UNSC STUDY GUIDE

Before reading the guide, it is to clarify that the guide has been divided into parts in the form of bold statements prior to explaining what the statement entails to in relevancy of Article 51, self-defense and armed intervention, should any delegate face difficulty in understanding the basis of any content in the guide, they can contact the chair directly. A special focus is given on the specific case studies which are to be studied by the delegates and a number of listings are given to ensure properly that the delegates understand the topic. Moreover, within are inscribed, the set number of resolutions that are needed to be overlooked in order to understand UNSC mandate as well as the theory of armed intervention.

Introduction

Considering among other things the fundamental goal of the United Na-tions (UN) of saving succeeding generations from the scourge of war, the most convincing view of the provisions on the use of force in the Charter of the United Nations (UN Charter) is the one claiming that the prohibition on the unilateral use of force is very broad and that the exception to the prohibition in the form of the right of self-defence against an armed attack is very narrow. Effective collective measures including military measures for the suppression for instance of acts of aggression or other breaches of the peace were supposed to be taken by the Security Council. For that purpose the UN Members conferred on the Security Council primary responsibility for the maintenance of international peace and security. Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. But until now it has been understood that when States go beyond that, and decide to use force to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations. Now, some say this understanding is no longer tenable, since an "armed attack" with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed. According to this argument, States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions.

This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years. The international legal order, including the regime on the use of military force, is currently in transition. Our times are characterized by a high tension between interdependence and globalization (economic, technical, and cultural) on the one hand, and stark cleavages and fencing (ideational, eco-nomic, territorial, and even military) among states, on the other hand. In such a period of tension, international law, with its broad principles, offers little guidance. This makes legal scholarship which tries to work with these principles particularly vulnerable. The "new threats" to peace and security emanating from "new actors" are iconised in the terrorist attacks of 9/11/2001, alt-hough numerous large-scale terrorist transnational crimes had been com-mitted before, and are continuing. The Security Council's resolutions 1368 and 1373 of September 2001 are interpreted by many observers as an en-dorsement of the lawfulness of self-defence against a large scale terrorist armed attack, while others insist that these resolutions only mentioned the right to self-defence without passing judgment on its lawful use in the con-crete case. Whatever they mean, these resolutions still constitute the most important reference point for those "expansionists" who believe that self-defence can in principle be lawfully exercised against non-state attacks. China and Russia are attempting to shed their role as mere norm-takers, and to participate as norm-shapers – also in the field of peace and security. In the Chinese-Russian declaration on the Promotion of

International Law of 2016, the two states "condemn terrorism (…) as a global threat that under-mines the international order based on international law". However, the two signatories do not mention self-defence as a response but – to the con-trary – ask for "collective action in full accordance with international law, including the United Nations Charter" to "counter this threat".

If the international order is currently changing, then it is not only due to the military power of – say – the Islamic State and Russia, but *also* due to the power of ideas and emo-tions, such as resentment against Western interference, the perception of being left behind, lack of prospects for a decent life, opposition against ma-terialism and consumerism, or the like. And if the international legal order feeds on preconditions which itself cannot guarantee, this also means that international scholarship, too, must come to grips with pre-conditions and side-conditions over which itself has no control.

Collective Security

The phrase "collective self-defense" in Article 51 of the UN Charter has given rise to the debate as to how military alliances, mutual assistance treaties and treaties of guarantee affect the right to collective self-defense in relations to the UN Charter. However, it would seem clear that any such treaty, which would be in violation with Article 51 and the remaining part of the UN Charter, would therefore become void. According to Article 103 of the UN Charter the UN Charter has primacy over any con- flicting charters and treaties. Article 103 of the UN Charter states،

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

This does not mean that treaties of assistance or military alliances necessarily are in- compatible with the UN Charter and some of the treaties explicitly state that they are subordinate to the UN Charter, such as the North Atlantic Treaty Organization. Therefore, the UN Charter must govern the exercise of collective self-defense by the contracting parties of NATO. Conclusively, this means that collective self-defense is a right and not a duty unless a state has entered into a mutual assistance treaty NATO´s defense agreement is probably the most prominent agreement on collective security and is a great example of a mutual assistance treaty that co-exists with the UN Charter. According to NATO an attack of one of the countries of the NATO is an attack on all the countries, and it has only been invoked once, which was after the terror attacks on 9/11. Article 5 of the NATO treaty provides،

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, includ- ing the use of armed force, to restore and maintain the security of the North Atlantic area"

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Se- curity Council has taken the measures necessary to restore and maintain internation- al peace and security"[235].
The question of whether a state can violate the prohibition on the use of force and non- intervention by tolerating and accepting that rebel groups operate from their territory was exam- ined in the Congo-Case. Uganda claimed a wider interpretation of the non-use of force and non- intervention to also extend to a duty

of vigilance to ensure that such activities did not take place. However, Uganda failed to prove the absence of action by Congo on the grounds that Congo at first had not been capable to stop the rebels operating from its territory and afterwards actually had taken clear action[314]. This judgment is important for two reasons. First of all because the ICJ determined that a state's inability or ineffectiveness for taking action against rebels operating from its territory do not make the state in question responsible for non-intervention[315] and sec- ondly because it establishes that states have an obligation to secure that its territory is not know- ingly being used for acts contrary to the rights of other states.

Parameters on Self-Defence

The question whether and under what conditions self-defence is lawful against (certain types of) non-state attacks has reemerged since 2014 by the interventions in the armed conflict in Syria. In this context, a number of states, notably the United States of America, the United Kingdom, Turkey, and France, claimed individual self-defence against the Islamic State (IS) and/or Khorasan. Other states, and some of the mentioned ones, alterna-tively or additionally relied on collective self-defence of Iraq (which pre-supposes that Iraq was suffering an armed attack in the sense of Art. 51 of the Charter of the United Nations [UN Charter]) and/or on underlying customary law which would justify self-defence. The UN Charter circumscribes a right of self-defence, but – to quote the International Court of Justice (ICJ) – "does not go on to regulate directly all aspects of its content". The ICJ case-law has not settled the question whether self-defence is available against attacks by non-state forces either. At the same time, the Court implied that – if at all – self-defence was available only against "large scale attacks" of a non-state armed group. 2004, the mentioned High-level Panel of experts commissioned by the United Nations (UN) Secretary General, had pronounced itself in favour of a "restrictive" reading of Art. 51. It had chiefly relied on the – then new – response capacity of the UN Security Council.

"It may be that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. *But how-ever understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed* and expectations about legal compliance are very much higher."

A decade after this High-level Panel report, the world has changed again. We are (again) in a cold-war like situation in which the Security Council is blocked by mutual vetoing so that states feel that they have to act to protect their citizens, without having to engage in a Security Council process which they expect to be futile anyway.

A related scholarly enterprise is the "Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism", focus section on "practice" sought to assess the lawfulness of military interventions against the Islamic State of Iraq and the Levant (ISIL) and other terrorist groups against the benchmark of "positive international law" and also aimed "to evaluate whether these interventions and the counter-terrorism discourse surrounding them could lead to an evolution of the current legal system regulating the use of force". The events in Syria have added a new layer of relevant practice. Moreover, the letters to the Security Council can reasonably be seen as ex-plicitly formulating the states' *opinio iuris*, a phenomenon which is rare in international relations. Positions are currently so divided that the "common global understand-ing" called for in 2005 may be unattainable. As *Ian Hurd* has pointed out, "the question of whether US bombing against ISIL in Syria in 2016 really is self-defence or not under the UN Charter is not likely to be resolved – the issue rests on controversies over what the law allows and forbids, as well as over how these US actions fit into the law, and on these points it is probably unrealistic to expect convergence on any settled consensus." On top

of all, the ongoing events suggest that the law on self-defence against non-state actors may be in a flux. It has even been claimed that the war against ISIL triggered a "Grotian Moment" of change in international law. Despite the importance of finding common ground and developing glob-ally shared principles, we deem it advisable to approach the question of self-defence and armed intervention against non-state actors in a pluralist fashion.
With regard to self-defence against non-state actors, for example, whether a link of attribution is needed between the attack and the territorial state or not. As to contextualise the historical incidences of self-defence against irregular bands, the need to analyse the structure of the justificatory discourse, analyse the political function of the rule on self-defence in international relations, or of fairness in balancing the burden between the attacked state and the territori-al state. It therefore sought not only to make visible and to ac-commodate the legitimate pluralism of readings and interpretations of a complex legal problem in the international *jus contra bellum*, but also sought to try out the different types of thinking before, against, and with international law mentioned above. The exact balance that is struck between, for example, sovereignty and hu-man rights, or between the territorial integrity of one state and the security concerns of another, directly affect the material interests of states. Thus, these choices are deeply value loaded and connect to underlying political and theoretical preferences. Although UN Charter outlaws non-defensive claims to use of force, it provides little assured restraint upon state action the problem lies in the broadening interpretation of self-defence and unilateral use of force by powerful states. According to Glennon (2001, 89) "a broader conception of self-defence by states has pushed the rules of law into a zone of twilight –a sphere where predictability has been lessened, expectations confused and the contours of law rendered uncertain". UN Charter is more than five decades old yet the world is still suffering from the effects of armed struggles that have led to the loss of more than twenty five million people and other unbearable consequences (ibid). Some of the conflicts recorded include the, Israel, French and British invasion of Egypt 1956, US invasion of Dominican Republic 1954 and invasion of Dominican Republic 1965 (ibid). In response to the 11 September terrorist attacks of 2001, US attacked Iraq and Afghanistan in the name of self-defence.

The concept of self-defence derives from the notion of self-help available to states after being aggrieved. Such measures should meet the requirements enunciated by UN Charter Article 51. Article 51 of the UN Charter provides that, "nothin g in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the UN, until Security Council has taken necessary measures…" Wallace (2005, 285). Thus, an act of self-defence is permissible only following an armed attack. However, the actual definition of an armed attack was left to customary international law Gray in Evans 2003, 601). **A traditional definition of an armed attack considers an attack by a regular army of one state against the territory or against the land, sea or air forces of another state. During the *Nicaragua case,* the ICJ relied on the definition of Aggression as a basis for interpreting the meaning of armed attack. The court noted that it must include the sending by or on behalf of a state of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to actual armed attack (ibid, 602). What is important here is government involvement in the alleged action. The September 11 terrorist attacks of 2001 on USA seemed to have propelled the broadening of the definition to include terrorist attacks as constituting armed attack. The location of the alleged attack is crucial in understanding the legitimacy of force used for the purposes of self-defence. Distein (1998, 156) traditionally an armed attack that prompts the counter force for self-defence was expected to occur within the boundary of the victim state. However, an armed attack can occur beyond territorial boundaries for instance a vessel of a country may be attacked on the high seas and a satellite of the victim state might be attacked in the outer space. As such a victim state is entitled to resort to self-defence measures regardless of the geographical point of the attack. An attack may occur on the installations of the victim state such as, military base or an embassy and this may constitute an armed attack. During the *Tehran case of 1980*, the ICJ used the phrase "armed attack" when discu ssing takeover by Iranian militants of the US embassy in Tehran, and the seizure of the embassy staff as hostages**

in November 1997 (ibid). Thus attack of property and nationals of a state outside its borders may amount to armed attack. It can again be argued that Article 51 of the UN Charter does not state that non-performance of the reporting obligation carries with it incurable consequences for the invocation of the right of self-defence. This is because the sequence of events envisaged by the framers of the UN Charter is such that at the initial stages of the conflict, a victim state takes measures in self-defence and only thereafter does it have to communicate through a report to the Security Council (ibid). It is also submitted that the dispatch of a report to the Security Council is only one of the many factors bearing upon the legitimacy of state's claim to self-defence. More so the instantaneous transmittal of a report to the Security Council is no guarantee that the Council will accept that the force used in self-defence is legitimate. As such, failure by the victim state invoking its right to self-defence to file a report at an early stage should not prove an irremediable defect. In this regard, it is worth noting that, "It will be a gross misinterpretation of Article 51 for the Council to repudiate self-defence, thus condoning an armed attack, only because no report has been put on record (ibid، 197)." One can note that there are complexities that states encounter during the process of reporting and as such, lack of prompt reporting to the Security Council should not in any case doom the entitlement to the right of self-defence.

After receiving a report from any state in relation to the force taken for the purposes of self-defence, the Security Council is expected to study all the relevant facts concerning the case in question. Surprisingly, there is no mandatory provision under Article 51 requiring the Council to establish a fact-finding mission but it can take any action it deems necessary for the maintenance of international peace and security. The Security Council can opt for one or a combination of the following options، approving the exercise of the right self-defence or, calling for cease-fire. Other options include demanding total withdrawal of forces to the original lines, insisting on the cessation of the unilateral action of the defending state supplanting it with measures of collective security or declaring the defending state as the actual aggressor. Whatever the decision made by the Security Council, the resolution must be unequivocal and all UN member states are obligated to act as the Council ordains. However, this is not always the case, because most powerful states usually influence the decisions of the Security Council and they can disregard its Resolutions without any negative effects on their part. For example due to its preponderance in the international economy, US cannot be affected by measures such as economic sanctions.

The use of force under Article 51 was intended to be temporary and the UN Charter is explicit in articulating that the victim will only use this option awaiting the response, of the Security Council. The Security Council retained the discretion of determining whether a threat to peace and security or the armed attack had occurred that warrants the resort to force by the alleged victim state for the purposes of self-defence. This guideline will only apply where the UN Security Council is effective in performing its mandate. The following chapter examines the effectiveness of the Security Council in performing its mandate in relation to the application of the right to self-defence by USA.

Interpretation of Article 51 of the UN Charter

It is generally recognised that the *jus contra bellum* regime enshrined in the Charter of the United Nations (UN Charter) is composed of perempto-ry norms.That does not mean that its meaning is frozen once and for all. On the contrary, it can evolve and be adapted to new circumstances, includ-ing by taking practice into account as it has been the case, for example, with the powers of the Security Council. In this case, however, a new interpreta-tion of the rule has been "accepted and recognised by the international community of States as a whole" (Vienna Convention on the Law of Trea-ties [VCLT], Art. 53) or, if one prefers to use the classical means of interpre-tation set out in Art. 31.3 of the VCLT, been the object of an "agreement between/of the parties" to the Charter. The current debate about the scope of self-defence is often framed as fol-lows، Does

the expression "armed attack" contained in Art. 51 of the Char-ter apply to a use of force by a non-State actor (NSA)? In fact, the question is biased, or rather largely irrelevant. Indeed, an affirmative answer has been evident for decades. In 1974, after decades of debates, all the UN Members adopted a definition of aggression in which the possibility to respond to some uses of force led by NSAs was specifically recognised (Art. 3 g)). This definition has been regularly reaffirmed by States, notably in 2010 when they adopted a definition of the crime of aggression in the context of the International Criminal Court (ICC) statute. Moreover, the definition is considered by the International Court of Justice (ICJ). **The problem thus lies not in the invocation of self-defence in the case of an armed attack launched by an NSA, but rather in the possibility to invoke self-defence against a *State* which is not itself the direct author of the armed attack, and is therefore entitled to the protection of its sovereignty and its political independence under Art. 2.4 of the UN Charter. In other words, How can an actor (a State) invoke a use of force attributable to another actor to justify using force against another actor (a State whose territory is used), considering that the State would be "objectively responsible" for what the interventionist did (correspond-ing to a situation of "inability" or of a "Failed State"), invoking necessity as the only criterion justifying the intervention, without even searching to establish a form of responsibility of the territorial State. Practice has been invoked in support of some of those options, and it is true that many States interpreted Art. 51 beyond the parameters laid down in Art. 3 g). However, the result is undoubtedly mixed.**

Actually, the only precedent having given rise to an implicit general endorsement of a broad interpretation of Art. 51 is the war against Afghanistan launched in 2001. This precedent could be interpreted as an illustration of options A (if we consider that the Taliban regime was "substantially involved" in the activi-ties of Al Qaeda) or B (if we prefer to characterise it as a mere situation of complicity) presented above. However, this precedent was not followed by others, at least not of similar magnitude. The wars launched by Israel against Lebanon (2006) and in Gaza (in 2009 and 2014) were widely con-demned, and not only because of the disproportional character of the ri-postes. The Non-aligned Movement (NAM) adopted a statement in September 2006 denouncing a "relentless Israeli aggression", without any ref-erence to the criterion of proportionality, and similar statements were issued to denounce the military interventions in Palestine. Finally, the fight against Islamic State of Iraq and Syria (ISIS) in Iraq and Syria provides a topical example of the diversity of the position of States about the scope of self-defence, having been invoked by some, without any possibility to establish a common understanding of what international law-could mean. Given this brief overview of the existing practice, we have to deal with two different conclusions.

If we turn to formal and multilateral declarations made by States, the classi-cal reading of the UN Charter, as reflected in the definition of aggression, still prevails. The NAM, composed by some 120 States (in other words, by the majority of the UN Members) regularly reaffirmed that "consistent with the practice of the UN and international law, as pronounced by the ICJ, Art. 51 of the UN Charter is restrictive and should not be re-written or re-interpreted", If we observe unilateral or regional practice, those statements are clearly not respected. Many large-scale or (more often) limited military operations have been conducted in the name of a broad conception of self-defence, beyond the criteria enshrined in Art. 3 g) and applied regularly by the ICJ in its ju-risprudence.

At this stage, two possibilities are open, each of them reflecting a certain conception of Article 51. The first would be to consider that, even if formally in force, the rule doesn't have any relevance any more, in view of its incapacities to address the current problems and challenges of the new "fight against terror". This "realistic" view could offer a "death" of Art. 2.4. Another possibility, chosen by the ICJ in order to preserve the very existence of international law, is to refuse to consider that deeds are more important than words

US Invasion of Afghanistan (2001)

Following the September 11 attack, the US government took several aggressive steps to fight global terrorism. One of these steps was an attack on Afghanistan ultimately overthrowing the Taliban government. US accused the Taliban government of harbouring a terrorist group suspected of orchestrating terror attacks. However, US justifications were not convincing especially the argument of self-defence. The force used was neither necessary nor proportional as unparalleled civilian deaths were recorded. In stark contrast with the provision of Article 51, the then US President Bush stated that they will make no distinction between the terrorists and those harbouring terrorists. Under international law, force used for the purposes of self-defence must be directed upon the actual perpetrator of the crime. Traditionally force was expected to be directed only against a state. In a letter to the Security Council, during the war against Afghanistan US based its argument on the fact that the Taliban regime permitted parts of its territory under its control to be used as a terrorist base of operation for Al-Qaeda. Thus, USA used the doctrine of state responsibility to support its invasion of Afghanistan. However, the case of Afghanistan failed to meet the conditions of state responsibility and this can be supported by the arguments given by the International Law Commission (ILC) on the subject. According to Bianchi (2004, 12) the ILC noted that ,"a state is responsible if the person or group of persons is in fact acting under the instructions or the control of that state, if the person or group of persons is in fact authorities or if the accused state acknowledges and adopts the conduct in question as its own." USA overthrew the Taliban government despite the fact that it had no ties with the alleged terrorist group accused of attacking USA.

USA has indicated that, its Harbouring doctrine would imbue responsibility to a state that permits a terrorist group to operate and train within its borders even without supporting or adopting its actions. USA seemed to have gained unequivocal support from the UN Security Council Resolution 1373, which stipulates that, "al l states shall prevent terrorists from using their territory for terrorist purposes and deny safe haven to those who finance or plan or facilitate terrorist activities (ibid, 12)." The re solution seemed to have given US the green light to invade Afghanistan since no resolutions were passed to condemn the invasion. To the contrary, the Organisation of American States (OAS) and NATO passed resolutions expressing their unconditional support of the US's right of self-defence. The passing of resolution 1373 by the Security Council and its subsequent actions all point to the view that it approved and supported US actions in Afghanistan. After the fall of Kabul, the UN joined the US to develop a new plan that was aimed at establishing a new multi-ethnic government and the initiative of a long-term process of nation building. More so, UN Security Council passed other resolutions authorizing the US to maintain law and order and endorsing an initiative to form a multi-ethnic transitional government in Afghanistan.

The unilateral application of force by the US had destroyed economic well-being of the affected states. In Afghanistan, analysts argue that the invasion was driven more by economic interests. The US has argued that it had discovered "previously unknown and untapped" mineral reserves with the estimated value of one trillion dollars, the minerals include inter alia huge veins of iron, copper, cobalt, gold and critical industrial metals such as lithium (Chossudovsky 2010, 1). The minerals could transform Afghanistan into one of the most mining centres in the world. The argument of the US that the minerals were previously unknown is just concealment of the truth to make the world assume that it discovered the minerals well after the invasion. Thus, the 2001 invasion of Afghanistan had set a stage for the exploitation of mineral deposits by western mining and energy conglomerates. Despite undermining international law, the invasion by USA has led to the impoverishment of target states. This is because the US has turned the alleged right to self-defence in Afghanistan into occupation. No industrial development can thrive in a war situation such as in Iraq.

During the US invasion of Afghanistan, fundamental human rights were disregarded. While it is terrorists violate the rights of individuals, those accused of committing acts terror themselves must be treated in

accordance with human rights law especially where detention, fair trial, non-discrimination and deportation are concerned. The US detention camp at Guantanamo Bay in Cuba has been regarded as the most notorious base world over used for torturing suspected US enemies. It is worth noting that the US has abrogated its international human rights obligations citing threat of terrorism. More so even if USA had genuine reasons to invoke its right to self-defence the force used was disproportionate and the aerial bombings against Afghanistan were indiscriminate. Villages were destroyed killing civilians and their livelihood for instance a farming village Chowkar- karez 25 miles of Kandahar was bombed by US warplanes and at least 93 civilians were killed. A US official who participated in the bombings argued that, "A 2,000 IB bomb, no matter w here you drop it is a significant emotional event for anyone within a square mile." This was a total disrespect of international humanitarian law according to which civilians must not be the target of attack in any warfare whether offensive or defensive.

From 7 October 2001 to January 2002, the Al-Ahram Weekly of Egypt estimated that about 300 – 3400 civilian deaths were recorded in Afghani stan. Thus, one commentator succinctly captured the nature of the war in Afghanistan arguing that, "the war in Afghanistan has been a war upon the people, the homes, the farms, and the villages of Afghanistan, as well as upon the Taliban and Al Qaeda." This indicates that US's claim that it was waging a just war can be disqualified considering the number of civilians that were killed within a small space of time. Civilians were killed deliberately because US had advanced military equipment that ensures precision accuracy when launching an attack. The alternative US media noted that during the first week of bombing, 400 Afghanistan civilians had been slaughtered and Pentagon has blithely dismissed this reality. The disproportionate and indiscriminate bombardment of US on Afghanistan had made the whole nation to suffer for the crimes of few obvious individuals. Indeed the war was unnecessary and failed to fit within the definition of a just war. If the war was waged in the name of self-defence then it will be difficult to understate the meaning of the law. Such actions will not encourage voluntary compliance to international law by other states. Thus if states can willingly disrespect the rules governing the use of force it will be meaningless to talk of international law and collective security system.

The Invasion of Iraq by US Led Coalition of the Willing (2003)

In September 2001, the Bush Administration formulated and announced the US National Security Strategy (USNSS). The strategy was explicit on the fact that it was prepared to use pre-emptive strikes to prevent its enemies from using Weapons of Mass Destruction (WMD) against it or its allies and friends. Concurrently, the Bush Administration was peddling a speculation that Iraq's WMD programme posed a threat to US's political, economic and security interests. Consequently, it became obvious that Iraq could be the first victim of pre-emptive strike. Notwithstanding other reasons such as alleged possession of nuclear weapons and flouting prior UN Security Council resolutions, US military invasion of Iraq follows the principle aims of the aforementioned USANSS. The security strategy contained the guiding security philosophy or ideologies of the US in the period after the September 11 attacks of 2001. The USNSS contained a range of positive elements, for instance the focus on the need for international and regional cooperation as well as the view on development assistance for the purposes of achieving global peace and security. Regrettably, the implementation of the security strategy never considered such options that could have been welcomed by the international community. To legitimise the invasion of Iraq, the Bush Administration sought and obtained UN Security Council Resolution 1441 on November 8 2002. The resolution noted among other factors that Iraq was still in material breach of its obligations under the prior UN Security Council Resolutions to destroy and not to seek to obtain various prescribed weapons and capabilities. UN Security Council Resolution 1441 further stipulated that, "Serious consequences could result from the failure of Iraq to comply unconditionally with its obligations contained in UN Resolutions (White House news release 2003, 11)." One can argue that US took the responsibility of the UN Security Council though the UN Charter does not provide for such an action. The

world will not be safe if a single country can supersede the international collective security. Beyond invoking prior Security Council Resolutions, the US had expanded doctrine of self-defence to justify its right the right to launch pre-emptive strikes. The expansion of Article 51 has led to major controversies and uncertainty in relation to application of force in international relations. The Bush administration had stated that it had launched a pre-emptive attack on a dangerous regime possessing WMD. The then US president George Bush argued that, "responding to such enemies after they have s truck us is not self-defence, it is suicide Anneus and Torpman 2004, 400)." The USANSS made it clear that the US was not going to wait for its enemies to attack first. This again makes sense when there is a serious threat from an enemy with nuclear weapons. Unfortunately, there was no such imminent attack from Iraq on the US. Evidence is glaring that Iraq was not in possession of NW or WMD. Therefore, the claims by the US were unfounded and even unsubstantiated by the realities on the ground. For years, the US and British armed forces have surrounded Iraq and its Northern and Southern areas were being sealed off as no fly zones White House news release (2003,13). Thus Iraq was not able to develop NW in such a scenario. Although some would want to believe that Saddam Hussein had at some time possessed chemical weapons, such weapons were not an imminent threat to the US. Again, analysts accused the US of assisting Hussein to acquire the biological weapons because by then they were serving its interests. Even if Iraq was in possession of actual nuclear weapons, there is no indication that it has threatened to attack the US to the extent that US was left without an option rather than to launch a pre-emptive strike.

The international community has been always rejecting the concept of pre-emptive self-defence. However, pre-emptive strikes can be accepted at least if there is covert action that demonstrates that an armed attack is imminent. The advent of Nuclear Weapons (NW) and WMD may require some sort of elasticity in the application of the doctrine of anticipatory self-defence other important aspects need to be considered as well. Thus, the principles enunciated during the *Caroline incident* should be taken into consideration whenever a state wants to invoke its right to self-defence. There should be at least an imminent threat and no opportunity for negotiations before the attack can be averted.

A restrictive interpretation of Article 51 shows that present rules of self-defence do not permit the use of force against states deemed unfriendly or dangerous in order to deny them weapons possessed by many countries. Regime change cannot be deemed the wisest solution against the possession of WMD as the current situation in Iraq and Afghanistan indicates. The removal of regimes in these two countries by the US has worsened the situation rather. More so, the attack on Iraq was against a well-known fact that other states such as India, Pakistan, North Korea possess WMD. The US could have wanted to control the "black gold" –oil from the Middle East and the idea of democratizing the whole region starting with Iraq basing on the principles of Democratic Peace Theory, which stipulates that mature and stable democracies do not fight each other.

Proponents of the invasion argue that, "… the US is entitled to go forth and defend its national security in a case as here where there is nothing contrary to law or morality." Thus, the application of the right to self-defence by the US has led to major divisions among international legal scholars on the best way to interpret the rules regulating the use of force. Although there is need for a state to defend its interests if they are under threat, rules of necessity and proportionality should be applied. The right to self-defence should always be regarded as an exception to article 2(4) of the UN Charter that outlaws the use of force. Force in this regard should be limited at weakening the enemy or aggressor's armed forces and not toppling a country's government. In Afghanistan and Iraq, the US deposed ruling governments against the principle of territorial integrity and political independence of other states. In these cases, the US application of force can be viewed as occupation. The US forces did not observe conditions of necessity and proportionality during the occupation of the two countries.

Conclusive Understanding

In international relations, force has remained a principal option for solving conflicts. Hence, UN Charter Article 51 provides for inherent right of states to use force for collective and individual self-defence following an armed attack. Other conditions include necessity and proportionality of the means used. Actions taken for the purpose of self-defence should be reported to the Security Council immediately which will then decide whether the claimed right is legitimate or not followed by a resolution either upholding the inherent right of the victim state or condemning the aggressor. Unfortunately, the Security Council is ineffective in carrying out its mandate. Since the US is the major contributor to the UN budgetary support, it is now the "Dollar" that rules rather than the r ule of Law. US adopted a broader interpretation of self-defence to include, war against terrorism as was the case in Afghanistan in 2001 and combating drug trafficking, which led to the invasion of Panama. In Iraq US had invoked Article 51 to launch a pre-emptive attack to a regime deemed dangerous to its national interests. While elasticity is crucial when interpreting the right to self-defence the reasons offered must be genuine. This paper reveals that in most cases the US invoke Article 51 in controversial situations thereby undermining the credibility and integrity of international law and collective security system. This is normally the case when unilateral force is used by-passing the UN Security Council. However, on the other hand the actions of the US in invoking the right to self-defence reveals gaps within the body of international law as well as positive developments in customary international practice that are actually in tandem with the changing circumstances. Such changes include increased acts of terrorism and the existence of WMD.

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Unwilling or Unable?

In this very brief op-ed, focus on the famous "unwilling or unable" (UoU) test of self-defence. Proponents of this test claim that the case of Syria and adoption of United Nations Security Coun-cil (UNSC) resolution 2249 led to a "newly accepted change in the interna-tional law of self-defence" according to which "any State can now lawfully use force against non-State actors (NSA) (terrorists, rebels, pirates, drug cartels, etc.) that are present in the territory of another State if the territorial State is unable or unwilling to suppress the threat posed by those non-state actors". However, there are good reasons to argue that the UoU test was "unable" to make its entry in positive international law and that the interna-tional community of States could be "unwilling" to do so in the future.

No acceptance by the UNSC, UNSC resolution 2249 provides no support for the UoU test. This resolu-tion does not refer to self-defence, even less so to the UoU test. Several ele-ments, including the context of adoption of this resolution, indicate on the contrary that there was a consensus among UNSC members not to refer to self-defence – which was in sharp contrast with other similar resolutions in the past made on armed intervention.
No agreement between coalition members themselves, While the mem-bers of the coalition claimed that they were entitled to act against the Islamic State of Iraq and the Levant (ISIL) on the basis of individual or collective self-defence, the grounds for this claim seem to vary. Several states (Germa-ny, Belgium, Norway or the Arab states) did not refer to the UoU test in their letters to the UNSC, despite its previous use by the USA. France, for instance, seemed to be reluctant to endorse this new theory.

No endorsement by other UN members, The debates within the United Nations (UN) demonstrate that the UoU test was not shared by the vast majority of States. In February 2016, for instance, the Non-Aligned Move-ment reaffirmed its constant position that "consistent with the practice of the UN and international law, as pronounced by the International Court of Justice (ICJ), Art. 51 of the Charter of the United Nations (UN Charter) is restrictive and should not be rewritten or re-interpreted". Claiming that a State has an "obliga-tion of

result" to eliminate all terrorists threats on its territory in order to be protected against foreign intervention could be highly risky and even ab-surd. Western leaders themselves often make declarations about how "long and difficult" it is to eliminate terrorist threats in their territory. Does this mean that the UoU test could apply in such cases?

***A risk for multilateralism.* The UoU test could lead States to consider that self-defence always offers a sufficient legal basis for military intervention abroad and there is thus no need to search multilateral solutions (international cooperation, consent of the State concerned, use of force mandate by the UNSC …) in the fight against hostile NSAs. Put emphasis on the "prioritisation of consent and cooperation", these elements were set aside in the case of Syria (be-cause of the United States (US)-led coalition's hostility to the regime of Ba-shar-Al-Assad). It is more striking that the recent report of the Joint Com-mittee on Human Rights of the United Kingdom (UK) Parliament on the UK Government's drone policy completely neglects to discuss all these al-ternative solutions – considering that self-defence and the UoU test provide a sufficient legal basis for the use of lethal force for counter-terrorism pur-poses in foreign countries.**

A risk for the jus contra bellum system. The UoU test opens the gate to unbridled unilateralism in relation with the use of force. If this new theory becomes part of positive law, it could entirely unravel the shroud of collec-tive security and seriously endanger the system of the prohibition of the use of force. To paraphrase the ICJ, this new theory could be regarded as "the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in inter-national organisation, find a place in international law. Intervention is per-haps still less admissible in the particular form it would take here, for, from the nature of things, it would be reserved for the most powerful States …". Indeed, we could ask ourselves if the western proponents of this theory are ready to accept that, tomorrow, it could be used by States like China, Russia or other regional powers in order to undertake military interventions against "threatening" NSAs abroad. This could lead us back to the pre-Art. 2 § 4 universe of International Law where the doctrines of self-help, self-preservation and "vital interests" of States were dominant.

Competence of Security Council

Today developments around the world suggest that states have a right not only to take measures in self-defence against armed attacks carried out by other states, in exceptional circumstances, but that states have a right to take measures in self-defence against armed attacks carried out by non-State ac-tors. The crucial issue is to what extent if at all the provisions making up the collective security system under the UN Charter have been affected by the events we see unfolding on the ground. The conditions presumably qualify-ing the exercise of this potential right of states of self-defence against armed attacks by non-State actors are still highly unclear. One argument in favour of an emerging right of self-defence against armed attacks by non-state actors is that the Security Council is not capable of responding adequately and that therefore the persuasive force of the col-lective security system under the UN Charter is weakened, both it would seem in terms of rules on competence and in terms of substantive content. If the Member States cannot rely on the Security Council they are entitled to take matters into their own hands and from the substantive point of view the right of self-defence can be interpreted a bit more freely and thus be-comes a bit less exceptional. At the same time the fundamental prohibition of the unilateral use of force is necessarily narrowed. It would seem as if this argument presupposes that the original broad prohibition on the use of force together with the narrow right to self-defence are dependent on the UN collective security structure in its entirety and especially on a functioning Security Council. There is some strength to this argument, and it also illustrates

the potential fragility of the collective security system. Whether one wants it or not, the collective security system is dependent on all its parts in order to stay intact.

Another argument in favour of a right of self-defence against armed at-tacks by non-state actors is that is has always been there in the text of the relevant provision of the UN Charter، Member States have a right of indi-vidual or collective self-defence if an armed attack occurs, nothing more nothing less. The target of the armed attack is pointed out – the (Member) State –, but not the source of the armed attack, the text could or could not implicitly include attacks carried out by non-state actors.
The decision of the majority to rely on broader considerations influences the implica-tions of the *Wall* case on the development of the law of self-defence. This in particular because paragraph 139 of the Opinion, in its general approach to Article 51, is in line with the Court's *Oil Platforms* judgment of 15 December 2003.[77] Taken together, both decisions strongly reaffirm the traditional, restrictive reading of self-defence as set out in the Court's *Nicaragua* judgment. Within less than a year, the Court has now confirmed that judgment's two most controversial holdings on the law of self-defence، the *Oil Platforms* judgment leaves little doubt that, indeed, the prohibition against the use of force can be breached in a 'minor' way, in which case the state victim of that minor breach cannot retaliate by way of self-defence.[78] The more recent pronounce-ment in the *Wall* Opinion shows the Court's unwillingness to embrace broader read-ings of Article 51, which would recognize a right of self-defence against armed attacks by non-state actors not directed and controlled by another state.

From a more general perspective, this has important consequences on the role of Article 51 within the broader spectrum of forcible responses against violence. The restrictive interpretation now confirmed ensures that Article 51 is applicable rather infrequently. States seeking to defend themselves against low-level warfare (the most common form of inter-state force) or private violence not controlled or directed by another state will not be able to rely on self-defence. Borrowing a much-quoted phrase which refers to another famous concept of international law, one might say that self-defence, read restrictively, becomes 'a vehicle that hardly ever leaves the garage'.[79]

Whether this is a positive development seems debatable. Of course, at first glance, a restrictive interpretation of Article 51 further reduces the number of instances in which states are entitled to use force unilaterally. Upon analysis, however, it is much more realistic that states, instead of invoking self-defence, will respond to low-level warfare or private violence by relying on other, non-written justifications. While an expansive reading (indicated by recent practice) might have brought these responses within the scope of Article 51 (and subjected them to the procedural and substantive conditions of that provision),[80] the restrictive reading confirmed by the Court increases the pressure to recognize further non-written exceptions to Article 2(4)It is rela-tively easy for those in power in different states around the world to unite against those challenging the powers that be, at least and in particular if the challengers use violent means to pursue their cause and/or are labelled ter-rorists. It would seem unlikely in any case that military self-defence measures would be an effective way of eradicating terrorism. It would also seem likely that the easing of the prohibition on the internation-al use of force and the relaxing of the exceptional nature of the right of self-defence risk leading to more international use of force. That would be in complete contrast with the overarching goal of the UN Charter. Lastly, and most importantly, confronted with the 9/11 bombings, the interna-tional community has expressly confirmed that self-defence could be exercised against armed attacks not attributable (under the traditional restrictive test) to another state.[59] Summarizing the international response in very clear terms, Antonio Cassese noted، 'It would thus seem that in a matter of a few days, practically all states (all members of the Security Council plus members of NATO other than those sitting on the Security Council, plus all states that have not objected to resort to Art. 51) have come to *assimilate* a terrorist attack by a terrorist organization to an armed aggression *by a State*, entitling the victim

state to resort to individual self-defence. The pending *Armed Activities* case between Congo and Uganda[84] (concerning Uganda's military presence in Eastern Congo and its involvement in that country's multiparty civil war[85]) illustrates a further problem. Given the complex facts of that case, and the involvement of many different factions with changing allegiances, it proved extremely difficult for the Court and litigants to establish the degree of effective state control over private violence which Article 51 (pursuant to the Court's restric-tive reading) requires. More generally, the proceedings suggest that self-defence (on which both parties relied), following the restrictive reading confirmed in the Court's recent jurisprudence, will often simply not be applicable to chaotic 'dirty' wars like the one in the Congo. This is not to suggest that a liberal, more flexible approach to the law of self-defence would solve the many problems raised by the *Armed Activities* case. However, it illustrates that the restrictive reading of Article 51 makes the law of self-defence all the more difficult to apply in practice. Given that under the Charter regime, Article 51 not only preserves an inherent right, but was intended to function as the main exception to the ban on the use of force, this is a curious development.

Perhaps the risks inherent in what seems to be today's developing prac-tice could be limited by the normative obscurity pervading the next step, after a right of self-defence against an armed attack by a non-state actor has potentially been found. From the normative point of view, in this case of the *jus ad bellum* , the circumstances that should surround the exercise of a potential right of self-defence against an attack by a non-state actor remain largely unclear, including the issue whether military measures can be used in third countries at all, presuming that the armed attack cannot be attributed to the third state in question. The stipulations of necessity and proportion-ality which are crucial to the lawfulness of self-defence in the inter-state context have yet to be translated to the non-state context, if an armed re-sponse is lawful at all in a third country. Consider also the territorial integ-rity and sovereign equality of states which are at stake. If the criteria for legality of self-defence against an armed attack by a non-state actor are so difficult to fulfil that any exercise of such self-defence would break the law, then in practice this potential right on the part of states would become useless. A parallel could perhaps be drawn *mutatis mutandis* to the pronouncement of the International Court of Justice (ICJ) in the *Nuclear Weapons Case* on the legality of the use of nuclear weapons in the light of international humanitarian law، The use of such weapons in fact seems scarcely reconcilable with respect for the requirements of inter-national humanitarian law, says the ICJ. Similarly, the exercise of a right of self-defence against an armed attack by a non-state actor, should such a right exist, seems hardly reconcilable with the remaining *jus ad bellum*, as it currently stands. Imagine if a dangerous development of the law could stop there.

Military intervention against NSA (Non State Actors)

The recent strikes by the United States against the Islamic State in Syria have again caused a fierce controversy about self-defence against non-state actors. According to this, the ICJ merely indicates the typical case for self -defence, namely attacks by a State, and does not ex-clude acts by non-state actors from "armed attack". However, such a reading is problematic. First, by holding that "Art. 51 of the Charter has no relevance in this case", the ICJ decides that the measures by Israel are not justified under Art. 51. It is important to note that to reach this conclusion, the ICJ mentions as follows، "Israel does not claim that the attacks against it are imputable to a foreign State." Consider-ing this line of reasoning, the ICJ substantially limits the scope of self-defence under Art. 51 to the case that "armed attack" is conducted by a State. It is now generally accepted that an armed attack carried out by a non-State armed group may activate the right of self-defence in Art. 51, Charter of the United Nations (UN Charter), but States relying on self-defence must nevertheless ensure that the conduct of the non-State armed group is attributable to the territorial State. The International Court of Justice in the *Nicaragua* case defined this threshold of attribution as one of effective con-trol over the conduct of the non-State armed group.[1]

As the Islamic State of Iraq and the Levant (ISIL) threat reveals, in some situations an armed attack by a non-State armed group is simply not at-tributable to the territorial State from which it emanates, and may even pose an existential threat to States like Iraq and Syria. Confronted with this diffi-culty, several States have advanced alternate justifications for the exercise of self-defence, offering weaker links of attribution between the activities of terrorist groups and the territorial States that "harbour" them, or States that are unwilling or unable to effectively take action against non-State armed groups operating from their territories . These propositions enjoy only limited support in State practice.

In the ISIL context, a handful of States offer a new justification for the use of force in Syria while acting in the collective self-defence of Iraq and other States. The most elaborate articulation of this view was made by Germany in its letter to the Security Council in accordance with Art. 51, UN Charter on 10.12.2015, which states،
"ISIL has occupied a certain part of Syrian territory over which the Govern-ment of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the con-sent of the Government of the Syrian Arab Republic."

Earlier in 2015, Canada and Australia hinted at this argument, suggesting that their operations were not directed against Syria or its people. Norway and Belgium followed suit in 2016, each with a letter emphasising – as Ger-many did – that the measures taken in collective self-defence under Art. 51, UN Charter are directed against the ISIL and not against Syria. In contrast, the letters from Canada, Australia, Norway and Belgium do not expressly discard the need for Syria's consent. Instead, they rely on Iraq's letters to the Security Council requesting international support "with a view to deny-ing terrorists staging areas and safe havens" in Syria. Notably, Germany, Norway and Belgium all refer to United Nations Se-curity Council (UNSC) Resolution 2249 (2015), in which the Security Council found the ISIL to be an "unprecedented threat to international peace and security" based to some extent on "its control over significant parts and natural resources across Iraq and Syria". The operative part of this Resolution calls upon Member States to،

"take all necessary measures, in compliance with international law … on the territory under the control of ISIL … to eradicate the safe haven they have estab-lished over significant parts of Iraq and Syria".

UN Secretary-General *Ban Ki -Moon* advanced the same line of reasoning in his response to United States airstrikes in Syria, stating that "the strikes took place in areas no longer under the effective control of that Govern-ment". In a similar vein, the United Kingdom justified the use of force against "ISIL sites" and "military strongholds" in Syria to ensure that Iraq is able to regain control of its borders. The United States has also affirme Iraq's right to defend its borders in relying on Syria's unwillingness and in-ability to confront safe havens within its territory. Justifying the exercise of self-defence on the basis that a State has lost ef-fective control over parts of its territory is problematic for several reasons. To begin with, as long as the State continues to exist, its loss of effective control of parts of its territory does not justify further compromising its sovereignty and territorial integrity by resorting to force without its con-sent. For as long as President *Bashar al-Assad's* Government represents Syr-ia, and the ISIL has not established an internationally recognised *de facto* regime,measures "directed against" the ISIL constitute an unlawful use of force against Syria.
Secondly, the reliance on UNSC Resolution 2249 (2015) to justify the use of force in Syria is misplaced. The Resolution neither authorises forcible measures under Chapter VII, UN Charter, nor endorses the exercise of self-defence against Syria. On the contrary, by addressing the ISIL as a unified threat to international peace

and security across Iraq and Syria, the Security Council fails to acknowledge the distinct legal justifications for the use of force in Iraq, which requested international assistance, and Syria, which did not.The question of whether or not States may lawfully resort to actions in self-defence against non-State actors (NSA) is prompted by two elements, i) the emerging practice of States[1] resorting to force in self-defence against terrorist groups including the Islamic State in Iraq and the Levant (ISIL), and United Nations Security Council (UNSC) resolutions seemingly legiti-mising self-defence against NSA (i.e. UNSC Res. 1368 (2001), UNSC Res. 2249 (2015)). From a scholarly viewpoint, such developments would entail interpreting Art. 51 of the Charter of the United Nations (UN Charter) in a manner such as to encompass armed attacks carried out by states and NSA alike.[2]

The UN Charter envisages two exceptions to the prohibition on the use of force codified in Art. 2 (4) UN Charter, self-defence against an armed attack, and enforcement measures implying the use of force decided by the UNSC pursuant to Art. 42. In considering the adoption of military measures in response to threats and breaches of international peace and se-curity, one may observe that Art. 42 UN Charter may actually serve as an appropriate legal basis for the adoption of military measures against ISIL, and has in fact the merit of preserving the system of collective security as it has been envisaged by the drafters of the UN Charter. In contrast, broaden-ing the scope of Art. 51 UN Charter to grant states the right to self-defence against NSA is premised upon somewhat slippery bases.

This contribution intends to shed light on the shortcomings of invoking Art. 51 as a legal basis for military measures against ISIL, and presents the advantages of invoking Art. 42 instead. This would lead to,

No Pindaric interpretation of Art. 51 (stretched to the point of applying the "unwilling or unable state" doctrine)
compliance of Art. 51 interpretation with Art. 2 (4), which speaks about inter-state relations (Art. 51 would as a consequence be understood as an exception to use of force in inter-state relations, hence against an armed at-tack of another state), and
safeguards against abusive powers of states in determining actions in self-defence when an armed attack occurs.

Although the term "armed attack" in Art. 51 does not specifically refer to a *state* armed attack, the joint reading of Arts. 51 and 2 (4) UN Charter is conducive to interpret self-defence within an inter-state dimension.

Similarly, the temporal scope of self-defence, in particular in its anticipa-tory variant against ISIL's threats to commit new attacks, poses questions of conformity with Art. 51 UN Charter insofar as it only concerns cases in which "*an armed attack occurs*".

Remarkably, the UN collective security system is centred around the role of the UNSC in countering armed attacks. This is supported by the word-ing of Art. 51 which, while recognising the inherent right of states to self-defence, reaffirms the pivotal role of the UNSC in the resort to military force in the expression "*until the Security Council has taken the measures necessary to maintain international peace and security*".

In the framework of Chapter VII, Art. 42 has been designed as a provi-sion of last resort, in case of a failure of measures not implying the use of force pursuant to Arts. 40 and 41 UN Charter. This is consistent with the purposes of the UN enumerated in Art. 1 UN Charter, in particular with maintaining international peace and security (Art. 1 (1) UN Charter). Notoriously, the practice of the UNSC has already developed towards imposing

Chapter VII-measures against NSA (including individuals, groups of individuals, and legal entities) and it would be no surprise if those actors were made the target of military actions agreed upon by the UNSC. Hence, the application *ratione personae* of Art. 42 would not raise the same contro-versies of Art. 51. Having an enforcement character, Art. 42-measures do not require the consent of the targeted state, unlike – as mentioned earlier – cases of self-defence against NSA would require. Most importantly, Art. 42-measures may be resorted to in case of *breaches* of the peace (armed attack or lower threshold violations of the non-use of force) and *threats* to the peace alike, thus encompassing a broader spectrum of situations than Art. 51. This is noteworthy as state military actions against ISIL are arguably resorted to against *threats* of future attacks. Further, if the use of force is authorised pursuant to Art. 42 UN Charter, the UNSC is to determine the scope of the mandate, including a temporal delimitation for the resort to such measures.

The claim of an emerging practice corroborating the existence of a right to self-defence against NSA may prove appealing and perilous insofar as it would allow defensive actions against ISIL's "attacks" but would decentral-ise the use of force to the extent that States qualifying themselves as victims of an NSA's armed attack may resort to military force. The Definition of Aggression contains a further clarification of what constitutes the threat or use of force and is described as[67],

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

Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State,

The blockade of the ports or coasts of a State by the armed forces of another State, An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State, *T*he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement,

The action of a State in allowing its temtory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State,

The sending by or on behalf of a State of armed bands, groups, irregulars or mer- cenaries, 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

The main rule in Article 2 (4) states an absolute prohibition on the threat or use of force, and currently only two exceptions to this main rule are stated in the UN Charter[73], the Se- curity Council using its Chapter VII powers[7475] and the inherent right to self-defense[76]. If it does not fall within any of these legal exceptions, threat or use force cannot be legally ap- plied. In this context it is relevant to mention that it has been widely debated whether some other fundamental rights to use force exist beyond Security Council authorization, such as humanitarian intervention and the responsibility to protect[79]. It has been established that each individual state has a responsibility to protect its people from for example genocide, war crimes and crimes against humanity[80]. If a state fails to live up to its responsibility the international community will take action using diplomatic, humanitarian and other peace- ful means to protect the people, and if necessary also Chapter VII powers[81], as it for exam- ple has been done in Libya[82]. It is important to note that responsibility to protect so far only is legitimate when conducted in accordance with Chapter VI and VII of the Charter[83], so the

question of whether such fundamental rights exist beyond Security Council authoriza- tion in customary international law remains unanswered. At the time being Security Coun- cil authorization and self-defense are therefore still the only certain legitimate exceptions to use of force[84], and the topics of humanitarian intervention and responsibility to protect will therefore not be the subject of any further examination in this thesis.

Armed Attack

According to Article 51 of the UN Charter the first requirement to exercise legal self-defense is that "… an armed attack occurs against a Member of the United Nations…" The rule requires that a state must have been the victim of the illegal use of force which in scale and effect amounts to an armed attack and it has been determined that this rule is in force in both treaty law and cus- tomary international law. Self-defense in accordance with Article 51 of the UN Charter contains a requirement to re- port to the Security Council. This condition is a two-phased rule which regulates a state's obligations to report its use of force when claiming to be acting in self-defense, whether in- dividual or collective[171][172]. The first requirement is that measures taken in self-defense are only legal "until the Security Council has taken the measures necessary to maintain interna- tional peace and security"[173]. Secondly these measures taken in self-defense "shall be im- mediately reported to the Security Council"[174].

The first requirement regulates the duration of self-defense, and determines that self- defense is a temporary right. It is argued by Yoram Dinstein that the right to self-defense only exists until the Security Council has taken effective measures to prevent the state from further attacks and that the right to self-defense exists until the Security Council has "suc-ceeded in restoring international peace and security[175]". This position seems to be in ac- cordance with other academic writers[176] and it seems by far to be the most reasonable. The argument for this position is that Security Council measures should not paralyze a victim-state in the case that the Security Council measures prove to be inadequate to "maintain international peace and Security". It would seem that the purpose of the phrase must be to allow a state to protect itself until the Security Council has taken effective measures.

The second part of the rule leaves the question of whether or not a state loses the validity to take measures in self-defense if these measures are not reported to the Security Council. So is the rule mandatory or directory?
According to Article 51 "Nothing in the present Charter shall impair the inherent right of in- dividual or collective self-defense if an armed attack occurs against a Member of the United Nations…". Collective self-defense can be defined as a states right to defend itself from an armed attack with the assistance of two or more states. Collective self-defense requires, just as individual self-defense, that a state has been the victim of an armed attack and the definition of armed attack is the same as in individual self-defense[225][226]. The same conditions that exist when claiming individual self-defense such as necessity, proportionality, reporting to the Security Council and attribution are also re- quired when claiming collective self-defense.

Lebanon 2010

Far from being an academic exercise, let us now imagine that Israel would launch an armed attack in self-defense against the actions of Hezbollah next spring (for an example of such predictions, cf. RIA Novosti, 2009). Now, we have seen that some of the Israel's actions in summer 2006 were hard to square with a principle of self-defense (especially the attack on Hezbollah non-affiliated targets). In the November 2009, Israeli Defense Minister Ehud Barak stated that if Lebanon let Hezbollah to escalate the conflict, the retaliation (doubtlessly branded as self-defense) would target Lebanon (Eyadat, 2009). At the same time,

the newly-elected Lebanese government agreed Hezbollah to use their arms against Israel (AFP, 2009). Bearing these developments in mind, it seems that the Lebanese government is actually deliberately putting itself in a worse position by endorsing the activities of Hezbollah (or, in the terminology of Articles on State Responsibility, by adopting the actions of Hezbollah as its own). While this action has certainly domestic roots, its international implication for justification of
actions in potential conflict is enormous. If Israel truly launches an operation against Lebanon, it can actually target also Hezbollah non-affiliated infrastructure in the country (as long as it fulfills the criteria as set out by the international humanitarian law). This would have two severe repercussions. Firstly, bearing in mind only limited ability of the Lebanese Armed Forces to actually retaliate against actions of Israel, Israel would undoubtedly inflict severe damages upon Lebanon (bearing in mind, as we said above, it would not be required to limit its actions to symmetry with activities of Hezbollah and LAF). Secondly, from a political point of view, Lebanon would even more closely tie its political future with Hezbollah – undoubtedly not the smartest strategy.

A Right to Preventive Self-Defence?

Pursuant to the "inherent right of individual or collective self-defence" expressed in Article 51 of the *Charter*, states may use force to respond to an "armed attack." Customary international law that exists in parallel with the *Charter* permits anticipatory action to the extent that it is necessary to prevent an imminent attack. In light of the continued questioning of the validity of this latter conclusion, it is important that the UN High Level Panel report simply observes 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." These parameters of the customary law right of anticipatory self-defence were first enunciated in the 1842 *Caroline* incident between Britain and the United States. In a letter to his British counterpart, U.S. Secretary of State Daniel Webster described anticipatory self-defence as strictly limited to cases involving "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." The criteria for the limitation of anticipatory self-defence – and self-defence generally speaking – that were outlined in the *Caroline* case remain valid today. Thus, although customary law does extend the margin of appreciation surrounding the right to self-defense, it does not allow for entirely self-serving claims. There must be convincing evidence of a future attack. The fact that anticipatory self-defense must be assessed against the criteria of necessity and proportionality imposes further external measures of evaluation.

Permissible anticipatory self-defence does not encompass "threat pre-emption" or, for greater clarity, a purely "preventive" war. This conclusion is widely shared among legal scholars and government lawyers, and is echoed in the High Level Panel report.[45] In this context, it is also important to note that threat pre-emption, as outlined in the 2002 US *National Security Strategy*,[46] is not an expansion by analogy of an existing category. It is the launching of a new concept, one that cannot provide any effective normative guidance. Threat pre-emption, or preventive war, may superficially seem to be a legal norm, but it is actually no norm at all because it leaves the assessment of danger entirely in the hands of a self-interested actor, the state claiming the right to pursue a preventive war. In addition, a right to preventive war actually has the perverse effect of turning "rival states into potential threats to each other by permitting preventive invasion of potential adversaries based on risk calculations whose indeterminacy makes them inherently unpredictable by the adversary." In any case, threat pre-emption is an unnecessary concept. The existing concept of "imminent attack" is sufficiently flexible to accommodate those instances in which individual states must act to defend themselves against pending terrorist attacks or tangible threats posed by WMD, always

assuming the existence of credible and clear evidence.[48] The Legal Adviser to the US State Department, William Taft IV, appeared to share this assessment in a memorandum written prior to the Iraq intervention.[49] He brought the controversial concept of 'pre-emptive strike' within the "traditional framework," stressing that "a preemptive use of proportional force is justified only out of necessity."[50] He added that "necessity includes both a credible, imminent threat and the exhaustion of peaceful remedies." Indeed, "[w]hile the definition of imminence must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity… in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm."[51] However, in light of the reference to "unimaginable harm," it is important to underline Taft's emphasis on the need for "overwhelming evidence of an imminent threat." If the emphasis were to shift to the possibility of "unimaginable harm" or "catastrophic attack,"[52] there would in fact be a move from anticipatory self-defence to preventive self-defence. Beyond the fundamental questions about preventive self-defence that were raised above, efforts to circumscribe it primarily with reference to the possibility of unimaginable harm or catastrophic attack raise further concerns. As the U.K. Foreign Affairs Committee observed in a July 2004 report,

Since a potentially catastrophic attack … is by its very nature out of all proportion, a proportional response could potentially be catastrophic in its own right. As a result, quantifying and even curtailing a state's right to a 'proportional' response … is a major challenge for the international legal system.[53]

To conclude this brief overview of the preventive war debate, Article 51 and complementary customary law remain broadly adequate to delimit unilateral military responses to security threats. They strike a fundamentally appropriate balance between competing values and policies, including domestic political and cultural autonomy, and the need to limit the exposure of civilian populations to war. The Security Council's collective process remains the most appropriate forum for deliberation and legitimation of responses to more remote security threats. While those responses will sometimes have to involve military intervention, more often than not inspection regimes, counter-proliferation efforts or international counter-terrorism commitments will be both more appropriate and more effective. And in all these cases, a collective response will be far stronger than actions by individual states or *ad hoc* coalitions.

Perhaps not surprisingly, these are also the conclusions of the UN High Level Panel report. It denies the need for and appropriateness of a "rewriting or reinterpretation of Article 51," suggesting that Security Council authority under Chapter VII of the UN Charter is broad enough to deal with situations where the use of force may be required "not just reactively but preventively and before a latent threat becomes imminent."[54] As noted earlier in the discussion of the collective security system, the panel proposed specific criteria for the Council to consider in making decisions on the use of military force, including in circumstances of preventive action.

Two main questions.

How to tackle Non-State Actors operating with the Support from a State?
How to address Non-State Actors Operating from the Territory of a Another State without Support from the State in Question?

The Right to Self-Defence and Security Council Authority: Article 51

One issue that has received relatively less attention in the most recent round of debates than the big questions about the scope of the right to self-defence is that of the connections between states' right to self-defence and the collective security system. Article 51 requires states to immediately report measures taken in exercise of their right to self-defence to the Security Council, and reaffirms the Council's authority "to take at any time such action as it deems necessary in order to maintain or restore international peace and security." More importantly, Article 51 underlines the primary position of the Security Council by placing an explicit limit on the right to self-defence. Under Article 51, nothing shall impair states' inherent right to self-defence "until the Security Council has taken measures necessary to maintain international peace and security." Based on the wording of Article 51 and the broader purposes of the Charter, some observers suggest that the right to self-defence ceases once the Security Council has taken any measures to maintain peace and security.[81] For the majority of commentators, the correct interpretation of Article 51 is that the right to self-defence does not end simply when the Security Council has undertaken measures, but only when these measures have had the effect of restoring peace and security.[82] According to Thomas Franck, while this reading does not accord with the text Article 51, it has become accepted practice that the Security Council and states acting under Article 51 can have concurrent powers. For the many years during which the Security Council was hampered by Cold War tensions, the requirements of Article 51 may have been largely the object of academic interest.[84] However, the Council's active engagement in the crisis following Iraq's invasion of Kuwait put the practical ramifications of the Article 51 requirements into the spotlight.

In its resolution 661 (1990), the Security Council specifically affirmed "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."[86] Through this preambular statement, the Council made clear that the right to self-defence. When exercising an act of armed self-defense, states have basically two options، to attack only the part of the country that is used by a given non-state actor or to attach the whole of territory. In the *Armed Activities* case, the ICJ ruled that Uganda had no right to launch an armed attack against the Democratic Republic of Congo and that there was no jurisprudence in this respect. All the jurists had were limited rules of necessity and proportionality. Therefore, such attack on a non-state actor in a foreign territory could be made in a very limited and targeted fashion, using force solely against the very source of attack (Heinze, 2009).

The condition of necessity allows opening a full-scale operation only after other means of settlement were exhausted. The proportionality condition, on the other hand, theoretically requires "symmetry [...] in scale and effects [...] between the unlawful force and the lawful counter-force" (Dinstein, 2005،237). Such symmetry is, however, difficult to achieve and, as Dinstein argues, even problematic from a practical point of view (as it would require the 'defending' part to approximate their own actions to those of the wrongdoer). Yet, as the current interpretation of the self-defense against non-state actor goes, use of force in self-defense should be limited to the scope of activities and areas tied to the activities of the attacking non-state actor (Duffy, 2007). Franck also argues that some measures cannot be used in self-defense – long-term occupation of a country is one of them (Franck, 2002).

The Security Council and the Adequacy of the Collective Security System

In his address to the General Assembly of September 2002, President George W. Bush called on the United Nations to face up to the threat posed by Iraq. He issued a pointed challenge،

All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant? With these remarks, the President fanned the debate on

the role and performance of the Security Council.[14] As is well known, the Security Council did not adopt a resolution to President George W. Bush, Address to the United Nations General Assembly, September 12, 2002, at http://www.whitehouse.gov/news/releases/2002/09/20020912-1.htm specifically authorize the military intervention in Iraq that was undertaken several months after the President's address. And yet, the United Nations and its Security Council have clearly not become irrelevant. Indeed, if anything, the developments leading up to and following the Iraq intervention demonstrate that the Council continues to provide an indispensable forum for the mutual engagement of states, and for deliberation and justification.

Notwithstanding widespread dissatisfaction with its performance over the years, the Security Council has maintained a unique ability to lend legitimacy to international action, including the use of force.[15] This ability derives from the manner in which collective process and substantive assessment are blended in the Council's work.[16] As a matter of process, multilateral checks are imposed on purely self-serving arguments.[17] Rather than permitting unilateral assessments of threats to international peace and security, a discipline was imposed by demanding that a range of states with different social, cultural and political traditions be convinced of the reality of the threat at hand and the utility of forceful intervention.[18] As a matter of substance, a proposed action mustsatisfy a blend of legal, prudential and political assessments.[19] The interplay between collective process and substantive considerations in decisions on the use of force is complex. While Security Council endorsement is an important indicator of legitimacy, it is not sufficient in and of itself. The considerations that animate an individual decision also must resonate with widely shared understandings of international society, and must be attentive to legal norms.[20] For example, it is not clear that, on identical facts, the mere formality of a 'second resolution' would have legitimized the Iraq intervention. As many observers have noted, in the case of Iraq, the Council actually functioned as intended when, on the available evidence, it declined to authorize a full-scale war against Iraq.[21] Conversely, the Council's inaction on Kosovo and the Rwandan genocide, while formally its prerogative, is widely seen as having damaged its credibility.[22]

The frustration and tension that were evident during the Security Council debates over Iraq may have helped strengthen the resolve for institutional change. It is in part this hope that animates the decision of the Secretary-General's High Level Panel to offer suggestions for Security Council reform. Of course, the panel also responded to other pressures, such as the campaigns of certain states for permanent seats and long-standing grievances regarding inadequate representation of large parts of the world on the Council. And yet, as difficult as institutional reform may be, there is no plausible alternative to the collective legitimization of the use of force through the Security Council, be it inside or outside the United Nations. Given its diffuse decision-making authority, the General Assembly lacks an appropriate sense of responsibility in actions relating to the use of force. *Ad hoc* 'coalitions of the willing' often lack neutrality and therefore legitimacy. Suggestions that a more permanent 'coalition of liberal democratic states' might serve as a supplementary decision-making body to authorize the use of force when the Security Council is paralyzed are also problematic. Developing states have long fought the notion that there is a core group of 'civilized states' that provides the sole model for states that seek international credibility. The idea also undermines the pluralist aspirations of international law, and the diversity of its sources. A banding together of a coalition of democratic states would only further poison international relations. However, the human rights records and internal legitimacy of regimes are not beyond international scrutiny. Human rights regimes call states to account, albeit less forcefully than many advocates would wish. These modest human rights gains must be brought to bear on the functioning of the UN system itself, and must shape its ethos.

Furthermore, the most recent debates about the crisis in Darfur suggest that resistance to a more assertive international approach also continues to come from permanent members of the Security Council, notably Russia and China. Their stance on Sudan casts doubt on the feasibility of institutional reforms, such as the

ICISS proposal regarding the use of the veto in the humanitarian context. Nonetheless, the report of the UN High Level Panel draws extensively on ICISS' recommendations. The panel specifically endorses "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort."[37] Indeed, in building on the ICISS criteria, the panel outlines "five basic criteria of legitimacy" for the Council to consider in making decisions on the use of military force, be it to deal with external threats to states' security or to address grave humanitarian crises within states. These criteria, which the panel suggests should be "embodied in declaratory resolutions of the Security Council and the General Assembly," are، seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.[38] The panel also took up the ICISS suggestions regarding the exercise of the veto. As already noted in the context of Security Council reform, the panel recommends that veto-bearing members refrain from blocking Council action in situations involving genocide and large-scale human rights abuses. What, at cursory glance, might look like a straightforward and sensible division of powers between the Security Council and individual states is, of course, inextricably and uneasily intertwined. Fundamental normative and legal policy issues are embedded in the push and pull between the aspiration of collective security and assertions of individual security needs. The less the Security Council is perceived to address such individual concerns, the more there is pressure to loosen the constraints on states' right to self-defence. There are various strands to the current debate on the adequacy of the existing self-defence regime. I canvass four of the central issues.

Better be safe than sorry

The question of pre-emptive self-defense is one of the most intriguing issues of the contemporary self-defense, especially after publishing 2002 US National Security Strategy. As the AIV/CAVV report makes clear, there is a distinction against pre-emptive self-defense and preventive action. Whereas the first one is a defense against imminent attack, the other is prevention against more distant threat. The legal framework for the anticipatory self-defense was laid down in *Caroline* case. In the commentary to the case, Webster famously defined "necessity of self-defence [as] instant, overwhelming, leaving no choice of means, and no moment for deliberation" ("Caroline," 1841). This case was already a part of the customary international law even before the UN Charter. The period when the Caroline occurred, however, was the one where war was generally allowed and there was no prohibition on the use of force, as there is nowadays. Additionally, another problem associated with the Caroline case is that the such necessity as described by Webster is difficult to ascertain by objective means and necessarily leaves the decision to political decision-makers (Randelzhofer, 2002).

Another aspect which could lead us to the acceptance of anticipatory self-defense is the inability of the ICJ to declare first-use of nuclear weapons to be contrary to the international law in its Advisory Opinion on legality of use of nuclear weapons ("Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996," 1996). There also seems to be opinio iuris that there is no need to wait until the threat materializes. In 1967, Israel used force to strike Egyptian air force and effectively destroyed all Egyptian fighter jets which were ready to strike Israel. Despite heated discussion in the UN SC, the Council did not reject Israel's claim of anticipatory self-defense. In 1981, when Israel used its military again to destroy the nuclear reactor in Iraq, the action was denounced not because the very idea of anticipatory self-defense was rejected, but rather because it was deemed that the reactor itself did not pose threat to Israel (Franck, 2002).

Thus, although there are some examples of anticipatory self-defense, states seem to be reluctant to include the definition as wide as the one used in the 2002 US National Security Strategy (AIV & CAVV, 2004). Preventive self-defense against distant threat is however forbidden, but self-defense as a reaction to a

looming attack might be acceptable (Gazzini, 2008). Art 51 does not require the state to wait until an attack is launched. However, there should be a clear preparation for the attack and as Gazzini reminds us, terrorism requires such reading because the successful tacking of it requires precisely detection and interception before the attack itself can take place (2008). Secondly, the attribution can be made on the basis of adoption of non-state actor's actions as its own by the state. This would be then done by virtue of Art 11 of Draft Articles (Crawford, 2002). An example of such adoption is Ayatollah Khomeini's endorsement of occupation of US embassy in Tehran in the aftermath of the Islamic Revolution.
a state controls terrorists – the kind and degree of control may be disputable, but the state can be a target of armed self-defense a state is supporting or tolerating terrorists – in this case, the state is violating the international law and can be held responsible under some circumstances. In this case, state might be violating its obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states", which comes from the *Corfu Channel* case (Dinstein, 2005). Additionally, sending terrorists on behalf of the state would probably constitute an act of aggression by virtue of Art 3(g) of Definition of Aggression resolution of UN GA which states that also "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein" shall constitute acts of aggression
a state is unable to prevent the use of its territory for armed attack – state is not responsible for the actions of the non-state actor and cannot be a target of armed self-defense. Gazzini makes point that under necessity clause, in exceptional circumstances, self-defense can be invoked. Cases of failed states would probably fall into this category. Ruys and Verhoeven, in this respect, mention that whereas there is a substantial state practice in this respect, problems arise due to the fact that most of such cases date back either to the pre-Charter era or were condemned by the UN SC (Ruys & Verhoeven, 2005).
Afghanistan 2001

After the attacks of 9/11, the US were quick to point to Al Qa'eda as the perpetrator of the attacks. Al Qa'eda was back then known to be hiding in Afghanistan (although it is debatable whether at that very point the leadership was still there). On October 7, 2001, the US launched the the invasion of Afghanistan, the operation Enduring Freedom based on Art 51 of the Charter, without UN SC blessing.

The US attacked the Taliban-led Afghanistan because the Taliban harbored Al Qaeda and refused to hand them to the US (Bellinger, 2006). Dinstein even goes as far as stating that Taliban assumed responsibility for actions of Usama Bin Laden and Al Qa'eda by refusing to hand them over to the Americans (Dinstein, 2005). When we however employ more sober look on the situation, we have to say that Al Qa'eda was not under neither effective nor overall control of Taliban[2]. It is therefore improbable that the events of 9/11 could be attributed to Taliban. Certainly, Afghanistan (under the Taliban) committed an internationally wrongful act by harboring terrorists of Al Qa'eda and by not complying with the UN SC resolutions. But did this wrongful act amount to an armed attack (in order for a self-defense to be used)? The failure to comply with international obligations could be responded by unfriendly, but lawful acts (Duffy, 2007)[3]. The artificiality of the link between a non-state actor (Al Qa'eda) and a state (Afghanistan) only underscores the transformation of perception of the necessity of state attribution. In the reaction of the states, however, there was little doubt left about the legality of the use of self-defense as the justification for the invasion of Afghanistan. It seems that overwhelming majority of states accepted it (Duffy, 2007). Lastly, it remains highly questionable whether the regime change was justifiable in self-defense. This seems to be hard to square with principles of proportionality and necessity (Duffy, 2007). Furthermore, the ensuing prolonged military occupation by US- and later NATO-led forces is also probably problematic as a measure of self-defense (compare with Franck, 2002 above). In Summer 2006, Israel attacked the positions of Hezbollah in Lebanon in retaliation for kidnapping of two Israeli soldiers, as a peak of mutual exchange of hostilities. Whereas majority of the UN member states would probably not have any problem accepting the right of self-defense

against non-state actors, this rule is far from established in the Middle East and North Africa (Kattan, 2007). However, it seems that most of the countries (including UN SC permanent members) accepted the right of Israel to protect itself from the attack of Hezbollah and therefore showed their opinio iuris in this respect (Heinze, 2009).

Hezbollah has not been under the control of the Lebanese state (Kattan, 2007). Despite the fact that the political wing of Hezbollah participates actively in the political life of the country, it is not a part of the armed forces of the country and in fact, the Hezbollah arms remain one of the main problems of contemporary Lebanon. It seems therefore to fall into the third Gazzini's category, whereby state is unable to prevent its territory from being used by a non-state actor for launching attack on another country. Whether Israel was in a situation of necessity seems debatable and it is clear that not all other channels were exhausted before the armed action was taken (Kattan, 2007).

Israel employed reasoning that at the certain point the Hezbollah actions reached level when they accumulated to an armed attack (Heinze, 2009). Kattan, however, persuasively argues that the same logic could be used by Lebanon, if it invoked self-defense against Israel, after countless border incursions and violations of Lebanese territory by Israel (2007). Majority of the UN SC members, however, recognized Israel's right to self-defense under Art 51. Many states approved the *ius ad bellum* dimension of the conflict, but most of them were very hesitant about the *ius in bello* dimension (the conduct of war) (Heinze, 2009). This recognition of Israel's right to self-defense marks a departure from the "most grave" clause of the *Nicaragua* case.

When we look at the Israeli actions in Lebanon during the Second Lebanon War, it is clear that Israel attacked sites in Lebanon which had nothing to do with Hezbollah. In particular, attacks against Beirut airport or some dual-use infrastructure seem to be most problematic (Heinze, 2009, Kattan, 2007). Heinze comments that acquiescence of the state towards the use of its territory for use by the terrorists becomes sufficient condition for the launch of large armed self-defense action. As he also notes, in the post-9/11 world, the two conditions previously separated – severity and state involvement – conflate (Heinze, 2009) empted by its involvement in the matter, nor by the sanctions it imposed through the resolution.

Because of the difficulties in determining whether the Security Council has "taken measures necessary to maintain international peace and security," it is obviously preferable that the Council provide a specific statement on the continuation of the self-defence right. Thus, in the case of the Kuwait crisis, it was clear that the United States and the United Kingdom could act in collective self-defence of Kuwait until the Council specifically authorized, in resolution 678 (1990), the use of force to expel Iraq from Kuwait.[87] By contrast, in the latter resolution, the Council did not provide a clear statement on whether the authorization to use all necessary means displaced or supplemented the relevant states' right to self-defence.[88] The resolution thus invited the argument that Chapter VII measures could "co-exist with the "inherent" right of a state and its allies to defend against an armed attack," until collective measures "have had the effect of restoring international peace and security."[89] Even if one agrees with Thomas Franck's conclusion that this interpretation leads to a sensible result,[90] it raises an array of thorny issues as to the scope of the right to self-defence. To name but one issue in the case at hand, in face of Security Council authorized military measures to expel Iraq from Kuwait, to what extent could self-defence measures still meet the requirement of necessity?

The importance of a clear Security Council statement was illustrated again following the terrorist attacks of September 11th. Immediately after the attack, the Council recognized "the inherent right of individual or collective self-defence in accordance with the Charter" in its resolution 1368 (2001). In specifically

reaffirming that right in resolution 1373 (2001), the Council then made clear that the array of counter-terrorism measures it mandated in that resolution did not displace the right to self-defence. However, it is also worth noting that, unlike the forcible measures contemplated in resolution 678, the measures required by resolution 1373 were of a general, preventative nature and not aimed specifically at removing the threat to international peace and security posed by Al-Qaida and the Taliban. In any case, it was clear that, notwithstanding the Security Council's being seized of the matter, the United States and allied countries were entitled to use force in self-defence, to the extent that the requirements of that right were otherwise met. And yet, the Afghanistan intervention too ultimately raised questions pertaining to the Article 51 requirements.

After the initial campaign against the Taliban and the establishment of an interim administration for Afghanistan, Security Council resolution 1386 did authorize the creation of an International Security Assistance Force (ISAF) "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas."[95] The resolution also authorized the member states participating in ISAF "to take all necessary measures to fulfil its mandate."[96] This resolution, while it reaffirmed resolutions 1368 and 1373, did not specifically re-confirm the right to self-defence. Thus, in view of the opaque terms of ISAF's mandate and its authority to use force, there is room for debate on whether or not resolution 1386 provided for all necessary measures.[97] The answer to question is of considerable importance, given its implications for the scope of the American and allied states' right to use force in Afghanistan. So long as the right to self-defence remains bounded by reasonably tight requirements, questions regarding its co-existence with the collective authority of the Security Council, while by no means uncomplicated, would seem to be manageable. In any case, there would only be a relatively limited range of circumstances in which individual states' right to defend themselves would cut into the much broader realm of threats to international peace and security. However, to the extent that self-defence expands into what is now the exclusive domain of the collective security system, Article 51 is likely to become another fault-line in the debate on authority to use force. Claims of preventive self-defence and claims that blend humanitarian and security issues with self-defence arguments are most likely to raise this spectre. 29

It has been suggested that the Article 51 balancing between self-defence and Security Council authority could actually be a mechanism for Charter adaptation. Specifically, the suggestion is that Security Council pronouncements on the existence of the right to self-defence could serve to manage a "controlled extension" of the right to self-defence to address the circumstances of individual cases.[98] As the preceding two examples illustrate, there is a constructive role for Security Council pronouncements on states' right to self-defence in certain circumstances. That role arises when states have a right to self-defence according to the existing legal requirements. In such circumstances it is important for the Council to clarify when, notwithstanding its involvement, individual states can continue to take military measures necessary to defend themselves.

However, were the Council to affirm the existence of a right to self-defence in circumstances where a right to self-defence has not traditionally existed, it could undermine rather than improve the collective security system.[99] If, in such circumstances, the Council resorted to affirmations of self-defence rights to extricate itself from the need to authorize collective measures, it would progressively write itself out of the collective security business. Sooner rather than later, Security Council confirmations of the right to self-defence would be cast as affirmations of the expansion of states' unilateral entitlement to resort to force. Given the dynamics in the Council, it may be unlikely that its pronouncements would stray significantly beyond the accepted scope of self-defence. Nonetheless, it is important to note that the Council has so far avoided

slipping on this slope. In the case of Iraq's invasion of Kuwait in 1990, its pronouncements pertained to a clear cut case of self-defence. Resolution 1368 has invited more debate on whether or not the Council merely offered a generic reference to the right to self-defence, confirmed its assessment that sufficient links existed between Al-Quaeda and the Taliban regime to attribute the September 11th attacks to the latter within established parameters,[101] or endorsed a new, more open-ended right to self-defence against terrorist attacks.Certainly in retrospect, given the evidence confirming significant Al-Quaeda and Taliban links and confirming that further attacks were planned, it seems fair to conclude that resolution 1368, and its reaffirmation in resolution 1373, remained on sufficiently solid ground. Finally, in the case of the 2003 invasion of Iraq, an explicit self-defence argument was not advanced, and relevant Security Council resolutions do not contain even a generic reference to states' inherent right to self-defence.

What can be done?

Radical change to the Charter framework on the use of force must be resisted as both unnecessary and unwise. The balance between individual and collective authority to resort to military force remains fundamentally sound. Limited adjustments to the requirements of a link between the target state of defensive action and perpetrators of attacks are required to adapt the rules on self-defence to the fact that terrorist networks are a major source of attacks today. But the sweeping claim that the existing legal regime on self-defense cannot accommodate global terrorism and new security threats vastly overstates the issues at hand. It also distracts from the real issues by suggesting that only the use of force can solve problems that actually require far more complex responses. The Security Council remains the most appropriate forum for deliberation and legitimation of responses to more remote security threats or humanitarian emergencies. At the end of the day, the only way to global security is a collective one. But if the collective security system is to meet the attendant challenges, the consensus on the international framework governing the use of force must be renewed. The report of the High Level Panel on Threats, Challenges and Change offers a good starting point for that renewal. States must now engage with the report and work towards agreement on the merits of its recommendations. Furthermore, where human rights abuse escalates into grave crisis, such as large scale ethnic cleansing or genocide, the Security Council must be able to mobilize international action. It is increasingly argued that, in such extreme cases, the principle of non-intervention must yield to a "responsibility to protect" particularly threatened populations. In its 2001 report, the Canadian sponsored International Commission on State Sovereignty and Intervention (ICISS) outlines a constructive proposal.[31] The report emphasizes the overriding importance of a wide spectrum proactive measures and assistance to local governments in discharging their responsibility to protect, as well as of non-forcible forms of pressure. But it also offers a set of carefully crafted threshold criteria for recourse to military means where "serious and irreparable harm occurring to human beings, or imminently likely to occur." These criteria offer a plausible starting point for developing guidelines to assist the Security Council in determining when a humanitarian crisis constitutes a threat to international peace and security, and in deploying force when it is needed for human protection. Clearly, such guidelines would not be a miracle cure for lacking political will, nor for political differences. However, they would help discipline deliberations and demand focused justification of the need for military intervention, its appropriateness and its likelihood of success. The ICISS report also addresses questions of "right authority" and identifies the Security Council as the most appropriate body for decisions on military intervention for human protection purposes.[34] To enable Council action, the ICISS suggests that permanent members agree to a "code of conduct" for the use of the veto concerning actions needed to stop or avert a significant humanitarian crisi

Topic Area B: Cross-examining the abolishment of Veto: Restructuring of the Security Council

"Security Council reform is the most important aspect of the United Nations' institutional reform. I sincerely hope that Member States will make progress on this issue because, considering the tremendous, dramatic changes in the international political scene during the last 60 years, it is necessary that the Security Council be expanded in a manner that will be acceptable to the Member States. For my part, I will spare no effort to facilitate such consultations among Member States to enable Security Council reform." - Ban Ki-moon

Introduction and HistoricalBackground

The reformation of the Security Council has been one of the major issues of the United Nations since the creation in 1948. The current problems that member states have raised regarding the Security Council, have mostly been regarding veto powers (P5) and the representation of nations within the Council. The issue with the veto powers ties in closely with the issue raised regarding representation, in the sense that the current veto powers do not reflect the current five most powerful states in the United Nations, either in economic power nor in population numbers. After World War II, the Allies, specifically the United States, the United Kingdom, France, China, and the USSR, were determined to prevent allowing future genocides and conflicts from ever reaching the scope of World War II. To do this, the League of Nations was disbanded in 1946 and in its place the United Nations was created. In the UN, the majority of power would be held by the Security Council. This Council would include the five allies as permanent members with the right to veto any resolution and 6 temporary members selected on a rotating basis. The Security Council was intentionally formed as a small body in order to make it more capable of acting effectively in times of crisis. Ineffectiveness had been the defect in the League of Nations as the body was far too large to come to any consensus. Through the Security Council, these problems were hoped to have been solved. From its inception, the Security Council was faced with challenges. The peaceful coexistence that existed between the capitalist West and the communist East as a result of a common enemy quickly turned cold, and by 1948 it seemed as though there would soon be another major war, one that had the potential to go nuclear and result in millions of deaths. With the creation of NATO in 1949 and the subsequent response of 13 the USSR with the creation of the Warsaw Pact, it seemed as though the world were heading down a path towards nuclear war. This danger instantly put a lot of pressure on the UN and the Security Council. As the Cold War unfolded, the world was again forced to draw sides. As the main body for world affairs, these sides were evident in the UN and in the Security Council. Moreover, by 1963, the first wave of decolonization in Africa and Asia had taken place, and UN membership more than doubled from 51 nations to 114 nations. More than half of the UN was now from either Africa or Asia. Soon, these countries demanded to be better represented in the Security Council.

Past UN Actions

1963 Resolution

The number of UN member states grew from 51 in 1945 to 113 in 19631 . The push from decolonized countries for better representation on the Council both in numbers and in interests was a key driver of the decision to reform the Council in 1963. Countries from Africa, Asia, and Latin America worked together and drafted the resolution that ultimately expanded the Council and came into force on 31st of August 1965.2 A 2010 Council on Foreign Relations report notes that domestic ratification would be more challenging today, and that today there is no parallel to the rapid surge of new member states from decolonization. However, the report argues that similar to 1963, permanent members may still be cautious about standing alone on this issue. P5 members that do not ratify reform resolutions in capital are in effect, wielding a veto, since P5 ratification is required as per the Charter.

The Razali Plan

Ambassador Ismail Razali, the 1996-7 President of the General Assembly (PGA) and then Chair of the Open-Ended Working Group, sought to push reform forward through his three-stage plan. The plan involved first a framework resolution deciding to add unnamed members to the Council, five permanent and two non-permanent, and second, a framework resolution selecting which countries would serve. The framework resolutions required two-thirds majority of those present and voting. The third stage required implementation of both framework resolutions through a Charter amendment. This requires favorable votes from two-thirds of the entire membership followed by domestic ratification. The third stage requires a more significant vote, but the groundwork for the resolution would have already been laid in the first two stages. Razali's plan was never implemented.

In Larger Freedom

In March 2005, Secretary-General Kofi Annan presented his report "In Larger Freedom" to set the agenda for the September 2005 World Summit. The report proposes an agenda for the Summit, involving a broad package of institutional reforms, including two models for Security Council reform. Model A involves expansion in both categories with six new permanent and three new two- year non-permanent seats. Model B does not expand the permanent category, but creates a new category of four-year renewable seats, proposing eight Council seats in the new category and one new two-year non-permanent, nonrenewable seat. For both models, seats are divided regionally and there are no new vetoes4 . Model A aimed to fit the requests of the G4 and its allies, while Model B was meant to be in line with UfC's position. Neither model, nor other models that emerged from member state groupings in the discussions leading up to the World Summit, was put

to a vote in September 2005 or thereafter. Whether or not the political climate in 2005 reached the necessary breaking point to make reform possible, a widespread acceptance that there is a need for reform has grown since 2005. Today's reform efforts face far fewer questions about whether or not reform is necessary, and rather focus more on what kind of reform is possible.

Recent developments

The Security Council reform issue reopened with a two-day debate in General Assembly in February 2007, where Member States discussed the five tracks for consultations (categories of membership, the veto question, regional representation, the size of an enlarged Council, the Council's working methods and relationship with the General UN Charter, article 108. Report of the Secretary-General, "In Larger Freedom، Towards Development, Security and Human Rights for all," 21 March 2005, A/59/2005 15 Assembly), but opinions continued to diverge، so at the General Assembly in November 2009, the Member States called into question the effectiveness of the Security Council again, taking into account the Middle East and Palestine situations. In January 2010, Member States met for the second exchange of the fourth round of intergovernmental negotiations on Security Council reform, to discuss areas of convergence. The next round (fifth) took place from 2nd June to 12th July 2010, and it was based on the first-ever negotiation text on reforming the Security Council. The text is comprised of the positions and proposals of Member States on the aforementioned five key issues of negotiations on Council reform. Finally, on November 2013, the General Assembly has reopened the debate on Security Council Reform, taking in consideration the fiftieth anniversary of the Assembly's first call for Council reform through resolution 1991. A common view agreed on a democratic, representative, accountable and effective Council, with many delegations 9 supporting an expanded membership that included seats for African States, Arab States and other under- represented groups.

Discussion

An amendment of the Charter of the United Nations is necessary for any changes in membership to the Security Council. According to Article 108 of the Charter, an amendment requires approval of a resolution to amend the Charter from two-thirds of the entire General Assembly followed by national ratification by two-thirds of the Member States, including all permanent UNSC members. Given the lengthy and cumbersome process of reforming the Council, successful reform requires significant interest and effort from the membership . The "need for sufficient political will" of member states is a phrase often used by the Chair of the IGN and member state representatives. Academics and representatives of non-governmental organizations also cite the importance of "political will" frequently. But the real question for advocates of Council reform is how to

generate sufficient will for change. The United Nations, including some of the P5 Nations, wish for the Security Council to be expanded in order to more accurately represent the needs of the world population. In terms of membership expansion, there are three main ideas that have been proposed،

Charter of the United Nations, Article 108, < http،//www.un.org/en/sections/un-charter/chapterxviii/index.html >

The proposal most discussed is known as the G-4 Plan because it is sponsored by the Group of Four countries vying for a permanent seat in the Security Council Brazil, Germany, India, and Japan. The plan involves expanding the Security Council to 25 members. The new ten members would include six new permanent members, without veto power, with the first four seats going to each G-4 nation, and the remaining two going to nations in Africa that have yet to be determined. Non-permanent

membership would also expand by four seats, still elected to serve two-year terms. France and the United Kingdom are in favor of this plan, while China is strongly against it.

The next plan has been proposed by the African Union, which is made up of 53 nations. This plan would entail expanding the Security Council to 26 members, six of which would be the same new permanent member states proposed by the G-4 plan. The differences between this plan and the G-4 plan are that it proposes five new non- permanent seats as opposed to four and that it wishes to see the new permanent members receive veto power.

The third idea suggests increasing non-permanent membership by ten. This plan is proposed by the countries known as the Uniting for Consensus (UFC) group, of which the most prominent members are Argentina, Canada, Italy, Mexico, Pakistan, South Korea, Spain, and Turkey. Because any reform action taken will include amending the UN Charter, two things must happen before a proposal can pass. The first is that a two-thirds majority of the General Assembly (128 countries) must support it. The second is that it must be ratified by a 2/3 majority of the General Assembly, including all five permanent members of the Security Council. As the most powerful and influential Security Council members, the P5 have strong feeling about the topic of reform and about maintaining their current positions, veto power included. Thus, discussions of reform have been going on for years without reaching any substantive conclusion. The veto power held by the permanent members is widely considered to be the main weakness of the Security Council. Because the veto cannot be contested, it sometimes causes resolutions needed to address a problem to be blocked because a permanent member wishes to maintain an interest unrelated to the issue being discussed. Because the veto power has been in place for so long, reform discussions have not yielded results. No country holding a veto is willing to give it up, and no resolution revoking this privilege is going to pass without unanimous approval from the P5. The final point of concern in reforming the Security Council is its

working practices. The power held by the Council is defined by the chapter of the UN Charter being invoked in the creation of a resolution, either Chapter 6 or Chapter 7. Chapter 6 allows the Security Council the power to investigate disputes pertaining to international security and to recommend appropriate procedures for dealing with the issue. Chapter 7 deals with 17 threats to peace, breaches of peace, and acts of aggression. If this chapter is invoked, the Security Council is not limited to merely recommending actions, but has the authority to actually authorize and implement actions such as military intervention.

Bloc Positions

A country may be part of several different groupings، The Arab Group، L69، the Organization of Islamic Cooperation (OIC)، Uniting for Consensus (UfC)، Accountability, Coherence, and Transparency (ACT)، The African Group and CARICOM, among many other. Some more relevant groupings are the following.

The five permanent members (P5) of the Security Council are divided on the issue of Security Council reform, and are informally referred to, unlike in other circumstances, as the P3 (China, Russia, and the US) and the P2 (France and the UK). Regarding enlargement, the US supports modest expansion in both categories of membership "in principle," requires that all new members are

country-specific (not regionally-based), and is against any expansion of veto powers. Russia expresses openness to exploring the interim model of expansion and to extending veto powers to possible new permanent members, but emphasizes that the veto should only be discussed after new members have been selected. Russia and the US support maintaining veto prerogatives for current permanent members. China‟s position supports expansion to address imbalance in its structure, but only makes a general statement regarding categories of membership, stating that member states further engage on the divisive issue. France and the UK hold a shared position supporting expansion in both categories of membership as well as supporting intermediate models with longer term seats and a review to convert those seats into permanent ones. Although France and the UK have more progressive positions on UNSC reform than other P5 members, they have not sought to take the lead on issues relating to reform in recent years until the French proposal on limiting the veto in the current GA session.

The Group of Four (G4) consists of Brazil, Germany, India, and Japan. The G4 model consists of expansion in both categories of membership and reform of the working methods. The G4 has shaken up the debate on Security Council reform twice in the last decade. First in 2005 and again in 2011, both times pushing forward reform models involving expansion in both categories. In 2011 G4 representatives reported that their attempts to collect written signatures on a draft "short resolution" circulated amongst the membership received more than 80 signatures. While their efforts fell shy of the

required two thirds support in the General Assembly, as the resolution was never brought to vote, it elicited strong responses from other member state groupings, 18 particularly UfC members who were against the resolution, and renewed interest in the debate.

Points to be incorporated in the Resolution

Reform of the Security Council is a very difficult topic to discuss because of the interests at stake and the balance of power and structure of the body. The delegates have three main issues to resolve، membership, veto power and working practices, in order to provide more transparency and inclusiveness to its procedures, as well as to strengthen the capacity of the UN to implement the decisions of the Security Council.

1. Should other countries be included as permanent members in the SC? Which ones?
2. How is the SC response to a crisis? Is the veto power blocking further progress?
3. Should the P5 continue to have exclusive veto power? Should this be abolished or expanded to other countries? Which ones?
4. What solutions have been attempted? Have they worked? How can they be improved?

Conclusion

The inherent paradox is that for the Security Council to reform the five nations holding ultimate power have to vote to give some of it up. Also, looking to the future, would new members of an expanded UNSC be willing to forgo their status if global power dynamics were to shift decisively in another direction, as they surely will? The organization has, in terms of participation, been a huge

success and its involvement in international affairs does carry significant weight. But the divide between the General Assembly and the Security Council is marked. General Assembly delegates complain of a lack of transparency in the Security Council and even the non-permanent members can find themselves literally locked out when the P5 wishes to discuss matters alone. Political will among the more senior states is what is delaying the advancement of any of these plans and problems unrelated to UN reform continue to cause friction among the rest of the UN"s members. The UN"s rules state that changing the composition of the P5 involves changing the UN"s charter– making this, and other similar moves, difficult. To succeed, it would also require the backing of two-thirds of the General Assembly - including the current P5. 19 Without any reform, the Security Council may lose legitimacy, other multilateral institutions may gain relevance, and decentralization of international peace and security could result. These suggestions also have practical implications in regards to efficient functionality at the UN، better coordination and unity within regional organizations can help improve the work of Council members from those regions. Furthermore, expansion of the Council, whether in the permanent or a new category of membership, will allow member states elected for those seats to shift focus from time-consuming, expensive election campaigns at the UN, and better focus on and contribute to the work of the Council. All member states, at least in their public positions, express an interest in reforming the Security Council. Even member states with the most conservative approaches articulate two sentiments in common، first, frustration that the process is not moving more quickly (if it is perceived to be moving at all), and second، skepticism that any real change will come at least in the short term. The United Nations made it their mission to act as a moderating platform for dialogue between states and to promote global peace, and with such a reformation in the most crucial organ of the United Nations for the achievement of this goal, we can create an equal, prosperous and most of all safe future for our generations to come.

Further Reading

1. www.un.org/en/charter-united-nations/index.html
2. http،//csnu.itamaraty.gov.br/images/pathways_sc_reform_final.pdf
3. http،//af.reuters.com/article/worldNews/idAFTRE7042DP20110105
4. http،//news.xinhuanet.com/english2010/indepth/2011-01/05/c_13677327.htm
5. http،//www.nationsonline.org/oneworld/
   http،//news.bbc.co.uk/1/hi/country_profiles/default.stm
6. http،//www.newint.org/
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