THE LEGITIMACY OF ANTICIPATORY SELF-DEFENCE IN COMBATING TRANSNATIONAL TERRORISM

Een onderzoek naar de legitimiteit van het gebruik van preventieve zelfverdediging in de bestrijding van transnationaal terrorisme

Masterproef van de opleiding
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<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IHL</td>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>NSS</td>
<td>2002 National Security Strategy of the US</td>
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<td>NSA</td>
<td>Non-state actor(s)</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNC</td>
<td>Charter of the United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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INTRODUCTION

1. This thesis will explore the legal boundaries of the use of force used by states in combating transnational terrorism. More specifically, it will deal with the legality of anticipatory self-defence in this matter.

2. The world today is confronted with a changed security environment. Terrorism goes beyond borders. Terrorists’ attacks are no longer isolated events that can be solely prevented by classical national law enforcement. Furthermore, the threat posed by terrorism today has become much bigger following the immense technological developments and increasingly globalized environment. It has become easier for terrorists to get their hands on more destructive weapons and harder for law enforcers to locate terrorists in a world where the ways of transportation have boomed. Governments face an enormous challenge in trying to maintain a safe environment and preventing terrorism. For that reason, states need to cooperate and strive together towards a ‘new security consensus’. Sole law enforcement will no longer suffice. Terrorism has developed to such a level that states can no longer control with solely traditional law enforcement means.

   Law enforcement on its own is especially insufficient in cases where certain states support financially or through other means - terrorist groups that carry out attacks abroad. Furthermore, states are faced with the threat of terrorist attacks originating from the terrorist training camps that are mostly located in failed states, i.e. states where there is no longer an overall and effective government and control over the territory and inhabitants. As the governments of these states have little to no control over their territory, these states are characterised by corruption, a high level of criminal activity and human rights violations. These states are ruled by power and not by law. Consequently, the terrorist’s organizations consider these states as perfect safe havens to develop and prepare themselves for future terrorist attacks abroad.

   In sum, combating terrorism can no longer be done effectively on a purely national level, instead the fight against modern terrorism is located at the international level, where different rules apply. As there is no law of terrorism, regulations of different sectors of public international law will apply. In this work, the main focus will be on the prohibition to use force and more specifically on one of its exceptions, the right to use force in self-defence.

3. States have been using force to defend themselves and their inhabitants for decades. It has been a generally accepted principle of law that when a state is attack by another state it can use force in self-defence. Nonetheless, in the last decade there has grown controversy around its use in the so-called war on terror. As indicated above, terrorists pose a greater threat today than they did in the past.

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because of the much larger range of weaponry. Most notably and threatening are the weapons of mass destruction by which a single terrorist attack can affect hundreds, if not thousands of people. Because of this greater threat, some states have claimed they need to take action before an attack has occurred and consequently rely on the so-called right of anticipatory self-defence, before an attack has occurred.

4. The use of anticipatory self-defence in combating transnational terrorism raises two main questions concerning the boundaries of the right to self-defence. First, whether self-defence can be used in the war on terror, as terrorists are non-state-actors (NSA). This question deals with the armed attack requirement 'ratione personae.' The latter question will first deal with the question whether and under which circumstances self-defence can be used against NSA. Second, this thesis will look at whether the use of anticipatory self-defence is acceptable under international law. This question needs to be answered by investigating the temporal scope of the right to self-defence. More specifically this has triggered the question whether the concept of ‘immediate threat’ needs to be re-examined in the light of such terrorist threats.²

5. As for the methodology followed, the first chapter will look at the right to self-defence in general in order to then examine its scope to see if and under which requirements there exists a right to anticipatory self-defence. The second chapter will give an overview of the evolving opinions and state practice on the separate sub-question throughout history. Further, the author will try to formulate a few policy recommendations on how transnational terrorism should be dealt with in the future. Finally, this paper will conclude that terrorism does in fact pose an extraordinary threat to peace and security, but that nonetheless there is no room for preventive self-defence in our international law system. Admittedly, fighting terrorism is a just cause, however international law has long developed away from the just-war doctrine. States need to act within the international law boundaries limiting the use of force, that where set out and have grown out of experience. As the prohibition on the use of force is one of the if not the most important cornerstone of our International relations, states need to respect it in whatever circumstances, even when they are fighting for a good cause.

I. SELF-DEFENCE IN INTERNATIONAL LAW

6. This chapter will discuss the general right to self-defence so as to provide a basis for the discussion of the main question ‘whether anticipatory self-defence in combating terrorism is legal under international law. The first section will give a brief note on the prohibition on the use of force, to which the right to self-defence forms an exception. The second section will briefly set out the idea behind the inherent nature of self-defence. Next, the third section will indicate that the right to self-defence exists both as a customary- and treaty-norm. Thereafter, the fourth section will describe the traditionally accepted requirements for the lawful use of self-defence. Finally, the last section of this chapter will explain which actors can call in this right to self-defence in International law.

1. THE RIGHT TO SELF-DEFENCE: AN EXCEPTION TO THE PROHIBITION ON THE USE OF FORCE

A. PROHIBITION TO USE FORCE

7. The starting point for any discussion on the right of self-defence is the prohibition on the use of force. The rules governing the legality of the use of force, the *jus ad bellum*, are a central element of international law. The prohibition on the use force has formed the cornerstone of the international legal order since 1945. Together with the principles of territorial sovereignty and the independence and equality of states, the prohibition forms the framework of the international order. Although the prohibition is the subject of different interpretations by scholars, and has been violated on numerous occasions, it is nevertheless widely recognized as a principle of customary international law and as having jus cogens character. The prohibition on force in international law – as set out in Article 2(4) UNC- is only applicable in states’ international relations and not within their domestic jurisdiction. Hence, this prohibition to use force internationally does not affect the right of a state to take forcible measures to maintain law and order within its jurisdiction.

3 Gill (n 2) 115.
5 Gill (n 2) 116.
6 Shaw (n 4) 1118.
7 It is important to note that this general prohibition on the use of force and it is exceptions have become part of customary international law. Consequently, it does not only bind the UN-charter signatories but the International community as a whole; B. Simma and others (Eds), The Charter of the United Nations: a Commentary (Oxford University Press, Oxford, 2012) vol 1, 112. (‘Commentary to the Charter’); Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, paras 188-190 and 228 (‘Nicaragua Case’); and D. Harris D (Ed.), Cases and Materials on International Law (7th Edition, Sweet & Maxwell, London, 2010) 722 (‘Harris’).
9 Shaw (n 4) 1118 and 1126.
**HISTORICAL DEVELOPMENT**

8. Originally, it was common practice to use force to settle disputes among individuals, tribes and states.\(^{10}\) Gradually however, states realised that it was wiser, if not necessary, to restrict and confine the use of force.\(^{11}\) Following this realisation, the use of force gradually became limited and eventually generally prohibited.

First, there was the doctrine of the just war, which was popular in the 13\(^{th}\) century as a result of the Christianisation of the Roman Empire.\(^{12}\) The doctrine limited the acceptability of war to those cases which intended to punish wrongs and restore peaceful status.\(^{13}\) Force without this cause was considered aggressions and unjust. Thomas Van Aquinas developed this doctrine further by setting out that war, via the use of force between states, was only acceptable when fought for a just cause (*causa justa*), conducted under sovereign authority (*auctoritas principis*), and fought with the right intention (*intention recta*) to promote good and avoid evil.\(^{14}\) The Just War doctrine accepted three causes as *just*: the prevention of injustice, the compensation of victims past injustice and the punishment of perpetrators of injustice. However, the rise of the European nation-states began to change the doctrine of just war.\(^{15}\) It became clear that the just-war doctrine would be paradoxal when applied to the wars between the Christian states, in which each side was convinced that they were fighting for a just cause.\(^{16}\) Therefore the international community changed its approach and the concept of just war disappeared from international law as such.\(^{17}\)

The establishment of the European balance of power system – after the Peace of Westphalia in 1648- and the rise of positivism led to the understanding that States are sovereign and equal and thus that no one state could judge whether another’s cause was just or not.\(^{18}\) Accordingly, States were bound to respect agreements and the independence and integrity of other States, and had to make serious attempts at a peaceful solution of differences before turning to war.\(^{19}\) States thus had started to perceive war as a method of last resort. However, the use of force was not prohibited as such, measures of force falling short of war were not limited to measures of last resort. Such ‘hostile

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11 Shaw (n 4) 1118-1121; Bossuyt & Wouters (n 10) 514.

12 Shaw (n 4) 1119.


14 Oberleitner (n 1) 263.

15 Shaw (n 4) 1119.

16 ibid.

17 Shaw (n 4) 1119 - 1120; Brownlie (n 13) 14.

18 Shaw (n 4) 1120.

19 Shaw (n 4) 1119 -1120.
measures short of war’ were undertaken by States to assert or enforce rights or to punish wrongdoers.20

Following the end of the First World War, at the initiative of American President Woodrow Wilson, the international community agreed to set up a world organisation that would solve disputes in a peaceful manner whilst respecting international law.21 The result of this was the establishment of the League of Nations -the first international organisation with a universal character, this both in membership and competences22 - by the victorious states of the war.23 The creation of the League of Nations reflected a completely new approach to the concept of use of force in the international order.24 The goal of the League of Nations was to enhance international cooperation and to maintain international peace and security via a collective security mechanism.25 The foundation of this collective security mechanism was a limited prohibition on war. Article 12 of the League of Nations’ Covenant26 set out that its members had the obligation to bring any interstate disputes to arbitration, before the Permanent Court of International Justice27 (hereinafter PCIJ) for judicial settlement or the League of Nations.28 Furthermore, the parties to the dispute had to respect a three months cooling down period -a moratorium- after this judicial/arbitration decision or the decision of the League, during which they were prohibited from using any force against each other.29 This cooling-off period was intended to allow the emotions and passions linked to the disputes to subside so as to avoid impulsive decisions of states to go to war.30 Again, the use of force was not prohib as such under the league of nations regime, but solely set up a formal system designed to restrict and limit the recourse to the use of fore.31 Sadly, in spite of being a great idea, the League of Nations was only effective for a short period, from 1933 onwards the League’s impotency started to show. Italy, Japan and Germany exited the league and consequently no longer subscribed the League’s idea of renouncing war. Eventually the league collapsed completely with the start of the Second World War in 1939.

20 Shaw (n 4) 1121.
21 Bossuyt & Wouters (n 10) 16.
22 Bossuyt & Wouters (n 10) 515.
23 One notable exception to this are the United States, they were never a member of the LON, despite the fact that they were involved in the drafting of the charter.
24 Shaw (n 4) 1121.
25 Bossuyt & Wouters (n 10) 16.
26 The Convenant of the League of Nations forms part of the Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920)). (‘LON Convenant’)
27 The precursor of the International Court of Justice
28 Bossuyt & Wouters (n 10) 515 ; Shaw (n 4) 1121.
29 ibid.
30 Shaw (n 4) 1122.
31 ibid; Harris (n 7) 722.
A few states went a step further and were able to agree on a comprehensive prohibition of war in international law. This resulted in these states signing the Briand-Kellogg Pact, which condemned recourse to war and denounced war as a method of settling international disputes. Although the convention had a wide number of signatories, it did not function as a wide prohibition on the use of force as such because of its two shortcomings. Firstly, the convention had no institutional framework which could sanction states that derogated from its provisions. Second, the convention did not go so far to prohibit all uses of force but solely prohibited wars -which necessitated a declaration of war. The use of force without a declaration of war was therefore not denounced under the Briand-Kellogg Pact.

9. History thus shows that it gradually became customary that states’ decisions to use of force and to wage war were limited. However, it was not until the establishment of the UN that the use of force became generally prohibited under international law. After the devastations of the World Wars, which ‘had brought untold sorrow to mankind’ the international community wanted to ‘save the succeeding generations from the scourge of war’. Accordingly, the international community founded the United Nations (hereinafter UN), an international organization with main goals to maintain international peace and security, to develop friendly relations among nations and to promote social progress, better living standards and human rights. The UN was created by the UN Charter, a multilateral treaty agreed upon by the founding members. The Charter contains the purposes and principles of the UN and the rights, the obligations of its members and introduced a general prohibition on the use of force between states.

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32 Shaw (n 4) 516 and 1122; Brownlie (n 13) 74-92; and Harris (n 7) 722.
34 Brownlie (n 13) 75-76.
35 Bossuyt & Wouters (n 10) 516.
36 ibid.
37 Shaw (n 4) 1122; Brownlie (n 13) 87; and Harris (n 7) 722.
38 Bossuyt & Wouters (n 10) 516.
39 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI 1945, preamble. (‘UN Charter’)
40 UN Charter (n 39) preamble; and A.C. Arend 'International Law and the Preemptive Use of Military Force' (2003) 26 The Washington Quarterly 2, 91. (‘Arend’)
41 UN Charter (n 39) Article 1; Shaw (n 4) 1204
42 Shaw (n 4) 1205; Bossuyt & Wouters (n 10) 516; and Arend (n 40) 91.
Art. 2 (3): “All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

Art. 2 (4): “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

10. In its Nicaragua decision, the ICJ recognised the general prohibition on the use of force as a principle of customary international law and as jus cogens.43 Contrary to previous limitation on the use of force, the provision in the UN Charter prohibits the use and threat of force, whether it amount to war or not.44 The term ‘force’ needs to be understood as referring to armed force, the provision does not prohibit political or economic pressure.45

11. The text of the Charter makes clear that the prohibition covers the use of force as well as threats of force.46 A threat of force can be understood as ‘an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government’. 47 The International Court of Justice (hereinafter ICJ) made clear in its advisory opinion on the Legality of Nuclear Weapons that a ‘signalled intention to use force if certain events occur could constitute a threat under Article 2(4) UNC when the force threatened with would itself be unlawful.48

12. The Charter formulates that it prohibits force ‘against the territorial integrity or political independence of states, or in any other manner inconsistent with the purposes of the UN’.49 Although there have been some claims that these words should be interpreted restrictively -so as to allow the use of force that does not infringe the clause-50, the clause is widely understood as intended to reinforce the primary prohibition.51 Brownlie argued convincingly against the restrictive interpretation by referring to the travaux préparatoires which make clear that the phrasing was not intended to be

43 Nicaragua Case (n 7) paras 188-190; Harris (n 7) 722.
44 Harris (n 7) 723.
45 ibid; Shaw (n 4) 1124-1125.
46 Shaw (n 4) 1125 ; Harris (n 7) 725.
47 Brownlie (n 13) 364.
48 Shaw (n 4) 1125 ; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 47. (‘Nuclear Weapons’) 49 Shaw (n 4) 1128.
50 See e.g. D.W., Self-Defense in International Law (Praeger, New York, 1958) 152. (‘Bowett’)
51 Shaw (n 4) 1127; Brownlie (n 13) 268-287 ; Bossuyt & Wouters (n 10) 517 ; Harris (n 7) 725-726.
restrictive, but on the contrary, intended to give small states specific assurances. International courts and arbitrations have followed the latter approach and thus have ruled that the use of force violates international law even where some of the territory concerned is territory to which the state using force has a valid claim. The Eritrea-Ethiopia Commission emphasized that ‘any exception to the threat or use of force would create a large and dangerous loophole in a fundamental rule of international law’ and thus should not be presumed. Force used by states is only legitimate when it falls within one of the accepted exceptions, the maintenance of collective security by or through the Security Council mandate and self-defence. Consequently, any force used between states, which does not qualify as one of those exceptions, is prima facie illegal.

B. EXCEPTIONS TO THE PROHIBITION ON THE USE OF FORCE

13. Although the prohibition on the use of force is a general prohibition, it does not mean that the use of force by states in international context is illegal in all circumstances. The UN Charter provides for two exceptions to the general prohibition of the use of force: force in self-defence as set out in Article 51 UNC and use of force authorized by the Security Council under Chapter VII of the Charter for the maintenance of collective security. These exceptions have grown out a necessity and realism that force cannot be banned in all situations.

14. Understandably, it will be the latter exception –self-defence- which will be focussed on in this work and mostly in the context of its controversial anticipatory application in the context of the war on terror today. A great deal had been written on the right to self-defence and after the terrorist attacks of the 11th of September 2001 there has been much debate on the legitimacy of the use of self-defence as a measure against the new wave of terrorism. Many states have routinely called in their right to self-defence as justification for their use of force in the war on terror. Whether or not this was always done in a legitimate way has been questioned and it is just that, which will be discussed in this paper.

52 Brownlie (n 13) 268-287.
55 Shaw (n 4) 1126 ; Bossuyt & Wouters (n 10) 517 ; Gill (n 2) 116; Arend (n 40) 91.
56 Gill (n 2) 116. (‘although there may be extenuating circumstances in relation to cases of humanitarian intervention, or support for «national liberation»…. Since those topics have no direct bearing on the scope of the right to self-defense, they need not concern us here, beyond stating that legal opinion is in wide agreement that the only clearly recognized exceptions to the prohibition are those the Charter sets forth- the maintenance of collective security by or through Security Council mandate and self-defense.’)
57 Shaw (n 4) 1122; Oberleitner (n 1) 263; Bossuyt & Wouters (n 10) 517.
58 This will be further explained in below on page 11 of this thesis.
15. Adversely, the second exception, the collective security system by the Security Council’s authorisation for the use of force as a collective measure to maintain or enforce international peace and security, poses far less controversy. The collective security system is set out in Chapter VII of the Charter, which stipulates that the Security Council has the authority to take enforcement measures - including the forcible measures - in situations which it determines to be a threat or breach to international peace and security. Under Article 39 UNC, the Council is empowered to determine if there is a ‘threat to the peace, breach of the peace, or act of aggression.’ If the Security Council so determines, it can authorize the use of force as a measure to ensure and maintain international peace and security under Article 42 UNC.

This application of this collective security system exception is less controversial because the Security Council authorisation will only be given after thorough and objective investigation. This investigation ensures that force is not be used too often, thus preventing unnecessary pain and suffering. Sadly, the flipside of this is that the whole procedure to acquire authorization is rather rigid and time-consuming. Consequently, this makes this method a far less useful tool in the war on terror in which time is of essence.

16. Article 51 UNC sets out the relation between the right of self-defence and the UN Collective Security System of Chapter VII. From the text of the Article and the intention of the Charter itself it can be deduced that self-defence was intended to be adjuvant to the Security Council’s competence to maintain peace and security via collective security measures. The collective security system does not take the place of the right to self-defence, the collective security system only becomes effective when the Security Council decides to act. Until the Council comes into action to restore and/or maintain international peace and security, a state which is threatened by an imminent attack retains the inherent right to defend itself or to assist another state(s) confronted with such a threat on the basis of a request or other form of consent, within the customary law limits on self-defence.


60 Arend (n 40) 92.

61 ibid.

62 See e.g.: Gill (n 2) 119; Dinstein (n 8) 208.

63 Gill (n 2) 119.

64 ibid.

65 Authors argue on the precise extent of the right to self-defence. Some claim that states retain the right until the Security Council has taken necessary measures which are adequate and effective in the opinion of the victim state. Others argue that the victim state’s right to self-defence ends as soon as the Security Council is seized of the matter. See N.A. Shah 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism' (2007) 12 Journal of Conflict and Security Law, 108 (‘Shah’) for an overview on the different views concerning the end of the right of self-defence.

66 Gill (n 2) 119; Shah (n 65) 159.
17. Furthermore, Article 51 UNC sets out that every use of force in self-defence needs to be reported as soon as possible to the Security Council, which can then approve or disapprove the reported act.\footnote{Gill (n 2) 119; Dinstein (n 8) 203-204; Shah (n 65) 159.} In this regard the Council can respond in one of the following ways.

For one, the Council can endorse the act in self-defence and subsequently decide to take measures to assist the state in its defence.\footnote{Gill (n 2) 119.} In this case, the Council’s measures will complement the measures taken in self-defence, or even include the state’s self-defence measures into a broader collective set of measures intended to restore the international peace and security.\footnote{ibid.} Conversely, the Security Council can judge the reported use of force in self-defence as illegal or inappropriate in the light of the relevant circumstances.\footnote{ibid.}

The Council can furthermore bar the reporting state which has the right to invoke self-defence, from continuing to exercise his right to self-defence, provided that the Council takes the measures needed to restore the peace and security or that the attacker ends and abstains from the armed attack(s) and provides the necessary assurances of this cessation of armed attack.\footnote{ibid.} In case the Council does not take such necessary measures, such measures do not have the effect of restoring peace and security, the attacker continues its attacks or does not provide the necessary assurances of cessation of the armed attacks, the attacked state retains its right of self-defence.\footnote{ibid.}

Most commonly however, the Council has been unable to go further beyond simply condemning the act or noting the existence of a breach or threat to the peace, because of a veto by one of the permanent members of the Security Council.\footnote{ibid.} In cases where the Council fails to act effectively, or fails to take action at all, states faced with an armed attack maintain the inherent right to act in self-defence, individually or collectively with other States.\footnote{ibid.} In sum, any act in self-defence needs to be subjected to the Council’s ultimate legal and political judgement. While it is the state that acts in self-defence has the first word, the Security Council ultimately has the final saying, provided it is prepared to back its words with the action required in the situation.\footnote{ibid.}
2. **THE RIGHT TO SELF-DEFENCE: A NATURAL RIGHT**

18. The right to self-defence is a natural right, known and recognised since time immemorial, both on the international and the national level.\(^{76}\) It has been available to individuals and, after the emergence of states, to states as sovereign entities.\(^{77}\) It has generally been formulated as a limitation or exception to the general prohibition on the use of force.

19. The natural right to self-defence is a right that has grown out of self-preservation. Individuals and states possess the right to self-defence because it is “equally necessary for the preservation of both.”\(^{78}\) Accordingly, the right to self-defence for individuals and the right for states on the international plane are based on a similar idea and principle that everyone has the “inherent” right to defend itself.\(^{79}\) Although a bit more abstract on a national level, from the individual’s perspective, self-defence is an evident necessity. On both levels, the right to self-defence functions as a necessary counterweight to the monopoly of force.

    On a national level, the governments have the monopoly on force, ruling out the right to use force for the individuals.\(^{80}\) The right to self-defence as an exception to this monopoly follows naturally. Individuals are allowed to use force in those limited situations where they are faced with an immediate and inevitable threat. It would not be reasonable to require individuals to undergo harm passively, in the timespan before the government is able to step in. Still, individuals are not allowed to use force unlimitedly in such situations of an imminent threat. Individuals’ right to self-defence remains limited by the societal monopoly on force. When using force in self-defence, individuals are required to notify the authorities as soon as possible, so the government can step in and take control of the situation. As soon as the government has done the latter, the individual’s right to self-defence will end. Adversely, the government right to use force – being the monopoly-holder- is not limited by the imminence requirement. The government is entitled to act even before a threat has become imminent and can prevent future harms as well as punish completed wrongdoings that no longer pose a future threat.\(^{81}\)

    States have a similar right to self-defence on the international level. Like individuals, states are prohibited to use force. The signatories of the United Nations Charter handed over their monopoly to use force outside of their sovereign jurisdiction -on the international level- to the Security Council.

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\(^{76}\) Shah (n 65) 95.
\(^{77}\) ibid.
\(^{78}\) Shah (n 65) 95; D. Webster, ‘Letters from US Secretary of State Daniel Webster to British Minister Mr. Fox’ (1841) 29 British and Foreign Affairs Papers, 1137-1138.
\(^{79}\) Gill (n 2) 116; Dinstein (n 8) 176; Brownlie (n 13) 216.
\(^{80}\) Shaw (n 4) 1118
\(^{81}\) W. Kaufman 'What's Wrong With the Pre-emptive War?' (2005) 19 Ethics and International Affairs 3, available at www.isme.tamu.edu/JSCOPE05/Kaufman05.html [last accessed 3 April 2013] 6-7. (‘Kaufman’); Shaw (n 4) 1126
Yet, states explicitly reserved the natural and absolute right to act in self-defence when attacked or faced with an imminent threat. The Security Council’s right to use of force is, contrary to that of states, not limited to defensive actions against imminent threats. The Security Council acting under its Chapter VII competence can use force in case of any situation, which they deem constitutes a threat to peace and security and for which the Council feels that measures short of armed force would be inadequate.\(^\text{82}\)

20. This thesis deals solely with the scope of the international right to self-defence, which is applicable in international relations and will not discuss the individual’s right to self-defence. It needs to be kept in mind that the right to self-defence is formulated as an exception to the general prohibition. Accordingly, the right to self-defence needs to be interpreted in a restrictive manner and the prohibition of force needs to remain the generally applicable rule. Use of force needs to remain a last and carefully considered resort in international relations. Critics have argued that in the war on terror, states have resorted to force too easily by relying on a broadly interpreted right to self-defence. It seems that it proves to be difficult for states confronted with a possible terrorist threat to make an objective assessment of the need to use force. The following sections will therefore define the precise scope of the right to self-defence to ascertain in which cases force can be used legitimately in the war on terror.


21. International law is created through the consent of states, which results in treaties and custom.\(^\text{83}\) The right to self-defence is grounded in both treaty and customary law.\(^\text{84}\) Treaties\(^\text{85}\) are written agreements between states, whereby the parties bind themselves legally to act in a certain way or set up a certain relation between themselves.\(^\text{86}\) Basically, treaties are the international equivalent of contracts.\(^\text{87}\)

Customary law on the other hand is not created by what states explicitly agree but rather by what states do in practice and develops almost subconsciously within the international community.\(^\text{88}\) The ICJ defined customary international law as ‘evidence of a general practice accepted as law’\(^\text{89}\)


\(^{83}\) Arend (n 40) 90 and 93.

\(^{84}\) Gill (n 2) 114.

\(^{85}\) Synonyms include: Conventions, International Agreements, Pacts, General Acts, Charters, Statutes, Declarations and Covenants.

\(^{86}\) Arend (n 40) 90; Shaw (n 4) 93.

\(^{87}\) Arend (n 40) 90.

\(^{88}\) ibid; Shaw (n 4) 72.

\(^{89}\) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1179, Art. 38, para 1.
which is formed by two elements: general practice of states\textsuperscript{90} and opinio juris\textsuperscript{91}, the belief of states that such practices is legally binding. Put differently, in order for a rule to become customary international law states must act according to such rule and believe that they are required by law to do so.\textsuperscript{92}

22. Long before it became a statutory right in the UN Charter, the right to self-defence originated as a traditional principle of customary international law.\textsuperscript{93} The traditional customary rules surrounding self-defence and its scope where articulated in the aftermath of the famous Caroline Case in 1841.\textsuperscript{94} During the 19\textsuperscript{th} century, Canada was under British rule and was faced with anti-British insurrections.\textsuperscript{95} The American steamboat, the SS Caroline was supplying a Canadian group of rebels, who had found refuge on a navy Island in between Canada and the United States (hereinafter US).\textsuperscript{96} To weaken the Canadian rebels, the British decided to stop the ship. In the night of 29 December 1837, the British crossed the Niagara River, boarded the SS Caroline -which was moored on US-territory- set it on fire and sent the boat over Niagara Falls.\textsuperscript{97} The incident injured and killed many US citizens and soldiers in American waters.\textsuperscript{98}

The British claimed they acted in self-defence and had no other choice than to do what they did.\textsuperscript{99} The Americans rejected this legal ground and were outraged by the British attack.\textsuperscript{100} Eventually the British apologized after intense diplomatic exchanges between the UK and British governments.\textsuperscript{101} 23. It is in these heated, diplomatic exchanges that Webster, the US Secretary of State, articulated two requirements for permissible self-defence -the so called Caroline-doctrine.\textsuperscript{102}

\textsuperscript{90} Shaw (n 4) 74.
\textsuperscript{91} Shaw (n 4) 75.
\textsuperscript{92} Arend (n 40) 90.
\textsuperscript{93} Customary international law is created by what states do in practice. A practice becomes a customary rule when there is an authoritative state practice, a combination of a near universal practice and a belief that law requires the practice. Put differently, a state must engage in a particular activity and believe that law requires such activity; the state will feel legally bound to accept these principles. As customary international law binds the whole international community, the prohibition on the use of force will not only bind the UN-signatories, but all states worldwide.
\textsuperscript{94} Brownlie (n 13) 42-43 ; Dinstein (n 8) 243-244 ; T. Franck, Recourse to Force (Cambridge University Press, Cambridge, 2002) 97-98 (‘Franck’); Kaufman (n 81) 25.
\textsuperscript{95} Harris (n 7) 746-747; Brownlie (n 13) 701; Arend (n 40) 90.
\textsuperscript{96} Harris (n 7) 746-747; Brownlie (n 13) 701.
\textsuperscript{97} ibid; Arend (n 40) 90.
\textsuperscript{98} Harris (n 7) 746-747; Brownlie (n 13) 701.
\textsuperscript{99} Harris (n 7) 746-747; Brownlie (n 13) 701; Arend (n 40) 90.
\textsuperscript{100} ibid.
\textsuperscript{101} ibid.
\textsuperscript{102} Harris (n 7) 746-747; Brownlie (n 13) 701.
Extracts of the declaration of Mr. Webster to Lord Ashburton in the diplomatic discussions following the Caroline Case (April 24, 1841)\textsuperscript{103}

“It will be for (her Majesty’s) Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.”

“Furthermore, any action taken (in self-defence) must be proportional, since he act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”

Since this Caroline-doctrine is accepted by most authorities as a given, and since there is no considerable evidence that this doctrine or framework has been abandoned or replaced by a new set of customary rules, this thesis will assume that the Caroline-framework still forms part of contemporary customary law.\textsuperscript{104} However, as will be shown later,\textsuperscript{105} the framework and criteria’s understanding has lately been the subject of reinterpretation.

24. This originally customary right to self-defence became a part of statutory law via several codifications. The most important codification has been incorporated in Article 51 of the UN Charter and needs to be read in combination with the Charter’s Articles on the prohibition of the use of force.\textsuperscript{106}

\textbf{Article 51 UN CHARTER:}

\textit{Nothing in the present Charter shall impair the inherent right of individual or collective self-defence\textbf{ 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 to self-defence shall be \textbf{immediately reported} to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.}

\textsuperscript{103} Harris (n 7) 767-747.

\textsuperscript{104} Gill (n 2) 126.

\textsuperscript{105} See page 75 of this thesis.

\textsuperscript{106} UN Charter (n 39) Article 2 (3-4)
25. The codifications of the right to self-defence raised confusion as to what influence the new statutory rule has on the original customary rule.\textsuperscript{107} The outcome of this discussion is vital, as it will determine the contours of the right to self-defence, thus establishing if and to what extent anticipatory self-defence can be lawful under contemporary international law.\textsuperscript{108} As said, customary international law recognises a limited right of self-defence in response to an imminent threat, so-called preemptive self-defence.\textsuperscript{109} Whether the Charter-regime does the same depends on how Article 51 UNC is interpreted.

When reviewing the scholarly literature on the effect of Article 51 UNC on the customary norm of self-defence, writers seem to be divided into two camps. A minor group of scholars\textsuperscript{110}, called the restrictionists, claim Article 51 UNC sets out a new, updated rule that replaces the older custom and that Article 51 UNC in consequence narrowed down the International rule of self-defence to reactive self-defence.\textsuperscript{111} Other scholars, the counter-restrictionists or liberals, argue that Article 51 UNC is a declaration of customary international law, solely clarifying and codifying a part of the already existing customary rule.\textsuperscript{112} According to them, Art. 51 does not explicitly allow anticipatory self-defence however, preemptive action remains accepted under the customary right that exists alongside the Charter. Thus, they believe that there is an internationally accepted right to preemptive self-defence that finds its authorization in customary law. This debate will be further explored in the next Chapter, which will examine whether and to what extent anticipatory self-defence is legally acceptable today.

4. \textbf{THE RIGHT TO SELF-DEFENCE: REQUIREMENTS FOR ITS LAWFUL USE}

26. A state which has been the victim of armed attack or of an imminent threat of such an attack is not completely free to use any amount of force neither in self-defence nor for any amount of time.\textsuperscript{113} International law imposes certain limitations on the amount of force used in self-defence as well as on the period in which self-defence can be used. The requirements which indicate from what moment self-defence can be used are the armed-attack and imminent threat requirements, whilst ‘the until-clause’ and the imminence-criterion indicate when the right to self-defence ends. Furthermore, the proportionality and necessity requirement deal with the amount and methods of force that can be used.

\textsuperscript{107} Arend (n 40) 92
\textsuperscript{108} Arend (n 40) 98.
\textsuperscript{109} Gill (n 2) 121.
\textsuperscript{111} Arend (n 40) 92.
\textsuperscript{112} ibid.
\textsuperscript{113} Shah (n 65) 107.
27. As illustrated above, this thesis follows the view of the dual treaty-customary basis of the right to self-defence. And as Article 51 UNC remain relatively silent or merely indicative on the precise criteria needed for self-defence this thesis will necessarily refer to the customary Caroline-criteria for guidance on the precise understanding of the required criteria for the lawful use of self-defence.\footnote{Gill (n 2) 121.}

Article 51 UNC sets out a number of requirements, some material and one formal one. The material requirements sets out that self-defence is permissible ‘if an armed attack occurs’ but further remains silent on the precise meaning of this notion of armed attack. Another material requirement or rather material limit put forward in Article 51 UNC is that the right to self-defence exists “until the Security Council has taken the measures necessary to restore and maintain international peace and security.” The formal requirement –which is linked to the latter material criteria- is that the state using force in self-defence needs to report this to the Security Council immediately so as to allow the Security Council to step in and control the situation.

As set out above, the customary criteria required for permissible self-defence are the well-known and widely accepted Caroline criteria,\footnote{Gill (n 2) 114.} related to imminence, necessity and proportionality. Accordingly, in the pre-UN Charter period force used in self-defence was considered permissible when it met the standards of these criteria.\footnote{Arend (n 40) 91.} Once a state could demonstrate that the force they used in self-defence was in proportion to the threat and in response of an imminent use of force of another state, which could not be forestalled by anything but force in self-defence, the self-defence would be acceptable under international law.\footnote{ibid.} These criteria, generally referred to as the Caroline-test,\footnote{These critera will be discussed more extensively in the next section of this thesis.} are widely cited as the customary international law-standard for self-defence and will be set out in this section of the thesis.\footnote{H. Duffy, The ‘War on Terror’ and the Framework of International Law (Cambridge University Press, Cambridge, 2005) 157; Nicaragua Case (n 7) \footnote{For a more detailed discussion on the territorial scope of the right to self-defence see e.g.: Dinstein (n 8)175.}}

28. As explained in the introduction, this thesis will mainly focus on the temporal scope of the right to self-defence and its applicability against NSA. However, for the sake of completeness, this thesis includes a brief indication on the territorial scope of the right to self-defence. The territorial scope of self-defence stretches from the territory of the defending state to the territory that where the original attack originated.\footnote{Dinstein (n 8)175.} In case the attack originated in international sea and airspace the self-defence can be used in international sea and airspace too.\footnote{Gill (n 2) 118.} Self-defence can never be legally used on the territory
of neutral or non-belligerent states, except in case when its territory is being used as the base of operations or launching pad for the attacks.\textsuperscript{122}

A. \textbf{When May Acts be Taken in Self-Defence: Armed Attack and Imminent Threat}

29. From this overview of the statutory and customary criteria for the right to self-defence it can be seen, that under customary international law, the right self-defence is accepted in response to an armed attack as well as to an imminent threat. Whilst under the statutory right the text of the provision seems to indicate that it only allows self-defence in response to the occurrence of an armed attack.

\textbf{In Response to an Armed Attack}

30. Article 51 UNC allows for self-defence ‘\textit{if an armed attack occurs}’, the occurrence of an armed attack is considered a requirement for the lawful use of the right to self-defence.\textsuperscript{123} However, the text of the provision and the Charter’s \textit{travaux préparatoires} do not go in further detail or offer any further insight on what constitutes an armed attack or when an armed attack begins.\textsuperscript{124} Therefore it is impossible –when relying solely on the text and \textit{travaux préparatoires} of Article 51 UNC- to determine what is meant with ‘\textit{if an armed attack occurs}’.\textsuperscript{125} Given the absence of a clear written definition, the international community has great difficulty coming to a consensus on what constitutes an armed attack. Generally states prefer to keep this concept quite vague to enable them to tailor it to their particular needs. Needless to say, this leaves much room open for misuse.

31. What is generally accepted and undisputed concerning self-defence in response to an armed attack, is that only one side to a conflict can have the right of self-defence. Use of force in self-defence is only permissible against an illegal armed attack or threat.\textsuperscript{126} Self-defence against legitimate self-defence is thus not accepted. This is so because self-defence is not permissible against the ‘legal’ use of force. Legal use of force is force which is permissible under the Charter: on the basis of self-defence itself or the authorization of the UN Security Council for the maintenance of collective security.\textsuperscript{127}

32. When an unlawful use of force by a state, for example in the form of an attack or interventions, against another state does not reach the threshold of an armed attack, then that unlawful act will not trigger the attacked or intervened state’s right to use force in self-defence under international law. Instead, international law provides states with the right to respond to unlawful acts of states against

\begin{thebibliography}{99}
\bibitem{ibid} ibid.
\bibitem{Gill (n 2) 121} Gill (\textit{n 2}) 121.
\bibitem{Gill (n 2) 121} Gill (\textit{n 2}) 121.
\bibitem{Dinstein (n 8) 177} Dinstein (\textit{n 8}) 177.
\bibitem{Gill (n 2) 118} Gill (\textit{n 2}) 118.
\end{thebibliography}
them with proportionate countermeasures. Countermeasures are measures, which a state is legally allowed to take against a state that has committed an internationally wrongful act. Such measures include economic and political sanctions but can never consists of measures of force. Again, with the risk of repetition, use of force is only acceptable under the exceptions provided under the Charter: self-defence and under UN Security Council authority.

33. Scholars have tried to define the notion of armed attack, resulting in different definitions which vary on different points and thresholds on the amount of force required to reach of an armed attack. Nonetheless, there is certain agreement on the basic elements of an armed attack: most definitions conclude that armed attacks include armed force, breaches of the peace and border crossing. Brownlie for instance interprets the notion ‘armed attack’ as:

“some grave breach of the peace, or invasion by large organized forces acting on the orders of a government.”

Shah’s definition on the other hand is more restrictive and finds that an armed attack consists of:

“the physical occurrence of an attack when forces of one state cross the border into another state.”

34. Furthermore, there has been much debate on whether the notion ‘armed attack’ includes an imminent or future threat. This depends on a narrow or broad understanding of the notion armed attack. If imminent or future threats are considered part of ‘armed attacks’ then anticipatory self-defence falls within the scope of the statutory right of self-defence as set out in Article 51 UNC. On this point the opinion of scholars also differs, but generally over the years most scholars have considered threats not to form a part of armed attacks. Consequently, it is generally held that the statutory right of self-defence does not accept any form of anticipatory action.

128 Harris (n 7) 741; Nicaragua Case (n 7) paras 210 and 249.
129 Countermeasures have traditionally been referred to as reprisals, measures of self-help or self-protection. The term countermeasures is most relevant in modern international law as it is also used by the ILC and the ICJ.
131 I. Brownlie 'International Law and the activities of the Armed Bands' (1985) 7 International and Comparative Law Quarterly 4, 731.
132 Shah (n 65)101.
In 1947, Josef Kunz, an American professor at the University of Ohio, implicitly excluded future attacks from the notion of armed attack:

“A [204]rticle 51 constitutes an important progress by limiting the right of individual and collective self-defence to the one case of armed attack against a member of the U.N. ’ ‘This right does not exist against any form of aggression which does not constitute ’armed attack’ and it ’means something which has taken place. ’”

Later, Emanuel Gross, professor at the University of Haifa, did the same but in a more explicit manner:

“the wording of Article 51 requires an armed attack using weapons and 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.’”

35. To find out what should be precisely understood under the notion ‘armed attack’ in the context of self-defence, this thesis will look at how states and International Courts have interpreted the notion when applying the right to self-defence. The most prominent decisions of the ICJ concerning the right to self-defence are the Nicaragua case and the Oil Platform Case. Both of these judgments affirm that an armed attack is a strict requirement for the exercise of self-defence and further offer some insight on the criteria and their understanding for the lawfulness of self-defence. However, as will be shown, both judgments have been widely criticized because of the ICJ’s overly abstract, unrealistic and somewhat imbalanced approach. Furthermore, these judgments show that the ICJ puts a very high burden of proof on the state invoking self-defence. The Court required the invoking state to provide conclusive evidence of its own conduct, lack of alternatives and motives, so as to prove that the state respected the requirements of necessity and proportionality. Moreover, the invoking state was

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135 Gill (n 2) 123.

136 Imbalanced because the court based itself too greatly on theoretical definitions of an armed attack, rather than to critically apply them to the relevant circumstances of these cases.

137 Gill (n 2) 123.

138 ibid.
also required to provide conclusive evidence of the conduct of the attacker. Contrarily, the Court accepted the alleged attacking state’s denial of involvement in the armed attack very easily, without requiring supporting proof.\(^{139}\)

In its Nicaragua judgment, the ICJ reaffirmed the armed attack-requirement of Article 51 UNC by stating that ‘the right of self-defence under Article 51 UNC, whether individual or collective, is only available in response to an armed attack.’\(^{140}\) In this judgement the ICJ further gave an indication on the general understanding of the notion of armed attack, so as to apply it to decide if the facts of the case reached up to an armed attack. For forming such a definition or indication of what constitutes an armed attack, the ICJ based itself on the General Assembly’s declaratory resolution on the definition of “aggression”.\(^{141}\) Accordingly, the ICJ’s judgment indicated that an armed attack consists of a significant direct use of force by one state against another, as well as the sending by or on behalf of a state of armed bands, militias and the like to carry out armed actions when such activities are comparable in scale and effects to a conventional armed attack carried out by regular forces.\(^{142}\)

However, this restrictive definition of an armed attack by the ICJ was heavily criticized by different judges in dissenting opinions\(^{143}\) and different scholars.\(^{144}\) The general comment was that the ICJ’s approach of the notion was unrealistic and failed to take into account that other considerations could lead to different results under different circumstances.\(^{145}\) Therefore, the approach in the Nicaragua decision –although authoritative- should not be seen as the conclusive and final understanding of what constitutes an ‘armed attack’ required to trigger the right of self-defence.\(^{146}\)

36. In the later Oil Platform Case the ICJ affirmed that an armed attack is still a prerequisite requirement for the legality of use of force in self-defence.\(^{147}\) The court placed the –high- burden of proof on the state that invokes the right to self-defence but did not offer a clearly defined standard of proof.\(^{148}\) In this judgement the court merely offered some ambiguous indications on the threshold of an

\(^{139}\) ibid.

\(^{140}\) Nicaragua Case (n 7) para 195.

\(^{141}\) Resolution 3314 of the UN General Assembly, UN Doc. A/RES/3314 (1974).\(\text{‘UNGA Definition of Aggression’}\) (“Aggression is the use of armed force by a state against the sovereignty, territorial or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”)

\(^{142}\) Nicaragua Case (n 7) para 195 ; Gill (n 2) 122; Shaw (n 4) 1132.

\(^{143}\) Nicaragua Case (n 7) dissenting opinions of judge Schwebel and judge Jennings.

\(^{144}\) For such comments by scholars see e.g.: Franck (n 94) 97; Dinstein (n 8) 202, 215, 219-220 and 235-237; Gill (n 2) 113; T.D. Gill ‘The Law of Armed Attack in the Context of the Nicaragua Case’ (1988) Hague Yearbook International Law 45-50.

\(^{145}\) Gill (n 2) 122.

\(^{146}\) ibid.

\(^{147}\) Oil platforms (Islamic Republic of Iran v United States of Amreica)(Merits) [2003] ICJ Rep 161, para 51. \(\text{‘Oil Platform Case’}\)

\(^{148}\) Gill (n 2) 123.
armed attack and thus remained merely indicative.\(^\text{149}\) Furthermore, although the judgement was decided on by a numerical majority, the text of the judgement and the individual opinions show that there was a large disagreement among the judges on the interpretation of many matters related to the right of self-defence and on the question whether it was even appropriate for the court to pronounce on those matters.\(^\text{150}\) These issues - the indecisive and ambiguous pronouncement on the notion of armed attack and the disagreement of the judges – clearly affects the authority of the Oil Platform Case on the issues of self-defence.\(^\text{151}\)

37. There are two points that are of specific interest for this thesis surrounding the precise understanding of armed attack. First, the debate on whether an armed attack includes an imminent or future threat. If so, this could mean that even under the statutory right to self-defence – as set out in Article 51 UNC - some degree of anticipatory action would be accepted. Second, whether an armed attacks can only be committed by states or also by non-state-actors such as armed bands, irregulars, militia and terrorists. These two questions will be further explored in the next Chapter, which will discuss the legality of self-defence against terrorism.

**IN RESPONSE TO AN IMMINENT THREAT**

38. Apart from the acceptability of self-defence in response to an armed attack, the customary norm further allows self-defence in response to an imminent attack.\(^\text{152}\) The customary norm of self-defence - which was deduced from the correspondence in the aftermath of the Caroline incident\(^\text{153}\) between the British representative, Lord Ashburton, and the American representative, Mr. Fox – allowed for anticipatory acts of self-defence under the strict prerequisite that the necessity to act in response to an imminent armed attack was ‘instant, overwhelming, leaving no choice of means for deliberation.’\(^\text{154}\)

39. This imminence criterion is not solely satisfied by the proximity in time of the threatened attack. Instead, the imminence criterion requires that there exists a credible threat of a probable attack in the foreseeable future.\(^\text{155}\) What this criterion requires in practice will depend on the specific and factual circumstances of each case.\(^\text{156}\) In the following Chapter of this thesis, the precise understanding of the

\(^{149}\) *Oil Platform Case* (n 147) paras 53-61 and 69-71.

\(^{150}\) *Gill* (n 2) 123 and note 33.

\(^{151}\) *Gill* (n 2) 123.

\(^{152}\) ibid.

\(^{153}\) The Caroline-incident is described above, see page 13.

\(^{154}\) *Arend* (n 40) 91.

\(^{155}\) *Gill* (n 2) 151.

\(^{156}\) ibid.
imminence criterion will be discussed more extensively, as it will be shown that it determines the temporal scope of the anticipatory right to self-defence.  

B. **How long does the right to self-defence lasts?**

40. It has now been shown that states’ right to use force in self-defence starts after an armed attack occurs or as soon as a threat becomes imminent. However, these triggers of self-defence do not activate the right to use force unlimited in time. Instead, a state’s right to use force in self-defence lasts for the imminent period after the attack or until the Security Council has taken the necessary measures to maintain international peace and security.

**The dividing-line between offensive reprisals and defensive self-defence: The imminence-requirement for reactive self-defence**

41. The “imminence-requirement” which determines the dividing-line between acts in reactive self-defence and armed reprisals is different from the more widely discussed “imminence-requirement” which sets the boundary between acceptable and unacceptable anticipatory self-defence. It is this first imminence-requirement, which will be discussed in this section. This imminence-requirement is solely relevant in cases where force used in reactive self-defence and therefore will solely discussed briefly in this section of the thesis. Any mention of an imminence requirement outside of this section, will refer to the imminence-requirement in relation to the legality of anticipatory action.

42. The imminence-requirement sets out that states can only use self-defence in response to an armed attack in the period imminent to the armed attack. This imminence-requirement does not refer solely to a near time period. Although the time factor is definitely part of the equation, the imminence requirement does not require states to act in self-defence within an artificially short timespan. The timespan after the armed attack is not the determining factor.

Instead, the determining factor is the purpose and nature of the force used in self-defence. As indicated, force used by a state in response to an armed attack, that does not meet this imminence-criterion will not be accepted as self-defence, but will be considered an armed reprisal, which is generally considered illegal under contemporary international law. Reprisals and self-defence both are a form of self-help, methods by which states take unilateral measures to address violations of international law. However, these two concepts differ on their purpose. Whilst the purpose of a reprisal is to redress an injustice and punish the wrongdoing state, measures of self-defence are

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158 Gill (n 2) 154.

159 Gill (n 2) 154.

160 For a description on the concept of reprisals see page 18 of this thesis.

161 Gill (n 2) 151.
intended to avert and, if necessary, defeat an attack. The imminence-criterion determines whether the forcible measures used by a state, that was the victim of an armed attack, qualify as measures of self-defence or as reprisals.

43. This imminence-requirement can be seen as an independent criterion, alongside the armed attack, necessity and proportionality requirements, or as part of the necessity criterion which will be discussed below. Such discussion however is immaterial, as it has no effect on the content of the requirement.

44. In sum, a state should only use force in self-defence within a reasonable period after the armed attack, on the basis of credible evidence, with the aim of averting or overcoming the attack and removing the threat of a future attack. It is important that this requirement is interpreted in a reasonable manner, which allows states the time to overcome practical and legal obstacles before deciding to act in self-defence.

**Boundary of all types of self-defence: Until the Security Council has taken the measures necessary to maintain international peace and security**

45. Article 51 stipulates that a state can use force in self-defence “until the Security Council has taken the measures necessary to maintain international peace and security.” Article 51 UNC further provides that once a state uses force in self-defence, he is obliged to report this immediately to the Security Council, so as to enable the Security Council to respond and take such measures, which can control a situation and require the use of force.

46. As set out above, the Charter itself intended self-defence to be adjuvant to the Security Council’s competence to maintain peace and security via collective security measures. Therefore, a state will only have the right to use force in self-defence for as long as the Security Council has not intervened by taking measures to restore international peace and security.

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162 Gill (n 2) 154.
163 ibid.
164 ibid.
165 Gill (n 2) 119; Dinstein (n 8) 203-204; Shah (n 65) 108.
166 See this thesis page 9.
167 Gill (n 2) 119.
168 Authors argue on the precise extent of the right to self-defence. Some claim that states retain the right until the Security Council has taken necessary measures which are adequate and effective in the opinion of the victim state. Others argue that the victim state’s right to self-defence ends as soon as the Security Council is seized of the matter. See Shah (n 65) 108 for an overview on the different views concerning the end of the right of self-defence.
169 Gill (n 2) 119; Shah (n 65) 108.
C. What Acts May Be Taken in Self-Defence: Necessity and Proportionality

47. In addition to the requirement that self-defence can only be used in response to an armed attack or imminent attack, there are two other requirements which the force used in self-defence need to fulfill.\(^{170}\) The force used in self-defence needs to be proportionate, necessary and in conformity with the principles of human rights and humanitarian law.\(^ {171}\) These requirements have invoked less controversy than the armed attack or imminence requirement as they have been long accepted in customary international law and have been undisputedly applied by the ICJ in both the *Nicaragua case*\(^ {172}\) as well as the *Oil Platform case*\(^ {173}\). Because of their uncontroversial application and because these requirements are not so important in finding the answer to the research question, these requirements will only be discussed in this section briefly.

48. The necessity and proportionality requirement follow logically from the idea that the main purpose of self-defence is to end and repel illegal armed attacks. Both these requirements set out that the force used in self-defence are limited to achieving that defensive purpose under the relevant circumstances so as to prevent the force used from becoming offensive.

49. The necessity requirement demands that any use of force in self-defence is necessary.\(^ {174}\) The use of force needs to be necessary on two different ‘levels’. First, there needs to be an on going armed attack, a credible threat of an impeding armed attack or the clear probability of a (renewed) attack, which necessitates the use of force in self-defence.\(^ {175}\) Furthermore, there should not be any feasible alternative\(^ {176}\) to the use of force in self-defence, to deter or defeat the armed attack or imminent threat.\(^ {177}\)

50. The proportionality requirement addresses the issue of how much force is permissible in self-defence, both temporarily and in quantity.\(^ {178}\) The criterion is widely misunderstood\(^ {179}\) as requiring

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\(^{170}\) *Gill (n 2)* 124.

\(^{171}\) *Shaw (n 4)* 793.

\(^{172}\) See *Nicaragua Case (n 7)* para 194.

\(^{173}\) See *Oil Platform case (n 147)* 1362.

\(^{174}\) *Schmitt (n 157)* 172.


\(^{176}\) *Gill (n 2)* 124. (‘Feasible alternatives can include, inter alia, the acceptance of a ceasefire, the negotiated withdrawal of forces, the discontinuance of hostile activity, the adoption and implementation of effective collective measures by the Security Council or in some cases, the possibility of forestalling an incipient or impending attack by the use of alternative means, such as law enforcement.’)

\(^{177}\) *Gill (n 2)* 124; *Dinstein (n 8)* 202-203; *Gray (n 175)* 105-108; *Schmitt (n 157)* 171.

\(^{178}\) *Schmitt (n 157)* 172.

\(^{179}\) See for example: *Arend (n 40)* 91.
equivalence between the armed attack or threat and the use of force in self-defence. Such an interpretation would most likely make the right to self-defence ineffective in a number of situations since it absolutely prohibits a greater use of force in self-defence than was used in the original armed attack or imminent armed attack. A good example of this is self-defence against a series of isolated bombings by terrorists. When states want to use force in self-defence against the probable following terrorist attacks they will probably need to use more force than a single bombing to preclude further armed attacks by these terrorists, for instance it might require a major air strike against the terrorist’s base camp.

The correct understanding of the proportionality requirement in the context of self-defence is that the duration and amount of the use of force in self-defence needs to be strictly limited to the removal and repelling of the threat. This amount of force needed in self-defence may be more or less than the amount of force used in the armed attack or imminent attack which triggered the right to self-defence. The determination of the accepted amount of force in self-defence will be an operational one, depending on the available measures which will repel future attacks. The proportionality requirement thus sets out that there should only be used such an amount and duration of force as needed to end the armed attack or imminent threat, and repel further attacks.

51. Lastly, for the sake of comprehensiveness, the author would like to point out that states need to act in accordance to the provisions of IHL and IHRL that are binding upon them. Accordingly, they also need to respect the relevant provisions of those bodies of law when exercising their right of self-defence.

5. THE RIGHT TO SELF-DEFENCE: ACTORS

52. Even given the similarities that were illustrated earlier it is important to keep in mind that the debate spread out in this thesis deals with the right to self-defence on an international plane. In International law- as opposed to national law- the right to self-defence is only available for states. Acts in self-defence by NSA are not accepted on the international plane and are on the national plane they are governed by domestic laws and regulations. This thesis will only deal with the legitimacy of the

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180 Schmitt (n 157) 172.
181 ibid.
182 ibid.
183 ibid.
184 ibid.
185 As an example: the higher the probability that the law enforcement mechanism is able to prevent future attacks, the less amount of force will be allowed in self-defence to repel future attacks.
186 For practical examples on the application of this proportionality requirement see e.g.: Gill (n 2) 124.
187 Gill (n 2) 118.
right to self-defence applied by a state or several states. The latter option –self-defence applied by several states- is the so-called collective self-defence.

53. Given the difference in the type of actors, the international right to self-defence asks for a different understanding of the required conditions. To begin with, the imminencerequirement cannot be as strictly applied to nations as to individuals. As Dinstein says: ”a state cannot be expected to shift gear from peace to war simultaneously.” Because of this it is clear that the Caroline-standard or imminence requirement cannot be applied as strictly to states as to individuals. This requirement says that self-defence is only justified when there is no moment of deliberation. For a state, there is need for collective coordinated decision-making before it takes action and quite fortunately so, as it is important that states deliberate wisely before they turn to using force.188 If the imminence requirement would be applied very strictly, it would prevent any meaningful response by states. Nevertheless, even if not applied as strict as to individuals, the imminence requirement forms a foundational element in international law.

54. The right to self-defence mentioned in Article 51 UN Charter entails both the right to individual and collective self-defence. Collective self-defence needs to be seen in the context of the North Atlantic Treaty Organisation (hereinafter NATO). The NATO-members189 agreed that an attack against one or more of the NATO-countries is to be considered as an armed attack against all of them.190 Consequently, once a NATO-country is being attacked or threatened, the NATO as a whole can call in the right to collective self-defence to use force.

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188 Kaufman (n 81)
189 The NATO consists of 28 members, being most of the European countries and the United States.
II. **ANTICIPATORY SELF-DEFENCE AGAINST TRANSNATIONAL TERRORISM**

1. **RATIONE PERSONAE – IS THE USE OF SELF-DEFENCE AGAINST TERRORISTS ON FOREIGN TERRITORY ACCEPTABLE?**

55. This section of the thesis sets out to examine whether states can use force in self-defence against terrorists on foreign territory. To do so this section will examine whether international law allows for self-defence by states against NSA on foreign territory.

56. The main issue with a state using force on another state’s territory is that it interferes with the right of territorial sovereignty and the principle of non-intervention.\(^\text{191}\) According to this right of territorial sovereignty, states cannot intervene or take measures on the territory of another state against its will. Only following express agreement of another state, is a state permitted to deal with threats –of terrorists, international criminals …- on that other state’s territory.\(^\text{192}\) Furthermore, under international law, states are prohibited from using force against each other except under Security Council authorization or in self-defence. This thesis will examine whether and under which conditions, international law allows states to use force on another state’s territory against terrorists that have attacked them.

57. At time of the drafting of the Charter, international law only considered states as relevant actors on the international plane. Likewise, the presumption at the time was that states were the only actors to carry out aggression on the international plane. As a consequence of this mind-set, the prohibition on the use force –of Article 2(4) UNC- is addressed to states only.\(^\text{193}\) Contrarily, the customary norm and Article 51 UNC, instead are silent on any requirement that the armed attack should originate from a state.\(^\text{194}\) Purely on the basis of the text of the Charter, it does seem that international law does not limit the right to self-defence to responses against attacks by states.\(^\text{195}\) International law thus -prima facie- seems to accept that any use of force that amounts to an armed attack -regardless of its executor- can trigger the right to self-defence.\(^\text{196}\) In this regard, Judge Greenwood further argues that it only seems

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\(^{191}\) See Shaw (n 4) 1147.


\(^{193}\) Gill (n 2) 118.

\(^{194}\) Gill (n 2) 118; Ruys & Verhoeven (n 192) 311.


\(^{196}\) Gill (n 2) 118.
logical that since the Security Council can authorise force against a NSA, an attacked state must also have the ability to exercise its right to self-defence against NSA.\footnote{Greenwood (n 19) 17.}

58. Yet, this thesis will show that this is not entirely true by referring to the right to self-defence in practice and the early literature following the adoption of the Charter. Legal scholars agree that the concept of armed attack –which forms a prerequisite for the right of self-defence– was traditionally limited to acts of states.\footnote{See inter alia: Gray (n 175); and A. Cassese ‘The International Community’s “Legal” Response to Terrorism’ (1989) 38 International and Comparative Law Quarterly, 597. (‘Cassese 1989’)} The scholars come to this conclusion on the basis of the Charter’s travaux préparatoires, which show that several delegates proposed to include a provision on the right to self-defence “in response to an armed attack by another state.”\footnote{Cot J.P. and others, La Charte des Nations Unies: Commentaire Article par Article (2nd Edition, Bruylant, Brussels, 1991) 774. (‘Commentaire du Charte’) (n 192) 291. For an example of such early literature see inter alia: Kunz (n 133) 878.} Furthermore, the scholars have found confirmation of this approach in the early literature on self-defence.\footnote{Ruys & Verhoeven (n 192) 291.}

Yet, this thesis will show that this is not entirely true by referring to the right to self-defence in practice and the early literature following the adoption of the Charter. Legal scholars agree that the concept of armed attack –which forms a prerequisite for the right of self-defence– was traditionally limited to acts of states. The scholars come to this conclusion on the basis of the Charter’s travaux préparatoires, which show that several delegates proposed to include a provision on the right to self-defence “in response to an armed attack by another state.” Furthermore, the scholars have found confirmation of this approach in the early literature on self-defence.

However, this early literature furthermore shows that the concept of an armed attack –which forms the prerequisite for self-defence– has been traditionally categorised in two categories: direct and indirect military aggression.\footnote{Ruys & Verhoeven (n 192) 291.} The category of direct military aggression refers to armed attacks committed by states, whilst indirect military aggression denotes armed attacks by NSA for which states shared a certain degree of responsibility.\footnote{ibid; Brownlie (n 13) 245.}

The latter approach was reaffirmed by the ICJ in its Nicaragua decision.\footnote{Nicaragua Case (n 7) para 195; Tsagourias N. ‘Non-State Actors and the Use of Force’ in d’Aspremont J. (Ed.) Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law (Routledge, London, 2011) 331. (‘Tsagourias’)} As indicated above, this judgment indicated that an armed attack consists of a significant direct use of force by one state against another, as well as the sending by or on behalf of a state of armed bands, militias and the like to carry out armed actions when such activities are comparable in scale and effects to a conventional armed attack carried out by regular forces.\footnote{Nicaragua Case (n 7) para 195.} The ICJ further admitted that substantial involvement of a state in actions carried out by armed bands, irregulars and so forth can also constitute an armed attack in the sense of Article 51 UNC.\footnote{ibid; Tsagourias (n 204) 331.} This statement seems to indicate that only acts that were done by, on behalf of or with substantial involvement of a state can amount to an armed attack and that armed attacks without any state involvement cannot amount to an armed attack.

\footnote{197 Greenwood (n 19) 17.} \footnote{198 Ruys & Verhoeven (n 192) 290; Gill (n 2) 118; Kunz (n 133) 872-879; and Nicaragua Case (n 7) para 195.} \footnote{199 See inter alia: Gray (n 175); and A. Cassese ‘The International Community’s “Legal” Response to Terrorism’ (1989) 38 International and Comparative Law Quarterly, 597. (‘Cassese 1989’)} \footnote{200 Cot J.P. and others, La Charte des Nations Unies: Commentaire Article par Article (2nd Edition, Bruylant, Brussels, 1991) 774. (‘Commentaire du Charte’) (n 192) 291. For an example of such early literature see inter alia: Kunz (n 133) 878.} \footnote{201 Ruys & Verhoeven (n 192) 291.} \footnote{202 Ruys & Verhoeven (n 192) 291.} \footnote{203 ibid; Brownlie (n 13) 245.} \footnote{204 Nicaragua Case (n 7) para 195; Tsagourias N. ‘Non-State Actors and the Use of Force’ in d’Aspremont J. (Ed.) Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law (Routledge, London, 2011) 331. (‘Tsagourias’)} \footnote{205 Nicaragua Case (n 7) para 195.} \footnote{206 ibid; Tsagourias (n 204) 331.}
59. Accordingly, this thesis will start its examination into the current standing of international law on the matter on the premise that it was traditionally accepted that armed attacks could also be committed by NSA, provided that it was an attack for which a state also share a degree of responsibility, and that acts of NSA which did not have ‘substantial state involvement’ did not constitute an armed attack.\(^{207}\) Put differently, this thesis departs from the view that under traditional international law, the right to self-defence allowed for self-defence in response to armed attacks by states and in response to armed attacks by NSA for which a state shares a degree of responsibility.\(^{208}\)

60. However, over the years there has been and remains much debate and uncertainty on the precise degree of state involvement required for an act to constitute an armed attack, which can trigger the right to self-defence. Since the attacks of 9/11 this debate has intensified and some authors have even argued that the requirement of state involvement is –in its totality- too restrictive to allow states to defend themselves effectively against the contemporary transnational terrorism.\(^{209}\) The authors of the latter view therefore maintain that the requirement of state involvement should no longer be upheld. If the international community were to follow this view, it would accept that states could use self-defence against any armed attack of NSA, including those attacks without any state involvement.

61. Consequently, this thesis has already established that self-defence against attacks of NSA is acceptable. However, it is not clear yet whether self-defence is acceptable against all attacks of NSA or only against those that have a certain amount of state involvement, nor is it clear how much state involvement is required. The following sections therefore sets out to determine the precise degree of state involvement that is required by contemporary international law for the right of self-defence against attacks of NSA. To do so, this thesis will examine the state practice on this topic. Thereafter, the author evaluate whether the principles of the law of state responsibility can provide guidance in determining the appropriate standard of state involvement. Finally, the author will attempt to formulate the appropriate formula to be used in future decisions on whether a state can use self-defence against armed attacks by NSA.

\(^{207}\) Gill (n) 122; Ruys & Verhoeven (n 192) 291; Brownlie (n 13) 245.

\(^{208}\) Gill (n 2) 118.

\(^{209}\) Ruys & Verhoeven (n 192) 290.
A. State Practice on Self-Defence Against Armed Attacks by Non-State Actors

62. When examining state practice concerning the right to self-defence against armed attacks by NSA it can be seen that states have generally agreed that self-defence is permissible against armed attacks by NSA provided that the attack has sufficient state involvement. This requirement of state involvement logically follows from states’ understanding that it would be absurd to allow state to use force on another state’s territory, which has not committed a wrongful act itself. Such an absurd approach would be a blatant violation of the principles of non-intervention and state sovereignty. It has thus consistently been held in the past that a state can only use force in self-defence against NSA on foreign territory, if there is some kind of state involvement in the armed attack. However, it can further be seen that states have maintained very different conceptions on what should be understood under sufficient state involvement.

63. The different conceptions, which can be found in state practice, can be categorized in three main groups. A first group of conceptions entail that self-defence can only be used against armed attacks by NSA, which have received active state support. Active support refers to providing support in the form of –inter alia- training facilities, weapons or tactical advice.

A second group of conceptions requires a lower threshold for the establishment of the state link. Instead of requiring active support – as the first group- this second group is already satisfied with passive state support to the NSA that has committed the armed attack. Passive support consists of knowingly harbouring terrorists or being unwilling to prevent terrorist attacks.

The third group of conceptions require an even lower threshold. According to these conceptions, it suffices for a state to be unable –even if it would be willing and trying- to prevent the NSA from committing the armed attack, to establish the state link required for self-defence.

64. Throughout the years, states have continuously based themselves on all three of these arguments. The active support criterion has always been the primary justification used by state for the use of force

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210 For an overview on state practice concerning the right of self-defence against attacks of non-state actors see Ruys & Verhoeven (n 192) 291-298.
211 Ruys & Verhoeven (n 192) 312.
212 ibid.
213 Allo (n 195) 195 195 147.
214 Ruys & Verhoeven (n 192) 292.
215 ibid.
216 ibid.
217 ibid.
218 ibid.
219 ibid.
in response to attacks of NSA. The post-Charter period marked the start of a clear trend of a widened acceptance of the other two formulas to establish the required link. Nevertheless, the active support criterion clearly remains the most widely used formula. The trend thus shows a widened acceptance of different justifications for the use of force in self-defence against armed attacks of NSA.

The dispersed state practice in combination with the fact almost none of these claims to use self-defence received wide consistent support of the international community, makes it difficult draw a clear conclusion on the precise state link needed. Although, it seems that the international community is growing warmer for the concept of the use of force in self-defence against NSA attacks, the dispersed state practice indicates that it nevertheless remains a very controversial issue, which is governed by a great amount of uncertainty.

65. This uncertainty has become even greater since the 9/11 terrorists attacks on the twin towers. The day after the attacks, the Security Council adopted Resolution 1368, which unanimously condemned the terrorist attack and also explicitly recognized the inherent right of individual and collective self-defence in accordance with the Charter. Since at the time of the adoption of this resolution it was not clear who was behind the attacks and accordingly impossible to determine whether there was any state involvement involved, it was remarkable that the Security Council already recognized the states’ right to use force in self-defence against this attack. In the weeks following this resolution, the Security Council –although it still was not clear who was behind the 9/11 attacks- adopted another resolution which reaffirmed the right to self-defence and called upon all states to prevent and conquer terrorist activities. Following these Security Council resolutions, both The Organisation of American States and NATO invoked the collective right to self-defence against the 9/11 attacks as a basis to take forcible measures.

About one month after the terrorist attack, the US launched their operation ‘Enduring Freedom’ in Afghanistan. As a legal basis the US invoked Article 51 UNC and claimed that it had the right to respond with force to the armed attack that were carried out against them on the 11th of

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220 Ruys & Verhoeven (n 192) 292 and 294.
221 Ruys & Verhoeven (n 192) 296.
222 ibid.
223 Ruys & Verhoeven (n 192) 293-294.
224 Ruys & Verhoeven (n 192) 296.
226 Ruys & Verhoeven (n 192) 297.
227 UNSC Res. 1373 (28 September 2001) UN Doc. S/RES/1373
228 Ruys & Verhoeven (n 192) 297.
September 2001. The US then indicated that it was their conviction that the 9/11 attack had been made possible by the decision of the Afghani Taliban regime to allow parts of its controlled territory to be freely used by Al-Qaeda as a base of operation. The latter statement indicates that the US relied on the passive support requirement to justify its use of self-defence on Afghani territory against the NSA, Al Qaeda. The majority of the UN Members accepted the US’s passive support justification.

66. The 9/11 attacks led to an enormous shock for the international community, which was almost forced to awareness about the dangers that NSA posed. As a result states adopted several new Security doctrines, which all acknowledged the dangers posed by contemporary transnational terrorism and organised crime. These new doctrines further pointed out the particular complications of failed states and weapons of mass destruction.

A number of authors and states held that the state- and UN practice in the aftermath of the 9/11-attacks, indicated a change of the customary law rule on self-defence in response to NSA. According to these states and authors, the prerequisite of state involvement for the acceptability of self-defence against terrorist attacks has or should be discarded. These authors argue that the requirement of the state link is too restrictive to allow states to effectively defend themselves against the increasingly occurring phenomenon of transnational terrorism. Several states have explicitly stated that they believe that the right to self-defence allows for self-defence against terrorists - or that the right should be rewritten so as to allow self-defence against terrorists, regardless of state involvement.

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231 Ruys & Verhoeven (n 192) 297; Gray (n 175) 604; Only Iran and Iraq challenged the legality of the American operation ‘Enduring Freedom’

232 Ruys & Verhoeven (n 192) 297; Allo (n 195) 195 195 148.


234 ibid; Ruys & Verhoeven (n 192) 298.

235 Allo (n 195) 195 195 148 ; and Ruys & Verhoeven (n 192) 298.

236 Ruys & Verhoeven (n 192) 297-299.

237 Ruys & Verhoeven (n 192) 298. These states include the US (see its NSS 2002), Australia and Russia.
67. However, many other authors disagree with the position to discard the prerequisite of state involvement and do not follow the view that the 9/11-attacks and the events in its aftermath, established a change in customary international law. These authors warn for serious alterations of the rules relating to the use of force on the basis of a single catastrophic event, such as the 9/11-attacks. They point to the fact that it needs to be kept in mind that the rules relating to the use of force form the cornerstone of our international stability and that, hence, changing its provisions should only be done following careful deliberation or a long and consistent change in state practice.

In casu however, the practice of the US cannot be considered consistent. Whilst at first the US argued that the right to self-defence allows for defence against attacks of NSA regardless of state involvement, the US eventually invoked the passive support of the Taliban regime as a state link between Afghanistan and Al Qaeda, to justify their operation ‘Enduring Freedom’. Furthermore, these authors point out that the UN resolutions following the 9/11-attacks cannot be considered as state practice that convincingly shows that the international community no longer requires state involvement. Both resolution 1368 and 1373 are unmistakably ambiguous by on the one hand recognizing the inherent right of self-defence in accordance with the Charter, but on the other describing the 9/11-attacks as a threat to international peace and security and thus not as an armed attack—which is in principle a prerequisite for the Charter’s right to self-defence. Moreover, this reference to the inherent right of self-defence was done in the preamble and not in the operative part of the resolutions, which has binding power. Additionally, it is interesting to point out the Council’s reaction to terrorist attacks that occurred after 9/11. In the post 9/11-era, the Council consistently rigorously condemned the terrorist attacks as threats to peace and security, but remained silent on the possibility of self-defence in response. It thus seems that the council is rather hesitant in proclaiming an absolute right of self-defence against attacks of NSA.

Because of the reasons set out above and the fact that previous state practice has consistently upheld the need for a certain amount of state involvement, the author of this thesis is not convinced that the 9/11-attacks changed the traditional approach of international law to self-defence against NSA in such a drastic way that self-defence is now acceptable against all attacks by NSA regardless of state involvement.

238 Allo (n 195) 195 195 148.
240 Ruys & Verhoeven (n 192) 312.
241 Ruys & Verhoeven (n 192) 311.
242 Ruys & Verhoeven (n 192) 312.
243 ibid.
244 ibid; These more recent terrorist attacks are –inter alia- the attacks in Bali, Madrid and Beslan.
245 Ruys & Verhoeven (n 192) 312.
246 ibid.
involvement. Instead, the author believes that contemporary international law still only allows for self-defence against attacks of NSA, provided that the attack had some degree of state involvement. Accepting the opposite could all too easily lead to an escalation of violence between states.

68. Since state practice does not provide a conclusive answer on the precise amount of state involvement required, this thesis will try to find guidance in another field of law: the law of state responsibility. Some authors have chosen this approach, which consists of applying the principles of the law of state responsibility to the rules relating to the use of force, to establish the required state link between the attack of a NSA and a state, necessary for the legality of the use of force in self-defence against NSA. 247 The ICJ has followed the same approach – applying the principles of state responsibility to determine the required state link- in its advisory opinion on the legality of the construction of a wall in Palestine, and its judgment on the territory of Congo. 248 The following section will examine the possibility of applying the attribution-mechanism of the law of state responsibility to the rules relating to self-defence.

B. STATE LINK BASED ON THE LAW OF STATE RESPONSIBILITY: ATTRIBUTION OF CONDUCT OF NON-STATE ACTORS TO STATES

69. The provisions of state responsibility are secondary rules of international law, which stipulate the general requirements for States to be held responsible under international law for acts or omissions, and the legal effects thereof. 249 Under the rules of the law of state responsibility, an act or omission of a state will lead to state responsibility provided that two conditions are met. 250 First, there must have been an internationally wrongful act. Second, the wrongful act must be attributable to the State. 251 The law of state responsibility further provides a number of circumstances precluding wrongfulness, which clears a normally unlawful act of its illegal character.

247 See e.g.: Stahn (n 239) 216-228; and D. Brown ‘The Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defence and Other Responses’ (2003) 11 Cardozo Journal of International and Comparative Law, 4-17.


251 ARSIWA (n 250) Article 2.
In the past it has been wrongly held by some scholars\(^{252}\) that the principles of state responsibility have no bearing on the rules on the use of force.\(^{253}\) However, it can be deduced from a number of arguments that the principles on state responsibility do have a bearing on the rules on self-defence.\(^{254}\)

First, as indicated, the rules of state responsibility are secondary rules of law. Secondary rules of law define the conditions and consequences of breaches of primary law. The rules on state responsibility set out when a state can be held responsible for the violation of a primary rule of international law, unless the primary rule has a specific regime to establish state responsibility.\(^{255}\) Since, the rules on the use of force are primary rules of international law, which do not have a specific regime of state responsibility, the law of state responsibility will govern every breach of its provisions.

A further argument is that state responsibility’s attribution-mechanism, which determines when a particular act is considered an act of a State, is of critical importance to determine which state was responsible for an armed attack.\(^{256}\) Another argument indicating the relevance of the law of state responsibility on the law of self-defence is that the ILC derived the content of its Article 8 ARSIWA from the Nicaragua judgment of the ICJ, which specifically dealt with the primary rules on the right to self-defence.\(^{257}\) Consequently, because of these reasons it can safely be held that the rules of state responsibility have a bearing on the rules regulating the use of force.\(^{258}\)

**STATE RESPONSIBILITY FOR THE ACTS OF PRIVATE ACTORS**

This section will now examine under which conditions the principles of state responsibility can establish a state link between a terrorist attack and a State. As a principle, the law of state responsibility is very restrictive on attributing conduct of private actors to a state. The general rule is that only the acts of official state organs, which are acting in their official capacity, are attributable to states.\(^{259}\) Hence, following the general rule, act of private actors are not attributable to states. Nevertheless, the law of state responsibility has provided for two exceptions to this rule.

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\(^{253}\) Example of an author that purports that the principles of state responsibility are relevant in the rules on the use of force: L. Condorelli ‘The Imputability to States of Acts of International Terrorism’ (1989) 18 Israeli Yearbook on Human Rights, 240.

\(^{254}\) *Ruys & Verhoeven* (n 192) 299.

\(^{255}\) *ARSIWA* (n 250) Article 55; *Ruys & Verhoeven* (n 192) 300.

\(^{256}\) *Ruys & Verhoeven* (n 192) 299.

\(^{257}\) *Commentaries on the Draft Articles* (n 249) 83, para 105-107.

\(^{258}\) *Ruys & Verhoeven* (n 192) 300.

\(^{259}\) See *ARSIWA* (n 250) Article 4 and 7.
72. The first exception can be found in Article 8 ARSIWA which sets out that:

“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.”

This provision thus refers to two possible scenarios, which can attribute the act of a private actor to a state. The first is the scenario in which a person or group is acting on the specific instructions of the state to act in a certain way. This method of attribution is widely accepted and is not dependent on any further requirements. Hence, in case a state gives specific instructions to a person or group to act in a certain way, the act of the person or group in execution of those instructions will be attributable to the instructing state.

The second is the scenario in which a state has direction or control over a person or group. In such situation, the state will be responsible for the wrongful acts committed by the person or group whilst it is under its direction or control. This scenario is not so straightforward to apply as the ‘instruction-scenario’, because here there can be discussion on the required amount of direction and control for attribution.

The generally favoured approached of the ICJ is the ‘effective control’ test, which was introduced with the Nicaragua-judgement and later applied by the ICJ in several cases. The ‘effective-control’ test sets a high threshold which can only be reached by a high level of control over the person or group and active state involvement in the form of instructions, direction or control over the specific wrongful act. On the basis of this test, a state can be held responsible for a certain conduct of NSA when this conduct was an integral part of the operation directed or controlled by the state. Accordingly, conduct that is only incidentally associated with an operation directed or controlled by the state, shall not lead to state responsibility. A state exercises effective control over an armed attack of a NSA when it is involved in the planning of the attack, the choosing of the targets, provides operational support and gives specific directives and instructions.

\(^{260}\) ARSIWA (n 250) Article 8.

\(^{261}\) Ruys & Verhoeven (n 192) 300.

\(^{262}\) ibid.

\(^{263}\) Nicaragua Case (n 7) para 115; Wall Advisory Opinion (n 248) para 139; Territory of Congo (n 248) para 146; and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgement) [2007] ICJ Rep 43, paras 384, 391, 400 and 401. (‘Genocide Case’)

\(^{264}\) Ruys & Verhoeven (n 192) 300; and Commentaries to the Draft Articles (n 249) 104, para 2.

\(^{265}\) ibid.

\(^{266}\) Nicaragua Case (n 7) para. 112.
The more flexible “overall control-test” applied by the ICTY in the Tadic case\textsuperscript{267} to determine whether acts performed by ‘organized and hierarchically structured groups’ are attributable to the state- is no longer considered appropriate to establish state responsibility. This test set out, that a state could be held responsible for the acts of private groups over which it had ‘overall control’ beyond the mere financing, training or equipping.\textsuperscript{268} The ICTY has a limited competence to establish individual criminal responsibility and thus cannot establish state responsibility. The ICTY applied this test in the Tadic-case to determine whether the conflict in Yugoslavia constituted an international or non-international armed conflict. Furthermore, the ICJ rejected and criticised this test to establish state responsibility in its Genocide-case because it “stretched too far the connection which must exist between the conduct of a State’s organ and its international responsibility.”\textsuperscript{269} Consequently, it can be concluded that the appropriate test to determine whether the conduct of a NSA can be attributed to a state under Article 8 ARSIWA is the effective control-test.

73. The second exception provided by the law of state responsibility can be found in Article 11 ARSIWA:

\begin{quote}
"Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."\textsuperscript{270}
\end{quote}

The threshold of this Article is so high that it is only rarely successfully invoked.\textsuperscript{271} Conduct of an individual or group will only be considered attributable to a state –on the basis of this Article- when both requirements are fulfilled cumulatively: acknowledgement and adoption.\textsuperscript{272} A state thus needs to have explicitly acknowledged and adopted the conduct as conduct of its own, factual acknowledgment, approval or endorsement will not suffice to fulfil this criteria, the state must really identify itself with the conduct of the NSA.

\begin{flushleft}
\textsuperscript{267} Prosecutor v Tadic ICTY-94-1-A (judgment in Appeals Chamber) (15 July 1999) 38 ILM 1518, para 137.
\textsuperscript{268} ibid; Ruys & Verhoeven (n 192) 301.
\textsuperscript{269} Genocide-case (n 5) para. 406 ; Chapter 2 (n 1) 22.
\textsuperscript{270} ARSIWA (n 250) Article 11.
\textsuperscript{271} For a rare case in which this Article was succesfully invoked see: United States Diplomatic and Consular Staff in Teheran (United States v Iran) (Judgment) [1980] ICJ Rep 3, para 74.
\textsuperscript{272} Ruys & Verhoeven (n 192) 301 ; Tsagourias (n 204) 334.
\end{flushleft}
STATE RESPONSIBILITY IS NOT THE ONLY METHOD TO ESTABLISH THE STATE LINK REQUIRED FOR ACCEPTABLE SELF-DEFENCE AGAINST ATTACKS OF NON-STATE ACTORS

74. Although it thus has been shown that the law of state responsibility certainly has some bearing on the law relating to the use of force, the criteria of the law of state responsibility should not be applied objectively on concepts of the rules relating in to the use of force.\(^{273}\) It needs to be kept in mind that the law on state responsibility and the laws relating to the use of force have different rationales.\(^{274}\) Whilst the law on state responsibility governs the legal consequences of violations of international law, the rules related to the use of force prescribe the situations and conditions for the lawful use of force.\(^{275}\) Whilst it is logical that when an attack, which was committed by a NSA, is attributable to a state, the victim state also has the right to use force in self-defence against that responsible state, the opposite is not necessarily true. When a state has the right to use force against an attack, which was committed by a NSA on foreign territory, it not necessarily follows that the ‘territorial state’ can be held internationally responsible for the attack of the NSA. The threshold for state responsibility will inevitably be higher than the threshold for the use of force in self-defence.

If we were to accept the idea that states can only use self-defence against attacks of NSA for which a state can be held internationally responsible, this would mean that states can only use self-defence against acts of NSA which meet the high thresholds of Article 8 or 11 ARSIWA. Such an approach would make it nearly impossible for states to defend themselves against attacks of NSA.\(^{276}\) First, it is highly unlikely that a state would acknowledge and adopt an attack of a NSA as its own.\(^{277}\) Second, although not impossible, it is quite rare for a state to be in effective control of acts of NSA. States are generally more indirectly involved in acts of NSA by providing them assistance, training, financial and logistical support, which is not sufficient to constitute effective control.\(^{278}\) Accordingly, following the approach that self-defence against NSA is only acceptable against such attacks for which state responsibility can be established, would in practice lead to the near powerlessness of states against attacks of NSA.

75. The ICJ made clear in its Nicaragua-decision that self-defence was no limited to those situations in which a state can be held responsible for an armed attack, but also exists in situations where there is a mere substantial involvement of a state in the actions of NSA.\(^{279}\) Instead of relying on the rules of state

\(^{273}\) Tsagourias \((n\ 204)\ 333.\)
\(^{274}\) ibid.
\(^{275}\) ibid.
\(^{276}\) Ruys & Verhoeven \((n\ 192)\ 313.\)
\(^{277}\) ibid.
\(^{278}\) ibid; Nicaragua Case \((n\ 7)\ \) para 115.
\(^{279}\) Ruys & Verhoeven \((n\ 192)\ 303 ;\ \) Nicaragua Case \((n\ 7).\)
responsibility, the court established the required state link by relying on the definition of aggression of the General Assembly:

‘Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition’  

Article 3 of the annexed list to the UNGA Definition of Aggression listed which acts qualified as aggression. The ICJ referred to Article 3(g) specifically as an indication of how a state could commit an act of aggression through acts of a NSA. Article 3(g) set out that the following act qualifies as an act of aggression:

‘The sending by or on behalf of a state or armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein shall’

Does this act of aggression as set out in Article 3(g) also constitute an armed attack? The first part ‘the sending by or on behalf of a state’ sets out a similar threshold as the effective control requirement required for state responsibility. Most states that send NSA to carry out an armed attack, will have effective control over the attack, thus meet the threshold of Article 8 ARSIWA and can be held responsible for the armed attack. Hence, the sending of a NSA to commit an armed attack can be considered an armed attack committed by the ‘sending state’. Accordingly, the first part of Article 3(g) -the sending of a NSA to commit an armed attack- constitutes of an armed attack.

Whether, the substantial involvement in the armed attack of a NSA also suffices, as a sufficient link to constitute an armed attack in the sense Article 51 UNC is less obvious. A state that is substantially involved in an armed attack committed by a NSA is not likely to meet the effective control threshold required for state responsibility. Nevertheless, by being substantially involved in an armed attack of a NSA, the state will have committed an act of aggression under the UNGA Definition of Aggression. However, an act of aggression is not the same as an armed attack, the

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280 UNGA Definition on Aggression (n 141) Article 1.
281 UNGA Definition on Aggression (n 141) Article 3 (g).
282 Ruys & Verhoeven (n 192) 302.
283 ibid.
284 ibid.
285 ibid.
drafters intentionally used these two different terms. The term act of aggression is a wider term than armed attacks and includes -next to armed aggression- economic and ideological aggression. The term armed attack solely refers to acts of armed aggression. By using these two terms, the drafters of the Charter intended to limit the right to self-defence to armed aggression, this way excluding economic and ideological aggression. Only the gravest forms of aggression constitute an armed attack. In sum, the substantial involvement of a state in an armed attack of a NSA, is an act of aggression but does not constitute that state’s responsibility.

In its Nicaragua judgment the ICJ explicitly held that substantial involvement of a state in an act of armed force of a NSA could constitute an armed attack. By doing so, the ICJ made clear that an armed attack of a state does not only consists –as traditionally accepted- of a significant direct use of force by one state against another, but also of the act of aggression as set out in Article 3(g) of the UNGA Definition of Aggression. Accordingly, it declared that the sending by or on behalf of a state of armed bands, militias and the like to carry out armed actions when such activities are comparable in scale and effects to a conventional armed attack carried out by regular forces, or its substantial involvement therein, also constitute an armed attack in the sense of Article 51 UNC

76. Based on the overview of state practice, the approach of the ICJ and the possible consequences of limiting the right of self-defence against acts of NSA to only those acts for which states can be held responsible under the principles of state responsibility, the author must conclude that such an approach should not be attained. Therefore, instead of applying the principles of state responsibility as an exhaustive set of rules on the law relating to the use of force, the rules on state responsibility should be seen as an additional method to establish the required state link for self-defence against attacks of NSA.

C. STATE LINK BASED ON THE SUBSTANTIAL-INvolVEMENT CRITERION

77. It is clear from the overview of state practice and ICJ jurisprudence above that contemporary international law allows for the use of self-defence against armed attacks of NSA, for which a state can be held responsible or in which a state has substantial involvement. The previous section has set out under which circumstances an act of a NSA can incur responsibility of a state. This section will now set out what should be understood under ‘substantial involvement’ of a state in the act of a NSA.

286 ibid.
287 Nicaragua Case (n 7) para 195; Gill (n 2) 122; Shaw (n 4) 1132.
288 See page 30 of this thesis.
289 Tsagourias (n 204) 333.
THE ICJ THRESHOLD OF THE NICARAGUA-CASE

78. The ICJ did not elaborate much on the concrete meaning of ‘substantial involvement’, apart from explicitly rejecting that assistance in the form of provision of weapons or logistical or other support could amount to an armed attack.\(^{290}\) The Court thus rejected the idea than an armed attack – short of a direct attack by the state’s regular forces- could arise without active and substantial state support.\(^{291}\) This understanding of substantial involvement sets out a high threshold, which implicitly rejects self-defence in response to armed attacks of NSA which received passive support of a state or which the state was unable to prevent.

79. Scholars heavily criticized the court’s view on the amount of state involvement needed to constitute an armed attack.\(^{292}\) Furthermore, several judges of the ICJ wrote Separate and Dissenting Opinions on the judgement. Whilst Judge Singh called for an even more restricted approach, in which even regular and substantial arm supplies would not amount to an armed attack,\(^{293}\) Judge Schwebel and Jennings criticised the courts approach as being already too restrictive on states’ right to defend themselves.\(^{294}\) Judge Schwebel argued that financial and logistical support should also be understood as ‘substantial involvement’.\(^{295}\) He further opposed the Court’s complete exclusion of the provision of arms from the understanding of substantial involvement, as he argued that the provision of arms, in combination with other kinds of state involvement, could constitute and important element in what might amount to an armed attack.\(^{296}\) Judge Schwebel found it difficult to understand what could constitute an armed attack –short of a direct attack by the state’s regular forces- on the basis of substantial involvement, if logistical or other support is excluded.\(^{297}\)

80. Although the ICJ did not provide much information on the understanding of substantial involvement, it can be deduced from the term ‘substantial involvement’ as well as the wording of the judgement, that passive support cannot be considered as ‘substantial involvement’. Accordingly, following the ICJ’s approach would mean that a state can never use self-defence against a terrorist attack of terrorists which were tolerated yet not actively supported by their ‘territorial state’, since in

\(^{290}\) Nicaragua Case (n 7)  
\(^{291}\) Gray (n 175) 111 ; Cassese 1989 (n 199) 599.  
\(^{292}\) See : Gray (n 175) 109 ; and R. Higgins, Problems and Process: International Law and How We Use It (Oxford University Press, Oxford, 1994) 250-251. (‘Higgins’)  
\(^{293}\) Nicaragua Case (n 7) Seperate Opinion of President Nagendra Singh.  
\(^{294}\) Nicaragua case (n) Dissenting Opinion of Judge Schwebel ; and Nicaragua case (n) Dissenting Opinion of Judge Jennings.  
\(^{295}\) Nicaragua case (n) Dissenting Opinion of Judge Schwebel  
\(^{296}\) ibid.  
\(^{297}\) ibid; Ruys & Verhoeven (n) 304.
such case there was no substantial state involvement, nor can the terrorist attack be attributed to the state.

In such a case the terrorist attack can only be dealt with via law enforcement or collective measures authorized by the Security Council in case the attack is considered a threat against international peace and security. Furthermore, although the state cannot be held responsible for the terrorist attack itself, the state nevertheless might have breached its due diligence obligation to protect other states from attacks conducted by private individuals from their territory by combating the hostile use of force of private individuals against foreign states. In such cases the states is thus solely held responsible for breaching its own due diligence obligation of not protecting other states, but is not held responsible for the terrorist attack itself. Accordingly, on the basis of the ICJ jurisprudence, such cases cannot be subjugated to self-defence as a breach of the due diligence obligation does not constitute an armed attack.

81. This brings us to the final situation to be addressed. Can states respond with self-defence against terrorist attacks, which the ‘territorial state’ was incapable to prevent? This is often the case with so-called failed states, in which the state apparatus has entirely collapsed. The law of state responsibility explicitly deals with such type of situations in its Article 9 ARSIWA:

“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 exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”

On the basis of this Article, in situations in which there is no governmental authority, the conduct of individuals’ exercising elements of governmental authority will be considered an act of the state. Elements of governmental authority are tasks that under normal circumstances are the government’s tasks. Not every act of the individuals exercising governmental authority will be considered acts of states, only those acts that are of the nature governmental tasks.

Consequently, if in the absence of governmental authority, a person or group of persons start sending NSA to carry out armed attacks against another state, the attack will be attributable to the

298 Ruys & Verhoeven (n 192) 306; UNGA Friendly Relations Declaration (n 130); and for an example of a case in which this obligation was discussed see Corfu Channel (n 53).
299 Ruys & Verhoeven (n 192) 307.
300 ibid.
301 ARSIWA (n 250) Article 9.
302 Commentaries to the Draft Articles (n 249) 110-111, paras 4-5.
collapsed state, thus making it the target of actions in self-defence against the attributable attack.\(^{303}\)

Similarly, in case the person or group becomes substantially involved in such an attack of a NSA, the substantial involvement will be considered an armed attack in the sense of Article 51 and will also make the collapsed state the target of actions in self-defence.\(^{304}\)

82. The strict interpretation of substantial involvement by the ICJ -which only accepts active and substantial support but rejects passive support as well as incapability to prevent the attack, as substantial involvement- has been highly criticised. Several authors have argued that this strict approach leaves almost any room for states’ right to defend themselves against attacks of NSA.\(^{305}\)

Consequently, it has been argued that the post-Nicaragua state practice has departed from this high threshold and that contemporary international law has come to accept a broadened understanding of the concept of ‘substantial involvement’.

**A NEW BROADENED UNDERSTANDING OF SUBSTANTIAL INVOLVEMENT: AIDING AND ABETTING**

83. When examining the state practice following the Nicaragua-judgment, it can be seen that the international community has adopted a wider understanding of the concept ‘substantial involvement’ than the one purported by the ICJ in the Nicaragua-case.\(^{306}\) Several states have used force in self-defence against attacks of NSA of which the state involvement did not reach the high ICJ-threshold. Instead, these states referred to the fact that states provided military training and weapons or tolerated terrorist groups on their territory as establishing the required state link.\(^{307}\)

In the same manner, the US’s NSS declared that the US would not distinguish between terrorists and ‘those who knowingly harbour or provide aid to them.’\(^{308}\) In other words, the US will consider terrorist attacks committed by terrorists that were provided a safe haven or aid by a state, as an attack by the ‘supporting state’ against which they would not hesitate to use self-defence. What is even more illustrative, is that none of these decisions of states -to use force against NSA based on a broader understanding of the substantial involvement-requirement- was condemned by the Security Council. Conversely, most, if not all of these decisions received significant support of the international community.\(^{309}\)

This evolution in state practice can similarly found in the post-Nicaragua scholarly articles.\(^{310}\)

\(^{303}\) Ruys & Verhoeven (n 192) 308.

\(^{304}\) ibid.

\(^{305}\) Ruys & Verhoeven (n 192) 314.

\(^{306}\) ibid.

\(^{307}\) For examples of this state practice, see : Ruys & Verhoeven (n 192) 314.

\(^{308}\) NSS 2002 (n 233).

\(^{309}\) Ruys & Verhoeven (n 192) 314.

\(^{310}\) See for example : Commentary to the Charter (n 7) 801; and Gray (n 175) 604.
84. However, when broadening the understanding of substantial involvement, the international community needs to be careful not to go too far. Otherwise, the consequences could be similar to those –set out above- of getting rid of the requirement of state involvement all together.\footnote{See this thesis page 33.} Furthermore, it should not be forgotten that the fight against terrorism is primarily one that should be executed by way of law enforcement and cooperation between states.\footnote{Ruys & Verhoeven (n 192) 314.} The collective security system of the international community has been designed to limit the use of force by states to a minimum.

85. The previous paragraphs have made clear that there is a need for a reinterpretation of the concept of ‘substantial involvement’ so as to allow states to effectively defend themselves against attacks of non-states actors, whilst retaining sufficient restraints on the scenarios in which states can use force on each other’s territory.

The author has chosen to opt for the concept -proposed by Tom Ruys and Sten Verhoeven- of ‘aiding and abetting’.\footnote{Ruys & Verhoeven (n 192) 313.} This test has already been relied on, in this context of self-defence against NSA, by several states in the past and is furthermore a known concept of international criminal law.\footnote{Ruys & Verhoeven (n 192) 314.} Although it would not be wise or possible to apply the concept in a completely identical manner on the law on the use of force, international criminal law nevertheless provides a good basis to start from.

86. This new criterion of ‘aiding and abetting’ related to the law on the use of force –like the concept in international criminal law- consists of two cumulative elements.\footnote{ibid.} The first is a material element \textit{(the actus reus)}, which requires that the state has provided the NSA with practical assistance.\footnote{ibid.} This aid must moreover have substantially contributed in the commission of the armed attack. The second is a subjective element, which requires that the state as aware that its aid assisted in the commission of an armed attack against another state.\footnote{ibid.}

As such, this new criterion comprises of a much broader range of activities in support of the NSA than envisaged by the ICJ.\footnote{ibid.} Moreover, contrary to the ICJ-approach of substantial involvement, this criterion takes account of the state’s intention and the substantial contribution of the aid to the armed attack.\footnote{ibid.} As such, states cannot use force against a state that was not aware of the fact that it was contributing to the commission of an armed attack.\footnote{ibid.}

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\footnote{See this thesis page 33.}
\footnote{Ruys & Verhoeven (n 192) 314.}
\footnote{Ruys & Verhoeven (n 192) 313.}
\footnote{Ruys & Verhoeven (n 192) 315.}
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Conversely to the concept of ‘aiding and abetting’ of international criminal law, the concept in the law on the use of force does not cover moral support for an armed attack. Consequently, a state becomes the target of self-defence because it sympathises with the terrorist group that committed the attack. Accepting state involvement on the basis of moral support would overstretch the limits of the right of self-defence and create risks of escalation.

Another difference with the concept of international criminal law is that the concept of ‘aiding and abetting’ in the law on the use of force includes providing a state haven to NSA which substantially contributes to the commission of the attack. The latter requirement –contribution to the commission of the attack- excludes the activity of sheltering an individual or group so as to escape prosecution, from the concept of ‘aiding and abetting’. Nevertheless, whilst the latter activity does not allow for a response by self-defence, it does expose the ‘sheltering’ state to countermeasures, as such activity consists of a violation of the obligation aut dedere aut judicare.

87. As such, the new concept of ‘aiding and abetting’ thus allows for self-defence against attacks of NSA when there is active state support –practical assistance- as well as passive state support –providing a safe haven which knowingly contributes to the commission of the attack. However, how does the new concept deal with states that are incapable to prevent the attacks of NSA, and specifically with the so-called failed states?

Several authors have argued that states have the right to use self-defence against attacks emanating from failed states, because otherwise these failed states would form safe havens for terrorists. These authors explain that the terrorists in these states are immune to measures of law enforcement because of the lack of a government to enforce the law. These authors’ approach finds some support in state practice.

However there are also a number of interesting arguments which purport the contrary. First, it is pointed out that the state practice which supports self-defence against failing states, is mostly practice from the pre-Charter-period in which there was no general prohibition on the use of force. The few examples of supporting state practice of the post-Charter period was either condemned by the Security Council or received only little support of the international community. Therefore, it is

321 ibid.
322 ibid.
323 ibid.
324 Ruys & Verhoeven (n 192) 317.
325 ibid.
326 See : Commentary to the Charter (n 7) 802 ; M. Bothe ‘Terrorism and the Legality of Pre-emptive Force’ (2003) 14 EJIL 3, 233. (‘Bothe’)
327 See : Ruys & Verhoeven (n 192) 317.
328 Ruys & Verhoeven (n 192) 317.
329 ibid.
argued that it can not be held that there is wide state practice which supports self-defence in response to attacks emanating of failed states. Secondly, the argument –put forward by the supporters\textsuperscript{330} of self-defence against attacks emanating from failed states- that failed states are not protected by the prohibition on the use force, is manifestly incorrect.\textsuperscript{331} It is true that international law solely protects sovereign states and territories with the prohibition on the use of force and thus allows states to use self-defence against attacks emanating from territories that are not under the sovereignty of any state. However, although a failed state has lost any governmental authority and control over its territory and inhabitants, it maintains its sovereignty.\textsuperscript{332} Factual loss of authority and control does not affect a state’s legal title on its territory, nor does it change its rights and obligations in its relation with the international community. Accordingly, a failed state remains to enjoy the protection of the prohibition on the use of force and the principle of non-intervention.\textsuperscript{333} The only possible -limited- exception to this rule can be found in Article 9 ARSIWA, which deals with acts by NSA in the absence of governmental authority.\textsuperscript{334}

On the basis of these arguments, this thesis concludes that failed states should not be treated differently than ‘normal states’. The author is convinced that the ‘aiding and abetting’ test allows states sufficient margin to defend itself. Furthermore, it would not be correct to ‘punish’ states by using force against them in self-defence for not being able to prevent NSA in its territory from committing armed attacks. Such an approach would only further isolate failing states from the rest of the international community and would make the already failing government even weaker and thus more incapable of preventing future attacks.\textsuperscript{335} Instead, it would be better to address these violent NSA by cooperative law enforcement. Such cooperation’s would ideally be organized by the Security Council’s Counter-Terrorism Committee.\textsuperscript{336} It would furthermore be advisable to assist failing states – provided that they consent to this- in preventing future attacks of NSA on its territory. This can be accomplished by ‘capacity building’ programmes which aim at strengthening the national law enforcement and judicial institutions.\textsuperscript{337}

\textsuperscript{330} See : \textit{Bothe (n 326) 233.}
\textsuperscript{331} \textit{Ruys & Verhoeven (n 192) 318.}
\textsuperscript{332} \textit{ibid.}
\textsuperscript{333} \textit{ibid.}
\textsuperscript{334} See this thesis page 42.
\textsuperscript{335} \textit{Ruys & Verhoeven (n 192) 319.}
\textsuperscript{336} \textit{ibid.}
\textsuperscript{337} \textit{ibid.}
D. Conclusion: Self-defence Against Terrorist Attacks is Acceptable Provided the Existence of a Sufficient State Link: Attribution or Aiding and Abetting

88. As has been shown above, traditional international law and a majority of the ICJ have consistently held that a state can only use force in self-defence against an armed attack of a NSA on foreign territory, if there is some kind of state involvement in the armed attack. The international community has furthermore purported different possible formulas to define the required link between the state and an armed attack by a NSA, to constitute an indirect military aggression against which the victimized state can use self-defence.

Some authors have argued that self-defence against attacks of NSA should only be accepted if the attack could be attributed to the state following the principles of state responsibility. Others have taken the other extreme position and purported that self-defence should be acceptable against all attacks of NSA, regardless of any state involvement. The previous sections have indicated that none of these extreme positions can be maintained.

89. Consequently, this author will follow a more nuanced approach. The author strongly holds on to the requirement of a state link as she considers the consequences of getting rid of this requirement too treacherous. Allowing states to use force in self-defence against any attack of NSA, regardless of a state link, would open the world up to constant interference of states on each other’s territory, which would inevitably lead to serious international disagreements and conflicts threatening international peace and security.

However, this thesis will not go so far as to purport that the required state link can solely be established on the basis of attribution following the principles of the law of state responsibility. This thesis acknowledges the usefulness of the law of state responsibility to establish such a link, but recognizes that the thresholds for attribution under the law of state responsibility are very high. Only accepting self-defence against acts which can be attributed to the state would lead to virtually no situations in which states can use self-defence against attacks of NSA. It should not be allowed that the authors of state-sponsored terrorism can evade all responsibility and remain free of punishment, leaving the victims with the sole option to try and punish the NSA.

90. Consequently, this thesis concludes that the best approach is that states can use self-defence against a terrorist attack provided that the attack can be attributed to a state or that there is a substantial state involvement. However, in order to clearly purport that state-sponsored terrorism is unacceptable in any form, this thesis does not follow the restricted understanding of state involvement, set out by the ICJ in its Nicaragua-judgement, but instead follows the more broader understanding of ‘substantial

338 Allo (n 195) 195 195 147; Nicaragua Case (n 7); Wall Advisory Opinion (n 248); and Territory of Congo (n 248).

339 Ruys & Verhoeven (n 192) 310.
involvement’ which can be found in the post-Nicaragua state practice. Accordingly, this thesis will follow the approach that substantial state involvement is established as soon as a state has ‘aided and abetted’ terrorists in the preparation and execution of the armed attack.\textsuperscript{340}

In this manner, this thesis concludes that contemporary international law allows states to use self-defence against attacks of NSA – apart from the situations in which the attack can be attributed to the state- which received active or passive support of its ‘territorial’ state. At the same time, this indicates that contemporary international law does not allow for states to use self-defence against armed of NSA located in a state, which was incapable to prevent the attack. In this manner, international law chooses not to injure a state that is already so fragile that it is incapable of controlling its territory and chooses to address the violent NSA in such states by cooperative law enforcement.

91. In sum, this thesis concludes that a state can use self-defence against a terrorist attack provided that the attack can be attributed to a state or that there is a substantial state involvement in the form of aiding and abetting. In practical terms this means that states can only respond with self-defence to a terrorist attack when the ‘territorial state’ had effective control over the terrorist attack, acknowledged and adopted the terrorist attack as its own conduct, or aided and abetted the terrorist in committing the attack.

\textsuperscript{340} Nicaragua Case (n 7) para 195.
2. **RATIONE TEMPORIS – IS ANTIMATORY SELF-DEFENCE ACCEPTABLE?**

92. In many works the different concepts, relating to the temporal scope of self-defence, are confused or wrongly used as synonyms, making a discussion on the topic even more confusing. Therefore, before commencing this discussion it is important to ensure that everyone is talking about the same thing. The term ‘preemptive self-defence’ or ‘preemptive action’ will be used to denote use of force in response to imminent, inevitable threats of armed attack, which are in progress or at the point of being launched. Those acts in preemptive self-defence against attacks which have been launched yet but have not reached their target – in other words against attacks in progress - will be referred to as ‘interceptive self-defence’. ‘Preventive self-defence’ or ‘preventive action’ will indicate use of force in response a probable threat of an armed attack at some indeterminate point in the future, such a threat is still in its early stages of development and has not become imminent yet. Finally, the term ‘anticipatory self-defence’ or ‘anticipatory action’ will be used as the broader term containing both preventive and preemptive action. The force used in response after an actual attack occurred will be called reactive self-defence. If and when these can be considered legitimate in international law will be discussed in this work. None of these terms will be used to refer to action undertaken in response to the mere possibility of an attack at some indeterminate point in the future resulting from a threat that has not yet manifested itself in any substantial sense.

93. Firstly it needs to be pointed out that there is no discussion on the legality of the “reactive right to self-defence” i.e. force used in self-defence in response to an actual attack. It is generally accepted that this forms the core and inherent part of the right to self-defence. Therefore, the legality of this narrow “reactive” self-defence needs not be discussed here. Contrary, mere uncertainty remains on the legality of the broader right to self-defence. It is not clear if the right to self-defence extends to use of force in response to imminent threats or even to mere possible attacks. The question left to discuss here is: “does the right to self-defence entail anticipatory self-defence?”

Although some scholars and international lawyers\(^\text{341}\) oppose any notion of anticipatory self-defence, prior to the actual launching of an armed attack, most scholars\(^\text{342}\) that have discussed this question and most states have agreed on the possibility of some degree of anticipatory self-defence. These scholars and states accept anticipatory self-defence which stays within the strict limits of the Caroline-criteria, thus in response to an immediate and manifest threat of an attack, the so-called preemptive self-defence.\(^\text{343}\) Conversely, scholars are less in agreement on the permissibility of self-defence in response to potential threats of an attack at some indeterminate point in the future, the so-

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\(^{341}\) See e.g. Brownlie (n 13) 275-278; and Bothe (n 326) 227-240.

\(^{342}\) See e.g. Greenwood (n 19) 7-38; and Bowett (n 50) 185-186.

\(^{343}\) Gill (n 2) 113 and 115.
called preventive self-defence. Furthermore, since the terrorist attacks of 9/11, certain scholars have formed yet another theory on the scope of permissible anticipatory self-defence. This last group suggest that anticipatory self-defence can also be justified outside of the Caroline criteria, to counter threats, which are not immediate and manifest, but more remote in the future.

94. It would be hard to overstate the importance of the debate on the legitimacy of the anticipatory use of force. Allowing a wide exception of the prohibition on the use of force could not only set open the door to dangerous misuse, but even if used correctly, it would pose a great threat to international peace and security as any exception to the prohibition of force. It needs to be kept in mind that every exception to a rule contributes to uncertainty and loopholes. The starting point for the discussion on the temporal scope of the right to self-defence is the interpretation of the relation between the customary and treaty norm.

A. EFFECT OF ARTICLE 51 UN CHARTER ON THE RIGHT TO SELF-DEFENCE

95. An important point of examination in this discussion of this thesis will be the difference between the scope of the customary and the treaty-norm of the right to self-defence. According to some scholars, the customary norm may include the right to use force in response of an imminent and even remote threat, whilst the statutory norm – which can be found in Article 51 of the UN Charter- does not explicitly allow or exclude anticipatory self-defence and consequently leaves open a lot of room for discussion.

96. Under the Customary right, once a state could demonstrate that the force they used in self-defence was in proportion to the threat and in response of to imminent use of force of another state, which could not be forestalled by anything but force in self-defence the use of force in self-defence was accepted under international law. In the pre-UN Charter, it was generally accepted that the Caroline-criteria set out the scope of permissible anticipatory self-defence. This is demonstrated by the judgments of the International Military Tribunals in Nuremburg and Tokyo on the 1940 German invasion of Norway and the Declaration of War by the Netherlands against Japan following the

344 Gill (n 2) 113.
345 See e.g. Sofaer A. ‘On the Necessity of Pre-emption’ (2003) 14 EJIL 2, 209-226. (‘Sofaer’)
346 Gill (n 2) 114.
347 Gill (n 2) 114, note 3.
348 Gill (n 2) 114.
349 As introduced briefly above on page 15.
attack on Pearl Harbour, which both relied the Caroline-case as a precedent and thus accepted some degree of anticipatory action.

The customary right to self-defence included a limited anticipatory self-defence but did not go so far to accept every form of anticipatory self-defence. It was the imminence requirement that clearly excluded use of force in preventive self-defence and thus limited the legitimate forms of anticipatory self-defence to those in preemptive self-defence. When a state could demonstrate necessity – that another state was about to engage in an armed attack, which could only be forestalled by use of force in self-defence- and proportionality, the anticipatory self-defence was acceptable. It is clear that this customary right allows for preemptive self-defence -force used in response to an imminent, unavoidable threat. However, whether the customary right allows for preventive self-defence remains debatable. The precise scope of the accepted anticipatory action under the customary right of self-defence will be discussed later.

97. As set out above, there remains debate among scholars on the effect of the codification of the right to self-defence –in Article 51 UNC- on the customary norm. This section of this thesis will provide an overview of the arguments put forward by the two main schools of opinion on the matter and will conclude on which school this thesis will follow.

RESTRICTIONISTS’ SCHOOL

98. A first group of scholars –‘the restrictionists’- are of the opinion that Article 51 UNC sets out a new, updated rule that replaces the older custom and thus changed the International rule of self-defence. This group reaches this conclusion based on the following arguments. Firstly, the restrictionists base themselves on the widely accepted doctrine of interpretation of sources, which sets out that exceptions to general rules need to be interpreted restrictively. Accordingly, the right to self-defence, being an exception to the general prohibition on the use of force, needs to be interpreted restrictively and in accordance with the philosophy of the Charter and its other Articles. In this regard, the restrictionists put forward that the Charter’s main intention was to maintain international peace and security by limiting the states use of force. Accordingly, the right to self-defence, as an exception to the general prohibition needs to be interpreted restrictively in accordance with its wording. Accordingly, in line with the textual interpretation-method, the restrictionists conclude that the

353 Bowett (n 50) 141-144.
354 Restrictionist authors include: Brownlie (n 13) 271-272 ; Gray (n 175) 98-99; Shah (n 65); and A. Cassese, International Law (Oxford University Press, Oxford, 2005) 245-255. (‘Cassese 2005’)
355 Arend (n 40) 92.
356 For more information on the general doctrine of the interpretation of sources see e.g. Shaw (n 4) 932-938.
357 Gill (n 2) 116.
358 An interpretation based on the actual and literal wording of the law.
wording of the provision of self-defence ‘if an armed attack occurs,’ intended to limit the right to self-defence explicitly to those circumstances in which an armed attack has occurred.\(^{359}\) The restrictionists argue that the term ‘armed attack’ has a reasonably clear meaning and thus necessarily rules out anticipatory self-defence.\(^{360}\)

99. Another argument put forward by the restrictionists is that allowing anticipatory self-defence entails a considerable risk. It is generally know that any exception to a rule almost certainly –if not inevitably- generates loopholes, which enable misuse. These potential loopholes can and probably will be exploited by rogue nations as an excuse to use force more regularly.\(^{361}\) Determining if there is an immediate threat obviously is more difficult than verifying if there has been an actual armed attack. This is because the occurrence of an armed attack generally provides clear, physical and obvious evidence whilst evidence of a threat will usually be of subjective and hypothetical nature.\(^{362}\) It is not unimaginable that one states perceives a threat to be imminent whilst another deems it merely possible/avoidable by other peaceful means. The restrictionists are convinced that allowing pre-emptive self-defence will create this slippery slope on the thin line between the illegitimate preventive and legitimate pre-emptive self-defence and will thus form a threat to international peace and security.

100. Based on these arguments the restrictionists hold that the former broader customary rule of self-defence has been replaced by the more limited rule set out in Article 51 UNC. These restrictionists thus hold that international law does not allow for any type of anticipatory action from the time of the introduction of the UN Charter.\(^{363}\) In other words, these scholars conclude that a state can only use force in self-defence when it has already been subjected to a clear, armed attack by another state and cannot take any forcible measures against looming attacks.\(^{364}\) However, such a conclusion goes against the basic idea of the inherent, natural right of self-defence, being that no one can be expected to passively undergo an armed attack as a sitting duck. Furthermore, the restrictionists seem to ignore the drafting history of Article 51 UNC, which shows that the provision was never intended to codify the customary right in an exhaustive manner.\(^{365}\) Moreover, following the restrictionists’ theory would lead us to have to rely on the ambiguous and incomplete provision of Article 51, which remains silent on most of the criteria for the right to self-defence.\(^{366}\) In the opinion of the author of this thesis, it is

\(^{359}\) Arend (n 40) 92.

\(^{360}\) Brownlie I., Principles of Public International Law (Oxford University Press, Oxford, 2006) 700. (‘Brownlie Principles of PIL’)

\(^{361}\) Kaufman (n 81) 23.

\(^{362}\) ibid.

\(^{363}\) Arend (n 40) 92.

\(^{364}\) Brownlie Principles of PIL (n 360) 700; Kaufman (n 81) 23.

\(^{365}\) Gill (n 2) 116.

\(^{366}\) Gill (n 2) 121.
impossible to rely solely on Article 51 UNC to determine the precise criteria of, and accordingly the scope of the right to self-defence. Therefore, although some of the arguments put forward by the restrictionists are convincing, the author of this thesis is nevertheless more convinced by the counter-restrictionists’ or liberal school’s arguments and view on the effect of Article 51 UNC.

**COUNTER-RESTRICTIONISTS’ OR LIBERAL SCHOOL**

101. The more dominantly followed counter-restrictionists or liberal school rejects the restrictionists’ interpretation. These ‘counter-restrictionists’ or ‘liberals’ claim that the drafters of the Charter did not formulate Article 51 UNC with the intent to limit the pre-existing customary right to self-defence to merely anticipatory action. Instead, the drafters of the Charter solely intended to declare or crystallize a part of the already existing customary rule so as to clarify and safeguard part of the right of self-defence and thus allows for some anticipatory action.

102. The arguments formulated by the counter-restrictionists’ school for their view vary. The most important ones will be set out here. For starters, the counter-restrictionists have indicated that a norm can exist parallel in international treaty law and customary international law. The ICJ has confirmed this idea in the North Sea Continental Shelf Case. There are no grounds for holding that when a norm of international customary law is comprised identical in a norm of treaty law, the latter “supervenes” the former, nor that the customary norm has no further existence of its own. Thus, even if an area is governed by these two sources of law, which do not exactly overlap and the substantive rules in which they are framed are not identical in content, both sources remain applicable norms. It can thus not be held, as a general rule, that Art. 51 UNC automatically replaced the older customary right norm of self-defence.

103. Furthermore, these scholars have referred to the Charters travaux préparatoires, which show that Article 51 UNC was not part of the original drafts of the Charter but more of an afterthought. The travaux show that the Article was only included late in the drafting process on the insistence of the Latin-American States, who wanted to guarantee the legality of their regional self-defence arrangements. These arrangements were a collective version of the right to self-defence, which allowed for the Latin-American States to defend each other in response of an armed attack against one

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366 *Kaufman (n 81)* 24.
368 *Arend (n 40)* 92.
369 ibid.
370 ibid.
372 *Gill (n 2)* 116.
373 ibid; *Bowett (n)* 182-183.
of them on the basis of a pre-existing treaty between them or an ad hoc request.\textsuperscript{374} Furthermore, when taking a closer look at the complete set of Charter-provisions it becomes clear that Article 51 UNC was included to incorporate the pre-existing right of self-defence in the Charter system regulating the use of force.\textsuperscript{375}

104. Other arguments focus on the wording of Article 51. The counter-restrictionists argue that the reference in Article 51 UNC to self-defence as an \textit{inherent right}\textsuperscript{376} implies that the drafters of the Charter did not intend to limit the inherent pre-UN Charter customary right of self-defence which includes anticipatory self-defence in response to an imminent threat.\textsuperscript{377} Another textual argument was formulated by Judge Schwebel, American judge on the ICJ, in his dissenting opinion of the Nicaragua-decision.\textsuperscript{378} Schwebel pointed out that Article 51 does not state ‘\textit{if, and only if, an armed attack occurs}’ and thus does not explicitly limit the right to self-defence to those instances in which an armed attack has occurred.\textsuperscript{379} Lastly, scholars of the liberal-school have pointed to the fact that Article 51 UNC is silent on the substance and criteria for the right to self-defence. The Article makes no reference to what constitutes an armed attack\textsuperscript{380}, or any of the requirements: such as necessity and proportionality.\textsuperscript{381} As a result, where the Article is incomplete, in not specifying what constitutes armed attack, or silent, on the other requirements of self-defence, answers must be sought in the customary norm.\textsuperscript{382}

105. The General Assembly and the ICJ further affirm this idea. The General Assembly Resolution 2625XXV\textsuperscript{383} of 1970, a “declaration on the principles of international law concerning friendly relations and cooperation among states in accordance with the charter of the united nations” stated in one of the paragraphs that dealt with the prohibition of the use of force that the General Assembly considered the right to self-defence as an exception to the prohibition of force “already a matter of customary international law”\textsuperscript{384}

\textsuperscript{374} Gill (n 2) 116; Dinstein (n 8) 249.
\textsuperscript{375} Gill (n 2) 121.
\textsuperscript{376} UN Security Council Resolutions 1373 and 1368 reiterate and reaffirm the inherent character of the right to self-defence.
\textsuperscript{378} Arend (n 40) 91; Nicaragua Case (n 7) Dissenting opinion Judge Schwebel.
\textsuperscript{379} Nicaragua Case (n 7) Dissenting opinion Judge Schwebel, para 173.
\textsuperscript{380} Gill (n 2) 121.
\textsuperscript{381} Gill (n 2) 116.
\textsuperscript{382} Gill (n 2) 117.
\textsuperscript{383} UNGA Friendly Relations Declaration (n 130)
\textsuperscript{384} Harris (n 7) 899.
In the merits phase of the Nicaragua case the ICJ pronounced:

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” of individual or collective self-defence, which ‘nothing in the present charter shall impair’ and which applies in the event of an armed attack.385

The Court then further points out that Art. 51 UNC on its own does not form a complete and exhaustive norm as it “does not go on to regulate directly all aspects of it’s content”, hereby pointing at the absence of any reference to the proportionality or necessity requirement. Therefore the ICJ concludes that Art. 51 UNC only intended to complement the customary right to self-defence.386 In fact, it can be said that the ICJ supports the liberal view, as it has never ruled pre-emptive force to be illegitimate.

106. Accordingly, the counter-restrictionists conclude that the right to self-defence cannot be solely stipulated by Article 51 UNC.387 They hold that Article 51 UNC is a mere clarification of part of the pre-existing customary rule without replacing it and that the Charter did not set out to forbid any form of anticipatory action. This school thus sets out that the customary right and statutory right exist together. Following the adagio ‘lex specialis derogat legi generali’ Article 51 UNC will only prevail those fragments of the customary norm which the Article regulates more specific.388 For instance, the Article stipulates in detail that the Security Council is the ultimate arbiter of the continued necessity of the use of self-defence.389 As a result, even though Article 51 UNC does not explicitly allow or exclude anticipatory self-defence, there remains such a right accepted under customary international law, which complements the Charter’s lex scripta.

107. This conclusion is further supported by the philosophy and idea behind self-defence. Self-defence naturally includes the right to anticipatory action. Kaufmann- a German-American philosopher- points out that self-defence is in fact inherently anticipatory as it is meant to be defensive, meant to head off

385 Nicaragua Case (n 7) para 176.
386 Shaw (n 4) 1132.
387 Gill (n 2) 116.
388 Gill (n 2) 117.
389 ibid.
harm before it occurs. The very idea of self-defence thus intrinsically involves action aimed at removing or pre-empting an immediate threat. However, Kaufmann does not accept every use of force in anticipatory self-defence. Kaufmann sets out that force used in response to possible future threats cannot be perceived as defensive in the strict sense. Instead such acts have an offensive character and cannot be considered as falling within the scope of the right to self-defence. Likewise, if we refer back to self-defence on a national internal level we can see that most national laws allow anticipatory measures. For instance, according to the domestic Belgian criminal law individuals have the right to use force in self-defence against an imminent or inevitable attack.

CONCLUSION

108. To sum up, there are two opposing school of thoughts that conflict in the following way. The restrictionists believe that allowing anticipatory self-defence would do more harm than good. They believe that the danger of misuse that would appear would exceed the added defence against terrorism and therefore accept no form of anticipatory self-defence. The liberals oppose this and are convinced that it is more dangerous to limit a state’s reaction than opening up possible misuses. Therefore, they accept the some anticipatory use of force in self-defence.

109. This thesis will follow the counter-restrictionists view on the effect of Article 51 UNC on the customary norm because of the arguments set out above. Accordingly, this thesis will proceed to answer the research question on the premises that the right to self-defence has a dual customary-Charter basis: it has a customary character and is at the same time partially embodied as a statutory norm in Article 51 UNC. The following part of this thesis will thus continue on the premises that Article 51 UNC does not exhaust cover the whole scope of the inherent right to self-defence and accordingly, that the current right of self-defence allows for some anticipatory action.

110. However, the liberal school of though remains divided on the extent of such anticipatory right. A first group of liberals accepts the legality of both preemptive and preventive self-defence. A second group of liberals does not go so far and only accepts the legality of preemptive self-defence.

B. THE OPPOSING VIEWS WITHIN THE LIBERAL SCHOOL OF THOUGHT

111. Although the liberal scholars all agree that anticipatory action is permissible under international law they diverge on how much anticipatory action is acceptable under the Caroline-criteria. The opposing views will be set out in this section.

390 Kaufman (n 81)
391 As we did before, to indicate the philosophy behind the right to self-defence. See infra page 11 of this thesis.
FIRST GROUP: ONLY LEGALITY OF PREEMPTIVE SELF-DEFENCE

112. The first group of liberal scholars, which includes Kaufmann, holds that the customary right of self-defence allows for preemptive self-defence as legally acceptable.\(^{393}\) In other words, this group accepts self-defence in response to imminent threats of armed attacks or attacks that have been already launched, but which have not reached their point of impact yet.\(^{394}\) Conversely, this group thus does not accept the right to preventive self-defence, and considers preventive self-defence as offensive and thus incompatible with the very concept of self-defence.

113. This group only accepts self-defence, which is in strict accordance with the Caroline-criteria, more specifically with the imminence criteria of self-defence. As a result, a nation must to prove the existence of an imminent threat when employing anticipatory self-defence. On that account, the fact that an attack is likely to occur will not allow for a state to use anticipatory self-defence. Anticipatory self-defence will only be considered legitimate when used in response to an imminent threat.

114. This group’s main argument is that even under customary law, self-defence remains an exception to the general prohibition and thus should be applied restrictively and in strict accordance with its requirements so as to avoid too wide loopholes.

SECOND GROUP: LEGALITY OF BOTH PREEMPTIVE AND PREVENTIVE SELF-DEFENCE

115. The second group of liberal scholars go further than the first group, by accepting both preemptive and preventive self-defence as legally acceptable.\(^{395}\) This group is again divided in the extent of preventive action they accept.

116. A first sub-group holds, albeit to different degrees, that the customary right to self-defence’s Caroline-criteria allow for anticipatory action in the face of an immediate, or at least a reasonably proximate, threat of attack which has not yet been launched, but is very likely to be launched within the near future.\(^{396}\) By also accepting self-defence against reasonably proximate threats which have not become imminent yet, this group goes beyond preemptive action. Nonetheless, this group goes not that far to accept, self-defence against threats of an attack at some indeterminate point in the future.

117. The second subgroup\(^ {397}\) of this group goes further by also accepting the legality of self-defence against mere hypothetical threats, based on a more liberal interpretation of immediacy. This ‘extreme’

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\(^{393}\) Scholars who limit their acceptance of anticipatory self-defence to incipient attacks include inter alia: Kaufman (n 81); Dinstein (n 8) 188-190.

\(^{394}\) Gill (n 2) 126.

\(^{395}\) Scholars who accept both preemptive and preventive self-defence include inter alia: Bowett (n 50) 185-186; Franck (n 94) 97; Greenwood (n 19) 13-14; Higgins (n 292)242.

\(^{396}\) Gill (n 2) 126.

\(^{397}\) For an example on an author supporting this view see e.g.: sofaer (n 345) 209.
subgroup has emerged since the attacks on the twin towers on 9/11. This group takes a very liberal approach and argues that the imminence requirement needs to be reinterpreted in the light of new circumstances including: threats posed by terrorists and rogue regimes, which might possess weapons of mass destruction. Following this more liberal reinterpretation, this group holds that self-defence would be acceptable in response to the hypothetical possibility of an armed attack at some indeterminate future moment.

It is this last opinion which is adopted by the US-government in its so-called Bush-doctrine and which was incorporated in the US’s 2002 NSS. The NSS argued that ‘the greater the threat, the greater is the risk of inaction- and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.’

“I believe it is essential that when we see a threat, we deal with those threats before they become imminent. It’s too late if they become imminent.”

(Bush Jr.)

CONCLUSION

118. Now that the opposing views have been set out briefly, the challenge of this thesis is to determine which of these views is the correct understanding of the right to anticipatory self-defence. In order to determine how wide this scope of acceptable anticipatory self-defence is, this thesis needs to locate the thin line between offensive and defensive anticipatory action by defining the elements needed for legitimate anticipatory self-defence. Therefore, this thesis will now examine the contemporary understanding of the right to self-defence under the customary norm and its criteria.

C. HOW MUCH ANTICIPATORY ACTION IS ALLOWED UNDER THE CUSTOMARY RIGHT OF SELF-DEFENCE: AN OVERVIEW OF PAST STATE PRACTICE ON ANTICIPATORY SELF-DEFENCE

119. So as indicated in the previous section, the right to self-defence has a dual customary-statutory basis. Following the well-known Caroline-criteria there can be little doubt that the customary right to

398 Gill (n 2) 126.
399 ibid.
self-defence allows for some anticipatory action.\textsuperscript{402} The original customary right of self-defence allows for self-defence within the strict boundaries of the Caroline-criteria.

120. Whether the statutory norm of Article 51 UNC does the same depends on how Article 51 UNC is interpreted. Neither the ICJ nor the UN Security Council has authoritatively determined the precise meaning of Article 51 UNC. Indeed, in the Nicaragua case, the ICJ made a point of noting that, because “the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised” the Court expresses no view on the issue. As a consequence, the language of the charter admits for different interpretations on the permissibility of anticipatory force, depending on the interpretation of the notion ‘armed attack’. However, as was shown above, it is majority of scholars hold that the Article 51 UNC does not allow for anticipatory action.\textsuperscript{403}

121. Accordingly it has been established that the anticipatory right to self-defence solely finds its basis in customary law. The scope of this right to anticipatory self-defence is determined by the Caroline-criteria, which form the boundaries of acceptable self-defence. Accordingly, this thesis will have a closer look at theses Caroline-criteria so as to determine how much anticipatory action these criteria allow. On a first view, the Caroline criteria have set out that self-defence is acceptable in response to an actual armed attack or an imminent threat of such an attack but do not seem to stipulate further how imminent such a threat or attack should be.

This section sets out to determine the exact scope of the immediacy criterion so as to determine whether the customary right to self-defence allows for self-defence in response to threats which are more remote in time than the period immediately preceding the actual launching of an armed attack, what should be understood under the period immediately preceding the actual launching and how much more remote a threat can be to allow for self-defence. Furthermore this section examine whether the contemporary understanding of ‘imminent threat’ has evolved to include mere potential threats.

122. Although the Caroline criteria, which were formulated in 1837, are still a workable and acceptable framework for analysis it is important that the framework was not articulated with the intention to be applied in isolation, as mere abstract concepts.\textsuperscript{404} Instead, the criteria need to be applied in context, in light of the relevant circumstances of each particular situation: taking into account the credibility and urgency of a specific threat, the consequences of suffering the incipient or probable attack ant the availability, or lack thereof, of feasible alternatives to the taking of action in self-defence.\textsuperscript{405} In other words, the Caroline-criteria should not be applied as a scholarly exercise, as in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{402} Gill (n 2) 121 ; Bowett (n 50) 141-144.
\item \textsuperscript{403} See page 17 of this thesis (cfr. description of armed attack requirement)
\item \textsuperscript{404} Gill (n 2) 114 and 128.
\item \textsuperscript{405} ibid.
\end{itemize}
\end{footnotesize}
applying them in a mere abstract and textual manner. Instead, the criteria need to be seen as workable and adaptive criteria which need to be interpreted and interpreted depending on the circumstances of each particular situation.

Therefore, to answer the research question of how much use of anticipatory self-defence is acceptable in combatting transnational terrorism, this thesis will have to determine the changing scope of the customary Caroline criteria under contemporary circumstances relating to threats of terrorism. As examining the contemporary understanding of a customary principle can only be achieved by looking at different illustrations of past state practice, this thesis will now discuss past state practices of the post-UN-era in which different degrees of anticipatory action were claimed or actually exercised.406

The author has chosen to discuss incidents, which were also debated in the Security Council as these debates provide a clearly traceable rendition of the states’ opinions on the matter at the time of the incidents. The discussion of each incident will include a brief description of the relevant facts and an examination of the degree of immediacy involved in relation to the nature and credibility of the potential or incipient attack, the availability of feasible alternatives to force in anticipatory self-defence, the probable consequences if no action was taken and the consequences of the anticipatory action taken.407

1962: The Cuban Missile Crisis

123. The Cuban missile crisis or October crisis was the escalation of a conflict between on the one hand Cuba and Soviet Union and on the other, the US in October 1962. The conflict is considered one of the major confrontations of the Cold War and was also known as a nuclear poker game since the crisis was the closest instance of the Cold War turning into a nuclear conflict.408

The Cuban missile crisis was the result of a steady increase in nuclear armament of both sides to the conflict. To begin with, it US had aimed their nuclear missiles - which were located in Turkey- at Moscow. The failed attempt of the US to overthrow Cuban regime in May 1962 then led the communists to secretly start placing nuclear missiles on Cuban territory with the intent to deter future American invasions. This construction of these missiles on Cuba was discovered by an Americans aircraft, which was overflying the area in October 1062. This led to the start of the Cuban missile Crisis.

The US responded to the construction of the missiles with a military blockade, which prohibited the delivery of offensive weapons to Cuba for as long as the Soviets did not dismantle the

406 ibid.
407 Gill (n 2) 129.
missile bases and return all the missiles to the Soviet Union. In response, Premier Nikita Krushchev, the general secretary of the Communist Party of the Soviet Union at the time, condemned this blockade as an 'act of aggression propelling human kind into the abyss of a world nuclear-missile war’ in a letter to President John F. Kennedy.\textsuperscript{409} Tensions increased when several Soviet ships tried to break through the blockade up to the point that the American ships got the order to open fire on the Soviet ships which did not respond to warning shots. On the 27\textsuperscript{th} of October the conflict almost escalated as the Soviets shot down an American airplane. Fortunately, the President Kennedy decided against immediate retaliations and continued with the peace negotiations. Eventually the Cuba missile crisis ended on 28\textsuperscript{th} October 1962 by the signing of an agreement between the UN Secretary General at the time Thant, President Kennedy and Premier Khrushchev.

124. The US representatives purported different legal arguments in defence of their military blockade that was set up before the Soviets had used any force.\textsuperscript{410} Although most of these arguments concerned the role of the regional organisations and their competence to authorize the use of force absent of Security Council authorization, the tense negotiations held between the US and the Soviet Union as well as the debates held in the Security Council concerning this conflict reveal different states’ opinion on the issue of anticipatory self-defence.\textsuperscript{411} These debates show that there was no clear consensus in favour, nor against anticipatory self-defence.\textsuperscript{412} The representatives which argued against the legality of the US’s decision to introduce the military blockade did not argue against anticipatory action as such, but disputed that in this case the required customary criteria for the use force in self-defence were not sufficiently satisfied.\textsuperscript{413}

As an example, the statements of the Ghanaian delegate at the time, Mr. Quaison-Sackey, indicate that the Ghanaian accepted the use of force in anticipatory action under the strict condition that the Caroline criteria were met.\textsuperscript{414} The delegate quoted the customary criteria as they were formulated by Webster in the Caroline-case: ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.’\textsuperscript{415} Thereafter, he pointed to two reasons why these criteria were not fulfilled in the case of the military blockade. The first issue was that—in the opinion of the Ghanaian delegate- there was not yet an inconvertible proof of the offensive

\textsuperscript{409} Most of the content of this letter can be found paraphrased in E. Abel, \textit{The Missile Crisis} (Lippincott, Philadelphia, 1966) 220p.

\textsuperscript{410} Arend (n 40) 94.

\textsuperscript{411} ibid.

\textsuperscript{412} ibid.

\textsuperscript{413} ibid.

\textsuperscript{414} Arend (n 40) 94 ; UNSC Verbatim Record (24 October 1962) Mr. Quaison-Sackey, UN Doc. S/PV/1024, 52. (‘UNSC Mr. Quaison-Sackey’)

\textsuperscript{415} ibid.
character of the military developments in Cuba.\textsuperscript{416} The second issue purported by the Ghanaians was that in their opinion the Cuban threat was not of such a nature as to warrant unilateral action of such a scale, without soliciting the Security Council.\textsuperscript{417}

\textbf{1967: THE SIX-DAY WAR}

125. The Six-Day War is the name of the conflict between Israel and the United Arab Republic in June 1967.\textsuperscript{418} The tensions in the Middle East increased that year by the closing of the Straits of Tiran to all traffic over sea towards the Israeli port of Eilat, the dismissal by Egypt of the UN peacekeeping force UNEFII which was stationed along the Israeli-Egyptian border, the establishment of a military alliance between Egypt and Syria and Jordan’s declaration of support for Egypt.\textsuperscript{419} Furthermore, the Egyptian President Nasser made clear in several speeches that he intended to end the existence of the state of Israel permanently by “driving the Jews into the sea.”\textsuperscript{420} In addition, the hostilities along the Israeli-Egyptian border increased, leading to the further deployment of Egyptian soldier along the border.\textsuperscript{421}

As a result, Israel was surrounded by a strong alliance of potential adversaries, which numerically outnumbered the Israeli forces.\textsuperscript{422} Moreover, Israel found itself in a hazardous geographical position, since many of the Israeli population centres were located in close proximity to the borders.\textsuperscript{423} Furthermore, the western Israeli-Jordan border lay only twelve miles from Israel’s Mediterranean coast, which left a potential risk that Israel could be divided in half when the adversaries would decide to invade.\textsuperscript{424}

This increase of tension eventually escalated to the point that Israel decided to undertake military action against the United Arab Republic on the 5\textsuperscript{th} of June, effectively starting the Six-Day War.\textsuperscript{425} Israel’s attack destroyed most of Egypt’s modern military aircrafts and air defence systems on the ground.\textsuperscript{426} In the following days, the Israeli forces broke through the Egyptian positions and advanced to the Suez Canal. Additionally, the Israeli’s advanced on the Jordanian and Syrian fronts.\textsuperscript{427}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{416} ibid.
\item \textsuperscript{417} ibid.
\item \textsuperscript{418} For a more extensive description of the facts leading to the Six-day War see: Franck (n 94) 101-102.
\item \textsuperscript{419} Gill (n 2) 134.
\item \textsuperscript{420} ibid.
\item \textsuperscript{421} ibid.
\item \textsuperscript{422} ibid.
\item \textsuperscript{423} Gill (n 2) 135.
\item \textsuperscript{424} ibid.
\item \textsuperscript{425} Arend (n 40) 94.
\item \textsuperscript{426} Gill (n 2) 135.
\item \textsuperscript{427} ibid.
\end{enumerate}
\end{footnotesize}
126. Israel justified its military action by claiming that it was acting in a pure defensive manner, in anticipation to an imminent attack by the United Arab Republic.\(^{428}\) Israel claimed that its only possibility for a chance on a successful defence and its survival as a state was to attempt to take out the Egyptian Air Force on the ground before it could attack.\(^{429}\) After six days of hostilities and numerous failed attempts by the Security Council calling on the parties -via resolutions- to accept a cease-fire without allocating the blame on either side, the parties finally agreed to a cease-fire called on by the Security Council on the 10\(^{th}\) of June.\(^{430}\)

127. The debates in the Security Council on this conflict reveal a slightly shifted approach compared to the one at the time of the Cuban missile crisis. Whilst earlier states were all quite open to the concept of anticipatory action as long as it was in conformity with the Caroline requirements, the debates concerning the Six-Day War revealed more speakers that had a negative perception of anticipatory action.\(^{431}\) A minority of states\(^{432}\) proclaimed the Israeli action as illegitimate by purporting that the first use of force is decisive for the acceptability of self-defence and thus seemed to denounce any doctrine of anticipatory action.\(^{433}\)

Nevertheless, the overwhelming majority of states remained clearly in favour of the Israeli action, perceiving it as a reasonable and lawful exercise of anticipatory self-defence.\(^{434}\) This can be concluded from a number of facts. Firstly by the fact that a draft resolution condemning Israel’s action, put forward by the Soviet Union, was supported by only four of the fifteen Security Council members.\(^{435}\) Furthermore, a similar resolution put to the vote in the General Assembly was rejected not reaching the required two-thirds majority vote.\(^{436}\) Finally, the fact that Security Council Resolution 242 concerning the general framework for an overall settlement of the conflict, which was received with wide international support, does not mention any condemnation of the Israeli action, indicates an implicit acknowledgement of the legality of the action of Israel.\(^{437}\)

\(^{428}\) Arend (n 40) 95.

\(^{429}\) Gill (n 2) 135.

\(^{430}\) Gill (n 2) 136 ; Franck (n 94) 102-103.

\(^{431}\) Arend (n 40) 95.

\(^{432}\) Including : the Soviet Union, Syria and Morocco.

\(^{433}\) Arend (n 40) 95.

\(^{434}\) Notably, as is generally the case with conflicts to which Israel is a party, Israel got support from its predictable allies: the US and the UK. However, although supporting Israel, these allies of Israel refrained from asserting any doctrine on anticipatory action and referred to other legal bases for Israel’s action. See infra, paras 81-84.

\(^{435}\) Gill (n 2) 136, note 63 ; Franck (n 94) 104.

\(^{436}\) Ibid.

\(^{437}\) Gill (n 2) 136.
128. Some authorities have argued that the wide acceptance for Israel’s action flows from the acceptance of another legal basis then anticipatory self-defence.\footnote{Gill (n 2) 137.} If this is correct, then the illustrated acceptance cannot be considered as implying a wide acceptance of the legality of anticipatory self-defence. However, it will be shown below that none of these arguments -reasoning that Israel’s action had another legal basis then anticipatory self-defence- can be upheld.

129. Some authors have argued that Israel’s action was legally based on belligerent rights in the context of an already on-going armed conflict between Israel and different states.\footnote{ibid.} Although it is true that Israel had been, since its foundation, in a technical state of war with several of its neighbouring countries, it must not be neglected that this technical state of war had been characterised by long periods without inter-state hostilities.\footnote{ibid.}

Accepting that any party to a state of war has the right to reopen hostilities at any moment he chooses on the basis of belligerent rights would be contrary to the provisions of various armistice agreements, cease-fire orders and Security Council resolutions rejecting claims of opening hostilities.\footnote{ibid.} This is similarly the case in situations of a state of war which, although not regulated by formal armistice or cease-fire agreements are characterised by a \textit{de facto} material armistice for a significant period of time. Once a cease-fire has become a \textit{de facto} material armistice, parties to a conflict are no longer free to decide on reopening hostilities.\footnote{ibid.} Consequently, since Israel’s relation with its neighbouring countries was in such a \textit{de facto} material armistice, it could not base itself on its belligerent rights for the military action taken on the 5\textsuperscript{th} of June 1967.

130. Other authors have argued that Israel acted in response to an already commenced armed attack and thus that its action was not an exercise of anticipatory self-defence but of the regular right to self-defence.\footnote{Gill (n 2) 137, note 65.} However, although this author concedes that Israel’s neighbours were undisputedly conveying hostile intents towards Israel, in their threatening speeches and the clear military preparations along the Israel border, the author firmly holds that no armed attack had been launched yet on the 5\textsuperscript{th} of June, the moment on which Israel took military action.\footnote{Gill (n 2) 138.}

These authors which maintain that Israel was acting in reactive self-defence point to the intensification of the maritime blockade, by the closing of the Strait of Tiran to all Israeli maritime
commerce, as constituting the initial armed attack by Egypt. Such reasoning, however, can only be followed by stretching the understanding of the notion ‘armed attack’ to its limit.\textsuperscript{445} Admittedly, some blockades can amount to armed attack, however partial blockades – as was the one in this case – have never amounted to that threshold in the past.\textsuperscript{446} The partial maritime blockade did not hinder Israel’s air and sea communications or strangled of local population and/or economy and thus cannot be considered to have such fare reaching effects so as to be considered an armed attack.\textsuperscript{447} Therefore, it is clear that Israel’s action of the 5\textsuperscript{th} of June cannot be considered an act of ‘regular’ reactive self-defence but instead was an act taken in anticipation of a probable impending armed attack.\textsuperscript{448}

131. Based on these considerations, it can be settled that Israel’s action of the 5\textsuperscript{th} of June was not an act of ‘reactive’ self-defence, as no armed attack had been launched yet. Although the facts indicate a threat of a probable impending armed attack against Israel in the days before the 5\textsuperscript{th} of June, at that moment there was no indication that an armed attack had been put in motion yet. Therefore, the acts of Israel on the 5\textsuperscript{th} of June are a textbook example of preemptive self-defence: anticipatory self-defence in response to an imminent threat of an armed attack which has not been launched yet.\textsuperscript{449}

132. Bearing this categorisation in mind, this thesis will now assess whether the anticipatory action of Israel respected the Caroline criteria. According to these criteria, for anticipatory action to be lawful “the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation.” Furthermore, acts taken in self-defence need to be in proportion to the threat they were taken in response of.

To begin with it is visibly clear from the facts as set out above, that the threat posed against Israel was imminent and credible, and that accordingly Israel’s action was a necessary exercise of self-defence in response.\textsuperscript{450} In the months preceding the 5\textsuperscript{th} of June, three of Israel’s neighbouring countries\textsuperscript{451} had each taken different acts, which all clearly showed their combined intention and capability to launch an attack against Israel in the near future.\textsuperscript{452} These preparations included the mobilizations of troops and the formation of a joint command.\textsuperscript{453} By making these preparations, expressing their hostile intentions and being numerically superior, the neighbouring countries had

\begin{itemize}
\item \textsuperscript{445} ibid.
\item \textsuperscript{446} ibid.
\item \textsuperscript{447} ibid.
\item \textsuperscript{448} ibid.
\item \textsuperscript{449} The majority of scholars share this conclusion. For an overview of such authors see: Franck (n 94) 104-105.
\item \textsuperscript{450} Gill (n 2) 139.
\item \textsuperscript{451} Israel, Syria and Egypt.
\item \textsuperscript{452} Gill (n 2) 139.
\item \textsuperscript{453} ibid.
\end{itemize}
posed a credible, immediate and overwhelming threat towards Israel.\(^{454}\) As the Caroline criteria only require an imminent threat, it was irrelevant that it was not entirely certain whether Israel’s neighbours would actually launch an attack or whether they were merely bluffing.\(^{455}\) The Caroline criteria do not require states to take the chance to wait and sit idly by and find out whether their adversaries, which made preparations and expressed clear threats, were just bluffing.\(^{456}\)

It is furthermore apparent that on the 5\(^{th}\) of June, Israel had no feasible alternatives left to neutralize the imminent threat than taking anticipatory military action.\(^{457}\) Israel had already undertaken several attempts to settle the situation diplomatically, without result.\(^{458}\) Limiting its action to mere preparations on its own territory would, although making its territory more resilient against the probable armed attack of its neighbours and limit the potential damage of such an attack, never effectively avert the imminent armed attack completely.\(^{459}\) Israel would be in serious disadvantage when its neighbours would launch an armed attack and would have no chance to effectively defend its territory—since, because of its geographical layout, most of its territory and cities would turn into a battle ground, unless it would act first.\(^{460}\) Therefore, Israel was left with no feasible alternatives, apart from using force in anticipatory self-defence, which could effectively neutralize the imminent threat posed by its neighbours.\(^{461}\)

Lastly, the Caroline-criteria require the action taken in self-defence to be proportionate in relation to the imminent threat faced. When assessing the circumstances, it is not so certain that the force used by Israel was in accordance with this requirement. In casu the imminent threat was posed by the mobilization of the Egyptian troops. This Caroline criterion allows a response needed to neutralize threat, the mobilization of those troops. The author concedes that Israel’s armed action of the 5\(^{th}\) of June itself, which resulted in the pushing back of the adversaries’ forces to such a distance and position that Israel was safe from future possible threats and gave Israel a stronger position in any subsequent negotiations, was proportionate under the Caroline-criteria.\(^{462}\) Nevertheless, the author cannot accept a full-scale war to be a proportionate response to the mobilization of troops on the adversary’s own territory. However, the fact that Israel’s action of the 5\(^{th}\) of June did not result in lasting peace settlement, but resulted in the Six-Day war is irrelevant for the assessment of whether the Israeli action of the 5\(^{th}\) was proportionate under the Caroline framework. In sum, the military action of

\(^{454}\) ibid.  
\(^{455}\) ibid.  
\(^{456}\) ibid.  
\(^{457}\) ibid.  
\(^{458}\) ibid.  
\(^{459}\) ibid.  
\(^{460}\) ibid.  
\(^{461}\) ibid.  
\(^{462}\) ibid.
Israel on the 5th of June was a clear example of anticipatory self-defence which was in conformity with the Caroline criteria. 463

**1981: The Israeli Attack on the Osirak Nuclear Reactor**

133. In June of 1981 Israel used force against Iraq to destroy a nuclear reactor near Baghdad: the Osirak reactor. 464 Iraq had bought the nuclear reactor from France in 1975 via a sales agreement which stipulated that the reactor needed to be inspected by the International Atomic Energy Agency (hereinafter IAEA) in accordance with the Nuclear Non-Proliferation Treaty 465 of 1963. 466 Regardless of this stipulation and the fact that the reactor was not yet operational at the time of the Israeli attack, Israel justified the attack with their conviction that Iraq had violated the sales agreement and was engaged in a program under which the reactor produced nuclear weapon-grade material with the intention to construe nuclear weapons. 467 Israel understandably feared that the Iraqi would be an implacable hostile state if it would acquire nuclear weapons, which would pose a grave threat to their security and possible survival if Iraq were to use these weapons against them. 468

Therefore, Israel had protested the purchase of the reactor to Iraq by expressing its concerns in several diplomatic fora in an attempt to dissuade France from going through with the sale. 469 It needs to be kept in mind that, at the time of these debates, Iraq still enjoyed a very favourable diplomatic position 470 which provided them with quite some trust and support in these fora. 471 More specifically, this favourable reputation made it highly unlikely for Israel to successfully call upon the Security Council to take action in controlling or investigating Iraq’s alleged nuclear activity and regional power ambitions. 472

Another consideration, which drove Israel to fast action, was the understanding that it was a lot easier to destroy the reactor whilst not being operative yet. 473 Because of this understanding and

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463 ibid.

464 Arend (n 40) 95; Gill (n 2) 139.


466 Gill (n 2) 139.

467 Arend (n 40) 95; Gill (n 2) 139.

468 Gill (n 2) 140.

469 ibid.

470 Evidence of such support in that period can be found inter alia in the formal treaty of friendship between the USSR and Iraq, the USSR’s supplies of weapons to Iraq, close commercial and diplomatic ties between France and Iraq and the fact that the US saw Iran as a greater threat than Iraq to the Middle Eastern security and stability in the aftermath of the Iran-Iraq war. Moreover, the US saw Iraq as a bulwark against the Iranian revolutionary religious extremism. See Gill (n 2) 140; and D. Hiro, The Longest War: The Iran-Iraq Military Conflict (Routledge, New York, 1989) 71.

471 Gill (n 2) 140.

472 ibid.

473 ibid.
since the diplomatic attempts, to stop the sale of the reactor, were unsuccessful Israel opted for the use of force in anticipatory action against this –in their view- imminent threat of the growing military potential of Iraq.\textsuperscript{474} Israel considered that on the balance, preventing Iraq from gaining access to nuclear weapons was worth risking diplomatic isolation and legal condemnation.\textsuperscript{475}

134. It was based on these events and convictions that the Israeli representative at the time, Mr. Yehuda Blum, purported in the Security Council that “Israel was exercising its inherent and natural right of self-defence, as understood in general international law and well within the meaning of Article 51 UNC.”\textsuperscript{476} The Security Council however unanimously rejected Israel’s argumentation of justifying its use of force as anticipatory self-defence and reprimanded Israel for this use of force.\textsuperscript{477}

135. In reaching this conclusion, the members of the Security Council engaged in a debate on the concept of anticipatory self-defence.\textsuperscript{478} Although Israel’s reference to anticipatory action as justification for its action was unanimously rejected, not all delegates in the Security Council rejected the doctrine of anticipatory self-defence per se.\textsuperscript{479} In casu the Security Council condemned Israel’s action as most delegates concluded that Israel’s action did not meet all of the Caroline criteria required for the legality of anticipatory action.\textsuperscript{480} Most notably, the Security Council generally held that Israel had failed to meet the immediacy requirement and the ‘lack of feasible alternatives’ requirement.\textsuperscript{481} Though, there still was no clear consensus on the acceptability of the anticipatory action, there seemed to be wider support than in the previous cases, provided that the Caroline criteria are met.\textsuperscript{482} Still, one group of states\textsuperscript{483} followed the restrictionists view\textsuperscript{484} and thus denounced any doctrine of anticipatory action.\textsuperscript{485} However, the majority of states\textsuperscript{486} followed the counter-restrictionists approach\textsuperscript{487} which accepts anticipatory self-defence provided that the Caroline-criteria are met.\textsuperscript{488} As

\textsuperscript{474} Arend (n 40) 95.
\textsuperscript{475} Gill (n 2) 140; Franck (n 94) 105.
\textsuperscript{476} UNSC Verbatim Record (12 June 1981) Mr. Yehuda Blum, UN Doc. S/PV/2280, 16.
\textsuperscript{477} Arend (n 40) 96; Gill (n 2) 139-140.
\textsuperscript{478} Arend (n 40) 96.
\textsuperscript{479} Gill (n 2) 140.
\textsuperscript{480} Arend (n 40) 96; Gill (n 2) 140.
\textsuperscript{481} ibid.
\textsuperscript{482} Arend (n 40) 96; Greenwood (n 19) 14.
\textsuperscript{483} This group included inter alia: Syria, Pakistan, Guyana, Spain and Yugoslavia.
\textsuperscript{484} As set out above: See page 51 of this thesis.
\textsuperscript{485} Arend (n 40) 96.
\textsuperscript{486} This group included inter alia: Sierra Leone, the UK, Uganda, Niger and Malaysia.
\textsuperscript{487} As set out above: See page 53 of this thesis.
\textsuperscript{488} Arend (n 40) 96.
indicated above, at the time of the debates on this incident in the Security Council, the view of the international community was clearly that Israel’s action did not fulfil these criteria.\(^{489}\)

136. The Sierra Leonean representative, Mr. Koroma, explained again – quoting Webster - that the self-defence is only acceptable under the Caroline-criteria where an armed attack has taken place or is imminent.\(^{490}\) He further reiterated that for anticipatory action to be lawful that “the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation.”\(^{491}\) Sierra Leone held that Israel’s anticipatory self-defence did not fulfil the necessity requirement since the decision to destroy the Osirak reactor was taken following long and considered policies.\(^{492}\) Therefore, Sierra Leone held that the Israeli act was a plain offensive act of aggression and could not be considered self-defence.\(^{493}\)

The British representative, Sir Anthony Parsons, similarly set out that the Israeli attack: “was not a response to an armed attack on Israel by Iraq”, thus indicating that Israel’s action was not a form of ‘reactive’ self-defence, but of anticipatory self-defence which needed to fulfil the Caroline-criteria. He then continued stating that “there was no instant or overwhelming necessity for self-defence” and that accordingly, the United Kingdom concluded that the use of force by Israel could not be considered acceptable under international law or the Charter framework.\(^{494}\)

137. After providing a brief overview of the delegates different opinions in the Security Council at the time, the following paragraphs will examine to what extent the Israeli action respected the Caroline-criteria. When considering the immediacy-criterion it needs to be noted that although Israel was faced with the prospect of its hostile neighbour getting access to nuclear weaponry, there was no clear evidence - at the time of Israel’s attack - that Iraq planned to attack Israel in the immediate future.\(^{495}\) Moreover, at the time of Israel’s attack there was likewise no conclusive evidence which showed that Iraq was acquiring or developing nuclear weapons.\(^{496}\) Israel’s reference to the fact that it was unlikely – due to Iraq’s large petroleum reserves - that Iraq acquired the nuclear reactor for economical reasons does not constitute as sufficient evidence to establish an immediate and imminent threat allowing for anticipatory action. Although international law allows for anticipatory action against potential threats under certain circumstances, the Caroline-criteria do not allow for preventive action against the mere

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\(^{489}\) Gill (n 2) 140; UNSC Res. 487 (19 June 1981) (adopted unanimously) UN Doc. S/RES/487.

\(^{490}\) UNSC Verbatim Record (15 June 1981) Mr. Koroma, UN Doc. S/PV/2283, 56. (‘UNSC Mr. Koroma’)

\(^{491}\) ibid.

\(^{492}\) ibid.

\(^{493}\) ibid.

\(^{494}\) UNSC Verbatim Record (15 June 1981) Sir Anthony Parsons, UN Doc. S/PV/2282, 42. (‘UNSC Sir Anthony Parsons’)

\(^{495}\) Gill (n 2) 141.

\(^{496}\) ibid.
probability that a state might obtain a nuclear weapon which would put that state in the position to possibly use it at some indeterminate moment in the future.\footnote{497}

The fact that today, post-facto, we have learned that the former regime of Iraq, which was in place at the time of Israel’s action, did in fact have the ambition to develop nuclear weapons as well as other weapons of mass destruction and did not hesitate to invade its neighbouring countries and massacre its own citizens, is irrelevant in the examination of the legality of Israel’s action.\footnote{498} States can only make decisions based on the evidence they have at the time of the decision.\footnote{499} Therefore, the immediacy-criteria can only be evaluated by taking into account the circumstances which were known at the time of the Israeli-attack.

138. Regarding the ‘lack of feasible alternatives’ requirement it is true that there was only a slim chance that the Security Council would support Israel’s inquiry to stop Iraq’s activity in the nuclear reactor or even to prevent Iraq from gaining access to nuclear technology.\footnote{500} It is therefore submitted that Israel was in fact left with no other feasible alternative to stop this –in their opinion- imminent threat.

139. It is quite clear that the Israeli-attack meets the terms of the proportionality-requirement. The Israeli-attack on the nuclear reactor was executed in an almost surgical and precise way, aimed at hitting solely eliminating the imminent threat posed by the nuclear reactor and barely producing any collateral damage.\footnote{501}

140. In sum, the opinion of the international community at the time of the debates in the Security Council did appropriately condemn the Israeli-attack on the nuclear reactor. The Israeli act was an anticipatory response to a potential threat, which could not be sufficiently supported by evidence to constitute an imminent threat required for the legality of anticipatory action. Israel was at the time of its action not faced with the imminent threat of a nuclear-armed attack by Iraq and did not have the right to take anticipatory action under international law or the Charter framework.\footnote{502}


141. The 2003 Gulf War was a conflict between on the on hand the United States and the United Kingdom and on the other Saddam Hussein’s regime in Iraq. The motive of the Anglo-Saxon\footnote{503}
invasion in Iraq was to remove Saddam and his associates from power and to enforce compliance with the UN Security Council resolution regarding the disarmament of nuclear, chemical and weapons of mass destruction.\textsuperscript{504} The invasion began with an air strike on the presidential palace in Baghdad on the 19th of March 2003 and evolved into an occupation with the end of the major combat operations from the 1st of May onwards.

142. This invasion of Iraq has been widely discussed in legal literature and criticised for not having a legal justification under the \textit{jus ad bellum}.\textsuperscript{505} The invading coalition and several scholars have put forward numerous legal bases for the invasion of Iraq ranging from Iraq’s violation of the terms of several Security Council Resolutions, the harsh and repressive nature of Saddam’s regime, the serious human right violations, to the right of the Anglo-Saxon countries to reopen hostilities in response to Iraq’s breach of their earlier cease-fire agreement of 1991.\textsuperscript{506} The legal justification, which is most relevant for this thesis, is the justification that the Anglo-Saxon countries invaded Iraq so as to defend themselves against the imminent threat posed by terrorists which had an alleged link with Saddam Hussein’s regime.\textsuperscript{507} The acceptability of these legal justifications, which are unrelated to the right of self-defence, will not be discussed in detail here. It suffices here to say that the arguments on the breach of the cease-fire agreement and compliance with the Security Council resolutions are legally more persuasive justifications than the other arguments.\textsuperscript{508}

143. This thesis will now examine the argument that the invasion of Iraq was justified based on the Anglo-Saxon countries’ right to anticipatory self-defence against the imminent threat of terrorism. The Anglo-Saxon countries argued that the Iraqi government had an actual or potential link with international terrorists and even more concerning, that the Iraqi government had possibly assisted and supported the terrorist group, Al Qaeda, in obtaining weapons of mass destruction.\textsuperscript{509} These disturbing findings combined with the well-known fact that Al Qaeda considered the US as an important adversary, led the US and its constant ally, the UK, to the decision to take anticipatory action to neutralize this –in their opinion- imminent threat.

This decision was based on the so-called Bush-Doctrine of preemptive self-defence. This doctrine was widely discussed and criticized, the international debates on this doctrine form an


\textsuperscript{505} Gill (n 2) 142.

\textsuperscript{506} For a more elaborate description of these other legal justifications see : Gill (n) 143, note 73.

\textsuperscript{507} Gill (n 2) 144.

\textsuperscript{508} Gill (n 2) 143-144.

\textsuperscript{509} Gill (n 2) 144.
important indication on the state’s opinion on the legality of preemptive self-defence in 21st century and will be discussed below.

When examining circumstances leading up to the invasion of Iraq it becomes clear that the Caroline-requirements needed for anticipatory action to be legally accepted were not fulfilled. To begin, with the imminent threat of a terrorist attack -which the US relied on to call in its right to self-defence- was based on nothing more than mere allegations, since the US had no conclusive evidence which supported the existence of this imminent threat. The US had –at the time of the invasion- and today still has no proof which shows an actual link between the Iraqi government and international terrorist, that the Iraqi government supported Al Qaeda in obtaining weapons of mass destruction or that the Iraqi government was in any way linked to the attacks of 9/11 on the twin towers.\textsuperscript{510} Consequently, the only correct conclusion needs to be that, in the absence of any conclusive evidence of such link between Iraq and Al Qaeda, the invasion of Iraq cannot finds its legal basis in the right of anticipatory self-defence.\textsuperscript{511}

\textbf{EVALUATION OF THE POST-UN CHARTER STATE PRACTICE IN RELATION TO ANTICIPATORY SELF-DEFENCE}

144. What becomes clear from this brief overview of post-UN state practice concerning anticipatory self-defence is that the state practice has not reached sufficient consensus to establish a rule of customary international law that prohibits anticipatory action or to alter the existing rule of customary law, which allows for anticipatory action, provided that the action stays within the Caroline-framework.\textsuperscript{512} Therefore it seems that the original rule of customary international law, as was formulated in the Caroline incident, remains the applicable rule in contemporary international law. As the state practice has shown, those states accepting anticipatory self-defence consistently put forward that the anticipatory right to self-defence remains limited by the customary requirements of immediacy, necessity and proportionality.\textsuperscript{513}

In other words, contemporary international law allows for preemptive self-defence –which is self-defence in response to a credible and imminent threat of an armed attack- and does not provides for states to use preventive self-defence –which is self-defence in response to a potential threat of an armed attack at some indeterminate point in the future.

145. Furthermore, this brief overview provided a nice application of the scope of, limitations on and the practical application of the right of anticipatory self-defence. It can be concluded from the description and examination of the incidents that the Caroline-criteria should not be understood as

\textsuperscript{510} Gill (n 2) 144.
\textsuperscript{512} Arend (n 40) 96.
\textsuperscript{513} ibid.
objective criteria to be applied as a static checklist, but instead should be seen as a set of guidelines which provide a framework for assessment to be applied in the light of the applicable circumstances of each case, based upon the information available at the time.\(^{514}\)

As an example we can compare the way the Caroline-criteria were applied during the Caroline-incident itself and in later cases. In the Caroline-case the criteria were applied to a situation in which an attack had already been launched but still had to read its target. However, practice clearly shows that the Caroline-criteria were not understood as being exclusively applicable to such specific types of situation, in which an attack has already been launched. Instead, practice has shown that the Caroline criteria have been applied to all situations of anticipatory self-defence, including those in which an attack has not yet been launched. Consequently, it has become accepted under customary law to use anticipatory self-defence in response to attacks that have already been launch and are only minutes or hours away of their point of impact, as well as in response to attacks that are imminent and which will be very probably launched in the near future.\(^ {515}\)

How near in the future, an attack should be to be acceptable under the immediacy-criteria is not fixed in customary law and has differed depending on the circumstances of each case. From this we can conclude that the immediacy-requirement should not be understood as a requirement of proximity in time, but instead as a requirement of the existence of a credible threat of a probable attack.\(^ {516}\) Nevertheless, in practice, proximity in time will remain a relevant consideration in the evaluation of the immediacy and other criteria: the availability of feasible alternatives and the necessity of anticipatory action.\(^ {517}\) Nonetheless, proximity in time should definitely not be seen as the only relevant or most important consideration.\(^ {518}\)

D. CONCLUSION: THE TEMPORAL SCOPE OF THE RIGHT TO SELF-DEFENCE UNDER CONTEMPORARY INTERNATIONAL LAW

TEMPORAL SCOPE OF THE RIGHT TO SELF-DEFENCE IN GENERAL

146. In the sections above it has been established that contemporary international law allows for anticipatory self-defence. This has been concluded by providing an overview of the arguments put forward by the opposing schools of thought on this question: the restrictionists and counter-restrictionists. This thesis concluded that the counter-restrictionists had more plausible and convincing argument and accordingly follows this school of thought, which considers that the right to self-defence still exists as a customary norm in parallel with the later introduced treaty norm. It has further been

\(^{514}\) Gill (n 2) 145.
\(^{515}\) Gill (n 2) 146.
\(^{516}\) ibid.
\(^{517}\) ibid.
\(^{518}\) ibid.
shown that the original customary norm of self-defence – which was introduced in the aftermath of the Caroline-incident - allowed for anticipatory self-defence.

147. To determine the contemporary scope of this customary right of anticipatory self-defence in the post-Charter era, the author provided a brief overview of post-Charter state practice. This overview showed that the original rule of customary international law, as was formulated in the Caroline incident, remains the applicable rule in contemporary international law. States have consistently continued to consider that the right to anticipatory self-defence is limited by the Caroline-framework. It was further shown that the Caroline-criteria allow for preemptive self-defence – which is self-defence in response to a credible and imminent threat of an armed attack - and does not provides for states to use preventive self-defence – which is self-defence in response to a potential threat of an armed attack at some indeterminate point in the future.

148. Consequently, it was concluded that contemporary international law allows for anticipatory action in response to imminent threats of armed attacks in the foreseeable future which are based on credible evidence. Conversely, international law does not allow for anticipatory action in response of mere potential threats of an armed attack at some indeterminate point in the future. Furthermore, it was concluded that the Caroline requirements - which determine the scope of acceptable anticipatory self-defence- need to be applied in the light of the relevant circumstances. Accordingly, the application of the criteria will differ slightly in different situations.

149. This does not mean however, that states are completely unable to take action against such less concrete threats. Although international law has opted to keep decisions to take forcible measures against uncertain threats out of the competence of a single state, it does allow the international community to determine multilaterally on taking (forcible) measures when they determine there is a threat to international peace and security. Anticipatory action in the absence of an imminent threat can be undertaken with Security Council authorization.

150. In sum, this thesis concludes - on the first sub-question concerning the temporal scope of the right to self-defence- that anticipatory self-defence is accepted within the boundaries of the Caroline framework. Accordingly, self-defence can be used to address concrete and credible threats of terrorism in the near future. Threats that are not as concrete or credible yet can thus not be addressed forcibly on the basis of the right to self-defence.

It is important to point out that this does not mean however that states stand powerless against the latter type of threats. Such threats can possibly be addressed with forcible measures via the second

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519 This conclusion is supported by the majority of international scholars: See Kaufman (n 81) 24.
520 Shah (n 65) 111.
exception to the general prohibition of force: the multilateral collective security system in the Security Council.\textsuperscript{521}

E. **THE BUSH-DOCTRINE: CAN THE RIGHT TO SELF-DEFENCE DEAL WITH THE THREAT OF CONTEMPORARY TERRORISM?**

151. When examining the legality of anticipatory self-defence against terrorism one inevitably comes across the Bush-doctrine.\textsuperscript{522} This doctrine argues that the right to self-defence as it currently exists in international law is not adequate to deal with the modern threats of terrorism. Therefore, the Bush-doctrine purports that the right to self-defence needs to be redefined so as to allow states a wider scope of situations in which it is allowed to use force in self-defence. The NSA puts forward that this widening of the right to self-defence is necessary to enable states—contrary to their more limited ability under the current right to self-defence—to protect themselves and their citizens against the danger of terrorism.

152. Because of its potential fare going consequences, the Bush-doctrine has raised immense controversy and triggered debates among international scholars on the right to self-defence, which will now be reflected upon in this section of this thesis. This thesis will do so, by first providing a brief description of the precise argument made by the NSS. Next, the following section will provide an evaluation of this so-called Bush-doctrine—as expressed in the US’s NSS of 2002—basing itself on the conclusions reached above on the scope of anticipatory self-defence.

**ARGUMENT OF THE NSS: THE CURRENT RIGHT OF SELF-DEFENCE IS INADEQUATE TO DEAL WITH THREAT OF CONTEMPORARY TERRORISM**

153. The US’s NSS argued in its 2002 National Security Strategy (hereinafter NSS) that:

\begin{quote}
“the concept of an imminent threat needs to be redefined to take account of new capabilities and objectives of today’s adversaries.”\textsuperscript{523}
\end{quote}

The NSS thus argued that the current right of self-defence is inadequate to deal with the current threat of terrorism. It does so by describing the in what way the nature of the threat of terrorism has become greater and thereafter indicating why the current Charter-framework is incapable to deal with it.

**CHANGED NATURE OF THE THREAT: TERRORISM & WEAPONS OF MASS DESTRUCTION**

154. The NSS rightly indicates that the contemporary threat of terrorism has become greater and is of a completely different nature than then threats that were envisioned at the time of the drafting of the

\textsuperscript{521} This argument will be further developed on page 82 of this thesis.

\textsuperscript{522} See Gill (n 2) 148; and Arend (n 40) 96.

\textsuperscript{523} NSS 2002 (n 233)
Charter. The NSS holds that the right to self-defence was not drafted or formed in such a way that it could deal with the threats that states are faced with today. The rules of international law governing the use of force in general, which have developed over the years and were eventually partly cemented in the UN Charter, mainly focussed on the conventional use of force between the conventional actors, states.  

“Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction - weapons that can be easily concealed, delivered covertly, and used without warning.”  

155. At the time of the drafting of the Charter, the type of attacks which states had predominantly been faced with were clear, overt acts of aggression by other states’ regular armies. The Charter was adopted so as to avoid such conventional types of aggression in the future, by prohibiting the threat and use of force between states.  

Even though the Charter’s provisions on the use of force need to be understood in the light of the customary norms regarding self-defence, the Charter’s focus was clearly on the force used by states in the conventional way.  

156. The nature of threats of armed attacks has changed significantly since 1945. The contemporary terrorist attacks and threats of terrorism differ in two factors. First, the type of actors involved on the international plane has increased. Traditional international law only dealt with state-actors and accordingly, the Charter – as well as other major multilateral treaties concerning the use of force - only addressed the provisions relating to the use of force to state-actors. However, today NSA have become very relevant actors on the international plane and have attacked states on a number of occasions. States are thus clearly no longer solely faced with threats by states, but are more and more confronted with attacks and threats of non-state-actors, especially of terrorists. 

Second, the means and methods of attacks, which states face today, have evolved drastically as a result of technology developments. The Internet has made it easier for actors, who want to initiate an armed attack, to gather the information necessary to prepare and execute an armed attack. Furthermore, modern day technologies, most disturbingly the weapons of mass destructions, enable

524 Arend (n 40) 97.
525 NSS 2002 (n 233).
526 Article 2 (4) UNC.
527 Arend (n 40) 97.
528 ibid.
529 This mainly refers to the LON Convenant (n 26); and Briand-Kellogg Pact (n 33).
actors to damage an enormous area in a single hit. The drafters of the Charter could not have envisioned these (technological) developments in 1945. None of the main types of weapons of mass destruction—chemical, biological and nuclear—had been used in any significant way in warfare and thus could not have been considered by the drafters as potential future threats. Although, chemical weapons had been used during the First World War, they had not proven to be particularly military useful and consequently were not used in the following Second World War. The idea of nuclear weapons was only revealed in August 1945, two months after the adoption of the Charter. The Charter is thus a “pre-atomic document” which was thus drafted without envisioning future threats of nuclear weapons.

157. The NSS concludes that it follows from this, in 1945 unforeseen, development of threats against states, that the original Charter framework is inadequate to deal with the contemporary threats. In the US’s opinion the original Charter framework, which requires the establishment of an imminent threat, can only be effective against the original type of state-threats.

**US’S PROPOSED SOLUTION: REDEFINING THE IMMINENCE REQUIREMENT**

158. The NSS claims that the current Charter framework cannot deal adequately enough with this changed nature of the terrorism threat. The NSS purports that it is irrational to limit state’s use of force in anticipatory self-defence to those situations in which they can establish an imminent threat. Although the current imminence-requirement does not require a state to indicate the precise time and place of the looming attack, it does require near certainty. In other words, the current imminence requirement is considered fulfilled when the defending state can establish that it is nearly certain that the armed attack will occur.

With this in mind, the NSS holds correctly that requiring states to establish the imminence of a threat of a terrorist attack, and more particularly of the threat of a terrorist attack with weapons of mass destruction, would probably make it impossible for states to take successful anticipatory action before the attack is done. Since, terrorists prepare their attacks covertly, it is very difficult, it not impossible to detect or determine the near certain time and place of a terrorist attack until the attack is

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530 Arend (n 40) 97.
531 ibid.
533 Arend (n 40) 97.
534 Arend (n 40) 96.
535 ibid.
536 Arend (n 40) 96.
well underway or even finished. Accordingly, the NSS has indicated that the risk of inaction has grown so significantly -by the development of technology which allows terrorist to create more damage and casualties by a single attack- that the risk of inaction become so high that it warrants going beyond the imminence-boundary of the existing right to self-defence:

"The greater the threat, the greater is the risk of inaction –and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack."

"In an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather."

159. Put differently, the NSS holds that in the light of the contemporary circumstances the imminence requirement no longer makes sense and needs to be redefined so as to allow states to target known terrorist camps, training areas or facilities containing weapons of mass destruction long before they pose an imminent threat. The NSS holds that this is the only way to preserve state’s inherent right to self-defence.

EVALUATION OF THE NSS ARGUMENT

160. The author of this thesis does not follow the NSS’s strategy as set out in the 2002 NSS. The NSS essentially flaw by implying that the existing doctrine of anticipatory self-defence is inadequate to deal with the contemporary threats, which include both real and potential threats, without providing any proof that this is truly so. Although it is true that the contemporary threats of terrorism were unanticipated by the traditional framework on the use of force, that does not mean that the framework is inadequate per se to deal with these modern threats. The NSS based itself on a fundamentally wrong understanding of the scope of the right self-defence and the subsequent incorrect premise that the right of self-defence cannot deal with contemporary threats of terrorism.

537 Arend (n 40) 98.
538 NSS 2002 (n).
539 NSS 2002 (n 233) 15.
540 Arend (n 40) 96 and 98.
541 Arend (n 40) 98.
542 Gill (n 2) 148; Arend (n 40) 91.
543 See also Gill (n 2) 148.
161. The NSS purports that the imminence criteria should be redefined so as to widen the scope of anticipatory self-defence from only allowing self-defence in response concrete or probable threats of attacks within the foreseeable future, to also allowing self-defence in response to inchoate threats which could potentially manifest themselves at some indeterminate moment in the future.\(^{544}\) In essence, if international law were to follow the 2002 NSS, the right to self-defence would become totally redefined to having a much wider scope than the original customary right and would allow for self-defence in response of pure potential threats in the absence of credible proof.

If the international community would choose to follow the NSS’s position, the international community would need to undertake the difficult exercise to formulate a new requirement, which would draw the line between offensive and defensive acts.\(^{545}\) Since the NSS no longer considers the imminence-requirements appropriate, another prerequisite for acceptable anticipatory action needs to be defined. Several scholars have purported alternative standards\(^{546}\), however, none of them has been endorsed by the international community or international law yet.\(^{547}\) Furthermore, almost all of these proposed alternative standards widen the possibility for states to abuse the right of anticipatory action and most possibly open the floodgates to unilateral anticipatory use of force by states. That said, widening any exception to a general rule inevitably does so.

162. Furthermore, it can be deduced from the overview of state practice above, the rest of the international community does not follow the NSS’s view and has always held on strong to the original right to self-defence as introduced in the Caroline-incident and does acknowledge the importance of the immediacy-requirement.\(^{548}\) Accordingly, the international community supports the original understanding of the right to self-defence and only allows for anticipatory self-defence in response to a credible threat within the foreseeable future, which needs to be based on conclusive evidence.

In the case of the invasion of Iraq, for instance, there was no sufficient credible and conclusive proof of the existence of an imminent threat from Iraq towards the US and UK. Consequently, it was generally accepted that the Iraqi invasion could not and cannot find a legal basis in the right of anticipatory self-defence.

163. As has been shown above, both the customary and Charter norm of self-defence have long included the right to take anticipatory self-defence in response to concrete, probable and credible threats of attacks.\(^{549}\) However, it has also already been indicated that the right to self-defence is not

\(^{544}\) Gill (n 2) 148.

\(^{545}\) Arend (n 40) 98.

\(^{546}\) For example see: Arend (n 40) 98-99.

\(^{547}\) Arend (n 40) 99.

\(^{548}\) Gill (n 2) 149.

\(^{549}\) See also Gill (n 2) 149.
unlimited and needs to meet the requirements of necessity and proportionality, which need to be interpreted in the light of the relevant circumstances of each case, more specifically in the light of the nature of the threat and the availability of feasible alternatives to neutralize the threat.\(^\text{550}\) By purporting that these requirements should be redefined, the NSS depreciates the fundamental function of these requirements, which is to limit states’ use of force in self-defence.\(^\text{551}\)

The National Security Agency has wrongly purported that the requirements of necessity and proportionality are out-dated and do not allow states to act effectively in the face contemporary threats.\(^\text{552}\) Although the author has repeatedly conceded that it is true that the all the Caroline-criteria – including the imminence criteria- need to be applied and interpreted in light of the relevant circumstances, the NSS goes to far by stating the imminence requirement needs to be completely redefined. The Caroline-criteria –as they were formulated by Webster- need not to be seen as overly restrictive, condemning states to solely act in a reactive manner. Instead, the Caroline-criteria allow for a flexible application to a wide variety of circumstances, including against today’s terrorist threats.\(^\text{553}\) Therefore, it is absolutely unnecessary to completely redefine the imminence-requirement. Not only would this create considerable difficulty in finding an appropriate replacement for the imminence criteria, it would inevitably lead to the unnecessary widening of the situations in which a state can unilaterally decide to use force.

164. As will be indicated in the following chapter, the author strongly believes that the current international framework is fairly capable to deal with the contemporary threats. This international framework, which has been in place since the end of the Second World War, has been able to safeguard a relatively stable and peaceful international community ever since. Any decision to alter it, thereby risking this international stability, should only be taken when absolutely necessary. And since the author is convinced that the contemporary threat of terrorism can be perfectly dealt with by the contemporary international framework there is no such necessity, which would warrant a severe alteration to the scope of the right of self-defence.

\(^{550}\) ibid.

\(^{551}\) Gill (n 2) 149.

\(^{552}\) See also Gill (n 2) 149.

\(^{553}\) ibid.
III. Future Perspectives: Suggestions for Future Policy

165. Now that this thesis has determined the scope of application of the right to self-defence, this author will turn to an evaluation of international law’s (future) ability to deal with (threats of) terrorism and cautiously offer some policy-suggestions for the future. This section of the thesis will discuss whether international law provides states and the international community with sufficient possibilities to take measures against the contemporary threats of terrorism.

As was already indicated in the introduction, these contemporary threats of terrorism pose serious difficulties and risk as modern terrorist-attacks include attacks on a much larger scale through the availability of weapons of mass destruction, modern transportation and technologies. Terrorists have the increasing ability—because of the developing technologies—to target large areas and make more casualties in a single attack with weapons of mass destruction, as well as to spread their convictions and recruit new terrorists worldwide in an inexpensive and fast manner via the internet. The result of this is that the threat of international terrorism has grown significantly.

166. Now that the international community is faced with this growing threat it is important to consider what measures can be taken in response of this under international law. Terrorism is a serious threat to international peace and security, which needs to be dealt with rigorously and without delay. However, even in this important battle against terrorism states must stay within the limits of international law. Terrorism must be beaten by the strength of international law, not by breaching it.

Contrary to what has been argued—inter alia by the US—international law provides adequate measures to deal with the threats of modern terrorism. The Charter framework provides states with efficient measures against all types of terrorist threats. It is important to keep in mind that the right to self-defence is only one exception in which the use of force is allowed. The two exceptions to the prohibition to use force—the right to self-defence and Security Council authorization—complement each other. Therefore, to address those situations, which do not meet the Caroline-criteria and/or reach the required state link, and thus cannot be dealt with by unilateral use of force in self-defence, states can still use forcible measures provided that the Security Councils delivers authorization to do so. Furthermore, apart from the use of force, states can also combat terrorism by measures of law enforcement.

In case of threats of terrorists that have already committed a series of terrorist attacks with sufficient state involvement, states can use traditional reactive self-defence as the threat of attack is considered part of an on-going armed attack. Threats of “new” terrorists—who have not committed any terrorist attacks yet—can be dealt with via anticipatory self-defence, provided that they pose an

554 Shah (n 65) 110.
555 ibid.
556 Shah (n 65) 111.
imminent threat, which can be established by credible evidence, of a terrorist attack in the foreseeable future. Threats of “new” terrorists which are not imminent enough to allow for anticipatory self-defence can only be addressed with force if the Security Council authorizes this and by law enforcement. The latter category has raised the most controversy, as many states have argued that the collective security mechanism of the Security Council is often left impotent by a veto of a permanent member, or cannot act swiftly enough against terrorist threats.

167. In sum, the Charter framework -which exist out of a combination of a collective security system and a right to self-defence- has the potential to be an effective legal and political structure capable to deal with a wide variety of situations. However, as indicated above, it does have some flaws which should be addressed so as to make the system completely or at least more effective than it is today. Nonetheless, it is the author’s opinion that -regardless of this possibility of inaction of the Security Council- states’ use of force should remain within the carefully set out boundaries of international law. The author acknowledges that the collective security system does not always function effectively, the author nevertheless does not believe that it would make the world safer to allow states to unilaterally decide to use force against potential threats at some indeterminate point in the future, which have not been conclusively proven. Instead of arguing for a widening of the scope of self-defence it would be wiser that those that argue that the contemporary threat of terrorism needs to be addressed rigorously and without delay, to focus on strengthening the existing framework.

We should not forget that it took the international community a long time and a lot of effort to incorporate a general prohibition on the use of force in international law, which has formed the cornerstone of our relatively stable international community ever since. Widening the exceptions to this general prohibition sets the whole international stability on a slippery slope.

Therefore, it is the author’s opinion that the international community should deal with these modern threats of terrorism without altering the existing flexible framework of international law drastically. Nevertheless, the author –in line with the opinion of the majority of authors- purports that it is necessary for the international community to re-evaluate and reform the Security-Council’s decision-procedure, so as to enable the Council to act decisively in all situations which threaten international peace and security. The author furthermore points to the strengthening of law enforcement cooperation and a much needed reform of the United Nations’ decision procedure.

557 Gill (n 2) 150.
1. MOVING FROM UNILATERAL USE OF ANTICIPATORY SELF-DEFENCE TO MULTILATERAL USE: WIDER INVOLVEMENT OF THE SECURITY COUNCIL

168. As explained above\(^\text{558}\) the Security Council can authorize the use of forcible measures in situations that threaten international peace and security. And since the Security Council has the discretion to determine which situations constitute such a threat, it can authorize force in virtually every situation it chooses to.\(^\text{559}\) International law has not provided so many limitations for this Security Council authorization as for the right to self-defence, based on the idea that the formal decision procedure of the Security Council already prevents misuse by an individual state or group of states.

The flipside effect of these procedural rules is that Security Council authorization to use force requires a certain amount of time. Contrary to self-defence, which can be decided unilaterally, Security Council authorization requires a multilateral approach, which inevitably takes more time than a unilateral decision.

169. When the UN Charter was drafted the starting point was to introduce a general prohibition on the use of force in international law. The drafters included the two exceptions as they realized that complete prohibition without any exception would be unrealistic. The exception of use of force in self-defence was introduced to deal with those situations that required immediate state action and did not allow states the time to ask Security Council authorization. Conversely, in those situations in which states are not faced with an imminent threat, states are prohibited to unilaterally decide to use force. The cornerstone of the international communities’ stability is this prohibition for states to unilaterally decide to use of force on the international plane.

It is the author’s opinion that it is important to apply each of these two exceptions for what they were designed for and to respect their complementarity. A situation which threatens international peace and security, but which is not imminent, should be dealt with by the Security Council, which provides guarantees against abuse of an individual state. Only in those situations in which a state is unable to turn to the Security Council for authorization because of the imminence of the threat, should a state decide to use force unilaterally.

170. In theory the Security Council’s collective security system should be able to deal effectively with potential threats of armed attacks. However, history has clearly shown that in practice the collective security system of the UN has not always fulfilled its task efficiently.\(^\text{560}\) The Security Council has often been paralyzed and unable to act effectively in situations, which threatened international peace and security. To assure that the Security Council will be able to address threats of Security which

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\(^{558}\) See page 9 of this thesis.

\(^{559}\) Gill (n 2) 149.

\(^{560}\) Shah (n 65) 109.
cannot be dealt with via self-defence it is necessary to make the Council a reliable body with more effective decision procedures.\textsuperscript{561} The main issue is that the Security Council has a serious systemic flaw by being based on the concept of an oligarchy. The Security Council is effectively governed by a group of five states, the permanent members, which have the right to veto Chapter VII decisions. This means that a permanent member can and has done so frequently in the past, rendered the Security Council impotent to act.\textsuperscript{562}

171. Therefore, in order to strengthen the Charter framework it is of the utmost importance that the United Nation’s decision mechanisms are re-evaluated and reformed so as to have a more effective voting procedure. The author acknowledges that this will require the consent of the permanent members, which will not be eager to denounce their veto-power. Nevertheless, the author hopes that the permanent members will realize that such a reform is truly required to maintain the effectiveness of the Charter’s framework in the future.

2. **DEVELOPING BETTER COOPERATION BETWEEN LAW ENFORCEMENT POLICIES OF STATES**

172. The unfortunate choice of the US to refer to the combat of terrorism as ‘the war on terror’ has nourished the international communities tendency to think that the only option to defeat terrorism is by using force to extinguish terrorism once and for all. However, it is the author’s belief that, although there are situations, which require the use of force to protect the international peace and security, the use of force generally only creates a more violent and instable international community. Therefore the author of this thesis advises states to focus on law enforcement measures in their combat against terrorism and to limit the recourse to force to those situations which do not allow for any feasible alternative.

173. This argument weighs even heavier in relation to the problem of terrorism in failed states. The international community should strive towards the assistance of such states by way of capacity building. This will strengthen and enable failed states to take measures itself against the terrorist which use its territory as a safe haven to prepare attacks. In this regard it would be recommendable to set up an International Committee, which focuses on setting up capacity building programmes in failed states and in states that have a lot of terrorist on their territory. Such a Committee should facilitate an effective allocation of state contributions and ensure an efficient and coherent international policy in dealing with terrorism.

\textsuperscript{561} Shah (n 65) 111.
\textsuperscript{562} Shah (n 65) 109.
IV. Conclusion

174. This thesis set out to define the precise scope of the right to anticipatory self-defence in response to contemporary terrorism. To do so it has examined whether and to what extent the right to self-defence allowed for states to use force against non-state actors (hereinafter NSA) and has examined the temporal scope of the right to self-defence. In the process, this thesis has also looked at the US’s controversial National Security Strategy to see whether it provided an acceptable strategy against contemporary threats against states.

175. As has been indicated throughout this thesis, the world of today is confronted with an increased threat of terrorism. The threats of terrorism have grown parallel with the development of technology. The 9/11-attacks have made the international community realize abruptly that dangers posed by NSA are no longer isolated and limited issues, which need to be dealt with on a national level. Instead, in this globalized and developed world, NSA form a transnational and increasingly growing threat, which needs to be addressed on an international level. This can be done by cooperation between states in law enforcement, but also by measures of force in self-defence or on the basis of Security Council authorization.

176. This thesis has clearly set out that the right to self-defence allows for self-defence against armed attacks by NSA, provided that there was substantial state involvement –in the form of active or passive support- in the attack or that the state itself can be held responsible under the principles of state responsibility for the attack as such. This approach shows that the international community that no form of state-supported terrorism will be accepted under international law.

Conversely, terrorist attacks that were committed without any state link, do no allow for self-defence in response and will need to be addressed by measures of law enforcement or forcible measures authorized by the Security Council. Accepting the contrary would lead to the absurd result that states could be the target of force without having done anything wrong. Such an approach would violate states’ fundamental rights of territorial sovereignty and of non-intervention. Consequently, the use of self-defence against attacks of NSA, without state involvement, would quite possibly outrage the ‘territorial states’ which have nothing to do with such terrorist attacks and hence instead of restoring peace and security, would only create inter-state conflicts. In the face of terrorism it would be much better for states to unite against the terrorist than to start fighting about who should stop them. This can only be done by state cooperation in law enforcement and capacity building.

177. On the temporal scope of the right to self-defence, this thesis has shown that there exists –an already long standing- right of anticipatory self-defence under customary international law, which has continued to exist after the adoption of the Charter. This conclusion was reached by a combination of the travaux préparatoires, the opinion of several scholars and illustrative post-Charter state practice.
The post-Charter state practice clearly showed that the international community firmly holds on to the customary right of anticipatory self-defence and its Caroline-requirements. On this basis it was concluded, that the contemporary right of anticipatory self-defence remains limited by these Caroline-criteria. Accordingly, it was concluded that contemporary international law only allows for unilateral anticipatory action in response of a credible and imminent threat of an armed attack in the foreseeable future, for which no feasible alternative action would work to neutralize.

178. Insisting on the limits of self-defence does not stem from naiveté, but from realizing that widening the acceptability to use force in reaction to threats all over the world does not in itself make such acts of self-defence legal or useful, but rather makes the world a more dangerous place. This thesis thus has shown that International Law allows for anticipatory self-defence provided that it stays within the limits of the Caroline-criteria.

This thesis has further concluded that the Caroline-requirements need to be applied in the light of the relevant circumstances of each case and thus allow for flexibility. By providing some examples, this thesis has shown that the exact scope of the right to self-defence depends on the circumstances of each particular situation. Accordingly, it has been shown that the imminence requirement allows for, not only those situations in which there is persuasive evidence of a probable attack in the foreseeable future, but also in certain exceptional circumstances for potential threats of an attack in the foreseeable future. In certain exceptional circumstances the imminence-requirement thus allows for a flexible interpretation. The imminence-requirement will nevertheless always require a credible threat of an armed attack as well as evidence that this attack would take place in the foreseeable future. Purporting that there is a threat of an attack at some indeterminate point in the future will never suffice to warrant a state to use anticipatory self-defence. It is precisely because of the latter boundary, that the 2002 NSS could not be accepted.

179. It has been made clear that states are not entirely powerless against situations, which do not allow for the unilateral use of force in self-defence. Although international law does not allow states to decide unilaterally to take forcible measures against undeveloped threats or attacks of terrorist without state involvement, it does provide states the possibility to decide collectively –via the Security Council- to take forcible measures against threats which threaten international peace and security. In sum force can only be used against terrorism when authorized by the Security Council or in response to an actual attack that amounts to an armed attack, which has substantial state involvement, or an imminent threat thereof.

180. Some states have argued that there is a war on terror, which warrants a wider understanding of the provisions regulating the use of force and particularly the right to self-defence. Accepting such an argument, that more force is accepted because it is for the just cause of combating terrorism, would

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take the regulation of force back to the dark ages. The Just-War theory was abandoned by International Law a long time ago. International law has evolved to a system in which the use of force is limited to situations in which the Security Council authorizes the use of force and cases of self-defence in response of armed attacks or imminent threats. As a result, unilateral decisions to use force, with the exception of in self-defence, have been outlawed. Redefining the Charter framework so as to widen the exceptions to the prohibition on the use of force in case of a just cause would be a definite step back and only open the door to more use of force on the international plane.\footnote{Oberleitner (n 1) 267.}

181. Instead, of trying to go beyond the boundaries of the Charter framework, the international community should opt for adherence and expansion of the Charter Framework making the UN and the international community as a collective more effective in combatting terrorism.\footnote{ibid.} The international community should engage in multilateral for a, strengthen international cooperation in law enforcement, develop an effective set of criminal norms and support the International Criminal Court.\footnote{ibid.} It is by doing those things that the world can become a safer place, not by allowing states to unilaterally decide to use force in response to distant threats.\footnote{ibid.}
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ANNEX: NEDERLANDSE SAMENVATTING

In het voorbije decennia werd er meermaals geweld gebruikt tegen een andere staat omwille van de bescherming van de eigen staat of van de eigen onderdanen tegen dreigende terroristische aanvallen. Een van de redenen die hiervoor werd aangehaald was het (preventieve) recht op zelfverdediging tegen terroristische aanslagen.


Deze thesis zal dit onderzoek voeren door een bespreking van de evolutie van het recht op zelfverdediging in de rechtsleer en rechtspraak. Daarnaast zal deze thesis aandacht schenken op de statenpraktijk met betrekking tot het recht op zelfverdediging.

Deze thesis zal besluiten dat internationaal recht verschillende grenzen stelt aan het recht op zelfverdediging. Zo kunnen staten enkel zelfverdediging gebruiken tegen terroristen, wanneer de staat waar de terroristen zich bevinden de terroristische aanval bewust mede heeft mogelijk gemaakt door actieve of passieve steun. Dit is het zogenaamde ‘aiding and abetting-criterium’. Het internationaal recht laat state niet toe om zelfverdediging te gebruiken tegen terroristen die zich bevinden in een staat die de aanval niet heeft kunnen voorkomen.

De auteur van deze thesis benadrukt dat het gebruik van geweld door staten tot een minimum dient te worden beperkt. Zelfverdediging is en blijft een uitzondering op het algemeen geweldverbod van het VN-Handvest. De interpretatieregels van het internationaal recht voorzien dat uitzonderingen steeds restrictief dienen geïnterpreteerd te worden.

Daarenboven stelt de auteur dat het verbreden van de uitzonderingen op het algemene geweldverbod bijzonder grote risico’s inhoudt. Sinds het geweldverbod in 1945 in werking trad is de internationale gemeenschap gespaard gebleven van grote statenconflicten. Het verbreden van het recht op zelfverdediging, zou staten meer mogelijkheden bieden om geweld te gebruiken en op die manier de internationale vrede en veiligheid op de helling zetten.

Om die redenen formuleert deze thesis als aanbeveling dat terrorisme zo min mogelijk bestrijd wordt door middel van zelfverdediging. Het verdient de aanbeveling om terrorisme aan te pakken bij de wortels door, doormiddel van internationale samenwerkingsprogramma’s zwakke staten hun ordehandhavings- en justitiële diensten mee te helpen ontwikkelen en te versterken.

Daarnaast roept de auteur op tot een hervorming van het besluitvormingsmechanisme van de VN Veiligheidsraad. De auteur is ervan overtuigd dat zo’n hervorming staten ertoe zou aanzetten om hun probleem voor te leggen aan de veiligheidsraad, die dan kan beslissen om collectieve maatregelen te nemen, alvorens zelf over te gaan tot het gebruik van geweld in zelfverdediging.