A right to self-defence or an excuse to use armed force?

About the legality of using self-defence before an armed attack has occurred.

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Abstract

A states’ right to self-defence within international law is enacted in article 51 of the UN Charter and an exception to the general prohibition to the use of force. Article 51 establishes a right to self-defence after an armed attack has occurred but doesn’t meet the issue regarding the lawfulness of self-defence actions before an armed attack. The fact that pre-existing customary law has established such a right query the matter whether the pre-existing custom has remained valid after the Charter entered into force. While the issue has amounted to great controversies, the state practice demonstrates that claims and actions of averting self-defence has been persistent during the years. This essay examines the lawfulness of self-defence actions before an armed attack has been conducted. States practice clearly demonstrates that different concepts of precluding self-defence have been invoked through time, and the main focus of this essay are anticipatory and preemptive self-defence. Anticipatory acts refer to situations where there is an imminent threat, while preemptive acts refer to a broader concept, where threats do not amount to imminence. The research has included scrutiny of both legal sources, like treaty rules, customary rules and international principles, and state practice and different scholarly interpretations in order to examine the lawfulness of anticipatory and preemptive self-defence actions. The research has found that preemptive self-defence can not be seen as lawful acts, due to a lack of legal basis and sufficient support within the international community. Anticipatory acts, strictly deriving from preexisting customary law, on the other hand, could not be rejected as unlawful due to the broad and persistent support. Furthermore, the essay has clearly demonstrated the problems with the vague and diffuse current regulation of the issue and the need for an established clarification in order for the main purpose of the Charter to be observed.
Abbreviations

AJIL
American Journal of International Law

DRC
Democratic Republic of the Congo

EJIL
European Journal of International Law

GA
General Assembly

ICJ
International Court of Justice

NATO
North Atlantic Treaty Organization

NSS
National Security Study

OAS
Organization of American States

SC
Security Council

UN
United Nations

UNYB
United Nations Yearbook

WMD
Weapons of mass destruction

YBILC
Yearbook of International Law Commission
Contents

Abstract ............................................................................................................................... 3
Abbreviations .................................................................................................................... 5
1 Background....................................................................................................................... 9
  1.1 Problem ................................................................................................................... 9
  1.2 Purpose ................................................................................................................... 10
  1.3 Research questions ................................................................................................. 10
  1.4 Limitation ............................................................................................................... 11
  1.5 Method and material .............................................................................................. 11
  1.6 Outline of the essay ............................................................................................... 13
2 The general prohibition on the use of force ................................................................. 15
  2.1 The background ...................................................................................................... 15
  2.2 Article 2(4) UN Charter ......................................................................................... 15
      2.2.1 The scope of the prohibition ......................................................................... 16
      2.2.2 What does “use of force” mean? ................................................................. 17
3 The right to self-defence ............................................................................................... 19
  3.1 Exceptions to article 2(4) ....................................................................................... 19
  3.2 The right to self-defence under international law .................................................. 19
      3.2.1 Individual and collective self-defence ....................................................... 21
      3.2.2 The role of the Security Council ................................................................. 22
      3.2.3 Necessity and proportionality as limitations .............................................. 23
      3.2.4 Armed attack ................................................................................................ 25
4 Anticipatory and Preemptive self-defence ................................................................. 27
  4.1 A right to pro-action? .............................................................................................. 27
  4.2 The terminologi ........................................................................................................ 28
  4.3 Anticipatory self-defence ....................................................................................... 29
      4.3.1 The origins from the Caroline Incident ...................................................... 29
      4.3.2 The International Military Tribunals and State Practice ......................... 31
4.4 Preemptive self-defence .......................................................... 34
  4.4.1 During the Cold War Era .................................................. 34
  4.4.2 After the 9/11 attacks ...................................................... 37

4.5 Further developments .......................................................... 44
  4.5.1 A modification of the term “imminence”? ......................... 45
  4.5.2 The US drone strike in 2020 ........................................... 46

4.6 The position of ICJ ............................................................... 49

5 Three different views ............................................................ 52
  5.1 The never-ending academic debate .................................... 52
  5.2 The restrictive view – Ian Brownlie .................................. 52
  5.3 The “in between” view – Christopher Greenwood .............. 54
  5.4 The extensive view – Anthony Clark Arend ....................... 56

6 Discussions and conclusions .................................................. 58
  6.1 Discussions regarding the different interpretations .............. 58
    6.1.1 The interplay between customary and treaty law through state practice .... 59
  6.2 Is it needed or desirable to change current regulation? ........ 64
  6.3 Finishing conclusions ....................................................... 67

Bibliography ............................................................................. 68
1 Background

1.1 Problem

On January 3rd (January 2nd US time) 2020, the US President, Donald Trump, ordered a drone strike that killed Iranian Major General, Qasem Soleimani, widely seen as the second most powerful man in Iran. The strike hit two vehicles leaving Baghdad International Airport and killed other Iranian and Iraqi military figures as well, among them the Iraqi militia leader, Abu Mahdi al-Muhandis.1 The day after the strike, President Trump stated following:

Last night, at my direction, the United States military successfully executed a flawless precision strike that killed the number-one terrorist anywhere in the world, Qasem Soleimani. Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel, but we caught him in the act and terminated him. Under my leadership, America’s policy is unambiguous: To terrorists who harm or intend to harm any American, we will find you; we will eliminate you. We will always protect our diplomats, service members, all Americans, and our allies.2

As the statement of President Trump, The Department of Defence, justified the attack by claiming that General Soleimani was “actively developing plans to attack American Diplomats and service members in Iraq” and that the “strike was aimed at deterring future Iranian attack plans.”3 In other words, the US claimed that the attack was an act of anticipatory self-defence and therefore, a lawful act within international law. The reaction globally did, however, not show much support. In fact, the attack and killing of General Soleimani resulted in heated debates internationally and prompted the questions about anticipatory and preemptive self-defence once again. Is it really lawful under international law, to act in self-defence

before being subject to an armed attack by the enemy? And if the answer is “yes”, when is it permitted for states to use force to avert an armed attack that has not occurred?

One of the main principles within the UN Charter (Charter of the United Nations and Statute of the International Court of Justice) is the general prohibition of the use of force in article 2(4) UN Charter. One exception to the general prohibition, is the right to self-defence under article 51 UN Charter. This article states the inherent right to self-defence when a member state is being subject to an armed attack. At a first glimpse, the UN Charter and its articles seem very clear. The distinction of when, at what time, the use of force is lawful and not, seems rather uncomplicated. But in reality, the rules of self-defence, have through the history been subject to fundamental disagreements as to when the exception is applicable. Since the Charter entered into force, member states have repeatedly used force against other states before being subject to an armed attack, by claiming a right to self-defence. Meaning that article 51 also includes a right to self-defence before being subject to an armed attack. This issue demonstrates a conflict between two of the most essential interests within international law and the UN Charter; the general prohibition of the use of force and the right to use force under self-defence. The question of whether self-defence actions before an armed attack has been conducted is lawful under international law, has always been and still is, very controversial between member states, legal scholars, lawyers and the international community.

1.2 Purpose

The purpose with this essay is to investigate whether international law establishes a right to self-defence before an armed attack has occurred. If such a right exists, the aim is furthermore to examine at what point this right applies. In addition, the essay will examine and analyze if there is a need or a desirability to change current international regulations regarding the issue.

1.3 Research questions

The essay will examine following research questions:

- Is it legal within international law to use armed force as self-defence against another state before an armed attack has occurred?
- Has the apprehension of the terms changed within international law during time?
- Is there a need or a desirability to change existing international law regarding the issue?

1.4 Limitation

First of all, it is important to clarify and understand the distinction between *jus ad bellum* and *jus in bello*. *Jus in bello* is the part of international law that regulates the law within an armed conflict, the law of war (synonymous with international humanitarian law) while *jus ad bellum* regulates the conditions of a State’s right to resort to war; the right to use force. This essay is only subject to the latter; *jus ad bellum*.

The UN system is based on a collective security system, where the Security Council has the primary responsibility. The Security Council is hence authorized to approve the use of force in order to maintain international peace and security. This collective security by the Security Council must thought be distinguished from the right to individual and collective self-defence appertain to the member states under article 51. This essay will henceforth, (with the exception of a shorter description of the collective security system) only examine the use of force under the right to individual and collective self-defence based on member states’ own initiatives.

This subject is linked to a lot of other interesting and controversial questions and topics within international law. This essay will focus solely on the complexity of the issue with anticipatory and preemptive self-defence against other state actor. Besides that, other problematic topics, like the controversies regarding self-defence against other non-state actors, issues of targeted killings or similar subjects, can be mentioned within the text, but will not be further studied or examined within the essay.

1.5 Method and material

In order to fulfill the purpose of the essay I will use the doctrinal method, which means that I will use the recognized legal sources of international law as enumerated article 38 of the Statute of the International Court of Justice (1945). According to article 38 the general sources of the international law are; international conventions, international customs and international recognized principles.

Due to the fact that this essay examines a topic within international law, the rules on treaty interpretations are applicable. The Vienna Convention on the Law of Treaties (1969) states how the treaty interpretation should be done in case of treaty conflicts. In case of a treaty conflict or other obscurity regarding the codified international law, the general rule of interpretation, under article 31 of the Vienna Convention will be used in this essay.

Furthermore, in order to examine the research questions regarding this topic it is also needed to use other sources. Hence, I will study relevant case law from international courts and tribunals. But also, other relevant incidents that haven’t appeared in front of an international tribunal but still have had big influences
within the international law community. That means, that I will use and, to some extent, compare significant and important cases that have affected the view of the legality of anticipatory and preemptive self-defence through history. One case, among many others, that will be highlighted under chapter 4, is the US drone strike that killed inter alia the Iranian General Soleimani in January 2020.

The reason why this essay emphasizes the importance of incidents and state practice is due to the fact that international law (both treaty law and customary law) is created by states. Treaty law is established by states’ consent, while customary law is established by state practice and custom. In other words, in order to examine the lawfulness of these self-defence actions, one must examine state practice and customs.

Due to that this is a controversial subject, there are a lot of written journals, articles and literature by scholars that will be used in order to examine the research questions. These kinds of sources must, however, be used critical because of the fact that the approaches within these sources are often subjective. That is to say, different scholars have different cultural, political and historical origins that affects their standpoint and policy rearing this topic. With that said, it is important, both for me as the writer but also for the reader, to have that in mind. Even though there is a risk of subjectivity in these articles and literature, these types of sources are highly important for the purpose of this essay. Not only due to the lack of specified codified international rules regarding the topic, but also in order to understand the debate and development of the issue.

In order to examine and understand the different views and interpretations of the issue in more detail, the academic debate of legal scholars will be more precisely examined under chapter five. Due to the huge amount of published materials within this subject, and in order to get a broader and more complete perspective of the different views of the issue, the chapter will examine three different legal scholars that each represents one of the three different views; the restrictive, extensive and the so-called “in between” view. In that way, the interpretations and views will be equally presented and examined.

Furthermore, other official documents from the UN, like Security Council Resolutions, General Assembly Resolutions, General Comments and so on will also be used. Even though these sources are not included as general accepted sources of international law, these documents are of high importance within the international law community. They present and describe reliable and important information of states’ practice, standpoints and actions regarding different cases, incidents and legal issues. In addition, they also provide reliable information about other relevant legal incidents and issues. Lastly, the essay will use official documents, statements and publications by member states in order to examine and understand states’ legal standpoints regarding the issue.

Regarding the terminology of the concepts of “anticipatory” and “preemptive” self-defence that will be examined within the essay, there is a confusion of the terms within the international law community, different scholars and states. There is no universal terminology of the concepts and different terms
have been used for different actions. Therefore, there is a need of clarification regarding the terminology that will be used in this essay. Briefly, the term of anticipatory self-defence refers in this essay to self-defence actions where there exists an “imminent” attack. Preemptive self-defence refers, in contrary, to non-imminent threats. In other words, it is a more extended term that refers to more remote threats. This terminology will be further explained under chapter 4.2.

1.6 Outline of the essay

First of all, the essay will remind the readers about the main principles of the UN Charter in order to give the reader an overview and knowledge about the general ideas within the subject. Afterwards, it will first explain and examine the existing rules of regular self-defense under article 51 UN Charter. Thereafter, in chapter four, it will demonstrate the meaning of anticipatory and pre-emptive self-defence is in regard to existing treaty and customary law and declare the terminology that will be used. Furthermore, it will examine cases, state practice, international jurisprudence and UN debates. In the next chapter, it will examine three different legal scholars and their views regarding the lawfulness of anticipatory and preemptive self-defence. The last chapter holds the discussion and analysis about the different sources, state practices, cases and legal standpoints and the finishing conclusion.
2  The general prohibition on the use of force

2.1  The background

For a long time in history, there was no prohibition to start a war or use armed forces against another state actor. And for a long time, war was considered to be a direct link to the State sovereignty, an unavoidable natural phenomenon and a legal method of solving disputes between states. At the end of the first world war this standpoint started slowly to shift towards a more restrictive approach of the *jus ad bellum*, the law on the right to use force. In 1919, during the Paris Peace Conference, the Treaty of Versailles entered into force and resulted later in 1920, the foundation of the first intergovernmental organization, the League of Nations. During these times and up until the UN Charter entered into force, the *jus ad bellum* was mainly regulated by a combination of customary law and treaty law. The Treaty of Versailles didn’t fully prohibit the use of force, but it did enact some limitations. It established inter alia the term of “aggression”, that at that time was weakly equivalent to the meaning of an unlawful use of force. The development towards a more restrictive standpoint on the use of force lead, in 1928, to the Kellogg-Briand Pact. The agreement famously stipulated a ban to use war as an instrument to resolve international conflicts between states. But, even though the international community adopted this restrictive development, it couldn’t prevent the beginning of World War II.

2.2  Article 2(4) UN Charter

At the end of the world war, the United Nations was founded. The UN Charter entered into force in October 1945 and stipulated some significant provisions

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8 The Treaty of Versailles. See also Bring, Mahmoudi and Wrang, *Sverige och Folkrätten*, page 172.
and principles within the international law. Not only did it codify the main purpose of the UN; to maintain international peace and security, it also gave the UN the legal tools and a mandate observe it. One of the most significant provisions of the *jus ad bellum* today, is the general prohibition of the use of force, that also got codified in the UN Charter. The principle can be found in article 2(4) and establishes following:

“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.”

The general ban on the use of force, is one of the cornerstones of the public international law today, with the purpose to “save succeeding generations from the scourge of war.” Even though there are some discrepancy regarding the interpretations of the principle and the scope of the prohibition one cannot deny that its significance has gained the universal acceptance as a norm of international law. The member states have acknowledged its fundamental importance and the fact that the article stipulates a presumption stating that the use of force is illegal within international law.

2.2.1 The scope of the prohibition

As mentioned, there are variant opinions regarding the precise extent of the prohibition on the use of force. This difference of opinion regards the interpretation of the principle, especially whether the prohibition constitutes an absolute norm within international law or not. At large, this question is usually answered by either a permissive or restrictive interpretation. The proponents of the permissive interpretation states that the prohibition doesn’t constitute an absolute prohibition, due to that it would weaken a state’s capacity to defend itself against foreign threats and illegal actions (like terrorism). Additionally, the UN Charter is valid parallelly with international customary law and doesn’t exclude preexisting customary rules with a more expansive interpretation. The restrictive interpretation on the other hand, lays down an absolute prohibition on the use of force. The only legal accepted exception is the one enacted in the

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12 Articles 1.1 and 24 UN Charter.
13 Article 2(4) UN Charter.
14 Preamble to the UN Charter.
UN Charter itself, and the only way to fulfill the main purposes of the UN Charter is by the restrictive interpretation.

The supporters of the permissive interpretation have historically been represented by individual military powerful States, whilst the majority of the UN member states have supported a restrictive approach. The restrictive interpretation has been established as in coherence with the general purpose of the UN Charter and was therefore later also laid down in the so-called Friendly Relations Declaration from 1970. The International Court of Justice (ICJ) has also taken the same path by establishing the restrictive interpretations in its case law. The ICJ stated that the US, in the Nicaragua case, violated article 2(4), when it used force against Nicaragua and did not act under the exception of self-defence. With that said, the restrictive interpretation of article 2(4) has historically been seen as the dominant one.

2.2.2 What does “use of force” mean?

Furthermore, it is essential to examine the precise meaning of “use of force” under article 2(4). First of all, we have to clarify what the world “force” means within the article. “Force” in general can be seen both as armed force and as economic and political force, like inter alia economic aggressions and political pressures. Article 2(4) refers though only to armed forces, military forces that includes the use of violence.

18 Articles 1(1) and 2(3) UN Charter.
19 Dixon, Textbook on international law, pages 325.
24 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (the Nicaragua case), International Court of Justice (Merits), Judgement of 27 June 1986, § 193.
Secondly, the use of force can be conducted directly or indirectly. A directly use of force is when the state directly, with its own military, uses armed force against another, for instance a military invasion of another state. An indirect use, is when a state supports an armed group of irregulars (like guerillas), meaning that an armed group uses armed force on the states’ behalf. Direct use of force is obviously prohibited under article 2(4), and in the Nicaragua case, the ICJ ruled that indirect means is prohibited as well. In the Nicaragua case, the US supported the so-called Contras (a rebel opposition group) in their revolt against the Government of Nicaragua. The revolt included use of force, like minelaying in Nicaragua’s internal waters and territorial sea and conducting armed attack against their harbors, oil platforms and naval base. Due to the fact that the US had “effective control” of the Contras they were held responsible for an unlawful use of force against the Nicaragua Government. In other words, the Court famously stated that indirect, as well as direct, means of force constitutes “use of force” within article 2(4) and is therefore prohibited.

3 The right to self-defence

3.1 Exceptions to article 2(4)

During the history, states have claimed different exceptions for the use of force. Some exceptions have been and are still more controversial than others, like the so-called doctrine of humanitarian intervention. A humanitarian intervention means that a state (or a group of states or an organization) use force against another state on its territory with the purpose to protect the people within that state from inter alia human rights violations or genocide. This exception has been used in several cases, for instance by Tanzania in 1978-1979 when they used armed force in Uganda or during NATO’s bombing of Serbia in 1998/99, but has remained highly controversial. Not only due to the fact that interventions overall are forbidden under international law but also because it is not included as a legal exception in the UN Charter.

Until today, there are only two exceptions that are widely accepted by the whole international community; an authorization of the use of force made by the Security Council and self-defence. The Security Council is primary responsible for the maintenance of peace and security in the world and has therefor under articles 42-43 UN Charter, the mandate to authorize necessary armed force in order to maintain or resort to international peace and security (include also when use of force is enforced by regional organizations and authorized by the Security Council).

3.2 The right to self-defence under international law

The right to self-defence as an exception to the prohibition on the use of force, is today generally accepted within international law. Self-defence has actually been a concept of customary international law long before it was established in the UN Charter in 1945. It first arose as a legal excuse to the use of armed force in the so-called Caroline Incident in 1837. Scholars state that the Caroline Incident changed the concept of self-defence; it went from being a political excuse to a

30 Bring, Mahmoudi and Wrange, *Sverige och Folkrätten*, page 177.
31 Article 24 UN Charter.
32 Article 53 UN Charter.
legal concept, when it famously laid down the elements for self-defence actions within international customary law. The Caroline Incident arose when British military forces seized the American vessel, the Caroline. The vessel had during that time been used by Canadian rebel groups for transportation of ammunition from the US to Canada, in their fight against a British rule in Canada. The British forces raided therefore the vessel while it was at American territory, killed two members of the crew and sent the vessel over the Niagara Falls. While the British authorities claimed that their action was an act of necessary self-defence the US did not agree. The US Secretary of State Daniel Webster then famously replied to the British Minister Henry Fox in 1841, that the British Government had to show a “the necessity of self-defense, instant, overwhelming, leaving no choice of means, and no amount of deliberation” in order for the act to be a lawful self-defence. The incident has thereafter generally demonstrated the right to self-defence as a well-known and established concept of international customary law.

Today, the exception of self-defence is famously established under article 51 of the UN Charter. The article states following:

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

Even though the right to self-defence is codified in the UN Charter, the general view of the ICJ is that pre-existing customary law ought to collaterally be valid. The codified treaty law of the use of force shall interact with the existing customary law. This was established by the ICJ in the Nicaragua case when the Court famously stated that the Charter is not intended to regulate and cover the entire international law on use of force. Furthermore, the fact that the article includes the wording of “inherent right” is usually interpreted with the meaning that this principle is rooted from international custom. In other words, self-defence in article 51 is supposed to be combined with customary law and case

34 Daniel Webster, Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr. Mcleod, for the Destruction of the Steamboat Caroline – March, April 1841, 24 April 1841, volume 29, British & Foreign State Papers, 1126-1142, page 1137.
35 Article 51 UN Charter.
36 Nicaragua case, §§ 175–179 and 194–199.
law in order for the principle to be used and interpreted correctly.37 But as
mentioned earlier, interpretations of international law principles are debated and
controversial, as is the ICJ’s ruling and interpretation of self-defence.38 Scholars
with a restrictive interpretation argue that the codification of self-defence within
the UN Charter did not change or effect pre-existing customary law and that the
wording of “inherent” within the article aimed to emphasis the right.39 Supporters
of the extensive school argue however that divergent customary law does not co-
exist parallely to the treaty.40 This schism between the restrictive and extensive
scholars will be further discussed and developed under chapter 5.

3.2.1 Individual and collective self-defence

Article 51 enacts several limitations to the right to self-defence. It states inter alia,
that self-defence can either be an act of individual self-defence by a state, the
state that is subject for an armed attack. Or it can also be a collective act of self-
defence, meaning that member states have a right to use force to defend other
member states from armed attacks. The right to collective self-defence as an
exception to the ban on use of force has been invoked in several cases during the
history. In for instance the US military intervention in Vietnam in 1961-1975, the
French military intervention in Chad in 1983-1984 during the Chadian-Libyan
conflict41 and the US armed attacks in Iraq 2014, after Iraq had asked for military
assistance in their fight against terrorist groups.42 The justification of collective
self-defence was also famously invoked by the US in the Nicaragua case. The US
claimed that their armed activities against Nicaragua were acts of collective self-
defence of El Salvador, Costa Rica and Honduras in response to an alleged armed
attack conducted by Nicaragua.43

37 Bring, Efter den 11 september – en rätt till väpnat självförsvar mot internationell terrorism?, Internationell
våldsanvändning och folkfru, page 81; Tom Ruys, “Armed Attack”, Article 51 of the UN Charter,
39 See for instance Derek W. Bowett, Self-defence in international law, Manchester University Press,
1958, page 187; M.S. McDougal, The Soviet-Cuban quarantine and self-defense, American Journal of
40 Roberto Ago, Addendum to the 8th Report on State Responsibility, Yearbook of the international Law
Nation, page 63; Ian Brownlie, The principle of non-use of force in contemporary international law, The non-
17-27.
176-180.
42 UN Doc. S/2014/695, 23 September 2014. See also Gray, International Law and the Use of Force,
pages 176-178 and 237-240.
43 Nicaragua case.
In order for collective self-defence to be legal, a request for help from the victim state to the third state is necessary. This was first mentioned by the ICJ in the *Nicaragua case* and later confirmed in the *Oil Platforms case*. Even though the requirement of a request has been criticized by occasional scholars or lawyers, the case law and state practice have in general accepted this requirement.

### 3.2.2 The role of the Security Council

Article 51 also indicates on a balancing of interest between the right to self-defence for member states and the collective security by the Security Council (the collective security by the Security Council has to be distinguished from the collective self-defence, under 3.2.1). As mention earlier, the Charter created a significant system of collective security where the Security Council has the primary responsibility to maintain peace and security. Despite that, some member states still wanted a right to individually act in self-defence, which resulted in: “...the inherent right of individual or collective self-defense...” “...until the Security Council has taken the measures necessary to maintain international peace and security.” In other words, member states have a right to self-defence, but that right is limited to being temporary. Meaning that state actions have to cease as soon as the Security Council starts taking actions.

Furthermore, article 51 establishes that states are also obliged to report their measures of self-defence to the Security Council. The ICJ clarified this requirement in the *Nicaragua case* by establishing that a failure of reporting, affects the state’s claim of self-defence negatively. It does not in itself invalidate the claim of self-defence, but it weakens the claim. The requirement has later been confirmed by the ICJ in *Armed Activities on the Territory of the Congo* (DRC v. Uganda) where Uganda failed to report its use of force as self-defence.


45 *Nicaragua case* §§ 197, 234-234.

46 *Case Concerning Oil Platforms*, (Islamic republic of Iran v United States of America) (Oil Platforms case), International Court of Justice (Merits), Judgment of 6 November 2003, § 51.


51 *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) (Armed Activities case), International Court of Justice (Merits), Judgement of 19 December 2005.
3.2.3 Necessity and proportionality as limitations

The limitations of necessary and proportionate are not mentioned in article 51, but have its roots from the 1837 Caroline Incident. They have been criticized and questioned in some few occasions by separate scholars and few states, but are however in general accepted and established as essential limitations to actions of self-defence by the ICJ, the majority of states, and international law scholars. In 2007 the Institut De Droit Internationals adopted a resolution stating that both necessity and proportionality are key elements within the framework of self-defence. These principles demonstrates the fact that the main purpose of self-defence is to repel an armed attack, not to go after the attacker or to get revenge. They also indicate that self-defence constitutes a temporary act of armed forces and can therefore not justify a long-term act of armed occupation or annexation.

3.2.3.1 Necessity

The principle of necessity as a limitation to self-defence, states that an invoked armed defence, must be the only possible and working measure in the current case. Meaning that, other possible defence-mechanism (like a peaceful and diplomatic measure) can’t exist. It doesn’t though mean that the claimants are obliged to first exhaust all other measures. The assessment by the ICJ is rather based on the circumstances of each case where the claimant state has to prove

52 Daniel Webster, Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr. Mcleod, for the Destruction of the Steamboat Caroline – March, April 1841, page 1137.
54 Especially regarding the proportionality principle. The Soviet Union, Syria and Ghana opposed the principle during the negotiations on the Definition of Aggression, see UN Doc. A/AC.134/SR.67-78, 19 October 1970; 85 (USSR); 86 (Ghana); 87 (Syria).
55 Inter alia in Nicaragua case, Oil Platforms case, Armed Activities case; Legality of the threat or Use of Nuclear Weapons (Nuclear Weapons case), International Court of Justice, Advisory Opinion of 8 July 1996.
56 E.g., UN Doc. A/AC.134/SR.52-66, 19 October 1970; 43 (Turkey); 61 (Yugoslavia); UN Doc. A/AC.134/SR.&/-78, 19 October 1970; 81-82 (Congo); 83 (Iraq); 84 (UK); 86 (US), 87 (Romania): 88 (Guyana); 89 (Cyprus, Bulgaria, Italy); 90 (Ecuador); UN Doc. A/AC.134/SR. 79-91, 7 June 1971; 21 (Mexico). See also Ruys, “Armed Attack” and article 51 of the UN Charter, pages 91-95.
57 Ruys, “Armed Attack” and article 51 of the UN Charter, pages 91-95; Gray, International Law and the Use of Force, page 157; Ove Bring, Efter den 11 September – en rätt till våpnat själförsvar mot internationell terrorism, Internationell vältidssvändig och folkträtt, page 82.
58 Also called The Institute of International Law, is an organization founded in 1873, to promote the progress of international law: <https://www.idi-iii.org/en/>.
60 Ibid.
that the armed activities were in fact invoked with the aim to repel an armed attack.62

The ICJ clarified the requirement of necessity in the Oil Platforms case where Iran brought actions against the US, claiming that the US armed attacks on Iranian oil platforms were unlawful. This incident arose from the conflict between Iran and Iraq, when Iraq invaded Iran in the 1980s. The conflict became a so called “Tanker war” in 1984, when Iraq attacked a tanker with Iranian oil in the Gulf. The development of the attacks on tanks and ships in the Gulf resulted in that Kuwait asked the US for help to protect its ships from the unpeaceful situation. Therefore, some of Kuwait’s ships got re-flagged to US ships. When two of the US ships and tankers got hit by missiles, on two different occasions, the US held Iran responsible. They therefor attacked and destroyed two different Iranian oil platforms, on two different occasions, and claimed self-defence on the grounds that their actions were a response the Iranian attacks on the US ships. As a consequence, Iran brought actions to the ICJ by stating that the US attacks were not lawful under international law. The Court firstly established that the state claiming self-defence (in this case, the US) had to prove that it has been subject to an armed attack. Thereafter, the ICJ established that the claiming part also has to prove, that the alleged aggressor (in this case Iran) is actually responsible for the armed attack. The Court denounced that the US didn’t succeed to satisfy the requirements; the US failed to prove that Iran was actually responsibility for an armed attack and established therefor that the attacks by the US as self-defence were in fact not necessary. The ICJ also stated that the US measures of self-defence were unnecessary due to that they didn’t complain about the Iranian military activities to Iran before their use of armed force.63 Additionally, the Court emphasized “necessity” by stating that the requirement: “is strict and objective, leaving no room for any "measure of discretion".64

3.2.3.2 Proportionality
Proportionality relates more to the duration, size and the target of the armed defence.65 The use of force under self-defence has to be invoked with the purpose to repel the armed attack. The actions shouldn’t therefore amount to more than what is strictly needed to conduct a repulsion.66 This doesn’t though mean that

63 Oil Platforms case, §§ 51-57, 64 and 71-72 and 76.
64 Oil Platforms case, § 73.
the actions of self-defence have to be made with the same weapons or the same numbers of armed forces as the attacking state.67 In the Armed Activities case, Uganda claimed self-defence for using force against alleged non-state actors from the territory of DRC (the Democratic Republic of Congo) during 1998-2003. The alleged defence actions were initiated against the attackers (the non-state actors from DRC) on the territory on Uganda. But due to Uganda’s strong forces, they advanced quickly over the borders to the territory of DRC. But, that Uganda’s forces took airports and towns located hundreds of kilometers from their border, were not proportionate in regard to the claimed armed attack they were subject to. In other words, the ICJ assessed the proportionality of Uganda’s armed force by comparing the intensity to the alleged armed attacks they were subject to.68

Similarly, in the Oil Platforms case69 and Nicaragua case, the Court emphasized the requirement of proportionality. In the latter, the ICJ stated that the mining of ports and attacks on the oil installations in Nicaragua were unproportionate in regard to the alleged aid that Nicaragua sent to armed rebels in El Salvador.70

3.2.4 Armed attack

The fact that there is no general definition of “armed attack” has amounted to heated discussions regarding the applicability of the provision.71 In order to understand the meaning, other similar terms in the Charter (like “use of force” in article 2(4) and “aggression” in article 39), have been used as possible guidelines. The term of “aggression” has especially been considered closely linked to “armed attack”72 and the resolution of Definition of Aggression, adopted by the General Assembly in 1974,73 has therefore been used as a guideline in several occasions.

The Definition of Aggression establishes that “aggression” is the most serious form of illegal use of force74 and has to amount to a “sufficient gravity” in order to constitute “aggression”.75 Article 1 states that the term refers to the use of force by one State against the sovereignty, territorial integrity or political independence of another State.76 Furthermore, article 3 establishes a list of actions that prima facie constitutes an act of aggression:

67 Gray, International Law and the Use of Force, from page 158.
68 Armed Activities case para 147; Corten, Necessity, pages 869-870.
69 Oil Platforms case para 77.
70 Nicaragua case para 237.
71 Gray, International Law and the Use of Force, pages 134-140; Ruys, “Armed Attack” and article 51 of the UN Charter, page 126.
72 Bring, Mahmoudi and Wrange, Sverige och Folkrätten, pages 178-181; Ruys, “Armed Attack” and article 51 of the UN Charter, page 127; Gray, International Law and the Use of Force, pages 135-140.
73 Definition of Aggression, GA Res. 3314 (XXIX) of 14 December 1974.
74 Annex to the Definition of Aggression.
75 Article 2 Definition of Aggression.
76 Article 1 Definition of Aggression.
Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(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;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State 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;

(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;

(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 above, or its substantial involvement therein.

In the Nicaragua Case, the ICJ used article 3 in the resolution, in order to determine the meaning of armed attack in the case. The ICJ didn’t go further by establishing an actual definition of the term, but they did denounce that it is “necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.” With that statement, the Court established that all kinds of use of force doesn’t amount to constitute an “armed attack” as the meaning within article 51. This statement was later also confirmed by the Court in the Oil Platforms case.

Another issue regarding the term “armed attack” regards the question of what kind of actors can conduct an armed attack in order to trigger the right to self-defence. The fact that article 51 expressively states “against a member of the United Nations” clearly states that self-defence actions can be taken against state actors. But what about armed attacks by “non-state” actors? This issue got stressed after the 9/11 attacks and the increasing number of threats from terrorist groups and has thereafter been subject for a lot of discussion. But, due to the fact that this issue is not relevant for the purpose of this essay, we will not examine it further.

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77 Nicaragua case, § 191.
78 Oil Platforms case, §§ 51 and 64.
79 Gray, International Law and the Use of Force, page 120.
4 Anticipatory and Preemptive self-defence

4.1 A right to pro-action?

Do states have to wait for an armed attack to be conducted on their territory before they can invoke the right to self-defence? Or can a state use force in order to avert the attacker before the armed attack has occurred? In other words, can self-defence be made before the armed attack by the enemy has been conducted?

States have persistently, during history, claimed a right to self-defence before an armed attack has been carried out. In the beginning of the so called Six-day war, in June 1967, Israel attacked and destroyed the Egyptian air force, and claimed self-defence on the grounds that Egypt had started a mobilization in order to attack Israel. In 2003, US and the Great Britain invaded of Iraq and claimed that Iraq possessed and manufactured a program of weapons of mass destruction (WMD) which constituted a future threat. In 1981, Israel attacked and destroyed Iraq’s nuclear reactor and claimed a justification on the grounds that Iraq planned to use the reactors for manufacturing weapons and attacking Israel. In 1985, South-Africa used force against Angola and claimed self-defence on grounds that Angolan-based guerrillas planned an attack on South-Africa.

The US invasion (with support by the UK) of Afghanistan in 2001, after the 9/11 attacks, were claimed as self-defence in order to prevent future armed attacks. In January 2020, the US launched a drone strike that hit two vehicles close to Baghdad international airport and killed the Iranian General Qasem Soleimani. The justification for the attack was, as in the other mentioned cases, self-defence in order to prevent future Iranian attacks.

The list of incidents, where states justify their use of force based on self-defence in order to avert future armed attacks, can be made much longer. And each time these allegations are made, they refuel the never-ending debated whether these actions are lawful as self-defence under international law or not.

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4.2 The terminology

In order to examine and understand the discussions of whether a state has a right to self-defence before an armed attack occurs, it is necessary to understand the terminology of different claims. The fact that there is no universal definition of the different concepts, has constituted an incoherent terminology where same terms have been used for different self-defence concepts. Hence, it is important with a clarification regarding the terminology that will be used in this essay.

Mainly three different terms have been used within this context by legal scholars and jurists; preventive, preemptive and anticipatory self-defence. But in this essay, primarily the terms of “anticipatory” and “preemptive” self-defence are being used. The picture below demonstrates the relevant terminology and the meaning of these terms by distinguishing them in regarding to when, at what time, before the armed attack, they are being invoked.

Preemptive self-defence, in contrary, refers to non-imminent attacks. In other words, as soon as the threat moves beyond the requirement of imminent, it will, in this essay be termed as “preemptive” self-defence. The term of preemptive is much wider and refers to halting a potential and abstract future armed attack. In other words, there is no actual plan of attacking, an attack is rather only a contingency. Preemptive self-defence has been used through history, but got especially emphasized by the Bush Government when they established their new US approach of national security in 2002.\(^8\) Important to notice is that, the US Government has, in their documents and statements, on some occasions used

the term of preemptive in regard to also anticipatory self-defence. Nevertheless, the term “preemptive” has usually been associated by the Bush Government as a wider term, regarding abstract and possible threats of attacks, that are more remote in time and where there is no evidence of a specific attack.

4.3 Anticipatory self-defence

4.3.1 The origins from the Caroline Incident

As mentioned above, anticipatory self-defence refers to the use of force where there is an imminent and obvious threat of armed attack. It refers to the moment just before an armed attack is actually being launched. The concept of anticipatory self-defence has its roots long before the UN Charter and the right to self-defence got codified. In fact, already in 1814, the Dutch legal scholar Hugo Grotius stated that self-defence may be permitted before an attack has occurred. Grotius established that “the danger must be immediate, which is one necessary point.” It is commonly said that anticipatory self-defence was thereafter, first referred to in the Caroline Incident from 1837 (explained under 3.2), where the so-called Webster formula laid down the criteria for anticipatory self-defence. The formula established that states have a right to self-defence before an armed attack has occurred if, there is an “imminent” threat of an armed attack. The threat should be so severe, that it requires a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

The requirement of “imminence” is the key concept within the meaning of anticipatory self-defence. However, the actual meaning of the requirement is not precisely established. The fact that there is no legal definition of the term has given rise to different interpretations. In general, the meaning of the word refers to a future event. And historically, imminence has been referred to a temporal concept and a future event, where a specific attack is impending. This specific

anticipated threat, can’t just be based on abstract, obscure or latent suspicions. The anticipated threat must instead be based on an identifiable specific attack which is in fact being prepared. In the report by the Independent International Fact-Finding Mission on the Conflict in Georgia, the question of anticipatory self-defence arose due to Russian preparations for entering Georgia. Regarding the question whether Georgia had a right to anticipatory self-defence due to Russia’s preparations, the report referred to “imminent attack” by establishing it as a “concretely” and “objectively verifiable” threat. However, through time and due to certain incident and cases in the world, different claims have been made to expand and modify the meaning of the term. Due to modern and more dangerous threats, like weapons of mass destruction or terrorism, allegations state that there is a need to examine other factors when assessing the requirement of “imminence”. Factors like the gravity, nature and the capability of the attacker. This discussion, regarding the different interpretations of the meaning of “imminence”, will be further elaborated under chapter 4.5.

When the right to self-defence got codified in article 51, it stated that the right applies after an armed attack has occurred. In other words, it didn’t include self-defence actions as established in the Caroline Incident. At the same time, the wording of the article didn’t establish a prohibition to self-defence actions before an armed attack. As a result, the lawfulness of anticipatory self-defence is persistently debated.

The academic debate between legal scholars, has historically divided the jurists into two groups. The ones supporting an expansive interpretation, claiming that the right to self-defence also permits anticipating acts due to its legality within pre-existing customary law. Contra the ones supporting a restrictive interpretation, claiming that the wording of article 51 clearly establishes that self-

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93 Ibid, pages 254.
95 Ibid, pages 703-704.
97 Christian Henderson, Preventative Self-defense, pages 277-278.
defence is lawful “only if” an armed attack has occurred. This debate, did not just divide the legal scholars, but also the member states. As we will see furthermore, this fragmentation of different interpretations pervaded the state practice and debates within the UN institutions.

4.3.2 The International Military Tribunals and State Practice

During the proceedings in the International Military Tribunals in Nuremberg and Tokyo after the second world war, the question about the legality of anticipatory self-defence was raised. In the Nuremberg Trail Judgment from October 1946, where Germany faced allegations for the invasion of Norway, Germany claimed anticipatory self-defence. The Tribunal stated following regarding the claim:

“It must be remembered that preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation" (The' Caroline Case, Moore’s Digest of International Law, II, 412).”

In the Tokyo Tribunal, regarding the Japanese attack on the Netherlands East Indies, the Tribunal took a similar approach, by acknowledging the right to anticipatory self-defence. However, it has to be noted that the Military Tribunals did not include the law of the UN Charter in their judgements, but only the law prior to the Charter. Meaning that, the Tribunals did not handle the interaction between the preexisting customary law with the provisions of the Charter. The position and statement of the Military Tribunals have anyway, been used by supporters for the permissible view, as arguments in favor for the legality of anticipatory acts.

4.3.2.1 The Six-Day War in 1967 and other similar incidents

The controversy of the legality was also clearly shown within the international community. State practice and different cases distinctly illustrated the divergent legal views between the member states. One significant example is the Six-Day War between Israel and Egypt. During the beginning of 1967, the relationship

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100 Judgment of the International Military Tribunal (Nuremberg), 1 October 1946; Judgement of the International Military Tribunal for the Far East (Tokyo); Henderson, Preventative Self-defense, pages 279-280.
102 Judgement of the International Military Tribunal for the Far East (Tokyo), 4 November 1948.
between Israel and its neighbors, Egypt, Jordan and Syria, was noticeable fragile. The Egyptian President had sent troops to the Sinai border and Israel had responded with a mobilization.\(^\text{105}\) The threats and tensions mounted even more when the Egyptian President, on 25 May had declared that “we intend to open a general assault against Israel. This will be total war. Our basic aim will be to destroy Israel.”\(^\text{106}\) As a result of the threats, Israel launched an attack on Egypt’s airbase on 5 June. And by the 11th of June, Egypt was totally defeated. Israel had not only destroyed the Egyptian Air Force, they had also occupied Gaza, the West Bank, the Sinai and the Golan Heights. In order to justify their actions, Israel claimed different justifications, and one of them seemed to be,\(^\text{107}\) the right to anticipatory self-defence.\(^\text{108}\) Israel didn’t expressively refer to anticipatory self-defence or an existence of an imminent treat. But their allegations stating that the attack was a response to the transfer of Egypt’s forces to the border, and the nature of their use of force, however, raised the question of anticipatory self-defence and its lawfulness within the UN. The offensive by Israel was highly controversial and the legal reactions within the UN varied. Even though there existed no expressed support for Israel’s right to anticipatory acts, the drafted resolutions in the General Assembly\(^\text{109}\) and Security Council,\(^\text{110}\) holding Israel responsible for aggression, were not adopted. At the same time, some opposing states, openly expressed that the attack by Israel was unlawful, basically on the grounds that Israel did not suffer an armed attack.\(^\text{111}\) Meaning that, even though the majority of the UN didn’t condemned the attack, it didn’t neither expressively establish a support for anticipating defence.

This case both demonstrated the divergent views regarding the lawfulness of anticipatory actions within the UN, and the reluctance from Israel to publicly claim their support for anticipatory self-defence. As seen, even though Israel

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\(^{106}\) UN Doc. S/PV.1348, 6 June 1967, § 150.


\(^{109}\) For example, a resolution by Soviet, UN Doc. A/L.519, 19 June 1967; A resolution by Albania, UN Doc. A/L.521, 26 June 1967.

\(^{110}\) Drafted resolution by Soviet was rejected by the Security Council, UN Doc. S/7951/Rev.2, 14 June 1967.

\(^{111}\) For example, UN Doc. A/PV.1527, 20 June 1967, §§94-95 (Czechoslovakia); UN Doc. A/PV.1546, 11 December 1967, § 59 (USSR); UN Doc. A/PV. 1530, 21 June 1967, § 153 (India); UN Doc. A/PV.1529, 21 June 1967, § 93 (Yugoslavia); UN Doc. A/PV. 1530, 21 June 1967, §§ 57-58 (Sudan); UN Doc. A/PV.1538, 27 June 1967, § 84 (Zambia).
never used the specific terms, they still clearly supported a wider interpretation of the right to self-defence. In contrary, the states condemned the expanded right, publicly expressed their views during the discussions.\textsuperscript{112} A similar situation where claims of anticipatory self-defence were not made publicly was for instance in 1950 when Pakistan deployed military troops to Kashmir, India. Pakistan claimed that their actions were invoked due to allegations that “India was mounting an offensive”.\textsuperscript{113} However, Pakistan didn’t expressively claim a justification of anticipatory self-defence, while India condemned Pakistan’s right to anticipating defence in this case.\textsuperscript{114}

16 years before the Six-Day War, in 1951, same parties disputed in another self-defence conflict, when Egypt interfered with the passages of goods to Israel through the Suez Canal. The Egypt’s acts were alleged by Israel, as acts of aggression, while Egypt claimed a right to anticipatory self-defence by referring to pre-existing customary law.\textsuperscript{115} Israel strongly condemned the actions and especially Egypt’s justification. Israel alleged that the anticipatory acts were unlawful by stating: “Article 51 allows a nation to undertake action of self-defence only on two conditions . . . One of them is that that country shall be the victim of armed attack, and not even the Egyptian himself has invoked such prospect.”\textsuperscript{116} The majority of the Security Council similarly condemned Egypt’s actions and adopted a resolution establishing that they couldn’t be justified as self-defence.\textsuperscript{117} Even though some of the majority states publicly opposed the lawfulness of anticipatory actions (like Israel), others explicitly didn’t.\textsuperscript{118} The UK stated for instance: “Egypt is not being attacked and is not under any imminent threat of attack, and we therefore cannot agree that these measures are necessary for the self-defence . . . of Egypt”\textsuperscript{119} In other words, the UK condemned the actions on the grounds that the actions did not fulfill the requirements of anticipatory self-defence.

4.3.2.2 The US invasion of Panama in 1989 and the US attacks of Afghanistan and Sudan in 1998

Anticipatory self-defence was also publicly claimed to justify the use of force when US invaded Panama in 1989.\textsuperscript{120} US launched their attack on Panama in

\textsuperscript{112} Walker, \textit{Anticipatory collective self-defense in the Charter era: What the treaties have said}, pages 357-359.
\textsuperscript{114} UN Doc. S/PV.499, 10 February 1950, §§ 4-5; UN Doc. S/PV.536, 9 March 1951, §15.
\textsuperscript{115} UN Doc. S/PV.549, 26 July 1951, § 78; UN Doc. S/PV.550, 1 August 1951, §§ 33-35 and 39; UN Doc. S/PV.553, 16 August 1951, § 60; Ruys, \textit{“Armed Attack” and Article 51 of the UN Charter: Evolutions in Customary Law and Practice}, pages 288-290.
\textsuperscript{116} UN Doc. S/PV.551, 1 August 1951, §36.
\textsuperscript{117} SC Res. 95 (1951) of 1 September 1951.
\textsuperscript{118} For instance, Israel themselves (UN Doc. S/PV.551, 1 August 1951, § 36).
\textsuperscript{119} UN Doc. S/PV.552, 16 August 1951, § 10; UN Doc. S/PV.550, 1 August 1951, §§ 93–4 (UK).
December 1989 and just several weeks later, the American military had defeated and removed the existing government. In order to justify their military actions, the American authorities presented different justifications and one of them was anticipatory self-defence. The claim established that the attack was conducted in order to protect American military and civilians from imminent attacks and danger. The response to the justification demonstrated the apparent fragmentation regarding the lawfulness within the UN. For instance, a drafted resolution within the Security Council, marking the invasion as unlawful, didn’t get adopted due to a lack of support by the majority of states (states like Great Britain, France, Canada and of course USA, all opposed the resolution). In the contrary, during the discussion within the General Assembly, a drafted resolution, holding the US invasion unlawful, got adopted.

Almost a decade later, in 1998, the US similarly claimed a right to anticipatory self-defence after attacking al-Qaeda camps in Afghanistan and a pharmaceutical plant in Sudan (claimed to be producing weapons of mass destruction). The US launched the attacks after their embassies in Tanzania and Kenya had been subject to terrorist attacks. The US president at that time, Bill Clinton, established that the US attacks were anticipatory self-defence due to the existence of imminent threats to other US embassies. Furthermore, the president claimed that there existed mounting evidence for these imminent attacks. Even though the response internationally showed a widespread mistrust regarding the evidence for the alleged imminent threats, the Security Council did not take any actions.

4.4 Preemptive self-defence

4.4.1 During the Cold War Era

The debate regarding the lawfulness of anticipatory self-defence, with the crucial criteria of “imminence”, was constantly ongoing. However, the majority of states, during the Charter era and before the 9/11 attacks, supported a restrictive approach of self-defence. Meaning that the anticipatory self-defence as mentioned in the Webster formula, was not permissible under international law. It

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123 GA Res. 44/240. 29 December 1989.
was very controversial and not generally accepted. Nevertheless during the Cold War era, some states started to claim a wider right of self-defence. One moving beyond the criteria of “imminence”. Attempts to expand the scope of the temporal dimension of “armed attack”, including more remote threats in the future, was claims of preemptive self-defence.

4.4.1.1 Cuban Missile Crisis

One of the first usually mentioned examples regarding preemptive self-defence is the Cuban Missile Crisis in 1962. The crisis occurred during the Cold War era when Soviet secretly installed ballistic missiles on Cuba. When discovering the instalment, the US President at the time, John F. Kennedy, immediately responded by stating that the installation created a serious threat to the world peace and the security of the United States. The US imposed a naval quarantine on Cuba in order to block the delivery of weapons and other affiliated materials. The President authorized the military to search and intercept all vessels heading towards Cuba. If necessary, the military had also the authorization to use force, in order to prevent the creation and use of military capability in Cuba as well as to prevent Cuba from receiving military materials from the Soviet Union. Even though these actions can be seen as preemptive self-defence with the aim to avert future possible attacks, the US never expressively justified them as self-defence when the issue was brought up to the Security Council. Instead, they claimed justifications under articles 52 and 53 UN Charter. The fact that the US never claimed self-defence and that the debate didn’t include discussions about article 51, has thereafter been challenged. The US reluctance to expressively claim self-defence queried about the US standpoint regarding preemptive self-defence actions. Later, the US Legal Advisor Chayes, at the time, declared that article

127 Henderson, Preventative Self-defense, pages 281-281; Mahmoudi, Self-Defence and International Terrorism, Internationell våldsanvändning och folkrätt, page 169
51 was not claimed due to that there were no “imminent threat of an armed attack”. Meaning that, the missiles in Cuba, never constituted an imminent threat to the US. And therefore, the US never used the concept of self-defence in order to justify its actions.132

4.4.1.2 The Israeli strike on the Osirak nuclear reactor

Another significant incident where the issue of preemptive self-defence was highlighted, was during the Israeli strike on the Osirak Nuclear Reactor, Iraq, on 7 June 1981. The Israeli aircraft destroyed the nuclear reactor located at the Tuwaitha research center close to Baghdad.133 On Israel’s report to the Security Council, Israel justified the actions by stating that “From sources whose reliability is beyond any doubt we learned that this reactor, despite its camouflage, is designed to produce atomic bombs. The target for such bombs would be Israel.”134 Furthermore, they claimed that this was an act of self-defence under general international law and article 51 of the UN Charter.135 The response by the other UN member states didn’t though show much support. Firstly, the Security Council adopted a resolution on 19 June, which strongly condemned the Israeli attack and established that the attack in fact, violated the UN Charter and international law.136 While the US supported the Israeli arguments in general, it still voted in favor of the resolution because Israel didn’t exhaust other, diplomatic and more peaceful remedies, before using force as self-defence.137 Secondly, several months later, the General Assembly adopted a resolution which reconfirmed the language of the Security Council resolution, and in addition, condemned the Israeli aggression.138 The resolution was adopted with a clear majority, where only two states voted against it; USA and Israel.139

The discussions and outcomes within the Security Council and the General Assembly demonstrated quite clearly the view of the member states regarding the legality of the preemptive claims. A lot of states expressively rejected self-defence actions against non-imminent threats, by stating that international law does not


134 UN Doc. S/14510, 8 June 1981 (Israel).


permit the expanded concept of self-defence. Sweden, for instance, stated following:

The interpretation by Israel of Article 51 of the Charter, invoking the right of self-defence, is not convincing. It implies that the concept of legitimate self-defence could be extended almost limitlessly to include all conceivable future dangers, subjectively defined. The implications of such an interpretation are dangerous and could jeopardize peace if other nations followed that argument.

Similarly, the European Community at the time (including 10 states), publicly rejected the wide interpretation of article 51 that Israel claimed. However, some states also rejected Israel’s actions on other arguments. The United Kingdom, for instance, expressed that they condemned Israel’s actions on the grounds that “there was not an instant or overwhelming necessity for self-defence.” Sierra Leone, Niger and Omar stated a similar argument.

4.4.2 After the 9/11 attacks

One incident in particular, the 9/11 attacks, has had a significant effect on the standpoint, view and claims of self-defence in the international community. In the aftermath of the attack the law of self-defence played a central role in several different happenings and incidents. Initially, the US, with President Bush at the front, responded to the 9/11 attack by invoking Operation Enduring Freedom, when they attacked Afghanistan on 7 October 2001. As the attacks were linked to the terrorist group al-Qaida and its leader, Osama bin Ladin, the US lead operation, with assistance of UK forces, launched armed attacks on al-Qaida and

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140 For instance, Algeria, Brazil, Spain, Ireland, Bulgaria, Yugoslavia, Uganda, Philippines, Czechoslovakia, Sierra Leone, Yemen, Somalia, Mexico and Turkey, see UN Doc. S/PV.2280-2288, 12-17 June 1981. See also for instance, Syria, India, German Democratic Republic, Austria, Tunisia, Egypt, Poland, Guyana and Chile, see UN Doc. A/36/PV.53-56, 11-13 November 1981.
142 In 1981 following countries were members in the European Community; Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Denmark, Ireland, the United Kingdom and Greece, see European Union website (eurpoa.eu), The History of the European Union – 1981: <https://europa.eu/european-union/about-eu/history/1980-1989/1981_en>.
146 “Operation Enduring Freedom” was the name the US Government used to the so-called “War on terrorism” that began in October 2001 when US and UK began the military intervention in Afghanistan as a response to the attack in 11 September 2001. See also Gray, International Law and the Use of Force, pages 176-180.
Taliban targets in Afghanistan. In their letters to the Security Council, both the US and the UK justified their armed attacks as self-defence under article 51, in order to “prevent and deter further attacks” and “to avert the continuing threat of attacks from the same source”. Before the operation was launched, the Security Council adopted a resolution, where it condemned the 9/11 attacks and recognized the right of self-defence in response to terrorist attacks. Furthermore, the OAS member states also invoked the right to collective self-defence and the European Union publicly supported the self-defence actions that were carried out by the US and UK. Also other states like Japan, China and Russia supported the military actions.

In 2002, the Bush Administration went further with their claims of self-defence. The US Government expressively tried to stretch out the boundaries of the scope of anticipatory self-defence by claiming a much more expanded right in their National Security Strategy of the United States (NSS) from 2002. Even though previous US presidents had established a wider self-defence approach and other states had claimed an expanded right (as seen above, for instance after the attack on the Osirak nuclear reactor) the concept of preemptive self-defence became a cornerstone within the US new strategy. And not surprisingly, this broader concept got called the “Bush Doctrine” after the publishing of the NSS due to its significance during the aftermath of the 9/11 attacks. The 2002 NSS stated inter alia following regarding the US actions against global terrorism:

We will disrupt and destroy terrorist organizations by:
- defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our

149 Ibid.
borders… we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country; and…

Furthermore, the strategy also stated following regarding what means the US will use in order to prevent threats of weapons of mass destruction:

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

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

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

As can be seen in the wording of the US National Security Strategy from 2002, the US clearly distinguished the use of preemptive self-defence from anticipatory, by stating that the US will use act in self-defence even if the requirement of an “imminent attack” is not fulfilled. Similarly, it stated that they would use preemptive force even though there is no evidence of time or place for an attack by the enemy. What can be stated at this point is that, even though preemptive self-defence was used and claimed prior to the US statements in 2002, the claims of preemptive self-defence by the US in the NSS, was obviously a reappraisal of the concept. The US had publicly expanded the concept in a way that was both significant and amounted to a lot of controversy. The US approach had therefore, once again, refueled the debate regarding the legality of self-defence actions before an armed attack had been conducted.

4.4.2.1 The invasion of Iraq in 2003

The US’s establishment of NSS from 2002 was alleged to have laid the ground for the invasion of Iraq that occurred the following year. On 19 March 2003, the combined troops of the US, UK and Australia invaded Iraq after months of mounting tension between the countries. Iraq refused to comply with their disarmament obligations within the weapons inspections regime in the Security Council Resolution 687 from 1991 while the US and UK claimed that Iraq possessed weapons of mass destruction and publicly included Iraq in the “axis of evil”. Even though the members of the Security Council refused to adopt a resolution that authorized the use of force in Iraq, and the UN Secretary-General publicly stated that, an US invoked armed attack against Iraq without the authorization of the Council, is a breach of the UN Charter, the US and its allies, launched the invasion of Iraq. The invading states claimed different justifications. Inter alia that the Iraqi Government had close ties with al-Qaeda and that it had breached the ceasefire conditions in the previous Security Council Resolution 678 and the Security Council resolution 687 from 1991 after the so-called Gulf War in 1990-1991. The US also claimed that Iraq had a program of possessing and manufacturing weapons of mass destruction, which created a future threat to the peace and security of both the US and the world. Additionally, out of all the invading states, solely US added the right to preemptive self-defence as justification for the invasion. Meaning that, the justification was not the US main argument even though one could have imagined it to be, after the publication of the “Bush Doctrine” the year before. The preemptive self-defence argument was instead rather an addition to the other justifications.

In fact, the invasion was highly controversial and received a lot of criticism, however the discussions didn’t circle around the issue of preemptive self-defence, and the issue was almost not even brought up during the discussions about the lawfulness of the invasion. Additionally, the allegations of the existing threat by Iraq was also dismissed. In fact, it later became public that Iraq didn’t even possess weapons of mass destruction.168

4.4.2.2 The response from the international community

The response from the international community after the US’s broad expansion of self-defence in 2002, and the invasion of Iraq in 2003 was shattered and created a great amount of controversy. Some states supported the US standpoint and the invasion of Iraq, some only rejected the invasion and while others rejected both the US expansion of the self-defence concept and the invasion of Iraq.169 The United Kingdom for instance, a long standing US ally, didn’t publicly support the right of preemptive self-defence but established an approach that was quite close to the concept in the NSS.170 However, after the invasion and when justifying their actions, the UK refrained from publicly claims of preemptive self-defence. Nevertheless, other states like Australia,171 (an US ally that also contributed with military troops during the 2003 invasion) Iran,172 North Korea173 and India174 publicly expressed its support for using pre-emptive attacks.

On the other hand, states like Spain,175 Turkey176 and Germany177 openly criticized the US establishment of preemptive strikes. China, similarly, condemned the US approach of preemptive self-defence, but with a reservation

169 W. Michael Reisman and Andrea Armstrong, Chapter 4, Claims to Pre-emptive Use of Force: Some Trends and Projections and Their Implications for World Order pages 96-108.
173 Yong Taim, Kui, Australia, N. Korea join “Preemptive” Bandwagon, News Straits Times, 26 October 2003.
174 The times of India, Every Country Has Right to Pre-emption: Jaswant, 30 September 2002.
stating, “Notwithstanding this criticism, such action appears to be possible in the limited context of China’s claims to Taiwan.”

Even though a few states showed support to the US approach on the earlier stages just after the 9/11 attacks, the majority of the member states later condemned the invasion of Iraq 2003. And in general, the US claims of preemptive self-defence during the Iraq invasion hardly meet any positive response within the UN, despite from the few mentioned states.

However, it cannot be denied that the establishment of the preemptive concept and the invasion of Iraq created controversies and fractions within the UN. In September 2003 the Secretary General, Kofi Annan, expressed his concerns about the concept of preemptive self-defence, to the General Assembly by stating following:

Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence… Now, some say this understanding is no longer tenable, since an “armed attack” with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed… Instead, they reserve the right to act unilaterally, or in ad hoc coalitions. This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years. My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.

The Secretary-General’s High-Level Panel on Threats, Challenges and Change, published a report, in the late 2004, where the issue of self-defence actions prior to an armed attack has occurred was threatened. The panel established that a state can act in self-defence, before an armed attack has occurred, only if there is an imminent threat. If the threat is not imminent, but still real according to credible evidence (for instance, real allegations regarding possession of nuclear weapons), the issue should be submitted to the Security Council. Member states should not, in other words, handle the threat solely with armed self-defence actions. This approach was later, in 2005, also supported by the Secretary-General in the so-

178 BBC International Reports, Quotes from China, Taiwan Press, 8 February 2006 (citing China Defense Daily) (Lexis Academic).
called *In Larger Freedom* report, when he established that only imminent threats are in coherence with article 51 of the UN Charter.\(^{182}\)

### 4.4.2.3 Attack on the Syrian Al-Kibar facility in 2007

In 2006, the Bush Government published their new National Security Strategy, where the emphasize of using the wide approach of preemptive military actions was moderated.\(^{183}\) Even though the document established that the US approach to preemptive use of force remained the same, the strategy included much more alternative means.\(^{184}\)

However, after condemning and rejecting approach from the international community and the US publications of the NSS, Israel launched the "*Operation Outside the Box*" in September 2007; an attack on the alleged Al-Kibar nuclear reactor, located in Syria. In the aftermath of the attack, all of the concerned states remained strangely quiet. Syria solely complained about the fact that Israel had invaded their airspace, while Israel completely declined commenting the incident at all.\(^{185}\) The reactions within the international community after the attack were very limited and the issue was not even debated within the Security Council. Not earlier than several months later, more precisely on April 2008, the US released information about that the targeted facility Al-Kibar was a nuclear reactor possessing a program of weapon production. The information also established that Israel was responsible for the attack due to that the Syrian nuclear reactor created "*an existential threat to the state of Israel*".\(^ {186}\) However, Israel remained silent for a long time and it was not until March 2018, that they actually acknowledged being responsible for the attack by removing the censor.\(^ {187}\) The Prime Minister of Israel, Benjamin Netanyahu, established that Israel attacked the Syrian nuclear reactors in order to prevent Syria from producing nuclear weapons. He also stated following: "*Israel's policy was and remains consistent - to prevent our enemies from arming themselves with nuclear weapons.*"\(^ {188}\) Even though Israel has released information about the strike, it still hasn’t publicly presented a legal justification.

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\(^{184}\) Ibid, pages 12 and 23.


\(^{186}\) Office of the Director of National Intelligence, *Background Briefing with Senior U.S. officials on Syria’s Covert Nuclear Reactor and North Korea’s Involvement*, 24 April 2008, page 8.


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for their action. Similarly, the reactions within the international community, after the acknowledgment, have remained muted.189

4.5 Further developments

After the establishments by the different UN institutions, the reactions by the member states shifted from discussions regarding the expanded right of preemptive strikes, to discussions regarding the lawfulness of anticipatory self-defence with the central requirement of “imminence”. A lot of states support the establishment by the UN High-Level Panel, like for instance the US, Australia, the UK, Israel, Germany, Switzerland, Uganda and Republic of Korea.190 However, many states, explicitly rejected the approach by establishing a restrictive view of article 51 and argued that international law, only permits self-defence after an armed attack has occurred. The member states supporting the opposing view were for instance Vietnam,191 Pakistan, Iran, Cuba, Egypt, China, India, Syria and Indonesia.192 In addition, the 125 states of The Non-Aligned Movement193 publicly established the same restrictive view on the right to self-defence under article 51.194

In September 2009 the Independent Fact-Finding Mission on the Conflict in Georgia, published their report where they established a similar approach. The report stated that it is clear that international law doesn’t permit abstract and presumed threats that doesn’t amount to being imminent. But the question whether anticipatory self-defence, or “the existence of an objectively verifiable, concretely imminent attack” as the report describes it, is lawful within international law was not answered.195

193 An international organization, representing member states that does not want to be officially aligned with or against any superpower. The organization was created during the cold war, in 1961, see André Munro, Non-Aligned Movement, Encyclopedia Britannica, 19 July 2013: <https://www.britannica.com/topic/Non-Aligned-Movement>.
4.5.1 A modification of the term “imminence”?

As the question of anticipatory self-defence had been highlighted once again after the publication of the 2005 report, *In Larger Freedom*, the requirement of “imminence” became hotly debated. The historical meaning of the term (as discussed under 4.3.1) is a restrictive one, with emphasis on the temporal dimension, where the existence of an impending, specific and identifiable threat is required. In other words, the attack should be just “about to occur”.

But the lack of a universal legal definition of “imminence”, has opened the door for new interpretations. In 2006, actual ideas and claims of a new, modified and contemporary interpretation of “imminence” arose. The supporters of a contemporary interpretation claimed that due to modern threats of WMD and terrorism, the requirement of “imminence” can’t solely be based on a temporal factor. Instead, the requirement should additionally be based on other circumstances, like the nature and gravity of the attack and the capacity of the attacker. This approach was firmly endorsed by Sir Daniel Bethlehem in his article from 2012. The article established that contemporary imminent threats should be evaluated through following factors:

(a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.

The article also established that even in cases where a lack of precise averment of the location or nature of the attack exists, does not hinder the threat of being imminent.

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198 See for instance the report by The Chatham House: International Affairs Think Thank, (also known as The Royal Institution of International Affairs), *The Chatham House Principles of International Law on the Use of Force in Self-Defense*, pages 967-968.
201 Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors*, in the article *Self-Defence against an Imminent or Actual Armed Attack by Non-State Actors*, pages 775-776, principle 8.
Bethlehem’s new approach, seemed to have gained endorsement from the US and their new President at the time, Barack Obama. The shifting of the US president clearly affected their approach regarding self-defence actions. From claims of a right to preemptive self-defence, the Obama Administration, established their approach of anticipatory self-defence in, inter alia, a report from 2016. In order to evaluate the requirement of imminence, the US Government referred to Bethlehem’s approach of countering contemporary threats. They established inter alia that the assessment of imminence will be based on factors like the gravity, nature and probability of the threatened attack. Similarly, in 2017, both the UK and Australia expressively supported Bethlehem’s approach of the contemporary requirement of imminence.

The reactions from other states have not resulted in the same expressively support. In fact, most states seemed to have remained silent.

4.5.2 The US drone strike in 2020

On January 3rd, 2020, after a period of mounting tensions between US and Iran, the US launched a drone strike, hitting two vehicles leaving Baghdad International Airport in Iraq. The airstrike killed the Iranian General Qasem Soleimani and nine others, including the Iraqi military commander, Abu Mahdi al-Muhandis. After the airstrike, the US served several different justifications. For the purpose of this essay, we will mainly highlight two different statements; the one made by the President the day after the airstrike and the US statement sent to the UN a few days later. The US President Trump justified the action by claiming anticipatory self-defence; “Soleimani was plotting imminent and sinister attacks.

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When the US reported about the attack to the UN Security Council, the letter constituted a slightly different wording. The justification to the Security Council relied on self-defence under article 51 but did not mention anything about the existence of an “imminent threat or attack”. Instead, it stated that the self-defence action was a “response to an escalating series of armed attacks in recent months by the Islamic Republic of Iran… in order to deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States… and to degrade the Islamic Republic of Iran ability to conduct attacks.”

The justification put forward to the Security Council, clearly didn’t establish a reference to anticipatory self-defence. It was rather a claim of preemptive nature, where US wanted to avert future non-specified attacks. However, they completely refrained from using the terms of “preemptive”, “anticipatory” and generally “self-defence”. Additionally, in the aftermath of the attack, it was also established that there didn’t exist actual evidence of an imminent threat. And as the evidence of actual and existing “imminent threat’s” ceased, the justifications shifted to other grounds.

Iran on the other hand, claimed in their letter to the Security Council, that the US strike was a criminal act and violated the provisions within the UN Charter.

And few days later, Iran launched missile attacks on US air bases in Iraq on January 8th, 2020.

The reactions from other states have though varied. States supporting the attacks (mainly US allies), stated that the strike was in coherence with the right of self-defence. States like Georgia, Latvia, Lithuania, Kosovo and Israel all established their support for the attack and its lawfulness as a self-defence act.


213 Georgia: David Zalkaliani, Georgia’s Foreign Minister, tweet, 3 January 2020: <https://twitter.com/DZalkaliani/status/1213190674151071749?s=20>; Latvia: Edgars Rinkevics, Latvia’s Foreign Minister, tweet, January 3rd: <https://twitter.com/edgarsrinkevics/status/1213161573-061551626>; Lithuania, Linas Antanaitis, Lithuania’s Ministry of Foreign Affairs, tweet, January 3rd: <https://twitter.com/LinkeviciusL/status/1213125016465891328>; Kosovo: Prime Minister Ramush Haradinaj, quoted in, “Kosovo arrests Iran supporters over comments after Soleimani’s death”, 7
The response from the UK was however not as clear. In fact, they established their support for US and the support for the right to self-defence but refrained from establishing their view regarding whether this specific attack was lawful.\textsuperscript{214}

States that expressively rejected the lawfulness of the strike was for instance China, Russia, Cuba, Nicaragua, Malaysia, Liechtenstein and South Africa.\textsuperscript{215} And Iraq, where the attack occurred, expressively condemned the attack and claimed that US violated international law.\textsuperscript{216} A lot of other member states, like for instance Germany, France, Canada, Armenia and Egypt, remined though silent about the question of lawfulness, but generally expressing their concern regarding the conflicts in the region.\textsuperscript{217} Until now, there has been no drafted nor adopted resolutions within the Security Council or the General Assembly regarding the issue. In other words, even though the lawfulness was very questionable and

\textsuperscript{214} For instance UK statement, UN Doc. SPV.8688, 9 January 2020; the Minister of State and Ministry of Defense, Baroness Goldie’s statement in the House of Lords, 16 January 2020: <https://hansard.parliament.uk/lords/2020-01-16/debates/A12A5FDB-E393-4C10-91CF-C88CBB51C78B/DronesInternationalLaw>.


amounted to strong reactions from individual states and scholars, the UN still haven’t established an approach.

4.6 The position of ICJ

Due to all these debates, statements and claims regarding the legality of anticipatory and preemptive self-defence, the reasonable sequent is to ask, what standpoint does the only international and worldwide judiciary institution, with the power to distinguish right from wrong within international law, take? The short answer to this question is that the ICJ has never really established a clear point of view, neither in terms of an anticipatory nor a preemptive right to self-defence. The issue has still emerged in several cases and it is therefore of our interest to examine how the ICJ handled the issue.

In the Nicaragua case, the ICJ adopted a restrictive approach regarding the “armed attack” criteria and article 51 in general. For instance, the Court established the requirements and the nature of armed attack regarding gravity and attributions of it. But they did not establish a full definition of “armed attack”, including the temporal dimension nor did they express their view regarding the legality of anticipatory self-defence or the Webster Formula. ICJ stated following:

In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised.

The ICJ did however establish that the meaning of “inherent right” in article 51, referred to customary law. But at the same time, they stressed that this statement did not mean that the Court validated some specific rules of pre-existing customary law. In other words, they refrained from treating the legality of the Webster formula. Even though the Court refrained from stating its view, some individual judges, especially Judge Schwebel, were open to establish a more apparent view. Judge Schwebel established that it was not convincing that the purpose of article 51 was indeed to extinguish the customary law or to restrict the scope to the explicit terms of article 51.

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219 *Nicaragua case*, §194.

220 *Nicaragua case*, §§176-177.


The ICJ took a similar general strict approach in both the *Oil platforms case*\(^{223}\) and the Advisory Opinion of *Legal consequences of the construction of a wall in the occupied Palestinian Territory*\(^{224}\) (further called the *Wall opinion*) regarding the requirement of “armed attack”. In the *Wall opinion*, where Israel had started to construct a wall in and around the West Bank, Israel claimed self-defence in order to prevent future attacks by Palestinians in Israel. The ICJ stated in their advisory opinion that the claim of self-defence was not relevant to the case.\(^{225}\) Furthermore, the ICJ followed the approach from the Nicaragua case, by refraining from establishing a standpoint regarding anticipatory and preemptive self-defence.

In the *Armed Activities case* from 2005, where Congo brought actions against Uganda on the grounds that Uganda’s use of force was not in coherence with international law, the issues of anticipatory and preemptive self-defence surfaced. Similarly, as to the other cases, the ICJ established a general restrictive interpretation of article 51, by stating: “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these to protect perceived security interests beyond these parameters”.\(^{226}\)

What though, distinguish this case from the previous cases, was that the issue of averting self-defence, seemed to be more relevant in this case. The Ugandan High Command had in 1998 released a document containing the foundation of the operation called “Safe Heaven”. ICJ stated that the operation was an alleged entitlement to secure Uganda’s security interests.\(^{227}\) The document contained inter alia following:

NOW THEREFORE the High Command sitting in Kampala this 11th day of September 1998, resolves to maintain forces of the UPDF in order to secure Uganda’s legitimate security interests which are the following:

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.

\(^{223}\) *Oil Platforms case* §§ 51, 57, 61, 64, 71–72.
\(^{225}\) *Legal consequences of the constitution of a wall in the occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004, § 139.
\(^{226}\) *Armed Activities case*, § 148.
\(^{227}\) *Armed Activities case*, § 113.
4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces.”

As seen in the document, almost all of the items, refer to the use of force in order to anticipate and preempt future attacks, rather than to respond to an occurred attack. The ICJ similarly stated that, despite from the second point, the document only included use of force in order to prevent, halt and safeguard future attacks and invasion. It also noted that “Safe Heaven” were not in coherence with self-defence as understood in international law. Still, the ICJ noted that Uganda insisted on claiming that they only acted in self-defence to already occurred armed attacks. Due to that Uganda never claimed the right to anticipatory or preemptive self-defence, the Court didn’t establish its view on the issue.

228 Ibid, § 109.
229 W. Michael Reisman and Andrea Armstrong, Chapter 4, Claims to Pre-emptive Use of Force: Some Trends and Projections and Their Implications for World Order, pages 91-93.
230 Armed Activities case, §§ 119 and 143.
231 Ibid, §§ 143-144,
232 Armed Activities case, § 143.
5 Three different views

5.1 The never-ending academic debate

As we have seen, the discussions regarding the legality of anticipatory and preemptive self-defence have been ongoing since the right to self-defence got codified within article 51 UN Charter. Before 2002, the academic debate, about the legality of anticipatory self-defence, was mainly between two groups of scholars, the ones supporting a restrictive interpretation and the ones supporting an expansive. When the US Government presented their concept of preemptive self-defence in 2002, it constructed another group of scholars supporting the broader concept of preemptive self-defence.

With that said, there is an enormous amount of statements and publications by legal scholars that represents these different views and interpretations. In order to objectively examine the different views, one can divide them in three main groups; scholars supporting a restrictive view, scholars supporting an extensive view and the ones representing a so-called “in between” view. Henceforth, these three different views will be examined by looking into three different scholars, each representing one view.

5.2 The restrictive view – Ian Brownlie

The scholars supporting a restrictive view of the right to self-defence, also called “the restrictionists” have claimed, ever since the UN Charter entered into force, that the right to self-defence only is permitted after an armed attack has occurred. One of the most eminent “restrictionist” is Ian Brownlie, that established his approach in his book “International Law and the Use of Force by States”. Brownlie, emphasizes the significance of the wording in article 51 and the actual intentions with the establishment of the article and the Charter in general; to ensure international peace and security by limiting states right to use of force. The fact that article 51 establishes “if an armed attack occurs” explicitly means that self-defence is permissible “if” and “only if” an armed attack occurs. Meaning that, actions of self-defence in any kind of preventive nature, is not permitted under article 51. This restrictive approach, argues Brownlie, pervades the entire law on

the use of force and clearly establishes the purpose of the Charter. Hence, the right to self-defence was constituted only as an exception, to the general prohibition on the use of force and with the limitation of being subordinate to the Security Council. The vital corollary is therefore that article 51 only permits self-defence if an armed attack has occurred. 234

Brownlie also argues that even though, the pre-existing customary law established a right to anticipatory self-defence, does not automatically mean that the pre-existing customary law is still valid. In fact, Brownlie argued the contrary by stating “where the Charter has a specific provision relating to a particular legal category, to assert that this does restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provision at all?” 235 An approach where pre-existing customary right remains valid, neglects both the principle of effectiveness and the meaning of the wording and purpose of codifying the law of self-defence.

Furthermore, Brownlie totally dismisses different arguments opposing the restrictive approach. For instance, he opposes the argument that the restrictive approach of self-defence protects a right for the aggressor to attack first. In fact, a right to self-defence that permits any kind of anticipating or preemptive force gives the aggressor an even bigger protection. Similarly, he dismisses the argument that an attack can begin to occur when evidence shows that an attack is being mounted, by stating that this fragile approach gives rise to assumptions of armed attacks and constructive evidence. 236

Other restrictive scholars are for instance Anthony D’Amato, Dimitri N. Kolesnik, and Said Mahmoudi. The latter emphasized a restrictive interpretation based on the main purposes and backgrounds to the Charter, by stating following:

…the nature of war in all its forms requires us to be extremely restrictive in opening new possibilities for use of force. The same moral and ethical values that led us in 1945 to put a general ban on the use of force … should also guide us to resist expanded use of force. We should withstand any effort to go back to the legal situation that prevailed before the adoption of the Charter… International terrorism and human tragedies should not become an excuse for unwarranted use of force. 230

236 Ibid, page 278.
5.3 The “in between” view – Christopher Greenwood

The so-called “in between view” represent the approach in between the restrictive and the extensive view. Christopher Greenwood, professor of international law, established his support for this approach in his article “International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq”. Greenwood notes in his article that the right to self-defence was not created with the UN Charter. It was a well-established concept of customary international law deriving long before the UN Charter, more precisely from the Caroline Incident 1837. As mentioned before, the Caroline Incident established that self-defence is permitted even before an armed attack has occurred, if the attack is imminent. The necessity of anticipatory self-defence must be “instant, overwhelming, leaving no choice of means, and no amount of deliberation”. After the establishment of article 51, the ICJ has affirmed a close link between the customary law and the treaty provision of self-defence, for instance regarding the requirements of necessity and proportionality. Even though article 51 establishes a right “if an armed attack occurs”, the right to self-defence as established under customary law and Caroline Incident, is still permitted, argues Greenwood. The fact that the Military Tribunal in Nuremberg and Tokyo in 1947-1948, applied the Caroline Incident, can therefore be seen as a proposition that the customary law of anticipatory self-defence should maintain valid as the Charter enters into force.

Furthermore, Greenwood establishes that state practice in general has shown support to anticipatory self-defence. Two cases in particular, demonstrates this; the Six-Day War and the attack 1981 Israeli attack on the Osirak Nuclear Reactor. The response by the international community after the Six-Day war clearly demonstrated an approval of the Israeli anticipatory action. Neither the Security Council, nor the General Assembly adopted the drafted resolution that condemned Israel’s actions as unlawful. Even though the Israeli attack on the Osirak Nuclear Reactor, was condemned by the international community, the majority of states still established that they based their statement on the fact that Israeli was unable to prove an existing imminent threat. In other words, they condemned the Israeli action due to the Israeli failure of satisfying the requirements for anticipatory self-defence. This approach, establishes Greenwood, clearly demonstrates the member states recognition of the right to anticipatory self-defence.

Another argument by Greenwood is the change of military conditions and warfare. By quoting Judge Higgins, Greenwood stated that, due to the contemporary warfare with threats of nuclear and mass destructing weapons, it cannot be required that a victim state has to wait to be subject to an armed attack,

244 Higgins, Problems and Process: International Law and How We Use It, page 242.
before having a right to defend itself. The restrictive approach is hence not suitable in order to meet the realities of the modern military threats. But still, this approach of anticipatory self-defence is strictly limited to “imminent attacks”. And in order for an attack to be imminent, two factors must be considered; the gravity of the threat and the method of delivering the threat. Even though these factors are not easily satisfied, Greenwood stresses “the requirement that the attack be imminent cannot be ignored or rendered meaningless… the right of self-defense will justify action only where there is sufficient evidence that the threat of attack exists. That will require evidence not only of the possession of weapons but also of an intention to use them.”

Greenwood hence argues that, self-defence actions that moves beyond the requirement of “imminence”, like claims of the expanded concept of preemptive self-defence are, as a fact unlawful. While anticipatory self-defence is an established principle of pre-existing customary law, recognized by inter alia the Military Tribunals and state practice, preemptive self-defence doesn’t have any basis in law at all.

Other scholars supporting this view are for instance Judge Rosalyn Higgins, Derek W. Bowett and Thomas M. Franck. There are also those scholars that in fact supports the nature of anticipating acts but limited to a stricter interpretation. Instead of claiming that the threats are imminent, these scholars expand the requirement of when the attack has started. They claim that the attack has begun at an earlier stage and therefor is in coherence with article 51. One of these are Yoram Dinstein, that in his literature refers to this as a concept of “interceptive self-defence”. Dinstein states that interceptive self-defence occurs “after the other side has committed itself to an armed attack in an ostensibly irrevocable way” and that such actions “counts an armed attack which is already in progress, even if it is still incipient and its consequences have not yet been suffered”. In other words, this approach can be established in between the “restrictive” interpretation as Brownlie establishes, that only permits self-defence after the attack has de facto occurred, and the approach of anticipatory self-defence followed by the Caroline Incident-requirements, and supported by Greenwood.

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246 Ibid, pages 15-16.
250 Dinstein, War, Aggression and Self-Defence, page 233.
5.4 The extensive view – Anthony Clark Arend

The most extensive approach, supporting the view of preemptive self-defence, gained notifiable support after the attacks of 9/11 and the Bush Administration published the new National Security Strategy of 2002. The American law professor, Anthony Clark Arend, established in his article “International Law and Preemptive Use of Military Force”, his support for preemptive self-defence as established under the “Bush Doctrine”. In his article, Arend stresses the role of state practice within international law. As international law is created through the consent of the member states, the sovereignty of each state is essential to the law. This means that states are only bound by rules that they have given consent to and therefore, a state can act however they want, as long as their actions are not restricted by a rule they are bound by. This principle, Arend argue, is highly relevant in the question of preemptive self-defence. The fact that article 51 only establishes that self-defence is permissible “if an armed attack occurs”, does not necessarily mean that pre-existing customary law of anticipatory self-defence is no longer valid. Additionally, Arend argue, it should be noted that article 51 does not establish a prohibition on preemptive self-defence. And the fact that states are sovereign, means that a state can act in any way they want, as long as their behavior doesn’t breach a rule that they are bound by.

Arend similarly argues that the debates within the Security Council, after an attack of alleged preemptive use of force has occurred, also has considerable importance in this discussion. For instance, the opposing member states in inter alia the Six-Day War, the Attack on the Osirak Reactor and the Cuban Missile Crisis, were not in a clear consensus. Therefore, Arend states that “it would be difficult to conclude that there is an established rule of customary international law prohibiting the preemptive use of force”. With that said, Arend continues, the fact that the Bush Administration in 2002, invoked a concept preemptive self-defence, is unremarkable.

Another main argument that Arend establishes is, that the nature of threats to the national security have changed with time. When the UN Charter entered into force, the main threat to international peace and security were the states. The articles enacted in the Charter, like article 2(4) and article 51, were therefor framed to combat and prohibit states from using force against other states. Today, Arend argues, the biggest threats are not the states, but WMD and terrorism. The fact that the UN Charter doesn’t address the threats of the modern world, is in itself the main issue. The criteria of “imminent threat” within the customary law, is suited and well-working in regard to tensions and conflicts between states. But the situation regarding threats of WMD and terrorism are

different. First of all, Arend states, it can be hard to establish whether a state has a possession of WMD. Secondly, by the time the threat of an attack with WMD is imminent, it might be “too late” for the state to mobilize an effective defence. The same issue applies to the threats of terrorism attacks. The threats of attacks by terrorist groups are usually not even discovered before the specific attack is actually well underway. Therefore, it is reasonable to attack a known facility of WMD or a known terrorist camp area on an earlier stage before the attack gets imminent. This approach, Arend states, actually preserves the state’s right to an effective self-defence to the new threats of the modern world.255

Lastly, Arend argues that the UN Charter framework is dead. For a long time, member states have time after time, violated the basic principles of the Charter, by using force and breached the general prohibition in article 2(4). In other words, the state practice has not been coherent with the basic rules of the treaty law. Due to the fact that international law is based on state’s consent by both their custom and treaties, the state practice does therefor no longer reflecting the existing international law. Thence Arend continues, the customary norm does no longer restrain the use of force. With that said, Arend concludes that the UN Charter framework is dead which means that “the Bush doctrine of preemption does not violate international law because the charter framework is no longer reflected in state practice.”256

Other scholars supporting this view is for instance Abraham D. Sofaer and William H. Taft IV and Todd F. Buchwald, that all emphasizes the significance of contemporary threats of attacks, like terrorism and weapons of mass destructions.257

255 Ibid, pages 97-98.
6 Discussions and conclusions

6.1 Discussions regarding the different interpretations

As presented in the essay, there are various arguments and statements regarding the lawfulness of self-defence actions before an armed attack has occurred. As a matter of fact, this research has clearly established that the issue dates back to the establishment of the UN Charter, and is however, still today highly controversial and relevant. With that said, one can with certainty establish that there in fact are no easy answers to the posed research questions.

The absence of a specified regulation regarding the lawfulness of anticipatory self-defence within the UN Charter, is maybe the most problematic aspect within this issue. The wording of article 51 (not including an expressive prohibition of anticipatory self-defence), opened the door for different interpretations and claims of the preexisting customary rule of anticipating acts. The enacted language in article 51, include the wording of “if an armed attack occurs”, which indicates of a restrictive interpretation of the temporal dimension. However, as the article does not enact a prohibition of anticipatory actions, interpretations permitting preexisting custom cannot just be rejected. And the fact that the ICJ has denounced that article 51 ought to be interpreted coherently with customary law upholds that view. In the light of these different interpretations, one queries about what interpretation is the right one? It seems quite obvious that the interpretation of the authors of the Charter had a restrictive one. While some readers, obviously, have constitute another interpretation, an extensive one. But where does the truth lie? Within the authors’ interpretation or the readers’? To answer that question, one could disregard the arguments for the two interpretations for the moment, and query whether there exists a general consent to what the inherent meaning of the UN Charter? Is there an underlying consensus regarding how the Charter in general should be read? As highlighted under chapter 2, the foundations and main purposes of the UN Charter have always been to maintain peace and security by expressively prohibit the use of force. All 193 member states understood and accepted the cornerstones of the UN Charter when ratifying it. In other words, one cannot really diminish nor neglect the foundations and main purposes of the UN Charter and its significance and the fact that all member states approved that. Therefore, one has to accept that there actually exists an underlying consensus that the Charter enacts a restrictive approach of the *jus ad bellum*. And that must, in this case, has
some kind of importance when determining what interpretation is the “right one”.

However, the significance of law is the fact that it evolves and changes with time. Meaning that, a legal rule will not necessarily remain a legal rule after 50 years. In other words, the development of the society affects the development of the international law. Claims that the provision must be interpreted in the light of the contemporary society and threats, can’t therefor just be rejected. As a matter of fact, the world today is different from the world in 1945. Not only regarding geographical and social aspects, but also regarding warfare and threats. As the society and technology develops, the constructions and nature of threats does as well. As several scholars have stated, through history and in the future, the threats and the use of force have and will proceed to generate new and hazardous threats. Therefore one cannot deny the fact that the contemporary threats of today’s society, like terrorism and WMD, are different from the nature of threats during the period when the Charter was founded. Therefore, one can argue that in order to fulfill the purpose of the Charter today, the law of self-defence must be amended and interpreted in a way to meet the contemporary threats. So even though there might be an underlying consent that the Charter should be interpreted restrictively to maintain its purpose, one can also argue that it might be necessary to expand temporal dimension of self-defence in order to maintain the purpose. If that is the case, when and how does this necessity prevail? As seen within the research, claims have been made that both anticipating acts and preemptive acts are necessary to meet the contemporary threats and fulfill the aim of peace and security. However, the legal issue is and has always been, are these actions really lawful?

6.1.1 The interplay between customary and treaty law through state practice

As a matter of fact, one cannot deny that customary law constitutes a source of international law to the same amount as treaty law does. The legal validity of the pre-existing custom of anticipatory self-defence can’t therefor be rejected. The ICJ has for instance in general established a close link between article 51 and customary law by declaring the importance of customary rules when applying the law of self-defence. However, this research, has demonstrated a fraction regarding the interaction between customary law and treaty law within this issue. While the ICJ in the Nicaragua case established that article 51 must be interpreted in coheres with customary law,258 the Court might have taken a slightly different approach in the Armed Activities case. The ICJ’s statement in the latter case indicated on a more remote approach regarding the close relations between article 51 and pre-existing customary law. The fact that ICJ stated “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid

258 Nicaragua case, §§ 175–179 and 194–199.
down” indicates on a more restrictive interpretation of article 51 where the provision prohibits the broader customary norm. The relation between treaty law and customary rules might in this case not be as coherently as supposed to.

This reasoning also corresponds to the questions of validity regarding different rules. If a latter invoked rule prevails an earlier one, in regard to the common legal principle of “lex posterior derogat legi priori”, the latter one should prevail the earlier. In this case, it can’t be concluded that the latter rule, article 51, has succeeded to prevail the pre-existing customary norm of a right to anticipatory acts. But as Brownlie asked; if customary principles can’t be prevailed by latter established treaty provisions, why even bother conducting treaty provision? The fact that anticipatory self-defence, as derived from the Caroline Incident, has been a norm of customary law, does automatically not mean that it will remain a customary rule forever. But if treaty provisions can’t prevail or change customary international law, what can? If there is evidence that an existing customary norm does not possess the same general and worldwide support as it once did, can it still remain valid? Or at what point does a customary norm cease to be a customary norm? As known, a norm acquires the statutes as international customary law when the custom constitutes, inter alia, a general and consistent practice. Rationally, one can therefor argue that a custom loses its legality the same way as acquired. On that logic, a rule neglected and ignored by states, has ceased its lawfulness. In this case one could therefor argue that, if an inconsistency and non-general recognition of the Caroline Incident as a customary rule is shown, claims of anticipatory self-defence as a customary norm can be rejected as unlawful. The same is for treaty provisions and the strict interpretation of article 51. International law is founded by states and acquires its legitimacy from the states, which means that if an existing treaty provision is totally ignored by states, it will automatically loose its validity. If member states totally ignore an existing treaty provision, like article 51, it will cease its validity.

When analyzing the presented state practices there are several aspects that have to be highlighted in order to objectively understand and analyze the lawfulness of the different practices. First of all, one cannot deny the fact that a right to anticipatory act has been claimed persistently since the Charter entered into force. However, there are other interesting aspects that queries its statutes as a legal norm. Some incident’s and cases presented in the essay (several of them during the periods of the Cold War era, like the Six-Day War and the Cuban Missile case) showed an approach of reluctance to publicly claim a right to anticipatory self-defence. Even though the nature of the actions and circumstances of the cases clearly indicated that they acted in anticipatory self-defence, the acting states refused from publicly justifying them averting self-defence acts. Why is that? And what does that say about the legality of self-defence actions before the occurrence of an armed attack? What is also interesting regarding these cases is that the opposing states, clearly and publicly

259 Armed Activities case, § 148.
established their opposing towards anticipatory self-defence. One could argue that this indicates on a lack of support for anticipatory actions within the international community at that time. If one knows for a fact, that an argument is highly controversial and lacks support within the community, why would the state still use that argument? Especially if there is a possibility to use another legal argument, more likely to receive support? Even if the state in fact supports the lawfulness of these actions, why would they put forward a justification they know won’t gain enough support within the other stats?

Another argument is that, the state itself did not support the legality of that kind of self-defence actions. And on those grounds, they refrain from using that argument. For instance, during the Cuban Missile Crisis, the US Legal Adviser at that time, established after the crisis, that the US didn’t claim self-defence due to the lack of “imminent threat”. In other words, the threat posed by the Cuban missiles, didn’t amount to being imminent, it was much more remote. One could therefore argue that this shows the US support for the lawfulness of anticipatory self-defence and their rejection of preemptive actions. And because of that, the US didn’t want to justify their actions on a claim they themselves didn’t believe were lawful. It could also mean that, even though the US supported the expanded self-defence right, the international community didn’t. And on those grounds, the US refrained from using that justification.

In the more recent cases (like the US attacks in Afghanistan 1998, the Osirak Nuclear strike and the Operation Enduring Freedom in 2001), the research shows that states acting in averting self-defence, are also more likely to publicly claim that. In the light of this, can it be concluded that this demonstrates the opposite? That the claiming state itself supports and refers to the right as a lawful justification? In most of the cases presented in the research, one can conclude that so is the case. Take the US Drone strike that killed the Iranian General in 2020 as an example. The justifications after the attack shifted as revealing information surfaced with time. At first, the justifications were mainly and publicly based on anticipatory self-defence on the existence of an imminent “attack”. As new evidence and information surfaced that there existed no imminent threats, the tendency to invoke other justifications where obvious.

To publicly claim a right, doesn’t however has to indicate what the general apprehension of the allegation within the international community is or not. What the research clearly has shown is the importance of the reactions from the international community after actions of anticipatory or preemptive self-defence. The discussions within the General Assembly and the Security Council demonstrates on what grounds states argue about the lawfulness of the actions. For instance, when states have claimed a right to anticipatory self-defence, the subsequent reactions within the international community usually relates to discussion about the requirement of “imminence” contra the restrictive interpretation of article 51. Remarking is also that in cases after actions of preemptive self-defence, have often also raised the discussions regarding the requirement of “imminence”. Does this mean that anticipating acts are legally
accepted, while preemptive aren’t? In the light of the research, one cannot state that the current support for anticipatory self-defence has decreased. The fact that international reports and statements, like the *In Larger Freedom* report expressively endorsed the lawfulness of self-defence of imminent attacks, and states’ persistent claims of the right, one cannot simply overrule the lawfulness of anticipatory acts. In contrary, it indicates on the opposite.

Additionally, regarding arguments that article 51 is, as Arend demonstrated it, “dead” due to the constant prevailing’s, are on the same grounds highly doubtful. As seen within the research, there hardly exists any claims or discussions that fully rejects article 51 and the prohibition on the use of force. It rather demonstrates the opposed. After expansive self-defence claims, the foundation within the discussions have always been the wording of article 51. One can therefore not conclude that state practice for decades has ignored the provision, when states in fact adjusts their justifications and actions in regard to the article. With background of the research, which demonstrated that states often act in self-defence due to security and political interests based on fear, it is hard to see how states would be prone to argue for a total ban of the article. Even though states claim for an extensive right of the self-defence, that doesn’t mean a claim for abolishment of the UN use-of-force mechanism. To conclude that the article fully has lost its validity is therefore unrealistic.

### 6.1.1.1 An attempt to ”change the game”?

When discussing and analyzing the claims of preemptive self-defence it is interesting to compare the international reactions though time. After the Israeli strike in 1981 the majority of states clearly demonstrated a common international rejection against preemptive self-defence. And most of those statements were based on the argument that actions against non-imminent threats were not lawful self-defence acts. In the light if that, one can conclude that the support for preemptive self-defence at that time was very limited to certain states, peculiarly Israel and US.

When the Bush Government publicly invoked the approach, the response by the community was different. As mentioned before, when self-defence actions against non-imminent attacks were made in the earlier periods, like in the Cuban Missile case, states usually abstained from publicly using preemptive self-defence as justification. But with the 2002 NSS, the US self-defence approach was significantly openly established. Why is that? Why did the US publicly claim the right in 2002 but not in 1962? As seen in the research, it has been argued that the established approach in 2002 was a serious attempt to excuse and justify future military actions, like the 2003 Iraq invasion. But one could also argue that the US saw the opportunity, that after the hazardous attacks of 9/11, the international community was ready to both accept and adopt a broader right of self-defence against non-imminent attacks. The US, and other states like Israel, have claimed the right to defence against non-imminent attacks before, but never gained
sufficient support from the community. The 2002 NSS can therefore be seen as a serious attempt to “change the game”, to change current self-defence law by developing a broader customary norm. Because, unlike anticipatory self-defence, preemptive acts don’t have its roots strictly from pre-existing customary law. This broader concept of self-defence does not derive from any preexisting legal basis, not from any treaty provision nor customary rule. The only possible approach is to claim that state practice of preemptive self-defence has changed the alleged existing customary law to include this expanded right of self-defence. And the farmers of the 2002 NSS might have believed that the international community was ready to accept this broader right. The reactions from the community, demonstrated though the opposite.

Interesting is, however that the expanded concept, directly after the 9/11 attacks, had support by certain states. And when analyzing this support, the research presented several interesting aspects. First of all, one cannot diminish the power of fear. The fact that this legal concept was invoked and established after a serious and hazardous incident as the 9/11 attacks, affected the politics worldwide. States and international organizations where surprised, choked and realized the danger and capability that the terrorist groups actually possessed. The immediate reaction from the surrounding world, was therefor based on fear and concerns about future similar attacks. In other words, the state leaders were more willing to establish a more intense security policy. Secondly, what has also been demonstrated within the research is that politics has a tangible impact within this topic. One can for instance deduce a pattern of states that roughly speaking has remained loyal to each other through all different incidents. Peculiarly, the US, UK, Israel and Australia and other US allies. That doesn’t have to mean that these states in fact publicly express same arguments or support, but rather that these states often won’t publicly reject or condemned the lawfulness of the actions. This was for instance seen after the Osirak Nuclear strike and in 2020 after the US Drone strike outside Baghdad airport. Similarly, the political influence is also seen how surprisingly willing states are to amend or adopt its statement when it benefits their interests. A perfect example of this is when China in general opposed the US approach of preemptive acts, but with the explicit exception of Chinas affairs and interests with Taiwan. With that said, due to certain circumstances, politics and interests it is not surprisingly that the 2002 NSS (at first) gained support and that controversial acts in 2020, also gains support.

What later has been shown in the research is that the support for the US preemptive approach, pretty quickly ceased after some time. The fact that Secretary-General, Kofi Annan, in 2003 and later the 2005 report expressively condemned the broad concept of preemptive self-defence, was in itself significant. Not only due to that the Secretary-General had condemned the legal justifications put forward by the US, but also due to the previous apparent reluctance from the other UN institutions to declare a standpoint regarding the issue. In the light of that, the research has shown that it is rather hard to find a
legal basis for preemptive self-defence actions, when it doesn’t find support in existing customary law nor has sufficient support by states practice to establishes a new custom.

However, the ideas of a broader and more far-reaching self-defence actions are however not fully dead today. Even though the term of preemptive self-defence has been rejected, the same ideas and arguments, based on contemporary threats, are constantly persistent. The claims of an expanded concept of the term “imminence” that meets “contemporary threats” can be seen as a new attempt to broaden the scope of averting self-defence. Regarding legal aspects, the concept of an expanded term of “imminence” has a clearer connection to the preexisting customary norm, unlike claims of preemptive actions. And the approach quickly got enacted by several states, the US by the Obama administration, the UK and the Australia. However, in the light of the research and the reactions by the latest cases, it cannot be concluded that this broader concept of imminence has gained more support than the restrictive and classical concept of anticipatory self-defence as formed in the Caroline Incident.

Another interesting aspect to emphasize is the observation that particular states have several times attempted to reform the international rules. The US, Israel and (often) the UK, have during the years tried to expand the custom of anticipatory self-defence to also include preemptive actions. After studying and analyzing state practices and the international responses, one cannot conclude that the preemptive self-defence has gained the status of being consistent and generally accepted as a customary norm. The approach hasn’t been universally condemned, but the fact that only several states have claimed this right, inconsistently and during shorter periods (like after the 9/11 attacks), cannot be found to constitute the nature of an international recognized custom. This establishment also demonstrates that few individual and military powerful states can’t develop and create customary norms, formed to suit their own politics and security aspects. They are likewise dependent on other states. In my opinion, that demonstrates that no state stands above the international law. Even though certain states are more powerful and influential, they still can’t reform and adopt the law in a way suited only for them. This establishment demonstrates both the strength and significance of the international law and its lawfulness.

6.2 Is it needed or desirable to change current regulation?

The current legal situation opens up for a scenario where the member states play in the same game but with different rules. The states supporting the restrictive view will act in accordance with a restrictive regulation, while states supporting the extensive, will act in accordance with an extensive one. This way, the regulation continues to allow states with great power, to easier act in ways that
suits them and their politics. Powerful states know that their allies and less powerful states will, in one or another way, still support them. Even after highly questionable incidents, where the absence of evidenced is a fact, states often refrain from expressing an opposition regarding the lawfulness. For instance, after the US drone strike in 2020, a lot of states like France, Germany and Canada didn’t express their opinion regarding the lawfulness of the strike. In other words, more often than not, a lot of states will not, due to political interests, publicly criticize their actions by establishing it as an unlawful act. On that logic, it is even more unlikely that the General Assembly and Security Council will adopt condemning resolutions.

The current vague regulation also continues to allow states to launch attacks based on fear. As the research has demonstrated, a lot of anticipating and preemptive actions have simply been conducted due to dreads of being subject to armed attacks. For instance, the Cuban Missile Crisis, the US invasion of Panama, the Strike on the Osirak reactor, the strike on Syrian Al-Kibar facility and the US drone strike in 2020, were all based on fear of being subject to an armed attack. Instead of risking to wait for an attack to be evidently imminent or let alone to wait for an actual attack to occur, states act in advance to avert possible future attacks due to fearfulness. This dread resulted in 2003, to the Iraqi invasion, falsely based on suspicions of WMD possessions. In fact, there were no evidence for the allegations, nor did Iraq actually possess or manufactured WMD. As seen, these behaviors give rise to mounting tensions and triggers stats to use force based on fear. It also triggers states to mobilize, even though there in fact might not exist any threat at all. The result of this; mounting tensions and mistrust, mobilizations of forces including strivings to develop hazardous weapons. In other words, the current legally indeterminate situation opens the door for surprise military attacks, of similarly nature as the invasion of Iraq and as current tensioned situation between Iran and US in 2020. The same kind of attacks, that based the foundation of the UN Charter, are used for claiming and expanding the current regulation of international law.

With that said, one cannot deny the need for a clarification and determination regarding the issue. A reformation of the texture within article 51 is today, however highly unlikely, especially in regard to the prevailing disagreement regarding the issue within the member states. To anticipate a determine and direct response by the Security Council is not realistic (both due to the role of the political interests and to the mandate of the permanent members). Take for instance the US airstrike in 2020 as an example. Even though the liability of the justification as anticipatory self-defence ceased with evidence of non-existing imminent threats, the Security Council didn’t manage to act with a response, nor did the General Assembly.

With that said, it is desirable that the ICJ establish a distinct statement regarding the issue. Therefore, it is problematic that the Court has refrained from expressed a declaration. In some specific cases, like in the Armed Activities case, the Court sincerely had an opportunity to establish a precedential decision when
the issue indirectly arose within the proceedings. But the ICJ choose not to take a stance. One could argue that the fact that the Courts’ reluctance regarding pronouncing a position, shows that the judges within the ICJ has various opinions or standpoints and therefore refrains from declaring its position. On the other hand, it could also simply be due to the fact that the question hasn’t been properly raised yet. Anyhow, in my opinion, it is problematic that the ICJ hasn’t pronounce a clear establishment regarding the subject. As the only international judiciary institution, with the mandate to judge legal issues within international law, one could really expect the Court to at least remark on some clarifications. Due to the fact that the ICJ has established clarifications regarding other issues, like the requirements of necessity, proportionality and the nature of an armed attack, it would not be infrequent for ICJ to simply declare the meaning of the temporal dimension of the “armed attack” requirement.

Additionally, one has to notice that if and when the ICJ denounce an approach, the denounced approach must have acceptance within the state practice. Meaning that, they must establish an approach that most likely will be observed by the states. Otherwise, there is a risk, that the establishment lacks support. What establishment would, in other words, be desirable?

Whatever interpretation or point of view one has regarding the issue of the right to self-defence, one has to recognize the importance that the UN Charter was enacted in order to maintain peace and security by expressively prohibit the use of force. However, one cannot diminish the fact that the threats and warfare are different today from the day when the article got established. But an approach that permits a much more expanded use of self-defence risks of resulting to the contrary; a situation where states effortlessly can “act in self-defence” against abstract and potential future threats, based on suppositions and no evidence. It would risk giving the most powerful and military desirously states a “safe heaven” where they can use armed force as they want. In other words, it would totally be incapable to the purpose and foundation of the UN Charter.

In order to still maintain to meet the contemporary threats, it might be needed to slightly “step outside” the strict interpretation of article 51 and permit the strict interpretation of anticipating self-defence. Due to the enormous capacity possessed within contemporary WMD and the serious threats of terrorism attacks, there is a need for a possibility to avert real and serious future attacks. The consequence of a need to wait for an attack to actually occur before being able to act, can result in hazardous and devastating consequences. And by permitting acts against anticipating threats these contemporary threats can be countered, when the requirement of imminence is based on a temporal dimension, on facts and concrete evidence. That way states would be obliged, when invoking article 51, to evidence that their actions where in coherence with international law.
6.3 Finishing conclusions

After conducting the research and reflections, there are several conclusions that can be made. The research has clearly shown that there is a need for a clearer establishment of the current legal situation regarding the lawfulness to act in self-defence before an armed attack has occurred. In order to fulfill the purpose of the UN Charter, to prevent an eager warfare and maintain a universal support for the UN Charter and the international law in general, it is important with a more distinct legal regulation, in coherence with the contemporary situation.

What has also been demonstrated is that the apprehension of the terms and concepts has changed and developed through time. Firstly, the main concept was anticipatory self-defence with the main requirement of imminence. But with time, several attempts have been made to expand and develop the concept. By publicly invoking the term of preemptive self-defence with the meaning to avert non-imminent attacks this was a fact. Afterwards, other attempts have also been made to modify and reform the classical meaning of anticipatory self-defence by expanding the term of imminence. In the end, the only concept that has remained “the same” is the restrictive interpretation of article 51, that only permits self-defence after an attack has been conducted.

Even though there is no universal establishment of when and if averting self-defence is lawful, some conclusions can be made. Firstly, it cannot be concluded that preemptive self-defence has gained the status of being an international customary norm. Due to the lack of support, preemptive acts are not established as lawful acts of self-defence within international law. Similarly, the response to the broader concept of anticipatory self-defence, where the requirement of “imminence” is broader, cannot be established as a norm of customary law. Secondly, it cannot be concluded that the Charter and article 51 has lost its lawfulness. Even though opposition and violations against the textual interpretation of article 51 exists, it cannot be concluded that it has ceased its validity. Similarly, to its nature of pre-existing customary rule and the fact that the state practice shows persistent support and claims of the classical and strict right to anticipatory self-defence, this interpretation cannot be rejected. At this point, the lawfulness of anticipatory self-defence can therefore not be condemned. With that said, it seems like there is a right to self-defence before an armed attack occurs, when a threat becomes strictly and evidently imminent. Even though there is no universal recognition of this right, one can conclude that the majority still supports this approach.
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