PRE-EMPTIVE SELF-DEFENCE AND WEAPONS OF MASS DESTRUCTION

The scope of the UN Charter Article 51 in light of the current threat

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1 Presentation of the Legal Issue

1.1 Introduction

”…as a matter of common sense and self-defense, America will act against such emerging threats before they are fully emerged…History will judge harshly those who saw this coming danger but failed to act.”

This paper will examine whether armed force may be used in pre-emptive self-defence in order to combat the threat from weapons of mass destruction. I will have a general approach to the issue, but will use The National Security Strategy of the United States of America (the US Security Strategy) from September 17th 2002 as a specific example.

The right to self-defence in international law has long traditions. And it makes sense that States who are attacked should be allowed to defend themselves against aggressors; at least to some limit. The principle seems to be of an inborn kind because this right is also acknowledged within many domestic law systems. But even if the notion of self-defence is generally accepted among international lawyers, the concept of pre-emptive self-defence is far more uncertain.

Whether the path of military and violent action is the best way to achieve international peace may obviously be subject to disagreement. Mahatma Gandhi once said that “an eye for an eye makes the whole world blind” and history has sadly proved his statement right to an outsized degree. However, this paper is dedicated to the legal arguments surrounding self-defence in general, and the right of pre-emptive self-defence in particular. Rephrasing Gandhi, that is whether there is a legal right, in order to prevent losing your own vision, to take out your enemy’s eye before he/she takes out yours.

1 President George W. Bush jr. in his introduction to the National Security Strategy of the United States of America of September 17th 2002.
2 Arend & Beck (1993) page 72, say it goes all the way back to Aristotle.
1.2 The Current Threat

Weapons of mass destruction\textsuperscript{4} are indisputably of a horrifying and appalling character. Notwithstanding any categorisation, their common denominator is that they make it possible to cause grave and widespread injuries with just one single stroke.

Nuclear weapons are perhaps deemed as the “worst of the worst”, and the International Court of Justice said the following when it gave its advisory opinion on the legality of those weapons:

“…damage is vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet…it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.”\textsuperscript{5}

The fear for these most devastating weapons is the background in which any anti-weapons of mass destruction actions must be judged. The international community has taken different steps to avoid the proliferation of such weapons, for example the Treaty of the Non-Proliferation of Nuclear Weapons (NPT), July 1\textsuperscript{st} 1968.\textsuperscript{6} Recently, disarmament (by different means) has turned into an attractive method to deter the peril of weapons of mass destruction, see e.g. the United Nations Security Council (UN Security Council) resolution 1441 (2002).

\textsuperscript{3} E.g. the Norwegian Penal Code §§ 48 and 228 paragraph 3, and also Austrian law as cited by Neuhold (1977) pages 133 and 134.

\textsuperscript{4} Dettter de Lupis Frankopan (2000) page 234, refers to an United Nations General Assembly debate labelling weapons of mass destruction as “…atomic explosive weapons, radioactive weapons, lethal chemical and biological weapons, any weapons developed in the future with similar destructive effects to those of the atomic bomb or other weapons mentioned above”. Burroughs (1997) pages 19-20, has given a presentation of the dangers attached to the use of nuclear weapons.

\textsuperscript{5} \textit{Legality of the threat or use of nuclear weapons} (Nuclear weapons opinion), paragraphs 35-36.

\textsuperscript{6} And among many others; \textit{Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction} (1972).
Weapons of mass destruction are not a new invention. Nevertheless, it is probably correct to see the current threat as something different than the threat from the same weapons during the Cold War.7 For a long time following World War II, two major blocs stood against each other, and thus to some extent controlled each others military power. This has changed after the fall of the Soviet Union as the threat no longer comes from another major power. Rather, possible attacks are predictably most likely to appear from so-called rogue States or international terrorist organizations. And it is feared that these sources of danger are more unpredictable, and hence more willing to employ weapons of mass destruction than what was the situation before.8

Few are likely to challenge the serious down-sides of such instruments of grave peril coming in to the wrong hands, but the accuracy of these fears and the possibility for them to materialise, are nevertheless uncertain. Some claim that “[t]rends in terrorist activities make further incidents involving … WMD inevitable”, perhaps because “the motivations to use them are increasing, for a greater number of groups.”9 Nevertheless, it is called for not overdramatising the threat10 and it has also been claimed that the threat is less serious today than it was under the Cold War.11

1.3 Terminology

Self-defence; whether executed before or after a prior attack, may be carried out with different measures. From a common point of view, it seems plausible to interpret the term to include both military as well as less aggressive methods. States appears to have different views regarding what is embraced. Some States argue that economical and

7 Neuhold (1977) pages 240-258, gives a comprehensive report on the issue of pre-emptive self-defence in regard of the threat from the Cold War and weapons of mass destruction.
8 This was stated by President Bush in a speech in Cincinnati, Ohio on October 7th 2002. The speech is published on www.whitehouse.gov/news/releases/2002/10/20021007-8.html under the heading President Bush Outlines Iraqi Threat. He claimed that allowing certain States to possess these kinds of weapons may give them an opportunity to firstly blackmail their neighbours and thereby destabilising an entire region causing a threat to international peace. And secondly, that these States may give terrorist organisations possession of such weapon enabling them to cause severe injuries to USA and her friends.
10 Ibid. chapter 10; it does not seem as if they believe such threats are likely to materialise in the nearest future.
11 The Economist, March 8th 2003 page 13, 1st column (leader).
political pressure and measures should be included, in addition to the use of force. This was nevertheless not the successful view when the United Nations General Assembly (UN General Assembly) adopted resolution 3314 (XXIX) in 1974. Albeit only discussing the scope of “aggression”, this is relevant as use of force at least must contain aggression. Thus, if an act cannot satisfy the condition of “aggression” it can neither be categorised as “use of force”. The General Assembly emphasised the military aspects in their definition, and this paper will focus on the use of armed force in self-defence.

Self-defence may also be carried out aiming to achieve different objectives. Thus, it is named with different prefixes from time to time. Because States tend to employ any means necessary to justify their own actions, some of the following expressions may be used: Self-help, self-reservation, reprisals, anticipatory or pre-emptive self-defence.

Even though the mere wording may indicate a difference in opinion, a realistic approach to them in their context will lead to the conclusion that the core content for the authors of these expressions often is the same. Thus, I think it is insignificant to differ between e.g. pre-emptive and anticipatory self-defence. Most legal scholars use both terms in the same meaning as well, as does the US Security Strategy – the essence being that the act of self-defence comes ahead of an attack from another State. Some scholars do however seem to separate the two expressions in that pre-emptive self-defence is special because it deals with some future event and that the condition of immediacy, which is often required, is lacking. They accurately describes that some States now seem willing to apply the condition of imminence differently – and perhaps less carefully – than before. Nevertheless, this does in my opinion not affect the need for this requirement to be fulfilled. Thus, a partition in words appears to be artificial and unnecessary because the core content of both terms seems to be that the action comes ahead of an attack; in order to prevent it.

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12 United Nations General Assembly resolution 3314 (XXIX) of December 14th 1974: Resolution on the Definition of Aggression. The resolution was adopted without a vote.
13 Gray (2000) pages 111-112: “…to use force even before their territory or units of armed forces are attacked…”.
14 Breau (forthcoming) page 37, citing a former US Secretary of State, Madeleine Albright.
As regards *reprisals*, the problem arises from different reasons. It will be pointed out more closely below that States seem to be a bit ambivalent when they are commenting events regarding the use of force in the context of self-defence – political relationships are probably more important in international law than what can be appreciated. This is not a problem unfamiliar to the issue of self-defence, or any other field of international law for that matter. What one State holds to be lawful self-defence, another State may look upon as a reprisal, and violation of international law.\(^\text{15}\) This is for example the case with the ongoing, and perhaps everlasting, conflict between Israel and Palestine in the Middle East. Military action from Israel is deemed to be unlawful reprisal by the Palestinians while the Israelis consider it to be legitimate self-defence. The illegality of armed reprisals is reported to have status as an international legal custom,\(^\text{16}\) possibly because of this statement in an UN General Assembly resolution in 1970: “States have a duty to refrain from acts of reprisal involving the use of force.”\(^\text{17}\) I will separate reprisals from being discussed in this paper but the vague limits may cause difficulties hereto.\(^\text{18}\)

In this paper “pre-emptive self-defence” will mean the use of *armed force* in *advance* of the development/use of weapons of mass destruction in order to *prevent* proliferation/conflicts.

1.4 The Legal Issue

The main rule in international law, with regard to the use of force, is set out as an important principle in the United Nations Charter (UN Charter)\(^\text{19}\) Article 2(4):

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\(^{15}\) Reprisals as such are not unlawful. According to Ruud and Ulfstein (2002) page 183, it may be lawful if some specific conditions are fulfilled: To refrain from the use of armed force is one of those conditions.

\(^{16}\) At least “[i]t cannot be expected that the Security Council will ever accept this justification.” This was claimed by Bowett in *Reprisals involving recourse to armed force* in 66 American Journal of International Law (1972), as cited by Harris (1998) page 915.

\(^{17}\) General Assembly resolution 2625 (XXV), October 24\textsuperscript{th} 1970: *General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations 1970.*

\(^{18}\) This may imply that the cases I refer to as self-defence may be looked at as reprisals by others, and vice versa.

\(^{19}\) Charter of the United Nations, June 26\textsuperscript{th} 1945.
“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”20

The International Court of Justice has referred to this prohibition against the use of force as a “cardinal principle” in international law21 and some legal scholars have even characterized it as *jus cogens* – a non-derogable rule.22 If this provision were exclusive as regards international law and the use of force, pre-emptive self-defence would be forbidden. However, international law accepts the use of armed force under some circumstances.

This paper will not examine all possible exceptions; for example will the right to use force when it is authorised by the UN Security Council in accordance with Chapter VII in the UN Charter not be discussed. I will neither discuss regional arrangements in harmony with Chapter VIII of the Charter, but rather focus on the right to self-defence in the light of Article 51. However, no attention will be given to questions that in particular relates to the concept of collective self-defence. I will only refer to the right to use force – *jus ad bellum* – unilaterally.

The current threat (section 1.2) has created a will among some States to seek to stop the proliferation and the circulation of weapons of mass destruction to a vast larger extent than earlier. Especially does USA seem increasingly eager to act to achieve her goals in this respect, as described in the US Security Strategy V. Taking into account the change of world order, she is apparently willing to act pre-emptive “to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and [their] allies and friends.” USA adapts “the concept of imminent threat to the capabilities and objectives of today’s adversaries” and believes that:


21 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua-case)* paragraph 190.

“The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”

When reading this together with the present campaign against Iraq and Saddam Hussein it is probable that USA (and perhaps some other States) is prepared to strike – with military force – in advance of any enemy in order to avoid the mere development, and most definitely in advance of any use of weapons of mass destruction. Although stating that this will only happen “if necessary”, they claim a right to act even if uncertainty remains as to the time and place of the enemy’s attack. These points of view are confirmed in the independent “National Strategy to Combat Weapons of Mass Destruction” from December 2002, as set out under the heading of “Counterproliferation”.

At the time of writing Iraq and Saddam Hussein are the biggest worries, but the US Security Strategy is formed in general terms and should therefore be judged to represent US policy in general. Other States can thus also fear possible action from USA in the future, if the Americans deem it necessary.

This paper is therefore dedicated to examine whether unilateral and pre-emptive use of force in self-defence, in order to deter weapons of mass destruction from being developed/used, is lawful under Article 51 of the UN Charter.

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23 The US Security Strategy V.
24 According to USA Today, February 21st 2003 approximately 130,000 soldiers were situated in the Middle East region, awaiting the arrival of about 25,000-30,000 more soldiers. These soldiers (and more) were March 20th engaged in military combat against Iraq (see more on this campaign in section 2.6.3).
25 The Foreign Secretary of Great Britain, Jack Straw, is though reported to look at North Korea as the biggest threat over the next decade, Aftenposten, January 7th 2003 page 8.
2 Pre-Emptive Self-Defence and Weapons of Mass Destruction

2.1 Introduction

Despite the prohibition against the use of force, there has always been commonly agreed upon the need for limitations from this starting point. The most well-known exception is probably the right to self-defence, now expressed in Article 51 of the UN Charter:

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

The extent of this exception is nevertheless uncertain, and therefore subject to the present examination. The Article has been discussed in relation with many different legal issues, but I will solely focus on the one presented in section 1.4. In this regard, two rival “schools” of interpretation can be found; the restrictionist and the counter-restrictionist.26 The supporters of the former is traditionally said to be traced back to Brownlie (1963), while the latter group finds inspiration in Bowett (1958). My presentation will deal with the different interpretation factors separately, and I pretend to deduce their legal implication as I go along.

2.2 Pre-Charter Law

Even if weapons of mass destruction were rare in the time prior to the adoption of the UN Charter,27 it might be useful to observe the position the law of self-defence

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26 These terms are often used by legal writers when presenting the legal opinions of others, see Arend & Beck (1993) page 73.
27 Nuclear weapons were for instance yet to be launched.
possessed at that time. Determining the state of affairs in 1945 may offer guidelines to both the textual approach, as well as the teleological one. I will look closer at the text of Article 51 of the UN Charter (section 2.3), and examine whether, and if so, to what extent the phrase “inherent right” might reflect the law as it was before the adoption of the Charter. Furthermore, pre-Charter law will be a significant part of the background and context from which the object and purpose behind Article 51 may most comprehensively be discussed (section 2.4). Thus, despite the lack of direct consideration of weapons of mass destruction, pre-Charter law may contribute to the general interpretation of the relevant provision; and therefore indirectly inflicting the present issue.

2.2.1 Pre-Charter Custom (the Caroline case)

Especially one episode in history looks to be very significant for the development of pre-Charter law, namely the Caroline case. It has also been subject to a substantial international legal debate.28

“Caroline” was a boat abetting rebellions on the American-Canadian border, Canada being under British control at the time. The vessel, carrying men and arms to a position near the Canadian boarder, was set on fire and obliterated by the Britons who sent her down the Niagara Falls on December 29th 1837. But because the British action took place under an uprising, it may be argued that this is not an adequate example of pre-emptive action, but merely an act in an on-going conflict. Thus, the relevance of this incident may be contested. This argument is for example vaguely presented by Harris (1998).29 I nevertheless see this incident to represent a good example for the present issue. Recalling the definition given of pre-emptivity in section 1.3, the main point is that the defensive action is taken prior to any enemy attack. And the general impression is that the destruction of Caroline is regarded as an anticipatory act, both among

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28 Jennings (1938), and McCormack (1996) pages 242-248. As regards the facts I have heavily relied upon the former, who operates with notes to British governmental documents.
29 Page 895 note 2: “…that the British Government was entitled to anticipate further attacks” (emphasis added).
scholars\textsuperscript{30} and judiciary tribunals\textsuperscript{31} The communication between the Parties involved, does in my opinion support this approach: Great Britain claimed she had acted in “self-defence and self-preservation”. USA apparently accepted Great Britain’s conduct (i.e. the destruction of Caroline), and thus pre-emptive self-defence if she could prove a:

“…necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”\textsuperscript{32}

Great Britain accepted the US view as regards the legal conditions when “…[a]greeing, therefore, on the general principle and the possible exception to which it is liable…” leaving the problem between USA and Great Britain to be a matter of facts.\textsuperscript{33}

International law regarding the use of force then appeared to be limited in at least two ways. The use of force in self-defence was not to be lawful unless the “defender” could prove to have fulfilled the requirements of \textit{necessity and proportionality}, as described in the letter from Mr. Webster. But if these conditions were fulfilled, international law seemed prepared to allow pre-emptive action.

This incident has been regularly applied in the legal debate, but not all international lawyers uphold its relevance. I will now look at two reasons why this incident might not be used as a precedent for international law. Firstly, some might argue that no proper law can occur in the non-legal environment of the 19\textsuperscript{th} century. It has been pointed out, with natural law losing its status, that the question was no longer whether a war was “just” or “unjust”, but rather whether war was lawful. Hall has been quoted to report

\textsuperscript{30} In his comprehensive presentation Jennings (1938) does not refer to any prior military activity, but merely refers to the circumstances as “rebellion”, pages 82-84. Bowett (1958) page 189, is more categorical naming the Caroline incident as “the classical illustration” of anticipatory action.
\textsuperscript{31} Bowett (1958) page 160, quotes the International Military Tribunal at Nuremberg: “It must be remembered that preventive action … is justified only” if the conditions from the Caroline case are fulfilled.
\textsuperscript{32} Expressed in a letter from the American Secretary of State (Mr. Webster) to a British special Minister (Lord Ashburton), July 27\textsuperscript{th} 1842, as cited by Jennings (1938) page 89.
\textsuperscript{33} Expressed in a letter from Lord Ashburton to Mr. Webster of July 28\textsuperscript{th} 1842, as quoted by McCormack (1996) page 247.
that international law at that time had to accept war, and if international law did not forbid war at the time, there would be no obstacles to accept the use of force in self-defence either. In these circumstances it would be unreasonable to give the statements in the Caroline case too much significance. Despite this insecurity it seems obvious to me that the two representatives were discussing the legality of an act of self-defence. This appears from the already mentioned correspondence above, but particularly from a letter from Lord Ashburton’s predecessor (Mr. Fox) to Mr. Webster claiming that a British national accused for the murder of an American citizen in connection with the incident, had to be released because he had acted in self-defence for Her Majesty, even though not explicitly referring to “law”. Furthermore, the conditions applied in this case – necessity and proportionality – has been frequently referred to later, both in literature and judiciary practice. The International Court of Justice did for example in the Nicaragua-case uphold these two conditions as essential in the assessment of the legality of self-defence.

Another reason to question the legal implication of this case is its lack of formality and its few participants. It might be argued that diplomatical correspondence between governmental representatives is inadequate to create legal principles, especially when representatives from only two States are involved. Additionally one must take into account that the letters were written almost five years after the incident, and thus under more peaceful circumstances. This obstruction is in my opinion a higher hindrance to overcome than the first one. Whether the statements of governmental representatives at all can be sufficient to develop international customary law alone is highly unsure. The prevailing view seems to accept a wide range of “state practice” as the basis for new custom, and statements from State officials are probably embraced. As regards the fact

34 Hall, quoted by McCormack (1996) page 243. The view was also supported by Brierly, *International Law and Resort to Armed Force* in 1932 Cambridge Law Journal, the latter referred to in Harris (1998) page 859.
36 Constantinou (2000) page 25 stating that the content of the customary law prior to 1945 was “identified in the famous formula…in 1837 following the Caroline incident.” Also Arend & Beck (1993) page 72, claiming that “pre-Charter customary international law recognized a right of anticipatory self-defense provided the conditions of necessity and proportionality were met”.
37 Paragraph 237: “…even if the United States activities in question had been carried out in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground for wrongfulness.”
38 Akehurst (1974-75) pages 1-11. His view is nonetheless contested by for example D’Amato, *The Concept of Custom in International Law* (1971), referred to by the former.
that only two States were involved, the law of today does not seem ready to accept the creation of an internationally binding custom on this basis alone. Nonetheless, taking into account the noticeably uniform acceptance this doctrine has achieved, I will argue that the limitations imposed on the law of self-defence became part of international custom throughout the 19th century. Whether the requirements still are applicable, and thus affecting the present issue, can only be examined in light of the legal development after the Caroline case.

2.2.2 Pre-Charter Treaties (especially the Pact of Paris)

Following the atrocities of World War I, State leaders were determined to create a treaty régime in order to prevent similar events from occurring again. The first attempt was the Covenant of the League of Nations in 1919, followed by the Pact of Paris four years later. I will only look into the latter.

The Parties to the Pact of Paris agreed in Article I to “condemn recourse to war”, and Article II encouraged the Parties to solve any conflicts between them “by pacific means”. The wording can hardly be described as clear or unambiguous, but can nevertheless be considered to oppose to the use of force in States’ international relations, albeit to an uncertain extent. The Pact of Paris did not mention the law of self-defence at all, and this opens for two alternative interpretations. Either the treaty text was meant to be exclusive as regards the use of force. That is, that the Pact of Paris prohibited all use of force, including situations of self-defence and thus excluding the right to pre-emption. Or, the treaty text was intended to add something to the existing customary law. Recalling that there only were a few limitations on the legality of the use of force in pre-Charter time – besides the conditions set out in the Caroline case – Article I in the Pact of Paris may be read just to impose another constraint on State sovereignty in this regard, but still preserving pre-Charter custom as well. The omission

40 Treaty of renouncement of recourse to war, August 27th 1928, also known as the Briand-Kellogg Pact, named after the American and the French Foreign minister at the time.
41 That Pact got the biggest number of ratifications, and its wording appears to be the more comprehensive one. McCormack (1996) page 249, says the Covenant of the League of Nations makes no express mention of the law of self-defence, but he nevertheless concludes that there is “no reason to speak of a restrictive right of self-defence.”
of a provision regulating the law of self-defence has been frequently debated among legal scholars, and the main impression seems to be that the latter proposition is the correct one. I find their reasoning to be convincing. Statements by the State leaders involved in the drafting of the Pact of Paris indicate that they did not intend to lay any constraints on the customary law of self-defence. Kellogg said that the right to self-defence was “inherent in every sovereign state and [was] implicit in every treaty.” And the British Foreign Secretary entirely agreed with Mr. Kellogg stating that the Pact of Paris “does not restrict or impair in any way the right of self-defence…”

If we are to trust the directly involved participants, there is no reason to claim that the Pact of Paris did abolish customary law as we knew it through the Caroline case. It is on this background I will examine Article 51 of the UN Charter.

2.3 The Textual Approach

2.3.1 Introduction

The Vienna Convention on the Law of Treaties (Vienna Convention) Article 31 paragraph 1 says that treaties are to be understood in accordance with the “ordinary meaning to be given to the terms in their context”. Thus, when interpreting Article 51 of the UN Charter one is supposed to find the common and usual understanding of the terms, and not any specific legal meaning.

A frequently contested part of Article 51 seems to be “[n]othing in the present Charter shall impair the inherent right of …self-defence if an armed attack occurs…” (emphasis added). These terms are used to argue both sides of the issue; both supporting and denying a right to pre-emptive self-defence.

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43 Quoted by Bowett (1958) page 133.
44 Quoted by Harris (1998) page 862. Bowett (1958) page 133, says that this was the opinion of Germany and Japan as well.
46 “Context” is defined in Article 31 paragraph 2 to embrace among others the text, the preambles and annexes, and treaty-related agreements as well as treaty-related domestic instruments (accepted by the other Parties) made in connexion with the treaty conclusion.
47 Harris (1998) pages 814 (note 3) and 816 (note 6).
2.3.2 “Nothing…shall impair the inherent right…”

I will first look at the content of the Article that may be taken in account to allow pre-emption. Recalling from section 2.2, pre-Charter customary law allowed pre-emptive self-defence if the conditions of necessity and proportionality were successfully met (the Caroline case). In this regard the phrase “inherent right” is of significant interest. As “inherent” indicates a retrospective approach, it may be argued that this phrase was implemented in order to preserve the law as it was at the time, and thus maintaining the legality of pre-emption. The fact that Article 51 is initiated with “[n]othing…shall impair” this right, supports this approach. It is thereby possible to suggest that the adoption of the UN Charter was nothing but a codification of current law.

“Inherent” seems to reflect something old and perhaps even everlasting, thus being strongly in favour of a preservation of pre-Charter law. This point of view also seems to have profound support with regard to two other authentic translations, namely the French (“droit naturel”) and the Spanish (“derecho immanente”).48 The German translation is even clearer in this regard (“Naturrecht”), but it is not an official translation. The French and the German version may together be seen as if Article 51 reflects natural law, and would, presuming that pre-emptive self-defence are to be deduced from such ideas, support those who claim that Article 51 preserves pre-Charter law, because it then would be seen to describe something self-explaining and constant. However, there are no indications that the drafters were conscious of any relation to natural law, so this is probably not a credible interpretation.49 Also, the English and Spanish wording does not appear to echo any connection with natural law. Nevertheless, “inherent” as a term focusing on the past will be seen to support the preservation of pre-Charter law and thus also a right to pre-emptive self-defence. This is not a view unfamiliar in the legal doctrine.50

48 UN Charter Article 111.
49 Constantinou (2000) also sees this linkage to be unrealistic, see page 54, and furthermore vigorously contests the value the term “inherent” has been given, but this seems to be founded on other grounds than the mere wording itself, and should not be addressed in this section.
The Charter does not make specific mention of weapons of mass destruction but this is probably because these were rather unknown or at least not very wide-spread. The extent to how far the wording upholds pre-Charter law with regard to the issue in the present paper (section 1.4), might therefore be uncertain. But as the textual approach by nature is static, I see no reason to claim that the text itself looks differently at threats from weapons of mass destruction, than from any other threat. Thus, if the UN Charter preserves a right to pre-emptive self-defence in general, this right will also include deterrence of weapons of mass destruction (under the same conditions).

2.3.3 “…an armed attack…”

Opposing this view is the mentioning of “an armed attack”. It represents the textual basis of the restrictionist interpretation. The supporters of this school claim that this phrase requires an armed attack to have taken place before there is a right to use force in self-defence. If this view is to prevail, pre-emptive action, as defined in section 1.3, would be impossible to justify under Article 51. The above-mentioned statement from the US Security Strategy – that USA reserves herself the right to attack for defensive purposes “even if uncertainty remains as to the time and place of the enemy’s attack” – would then be inconsistent with international law.

The term “an armed attack” is nevertheless not unambiguous itself, and may be the foundation for several reasonable interpretations. At least two problems seem to arise. Initially, it may be suggested that the mention of “armed attack” merely represents an example of a situation when self-defence can be lawful. This could imply that “an armed attack” is not absolutely necessary to accept the use of force in self-defence. However, this statement does not look too strong at the end of the day. The appearance of the term “armed attack” automatically gives the impression that this is an absolute condition which has to be fulfilled if self-defence is to be lawfully performed. And the identification of only one example could in that context create obscurities when only reading the text, and it would furthermore be superfluous to even mention it. The UN

50 Bowett (1958) page 187, although he does not appreciate this as a necessary element to support the legality of pre-emptive self-defence.
Charter read as a whole also supports this; only allowing self-defence in case of an “armed attack” is best reconcilable with the prohibition against force in Article 2(4). Thus, one may suggest that the Charter, read in full, argues that the use of force – even in self-defence – should be the last resort, and that the textual approach requires “an armed attack” to have taken place.

The second question may prove to be more interesting. The scope of “armed attack” is vague and is therefore disputed among international jurists, and the scope will influence the legality of pre-emption under Article 51 – even if the threat is as brutal as the one from weapons of mass destruction. The uncertainty appears both alone in regard to the quantity, but also together with the term “occurs” in regard of the time. I will first examine which acts are capable to fulfil the scope.

The treaty text is silent but does lead the mind to believe that some kind of cross-border, military intervention is required, i.e. that self-defence will not be lawful until the attacker has crossed the border, armed and with aggressive intentions. If that interpretation is correct, it would not embrace the development of weapons of mass destruction. Not even the launching of a missile from within a State’s own territory – whether with conventional weapons or weapons of mass destruction – would then constitute an armed attack until the hostile missile crossed the enemy’s border.

However, the French version of the UN Charter appears to take a more liberal approach because it sets out the condition to be “aggression armée”. This expression is alleged to be weaker and hence favouring a wider interpretation of “armed attack” than the English. That is, the French version does not require the same amount of activity as the English, and this may well effect the decision regarding the legality of pre-emption. This possible conflict between the two authentic versions of the UN Charter cannot be resolved by a textual analysis. The Vienna Convention Article 33 paragraph 1 decides

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51 This is supported by de Arechega, General Course in Public International Law, as quoted in Cases and Materials on International Law page 563.
52 Bowett (1958) page 184: “The correct interpretation of Art. 51 is, in our submission, only to be achieved by a full appreciation of its relation to Art. 2(4).”
53 Gray (2000) pages 96-105, claims that the scope of Article 51 is the real issue between international lawyers as regards the issue of pre-emptive self-defence. Bowett (1958) deals with this on pages 187-193, and Brownlie (1963) on pages 278-279.
that all versions of a treaty, as a starting point, are to be equally authoritative.\textsuperscript{54} The scope of “armed attack” must therefore be identified using other means.

The International Court of Justice examined the term in the Nicaragua-case.\textsuperscript{55} It should be noted that Court did not deal with the notion of anticipatory/pre-emptive self-defence.\textsuperscript{56} I nevertheless hold its examination of this expression to be relevant because the Court explicitly emphasised that it was the “nature” of the any possible acts of armed attack it was looking at.

In paragraph 195, the Court stressed “action by regular armed forces across an international border” to be the major condition. It seems plausible to read the Court to include at least two elements. First, “action by regular armed forces” must be understood to be regular military activity, i.e. the use of armed force must be part of the expression. And secondly, the Court emphasised the international aspect (“across an international border”).\textsuperscript{57} This seems to require some sort of invasion, or at least some sort of territorial disrespect. This paragraph has been criticised for not going far enough,\textsuperscript{58} and it was also ground for dissenting opinions (from e.g. judges Schwebel and Jennings). It is in particular the reference to the UN General Assembly resolution 3314 (XXIX) that causes a dispute.\textsuperscript{59} Recalling that this resolution deals with “aggression”, one major indictment is obvious. There is a difference in the wording; \textit{aggression} and \textit{armed attack} are in their ordinary meaning not equivalents. The latter expression seems to embrace the former, thus demanding even more qualified armed actions. This is also recognised in the resolution itself.\textsuperscript{60} And even if aggression were

\begin{footnotes}
\footnotetext[54]{The provision reads: “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.” According to Harris (1998), there are some uncertainties as to how to resolve this kind of conflict. He refers to three different cases with three different outcomes, see pages 821-822. I will not take time nor space to examine this any further.}
\footnotetext[55]{It should be noted that the Court did not explicitly consider the scope under the UN Charter but rather under customary international law, due to an US reservation.}
\footnotetext[56]{Paragraph 194: “…the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue.”}
\footnotetext[57]{Additionally, the Court held that \textit{assistance} to such acts, qualified to be armed attack: “…the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces […] of such gravity as amount to” an actual attack conducted by regular forces.”}
\footnotetext[58]{Citations to legal scholars can be found in Gray (2000) page 97, note 42.}
\footnotetext[59]{The Court refers to Article 3 litra g of that resolution.}
\footnotetext[60]{The third operative paragraph says that States should refrain from aggression “and other uses of force” contrary to \textit{de lege lata}. The fourth paragraph in the preamble of the Annex also favours this}
\end{footnotes}
held to mean the same as “use of force”, this does not necessarily constitute an “armed attack” in the meaning of Article 51 as the latter’s scope is more narrow. Nevertheless, I still recognise the definition, and perhaps particularly the discussion ahead of it, to be helpful to identify the minimum requirement of the term because it at least discloses what does not constitute an “armed attack”. A few States expressed a more liberal approach than others. They claimed it would be problematic for the definition that it only concerned “armed aggression”, and expressed that “economic aggression” also should have been embraced.\(^{61}\) However, the majority seemed to be satisfied with the scope of the definition. It was even held that it was important to limit the definition to “armed aggression” as a wider option could “provoke extensive interpretations of the right to self-defence”.\(^{62}\) The majority then seemed to take the view that even the more narrow expression “aggression” needs a military aspect to be fulfilled.

The scope of the term “armed attack” then seems to at least involve some military action, and also some sort of cross-border activity, hence perhaps being closer to the English version rather than the French. This will in my opinion also be the result that is best reconcilable with the ordinary meaning of “armed attack”. Such a narrow scope of “armed attack” argues against allowing pre-emptive self-defence in general, and there is nothing in the wording to impose a different opinion because the threat is from weapons of mass destruction.

### 2.3.4 “…occurs…”

The last element of the wording in Article 51 that will be discussed is related to time. The text says that the right to self-defence is ignited when the “armed attack occurs” (emphasis added). The time aspect can be divided in at least two major issues. The relevant issue for this paper is when can an armed attack be recognized to have begun? This issue is closely related to the question of pre-emption. If an armed attack is deemed to begin by the mere military build-up, or here by the mere development of weapons of mass destruction because it emphasizes that the resolution should not affect the scope “of the provisions of the Charter”.

\(^{61}\) 1974 United Nations Yearbook page 841, 2\(^{nd}\) column. The States included Argentina, China, India, the Libyan Arab Republic, Mali, Peru and Rwanda (also Gray (2000) page 96).

\(^{62}\) Ibid. The Swedish representative is quoted like this.
mass destruction, then a right to pre-emption is embraced by the mere wording. But if
the attack is not considered to have begun until the enemy is crossing the border, the
legality of pre-emption may be seriously at risk.63

The issue of time seems to be the genuine point of disagreement in practice. States in
favour of an act will be likely to deem an armed attack to have occurred, while States
opposing the act will be more reluctant. Thus, the factual analysis may cause severe
problems. This is possibly because the wording is highly ambiguous. “[O]ccurs” in
Article 51 is the present tense of the verb “to occur”, thus meaning something which is
happening now. If we read “occurs” isolated from the rest of the provision it exposes no
decisive information as to where an armed attack have to take place or how extensive it
is required to be, before the right to self-defence commences. Thus, the mere
development of weapons of mass destruction may alone be sufficient – this being an
argument to allow pre-emption. This can be supported by suggestions in literature. It
has been claimed that “[t]he moment of commencement of an armed attack essentially
depends upon the means by which it is carried out.”64 And, unlike the gunfire from one
single soldier, one battalion or an artillery unit, an attack with weapons of mass
destruction can cause almost unlimited damage in just one single strike. Thus it may be
possible to argue that the attack must be deemed to have commenced earlier, because no
acts of self-defence could comprehensively combat these consequences of that kind of
attack after it has taken place.

However, the Vienna Convention Article 31 emphasises that the text must be read as a
whole. In relation to “armed attack” the term “occurs” then seems to be significant in
the opposite direction. To allow the use of force in self-defence then requires the armed
attack to be happening now. This view was also supported by the International Court of
Justice in the Nicaragua-case when it stated that the right to self-defence is admitted to
States “having been” the victim of an armed attack.65 This use of past tense strongly
indicates that the restrictionist view should prevail. Recalling the most credible

63 The other aspect of time related to Article 51, is the question of the duration of the attack. For how long
is a right to self-defence maintained? This issue obliges an armed attack to have commenced, and is
therefore not relevant to this paper.
64 Constantinou (2000) pages 125-127, examining different types of attack (but not the threat from
weapons of mass destruction).
65 Paragraph 195.
understanding of “armed attack” this means that the attack, after a mere textual approach, probably must include cross-border activity. Development of weapons of mass destruction would therefore not in itself be held to constitute an “armed attack”.

2.3.5 Textual conclusion

Despite the appearance of a conservative approach, as suggested by “inherent”, I hold the best way to understand Article 51, to make an argument against a right to pre-emptive self-defence. In other words, the restrictionist approach seems to be the better one. The fact that Article 51 includes one, although vague and imprecise, condition to allow self-defence, supports this point of view, because it must be assumed to be implemented in order to reflect the intention of the Parties, which was held to be an important objective at the Conference. Nevertheless, the wording is ambiguous, and a further examination of Article 51 is welcome.

2.4 Object and Purpose

2.4.1 Introduction

Article 51 of the UN Charter must, according to Article 31 paragraph 1 in the Vienna Convention, be read “in the light of its object and purpose”. This is a comprehensive way to find the intentions of the Parties which was stressed as an important aim by the Parties. The relevance of these means of interpretation is generally acknowledged, but it will follow from this examination that the weight might be contested.

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66 This was expressed by e.g. the representative from Soviet Union, Mr. Talalaev, The Conference – 1st session page 175 paragraph 38: “The object of the interpretation was to establish the common intention of the parties, as expressed in the common purpose of the treaty”.
67 The Conference – Summary Records page 40 paragraph 12.
68 McNair (1961) chapters XXI and XXIII.
The separation of the interpretation factors – the text apart from its object and purpose – is not intended to reflect any difference in neither relevance nor weight, but is done merely to give a more systematical interpretation of Article 51.\textsuperscript{69}

Two central issues may arise from the aspect of “object and purpose”. The first is related to the object and purpose with the adoption and implementation of Article 51: Did the drafters intend to eliminate or amend pre-Charter law? And furthermore; can any circumstances in the world \textit{today} support any particular understanding of Article 51? The first question will be examined in the following section, whilst the latter is subject for the discussion in section 2.6.

\subsection*{2.4.2 The Implementation of Article 51}

If, as here, the text alone cannot help us identify the intentions of the Parties, other methods may be useful; including the Charter itself, its historical context, preparatory works as well as statements from the aftermath of the adoption.

The application of those methods to identify the object and purpose with Article 51 is however not straightforward because they are cited as relevant, single factors as well. Especially may the application of preparatory works be complicated because it isolated, as opposed to the other factors, is regarded to be of only “supplementary” value.\textsuperscript{70} It was expressed at the Conference that the object and purpose did not enjoy the “authentic character as an element of interpretation”.\textsuperscript{71} However, this reflection only possesses limited value to the interpretation of Article 51, mainly because the Parties to the Vienna Convention were ready to recognise the submission of preparatory works as long as it did not create an “alternative, autonomous” understanding of the provision.

\textsuperscript{69} Interestingly, a similar view with regard to the internal hierarchy was expressed by the Expert Consultant, Sir Humphrey Waldock, at the Conference – 1\textsuperscript{st} session page 184 paragraph 72.

\textsuperscript{70} Vienna Convention Article 32 reads: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable.” The US representative, Mr. McDougal, criticised this view, claiming that it did not reflect international practice, the Conference – 1\textsuperscript{st} session page 167 paragraph 43. This critique did however not make sufficient impact, and preparatory works got status as supplementary.
They went on to say that a “general link between two articles [Articles 31 and 32 which] maintains the unity of the process of interpretation” (emphasis added). They furthermore stated, on page 43 paragraph 19, that preparatory works would be relevant if it would “aid to an interpretation governed by the principles contained in Article [31].” And as the wording of Article 51 is unclear, I see no sufficient reason not to apply this factor as evidence for the “object and purpose”. Hence, I will therefore not separate them as regards the examination of the “object and purpose” of Article 51.

The drafters did probably not have any threat from weapons of mass destruction in mind when drafting the UN Charter, thus their intentions can solely be seen to explain the object and purpose with Article 51 in general.

The object and purpose of the drafters of the UN Charter can only be properly scrutinized if one understands the social and historical context of their time. The world had just deterred Hitler’s Nazi regime, and USA was still fighting Japan. Nearly half a decade of world-wide-wars was coming to an end, but devastating and atrocious wounds from increasingly fierce warfare had left scars reminding the world of the hazard caused by the use of armed force. The desire to prohibit the use of force makes a strong argument against allowing any kind of force, including pre-emptive self-defence. World leaders had been trying to obtain treaty agreements to declare the use of force unlawful in between-war period as well, but neither the Covenant of the League of Nations nor the Pact of Paris proved sufficient to prevent World War II. The work however, continued – also during the second war. The will to unite in order to prevent forthcoming wars was strong, as reflected by this statement of the Parties to the Yalta Conference:

“We are resolved upon the earliest possible establishment with our allies of a general international organization to maintain peace and security. We believe that this is essential both to prevent aggression and to remove the political,

73 Murray in The United Nations Charter – a commentary and the text, page 10: “At the end of the European War the British Government, whichever party might be in power, was anxious to form an organisation for the maintenance of world Peace and Justice on the lines of a stronger League of Nations.”
economic and social causes of war through the close and continuing collaboration of all peace-loving peoples.”

The two wars and the understandable wish for a peaceful world were also recognised in the preamble of the UN Charter. The preamble also stressed that armed force should not be used “save in the common interest”, and only to “unite” the world’s strength to maintain international peace.

Both the historical context and the preamble can support the view that pre-emptive self-defence, at the very least when executed unilaterally, were to be excluded from the international arena as from the implementation of the UN Charter. This seems to be true for at least two reasons. Initially, we must recall that it was finally agreed upon a prohibition of the use of force in international relations (Article 2(4)). This rule does as a starting point oppose any first use of force, and also forbids first-strikes performed in self-defence. One could therefore suggest that the system within the Charter itself opposed pre-emption. That is somewhat true, but cannot be decisive: Although one must take into account the interactivity between Articles 2(4) and 51, it is implausible to refuse any independent examination of the latter. As long as it has been laid explicitly down as an exception in the Charter, it deserves to be given consideration. But secondly, the Parties did also seem to intend to lay down co-operation as the best way to solve international differences. With pre-Charter law allowing unilateral pre-emptive action, this would conflict with such purposes and one may perhaps deduce that the Parties to the UN Charter therefore intended a very narrow understanding of Article 51.

According to the preparatory works, the law of self-defence was not even included in the draft at all, but was implemented at the conference in San Francisco in 1945. It appears that the right to self-defence was codified only to reassure American nations that their collective security provisions from the Act of Chapultepec were not impaired. This may have different outcomes. Constantinou claims that this implies a heavy...
reliance on the prohibition in Article 2(4) and therefore strongly supports a narrow interpretation of Article 51.\textsuperscript{77} Thus, pre-Charter law would be changed in that the right to pre-emptive action was abolished, even under the Caroline conditions.

However, the late implementation may also be read to support the conservation of pre-Charter law, allowing pre-emption under the Caroline conditions. Any other solution would limit State sovereignty. And even if there is the right of sovereign States to create new and thus, change the current law at any time, it can be argued that they are unlikely to do so unless they have seriously discussed it in advance, which apparently was not the case. Especially, this can be a weighty argument when it is related to a concept with long traditions in international law. Self-defence is furthermore reported to be commonly respected in legal orders throughout the world, and this could be seen to reflect a wish to conserve already recognised law, thus also, a right to pre-emptive self-defence.

That conservation of pre-Charter law was to be the correct interpretation seemed to be the opinion of Great Britain. When presenting the UN Charter for the British Parliament in 1945, Foreign Secretary Anthony Eden stated:

“[a] most important addition is the recognition of the explicit right of self-defence, both individual and collective, but in such manner that the final authority and responsibility of the Security Council to maintain international peace and security is not impaired (Art. 51). It was considered at the Dumbarton Oaks Conference that the right was inherent in the proposals and did not need explicit mention in the Charter.”\textsuperscript{78}

It appears that at least the British negotiators believed the UN Charter preserved the law of self-defence as it was before 1945. Eden’s presentation can however be challenged for at least two reasons. Firstly, the legal significance of such political statements can be doubtful. Allegedly, some may claim that a governmental presentation to its Parliament is defensive to some extent, hence over-emphasising the insignificance of the addition,\textsuperscript{78}


\textsuperscript{78} Miscellaneous No. 9 (1945) paragraph 38 (emphasis added).
just to make sure to avoid critical comments from the political opposition. Nonetheless, I have no particular reason to claim that this was the case here, and will accept this statement to be the sincere perception of Minister Eden. Secondly, one can isolate certain parts of his statement and ask whether the confirmation of the UN Security Council as the “final authority” indicates that Article 51 shall be taken into account for the restrictionist view because this would deprive States the right to unilaterally employ military force. This would deny a right to pre-emption as allowed in the Caroline case, and could seem to be a natural consequence of such a procedural limitation of the right to use force. However, I do not hold the latter suggestion to be imperative as regards the interpretation either. Eden’s statement must be read in full, and I believe it is evident from the quotation that his major opinion is that Article 51 does not interfere with the already existing customary international law.

The preservation of a customary law seems to be acknowledged within the International Court of Justice as well. In the Nicaragua-case it stated that the “inherent” right in Article 51 most likely was of a “customary nature”. The significance of this is nevertheless weakened by the continuance of the Court, stating that the UN Charter has “confirmed and influenced” the content, and that the Charter is not exclusive in this regard (“does not go on to regulate directly all aspects of its content”). The latter view was expressed in relation to the conditions of necessity and proportionality; “a rule well established in customary international law”. The Court then seemed to deem Article 51 to somehow preserve pre-Charter law, but to an unknown extent. Nevertheless, the Court did at least accept the conditions appearing from the Caroline case, however, not performing any particular or thorough investigation of those. Furthermore, the view of the Court is not in any way connected to any threat from weapons of mass destruction, and that weakens the impact of the Nicaragua-case even more. And thus it left the present scope still somewhat uncertain. Furthermore it is suggested that the intentions behind Article 51 was to amend previous law, and that this has been affirmed by the ICJ in the Nicaragua-case, paragraph 193. I do not read paragraph 193 in the same way. I rather believe that the Court merely reaffirms that the law of self-defence is a part of

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79 Paragraph 176 and also paragraph 193: “…the exception to the prohibition of force constituted by the right of […] self-defence as already a matter of customary international law.”
80 The Court found USA to be violating the prohibition to use force, but did also briefly conclude that USA would not have met the conditions of necessity and proportionality either, paragraph 237.
customary international law, and that it does not at all deal with the impact of the UN Charter as such.

2.4.3 Part Conclusion

Both points of view can collect support from the object and purpose. I hold the counter-restrictionist view to be the better one because it is unlikely that States would give up a major part of their sovereignty, the right to pre-emptive self-defence as accepted through pre-Charter law, without any specific discussion before the adoption of the UN Charter. States tend to be fairly protective with regard to their jurisdiction, and as long as the right to self-defence is traditionally seen to be essential for States, I mean that this is the legally responsible solution.

This view is then contrary to the textual conclusion in section 2.3.5, and we are left to decide which view that should prevail. Article 31 in the Vienna Convention is not informative in that regard but seems to order a full and comprehensive consideration, and balancing process: Both factors are named in the same paragraph, with the heading of the Article being “[g]eneral rule” (as opposed to the “[g]eneral rules”). This view also has support from the Vienna Convention drafting Conference. Nevertheless, the majority at the Conference held the wording of a treaty to be the best instrument to identify the Parties’ intentions, and I will follow their instruction. This is also best reconcilable with the principle of State sovereignty which has a long tradition in international law and goes back at least some centuries. One significant consequence of this principle is that States as a general rule only can limit their jurisdiction

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81 Grewe and Khan in *The Charter of the United Nations – a commentary: volume I* page 11, explain that the conference ran into time pressure at its final stages, thus this may have been the reason for not discussing this issue.
82 The Conference – Summary Records page 39 paragraph 8: “All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.”
83 As far as I can see, only 4 States (Greece, Austria, Viet Nam and Trinidad and Tobago) expressly supported the US view; a teleological view preference. The majority expressed, here represented by the Soviet representative: “The text of the treaty was the main source of those intentions because it fixed in words the common intentions on which the parties had agreed” (the Conference – 1st session page 175 paragraph 39).
84 In *Essays in Honour of Wang Tieya*, Schachter indicates that it arose in the early fifteenth century, pages 672-675. Cavallar (1999) chapter 5, asserts that Immanuel Kant also held the principle of sovereignty to be of major significance in international relations.
themselves – no one can take it away without the State’s consent. Such a limitation is most likely to take place when the State signs and ratifies a treaty. Pursuing this principle would imply heavy emphasis on the treaty text because this best represents the foreseeable amount of sovereignty given up.

But, recalling from section 2.3, the wording was not decisive as regards Article 51. And this opens for more emphasis on the object and purpose. The latter factor is also attached with a few concerns which could lessen its legal weight to the interpretation of Article 51. There is nothing which indicates that the drafters had any specific worry about neither pre-emption in general, or weapons of mass destruction in particular. Thus, it could be advocated that the object and purpose of the drafters should make little impact on the present issue.

The interpretation of Article 51 is then still uncertain with regard to the specific issue raised in this paper. Hence, there is a need to apply other interpretation factors.

2.5 Subsequent Practice

2.5.1 Why Use Subsequent Practice as a Means for Interpretation?

A possible way to understand a treaty provision is to examine States’ conduct. This is referred to as “subsequent practice” in the Vienna Convention Article 31 paragraph 3 litra b. Such practice may have a side-effect as well. It may also be taken into account when examining whether a new custom in international law is developed. However, I will emphasise the impact of subsequent practice as a means for treaty interpretation.

85 Such points of view were also expressed in the France v. Turkey (1927), P.C.I.J. Reports, Series A, No. 10 (the Lotus case), referred to by Harris (1998) at page 268: “The rules of law binding upon States therefore emanate from their own free will as expressed in conventions...Restrictions upon the independence of States cannot therefore be presumed.” Additionally, States may obviously be bound by internationally accepted custom, see the Statute Article 38 number 1 litra b.

86 However, State sovereignty has recently come under increasing pressure: Chopra and Weiss in International Law: Classic and contemporary readings page 376, stating: “The exclusivity and inviolability of state sovereignty are increasingly mocked by global independence.” I will not look further into the consequences of that.
Using this factor as a technique to interpret treaties is well-recognised in international law. According to Fitzmaurice this is “desirable, as affording the best and most reliable evidence…as to what its correct interpretation is” 88. It is claimed that the application of subsequent practice in this respect is “both good sense and good law”. 89 Furthermore the Conference held the applicability to be well established in international jurisprudence. 90

However, applying this factor in international law is not unproblematic. States’ conduct in international affairs is influenced by several factors, and the wish not to violate international law is one of them. Thus, there may be different approaches to justify any unilateral use of force. They may for example either leave legal arguments totally out of their plea, or they may try to justify their actions legally; but avoiding a clear and unambiguous language. This makes the identification of the States’ honest opinion as regards international law (opinio juris) greatly doubtful, and therefore weakens the weight of subsequent practice. 91 The impact of this problem will be discussed in relation to the concrete examples given below.

Legal debate has referred to a large number of incidents in this regard. 92 I have chosen to examine only a couple of incidents in world history. The selection is grounded on a wish to achieve as much similarity in facts and argumentation to the specific issue raised in this paper as possible. In my opinion, this is essential to create a truly relevant factor of interpretation. I will therefore try to look exclusively at incidents containing elements of both pre-emptive self-defence and weapons of mass destruction, because the legal value of such incidents will be harder to challenge and contest. This excludes

87 This provision reads: “There shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...”
89 McNair (1961) page 424, and generally in chapter XXIV.
90 The Conference – Summary Records page 41 paragraph 15.
91 Gray (2000) also emphasises this, particularly chapter 1 under the heading Identification of the Law. This has especially been a problem with regard to self-defence because this is a recognised justification of the use of force, page 6: “It is clear that in the overwhelming majority of cases of inter-state use of force both states involved invoke self-defence against an armed attack by the other state.”
92 The 1964 Harib Fort incident, the 1967 Six Day War, the 1973 Yom Kippur War, the 1982 Falklands War, the 1986 US bombing in Libya, the 1988 US bombing of an Iranian aircraft, the 1993 US bombing
most of the incidents usually referred to. The 1967 Six Day War does for example lack both my prerequisites. Israel did attack Egypt, Syria and Jordan, and did argue self-defence as her justification. But she also argued that Egypt had taken action equivalent to an attack, and this contradicts the present definition of pre-emptivity (section 1.3). Furthermore, there was no explicit mention to any threat from weapons of mass destruction in that case. Also the 1986 US bombing in Libya fail to comply with my conditions, even though USA partly argued that the bombing also were meant to have a preventive effect. A more likely understanding may be to see the incident as a response to the killing of an American serviceman in a Berlin disco. This incident is also free from any linkage to weapons of mass destruction.

2.5.2 The Cuban Quarantine

October 22nd 1962, USA initiated a naval quarantine against Cuba, using armed force to uphold it. The quarantine was addressed to the UN Security Council by all the involved parties, and was the topic of the 1022nd – 1025th UN Security Council meetings. The background for the quarantine was presented to the Council by the US representative. USA held her use of force to be necessary to halt the offensive, military build-up that was taking place on Cuba (with the help from Soviet-Union). USA alleged that the installations set up were capable of carrying thermo-nuclear warheads against both South and North America, thus creating a threat to international peace and security. USA further claimed her action was necessary because “a delay would have meant [...] the nuclearization of Cuba, a risk which the hemisphere was not prepared to take”. It should be noted that USA also claimed regional security to be threatened, and that the Organization of American States (OAS) adopted a resolution calling on their members to use all measures necessary, “including the use of force”, to prevent the receipt by of Baghdad, the 1998 US bombing in Sudan and Afghanistan and the long-term US and UK bombing in Iraqi no-fly-zones; to mention some of them.

93 I do not claim my selection to be exclusive in this regard.
95 1962 UN Yearbook pages 104-107.
96 Soviet-Union and Cuba denied this proposition; claiming the build-up to be necessary for defensive purposes, see 1962 UN Yearbook page 105, 1st column. Instead they requested the UN Security Council to condemn the American use of force.
97 1962 UN Yearbook page 107, 2nd column.
Cuba of further military material. This does indeed weaken arguments arising from this incident, as it might rather be seen to be linked with Article 52 of the UN Charter. But, even if the expressed words may diverge from the doctrine examined in this paper, the concrete action taking place, was similar. I will therefore consider the US action as an example of pre-emptive self-defence aimed at deterring a threat from weapons of mass destruction.

The Council did not adopt any resolution condemning the US action, and this could perhaps be taken as an acceptance of the legality of pre-emptive self-defence. However, there are in my opinion several reasons not to deduce any such view from this incident.

First of all, it is unthinkable that USA would vote in favour of condemning any action taken by herself. And, as she possesses a right to veto any material decisions,98 the lack of a resolution cannot be a weighty factor. Furthermore, the debate in the Council does not support the legality of the doctrine examined in this paper.

The States who supported the US view, opposing a condemnation, did not make any legal references in their statements. Rather, they emphasised the factual aspects; their fear of the arrival of weapons of mass destruction to the region. Two of the members of the Council were also members of the OAS (Venezuela and Chile), thus it was not surprising that they expressed their support.99 The other side of the conflict, had some arguments linked with international law. Both Soviet Union and United Arab Republic stated that they held the quarantine to be “contrary to international law” and “aimed at violating the United Nations Charter”; but leaving any specific reference to the law of self-defence aside. It is therefore not certain that their legal view was based on self-defence considerations. However, as long as their opposition argued that the quarantine was necessary to secure international peace and security, it is appropriate to assume that they made their judgment in that perspective. *Opinio juris*, if it can be deduced from these debates, then seems to be diverging. Furthermore it may be reasonable to ask whether such debates at all are legally relevant. The Vienna Convention Article 31

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98 UN Charter Article 27(3).
99 Additionally Great Britain, France, China (!) and Ireland stopped a resolution from being adopted. In addition some States (e.g. 12 African States) took a fairly impartial approach, rather seeking a peaceful solution based on diplomacy, see abstracts of their letter to the Secretary-General in 1962 UN Yearbook page 108, 1st column.
paragraph 3 litra b states that it is the practice “which establishes the agreement of the parties” that should be recognised. This raises questions related to the amount and uniformity of subsequent practice, e.g. whether the practice of all parties is required. Maybe it is sufficient that a significant number of States practice in the same way, or possibly even that only the bigger and more powerful States behave similarly? These issues were not properly addressed at the Conference, thus it is difficult to give any certain answers. On one hand it was held that it was the practice of “the parties as a whole” that was needed. This supports the opinion that the practice must include all States; at least it suggests that States cannot expressly disagree. But on the other hand, the word “all” was withdrawn from the provision in order to avoid any misunderstandings as to the condition of quantity. The latter suggestion seems to acknowledge subsequent practice as a relevant factor even without the explicit support of all States, and perhaps even if some disagree. I hold this to be the most reasonable understanding. Then, it must be decided how many parties must agree (or not expressly disagree) in order to apply subsequent practice as a successful argument? An attractive assessment hereto would probably be that a significant majority is required. After all, it would not be tolerable to allow a few number of States to revise the treaty text themselves, especially when in contradiction to a large number of other States. This will also be in accordance with the view expressed by Akehurst.

But with only two States making legal arguments, and with the clear impact of political considerations (with classical Cold War impact), the value that can be drawn from this incident is strongly weakened. If any view concerning the present issue could at all be imposed, the incident would seem to support the restrictionist view. That view is also best reconcilable with the fact that USA chose to explain her action not merely from a self-defence point of view. If not even the State executing the use of force believes that her action is within the law of self-defence, it could rather be seen as a

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100 The latter is suggested by Byers (2002), particularly page 32.
102 Akehurst (1974-75) page 18. It must be noted that he takes this position when examining the quantity of practice required developing new law through custom. That situation may request another amount of homogeneity. After all, the creation of custom is different from treaty interpretation in that it takes place in “open space” while the interpretation of treaties begin with the examination of a written agreement between the parties.
103 Ghana and Romania were the other States taking that part of the conflict.
testimony of the illegality of a doctrine of pre-emptive self-defence. This has also received support in literature.\textsuperscript{104}

2.5.3 The Osirak Incident\textsuperscript{105}

June 7\textsuperscript{th} 1981, Israeli aircrafts bombed and destroyed a nuclear research plant near Baghdad in Iraq (Osirak). It was not held that Iraq had failed to comply with their international obligations as regards the non-proliferation of nuclear weapons,\textsuperscript{106} and even more important Iraq had not attacked Israel in advance of this bombing. Iraq addressed the issue to the UN Security Council, claiming that Israel was guilty of unlawful use of force. The action taken by Israel is in accordance with the present definition of pre-emptivity (section 1.3), and the arguments put forward by Israel in the UN Security Council\textsuperscript{107} is also reconcilable with the issue raised in this paper; Israel claimed that Iraq used the Osirak reactor to produce atomic bombs with the intention to use such bombs against the State of Israel. The Israeli representative stated that “under no circumstances would Israel allow an enemy to develop weapons of mass destruction against it.” Additionally, it was claimed that Israel merely had “performed an act of self-preservation and exercised its inherent right of self-defence.” The facts and the argumentation seen together, makes a striking resemblance to e.g. the arguments given in the US Security Strategy V. However, the new world order, as described in section 1.2 may weaken the relevance and impact that could come from the Osirak-incident. As seen above, the end of the Cold War may cause different approaches to legal issues. Nonetheless, this indictment does in my opinion have little impact on this particular event. Neither Israel nor Iraq was among the most significant Parties in the Cold War weapon mobilization – therefore the most identifiable observation that could weaken the relevance, is unsuccessful. Rather, the Osirak bombing should be regarded

\textsuperscript{104} Goodrich, Hambro and Simons (1969) page 345: Referring to the mention of regional arrangements “…instead of involving the right of self-defence under Article 51, are evidence of recognition of the dangers inherent in relying upon a claim to the right of self-defence going beyond the Charter text.”  
\textsuperscript{105} A thorough presentation of this incident is given by McCormack (1996). In addition to what is presented in 1981 UN Yearbook pages 275-283 (under the heading Situation between individual Arab States and Israel), I have relied upon his presentation of the facts at pages 15-110.  
\textsuperscript{106} UN Security Council resolution 487 (1981) paragraph 6 in the preamble, and also the UN General Assembly resolution 36/27 (1981) paragraph 6 in the preamble.  
\textsuperscript{107} The debate took place in the 2280\textsuperscript{th}-2288\textsuperscript{th} UN Security Council meetings, as referred to in 1981 UN Yearbook.
as very relevant to the present issue. This is because Israel’s statement implies that they saw Iraq as a “rogue State” (albeit not using such a modern expression) developing weapons of mass destruction with evil intentions.

The UN Security Council discussed the case after receiving Iraq’s letter, and unanimously adopted resolution 487 (1981). After setting out the issue clearly and accurately in the preamble, the Council said in the first operational paragraph that it “[s]trongly condemns the military attack by Israel in clear violation with the Charter”. On the outset it then seems as if the members of the Council did not tolerate Israel’s arguments under international law – described as a right to pre-emptive self-defence. This could prove to be imperative for the solution of the current issue. The legal significance of an UN Security Council resolution has though been contested. The Council is not a legal body, and thus the resolutions are held not to be legally decisive.\(^{108}\) It is true that most of the activity in the Council is under a political influence and of a political character, and that this is capable of weakening the legal weight of resolution 487 (1981). I nevertheless see this protest to be inconsequential because the resolution itself (“in clear violation with the Charter”) and the discussions in the UN Security Council ahead of its adoption, at the very least must be seen as evidence of \textit{opinio juris}. This is maybe not equivalent to the main body of “subsequent practice”, but this is nevertheless suitable to illustrate the interpretation of the States.\(^{109}\)

Most members condemned the Israeli action as “a violation of the United Nations Charter and international law”\(^{110}\) as they did not accept the notion of self-defence, partly because it would set out a “dangerous precedent”.\(^{111}\) Spain, for instance, held that the Charter did not allow any right to preventive action by which a State could set itself up as a judge and policeman in respect of another country, whilst Japan said that the resolution only contained the minimum common elements voiced by the international

\(^{108}\) McCormack (1996) examines this in chapter one, and concludes that despite the unanimous condemnation, the legal weight of UN Security Council resolution 487 (1981) is serious but not “insurmountable”.

\(^{109}\) Akehurst (1974-75), still discussing the creation of custom, examines “[w]hat constitutes state practice” at pages 1-11, and his broad approach will definitely include statements in UN Security Council debates.

\(^{110}\) 1981 UN Yearbook page 277.

\(^{111}\) The representative of Uganda stated at page 276, 2nd column that the resolution “rejected Israel’s dangerous notion of the doctrine of self-defence.”
community. Thus, the common accusation against State practice, namely their reluctance to make legal statements, does not appear to be valid in this case. In my opinion this a clear indication that pre-emptive self-defence was condemned in resolution 487.

But the reasoning is not entirely clear-cut. Some States also seemed to base their view merely, or at least jointly, on a factual basis. France and Great Britain expressed concern as regard to the law, but they did emphasise that it was Israel’s contention concerning Iraq’s intentions they disagreed with. France, who had sold equipment to Iraq for the build-up of Osirak, argued that their contracts with Iraq did not accept any military use of such installations. And Great Britain maintained that she did not believe Iraq was capable to develop nuclear bombs at the time. USA did not at any extent go into the law, but merely condemned Israel for failing to exhaust peaceful means. Such non-legal arguments might lessen the impact from resolution 487 because the resolution then can be said to be based on facts, rather than law.

In my opinion this denunciation cannot be given any particular emphasis, mainly because there was, at the end of the day, a significant majority arguing international law as their basis for the condemnation. And due to the similarity in facts and argumentation, I therefore hold the Osirak incident to strongly support a restrictive interpretation of Article 51.

2.6 The Impact of the Current Threat

2.6.1 Introduction

The world has undergone major important changes, both politically and with reference to security issues, after the end of the Cold War. Recalling the brief presentation of the

112 The condemnation was repeated in the UN General Assembly resolution 36/27, see the 10th paragraph of the preamble and the 1st operational paragraph.
113 Another possible consequence that might be drawn from State practice is the creation of new custom. But due to the conclusion I have reached in this section, it is unlikely that any customary law allowing pre-emptive action has been developed.
114 This seems to be the basic foundation of McCormack’s view.
“new” current threat in section 1.2, I will examine the possible impact this may have on the interpretation of Article 51. It can in my opinion best be considered within an approach arising from the “object and purpose” (section 2.6.2) as well as from “subsequent practice” (section 2.6.3).

2.6.2 Increased Necessity?

The concept of “object and purpose” can be related to the size of the new threat. The nature of weapons of mass destruction is obviously of a grave character, and this is not contested by anyone today. One single, and in the eyes of an attacker successful, strike is sufficient to cause huge and devastating consequences to both individuals and States. And these consequences are a highly relevant source for concern. It can be suggested that these impending outcomes, ignites some sort of necessity sufficient to excuse the use of force. Because of the devastating consequences weapons of mass destruction may cause, the realistic question arising from the earlier mentioned Gandhi quotation, may be whether there is a right to blind another person, in order to prevent that person from killing you. The issue which really is at stake is how far a potential attacker should be protected by Article 51. Hence, the extreme potential risk of such weapons could favour a teleological approach, and thus the legality of pre-emption to deter weapons of mass destruction under Article 51.

It may be proposed that the very interests and values Article 51 is set out to protect, will be ineffective if the provision cannot increase its scope. In the light of weapons of mass destruction, one may argue that self-defence sometimes must be executed in advance of the actual attack in order to have any effect at all. This strongly supports a right to pre-emptive self-defence under Article 51, because it would improve the defensive purposes. This view has to some extent found support among legal scholars. Applying the conditions set out in the Caroline case, it has therefore been claimed that self-defence can be performed prior to any attack if this attack is imminent, i.e. a right to

115 Marcelo G. Kohen; The notion of ‘state survival’ in international law in International law, the International Court of Justice and nuclear weapons (pages 293-314) examines this in relation to the Nuclear Weapons opinion. He concludes that, although several scholars argue for this view, this notion has no legal value as such.
pre-emptive self-defence.\textsuperscript{117} In addition to the severe potential damage from weapons of mass destruction itself, this may find support in the hesitancy of the international community to take the required action.

The UN Charter system relies heavily on collective action\textsuperscript{118} as i.e. described by the limitation in Article 51; only allowing self-defence until “measures necessary” has been taken by the UN Security Council. However, such action is not necessarily adequate in situations necessitating self-defence. It has shown difficult to agree upon when it is necessary to act under Article 51 of the Charter, and then also how much action which then is required – especially in times of anxiety and international conflict. It is feared that too much diplomacy and talk can be fatal, and that the emphasis on collectivism should not prevail in this respect. Also, there has been suggested that there is a vital military advantage of striking first.

The potential risk and the possible need to strike first in that respect can thus be held to favour the counter-restrictionist view in light of the object and purpose of Article 51.

If that view is to be acknowledged as de lege lata, the next issue would be whether the current threat is sufficient to successfully meet the conditions of necessity and proportionality that are generally accepted to exist.\textsuperscript{119} The existence of these two conditions in international law was for example repeated in the Nicaragua-case.\textsuperscript{120} It is natural to believe that they agree that these conditions are relevant even if, or perhaps especially when, the threat is from weapons of mass destruction as well.

These conditions, although separated in legal theory as well as in judiciary action, are strongly associated and may interact with each other in many aspects. If I were to distinguish between them, I would say that the major difference is related to the issue of

\textsuperscript{116} Ruud (1980) page 75, points out a worst-case-scenario and says that the right to self-defence then can be constrained so much that is has no actual value.


\textsuperscript{118} Paragraphs 6 and 7 in the preamble.

\textsuperscript{119} McCormack (1996) chapters 9.4 and 9.5.

\textsuperscript{120} Paragraph 176 said only “measures which are proportional to the armed attack and necessary to respond to it” were permitted as regards the law of self-defence. The International Court of Justice in the Nicaragua-case also held the conditions of necessity and proportionality to be “well established in customary international law.”
time. The condition of necessity may be held to be most active prior to the act of self-
defence, whilst the conditions of proportionality refers to something that must be 
complied with in the aftermath of the beginning of the act of self-defence. But the 
distinction must not be over-emphasised. The latter indicates e.g. that the act of self-
defence cannot go further than what is necessary to achieve the aim with the self-
defence. If the defensive action goes any further than this, the defender would be in 
violation of international law herself.

Because a prerequisite in this paper is that the enemy has not performed any attack (in 
accordance with the definition of pre-emption in section 1.3), it is probably more 
interesting to look closer at the condition of necessity in particular.121

Although being traditionally accepted in international law, there is no definition as to 
when acts of pre-emptive self-defence are necessary.122 Legal scholars seem to adopt a 
narrow and strict view, only allowing such action if an attack from an enemy is 
imminent.123 In the Caroline case, the Americans and the British were only prepared to 
accept pre-emption if the threat was “instant” and “overwhelming”. According to Mr. 
Webster any other defensive act had to be “impracticable, or would have been 
unavailing”, thus leaving “no moment for deliberation”. This view only opens for a very 
narrow right to perform these kind of military operations, only allowing pre-emptive 
self-defence if there were no other options available. Thus, even if accepting a general 
doctrine of pre-emption, it is not certain that the use of armed force for defensive 
purposes would be lawful under the issue presented in this paper.

Recalling from section 1.2, the potential risk with weapons of mass destruction in 
general is huge, and this might argue for a slightly less restrictive application of the 
condition.124 However, in my opinion this is not enough to make a conquering argument 
to accept the condition of necessity in relation to the present issue to be accomplished.

121 The issue of proportionality in this regard has been examined by Breau (forthcoming), who concludes 
that an attack to stop the development of weapons of mass destruction may be legal in that respect, whilst 
tracing anything beyond this (for example a regimè change) is a violation of international law.
122 Gray (2000) page 107, says that the “questions of necessity and proportionality are dependent on the 
facts of the particular case”.
123 Breau (forthcoming) page 10 and McCormack (1996) chapter 9.4.2, albeit the latter uses the term 
“proximity”.
124 Bring (1997) page 181, cites Stone (Aggression and World Order, page 49) who argued this view.
The mere development of weapons of mass destruction cannot be said to represent an instant and overwhelming threat itself. To allow the use of force in self-defence under those circumstances would at least strongly contradict the mere wording because an “armed attack” could hardly be said to have commenced.

However, the factor of object and purpose can also make a case opposing pre-emption, and I will now discuss some counter-arguments against such an interpretation of Article 51. Allowing that interpretation would undermine the significance of the United Nations in general, and the Security Council in particular. This opposes the object and purpose of the UN Charter system as a whole, emphasising the collective approach to maintain international peace and security to be the “primary responsibility” of the Council.125

If a doctrine as the one proclaimed in the US Security Strategy V collects worldwide, or at least sufficient support, military force may well be more frequently used – claiming validity because of the law of self-defence. Thus any preventive function Article 2(4) may possess will disappear, and the major instrument to control the use of force in international relations will be then be released from the collective system of the United Nations and given into the hands of sovereign States. It will then be open for these States to determine whether the danger is imminent enough to authorise the use of armed force. Some States apparently believe that such a right only will be given to a few members of the world community, selected by them, but this is a misconception. The equality of States is in theory an untouchable element of world order,126 and all States will achieve the same right to decide that a threat is sufficient for them to use military force against an “aggressor”. Hence, the danger of abuse is grave. This could cause even increasing use of force and warfare, and may have as a result the opposite of the object and purpose of the UN Charter. It is unlikely that Article 51 could be read wide enough to open for this solution, even if the concrete purpose of self-defence as such, may seem to differ from this. The purpose of the UN Charter as a whole should prevail in this regard. That is, because the right to self-defence is an exception from the prohibition against the use of force, and the main rule should be considered the more important.

125 UN Charter Article 24(1).
If we suppose that no States actually abused this opportunity created by this doctrine, the consequences could still combat the true intentions of peace, laid down in the UN Charter. Suspicion and accusations of abuse would be likely to be borned from this doctrine, and this could constitute more aggressive and threatening situations.

Furthermore it may be embraced in an argumentation against the right to pre-emption that the International Court of Justice did not exclude every use of nuclear arms in the Nuclear Weapons opinion, but rather kept a very narrow possibility open. Thus, the mere possession of such weapons cannot in itself be held to be dangerous enough to allow other States to attack the possessor. If so, many States would have the right to attack each other because there are many that hold these kinds of weapons. And as long as the mere possession of these weapons does not permit another State to use force, the mere acquisition of such weapons can neither be reason good enough to do it. Something additional is then required. This could be the fact that the potential aggressor is filled with cruel and bad intentions. Nevertheless, we will then need a “morality judge” to decide whose intentions are evil enough, and this takes us back to the danger of abuse.

Finally, the value of any teleological approach based on today’s objectives may be contested. Such an approach may give international treaties a more dynamic emergence, which on one hand could prove to be practical. Multilateral and law-making treaties are often subject to several hindrances during the drafting process. Much time, diplomatical efforts, money and international goodwill are involved to achieve agreement. Because the world is in a constant development some may suggest that a dynamic interpretation of treaties is appreciated to make it easier and less costly to amend former agreements. This approach were taken by some Parties at the Conference who were willing go as far as to support this if the result then were to “go beyond, or

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126 Article 2(1) of the UN Charter.
127 The Court also referred in rather vague terms to the Article VI in the NPT, cited by Burroughs (1997) pages 2-3.
128 “Multilateral and law-making treaties” meaning treaties with many Parties agreeing upon general principles or specific rules on broad fields of international law, as opposed to typical two-Parties business-contractual treaties.
even diverge from the original intentions of the parties as expressed in the text.”\textsuperscript{129} The latter was contested by a clear majority who highlighted the textual understanding as the supreme instrument. And there are strong counter-arguments opposing this approach. The use of treaties as an instrument to deal with international affairs directly affects and limits States’ sovereignty. To impose a dynamic interpretation of the treaty text may then seriously further reduce the sovereignty, and consequently it could be claimed that States should only be forced to comply with what they reasonably could foresee at the time of ratification. Many are therefore sceptical to allow this way of interpretation.\textsuperscript{130} However, denying any right to dynamic interpretations may have a negative side-effect. In order to avoid re-negotiating all the time, States could be tempted to agree upon more ambiguous texts that could create even more uncertainty as regards international law.

The consequences of allowing this doctrine could thus be equally as dangerous as denying it. Therefore, the object and purpose, if at all relevant, should in my opinion be taken into account for the restrictionist view, thus requiring an “armed attack” to have occurred – only accepting this condition to be fulfilled if some cross-border action is taken. Adding this with the conclusion of the textual approach as well as the one escaping from subsequent practice, I see this to support the restrictionist view.

2.6.3 Recent State Practice

In light of the current threat, as described in section 1.2, some States deem it necessary to expand their habits of self-defence. This is a view supported in the US Security Strategy V. USA claims that “new deadly challenges have emerged” after the Cold War to make today’s security environment “more complex and dangerous”. It is asserted that the legal order throughout the Cold War is no longer comprehensive to satisfy today’s adversaries. USA claims she is required to adapt “the concept of imminent threat to the capabilities and objectives of today’s adversaries”.\textsuperscript{131} The US Security Strategy may be seen to represent more recent State practice (“subsequent practice”).

\textsuperscript{129} The Conference – Summary Records page 38 paragraph 2.
\textsuperscript{130} McNair (1961) chapter XXI and Constantinou (2000) are generally reluctant to accept any constraints on State sovereignty, whilst others (Byers (2002)) seem to have a more liberal view.
The present military campaign against Iraq may also be seen as an upshot of this strategy. The campaign and its reception in the international community may indicate whether the new, fundamental changes in circumstances have changed the legal climate. The use of force against Iraq, which started March 20th 2003, must nevertheless be seen through careful glasses. Despite the long-expressed fear of Saddam Hussein’s and Iraq’s desire for weapons of mass destruction, and despite the new policy of one of the military powers in the campaign, the action taken against Iraq is not directly applicable to the current issue. Nobody suggests that Iraq has executed any “armed attack”, as required by Article 51, but it is asserted that there are Security Council resolutions which authorises the use of force. This is for example suggested by the UK Attorney General, Lord Goldsmith, but most legal scholars deny this. This view was also denied by many States in the UN Security Council debate concerning the military action in Iraq. Thus, the relevance of any arguments taken from this action cannot be strong. In light of the US Security Strategy, and also because of the reactions of the international community to the bombing of Iraq, I nevertheless find sufficient reasons to add a few comments to it:

Most factors indicate that *opinio juris*, even in the light of a threat from the feared regimè of Saddam Hussein, disapproves any doctrine of pre-emptive self-defence as an instrument to combat weapons of mass destruction. First of all, the fact that agreement could not be achieved in the UN Security Council can be held to support the restrictionist view. That is, because it could be seen to reflect that there is not sufficient *opinio juris* supporting the legality of pre-emptive actions. However, this would be to rush into conclusions. There could be several different reasons why the Council could not agree upon the use of force; for example it seemed apparent that many States claimed that peaceful means were not exhausted.

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131 The US Security Strategy V.
132 The disarmament of Iraq has been demanded by several UN Security Council resolutions, e.g. 687 (1991) and 1441 (2002).
133 The expressed US statement to use force even if “uncertainty remains as to the time and place of the enemy’s attack”.
134 See www.open.gov.uk/NewsRoom/NRArticle/0,1169,223412--801b22--fs--en,00.html; “Legal basis for the use of force against Iraq” also referring to resolution 678 (1990).
135 Statements from the 4726th meeting are quoted in UN Security Council Press Releases 7705 and 7707. The meeting were open to all UN members.
But also comments *after* the outbreak of military action does indicate that it is, albeit among other factors, the *legality* of such a doctrine that is subject for condemnation. The majority of States expressing their view concerning this expressed that they regarded the US-led attack on Iraq as a violation of international law.\textsuperscript{136} However, no State representatives have discussed this in regard to the doctrine as such, and it is therefore not necessarily the legality in general which is opposed to, but rather this concrete application (e.g. the condition of necessity or proportionality is deemed not to be fulfilled). This obstruction can in my opinion not be especially weighty. The fact that they did not specify *why* they claimed the illegality of the action can never be seen to support legality of another doctrine than the one the attacker pleas.

The fact that the coalition primarily tries to argue UN Security Council resolutions as their legal basis, may perhaps also be seen to question the legality of such a doctrine. It can probably be assumed that their reason for preferring that justification is evidence of a lack of necessary *opinio juris*.\textsuperscript{137}

Because of these significant uncertainties, I will not lay heavy emphasis on the argument drawn from the current campaign. But I find it reasonable to argue that the current actions at the very least does *not support* the legality of pre-emptive self-defence.

\textsuperscript{136} Among these States were among others Malaysia, Algeria, Yemen, Libya, Indonesia, Viet Nam, Sudan, Iran (the only country with concrete reference to the law of self-defence: “It was not waged against any armed attack”), Mauritius, China and Russia. Many States did not make any retrospective approach but were rather concerned with the humanitarian aspects of the conflict. According to reports and interviews on BBC World, March 20th 2003, Sweden and Germany also held the bombing to be in violation with international law and the UN Charter.

\textsuperscript{137} This is probably not the case with regard to USA. Her representatives have made it clear that they believe pre-emptive self-defence is lawful, even without an UN Security Council resolution; the US Security Strategy V.
3 Conclusion

I then deem most of the interpretation factors to oppose the legality of the examined question; the wording, subsequent practice as well as the purposes of the UN Charter strongly resist this to be part of international law. The only factor I hold to support pre-emption, is a possible intention of the drafters to preserve the Caroline doctrine and not to change pre-Charter law (section 2.4.2). Nonetheless, there are good and sufficient reasons to lay more weight and emphasis on the other factors – especially the wording. And as long as the wording also has support in State practice, I find the conclusion to be:

Pre-emptive self-defence in order to deter the development/use of weapons of mass destruction is not permitted under Article 51 of the UN Charter.
4 List of Literature

4.1 Treaties/Resolutions

Treaty of renouncement of recourse to war, August 27th 1928
Charter of the United Nations, June 26th 1945
Statute of the International Court of Justice, June 26th 1945
Treaty of the Non-Proliferation of Nuclear Weapons, July 1st 1968

United Nations General Assembly resolution 2625 (XXV) of October 24th 1970
United Nations General Assembly resolution 3314 (XXIX) of December 14th 1974
United Nations General Assembly resolution 36/27 of November 13th 1981
United Nations Security Council resolution 678 of November 29th 1990
United Nations Security Council resolution 1441 of November 8th 2002

4.2 Judgments/Judiciary Opinions

Case concerning Military and Paramilitary Activities in and against Nicaragua, judgment June 27th 1986, I.C.J Reports 1986 page 14

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of the International Court of Justice, July 8th 1996, I.C.J. Reports 1996 page 227

4.3 Other Documents

1962 United Nations Yearbook
1974 United Nations Yearbook
1981 United Nations Yearbook
Conference on the Law of Treaties, 1st session 1968

Conference on the Law of Treaties, Summary Records 1969

Miscellaneous No. 9 (1945), *A commentary on the Charter of the United Nations – signed at San Francisco on the 26th June, 1945*. Presented by the Secretary of State for Foreign Affairs to Parliament by Command of his Majesty: London 1945

National Strategy to Combat Weapons of Mass Destruction, December 2002

The National Security Strategy of the United States of America, September 17th 2002

Aftenposten, January 7th 2003
BBC World, March 20th 2003
The Economist, March 8th 2003
USA Today, February 21st 2003

4.4 Books


Burroughs, John, *The (Il)legality of Threat or Use of Nuclear Weapons*, Lit Verlag: Münster 1997

Cavallar, Georg, *Kant and the Theory and Practice of International Right*, University of Wales Press: Cardiff 1999


4.5 Articles

Akehurst, Michael, *Custom as a Source in International Law*, British Yearbook of International Law, 1974-75, pages 1-53

Breau, Susan C., *The Bush-doctrine of pre-emption: Does it exist in international law*, forthcoming


Simma, Bruno, *NATO, the UN and the Use of Force: Legal Aspects*, European Journal of International Law, volume 10, number 1, 1999, pages 1-22