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**THE RIGHT TO USE FORCE IN SELF-DEFENCE***Josef Mrázek*

**Abstract:** The Concept of self-defence in international law is a matter of controversy since adoption of the UN Charter. The study deals with the main controversial and most disputed issues as self-defence under Art. 51 of the UN Charter (and beyond?) and international customary law, preventive and pre-emptive self-defence. Some other related notions as an armed attack, collective self-defence, the ICJ approach to self-defence, preventive (anticipatory) and pre-emptive self-defence and self-defence against terrorist attacks are discussed here, too.

The discussions of the Art. 51 of the UN Charter indicate substantial differences of opinion as to the scope of the right to self-defence. It seems that some Great Powers (especially USA, Great Britain, France or Russia) and some other countries (e.g. Israel) have a strong tendency to rely on the use of force in solution of their difficulties. We can even see in the practice of the states certain shift from the original intentions and signed stipulations of Art. 2 par. 4 of the UN Charter to limit the use of force as possible as it can be. Some countries claimed e.g. very wide rights of self-defence to protect their nationals abroad, to respond to anticipatory or pre-emptive attack, to fight international terrorism, to prevent any armed attack in the future. This shift in thinking and state practice is supported also by some authors on international law. In the past various “rescue actions” were taken without approval of the UNSC. Humanitarian interventions or military action taken on protection of human rights and democracy still remain controversial and may have even negative political and legal effects. Substantial extinction of the right of self-defence above the Art. 51 may lead to reappraisal *jus ad bellum* and to removal of existing restraints on the right of self-defence within the UN collective security system and existing international law order.

**Resumé:** Koncepce práva na sebeobranu je jednou z nejméně diskutovaných a kontroverzních otázek v mezinárodním právu od přijetí Charty OSN. Existují rozdílné názory o jeho obsahu i okolnostech, kdy se lze práva na sebeobranu dovolávat. Studie se zabývá vztahem mezi článkem 51 Charty o přirozeném právu na sebeobranu a mezinárodním obyčejovým právem, preventivní a pre-emptivní sebeobranou. Nezkoumá další otázky, jako jsou princip proporcionality při sebeobraně nebo vztah mezi sebeobranou a svépomocí. Autor zmiňuje názory reprezentativních představitelů nauky a snaží se formulovat vlastní názory s ohledem na vývoj v mezinárodním právu následně poté, co v roce 1989 publikoval studii týkající se zákazu použití síly a hrozby silou v *The Canadian Year Book of International Law*. Nynější studie si všímá i takových souvisejících otázek jako jsou např. ozbrojený útok, kolektivní sebeobrana, přístup MSD v Haagu k problému sebeobrany a kriticky hodnotí širokou a novou koncepci sebeobrany proti teroristickému útoku.

**Key words:** Use of force, self-defence, preventive (anticipatory) and pre-emptive self-defence, the UN Charter, armed attack, the ICJ (International Court of Justice), judgement, terrorist attack, humanitarian intervention.

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## I. Introduction

Unfortunately, the concept of self-defence in international law is a matter of wide controversy ever since the adoption of the UN Charter.<sup>1</sup> There is a deep disagreement about its content and circumstances in which the right of self-defence may be invoked and exercised. Indeed, the right of individual and collective self-defence still represents one of the most disputed matters in international law. Having in mind the practice pursued in the various countries, many authors have tried to clarify this rather complicated issue which together with the non-use of force principle forms the very cornerstone of the contemporary international law protecting peace and international security.

Self-defence is a fundamental principle not only of international law but of law generally. The concept of self-defence was embodied in different legal systems and has been considered as a natural right of any human being and any human society. The concept of the right of self-defence can even be traced back to Roman law. In his defence of Annio Milo, the Roman lawyer and statesman Cicero stated: “There does exist therefore gentlemen, a law which is not a law of the statute-book, but of the nature...”<sup>2</sup> The idea of self-defence has its roots in the naturalist doctrine when self-preservation of the state was considered to be “natural right” that was not “abrogated or limited by “positive law”.”<sup>3</sup>

<sup>1</sup> Alexandrov, *Self Defence Against the Use of Force in International Law*, The Hague, 2006; Bowelt, D., *Self-Defence in International Law*, Manchester, 1958; Brownlie, I., *International Law and the Use of Force by States*, Oxford, 1963; In the Czech literature see e.g. Čepelka, Č., Šturma, P., *Mezinárodní právo veřejné* [International Public Law], Praha, 2003, at p. 642-655; Malenovský, J., *Mezinárodní právo veřejné* [International Public Law], Brno, Masaryk University, 1993, at p. 369-376; Potočný, M. Ondřej, *Mezinárodní právo veřejné* [International Public Law], Praha, 2006; Dienststein, Y., *War Aggression and Self-Defence*, Cambridge 2001; Franck, Th. M., *Recourse to Force State Action Against Threats and Armed Attacks*, Cambridge, 2004; Gray, Ch., *International Law and the Use of Force*, Oxford, 2004.

<sup>2</sup> See Cicero M. T., Pro T. Annio Milone, in Cicero The Speeches; with an English translation by N. H. Watts, Cambridge 1964, quoted in Rosenne, Sh., Self-Defence and the Non-Use of Force: Some Random Thoughts, in Eyffinger, A., Stephens, A., Muller, S., *Self-Defence as a Fundamental Principle*, Hague, 2009, at p. 55.

<sup>3</sup> Haggenmacher, P., Self-Defence as a General Principle of Law and Its Relations to War, in Eyffinger, A., Stephens, A., Muller, S., see footnote 2 above, at p. 4.

The concept of self-defence has changed during the historical development of international law, especially with the outlawing of war. At present, international law of self-defence is generally considered an exemption to the general prohibition on the use of force as laid down in the UN Charter (Art. 2 par. 4). However, there also exist international law scholars who maintain that the security of a state and its preservation cannot be subjected to international law. Others ask “whether the ideal of a rule of law can be applied on the international level to national security decisions”.<sup>4</sup>

In the recent past, several powerful countries invoked self-defence in protection of their nationals abroad, in protection of human rights and democracy in foreign countries, in case of anticipatory or pre-emptive self-defence, and in fighting international terrorism. As Ch. Gray would put it, “it helps to give the impression that far-reaching claims of states like the United States and Israel are normal rather than exceptional”.<sup>5</sup> It is true that a country using nowadays force against another one almost always invokes the right of self-defence. There is a different interpretation of Art. 51 of the UN Charter and its scope. The supporters of the limited right of self-defence insist that force in self-defence can only be used if an armed attack occurs. Those in favour of the wide interpretation refer to the “inherent right” of self-defence which, in Art. 51 of the Charter, preserves the right of self-defence as provided in customary international law. The scope of the right of self-defence at the time of signing the UN Charter remains a subject of doctrinal controversy. In his study on the “Prohibition on Use and Threat of Force: Self-defence and Self-Help in International Law”, the author of this paper already supported a narrow interpretation of the right of self-defence. Nevertheless, the paper read: “It can hardly be assumed that states will wait until nuclear warheads reach their territories; they will try to annihilate them within the shortest possible time after their start. In such a case it can be assumed that the armed attack has actually occurred without its having hit the territory of the intended victim. The problem is, however, to get an objective verification of the fact that the attack has been unequivocally and intentionally launched by a certain state against the state that defends itself.”<sup>6</sup> Recently, various countries have attempted, with the support from many international scholars, to extend the scope of the right of self-defence beyond an “armed attack”, and invoked Art. 51 to justify a purely pre-emptive action. The latest development has been the extension of the right of self-defence so as to cover the use of force against terrorism and “non-state actors”.

Classic international law recognised the right of a state to resort anytime to war as an instrument of state policy. The principle of refraining from the threat or use of force embodied in Art. 2 par. 4 of the UN Charter represents a landmark and a fundamental change in the development of international law. However, the tendency to extend the possible use of force beyond the above landmark date back

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<sup>4</sup> See Schachter, O., Self-Defence and the Rule of Law, in *AJIL* 1989, N. 1, at p. 259.

<sup>5</sup> Gray, Ch., see fn. 1, at p. 129-134, 183.

<sup>6</sup> Mrázek, J., Prohibition on the Use and Threat of Force: Self-Defence and Self-Help in International Law, in *The Canadian Yearbook of International Law*, 1989, at p. 81-111.

to the creation of the United Nations. A new impetus to this tendency was given by the “Bush doctrine” of pre-emptive self-defence.<sup>7</sup> Worth mentioning is President Obama’s speech at the Nobel Peace Prize ceremony in December 2009 where he maintained that the use of force in international affairs is sometimes both necessary and morally required. In this connection, President Obama mentioned the concept of a new “just war” which can only be justified if “it is waged as a last resort or in self-defence”.<sup>8</sup>

A broad rule on self-defence is contained in Art. 21 of the Draft Articles on the international responsibility of states for internationally wrongful acts adopted by the ILC in 2001: “The wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations”.<sup>9</sup> This broad understanding of self-defence means a legal protection of a state’s rights against various violations.

This study deals with the narrow concept of self-defence as a strict exception to the general prohibition on the use of armed force which represents a peremptory norm in international law. States using force are often acting on their own initiative without an authorization from the United Nations Security Council (UNSC), in reliance on being so justified by their right of self-defence. In such a case, one could ask whether the self-defence was lawful. The main controversial and most disputed issues of self-defence in international law include:

Relationship between Art. 51 of the UN Charter and customary international law – the existence of customary international self-defence law, which goes beyond Art. 51 of the UN Charter

- Preventive and pre-emptive self-defence
- The principle of proportionality in self-defence
- Self-defence, self-help and self-preservation

This study only addresses the two first items, including self-defence against terrorist attacks.

## **II. Self-defence under Art. 51 of the UN Charter and Customary International Law**

### ***1. Self-Defence in Art. 51 of the UN Charter and Beyond?***

Art. 51 of the UN Charter confirms “the inherent right of self-defence if an armed attack occurs...” This right is limited to the period of time “until the Security Council has taken measures necessary to maintain international peace and security”. Measures taken in self-defence “shall be immediately reported to the

<sup>7</sup> The National Security Strategy of the United States, Sept. 17, 2002, 41 LLM 2002, 1478; <http://www.whitehouse.gov/nsc/nss-pdf>.

<sup>8</sup> President Obama’s Nobel Peace Prize Lecture Addresses Use of Force in Global Affairs, AJIL 2010, N. 1, at p. 127-129.

<sup>9</sup> Draft Articles on Responsibility of States GAOR, Fifty-Sixth Session, Suppl. No 10, A/56/10.

Security Council”. The question still remains if the customary right of self-defence is fully independent of the UN Charter and what kind of mutual interaction and influence exists between them? In other words, it is legitimate to ask what are the results of mutual “coexistence” of self-defence, as a “natural” law under customary international law, and self-defence, as an institute of “positive law” as embodied in Art. 51 of the UN Charter. What is the difference, if any, between the right of self-defence, enshrined in Art. 51 of the UN Charter, and self-defence under customary international law? Have both these notions the same legal content and does Art. 51 represent the codification of pre-existing customary international law only? In the *travaux préparatoires* for the UN Charter it is noted that “the use of arms in legitimate self-defence remains admitted and unimpaired”.<sup>10</sup> Art. 2 par. 4 prohibits the recourse to armed force to “all members” of the UN. However, Art. 2. clearly stipulates that “the Organization shall ensure that states which are not Members of the United Nations act in accordance with these principles...” It is therefore impossible to state that Art. 51 only serves the purposes of the UN members. Self-defence is formulated as an exception to the general prohibition on the use of force. It means that the use of force in self-defence must coincide with the fundamental principle of international law contained in Art. 2 par. 4 of the Charter, which principle refers not only to the use of force, but also to the threat of force. Art. 2 par. 4 and Art. 51 are closely interrelated. In addition, the UN Charter confers “primary responsibility” (Art. 24) for the maintenance of international peace and security on the Security Council (the “UNSC”). In relation to customary international law of self-defence, the role cannot be eliminated for so long as the UN exist. I. Brownlie wrote in 1963 that Art. 2 par. 4 “restated and reinforced the customary norm of international law”.<sup>11</sup> Already in 1966 the International Law Commission (the “ILC”) stated that “the great majority of international lawyers today unhesitatingly hold that (the article) together with other provisions of the UN Charter authoritatively declares the modern customary law regarding the threat or use of force”. At the same time the Commission expressed the view that “the law of the Charter concerning the prohibition of the force constituted, in itself, a conspicuous example of a rule in international law having the character of *ius cogens*”.<sup>12</sup> The relationship between self-defence in the UN Charter and customary international law was dealt with by the International Court of Justice (the “ICJ”) in the case of Nicaragua which is discussed in detail below. The Court rejected the endeavour to deprive the customary law of self-defence of its separate applicability. It emphasized that “customary international law continued to exist alongside the treaty law”, the two sources of law thus did not overlap exactly and the rules did not have the same content”.<sup>13</sup> Contrary to the argument of those authors who juxtapose

<sup>10</sup> Documents of the United Nations Conference on International Organization, Vol. 6, at p. (UNCIO 1945), at p. 265.

<sup>11</sup> Brownlie, I., see footnote 1., at p. 264.

<sup>12</sup> ILC Yearbook, 1966, 1966 – II, at p. 247.

<sup>13</sup> ICJ Reports 1986, Case Concerning Military and Paramilitary Activities in and against Nicaragua, at p. 94; <http://www.icj-cij.org>.

customary international law and the UN Charter in interpretation of the prohibition on the use of force and the right of self-defence, the ICJ held that the principal rules of the Charter and the customary law on the subject are “identical”.<sup>14</sup>

In his publication “The Law of the United Nations (1951)” H. Kelsen indicated that Art. 51 applied “only in case of an armed attack” and the right of self-defence was not exercisable in case of any other violation of a Member’s legally protected interests”. With regard to Art. 51 he argued: “Although the right of self-defence is supposed to be established by a rule of general international law which has the character of *ius cogens* so that it cannot be affected by any treaty...”, this provision presupposes the existence of the right of self-defence as established by a natural law rather than by a positive international law because it speaks about an “inherent right”. Mr. Kelsen added: “This is a theoretical opinion of the legislator which has no legal importance. The effect of Art. 51 would not change if the term “inherent” were dropped. In declaring that nothing in the Charter shall impair the inherent right of self-defence, the Charter confers such right upon the Members, whether positive general international law or natural law established it or not”.<sup>15</sup>

In 1952, H. Lauterpacht stated, among other things, that “It does not follow from the Charter of the right of self-defence – conceived as an inherent, natural right – that the States resorting to it pass the legal faculty of remaining the ultimate judges of the justification of their action”. In his view, they are firstly entitled to decide whether they are “in the presence of armed attack calling for armed resistance” and whether “an inherent right must be controlled by and accountable to a higher authority...” He wrote that “the clear terms of Art. 51 adequately express that general principle of jurisprudence”. For him, self-defence was “an exceptional right” confined to the case of “an armed attack” as distinguished from anticipated attack or other forms of unfriendly conduct falling short of armed attack.<sup>16</sup>

In 1963, I. Brownlie noted that Art. 51 had “an inhibiting effect on interpreting the right of self-defence”. In his view, the narrow and precise terms of Art. 51 were explicable against the background of general prohibition in Art. 2, par. 4, and the general assumption made at San Francisco, and were evident in the language of Art. 51 that “the Organization was to have a near monopoly of the use of armed force...” With regard to the relationship between Art. 51 and the right of self-defence in customary law, I. Brownlie explicitly stated that “a restrictive interpretation of Charter provisions relating to the use of force would be more justifiable and that, even as a matter of “plain” interpretation, the permission in Art. 51 is exceptional in the context of the Charter and exclusive of any customary law of self-defence”. He argued that Art. 51 was expressed in the form of a reservation of an existing customary law.<sup>17</sup>

<sup>14</sup> Ibid., at p. 97, 100.

<sup>15</sup> Kelsen, H., *The Law of the United Nations*, London, 1951, at p. 156, 159, 269, 792, 914.

<sup>16</sup> Lauterpacht, H., *Oppenheim’s International Law*, at p. 156.

<sup>17</sup> Brownlie, I., see footnote 1., at p. 255, 265, 271-273.

In accordance with the customary position based upon the natural law doctrine, Judge N. Singh and E. McWhinney maintain that the right of self-defence is “available not only in the event of an actual attack” but also “when the same is really imminent or threatened”. At the same time they added: “However, Art. 51 of the Charter... while recognising the right of self-defence as “inherent” in every sovereign independent State has, for members of the UN, restricted its exercise to an armed attack only...”<sup>18</sup> Although Art. 51 attempts to preserve the inherent right and creates the impression that it cannot be altered by the provisions of a treaty due to being based on the general principles of international law, Judge N. Singh and E. McWhinney have pointed out that there is “little doubt that the use of words if an armed attack occurs” (in Art. 51) has expressly ruled out ... exercise of the right in the event of a threat even if being a threat of the use of nuclear weapons”. They believe that the governing or operative clause of Art. 51 is an armed attack which constitutes “the sole condition on which a member of the UN can exercise the “inherent right of self-defence” and, “if no armed attack as such takes place on a member of the UN, the provisions of Art. 51 would remain inapplicable in their entirety”.<sup>19</sup>

The authors of the last (1996) edition of “Oppenheim’s International Law” maintain that “if a state is attacked, it is entitled – in circumstances of necessity – to use armed force in order to defend itself against an attack...” They confirmed that an armed attack included a direct attack led by another state’s regular armed forces (if amounting to more than a mere frontier incident), indirect attacks which consisted in the sending by, or on behalf of, a state of armed groups or mercenaries into another state where they carried out acts of armed force of such gravity as would constitute an armed attack if conducted by regular forces.<sup>20</sup>

Surely, Art. 51 imposed a restriction to the right of self-defence limiting it to sole use in an “armed conflict”. Under customary international law, self-defence is restricted by the principle of necessity and proportionality. The state practice is and will be decisive for an understanding of the scope of the right of self-defence.

In J. Stone’s view, Art. 51 presents such insoluble problems so that the term “inherent” is better interpreted as “otiose”. At the same time, the notion of collective self-defence itself seems to him as “contradictory” except as resorted to “by to” or more victims simultaneously attacked by the some Power”. “Collective self-defence“, so J. Stone, “necessarily implies preparatory steps in advance of an armed attack”.<sup>21</sup>

Myres S. McDougal wrote: “There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly serves

<sup>18</sup> Singh, N., McWhinney, *Nuclear Weapons and Contemporary International Law*, 1989, at p. 87-88.

<sup>19</sup> Ibid. , at p. 96.

<sup>20</sup> Sir Jennings, R., Sir Watts, A., *Oppenheim’s International Law*, Vol. I, London – New York, 1997, at p. 417.

<sup>21</sup> Stone, J., *Legal Controls of International Conflict*, London, 1959, at p. 245.

a right of self-defence, had the intent of imposing by this provision new limitations upon the traditional right of states".<sup>22</sup>

D. W. Bowett summarized the preparatory work on the UN Charter and concluded that the preparatory work only suggested "that the Article should safeguard the right of self-defence, not restrict it". Bowett added that Committee I/I stressed in its report, approved by both the Commission and the plenary conference, that "the use of arms in legitimate self-defence remained admitted and unimpaired". He held that it was "fallacious to assume that members have only those rights which the Charter accords to them; on the contrary, they have those rights which general international law accords to them except and in so far as they have surrounded them under the Charter. He refused the view of H. Kelsen on content of Art. 51 stating: "Kelsen, writing of the right of self-defence, says the right has no other content than the one determined by Art. 51, this is a fundamentally erroneous approach which produces a restricted interpretation of the Article not warranted by the Charter".<sup>23</sup>

The late T. M. Franck held that there were other instances in which states asserted their right of self-defence against insurgents including the right to strike back at territory from which the attackers originated. T. M. Franck asserted that "the international system now appears increasingly to acquiesce in his expanded reading of the right of self-defence". For example, if there were sufficient evidence of "a persistent, large scale pattern of support", even for indirect aggression, it would, in his view, qualify the victim "to resort to military force in self-defence under Art. 51". According to him "it is becoming clear that a victim-state may invoke Art. 51 to take armed countermeasures" against "any territory harbouring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or a terrorist attack. From this perspective, "armed countermeasures" were equated with self-defence. He speaks directly about "countermeasures in self-defence".<sup>24</sup> T. M. Frank supports an "expansive" concept of self-defence within the meaning of Art. 51 to justify using force to protect citizens abroad. He maintains that the UN system has under Art. 51 adapted the concept of self-defence "to include a right to use force in response to an attack against nationals provided that there is clear evidence of extreme necessity and the means chosen are proportionate". He asks: "Has recourse to such anticipatory self-defence in circumstances of extreme necessity been preserved or repealed by the Charter?" and concludes that Art. 51 should not be interpreted so as "to compel the *reductio ad absurdum* that states invariable must await a first, perhaps decisive, military strike before using force to protect themselves". At the same time, however, he notes: "On the other hand, a general relaxation of Art. 51's prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threat end could lead to another *reductio ad absurdum*". T. M. Frank sees the issue involved in recourse to anticipatory self-defence in its

<sup>22</sup> McDougal, M. S., The Soviet Cuban Quarantine and Self-Defence, 57 AJIL 1963, N. 1, at p. 597, 599-601.

<sup>23</sup> Bowet, D. W., op. cit. supra note 1, at p. 166-167.

<sup>24</sup> Franck, T. M., fn. 1, at p. 64-65, 67.



“ambiguity”. In the framework of a “creative” interpretation of Art. 51, he discussed five claims including: (1) a state’s right to resort to armed self-defence in response to attacks by terrorists, insurgents or surrogates operating from another state; (2) the right to exercise self-defence against the source of ideological subversion from abroad; (3) a state’s right to act in self-defence to rescue or protect its citizens abroad; (4) a state’s right to act in self-defence to anticipate and/or pre-empt an imminent armed attack; and (5) a state’s right of self-defence available to abate an egregious, generally recognised, yet persistently undressed wrong including the claim to exercise a right of humanitarian intervention. The above claims, except for “ideological subversion”, were answered by him in a positive way.<sup>25</sup>

The late Shabtai Rosenne argued that self-defence was nowadays often treated as if Art. 51 were “all and end – all of the matter”. In his view, “the Charter has engendered new forms of violence ... especially the use of armed force by non-State entities ...” He insists that “when the attack is not attributable to a State, the right of self-defence becomes separated from the principle of the non-use of force which has little if any relevance ...” He described self-defence as an independent, self-standing principle of law and, as such, also a general principle of international law. Where self-defence against another state involves the use of armed force, Art. 51 on the right of self-defence will be applied as “an exception to the general prohibition on the use of force laid down in par. 4 of Art. 2”. Shabtai Rosenne also mentioned “economic self-defence” as the use of economic measures in self-defence against other illegal act of whatever kind....” He also stressed that “self-defence” against cyber-crime was becoming more urgent and adverted that this type of crime might potentially pose a threat to world peace.<sup>26</sup> According to A. Cassese there is a growing consensus that anticipatory self-defence is allowed but only if strict conditions are met that demonstrate imminence of an armed attack that would jeopardise the life of the target state and the absence of peaceful means to prevent such attack. However, A. Cassese concludes that “it is more judicious to consider such action (anticipatory self-defence) as legally prohibited, while admittedly knowing that there may be cases where breach of the prohibition may be justified on a moral basis.<sup>27</sup>

## **2. Armed attack**

Views also differ as to what constitutes an armed attack and when it starts and ends. These divergences then seriously impact the conception of self-defence. As a rule, an armed attack represents armed action taken by regular army forces. According to the definition of aggression, an armed attack may be pursued also by armed bands, groups, irregulars or mercenaries, who are sent by or on behalf of another state, and their armed acts are of such gravity as “to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement

<sup>25</sup> Ibid., at p. 52, 76, 96, 98, 107.

<sup>26</sup> Rosenne, Sh., fn. 2, at p. 50, 51.

<sup>27</sup> Cassese, A., *International Law in Divided World*, Oxford, 2004, at p. 233.

therein". It seems, therefore, that a lesser degree of state involvement is not sufficient to constitute an armed attack and to invoke the right of self-defence. Some authors distinguish between the wider notion of "aggression" and the narrower concept of "armed attack".<sup>28</sup> Several writers criticised ICJ's interpretation of armed attack. Others maintain that the Court's decision is consistent with state practice.

Not every use of armed force amounts to an armed attack mentioned in Art. 51 of the UN Charter. The notion of armed attack in terms of Art. 51 is defined neither in the Charter nor in any other international document. The Definition of Aggression adopted by the G.A. resolution 3314/XXIX defines "acts of aggressions" in terms of Art. 39. Some writers assume that the terms "armed attack" and "aggression" are identical, mentioning the French term "aggression armée" in Art. 51 which appears to be the equivalent of "armed attack" in the English text. The differences in interpretation have not been removed by the UN res. 3314 (XXIX) on Definition of Aggression which recognizes the first use of armed force as *prima facie* evidence of an act of aggression only. In principle, self-defence is limited to preservation of the *status quo ante* or its restoration. In accordance with Art. 51 and Art. 2, par. 4, "preventive" self-defence is impermissible. However, some states and writers maintain that there may be situations when a preventive self-defence against imminent attack is allowed. Most commentators say that "it's doubtful whether the right of self-defence can be expanded beyond Art. 51".<sup>29</sup> Brownlie and others argued that state practice had come to restrict the right of self-defence to cases of armed attack even before the founding of the UN, and believe that self-defence under Art. 51 and the customary law of self-defence are identical from the outset.<sup>30</sup> In addition, Art. 51 and customary international law operate in correlation and dependence. It can be thus argued that Art. 51 "delineates the boundaries of legitimate self-defence not only for the purposes of the UN Charter, but also in general international law".

In the Nicaragua case, the ICJ dealt with the notion of armed attack: "Moreover, a definition of 'armed attack', which, if found to exist, authorizes the exercise of the 'inherent right of self-defence', is not provided in the Charter, is not part of treaty law. It cannot therefore be held that Art. 51 is a provision which 'subsumes and supervenes' customary international law". The ICJ confirmed that "customary international law continues to exist alongside treaty law", insisting that "the areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content". The Court noted that an "armed attack" included not only action by regular armed forces but also "the sending by or on behalf of a state of armed bands or groups which carry out acts of armed force of such gravity as to amount to an actual armed attack conducted by regular armed forces".<sup>31</sup>

<sup>28</sup> Schwebel, M., *Aggression, Intervention and Self-Defence in Modern International Law*, 136 RCADI 1972, at p. 463.

<sup>29</sup> Bryde, B. O., *Self-Defence*, *Encyclopaedia of Public International Law*, 1982, Vol. 4, at p. 362-363.

<sup>30</sup> Brownlie, I., fn. 1, at p. 264.

<sup>31</sup> ICJ Reports 1986, fn. 13, at p. 93-94 (para 194-195).

### 3. *Collective Self-defence*

Since the adoption of the UN Charter there has been also controversy in the theory and state practice on collective self-defence. Collective self-defence was included in Art. 51 (Chapter VII) rather than in the stipulations concerning regional arrangements (Chapter VIII). Art. 51 refers to the inherent right not only of individual self-defence, but also of “collective self-defence”. The term “collective self-defence” may have two different meanings. Theoretically, it may include a number of individual rights of self-defence, or it may form collective security. Under Art. 51, various organisations were established such as the NATO. There is some controversy surrounding the notion “collective self-defence”. Some authors argued that the right of collective self-defence only meant that states might exercise the right of self-defence collectively only in case they were also entitled to exercise such right individually. State practice supports the idea that one state may defend another state upon its request. Under Art. 5 of the North Atlantic Treaty, the Parties agree that an armed attack against one or more of them is considered to be “an attack against them all”. If such armed attack occurs, each of them is entitled to exercise the right of individual or collective self-defence “recognised” by Art. 51 of the Charter “individually and in concert with the other Parties”. In the Nicaragua case, the International Court of Justice stated that one state could not defend another unless such other state was the victim of an armed conflict and asked for assistance. The Court noted that this right was established in customary law and emphasised that the use of force by one state against another is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack”.<sup>32</sup> Some writers maintain that “collective self-defence” was a new concept included in the UN Charter. ICJ Judge Shigeru Oda went even so far as to express doubts as to whether “collective self-defence” could be considered as an “inherent right” existing before the UN Charter was signed.<sup>33</sup> ICJ Judge Sir Robert Jennings characterized the nature of collective self-defence as one “open to abuse”, which was necessary to ensure that it was not employable as a mere cover for aggression disguised as protection, and the Court was therefore right to define it somewhat strictly”<sup>34</sup>. In the past, several states often invoked collective self-defence to justify their use of force. For example, it is possible to mention the Operation Enduring Freedom in Afghanistan (launched on October 7, 2001), use of force by the USA against Nicaragua (1990), Lebanon (1958), North Vietnam (1961), and Kuwait (1996). During the war between Iran and Iraq (1980–1988), several US vessels in the Persian Gulf were damaged by mines. The US responded by force claiming self-defence against Iran. Similarly, the US destroyed in 1988 oil platforms in Iran claiming self-defence under Art. 51. The US used armed force against the Democratic Republic of Vietnam, Cambodia and Laos, claiming collective self-defence of South Vietnam. Likewise, the use by the

<sup>32</sup> ICJ Reports 1986, fn. 13, at p. 93-94 (para 194-195).

<sup>33</sup> ICJ Reports 1986, fn. 13, Dissenting opinion of Judge Oda, at p. 243 (para 91).

<sup>34</sup> *Ibid.*, Dissenting opinion of Judge Sir R. Jennings, at p. 354.

US of force against Nicaragua was justified by collective self-defence of El Salvador, Costa Rica and Honduras. The ICJ noted that there was no armed attack and rejected US position. The UK invoked collective self-defence in armed conflicts with Jordan (1958) and the Federation of South Arabia (1964). France did the same on the grounds of using force against Chad (1983, 1986). In 1968, the Soviet Union and other so-called socialist countries invaded Czechoslovakia. The invaders and official propaganda explained the operation as “collective self-defence of socialism” based on the so-called “socialist internationalism” doctrine.<sup>35</sup>

The legality of a majority of the above uses of force remains controversial. Collective self-defence had often been invoked upon the request of a third-party state before an armed attack occurred or even if there was no armed attack at all. Generally, no clear dividing line exists between the right of self-defence and “intervention by invitation”, which is rather controversial in international law.

In almost all cases of collective self-defence the question may be asked whether there was an armed attack. Another controversial issue is whether or not a previous request for collective self-defence is required from the victim state. Some scholars maintain that it is an “autonomous right” that allows a third-party state to provide assistance to the victim, others argue that a previous agreement or invitation is necessary.

In practice, the UNSC has not received many claims from the various countries alleging they were acting in self-defence. In fact, some of the cases involved armed reprisals rather than self-defence. The UNSC most often condemns unlawful uses of force instead of mentioning anticipatory self-defence. In fact, only few UNSC resolutions referred to Art. 51.<sup>36</sup> Not every use of armed force amounts to an armed attack mentioned in Art. 51 of the UN Charter.

### III. ICJ Approach to Self-defence

In June 1986, the ICJ rejected by a vote of 12 to 3 US justification of the collective self-defence because there was no reliable evidence of an armed attack. In addition, it noted that Art. 51 required any action in self-defence to be reported to the Security Council what the US had not done. The US argued that “claims allegedly based on customary and general international law” cannot be determined without recourse to the UN Charter as the principal source of that law...” The US further contended that “the only general and customary international law on which Nicaragua can base its claims is that of the Charter”. The ICJ observed that the UN Charter “by no means covers the whole area of the regulation of the use of force in international relations”. The ICJ simultaneously stressed that Art. 51 of the Treaty itself referred to “pre-existing customary international law” (*droit coutumier preexistant*), which meant an “inherent right” (in the French wording: “*droit naturel*”) of individual or collective self-defence. The Court stated that “Art. 51 is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence *[and it is hard to*

<sup>35</sup> See Gray Ch., fn. 5., at p. 135-142.

<sup>36</sup> *Ibid.*, at p. 100.

*see how this can be anything]* other than of a customary nature, even if its present content has been confirmed and influenced by the Charter". In addition, the Court stated, that the Charter did not regulate "all aspects" of the right of self-defence. For example, it was mentioned that it did not contain "any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".<sup>37</sup> The Court observed that "even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty law". The Court already recognized the existence of identical rule of both international treaty and customary law in the North Sea Continental Shelf case. It was ascertained that there were no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervened" the former, so that customary international law had no further existence of its own.<sup>38</sup>

According to the US statement in the Nicaragua case, the rules of customary law were "subsumed" and "supervened" by those of international law, and especially those of the UN Charter. The ICJ maintained that this US statement could not be upheld and rejected the view presented by the USA that the existence of principles in the UN Charter precludes the existence of similar rules in customary law either because existing customary rules had been incorporated into the Charter, or because the Charter later influenced customary rules. However, the ICJ did not consider that it could be claimed that all the customary rules which could be invoked had a content "exactly identical" to that of the rules contained in the treaties.

As regards the use of armed force in self-defence and the relationship between Art. 2 par. 4 and Art. 51 of the UN Charter, the ICJ stated: "The Court finds that both Parties take the view that the principles as to the use of force incorporated in the UN Charter correspond, in essentials, to those found in customary international law... The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Art. 51 of the UN Charter which refers to an "inherent right" and from the declaration in resolution 2625".<sup>39</sup> The ICJ thus confirmed that the right of self-defence existed "independently" on Art. 51 of the Charter. In its December 2005 judgement concerning armed activities on the territory of the Congo, the ICJ stated that this provision was a "cornerstone of the United Nations Charter".<sup>40</sup> However, prohibition on the use of armed force is "a cornerstone" of contemporary international law in its entirety.

<sup>37</sup> ICJ Reports 1986, fn. 13, at p. 84-86 (para 176, 178).

<sup>38</sup> ICJ Reports 1969, The North Sea Continental Shelf Case, at p. 39 (para 63).

<sup>39</sup> ICJ Reports 1986, fn. 13, at p.

<sup>40</sup> ICJ Reports 2005, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda); <http://www.icj.org>.

In the Nicaragua case, the ICJ also expressed their view on collective self-defence against armed attack. The issue of an imminent armed attack was not discussed because no party to the dispute raised the question of threat of imminent attack before the Court. The ICJ decided that there was no rule “permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack”.<sup>41</sup> In some way, the judgment was criticized by Judge J. M. Ruda and Judge Sh. Oda who provided separate and dissenting opinions with respect to the statement of the Court on “collective self-defence”. Judge Shigeru Oda expressed his doubts as to whether collective self-defence had been known before 1945 and therefore an “inherent right”.<sup>42</sup> Judge J. M. Ruda mentioned that there was “no armed attack” to pass judgement “as to what the Court says on such facts as may underlie the claimed justification of collective self-defence”. He declared that “assistance to rebels cannot, per se, be justified on grounds of self-defence.”<sup>43</sup> Not only the Court’s reasoning on collective self-defence, but also its conclusion that the US used armed force and intervened in Nicaragua unlawfully drew strong criticism from some American writers. Nevertheless, the ICJ judgment remains to be an authoritative statement of relevant law and was reaffirmed in the Oil Platforms case.<sup>44</sup>

In his “dissenting opinion” in the Nicaragua case, Judge M. Schwebel supported the wide interpretation of “self-defence” behind cases of armed attack. He noted that the question of whether a State may react in self-defence to action other than armed attack was not an issue in this case. Nevertheless he clearly declared: “I do not agree with the construction of the UN Charter which would read Art. 51 as if it were worded: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if an armed attack occurs... I do not agree that the terms or intent of Art 51 eliminate the right of self-defence under customary international law or confine its entire scope to the express terms of Art. 51.” He recognized that the issue was controversial.<sup>45</sup> To support his opinion, Judge M. Schwebel quoted interpretation of Art. 51 by Sir H. Waldock who wrote: “Does Art. 51 cut down the customary right and make it applicable only to the case of resistance to armed attack by another State? This does not seem to be the case... Art. 51, as it is well known, was not inserted for the purpose of defining the individual right of self-defence but of clarifying the position in regard to collective understandings for mutual self-defence... It would be a misreading of the whole intention of Art. 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an armed attack”.<sup>46</sup>

<sup>41</sup> ICJ Reports 1986, fn. 13, at p. 94 (para 195).

<sup>42</sup> Ibid., Sh. Oda, Dissenting Opinion, at p. 243-248 (para 90-91, 97).

<sup>43</sup> Ibid., Ruda J. M., Dissenting Opinion, at p. 166 (para 12-15).

<sup>44</sup> ICJ Reports, Oil Platform Case.

<sup>45</sup> ICJ Reports 1986, fn. 13, at p. 337-338 (para 172).

<sup>46</sup> Ibid., at p. 138 (para 172); quotation from Waldock C. H. M., *The Regulation of the Use of Force by Individual States in International Law*, Collected Courses, The Hague 1952, II, at p. 496-497.

When dealing with the relationship between customary international law, and Art 2, par. 4, and Art. 51 of the UN Charter, Judge Sir R. Jennings argued: “There is no doubt that there was, prior to the UN Charter, a customary law which restricted the lawful use of force, and which correspondingly provided also for a right to use force in self-defence; as indeed the use of the term “inherent” in Art. 51 of the UN Charter suggests. The proposition, however, that, after the Charter, there exists alongside those Charter provisions on force and self-defence, an independent customary law that can be applied as alternative to Articles 2, paragraph 4, and 51 of the Charter, raises questions about how and when this correspondence came about, and about what the differences, if any, between customary law and the Charter provisions, may be”. He mentioned that the Charter was not a codification of the existing customary international law, and asked whether a general customary law, replicating the Charter provisions, has developed as a result of the influence of the Charter provisions. He came to the conclusion that there was no need to further pursue the relationship between the UN Charter and customary law and stressed that there remained “a most cogent objection to any attempt to decide the issues of force and self-defence without the Charter...” In his dissenting opinion, Judge Sir Robert Jennings expressed the view that “it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden and yet the United Nations employment of force, which was intended to fill that gap, is absent”. The foregoing was mentioned by Judge Sir Robert Jennings in connection with the fact that the provisions of UN Charter VII on the UN armed forces have never come into effect.<sup>47</sup>

In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 8. 7. 1996, the ICJ stated that it could not exclude that their use would be lawful “in an extreme circumstance of self-defence, when the very survival of a State would be at stake” as the highest value. The ICJ held that armed reprisals in time of peace were “unlawful” and any right to belligerent reprisals would, “like self-defence, be governed inter alia by the principle of proportionality”. There is always danger that an aggressor will design such “peaceful reprisals” as self-defence. The ICJ provides: “Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality” which means with the right of self-defence”.<sup>48</sup>

In a separate opinion on the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9. 7. 2004, Judge R. Ago stated that “nothing in the text of Art. 51 thus stipulates that self-defence is available only when an armed attack is made by a State”.<sup>49</sup> Judge Kooimans noted

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<sup>47</sup> ICJ Reports 1986, fn. 13, at p. 530-533; Dissenting Opinion of Judge Sir Robert Jennings, at p. 520-521, 523.

<sup>48</sup> ICJ Reports, Advisory Opinion on the Legality of the Threat on Use of Nuclear Weapons.

<sup>49</sup> ICJ Reports, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Separate Opinion of Judge R. Ago.

in his separate opinion that resolutions 1368 a 1373, adopted after the terrorist attack of Sept. 2001 “recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State”.<sup>50</sup> Judge Th. Buergenthal in his declaration maintained that the United Nations Charter, in affirming the inherent” right of self-defence, does not make its exercise dependent upon armed attack by another State”.<sup>51</sup> And finally, Judge R. Higgins indicated in separate opinion that there was “nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State”.<sup>52</sup>

On November 6, 2003 the ICJ entered a judgement in the Oil Platforms Case (Iran *v.* United States of America) concerning a dispute arising out of attacks (by several US warships in October 1987 and April 1988) on offshore oil production complexes owned by the National Iranian Oil Company. The ICJ concluded that actions carried out by the United States of America could not be justified as “being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying under international law on the question as acts of self-defence...” The ICJ jurisdiction was given by compromissory clause included in the Treaty of Amity, Economic Relations and Consular Right, signed in Tehran on Aug. 15, 1955. In this case, the ICJ held that even the mining of single military vessel might be sufficient to bring into play the “inherent right of self-defence”.<sup>53</sup> However, the ICJ did not consider the use of force by the US as lawful self-defence.

#### IV. Preventive (Anticipatory) and Pre-Emptive Self-defence

The concept of distinguishing between “pre-emptive self-defence” against an “imminent threat” and “anticipatory” or “preventive self-defence”, which is directed against a “developing” danger, won almost general acceptance by international lawyers. One of the main controversies over the right of self-defence relates to the right of “anticipatory” and “pre-emptive” self-defence.<sup>54</sup> Some authors in favour of a right to anticipatory self-defence insist that it is not possible to wait for an armed attack to occur. From this point of view, the denial or exclusion of anticipatory self-defence may deprive the party of the advantage to strike the first blow. However, serious risk of wrongly evaluated “imminent” armed attack may exist. The authors who are against anticipatory self-defence stated that anticipatory self-defence was contrary to international law. As a rule, they point out potential mistakes in evaluating a risk of imminent armed attack. In such a case there is, of course, a danger of disproportionality of self-defence. In the past, state practice in the matter of “anticipatory” or “pre-emptive” self-defence differed. Certain great powers claimed

<sup>50</sup> Ibid., Separate Opinion of Judge Kooimans (para 35); <http://www.icj-cij.org>.

<sup>51</sup> Ibid., Declaration of Judge Buergenthal (para 5).

<sup>52</sup> Ibid., Separate Opinion, Judge Higgins (para 33).

<sup>53</sup> ICJ Reports, Oil Platforms (Islamic Republic of Iran *v.* United States of America) 16. 11. 2003.

<sup>54</sup> See Gray, Ch., fn. 1, at p. 135, 159-195; Franck, M., fn. 1, at p. 4, 9, 50, 93-97; Shaw, M. N., *International Law*, Cambridge, 2004, at p. 8-30, 102.



that anticipatory self-defence was legitimate. At the same time, other States argued that anticipatory self-defence was illegal. There are authors and politicians who are in favour of anticipatory self-defence for a wide range of reasons, disregarding even the existence or imminent danger of an armed attack. In their opinion, the conditions stipulated in Art. 51 are not exhaustive and the Article contained no mention of attack against non-members of the United Nations. The main argument of these authors is that Art 51 describes self-defence as “inherent right” and, consequently, it is inconsistent to restrict the right at the same time. Some States affirm the anticipatory self-defence for protected nationals abroad. The UK Foreign Secretary declared on June 28, 1993 that “force may be used in self-defence against threats to one’s nationals if: a) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one’s nationals; b) there is, effectively, no other way to forestall imminent further attack on one’s nationals; c) the force employed is proportionate to the threat.”<sup>55</sup>

Adversaries of a wide interpretation of self-defence argue that a wide interpretation of self-defence contradicts the purpose of, and restrictions imposed on, the right of self-defence. Supporters of limited right of self-defence insist that it may be used only if an armed attack occurs. If we accept the concept that, in accordance with Art. 51, self-defence is restricted to the actual occurrence of an armed attack, then anticipatory or pre-emptive self-defence seems to be incompatible with wording of the UN Charter, especially with Art. 4 par. 4. The development of modern weapons and the possibility of their use in an armed attack may support the idea of anticipatory self-defence under strict conditions. The concept of anticipatory self-defence involves the risks of error, misuse and armed conflict. A pre-emptive strike may even constitute an aggression. The very broad interpretation of the right of self-defence may invoke “the breakdown of the UN collective security system”. As advised by, for example, Benedetto Conforti, there is no legal reason to be in favour of “preventive self-defence” of the view that “every State could resort to the use of force” against serious violations of international law such as gross violations of human rights (humanitarian interventions) or complicity in terrorist activities or drug trafficking. Conforti maintains that these views are “usually upheld by the stronger States and, in particular, by the United States and their closest allies, but never accepted by the weaker ones...” Conforti also sharply refused the doctrine of pre-emptive or preventive self-defence contained in the document “National Security Strategy of the United States”. According to the document – as already mentioned above – the US will exercise pre-emptive self-defence whenever they deemed it necessary to prevent an imminent threat of attack with weapons of mass destruction or terrorist acts (the so-called Bush doctrine). B. Conforti wrote resolutely: “It is not law but a rough and arrogant expression of force”.<sup>56</sup>

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<sup>55</sup> See Eyffinger, A., fn. 3, at p. 159.

<sup>56</sup> Conforti B., *The Law and Practice of the United Nations*, Martinus Nijhoff, Leiden, 2005, s. 174-175.

Nowadays, a strong tendency exists to accept the principle of anticipatory self-defence in limited cases, very often mentioning the limits of the Caroline case. In case of an “imminent” armed attack, States tend to invoke the right to “inherent” self-defence. States have employed pre-emptive strikes in “self-defence” many times. The US used a pre-emptive attack in proclaiming the no-fly zone in Iraq after Iraq invaded Kuwait in 1990. A civilian Irani Airbus was shot down in 1998 by the US invoking anticipatory self-defence. The US argued that it had acted under threat of an ongoing attack on its naval convoy in the Gulf. It believed that an imminent attack by hostile Iranian military aircraft had taken place. Ch. Gray described the mistakenly led attack as a “hazard of anticipatory self-defence”. Israel invoked the doctrine of anticipatory armed attack in the context of an air-strike on a Iraq nuclear reactor in 1981. Israel justified the action by contending that Iraq seeks nuclear weapons which will pose a threat to Israel. The attack was condemned by both the UNSC and the General Assembly. In this case, the relevant Resolution rejected anticipatory self-defence while leaving unanswered the question of legitimacy of anticipatory self-defence in general. On August 7, 1998 US embassies in Kenya and Tanzania were bombed. Does an attack on an Embassy or diplomats constitute an armed attack which would legitimate action in self-defence? The US claimed having acted in accordance with Art. 51 of the Charter, and in exercise of its right of self-defence when launching cruise missiles against installations in Sudan and Afghanistan. The US stated that the missile strikes were “necessary and proportionate response to the imminent threat of further terrorist attacks against US personnel and facilities.

In the past, many anticipatory and pre-emptive attacks were condemned by the UNSC Council and the General Assembly. In their resolutions, in fact, no clear, unambiguous response can be found to the issue of general legitimacy of anticipatory self-defence. In particular, the US, the UK and Israel invoke the existence of a broad right of self-defence which is not limited only to an armed attack. As mentioned above, there has been a lot of controversy over the scope of self-defence with regard to “anticipatory” or “pre-emptive” attack. The question may be raised whether the right of self-defence exists even after an armed attack occurred and was already finished. In such case, is it possible to use armed force and for how long?

Since 1945, State practice seems to support the idea of self-defence going beyond Art 51. Based on Art. 51, rather than for defence against “imminent dangers of armed attacks”, the North Atlantic Treaty Organization only provides for defence against armed attacks. Customary international law requires that self-defence be necessary and proportionate. These principles were confirmed in the Nicaragua case and in the Nuclear Weapons Advisory Opinion. It is true that no provision concerning self-defence was included in relevant documents such as the Definition of Aggression and the Declaration on Friendly Relations. There has also been much controversy about the right of States to use force to protect their own nationals abroad or to invoke self-defence against international terrorism.

The 2002 US National Security Strategy provides: “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists to prevent them from doing harm against our people and our country”.<sup>57</sup> The above comprehensive report concerning the national security strategy of the United States claimed the existence in international law of an evolving right enabling the US to pre-emptively use armed force against “rogue states”, possessing weapons of mass destruction. The justification for this pre-emptive use of force was not to allow enemies of the United States to strike first. Commentators supporting this approach maintain that traditional concepts of deterrence will not work against leaders of “rogue states” willing to take risks or against terrorist enemies. Therefore it is suggested to adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. There is a “challenge to prior understandings of *jus ad bellum*”. Academic critics of the US use of force against Afghanistan in self-defence raise questions as to “(1) the appropriate interpretation of the Charter, in particular the definition of an “armed attack” in Art. 51, (2) the requirements under customary international Law of necessity and proportionality in reaction of self-defence, (3) the customary law of state responsibility, in particular whether a state is liable for action undertaken by those with a nexus to it in this case the planning of terrorist acts by nonstate actors on its territory”.<sup>58</sup> Appearance of the “new US doctrine on use of force” is stated in connection with the 2002 comprehensive report on the national security strategy of the United States. The report of President Bush claimed, among other things, an “evolving right under international law for the United States to use military force pre-emptively against the threat posed by rogue states possessing weapons of mass destruction (WMD).<sup>59</sup> In January 1993, the US Department of State elaborated the conception of the evolving international law standard on the use of force. It stated that “the right of self-defence – including the right to take pre-emptive action against a clear and imminent threat – has long been recognized in international law and practice”.<sup>60</sup> In this connection, it was stressed that challenge of today is to adapt the principle of self-defence to the unique dangers posed by the proliferation of weapons of mass destruction.

Many attempts have been made to justify numerous unilateral armed actions by “preventive wars” or “humanitarian intervention”. Former UN Secretary-General, Mr. Kofi Annan, initiated the idea of a duty inherent in state sovereignty to safeguard the lives and livelihoods of civilians. In his report to the UN General Assembly in Sept. 2005, Mr. Annan stated that norm a norm was emerging on international responsibility to protect civilians in the event of genocide and large scale killing, ethnic cleansing or serious violations of international humanitarian law which

<sup>57</sup> National Security Strategy of the United States, Sept. 17 2002, 41 LLM 2002, 1478; <<http://www.whitehouse.gov/nsc/nss.pdf>>.

<sup>58</sup> *Jus ad Bellum: The American resource to force*, in AJIL 2002, N. 2, at p. 906-7.

<sup>59</sup> U.S. Adoption of New Doctrine on Use of Force, in AJIL 2003, N. 1, at p. 203.

<sup>60</sup> AJIL 2003, N. 1, at p. 205.

sovereign governments have proved powerless or unwilling to prevent.<sup>61</sup> The General Assembly endorsed this concept of the sovereign responsibility to protect civilians by using armed force.<sup>62</sup> This concept, if accepted without the approval of the UNSC, may open the door not only to military interventions for various reasons, but also to modifications to the non-use of force principle. There is already a tendency to speak about the precedents of past humanitarian interventions as legitimate cases. New doctrine of the “responsibility to protect” has appeared already in 2001 Report of the International Commission on intervention and state sovereignty as a response to Kofi Annan’s appeal.<sup>63</sup>

This concept supports the use of military force by states to protect the lives of their nationals, to prevent violations of human rights and even to assist in the rebuilding of relevant societies. The military use for humanitarian purposes is not excluded. Then there is a question of mutual relationship between the concept of the responsibility to protect and the controversial conception of humanitarian intervention. This new doctrine is trying to revitalize the “just war” doctrine including “just cause”. Other criteria such as “legitimate authority, right intention, last resort, proportional means and reasonable prospects” have been also used. The “legitimate authority” is not limited to the UN Security Council. Other subjects such as regional organizations, individual States and groups of States may intervene if the UNSC is unable or unwilling to do it itself. This concept invokes the possibility unilaterally using force, disregarding the prohibition on the use of force as a peremptory norm of international law, and remains very controversial. It is supported by several dominant and powerful Western states and opposed by large majority of other states. It is clear that this concept goes beyond not only the Charter but also customary international law on use of force and self-defence. The 2005 UN World Summit refused to accept the legality of unilateral humanitarian intervention. The World Summit Outcome Document only declared the readiness of international community “to take collective action, in a timely and decisive manner, through the Security Council in accordance with the Charter...”<sup>64</sup> The issue was re-discussed in the course of the UN General Assembly plenary debate on the responsibility to protect in July 2009. The UN Security General Special Advisor on responsibility to protect presented his report in January 2009.<sup>65</sup> The discussion on the issue of unilateral use of force was not finished,

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<sup>61</sup> Report of the Secretary – General, In larger freedom: towards development, security and human rights for all, UN doc. A/59/2005, 21 March 2005.

<sup>62</sup> UNGA Resolution 59/314/2005.

<sup>63</sup> The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (ICISS), The international Development Research Center, Ottawa, December 2001. See Bílková V., The Responsibility to Protect – New Beginning or End of the Road for Humanitarian Intervention? In *Czech Yearbook of International Law*, Prague 2010, at p. 75-86.

<sup>64</sup> UN Doc. A/60/L.1, 2005 World Summit Outcome, 20 Sept. 2005.

<sup>65</sup> UN Doc. A/63/677, Report of the Secretary General 12. January 2009, Implementing the responsibility to protect.

it is topical especially in the event of genocide and other large-scale killing or ethnic cleansing. The discussion will certainly continue.

### V. Self-Defence Against Terrorist Attacks

The question may be raised whether the right of self-defence applies in response to terrorism and whether terrorist acts constitute an “armed attack” and “armed conflict”. After the 9/11 attacks on World Trade Centre, the UNSC adopted Resolution 1368 declaring “the inherent right of individual or collective self-defence in accordance with the Charter”. This declaration was reaffirmed in another resolution (Resolution 1373/2001) stating that all States should “take the necessary steps to prevent the commission of terrorist acts”. On October 7, 2001 the US notified to the UNSC that it was exercising its right of self-defence in taking action in Afghanistan against Al-Qaeda and the Taliban. The UNSC accepted that what happened on 9/11 constituted an armed attack within the meaning of Art. 51 of the Charter.

Ch. Gray maintains that the 9/11 terrorist attack on the World Trade Center and the Pentagon “led to a fundamental reappraisal of the law on self-defence”.<sup>66</sup> On September 10, and Sept. 28, 2001, respectively, the UN Security Council passed Resolutions No. 1368 and 1373 condemning the terrorist attack and in which it affirmed, for the first time in history, the right of self-defence against terrorist attacks. On October 7, the US together with the UK and military support from France, Germany, Australia and others launched Operation Enduring Freedom in Afghanistan. At its outset, both the US and the UK informed the UNSC of their acting individual and collective self-defence. The EU supported this action “wholeheartedly” because of being undertaken in “self-defence in conformity with the UN Charter and Resolution 1368”. It is still not quite clear whether the said military action radically changed the content of the right of self-defence. The question has been raised in relation to contemporary international law whether the right of self-defence applies in response to terrorism and whether terrorist acts and, in particular, attacks by non-state actors constitute “armed attack”. Before the 9/11 terrorist attacks, the use of force in self-defence did not raise an issue seriously discussed in international law. Only few States, primarily the US and Israel, invoked several times Art. 51 of the UN Charter to justify the use of armed force against various terrorist attacks on their nationals abroad. The situation changed after September 2001. The Preamble of both Resolutions reaffirmed UNSC’s determination “to combat by all means threats to international peace and security” caused by “terrorist acts”, recognizing the inherent right of individual or collective self-defence in accordance with the Charter. After the terrorist events, there was almost universal acceptance of the idea of self-defence in response to terrorist attacks. Nevertheless, there was some uncertainty as to the exact scope of the right of self-defence in this case. The President of the US declared a “global war on terrorism” and warned that the US

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<sup>66</sup> Gray, Ch., fn. 1, at p. 159.

would make no distinction between terrorists and those who “harboured” them. Since then, arguments for widening the concept of self-defence strengthened.

The right of self-defence was invoked by the US and Israel to justify using force in response to terrorist attacks against their citizens before 9/11. Worth mentioning are, for example, US actions against Libya in 1986, Iraq in 1993, Sudan and Afghanistan in 1998, etc. The US voices the opinion that a state exposed to ongoing terrorist attacks may respond with appropriate use of force to defend against further attacks. The US and Israel argued that this was an aspect of the inherent right of self-defence. Although other members of the UNSC did not share this opinion, the United States and Israel repeated this stance in taking, in some later instances, action against states (allegedly) “harbouring” terrorists. Some of these actions were condemned by the UNSC. During its air attack on Tunisia in 1985, Israel claimed acting in self-defence against the PLO headquarters in response to Palestinian terrorist attacks on Israel abroad. The UNSC condemned the action by its Resolution No. 573/1985. There is a legitimate question as to how far the use of force is in fact an effective response to terrorism. Apparent attempts have been made to extend the right of self-defence so as to cover pre-emptive actions. It seems clear that self-defence against international terrorism should be limited to an actual and massive terrorist attack on a state’s territory. The majority of states would not be willing to accept smaller-scale terrorist attacks on nationals abroad as “giving rise to the right of self-defence”.

If, however, a real threat of imminent armed attack against the states exists, it will invoke the right to inherent self-defence under the Charter. The development of modern weapons and their potential use in an armed attack may support the idea of an anticipatory self-defence.

## VI. Conclusions

The discussions concerning Art. 51 of the UN Charter revealed substantial differences of opinion as to the scope of the right of self-defence. It seems that certain Great Powers (particularly the US, Great Britain, France or Russia) and some other countries (such as Israel) have a strong tendency to rely on the use of force when seeking a solution to their difficulties. Certain shift may even be observed in their practice from the original intentions and rigid stipulation of Art. 2 par. 4 of the UN Charter to limit the use of force as much as possible. Some countries claimed very wide rights of self-defence to protect their nationals abroad, to respond to anticipatory or pre-emptive attack, to fight international terrorism, and to prevent any armed attack in the future. This shift in thinking and state practice is supported by some international law scholars. As Ch. Gray would put it: “A few of these commentators seem prepared to treat any US action as a precedent creating new legal justification for the use of force. Thus they use the US actions as shifting the Charter paradigm and extending the right of self-defence. The lack of effective action against the USA as a sanction confirm them in this view. But the vast majority of other

states remained firmly attached to a narrow conception of self-defence”.<sup>67</sup> In a well-known declaration, the Russian Government stated that Russia would intervene in the former Soviet republics using force to protect their nationals. Similar Russian Government statement was given with regard to terrorist activities abroad directed against Russia.

Various “rescue actions” were taken in the past without approval from the UNSC. “Humanitarian interventions” or military action taken to protect “human rights and democracy” still remain controversial and may even have negative political and legal effects. Art. 51 of the UN Charter assigns a decisive role to the UNSC.

The right of self-defence is one of the most fundamental and, at the same time, the most controversial issue in international law. The same applies to the principle of the use of force which, in fact, is the other side of the same coin. Despite many lawyers’ effort and ICJ activities, the scope of lawful self-defence remains open to different interpretations. The decisions taken by the US and the UK to use military force against Iraq in 2003, and to carry out, back in 2001, military attacks in Afghanistan without the authorisation from the UNSC, raise the question of when the use of force can be justified, what are the limits of armed operations, what are the legal constraints on self-defence etc. Examination of the lawfulness of the Operation Iraqi Freedom and Operation Enduring Freedom still gives rise to detailed debate concerning their impact on international law and its extent.

In his 2009 Nobel Prize Lecture, President Obama noted that new challenges required “to think in new ways about the nation of just war and imperatives of a just peace”. He repeatedly added that “force may sometimes be necessary” as “a recognition of history, the imperfection of man and the limits of reason”. He said that “force can be justified on humanitarian grounds” and “all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace...” The same should be applied to those “who violate international laws by brutalizing their own people” and therefore “there must be consequences ...” The speech stressed clearly necessity to use military force whenever it is necessary for humanitarian reasons. Reference to medieval “just war”, however, may raise the question of who will decide that a war is “just” or “unjust” (*bellum iniustum*). The notion of medieval “just war” (*bellum iustum*) was originally developed by theologians. Under classical international law, self-defence was reason for a “just war and served very often as a justification for the use of force in measures short of war.

Substantial extension of the right of self-defence beyond that provided in Art. 51 may lead to reappraisal of *ius ad bellum* and to removal of the existing restraints on the right of self-defence within the existing international law order. It means that the present UN collective security system may even be at risk. Enlargement of “legal” reasons enabling unilateral resort to armed force, might take us back to the 19th century, when no limits on waging the war were imposed. For the above

<sup>67</sup> Gray, Ch., fn. 1, at p. 135.

reasons, international law of the use of force is at a crossroads and the international community will be challenged by new development. The way how international law responds to this challenge will be of fundamental importance to international security.

At present, the tendency to enforce protection of “human rights and democracy” against tyranny at international level is greater than ever before. There is a large number of unilateral armed actions described as “preventive” or “pre-emptive” self-defence, humanitarian interventions or “anti-terrorist war”. It seems, however, that the extensive approach to the use of armed force does not bring expected results. There is a danger that this approach could lead to the general acceptance of gradual relaxation on the use of armed force, undermining so the UN Charter. It can be argued that there are already precedents for extensive interpretation of self-defence as a customary law. Customary international law is based on two basic elements. Besides the practice of states as a constitutive element (*usus longaevus*) there must be *opinio iuris* as a legal conviction. In the Nicaragua case, the ICJ affirmed that practice was significant only to the extent that it was accompanied by legal justification.