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Pre-emptive self-defence against
states harbouring terrorists

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SUMMARY

This Paper analyses the legality of pre-emptive self-defence against states harbouring terrorists and elaborates the following aspect: Whether harbouring terrorists entails state responsibility. Therefore, it discusses secondary norms such as attribution rules. This leads to the main question of the Paper, use of pre-emptive self-defence against such states, and the legality of it, is looked at through attribution rules and breach of the due diligence obligation. Pre-emptive self-defence has enjoyed a new wave of discussion after adoption of US National Security Strategy in 2002. This doctrine has become well-known as “The Bush Doctrine”. The core aspect of this doctrine is: pre-emptive attack in self-defence against states harbouring terrorists. Thus, the primary rules of the use of force and the secondary rules of state responsibility stand together. Moreover the correlation of these two sources of law is evident in this regard.

At the outset, this Paper analyses the possibility to expand the right of self-defence, because it is connected to discussion of the legality of pre-emptive self-defence. Is there a probability to expand the right of self-defence so much? Concerning this, discussion focuses on anticipatory self-defence, its legality and strict boundaries. This analysis is further used to assess the necessity of pre-emptive self-defence and to demonstrate that even anticipatory self-defence, which has much more support from the whole community and the legality of which has been shown on an exceptional basis, is tool enough to combat terrorism.

Furthermore, the present work elaborates how harbouring terrorists fits under the scope of ILC Articles on State responsibility; divides forms of harbouring into two groups: The first, an armed attack originates or is an imminent threat of originating from states tolerating terrorists, and considers this situation as an armed attack triggering the right of self-defence. The second, states are harbouring terrorists but an armed attack has

not yet originated from them and the threat of armed attack is remote. The latter is considered as a threat to peace and security.

With respect to these two situations the use of force in self-defence is discussed. Focus is given to the issue when it is possible to use anticipatory self-defence in connection with these two situations and whether it is legal to use unilateral pre-emptive self-defence against such states.

Finally, the author believes that states should be responsible for harbouring terrorists and that force in self-defence can be used against those states from which an armed attack has originated or from which an imminent threat of attack originates.

However, regarding unilateral pre-emptive self-defence there is a high probability that it will not be accepted by the whole community in the near future. The reason for this is threats posed by pre-emptive self-defence. Nevertheless, sometimes it is a needed means for combating terrorism.

Therefore, the author is inclined to the view that pre-emptive self-defence needs some modification and establishment of strict boundaries to eliminate threats posed by it. Thus, at this stage there could be reconciliation with the order of the UN Charter by transferring unilateral pre-emptive self-defence to a multilateral pre-emptive strike under UN SC authorization according to VII Chapter of the Charter.

INTRODUCTION

“We will make no distinction between the terrorists who committed these acts and those who harbour them.”¹(George Bush)

This paper will analyze the rather narrow but, on the other hand highly sensitive question relating to self-defence: what is the relevance of the principle of attribution of the law of state responsibility in the case of assessing whether a state that has harboured or failed to prevent terrorist attacks can be subject of self-defence by a state which was the victim of these terrorist acts.

There is no category of the “law of terrorism” and problems regarding terrorism are characterized in accordance with the applicable sector of public international law such as: criminal justice, state responsibility, use of force, and so on. The present work aims to focus upon the use of force in the absence of consent by an individual sovereign state in order to remove sources of terrorism. This constitutes a situation where a terrorist attack involves the responsibility of the state, for example terrorist attacks are attributable to a state, while the state fails to prevent them or again when the state harbours terrorists and does not take action to remove them.

This paper will mainly focus upon state practice regarding anticipatory use of force and moving to pre-emptive self-defence against terrorists and furthermore, against states that harbour terrorists. The right of self-defence is a primary rule which prescribes certain conduct; however, to enforce this right against states that harbour terrorists it is necessary to deal with secondary rules such as state responsibility, particularly the rules

¹ United States President George W. Bush, *Statement by the President in His Address to the Nation* (11 September 2001) The White House (20 July, 2004); available on the internet at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010911-16.html> ; last visited 22 April 2010.

of attribution. In this regard it should be borne in mind that the attribution issue will be discussed as far as necessary to invoke the right of self-defence against states harbouring terrorists because the secondary rules prescribe the conditions under which the primary rules are enforced.

The proposed research question involves many sectors of public international law, such as: the correlation between the laws of state responsibility; use of force and self-defence. This paper attempts to demonstrate that several doctrinal developments, which before 9/11 lacked the support of the international community with respect to an anticipatory attack against terrorism, after 9/11 have enjoyed considerable support, although controversy remains about pre-emptive strikes or, to put it in another way, about preventive war against states harbouring terrorists.

Further, this paper will research and assess the legality of the new attitude towards the above mentioned issue, suggested by the United States of America by adopting the National Security Strategy in 2002; whether the pre-emptive use of force in the frame of self-defence against states that harbour terrorists has any legal basis. Moreover, what are the advantages of extending the right to self-defence so far? Is it only one means of defeating terrorism, the scourge of the 21st century? So, this paper will point out two core pillars of the "Bush Doctrine": attacks against states harbouring terrorists and the legality of using pre-emptive self-defence against those states and furthermore against "rogue states".

With respect to the research question the following methodology, will be followed. The first chapter will elaborate existing law about self-defence, the traditional understanding of the notion of "armed attack" and extending this concept to include attacks by terrorists in the shape of non-state actors; the traditional paradigm of self-defence and state practice regarding anticipatory self-defence to make a background to dealing with pre-emptive attacks. The Second Chapter will discuss the norm of state responsibility, attribution norms, thresholds established by the Nicaragua and Tadic cases and current state practice towards lowering the attribution threshold after 9/11: Does the lowered threshold of attribution have a connection to the law of use of force?

The third chapter will argue the legality of pre-emptive self-defence; will try to analyze the “Bush Doctrine” and will argue whether it is necessary to expand the right of self-defence to that extent that it includes pre-emptive self-defence, or whether the more accepted anticipatory self-defence doctrine is not enough to combat the terrorists.

Finally, in the light of ongoing developments, this paper will suggest a solution to overcome threats posed by the “Bush Doctrine” and moreover will give strict boundaries for pre-emptive strikes against such states under the UN SC umbrella. This means excluding the possibility of unilateral pre-emptive use of force in self-defence and moving the doctrine of pre-emptive self-defence to the realm of the UN SC as pre-emptive use of force under Chapter VII of the UN Charter. Furthermore, development of the United Nations Security Council’s role will be suggested in light of establishing strict confines for pre-emptive attacks beyond the right of self-defence against states harbouring terrorists, because “different circumstances require different methods, but not different morality.”² Hence, different threats need different treatment, different challenges need different resolutions, but international values always, and in every situation, remain the same.

² President George Bush; West point, New York; June 1, 2002; *Quoted* in the *National Security Strategy of the United States of America*; at p.3, available on the internet at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>; last visited 22 April 2010.

1 THE RIGHT TO SELF-DEFENCE

1.1 The right of self-defence: a customary or a provisional right?

Before discussing the main issue, the legality of pre-emptive attack, it is noteworthy to provide the theoretical background regarding the understanding of the right of self-defence and its scope. This information will lead in turn to the main question of this paper and moreover will contribute to formulating whether an anticipatory or pre-emptive attack is included in the right of self-defence while the latter depends on the expanded interpretation of the right of self-defence. The main disputable question of this sub-chapter is: Whether the right of self-defence is a customary norm or a charter based provision. That question is significant for this paper because if the right of self-defence is a customary right it may include the right to respond to an imminent and remote threat, which is not included in the wording of article 51.

The right of self-defence has been known since time immemorial. At the outset individuals enjoyed the right of self-defence and after the emergence of states this right became available to the latter, too. "It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both".³ The right of self-defence is a means of self preservation. Everyone has right to defend himself against an aggressor and to respond by force when force has been used against him. However, to restrict and confine the use of force has become necessary in society, a necessity also shown by two World Wars which "twice in our lifetime has brought untold sorrow to mankind."⁴ The first strict prohibition of the use of force was enshrined in the United Nations Charter in 1945. It is stated precisely in the charter "to

³D. Webster, "Letters from US Secretary of State Daniel Webster to British Minister Mr. Fox", (1840–41) 29 *British and Foreign Affairs Papers* 1129 at 1137–38 cited in Niaz A. Shah; "Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism"; (2007) 12 *JCSL* 1 (*journal of Conflict & Security Law*) at p 95 available on the internet at Oxford University Press Journals database, last visited 22 April, 2010.

⁴ Charter of the United Nations, (1945), preamble.

save succeeding generations from the scourge of war"⁵[...]” all members shall refrain in their international relations from the threat or the use of force.”⁶ The prohibition of the use of force is the main UN Charter-based rule which is embodied in numerous other treaties of regional scope. There are two exceptions from the general rule on prohibition of the use of force under the Charter system; maintenance of a collective security regime through the Security Council and the right of self-defence.

This paper will mostly focus upon the latter and especially on the realization of this right against terrorism as the threat nowadays to a vulnerable peace. Discussion over the right of self-defence always begins with article 51 of the United Nations Charter. (The Charter). The article states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the 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-defence 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.⁷

“Traditionally academic writers that concern themselves with the scope of the right of self-defence may be generally divided into two categories holding opposite views based on their interpretation of Article 51”.⁸ The main dispute among these two controversial groups concerns the word “inherent” in the text of the above mentioned article. Some scholars interpret the word “inherent” as showing that article 51 has a customary character; moreover, that reference to an “inherent” right of self-defence is evidence of the fact that Article 51 preserves the customary international law right of self-defence that already existed before adoption of the Charter.⁹

⁵ *Ibid.*

⁶ *Ibid.*; article 2(4).

⁷ *Supra* note 4; article 51.

⁸ C. Grey; *International Law and the Use of Force*, Oxford University Press, 2000, at p. 86.

⁹ M.W. Janis and J.E Noyes, *International Law. Cases and Commentary*. 2nd ed., ST Paul, Minn., 2001; at p.518.

These scholars maintain that the right of self-defence is a customary rule and the charter only preserved a pre-existing customary norm. However, embodiment in the Charter does not exclude the customary character of self-defence. Therefore, the extended understanding of the right of self-defence is based on its customary character. Furthermore, keeping in mind the customary character of article 51 of the Charter, this leaves room for an anticipatory attack in the scope of self-defence. Those scholars who maintain the inherent right of self-defence and extended understanding of article 51 of the Charter are so called liberal school followers.

It is(...) axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.¹⁰

To exemplify this practice it is worth referring to General Assembly Resolution 2625 XXV. The reference to the prohibition of force in Resolution 2625 XXV is followed by a paragraph stating that: “nothing in the forgoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the charter concerning cases in which the use of force is lawful.” This resolution demonstrates that the States represented in the General Assembly regarded the exception to the prohibition of force constituted by the right of individual or collective self-defence as “already a matter of customary international Law.”¹¹

Moreover, recognition of the customary character of the right of self-defence could be found in UN SC Resolutions 1373 and 1368. Both of these reiterated and reaffirmed the “inherent” right of self-defence, repeated the wording of the Charter. These two resolutions stress in their text the word “inherent”, which in itself is a solid argument for the liberal group supporters. This exemplifies the approach that the right of self-defence

¹⁰ *Continental shelf (Libyan Arab Jamahiriya/ Malta)*, Judgment of 3 June 1985, at p.20, para.27, available on the internet at: <http://www.icj-cij.org/docket/files/68/6415.pdf>, last visited 25 April 2010.

¹¹ D.J. Harris, *Cases and Materials on International Law*, Sixth edition, Sweet and Maxwell, 2004, at p. 899.

is not exhausted by the wording of article 51 and it is broad according to the customary character of the right of self-defence.

On the other hand, a controversial group of scholars - the so called restrictive school - are of the view that the right of self-defence should be understood narrowly with respect to article 2 (4) of the Charter. According to these scholars, the Charter clearly states the general prohibition of the use of force in international relations in article 2 (4) of the Charter:

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.¹²

The prohibition of the use of force enshrined in article 2 (4) of the Charter is a codification of an existing customary jus cogens norm of international law from which no derogation is allowed.¹³The one exception from this rule is the right of self-defence, which gives legality to the use of force by virtue of article 51 of the Charter and it is dictated by the necessity to use force as a means of self-defence. Moreover, according to the views of scholars against the extended right of self-defence, reading of article 51 should be carried out in conjunction with article 2 (4) of the Charter. Taking into consideration the main will of the founders of the charter to prohibit the use of force in relations between states, and furthermore bearing in mind that prohibition of the use of force is a jus cogens rule and can only be modified by a "subsequent norm of general international law having the same character."¹⁴ Therefore the question raised by those scholars and the main argument is whether the right of self-defence is a jus cogens norm. Arguing on the basis of the non-existence of unilateral state practice about the jus cogens character of self-defence, the latter group of scholars, i.e. the so called restrictive school, believes that the right of self-defence does not include anticipatory or pre-emptive attack

¹² *Supra note 4*, article 2 (4).

¹³ *See e.g. Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Nicaragua v. United States of America)*; International Court of Justice (ICJ), judgment of 27 June 1986; para.190, available on the internet at <http://www.icj-cij.org/docket/files/70/6503.pdf>, last visited 27 April 2010.

¹⁴ Vienna Convention on the Law of Treaties (1969), Article 53.

because expanding this right to that extent constitutes a change in article 2 (4) of the Charter and is thus inadmissible because the right of self-defence does not have the same character and it is not a jus cogens rule, as is prohibition of use of force.

Moreover they base their argument on the meaning of the word “armed attack” mentioned in article 51 of the UN Charter. The “restrictionists” take the view that “armed attack” has a reasonably clear meaning which necessarily rules out anticipatory self-defence.¹⁵ Furthermore, in the merits phase of the Nicaragua case it was recognized that this formulation refers to pre-existing customary law.

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the Convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of article 51, which mentions the “inherent right” (in French text the ‘droit naturel’) of individual or collective self-defence, which ‘nothing in the present charter shall impair’ and which applies in the event of an armed attack.¹⁶

From this extract it is quite clear that the Court is of the view of the “natural”, “inherent”, customary character of the right of self-defence; however, it holds the position that the whole meaning of this customary right is expressed in article 51 of the Charter. Thus, it tends to a narrow and word by word understanding of the right of self-defence.

Nevertheless, the author is quite inclined, as are most contemporary scholars, that the right of self-defence is of customary character and that article 51 of the Charter merely reserved that right and embodied it but did not exhaust it. Moreover, the right of self-defence is an inherent right and does not need approval from the UN SC, otherwise the use of force should be authorized by UN SC, which means that self-defence as a right does not need authorization, but when the use of force is used as the means of carrying

¹⁵ Ian Brownlie; *Principles of Public International Law*; sixth edition; published in the United States by Oxford University press 2006; at p.700.

¹⁶ *Supra note 13; Nicaragua case*, para. 176.

out the right of self-defence, then the approval of UN SC is necessary but it means that authorization is given on the use of force, not on the right of self-defence.

There are no grounds for holding that, when customary international law comprises rules identical to those of treaty law, the latter “supervenes” in relation to the former so that customary international law has no further existence on its own.¹⁷

Furthermore, there are several reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the states in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate existence.¹⁸

The Court therefore finds that article 51 of the Charter is the only meaningful basis for a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced.¹⁹

To sum up, it can be concluded that the right of self-defence has a customary character but still remains as a provisional norm embodied in article 51 of the Charter; however, as a provisional norm it neither covers the whole understanding of the “inherent” right of self-defence, nor exhausts it, but rather includes a mere reference to the broader customary right of self-defence. The interesting thing with regard to the research question is the notion of “armed attack”. Does an attack by non-state actors, terrorists, constitute an “armed attack” spelled out in article 51 of the UN Charter for the sake of triggering the right of self-defence?

1.2 The concept of “armed attack” from narrow to broad notion

To carry on the discussion about the scope of the right of self-defence, the notion of “armed attack” should be elaborated because this notion is the main subject of controversy between the two schools of thought. Self-defence under article 51 of the

¹⁷ *Supra* note 11, D.J. Harris, at p. 895.

¹⁸ *Ibid.*

¹⁹ *Supra* note 13, *Nicaragua* case, para.176.

Charter requires an “armed attack” upon the state, so that when the attack occurs from terrorists it is necessary to establish a link between the terrorists and the state through the attribution rule to invoke the right of self-defence by the victim state against the state which harboured the terrorists.

Traditionally, in order for a state to resort to armed force in self-defence, it needs to demonstrate that it has suffered an armed attack of sufficient gravity and for which another state is responsible.²⁰ From this is it quite clear that for invoking the right of self-defence the necessary requirement is an armed attack and additionally that the armed attack should be directed from a state party, but the latter is obscure from the text of article 51 of the Charter. Nevertheless, many scholars think oppositely and believe that an “armed attack” could be directed from non-state actors. This approach looks perspective and more modern taking into account that in the 21st century many attacks are directed mainly from non-state actors such as rebels and terrorists so that it would be unreasonable to argue that the right of self-defence could be invoked only against a state but when the attack is carried out by terrorists the state does not have a right to defend itself or its citizens. However, scholars who tend to the opinion that an attack should be directed from the state party justify their approach by stating that terrorist acts are mere criminal acts which entail criminal responsibility which is a matter of internal law and does not give rise to the right of self-defence. However, a possibility remains to find room for the right of self-defence against terrorism through this narrow approach too. The law of state responsibility plays the main role in the solution to this problem, for instance attribution of terrorist attacks to a state and through the rules of attribution invoking the right of self-defence against states responsible for terrorist attacks. Therefore the attribution problem and the threshold of attribution will be discussed in connection to the main question of this paper.

²⁰Greg Travalio and John Altenburg, “Terrorism, State Responsibility and the Use of Military Force,” (2003) 4 *Chicago journal of International law*, at p.102, available on the internet at Hein Online database, last visited 27 April 2010.

An armed attack is necessary to realize the right of self-defence. Moreover, this was also concluded by the ICJ in the Nicaragua case: The Court held that the right of self-defence, whether individual or collective, is only available in response to an “armed attack”.²¹ Also in 1950 Kelsen argued that article 51 only applies in the case of an armed attack and noted that the right of self-defence must not be exercised in the case of any other violation of legally protected interests of a member (of the UN).²² But the interesting thing is: what is assumed under the notion of “armed attack”. Discussion on the meaning and nature of the concept of “armed attack” lead to two crucial questions: 1. Does the term “armed attack” include an imminent threat? This question is purely connected to anticipatory self-defence, but is valuable for analyzing the legality of pre-emptive strikes 2. Can an attack by non-state actors amount to an armed attack? But the main question is: what can be comprised under the concept of “armed attack”? In 1958 Brownlie suggested that the concept of “armed attack” in article 51 probably refers to “some grave breach of the peace, or invasion by large organized forces acting on the orders of a government.”²³ A very interesting question is whether an armed attack includes an imminent or future threat. The answer relies upon a narrow or broad understanding of the concept of armed attack. For instance Professor Kunz argues that article 51 ‘constitutes an important progress by limiting the right of . . . self-defence to the one case of armed attack against a member of the U.N.’²⁴ ‘This right does not exist against any form of aggression which does not constitute ‘armed attack’ and it ‘means something which has taken place’.²⁵ Professor Gross argues that ‘the wording of Article

²¹ *Supra* note 13, Nicaragua case para.195.

²² Hans Kelsen, *Law of the United Nations*; 1950, at p. 269 cited in Sonia Cenic, “State Responsibility and Self-defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter Been Widened as a Result of the US Response to 9/11”, (2007), 14 *Austl. Int’l L.J (Australian International Law Journal)*, at p. 203, available on the internet at Hein Online database, last visited 27 April 2010.

²³ Ian Brownlie, “International Law and the activities of the Armed Bands”, (1958), 7(4), *Int’l & Comp. L.Q (International and Comparative Law Quarterly)*, at p. 731, available on the internet at Hein Online database, last visited 27 April 2010.

²⁴ J. Kunz, “Individual and Collective Self-defence in Article 51 of the Charter of the United Nations”, (1947), 41 *AJIL (American Journal of International Law)*, at p 877–8, available on the internet at Hein Online database, last visited 27 April 2010.

²⁵ *Ibid.*

51 requires an armed attack using weapons and that mere threats or declarations are insufficient [. . .] The indispensable condition for the exercise of the right of . . . self-defence under article 51 of the Charter is that ‘an armed attack occurs.’²⁶

In the Nicaragua case “the Court endorsed the narrow view of article 51”²⁷ and stated that for self-defence under article 51 of the Charter it is mandatory to face an “armed attack”. In addition in 2003, the Oil Platforms Case confirmed that an armed attack is still a prerequisite element for the use of force in self-defence.²⁸ Some indications of what constitutes an armed attack appear in the Nicaragua judgment. In that decision, the Court, relying heavily upon the General Assembly’s ‘Definition of Aggression’ declaratory resolution and the particular circumstances of the Nicaragua case, stated “In addition, the possibility was admitted that the substantial involvement of a State in actions carried out by armed bands, irregulars and so forth, could constitute an armed attack under the same provision. Other forms of support, which fell short of this threshold, were deemed not to constitute an armed attack, irrespective of their effect upon the target State.”²⁹

The approach of the Nicaragua judgment was highly criticized by judges in their dissenting opinion and by many scholars as “being unrealistic and for failing to take into account that other considerations could lead to different results under different circumstances”³⁰ The Nicaragua decision is for sure authoritative, having real power in establishing a common understanding of the notion of “armed attack”, but cannot be accepted as the only one for solving all situations. Moreover it should not be seen as the only or sole approach which should be employed in all circumstances for triggering the

²⁶ E. Gross, “Thwarting Terrorist Acts by Attacking the Perpetrator or their Commanders as an Act of Self-Defence: Human Rights Versus the State’s Duty to protect its Citizens”, (2001), 15 *Temp Int’l & Comp. L.J* (*Temple International and Comparative Law Journal*) at p 213, available on the internet at Hein Online database, last visited 27 April 2010.

²⁷ *Supra* note 13, *Nicaragua* case, para. 195.

²⁸ See e.g. *Oil platforms (Islamic Republic of Iran v United States of America)*, 6 November 2003, available on the internet at <http://www.icj-cij.org/docket/files/90/9715.pdf>, last visited 28 April 2010.

²⁹ T.D. Gill; “The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy”; (17 November 2006), *JCSL*, at p 365, available on the internet at Oxford University Press Journals database, last visited 22 April 2010.

³⁰ *Ibid.*

right of self-defence. Time goes by in its own way and brings new challenges to mankind, such as terrorism, which needs different treatment. Therefore, it would be wrong to assume that the Nicaragua case is the only right attitude towards the concept of “armed attack” and it should be used in the war against terrorism because such an approach will eliminate invoking the right of self-defence against terrorism, which would be not only wrong but also bad for the sake of maintaining peace.

However, an “armed attack” which invokes the right of self-defence needs to satisfy both of two elements: sufficient gravity and state responsibility, as was established by the Court in the Nicaragua case. Right now, we will discuss the sufficient gravity element and later in the following Chapters will elaborate precisely the state responsibility element in connection to the issue of attribution and lowering the threshold for states harbouring terrorists.

An interesting question is how many persons should suffer from a terrorist attack to amount to the court’s “scale and effect test”. This is not clearly explained in international law and it depends on the particular situation but nevertheless the 9/11 terrorist attack amounted to a threat to peace and reached such a “gravity and effect” test as to be considered an “armed attack.” The ICJ noted that “the element of sufficient gravity is necessary in order to distinguish between the gravest forms of the use of force and which amount to an “armed attack” from other less grave forms.”³¹ It is noteworthy regarding terrorist attacks to distinguish between a mere criminal terrorist act and a terrorist attack which meets such gravity as to be considered an “armed attack.” In the Nicaragua case the Court stated that the

sending of an armed band “by or on behalf of” an aggressor state to conduct an operation that meets the Court’s “scale and effects test” most cases of indirect use of force contrary to customary International Law by a state by giving of assistance to rebels will not generate the right of self-defence against the state.³²

³¹ *Supra note 13*, Nicaragua case, (1986), para. 191.

³² DJ Harris; *Cases and Materials on International Law*; Sixth edition, Sweet and Maxwell 2004, at p. 914. However, the Court does not hold the same position every time. For instance and for comparison see, exceptionally, Renamo, the Mozambique rebel force, which conducted guerrilla warfare against the

International terrorism is one of the most significant threats to peace and security in the 21st century, so to combat, remove or neutralize it is a very valuable question for the whole community. Therefore the legal question whether the right of self-defence includes response to terrorist acts and moreover, whether a terrorist act amounts to an “armed attack” defined in article 51 of the Charter is an issue of wide discussion among states and scholars.

The example provided above, the Nicaragua case, shows that state practice and even more the Court were tending to a narrow understanding of the concept of “armed attack”. This is proved by past experience, when before 9/11 only the US and Israel invoked self-defence to justify their response to terrorist attacks against states allegedly harbouring terrorists, for instance “Israel’s attack on Beirut Airport in 1968 was condemned by the Security Council,”³³ while its 1985 bombing of the Palestine Liberation Organization headquarters in Tunis was considered by the Security Council as an act of armed aggression in deliberate violation of the UN Charter.³⁴ In 1986, when the US bombed Libya, the international community did not accept its claim to self-defence.³⁵

However, some scholars argue that nothing contained in the Charter states that an armed attack may only be perpetrated by a state, and that Article 51 was drafted in a broad enough manner to permit the use of force in self-defence in order to counter non-state actors.³⁶ This approach was widely supported after 9/11. The destruction of the World Trade Center and a wing of the Pentagon by three hijacked civilian airliners and

Mozambique government in the 1980s: Renamo was controlled by South Africa and could be said to have been “sent by or on behalf of it” - not just assisted by South Africa - and conducted operations that probably met the Court’s “scale and effects” requirement, thus justifying individual and collective self-defence against South Africa.

³³ SC Res. 262 UN Doc S/RES/262 (1968).

³⁴ SC Res. 573 UN Doc S/RES/573 (1985).

³⁵ Stanimir Alexsandrov, *Self-defence against use of force*, 1996, at p.185-186 cited in Sonja Cenic; “State Responsibility and Self-Defence in international Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter been Widened as a Result of the US Response to 9/11”, (2007) 14 *Austl. Int’l L.J.*; at p 207; available on the internet at Hein Online database, last visited 22 April 2010.

³⁶ Dr. B.A. Feinstein, “A Paradigm for the Analysis of the Legality of the Use of Armed Force against Terrorists and States that Aid and Abet Them”, (2004) 17 *Transnat’l Law. (Transnational lawyer)*, at p. 68, available on the internet at Hein Online database, last visited 25 April 2010.

crashing a fourth in Pennsylvania on September 11, 2001 constitute without a doubt the high point of terrorist attacks on the United States to date.³⁷ The terrorists' methods, their economic effect and destructive power were unprecedented and therefore amounted to such gravity and intensity to be considered as an "armed attack" invoking the right of self-defence. US actions in Afghanistan were supported by the whole community. Moreover, the Security Council adopted two resolutions 1368 and 1373 which precisely approved a wide understanding of the term an "armed attack".

Security Council Resolution 1368 was adopted on the next day after the terrorist attacks, on 12 September 2001, which condemned terrorist acts. However, this Resolution does not explicitly state that a terrorist attack is included in the traditional understanding of the concept of an "armed attack" but spelled out that a terrorist attack constitutes a threat to peace and security and therefore stipulated "the inherent right of individual or collective self-defence in accordance with the Charter which is contained in Article 51 specifically with respect to the terrorist attack."³⁸ Furthermore, on 28 September 2004, the Security Council adopted Resolution 1373 which reaffirmed the previous resolution 1368 and "authorized states to take steps to prevent the commission of terrorist acts."³⁹

Even these two resolutions are enough to clarify the support of the whole community and state practice after 9/11 regarding the issue that a terrorist attack triggers the right of self-defence. In addition NATO considered the terrorist attacks as an act covered by Article 5 of the Washington Treaty, and, therefore, its member States could take such action as they deemed necessary in the exercise of the collective right of self-defence.⁴⁰

³⁷ Kirsten Schmalenbach, "The Right of Self-defence and "The War on Terrorism" One Year After September," (2002) *German Law Journal*, available on the internet at <http://www.germanlawjournal.com/article.php?id=189>, last visited 25 April 2010.

³⁸ SC Res. 1368 UN Doc, S/RES/1368, (2001).

³⁹ SC Res. 1373 UN Doc S/RES/1373 (2001).

⁴⁰ Secretary General Lord Robertson, *Statement at NATO Headquarters*, 2 October 2001, at <http://www.nato.int/docu/speech/2001/s011002a.htm>, last visited 25 April 2010.

After these approaches taken by NATO, the Security Council and most States towards assuming a terrorist attack as a notion involved in the term of an “armed attack” spelled out in the article 51 of the Charter, nowadays there is less support for a narrow understanding of the notion of an “armed attack”, with scholars and states inclined to broadening the notion of an “armed attack”, because it is for the sake of peace, while the threat posed by terrorism is obvious and threats to international peace and security, as by the Charter the main obligation of the States is to ensure peace and security, therefore, state and International Organizations are forced to accept the expanded notion of an “armed attack’ to combat terrorism.

To explore the changes in understating of the notion an “armed attack”, two elements are significant: gravity and state responsibility, the latter dealing with the attribution rules to enable the victim state to use force in self-defence against states which harbour terrorists. This stage elaborated mostly the scale, gravity and effect element of terrorist attacks but the second will be discussed in the chapter below on attribution requirements before and after 9/11.

1.3 Legality of anticipatory self-defence and moving to pre-emptive self-defence: state practice

The best defence is good offence⁴¹

Examination of the legality of anticipatory self-defence is connected with the dual customary-charter character of the right of self-defence; to state practice and to assessment of the Caroline incident principles: necessity, immediacy, proportionality, although the former was discussed in the first sub-chapter. So now let us turn to the latter criteria.

It should be kept in mind that states have failed to strictly confine the right of self-defence and to give a precise definition. This could have been dictated by the will of states not to eliminate the possibility to resort to force in the name of self-defence and

⁴¹ This is an adage that has been applied to many fields of endeavour, including games and military combat.

leave this chance open to themselves. However, in doing so states have sacrificed the boundaries of self-defence and kept this right without exact borders. Even the ICJ in *Democratic Republic of Congo V Uganda* (2005), after the Nicaragua case, again restricted itself to discussing the question of “imminent threat”. The court referred to the well-established Nicaragua case approach to avoid the parties raising the issue. The main argument why the court avoided discussing the question of “imminent thereat,” is that it is the main argument in the current war on terror.

At the outset a strict distinction should be made between the notions: “anticipatory” and “pre-emptive” attack. In many research works these two concepts are confused and mostly used as synonyms describing a preventive attack. However, this attitude is wrong as the notions do not have the same meaning. “Anticipatory” attack is used to describe military action against an imminent threat, while “pre-emptive” attack is employed to describe the response to a threat that is more remote in time. This strict line is noteworthy to be kept in mind while discussing the main question of this paper, the legality of a pre-emptive attack against states harbouring terrorists.

It is widely accepted by state practice that to resort to force in self-defence against an imminent threat posed by terrorism could be permitted under article 51 of the UN Charter, whereas pre-emptive self-defence against states harbouring terrorists - introduced by the US National Security Strategy, the so called Bush doctrine - is still disputable. Moreover, in the war against terrorism the borderline between these two notions is necessary to argue which form of use of force could be employed. A solution regarding this attitude towards the two concepts and the consequent use of force as self-defence or authorized use of force by the UN will be suggested in the chapters below.

Firstly, the author discusses anticipatory self-defence and state practice connected to this issue. The charter and customary grounded right of self-defence allows to some extent anticipatory action against a clear and manifest threat of attack in the immediate, or at least proximate, future, within the confines of the widely accepted Caroline incident criteria.

The first thing which comes to mind when addressing anticipatory self-defence is the Caroline incident and the criteria set up through it. The descriptor “incident” is applied because it was not taken before any tribunal or court.⁴² US state secretary Webster during the correspondence between the US and Great Britain on the Caroline incident gave a very strict and precise definition about the scope of anticipatory self-defence and with this statement clearly reaffirmed the doctrine that the right of self-defence includes the right of self-preservation so that these two terms are synonymous and moreover, the right of self-defence as a means of self-preservation is not limited.

Webster’s note was an attempt to describe this limit in connection to the particular facts of the Caroline incident.⁴³ Webster in his statement regarding the Caroline incident focused on the following principle: immediacy, necessity, proportionality. This well-known formula is worded as follows: “necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.”

Now in discussing anticipatory attack through the well-known criteria spelled out after the Caroline incident, the first question which should be answered is whether the right of self-defence can be invoked and an anticipatory attack triggered without an armed attack. With respect to the notion of “immediacy”, what is considered under the term “immediacy”?

We have analyzed in previous sub-chapters that the ICJ’s approach in the Nicaragua case was that to trigger the right of self-defence the main requirement is an “armed attack”. However, even the Caroline incident and historical experience does not enable a conclusion in this direction. Furthermore, mere literary interpretation of article

⁴² The Key facts in The *Caroline* incident are these: A rebellion by Canadians was underway in 1837; many Americans supported the rebels with supplies and by enlisting as fighters for an invasion of Canada. The US government did not act effectively to stop Americans from supporting the rebels. On 13 December 1837, a group of rebels, led by an American, took control of Navy Island, located in Canada [...] The rebel base on Navy Island began to receive supplies from The *Caroline*, operating a ferry from the US shore. On 29 December British force crossed the river, with the specific objective of destroying The *Caroline*. The British commander found that the American vessel moved to [...] US territory, dragged the boat into the river’s current, set it on fire; its remains were carried over Niagara Falls. See e.g. Abraham D. Sofaer; “On the Necessity of Pre-emption”; (2003), 14 (2) *EJIL (European Journal of International Law)* 2003, pp. 214-215; available on the internet at Oxford University Press Journals database, last visited 27 April 2010.

⁴³ *Supra* note 15, Ian Brownlie, at p. 701.

51 of the Charter is not enough, Moreover, in reading that article other methods such as teleological should be employed and it is important to understand the real will and purpose of the founders of the Charter.

It is clear that the charter is not a self-destructive document and the will of the creators of the Charter was not to restrict states from taking preventive measures, or indeed for a state to wait until real harm is carried out.

For instance, almost every state's internal law enables resort to force or killing another person in the scope of self-defence, while in addition an act of self-defence can be conducted before a real threat is realized by the offender:

As a general rule, a man, without fear of punishment, may kill another in self-defence, once the aggressor is clearly showing his desire to take my life, and equipped with the capacity and the purpose, has gotten into the position where he can in fact hurt me, the space [within which self-defence is permitted] being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him.⁴⁴

So it is possible to move this principle into international law from internal state law, where it is grounded. Self-defence includes an anticipatory attack against the offender and in the name of self-defence this act precludes wrongfulness. But such an approach has not been broadly accepted by international law specialists. Nevertheless, it might be good justification for the use of force against an imminent threat posed by terrorism. Moreover it was correctly criticized by many scholars that the Charter is not a document which demands that a state should be in the position of a "sitting duck" and not to act in self-defence before the threat is realized.

Mao Zedong opined that "the only real defence is active defence"; often success rests on destroying the enemy's ability to attack, before the attack is carried out. For instance with respect to the war against terrorism, Matthew Levitt stated: "it is important to pre-emptively strike at those who intended to do us harm."

⁴⁴ Abraham D. Sofaer; "On the Necessity of Pre-emption"; (2003), 14 (2) EJIL, at p. 216, available on the internet at Oxford University Press Journals database, last visited 22 April 2010.

Extending the right of self-defence towards an anticipatory and more to a pre-emptive attack occurs on the basis of expanding the notion “armed attack”. In the time of the Nicaragua case, triggering the right of self-defence required “armed attack” which rested on the state side, so that there was no room for considering that an “armed attack” conducted by non-state actors could invoke the right of self-defence, whereas after that time the concept of an “armed attack” has been broadened so that it now includes an attack conducted by non-state actors such as terrorists. Moreover, even the existence of an “armed attack” is not necessary to carry out the right of self-defence. To this end, it could be concluded that in response to an immediate threat from terrorists the right of self-defence can be employed and an anticipatory attack launched against terrorists, even when the threat is not yet realized.

This approach is based on the expanded interpretation of the notion “armed attack”. In contrast to the restrictive school, liberal school followers believe that force may not only be used in self-defence as a response to an armed attack, but it may also be a response to the “imminent threat” of an armed attack. Professor Waldock argues that to say self-defence begins only “if an armed attack occurs” is going beyond the necessary meaning of the word.⁴⁵ Professor Bowett asserts that article 51 of the Charter does not preclude action taken against an imminent danger; anticipatory self-defence is necessary and is practiced in today’s world.⁴⁶

In this regard it is very interesting to know the real will of the founders of the Charter while drafting article 51. Professor Frank argues that at the San Francisco Conference the founders deliberately closed the door to anticipatory self-defence.⁴⁷ In contrast, Mc Dougal and Feliciano after digging through the preparatory history of the

⁴⁵ Niaz A. Shah; “Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism”, (2007), 12 (1) *JCSL*, (*Journal of Conflict & Security Law*), at p. 99, available on the internet at Oxford University Press database, last visited 22 April 2010.

⁴⁶ D. Bowett, “Collective Self-defence under the Charter of the United Nations”, (1955–56) 32 *BYIL* 130–161, cited in Niaz A. Shah; “Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism, See *supra* note 45, at. p 99.

⁴⁷ T. Frank, “When, If Ever, May States Deploy Military Force Without Prior Security Council Authorisation”, (2001) 5 *Washington University Journal of Law and Policy*, at 68, available on the internet at Hein Online database, last visited 22 April 2010.

charter came to the conclusion that member states did not draw up article 51 to narrow down the right of self-defence under customary law.⁴⁸

Notwithstanding the inconsistency of those two scholars' approach through studying the preparatory history of the Charter, even professor Frank agrees that posture was soon challenged by the exigencies of a new age of nuclear weapons and after reading the practice of the organs of the United Nations concludes, that "the use of force by a state or regional or mutual defence system is likely to be tolerated if there is credible evidence that such first-use was justified by the severe impact of another state's indirect aggression or by the clear evidence of an impending, planned, and decisive attack by a state."⁴⁹ The author is inclined to the legality of anticipatory self-defence; moreover, an imminent threat constitutes the threat of armed attack and could be considered as an "armed attack" under article 51 of the Charter; however, pre-emptive self-defence is the response to a remote threat, a threat to peace and to this end does not leave open the possibility for self-defence.

Nevertheless, to take anticipatory action is not a right without boundaries. As mentioned above, the Caroline incident was the first example when the strict confines of anticipatory action were given. However, the Caroline framework was subject to reinterpretation and rejection in the light of recent events. A group of scholars rejected any form of anticipatory self-defence, notwithstanding its recognition as customary law, at the time when the charter was created. A second group, taking into consideration the Caroline principle, accepts them but adds that an anticipatory attack would apply only when an attack is incipient or already launched, but which has yet reach its point of impact. A third group accepts, albeit to different degrees, the proposition that Caroline allows for anticipatory action in the face of an immediate, or at least a reasonably proximate, threat of attack which has not yet been launched, but is very likely to be

⁴⁸ McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), cited in Niaz, A. Shah, "Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism", (2007), 12 (1) *JCSL* at p. 99.

⁴⁹ *Supra* note 47.

launched within the near future.⁵⁰ Finally, a last group of scholars has emerged since 11 September 2001, arguing that the term immediacy should be interpreted in connection with a threat posed by terrorists and “rogue states” suspecting of seeking weapons of mass destruction. This group would allow anticipatory action in response to the hypothetical possibility that an attack may occur at some intermediate point in the future.⁵¹

From this it is clear that the first group completely eliminates the possibility of anticipatory attack, the second and the third group more or less leaves the door open to anticipatory self-defence, while the last group of scholars tend to the very extended right of self-defence. The fourth group of scholars are more supporters of not anticipatory but of pre-emptive attack. These newly emerged groups of scholars are in the position taken in September 2002 by the USA by adopting the National Security Strategy which introduced the possibility to use force against rogue states and in response to each hypothetical, remote future threat. This position goes far from the immediacy principle established by the Caroline incident. Here more focus will be given to anticipatory self-defence and the latest development in the sphere of extending the right to self-defence to pre-emptive attack will be analyzed in the charter dealing with the threat posed by the Bush Doctrine.

Immediacy as a solid criterion for exercise of the right of self defence was recognized by the Webster formula. The controversy that self-defence is subject to a requirement of immediate exercise can be traced to two sources. The first is a general association of the international law of self-defence with personal self-defence against illegal assault under domestic criminal law.⁵² This was exemplified above. However, it would appear that there is no strict link between the international and national right of self-defence, notwithstanding the former is influenced by the scope and limitation of the latter.

⁵⁰ *Supra* note 29, T.D. Gill, at p. 365

⁵¹ *Ibid.* at p. 367.

⁵² *Ibid.* at p. 368

The second is to draw a strict line between the right of self-defence and armed reprisal which is illegal and unacceptable under international law. This question relies on lapse of time and in this regard it is interesting with respect to the notion of “immediacy”. Where resort to force is conducted immediately after an armed attack, this leaves no room for assuming such use of force as an armed reprisal, but when an act by the victim state is taken after time passes from the real attack, it looks like punishment, more an armed answer to the attacker state than exercise of the right of self-defence, of course taking into account that counting time does not include the period which is reasonably necessary for the victim state to prepare.

As stated above, the right of anticipatory self-defence is restricted. The boundaries have been established by the Caroline incident. Now we move on to analyze these three strict criteria which confine anticipatory self-defence in the war against terrorism. To demonstrate the strict borders of anticipatory self-defence is necessary in comparison of pre-emptive attack against terrorism and helps to answer the question whether there is a necessity to use pre-emptive self-defence against states harbouring terrorists.

1.3.1 The principle of “necessity”

The notions of immediacy, necessity and proportionality fall into a category which needs assessment. Therefore, each should be weighed in each particular situation on the basis of the facts. These notions cannot properly be established through an arbitrary assertion that a threat exists requiring anticipatory action in the view of the party being threatened.

In the light of the above, the necessity to use anticipatory force stems from assessing the following principles:

1. The nature and the magnitude of the threat involved. Here should be judged the magnitude of threat through considering the necessity of the use of force against this particular threat: whether the threat posed is of such gravity to invoke the necessity to use the force.

2. The likelihood that the threat will be realized unless anticipatory action is taken. It is quite difficult to determine, even after the fact, whether the threat actually existed and when that threat might have materialized. In this respect the potential victim state should consider the advantages of anticipating an attack and on the other hand the credibility of the threat to be realized. If the threat has a high level of probability that it will come true, the potential victim state has every right not to be in the position of a ‘sitting duck’ and to exercise anticipatory self-defence.

3. The availability and exhaustion of alternatives to using force. Resort to anticipatory self-defence should be last chance after exhausting all peaceful means. This is so because, before the attack occurs, the potential victim state has time in advantage to employ all other possible means. For instance in the war against terrorism, before using force states have the possibility to freeze all foundations and prevent the financing of terrorist groups. Moreover, pressure by the whole community by peaceful means can be useful. However, if after exhausting all means a threat still remains, then the only last chance to avert it would be anticipatory use of force. In this case an anticipatory attack is

completely justifiable. Moreover, it is an inherent right to realize your self-defence before others do you harm.

1.3.2 The principle of “proportionality”

The most difficult is to evaluate the proportionality of anticipatory attack, because in that case there is no prior attack to compare with and it would always be left under discussion whether a future attack would have been so massive as to justify the anticipatory attack used. Therefore a greater risk of abusing the proportionality principle arises in the case of anticipatory attack.

In the *Nicaragua* case the Court spelled out that any use of force in self-defence must be proportionate.⁵³ “Any state attempting to justify a forceful action as self-defence would be expected to show that the amount of force used was not disproportionate to the threat or attack it had experienced.”⁵⁴

The proportionality principle includes two main questions: First the degree of force would have to be proportional; and the second the duration of the action, which means that the anticipatory attack would have been strictly limited to removal of the threat.

If we consider this in conjunction with the principles established after the *Caroline* incident, it could be interpreted that proportionality of self-defence is justified by necessity, limited by that necessity and kept clearly within it. The proportionality principle includes two questions: How much is proportional? Who decides that enough is done?⁵⁵

⁵³ *Supra note* 13, Nicaragua case (1986), at para. 194.

⁵⁴ T. McCormack, “Anticipatory Self-Defence in the Legislative History of the United Nations History”, (1991) 25(1) *Israel Law Review* 1–41 at 38, available on the internet at Hein Online database, last visited 22 April 2010.

⁵⁵ The question what is enough is interesting but it is not connected to this Paper. However, in a nutshell it can be concluded that the right of self-defence is a self-judging principle but the lawfulness of the use of force can be assessed by the International Community.

Regarding the first question there are three approaches in international law and especially in response to terrorism:

(a) So called “eye for an eye”, “tit for tat” proportionality. This means that the victim state should use proportional force and proportionality is weighed in comparison with the prior “use of force”.

(b) The second approach may be called “cumulative proportionality”; proponents of this approach contend that the victim state’s forcible measures should be proportionate to an aggregation of past illegal acts.⁵⁶

(c) More disputable is the third approach, which argues for “deterrent proportionality”. Professor O’ Brien believes that counter-terror measures should be proportionate to the purposes of counter terror deterrence and defence and the referent of proportionality should be an “overall pattern of past and projected acts.”⁵⁷

This last is controversial because the victim state using force must calculate proportionality in connection with the threat faced but not realized. Therefore, to evaluate the degree and scale of a future threat is a very difficult matter; it is risky because probable damage cannot be measured in the case of probable future attacks. A clear example is the case of 11 September 2001, when one plane fell into a field in Pennsylvania. Nobody knows what would have been the real damage if the plane had reached its target, the Pentagon...

As has been shown, proportionality is very difficult to assess and there are no strict rules on how to assess it, but it is clear that judging whether the use of force in self-defence is proportional or not depends on the facts and circumstances of each case. Before giving concluding remarks on the legality of anticipatory self-defence, it is noteworthy to evaluate briefly state practice regarding this question.

⁵⁶ *Supra note 45*, Niaz A. Shah, at p 123.

⁵⁷ W. O’Brien, “Reprisals, Deterrence and Self-Defence in Counter terror Operations”, (1990) 30 *Virginia Journal of International Law*, at 472, available on the internet at Hein Online database, last visited 25 April 2010.

1.3.3 State practice

State practice can be divided in two parts: before the Charter and after adopting the Charter. Studying the pre-Charter practice of states shows that anticipatory self-defence against an imminent threat was seen as a part of a customary law right later preserved in article 51 of the Charter. Evidence of this is the Caroline incident, mentioned several times previously.

Practice since 1945, after adoption of the Charter, has not been unequivocal. However, it seems to tend to support that the right of self-defence in the Charter period continues to include an anticipatory attack in response to an imminent attack.

Some states tend to support an anticipatory attack. Among them the main supporters are the United Kingdom and the United States; they maintain that the right of self-defence also applies when an armed attack has not yet taken place but is imminent. Recognition of anticipatory self-defence is also based on historical experience, for instance, debates in the Security Council on the six day war between Israel and the Arab states, as well as Israel's attack on Iraq's nuclear reactor.

Regarding the first six day war, Professor O' Brien states that it was "a model case of anticipatory attack."⁵⁸ Moreover, it has been accepted by the whole community and use of force in this instant case was assumed as lawful. Furthermore, a Soviet draft Resolution which would have condemned Israel for unlawful use of force achieved only four votes in the Security Council and was thus roundly defeated.⁵⁹ In the General Assembly, a similar resolution was voted down.⁶⁰

In spite of support regarding the six-day war between Israel and the Arab states, the second incident, Israel's attack on Iraq's nuclear reactor, did not receive the support of the community. Moreover, this action was condemned on the basis of the statement

⁵⁸ William V. O'Brien; *The conduct of just and Limited War* 133 (1981) cited in Christopher Greenwood; "International Law and Pre-emptive use of force: Afghanistan, Al-Qaeda, and Iraq";(2003), 4 *San Diego International Law Journal*, at p. 14, available on the internet at Hein Online database, last visited 23 April 2010.

⁵⁹ *Ibid.* at p. 14.

⁶⁰ *See e.g.*, G.A Draft Resolution; 5th Emergency Special Sess.; U. N Doc. A/6717 (1967).

that Israeli failed to show that the threat was imminent.⁶¹ Notwithstanding this condemnation, it is clear that the condemnation refers to the action of Israel as it was not demonstrated that a threat from Iraq was imminent and failed to satisfy Caroline test. However, this assessment does not exclude the possibility of an anticipatory attack. Furthermore, Iraq began a justification of the 1980 invasion of Iran by relying on anticipatory self-defence, but subsequently changed its legal reasoning and argued that its attack was the answer to a prior armed attack by Iran. The USA kept the same argument while justifying shooting down a civilian Iranian airbus in 1988. In this instance the “US argued that its action had been part of the battle situation and a response to a prior armed attack by Iran.”⁶²

Therefore, analyzing these incidents tends to the conclusion that the whole community, after adoption of the Charter, are inclined to recognize anticipatory self-defence, but the heart of any dispute only lies in satisfying the Caroline principles of necessity, immediacy, and proportionality.

States’ concern regarding the legality of anticipatory attack has enjoyed a new wave since the 9/11 terrorist attacks. After this incident the whole community recognized the United States’ right to attack terrorist bases in Afghanistan, followed by Security Council Resolutions: 1368 (2001); 1373 (2001)

Before launching operation “Enduring Freedom”, both the United States and the United Kingdom informed the Security Council of the United Nations that Enduring Freedom was an exercise of individual and collective self-defence in compliance with article 51 of the Charter, which allows the use of force in self-defence against an armed attack.⁶³ The terrorist attacks were completed when the USA began the operation in Afghanistan; but under international law armed reprisals are prohibited. Thus, to avoid

⁶¹ See also, SC Res. U.N Doc S/Res/487 (1981); adopted unanimously, condemning the Israeli action.

⁶² C., Grey, *International Law and the Use of Force*, Oxford University Press, 2000, at p. 113.

⁶³ U.N. Doc. S/2001/946; Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, available on the internet at <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf>, last visited 23 April 2010.

such illegality, the US reported to the UN SC that threats from terrorists were ongoing,⁶⁴ so that operation Enduring Freedom fits within the scope of anticipatory self-defence, arguing that the threat of armed attack from terrorists is imminent and, moreover, ongoing. International support for operation Enduring Freedom was unanimous. For instance the United Kingdom was the main ally of the US. Many other states such as Germany, Italy, Japan, the Netherlands, Canada, Turkey, and the Czech Republic offered their ground troops; moreover, states such as Georgia, Uzbekistan, and Tajikistan offered their air space and facilities, whilst China, Egypt and Russia publicly expressed approval of the strikes.⁶⁵

If in the case of Afghanistan the use of force was accepted by civilized society, a great deal of controversy was given to the American invasion in Iraq.

The attack against Iraq was caused by violation of a disarmament agreement by the Iraqi party concluded after the Persian Gulf War. This prohibition is embodied in a 1991 resolution suspending the allied campaign against Iraq in “Desert Storm”.⁶⁶ However, violation of an international agreement does not amount to an armed attack triggering the right of self-defence. Of course, the United States was aware about this, and therefore, before launching the attack in Iraq, adopted its National Security Strategy and introduced a new approach towards the right of self-defence in the shape of pre-emptive self-defence against terrorists and states that harbour them.

1.4 Concluding remarks

The above analysis concerned the question of the legality of anticipatory self-defence. It was conducted by assessing the principles established after the Caroline incident; state practice before and after the UN Charter.

⁶⁴ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946, available at <http://www.un.int/usa/s-2001_946.htm>, last visited 23 April 2010.

⁶⁵ C. Henderson, “The Bush Doctrine: From Theory to Practice”, (2004), 9 (1) *Journal of Conflict & Security Law*, at p. 4, available on the internet at Oxford University Press Journals database, last visited 27 April 2010.

⁶⁶ SC Res. 687, UN. Doc. S/RES/687 (1991).

From the above mentioned facts, it may be concluded that the right of self-defence includes anticipatory attack. The possibility to justify anticipatory self-defence lay under the customary right of self-defence before adoption of the Charter. This possibility still remains under the Charter based right of self-defence. This approach is rooted in state practice, which shows the states' attitude towards this question.

It was accepted by many states that anticipatory self-defence is necessary in response to threats faced but not yet realized. Therefore, to expand the right of self-defence to that extent and include anticipatory attack within it was satisfied by state practice. Nevertheless, the right to conduct an anticipatory attack in self-defence is not right without boundaries. To this end the importance of the principles established by the Caroline incident were analyzed. Furthermore, the legality of anticipatory attack in self-defence is not itself an open door for states to use force in response to any unrealized threats. Moreover, it should be kept in mind that states can act in anticipation only within the strict confines of immediacy, necessity and proportionality.

Analysis of this issue is important before turning to the main problem of this Paper: the legality of pre-emptive attack. As demonstrated, controversy exists on the legality of anticipatory self-defence. The unanimous international support for the US and its allies' action in response to terrorist attacks in Afghanistan serves as an indication to develop anticipatory self-defence on the basis of state practice, which is capable of forming customary international law. Furthermore, it has also attempted to stretch the right of self-defence even farther to include pre-emptive attack. After the United States adopted its National Security Strategy in 2002, a great deal of controversy focused on the issue of pre-emptive attacks against states harbouring terrorists.

It is disputable whether terrorism raises the necessity to expand the right of self-defence to that extent to include pre-emptive attack. Many scholars argue that anticipatory attack is enough to combat terrorism. The legality of pre-emptive attack, threats posed by the Bush doctrine, will be discussed in detail, later, in the chapters that follow.

2 ATTRIBUTION REQUIREMENT BEFORE AND AFTER 9/11 (LOWERING THE THRESHOLD)

2.1 Definition of terrorism

The problem in defining terrorism is directly linked to the research question of this Paper. In order to use force in self-defence against state tolerated terrorism through harbouring terrorists, the main problem is what does terrorism include? Does harbouring terrorism amount to a threat to peace or is it just an armed attack which triggers the right of self-defence?

The use of terror as a means to achieve political ends is not a new phenomenon, but it has recently acquired a new intensity.⁶⁷ The first concern regarding terrorism is its definition. There is no universally accepted definition of terrorism. More than 13 conventions deal with terrorism.⁶⁸To speak about terrorism is impossible without giving a little background about the Security Council's attempt to define it.

Until 2001, resolutions did not impose any measures against terrorism, nor defined it; nevertheless, from 1985 there were several attempts to designate specific incidents and types of violence as terrorist acts. The Council's 2004 definition raises other problems, since it is non-binding (allowing States to preserve unilateral definitions) and potentially conflicts with multilateral treaty negotiations on defining terrorism.⁶⁹

The term "terrorism" was first used by the Security Council in Resolution 579 of 1985, which was adopted in response to a spate of terrorist acts in preceding years.⁷⁰

⁶⁷ Malcomn N. Shaw & David, *International law*. Cambridge, Fifth addition, 2003, at p. 1048.

⁶⁸ See in detail, 1963; 1970;1971 Conventions on hijacking of aircraft and offences on board an aircraft; 1979 Convention on taking hostages; 1971 Convention for the prevention and punishment of acts of terrorism; Convention on Terrorist bombing; 1998 International Convention for the suppression of terrorist bombing;1999 Convention on financing of terrorism.

⁶⁹ Ben Saul; "Definition of 'Terrorism' in the UN Security Council: 1985–2004;"(2005), 4 *CJIL (Chinese Journal of International Law)*, at p. 142, available on the internet at Oxford University Press Journals database, last visited 29 April 2010.

⁷⁰ Including the hijackings of a Kuwaiti aircraft in December 1984; a Jordanian aircraft, a Middle East Airlines flight, and a TWA flight in June 1985; an Egyptian flight in November 1985; seizure of the Achille Lauro in October 1985; and seizure of 25 Finnish UN soldiers by the South Lebanon Army in June 1985.

Resolution 579 condemned “all acts of hostage taking and abduction” as a “manifestation of international terrorism.”⁷¹

Terrorism is often considered through three lenses: the aim, the method, and the expected consequences. Many scholars define terrorism by focusing on the element of motive, for instance analyzing terrorism by religion, by ethno-nationalism considerations, by revolutionary concerns, by ideology. Regardless of motive, terrorist acts occur in the current world and need to be combated.

The day after the 9/11 attack, Resolution 1368 was adopted, which regarded “such acts, like any acts of international terrorism, as a threat to international peace and security.”⁷² Furthermore, UN SC Resolution 1373 required states to criminalize “terrorist acts” under their domestic law. It is widely accepted that the term “state terrorism” is not recognized by International law. However, the UN SC tried to avoid defining terrorism as an armed attack because this would imply that these attacks are attributable to the state. Nevertheless, it considered such attacks as a threat to peace and it seems that the UN SC went further. Hence, considering a terrorist attack as a threat to peace and security does not exclude the secondary role of state responsibility to be employed. In order to use force against a state which poses a threat to peace by harbouring terrorists the attribution link is still necessary.

Moreover, the term “terrorism” and disputes around this concept are interesting for development of the main question of this Paper as far as whether it is a crime which entails responsibility under domestic law or an act attributable to states and invokes state responsibility.⁷³ However, they are not mutually exclusive; existence of responsibility at domestic level does not exclude state responsibility.

⁷¹ SC Res. 579, UN. Doc. S/RES/579 (1985).

⁷² SC Res. 1368 UN Doc, S/RES/1368,(2001), para.1.Reaffirmed in the preamble of SC Res. 1373 UN Doc S/RES/1373 (2001).

⁷³ This issue is very wide and entails many works of scholars; furthermore there are two main controversial approaches about the understanding of terrorism, with some considering terrorism as a crime invoking individual responsibility, while others count acts entailing state responsibility; this is undoubtedly an interesting issue but will not be discussed in detail in the instant work.

Concerning the definition of terrorism, Professor Cassese has commented that “terrorist attacks have usually been defined as serious offences, to be punished under national legislation by national courts” and armed force was not used in self-defence to respond to such attacks.⁷⁴ In addition terrorism is a difficult phenomenon, because it has a dual character. It has a criminal and at the same time a military nature. Therefore to combat terrorism entails the general law enforcement mechanism under domestic law and military operations, such as use of force at international level.

In the instant work the term “terrorism” will be addressed as acts attributable to states and invoking state responsibility, to discuss the legality of triggering the right of pre-emptive self-defence against such states or resorting to authorized pre-emptive strike. With respect to the research question, terrorism will be considered as an act of a state tolerating terrorists on its own territory by failing to prevent or punish terrorism on the basis of tolerating them or on the basis of inability to take appropriate measures.

Hirschman gives a more political categorization and distinguishes between terrorism supported by a state and terrorism tolerated by the state.⁷⁵ The first category is well known as state sponsored terrorism and entails state responsibility; while the second category is more growing and disputable. Regarding the second category, a sensitive issue is imposing state responsibility and this is connected to the rules of attribution. Moreover, focus will be given to state tolerated terrorism in the shape of harbouring terrorists. This is necessary for discussing pre-emptive self-defence against hosting states, because secondary norms of state responsibility trigger operation of the primary rules of the use of force, without passing through the attribution rules, so that it is impossible to speak about the right of self-defence according to the inter-state reading of article 51 of the UN Charter. Furthermore, this Paper addresses the conflict

⁷⁴ A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, (2001) 12(5), *EJIL*, at p. 993, available on the internet at Oxford University Press Journals database, last visited 27 April 2010.

⁷⁵ K. Hirschmann, *Terrorismus* (2003), at 25–33; cited in Noëlle Quéniévet; “The World after 11 September, Has It Really Changed?” (2005), 16 *EJIL*, at p.562, available on the internet at Oxford University Press database, last visited 1 May 2010.

management (use of force) approach against terrorism, which is different from the domestic law enforcement approach. The former applies the law of the use of force, state responsibility and customary inherent right of self-defence which includes anticipatory self-defence and might include pre-emptive self-defence. Therefore the discussion on use of force in self-defence and especially pre-emptive self-defence against states harbouring terrorists is focused on these aspects.

2.2 Attribution threshold concerning terrorist attacks on states

2.2.1 ILC article 8; *Nicaragua* case, *Tadic* case

This question is connected to the previous chapter where the traditional inter-state reading of article 51 of the Charter was demonstrated. Article 51 of the UN Charter does not specify that an armed attack has to originate from a state. However, this may be implied since the UN Charter is a treaty binding on states and imposing obligations on states. According to the traditional understanding of the right of self-defence under article 51, for triggering self-defence it is necessary that an “armed attack” occur on the part of a state. But a radical reading of this article tries to take self-defence out of its regulatory context, fails to recognize that it is the only exception from the comprehensive ban on inter-state use of force and is focused on an attack by non-state actors. However, this re-reading of self-defence has provided the justification to use force against terrorists, but it could not justify violation of the sovereignty of the state where terrorists are based. Moreover, this paradigm leaves unexplained why state sovereignty could be violated by a victim state only on the basis of the assumption that terrorists are based in that state without examining any attribution link, or state involvement.

In contrast, the Court in the *Nicaragua* case did not rule out the possibility that a non-state attack could be promoted to the level of state attacks, if the state was involved sufficiently enough and to judge this involvement the court adopted the “effective control” test. To this end, is necessary to elaborate the attribution rules under state responsibility. Consequently, it is important for the victim state to respond, to establish state responsibility of the hosting state from which the terrorist attack originated.

Analyzing the issue of attribution of terrorist attacks to states begins from the ILC articles on State responsibility adopted in 2001 and particularly by article 8. This is an article which is often quoted with regard to state connected terrorism. This article deals with the question when the state is not directly involved in the commission of wrongful

acts, moreover the acts are committed by private persons but the state is still held responsible through the attribution rules. Article 8 of the ILC articles states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.⁷⁶

From this is clear that to establish state responsibility for the acts of individuals it is necessary that private persons should have acted according to the instructions or under direction or control of that state. It is impossible to speak about the attribution rules without discussing the *Nicaragua* case. The degree of control which must be exercised by the state in order to attribute conduct to that state was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case.

It is argued whether the “effective control test” of attribution is still valid in the war against terrorism. It is noteworthy to say that the ICJ established a high threshold for attribution in the *Nicaragua* case. Thus, the threshold for state responsibility should be drawn on the basis of harbouring terrorists when the state tolerates or is unable to prevent terrorist attacks and punish the perpetrators. Moreover it breaches a primary obligation and poses a threat to peace. In order to use force against such a state the lowered threshold of attribution should be applied to make states responsible for harbouring terrorists.

In *Nicaragua* the Court distinguished between two groups of individuals not having the status of *de jure* organs of state but nevertheless acting on behalf of that state. The first group is totally dependent on the foreign state - paid, equipped, generally supported by, and operating according to the “planning and direction” of organs of that state; while the second group is also paid and equipped by that state, but nevertheless retaining a degree of independence from that state. (These were Nicaraguan rebels)

The court stated with respect to the first class of persons that this entails state responsibility, while regarding the second group of individuals that retained

⁷⁶*ILC Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, article 8.

independence, the Court took a different stand with regard to acts performed by the rebels, but finally spelled out that US responsibility spreads as far as and to that extent as the US was involved directly in unlawful actions, but the acts of rebels were not attributed to the USA.

Moreover, the Court went on to a stricter test of attribution - "effective control"; in this regard, the court meant that the US should have "directed or enforced perpetration of the acts contrary to human rights." (Para. 115) It seems clear from these words that to establish state responsibility a very strict attribution requirement is necessary: the *issuance of directions* to the *contras* by the US concerning specific operations (such as indiscriminate killing of civilians), that is to say, the *ordering* of those operations by the US, or (2) the *enforcement* by the US of each specific operation of the *contras*, namely forcefully making the rebels carry out those specific operations.⁷⁷

In contrast to the "effective control" test the ICTY took a way through an "overall control" test defining the attribution rules in the *Tadic* case. To financing, equipping, and directing was also added *coordinating* or *helping* in the general planning of the group's activity.⁷⁸

2.2.2 Forms of relationship between terrorist groups and the hosting state

To look the forms of relationship between terrorist groups and the state helps to highlight what kind of relationship could be considered under the term "harbouring". Concerning this issue, four forms of relationship might be seen:

1. Terrorist groups are *de jure* or *de facto* organs of the state. In both situations the state is directly responsible for acts committed by such organs according to article 8 of the Articles on State Responsibility. In assessing whether terrorist groups constitute *de facto* organs of the state, the effective control test applies.

⁷⁷ Antonio Cassese: "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia"; (2007), 18 no. 4 *EJIL*, at 653; available on the internet at Oxford University Press Journals database, last visited 1 May 2010.

⁷⁸ See the case of Duško Tadić, Case No.: IT-94-1-A, 15 July 1999, para. 125-130.

2. The state supports terrorists groups. In the instant case, there is no situation when the state exercises effective control over the terrorist groups; to the contrary, the state's action amounts to a breach of the negative obligation to refrain from encouraging or promoting terrorist organs. This obligation is also incurred from the Declaration on Measures to Eliminate International Terrorism adopted in 1994.
3. The state tolerates terrorist groups. So the state is not actively involved in terrorist activity, but tolerates it. Thus, this is a breach of the positive obligation to take all measures to prevent or punish terrorist conduct from the state side.⁷⁹
4. The state is genuinely unable to prevent or punish terrorists; however this does not constitute a breach of international obligation, because that state can prove that it has fulfilled the requirement imposed by due diligence. In this regard the unilateral use of force against such a state is prohibited. However use of force under UN SC authorization seems to be possible and it would be an operation to help the state to punish and prevent terrorism on its territory.

In the first case to attribute the acts of terrorist groups to states is not disputable, while the other three cases entail indirect involvement of the state and need more evidence to trigger the right of self-defence. Whilst among them the second constitutes high support to the terrorist groups from the state side, breach of the negative obligation is obvious. Moreover, the last two cases amount to indirect involvement of the state and a lesser degree of support from the state. The author is inclined to consider the *last two situations* under the one *common notion of harbouring terrorists*. Using the territory of states for launching terrorist attacks without the state's direct or indirect involvement will be considered as an act of harbouring terrorists. Furthermore, there is a breach of the due diligence obligation which needs to be responded to for the sake of peace. The following sub-chapter will address the question of attribution concerning the case of harbouring

⁷⁹ Tarcisio Gazzini; "The rules of the use of force at the beginning of XXI century"; (2006) JCSL, at p. 333, available on the internet at Oxford University Press Journals database, last visited 22 April 2010.

terrorists. This will lead to assessing whether it is possible to invoke anticipatory self-defence against that state or to trigger pre-emptive self-defence or to resort to a pre-emptive strike authorized by the UN SC.

2.2.3 State tolerated terrorism in the scope of harbouring terrorists

The necessity to lower the attribution threshold emerged after the 9/11 attacks. Thus, the main focus is directed to states which harbour terrorists. Harbouring terrorists is an unlawful act according to many international agreements or conventions. Under the notion of harbouring terrorism will be considered the last two situations discussed above. With respect to harbouring, terrorism will be viewed through the following two lenses: a) a state tolerating terrorists c) enabling states to take appropriate measures against terrorists.

The “effective control” test established by the ICJ in the *Nicaragua* case seems very high. For this reason it has been criticized several times and after the 9/11 attack there has been a great change with respect to lowering the attribution test. The traditional paradigm for invoking state responsibility for terrorist attacks goes by assuming terrorists as an agent of states. In this regard article 8 of the ILC articles is used. Article 8 of the ILC Articles refers to active state involvement in commission of wrongful acts by individuals over whom the state exercises control. Therefore establishing state responsibility in the case of harbouring terrorists is out of the scope of article 8 of the ILC Articles on State Responsibility.

It is clear that after 9/11 and the war in Afghanistan the “effective control” test is not applicable in response to terrorist attacks in the context of self-defence. But what is applicable now is controversial. The level of support or even merely hosting, harbouring or tolerating terrorists is sufficient to establish state responsibility. Lowering the threshold to harbouring terrorists seems acceptable and suits international law principles.

Therefore, the issue should be viewed through the secondary rules of state responsibility. Article 1 of the ILC Articles on State Responsibility states: every internationally wrongful act of a state entails state responsibility. Therefore to establish state responsibility for harbouring terrorists should be an internationally wrongful act of that state. What is an internationally wrongful act and what the elements are is spelled out in article 2 of the ILC Articles on State Responsibility. According to this article the two elements are: first, breach of an international obligation and second, the breach is attributable to the state:

There is international wrongful act of a state when conduct consisting of an action or omission: (a) is attributable to the state under international law; and (b) constitutes a breach of international obligation.⁸⁰

Therefore in the case of harbouring terrorists establishing state responsibility should be passed through this paradigm. The primary obligation breached by the state in the case of harbouring terrorists is the following: providing terrorists with a "safe haven." For instance, this obligation was imposed on states by UN SC Resolution 1373 (2001) which demands that states must a) refrain from supporting terrorists; b) deny safe haven to those who finance, plan, support or commit terrorist acts or harbour them and *prevent the use of their territory for international terrorism*.⁸¹

From this derives the state obligation to deal with terrorism on its own territory, punish terrorists, and prevent terrorist acts. This entails not only incorporation in the domestic legislation of norms to consider terrorism as a crime and punish the perpetrators. Moreover, it demands from the state active action to prevent terrorist attacks. Therefore, the main duty imposed on state organs is to act against terrorism and resort to all appropriate means. Thus, in this case violation of an international obligation is visible when state organs are inactive. Hence, in the matter of harbouring terrorists, when the state tolerates them, this constitutes a breach of primary obligation. Breach of international obligation exists when the state fails not to encourage and not to provide a

⁸⁰ *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, article 2.

⁸¹ *Supra* note 39, SC Res. 1373 UN Doc S/RES/1373 (2001), para. 2.

safe haven for terrorists. After establishing a breach of primary obligation it is necessary to consider the attribution rules to finally establish state responsibility. The general rule is that the state is responsible for the acts of its own organs. According to article 4 of the ILC Articles on State Responsibility “the conduct of any state organ should be considered an act of state.”

The word conduct means an act or omission of a state organ. With respect to harbouring terrorists, it amounts to omission by state organs to prevent terrorist attacks or to punish terrorists. Moreover it is attributed to the state and entails state responsibility. Furthermore, it was suggested that harbouring terrorists does not constitute strict liability, but rather to “embody a due diligence test requiring reasonable measures of prevention.”⁸²

There is also a duty under international law which obliges the state to observe the due diligence obligation. This means to preserve certain standards of public order. According to the due diligence obligation the state is obliged to take all reasonable measures in order to prevent illegal action or harm to be caused to a third state. This obligation was imposed on states by adopting the Declaration on Friendly Relationship in 1970:

Every state has the duty to refrain from organizing, instigation, assisting or participating in acts of civil strife or terrorist acts in another states or acquiescing in organized activities within its territory directed towards the commission of such acts, when acts referred to in the present paragraph involve a threat or use of force.⁸³

This is visible as overlapping with breach of other international obligations, such as breach of the due diligence obligation. A state tolerating terrorism directly breaches the due diligence obligation and this is one more additional argument for invoking state responsibility. For instance, the Declaration on Measures to Eliminate International

⁸² Helen Duffy, *The war on terror and the framework of International Law*, at p.57, published by Cambridge University press, 2005.

⁸³ *Declaration on Principles of International law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G. A.Res.(XXV), at 123, UN, Doc. A/8082,(Oct. 14 1970).

Terrorism adopted in 1994 obliges states to refrain from organizing, instigating, facilitating, financing or *tolerating* terrorist activities and to take practical measures to ensure that their territories are not used for terrorist installations, training camps or for the preparation of terrorist acts against other states. This is a clear example of imposing on states the due diligence obligation. Moreover, the due diligence obligation is accepted in case law. In 1947 the ICJ held in *Corfu Channel*: “general and well-recognized principles” included “every state not to knowingly allow its territory to be used for acts contrary to the rights of the other state.”⁸⁴ If this principle is applied to terrorist activities then the state has an obligation not to permit its territory to be used for terrorist activities. If harbouring terrorism is as such a breach of the international obligation of due diligence then it leads to the same result, establishment of state responsibility, and goes through the same paradigm, breach of international obligation and attribution. Hence, it can be concluded that the host state is in breach of international obligation towards a third country – its due diligence duty - which amounts to an international wrongful act and thus can be held responsible for such a breach.

The second situation of harbouring, when the state is unable to punish or prevent terrorism does not entail state responsibility; acts are not attributed to the state. In this regard the state does not breach the due diligence obligation. Nevertheless, the threat posed by terrorism is not neutralized and still needs to be combated.⁸⁵

Consequently, harbouring terrorists could be considered as a lowered threshold for attribution and a pre-condition for establishing state responsibility, through the ILC

⁸⁴ *Corfu Channel (United Kingdom Great Britain and Northern Ireland v. Albania)*, ICJ judgment 1949, at p. 22.

⁸⁵ In this situation to allow the use of force against the host state would be a pure violation of state sovereignty and territorial integrity, furthermore amounting to violation of article 2 (4) of the UN Charter. Nevertheless, the solution would be the consent of the host state to permit the victim state to attack the terrorists harbourharboured on that territory. In the instant situation a possible solution would also be invocation of state necessity. This is reduced to cases in which (a) the urgency of the situation forces the acting state to not wait until the consent of the territorial state or the Security Council authorization; (b) the territorial state refuses such permission and the Security Council does not give authorization.⁸⁵ However, the definition of urgency should be approached with caution and should be carefully assessed before resorting to force against such a state to overcome the violation of state sovereignty. See in detail Tarcisio Gazzini; “The rules of the use of force at the beginning of XXI century”; *Journal of conflict and security law*

articles; but it still remains disputable whether the use of force against such a state is justifiable. Moreover, establishing state responsibility for harbouring terrorists is necessary, otherwise this would be a good chance for terrorists to escape from responsibility and make them “untouchable”. In the Al-Qaeda case, their aim was not to become the organs or agent of the state of Afghanistan simply because the absence of statehood and state sponsorship makes Al-Qaeda ‘untouchable’ through the established rules of international law.⁸⁶ It was a good possibility to flee from responsibility, even for Afghanistan, because the action of Al-Qaeda did not fit the traditional understanding of the self-defence paradigm and state responsibility. Therefore, the necessity to lower the attribution threshold emerged after the 9/11 attack.

2.2.4 Use of force in self-defence against states harbouring terrorists

Christine Gray notes that before 11 September 2001 few states were willing to openly support the right to use force against a state where terrorists operated, in the absence of complicity of that state in terrorist acts.⁸⁷ In this regard President Bush announced that there would be no distinction between terrorism and those who harbour terrorists. This statement was used to justify Operation Enduring Freedom conducted in Afghanistan in 2001.

Whether the lower threshold could change the right of self-defence spelled out in article 51 of the UN Charter, it is noteworthy to recall Professor Nollkaemper, who speaks about the correlation between secondary norms, attribution rules, and the primary rules on use of force. Nollkaemper argues whether lowering the threshold to attribution can amount to a threat to peace violating article 2 (4) of the UN Charter to

⁸⁶ Frédéric Mégret, “War? Legal Semantics and the Move to Violence,” (2002), 13(2) EJIL, at p. 365, available on the internet at Oxford University Press Journals database, last visited 30 April 2010.

⁸⁷ Andre Nollkaemper: “Attribution of forcible acts to states: Connections between the law on the use of force and the law of state responsibility,” in Niels Blokker and Nico Shrijver (eds), *The Security Council and the Use of Force*, Leiden, Boston, Martinus Nijhoff Publishers, (2005), at p. 136.

trigger the right of self-defence and analyzes it with respect to article 103⁸⁸ of the UN Charter, which speaks about the primacy of Charter based obligations in connection to other obligations for the state. According to the approach of Professor Nollkaemper, a secondary rule can not change a primary rule such as the requirements of article 103 of the UN Charter.⁸⁹ Nonetheless, the mutual coexistence of the law on state responsibility and the use of force are noteworthy with regard to the right of self-defence, moreover for strictly elaborating the conditions of self-defence.

Contrary to Professor Nollkaemper, the author tends to the view that lowering the threshold to harbouring does not in itself constitute a change in a primary rule such as the right of self-defence. This can be exemplified by the following argument. First when an armed attack occurs or an imminent threat exists of an armed attack occurring originating from a state harbouring terrorists, the traditional paradigm of self-defence still remains. Consequently, there is an armed attack which triggers the right of self-defence or there is an imminent threat of an armed attack which entails resorting to the anticipatory self-defence doctrine. Thus, in the situation of a lowered threshold the main requirement to trigger the right of self-defence still remains the same: an armed attack. However, to make this attack attributable to a state goes through a lowered requirement such as harbouring the terrorists who conducted these attacks.

In a case when an armed attack has not yet been conducted and the possibility of it occurring is remote, this constitutes a threat to peace and not an armed attack, but employment of pre-emptive self-defence in this regard amounts to a change in the primary rule because it seems to trigger the right of self-defence in response to the threat posed by states harbouring terrorists and is unacceptable. The author is inclined to see Professor Nollkaemper's argument in this respect and agrees that there is no change of a primary rule by a secondary norm. However, this change is visible on the basis of pre-

⁸⁸ The Charter of the United Nations; Article 13: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

⁸⁹ *Supra note 87*, at pp. 148-155.

emptive self-defence in conjunction with harbouring terrorists. But when harbouring terrorists and breach of the due diligence obligation is employed against an actual armed attack to trigger the traditional understanding of the right of self-defence, this change is not visible.

Moreover, this seems to be one more argument against pre-emptive self-defence with respect to other arguments which will be suggested below. Therefore, to avoid such changes, it is clear that pre-emptive self-defence should be transferred to the realm of the Security Council, because according to existing law the Security Council has the right to authorize the use of force in response to the threat.

The use of force against states harbouring terrorists should be pre conditioned, and the confines for this possibility strictly defined. When speaking about harbouring terrorists two different situations should be considered, with two different solutions. The first is when an armed attack is conducted or is an imminent threat of occurring from the hosting state and the second is when an armed attack has not yet occurred and there is only a possibility of it being conducted. The former situation definitely amounts to an armed attack and triggers the right of self-defence and even the anticipatory self-defence doctrine. The latter is connected to the pre-emptive self-defence doctrine and is the main question of this Paper. Hence, the possibility and legality of pre-emptive self-defence in this regard is precisely elaborated in a separate chapter below.

2.3 Concluding remarks

The instant chapter analyzed the correlation between the norms of state responsibility, in particular the attribution rules and the right of self-defence against non-state actor terrorists. These two sources of norms have become more connected after announcement of the war on terror. According to the traditional paradigm of self-defence, it is necessary that an armed attack originate from the state side. Therefore in the war on terror it is useful to employ the rules of attribution to trigger the right of self-defence.

The above chapter discussed the attribution threshold according to the *Nicaragua* and *Tadic* cases and moving step by step to lowering the threshold of attribution towards simply harbouring terrorists. The highlight point of the instant chapter was the use of force in self-defence against states harbouring terrorists. This was divided into two separate situations: the first, an armed attack originates or is an imminent threat of originating from the hosting state while in the second there is no armed attack but the fact of harbouring terrorists poses a threat to peace and security.

To sum up the previous chapters, and especially two important issues discussed above, namely the legality of anticipatory self-defence and use of force against a state harbouring terrorists, the following could be concluded. First, concerning anticipatory self-defence against terrorism, many states still believe that this is not lawful under the UN Charter, while “there are a number of important states that tend to take a contrary view” and therefore “there is no universal agreement as to the illegality of anticipatory self-defence against terrorism.”⁹⁰ Second, the use of force against states harbouring terrorists is lawful self-defence, but “subject to some stringent conditions.”⁹¹ To establish a strict watershed between armed reprisals, which is prohibited, and the legal use of force against states harbouring terrorists, the main focus should be on the principle of immediacy and proportionality.

The analysis conducted above helps to give on the one hand a background to turn to “The Bush Doctrine” and on the other hand to analyze the legality of pre-emptive self-defence within the scope of international law. Furthermore, the next Chapter will elaborate the threat to peace posed by “The Bush Doctrine” and solutions in the frame of the UN Charter.

⁹⁰ Antonio Cassese; *International Law*; Second edition by Oxford University press 2005; at p. 476.

⁹¹ *Ibid.*

3 PRE-EMPTIVE SELF-DEFENCE: LEGALITY AND CHALLENGES

3.1 The Bush Doctrine

“We must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge.”⁹²

The research question of this Paper is mainly focused on two aspects of the Bush Doctrine and the main purpose is to assess how this corresponds with international law. Therefore, it is noteworthy to dedicate a separate sub-chapter and to briefly summarise what the Bush Doctrine involves. This helps to turn to the legality of pre-emptive self-defence in the light of ongoing discussion.

The Bush Doctrine is a phrase used to describe the United States National Security Strategy, especially the foreign policy principles of former United States president George Bush. This phrase was first used by Charles Krauthammer in June 2001.⁹³ The Doctrine is used to describe two aspects: 1. The policy of the United States to secure itself against countries which harbour terrorists, which was realized in Afghanistan in 2001. Moreover, the above chapter analysed the rules of attribution and how the term “harbouring” fits them. 2. The policy of the United States to conduct pre-emptive war against states and regimes within these states that represent a potential threat to the security of the United States.

These two principles have been fulfilled in reality by the United States. Examples are: The Afghanistan war in 2001 on the basis of the assertion that the Afghan

⁹² Speech by George Bush: *West Point Grads Answer History's Call to Duty*, Washington, June 1, 2002. available on the internet at <http://www.defense.gov/news/newsarticle.aspx?id=43798>, last visited 10 May, 2010;

⁹³ <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/12/AR2008091202457.html>. last visited 10 May, 2010;

government was in breach of its international obligation and was providing Al-Qaeda terrorists with a “safe haven”. The second example is the Iraq war in 2003. The argument used to attack Iraq was that it was developing weapons of mass destruction (WMD), breaching its international obligations and posing a threat to security.

In 2006, the National security Strategy of the USA reaffirmed the controversial doctrine of pre-emptive self-defence introduced in 2002 with the same document. These two documents underline the necessity to avert future attacks from those states by using pre-emptive self-defence against such states. However, the 2002 National security Strategy slightly refers to international law and mentions that for centuries international law had recognized that nations need not suffer an armed attack before taking measures to defend themselves. Therefore, it is worth assessing the legality of pre-emptive self-defence, the threats posed by this new attitude and the advantages of realizing this doctrine in reality.

3.2 Admissibility of pre-emptive self-defence: arguments for and against

This present sub-chapter analyzes the legality of pre-emptive self-defence in light of the previous discussion and focuses on comparison between pre-emptive self-defence and the anticipatory doctrine. This is necessary to make a distinction between them and to see the necessity of pre-emptive self-defence.

Moving one step forward from anticipatory self-defence will confront the pre-emptive self-defence doctrine. Introducing the doctrine of pre-emptive self-defence, the main argument was that new challenges such as terrorism and states possessing WMD should be addressed by a new solution. It is clear that pre-emptive self-defence is broader than merely accepted anticipatory self-defence

In 2006 the National Security Strategy was spelled out: “To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-

emptively in exercising our inherent right of self-defence.”⁹⁴ From this statement it could be assumed that this is an implicit reference to the inherent right of self-defence prescribed in article 51 and an attempt to consider pre-emptive action in the ambit of the right of self-defence.

Scholars who consider pre-emptive self-defence as legal action under international law base their argument on the expanded understanding of the right of self-defence. In addition, they stipulate that the threat posed by terrorism showed the necessity to change the traditional understanding of the right of self-defence.

Regarding the first argument, the first chapter of this work analyzed the expanded right of self-defence in light of anticipatory self-defence. If the legality of anticipatory self-defence is a quite arguable issue in the current world, then the lawfulness of pre-emptive self-defence is even more disputable. The first chapter concluded that although anticipatory self-defence does not entirely fit the traditional paradigm of self-defence under article 51 of the UN Charter, its legality can be caused by a new threat such as terrorism. However, invoking such a right is not without borders and is possible only on an exceptional basis. This means that anticipatory self-defence is not a widely accepted form of self-defence but its lawfulness depends on the circumstances.

Taking into consideration this approach, the legality of pre-emptive self-defence is more questionable. Pre-emptive self-defence enjoys lack of argumentation: through the traditional paradigm of self-defence the use of force is conditioned by previous use of force, such as occurrence of an armed attack. If in the case of anticipatory self-defence the notion of armed attack could be expanded to an imminent threat of an armed attack, in the case of pre-emptive self-defence such a possibility is quite obscure. Concerning the latter, reference is given to a future possible attack from a state harbouring terrorists. Put another way, pre-emptive use of force in self-defence against states harbouring terrorists or possessing WMD is based on the argument that future, potential attacks might originate from those states.

⁹⁴ The National Security Strategy of the United States of America, 2006.

Hence, pre-emptive self-defence expands the right of self-defence as far as to remote threat of attacks. Scholars against pre-emptive self-defence stipulate that the notion of “armed attack” cannot include potential threats of attack because at least a threat should meet the requirement of immediacy and moreover the principle of necessity under the well-known Webster Formula. For the sake of anticipatory attack it could be assumed that the teleological understanding of article 51 and especially the concept of “armed attack” may contain an imminent threat of attack but definitely not possible threats of attack.

Furthermore, to expand the right of self-defence to a pre-emptive strike it is necessary to formulate unequivocal state practice which will contribute to establishing a customary rule and in this way a pre-emptive strike could be reconciled with article 51 of the UN Charter. Therefore, state practice should be looked at, that is, what is a state’s attitude towards pre-emptive self-defence.

The main supporters of pre-emptive self-defence are three states: Australia, the USA and the UK. Australia side by side with the USA was one of the strongest supporters of pre-emptive self-defence. It issued *Australia’s National Security Strategy: A Defence Update 2003* before the invasion in Iraq. This strategy also referred in general to use of military action to prevent proliferation of WMD and use of force against rogue states and terrorists, where peaceful efforts had failed.⁹⁵

The UK was also inclined to promote pre-emptive self-defence. This could be exemplified by the speech of State Secretary of Defence John Reid on 3 December 2006. He focused in his speech on the one hand on anticipatory self-defence and said that there was a need to consider whether the international framework covers the threat posed by terrorists, the circumstances in which states may need to take action to deter an imminent threat. On the other hand, John Reid touched on the issue of pre-emption and said:

⁹⁵ Australia’s National Security Strategy: A Defence Update 2003, available on the internet at <http://merln.ndu.edu/whitepapers/Australia-2003.pdf>, last visited 3.05.2010.

Another specific area of international law we perhaps need to think more about is whether the concept of imminence—i.e. the circumstances when a state can act in self-defence without waiting for an attack—is sufficiently well-developed to take account of the new threats faced.⁹⁶

In addition, John Reid said that there was a need to consider the legality of pre-emptive strike again. This statement by a UK official clarifies UK support for pre-emptive self-defence. Also, Japan repeated several times that it might take pre-emptive self-defence against North Korea; this assertion was made in 2006 in response to North Korea's test-firing of ballistic missiles.

The main argument of states supporting pre-emptive self-defence is that they have a right to act against a threat posed by states harbouring terrorists "before they are fully formed"⁹⁷ Nevertheless, the US, the United Kingdom and Australia tried to avoid use of the notion of pre-emptive self-defence in operation Iraqi Freedom. They relied on the authorization given by the UN SC by a combination of resolutions. As the action was pre-emptive, it was claimed as having been authorized by the UN rather than to constitute pre-emptive self-defence.⁹⁸ Indeed, among those states only the USA mentioned self-defence with a very brief and vague indication of pre-emption.⁹⁹ In its letter submitted to the Security Council, the USA said:

The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.¹⁰⁰

⁹⁶ Royal United Services Institute for Defence and Security Studies, UK, 3 April 2006, available on the internet at www.mod.uk, last visited 22 April 2010.

⁹⁷ United States National Security Strategy 2002.

⁹⁸ Taft and Buchwald, "Preemption, Iraq and International Law"(2003),97 *AJIL*, available on the internet at Hein Online database, at p. 97, last visited 20 April 2010.

⁹⁹ Cristine Gray; "The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA," (2006), 5, *CJIL*, at p 560; available on the internet at Oxford University Press Journals database, last visited 7 May 2010.

¹⁰⁰ UN Document S/2003/351, 21 March 2003.

However the United Kingdom and Australia in their letter to the Security Council did not make any reference to the right of self-defence.¹⁰¹This exemplifies reluctant state practice towards pre-emptive self-defence. The only strong supporter of pre-emptive self-defence is the United States, but even the US is very cautious about using it in practice. This could be reasoned by the controversial nature of the pre-emptive self-defence doctrine.

Now let us look at international practice toward pre-emptive self-defence beyond the states. The International Court of Justice has several times tried to avoid discussion on the legality of expanding the notion of self-defence and for this showed its unreadiness for the pre-emptive self-defence doctrine. In the *Wall Advisory Opinion*¹⁰² and in the *Armed Activities on the Territory of Congo (DRC v. Uganda)*¹⁰³ the court followed the restrictive approach of self-defence established in the *Nicaragua* case.

Furthermore, it is worth mentioning a UN World Summit which took place in September 2005. Its main purpose was to consider UN reform with respect to the collective security system to address new threats posed by terrorism and states possessing WMD. The World Summit Outcome document did not follow even the anticipatory self-defence doctrine and said: “the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.”¹⁰⁴ There was no significant support towards the new pre-emptive self-defence doctrine. Even the Western States did not widely accept this new doctrine. Moreover, NATO does not include such a doctrine in its security strategy.

Consequently, it could be concluded that international practice is very reluctant to promote pre-emptive self-defence, notwithstanding that all states are aware about threats posed by terrorism. Therefore, in the absence of precise state practice is difficult to speak about establishing a customary rule of pre-emptive self-defence.

¹⁰¹ UN Documents S/2003/350, S/2003/352, 20 March 2003.

¹⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Reports, para. 87.

¹⁰³ *DRC v. Uganda*, (DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA), 2005 ICJ, para. 143.

¹⁰⁴ UN Document A/60/1, 24 October, 2005, para. 79.

The states' prudent attitude towards the pre-emptive self-defence doctrine is caused by the following circumstances. Firstly, it is difficult to overcome possible abuse of the right of self-defence. Secondly, it might serve as a legal weapon in the hands of a powerful state to attack and invade states which are undesirable to them. Furthermore, it could lead to chaos and instability in the world. Establishing the practice of pre-emptive self-defence by the USA might be dangerous for the whole community and achieve the opposite result. Instead of ensuring peace, pre-emptive self-defence could have the opposite outcome, a threat to peace. For instance, pre-emptive self-defence can serve as justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for North Korea to attack South Korea.

Therefore, the United States has tried to avoid establishing a precedent. At the West Point Commencement in 2002, the president of the USA reiterated that the USA has a right to make the choice unavailable to others, yet the United States is equal before the law with all other states.¹⁰⁵

This means that such an attitude may turn to further abuse of international law. If we consider that pre-emptive self-defence is available only to powerful states, it will tend to polarization of the World and might have more severe consequences, rather, abuse of the right of self-defence. Moreover, it is contrary to the core principles of international law, because at the international level all states are equal and have the same rights. So, to permit the right of pre-emptive self-defence to one state will establish the practice and will make it allowable to all states. Therefore, no derogation is possible for the sake of one state.

The other danger posed by the pre-emptive self-defence doctrine is unilateral invocation of that doctrine. This threat was also realized by the USA when Russia intensified measures against the Chechens within its own borders and has also threatened action against those in Georgia. The main argument of Russia in this regard

¹⁰⁵ Mary Ellen O'Connell; "The Myth of pre-emptive Self-defence"; published by the American Society of International Law 2002; at p. 19.

was invocation of the right of self-defence against a remote threat possessed by a state hosting terrorists. Russia, in its letter to the Security Council on the first anniversary of September 11, used language reminiscent of that of the US in claiming the right to use force in self-defence against terrorists.¹⁰⁶ This example shows the threat posed by unilateral use of a pre-emptive strike.

“Pre-emptive self-defence,[...], is a military action against a potential adversary in advance of a suspected attack”¹⁰⁷ From this statement it is clear that the legality of pre-emptive self-defence relies only on suspicion. Therefore to leave assessment of suspicion only to one state would be wrong. It is not enough for the state side to assert that there is a reasonable suspicion of attack. Even reasonable suspicion needs to be assessed by a collective organ, to compare all the facts and conduct some investigation. The recent past shows the wrongfulness of basing an attack on suspicion: “the aftermath of the conflict due to Iraq not having harboured any terrorist group within the state and any WMD, or serious programmes of WMD, having yet to be found by the Iraq Survey Group.”¹⁰⁸

Furthermore, mere reference to suspicion of a future attack does not fit the requirement of article 51 of the Charter. Because the main requirement for invoking this right is an armed attack, contrary to an imminent attack which could fall under the scope of the notion of armed attack, suspicion of a future attack is more liable to amount to a threat to peace.

Therefore, the main argument against the pre-emptive self-defence doctrine will be that a potential and remote threat of attack before an armed attack originates from the hosting state amounts to a threat to peace. Following this assumption, the treatment will

¹⁰⁶ Cristine Gray, “The USA national Security Strategy and the New ‘Bush Doctrine’ on Preemptive Self-defence”, (2002), *CJIL*, at p. 446, available on the internet at Oxford University Press Journals, last visited 5 May,2010.

¹⁰⁷ Tarcisio Gazzini; “A Response to Amos Guiora: Pre-Emptive Self-Defence against Non-State Actors?”,(2008), *CSJIL*, at p. 29, available on the internet at Oxford University Press Journals database, last visited 7 May 2010

¹⁰⁸ Christian Henderson; “The Bush Doctrine form the Theory to practice”; 2004, 9 (1), *CSJIL*, at p.15. available on the internet at Oxford University Press Journals database, last visited 7 May,2010.

be different, taking pre-emptive self-defence from the unilateral scope to use force and move to collective self-defence. This solution will be analyzed in the final chapter.

Pre-emptive self-defence tends to undermine the general prohibition on the use of force. To go further assessing the credibility of pre-emptive self-defence, the opinion of the attacked state should be taken into consideration. If the attacker bases the legality of its attack on pure suspicion of a future attack, in this case the responding state should also invoke the right of self-defence claiming that it is the victim of a real “armed attack”. Thus, such a situation will lead to abuse of the right of self-defence when both states involved in armed hostilities are basing their argument on the inherent right of self-defence. It will obscure the situation and consequently will legalize the war, which is contrary to the purpose of the UN Charter.

Pre-emptive self-defence poses more threats to peace than advantages for the sake of peace. An additional argument to the illegality of pre-emptive self-defence can be its assessment within the ambit of the principle of proportionality because pre-emptive self-defence is directed to a remote attack so that assessment of the degree of risk of future attack is impossible.

While discussion of anticipatory self-defence followed the view that it leaves a high probability of abuse of the principle of proportionality, this is even more visible in the case of pre-emptive self-defence. With respect to pre-emptive self-defence it is not only difficult to weigh on the one hand the scale and degree of probable attack, but it is not credible to make such an assessment. Moreover, the possibility will always be left for the attacked state to invoke the principle of proportionality and argue that the force used was un-proportional. This will result in the situation where whether or not the legality of pre-emptive self-defence is recognized there will always be a possibility to condemn such action not on the basis of the unlawfulness of the action but to rely on the argument that the force used was un-proportional.

3.3 Concluding remarks

The instant chapter analyzed a new trend in international law, pre-emptive self-defence, which is also known as “The Bush Doctrine.” The discussion on this issue has become more vivid after the well known 9/11 attack and Iraq invasion in 2003. This Chapter has tried to assess the legality of pre-emptive self-defence and discussed the arguments for and against it. Moreover, analysis of international practice shows that the whole Community is not ready to accept this new doctrine. The reluctance of states to adopt pre-emptive self-defence is conditioned by the threats posed by this doctrine. While judging pre-emptive self-defence above, it became clear that it entails more dangers than advantages. Therefore, to permit it is a threat to peace itself and will lead to undermining the order established by the UN Charter.

Furthermore, the legality of pre-emptive self-defence is outside the scope of the accepted right of self-defence. The only possibility to reconcile it under the order of the Charter is to establish unequivocal state practice, which will lead to formation of a customary norm, but this possibility might also be undermined taking into consideration that the prohibition of the use of force is *jus cogens*, and to have any influence on this rule a norm with the same power is necessary. Therefore the practice of states, *opinio juris*, and international organizations all should be on the point that it is necessary to accept this doctrine, expand the scope of the right of self-defence and show this in practice. Moreover, it should be conducted in accordance with article 108 of the Charter, which mentions the procedure for amendment. This means that according to the procedure an amendment should be made to article 51 of the Charter to enlarge its scope.

However, the opposite attitude was shown by the UN Summit in September 2005, which indicated that states are not ready for this amendment. Therefore, it could be concluded that currently international law precisely excludes the possibility to legalize pre-emptive self-defence, while in the war against terrorism anticipatory self-defence would be a needful tool. While the lawfulness of anticipatory self-defence is also arguable, nevertheless current practice has shown that states are inclined to this doctrine

and their following practice places anticipatory self-defence in the ambit of the traditional understanding of self-defence which is possible on the basis of expanding the notion of an “armed attack” to imminent threat. In this regard state practice plays the main role.

Even in the case of anticipatory self-defence the civilized community recognized its lawfulness but on an exceptional basis and this legality always depends on the circumstances. A real example of this is Operation Enduring Freedom. The international community is aware about threats posed by states possessing WMD and harbouring terrorists and know that these challenges need to be combated. However, in the war against states harbouring terrorists the tool of pre-emptive self-defence was considered as inappropriate. Nevertheless, these challenges need to be answered beyond the pre-emptive self-defence doctrine. One solution might be to increase the role of the UN SC and work on a collective security system.

4 FUTURE PERSPECTIVES: THE ROLE OF THE SECURITY COUNCIL IN THE WAR AGAINST STATES HARBOURING TERRORISTS

4.1 Analysis of UN SC Resolutions: 1368; 1373

The UN Security Council has defined terrorism as a threat to peace many times and in this regard the applicability of Chapter VII of the UN charter was underlined. For example it was so in Resolutions 1267 (1999), 1333(2000).

The innovation of UN SC Resolutions: 1368(2001); 1373(201) was that they both highlighted the inherent right of self-defence. “*Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368”¹⁰⁹Mentioning the inherent right of self-defence in the resolutions might tend to the opinion that the UN SC has considered terrorist attacks under the notion of an armed attack to trigger the right of self-defence. However, the UN SC has taken the same way in assessing terrorist acts as a threat to peace. The UN SC in resolution 1368 “regards such acts, like any act of international terrorism, as a threat to international peace and security.”¹¹⁰ The same words are repeated in UN SC 1373: “*Reaffirming further* that such acts, like any act of international terrorism, constitute a threat to international peace and security”¹¹¹

The interesting thing is that on the one hand the UN SC in these two resolutions referred to the 9/11 attacks as a threat to peace and on the other hand reaffirmed the inherent right of self-defence. This approach looks ambiguous and moreover equivocal because the right of self-defence could be realized in response to an armed attack, but

¹⁰⁹ SC Res.1373 UN Doc, S/RES/1373 (2001).

¹¹⁰ SC Res. 1368 UN Doc, S/RES/1368, (2001).

¹¹¹ *Supra* note 109.

the UN SC did not consider that these terrorist attacks amounted to an armed attack embodied in article 51 of the Charter. This means that the UN SC is reluctant to consider attacks from non-state actors as attacks under the scope of article 51. In contrast, reaffirming the inherent right of self-defence gives the other view in this regard. Furthermore, the mention in the text of the inherent right was assumed as justification to invoke such a right against terrorists.

With respect to these Resolutions and the controversial approach suggested, on the one hand, it can be concluded that the UN SC has considered terrorist attacks as a threat to peace and at the same time has established the right of self-defence against a threat to peace. The author tends to think that such an understanding would be a danger for the right of self-defence, because it unlawfully expands the right of self-defence. Moreover a threat to peace is completely out from the traditional paradigm of self-defence and furthermore unreasonably expands the notion of an armed attack. On the other hand the approach suggested in these two resolutions can be understood in the following way. The UN SC tries to avoid expanding the notion of an armed attack, stays in the same position and assesses these attacks as a threat to peace; which excludes triggering of the right of self-defence. However, as the situation posed by the 9/11 attack was of an emergency character and the threat of future attacks was imminent from terrorists the UN SC affirmed the right of self-defence. Therefore, when an attack occurs or there is a threat that an attack is imminent, in this case invoking article 51 of the Charter might be lawful. Nevertheless, such an approach should be exceptional and only on the basis of the circumstances. However, the threat posed by states harbouring terrorists is of such a character as to amount to a threat to peace but does not entail triggering of the right of self-defence in any case until this threat materializes as an armed attack or as a threat of an imminent armed attack.

4.2 The role of the UN SC in pre-emptive war against states harbouring terrorists

The main problem of “The Bush Doctrine” is that it leaves open the door for arbitrariness and subjectivity, because it is based on unilateral use of force in the name of pre-emptive self-defence. Pre-emptive self-defence as described is directed to a future and not determined threat of attack from terrorists. It is clear that harbouring terrorists before an armed attack originates from the host state amounts to a threat to peace. Therefore, to use pre-emptive use of force in self-defence against a threat to peace is not lawful according to international law order. Thus, a threat to peace goes in the ambit of chapter VII of the UN Charter.

With respect to this situation the UN SC has authorization to invoke collective self-defence and to ensure peace and stability according to chapter VII of the Charter. Hence, to overcome a threat posed by a unilateral pre-emptive strike, which leads to subjectivities, the need for collective cooperation is obvious. This solution should be seen under existing international law. The preparatory work for the UN charter shows that at the outset the main role of the Security Council was as a political organ to act as a dispute settler under chapter VI and as a peace enforcer under chapter VII.¹¹²

Therefore, the focus on the Security Council’s role as a peace enforcer takes into consideration the threat posed by states harbouring terrorists. The accent was also made on the role of the Security Council in the ICJ Advisory opinion on Namibia, where judge Fitzmaurice in his dissenting opinion stated “It was to keep the peace and not to change the world order that the Security Council was set up.”¹¹³

To determine whether the mere fact of harbouring terrorists entails itself a threat to peace and needs forceful intervention should be left under the Security Council’s power. A different situation exists when terrorists are operating from that state and attacks are

¹¹² H. Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, New York: Frederick A. Praeger, (2000); at p. 724-731; 732.

¹¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Dissenting Opinion of Judge Sir Gerald Fitzmaurice, [1971] ICJ Rep 291, at 294, para. 115.

occurring or there is an imminent threat of their occurring. In such cases triggering the right of self-defence is possible. In contrast to this situation, when there is a mere suspicion that terrorist acts might be conducted from that state on the basis of the assumption that this instant state harbours terrorists, unilateral use of force is unlawful. The pre-emptive self-defence doctrine deals with the same situation and this is the main argument that subjective assessment of the situation will lead to abuse of the right of self-defence. Therefore the role of the UN Security Council is clear in this regard. Article 39 of the UN Charter says:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

From this article is clear that the UN SC has the right to determine the existence of a threat to peace, considering that harbouring terrorists is itself a breach of the international obligation not to provide terrorists with a safe haven. Moreover it is a threat to peace, because this situation involves a high probability of future terrorist attacks.

However, invoking chapter VII of the Charter does not automatically mean that the UN SC should authorize collective use of force against a state harbouring terrorists. Moreover the first step should be peaceful means to combat terrorism in that state such as economic sanctions, deteriorating diplomatic relations with that state:

These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations¹¹⁴

This way was followed in the war against Al-Qaeda. Several resolutions were adopted which demanded the freezing of funds connecting to terrorists, moreover condemning the financing of terrorists. For instance UN SC resolution 1373(2001) adopted immediately after the 9/11 attack also requires all states to

¹¹⁴ The Charter of the UN, article 41.

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.¹¹⁵

Before this resolution, on 9 December 1999 the General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism. This is a brief list of peaceful measures taken by UN against Terrorism, which shows that the use of force is not the only tool to combat terrorism.

Nevertheless, there might be a situation when peaceful means to combat terrorism is unhelpful. Then resort to collective use of force would be the solution. In this regard the UN SC has power to authorize collective use of force against states harbouring terrorists according to the procedure prescribed by chapter VII.

The main problem visible in that solution is that the Security Council still remains a political organ with five members possessing a veto. Therefore, this veto could be seen as an impediment in the decision making process against states harbouring terrorists; moreover it may be a thing of speculation and the place for international political games. However this is not a question dealt with in this Paper, but was only mentioned as one impediment to this solution.

The second and more significant problem is also that a multilateral approach always takes time and gives a warning to adversaries. This problem cannot be overcome. Hence, weight should be given on the one hand to the threat posed by unilateral pre-emptive use of force in self-defence against states harbouring terrorists and on the other hand the negative aspect of giving a warning to adversaries by the multilateral approach.

The threat emanating from pre-emptive self-defence is significant: abuse of the right of self-defence, a subjective approach, using it for subjective purposes, violation of the core principle of non-intervention. Therefore, to follow multilateral pre-emptive use

¹¹⁵ SC Res.1373 UN Doc, S/RES/1373 (2001).

of force against states harbouring terrorists sounds more appropriate and poses a lesser threat to peace. But overcoming the problem of giving a warning to adversaries can be seen in the anticipatory self-defence doctrine. Thus, it is necessary to move pre-emptive self-defence under the so called Bush Doctrine into the scope of the UN SC. This would transform pre-emptive self-defence into the notion of a collective pre-emptive strike. This possibility could be stretched to a future, potential attack from a state which harbours terrorists. The UN SC should authorize a collective pre-emptive strike against that state, when the suspicion arises that an attack will occur from terrorists. But even in the time when suspicion of attack transfers to threat of attack, anticipatory self-defence plays the main role. With regard to a real attack from non-state actor terrorists the use of force in self-defence is fully justifiable. A third weak point of resorting to a multilateral pre-emptive strike under the authorization of the UN SC is that there is still a need to employ secondary rules such as state responsibility before an attack on states harbouring terrorists. Furthermore, following the previous conclusions given in the above chapters, harbouring terrorists as such constitutes a breach of primary obligation such as due diligence and invokes state responsibility. Moreover harbouring terrorists itself amounts to a threat to peace and security and therefore a pre-emptive strike is under the realm of the UN SC. However, the UN SC giving authorization to resort to a pre-emptive strike against states harbouring terrorists might need to go through the secondary norms, such as attribution rules, at the same time. Nevertheless, the UN SC is political organ, which does not have authorization to speak about state responsibility but the embodiment of primary rules, while authorization of a pre-emptive strike entails assessment of secondary rules. Consequently, it seems in this regard that the UN SC needs reform to answer new challenges. One of these challenges is the previously mentioned necessity to go through the state responsibility rules while authorizing a pre-emptive strike against states harbouring terrorists.

To sum up, the "Bush Doctrine" is not itself unhelpful or unreasonable in the war against terrorism, but it needs to be sophisticated to meet the requirements of international law. For this, it would be more justifiable to transform it and establish a

new tool in the shape of a collective pre-emptive strike against states harbouring terrorists authorized by the UN SC. Developments should be conducted in this direction. Nevertheless, it should be kept within strict borders, as the anticipatory attack. The principle of necessity and proportionality should be followed. To place a pre-emptive strike in strict frames is possible by a multilateral decision in making the procedure such as the UN SC. In that case possible abuse as posed by unilateral pre-emptive self-defence will be eliminated.

5 CONCLUSION

This Paper has dealt with the legality of pre-emptive self-defence against states harbouring terrorists. In this regard the following methodology has been employed. First the legality of anticipatory self-defence has been considered. This helped to give a background to discuss the lawfulness of pre-emptive self-defence. The necessity of pre-emptive self-defence has been assessed in comparison with the anticipatory self-defence doctrine. With respect to this it was concluded that against the imminent threat of an armed attack originating from states harbouring terrorists the anticipatory self-defence doctrine is almost enough. It is noteworthy to mention former Secretary General of the United Nations Kofi Annan who equally made it clear that article 51 of the UN Charter covers an imminent threat, but when threats are not imminent but latent the charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.¹¹⁶

However, the need for pre-emptive strike is visible in the contemporary world. This need is caused by states which harbour terrorists, even though an armed attack might not have been conducted yet. The whole community cannot wait in the position of “sitting ducks” until the threat is realized. Therefore, a threat posed by states harbouring terrorists needs to be combated.

Thus, the secondary norms of state responsibility come into action. This Paper has concluded that harbouring terrorists may not include state complicity but still entails state responsibility. Establishing state responsibility for harbouring has been looked at through the lowered threshold of attribution according to the ILC Articles on State Responsibility. Furthermore, harbouring terrorists has been considered as a breach of primary obligation of the state, breach of the duty of due diligence. Consequently, it has been concluded that the mere fact of harbouring terrorists before an armed attack

¹¹⁶ UN Doc A59/2005/ at paras 114-115 based on para. 188 of the High level Panel Report.

originates from the host state amounts to a threat to peace. Therefore, it has been decided that to invoke pre-emptive self-defence against this threat is unlawful because it is outside the traditional paradigm of the right of self-defence. According to article 51 of the Charter the main element for triggering the right of self-defence is an armed attack. Thus, the lowered threshold of attribution, secondary norms, cannot change the primary rule on the use of force.

Consequently, an examination of state practice makes it clear that states are cautious about supporting pre-emptive self-defence. The main reason for this is that pre-emptive self-defence involves a huge threat of abuse of the right of self-defence. This leaves open the possibility for arbitrariness and subjectivity. Hence, it was suggested in the last chapter that pre-emptive self-defence needs to be modified and used as a pre-emptive strike under the authorization of the UN SC according to chapter VII of the Charter. Nonetheless, there still remains a problem in that while authorizing a pre-emptive strike against states harbouring terrorists the UN SC needs to go through the secondary rules, such as attribution. Therefore, the necessity appears to think of reform of the UN SC, to review the functioning of the SC. The main problem is that the UN SC is a political organ with five veto members and to leave the question of state responsibility in the hands of a political organ would be at least unfair. Reform of the UN SC has not been discussed in the present Paper, because the author considers it a good question for future and further research.