The Right of Self-defence in the UN Charter Art. 51

Examensarbete i folkrätt, 20 poäng
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Uplands Nation

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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>PLO</td>
<td>Palestine Liberation Organization</td>
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<td>SC</td>
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<td>UNCIO</td>
<td>United Nations Conference on International Organization</td>
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<td>YILC</td>
<td>Yearbook of the International Law Commission</td>
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1 Introduction, Purpose and Method

1.1 Introduction

This essay is about the right of self-defence for states under Art. 51 of the UN Charter. It does not directly deal with the general regulation of use of force by states but it will be necessary to deal with this partly in order to get the whole picture. The main way to handle international armed conflicts under the UN Charter is by collective enforcement action (by states acting together) decided by the Security Council according to Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression). As self-defence is unilateral action by a state it is an exception to the collective security system in the UN Charter.

Ever since the adoption of the UN Charter in 1945 there has been a debate in the doctrine about the right of self-defence and its content with sharply conflicting views and this is still the case today. In the end of 2001 the right of self-defence was a burning issue during the U.S. war in Afghanistan following the terrorist attack against the USA on 11 Sept. 2001. What had this to do with self-defence it might be asked? Indeed the sceptical minded might even ask who cares about the right of self-defence when powerful states (notably the USA) act as they wish anyway regardless of international law? This essay will hopefully show that the right of self-defence is a significant rule in international law and that it is worth studying it.

1.2 Purpose of the Essay

The purpose of this essay is to deal with the right of self-defence in the UN Charter Art. 51 and examine the content of that right. This also means that the historical development of the right of self-defence in international law will have to be examined. Another purpose is to critically study the existing right of self-defence to see if it is a reasonably clear rule in international law and more importantly, if it is a rule that is likely to help maintain international peace and security. The purpose is not to deal with
every possible aspect of the right of self-defence but to examine the core of this right and some controversial issues.

1.3 Delimitation of the Subject

This essay deals with individual self-defence which means that collective self-defence is not discussed. In particular it deals with the right of self-defence under the UN Charter and not under customary international law which should be pointed out since the two rules are not identical. This was confirmed by the ICJ in the Nicaragua Case where it held regarding the relationship between the UN Charter and customary international law on self-defence that “[t]he areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content”. But it is clear from the case that customary international law to a great deal corresponds with the law of the UN Charter which is natural since the UN Charter itself has influenced customary international law for over 50 years by now.

The doctrine “protection of nationals abroad” is an uncertain and controversial doctrine which has its place under the right of self-defence but I will not deal with it in this essay. It means that a state uses force to protect its nationals in another state without that state’s consent. This special doctrine has been invoked by a few states on some occasions but it is probably illegal under international law.

1.4 International Law and Legal Method

The nature of international law is different from that of municipal law in a number of ways. International law is a horizontal legal system with no clear supreme authority and a limited centralization of the use of force. This means that “the actual role and capability of international law in governing the relations between states must not be

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1 Collective self-defence is a special case of self-defence and for practical reasons I have chosen to deal only with individual self-defence here. Moreover, collective self-defence is based on individual self-defence and only adds a “collective” aspect to it.


3 See Malanczuk P, Akehurst’s Modern Introduction to International Law, p. 315.

4 Although it is a significant body the United Nations Security Council has a limited law-enforcement capacity due to both legal and political factors.
exaggerated, in view of the decisive significance of military, economic, political and ideological factors of power”.

On the other hand, the role of international law in relations between states is definitely not insignificant because states have a self-interest in the existence of a legal order which works on the basis of reciprocity. Disputes between states are therefore usually accompanied by references to international law as a justification for their actions. International law is in practice accepted as legally binding by states, let it be that they certainly do not always follow the rules in it. Still, international law matters for states.

With this in mind we can move on to the issue of relevant sources of international law. In the Statute of the International Court of Justice Art. 38(1), which is generally accepted as listing the sources of international law, it is provided that the primary sources are international conventions, international custom, as evidence of a general practice accepted as law and the general principles of law recognized by civilized nations. As subsidiary means for the determination of rules of law judicial decisions and the teachings of the most highly qualified publicists of the various nations are mentioned. In the Continental Shelf case, the ICJ held that that the substance of customary international law must be “looked for primarily in the actual practice and opinio juris of states”. Opinio juris means that states follow some particular practice because it is accepted as law (subjective element).

I am mentioning this as a general background to the forthcoming discussion about the law on self-defence. A great deal has been written about self-defence in the doctrine with many conflicting views about its content, which shows that the law is far from clear. However the sources in international law are quite clear, it is more a question of different interpretations of Art. 51 in the UN Charter. Anyway the doctrine is just a secondary source in international law although good arguments can be found there. The primary way to examine the content of Art. 51 in the UN Charter and the right of self-defence must be to closely scrutinize the rule itself and apply the rules for treaty interpretation. It should already at this stage be said that there are no simple “truths”

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5 Malanczuk P, Akehurst’s Modern Introduction to International Law, p. 6.
6 Ibid.
8 Malanczuk P, Akehurst’s Modern Introduction to International Law, p. 44.
about the right of self-defence and the conclusions will inevitably involve a degree of uncertainty. With this warning I will now move on to the substantive issues.

1.5 Outline

In the beginning of the essay I mention something about the nature of the right of self-defence. Next I deal with self-defence in treaty law and customary international law through history up to the UN Charter because this may have relevance for Art. 51 in the Charter. After this I deal with the UN Charter and the issue of interpretation as this is of great importance when one studies Art. 51 and the right of self-defence. Then I go into the substance of the UN Charter and first examine Art. 2(4) concerning the prohibition of use or threat of force. This is without doubt one of the most important rules of the Charter and self-defence is an exception to this rule. In order to make a correct assessment of the content of the right of self-defence one must study the main rule in Art. 2(4) because this rule and Art. 51 are parts of the same regulation of use of force by states. After this I deal with the main subject, the right of self-defence, and begin with a general discussion on Art. 51. The next issue is the criterion “armed attack” in Art. 51 and how to define this term. The next part is about permissible objects of self-defence, i.e. under what circumstances can a state exercise self-defence against other states or even terrorists? This is followed by a discussion on the limits for the exercise of self-defence including the demands for necessity, proportionality and immediacy. The next subject is the controversial issue of preventive or anticipatory self-defence, which means that a state uses force in self-defence against a supposed future attack by another state. This entails a discussion on the definition of the beginning of an armed attack. Naturally the terrorist attack against the USA on 11 Sept. 2001 and the following U.S. war in Afghanistan is dealt with as it concerns self-defence and international terrorism. This is followed by a discussion about the role of the Security Council in relation to the right of self-defence under Art. 51. I end the essay with an assessment of the right of self-defence de lege lata and a discussion de lege ferenda on some matters. Finally I state my conclusions regarding Art. 51 and the right of self-defence.

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10 The other exception is of course enforcement measures by the Security Council under chapter VII concerning action with respect to threats to the peace, breaches of the peace, and acts of aggression.
2 The Nature of the Right of Self-defence

In the UN Charter Art. 51 the phrase “inherent right of individual or collective self-defence” is used which implies that this is a “natural” right. The roots of this view come from the traditional naturalist doctrine expressed for example in Grotius’s words: “The right of self-defence… has its origin directly, and chiefly, in the fact that nature commits to each his own protection…”.\(^{11}\) Preservation of the self was regarded as a natural right both for states and individuals that could not be abrogated or limited by positive law.

A second school of thought with the proposition that self-defence cannot be governed by law is the belief of subordination of law to power. It is the belief that “[t]he survival of states is not a matter of law”.\(^{12}\) This implies that the preservation of the state has precedence over positive law and that each state must decide what is necessary for its self-defence. In classic international law this view was the valid one in state practice.

Today self-defence at the international level is regarded as a legal right defined and legitimated by international law. It is also the only acceptable view on self-defence if international law is going to have any relevance for state practice in this area.

Self-defence should be distinguished from retortion and reprisal. A retortion is a measure of self-help which is unfriendly but within the legal powers of the state employing retortion and therefore it is always a legal measure. For example it could concern economic measures to impose differential duties on another state’s import in reply to some unfriendly measure by that state. Reprisals, on the other hand, are measures of self-help involving force taken by a state in reply to an international wrong done to the state or its nationals by another state. Thus they are acts in retaliation to illegal acts, which have remained unredressed after a demand for amends. An act which is a reprisal would under normal circumstances be illegal under international law which separates it from a retortion. The purpose is to impose on the offending state reparation for the offence and the avoidance of new offences.


\(^{12}\) Statement by Dean Acheson, former Secretary of State in the United States cited in Schachter O, p. 260.
Self-defence is an act of self-help by a state to prevent an illegal act from being committed by another state, thus the purpose is solely to defend the state and not to retaliate. It is the purpose of defence which is essential to characterize an act as self-defence.
3 The Law on Self-defence through History

3.1 Customary International Law up to the First World War

The development of the law on self-defence or similar concepts is a part of the general development of the regulation of use of force by states. In the Middle Ages Christian theologians, e.g. St. Thomas Aquinas (1225-1274), developed the concepts of “just” and “unjust” wars (bellum iustum and bellum iniustum) which were meant to give guidance on lawful reasons for resort to war by its adherents. For example St. Thomas Aquinas said that one of the criteria for a just war was that a just cause was required, namely that those who were attacked should be attacked because they deserved it on account of some fault.\(^{13}\) The bellum iustum theory was created by the doctrine and was never a valid rule of international law. This meant that states were free to resort to war, as an aspect of sovereignty, since no prohibition of war or other use of force existed.\(^{14}\) This major deficiency in international law lasted up to the 20\(^{th}\) century.\(^{15}\) With this in mind it is not surprising that the right of self-defence had a very limited significance during this time as no justification was needed by a state to wage war. Strangely enough, however, in times of peace use of force was restricted by international law and there the right of self-defence, and similar justifications, had a role to play.\(^{16}\)

The customary law of the 19\(^{th}\) century is complex partly because of the contradiction between the existence of a right for states to go to war on the one hand and a tendency still to provide different justifications for resort to war on the other hand. There is also a lack of coherent terminology. Terms that were used except self-defence were inter alia self-preservation, necessity and protection of vital interests.\(^{17}\) There was no clear distinction between these terms but self-preservation was a wider concept than self-defence as was demonstrated by the invasion by Germany of Luxembourg and Belgium in 1914 on the plea of self-preservation, although there was no immediate threat of

\(^{13}\) Summa Theologica, II ii 40, in Brownlie I, International Law and the Use of Force by States, p. 6.


\(^{15}\) Ibid., Brownlie I, International Law and the Use of Force by States, p 19 f.

\(^{16}\) Randelzhofer A, in Simma B (ed.), p. 663. However a state could avoid any rules by resorting to war which was an absurd regulation of use of force.
attack by any other state.\textsuperscript{18} Self-defence was possibly a particular instance of self-preservation. The doctrine of necessity was very similar to the right of self-preservation and it was applicable when action was necessary for the security, safety or fundamental interests of the state. It is easy to see that both these terms (self-preservation and necessity) were vague by nature with an unclear content. A common feature of the different justifications was that it was the state taking action which was regarded as the judge of the situation.\textsuperscript{19} This led to a subjectivity of these terms which decreased their value as legal terms capable of regulating states’ conduct. Instead they were used mainly as a camouflage for the self-interest of states to provide a just cause for action.

The Caroline case in 1837 is a classic case concerning self-defence in international law.\textsuperscript{20} It concerned a Canadian rebellion against the British authorities in Canada. Insurgents in Canada were supported by sympathisers in the United States and the United States authorities were unable to suppress the activities of the sympathisers. A U.S. vessel, the Caroline, was used to transport reinforcements from the U.S. shore to an island. A small British force attacked the Caroline at a dock on the U.S. shore, set her on fire and sent her drifting over Niagara Falls. Two Americans lost their lives in this incident and the United States made a demand for redress which Britain refused claiming inter alia self-defence and self-preservation. The important phase of this case, however, took place in 1842 after the arrest of a British national, McLeod, on a charge of murder and arson in connection with the events in 1837. Britain demanded McLeod’s release and inter alia repeated that the destruction of the Caroline had been a legitimate act of self-defence which the United States disputed. In a note by Daniel Webster, the American Secretary of State, he called upon the British Government to show a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”. He then went on to say that it also had to show that the local authorities of Canada “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”. This is an expression of the so called proportionality principle which is a part of the

\textsuperscript{17} Brownlie I, International Law and the Use of Force by States, p. 40 f, Waldock C H M, The Regulation of the Use of Force by Individual States in International Law, Rec des Cours 81 (1952 – II) p. 461 f.
\textsuperscript{18} Ibid. , p. 462.
\textsuperscript{19} Brownlie I, International Law and the Use of Force by States, p. 42 f, Bring O, FN-stadgan och världspolitiken, p. 152.
\textsuperscript{20} The facts here are in Jennings R Y, The Caroline and McLeod Cases, AJIL Vol. 32, 1938, p 82 ff.
self-defence rule. Britain agreed on the content of the law on self-defence but justified its action by claiming that it fulfilled these demands. Thus the two states agreed on the law on self-defence in this case.

In this dispute between the United States and Britain there was no clear distinction being made between self-defence and self-preservation in the correspondence. Instead the terms were mixed as if they were synonymous terms. The Caroline case was interpreted as an instance of the doctrine of necessity or self-preservation and did not mean that a single right of self-defence was introduced. Nevertheless this was an attempt to set up limits for these kind of rights and Webster’s statement was generally accepted as a correct description of international law.21 Whereas the Caroline case did not revolutionize the law at the time, remember that there was still a right for states to resort to war, it would be of importance in the future development of international law on self-defence.

Classic international law on self-defence and similar rights lasted during the 19th century and until around 1920 (after the First World War). It was characterized by a distinction between measures in war, where there were no rules governing the use of force, and forcible measures of self-help short of war, including self-defence, where there at least in theory existed some limits for the use of force. In general it is clear that the regulation of use of force by states had major shortcomings.

Before the First World War a vague principle of anticipatory self-defence had been established. In case of an imminent attack the threatened state had a right to strike first against the hostile state.22 This is not surprising in view of the nature of the right of self-preservation and the doctrine of necessity which are capable of having a very wide application.

3.2 The Period of the League of Nations and Self-defence

After the end of the First World War the Covenant of the League of Nations was adopted in 1919 and it marked the beginning of a new era of the regulation of use of force by states in international law. Though it should be pointed out that the League’s membership was not universal and did not include the United States and the U.S.S.R..

22 Bring O, p. 152 f.
The Covenant introduced a distinction between legal and illegal wars based upon if procedural requirements for the pacific settlement of disputes had been observed by the states. Under Art. 11 any war or threat of war was a matter of concern to the whole League. According to Art. 12 the Members of the League undertook to submit all disputes likely to lead to a rupture to arbitration, judicial settlement or conciliation by the Council and not go to war until 3 months after the arbitrator’s award, the Court’s decision or the Council’s report. And in Art. 13-15 Members undertook not to go to war at all against a state which complied with the award of the arbitration, the judgement of the Court or the unanimous report of the Council (not counting the votes of the disputing states). The combined effect of Art. 11-15 was to set up some procedural restrictions on the right to resort to war but there was in reality only a partial renunciation of war. Despite all the shortcomings of the League it was the beginning of a development leading to a greater restriction on use of force by states, including a more restrictive view on self-defence.

Other documents of relevance are the Locarno treaties of 1925 and the most important instrument was a treaty of mutual guarantee between Germany, Belgium, France, Great Britain and Italy. In Art. 2 Germany and Belgium and also Germany and France mutually undertook that they would in no case attack or invade each other or resort to war against each other. This would not apply, however, inter alia in the case of the exercise of legitimate self-defence, which was resistance to a violation of the undertaking just mentioned. This reflects a more restrictive view on the right of self-defence than under classic international law.

The General Treaty for the Renunciation of War (called the “Kellogg-Briand pact”) was signed on 27 Aug 1928 and has been ratified or adhered to by 67 states. It is still formally in force but has for practical purposes now been superseded by the UN Charter. The treaty had an almost universal application since only four states (all in South America) in international society as it existed before the Second World War were not bound by it. Art. I reads: “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” Art. II contained an obligation for states to solve all

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disputes or conflicts by pacific means. This treaty was the first treaty with a comprehensive prohibition of war in international relations. There is some uncertainty as to whether this treaty also prohibited armed force short of war. As Brownlie has shown, the treaty played a significant role in international relations and state practice in the period up to the Second World War. In the years after the treaty several treaties were concluded which reaffirmed the obligations of the Kellogg-Briand pact.

The Kellogg-Briand pact was accepted by the signatories only with the reservations of the right of self-defence set out in the diplomatic exchanges prior to signature of the treaty. Many states expressed reservations relating to the right of “legitimate defence” or self-defence but it was not considered necessary to include such a reservation in the treaty. For example the Chechoslovak reservation stated that “each power is entirely free to defend itself according to its will and its necessities against attack and foreign invasion”. The American reservation stated that there was nothing in the treaty which restricted or impaired in any way the right of self-defence. “That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.”

This implies that a state should be its own judge regarding the use of self-defence but the subsequent state practice up to the Second World War did not confirm this view. When Japan in 1931 described the hostilities of Japanese forces against China in Manchuria as measures of self-protection, claiming the purpose of protecting the lives and property of nationals, this was rejected by the Special Assembly of the League which stated that the Japanese military operations could not be regarded as measures of self-defence. Another example is the Italian action against Ethiopia in 1935 where Italy partly justified it on the ground of necessity for action in face of Ethiopian military preparations and attack. The League of nations did not consider that this argument was

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25 The International Law Commission held that a signatory state which threatened to resort to armed force for the solution of an international dispute or conflict was violating the pact. Report of the 38th Conference of the International Law Association, Budapest (1934), p. 67, in Harris D J, Cases and Materials on International Law, p. 862.

26 Brownlie I, p. 76. See the list in footnote 1.

27 Ibid. p. 237.

28 Ibid. p. 236.

justified by the facts and disregarded other arguments that action to protect vital interests and security was justified. It also rejected the argument that Italy had the right to decide questions of self-defence for itself and Italy was stated to have acted in violation of the pact. These cases show that the plea of self-defence was objectively assessed by the international community and also that self-defence was developing into a more restrictive right allowing states to meet force with force. The German plea of self-preservation when its forces occupied Bohemia and Moravia in March 1939 was repudiated by many governments.

Without going into details of state practice on self-defence up to the Second World War it seems correct to say that permissible self-defence for a state in 1939 was resort to force in response to an actual or imminent use of force by another state. Thus anticipatory self-defence was permitted subject to the restrictions imposed by the Caroline case. But self-defence to assert legal rights in general, which had been allowed under the right of self-preservation or the doctrine of necessity, was not permitted any longer.

31 Brownlie I, p. 249.
32 Ibid. p. 250, Bring O, p. 156.
4 The UN Charter and the Issue of Interpretation

Finding the correct way to interpret the UN Charter is essential if one searches for the true meaning of its provisions. The ICJ qualifies charters as “constitutions” and employs the functional method for their interpretation which is a method of interpretation focusing on the purpose of the organisation.\(^{33}\) According to Art. 5 of the Vienna Convention on the Law of Treaties (1969)\(^ {34}\) the convention applies to any treaty which is the constituent instrument of an international organization which of course is true for the UN Charter. Strictly it only concerns treaties concluded subsequently to the entry into force of the Convention in 1980 (Art. 4) but the rules of interpretation in the Convention are now regularly applied as custom by the ICJ.\(^ {35}\) Under Art. 31(1) of the Convention a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus the starting point for an interpretation of the UN Charter is obviously the text which means that it must be analysed. The good faith rule is a general principle of law which calls for a non-arbitrary interpretation of treaties and forbids deviation from its “true” substantial meaning.\(^ {36}\) According to Art. 1(1) the primary purpose of the United Nations is to maintain international peace and security and to act collectively to attain this purpose. The primary object is a world in peace or, as it says in the preamble of the Charter, “to save succeeding generations from the scourge of war”.

Already the PCIJ (the forerunner of the ICJ) said that “it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined by particular phrases which, if detached from the context, may be interpreted in more than one sense”.\(^ {37}\) It is therefore necessary to compare different provisions of the UN Charter and study the whole structure of the Charter when one studies for example the provision about self-defence.

Under Art. 31(3)(b) there shall be taken into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its


\(^{34}\) 1155 UNTS, p. 331.

\(^{35}\) E.g. in the Maritime Delimitation and Territorial Questions case, ICJ Rep. 1995, p. 6 at p.18.


interpretation. As pointed out by Ress, the subsequent practice of the UN organs and/or the member states can be seen either in a historical-subjective or in a dynamic-objective way. The historical-subjective view means that subsequent practice is a factor of interpretation that refers to the dominant opinions of the parties to the treaty at the time of its conclusion (what did they mean then?). I agree with Ress that the better view is a dynamic-objective understanding where subsequent practice by the parties represents a dynamic consensus of interpretation based on the purpose of the organization (what do they mean now?). It is dynamic because the interpretation of a provision may change over time as the conditions change. For the UN Charter this is especially relevant as it was concluded over 50 years ago and it needs to be adapted as the world changes.

According to Art. 32 of the Vienna Convention recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31 inter alia leaves the meaning ambiguous or obscure. When it comes to the UN Charter the preparatory works has a somewhat doubtful value because the admission of a great number of states since the time of its conclusion. Only 50 states participated in the drafting of the Charter and the United Nations has now almost four times as many members (189 states). The preparatory works of the Charter should therefore be used with caution and are anyhow just a supplementary means of interpretation.

Art. 33(1) of the Vienna Convention provides that when a treaty has been authenticated in two or more languages the text is equally authoritative in each language. This means that according to Art. 111 of the UN Charter the Chinese, French, Russian, English and Spanish Charter texts are equally authentic, since the Charter does not provide that one particular text should prevail in case of divergence. According to Art. 33(3) of the Vienna Convention the terms of the Treaty are presumed to have the same meaning in each authentic text which means that any interpretation can normally rely on the correctness of one of those texts. I am mentioning this because it could have some relevance when one interprets Art. 51 of the UN Charter concerning the right of self-defence (the English and French texts are not identical as will be seen).

39 Ibid. p. 34.
5  The Prohibition of Use or Threat of Force under the UN Charter

Self-defence is an exception to the general prohibition of use (or threat) of force in the UN Charter. It is necessary to study the latter rule first in order to get a correct understanding of the law on self-defence. Both rules deal with the regulation of use of force by states in international law.

5.1  The Prohibition of Force in Art. 2(4)

The most basic and important principle of the UN Charter is the principle in Art. 2(4) which reads: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” There is a great deal of disagreement about the meaning of this principle which is something to regret since it is of paramount importance. It is clear though that the provision proscribes all levels of force, i.e. not just war but also forcible measures short of war. This is a major improvement compared with earlier treaties, e.g. the Kellogg-Briand Pact, which used the word “war” in their provisions that did not cover all levels of force between states. Another noticeable thing with Art. 2(4) is that also threat of force is prohibited which was not the case in the Kellogg-Briand pact.

The prevailing and, it seems, correct view is that Art. 2(4) deals with armed force and not other kinds of force. The reason for this is that in the Preamble of the Charter it says that one of the goals of the United Nations is that “armed force shall not be used, save in the common interest”. At the San Francisco Conference in 1945, where the UN Charter was adopted, a proposal by Brazil to also include economic coercion in the prohibition of force was explicitly rejected. It is logical then that Art. 2(4) should only deal with armed force since the Charter should be read as a whole. However in the preamble of the “Declaration on the Enhancement of the Effectiveness of the Principle

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41 UNCIO Vol. 6, p. 334 f, 609.
of Refraining from the Threat or Use of Force in International Relations”, a GA Resolution of 18 Nov. 1987, the General Assembly reaffirmed “the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State”. Besides the fact that this is a GA Resolution (and therefore only a recommendation) paragraph 33(2)(a) of the declaration states that nothing in it shall be construed as “[e]nlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful”. This means that this resolution cannot affect the conclusion that Art. 2(4) only deals with armed force.

Not only direct armed force, i.e. the open incursion of regular military forces into the territory of another state or cross-border shooting into that territory, is prohibited by Art. 2(4) but also indirect force. “Indirect force” refers to the participation of one state in the use of force by another state and also to a state’s participation in the use of force by unofficial bands organized in a military manner, e.g. irregulars, mercenaries or rebels. Support for this view can be found in the GA Friendly Relations Declaration, in the eighth and ninth paragraphs of its section dealing with the prohibition of force. This issue will be dealt with more later in connection with the definition of "armed attack" in Art. 51.

5.2 “Against the Territorial Integrity or Political Independence of a State”

Art. 2(4) prohibits the use (or threat) of force “against the territorial integrity or political independence of a state” and this phrase has been the source of controversy regarding the issue if it should be seen as a qualification of the prohibition. The implication is that force not directed against these values is permitted under the Charter. The preparatory works does not support this reading of the prohibition. In fact, the first two forms of the prohibition (territorial integrity and political independence) had not been part of the Dumbarton Oaks Proposals (the original proposal) but was inserted at the San Francisco Conference at the request of several smaller states, which wanted particular emphasis to be placed on the protection of territorial integrity and political

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43 GA Res. 2625 (XXV) of 24 October, 1970.
independence. There was no intention to restrict the original text with a general prohibition of force by states.\footnote{UNCIO Vol. 6, p. 556-558, 304, 334-335.}

In the doctrine Bowett argues that since the phrase has been included it must be given its “plain meaning”. According to him this means that force not aimed against the territorial integrity or political independence of a state is permitted (he mentions e.g. force to protect the lives and property of nationals abroad).\footnote{Bowett D W, Self-defence in International Law, p. 152.} Asrat argues along the same line but is less extreme saying that Art. 2(4):s “explicit terms prohibit the use of force in international relations against values protected by the Article, and its implicit terms permit the use of unilateral force against breaches of the prohibition of force”.\footnote{Asrat B, Prohibition of Force Under the UN Charter: A Study of Art, 2(4), p. 14.} Lauterpacht on the other hand argues that territorial integrity coupled with political independence is synonymous with territorial inviolability which means that the words “against the territorial integrity or political independence” does not limit the prohibition of the use (or threat) of force.\footnote{Lauterpacht H (ed.), Oppenheim’s International Law, p. 154.} In view of the preparatory works this latter opinion seems to be the correct one, i.e. the phrase discussed does not have a delimiting effect on the prohibition of force in Art. 2(4).

5.3 “Or in any Other Manner Inconsistent with the Purposes of the United Nations”

Art. 2(4) also includes the phrase “or in any other manner inconsistent with the Purposes of the United Nations”. The question is then if unilateral force by a state, not acting in self-defence under Art. 51, can be considered not to be inconsistent with the purposes of the United Nations. This is very unlikely when one looks at the purposes of the United Nations. The primary purpose is to maintain international peace and security and to take \emph{collective} measures to that end (Art. 1(1)). Besides, in the preamble it says that force shall not be used, “\emph{save in the common interest}”. This should mean that
unilateral force by a state cannot be consistent with the purposes of the United Nations (except in self-defence under Art. 51). 48

5.4 Art. 2(4) and Reprisals

One important effect of Art. 2(4) is that armed reprisals are illegal under the UN Charter as has been clarified by the Security Council on several occasions. In its Resolution 188 of 9 April 1964 regarding the British air attack on territory of the Yemen Arab Republic on 28 March 1964 it condemned reprisals as incompatible with the purposes and principles of the United Nations (I will come back to this resolution later in the essay). It has also condemned Israel for carrying out acts of military reprisal against its neighbour states. 49 The illegality of acts of reprisal involving the use of force was confirmed by the GA Friendly Relations Declaration 1970. 50

5.5 Conclusion

The final result is then that Art. 2(4) implies a general prohibition of the use of force by states except in self-defence under Art. 51. This conclusion is supported by Art. 2(3) which states that “[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”. According to the rules of treaty interpretation a treaty should be read as a whole and Art. 2(3) is the positive expression of the obligation in Art. 2(4). 51

As shown above there are some critics, however, of this wide interpretation of Art. 2(4). The sharpest critic is perhaps Stone who calls this interpretation of Art. 2(4) “the

48 However the phrase “or in any other manner…” in Art. 2(4) suggests that the protection of territorial integrity and political independence of a state does not cover all kinds of force which is a little confusing (the argument earlier was that it did). Actually, the terms “territorial integrity” and “political independence” seem to be superfluous and has only the purpose of clarifying the content of the prohibition in art. 2(4).

49 See e.g. SC Res. 228 of 25 Nov. 1966 and Res. 270 of 26 Aug. 1969.

extreme view”. He brings forward the same type of arguments as Bowett regarding
the scope of the terms “territorial integrity” and “political independence” and also points
to the fact that the purpose of the United Nations to maintain international peace and
security (Art. 1(1)) includes “to take effective collective measures…to bring about by
peaceful means, and in conformity with justice and international law, adjustment or
settlement of international disputes…”. He argues that it is “not self-evident what
obligations (if any) are imported where no such effective collective measures are
available for the remedy of just grievances”. When it comes to the phrase “that armed
force shall not be used, save in the common interest” in the preamble he holds that it
still leaves to be answered what this common interest is. According to him, to accept
“the extreme view” regardless of whether the machinery for adjustment works (pacific
settlement of disputes under chapter 6 or collective enforcement measures under chapter
7 in the UN Charter) would lead to absurdities and injustice. This is because states
would be required to remain passive to any and all wrongs which do not involve “armed
attack” within Art. 51 (the right of self-defence).

It must be remembered that Stone’s work was written during the cold war when the
collective enforcement mechanism of the United Nations to a great extent was not
functioning due to the east-west conflict. But his arguments still have relevance today
when the collective system is not working in a particular case. However it is wrong to
assume that there is no alternative to self-defence for a state as it may take measures of
retortion or reprisal against another state which commits an unfriendly or a wrongful act
respectively towards it. The main concern of the UN Charter is to avoid unilateral use
(or threat) of force, i.e. the maintenance of international peace and security, and
therefore it is quite natural that the right to use force is very limited for a state (only
allowed in self-defence under Art. 51). Stone’s criticism is, however, an indication of
the shortcomings of Art. 2(4) but it is hard to see a better alternative in view of the
purpose to maintain international peace and security.

51 Though Art. 2(4) is undoubtedly the more important of them since it implies a clear prohibition of use
of force.
52 Stone J, Aggression and World Order, p. 94 ff.
53 Ibid. p. 96.
54 Ibid. p. 95 f.
55 Ibid. p. 97.
56 A short account of these terms is given earlier in the essay.
6 The Right of Self-defence under the UN Charter

6.1 Art. 51 and Self-defence

The right of self-defence under Art. 51 in the UN Charter is an exception to the prohibition of force by states in Art. 2(4) and the scope of this right is subject of controversy. The material part of Article 51 reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The key notion here is “armed attack” because it is not the same thing as the use (or threat) of force prohibited by Art. 2(4). It is clearly a narrower notion, i.e. not every use of force is necessarily an armed attack. This means that there exists a “gap” between Art. 2(4) and Art. 51 since states are not entitled to self-defence against every use of force. The only explanation for this strange regulation is that the UN Charter is primarily concerned with the maintenance of international peace and security which means avoiding unilateral force by states as far as possible, thus restricting self-defence to the occurrence of an armed attack. But there are those who consider that the right of self-defence is implied by Art. 2(4) making Art. 51 superfluous. The reason for this is that Committee I at San Francisco, the committee which dealt with Art. 2(4), stated that “the use of arms in legitimate self-defence remains admitted and unimpaired”. Bowett argues that the use of force in self-defence cannot by definition involve a threat or use of force against the territorial integrity or political independence of a state or be in any other manner inconsistent with the purposes of the United Nations. According to him Art. 2(4) itself then permits self-defence as it was under customary international law and under that law it is quite certain that the right of self-defence was not limited to cases of an armed attack. He calls Art. 51 a “declaratory clause” which adds no obligation to that in Art. 2(4) arguing that the preparatory works show that Art. 51 should only safeguard the right of self-defence and not restrict it. He himself mentions some substantive rights

58 UNCIO Vol. 6, p. 459.
for which self-defence is a permissible means of protection for a state, including the
right to territorial integrity and political independence, the right to protect the lives and
property of its nationals and the right to protect its economic independence. As
already mentioned Asrat also thinks that the right of self-defence is implied by Art. 2(4)
and Art. 51 is considered as making explicit an aspect of that right, namely when self-
defence is a reaction to the occurrence of an armed attack. He refers to the “faulty
draftsmanship” of Art. 51 which speaks against a literal interpretation of it. Instead self-
defence should be permitted against all force which is prohibited by Art. 2(4).

It must be admitted that almost all discussion relating to Art. 51 in the preparatory
works was about the necessity of preserving regional defence systems (hence collective
self-defence was included). There is no comment on the meaning of the notion of
“armed attack”. But I agree with Brownlie when he says that “[t]here is no indication
in the discussions that the right of self-defence in the Article was in contrast with any
other right of self-defence permitted by the Charter or that the phrase “if an armed
attack occurs” was anything other than a characterization of the right of self-defence”.62
The fact that the primary purpose of the UN Charter is to maintain international peace
and security and thus to minimize unilateral use of force should also influence the
interpretation of Art. 51 (according to Art. 31(1) of the Vienna Convention on the Law
of Treaties). It supports a strict interpretation of Art. 2(4) and 51 making armed attack
the sole basis of self-defence under the Charter. It is therefore wrong to interpret Art.
2(4) as implying a right of self-defence. The ICJ in the Nicaragua case confirmed this
view when it said that “[i]n 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”.63 Although
the judgement in this case did not concern Art. 2(4) and 51 directly, since it dealt with
customary international law on the regulation of force, the Court interpreted those rules
as being closely related to the UN Charter provisions. By analogy the Judgement is
therefore a support for a necessary link between armed attack and self-defence.

59 Bowett D W, Self-defence in International Law, p. 185 ff.
61 UNCIO Vol. 12, p. 680 ff.
A justified conclusion is thus that an armed attack is a necessary condition for the right of self-defence to exist for a state and not any use of force.

It should be added that it can be inferred from the Nicaragua Case that the use of force in self-defence must be supported by credible evidence of an armed attack and of the attacker’s identity.\textsuperscript{64}

6.2 Countermeasures Analogous to Self-defence?

One perplexing thing with the Nicaragua Case is that the ICJ envisaged legitimate counter-measures analogous to but less grave than self-defence in response to measures in breach of the principle of non-intervention (Art. 2(7) of the UN Charter), possibly involving the use of force, which are less grave than an armed attack. As it was not necessary for the case the Court did not determine what counter-measures that were permitted but it did not rule out that they could include the use of force.\textsuperscript{65} Presumably these counter-measures analogous to self-defence cannot include use of force because this would create a second exception to the prohibition of force (Art. 2(4)) which would be contrary to the UN Charter. The Nicaragua Case of course deals with customary international law on the use of force but, as has been said earlier, the result would probably have been the same if the UN Charter had been applied. I find it hard to believe that the ICJ would acknowledge a right to use force which was not based on self-defence. And Dinstein is right in saying that it is not discernible how the whole legal edifice fits into the Charter system.\textsuperscript{66}

6.3 The Definition of an Armed Attack

Probably the most important issue relating to self-defence is to define the concept of armed attack. Only an armed attack triggers a right of self-defence which is why the definition of this concept is so important. No definition was given in the preparatory works but it is obvious that some kind of armed force must be involved. As has already

\textsuperscript{64} ICJ Rep. 1986, paragraphs 229-234.

\textsuperscript{65} ICJ Rep. 1986, p. 110.
been noted “armed attack” is a narrower concept than the concept of “use of force” in Art. 2(4). A stock example of an armed attack was the invasion of the Republic of Korea by North Korea in 1950 which was condemned by the Security Council as an armed attack.67 Another one was the invasion of Kuwait by the military forces of Iraq on 2 Aug. 1990 which was called an armed attack by the Security Council in its Resolution of 6 Aug. 1990, where it also affirmed the right of self-defence in response to the attack.68

6.3.1 The Definition of Aggression and “Armed Attack”

A similar concept is that of “act of aggression” which appears in art. 1, 39 and 53 (the last one is obsolete) but it has not the same content as the concept of “armed attack”. “Act of aggression” is a wider concept than “armed attack” although the exact relation between the concepts is not clear.69 In the GA Resolution 3314 (XXIX) on the Definition of Aggression of December 14 1974 the General Assembly has given a definition of aggression which is of some help to define armed attack.70 For example the ICJ referred to Art. 3(g) of the Definition of Aggression when it discussed a special case of armed attack in the Nicaragua Case71 (I will return to this later). Under Art. 2 of this Definition the first use of armed force by a state in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council in the light of other relevant circumstances may decide otherwise, including the fact that the acts concerned or their consequences are not of sufficient gravity. The same should apply for armed attack which means that the first use of armed force by a state generally indicates an armed attack if there are not other relevant factors which speak

66 Dinstein Y, War, Aggression and Self-defence, p. 194.
67 SC Res. 82 of 25 June 1950. In SC Res. 83 of 27 June 1950 the Security Council recommended Members of the United Nations to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack…”.
70 Ibid. p. 670. It should be pointed out that the Definition is just a recommendation, i.e. not binding law, since it is a GA Resolution.
against this conclusion.\(^7\) Regarding the demand for a certain gravity the same is true
for an armed attack which has been confirmed by the ICJ in the Nicaragua Case. The
Court said that it was “necessary to distinguish the most grave forms of the use of force
(those constituting an armed attack) from other less grave forms”.\(^7\) It implied that the
“scale and effects” of the operation mattered and made a distinction between an armed
attack and a mere frontier incident with respect to operations by regular armed forces.\(^7\)
Dinstein criticizes this distinction and argues that also small-scale armed attacks should
be included in the spectrum of armed attacks. According to him there is no good reason
to distinguish between different levels of armed force with respect to the right of self-
defence in Art. 51. He especially questions the phrase “frontier incident” and points out
that some frontier incidents can be very serious (comprising fairly large military
engagements) and these must be counted as armed attacks.\(^7\) Without denying that
Dinstein’s arguments have some merits Art. 51 uses the concept “armed attack” and not
“use of force” and this lends support for the distinction by the ICJ. As already
mentioned Art. 2 of the Definition of Aggression (see above) also supports such a
distinction. But Gray has a point when she argues that “the Court did not say that
frontier incidents could not cumulatively amount to an armed attack and thus justify
self-defence”.\(^7\)

In Art. 3 of the Definition of Aggression there is a list of acts which shall qualify as an
act of aggression (subject to the provisions of Art. 2). In paragraph (a) the invasion or
attack by the armed forces of a state of the territory of another state is mentioned and
this naturally also constitutes an armed attack provided that it reaches a certain scale and
effect (i.e. that it is not just a frontier incident). Any military occupation resulting from
such invasion or attack or any annexation by the use of force of the territory of another
state or part thereof are also mentioned and this refers to the concept of “permanent

\(^7\) The determination of the beginning of an armed attack is a crucial issue as it leads to a right of self-
defence for the attacked state. I will discuss this issue in connection to the issue of preventive and
anticipatory self-defence because there is a connection between the issues.


\(^7\) Ibid. p. 103.

\(^7\) Dinstein Y, War, Aggression and Self-defence, p. 192 f. It is clear though that the limit between a
frontier incident and an armed attack is not sharp. Brownlie is right in saying that the category “frontier
incident” is certainly vague. Brownlie I, International Law and the Use of Force by States, p. 366.

\(^7\) Gray C, International Law and the Use of Force, p. 132.
aggression” which is not applicable to the concept of “armed attack”. Since occupation or annexation do not necessarily involve the use of force, although this is usually the case, they do not as such constitute armed attacks.\textsuperscript{77}

Here it could be useful to say something about the nature of state territory protected. What is actually protected by Art. 51 is de facto peaceful possession and exercise of authority over a territory. This is shown for example by the Falkland Islands war between Great Britain and Argentina in 1982. There had been a dispute over which country had a legal right of sovereignty over the Falkland Islands for a long time and it was not a clear case. However the islands had been in de facto British possession for about 150 years when Argentina invaded the islands with armed forces on 2 April 1982. The Security Council in Resolution 502 demanded an immediate withdrawal of all Argentine forces from the Falkland Islands.\textsuperscript{78} Which country that had the legal right to the islands was not relevant in this resolution; of relevance was only that Argentina had used force against territory that was in de facto British possession which was considered unlawful (in reality an armed attack although the resolution did not explicitly say so). As Brownlie says, basing self-defence on de facto possession of territory “tends to avoid giving pretexts for breaches of the peace and corresponds to realities in so far as there are many frontiers which have never been demarcated and many frontier zones to which territorial disputes of varying age and seriousness relate”.\textsuperscript{79} The implication is that an armed attack is always an armed attack in the meaning of Art. 51 irrespective of the legal status of the territory. The disadvantage with this view is that an unjustified possession of territory gets protection by Art. 51. Thus “unfair” situations may become permanent since peaceful measures to get back territory can prove ineffective.

In paragraph (b) bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state is defined as aggression and this also constitutes an armed attack if it has a certain scale and effect.

According to paragraph (c) a blockade of the ports or coasts of a state by the armed forces of another state is an act of aggression. Randelzhofer says that a blockade is also to be considered an armed attack at least if maintained effectively and this is regardless


\textsuperscript{78} SC Res. 502 of 3 April 1982.

\textsuperscript{79} Brownlie I, International Law and the Use of Force by States, p. 382 f.
of whether the obstruction is carried out by land, air or naval forces. It is reasonable to describe a blockade as an armed attack in general as a state must be able to practice self-defence against a blockade by another state. A blockade can have as serious consequences as a “normal” armed attack for the victim state and the consequences get worse the longer time it is maintained. Since paragraph (c) only deals with the access to coasts and ports it seems as if the obstruction of transit across land to the open sea cannot be seen as an armed attack, at least not in general.

Paragraph (d) mentions an attack of the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state as an act of aggression. It is clear that these cases must also be seen as armed attacks which is generally accepted by states. When this kind of state positions abroad are attacked they have the right to defend themselves. For example in Art. 6 of the NATO-agreement “an armed attack on one or more of the parties is deemed to include an armed attack… on the vessels or aircraft in this area of any of the parties”. It is enough that only one vessel or aircraft is attacked for the exercise of self-defence to be legitimate but the demand for proportionality will limit the scope of the use of force allowed in self-defence. A right of self-defence also exists when military units of a state abroad are attacked by forces of the territorial state or a third state.

The use of force against individual commercial vessels or aircraft outside the territory of their home state probably cannot be treated as an armed attack but attacks on the whole of the civilian marine or air fleet are seen as armed attacks. This distinction is justified by Art. 3(d) of the Definition of Aggression (it mentions marine and air fleets of a state). Whether the use of force against a state’s nationals abroad can be seen as an armed attack against the state itself, and thus leading to a right of self-defence, is (as mentioned earlier) a controversial question which will not be dealt with in this essay. It is interesting to note that in the Tehran Hostages Case, where several hundred Iranian students and other demonstrators took possession of the U.S. Embassy in Tehran by force on 4 Nov. 1979 in protest at the admission of the deposed Shah of Iran into the

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81 Randelzhofer argues for exceptions in “extreme cases, where the blockade leads to an impairment equating to a military invasion (e.g. by cutting of all communication routes)”. Ibid.
82 This limit for the exercise of self-defence will be dealt with later in the essay.
United States for medical treatment, the ICJ described the event as an armed attack on the U.S. Embassy by militants. This was despite the fact that the action by the crowd was not considered as imputable to the Iranian state. On the other hand, Art. 51 is not mentioned in connection to the term “armed attack” which could mean that the Court did not determine that the incident was an armed attack in the sense of Art. 51 but instead made a description of it in ordinary language (what had occurred was an attack that was armed). Anyway, the case may be interpreted as support for the view that diplomatic missions can be the object of an armed attack and have a right of self-defence under Art. 51 in the UN Charter. Bring though argues firmly against the thought that an attack against an embassy can be considered an attack against the state itself by referring to the fact that a state’s embassies abroad no longer are viewed as a part of the state’s territory in international law. In modern international law the embassy area is considered to belong to the “receiving” state although the “sending” state has certain, by international law, protected rights within the area (immunity and inviolability). These are strong arguments but another problematic aspect is the doctrine of “protection of nationals abroad” which could be of relevance here. If this doctrine is accepted in international law (its status is uncertain) then it could be invoked for the protection of embassies abroad (indirectly via the protection of nationals). Anyway, the U.S. use of military force against Afghanistan and Sudan in response to the attacks on its embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) in Aug. 1998 (this case will be discussed more in detail below), which was met by lack of condemnation by many states, is at least an indication that embassies can be the object of an armed attack.

In paragraph (e) the use of armed forces which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement is defined as aggression. In principle this should be treated

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86 See below the part on permissible objects of self-defence for facts in this case.
as an armed attack since a state should be allowed to use force in self-defence against foreign armed forces acting in breach of a stationing agreement within its territory.\(^{87}\)

In paragraph (f) the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state is mentioned as an example of aggression. This covers the voluntary placing of territory at another state’s disposal and not the case where a state fails to prevent acts of aggression from being carried out on its territory by some other state. When there is active permission the permissive state is also responsible for an act of aggression. If the act of aggression by the acting state can also be seen as an armed attack (according to the previous criteria) the “passive” state can also be considered to be guilty of an armed attack. This means that defensive measures may also be taken against the “passive” state.\(^{88}\)

Finally in paragraph (g) the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed in the previous paragraphs, or its substantial involvement therein is also defined as aggression. It is generally accepted that this kind of indirect force is prohibited by Art. 2(4) in the UN Charter.\(^{89}\) Indirect force can also constitute an armed attack under certain circumstances. In the SC Resolution of 15 Nov. 1967 the Security Council condemned the failure of Portugal to prevent mercenaries from using the territory of Angola under its administration as a base of operations for armed attacks against the Democratic Republic of the Congo.\(^{90}\) It also called upon Portugal to put an end immediately to the provision to the mercenaries of any assistance whatsoever. Thus Portugal was blamed for the armed attacks as it had assisted the mercenaries in different ways.

In the Nicaragua Case the ICJ said that “it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against

\(^{87}\) Dinstein Y, War, Aggression and Self-defence, p. 188, 194 f, Randelzhofer A, in Simma B, The Charter of the United Nations, p. 672. Randelzhofer holds that minor violations of a stationing agreement may not be considered an armed attack which seems reasonable.


\(^{89}\) Ibid. p. 673.

\(^{90}\) SC Res. 241 of 15 Nov. 1967.
another state of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein”. The Court went on to say that “the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces”. But the Court thought that the concept of “armed attack” did not include “assistance to rebels in the form of the provision of weapons or logistical or other support” (though such assistance could be regarded as a threat or use of force). It is true that the Court in this case was concerned with customary international law on the use of force but it hints that the result would have been the same if the UN Charter had been applied instead. The crucial question is then what is meant with “substantial involvement” by a state in the sending of private groups. Apparently assistance to rebels by provision of weapons or logistical or other support was not considered a substantial involvement. Randelzhofer thinks that the ambiguous term “substantial involvement” must be interpreted restrictively to save the concept of “armed attack” from being blurred altogether and approves with the Court’s ruling in this matter. But he is right in pointing out that the Court did not disclose how much support by a state is needed to say that there is a substantial involvement and therefore an armed attack by it.

Under Art. 4 of the Definition of Aggression the acts enumerated in Art. 3 are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter. The same is obviously true for the concept of “armed attack” as it is practically impossible to list all forms of “armed attack”. Of significance is Art. 6 of the Definition which states that nothing in the definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful. In other words, the Definition of Aggression does not affect the content of Art. 2(4) or 51 in the UN Charter although it indirectly can help to clarify the concept of “armed attack”.

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92 E.g. ibid. p. 96 f.
94 However the great majority of all cases of armed attack will definitely fit into one of the categories mentioned above.
6.3.2 Are Terrorist Attacks Armed Attacks?

Terrorist attacks by individuals do not fit into the traditional structure for state relations set up by the UN Charter. Art. 51 was designed to protect a state from armed attacks by other states by providing a right of self-defence against such attacks. So how are terrorist attacks to be categorized?

In the Definition of Aggression Art. 3(g) (see above) the sending by or on behalf of a state of armed bands etc. which carry out acts of armed force against another state of enough gravity (see above), or its substantial involvement therein, is defined as an act of aggression. It is true that terrorist groups were not explicitly included in the definition but it seems reasonable to take the view that acts by terrorist groups which are organized or supported by a state may be defined as an act of aggression by that state if there is at least a substantial involvement by it (according to Art. 4 of the Definition the acts enumerated in Art. 3 are not exhaustive). Certainly the terrorist attack/attacks must have a certain scale and effect if it is/they are to be considered an armed attack.

According to Cassese “international law requires that terrorist acts form part of a consistent pattern of violent terrorist action rather than just being isolated or sporadic acts” for terrorist acts to qualify as an armed attack. He argues that the basic rule about the prohibition of use of force means that states can only use military force as a last resort and it follows that “sporadic or minor attacks do not warrant such a serious and conspicuous response as the use of force in self-defence”. This resembles the demand for a certain scale and effect but of course it is hard to draw a clear line between “ordinary” terrorist attacks and terrorist attacks which can be considered armed attacks. However Art. 51 does only, at least until recently, acknowledge a right of self-defence against states and not against private subjects which means that the terrorist act constituting an armed attack must be attributed to a state for the right of self-defence to

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95 The possible changes in international law following the terrorist attacks against the USA on 11 Sept. 2001 will be examined later in this essay.

96 ICJ Rep. 1986 p. 103 f (The Nicaragua Case). “Scale and effects” was the criteria that the ICJ used in this case and also the term “significant scale” when it discussed Art. 3(g).

exist. For example in the Definition of Aggression Art. 3 links all acts of aggression to a state, i.e. a state must be involved in an act of aggression and the same is true for an armed attack (armed attack is a special case of an act of aggression). Thus there must be state responsibility engaged in respect of the attack. This issue will be examined in the next part of the essay.

6.3.3 A Subjective Criterion in the definition of Armed Attack?

One somewhat puzzling part of the Nicaragua Case is where the ICJ discusses the transborder incursions from the territory of Nicaragua into Honduras and Costa Rica and says that “[v]ery little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an “armed attack” by Nicaragua on either or both states”.98 As Gray says, “the implication seems to be that the Court would include within “frontier incident” episodes where there was no intent to carry out an armed attack, including accidental incursions…”.99 If this is what the Court really held it would mean that not only objective criteria are relevant for the determination of an armed attack but also a subjective criterion (motivation). However it is reasonable to say that generally a state’s intention can be inferred from its action and focus will anyway be on the objective criteria. It is possible that the Court’s reasoning has to do with the lack of information in general about the transborder incursions in this case.

6.3.4 Conclusion

According to Combacau “[t]he infrequency of precedents, their heterogeneity and the fact, above all, that condemnations of States’ reactions are dictated by a multitude of reasons…make it impossible to find a definition of armed attack under the terms of Art. 51 either in UN practice or in that of its members”. Therefore it “can be freely construed

98 ICJ Rep. 1986 p. 120.
case by case by its authorized interpreters”. He is right in his observation but still there are some typical cases of armed attack, as has been shown, which makes it possible to identify a core area of the definition of an armed attack.

6.4 Art. 51 and Symbols of a State

A special case is the missile attack on Iraq by the United States in June 1993. The military target was the Military Intelligence Headquarters situated just outside Baghdad. The United States claimed it used force in self-defence because of a foiled assassination plot, sponsored by the government of Iraq, to kill George Bush, former President of the United States, during his visit to Kuwait in April 1993. President Clinton viewed the assassination attempt as an “actual attack” whereas the UN Ambassador Albright referred to it as an “attempted attack” but also referred to the threat of further attacks where the Iraqi military and intelligence service would be involved. What is interesting here is the claim that Iraq’s involvement in the initial stages of the assassination conspiracy constituted an armed attack. In view of the criteria in the Nicaragua Case for an armed attack to exist, the forceful act should actually have a certain scale or effect, the Iraqi involvement in the initial stages of the assassination conspiracy cannot in itself be considered an armed attack. At the most it can be described as an attempted armed attack. Another question is if a former U.S. President can be a protected object by the right of self-defence. The point is that Art. 51 provides that self-defence is lawful where there is an armed attack “against a Member of the United Nations”. Thus what is primarily protected is the political independence or territorial integrity of a state, which are the twin pillars of the sovereign state in international law. In this case the target of the attack, the former president, was considered to be a symbolic representation of the state and therefore the situation was interpreted by the United States as an attack against the state. Members of the Security Council generally understood and accepted the decision of the United States to use force.

101 UN Doc. S/26003 (26 June 1993).
Thus it seems as if symbols of a state are also protected by Art. 51, i.e. an armed attack against symbols, such as presidents, prime ministers and perhaps even monarchs, leads to a right of self-defence for the state concerned.

6.5 Permissible Objects of Self-defence

What are the objects which the exercise of self-defence may be directed against? This question is actually linked to the issue of defining “armed attack” as it can be said that those subjects which are responsible for an armed attack have to tolerate force in self-defence by the attacked state. However it could be of use to discuss the issue of permissible objects separately to focus on the conditions for state responsibility in different situations.

6.5.1 Indirect Force and State Responsibility

The ICJ said in the Corfu Channel Case that every state was under an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other states”. This means that a state must not allow its territory to be used by a state or armed bands etc. which intend to attack another country. In the Definition of Aggression Art. 3(f) the action of a state in allowing its territory to be used by another state for perpetrating an act of aggression against a third state was defined as an act of aggression. If the act of aggression by the active state in the particular case also can be defined as an armed attack the passive state is also responsible for an armed attack. The concept of the “duplicate attacker” means that both the active and passive state are responsible for the armed attack. The result is that the attacked state, besides taking defensive measures within its own territory, may take defensive measures against both states, e.g. confront the acting state at its operational base within the passive state’s territory, subject to the limits of proportionality (see below). This is reasonable because the attacked state in

103 UN SCOR 3245th Meeting: 27 June 1993.
most cases cannot deal effectively with the attack if it is not allowed to take defensive measures against the passive state where the attack comes from.

As mentioned above according to Art. 3(g) in the Definition of Aggression the sending by or on behalf of a state of private groups, or its substantial involvement therein, which carry out acts of armed force of enough gravity is defined as an act of aggression. This indirect aggression could in some cases also qualify as an armed attack. In the Nicaragua Case the ICJ held that the concept of armed attack (by a state) did not include assistance to armed bands in the form of the provision of weapons or logistical or other support (although this kind of assistance could violate other rules in international law).\(^{106}\) On the other hand, the dissenting Judges Schwebel and Jennings held that providing insurgents with logistical support, or at least that coupled with weapons, would generally be sufficient to make the assisting state responsible for an armed attack by the insurgents.\(^{107}\) The problem here is that logistical support may take many forms, e.g. it may involve the entire training, moving, lodging and equipping of insurgents etc. but it may involve merely giving insurgents a place to sleep in. In the first case the assistance should lead to state responsibility for an armed attack as there is a substantial involvement by the state but not in the second case as there is only little assistance. However it is hard in general to say how much assistance by a state there needs to be to make the state responsible for an armed attack.\(^{108}\) When a state can be held responsible for an armed attack due to its involvement in indirect aggression the attacked state may take defensive measures against this state (as well as against the private groups). Thus it may confront the private groups with force within the territory of the responsible state in so far as this is necessary to repel the attack.

As shown by the Nicaragua Case, mere acts of assistance or acquiescence by a state to armed bands is not enough to make the state responsible for an armed attack by the armed bands against another state. Though the conduct of the state is clearly unlawful under international law.\(^{109}\) This means that a state’s conduct can be unlawful under

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\(^{107}\) Ibid. p. 346 f (Schwebel), p. 543 (Jennings).


\(^{109}\) The Friendly Relations Declaration, GA Res. 2625 (XXV) of 24 Oct. 1970, contains the following paragraphs in the elaboration of the principle of non-use of force: “Every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including
international law without constituting an armed attack as was confirmed by the Nicaragua Case. The result is that self-defence by the attacked state may not in these cases be exercised against the assisting or acquiescing state but only against the armed bands. However, as already mentioned, in the Nicaragua Case the ICJ envisaged a right analogous to the right of self-defence, possibly involving use of force, against measures which do not constitute an armed attack but may nevertheless involve use of force. It never confirmed the existence of such a right but it did not rule it out. As I have said earlier I do not believe that such a right could involve use of force because under the UN Charter self-defence is the only exception to the prohibition of use of force (though remember that the Court was concerned with customary international law on use of force).

6.5.2 Terrorism and State Responsibility

Earlier in this essay it was said that terrorist attacks which reach a certain scale or effect can be defined as armed attacks under Art. 51. But self-defence by the attacked state may only be exercised against another state if there is state responsibility involved in the attack. As terrorist acts are similar to acts by armed bands etc. what is needed is the sending by or on behalf a state of terrorist groups which carry out terrorist attacks (of enough gravity) or at least its substantial involvement therein. This was the criteria used by the ICJ in the Nicaragua Case (the Court based this on Art. 3(g) in the Definition of Aggression). In the GA Resolution 40/61 in 1985 about measures to prevent international terrorism the General Assembly in paragraph 6 “[c]alls upon all States to fulfil their obligations under international law to refrain from organising, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities of incursion into the territory of another State.” “Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

10 ICJ Rep. 1986, p. 104. The ICJ said that assistance to rebels of various kinds “may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states”.

11 Ibid. p. 110.

12 Ibid. p. 103.
within their territory directed towards the commission of such acts”. This was repeated in the GA Resolution 42/159 in 1987 but here also other obligations for states were mentioned, inter alia the obligation “[t]o prevent the preparation and organization in their respective territories, of terrorist acts and subversive acts directed against other states and their citizens” (paragraph 5(a)). These resolutions clarify what obligations states have in respect of terrorist activities within their territory. Let us examine some different situations involving varying degrees of support by a state to terrorist groups.

First of all terrorist attacks may be committed by actual state officials which is very rare in state practice. Secondly a state may act by employing unofficial agents etc. that are organised, equipped, commanded and controlled by the state. These two cases are clear as the terrorist attacks is attributable to the state which means that the attacked state can react in self-defence against it. This finds support in the Definition of Aggression Art. 3(g) which mentions the sending by or on behalf of a state of armed bands etc..

A third case is when terrorist groups act “independently” but are supplied with financial aid or weapons by a state. Another case is when terrorist groups are supplied with logistical support by a state, e.g. the state provides training facilities for the terrorists on its territory. These cases resemble the situation where a state gives assistance to private armed groups (see chapter 6.5.1 and the discussion there) and the criteria in the Nicaragua Case mean that the state here in general is not responsible for armed attacks by the terrorist groups. But the same type of objections as in the case of support to private groups can be raised here, i.e. that logistical support may take many forms, and it can be argued that comprehensive support to terrorist groups by a state should lead to state responsibility for an armed attack (because there is a substantial involvement).

Finally there is the case when the state does not give any active support to the terrorist group but acquiesces in their seeking refuge on its territory before and after terrorist attacks are committed against foreign states. Since the ICJ in the Nicaragua Case did

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114 GA Res. 42/159 of 7 Dec. 1987. Adopted 153 for, 2 against (USA and Israel), 1 abstention. The reason for USA and Israel voting against the resolution was that it included the convening of an international conference to define terrorism and to differentiate it from the struggle of peoples for national liberation. See UN Doc. A/C.6/42/SR.31, 29 Oct. 1987, p. 6 f and A/C.6/42/SR.33, 6 Nov. 1987, pp. 6-9.
not consider that different kinds of active assistance to armed bands could constitute an armed attack by the state it is very unlikely that the Court would consider that this kind of passive assistance by a state makes it responsible for an armed attack by the terrorist group. This means that the attacked state may not exercise self-defence against this state. On 21 June 1972 Israel attacked claimed terror groups and bases on the territory of Lebanon (which it had done earlier) to avert additional attacks against Israel. It said that it reacted in self-defence as Lebanon had not abided its international obligations to put an end to the criminal activities of the terror organizations. In its Resolution of 26 June 1972 the Security Council did not accept Israel’s argument but condemned the repeated attacks of Israeli forces on Lebanese territory and population in violation of the principles of the UN Charter. As facts were unclear in the case and Israel’s attacks also had a preventive character (the legality of preventive self-defence will be discussed later) no definitive conclusion can be drawn from this case but it lends some support to the conclusion above.

On 7 Aug. 1998 there were two terrorist attacks against the American embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) killing nearly 300 people, including 12 Americans. The main suspect was Osama bin Laden, a wealthy Saudi expatriate then living in Afghanistan, and his terrorist organization Al Qaeda, and on 20 Aug. the United States launched 79 Tomahawk cruise missiles against terrorist training camps in Afghanistan and against a pharmaceutical plant in Sudan which the U.S. identified as a chemical weapons factory. In the UN the United States justified its action by arguing that “[i]n response to these terrorist attacks, and to prevent and deter their continuation, United States armed forces today 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… These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their co-operation with the Bin Laden organization… In doing so, the United States has acted pursuant to the right of self-defence confirmed by

115 SCOR 1648th Meeting: 23 June 1972, p. 5.
Article 51 of the Charter of the United Nations."\textsuperscript{118} The U.S. president Clinton in a speech said that “Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens.”\textsuperscript{119} Thus the United States claimed that it had the right to use force in self-defence against terrorism on other states’ territory when those states harboured and acquiesced in the activities of terrorists, i.e. it did not seem to matter to the United States whether those states were actually involved in the terrorist attacks themselves. Russia, Iran, Iraq, Libya, Pakistan and Yemen protested against the missile attacks whereas the Secretariat of the League of Arab states only condemned the attack on Sudan as a violation of international law.\textsuperscript{120} The Movement of the Non-Aligned Countries also protested against the attack on Sudan in a final declaration.\textsuperscript{121} However other states expressed support or at least understanding for the attacks, including Australia, France, Germany, Japan, Spain and the U.K..\textsuperscript{122} The incident was never put on the agenda of the Security Council and was not debated in the General Assembly which means that the implication of this case is hard to determine. The lack of condemnation, or in some cases even explicit support or understanding, of the U.S. attack by a wide group of states could be an indication of acceptance of this wider doctrine of self-defence against terrorism, allowing use of force against states not only when they are substantially involved in terrorist activities but also when they just harbour terrorists and acquiesce in their activities. However states did not explicitly accept this new legal doctrine so it could be that most of them in fact did not consider the U.S. action legal but abstained from condemning it because of sympathy with the United States in this particular case. Anyway, the case is not without relevance as it at least indicates an acceptance among many states of a wider right of self-defence against terrorists and states harbouring them. I will later in the essay deal with the latest development regarding self-defence against terrorism.

\textsuperscript{118} UN Doc. S/1998/780.
\textsuperscript{119} Murphy S D, Contemporary Practice of the United States Relating to International Law, AJIL Vol. 93 1999, p. 162.
\textsuperscript{120} Ibid. p. 164.
\textsuperscript{121} Yearbook of the UN 1998, p. 1219.
\textsuperscript{122} Murphy S D, Contemporary Practice of the United States Relating to International Law, AJIL Vol. 93 1999, p. 165.
Apart from earlier cases there is the case where a terrorist group receives no help of any kind from any state when it carries out attacks on the high seas or in international airspace against nationals of one or more states. This is a special case since there is no link at all to any state but clearly the national state of the ship or aircraft attacked may use force in self-defence against the terrorists aboard the ship or the aircraft.\footnote{Cassese A, The International Community’s Legal Response to Terrorism, ICLQ Vol. 38 July 1989, p. 600, Brownlie I, International Law and the Use of Force by States, p. 375.}

6.5.3 The Right of Self-defence and Interception of Aircraft

A special case is when an interception of an aircraft by a state is justified by reference to the right of self-defence. Two relevant cases will be mentioned here. In 1973 Israel intercepted a civilian aircraft belonging to Middle East Airlines but on charter to Iraqi Airlines. The plane was incepted after it had left Beirut for Baghdad and was forced to land at an Israeli military base. After that the passengers and the crew were made to disembark and questioned for many hours. The reason was according to Israel that there was reason to believe that a number of terrorist leaders responsible for different crimes were aboard but it turned out that it was wrong. The aircraft was allowed to depart when the Israelis were satisfied that there were no terrorists aboard the aircraft. Israel claimed that it had exercised its right to self-defence and duty to protect its citizens.\footnote{SCOR 1736\textsuperscript{th} Meeting: 13 Aug. 1973, p. 8.} The Security Council rejected this argument and in its Resolution of 15 Aug. 1973 condemned Israel for the act and considered that it inter alia constituted a violation of the provisions of the UN Charter. Thus it did not in this case accept the idea that self-defence against terrorism could justify interception of a civilian aircraft to capture terrorists.

In 1986 two Israeli fighter aircraft intercepted a Libyan civilian aeroplane, flying from Tripoli to Damascus and carrying an official delegation of Syrians, and forced it to land in Israeli territory. Again Israel had wrongly thought that some notorious terrorists were aboard the aeroplane so therefore it was allowed to take off again. As previously Israel claimed it had acted in self-defence to fight terrorism. It had heard that the Syrian delegation was going to Libya to attend a conference to plan terrorist activities and
wanted to forestall this.\textsuperscript{126} This time a draft resolution condemning Israel for the action was not adopted because of the veto of the United States. Besides, four other members of the Security Council abstained in the voting. The United States explained that it believed “that there may arise exceptional circumstances in which an interception may be justified”. Further that it believed “that the ability to take such action in carefully defined and limited circumstances is an aspect of the inherent right of self-defence recognized in the United Nations Charter [and therefore it could not] accept a draft resolution which implies that interception of an aircraft is wrongful \textit{per se}, without regard to the possibility that the action may be justified”\textsuperscript{127}. Although no resolution was adopted in the latter case the majority of states still considered this kind of interception, i.e. interception of foreign aircraft believed to be carrying terrorists, as unlawful under the UN Charter. Thus it must be concluded that interception cannot be justified by the right of self-defence although certain states argue for the opposite.

\textsuperscript{126} SCOR 2651\textsuperscript{st} Meeting: 1986, p. 19 f.
\textsuperscript{127} SCOR 2655\textsuperscript{th} Meeting: 6 Febr. 1986, p. 112 f.
7 Limits for the Exercise of Self-defence

Even if the right of self-defence exists for a state because of an armed attack by another state there are still limits for the exercise of self-defence by the attacked state. It is true that Art. 51 itself does not expressly state any limitations of the right of self-defence but they were part of the customary international law and are implicitly an important part of Art. 51. They are the demands for *necessity, proportionality and immediacy* in the exercise of self-defence. At least the first two criteria have their roots in the Caroline Case (see above) where Webster demanded a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation” and also that Great Britain “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”.128

It must also be emphasized that the laws of war in general and international humanitarian law129 in particular must be observed in the exercise of self-defence by a state as these laws are applicable to use of force in general. This was confirmed by the ICJ in the Legality of the Threat or Use of Nuclear Weapons case in 1997 (see below in the part dealing with nuclear weapons and self-defence).

7.1 Necessity

In the Nicaragua Case the ICJ mentioned a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”.130 And in the Legality of Nuclear Weapons Case the Court, referring to the Nicaragua Case, held that “[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed”.131

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129 This is mainly the four Geneva Conventions of 1949 for the protection of sick and wounded soldiers, of sick and wounded sailors, of prisoners of war and of civilians in international armed conflicts.
Necessity means that action taken in self-defence must be necessary in the sense that the state attacked “must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force”.\textsuperscript{132} The implication is that had the state been able to achieve the same result by other measures than use of armed force, it would have no justification for using armed force in self-defence. The demand for necessity will be more relevant if preventive self-defence is allowed and of less relevance if only self-defence against an attack which has occurred is allowed. Schachter says that force in self-defence is not necessary “until peaceful measures have been found wanting or when they clearly would be futile. However, to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defence.” His conclusion is “that a state being attacked is under a necessity of armed defence, irrespective of probabilities as to the effectiveness of peaceful settlement”.\textsuperscript{133} I think this is a sensible approach as an armed attack (which has occurred) should imply a necessity of self-defence for the attacked state. Thus the demand for necessity is generally fulfilled when an armed attack has occurred.

7.2 The Principle of Proportionality

7.2.1 The meaning of proportionality

As was shown above, in the Legality of Nuclear Weapons Case the ICJ confirmed that the principle of proportionality is a part of Art. 51 in the UN Charter. According to the Court measures taken in self-defence by a state must be proportional to the armed attack against it, i.e. excessive measures are forbidden. Although the proportionality principle is accepted as such there is uncertainty about the exact meaning of the principle. The question is if measures taken in self-defence should be proportional to the gravity of the attack or proportional to the purpose of self-defence (i.e. to repel the attack) or even to both criteria. In paragraph 237 of the Nicaragua Case the ICJ applied the proportionality principle in a way which leads to the conclusion that at least the exercise of self-defence


must be proportional to the gravity of the armed attack.\textsuperscript{134} On the other hand, Ago has said that proportionality concerns the relationship between action in self-defence and its purpose, namely that of halting and repelling the attack (or even, if preventive self-defence is recognized, of preventing it from occurring). The other kind of proportionality, i.e. proportionality between the action in self-defence and the gravity of the armed attack, he dismisses because “[t]he action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered”. Accordingly what is relevant “is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself”.\textsuperscript{135} However there are different views in the doctrine in this matter. I think that the most reasonable view is that proportionality should be required to the purpose of self-defence, i.e. the repelling of the attack. If self-defence by a state is allowed it should also be allowed to be effective and serve its purpose. To argue that action in self-defence should always be proportional to the gravity of the attack irrespective of whether this will be enough to repel the attack is neither reasonable nor realistic. Still the attack will be the most important factor in the assessment of proportionality but in some cases one has to accept that more (probably not much more) force must be used by the defending state than the attacking state if self-defence is to be successful. Normally though, it is probably enough for the purpose of self-defence that the defending state uses about the same degree of force as the attacking state and then there will actually be proportionality in this respect.

The law on proportionality \textit{de lege lata} is not completely certain as there is no clear state practice in this area but it seems to be that proportionality is required in relation to the gravity of the attack as this was how the ICJ interpreted the principle in the Nicaragua Case and the Legality of Nuclear Weapons Case. But how strict is the principle of proportionality to be applied in practice? Ago has said that the requirement of proportionality would be unacceptable without the necessary flexibility. He explains that “a State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the

\textsuperscript{134} ICJ Rep. 1986 p. 122. The Court held that “[w]hatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid” (emphasis added).

attack from succeeding and bring it to an end”. It might be added that the question “what might just suffice to prevent the attack” is largely a theoretical one as it should be impossible to answer in a particular case. I agree that the meaning of the principle of proportionality is probably not that defensive measures must be strictly proportionate to the attack but rather roughly proportionate to it. The implication is that the defending state is allowed a small margin of “error” regarding the degree of force it may use in self-defence. This is reasonable as strict proportionality is unrealistic to demand in all situations. To demand that defensive measures must be roughly proportionate is probably the correct interpretation of the principle of proportionality.

7.2.2 The Locality of Self-defence

The place for the exercise of self-defence is also relevant for the assessment of proportionality. It is in the nature of self-defence that the place where it is permitted is where the attack occurs since it aims to repel the attack. State practice is not, however, entirely clear in this matter. In August 1964 naval vessels of the United States in the Gulf of Tonkin were attacked by North Vietnamese torpedo-boats on two occasions. The United States repelled the attacks but also carried out aerial strikes deep into North Vietnam against North-Vietnamese torpedo-boats and their support facilities. This action claimed to be taken in self-defence was thus exercised in a geographical area far away from the original attacks. The United States justified the action by arguing that it was needed to secure its naval units against further aggression. As different opinions were held by the members of the Security Council no firm conclusion can be drawn from this case.

Another case was that in June 1982 when Israel first invaded southern Lebanon to fight terrorism and later extended its action deep into Lebanon (instead of limiting it to a 40 kilometer zone as originally announced) asserting that its right to self-defence gave it the right to eliminate the PLO in Beirut and other cities, as they were the source of the

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136 Ibid.
138 Among those states rejecting the argument of self-defence was Czechoslovakia which said that the action “far exceeded the place and size of the alleged attack”. SCOR 1141st Meeting: 7 Aug. 1964, p. 5.
continuing PLO attacks on northern Israel.\textsuperscript{139} This argument was rejected in several resolutions by the Security Council, for example in the Resolution of 6 June 1982 in which it demanded that Israel withdrew all its military forces forthwith and unconditionally to the internationally recognized boundaries of Lebanon.\textsuperscript{140} Thus it seems as if defensive action by a state in a completely different area than where the armed attack against it occurred is not allowed. In fact, as this kind of defensive action has the primary purpose of preventing future attacks it is a form of preventive self-defence which will be discussed later in the essay.

7.2.3 The Use of Nuclear Weapons and Self-defence

The relevant question here is whether the use of nuclear weapons in self-defence is allowed and this question is closely connected to the principle of proportionality. Can it ever be proportional to use nuclear weapons in self-defence? The more general question of the legality of the use of nuclear weapons at all will not be focused on here.

The UN General Assembly adopted a “Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes” on 24 Nov. 1961.\textsuperscript{141} In paragraph 1(b) of the resolution it was stated “[t]hat the use of nuclear and thermonuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and its civilisation…”. The General Assembly declared in paragraph 1(a) “[t]hat the use of nuclear and thermonuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the United Nations Charter” and in paragraph 1(d) “[t]hat any State using nuclear and thermonuclear weapons is to be considered to violate the Charter of the United Nations…”. The meaning of the resolution is that any use of nuclear weapons, even in self-defence, is prohibited by the UN Charter. Even though this resolution is not binding since it is a GA resolution it has a value as an expression of the opinion of many governments on

\textsuperscript{139} Communication of Israel to the Security Council, UN Doc. S/15271 (1982).

\textsuperscript{140} SC Res. 509 of 6 June 1982.

\textsuperscript{141} GA Res. 1653 (XVI) of 24 Nov. 1961. Adopted 55 for, 20 against, 26 abstentions. Most Western states and Nationalist China voted against the resolution. The Scandinavian states as well as most of the Latin-American states abstained in the voting.
the state of the law. But the fact that only a small majority (55 out of 101 states) adopted the resolution of course somewhat reduces its value.

In the Legality of the Threat or Use of Nuclear Weapons Case the ICJ said that “[t]he proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”\textsuperscript{142} But in fact the Court’s conclusion was that it was “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-defence, in which its very survival would be at stake”.\textsuperscript{143} One of the reasons for this conclusion was “the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake”.\textsuperscript{144} The only certain conclusion that can be drawn from the case is thus that according to the ICJ the principle of proportionality does not in itself exclude the use of nuclear weapons in self-defence in all circumstances. This seems logical since it cannot be held that a state which is attacked by another state using nuclear weapons and then itself uses nuclear weapons in self-defence would use disproportionate measures.

Recently the General Assembly adopted a Resolution on General and Complete Disarmament on 29 Nov. 2001 which in part C concerning “Reducing Nuclear Danger” in the preamble reaffirms “that any use or threat of use of nuclear weapons would constitute a violation of the Charter of the United Nations”.\textsuperscript{145} To say that any use of nuclear weapons is a violation of the Charter implies that also use of nuclear weapons in self-defence, even if used against an attack with nuclear weapons, is prohibited. Without looking away from the horrifying nature of nuclear weapons it seems unreasonable to deny a state the right to defend itself with nuclear weapons when it is attacked by another state with these weapons. I would say that in this exceptional case the use of nuclear weapons in self-defence would be justified as the response would not be

\begin{footnotes}
\footnote{142 Advisory Opinion. ILM Vol. 35 (1997) p. 809 and 1343 at paragraph 42.}
\footnote{143 Ibid. at paragraph 97.}
\footnote{144 Ibid. at paragraph 96.}
\footnote{145 GA Res. 56/24 of 29 Nov. 2001. Adopted without a vote.}
\end{footnotes}
disproportionate to the attack.\textsuperscript{146} If the attack is carried out with conventional weapons the situation for the defending state is different. According to Singh and McWhinney “the use of nuclear weapons to repel an attack with conventional weapons would appear to exceed the right [of self-defence], since the quantum of force used would be out of proportion to the nature of the attack necessary to repel”.\textsuperscript{147} I have no objection against this reasoning as nuclear weapons in many ways have a much more damaging effect when used against a state than conventional weapons. In this case the use of nuclear weapons in self-defence would be prohibited by the proportionality principle. But what if self-defence with conventional weapons is not enough to repel the attack by the aggressor. Is the victim state, when it faces defeat and after giving full trial to conventional weapons, allowed to use nuclear weapons as a last resort to prevent the aggressor from achieving victory? The answer depends on how the proportionality principle is interpreted, i.e. what the use of force in self-defence should be proportional to. As stated above, \textit{de lege lata} proportionality seems to be required to the gravity of the attack which would exclude the use of nuclear weapons even in the case where a state faces defeat. On the other hand, if proportionality is required to the purpose of self-defence instead the use of nuclear weapons would be allowed as a last resort against a conventional attack.\textsuperscript{148}

\section*{7.3 The Demand for Immediacy}

There is also a demand for immediacy in the exercise of self-defence meaning “that armed resistance to armed attack should take place \textit{immediately}, i.e. while the attack is

\begin{footnotesize}
\footnotesub{146} This is the view of Singh and McWhinney. Singh N, McWhinney E, Nuclear Weapons and Contemporary International Law, p. 102. Brownlie does not seem to completely exclude the legality of the use of nuclear weapons in extreme situations as he says that “[t]he use of nuclear weapons… is \textit{in most conceivable situations} illegal under the existing laws of war…” (emphasis added). Brownlie I, Some Legal Aspects of the Use of Nuclear Weapons, ICLQ Vol. 14 April 1965, p. 440.

\footnotesub{147} Singh N, McWhinney E, Nuclear Weapons and Contemporary International Law, p. 100.

\footnotesub{148} It must be admitted that the discussion above is largely academic since a state with nuclear weapons would hardly be attacked by another state lacking these weapons and if the aggressor had nuclear weapons it seems more likely that it would use these weapons if the attacked state also had nuclear weapons.
\end{footnotesize}
still going on, and not after it has ended”.149 This demand deals with the critical distinction between an act of self-defence, which is use of force by the attacked state to repel the attack, and a reprisal, i.e. use of force against the attacker after the attack has ended as a form of retaliation. A concrete case is that “[a] state can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier”.150 The demand for immediacy is simply a part of the nature of self-defence and is necessary for the delimitation of it. However it does not mean that self-defence always has to be exercised immediately as the region attacked by state A may be distant from the centre of the Government of state B and some time will therefore necessarily pass before the military forces of state B can exercise self-defence. For example in the Falkland Islands war in 1982 it took several weeks for Britain to exercise its right of self-defence because of the geographical distance but its action could still be considered lawful since the response to the Argentine attack was more or less immediate.151

7.4 War in Self-defence?

Can a war be fought in self-defence and if that is the case how do the demands concerning the exercise of self-defence affect the legality of the war? In the Judgement of the International Military Tribunal for the Far East in 1948 the Tribunal stated that the Netherlands had “in self-defence declared war against Japan… and thus officially recognized the existence of a state of war which had been begun by Japan…”152 Thus a state can wage a war in self-defence against another state waging a war of aggression, as a war can be viewed as a constant armed attack against a state varying in intensity. Dinstein argues that the proportionality principle has a special meaning when it comes to a war in self-defence. According to him, when a war has been legitimately started it can be fought to the finish (possibly involving the destruction of the enemy’s army)

150 Ibid.
151 For details see Harris D J, Cases and Materials on International Law, p. 902 ff.
despite any lack of proportionality.\textsuperscript{153} He is right provided that it in the individual case is necessary to totally defeat the attacking state’s military forces to stop the war of aggression (i.e. stop the armed attacks). I will return to this subject later when dealing with the U.S. war in Afghanistan in 2001.

\textsuperscript{153} Dinstein Y, War, Aggression and Self-defence, p. 231 f.
8 The Issue of Preventive or Anticipatory Self-defence

8.1 The Beginning of an Armed Attack

I have had a discussion earlier in the essay about the definition of an armed attack but at what point of time does an armed attack begin? I will deal with this question here since it is connected to the concepts of preventive or anticipatory self-defence. When an armed attack can be said to have begun self-defence by a state is no longer preventive or anticipatory since it then is exercised against an ongoing armed attack. Therefore it is crucial to know the exact moment when an armed attack begins in order to determine the form of the self-defence exercised.\(^\text{154}\)

There is no doubt that the core of an armed attack is the moment when the effect of it is felt by the attacked state, e.g. the bombs explode on its territory, but the armed attack has definitely begun before this moment. It is clear that “armed attack” implies some kind of action by the attacking state which means that mere preparations for an attack do not qualify as an armed attack. According to Dinstein “[t]he crucial question is who embarks upon an irreversible course of action [leading to an armed attack]… This, rather than the actual opening of fire, is what casts the die and forms what may be categorized as an incipient armed attack”.\(^\text{155}\) Singh and McWhinney say in similar terms that “as long as it can be proved that the aggressor State, with the definite intention of launching an armed attack upon a victim member-State, has pulled the trigger and thereby taken the last proximate act on its side necessary for the commission of an armed attack, the requirements of Article 51 may be said to have been fulfilled, even though physical violation of the territories by the armed forces may not, as yet, have taken place”.\(^\text{156}\) The theory of “the last irrevocable act” is ingenious but probably a little theoretic and hard to apply in reality. Singh and McWhinney explain that “when the aggressor State has allowed its aircraft to take off and the guided missiles and projectiles to be discharged, or the submarines to leave its territorial waters, the last irrevocable act has been done and the victim State would be entitled, within the

\(^{154}\) If preventive and anticipatory self-defence are unlawful (I will examine that later) then the determination of the beginning of an armed attack will decide when self-defence becomes lawful.

\(^{155}\) Dinstein Y, War, Aggression and Self-defence, p. 190.

\(^{156}\) Singh N, McWhinney E, Nuclear Weapons and Contemporary International Law, p. 96.
meaning of Article 51, to repel such attack in self-defence even though the aircraft or submarine may not have violated its own territory”. 157 But has there really been an irrevocable act which inevitably leads to the completion of an armed attack in these cases? It seems as if McDougal and Feliciano are right when they hold that because of the modern telecommunications and guidance systems there is probably no “last irrevocable act” in respect of these instrumentalities short of the actual effect of the attack. Therefore they dismiss the theory of “the last irrevocable act” as a way of determining when an armed attack begins. 158 I agree with them that the concept of “the last irrevocable act” is unsatisfactory for determining the beginning of an armed attack. It is better to speak of “the last proximate act” by a state on its side necessary for the commission of an armed attack as it better describes reality. Only because an armed attack which has begun later can be aborted by the attacking state does not deprive the action of its initial character of an armed attack. For example let us assume that the aircraft force of a state is ordered to abort the attack in the last minute or so while the aircraft have already passed the border of the state which they are supposed to attack. Before the order of abortion came the action could be described as an incipient armed attack (to use Dinsteins concept) and the order resulted in the attack never being completed.

In principle Singh and McWhinney are right that an armed attack begins when the aggressor state has allowed its aircraft to take off or the submarines to leave its territorial waters etc. but to this should be added that the action is taken with a clear intention by the state to attack another state. 159 States often move around their armed

157 Ibid. p. 97.

158 McDougal M S, Feliciano F P, Law and Minimum World Public Order, p. 240. It should be pointed out that Singh and McWhinney consider that preventive or anticipatory self-defence is not allowed whereas McDougal and Feliciano have a contrary view regarding anticipatory self-defence. McDougal and Feliciano think that the rejection of anticipatory self-defence together with the requirement for a “last irrevocable act” by Singh and McWhinney “would seem to be to compel the target state to defer its reaction until it would no longer be possible to repel an attack and avoid damage to itself”.

159 This requirement is implied by Singh and McWhinney since they in an earlier passage in this context refer to the case when “as a result of espionage and secret intelligence, a State is convinced it is the intended victim [of a future attack by another state]” (Singh N, McWhinney E, Nuclear Weapons and Contemporary International Law, p. 97). However the conviction of a state that there is an incipient armed attack against it by another state must be based on objective and reliable facts if self-defence is
forces without the intention of attacking some other state. This shows that probably in reality it will mostly be possible to detect a clear intention of attack against another state only when the attacking state’s forces cross the territorial border of the attacked state. Anyway, when an armed attack has begun to occur the attacked state has a right of self-defence and then I mean “classic” self-defence (i.e. not preventive or anticipatory). This is what Dinstein calls “interceptive” self-defence.\footnote{Dinstein Y, War, Aggression and Self-defence, p. 190.} This reasoning is without prejudice to the question of the legality of preventive or anticipatory self-defence.

A recent example of the problem of defining the beginning of an armed attack is the function of modern radar-guided missiles. On 30 June 1998 a U.S. F-16 fighter jet flying over the southern “no-fly” zone in Iraq fired a missile at an Iraqi radar installation after it had allegedly “locked on” to four other aircraft making a routine patrol. It seemed as if the USA was actually arguing that an armed attack begins when the radar guiding the missile is locked on ready to fire. Iraqi officials denied that the radar had “locked on” to the fighters but did not argue against the U.S. argument in principle (of course the legality of the “no-fly” zones is controversial as such).\footnote{Keesing’s 1998: Record of World Events, p. 42369.} What supports the view that an armed attack begins when the radar is “locked on” is that it represents a concrete hostile act which is the first step in a missile attack but the question is if there always really is a clear intention of attack. Anyway, the distinction between mere preparations for an armed attack and an actual armed attack becomes even more blurred with this wide view on the beginning of an armed attack.

to be allowed. Otherwise states could misuse their “convictions” about attacks as a pretext for using force against alleged aggressors.
8.2 Preventive and Anticipatory Self-defence

8.2.1 Definition of Terms

The question if preventive or anticipatory self-defence by a state is allowed under Art. 51 of the UN Charter is indeed a controversial matter in international law. I will therefore deal with this issue quite extensively to see if these forms of self-defence are lawful or not under the UN Charter. First of all the meaning of these terms should be explained. Preventive self-defence means use of force by a state against another state to prevent an attack sometime in the future by the second state which the defending state fears for some reason. It is in the nature of preventive self-defence that the defending state claims that there is a general threat of a future attack by another state. Anticipatory self-defence is also use of force by a state against a future attack by another state but here the defending state claims to act in self-defence against an imminent attack by the second state. Thus the state acts against a threat of attack which (it claims) is concrete, i.e. an attack will take place in the nearest future, and the aim is to stop this imminent attack. It is easy to see that preventive self-defence as such is a more objectionable form of self-defence than anticipatory self-defence considering its more vague nature.

8.2.2 Interpretation of “If an Armed Attack Occurs” in Art. 51

Now we can move on to the question if these forms of self-defence are legal under the UN Charter. According to Art. 51 the right of self-defence exists “if an armed attack occurs” against a state and the meaning of this seems quite clear if the phrase is literally interpreted. It should logically mean that no self-defence is allowed before an armed attack has occurred and this should lead to the conclusion that preventive or anticipatory self-defence is not permitted. But it turns out that the interpretation of Art. 51 in this respect is not that simple. To begin with, the French text is not as equivocal as the English since its literal translation would read “in a case where a United Nations Member is the object of an armed aggression”. It could possibly be argued that a state

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162 This is my own definition of the terms and does not reflect any standard definitions in the legal doctrine. In fact there are no clear definitions of the terms.
can be the object of an armed aggression by another state before the attack actually occurs. But one could also argue that the application of Art. 33(3) of the Vienna Convention on the Law of Treaties (see above) should lead to an interpretation of the French text which results in the same meaning as the English text, since that meaning is possible under the French text.

The most ingenious argument regarding this phrase comes from McDougal and Feliciano who argue that it is wrong to interpret “if an armed attack occurs” as if it read “if, and only if, an armed attack occurs”, since the former phrase does not necessarily imply the latter phrase. That is the latter phrase does not follow by a strict logical reasoning. They are of course right but their argument is still not convincing. It would indeed be strange if this argument would have a general application as it would imply “if an armed attack occurs, or if…, or if… etc.”. To interpret such a phrase in this way would not be an interpretation of a treaty in good faith which is required (Vienna Convention on the Law of Treaties Art. 31(1)). Anyway, the true meaning of the phrase “if an armed attack occurs” (and its French counterpart) cannot conclusively be found through a literal interpretation since what really matters is how the phrase has been interpreted in state practice through the years.

In the Judgement of the Nürnberg Tribunal it was stated in relation to Germany’s attack on Norway that “preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment of deliberation” (the formulation from the Caroline Case, see above). The German argument that it had attacked Norway in preventive self-defence was rejected because it had not acted to forestall an imminent Allied landing, only perhaps to “prevent an Allied occupation at some future date”. In the GA Resolution of 11 Dec. 1946 the General Assembly affirmed “the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgement of the Tribunal”. This provides support for the view that at least in customary international law at the time there was a general recognition of a right of anticipatory self-defence by a state against

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165 GA Res. 95 (I) of 11 Dec. 1946. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (unanimously adopted).
an imminent attack. But on the other hand the resolution cannot bear any influence on
the interpretation of Art. 51 of the UN Charter since it only relates to "principles of
international law". Remember also that the Tribunal was concerned with interpreting
customary international law at the time of the Second World War and was not dealing
with the UN Charter. The conclusion is that both the judgement and resolution are
without relevance for determining the status of preventive or anticipatory self-defence
under the UN Charter.

8.2.3 The Definition of Aggression

In the GA Resolution concerning the Definition of Aggression Art. 2 provides that
“[t]he first use of armed force by a State in contravention of the Charter shall constitute
prima facie evidence of an act of aggression although the Security Council may, in
conformity with the Charter, conclude that a determination that an act of aggression has
been committed would not be justified in the light of other relevant circumstances…” 166
Although the “first use” rule suggests that preventive self-defence in any form is not lawful under the UN Charter the possible exception relating to “other relevant circumstances” complicates the matter. It could be argued that use of force by a state against for example an imminent threat of attack by another state is a case where it would not be justified to classify the use of force as an act of aggression. Thus the Definition of Aggression provides no help for answering the question whether preventive or anticipatory self-defence is lawful under the UN Charter.

8.2.4 State Practice on Preventive or Anticipatory Self-defence

The question if preventive or anticipatory self-defence is allowed under Art. 51 of the
UN Charter can only be answered by a careful study of state practice in this area. How
have states interpreted Art. 51 in this respect in concrete situations and is there an
established interpretation which is respected by the majority of states? It will be shown

that state practice in this area is not clear and therefore it is not easy to draw firm
conclusions on the matter.

A case which some lawyers mention as an example of anticipatory self-defence is the
Soviet-Cuban Quarantine by the United States in Oct. 1962.\textsuperscript{167} This is strange since the
USA itself never justified the quarantine in this way. As is well known the Soviet Union
was in the process of installing long-range nuclear missiles in Cuba which led to the
USA imposing a defensive maritime quarantine to prevent the further introduction of
missiles into Cuba, and to induce the Soviet Union to withdraw the missiles already
there. The justification for this action, which eventually succeeded in achieving its goal,
was the authorization of regional enforcement action by the Organization of American
States which had earlier adopted a resolution.\textsuperscript{168} All that needs to be said here is that
self-defence was not officially the issue in this case which deprives it of any relevance
as state practice.

On 28 March 1964 the U.K. carried out an air attack against Harib Fort (a military
fort) on Yemeni territory. It claimed that it was a defensive response to several armed
attacks by armed bands across the border against the South Arabian Federation and that
the Yemeni authorities did not want to restrain those responsible for the attack.\textsuperscript{169} It
called its action a “counter-attack” and argued that it was “the use of force for defensive
purposes such as warding off future attacks”, i.e. preventive self-defence.\textsuperscript{170} The
Security Council in its Resolution of 9 April 1964 did not directly condemn the British
action but clearly did not accept the British arguments since it deplored the British
military action and condemned “reprisals as incompatible with the purposes and
principles of the United Nations”.\textsuperscript{171} It is reasonable to infer from this a rejection of
preventive self-defence as a justification of the British action by a great majority of the
members of the Security Council (9 out of 11 members). It was implied that the British
action was in fact viewed as an unlawful reprisal.

\textsuperscript{167} E.g. see McDougal M S, The Soviet-Cuban Quarantine and Self-defence, AJIL Vol. 57 1963, pp. 597-
604.

\textsuperscript{168} Henkin L, How Nations Behave, p. 218, 228.

\textsuperscript{169} UN SCOR 1106\textsuperscript{th} Meeting: 2 April 1964, p. 12. The U.K. was responsible for the protection of the
Federation by treaty.

\textsuperscript{170} UN SCOR 1109\textsuperscript{th} Meeting: 7 April 1964, p. 5.

\textsuperscript{171} SC Res. 188 of 9 April 1964. The U.K. and the USA abstained in the voting.
Another case mentioned earlier (see the discussion about proportionality) occurred on 2 and 4 Aug. 1964, the year before the Vietnam war started, when North-Vietnamese torpedo-boats attacked United States warships in the Gulf of Tonkin (on the high seas) but were beaten off. As a result of the incident, on 5 Aug., the U.S. bombed North-Vietnamese torpedo-boats and the base from which the torpedo-boats operated and an oil storage depot to great effect. According to the United States the purpose was “to secure its naval units against further aggression”.\(^{172}\) The Security Council did not vote on or adopt any resolution since there were different opinions concerning the legality of the U.S. action. The British representative was the only one who supported the arguments by the U.S. saying that “having regard to the repeated nature of these attacks and their mounting scale [the USA had the right] to take action directed to prevent the recurrence of such attacks on its ships”.\(^{173}\) By contrast the Czechoslovak representative called the U.S. action “an act of naked and brutal aggression”\(^{174}\) and the Soviet Union representative said it was an unlawful retaliation.\(^{175}\) No firm conclusion can be drawn from this case except that the USA and the U.K. were for a form of preventive self-defence due to the fact that earlier attacks had occurred and could also be expected in the future.

On 5 June 1967 the “Six Days War” started between Israel and Egypt, Jordan and Syria, and apparently Israel was the first to actually use armed force. Still it argued that it had acted in self-defence which prima facie seemed to be a case of anticipatory self-defence. But in fact the Israeli representative in the Security Council claimed that Egyptian armed forces had moved in an offensive thrust against Israel’s borders while at the same time Egyptian planes from airfields in Sinai had struck out towards Israel. The representative concluded that Israel had defended itself under Art. 51 of the UN Charter after Egyptian forces had attacked it.\(^{176}\) Thus it seems as if Israel based its justification on a wide definition of armed attack and not on the concept of anticipatory self-defence. The majority of states did not point out one state as the aggressor but stressed the need to put the cease-fire into effect immediately.\(^{177}\) In the Security Council Resolution of 6

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\(^{172}\) UN SCOR 1140\(^{th}\) Meeting: 5 Aug. 1964, p. 7.

\(^{173}\) Ibid. p. 12.

\(^{174}\) UN SCOR 1141\(^{st}\) Meeting: 7 Aug. 1964, p. 6.

\(^{175}\) Ibid. p. 15.

\(^{176}\) Yearbook of the UN 1967, p. 175 f, 196.

\(^{177}\) Ibid. p. 176.
June 1967 the Council just called upon the states concerned to take all measures for an immediate cease-fire and blamed no part in the conflict.\textsuperscript{178} It must be admitted that the facts are not entirely clear in this case but I agree with Gray when she says that “the point of importance here is that Israel did not rely on anticipatory self-defence to justify its actions”.\textsuperscript{179} This means that it does not contribute to the clarification of the legality of anticipatory self-defence.

On 7 June 1981 Israel carried out an air attack on Iraqi nuclear installations, the atomic reactor “Osirak”, situated near Baghdad and destroyed it. Israel claimed to have acted in preventive self-defence because “[a] threat of nuclear obliteration was being developed against Israel by Iraq”.\textsuperscript{180} Israel argued that the Osirak reactor soon was going to be loaded and that meant that Iraq in the nearest years would be able to develop an atomic bomb, which could be used against Israel since Iraq claimed to be at war with Israel. The Security Council totally rejected the Israeli justification in its Resolution of 19 June 1981 where it strongly condemned “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct”.\textsuperscript{181} In the Security Council debate almost all states were opposed to the Israeli arguments of preventive self-defence as valid in international law. Only the United States and the U.K. did not by principle deny that this form of preventive self-defence (i.e. not only anticipatory self-defence) was permissible.\textsuperscript{182} Very few states expressly recognized a narrower form of preventive self-defence, i.e. what in this essay is called anticipatory self-defence, against an imminent threat of attack.\textsuperscript{183} On the contrary, most of the states seemed to think that all forms of preventive self-defence was prohibited by Art. 51 of the UN Charter, including the narrow form of anticipatory self-defence.\textsuperscript{184}

\textsuperscript{178} SC Res. 233 of 6 June 1967.
\textsuperscript{179} Gray C, International Law and the Use of Force, p. 113.
\textsuperscript{180} UN SCOR 2280\textsuperscript{th} Meeting: 12 June 1981, p. 8.
\textsuperscript{181} SC Res. 487 of 19 June 1981.
\textsuperscript{182} See UN SCOR 2280th-2288\textsuperscript{th} Meetings 1981. The United States said its judgement that Israel had violated the UN Charter was based solely on the conviction that Israel had failed to exhaust peaceful means (Yearbook of the UN 1981, p. 276).
\textsuperscript{183} For example the representative of Niger said that “there was aggression, because Israel was in no way facing an imminent attack, irrefutably proved and demonstrated”. UN SCOR 2284\textsuperscript{th} Meeting: 16 June 1981, p. 2.
\textsuperscript{184} E.g. Pakistan (UN SCOR 2281\textsuperscript{st} Meeting, p. 7), Ireland (2283\textsuperscript{rd} Meeting, p. 3), Yugoslavia (2283\textsuperscript{rd} Meeting, p. 5), the Soviet Union (2283\textsuperscript{rd} Meeting, p. 7), Sierra Leone (2283\textsuperscript{rd} Meeting, p. 14), Syria
Perhaps the representative of Ireland, commenting on the Israeli interpretation of preventive self-defence, in a good way expressed what the majority of states thought saying that “[e]ven if one accepts the premise [i.e. that self-defence against imminent attack is allowed]... such a definition is still impossibly wide. It would [lead to] a virtually unlimited concept of self-defence against all possible future dangers, subjectively assessed”. The General Assembly also adopted a Resolution of 13 Nov. 1981 in which it strongly condemned Israel “for its premeditated and unprecedented act of aggression in violation of the Charter of the United Nations and the norms of international conduct...”. Most states in the General Assembly rejected the Israeli argument that it had exercised its right of preventive self-defence, thus confirming the views of the majority of states in the Security Council.

On 15 April 1986 U.S. military aircraft bombed military targets in Libya, hitting most of the targets successfully but killing approximately 100 civilians as well (it was estimated). The United States justified its action by saying that it had exercised its right of self-defence “by responding to an ongoing pattern of attacks by the Government of Libya”. It claimed that Libya had been involved in a number of terrorist attacks against American citizens and United States installations, the most recent being a bombing in West Berlin on 5 April which killed one U.S. soldier and injured 50 other soldiers (as well as about 180 other people). The U.S. objective was “to destroy facilities used to carry out Libya’s hostile policy of international terrorism and to discourage Libyan terrorist attacks in the future”. President Reagan called the air attack “pre-emptive action” justified by Art. 51 of the UN Charter, i.e. claiming a right of preventive self-defence. In the Security Council the vast majority of states did not accept the U.S. justification but condemned or deplored the U.S. action against Libya saying that such action violated fundamental norms and principles of international law (including the UN

(2284th Meeting, p. 6), Guyana (2286th Meeting, p. 3), Nicaragua (2287th Meeting, p. 2), Spain (Yearbook of the UN 1981, p. 277). It must be admitted that this is said more or less clearly by these states since few of them expressly say that self-defence against an imminent threat of attack is not permitted.

185 UN SCOR 2283rd Meeting, p. 3.
188 UN SCOR Supplement for April, May and June 1986, p. 22 (Doc. S/17990).
189 Harris D J, Cases and Materials on International Law, p. 913.
Charter).\textsuperscript{190} For example the Qatar representative said that “the concept of “preemptive self-defence” does not exist, since armed aggression has to precede acts of self-defence according to the first condition of that limited exception to the rule of non-use of force stipulated by Article 51 of the Charter”.\textsuperscript{191} The only state which clearly supported the U.S. actions was once again the U.K. whose representative held that “the right of self-defence is not an entirely passive right. It plainly includes the right to destroy or weaken the capacity of one’s assailant, to reduce his resources, and to weaken his will so as to discourage and prevent further violence.”\textsuperscript{192} On 21 April the Security Council voted on a draft resolution, which would have condemned the armed attack by the United States in violation of the UN Charter and the norms of international conduct, but of course it was not adopted owing to the negative votes of permanent members.\textsuperscript{193} But later that year on 20 Nov. the General Assembly adopted a resolution in which it condemned “the military attack perpetrated against [Libya] on 15 April 1986, which constitutes a violation of the Charter of the United Nations and of international law”.\textsuperscript{194}

It is clear in this case that a great majority of states rejected the U.S. argument of a right of preventive self-defence and the fact that the Security Council did not adopt a resolution condemning the U.S. action cannot change this fact. The important thing is that the U.S. action was not accepted as legal by most states, i.e. preventive self-defence was still considered unlawful under the UN Charter.

\textsuperscript{190} Yearbook of the UN 1986, p. 255 f, UN SCOR Meetings 2674-2680, 2682-2683, 1986.
\textsuperscript{191} UN SCOR 2677\textsuperscript{th} Meeting: 16 April 1986, p. 7.
\textsuperscript{192} 2679\textsuperscript{th} Meeting, p. 27.
\textsuperscript{193} UN SCOR Supplement for April, May and June 1986, p. 37 (Doc. S/18016/REV.1). The vote was 9 to 5, with 1 abstention. Those states voting against the draft resolution were Australia, Denmark, France, the United Kingdom and the United States. France and Denmark voted against the draft since they were of the opinion that it was unbalanced because it did not mention Libya’s responsibility for international terrorism. But Australia seemed to believe that the United States had had a right to use force in self-defence against Libya without expressly admitting a right of preventive self-defence (Yearbook of the UN 1986, p. 254).
\textsuperscript{194} GA Res. 41/38 of 20 Nov. 1986. Adopted 79 for – 28 against – 33 abstentions. It seems as if almost all states which voted against the resolution or abstained did so because of different reservations to the text of the resolution (e.g. that it gave an unbalanced view of events) and not because they supported a right of preventive self-defence for the United States. Yearbook of the UN 1986, p. 258.
Earlier in this essay, when self-defence against terrorism was discussed, the terrorist attacks against the U.S. Embassies in Nairobi and Dar es Salaam and the following U.S. missile attack against terrorist training camps in Afghanistan and against a pharmaceutical plant in Sudan (identified by the United States as a chemical weapons facility) in 1998 was mentioned. The United States justified the missile attacks by saying that it was aimed at preventing and deterring the continuation of the terrorist attacks.\textsuperscript{195} Thus not only was it arguing for a wider right of self-defence against terrorism (see above), it was also invoking preventive self-defence in this case. As was shown above, the reaction to the U.S. action by many states was one of understanding or at least not condemnation even though states did not explicitly say that they supported this doctrine of self-defence. I will repeat what I said earlier, namely that the implication of this case is hard to determine but that it at least indicates that more states than before were ready to accept a wider right of self-defence, including, it seems, a form of preventive self-defence against terrorism (remember that the terrorist attacks had already occurred when the United States responded).

There are also other instances of state practice where preventive or anticipatory self-defence has been a relevant issue but it is not necessary to mention every case in order to get a reasonably clear picture of state practice in general in this area. I think that the cases above lead to some conclusions regarding the interpretation of Art. 51 of the UN Charter.

\textbf{8.2.5 Evaluation of State Practice and Conclusion}

The examples given of state practice in this area prove that a great majority of states do not accept preventive self-defence as legal under Art. 51 of the UN Charter. Thus the \textit{use of force for a preventive purpose is not legal} according to the prevailing interpretation of Art. 51. However a few states, mainly the United States and the U.K., assert that there is a right of preventive self-defence in some cases where, they say, it is necessary to prevent further attacks. But this practice of some states does not affect the conclusion that preventive self-defence is not allowed under Art. 51. The U.S. action against Afghanistan and Sudan and the reaction of the international community leaves

\textsuperscript{195} UN Doc. S/1998/780.
room for some uncertainty though since it at least indicates that preventive self-
defence against terrorism may be accepted when prior terrorist attacks have occurred and are likely to continue.

When it comes to anticipatory self-defence, i.e. self-defence against an imminent threat of attack, it is more difficult to do an evaluation of state practice. It seems as if most states are opposed also to anticipatory self-defence but state practice is hard to interpret. In fact no case deals directly with anticipatory self-defence which complicates the matter and makes it hard to draw firm conclusions. The issue depends partly on when an armed attack is considered to begin which has been discussed above. There I held that an armed attack begins before the effect of it occurs which means that the attacked state can exercise “classic” self-defence against the attack to prevent it from being completed. I cannot say that this is an accepted view in state practice (the beginning of an armed attack has never been an issue as such) but Israel in 1967 claimed that there was an armed attack by Egypt although it had not used armed force and this was at least not openly rejected by most states. What can be said with certainty is that there is no general acceptance of anticipatory self-defence as legal under Art. 51 of the UN Charter among the majority of states. Rather owing to the categorical rejection of a right of preventive self-defence by most states in some of the cases above it seems as if the main rule must be that anticipatory self-defence is not legal under Art. 51. Most states do not seem to want to allow any form of preventive self-defence, including self-defence against an imminent threat of attack. On the other hand, it might be that states in general accept a wide interpretation of “armed attack” which makes it possible for the attacked state to respond to the attack before the effect of it occurs. This wide interpretation compensates for not allowing anticipatory self-defence.

The correct interpretation of Art. 51 is thus that neither preventive nor anticipatory self-defence is legal as shown by state practice, let it be that the law on anticipatory self-defence is not entirely clear. Whatever one thinks about this law it is the law de lege lata (at least before 11 Sept. 2001).
9 The Terrorist Attacks against the USA on 11 Sept. 2001 and the Implication for the Law on Self-defence

On 11 Sept. 2001 a giant and terrible terrorist attack occurred in New York, Washington, D.C. and Pennsylvania which resulted inter alia in the total destruction of the World Trade Center buildings and killed about 3000 people altogether. As everybody knows, four big aircraft were used as weapons and terrorism reached an unprecedented level. The shock and psychological effect was huge all over the world and the incident had great implications in many ways.

9.1 Action by the United Nations

The Security Council in its Resolution of 12 Sept. 2001 reacted by linking international terrorism and the right of self-defence for the first time since it in the preamble recognized “the inherent right of individual or collective self-defence in accordance with the Charter”. The resolution went on to strongly condemn the terrorist attack and described acts of international terrorism as a threat to international peace and security (this description was not new though). The recognition of the right of self-defence in connection with international terrorism was repeated in the preamble of the SC Resolution of 28 Sept. 2001. Both Stahn and Cassese point to the fact that in neither of these resolutions the notion of “armed attack” is used to describe the events on 11 Sept. 2001 but instead they are referred to as a “terrorist attack” (threatening international peace and security) without expressly linking this to Art. 51 of the UN Charter. According to them this makes the link between international terrorism and the right of self-defence in the resolutions uncertain and weak. They are right in principle that the reference to self-defence is vague but this does not change the fact that the Security Council mentions self-defence as a possible response to international terrorism.

by the attacked state. It was presumably done because of the enormous scale of the terrorist attack. It also implicates that a terrorist attack of this size (not any terrorist attack) can be seen as an armed attack. On 12 Sept. 2001 the Nato Council stated in clearer terms that if it would be determined that the terrorist attack was directed from abroad against the United States, it would be regarded as an action covered by Art. 5 of the NATO Treaty, which states that an armed attack against one or more of the NATO members shall be considered to be an armed attack against them all.\textsuperscript{199}

Both resolution 1368 (2001) and 1373 (2001) stated that there was a right of self-defence in connection with international terrorism but neither of them stated against what subjects self-defence could be exercised. In the GA Definition of Aggression Art. 1 states that aggression is the use of armed force by a state against another state as set out in the Definition.\textsuperscript{200} As “armed attack” is a sub-category of aggression this means that an armed attack so far could only be committed by a state or, put another way, only a state could be responsible for an armed attack, either directly or indirectly. In resolution 1368 the Security Council stressed “that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable”. Moreover, in resolution 1373 the Council laid down extensive obligations for states to prevent terrorism including that they should “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts…” (paragraph 2(a)), “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens” (paragraph 2(c)) and also “[p]revent those [people] from using their respective territories for those purposes against other States or their citizens” (paragraph 2(d)). However the Council did not say that a state breaching any obligation would be responsible for an armed attack by terrorists which would mean that self-defence could be exercised against that state. What also can be said with certainty is that these resolutions did not give an authorization to the United States to use force in self-defence against a specific state but only recognized that self-defence may be exercised in the context of international terrorism. Of course the United States could legally have exercised self-defence against the terrorists when the terrorist attack was occurring to prevent it, had it been possible,

\textsuperscript{200} GA Res. 3314 of 14 Dec. 1974.
but what about the use of force against other states in some way (actively or passively) supporting the terrorists? The resolutions do not provide a clear answer for this question, i.e. they do not say under what circumstances a terrorist attack amounting to an armed attack may be attributed to a state. I will come back to this issue later.

It might also be mentioned that the General Assembly in its Resolution of 12 Sept. 2001 strongly condemned the terrorist acts and also stressed “that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable”.201 However it did not mention the right of self-defence under Art. 51 in the resolution on international terrorism.

9.2 The U.S. Action in Afghanistan and the Response by the International Community

On 7 Oct. 2001 the United States started a military attack against terrorist training camps belonging to the terrorist organization Al-Qaeda and military forces and installations of the Taliban regime in Afghanistan. It claimed that it had clear information that the Al-Qaeda organization, which was supported by the Taliban regime in Afghanistan, had a central role in the terrorist attack on 11 Sept.. The United States justified the military operation against Afghanistan by saying that “[i]n response to these attacks, and in accordance with the inherent right of individual or collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States”.202 Thus once again it argued for a form of preventive self-defence against international terrorism. It is important to note that the action was directed both at terrorists and those who harboured them. The United States thought that the Taliban regime was also responsible as it allowed the parts of Afghanistan that it controlled to be used by the Al-Qaeda organization as a base of operation.203 The USA had on 21 Sept. issued a number of demands to the Taliban regime including to surrender all the terrorists (above all the leaders of Al Qaeda) in Afghanistan and close down terrorist camps and operations. The Taliban regime first rejected the demands and insisted that it received proof of bin Laden’s involvement in

201 GA Res. 56/1 of 12 Sept. 2001.
the terrorist attack against the USA. But in the beginning of Oct. Taliban officials said they were interested in negotiating with the USA and might agree to turn over bin Laden to a third country. However the U.S. government replied that the demands were not open to negotiation. 204 After the U.S. attack against Afghanistan had begun the Security Council had a meeting where the members of the Council seemed to accept the justification for the U.S. action against Afghanistan (i.e. self-defence) and had no legal objection to it. The permanent members explicitly recognized that the U.S. action was taken in self-defence and directed at terrorists and those who harboured them. 205 Earlier the 15 member states in the European Council said in a statement on 21 Sept. 2001 that “[o]n the basis of Security Council Resolution 1368, a riposte by the US is legitimate...The actions must be targeted and may also be directed against States abetting, supporting or harbouring terrorists”. 206 On 10 Oct. a declaration was issued at a meeting in Qatar of the 56-country Organization for the Islamic Conference (OIC) which contained no objections to the U.S. military action but only warned the United States not to extend military action beyond Afghanistan. 207

9.3 Conclusion

This widespread support among states for the U.S. action leads to the conclusion that Art. 51 and the right of self-defence as a result now has a wider application than before, namely it includes self-defence against international terrorism and significantly also against states which in some way support terrorists, conditioned by the fact that the terrorist attack is on such a gravity or scale that it can be equated with an armed attack. The point is that in this case the Taliban regime (at least officially) only harboured the

203 Ibid.
205 The Security Council President said in a press statement on 8 Oct. 2001 that the Security Council members “were appreciative of the presentation made by the United States and the United Kingdom”. UN Doc. SC/7167.
207 Keesing’s: Record of World Events 2001, p. 44393.
terrorists and did not actively take part in the terrorist attack (=armed attack) but it seems as if this was enough to make the regime responsible for it. Thus it seems as if in principle any active or passive support by a state to terrorists is enough to make it responsible for an armed attack by them and this means that self-defence may be exercised against this state. There is no need for a “substantial involvement” by a state in the terrorist attack to make it responsible as was stated by the ICJ in the Nicaragua case regarding the activities of armed bands etc. (see above). The international community was not ready to accept that terrorists committing major terrorist attacks would get away by seeking refuge in states harbouring them. And apparently most states thought that it made no difference whether only passive support was involved since the terrorists had to be caught and brought to justice. That is why the U.S. action was accepted by most states as legal self-defence. In fact already the Afghanistan/Sudan case in 1998 (see above) indicated a growing acceptance for this form of self-defence, although not this wide.

If the Taliban regime had accepted the U.S. demands to surrender the terrorists in Afghanistan etc. it would no longer have harboured terrorists and the USA would not have had a right of self-defence against the Taliban regime. The reason is that the terrorist attack could then not any longer be attributed to the Taliban regime.208 The fact that the Taliban regime offered negotiations with the USA did not, however, remove its responsibility for the terrorist attack against the USA.

9.4 An Analyse of the New Law on Self-defence

9.4.1 War in Self-defence

As has been noted what is fairly clear is that self-defence against terrorists committing major terrorist attacks and states harbouring them is now legal under Art. 51 of the UN Charter. But a more careful analysis of this wider right of self-defence is needed in order to know its content in more detail. The United States spoke (and still speaks) of a

208 In a speech the U.S. President Bush said (referring to the Talibans) “[t]hey will hand over the terrorists, or they will share in their fate”. Murphy S D, Contemporary Practice of the United States Relating to International Law, AJIL Vol. 96 2002, p. 243. This implicates that the USA would not have attacked the Taliban regime if it had surrendered the terrorists.
“war on terror”\textsuperscript{209} which could take years and the war in Afghanistan was a part of this. Thus this was not a single act of self-defence but a \textit{war in self-defence}. As mentioned earlier in the essay, a war can be fought in self-defence by a state against another state waging a war of aggression (which is equated with a constant armed attack) and when a war has been legitimately started it can be fought to the finish, including the destruction of the enemy’s army, if this is needed to stop the war of aggression. Now it seemed to be accepted by most states that the USA was fighting a war in self-defence against terrorism but obviously this was a new kind of war. A war not between two states but between a state, the USA, and terrorist organizations, primarily the Al Qaeda organization. This perspective may help to evaluate the U.S. action in legal terms.

\textbf{9.4.2 Problems}

There are several problems regarding the U.S. military action against Afghanistan. The first concerns the demand for immediacy in the exercising of self-defence, i.e. that self-defence should be an immediate response to an armed attack since its purpose is to repel an ongoing attack. In this case the terrorist attack had already been completed and the USA gave a delayed response to it. As noted above, the purpose of the military action was to prevent and deter future terrorist attacks against the USA which implicates a form of preventive self-defence against terrorism. Since the U.S. justification for its action was generally accepted by states one must conclude that this special form of preventive self-defence now is legal under Art. 51 of the UN Charter. Mahmoudi argues, however, that preventive self-defence not necessarily has been accepted by states but that the acceptance instead can be explained by the special circumstances in this case. He thinks that, considering the restrictiveness which must be applied in the interpretation of the right of self-defence, a justified conclusion is that the international community has accepted a delayed act of self-defence against a completed international terrorist act with large-scale damage involved.\textsuperscript{210} With respect there is nothing in the reactions by states which supports this interpretation and therefore it can only be a

hypothesis. What can be said with certainty is that the USA has argued for preventive self-defence in this case and that states accepted the justification for its action. This should clearly mean an acceptance of this form of preventive self-defence against terrorism. On the other hand, the fact that there had been at least two terrorist attacks before by the terrorist organization Al Qaeda, the attack against the U.S. Embassies in Nairobi and Dar es Salaam in 1998 and the attack on 11 Sept. 2001, most likely played a decisive role for the acceptance by states of preventive self-defence by the USA. They realized that these terrorist attacks against the USA would surely continue and therefore it was not considered reasonable to demand that the USA should be passive and risk more terrorist attacks of this size against itself. Thus the legality of preventive self-defence is probably conditioned by the occurrence of one or more earlier large-scale terrorist attacks which are likely to continue. Preventive self-defence must not be exercised against any “terrorist” threat around the world which a state perceives as it would open up for abuse of the right of self-defence by states (the definition of terrorism is not uncontroversial anyway).

As the U.S. military action was generally accepted as a war in self-defence most states also accepted that it lasted for several months (in fact limited military activity went on until February 2002).\textsuperscript{211} The justification must implicitly have been that this prolonged action was needed to prevent future terrorist attacks by the Al Qaeda organization and therefore the military action in Afghanistan could not stop before the Al Qaeda forces (and the Taliban forces) were totally defeated and the main terrorist leaders (notably bin Laden) captured or killed. Whatever one thinks of this reasoning the general acceptance by states of the prolonged U.S. action may confirm the proposition above that a war in self-defence may be fought to the finish, i.e. until the enemy is completely defeated, if this is necessary to prevent future attacks from it (the criterion of necessity).

Another problematic aspect of the U.S. action was that it occurred in a completely different place (Afghanistan) than where the terrorist attack took place. This was not allowed under the “traditional” right of self-defence which only permitted the exercise of self-defence in the place where the armed attack occurred (see the part on proportionality). Naturally this was a logical criterion for legal self-defence since the purpose with self-defence only was to repel an ongoing attack. With the special form of

\textsuperscript{211} Not until by mid-December were most of the Taliban and Al Qaeda forces defeated. Murphy S D, Contemporary Practice of the United States Relating to International Law, AJIL Vol. 96 2002, p. 250.
preventive self-defence exercised by the USA this was not the case since it was not
directed at any specific attack in a certain place but its purpose was to prevent future
attacks against the USA. As states in general accepted this form of preventive self-
defence by the USA it was a logical that they also accepted that it had to be exercised in
another place than the previous terrorist attack. The terrorist organization Al Qaeda had
its headquarters in Afghanistan and the terrorist training camps were situated there so in
order to prevent future terrorist attacks self-defence had to be exercised there. But the
problem here is that it is a fact that the network of terrorist cells making up the Al Qaida
organization sprawls across up to 60 countries in the world.\textsuperscript{212} Of course the USA is not
allowed to exercise preventive self-defence against all these states (most likely not
against any state) but only against a state, like Afghanistan, which \textit{knowingly harbours
terrorists (guilty of a terrorist attack which can be equated with an armed attack) and
refuses to extradite them although there is convincing evidence of their guilt, thereby
protecting them}. Only then an armed attack can be attributed to the state where the
terrorists are. Remember that terrorists usually operate covertly and the mere failure by
a state to stop all terrorist activity within its territory will not make it responsible for
terrorist attacks against other states carried out by terrorists who secretly take refuge in
this state.\textsuperscript{213}

Finally the relevance of the proportionality principle for the U.S. war in self-defence
must be examined. How could it be accepted by states in general that the USA initiated
a large-scale military action against Afghanistan which lasted for several months in
response to one let it be large-scale terrorist attack against itself? Traditionally
proportionality meant that the action in self-defence by a state had to be proportional to
a specific attack and more exact, to the level of the attack (see above the part on
proportionality). By this standard the U.S. action was not proportionate to the terrorist
attack on 11 Sept.. But since this was a war in self-defence the proportionality
requirement loses its ordinary meaning as was mentioned above. If a war waged in self-
defence may be fought to the end if this is necessary to stop future attacks by the
aggressor (in this case the Al Qaeda organization and indirectly the Taliban regime),
then \textit{proportionality must mean that the action in self-defence must be proportional to

\textsuperscript{212} Cassese A, Terrorism is also Disrupting some Crucial Legal Categories of International Law, p. 5.
\textsuperscript{213} Another significant problem is how to define terrorism which has not been solved yet on a global level
although there seems to be a growing consensus regarding this issue.
the purpose of self-defence, i.e. the prevention of future terrorist attacks. A prolonged military action by the USA was accepted by states as the action was actually considered proportional to the U.S. purpose of winning the war against the Al Qaeda organization and the Taliban regime thereby preventing future terrorist attacks against itself. This is a much less strict way of applying the proportionality principle but only this application can explain the acceptance by states of the U.S. action. But if the USA for example had used nuclear weapons against Afghanistan this would surely not have been considered proportionate to the purpose of preventing future terrorist attacks. Even so, it seems as if a great deal can be permitted under this interpretation of the proportionality principle.

It must be pointed out in connection to the above discussion that the acceptance by states of the U.S. war in self-defence against Afghanistan does not mean that they accepted every single action by the USA in this war. It is a fact that the USA (and the U.K.) made some “mistakes” during the war where civilian targets were hit and quite a lot of innocent civilians died (referred to as collateral damage)\(^{214}\) and these incidents cannot be excused by invoking self-defence. Obviously there was no necessity of self-defence involved at all as it was only necessary to strike at terrorist targets and targets relating to the Taliban military forces. Instead these actions were quite simply illegal according to the laws of war, especially international humanitarian law (mainly the four Geneva Conventions of 1949).

### 9.4.3 Conclusion

To sum up, the changes in the law on self-defence that have occurred after the terrorist attack against the USA on 11 Sept. have led to a wider right of self-defence for states in some aspects but have above all meant a right of self-defence with less certain limits. Even though I have tried to set up limitations for this “new” right of self-defence it is an illusion to believe that the new law can be determined with complete certainty at this stage. If more cases on self-defence against terrorism would occur in the future a clearer pattern can emerge. It is not impossible that the fact that the Taliban regime was not recognized by the international community and that its policy was notorious played a

certain role for the acceptance by states of the U.S. military action against Afghanistan. To draw general conclusions from one case is always hazardous but maybe especially in this case because of these circumstances. It is irrefutable, however, that the right of self-defence has got wider with the latest development.
10 The Security Council and the Right of Self-defence

Something should be said also about the role of the Security Council when a state exercises self-defence. The Security Council can explicitly recognize the right of self-defence as it did in the Resolution of 6 Aug. 1990 where it affirmed “the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter”. But it is clear in Art. 51 that prior recognition by the Council is certainly not necessary as self-defence is supposed to be practised immediately against an attack which has occurred and it is the attacked state itself which determines if self-defence is needed. However the legality of the exercise of self-defence will later be evaluated by the Council which will always have the final word in this matter.

10.1 Necessary Measures by the Security Council

It is also significant that under Art. 51 of the UN Charter the right of self-defence only exists “until the Security Council has taken measures necessary to maintain international peace and security”. The question what can be counted as necessary measures was relevant in the Falkland Islands war between Argentina and Great Britain in 1982. On 2 April Argentine forces invaded the Falkland Islands and the small British military garrison surrendered after some fighting. On 3 April the Security Council adopted a resolution where it demanded an immediate cessation of hostilities, an immediate withdrawal of all Argentine forces from the Falkland Islands and called on the two governments to seek a diplomatic solution to their differences but the resolution did not have any effect. A British military force landed on the Falklands on 21 May and the Argentine garrison surrendered on 14 June. In the Security Council Argentina argued that Britain did not have a right of self-defence after the Council had adopted the resolution since it represented necessary measures to maintain international

peace and security.\textsuperscript{217} Britain, on the other hand, replied that the resolution had proved insufficient to bring about withdrawal by Argentina and therefore Britain was entitled to take measures in self-defence under Art. 51. It said that necessary measures could “only be taken to refer to measures which are actually effective to bring about the stated objective [i.e. to maintain international peace and security]. Clearly the Security Council’s decision in its 502 (1982) has not proved effective.”\textsuperscript{218} In this case the Council did not explicitly say if it considered that it had taken necessary measures but a reasonable interpretation of Art. 51 supports the British view. Necessary measures should imply effective measures, i.e. measures which lead to a concrete result. But Gray is clearly right when she holds that “[g]iven that the UN Charter aims not only to limit but also to centralize the use of force under UN control, it seems clear that the intention was to give the Security Council itself the right to decide whether such measures terminating the right to self-defence had been taken”.\textsuperscript{219} Since the Charter is primarily a collective security system it would actually be absurd to let the defending state itself determine when the Security Council has taken necessary measures to maintain international peace and security.

A recent case where the issue of necessary measures by the Security Council was relevant was the U.S. military action against Afghanistan in self-defence in Oct. 2001 and the following months (see above). When the U.S. action started the Security Council had already adopted two resolutions on the subject of international terrorism, Resolution 1368 (2001) and Resolution 1373 (2001). In Resolution 1368 the Security Council expressed “its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations”. And in Resolution 1373 the Council decided on a number of different kind of measures to combat international terrorism (paragraphs 1-3, 6-7) including for example enhanced judicial and police cooperation between states and the establishment of a special committee to monitor implementation of the resolution by states. No military measures were taken but as

\textsuperscript{217} UN SCOR 2360\textsuperscript{th} Meeting: 21 May 1982 in Harris D J, Cases and Materials on International Law, p. 905.

\textsuperscript{218} Ibid. p. 906, UN SCOR 2362\textsuperscript{nd} Meeting: 22 May 1982 in Harris D J, Cases and Materials on International Law, p. 907.

\textsuperscript{219} Gray C, International Law and the Use of Force, p. 93.
Mégré t says, “nothing in the Charter suggests that only military measures are adequate to deal with threats to international peace and security”. What measures that are necessary must be determined in each individual case according to the particular circumstances. A reasonable conclusion in this case is that since the members of the Security Council accepted the U.S. military action despite the adoption of the two resolutions the Security Council implicitly recognized that it had not taken all necessary measures to maintain international peace and security (although it had been ready to do so). This reasoning is based on the premise (discussed above) that the resolutions themselves do not give an authorization for the USA to use force in self-defence against Afghanistan.

It must thus be concluded that in the view of the Security Council the USA still had a right of self-defence against Afghanistan although the Council had in fact dealt quite comprehensively with the issue of international terrorism at the time. This explains why it accepted the U.S. military action despite its earlier resolutions.

10.2 The Reporting Duty to the Security Council

For the sake of completeness one more formal aspect should be mentioned regarding the right of self-defence. Under Art. 51 of the UN Charter “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”. This part of Art. 51 is only an affirmation that the Charter is mainly a collective security system and self-defence is an exception in this respect. Without going into details it can be said that states did not always follow the duty to report measures taken in self-defence to the Security Council before the Nicaragua case in 1986. In this case the ICJ held that “the absence of a report may be one of the factors indicating whether the State in question

was itself convinced that it was acting in self-defence”.\textsuperscript{223} After the Nicaragua case states have in general complied with the reporting duty to the Council. The duty to report is a procedural requirement though and failure to fulfil the duty will not in itself make self-defence illegal as is shown by the Nicaragua case. It can only provide proof that the state has in fact not acted in self-defence.

\textsuperscript{223} ICJ Rep. 1986, p. 95.
11 An Assessment of the Right of Self-defence De Lege Lata and a Discussion De Lege Ferenda

So far I have tried to describe the law on the right of self-defence as accurate as possible but it seems necessary to do a general assessment of this law and also examine some particular aspects of it. I will also try to give suggestions de lege ferenda on how the law on self-defence should be as I see it.

11.1 General Comments

The right of self-defence is a part of the general regulation of the use of force and more specifically, it is an exception to the prohibition of force in the UN Charter (Art. 2(4)). It is plain to see from this survey of its content that Art. 51 (the right of self-defence) is not a clear rule in international law and therefore it is also quite a weak rule. Especially today, after the development following 11 Sept. 2001, there are too many areas where the limits of self-defence are uncertain. This does not help to contribute to international peace and security which is the main concern of the regulation of force. But Cassese clearly has a point when he rhetorically asks “[h]ow could powerful States have accepted (or accept) clear-cut and “frozen” legal restraints on their fundamental interests in using military force whenever vital interests are at stake”?224 Indeed, power politics will always be a factor in international relations and international law cannot be isolated from it. It is actually not realistic to believe that the right of self-defence could have a completely clear content free from uncertainties. But this does not mean an acceptance of ”the law of the jungle” with no regulation at all. There are limits for the right of self-defence in Art. 51, let it be that they often are vague, and states are definitely not free to use force as they wish in the name of self-defence. If they clearly exceed the limits of self-defence they will be condemned by the international community which has happened many times in the past.

11.2 Comments on Specific Issues

I have already commented on some aspects of the law on self-defence as I dealt with them in the essay. Now I will discuss some other specific aspects of the law on self-defence starting with the concept of “armed attack” in Art. 51. This is a necessary criterion for self-defence but it does not correspond to the prohibition against the “use of force” in Art. 2(4). In the Nicaragua case the ICJ held that a military operation must have a certain “scale and effects” for it to be classified as an armed attack and not only a frontier incident. Is this distinction between different levels of force really justified? In fact I think the distinction is largely arbitrary and hard to apply in reality which reduces its value. How can one know when the level of force used by a state is high enough to define it as an armed attack? Anyway, I agree with Dinstein when he says that “[i]n reality, there is no cause to remove small-scale armed attacks from the spectrum of armed attacks”.225 In principle I think that self-defence by a state should be allowed against use of force in general which leads to a correspondence between Art. 2(4) and 51. Naturally frontier incidents in the sense of accidental incidents should not be included in this respect. But the general rule should be that since use of force is prohibited in general self-defence should be allowed against use of force in general. Remember also that use of force in self-defence must be exercised on a low level if it is used against a small-scale use of force according to the proportionality principle. It must be admitted though that it could perhaps be somewhat easier to abuse a right of self-defence which allowed self-defence against any level of force.

The next issue is about preventive or anticipatory self-defence. I have earlier interpreted the latest development after 11 Sept. 2001 as implying a wider right of self-defence including a special form of preventive self-defence against international terrorism when prior large-scale terrorist attacks have occurred and are likely to continue. But what about preventive or anticipatory self-defence in general? Is it unrealistic not to allow this kind of self-defence against future attacks when an attack can be launched so quickly today? A starting point is to determine when an armed attack begins which I discussed above and used the criterion “the last proximate act”. Although this criterion is a bit vague the point is that an armed attack begins when the attacking state has initiated a military operation with a clear intention to attack another

225 Dinstein Y, War, Aggression and Self-defence, p. 192.
state and this is before the moment when the effect of the attack is felt on the attacked state’s territory. “Interceptive” self-defence by the attacked state is legal and can be exercised before the effect of the attack is felt. (Of course in reality there will not always be time to stop an attack before any effect of it is felt on the attacked state’s territory.) With this in mind I do not think that it is unrealistic that preventive or anticipatory self-defence in general is prohibited by Art. 51. This kind of self-defence, especially preventive self-defence, is very likely to lead to abuse of the right of self-defence since it requires that a state can ascertain other states’ intentions, i.e. whether there is an intention by any state of a future attack, and this will inevitably lead to a certain degree of subjectivity in the assessment. To allow a general right of preventive self-defence would certainly not contribute to international peace and security and would probably lead to greater instability in international relations. The better alternative is to interpret Art. 51 as prohibiting preventive or anticipatory self-defence in general and perhaps only allowing special exceptions to this (e.g. preventive self-defence against international terrorism under certain circumstances).

11.3 Comments on the Latest Development of Self-defence

Finally I will comment on the latest development after 11 Sept. 2001 of the law on self-defence which has led to a wider right of self-defence. The question is if the U.S. war in Afghanistan is a dangerous precedent regarding the right of self-defence. Above I pointed at some problematic aspects with the U.S. military action and there is no point in repeating them here. The concept of a war in self-defence is not wrong as such as a war clearly can be waged in self-defence by a state against another state waging a war of aggression (consider for example the war fought by the Allies against the Axis Powers during the Second World War). The problem is to determine under what circumstances a war in self-defence may be invoked by a state and to define limits for it. I will not discuss this concept in general but it seems to be a very uncertain concept which is unsatisfactory. Instead the focus will be on the U.S. war in Afghanistan as it is a concrete case.

The U.S. war in Afghanistan was a form of preventive self-defence against international terrorism and the use of force was directed both against the terrorists and
the state harbouring them. I find it acceptable that preventive self-defence should be allowed against terrorists to prevent future terrorist attacks when one or more prior large-scale terrorist attacks have occurred and are likely to continue. It must be emphasized that we are dealing with terrorist attacks that are comparable with armed attacks by states in their scale and effects which justifies that self-defence should be allowed against international terrorism. One other thing is that terrorists employ the tactics “hit and run” which makes it very hard to use traditional means of defence against a terrorist attack, i.e. ordinary self-defence (self-defence to repel an ongoing attack) will probably not work against terrorist attacks. Therefore preventive self-defence (under strictly limited circumstances mentioned above) should be allowed to make self-defence effective. This is an exception to the general prohibition of preventive self-defence justified by the special character of terrorist attacks.

Is it reasonable that a state knowingly harbouring terrorists incurs responsibility for terrorist attacks, and thereby possibly armed attacks, which the terrorists perpetrate in other states? I would say it is reasonable since a state harbouring terrorists actually protects them and this is a form of passive support for their activity. This situation is similar to the situation where a state allows its territory to be used by another state for an armed attack against a third state which will lead to responsibility for the armed attack both for the active and passive state. Then it is not so strange that a state harbouring terrorists will be responsible for their attacks against other states. But of course not every terrorist attack will be an armed attack in the meaning of Art. 51 and give a right of self-defence against the state.

The most questionable aspect of the U.S. war in Afghanistan was the way that it was exercised in. One can seriously question if it really was proportional to defeat the Talibans completely and establish a new government in Afghanistan with respect to the aim of preventing future terrorist attacks against the USA. There was no evidence that the Talibans themselves were involved in the earlier terrorist attacks but only that they were harbouring the terrorists. Moreover, the Talibans surely had no intention of attacking the USA in the future. Therefore it seems totally disproportionate to launch a full-scale attack against the Talibans and oust their government from power. The Al Qaeda organization could rightfully be attacked with great force but not the Talibans. It

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226 See chapter 6.5.1 in the essay.
was probably inevitable that the Taliban forces would be partly involved in the war because of the relation between the Talibans and the Al Qaeda organization. Thus there may have been a necessity of using force against the Talibans to a certain degree. But proportionality was definitely lacking in the U.S. military action. One could of course argue that it was necessary to prevent Afghanistan from being a safe haven for terrorists in the future and this meant that it was necessary and proportional to oust the Talibans from power in Afghanistan but this seems a little too far-fetched. The USA could have achieved its purpose of self-defence by defeating the forces of the Al Qaeda organization in Afghanistan and destroying the terrorist training camps situated there. In fact the U.S. action against the Talibans looked more like an armed reprisal (prohibited by Art. 2(4) of the UN Charter) than self-defence. It seemed as if no one in the international community was particularly unhappy that the Talibans lost their power in Afghanistan because of their despicable policy but this is another issue (although this may very well have influenced the reaction by the international community to the U.S. military action). If the proportionality principle may be interpreted in this loose way it will probably not fulfil its purpose of limiting (in a meaningful way) the use of force allowed in self-defence by a state. The limits for proportionality are very vague and have been stretched as a result of this wide right of self-defence. This is the most worrying part of the latest development of the law on self-defence after 11 Sept. 2001. Self-defence might become an excuse for states, especially powerful states, to use excessive armed force against “terrorists” and states harbouring them. A more strict interpretation of the proportionality principle is needed to prevent this form of abuse of the right of self-defence. It is important for international peace and security that the right of self-defence can be fairly clearly defined to limit the risk for its abuse by states. It remains to be seen how the “new” law on self-defence will develop in the future.
12 Conclusion

12.1 Summary

I will end this essay with a summary and some conclusions. In the beginning of the essay (chapter 3) I give a historical account of the right of self-defence which is connected to the development of the regulation of use of force. The classic international law on self-defence and similar rights (e.g. self-preservation) which lasted during the 19\textsuperscript{th} century and until around 1920 was characterized by a distinction between measures in war, where no rules governing the use of force existed, and forcible measures of self-help short of war, including self-defence, where there at least in theory existed some limits for the use of force (they were very unclear). What is clear is that the regulation of use of force by states had major shortcomings.

The period of the League of Nations (chapter 3.2) lasting up to the Second World War (1939) meant an improvement of the regulation of use of force in international law. The most important step was the adoption of the General Treaty for the Renunciation of War in 1928 which had an almost universal application at the time. It was the first treaty with a comprehensive prohibition of war in international relations but the right of self-defence was meant to be unaffected by the treaty. However the development during this period meant that in the end of it permissible self-defence was resort to force in response to an actual or imminent use of force by a state. The old doctrines of self-preservation and necessity (and related ones) had almost disappeared in international law.

In chapter 4 there is a discussion about the UN Charter and the issue of interpretation which is based on Art. 31-33 of the Vienna Convention on the Law of Treaties (1969) and I point especially to the importance of subsequent practice by states for determining the meaning of the UN Charter provisions as the UN Charter was concluded over 50 years ago.

Chapter 5 deals with Art. 2(4) of the UN Charter which contains a prohibition of the use or threat of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. This prohibition covers all levels of armed force including indirect force, i.e. the participation of one state in use of force by another state and also a state’s participation in use of
force by unofficial bands organized in a military manner, e.g. irregulars, mercenaries or rebels. After an analysis of the text of the provision the conclusion is reached that Art. 2(4) implies a general prohibition of use of force by states except in self-defence under Art. 51. As a result armed reprisals are also illegal under the UN Charter.

A general discussion of Art. 51 of the UN Charter and the right of self-defence follows in chapter 6 and it is noted that “armed attack”, the primary condition for a right of self-defence, is a narrower notion than the “use (or threat) of force” prohibited by Art. 2(4). A “gap” between Art. 51 and Art. 2(4) therefore exists since states are not entitled to self-defence against every use of force. It is concluded that despite some controversy in the doctrine regarding this aspect an armed attack is a necessary condition for the right of self-defence to be exercised by a state.

In chapter 6.3 the concept of “armed attack” is analysed by a comparison with the similar concept of “act of aggression” which appears in some provisions of the UN Charter and it is noted that “act of aggression” is a wider concept than “armed attack”. The Definition of Aggression adopted by the General Assembly in 1974, which includes a list of acts which shall qualify as an act of aggression, is used as a basis for identifying different types of armed attacks but the enumeration is not exhaustive for the definition of an armed attack.

The difficult case with terrorist attacks by private individuals is also examined and it is concluded that the terrorist attack/attacks must have a certain scale and effect if it is they are to be considered an armed attack. However at least until recently Art. 51 only acknowledged a right of self-defence against states which meant that the terrorist attack (constituting an armed attack) had to be attributed to a state for the right of self-defence to exist.

Chapter 6.5 is about permissible objects of self-defence, i.e. the objects which the exercise of self-defence may be directed against. The concept of the “duplicate attacker” means that both the active state and passive state, which is the state allowing its territory to be used by the active state for perpetrating an armed attack, are responsible for the armed attack. The attacked state may therefore take defensive measures against both states. In a similar way a state guilty of indirect aggression, i.e. the sending of private armed groups by or on behalf of the state or its substantial involvement therein, qualifying as an armed attack must accept that the attacked state may take defensive measures both against the private groups and the state. The same is true for the sending
of terrorist groups by a state. Some different situations involving varying degrees of support by a state to terrorist groups are examined.

As a part of this discussion cases concerning interceptions of aircraft believed to be carrying terrorists is discussed and the conclusion is reached that interception cannot be justified by the right of self-defence.

In chapter 7 I deal with the limits for the exercise of self-defence which were part of the customary international law and implicitly are a part of Art. 51 of the UN Charter. They are the demands for necessity, proportionality and immediacy. Necessity means that action taken in self-defence must be necessary, i.e. there should be no alternative to use of force by the state. The proportionality principle could mean either that measures taken in self-defence should be proportional to the gravity of the attack or proportional to the purpose of self-defence (i.e. to repel the attack) and de lege lata it seems as if it is the first kind of proportionality that is required.

In connection to the proportionality principle a discussion about the legality of the use of nuclear weapons is held and according to the ICJ the proportionality principle does not in itself exclude the use of nuclear weapons in self-defence in all circumstances (Legality of Nuclear Weapons case).

The demand for immediacy simply means that action in self-defence should take place immediately, i.e. while the attack is still going on and not after it has ended.

The concept of “war in self-defence” is briefly dealt with and it is concluded that a state can wage a war in self-defence against a state waging a war in aggression, which is the same as a constant armed attack varying in intensity.

Chapter 8 of the essay is about the issue of preventive or anticipatory self-defence which starts with a discussion of the beginning of an armed attack, i.e. at what point of time does an armed attack begin? This determines when self-defence can be exercised (provided that preventive and anticipatory self-defence is illegal under Art. 51). An armed attack begins when a state has taken “the last proximate act” on its side necessary for the commission of an armed attack, e.g. when the aggressor state has allowed its aircraft to take off or the submarines to leave its territorial waters, but the action must be taken with a clear intention by the state to attack another state.

In chapter 8.2 preventive and anticipatory self-defence is discussed. Preventive self-defence here means use of force in self-defence by a state which claims to act against a general threat of a future attack by another state whereas anticipatory self-defence
means self-defence against a concrete threat of an imminent attack by another state. The phrase “if an armed attack occurs” in Art. 51 is examined to see if preventive or anticipatory self-defence is legal. In particular state practice on preventive or anticipatory self-defence is studied and the conclusion is reached that neither preventive nor anticipatory self-defence is legal according to state practice (before the latest development following 11 Sept. 2001), although the law on anticipatory self-defence is not entirely clear.

Chapter 9 deals with the terrorist attacks against the USA on 11 Sept. 2001 and the development of the law on self-defence which followed. The USA responded to the attacks by starting a war in Afghanistan against the Al Qaeda and Taliban forces on 7 Oct. and claimed a right of preventive self-defence. The reaction by states both within and outside the United Nations in general to the U.S. military action was to support or accept it which leads to the conclusion that Art. 51 and the right of self-defence now also includes self-defence against international terrorism and also against states actively or passively supporting terrorists (in this case the Taliban regime only harboured the terrorists in Afghanistan).

There is an analyse of the “new” law on self-defence (chapter 9.4) and this part deals with different problems regarding the U.S. military action in Afghanistan connected to the limits for the exercise of self-defence. The problems are related to the timing, duration, location and proportionality of the U.S. action. It is concluded that the latest development has led to a wider right of self-defence for states in some aspects but above all a right of self-defence with less certain limits.

In chapter 10 I study the role of the Security Council when a state exercises self-defence. According to Art. 51 of the UN Charter the right of self-defence exists “until the Security Council has taken measures necessary to maintain international peace and security”. It is held that necessary measures should imply effective measures, i.e. measures that lead to a concrete result, and it is the Security Council itself which determines whether such measures have been taken. The duty for states to report measures taken in self-defence to the Security Council is described as a procedural requirement and failure to fulfil the reporting duty will not in itself make self-defence by a state illegal.

In the end of the essay (chapter 11) I make an assessment of the right of self-defence de lege lata and have a discussion de lege ferenda about its content. I point to the fact
that the content of the right of self-defence is unclear regarding several aspects which makes it quite a weak rule in international law. A critical discussion is held about the “gap” between “use of force” in Art. 2(4) and “armed attack” in Art. 51, preventive and anticipatory self-defence and the latest development of the law on self-defence after 11 Sept. 2001. The most worrying aspect of the U.S. military action in Afghanistan is that the proportionality principle has been stretched too much leading to the risk of excessive use of force in self-defence by states against “terrorists” and states connected to them.

12.2 Concluding Remarks

I will end this essay with some general conclusions. The right of self-defence is a necessary right for states in international law as they must be able to defend themselves against attacks by aggressors. Everybody acknowledges this but there are different views about the width of this right both among states and international lawyers. As mentioned earlier, this is not strange since the right of self-defence is a part of the regulation of use of force by states and this concerns a central part of state sovereignty. There are, however, a worrying tendency the last years, reinforced by the events after 11 Sept. 2001, that the right of self-defence is becoming more blurred which makes it easier for states to abuse this right for illegal purposes. Clearly a changing world requires rules that can be adapted to reality but cautiousness is needed. Self-defence is an element of anarchy in international law as it allows a state to act unilaterally with force against other states. If this element becomes too big the collective security system in the UN Charter will suffer and unilateral action by states will dominate. Self-defence is supposed to be an exception to the general prohibition of force in Art. 2(4), although as is well known during the cold war unilateral action by states dominated because of the paralysis of the United Nations (the major powers did not co-operate in the Security Council). However if the exception becomes too big it will undermine the main rule. Hopefully the latest development of the law on self-defence will not lead in that direction.

It might also be asked if Art. 51 works in reality or if it just provides a bad excuse for states to use force whenever they wish. Clearly states have quite often abused the right
of self-defence by invoking Art. 51 in doubtful circumstances. But in many of these cases the Security Council has condemned the state invoking self-defence indicating that it did not accept the justification. Even if the Council has not been able to act (because of the veto power of the permanent members) individual states have often reacted negatively if they have thought that the right of self-defence has been exceeded by a state. The point is that Art. 51 has been a rule in international law with existing limits for actions by states, albeit partly unclear. The fact that states from time to time illegally have invoked the right of self-defence does not change this fact. It is true that the right of self-defence is a partly unclear and controversial rule, yet it is one of the most important rules in international law.
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