, because we have convincing evidence these groups played the key role on the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth,*

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<sup>38</sup> *Id.* In addition to McDougal's views, the late Professor Abram Chayes, the then-State Department Legal Advisor presenting the views of President Kennedy's Administration, has stated that the law of the use of force is not "[a] set of fixed, self-defining categories of permissible and prohibited conduct," arguing that the quarantine against Cuba was a justified response to the threat posed by the Soviet missiles that had been placed there. He described the approach taken at that time as a "common-lawyer" approach where law is open to a broad range of interpretation and emphasis. Abram Chayes, *The Legal Case for U.S. Action on Cuba*, U.S. Dep't St. Bull. 763 (1962). See also ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 101 (1974); Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550 (Apr. 1963).

<sup>39</sup> To borrow from Professor McDougal, "[t]he highly restrictive language of Secretary of State Webster in the *Caroline* case specifying a 'necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation,' did not require 'actual armed attack,' and the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists. The requirement of proportionality, in further expression of the policy of minimizing coercion, stipulates that the responding use of the military instrument by the target state be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense under the established conditions of necessity." *Id.*

*because they are seeking to acquire chemical weapons and other dangerous weapons.*<sup>40</sup>

Ambassador Bill Richardson, the then-Permanent Representative of the United States to the United Nations notified the Security Council President of the missile attacks in Afghanistan and Sudan, using a mixed argument combining the *Caroline* doctrine and Article 51 of the Charter:

*In response to these terrorist attacks, and to prevent and deter their continuation, United States armed forces ... struck at a series of camps and installations used by the Bin Laden organization to support terrorist actions against the United States and other countries. In particular, the United States forces struck a facility being used to produce chemical weapons in the Sudan and terrorist training and basing camps in Afghanistan.*

*These attacks were carried out after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization. The organization has issued a series of blatant warnings that “strikes will continue from everywhere” against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right to self-defense confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.*<sup>41</sup>

The anticipatory self-defense as discussed above under the *Caroline* case implies the following situation: if you are not attacked, but there is an imminent attack, then a state can act in self-defense as a means of last resort. The *Caroline* doctrine, as agreed by Webster and Ashburton, would allow a target state to act unilaterally against a planned terrorist act emanating from the territory of another state. The *Caroline* doctrine has been used as a justification by Clinton

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<sup>40</sup> President William Jefferson Clinton, Remarks on Departure from Washington, D.C., from Martha’s Vineyard, Massachusetts, 34 Weekly Comp. Pres. Doc. 1642 (Aug. 20, 1998).

<sup>41</sup> Bill Richardson, Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), available at <http://www.jb.law.uu.nl/jb-vol/US-SC.pdf>.

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administration in attacks against Afghanistan and Sudan in 1998. In any case, according to Lord Ashburton, any unilateral action that was otherwise lawful would still have to be conducted in ways that minimized the damage suffered by the state in whose territory it was conducted.

The doctrine seems to actually have longer historical roots. The rule clarified in *Caroline* has been used in a number of other previous cases. The roots are sometimes traced to a 1587 case, where England's Queen Elizabeth I sent a fleet under the command of Sir Francis Drake aiming to attack Spanish and Portuguese harbors, especially Cadiz, with the sole aim to preventing or winning time by delaying the arrival of the "Invincible Armada."<sup>42</sup> A quite similar action was taken by Frederick the Great in a 1756 anticipatory enterprise on Saxony and Bohemia against what he saw as an impending attack by Russia, France, and Austria.<sup>43</sup> In a similar fashion, Britain acted in preemptive self-defense attacking Danish navy as a means of assurance that "these 'assets' did not fall into French hands during the Napoleonic Wars."<sup>44</sup>

Within the more established and legally sound parameters of the right to act in anticipatory self-defense and the more debatable resort to force under the broader preemptive category, the underlying principles that govern any use of force, preventive or reactive, primarily necessity, proportionality and discrimination, form an inherent part of the modern canon on the use of force and ought to be observed. There is an additional obligation flowing from Article 51 of the UN Charter to immediately inform the Security Council of the measures undertaken in self-defense.

As with any other discipline of law or even broader knowledge, context furnishes the arsenal of argumentation with specific nuances and differing features that form the ultimate judgment. In all claims to self-defense, thus "the international legal review of the action will be based upon a prudential contextual assessment of factors such as the degree of the threat presented, the availability of a meaningful organized international response, the urgency of unilateral action to prevent or deflect the attack, and the proportionality of the means chosen to the necessity presented by the threat."<sup>45</sup>

## 2. The justification of the use of force after an attack has occurred by a non-state actor

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<sup>42</sup> See David B. Rivkin, Jr., Lee A. Casey, and Mark Wendell DeLaquil, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 469 - 470 (2005).

<sup>43</sup> See Max Boot, Who Says We Never Strike First? N.Y. TIMES 27 (Oct. 4, 2002).

<sup>44</sup> Rivkin et al. *supra* note 42, at 470. Rivkin et al. note that "[I]n 1939, Britain and France exercised their anticipatory self-defense right in warning Hitler that they would consider an attack on Poland to be a *casus belli*, and acted accordingly once their warnings were disregarded. Germany's armed forces were not, of course, at that time menacing either Britain or France, and the only legal right either state would have had to issue an ultimatum to Germany -- since Poland was not British or French territory -- was rooted in their right to anticipate future attacks." *Id.* at 470.

<sup>45</sup> W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, *supra* note 29, at 88.



## ***2.1. The Case of Afghanistan***

Following the attacks of September 11 carried out in the territory of the United States, the US initiated the use of force against Afghanistan. The two resolutions adopted by the UN Security Council in the aftermath of September 11, resolutions 1368 and 1373, respectively, affirmed the “[I]nherent right of self-defense as recognized by the Charter of the United Nations,”<sup>46</sup> and recognized that the terrorist attacks against the United States constitute a threat to international peace and security. Therefore, the Security Council acknowledged that the situation implicated the right to self-defense, as set forth in Article 51 of the UN Charter.

Article 51 of the Charter, which provides for the individual and collective right of self-defense to be exercised by States, reads as follows:

*“[N]othing 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 necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>47</sup>*

After the September 11 attacks, this right of self-defense was expressly affirmed in the UN Security Council resolutions 1368 and 1373. In its Resolution 1368, the Security Council also authorized “[t]o take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism,”<sup>48</sup> (emphasis added) once it stressed “[t]hat those responsible for aiding, supporting, or harboring the perpetrators, organizers and sponsors of these acts will be held accountable.”<sup>49</sup> The expressions to “use all necessary means,” “take all necessary measures,” or “take all necessary steps” were consistently used by the Security Council to authorize the use of force. Among others, this was the language of Resolution 678, which authorized the use of force in the Gulf War in 1990,<sup>50</sup> Resolution 794 on Somalia<sup>51</sup>— which is considered to be the purest UN-authorized humanitarian intervention so far, Resolution

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<sup>46</sup> S.C. Res. 1368, U.N. Doc. S/Res/1368 (September 12, 2001). S.C. Res. 1373, U.N. Doc. S/Res/1373 (September 28, 2001).

<sup>47</sup> U.N. CHARTER, art 51.

<sup>48</sup> S.C. Res. 1368, *supra* note 46, ¶ 5.

<sup>49</sup> *Id.* ¶ 3.

<sup>50</sup> See S.C. Res. 678, ¶ 2, U.N. Doc. S/Res/678 (November 29, 1990).

<sup>51</sup> S.C. Res. 794, U.N. Doc. S/Res/794 (1992).

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940 on Haiti, which “[a]uthorized Member States to form a multinational force under unified command and control and, in this framework, *to use all necessary means* to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti,”<sup>52</sup> and Resolution 1973 (2011) on Libya, authorizing “all necessary measures” in order “to protect civilians and civilian populated areas under threat or attacks in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”<sup>53</sup>

The basis for the foregoing authorizations of the use of force is Article 39 of the UN Charter, providing that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>54</sup>

On October 2, 2001, the North Atlantic Council of NATO determined that the United States had been subjected to an armed attack. This determination permitted NATO to invoke its right of individual and collective self-defense agreed to under Article 5 of the NATO Treaty and expressly provided for under Article 51 of the UN Charter. Article 5 of the NATO Treaty states:

*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-defense recognized 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.*<sup>55</sup>

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council.

The US Ambassador to the United Nations, John D. Negroponte notified the President of the Security Council through a letter sent on October 7, 2001 that the United States is exercising its right of self-defense in accordance with Article 51 of the UN Charter. The letter reads:

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<sup>52</sup> S.C Res. 940, U.N. Doc. S/Res/940 (1994).

<sup>53</sup> S.C. Res. 1973, U.N. Doc. S/Res/1973 (2011).

<sup>54</sup> U.N. CHARTER, art. 39.

<sup>55</sup> THE NORTH ATLANTIC TREATY, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243 (Apr. 4 1949).

*“[I]n accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11, 2001.*

*On September 11, 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania, and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than five thousand persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since September 11, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks...*

*In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan...*”

The Security Council’s President at that time, Irish Ambassador Richard Ryan, said Council members were broadly supportive of the military action. He read a statement to the press summarizing the Council’s position:

*“[T]he members of the Security Council took note of the letters of the representatives of the United States and the United Kingdom sent yesterday to the President of the Security Council in accordance with Article 51 of the UN Charter in which they state that the action was taken in accordance with the inherent right of the individual and collective self-defense following the terrorist attacks in the United States. The Permanent Representatives made it clear that the military action that commenced on 7 October was taken in self-defense and directed at terrorists and those who harbor them. They stressed that every effort was being made to avoid civilian casualties and that the action was in no way a strike against the people of Afghanistan, Islam, or the Muslim world.”*

The UN Secretary-General, Kofi Annan in a statement of October 8, 2001 affirmed the US’s right to self-defense. Annan stated that immediately after the September 11 terrorist attacks in

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the states of New York, Pennsylvania, and Virginia, the UN Security Council “[e]xpressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts.”<sup>56</sup> He further noted that the Council “[a]lso reaffirmed the inherent right of individual or collective self-defense in accordance with the Charter of the United Nations. The states concerned have set their current military action in Afghanistan in that context.”<sup>57</sup>

Although in the *Nicaragua* case it purported to apply a higher threshold on the right of self-defense, limiting it to an armed attack of *significant scale*, hence not applying to “less grave forms,”<sup>58</sup> the International Court of Justice implicitly recognized in its Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>59</sup> that the post-9/11 responses were taken in self-defense. The Court denied Israel’s claims of self-defense paralleling with military actions in Afghanistan, since as the Court noted, “[I]srael exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory.”<sup>60</sup> In this respect, the outside attacks against the United States on September 11, 2001 could be justified. The Court also recalls the UN Security Council resolutions 1368 and 1373. In this connection, it stated that the circumstances in Israel do not fall under a situation as described by the Security Council resolutions 1368 and 1373.<sup>61</sup> The Court further notes that “[A]rticle 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,”<sup>62</sup> and observes that “[I]srael does not claim that the attacks against it are *imputable* to a foreign State”<sup>63</sup> (emphasis added).

The question of imputability of Al Qaeda’s actions against the United States to the Taliban regime in Afghanistan will be discussed next.

### 2.2. State Responsibility

To address the question of imputability, the state responsibility for actions of non-state entities within its territory will be examined. A State has a dual responsibility, both within its territory

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<sup>56</sup> U.N. Secretary-General Affirms U.S. Right to Self-Defense, *available at* [http://www.usembassy.it/file2001\\_10/alia/a1101021.htm](http://www.usembassy.it/file2001_10/alia/a1101021.htm).

<sup>57</sup> *Id.*

<sup>58</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* I.C.J. Reports 1986, p. 101, ¶ 191. See also *Case Concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. No. 90 (Nov. 6) (Merits), ¶ 51.

<sup>59</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. No. 131 (July 9) (Advisory Opinion).

<sup>60</sup> *Id.* ¶ 139.

<sup>61</sup> In Court’s words, “the situation [in Israel] is ... different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.” *Id.* ¶ 139.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

and outside it, for actions with regard to other states. Or, as Max Huber, the sole arbitrator in *Island of Palmas* case stated:

*“Territorial sovereignty ...involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war.”*<sup>64</sup>

The question here remains the responsibility that a state may have with regard to the actions of a non-state entity, and the extent to which the state needs to be involved in order to be held accountable. The test sets forth by the International Court of Justice in the *Nicaragua* case requires “an effective control” of the state over the actions of non-state actors.<sup>65</sup>

The post-9/11 practice would shed further light to the debate. After the September 11, 2001 terrorist attacks on the United States, President George W. Bush announced that, in responding to those responsible, “[w]e will make no distinction between the terrorists who committed those acts and those who harbor them.”<sup>66</sup> President Bush’s claims that there should be no exception of liability for those who *harbor or support* terrorists, as Professor Wiessner notes, would appear to require an even lower standard of control of the “host” state over the terrorists in its midst. “Still, it is a rule broadly acquiesced in, if not welcomed in the global community of state.”<sup>67</sup>

Both the United Nations Security and Council and the General Assembly have used the *harbor and support* language in their respective resolutions. Resolution 1368 (2001) of the Security Council states “[t]hat those responsible for ***aiding, supporting, or harboring*** the perpetrators, organizers and sponsors of these acts ***will be held accountable***.”<sup>68</sup> Similarly, the UN General Assembly in its September 12 resolution calls “[f]or international cooperation to prevent and eradicate acts of terrorism,” and “stresses that those responsible for ***aiding, supporting, or harboring*** the perpetrators, organizers and sponsors of such acts ***will be held accountable***”<sup>69</sup> (emphasis added).

### ***2.3. Harbor and Support: A new rule of customary international law***

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<sup>64</sup> 2 R. Int’l Arb. Awards 845.

<sup>65</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), I.C.J. Rep. 1986, 14, ¶ 115. See also: *United States Diplomatic and Consular Staff in Iran* (U.S. v. Iran), 1980 I.C.J. 3.

<sup>66</sup> U.S. President George W. Bush, Statement by the President in His Address to the Nation (September 11, 2001), available at <http://www.state.gov/s/ct/index.cfm?docid=5044> [hereinafter STATEMENT BY THE PRESIDENT]

<sup>67</sup> Professor Dr. iur. Siegfried Wiessner, *The Articles on State Responsibility and Contemporary International Law*, THESAURUS AGROASIMUM (2005).

<sup>68</sup> S.C. Res. 1368, *supra* note 46, ¶ 3.

<sup>69</sup> G.A. Res. 56/1, ¶ 4, U.N. GAOR, 56<sup>th</sup> Sess., U.N. Doc. A/56/L.1 (September 12, 2001).

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In light of the aforementioned UN resolutions and their relevant content, the next question to be addressed is whether a specific norm of customary international law has emerged. The classic legal definition of international custom is provided by Article 38 of the ICJ Statute and is conceived as “[e]vidence of a general practice accepted as law.”<sup>70</sup> In turn, this means two elements: (1) *usage*, or state practice, and (2) *opinio juris*, a subjective element that validates the acceptance of that practice as law.<sup>71</sup>

Traditionally, the development of new rules of customary international law has been equated to a very slow and/or long process.<sup>72</sup> A new, more dynamic concept of the development of new customary international rules has been, however, advanced by the ICJ in its decision in the *North Sea Continental Shelf Cases*. As noted elsewhere, “[n]ational legislation, parliamentary and administrative practice, and the case-law of municipal tribunals” is no more the only valid source of reference in confirming the emergence of a new customary rule; additionally, the views or statements of state representatives should also serve as a source of confirmation.<sup>73</sup> For example, in the *Nicaragua* case, the ICJ relied on the statements made by states at diplomatic conferences for confirmation of the customary rule.<sup>74</sup>

The Court’s decision in the *North Sea Continental Shelf Cases* thus marks a radical shift in the understanding of the process of customary international law formation, deviating from the traditional understanding or requirement for an extensive period of time and a specific evidence of *opinio juris* in forming new rules of customary law.<sup>75</sup> The Court held that:

*Although the passage of only a short period of time is not necessarily ... a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.*<sup>76</sup> (Emphasis added)

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<sup>70</sup> Statute of the International Court of Justice, art. 38, ¶ 1 (b).

<sup>71</sup> See Katherine N. Guernsey, *Comment: The North Continental Shelf Cases*, 27 OHIO. N.U.L. REV 141, 143 (2000).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 154.

<sup>74</sup> See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), I.C.J. Rep. 1986

<sup>75</sup> Katherine N. Guernsey, *supra* note 71, at 153.

<sup>76</sup> *North Sea Continental Shelf* (F.R.G. v. Den & Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 28).

Thus, no matter how short the period from September 11, 2001 may be considered, in the Court's view, it is not a bar to the formation of a new customary international rule. It is significant to note that both the UN General Assembly and Security Council agreed and adopted the same language in their resolutions, following September 11. President George W. Bush, seeking to attribute the acts to the Taliban regime of Afghanistan, in his address to the nation on the evening of September 11, declared that "[n]o distinction between the terrorists who committed these acts and those who harbor them" will be made.<sup>77</sup> Both the General Assembly and the Security Council in their resolutions adopted one day after the attacks stated that, "[t]hose responsible for aiding, supporting, or harboring the perpetrators, organizers and sponsors of such acts will be held accountable."<sup>78</sup> Furthermore, tens of declarations of support were received in the immediate days after the attack by the government of the United States from a very diverse body of states.<sup>79</sup> Many states offered finances, intelligence, law enforcement, military support, and humanitarian aid. Other states joined the United States in its military operations in Afghanistan, while the others, including Saudi Arabia and the United Arab Emirates condemned Taliban's regime failure "[t]o stop harboring criminals and terrorists."<sup>80</sup> For the foregoing reasons, it can be argued that the *harbor and support* by the state of a non-state group or entity is sufficient to attribute the actions of the non-state actor to the state for purposes of international responsibility.

## II. FUTURE TRENDS AND CONCLUSIONS

As most recent cases of the use of military instrument, such as in Syria, Libya, and the various instances referred to in the article reveal the constant employment of coercive measures in the context of state interaction in international life.

States have resorted to the use of force both with and without the approval of the UN Security Council. This practice is likely to continue in the future framed both within the confines of anticipatory and preemptive self-defense. The probability is perhaps even higher given the modern state of world affairs and the risks posed by nuclear weapons and transnational criminal groups.

Article 51 of the UN Charter mandates the use of force in self-defense. Its phrasing has been understood to even allow for resort to force prior to the comments of the attacks by the other party, for it provides that "[n]othing in the present Charter shall impair the inherent right of

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<sup>77</sup> STATEMENT BY THE PRESIDENT, *supra* note 66.

<sup>78</sup> S.C. Res. 1368, *supra* note 46; G.A. Res. 56/1, *supra* note 69.

<sup>79</sup> White House Website, News Releases for September 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/09>.

<sup>80</sup> *See Saudis Criticize the taliban and Halt Diplomatic Ties*, N.Y. TIMES, Sept. 26, 2001, at B5; *Kingdom Cuts Ties with Taliban; Militia Harbors Terrorists Who Cause Harm to Islam and Tarnish the Names of Muslims*, MIDDLE EAST NEWSFILE, Sept. 26, 2001, *available at* LEXIS, News Group File.

## Self-Defense in Operation: The Anticipatory and Preemptive Use of Military Instrument

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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.” In a number of cases, as discussed in this article, states have resorted to the use of military instrument prior to the occurrence of any attacks and received wide degree of support by the international community. The more complex question here relates to the circumstances under which one can support the use of force in pre-emptive self-defense, if at all. Or, in other words, the determination of what situations pose or constitute an *imminent* or *underway* threat or attack of the level that could justify anticipatory self-defense. The existent practice of the ICJ, including the *Nicaragua*, *Oil Platform*, and *Wall* cases would appear to demand some form of actual attack, be it, as the Court put it in the *Oil Platform* case, “the mining of a single military vessel,” which in its view, “might be sufficient to bring into play the ‘inherent right of self-defense’.”

In any event, the UN panel has proposed five basic criteria, which have been adopted in the Secretary-General’s Report, which however still remain to be made operational in the arena of use of force:

- (a) seriousness of threat (is the threat serious enough to justify prima facie the use of force?);
- (b) proper purpose (is the primary purpose of the proposed use of force to halt or avert the threat in question?);
- (c) last resort (has every non-military option been explored and exhausted?);
- (d) proportional means (is the force proposed the minimum necessary to meet the threat?);
- (e) balance of consequences (is it clear that the consequences of action will not be worse than the consequences of inaction?).<sup>81</sup>

Beyond preemptive self-defense and other use of force without the UN Security Council authorization, the international community is more willing to accept the use of force in self-defense in response to actual attacks, even though the attacks have not been *directly* taken by states, but are attributable to them. Considering Afghanistan, the world community agreed with the military actions taken against that state, albeit the source of attack was the terrorist network of *Al Qaeda*, a non-state actor. The previous military actions against Afghanistan in 1998 by Clinton administration, after the bombings of Embassies in Kenya and Tanzania by *Al Qaeda*, although of a lesser gravity, received solid support from the international community. For instance, the League of Arab States that condemned the attack on Sudan as a violation of international law did not react in the case of military attacks against *al Qaeda*’s suspected camps inside Afghanistan. In another event in early 1999, after the massacre of tourists, including Americans in Uganda by Hutu guerrillas, who operated from the Democratic Republic of the

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<sup>81</sup> REPORT OF THE SECRETARY-GENERAL, *supra* note 4, ¶ 207.



Congo, there would appear to have been no protest over Ugandan President Musaveni's decision to pursue the guerrillas into Congolese territory.

The International Court of Justice has had occasion to deal with cases involving or invoking the inherent right to self-defense. The latest of these cases has been the *Wall* Advisory Opinion, in which it recognized the existence of an inherent right of self-defense in the case of armed attack by one State against another State. This right, in the case of use of force against Afghanistan, has been recognized by Security Council resolutions 1368 (2001) and 1373 (2001) and, therefore, implicitly, also by the ICJ in the *Wall* case by way of attribution of state responsibility for acts of non-state actors. As a result, it can be argued that a new customary rule of international law, known as the *harbor and support*, came into existence.