TO WHAT EXTENT DO THE RIGHTS OF ANTICIPATORY AND PRE-EMPTIVE SELF-DEFENCE EXIST UNDER INTERNATIONAL LAW?

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I. Introduction

The right to self-defence is a natural one known and recognized since time immemorial, which is available to individuals and, after the emergence of States, to States as sovereign entities.[2]In the traditional war self- paradigm, States protect themselves either against armies massing against their border, or after attack by another nation-State.[3]After the massive terrorist attacks on the United States on 11 September2001 (hereafter 9/11) led to 'a different kind of war against a different kind of enemy', a global war on terrorism.[4] Self-defense in this 'unseen enemy' paradigm is ambiguous as it is not inherently clear who is attacking the State or who the State is protecting itself against. [5] This security threats pose a serious challenge to the international legal regime on the use of force in self-defense. The question whether international law permits the use of force not in response to existing violence but to avert future attacks has taken on

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[2] Niaz A. Shah, *Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism*, 12(1) J. Conflict & Sec. L.95, 95(2007).
[3] Amos N. Guiora, *Anticipatory Self-Defence and International Law - A Re-Evaluation*, 13(1) J. Conflict & Sec. L.3, 3 (2008).
[4]CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE193 (3rd ed.2013).
[5] Guiora, *supra*note 2, at 3-4.

added significance in the aftermath of 9/11.[6]It is the purpose of this article to examine whether, and if so under what circumstances, existing international law permits anticipatory and pre-emptive use of force in self-defense. To that end, this article reviews the legal framework on the use of force in self-defense under customary and modern international law, and will briefly explain the terminologicalmeaning of anticipatory and pre-emptive self-defense.

II. Self-Defense in International Law

Dinstein describes that 'The essence of self-defense is self-help: under certain conditions set by international law, a State acting unilaterally – perhaps in association with other countries – may respond with lawful force to unlawful force (or, minimally, to the imminent threat of unlawful force).'[7]The roots of customary international law as it relates to self-defense can be traced back to 1837, and the destruction,for attempting to transport supplies to Canadian insurgents. of an American steamship *Caroline* by British forces.[8]In the correspondence with the British authorities which followed the incident, the US secretary of State, Daniel Webster, laid down the essentials of self-defense: there must be 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.'[9]These principles were accepted by the British government at that time and accepted as part of customary international law.[10]

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[6] Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 San Diego Int'l L.J. 7, 8 (2003).
[7]YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE159 (3rd ed. 2001).
[8]Peter Franke, *A Pre-emptive Call to Arms: Questioning the Legality & Effectiveness of Pre-emptive Self-Defence as a Strategic Element of US National Security & Foreign Policy*, 12 Tilburg Foreign L. Rev.232, 235(2005).
[9]MALCOLM N. SHAW, INTERNATIONAL LAW 820 (7th ed. 2014).
[10]*Id.* at820.

Following World War II, one of the preliminary purposes for the creation of the United Nations in 1945 was to prevent future wars.[11]Consistent with this purpose, Article 2(4) of the Charter declares that States are prohibited for 'the threat or use of force against the territorial integrity or political independence of any State.'[12] Two major exceptions exist, however, to this general prohibition against use of force. First, States may use force if they are authorised by the UN Security Council under Article 42;[13] Second, if they are acting either individual or collective self-defense under Article 51, which provides:

> Nothing in the present Charter shall impair *the inherent right of individual or collective self-defense if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self- shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.[14]

Article 51 pronounces self-defense to be an 'inherent right', which the ICJ in the *Nicaragua* case construed as a reference to customary international law.[15] Accordingly, customary law continued to exist alongside the UN Charter in this field.[16]Under the Charter, all States agree that if there is an armed attack the right of self-defense arises, but

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[11] Leah Schloss, *The Limits of the Caroline Doctrine in the Nuclear Context: Anticipatory Self- and Nuclear Counter-Proliferation*, 43 Geo. J. Int'l L.555, 558 (2012).
[12] Charter of the United Nations art. 2(4), Oct.24,1945, 1 U.N.T.S. XVI.
[13] *Id.* art. 42.
[14] *Id.* art. 51 (emphasis added).
[15] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 84 [176](June27).
[16] Shaw, *supra* note 8, at 821.

there are controversies as to what constitutes an armed attack.[17]The ICJ in the *Nicaragua* caseobserved that an armed attack includes: (1) action by regular armed forces across an international border; (2) action by armed bands, armed groups, irregulars and mercenaries when (a) they are 'sent by or on behalf of a State' to carry out an armed attack against another State, and (b) the attack is of such gravity as amount toan actual armed attackconducted by regular armed forces.[18]The Courtalso distinguished 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'[19] and this was reaffirmed in the *Oil Platforms* case.[20] However, there are still controversiesconcerning the definition of the concept and the identification of an armed attack, especially in the case of modern missiles and naval mines.[21]

The terms 'anticipatory', 'pre-emptive', or 'preventive' self-defense are often used interchangeably, but should not be regarded as synonyms because many practical consequences result from their use or misuse.[22]Whilst not of universal usage, perhaps the distinction most often employed in the literature and the one adopted in this article is as follows:

'Anticipatory' self-defenseis the most immediate form, taken in responsc to the threat of an armed attack which, although perhaps not yet launched, is deemed to be imminent; 'prc-cmptive' self-defense refers to action that is taken against a perceived threat of a more

[17] Gray, *supra* note 3, at 128.
[18]Nicaragua Case, *supra* note 14, at 93-94[195].
[19]*Id.*at 91 [191].
[20]Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 29-30 [51](6 November).
[21] Gray, *supra* note 3, at 128.
[22] Dominika Svarc, *Anticipatory and Preventative Force under International Law*, 19(2) Peace Review 217, 217 (2007).

temporally remote nature; lastly, 'preventative' self-defense is a general term referring to either of the above forms.[23]

III. The Doctrine of Anticipatory Self-defense: Existence under International Law

The doctrine of 'anticipatory' self-defense in the context of international law and *jus ad bellum* refers to 'the ability to foresee the consequences of some action and take measures aimed at checking or countering those consequences'.[24] The basis of the right of anticipatory self-defense is that States faced with a perceived danger of immediate attack cannot be expected to await the attack like 'sitting ducks' but should be allowed to take the appropriate measures for their defense.[25] But there is long standing debate over the scope of this right under international law.

III.I. The Debate on the Legality of Anticipatory Self-defense under International Law

There is general agreement among international legal scholars that customary international law recognized a right to anticipatory self- long before Article 51 existed.[26]The famous *Caroline* incident of 1837 sets four, partly overlapping, criteria for anticipatory self-defense to be lawful in the pre-Charter era: First, there must be an imminent threat; Second, the response must be necessary to protect against the threat;

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[23] Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of 'Necessity Force'*, 15 J. Conflict & Sec. L.403, 407 (2010).
[24] Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-*, 72(1) U.M.K.C. L. Rev.123, 125 (2003).
[25]STANIMIR A. ALEXANDROV, SELF-DEFENCE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 149 (1996).
[26] Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self- & Preemption*, 55 A.F.L. Rev.87, 111-12(2004).

Third, the response must be proportionate to the threat; and Finally, the self-defensive action must be taken as a last resort, after peaceful means have been attempted.[27] In the judgments of the *Nuremberg* Tribunal the judges also expressly referred to the *Caroline* incident in order to uphold the view that self-defense was justified if exercised in face of an imminent threat.[28]

In the post-Charter era, two schools of thought exist regarding self-defense in international law.[29]The restrictive school argues that the language of Article 51 makes it clear that self-defense is lawful only when an armed attack occurs, and not as a first strike option.[30] They also assert that the pre-existing customary law on anticipatory self-defense was extinguished by Article 51. [31] Expansive school, by contrast, argues strongly against the assertion that Article 51 extinguished the customary law.[32] Their most persuasive argument is that Article 51 preserves the 'inherent right' of self-defense, which is an explicit reference to the customary international law.[33]As customary international law permits an act of anticipatory self-defense when the threat of an armed attack is imminent, it is therefore not implausible to interpret Article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter.[34]

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[27] Martinez, *supra* note 23, at 129-30.
[28]KINGA TIBORI SZABO, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW 138 (2011).
[29] Leo Van Den Hole, *Anticipatory Self-Defence Under International Law*, 19 Am. U. Int'l L. Rev.69, 80 (2003).
[30] Svarc, *supra* note 21, at 218.
[31] James Mulcahy & Charles O. Mahony, *Anticipatory Self-Defence: A Discussion of the International Law*, 2(2) Hanse L. Rev.231, 233 (2006).
[32]*Id.* at 233.
[33]*Id.* at 233-34.
[34] Katherine Slager, *Legality, Legitimacy and Anticipatory Self-: Considering an Israeli Preemptive Strike on Iran's Nuclear Program*, 38 N.C.J. Int'l L.& Com. Reg.267, 281-82 (2012).

The High-level Pane et-upped by the UN Secretary-General proclaimed in its 2004 Report that 'a threatened State, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate.' [35] The Secretary-General in his own subsequent Report of 2005, *In Larger Freedom*, asserted that imminent threats are fully covered by Article 51.[36] However, the 2005 World Summit for which the two reports had been prepared not surprisingly avoided the issue in its Outcome Document.[37]So, it is evident that the opinion of the international community diverged as to the status of anticipatory self-defense. Despite this it must be acknowledged that there is not a consensus of opinion that opposes the doctrine.

III. II. Views from the International Court of Justice

In the *Nicaragua* Case the ICJ sidestepped the issue of anticipatory self-defense and held that 'in the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack.'[38] In an Advisory Opinion onthe *Legality of the Threat or Use of Nuclear Weapon,* the Court again took no position on the lawfulness of anticipatory self-; it was simply unable to conclude definitively whether a State may legally use nuclear weapons 'in an extreme circumstance of self-defense, in which its very survival would be at stake.' [39] One could read this language as permitting States potential leeway with regard to the non-reactive use of defensive force

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[35] U.N.G.A. Report of the High-level Panel on Threats, Challenges and Change [188], Dec. 2, 2004, U.N. Doc. A/59/565.
[36] U.N.G.A. Report of the Secretary-General [124], Mar. 21, 2005, U.N. Doc. A/59/2005.
[37] Gray, *supra* note 3, at 165.
[38]Nicaragua Case, *supra* note14, at 93-94[195].
[39]Legality of the Threat or use of Nuclear Weapon, 1996 I.C.J. 226, 14-15 [15] (July 8) (Advisory Opinion).

in the face of an objectively existential threat.[40]In the *Oil Platforms Case*, the Court's consideration of a 'cumulative effects' test could suggest an openness to self-defensive force that is not necessarily exercised in reaction to a single imminent threat, so long as a State could demonstrate a cognizable threat based on a clear and ongoing pattern of strikes.[41] In the case of *Armed Activities on the Territory of the Congo,* the Court continues to avoid taking an express position on the lawfulness of anticipatory self-defense or even providing meaningful *obiter dicta* on the matter.[42]

III. III. Anticipatory Self-defense: States' Practice, Justifications and Reactions

This section will briefly examine some case studies that help to shed light on the question of lawfulness of anticipatory self-defense:

III. III. I. The 1962 Cuban Missile Crisis

On 22 October 1962, the United States indicated that it had sufficient evidence that nuclear missiles of Soviet Union were being installed in Cuba, brought to Cuba by Soviet ships. On 23 October 1962, after the United States' request for the Soviet Union to desist and withdraw the installation and shipping of nuclear missiles to Cuba was not acceded to, President Kennedy ordered a naval 'quarantine', which consisted of a naval blockade to inspect all ships going to Cuba, to preventthe transport of missiles and related material to Cuba and to compel the

[40] David A Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-*, 40 Geo. J. Int'l L.523, 578 (2009).
[41] *Id.*at 578-79.
[42] Case Concerning Armed Activities on the Territory of the Congo (D.R.C. v. Uganda), 2005 I.C.J. 168, 58 [143] (Dec. 19).

removalof the missiles already installed.[43]The US then brought the issue before the UN Security Council on the grounds that the delivery of offensive weapons, including nuclear missiles, to Cuba was a threat to international peace and security. The US did not seek to justify the act on the basis of Article 51; rather, it relied upon on regional peacekeeping under Chapter VIII of the UN Charter.[44]Thedispute was eventually resolved through bilateral negotiations,and the Security Council did not pass a resolution.[45]Moreover, during Security Council discussions, no clear doctrine of anticipatory self-defense emerged.[46]Despite these, most commentators continue to classify this incident as an example of anticipatory self-, likely because of the Security Council discussions.[47]

III. III. II. The 1967 Six Day War

On 5 June 1967, Israel launched its airstrikes against Egypt, Jordan and Syria on the basis that military measures by these three States against Israel were imminent.[48] Israel's claims have been questioned by commentators,with some concluding thatthere was little evidence of an imminent attack, only a collection ofcircumstantial evidence indicating that an attack might have been launched.Even those States which supported the Israeli action refrained from a discussion of the permissibility of anticipatory self-defense;Israel was the only State to examine the concept.[49]Shortly, thereafter, however, this argument lost

[43] Martinez, *supra* note 23, at 137.
[44] Gray, *supra* note 3, at 161-62.
[45] Martinez, *supra* note 23, at 137.
[46] Sadoff, *supra* note 39, at 566.
[47] *Id.* at 137-38.
[48] Alexandrov, *supra* note 24, at 153-54.
[49] *Id.*

weight and Israel made the alternative claim that the blockade by Egypt of the Straits of Tiran to passage by Israeli vessels amounted to an act of war; it was an armed attack justifying self-defense under Article 51. Most, but not all, States were opposed to this use of force by Israel, but in the ultimate resolution passed by the Security Council there was no express condemnation of Israel.[50] It was a clear indication that Israel's claim of anticipatory self-defense found little support.[51]

III. III. III. The 1981 Israeli Attack on Osirak Nuclear Reactor

On 7 June 1981, Israel led a cross-border air strike with 14 fighterjets that destroyed the Osirak nuclear plant in Iraq,[52] on the allegation that it was a threat to its existence.[53] In the Security Council,Israel specifically invoked the right of anticipatory self-defense and relied on an expansive interpretation of Article 51.[54] Again, the debates of Security Council reflect division as to the permissibility of anticipatory self-; however, most representatives seemed to accept the existence of the doctrine in international law even if they disagreed on the scope of the doctrine and its application in this case.[55]

III. III. IV. Other Examples

Other situations that may be classified as State resort to, at least partially, the doctrine of anticipatory self-defense to justify the use of force include the Israeli military invasion of Egypt in the Sinai

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[50] U.N.S.C. Res. 242, Nov.22, 1967, U.N. Doc. S/RES/242.
[51] Alexandrov, *supra* note 24, at 154.
[52] Sadoff, *supra* note 39, at 569.
[53] Slager, *supra* note 33, at 303.
[54] Alexandrov, *supra* note 24, at 159.
[55] Martinez, *supra* note 23, at 139.

Peninsula in 1956,[56] the 1986 air strikes of the US on five Libyan military targets allegedly used as bases for planning terrorist attacks on US citizens abroad,the 1998 missile strikes by the US on the alleged terrorist outputs of Osama bin Laden in Sudan and Afghanistan,[57] andthe 2007 Israeli attack on a Syrian nuclear facility.[58]In all these cases actions were taken inapprehension of imminent threats, not in response of actual armed attacks. That's why, in these incidents, those States relied on, or supported anyhow, the doctrine of anticipatory self-defense were criticized by the rests, but the criticism was based more on the application of the doctrine than on the existence of the doctrine.[59]

IV. Anticipatory Self-defense after the incidents of 9/11

The most important development in the immediate aftermath of 9/11 was the explicit acceptance on behalf of the Security Council that armed acts carried out by non-state actors could justify resort to self-defense.[60] That's why, the US invasion of Afghanistan in 2001is regarded a lawful exercise of self-defense that is also recognized by the Security Council Resolution 1368 (2001).[61] Feinstein argued that *Operation Enduring Freedom* was not only a lawful exercise of self-defense after an armed attack had occurred, but also a legal anticipatory action designed to prevent further serious injury.[62]Many commentators argue, especially after 9/11,thatif a State waits (particularly in the nuclear context) until it has actually suffered an 'armed attack', it is

[56] Szabó, *supra* note 27, at 144.
[57] Martinez, *supra* note 23, at 140, 143.
[58] Slager, *supra* note 33, at 304.
[59]Martinez, *supra* note 23, at 141.
[60] Szabó, *supra* note 27, at 231.
[61]*Id.* at 230; U.N.S.C. Res. 1368, Sep. 12, 2001, U.N. Doc. S/RES/1368.
[62] Barry A. Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11(2) J. Transnat'l L. Pol'y 201, 282 (2002).

likely that it will no longer be in a position to defend itself.[63] Therefore, they relied on common sense and logic to support the continued recognition of a doctrine of anticipatory self-defense in customary international law,[64] and suggest stopping those weaponsby taking anticipatory actions before it is too late.[65]

V. The Doctrine of Pre-emptive Self-defense: Does it exist under International Law?

Reisman defines pre-emptive self-defense as 'a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost.'[66] The goal of pre-emptive self-defense is to prevent 'more generalized threats from materializing' rather than trying to 'preempt specific, imminent threats.'[67] As to the legality of the doctrine arguments have been advanced through the years. However, the most recent National Security Strategy of the US represents a marked departure from the past practices.[68]

V. I. The National Security Strategy of the US: The Bush Doctrine

After 9/11, the US and the UK launched *Operation Enduring Freedom* against Al-Qaeda and Taliban targets in Afghanistan on 7 October

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[63] Francis Grimal, *Missile Defence Shields: Automated and Anticipatory Self-Defence?*, 19(2) J. Conflict & Sec. L.317, 329 (2014).
[64] Martinez, *supra* note 23, at 162.
[65] Schloss, *supra* note 10, at 562.
[66] W. Michael Reisman, *Self-defence in an age of Terrorism*, 97 A.S.I.L. Proceedings141, 143 (2003).
[67] Miriam Sapiro, *Iraq: The Shifting Sands of Pre-emptive Self-Defence*, 97(3) A.J.I.L. 599, 599(2003).
[68] Franke, *supra* note 7, at 240.

2001,[69] which was seen to be an appropriate exercise of the right of self-defense against an armed attack.[70] Within a year of the attacks, the US had built a case for further widening the conventional right of self-defense so as to include taking traditionally unlawful unilateral pre-emptive military action against the 'new' threats of global terrorism and weapons of mass destruction (hereafter WMD).[71] This has become known as the Bush Doctrine and its formal enunciation culminated in the release of the National Security Strategy in September 2002.[72] The kernel of the doctrine is that unilateral pre-emptive force may be used even in instances where an attack by an enemy has neither taken place nor is imminent.[73] In March 2006 the US released a new National Security Strategy where the Bush Doctrine of pre-emption remained a key element.[74] This doctrine seeks to aggressively expand the right of self-defense, and allow the use of force even in the face of uncertainty regarding the time and place of the anticipated attack.[75] It made no distinction 'between terrorists and those who knowingly harbor or provide aid to them'.[76] In light ofthe terrorist bombings in Bali on 12 October 2002,Australia has expressly endorsed the doctrine;[77] though itis not included in the Australian 2005 Defense Update.[78] Recently, however, a growing and increasinglyvocalopposition has questioned

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[69] Martinez, *supra* note 23, at 146.
[70] Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9(1) J. Conflict & Sec. L. 4, 4 (2004).
[71] *Id.* at 5-6.
[72] George W. Bush, *The National Security Strategy of the United States of America: The White House,* (Sep. 20,2002), http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.
[73] Mulcahy & Mahony, *supra* note 30, at 236.
[74] George W. Bush, *The National Security Strategy of the United States of America: The White House,* (Mar. 16, 2006), http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/.
[75] Franke, *supra* note 7, at 241.
[76] Henderson, *supra* note 69, at 7.
[77] *Id.* at10.
[78] Gray, *supra* note 3, at 216.

the legality of the new US position which claims a definitive legal right to use force in pre-emption of an attack.Furthermore, even among the supporters of a pre-emptive right to self-defense, many would not allow the use of such force in theabsence of a clear and imminent threat.[79]

V.II. The 2003 Iraq War: Justifiability of Pre-emptive Self-defense

In January 2002 *State of the Union Address,* President Bush declared that the greatest danger to America lay where terrorism, rogue States, and WMD intersected and that there was an 'axis of evil' consisting Iraq,Iran and North Korea.[80] In the period between 9/11 and the eventual attack on Iraq in March 2003 there were deep divisions between States on whether to use of force against Iraq and whether there was any legal justification for *Operation Iraqi Freedom.*[81] Some writers justified the Iraq war as legal under the authority of the Security Council Resolution 678 (1990),[82] arguing that at the date military action commenced, Iraq continued to be in material breach of(disarmament obligations)Security Council resolutions 687 (1991)[83] and 1441 (2002),[84] which posed a threat to international peace and security.[85] The US justified its action relaying both on the implied authorization of the Security Council and the right of self-defense against terrorism.[86] These notions have been rejected by many scholars arguing that there was no conclusive evidence that Iraq had relation with Al-Qaeda and was developing WMD.[87] Moreover, they asserted

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[79] Franke, *supra* note 7, at 242.
[80] Henderson, *supra* note69, at 7.
[81] Gray, *supra* note 3, at 218.
[82] U.N.S.C. Res. 678, Nov. 29, 1990, U.N. Doc. S/RES/678.
[83] U.N.S.C. Res. 687, Apr.3, 1991, U.N. Doc. S/RES 687.
[84] U.N.S.C. Res. 1441,Nov.8, 2002, U.N. Doc. S/RES/1441.
[85] Greenwood, *supra* note 5, at 33-36.
[86] Gray, *supra* note 3, at 219.
[87] *Id.* at 220-21.

that the UN did not empower any country or a group of countries to take unilateral action against Iraq in the event of latter violation of the resolution; thus the US action against Iraq was illegal.[88]The UK and Australia, the only other states to contribute forces to *Operation Enduring Freedom,* did not use pre-emptive self-defense as any part of their legal case for the invasion of Iraq; they preferred to rely on authorization by the Security Council, an indication of the doubt over the doctrine of pre-emptive action.[89] Besides, those forty-five States were willing to offer support to the US invasion of Iraq, they did so not on the basis of the doctrine of pre-emptive self-defense.[90]

V.III. The Legality of Pre-emptive Self-defense under International Law

The USA asserts that pre-emptive self-defenseis a recognized doctrine in international law, a controversial claim in the light of the divisions between States on the subject.[91] A number of arguments can be advanced to provide support for and against the notion.

V.III.I Arguments for the Legality of Pre-emptive Self-defense

The expansive school argues that a pre-emptive right to self-defense exists, not only under customary international law, but also under Article 51.[92]Commentators believe that pre-emptive self-defense can be legitimized by taking a more expansive interpretation of each of

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[88]Rajeesh Kumar, *Iraq War 2003 and the Issue of Pre-emptive and Preventive Self-defence: Implications for the United Nations*, 70(2) India Quarterly123, 131 (2014).
[89] Gray, *supra* note 3, at 219.
[90]*Id.* at 221.
[91]*Id.*
[92]RICHARD J.ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 138 (1989).

the prerequisite elements of the *Caroline* formula.[93] For example, the requirement of necessity can be met the severity of the attack is expected to be particularly devastating. The notion of proportionality would be met just as it would under more traditional notions of the use of force in self-defense. With respect to modern WMD the last opportunity for response might exist some time before the attack commences. Thus, the criteria of imminence should consider the defensive act in relation to the last opportunity the victim has to undertake alternatives to force.[94] The US claim to a right to pre-emptive self-defense rests on the contention that the current threat posed by non-state terrorists and rouge States demands new or at least modified understanding of international law in relation to the use of force.[95]

V.III.II. Arguments against the Legality of Pre-emptive Self-defense

The restrictive school argues that there is no pre-emptive right of self-defense under the UN Charter as well as under customary international law.[96] They argue that it breaches the core principles of international law.[97] From the textual reading of Article 51it is understandable that the drafters of the Charter did not intent to allow unilateral pre-emptive use of force by States.[98] To deal such a situation they inserted Chapter VII in the Charter which allows the Security Council to act pre-emptively, authorizing military force, not only for acts of aggression,

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[93] Franke, *supra* note 7, at 243.
[94] *Id.* at 244-45.
[95] Andrew Garwood-Gowers, *Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?*, 23 Aust. Y.B.I.L.51, 60 (2004).
[96] Erickson, *supra* note 91, at 136.
[97] Shah, *supra* note 1, at 115.
[98] Franke, *supra* note7, at 249.

but also for threats to peace and the maintenance of international peace and security'.[99]That's why, Greenwood argues that 'In my opinion, that still reflects international law and, in so far as talk of a doctrine of pre-emption is intended to refer to a broader right to respond to threats which might materializesometime in the future, I believe that such a doctrine has no basis in law.'[100]

The European Union and the North Atlantic Treaty Organization (NATO) still not expressly adopted the doctrine of pre-emptive self-defense.[101] Even the UK government recently, the USA's strongest supporter, has not openly accepted a wide doctrine of pre-emption.[102] The 118 member Non-Aligned Movement has repeatedly rejected the doctrine of pre-emptive self-defense.[103]The High-level Panel Report and the Secretary-General's Report *In Larger Freedom* both expressly rejected the doctrine of pre-emptive self-defense which they understood as action against non-imminent threats.[104]Considering all these matters, Gathii described the 'pre-emptive use of force' as a 'clear violation of international law.'[105]

VI. Conclusion

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[99]Mary Ellen O'Connell,*Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 Colum. J. Transnat'l L.473, 481 (1998).

[100] Christopher Greenwood, *The Legality of Using Force against Iraq.* [24]MEMORANDUM TO THE UKGOVERNMENT(Oct. 24, 2002),http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm.

[101] Gray, *supra* note 3, at 214-15.

[102]*Id.* at 215.

[103]*Id.* at 213.

[104]*Id.* at 212.

[105]James Thuo Gathii, *Assessing Claims of a New Doctrine of Pre-emptive War under the Doctrine of Sources*, 43 Osgoode Hall L.J.67, 77 (2005).

Despite the fact that the issue deserves more rigorous further study and it is not possible to discuss all the relevant matters in details within this limited space, it is revealed from the above discussion that some States, mainly the US and Israel, have raised the doctrine of anticipatory self-defense, sought to rely on it and acted, at least in their view, consistently with the doctrine; other States appear to accept the doctrine in theory, but have rejected any purported applications of it; some States reject the doctrine entirely. It is established above that the concept of armed attack includes an imminent attack and therefore, anticipatory self-defense is a credible rule of international law. On the other hand, it has been revealed that the pre-emption is a much broader and therefore, much more dangerous doctrine than anticipatory self-defense. The US is found as the main propounder of the doctrine of pre-emptive self-defense, while others, except few, rejected it entirely. The evident lack of support for the doctrine, the consensus emerged that it was not one that was, or likely to become, acceptable under international law. However, it seems certain that the rights of anticipatory and pre-emptive self-defense under international law will remain clouded and indistinct until such time the ICJ or the United Nations makes apronouncement on the issue.