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doi:10.1093/jcsl/krm006

Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism

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Abstract

This article makes the distinction between self-defence, anticipatory self-defence and pre-emption. It argues against pre-emption. In the presence of article 39 of the Charter the case for pre-emption is not convincing and the current international legal order can deal effectively with the threat of terrorism. The article argues that certain acts of terrorism may amount to an armed attack, hence necessary and proportionate force may be used after meeting the outlined criteria.

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1. Introduction

The right to self-defence is a natural one known and recognised since time immemorial. It is available to individuals and, after the emergence of states, to states as sovereign entities. Individual actors historically have reserved the right to use force unilaterally to protect and vindicate legal entitlements.[1] 'It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both'.[2] For centuries it was common practice to use force to settle disputes among individuals, tribes and later on states. 'Men rush to arms for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law; divine or human'.[3] There are two fundamental limitations, necessity and proportionality, on the use of force under customary law since the classic case of *Caroline* of 1837.[4] In the past century, efforts were made to codify these restrictions on the use of force: the 1928 General Treaty for the Renunciation of War (Kellogg-Briand Pact), the 1919 Covenant of the League of Nations etc. However, agonised by the horrors of the Second World War, the international community codified the rules

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1 M. Reisman, 'Criterion for the Lawful use of Force in International Law', (1985) 10 *Yale Journal of International Law* 279–285.

2 D. Webster, 'Letters from US Secretary of State Daniel Webster to British Minister Mr. Fox', (1840–41) 29 *British and Foreign Affairs Papers* 1129 at 1137–38.

3 H. Grotius, '*De Jure Belli Ac Pacis Libire Tres (Three Books on the Law of War and Peace)* (1625) (Kelsen, trans. 1913).

4 See R. Jennings, 'The Caroline and McLeod Cases', (1938) 32 *AJIL* 82–99; C. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', (1952) 2 *Recueil Des Cours* 451–515.

on peaceful settlement of disputes and the use of force in the form of the 1945 Charter of the United Nations.

The constitutive purpose of the United Nations was 'to save the succeeding generations from the scourge of war'.[5] To realise this lofty ideal, the Charter laid down that '[a]ll Members shall settle their international disputes by peaceful means'[6] and that '[a]ll 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'.[7] The Charter, however, recognises two exceptions to this rule: (a) the Security Council may authorise the use of force as an enforcement measure[8] and (b) the use of force in self-defence when there is an armed attack against a state or when such an attack is imminent.[9]

The purpose of this article is to examine the right to use force in self-defence as an exception to the general proscription of the Charter on the use of force. It addresses two questions: (a) when the right to self-defence begins and (b) when the right to self-defence ends. The first question involves issues such as what constitutes an 'armed attack', the legal status of anticipatory self-defence with a focus on the Bush doctrine of pre-emption. In substance, this is a question of 'necessity': when resort to force is permissible. The second question involves issues such as when self-defence ends: does it end after the Security Council takes action or does it continue until the state achieves the objective for using force? This question centres on 'who decides' and is in substance a decision on the principle of proportionality. The ultimate aim is to find out whether international terrorism can be dealt with effectively under the Charter regime: articles 51 and 39.

2. Self-defence and Article 51 of the Charter

A great deal has been written on the scope of article 51 but the recent terrorist attacks of 11 September 2001 in the United States and its response thereto, have reignited the debate on how to deal with this new wave of terrorism under the cloak of self-defence. Article 51 of the Charter reads:

> Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an *armed attack* occurs against a Member of the United Nations, *until* the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately *reported* to the Security Council and shall not in any way *affect the authority* and

[5] United Nations Charter (1945), Preamble, para. 1.
[6] *Ibid*., art. 2(3).
[7] *Ibid*., art. 2(4).
[8] Art. 42.
[9] Art. 51.

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> 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 [emphasis added].

The simple and traditional interpretation of article 51 seems to be that the Charter allows the right to use force in self-defence as an exception to its prohibition on the use of force[10] when there is an armed attack against a state. It does not state that the armed attack must come from another state but the traditional understanding is that usually one state attacks another.[11] Another requirement of article 51 is that the victim state should report its use of force in self-defence to the Security Council, which would take necessary measures. It seems that the right to self-defence is available until the Security Council comes into action.[12] However, article 51 does state that any self-defence measure of the victim state shall not affect the authority of the Security Council to take any action it may deem necessary either to maintain or to restore peace and security. It suggests that the Security Council has the power to take measures whether the state has reported or failed to report its use of force in self-defence. The Security Council may add to the measures already taken by the victim state or restrain the victim state from further action if it serves the purpose of maintaining or restoring peace and security.

Article 51 contains more than this simple interpretation presents. Scholars of international law are divided on its scope. There are two schools of thought, the first follows a restrictive interpretation while the second argues for an expanded interpretation. Most of the arguments of both schools focus on the semantics of article 51.

A. Restrictive interpretation

Those who argue for the restrictive interpretation of article 51 focus on the qualifying phrase 'if an armed attack occurs' and what constitutes an 'armed attack'. They claim that the use of force under the Charter is expressly limited to situations where an armed attack has already commenced or occurred. They believe, in general, that an armed attack means once the armed forces have crossed the border into another state. They argue that while customary international law prior to the United Nations Charter may have allowed self-defence in anticipation of an armed attack in certain circumstances, Article 51 limits the scope of that right. Self-defence is now only allowed in response to an 'armed attack' against a state and does not include anticipatory self-defence. Any use of force in self-defence shall be reported to the Security Council immediately, which shall take

[10] Art. 2(4).

[11] ICJ, *Democratic Republic of Congo v Uganda* (2005) see Separate Opinion of Judge Simma; ICJ, Israel Wall Opinion (2004) see paras 138–142.

[12] A. Cassese, 'Terrorism is also Disrupting some Crucial Categories of International Law', (2001) 21(5) *EJIL* 993–908.

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necessary measures. On this interpretation, the right to use force in self-defence seems an independent but transitory right, until the Security Council comes into play, and hinges on the occurrence of an armed attack. Apparently, article 51 exhausts the customary right to self-defence.

Professor Kunz argues that article 51 'constitutes an important progress by limiting the right of . . . self-defence to the one case of armed attack against a member of the U.N.'.[13] 'This right does not exist against any form of aggression which does not constitute 'armed attack' and it 'means something which has taken place'.[14] Professor Kelsen contends that article 51 restricts the right of self-defence to instances when an armed attack against members of the United Nations occurs until the time the Security Council intervenes. 'This provision restricts the right of self-defense to the case of an 'armed attack' . . . As soon as the Council takes the measures necessary to restore peace, the competence to interpret the term 'armed attack' and to ascertain whether an armed attack exists in a concrete case, is transferred to the Council. The member states acting under article 51 are, according to article 25, obliged 'to accept and carry out the decisions of the Security Council' in this respect'.[15] Professor Glennon submits that 'Article 51 of the Charter permits the use of force in self-defence' and only 'if an armed attack occurs against a Member of the United Nations'.[16] Professor Wehberg (1951) describes the exception for self-defence as 'substantially limited', and that parties may not invoke the exception except in cases of 'armed aggression'.[17] Professor Gross argues that 'the wording of Article 51 requires an armed attack using weapons and that mere threats or declarations are insufficient . . . The indispensable condition for the exercise of the right of . . . self-defence under article 51 of the Charter is that 'an armed attack occurs'.[18]

B. Expanded interpretation

Contrary to what the restrictive school believes, a significant number of publicists argue that force may not only be used in self-defence as a response to an armed attack but it may also be used as a response to an 'imminent threat' of an armed attack. They reason that self-defence is a customary right as well as one

[13] J. Kunz, 'Individual and Collective Self-defence in Article 51 of the Charter of the United Nations', (1947) 41 *AJIL* at 877–8.

[14] *Ibid*.

[15] H. Kelsen, 'Collective Security and Collective Self-defence under the Charter of the United Nations', (1948) 42 *AJIL* 783–796 at 791–792.

[16] M. Glennon, 'The Fog of Law: Self-defence, Inherence, and Incoherence in Article 51 of the United Nations Charter', (2003) 22 *Harvard Journal of Law and Public Policy* 16–35 at 20.

[17] Cited in L. Hole, 'Anticipatory Self-defence Under International Law', (2004) 19 *American University International Law Review* 96–106 at 81.

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

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recognised by the Charter. Customary law lives side by side with conventional law. Under customary law, anticipatory self-defence is permissible when the threat of an armed attack is 'imminent'. The Charter codifies the pre-existing customary rule of self-defence but does not exhaust it. Hence, the right to anticipatory self-defence exists and states may rely on customary rule or Charter or both of them.

Professor Waldock argues that to say self-defence begins only 'if an armed attack occurs' is to go beyond the necessary meaning of the word. It was not the intention of the drafters to cut down the right to self-defence beyond the narrow doctrine of the *Caroline* (1837) incident. In the 1949 *Corfu Channel* case, the International Court of Justice 'did not take a narrow view of the inherent right of self-defence reserved by Article 51'.[19] Professor Bowett asserts that article 51 does not preclude an action taken against an imminent danger.[20] Anticipatory self-defence is necessary and is practiced in today's world.[21]

> It is a fallacy of the first order to assume . . . that the right has no other content than the one determined by article 51. Such a view produces a restricted interpretation of the right not warranted by the Charter. Not least of the restrictions involved in this view is the construction of article 51, which limits the right of individual or collective self-defence to cases where an 'armed attack, occurs. This is a restriction certainly unrecognised by general international law, which has always recognised an 'anticipatory' right of self-defence.[22]

McDougal and Feliciano, after digging through the preparatory history of the Charter, conclude that member states did not draw up article 51 to narrow down the right of self-defence under customary law.[23] Professor Schachter cautiously says that it is erroneous to say that article 51 completely excludes anticipatory self-defence as it is not clear whether it was intended to cut down the inherent right to self-defence under customary law.[24]

> In light of the preoccupation with increased but limited autonomy for regional organisations it is difficult to argue that article 51 in its final draft form was intended to be a restriction of the customary right of self-defence in existence before the Charter or that the drafters were

[19] See Waldock, *loc. cit.*, fn. 4.

[20] D. Bowett, 'Reprisals Involving Recourse to Armed Force', (1972) 66 *AJIL* 1–36 at 13.

[21] D. Bowett, 'Collective Self-defence under the Charter of the United Nations', (1955–56) 32 *BYIL* 130–161.

[22] D. Bowett, *Self-Defence in International Law* (1958).

[23] McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961).

[24] Schachter, O. 'The Right of States to Use Armed Force', (1984) 82 Michigan Law Review. 1620–1646.

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> attempting to determine new limits to the circumstances in which a State could legitimately use force in self-defence.[25]

The International Court of Justice invariably shied away from addressing the question of anticipatory self-defence despite the fact that such opportunities were present. In the case of *Nicaragua v United States* (1986), the court refrained from extending its discussion to anticipatory self-defence.

> 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. Accordingly the court expresses no view on that issue.[26]

However, in his dissenting opinion, Judge Schwebel says:

> I do not agree with a construction of the United Nations Charter which would read article 51 as if it were worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs. . .' I do not agree that the terms or intent of article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of article 51.[27]

In the *Democratic Republic of Congo v Uganda* (2005), again the International Court of Justice did not extend its discussion to the question of 'imminent threat'. The court should have done so because its guidance would have been informative and timely given the fact that self-defence is used as a main argument in the current war on terror. The court referred to its position in the *Nicaragua* case that the parties had not raised the issue of a response to an 'imminent threat' so it expressed no view on that issue and 'so it is in the present case'.[28] Several Judges expressed dissenting views arguing that the court should have picked up the opportunity and discussed the question of anticipatory self-defence.[29]

The views of different publicists suggest that the Charter codifies the right of anticipatory self-defence available under customary international law. The intention of article 51 seems to be to make anticipatory self-defence a statutory right, not to limit it. What was a common practice acquired the shape of statutory law after the adoption of the Charter, without diminishing it. The inclusion of the word 'inherent' and the absence of any objection to it by states strongly points towards this interpretation. Another plausible interpretation seems to be that

[25] Ibid
[26] *Nicaragua v United States of America*, ICJ Rep. 1986, para. 194.
[27] *Ibid.*, para. 173.
[28] *Democratic Republic of Congo v Uganda*, ICJ Rep. 2005, para. 134.
[29] *Ibid.,* See Judge Kooijmans, paras 25–34; Judge Simma, paras 7–15.

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article 51 was designed to accommodate the concerns of Latin American states regarding regional security arrangements under the Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), 1945. It was neither intended to limit or deny the customary right of self-defence. The focus was rather on something else: the regional security arrangements of the Latin American states.[30] Therefore, in my opinion, the customary right remains unaffected and anticipatory self-defence together with its limits still exists today.

3. What Constitutes an 'Armed Attack'?

Central to the understanding of the two schools of thought discussed above is the question: what constitutes an 'armed attack'? The discussion on the nature and meaning of an 'armed attack' raises two further crucial questions: (a) does an armed attack comprise an 'imminent threat' of attack and (b) can the acts of non-state actors amount to an armed attack? These questions are discussed below, but first it is necessary to address what constitutes an armed attack. The Charter does not define the term 'armed attack' nor does any discussion of the term appear in the records of the San Francisco Conference.[31] The meaning of this phrase, however, has generated a vast literature with little consensus on its definition. There is even less consensus in the context of activity by international terrorists.[32] The restrictive school follows the argument that armed attack means the physical occurrence of the attack when the forces of one state cross the border into another state.

A. Does an armed attack include 'imminent threat'?

In contrast to the view of the restrictive school, the liberal school believes that an 'imminent threat' is included in the notion of an armed attack and states are allowed to resort to the use of force in self-defence in anticipation, when the threat is real and imminent. There are two main arguments for the justification of the use of force in self-defence in the case of an 'imminent attack' or anticipatory self-defence.

The main argument is that article 51 preserves the customary right of self-defence, which recognises anticipatory self-defence.

> Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may

[30] See M. Halberstam, 'The Rights to Self-defence Once the Security Council Takes Action', (1996) 17 *Michigan Journal of International Law* 229–248 at 242.

[31] M. Baker, 'Terrorism and the Inherent Right of Self-defence (A Call to Amend Article 51 of the United Nations Charter)', (1987–88) 10 *Houston Journal of International Law* 25–49.

[32] G. Travalio 'Terrorism, International Law, and the Use of Military Force', (2000) 18 *Wisconsin International Law Journal* 145–191.

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> be said to have begun to occur, though it has not passed the frontier . . . If an armed attack is imminent within the strict doctrine of the Caroline, then it would seem to bring the case within article 51. To read article 51 otherwise is to protect the aggressor's right to first strike.[33]

Professor Bowett says that any construction of article 51 limiting self-defence to the occurrence of an armed attack is 'a restriction certainly unrecognised by general international law, which has always recognised an 'anticipatory self-defence'.[34] Professor Schachter sums up this position thus:

> On one reading [of article 51] this means that self-defense is limited to cases of armed attack. An alternative reading holds that since the article is silent as to the right of self-defense under customary law (which goes beyond cases of armed attack) it should not be construed by implication to eliminate that right . . . It is therefore not implausible to interpret article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter.[35]

The development in weaponry and its delivery system has buttressed this argument.

> The introduction of vastly more destructive and rapidly delivered weapons began to undercut the cogency of that legal regime [in which self-defence was restricted to an armed attack]. The reason was simple: a meaningful self-defense could be irretrievably lost if an adversary with much more destructive weapons and poised to attack had to initiate (in effect, accomplish) its attack before a right of self-defense came into operation. This development prompted a claim to expand the right of reactive self-defense . . . to 'anticipatory' self-defense.[36]

Professor Higgins says:

> In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of

[33] See Waldock, *loc. cit.*, fn. 4, p. 498, see C. Greenwood, 'The Legality of Using Force Against Iraq', Memorandum to the UK Government on 12 October 2002 available at: <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm>.

[34] D. Bowett, 'Collective Self-defence under the Charter of the United Nations', (1955–56) 32 *BYIL* 130–161 at 131.

[35] O. Schachter, 'The Right of States to Use Armed Force', (1984) 82 *Michigan Law Review* 1620–1646 at 1633–34.

[36] M. Reisman, 'Self-defence in an Age of Terrorism', (2003) 97 *American Society of International Law Proceedings* 141–152 at 142. See A. D'Amato, 'Israel Air Strike upon the Iraqi Nuclear Reactor', (1983) 77 *AJIL* 584–588 at 588.

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> conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defence. It is the potentially devastating consequences of prohibiting self-defence unless an armed attack has already occurred that leads one to prefer this interpretation – although it has to be said that, as a matter of simple construction of the words alone, another conclusion might be reached.[37]

Professor Franck argues that in San Francisco, the founders deliberately closed the door to any claim of 'anticipatory self-defence' but that posture was soon challenged by the exigencies of a new age of nuclear warheads and long-range rocketry. The 'transformation of weaponry to instruments of overwhelming and instant destruction' and the first strike capabilities 'begat a doctrine of ''anticipatory self-defence'' '. After reading the practices of the organs of the United Nations, he concludes that 'the use of force by a state or regional or mutual-defense system is likely to be tolerated if there is credible evidence that such first-use was justified by the severe impact of another state's indirect aggression or by clear evidence of an impending, planned, and decisive attack by a state'.[38]

The arguments presented above seem plausible. As demonstrated above, the customary right of anticipatory self-defence is preserved and co-exists side by side with the Charter rule; this brings 'imminent threat' into the meaning of an armed attack. However, it must meet the criterion that the threat should be real, verifiable and leaving no choice of other means to deflect it. Only then may the use of force in anticipatory self-defence within the strict limits of proportionality be justified. The burden of proof lies on the potential target state state to provide justification for its use of force in anticipation under article 51. The argument of advancement in weaponry and that states cannot be 'sitting ducks' to borrow the phrase of Professor McDougal[39] is understandable but it is not totally free from the danger of being abused and, therefore, this author believes that the above criterion must be strictly adhered to. The mere possession of these dangerous weapons should not in itself be a ground for reaching a conclusion that the attack is imminent. There must be a clear intention and some sort of mobilisation for using these weapons against the target state to justify the use of force in anticipation. Resorting to the use of force on an unfounded fear of imminent attack could be disastrous.

The case of India and Pakistan is very relevant. Both India and Pakistan are nuclear powers and always seem to pose a serious threat to each other. Border skirmishes are routine and on many occasions border military build-ups have been seen. The 2002 military build up and the concern of the international community

[37] R. Higgins, *Problems and Process: International Law and How we Use it* (1984) 242.

[38] T. Frank, 'When, If Ever, May States Deploy Military Force Without Prior Security Council Authorisation', (2001) 5 *Washington University Journal of Law and Policy* 51–68 at 68.

[39] M. McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', (1963) 57 *AJIL* 597–604 at 601.

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is a recent example. Pakistan's nuclear capability is India specific and India's nuclear capability is Pakistan and China specific. Loosening the criterion from the strict limit of *Caroline* doctrine will give any one of them an excuse to use force in anticipation, which may engulf the region and seriously disturb international peace and security.

B. Can the acts of non-state actors amount to an 'armed attack'?

The answer to this question depends on two further questions: (a) Do the Charter rules apply to non-state actors?; and (b) Does a terrorist attack meet the 'scale and effect' test of the *Nicaragua* case?

First, it has long been understood that an armed attack is carried out by one state against another state. This is why some publicists tend to interpret article 51 narrowly despite the fact that it does not say that 'an armed attack must come from one state against another state'. It only says that 'if an armed attack occurs against a Member of the United Nations' leaving open the question of 'who' carried out the attack. The attack can come from one member state against another or from non-member or non-state agents, for example a terrorist organisation. 'While the notion of ''armed attack'' in 1945 no doubt was closely associated with the idea of armies crossing borders, the Nicaragua Court recognised in the 1980s that an armed attack could arise in other ways, such as the sending of armed groups into a state'.[40] The Security Council Resolutions 1368 (2001)[41] and 1373 (2001),[42] adopted immediately after the 11 September 2001 terrorist attacks, confirmed the inherent right of individual and collective self-defence against terrorist attacks without mentioning the perpetrators. Resolution 1368 called on states 'to bring to justice the perpetrators, organisers and sponsors of these *terrorist attacks*' (emphasis added).[43] Resolution 1373 called on states 'to prevent and suppress terrorist acts' and to 'take all necessary steps' to implement this resolution.[44] 'Necessary steps' are usually interpreted to include the use of force. These resolutions support the interpretation that non-state agents as well as states may carry out an armed attack and in some cases a terrorist attack may amount to an 'armed attack' against which force may be used in self-defence. Professor Murphy contends:

> There is nothing in Article 51 of the U.N. Charter that requires the exercise of self-defense to turn on whether an armed attack was committed directly by another state. Indeed, the language used in Article 2(4) (which speaks of a use of force by one 'Member' against 'any state') is not repeated in

[40] S. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter', (2002) 43 *Harvard International Law Journal* 41–51 at 51.
[41] SC Res. 1386 (2001) preamble.
[42] SC Res. 1373 (2001) preamble.
[43] SC Res. 1368, para. 3.
[44] SC Res. 1373 (2001), para. 8.

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> Article 51. Rather, Article 51 is silent on who might commit an armed attack justifying self-defense.[45]

This indicates that the Charter rules cover the activities of non-state actors in the case of an armed attack.[46]

The second requirement is that any attack carried out by the non-state actors must be of such a *scale* and have such *effect* that it would amount to an 'armed attack' had it been carried out by the regular armed forces of a state. This will require a case-by-case assessment. In the case of *Nicaragua*, the court said that self-defence could include responses to the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular armed forces, or its substantial involvement therein'. If a terrorist attack touches the required scale of gravity, it can amount to an 'armed attack'.[47]

The literature on terrorism is immense and ever expanding. It is not surprising that scholarly opinion has varied substantially. Beck and Arend identify three trends in the current literature: (a) lack of common analytical framework: (b) no consensus on the parameters of terrorist behaviour giving rise to the right of states using force in self-defence and (c) how to respond legally with force to terrorist acts. Three thresholds for using force in self-defence against terrorists may be discerned from a survey of current scholarship in the field: (a) high threshold, (b) low threshold and (c) moderate threshold.[48]

Professor Boyle believes in the high threshold. He argues that self-defence under article 51 could only be exercised in the event of an armed attack or perhaps at least an imminent attack against the state itself.[49] Professor Henkin notes that the United Nations recognises the exception of self-defence in emergency but limits it to actual armed attack, which is clear, unambiguous, subject to proof; and not easily open to misinterpretation or fabrication.[50] Professor Lobel argues:

> When one nation attacks another, the factual predicate for self-defense is clear and observable. That is usually not the case where a nation claims

[45] See Murphy, *loc. cit.*, fn. 40, p. 51. R. Wedgwood, 'Responding to terrorism: The Strikes against Bin Laden', (1999) 24 *Yale Journal of International Law* 559–579 at 564.

[46] But see the advisory opinion of the International Court of Justice in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Rep. para. 139.

[47] ICJ Rep. 1986.

[48] Beck and Arend, 'Don't Tread on us: International Law and Forcible State Responses to Terrorism', (1994) 12 *Wisconsin International Law Journal* 153–219.

[49] F. O'Boyle, 'Military Responses to Terrorism', (1987) 81 *American Society of International Law Proceedings* 287–296. See, Frowein, 'The Present State of Research Carried out by the English – Speaking Section of the Centre for Studies and Research', (1988) in: *Legal Aspects of International Terrorism* 55–96.

[50] L. Henkin, *How Nations Behave?* (1979) at 142.

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> the right to use force in response to alleged terrorist attacks and imminent threats thereof. It is untenable for international law to permit one nation to attack another merely because it alone claims that a group operating in the other country is launching terrorist attacks against it. Such a rule would obliterate the prohibition against the use of force, as unsubstantiated claims by a single state would become the new legal predicate for the use of force. Those who urge a looser interpretation of Article 51 have yet to prescribe a viable method of ensuring that self-serving characterisations of facts are subject to some clear legal standard and international oversight.[51]

It can be discerned from the decision in *Nicaragua* that a military response to a terrorist attack should at a minimum require: (a) that the nation carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent; (b) that the facts relied upon be made public; and (c) that the facts are subject to international scrutiny and investigation. Jonathan Charney contends:

> Any state that seeks to invoke the right of self-defense should be required to furnish the international community with credible evidence that it has suffered an attack, that the entity against which the right of self-defense is exercised was the source of the attack, that the attack or threat of attack is continuing, and that the use of force is necessary to protect the state from further injury.[52]

On the other hand Professor Coll argues for a low threshold. Challenging the views of Professor Boyle, he contends that self-defence need not be viewed as a 'straitjacket'. The self-defence provision of the Charter does not address the subtler modes of international violence. According to Coll, self-defence essentially consists of those measures, which are necessary to protect the state and its people from outside armed attack in its conventional and non-conventional forms including terrorism.[53] Professor O'Brien contends that article 51 should not be interpreted narrowly. Terrorist actions such as armed attack against state territory, hostage taking and armed attacks on nationals abroad may amount to an armed attack.[54] Judge Sofaer claims that the United States must use force when responding to terrorism even if our claims cannot 'be proved in a real court or

[51] J. Lobel, 'The Use of Force to Respond to Terrorists Attack: The Bombing of Sudan and Afghanistan', (1999) *Yale Journal of International Law* 24 at 537–557.

[52] J. Charney, 'The Use of Force against Terrorism and International Law', (2001) 95 *AJIL* 835–839 at 836.

[53] A. Coll, 'The Legal and Moral Adequacy of Military Responses to Terrorism', (1987) 81 *American Society of International Law Proceedings* 297–306.

[54] W. O'Brien, 'Reprisals, Deterrence and Self-defence in Counter terror Operations', (1990) 30 *Virginia Journal of International Law* 421–479.

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in the court of public opinion'.[55] Professor Wedgwood argues that military force should be used prudently to prevent terrorist attacks and to degrade terrorist infrastructure.[56] Professor Murphy describes the two positions in the following words:

> 'In an analysis under Article 51, one must consider the scale of actions that might constitute an armed attack. At the low end of the scale (below the 'armed attack' thresh-old) are actions such as the provision of arms to the nationals of a state who are seeking to overthrow their government. At the high end of the scale (above the threshold constituting an 'armed attack') are actions such as armies crossing borders, as well as a state sending armed irregulars who 'carry out acts of armed force against another State of such sufficient gravity as to amount to an actual armed attack by regular forces'.[57]

Between these high and low thresholds lies a middle ground: a moderate threshold. Professor Rowles suggests that a military response to terrorist acts would be lawful if those acts are on a scale equivalent to what would be an armed attack had it been carried out by the forces of government. Large scale and continuous terrorist attacks could give rise to the use of force in self-defence but an *isolated attack* would not justify the use of force (emphasis added).[58] Professor Cassese contends that, '[t]o qualify as an armed attack, international law requires that terrorist acts form part of a *consistent pattern* of violent terrorist action rather than just being *isolated or sporadic* attacks . . . sporadic or minor attacks do not warrant such a serious and conspicuous response as the use of force in self-defence' [emphasis added].[59]

This author submits that the standard should be the moderate threshold: if the terrorists acts amount to an armed attack. This author, however, disagrees with the argument that an isolated terrorist attack may not be a ground for use of force against terrorists because there are and certainly will be situations where a single attack may be characterised as an armed attack: , e.g 11 September 2001. Commenting on the nature of these attacks, Tony Rogers says that 'given the sheer scale of the recent attack, which puts it on a completely different level from previous terrorist acts and despite the unusual 'weapons' used, it can be argued that it amounts to an armed attack, giving rise to the right of self-defense'.[60] This

[55] A. Sofaer, 'Terrorism, The Law and the national Defence', (1989) 95 *Military Law Review* 89–123.

[56] See Wedgewood, *loc. cit.*, fn. 45, p. 563.

[57] See Murphy, *loc. cit.*, fn. 40, p. 45.

[58] J. Rowles, 'Military Responses to Terrorism', (1987) 81 *American Society of International Law Proceedings* 307–317.

[59] A. Cassese, 'The International Community's 'Legal' Response to Terrorism', (1989) 38 *ICLQ* 589–608 at 596.

[60] A.P.V. Rogers, 'Terrorism and the Law of War: September 11 and its Aftermath', (2001) *Crimes of War Project*, <http://www.crimesofwar.org/expert/attack-apv.html>.

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author agrees with Rogers' assessment. The reaction and support for the action of the United States against the perpetrators of 11 September 2001 confirm this interpretation. The events of 11 September 2001 may compel publicists to think differently including Professor Rowles and Professor Cassese who expressed their views in the late 1980s.

4. Can military force be used against non-state actors?

It is demonstrated above that the Charter rules are applicable to non-state actors and their acts may amount to an armed attack if certain conditions are met. The next logical question follows: is the use of military force permissible against non-state actors? The answer is that military force may be justified against terrorists if the following three conditions are met.

First, the terrorist act either inside or outside the state must amount to an 'armed attack'. The severity and scale of damage caused must be such as would amount to an armed attack had it been carried out by the regular forces of a state. Anything illegal but less than amounting to an armed attack would require countermeasures. The court in the *Nicaragua* case determined that although the provision of arms or other forms of aid by one government to guerrillas could be considered an unlawful use of force, it would not necessarily constitute an armed attack upon the other. The court suggested that the attacked state–though not its allies–could take proportionate and necessary countermeasures.[61] The violation of international obligations does not justify the use of force. In the *Corfu Channel* case of 1949, the International Court of Justice found that Albania's actions violated its international obligations but that by itself did not justify the use of military force by the United Kingdom against Albania.[62]

Second, the acts of terrorists must be attributable to a host state. When a state becomes responsible for the wrongful act of its non-state agents, is a question which remains unsettled under international law. This is because 'international case law is contradictory, no treaty in force addresses the subject, and rules of attribution have not risen to the level of customary international law'.[63] The emerging norm can be gleaned from the declarations of the United Nations organs, jurisprudence of the International Court of Justice and scholarly writings. Article 8 on State Responsibility of the International Law Commission directly deals with the issue:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the *instructions* of, or under the *direction* or *control* of, that State in carrying out the conduct [emphasis added].

[61] See *Nicaragua*, paras 201, 211.

[62] *Albania v United Kingdom*, ICJ Rep. 1949 (*The Corfu Channel Case*).

[63] G. Townsend, 'State Responsibility for Acts of De Facto Agents', (1997) 14 *Arizona Journal of International and Comparative Law* 635–678 at 635.

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Professor Crawford contends that as a general principle a state is not responsible for the conduct of private persons. However, in certain situations where a factual relation exists between a person and the state, such conduct may become attributable to the state. It is necessary to establish the existence of a 'real link' between the state and non-state agents. Such a conduct will be attributable if the state directed or controlled the specific operation and the conduct complained of was an 'integral part' of that operation. Peripheral or incidental conduct falls beyond the scope of article 8.[64] Professor Crawford further argues that the three terms 'instruction', 'direction', and 'control' in the text of article 8 are disjunctive and to attract attribution it is sufficient to establish any one of them.[65]

The *degree of control* exercised by the state in order for conduct to be attributable to a state was a crucial question in the *Nicaragua* case. The question was whether the support given by the United States to the *contras* was attributable to the United States and whether it would be held responsible for breaches of international humanitarian law by the *contras*. The court held the United States responsible for 'planning, direction and support' to the *contras* but rejected Nicaragua's claim that all the *contras'* conduct was attributable to the United State because of its control over them. The court held:

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed [emphasis added].[66]

The court thus set a high threshold of '*effective control*' for attribution of a conduct to a state and confirmed that 'a general situation of dependence and support would be insufficient to justify attribution of the conduct to the state'.[67] Judge Jennings, however, disagreed with the majority view on this point. He said that it may be agreed that the mere provision of arms may not amount to an armed attack. But the provision of arms if coupled with other kinds of involvement may be considered as an armed attack. 'It seems to me that to say that the provision of arms, coupled with 'logistical or other support' is not an armed attack is going too far'.[68]

The question of *degree of control* was also an issue in the case of *Prosecutor v Tadic*[69] before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. The majority Judges seem to disagree with the threshold set out in the *Nicaragua* case. The Appeal Chamber held that 'the requirement

[64] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2003) at 110–13.
[65] *Ibid*.
[66] See *Nicaragua*, para. 115.
[67] Crawford, *op. cit.*, fn. 63, p.111.
[68] See *Nicaragua*, Dissenting Opinion of Jennings, p. 533.
[69] ICTY *Prosecutor v Tadic* (1997).

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of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case'.[70] The Appeals Chamber held that the required degree of control is the '*over all control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations' [emphasis in original].[71]

It seems that the high threshold of '*effective control*' laid down in *Nicaragua* was lowered to '*overall control*' in the *Tadic* case. 'Although the ''overall control'' test applied in *Tadic* did indeed lower the threshold for imputing private acts to states when compared to the ICJ rule, the touchstone of both approaches is that states must direct or control, not simply support, encourage or even condone, the private actor'.[72] These two cases indicate that the mere belonging to or presence of non-state actors in a particular state would not make that state liable for the wrongful acts of non-state agents. There must be a 'real link' between a state and non-state actors and there must be strong evidence suggesting '*effective control*' or '*overall control*'. Mere support or tolerance by a state of non-state actors would not suffice to attract attribution and adverse action under international law.[73]

Third, the use of force must be proportionate. 'Acts done in self-defence must not exceed in manner or aim the necessity provoking them'[74] and they should not be 'unreasonable or excessive'.[75] Military force should be used only to eliminate the source of attack or to prevent reoccurrence.

> Terrorists are in a way 'modern enemies of mankind', and every State should endeavour to search for, try and punish them on its own territory. This, however, does not entail a licence to use force in the territory of other States or against ships or aircraft of other States. If such a licence were given by international law, our present condition of relative anarchy would be at risk of turning into one of absolute anarchy.[76]

Armed attacks by non-state actors such as members of al-Qaeda may trigger the right of selective and proportionate self-defence under the United Nations Charter

[70] *Ibid*., para. 117.

[71] *Ibid*., para. 147.

[72] D. Jinks, 'Self-defence in an Age of Terrorism', (2003) 97 *American Society of International Law Proceedings* 144–146 at 145.

[73] 'Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide', (2007) ICJ Rep. paras 402–7 in which the Court preferred the *Nicaragua* test to that in *Tadic*.

[74] O. Schachter, 'In Defence of International Use of Force', (1986) 53 *University of Chicago Law Review* 113–146 at 132.

[75] S. Knauft, 'Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks', (1996) 19 *Hastings International and Comparative Law Review* 763–788 at 774.

[76] Cassese, 'The International Community's ''Legal'' Response to Terrorism', (1989) 38 *ICLQ* 589–608 at 606.

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against those directly involved in processes of armed attack.[77] Force may be used in self-defence against non-state actors when these three conditions are met.

5. Anticipatory Self-defence and Terrorism

It is established above that the concept of armed attack includes an imminent attack and therefore, anticipatory self-defence is a credible rule of international law. It is also argued that the rules of the Charter are applicable to the acts of non-state actors and, in some cases, their acts may amount to an armed attack justifying the use of force both in the case of reactive self-defence and anticipatory self-defence. However, there is a need for a mechanism to verify the evidence of real and imminent threat and define limits on the anticipatory use of force to avoid the danger of being misused or abused. The risk and uncertainty involved in the use of force in anticipation and several recent intelligence failures in the war against Afghanistan and Iraq teaches us to be very careful in the verification and evaluation of evidence. However, a consensus seems to be emerging that if cogent and verifiable evidence of terrorist attack is available, limited use of force should be allowed. In my opinion, military force should be used if: (a) the threat is real and imminent, (b) a 'real link' and the required 'degree of control' is established between the state and terrorist organisation, which allegedly intends to carry out the attack, and (c) the response is limited and measured.

6. Pre-emptive Self-defence

Before proceeding to the arguments regarding the legal status of pre-emptive self-defence, it is important to note the difference between anticipatory and pre-emptive self-defence. The Chambers dictionary's meaning of the word 'anticipate' is 'to predict something and then acts as though it is bound to happen'.[78] It connotes that something is certain and bound to happen and which must be responded to. The degree of certainty is greater so there is a lesser chance of miscalculation. The Chambers dictionary's meaning of the word 'pre-emptive', on the other hand, in military sense, is 'effectively destroying the enemy's weapons before they can be used'.[79] It connotes a military tactic during the war rendering the enemy less capable of fighting. It does not involve an action against a sovereign nation's weaponry installations without being in a state of war. Professor Reisman defines pre-emptive self-defence as 'a claim of authority to use, unilaterally and without international authorisation, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening,

[77] J. Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond', (2002) 35 *Cornell International Law Journal* 533–557.
[78] *Chambers Compact Dictionary* (2001) 30.
[79] *Ibid.*, p. 465.

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but which, if permitted to mature, could be neutralised only at a high, possibly unacceptable, cost'.[80] Making a distinction between anticipatory and preventive self-defence, Professor O'Connell states that pre-emptive self-defence refers to cases where a party uses force 'to *quell any possibility of future* attack by another state, even where there is *no reason to believe that an attack is planned* and where no prior attack has occurred'. Anticipatory self-defence is a narrower doctrine that would authorise armed responses to attacks that are on the brink of being launched, or where an enemy attack has already occurred and the victim learns that more attacks are planned.[81]

Professor Reisman has given thresholds for different kinds of self-defence. The requisite threshold for reactive self-defence is 'actual armed attack', for anticipatory self-defence 'palpable and imminent threat of attack' and for pre-emptive self-defence 'conjectural and contingent threats of possible attack'.[82] The goal of pre-emptive self-defence is to prevent 'more generalised threats from materialising' rather than trying to 'preempt specific, imminent threat'.[83] It is reminiscent of the notion of strategic pre-emption that animated the German policy in the early years of the twentieth century. Its key idea is the political justification of assaulting another state so as to block any unfavourable shift in the balance of power.[84]

A. Permissibility of pre-emptive self-defence

Three trends can be gleaned from the current debate on the pre-emptive use of force: (a) states such as the United States and scholars that strongly argue for the justification of pre-emptive use of force under the broader interpretation of article 51, (b) those publicists who recognise the gravity the threat of terrorism poses and argue for reasonable interpretation of rules on the use of force and (c) publicists and states aware of the dangers and abuse involved in the pre-emptive use of force that strongly argue against it.

(i) The argument for pre-emptive self-defence

Professor Reisman explains that the introduction of vastly destructive and rapidly delivered weapons prompted a claim to expand the right of reactive self-defence

[80] See Reisman, *loc. cit.*, fn. 36, p. 143. Emphasis in original.

[81] M. O'Connell, 'The Myth of Preemptive Self-Defence', *ASIL Task Force on Terrorism* (2002) 1–22. Available at: <http://www.asil.org/taskforce/oconnell.pdf>. Emphasis added.

[82] See Reisman, *loc. cit.*, fn. 36.

[83] M. Sapiro, 'Iraq: The Shifting Sands of Pre-emptive Self-Defence', (2003) 97 *AJIL* 599–607 at 559.

[84] T. Farer, 'Beyond the Charter Frame: Unilateralism or Communism?' (2002) 96 *AJIL* 359–364 at 359.

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to anticipatory self-defence. But the proliferation of atomic, biological, and chemical weapons and their diffusion into the hands of non-state actors has given impetus to a new claim of 'pre-emptive' self-defence.[85] The arch proponent, besides Israel, of the pre-emptive doctrine is the United States and its lawyers. Soon after the September 11 attacks, the United States spelled out its National Security Strategy (2002) stating that 'the war against terrorists of global reach is a global enterprise of *uncertain duration*' and 'as a matter of common sense and *self-defence*, America will act against such emerging *threats before they are fully formed*' [emphasis added]. The United States clarified its position on the relationship between terrorists and those who support terrorism: 'we make no distinction between terrorists and those who knowingly harbour or provide aid to them'. We will disrupt and destroy terrorist organisations:

> By direct and continuous action is using all the elements of national and international power. . . defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, *we will not hesitate to act alone*, if necessary, to exercise our right of *self-defence by acting preemptively* against such terrorists, to prevent them from doing harm against our people and our country, and denying further sponsorship, support, and sanctuary to terrorists by *convincing or compelling* states to accept their sovereign responsibilities.[86]

The United States offers an interpretation of the right to self-defence and the reasons to strike pre-emptively:

> For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. . . Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilisation 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.[87]

The United States justifies the notion of pre-emptive action in the following words:

[85] See Reisman, *loc. cit.*, fn. 36.
[86] United States' National Security Strategy 2002 (revised in 2006) 6. Emphasis added.
[87] *Ibid.*, p. 15. Emphasis added.

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> Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first . . . The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.[88]

The legal advisor of the State Department of the United States says:

> In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pre-text for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.[89]

Professor Wedgwood strongly argues that 'deterrence and containment were the core doctrines of the Cold War. These do not translate easily to a brave new world of non-state terror networks . . . To a strategist; September 11 thus teaches that the keystone doctrines of the Cold War confrontation . . . have ceased to be reliable. Rather, one must consider acting against terrorist *capability* before it is employed and, better yet, before it is acquired'.[90] Professor Yoo (a former Bush appointee) believes that the emergence of rogue states, international terrorism and the easy availability of weapons of mass destruction have placed enormous strain on the bright line rules of the Charter system. He makes a strong argument that: 'a more flexible standard should govern the use of force in self-defence, one that focuses less on *temporal imminence* and more on the magnitude of the potential harm and the *probability* of an armed attack'.[91]

> The test for determining whether a threat is sufficiently 'imminent' to render the use of force necessary at a particular point has become more nuanced than Secretary Webster's nineteenth-century formulation. Factors to be considered should now include the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the

[88] *Ibid.*

[89] W. Taft and A. Buchwald, 'Pre-emption, Iraq and International Law', (2003) 97 *AJIL* 557–563 at 557.

[90] R. Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defence', (2003) 97 *AJIL* 576–585. Emphasis in the original.

[91] J. Yoo, 'Using Force', (2004) 71(3) *The University of Chicago Law Review* 729–797 at 730. Emphasis added.

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> threat. If a state instead were obligated to wait until the threat were truly imminent in the temporal sense envisioned by Secretary Webster, there is a substantial danger of missing a limited window of opportunity to prevent widespread harm to civilians.[92]

This author does not agree with the reasoning of Professor Wedgwood and the National Security Strategy of the United States for using force against *acquiring capabilities*. He also disagrees with the proposed test of Professor Yoo for using force if the attack is probable and the expected harm is enormous for the reasons given at the end of the following section.

(ii) The argument against pre-emptive self-defence

The majority of international law scholars oppose the notion of pre-emption. They argue that it breaches the core principles of international law. The thrust of the Charter is to prohibit the use of force and it should be used when extremely necessary and all peaceful means are exhausted. Professor Damrosch argues that 'force should ordinarily be a last rather than a first resort'. Use of force in self-defence is an exception to the general proscription and should be interpreted very narrowly.[93] Professor Paust contends that in the absence of an actual armed attack on a state triggering the right of self-defence under article 51 and in the absence of an authorisation to use armed force from the UN Security Council or an appropriate regional organisation, no state can lawfully engage in what some term pre-emptive self-defence.

> While I reject the notion of preemptive self-defense, in my judgment, when an armed attack can be categorised as *incipient*, the target state need not wait until the first shot is fired but can respond to intercept it at an early stage. That is to say, there is nothing preemptive about nipping an armed attack in the bud. The point is that you need a bud. Self-defense cannot be exercised merely on the ground of expectations, anticipations, and fear. You have to prove that the other side is already embarked on an inevitable course of action.[94]

Professor Greenwood argues:

[92] *Ibid*.

[93] L. Damrosch, 'Sanctions against Perpetrators of Terrorism', (2000) 22 *Houston Journal of International Law* 63–76 at 68.

[94] J. Paust, 'Post-9/11 Overreaction and Fallacies Regarding War and Defence, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions', (2004) 79 *Notre Dame Law Review* 1335–1364 at 1343. Emphasis added.

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> The right of anticipatory self-defence is quite narrowly defined. Ever since the United Kingdom-US exchange in what has become known as the *Caroline* case in 1837–38, the right has been confined to instances where the threat of armed attack was imminent. In my opinion, that still reflects international law and, *in so far as talk of a doctrine of 'pre-emption' is intended to refer to a broader right to respond to threats, which might materialise some time in the future, I believe that such a doctrine has no basis in law*.[95]

In his legal opinion to Prime Minister Blair, Attorney General Lord Goldsmith argues:

> Force may be used in self-defence if there is an actual attack or imminent threat of an armed attack; the use of force must be necessary. . . and the force used must be a proportionate response. . . I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. *If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law*.[96]

The reaction of 'the Security Council . . . [to the attacks of] September 11, 2001, can be cited to support anticipatory self-defence in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned, though not yet underway. By contrast, international law prohibits pre-emptive and even anticipatory self-defence if that is understood to be different from responding to incipient or ongoing campaigns'.[97] In the history of the United Nations, there have been authoritative condemnations of both pre-emptive and retaliatory actions so it seems to be against the purposes of the Charter.[98] Michael Bothe argues that the doctrine of pre-emptive strikes formulated in the recent US National Security Strategy proposes to adapt this concept to new perceived threats in a way that would constitute an unacceptable expansion of the right of anticipatory self-defence.[99] Professor Byers argues that the Bush doctrine of pre-emption is to make a new law. It is unprecedented in that it argues for a right to take pre-emptive action against potential threats, future threats. It is a

[95] Greenwood, *loc. cit.*, fn. 33. Emphasis added.

[96] L. Goldsmith, 'Iraq: Resolution 1441', (Secret Memo to the Prime Minster) 7 March 2002, available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf>. Emphasis added.

[97] See O'Connell, *loc. cit.*, fn. 79, p. 11.

[98] J. Paust, 'Responding Lawfully to International Terrorism: The Use of Force Abroad', (1986) 8 *Whittier Law Review* 711–733 at 717.

[99] M. Bothe, 'Terrorism and the Legality of Pre-Emptive Force', (2003) *EJIL* 14.

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way of effectively closing down dangerous regimes before they become imminent threats. It is clearly illegal.[100] Professor Brownlie says:

> It is believed that the ordinary meaning of the phrase precludes action which is preventive in character . . . There is no further clarification of the phrase to be gained from study of the *travaux preparatoires*. However, the discussions at San Francisco assumed that any permission for the unilateral use of force would be exceptional and would be secondary to the general prohibition in Article 2, paragraph 4. There was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council. In these circumstances the precision of Article 51 is explicable.[101]

The arguments for pre-emptive self-defence are not persuasive and the notion seems too broad and fraught with risks to be accepted as a norm of international law. To use military force for preventing states from gaining *capabilities*, which may pose a threat to a target state or international peace and security in the future, as Professor Wedgwood and the National Security Strategy suggest, is a very loose ground and several existing situations could spark such action today. The Arab states may join hands to attack Israel because it is building its nuclear arsenal and is becoming a growing threat to Muslim states in the region. Iran's current nuclear programme could entitle Israel, if not America, to attack and destroy Iran's nuclear capabilities. India may attack Pakistan because Pakistan supports the Kashmir freedom fighting movements and its nuclear programme is India specific. This would breach international peace and security.

(iii) Pre-emptive self-defence: a cautious approach

The above contra positions seem to be going too far in either case. The opponents of pre-emption fail to take into account the changes in weaponry and the rise of international terrorism. The proponents of pre-emption are stretching the notion of self-defence to an extent that the distortion seems beyond legal recognition. It is the creation of a new rule, not an extended interpretation of an existing rule as an exception to general prohibition on the use of force under the Charter. However, there are scholars who argue for a more cautious approach: terrorism must be eliminated but within the well demarcated boundaries of law.[102]

The better argument in the debate appears to support a cautious view of anticipatory self-defence recognising that the concept must be interpreted

[100] M. Byers, 'Iraq and the ''Bush Doctrine'' of Pre-Emptive Self- Defence', (2002) *Crimes of War Project*, available at <http://www.crimesofwar.org/expert/bush-byers.html>.

[101] I. Brownlie, *International Law and the Use of Force by States* (1963) 275.

[102] T. Franck, 'When, If Ever, May States Deploy Military Force Without Prior Security Council Authorisation', (2001) 5 *Washington University Journal of Law and Policy* 51–68 at 62.

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consistently within the Charter's goal of limiting force. Today it is more likely to be foolish, if not suicidal, for a state that believes its fundamental security interests were at risk to wait until the first attack. It is simply to recognise that the meaning of a document meant to be universally accepted and to remain relevant must also be flexible enough to adapt to changing circumstances. The requirement of *imminence* should mean that there is no time for deliberation, and no time to choose an alternative course of action. But the danger should be imminent in that it can be identified credibly, specifically, and with a *high degree of certainty*. Further, the requirement of necessity should continue to mean that time has run out because peaceful efforts to avoid a resort to force have been exhausted. Ideally, this requirement would include an appeal to the Security Council to resolve the problem, although there may be cases where the urgency of the threat makes resort to the Council impractical.

Professor Franck adopts a middle way 'approach'. To require that a small country wait for a neighbour to attack it with nuclear weapons before responding, insisting that's what the law requires, would encourage the view that the law is deeply flawed. On the other hand, if there is a law, which says that any time a country feels threatened, it is free to attack any country from which it feels the threat to be emanating, then there is no law at all and once again the law is fatally flawed. The law has to try to find very narrow exceptions that can be applied in a sensible way on the basis of rigorously demonstrated evidence that meets a reasonable test. The law on self-defence has to be interpreted reasonably but that is not the same as saying the law can be interpreted unilaterally by an interested party. If the process is an entirely unilateral one, in which the strong do as they wish and the weak have to accept it, then we are returning to the Peloponnesian wars, which most countries would resist.[103] Similarly, Judge Sofaer examines the background of the requirement that pre-emption is restricted to imminent attacks, and argues that the narrow standard properly applies only when a potential victim state can rely on the police powers of the state from which a prospective attack is anticipated. A more flexible standard for determining necessity is appropriate for situations in which the state from which attacks are anticipated is either unwilling or unable to prevent the attacks, or may even be responsible for them.[104]

The Charter of the United Nations is neither a 'suicide pact' nor a 'free licence' to use force in self-defence. To expect a state to wait for an actual attack when there is credible and verifiable evidence would render the Charter a suicide pact, but to interpret article 51 as to cover a perceived threat based on uncertain evidence would be providing a licence to use force for any reason, for example hidden and in some cases parallel agendas. In my view, the current norms of international law on self-defence and anticipatory self-defence provide an effective legal framework to deal with the threat of terrorism. If there is an armed attack, everyone will see it and proportionate force may be used. If the threat is imminent and there

[103] T. Franck, 'Iraq and the ''Bush Doctrine'' of Pre-Emptive Self-Defence', (2002) *Crimes of War Project*, available at <http://www.crimesofwar.org/expert/bush-franck.html>.

[104] A. Sofaer, 'On the Necessity of Pre-emption', (2003) *EJIL* 14.

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is no time for relying on peaceful means or no alternative means is available to deter it, then force may be used in anticipation in a proportionate way. All other threatening situations shall be referred to the Security Council for determination under article 39:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The plain meaning of article 39 suggests that the Security Council has to determine whether one of three situations – threat, breach or act of aggression – exists. After determining the existence of any one of these issues, the Security Council may recommend measures. Professor Paust contends that article 39 of the Charter appears to preclude the use of pre-emptive armed force against perceived threats that do not amount to an armed attack under article 51 by requiring the Security Council to determine whether a threat exists and what measures, if any, it chooses to authorise.[105] This author agrees with Professor Paust. Article 39 uses the word 'restore', which indicates that peace is breached and now there is the need to restore it. Article 39 also uses the word 'maintain', which suggests that action may be taken before the peace is breached. This raises the notion of an anticipatory action. The word 'restore' explains the conception of reactive self-defence whereas the word 'maintain' entails prejudging and, therefore, requires that any situation threatening peace and security may be referred to the Security Council.

In a nutshell, international law provides three mechanisms to deal with the threat of attack or armed attack by non-state actors: (a) the use of force in self-defence in a case of an armed attack, (b) the use of force in anticipation when the attack is imminent and (c) when the threat is remote and uncertain, to refer the matter to the Security Council for determination under article 39. There is no room for pre-emptive self-defence in the presence of article 39. If the Security Council fails to make a determination under article 39 or take effective measures because of the veto or any other reason and the threat becomes imminent, the right of anticipatory self-defence provides a narrow window to use force in self-defence.

7. When Self-defence Ends?

The victim state is not totally free to use any amount of force in self-defence or to apply such force for an indefinite period of time. Conventional and customary law imposes certain limits both as to the amount of force and the period of

[105] J. Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond', (2002) 35 *Cornell International Law Journal* 533–557 at 538.

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time for which force can be used in self-defence. The question of termination of self-defence centres on two things: (a) the interpretation of the 'until clause' in article 51, and (b) a proportionate response.

A. Self-defence and the 'until clause'

One of the requirements of article 51 is that any action taken in self-defence be reported to the Security Council immediately. Apparently, it seems that the right to self-defence continues until the matter is reported to the Security Council and it has taken necessary measures in response to the matter referred. This raises an important question: does the victim state retain the right of self-defence once the Security Council takes notice of the matter? There is no simple answer to this question. Different scholars take different views as to whether and to what extent the use of force is allowed in self-defence once the matter is reported to the Security Council. There is an argument that self-defence is a temporary right. Once the matter is reported to the Security Council, it is the primary responsibility of the Security Council to take necessary measures under Chapter VII. The state's right to self-defence ends here. The second argument is that self-defence is an 'inherent' right and continues until the Security Council has taken necessary measures and those measures are *adequate and effective* in the opinion of the victim state. Otherwise, the state retains the right to self-defence despite reporting to the Security Council.

Professor Chayes argues that the right of self-defence comes to an end once the Security Council is seized of the matter. The right of state is subject to limit of time 'until the Security Council has taken the measures necessary to maintain international peace and security'.[106] He contends that 'Article 51 is not an affirmative grant of a right of self-defense but a statement of the situations in which the exercise of an 'inherent right' is not precluded by the Charter'. He argues that it is the primary responsibility of the Security Council to maintain international peace and keeping in view the proscription on the use of force under article 2(4), the use of force under article 51 should be confined to the narrowest possible range.[107] Professor Greig states that the common sense of the situation suggests that a state is not obliged to cease acting in self-defence against an aggressor which is continuing with its offensive until the measures, its own or those employed by the Security Council, prove effective. The use of the word 'necessary' in article 51 would seem to reinforce such an interpretation.[108] Professor Schachter, following the same line of argument, contends that the Security Council has the authority to replace collective self-defence with enforcement measures under Chapter VII

[106] A. Chayes, 'The Use of Force in the Persian Gulf', in Damrosch and Scheffer (eds.), *Law and Force in the New International Order* (1991).

[107] *Ibid*., p. 5.

[108] D. Greig, 'Self-defence and the Security Council: What Does Article 51 Require? (1991) 40 *ICLQ* 366–402 at 389.

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if it intends to do so. It is inconsistent with the Charter to say that 'self-defence as an inherent right cannot be taken away'. Article 51 not only requires states to report the claims of self-defence to the Security Council but it also says that such measures shall not 'in anyway affect the authority and responsibility of the Security Council'.[109] However, Professor Schachter rejects the interpretation that the right of self-defence is 'overridden whenever the Security Council adopted measures considered necessary in case of an armed attack'.[110] Professor Franck takes the position that once the Security Council has taken action, the target state is barred from using force as self-defence.

> If states use armed force under the self-defense rubric of Article 51, their individual activities are subsumed by, or incorporated into, the global police response once it is activated. That is, the old way is licensed only until the new way begins to work: 'until', in the words of Article 51, 'the Security Council has taken the necessary measures to maintain international peace and security'.[111]

However, he adds a caveat that it is sensible to assume that the right of self-defence revives if the Security Council fails, for whatever reason, to take action.

Other scholars such as Professor Reisman argue that article 51 is not intended to take away the right to use force in self-defence once the Security Council acts. It is counter productive to interpret article 51 as barring the use of force in self-defence once the Security Council takes action.

> An interpretation of the Charter according to which individual states reserve the right of individual and collective self-defense keeps the pressure on an aggressor nation . . . an interpretation that says that states no longer have that right bleeds that pressure off.[112]

Professor Rostow rejects the interpretation that article 51 bars the use of force in self-defence after the Security Council comes into motion on the matter. It would be fatal to subordinate states' right of self-defence to the prior permission of the Security Council. He contends that the Charter intends the opposite of this position: the victim or targeted state and, in some case its allies, may decide for themselves when to use force in self-defence until the Security Council restores peace or decides that self-defence has gone too far and has become a threat to

[109] O. Schachter, 'Authorised Uses of Force by the United Nations and Regional Organisations', in Damrosch and Scheffer (eds.), *Law and Force in the New International Order* (1991).

[110] O. Schachter, 'United Nations Law in the Gulf Conflict', (1991) 85 *AJIL* 458.

[111] Frank and Patel, 'Police Action in Lieu of War: The Old Order Changeth', (1991) 85 *AJIL* 63–74.

[112] M. Reisman, 'Allocating Competences to Use Coercion in the Post-Cold World Order: Practices, Conditions, and Prospects', in Damrosch and Scheffer, *op. cit.*, fn. 107, p. 43.

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peace itself.[113] Professor Kelsen contends that a state has the right to use force in self-defence until the Security Council takes action and that action is *adequate* in the opinion of the claimant state. 'Article 51 was added to ensure that the right of regional or collective security groups to use force until the Security Council had taken measures that were *adequate* and *effective* to restore international peace and security was not impaired'.[114]

The right to self-defence is a natural and independent right. The state neither requires the prior permission of the Security Council for its exercise nor does reporting to the Security Council exhausts it. This right continues until the Security Council takes *effective* measures either to throw out the aggressor or deter an imminent attack and prevent the recurrence of such attacks. In the case of effective action by the Security Council, the state willingly suspends its right of self-defence but is not diminished. It remains in willing suspension only and can be revived any time if the Security Council fails to sustain its *effective* treatment of the matter. It is the belief of a state in the collective security system under the Charter, which makes a state suspend its right of self-defence as the Security Council is expected to act on its behalf. Otherwise, the state is the natural wielder of the right. As with the case of an individual's right of self-defence, no state would surrender its security without *effective* measures of protection provided by the Security Council. This seems to be the intention of the Charter as it cannot be imagined that its drafter would make a rule, which would put in jeopardy the security and, in some cases, the very existence of a state.

The interpretation that the right of self-defence comes to an end after the Security Council takes necessary action would have some weight if the Security Council had a record of taking swift and effective measures in response to situations requiring individual use of force in self-defence. However, the history of the Security Council provides the opposite picture. In such a state of affairs, the wisdom of a policy relying on a body, which has failed constantly to offer an effective alternative to the use of force, may be questioned. No one will wholeheartedly rely for his or her personal security on a police force in a state where it is believed the police cannot respond to a threat in time or it has a record of failures in protecting individuals. There is no suggestion that the Security Council should be shunned but states would be very cautious in laying down their security at the mercy of such a body. Moreover, the Security Council suffers from a serious systemic flaw: it is founded on the notion of an oligarchy where the permanent five members decide on the security of states that may not even have a vote in some cases. The veto of one oligarch can render the body impotent. The history of the Security Council is replete with such instances.

[113] E. Rostow, 'Until What? Enforcement Action or Collective Self-defence', (1991) 85 *AJIL* 506–516.

[114] H. Kelsen, *The Law of the United Nations* (1950). Emphasis in the original.

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B. The principle of proportionality

There exists the rule that any use of force in self-defence must be proportionate.[115] 'Any state attempting to justify a forceful action as self-defence would be expected to show that the amount of force used was not disproportionate to the threat or attack it had experienced'.[116] The proportionality requirement entails two main conditions. First, the degree of force exercised would have to be proportional in terms of intensity and magnitude. Second, the duration of the anticipatory attack would have to be strictly limited to the removal of the threat. The incident that provided the basis of the most commonly accepted formulation of proportionality is the *Caroline* incident: 'It will be for [the British Government] to show, also, that the local authorities of Canada, even supposing the necessity of the moment . . . did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it'.[117] This raises two important questions: (a) how much is proportional and (b) who decides that enough is done?

How much is proportional?

Beck and Arend identify three approaches to the principle of proportionality in response to terrorism. The first approach may be called 'eye for an eye' or 'tit for tat' proportionality. This means that a victim state must respond proportionately to some prior act of terrorism.[118] The claim of self-defence must be rejected if 'the nature and amount of force used is disproportionate to the character of the initiating coercion'.[119]

The second approach may be called 'cumulative proportionality'. The proponents of this approach contend that the victim state's forcible measures should be proportionate to an aggregation of past illegal acts. For instance, Guy Roberts says that the equivalence in number of deaths and extent of property damage is the *sine qua non* of proportionality. He asserted that proportionality must be calculated on the basis of prior events. An accumulation of small events can justify a single larger retaliatory response in certain cases.[120]

[115] See *Nicaragua*, para. 194.

[116] T. McCormack, 'Anticipatory Self-Defence in the Legislative History of the United Nations History', (1991) 25(1) *Israel Law Review* 1–41 at 38.

[117] See Jennings, *loc. cit.*, fn. 4.

[118] Beck and Arend, (1994) 'Don't Tread on Us': International Law and Forcible State Responses to Terrorism', (1994) 12 *Wisconsin International Law Journal* 153–219 at 206.

[119] G. Intoccia, 'American Bombing of Libya: An International Legal Analysis', (1987) 19 *Case W. Res. Journal of International Law* 177–213 at 206.

[120] G. Roberts, 'Self-help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisal', (1987) 19 *Case W. Res. Journal of International Law* 243–294 at 281–2.

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The third approach may be called 'deterrent proportionality'. This approach argues that the victim state's use of force must be proportionate to the overall terrorist threat faced by the state. Professor O'Brien believes that counter-terror measures should be proportionate to the purposes of counter terror deterrence and defence and the referent of proportionality should be the 'overall pattern of past and projected acts'.[121] Professor Schachter contends that 'tit for tat' is not the only test for proportionality. There are two others: (a) the response in relation to a continuing pattern of attack rather than the last one and (b) proportionality judged in terms of the ends sought, for example the cessation of attacks and the means used.[122] Similarly, Professor Baker states that self-defensive measures should be weighed against all attacks prior to the response and the probability and size of future attacks.[123]

The first two approaches makes more sense as it will be easy to measure the damage done in the case of one or more attacks. The third approach seems to be risky in that the size and probable damage cannot be measured in the case of probable future attacks. No one knows the exact size of damage in any probable attack. For instance, in the case of the 11 September 2001 attacks; one plane did not hit its target and fell into the fields of Pennsylvania. It raises two questions: (a) that the probable attack may be aborted and does not occur at all and (b) the planned attack may not happen in the manner it is planned. Hence, this approach or at least the part dealing with 'probable and size of future attack' is problematic and it would be very hard to decide what is proportional. Greater risk of abuse is involved in this approach.

Who decides the question of 'enough'?

The right of self-defence is a self-judging principle but the international community must judge its propriety.[124] If the victim state claims that it has the exclusive authority to determine the lawfulness of the use of force in self-defence, then 'the law has reached a vanishing point'.[125] The Nuremburg International Tribunal also rejected this argument when the Nazi leaders argued that Germany had acted in self-defence and in any given case, it is to the state to decide whether it has such a right.[126] The right of self-defence can be initiated at the discretion of the state, that is when the state believes that it has been attacked or such

[121] W. O'Brien, 'Reprisals, Deterrence and Self-Defence in Counterterror Operations', (1990) 30 *Virginia Journal of International Law* 421–479 at 472.

[122] O. Schachter, 'The Extra Territorial Use of Force Against Terrorists', (1989) 11 *Houston Journal of International Law* 309–316.

[123] M. Baker, 'Terrorism and the Inherent Right of Self-defence (A Call to Amend Article 51 of the United Nations Charter)', (1987–88) 10 *Houston Journal of International Law* 25–49.

[124] See Waldock, *loc. cit,* fn. 4.

[125] See Schachter, above.

[126] *Ibid*.

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attack is imminent. However, the final assessment of its lawfulness lies with the international community.

> The right of self-defence is a general principle of law . . . It is recognised to the extent. . . that recourse to it is not itself illegal. It is regulated to the extent that it is the business of the courts to determine whether, how far and for how long there was a necessity to have recourse to it. There is not the slightest relation between the content of the right of self-defense and the claim that it is above the law and not amenable to evaluation by the law. Such a claim is self-contradictory in as much as it purports to be based on legal right and as, at the same time, it dissociates itself from regulation and evaluation by the law.[127]

A state has an initial power to qualify its actions as being in self-defence, and this classification continues to operate unless the international community determines otherwise. The same is true with regard to the termination of the right to act in self-defence. If, despite a call for a cease-fire by the Council, hostilities continue, it is for the community to decide upon the consequences that flow from the failure to abide by the Council's decision.[128] Professor Waldock asserts that it is for the Security Council to determine whether the right to self-defence has come to an end.[129] 'If the Council is paralysed and fails to take any measure necessary to maintain international peace and security, the legal position is equally obvious: a Member State exercising the right of self-defence may persist in the use of force'.[130]

The right to self-defence is the natural and independent right of a state. It can be initiated and may continue as long as is necessary in the opinion of the victim state until either the objective for using force is achieved or the Security Council has taken effective measures. However, decisions on its lawfulness and propriety are for the international community at large and organisations such as the United Nations, regional organisations and interested individuals.

8. Conclusion

Terrorism is a serious threat to peace and security and human lives. It must be dealt with rigorously and without delay. However, the struggle against terrorism must be within the limits of law. States that take responsibility to implement international law or the resolutions of the Security Council must uphold the rule of law. Illegal terrorist acts must be defeated by the strength of law. The argument that the current norms of international law are inadequate to deal with

[127] H. Lauterpacht, *The Function of Law in International Community* (1933) at 179–80.
[128] See Greig, *loc. cit.*, fn. 106, p. 392.
[129] See Waldock, *loc. cit.*, fn. 4.
[130] Y. Dinstein, *War, Aggression and Self-Defence* (1988) at 196.

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the threat of terrorism is not convincing. The current international legal order provides for self-defence and anticipatory self-defence in credible cases and for any other situation threatening peace and security to be reported to the Security Council for determination and necessary action. What is needed is to make the Security Council a reliable and effective body, which requires the political will of the international community to meet the challenge. The doctrine of pre-emption cannot fit into the current international legal system and it does not present compelling arguments for it to be accepted as new norm of international law.

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