The Grotius Sanction: Deus Ex Machina. The legal, ethical, and strategic use of drones in transnational armed conflict and counterterrorism

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Chapter IV

"*Never think that war, no matter how necessary, nor how justified, is not a crime*."

— Ernest Hemingway . Introduction "*Treasury for the Free World*" by Ben Raeburn. (1946).

"*The question is not its success—it is its lawfulness."*

—Kenneth Anderson, *Congressional testimony, 2010*

LEGAL CONSIDERATIONS

Rules, Regulations and Guidelines

Regardless the legal perspective adhered to, or particular position adopted, in regard to the law, the assertion advanced by Stephen C. Neff that war and law have always exercised a reciprocal influence upon one another, remains perhaps one of the few uncontested and enduring facts relating to that unique partnership.[155] Once a thorough examination of the available literature has been completed, then the best elements from various poles can perhaps be melded into a more reasonable, cohesive and centralized approach for developing a deeper understanding and a more adequate application.

The following sections offer a deeper, more probing analysis and build upon previous, foundational insights. As discussed, there are many fundamental rules, regulations, and guidelines which apply to armed conflict in general. Despite these rules, there have been few

concrete precisions regarding the questions of transnational terrorism and semiautonomous aircraft; such as drones and unmanned systems. These international customary and conventional laws, regarding warfare, define the different reasons and justifications for commencing an armed conflict (*jus ad bellum*), the method in which that conflict is conducted once it has been initiated (*jus in bello*), as well as the aspects of conduct and responsibilities in a post-conflict environment (*jus post bellum*).

Within a legal context, as far as the use of drones is concerned, there exist two aspects that need to be considered. The first is *jus ad bellum* or the reasons and justifications for entering warfare. This concern only applies peripherally to drones when they are employed in a strategic sense. The second framework, which is more applicable, is the *jus in bello* humanitarian concept of how war is to be conducted. Of course, during the post-conflict phase, that of *jus post bellum*, the use of drones is of marginal concern. These two previous frameworks will be examined individually since each represents a unique school of thought separate from the other. It should be emphasized that the body of law relating to *jus ad bellum* principles have only very limited application concerning the types of armament employed, and these concerns are largely the domain of *jus in bello* and conventional law.

Worth noting also is the fact that both these bodies of international law are found as theoretical and philosophical foundations of the Just War Theory. It is therefore difficult to precisely define where the theory ends, and the law begins, except when the conflicts in question have been passed on judicially at the international level such as the well-documented cases of *Nicaragua v. U.S.; Uganda v. Congo*; and *Iran v. U.S.*

The Legal Framework

Mary Ellen O'Connell, however, contends that, "The view that the world does not have up-to-date rules for responding to terrorism and other contemporary challenges is simply incorrect."[156] While this statement by O'Connell, may, in fact, be true, it is also somewhat misleading.

The world may indeed have rules concerning the use of force and the conduct of armed conflict; however, they are obsolete and ill-adapted to the current criteria of asymmetric warfare, transnational armed conflict, and transnational terrorism. They were initially designed to address a traditional model of organized state militaries in international armed conflict and were later amended, during the period of colonial struggles of independence, to incorporate non-international armed conflict (NIAC).

There do, in fact, exist specific laws and guidelines related to the concept of self-defense with regard to violent non-state actors. We shall examine these various guidelines, which will also be applicable, in varying degrees, to the question of targeted killing and the use of armed drones for the prosecution of legitimate targets. There are, nevertheless, several consistent and perplexing aspects relating to the application of these different legal principles and we shall examine these over the course of the following pages.

There are drastic differences in interpretation, which lead to widely varying perspectives; differences which are rarely resolved. Another significant hindrance, to the proper application of these laws, is the failure to obtain universal recognition, acceptation, adherence, and enforcement by all states

The lack of enforcement power is a significant hindrance to the effectiveness and legitimacy of the international legal regime.

Laws, treaties, and international covenants are important for establishing the foundations, which define international ethical and normative standards. Unfortunately, these conventions and treaties mean absolutely nothing if they are not backed by effective mechanisms of enforcement.

Elshtain cites the Soviet Union's continued biological weapons development—despite having signed the 1972 Biological Weapons Convention, as a prime example and rightly concedes, "The evidence by now is pretty clear that various treaties and conventions often provide a cover behind which determined states go forward with whatever they want to do."[157] The same observation applies in regards to various resolutions passed by the United Nations Security Council, which are frequently violated or ignored completely.

One clear example was the passage of Resolutions 1054 (April 26, 1996) and 1070 (August 16. 1996),[158] in response to an assassination attempt on President Hosni Mubarak of Egypt. These resolutions were intended to apply strong pressure on Sudan, in response to harboring terrorists and sponsoring terrorist acts. Micha Zenko points out that while these specific Resolutions were intended to curb Sudanese behavior, they had absolutely no effect since few states bother to properly implement and respect them.[159] In addition to these previously cited examples, there is an extensive historical record of other well-documented violations. Anthony Clark Arend asserts that "Given this historical record of violations, it seems very difficult to conclude that the charter framework is truly controlling of state practice, and if it is not controlling, it cannot be considered to reflect existing international law. "[160] The logic associated with such an assertion raises a problem and needs to be nuanced. While there exists a penal code for theft, murder assault and so forth, these crimes continue to be perpetrated, however, few would consider suggesting that such laws be abolished. What Arend is really emphasizing here is the fact that the Charter framework is far less effective than we would like it to be.

Colonel Peter M. Cullen, another proponent for change, states that "The ongoing U.S. campaign against terrorism does not fit neatly into the existing system on the use of force in international law."[161] Fortunately, however, there exist many laws, guidelines, rules, and regulations which could serve as a springboard for the possible formation of newer and more serious protocols. These precepts are examined more closely in this research.

The current state of legal doctrine and the rapidly changing face of the globalized world, offer very little in the way of a clear and succinct definition, concerning the right to self-defense and the use of preemption, or first strike doctrine. "Nations perceive the threat of armed aggression differently, and international law has not attempted to codify precisely the circumstances that justify the use of force in self-defense," comments Roger Scott.[162] While the author makes a valid point, it also is somewhat misleading. There is an entire body of case law surrounding the use of force in self-defense. From customary law, such as the Carolina Case, to article 51 of the of the UN-Charter, self-defense and the use of force have been spelled out. The author is, however, correct that there is no uniform body of coherent law which addresses this subject and it remains a gray area which would benefit greatly from clarification, elucidation, and codification. The case law which does exist, both its application and shortcomings, is detailed in the following sections.

In terms of self-defense under international law, regarding the use of legitimate and justified force against the violent non-state actor, there are several protocols which constitute the current overarching legal framework. These include Articles 2(4), 39, 42, 51 of the UN-Charter; The Statute of the International Court of Justice, Article 38 (1) notably §§ b, d. We will examine those legal principles most applicable to the current research in greater detail, shortly.

International Law

There exist two bodies of law, which together constitute what is referred to as international law. A distinction is made between public international law, which refers to the law of nations and private international law, which refers to commercial affairs. Our focus is upon the former; public international law (PIL), also referred to as international law (IL). This latter terminology, that of international law, shall be adopted throughout this research.

IL is further subdivided into several other distinct bodies of law as well—including those of international criminal law, international human rights law, international refugee law, international environmental law, and international humanitarian law (IHL). International humanitarian law is also referred to as the law of armed conflict (LOAC), or more simply, the law of war. The International Red Cross (ICRC) also points out the core principle that "International humanitarian law, or *jus in bello*, is the law that governs the way in which warfare is conducted (my emphasis)."[163] Our focus shall be largely upon *customary and conventional law*, which together comprise IHL. The laws and rules encompassed under what is commonly referred to as international customary law, are separate and distinct from those of treaty law, or conventional law.

International law traces its philosophical and ethical origins back to the days of early Christian theologians, such as St. Ambrose, St. Augustine, and St. Thomas Aquinas. Their views having also been influenced by earlier Greek and Roman philosophers. Additionally, international law was further refined by later medieval scholars of renown such as Alberico Gentili, Balthasar de Ayala, and Hugo Grotius. Secularized international humanitarian law, was created from the earlier seeds of Christian moral thought. International humanitarian law (IHL),

or the law of war, a subset of international law, was further developed and refined through the customary practices and the subsequent creation of international treaties, such as the Peace of Westphalia of 1648 (the Treaties of Münster and Osnabrück), The Hague Treaties of (1899 & 1907) and the Geneva Conventions (1864, 1906, 1929, and 1949).

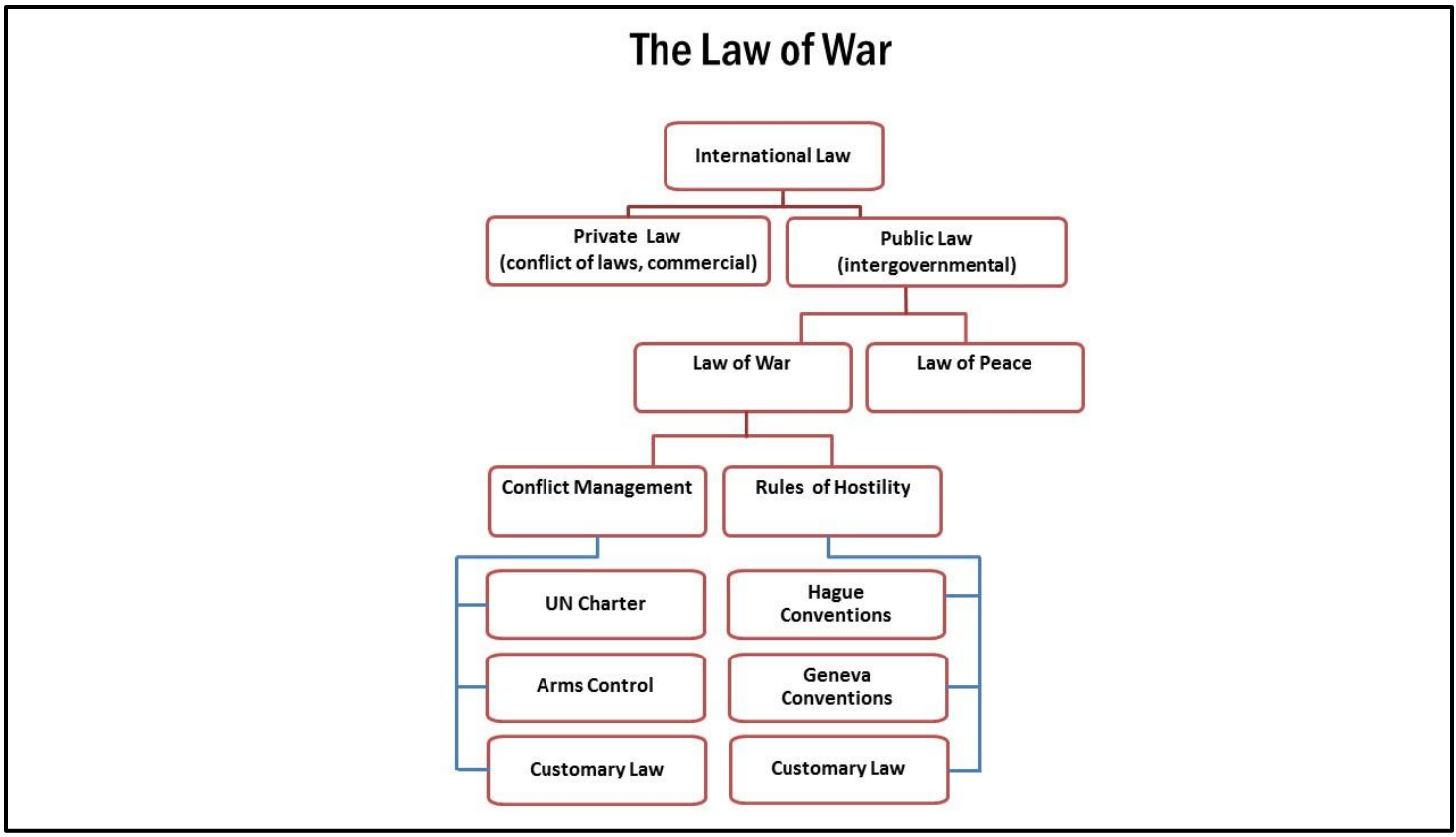
As far as the Additional Protocols I, II, (1977) and III (2005) of the Geneva Conventions are concerned, although they are in fact a part of international law, many states, such as the U.S., Israel, and much of Southeast Asia have failed ratify them are not party to them and are thus not bound by their terms. An important feature relating to human shielding (hostages) is addressed and terrorism may be found as a new addition within this Protocol. Specifically, Article 4(2) of Additional Protocol II, (Part II) of the section which deals with humane treatment clarifies that:

> *Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism…*[164]

Author Michael Byers, writing on the ethical aspects of warfare, began his interesting research with a rather inaccurate description relating to the regulating of armed conflict. The author rather misleadingly states that "Historically speaking, legal rules on the use of military force are a relatively recent development. Prior to the adoption of the UN-Charter in 1945, international law was conceived in strictly consensual terms during the nineteenth and early twentieth

centuries: countries were only bound by those rules to which they had agreed, either through the conclusion of a treaty or through a consistent pattern of behavior that, over time gave rise to what is referred to as 'customary international law.'"[165] Strictly speaking, this is not entirely correct, since there were many other precedents that had already set the stage for the codification of the laws of war, notably: The Lieber code of 1863, The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field first adopted in 1864, and later amended and replaced by the versions of 1906 and 1929 before arriving at its final form in 1949; The Hague Conventions of 1899 and 1907 (which in fact form one half of IHL), the Saint. Petersburg Declaration of 1868, renouncing the use of explosive projectiles under 400grams, and so on. Thus, it is understandable, if somewhat misleading to assume that the UN charter, while significant, represented a watershed of unparalleled historic proportions.

Below is a schematic depiction drawn and developed from the most recent version of the U.S. Army Judge Advocate General's Law of Armed Conflict DESKBOOK, as it is presented and taught to military lawyers. It is immediately apparent that The Hague Conventions, customary law, and the Geneva Conventions, play a major role in shaping policy and determining the conduct of armed conflict with respect to the armed forces of the United States.



Fashioned after: Di Meglio J.A., LTC Richard P, et al. *Law of Armed Conflict Deskbook: 2012*. Edited by MAJ William J. Johnson, & MAJ Andrew D. Gillman. Charlottesville, Virginia: International and Opertional Law Department. The United States Army Judge Advocate General's Legal Center and School, 2014. (Based upon and modified from the original).

Figure 2 © James P. Welch 2018.

International customary law, itself, like many other facets of law and ethics, is widely disputed concerning its precise composition, however, it is generally accepted that it is composed of two parts. The first is consistent state practice while the second, *opinio juris* [166] is the consideration by the state that is bound or obligated to adherence. The psychological component involved in opinio juris includes a rational evaluation of the risks and benefits. This can also be termed as psychological compliance and as Janina Dill so aptly asserted in her work, "Compliance is a necessary but not a sufficient condition of IL's [international law's] effectiveness."[167] Additionally, there is a distinct difference, that is not immediately obvious, that needs to be

considered; the difference between this sense of obligation and the underlying normative desires. They are two entirely different constructs. It does not automatically follow, for instance, that the *requirement* to behave in a certain way is founded upon a *desire* to do so.[168] Thus, we see that there exist psychologically constraining obligations relating to opinio juris.

According to the International Court of Justice (ICJ), the definition of customary international law is laid out in Chapter 1, Article 38(1)(b) which describes it as "evidence of a general practice accepted as law."[169] Which stipulates:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states [invoking the legal principle of *pacta sunt servanda*];
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognized by civilized nations;
    d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[170]

These customary "laws" most often become legitimized through *lex scripta* or conventional law (treaty law)—the establishment of international treaties and protocols, (governed by the Vienna Convention on the Law of Treaties, May 23, 1969), but also by persistent practice and implementation. It is important to point out, however, that customary law and conventional law

should not be considered identical. The further we move away from conventional law and written instruments the weaker the application and the adherence becomes.

Anthony Clark Arend confirms that the validation of customary law occurs with the convergence of practice and acceptance as a defining rule, "...when there was both a near universal practice and a belief that the practice was required by law."[171] David Jayne Hill writing in the introduction to the 1901 translated edition of Hugo Grotius's *Rights of War and Peace* also underscores this vision of the concept of state practice, "There are CUSTOMS of nations as well as a universally accepted law of nature, and it is in this growth of practically recognized rules of procedure that we trace the evolution of law international—*jus inter gentes*—as a body of positive jurisprudence."[172] One core problem with these rules is that they were originally designed for traditional international warfare between states, and limited or no provisions to address contemporary conflicts, such as warfare that is conducted in the military, religious, political and economic spheres simultaneously by transnational non-state actors (often referred to as fourth generation warfare (4GW,).[173] To compound matters even further, there exists a tension between the rights of states under said customary law, concerning the right to state self-defense, and the limitations imposed by treaty law such as that ensconced within Article 51 if the UN-Charter.

Orakhelashvili underscores the ongoing critical debate that still rages between the reciprocity of conventional and customary law in international application. The two bodies have much in common and are not mutually incompatible by any means. Orakhelashvili, masterfully analyzes the essential parameters of the debate involving the important question: "does custom equal consent, and if it does is it therefore binding upon third-party States?" In other words, is tacit consent, in this application, tantamount to explicit consent? While this view was certainly a

"customary" view (as per Wolff and Grotius) in the Medieval period, it appears to be far less so today.[174]

Since customary law is often considered a process of evolutionary adaptation, what then is the status of State practice as a form of consent? Orakhelashvili provides a possible response here as well, with the astute observation that "Action can be conscious whether it manifests that consciousness expressly or by conduct."[175] In other words, quite simply and quite appropriately, "actions speak louder than words." This is certainly the essence inferred in the text of ICJ Article 38 (1) (b). The author relies upon classical doctrinal support provided by authors such as Vattel and Wolff in support of this view, which appears well founded.

There is a caveat, however, and that is that practice by itself, does not automatically correspond, with customary law, it requires its *opinio juris* counterpart as well. Much like the war of ideas, customary international law also contains both a kinetic and a psychological component. Fitzmaurice (as cited in Orakhelashvili), also emphasizes the important point, according to his interpretation, that to tolerate is to accept. Of course, an obvious difficulty with passive acceptance is the actual evidence confirming such unexpressed acceptance.

In a unipolar world, where the U.S. exerts such a powerful military influence, despite the objections of other States (as was the case if the 2003 invasion of Iraq) can we still rely upon custom (i.e., State practice) as a binding instrument of international law? Does tacit acquiescence automatically signify acceptance? Is tactic or passive recognition still legitimate if it is borne of coercion (economic, political or military)? Relying merely upon conventional law raises the obvious specter of selective interpretation. Thus, there is a pressing need to determine and qualify an answer to these probing questions of validity, consent, and application.

The important case law underlying the rulings in *Nicaragua v. U.S.*; *Uganda v. Congo*, and *Iran v. U.S.*, are examples of the application of conventional law in questions of a state's right (or the lack thereof) to self-defense under the international legal order. When considering the second half of international law, that of conventional or treaty law, it might seem that, since this body of law is based upon written instruments of agreement, things should be much more clearly defined. There exist, nonetheless, some formidable challenges which must be considered. The first obstacle is one of *application* and arises under two legal principles: the *pacta sunt servanda* principle, indicating that treaties must be respected and the *pacta tertiis nec nocent nec prosunt* rule, which is the fundamental legal principle that there is no *erga omnes* requirement upon third-party States—treaties neither impose rights nor obligations upon third-parties (who have not consented to them), according to this rule of law. In other words, if a State is not a signatory to an agreement or treaty, they are not bound by it.

The only exception to this rule is that of peremptory norms, or *jus cogens*, Latin for compelling law (in cases such as, piracy, genocide, slavery, torture…), which is indeed erga omnes—incumbent upon all persons A violation of these principles is considered as *malum in se*, or evil in and of itself, in contrast to *mala prohibita*, conduct that constitutes an act that is unlawful only by virtue of statute. There does exist, however, another exception to the *pacta tertiis* principle.

Kelsen also points out that "general multilateral treaties to which the overwhelming majority of the states are contracting parties, and which aim at an international order of the world" are exceptions to the *pacta tertiis* rule"[176] Rafael Nieto-Navia, relying upon Article 38 of the Vienna Convention,[177] echoes Kelsen's earlier assertion "However it can be noted that if a treaty or convention simply codifies existing norms which are already binding on States as customary

international law, States not party to the convention or treaty in question may nevertheless find that they remain bound by the terms of the relevant customary law principle."[178] Thus, in essence, they are bound by the underlying principle, rather than the specific conventional instrument it engenders.

The second major challenge to conventional law is one of *interpretation*. It has been reiterated several times throughout this research, that it is a characteristic of law, and its attendant legal instruments, to be flexible in nature and to allow a certain degree of discretion in its interpretation. This enables the law to take into consideration exceptions for unforeseen circumstances and tailor it to a more just application. Thus, a strict textual adherence to an agreement or treaty often creates direct tension with a looser (spirit of the law) purposive interpretation. Conflict arises when these different interpretations clash head-on, often with completely opposite readings. This is the basis of the complex and long-running debate between advocates and critics of comparative interpretations of the UN Charter Articles 2(4) and 51.

The Law of War and the Concept of Self-defense

We have spoken about Just War Theory as an ethical precept. We shall now consider how it was modeled and adapted to the legal framework of international law. Customary ethical principles and their subsequent adoption in thought and practice, often become the guidelines to the framing of conventional law. This pertains to both customary international law—through state practice and opinio juris (a subjective sense of psychological obligation on the part of the state), as well as in positive conventional law (written treaties, conventions, and protocols). The legal principles, relating to the concept of self-defense against violent non-state actors, derive from *jus ad bellum criteria*—that is the legal reasons for going to war.

Thus, if we are to conduct war against groups such as transnational terrorists, the rules which apply are drawn from the *jus ad bellum* model. The related questions of State-sponsored self-defense and the debate revolving around Articles 2(4) and Article 51 of the U.N. Charter, also pertain to the realm of *jus ad bellum*. The most important rule of *ius ad bellum* is art. 2 par. 4 of the UN-Charter, which contains the prohibition on the use of armed force. In order to understand the current legal regime regarding the use of force we must take a closer look at the UN-Charter

The UN Charter and the Use of Force

Crucial for the interpretation of the provisions of the UN Charter is recognizing that the **drafters** aimed, above all, to prevent the use of unilateral military force internationally. This is specifically addressed in Article 2, paragraph 4, while Article 2, paragraph 3 demands that member states settle their international disputes peacefully. Although some in the past have tried to interpret Article 2 paragraph 4 to state that certain instances and forms of force are exceptions – e.g., when force is used to protect human rights -- it is generally assumed to forbid all uses of force, and for whatever reason.[179] It follows, then, that every use of force against another state or its territory falls within the ban on violence, and is only permissible when an internationally recognized justification vindicates its use, and the conditions for exercising such force are fulfilled.

According to the Charter, currently there are two situations in which force can be justified: The Security Council can decide to authorize military action (article 42)[180], and a state may execute military actions in exercise of the right of individual or collective self-defence in the event of an armed attack (art. 51).

To begin with the first situation: Article 39 of the Charter requires the Security Council to determine the existence of a threat to the peace, breach of the peace, or act of aggression, and on those grounds to make recommendations, or decide on the enforcement measures of article 41 (non-military coercive measures like economic sanctions) and article 42 (military enforcement measures). The "peace" referred to here concerns exclusively international peace; purely internal conflicts, such as those during NIAC do not apply.[181]

The second permissible use of force under the Charter occurs when states, either individually or collectively, take military action in response to an armed attack (article 51). The Charter fails to define what an "armed attack" specifically consists of, however, and neglects further to outline or specify from whom it must come. But before we examine this question more thoroughly, a few statements have to be made about the relationship between article 51 and article 2, paragraph 4 of the Charter.

The relationship between article 51 and Article 2(4)

Article 2, paragraph 4 of the UN Charter reads: "*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 manner inconsistent with the Purposes of the United Nations."*

A reading of Article 2 paragraph 4 indicates, then, that not every breach of the ban on force automatically triggers the right of self-defence. In fact, the phrase "armed attack" is a more limited term than the phrase "threat or use of force." Consequently, a state that is the victim of

force which cannot be qualified as an armed attack cannot claim a right of self-defence, and so may not react militarily, as this would entail a breach of the rule forbidding the use of force. But does the state that is the victim of the use of force therefore stand empty-handed? Not entirely; non-armed countermeasures are available when international obligations are violated.[182] But these measures, used as a response to the use of force, often are not effective.

Though at first glance, this outcome appears undesirable, it's more understandable if one bears in mind that the most important purpose of the Charter is the maintenance of international peace and security (article 1, paragraph 1 UN-Charter), and that achieving this, demands that unilateral uses of force be strictly avoided. In other words, in the absence of an actual armed attack, states are to avoid using force in self-defence. *In addition to the afore mentioned non-armed countermeasures, a state can only request the Security Council to determine the use of force of whom it was a victim as a breach of the peace or threat to the peace and to take measures according to articles 41 or 42.* Should the Security Council refuse, however, then indeed the state stands without recourse. But even when there is an armed attack in the sense of the meaning of article 51, the right of self-defence is not unconditional. Any use of force in self-defence must be both necessary and proportional; moreover, the attacked state must report all self-defensive actions to the Security Council and be prepared to cease and desist in all such actions if the Security Council itself takes measures to restore and maintain international peace and security.[183]

Armed attack

It seems obvious that the definition of the term "armed attack" as given in Article 51 would determine the extent and reach of the right of self-defence; that is, the more extensive this term is

interpreted , the sooner the use of force in self-defence is legally justified, while, by contrast, a narrow interpretation would likely result in greater reluctance and hesitation to approve such self-defensive measures. The critical importance of arriving at an unequivocal, unambiguous interpretation of the term "armed attack" hence can hardly be overstated. And yet, the term is not defined anywhere in the UN Charter. At most, one can, on the basis of systematic or teleological methods of interpretation, assume that the Charter takes a narrow interpretation of the term, since the highest purpose of the Charter itself is to maintain international peace and security and the instrument to achieve this is collective action, i.e. action by the Security Council under Chapter VII of the Charter. The right of self-defence thus forms an exception to the basic assumption that the use of force is not allowed in interstate relations, and therefore must be subject to restrictive interpretation. The fact remains, however, that the lack of a definition leaves crucial uncertainties about the precise scope of the concept. And a study of the *travaux préparatoirs* or legislative history brings us no further in this respect.[184]

Although the International Court of Justice (ICJ), as the highest judicial authority, has not defined the term either, it has spelled out its essence in the *Nicaragua Case.* The Court distinguished between direct and indirect armed force, noting that both can, under certain circumstances, qualify as "armed attack." "Direct force" involves the use of violence by one state against the other, across borders – for instance, when an army invades the borders of another state. "Indirect force" describes non-state international violence, such as by mercenaries or insurgents with substantive involvement of the state. Whether such an indirect use of force can be considered an "armed attack" would depend, however, on the "scale and effects" of that force. A "border incident", for instance, would not be sufficiently egregious to qualify as an "armed

attack." Given that the outlines provided by the Court remain the deciding factor in determining an "armed attack," the relevant passage is cited in its entirety.

"There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force ***of such gravity*** *as to amount to (inter alia) an actual armed attack conducted by regular forces, or 'its substantial involvement therein,' This description, contained in Article 3, paragraph (g) of the Definition of aggression annexed to General Assembly resolution 3314 (XXIX)), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation because of its* ***scale and effects,*** *would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands* ***where such acts occur on a significant scale*** *but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.'"*[185]

Based on the above stated vision of the Court, we can answer our two-part question – when can we speak of "armed attack" and who can be considered the source – as follows: non-state actors such as terrorist groups can also be named as the perpetrator of an armed attack, creating the right of the victim state to act in self-defence. Two conditions, however, are here required: first,

the attack must involve significant or serious uses of force; a border incident or incidental armed action is not sufficient. Second, the terrorist group must perform its acts through or in the name of the state, or the state must be substantially involved in its violent actions. However, "substantial involvement" requires more than the provision of weapons, logistical support, or other forms of help. Rather, on the basis of the Court's analysis, the right of self-defence against the use of **force** by a terrorist group exists only if the attack is serious enough to be considered an "armed attack", and (cumulative) the state from whose territory the terrorist group operates has been substantially involved in the attack itself.

In this regard, the following two questions represent the deciding factors: can a terrorist attack be qualified as an armed attack, and what must be understood by "substantial involvement"? To begin with the former: since the attacks of 9/11, it has been generally accepted that the right of self-defence can be applicable in case of a terrorist attack. Days after these attacks, the Security Council adopted Resolution 1368, wherein it declared itself committed "to combat by all means threats to international peace and security caused by terrorist acts, recognizing the inherent right of individual or collective self-defence in accordance with the Charter." Although the Council did not explicitly declare the 9/11 attacks "armed attacks," the fact that it determined that the right of self-defence applied indicates, at least, that they could be viewed as such.

The question then remains whether less destructive attacks than those of 9/11 can also be considered as such. But here, much would depend on the facts and circumstances of each case. Wettberg, in his paper, discusses a criterion of "severe quantitative gravity."[186] In this context, it is worth noting a few things about the so-called "pin-prick theory" or "accumulation of events" doctrine.[187] Where a single border incident or minor use of force cannot be considered an armed

attack, the question remains whether the term can be said to apply to a combination of several such incidents, or to an accumulation of several such attacks over time. In other words, when Hezbollah continuously, day in and day out, fires rockets into Israel, can this series of smaller attacks cumulatively be called an "armed attack"? This question is also known as the "accumulation of events" doctrine, or "zoom theory." [188] By "zooming out" from a particular violent incident to all incidents a pattern of attacks appears that, by dint of their cumulative effect, can also be seen as "armed attacks." In the Oil Platforms Case, for instance, the International Court left this possibility open when it determined that:

"[…] the question is whether that attack, either in itself ***or in combination*** *with the rest of the 'series of attacks' cited by the United States, can be categorized as an 'armed attack' on the United States justifying self-defence […] Even* ***taken cumulatively*** *[…], these incidents do not seem to the Court to constitute an armed attack on the United States."*[189] (Emphasis mine.)

This analysis seems to indicate that smaller attacks over the course of time, in separate places, can still cumulatively constitute an "armed attack." At the same time, some paragraphs later, the Court adds that it "does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence"[190] – a statement that seems at first glance contradictory in relation to its earlier one. However, if this is indeed the case, then a fortiori it would be true as well in the event of a terrorist attack of the caliber of 9/11. Zemanek concludes also that "regardless of the dispute over degrees in the use of force, or over the quantifiability of victims and damage, or over harmful intentions, an armed attack even when it consists of a single incident, which leads to a considerable loss of life and extensive

destruction of property, is of sufficient gravity to be considered an 'armed attack' in the sense of Art. 51 [of the] UN Charter."[191]

Hence the first part of the question – when can we speak of an "armed attack"? – is the least problematic. Terrorist attacks can be considered as such as long as they cause a large number of victims and great material damage. But to claim the right of self-defence, the attack must not only be a sufficient serious attack, but also the state from whose territory the attack was organized must be substantially involved in the incident.

Determining "substantial involvement", however, is more difficult. The ICJ gives only a negative description of the term by indicating only what it is not. In answer to the question of whether the United States could be held responsible for the actions of the "contras" – armed opposition groups who, supported by the CIA, worked to overthrow the (Soviet-allied) Sandinista regime – the Court determined explicitly that *"the question of the **degree of control** of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens in Nicaragua. […]*[192]

*The Court has taken the view that United States participation, even preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military and paramilitary targets, and the planning of the whole of its operation, **is still insufficient in itself**, […], for the purpose of **attributing** to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.[…] For this conduct [i.e. killing, wounding and kidnapping, J.W.] to give rise to legal responsibility of*

the United States it would in principle have to be proved that that State had ***effective control*** *of the military or paramilitary operations* ***in the course of which*** *the alleged violations were committed."*[193]

Although the Court did not actually address the issue of self-defence measures taken in response to violence perpetrated by non-state groups, it did examine the question of whether certain measures taken by the contras could be attributed to the United States, thereby allowing Nicaragua to hold the US responsible for violating its obligations under human rights and humanitarian law. This "effective control" test has since served as a general standard for establishing responsibility of private persons or groups.

While the Court did not further explicate the criterion of "effective control," the cited passage suggests that such control involves a form of concrete leadership, management, or control over the specific operation or actions for which responsibility is being claimed. In Article 8 of the Articles of State Responsibility the "effective control" test is codified thus:

"*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 under the instructions of, or under the direction or control of that State in carrying out the conduct.*"[194]

In its commentary, the International Law Commission emphasized that the issue must involve a "real link" between the state and non-state actor[195] that involves actions taken "on the instructions of" or "under the direction or control" of the State.[196] These are alternative criteria: it is sufficient when one or the other of these is fulfilled.[197] Despite the fact that numerous judges, in their dissents, criticized the Court for the criteria it established for "effective control," arguing

that it (in their eyes) placed the threshold for responsibility far too high, the Court nonetheless continued to hold to the standard in subsequent decisions.[198]

Criticism grew louder, however, after the attacks of 9/11. The most important concerns expressed against the decision of the Court argued that it constituted a free license to so-called "state-sponsored terrorism" so long as the sponsoring did not take the form of "effective control." Moreover, the imperative of a "real link" between the state and non-state actor would offer no solutions in the case of states that were neither prepared nor in a position to control operations by terrorist groups operating within (or from within) their borders. In other words, the "effective control test" provides no answers in three important situations: when a strong state supports terrorist groups but is not directly involved with its terrorist activities; when a weak or failing state is unable to prevent attacks by (organized) terrorist groups from its territory; and, finally, the situations in which a non-failing state passively supports or tolerates the operations of terrorist groups who are based within its borders.

It is precisely in this context of terrorism that abandonment of the "effective control test" is pleaded for. Two distinct approaches to this have been raised. The first still requires that a link can be established between the state and the non-state actor -- that is, that the behavior of the non-state actor has to be attributed to the state against whom the attacked state engages in self-defence. However, the bar for establishing attribution must be significantly lowered. In the second case, the "link" issue is discarded entirely, and considerations based on the nature and magnitude of the attack determine whether or not self-defence can be justified. In other words, when "private violence" is measurably severe enough to be viewed as an armed attack, the attacked party maintains the right to act in self-defence.

Finally, based upon the principle of consent and collective self-defense, the use of force is authorized by a request for intervention another state (the host state). Such conditions are meant to reduce the chances of resorting to armed conflict except in cases of justifiable need. They are considered as exceptions to the constraints on the use of armed force against the territorial integrity or political independence of another state. These legal requirements are important and have been reiterated several times throughout the text.

Recent history has shown that adherence to either or both principles has been weakened and even disregarded. The U.S. invasion of Iraq, in 2003 is but one example where the opinion of the international community exercised no significant authority. This situation again offers support for the position advanced in this research; that the current outmoded rules, laws, and regulations are improperly suited to deal with this new type of armed conflict and the specific challenges that it poses. The few attempts that have been made are poorly designed. They are not respected or enforced even when they are clearly applicable. Additionally, it should be born in mind that the decision-making process of the UNSC is controlled by major Westernized industrial states, creating for all intents and purposes a self-interested oligarchy.

It is important not to conflate the legal reasoning behind *jus ad bellum* with its ethical and philosophical counterpart. There has been an increasing tendency to blur the borders between the two, particularly since both contain the principles of necessity and proportionality as components central to their framework. Legally, the right to use justified force in self-defense is defined according to a specific set of binding conditions.

Jus ad bellum is strongly axed upon the crimes of aggression, and warfare for expansion. Crimes which were condemned during the Nuremberg and Tokyo Tribunal proceedings.

Aggression includes invasion, armed attack, blockades, bombardment, the sending of armed bands, irregulars or mercenaries on behalf of a State, the list being non-exhaustive (Article 2).[199]

. **Article 2(4) versus Article 51: Between a Rock and a Hard Place[200]**

"*The existence of law is one thing; its merit or demerit is another*."
—John Austen, *The Province of Jurisprudence Determined* (1832).[201]

There have been several interpretations of these two related articles of UN charter, particularly the relationship between Articles 2(4) and 51. These positions have tended to rely either on a flexible, purposive interpretation, or alternatively, a more restrictive one. Given the unusual threat that non-state actor aggression poses, many have pleaded in favor of a looser reading of the applicable articles (particularly pertaining to Article 51), including a right for anticipatory self-defense (also rather pejoratively referred to by some as preemptive strikes).[202]

The obvious danger of such flexibility is increased and unjustified conflict through manipulation of the concept of imminence. International law cannot and must not be adjusted to suit a political agenda, the result would be the failure of the rule of law itself and ultimately, total anarchy under unipolar military domination. It was creative interpretation and clever manipulation of this condition—that of a presumed imminent threat, which allowed the Obama executive branch to squeak its way through to its own advantage in the case of Iraq, Syria, Libya, Yemen and elsewhere.

There is a significant lack of clarity related to differences of interpretation, between the above two articles, particularly as they relate to the legitimacy of preemptive intervention. This section evaluates this contentious debate. A separate section dealing with questions of sovereignty,

imminence, and preemptive self-defense will follow. This tension has arisen and been fostered by the comparative interpretation of Articles 2(4) and Articles 51 of the UN Charter, though this was never the original intent of the instruments.

Suffice it to say that there is a constant, long-running, and heated debate over the exact interpretation of Articles 2(4) and 51 and their application to armed intervention; particularly as they pertain to anticipatory and preventative attacks. The critics call for restraint and adherence to a more literal interpretation, while proponents plead for a more expansive one. Somewhere, midway along this contentious continuum are situated the more balanced and limited narratives of those caught in-between.

This inherent lack of clarity and precision is also noted in the JAG officers LOAC Desk Book, Chapter 4, which importantly points out that:

> *"The use of the term "armed attack" leads some to interpret article [Sic] 51 as requiring a state to first suffer a completed attack before responding in self-defense. This is likely the cause of much of the debate between the restrictive approach and the expansive approach. However, the French version of the Charter uses the term aggression armée, which translates to "armed aggression" and is amenable to a broader interpretation in terms of authorizing anticipatory self-defense.*[203] *Orakhelashvili points out that, "The right to self-defence is also denoted as an inherent right in English text of Article 51 of the UN Charter and as a natural right in the French text*."[204]

Examining the question more closely, it is apparent that the difference between the traditional state-to-state conflicts of the past, and present-day asymmetric confrontations, has been further complicated by the introduction of two unforeseen and diametrically opposed—yet, by the same

token, inherently linked—elements; that of advanced technology in the battlespace and the advent of the violent non-state actor as a full-fledged military entity. Some authors such as Michael Walzer and Brian Orend have argued that preemption or anticipatory self-defense, is acceptable under situations they classify as supreme emergencies. a *doctrine* in the case of Walzer and an *exemption* for Orend.[205] In either case this exemption stands as a last resort measure when the state faces catastrophic defeat. Furthermore, not only would preemption be acceptable but for some, the laws of war might also be suspended particularly as they relate to *jus in bello* ethics.[206] That brings us to the next section on anticipatory self-defence.

Leo Van Den Hole offers a very thorough treatment of the critical question of anticipatory self-defense and its relationship to article 51 of the UN Charter, in his probing study, *Anticipatory Self-Defence under International Law.* Van Den Hole argues that article 51 was never intended to be restrictive regarding the right of state self-defense, either individually, collectively, or preemptively, but was geared more toward a collective defense initiative. He bases his argument upon several convincing premises:

- Historical language [employed] during the San Francisco Convention of 1945
- The specific wording within Article 51, itself
- The ambiguous [and hence flexible] nature of the language adopted
- The fact that Article 51 was placed within Chapter VII and not Chapter VIII
- Lack of defining criteria for what is ostensibly more important than reactive defense.[207]

Prior to the adoption of the UN Charter, there was more widespread universal acceptance of the concept of preemptive unilateral action. Much of the basis for this was founded upon the famous Caroline incident of 1837, itself based on preexisting formulations. This latter is sometimes referred to as the *Caroline test* when referring to the customary law justification for anticipatory self-defense, which has taken place outside the limitations imposed by Article 51. The primary elements and foundational principles drawn from this approach to self-defense, which remain viable today, were the concepts of necessity, proportionality, and last resort, or in the words of Daniel Webster, "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Webster further asserted that nothing "unreasonable" or "excessive" could be done in the name of self-defense, thus establishing the important principle of proportionality. In other words; the force employed must be commensurate with the threat. This principle places restraint on the unlimited use of force by the state. Byers notes that these were all important foundational principles underlying necessity and proportionality as they relate to self-defense.[208]

The Caroline test, therefore, not only serves as the underlying framework for the justification of the use of anticipatory intervention—under justified and qualified circumstances. However, it is important to note that the wording and intent of the Caroline test, in the opinions of both Crawford and Molier, relates more precisely to a situation based upon the excuse of necessity rather than directly to one calling for anticipatory self-defense.[209] Over a five-year period, the U.S. Secretary of State, Daniel Webster, formulated, clarified and fostered these principle criteria, in diplomatic exchanges with his British Counterpart, Lord Alexander Baring, 1st Baron Ashburton, which resulted in the Webster-Ashburton Treaty of 1842.[210] The principles were raised and upheld during the Nuremberg trials in 1945.

These fundamental principles largely defined state practice prior to the adoption of the UN Charter on October 25, 1945. More recently, there appears to be a trend to revert to a paradigm reflective of that of the Caroline incident test. Byers considers that a major shift has taken place in international customary law and that "[a]s a result of the law-making strategies adopted by the United States and heightened concern about terrorism worldwide, the right of self-defence now includes military responses against countries that willingly harbor or support terrorist groups, provided that the terrorists have already struck the responding state."[211] Whether such a perspective is justifiable under international law is the crux of a seemingly endless debate.

The House of Commons Foreign Affairs Committee in a subsequent report entitled, *Foreign Policy Aspects of the War Against Terrorism,* indicated the importance of balancing the requirements enshrined within Article 51 of the UN-Charter, restricting the use of armed force, with the fundamental requirements of State to defend themselves against new, different, and deadlier emerging threats, such as, among others, those presented by weapons of mass destruction (WMDs). The original purpose of Article 51 clearly was designed to maintain international peace, security, and international order. A blanket restriction against anticipatory self-defense is not conducive to such goals considering the expansion of the worldwide terrorist threat and is therefore counterproductive. Quite simply put, when the terrorists come knocking, it will be too late for talking. Principles relating to condoning anticipatory state self-defense have well-founded precedents, notably the Caroline test of 1837 (though many critics would prefer to overlook or disregard this important historical precedent in customary international law).

The importance and relevance of legal concepts and precedents cannot be held against some sort of imaginary chronological timeline. I believe many would fail to concur with such a view. Tladi expounds further asserting: "Moreover, even if the Ashburton-Webster exchange did

reflect customary international law in 1842, customary international law continually revolves."[212] While such a premise is certainly valid—to an extent, we must also question whether such an assertion is particularly applicable to the topic at hand.

Thus, we are faced with circular logic. Evolution? Yes certainly, however, it would be a grave error to jettison precedent on the mere pretext of evolution alone. The Caroline precedent took place 103 years prior to the establishment of the UN-Charter. We now find ourselves (at the time of writing) almost 72 years onward since the enactment of the Charter. Does this mean that in another 31 years it will be time to disregard the Charter as obsolete and anachronistic as well? This appears to be little more than a spurious argument in support of ignoring the Caroline precedent; portions of which some find inconvenient. Again, these legal wrangles do little to offer solutions and support the hypothesis of this research that the current rules of IL are inadequate to deal with the species of threat being faced today. Time is however not the only element to be considered. There remains a direct tension between the earlier Caroline test and the precepts enshrined within the UN Charter. This latter established an entirely different regime on the legitimate use of state force.

This ability of customary law to adapt to changing needs and circumstances is indeed one of its strong points, the fact that it is not codified, on the other hand, also represents its greatest weakness. Some examples of case law which continue to play a role and offer guidance in the question of self-defense are, *The Republic of Nicaragua v. The United States of America* (1986),[213] and the Caroline affair (1837).[214] While these precedents need not dictate international law, they should nevertheless be taken under consideration.

Such logic, as that of the legal evolution argument, supports and pleads in favor of revising the interpretation underlying Article 51, if we follow this conclusion to its logical end: customary international law evolves with time according to necessity

It is certain that clearly defined limitations must be prescribed in any relaxing of the interpretation of Article 51, however, change it must. One problem posed again, is that of ambiguous language. The House of Commons Foreign Affairs Committee speaks of a "threat of catastrophic attack." An empirical evaluation is required to designate what exactly constitutes a catastrophic attack and what separates it from other types. Given the difficulty to provide a coherent definition of terrorism, this poses a significant challenge to those who would alter the interpretation of Article 51.

When considering international customary law and State practice, the looser interpretation of anticipatory self-defense has been frequently practiced with other States either demurring (indicating tacit consent according to certain) or remaining silent. This tends to lean toward acceptance and hence, customary State practice. As Sir Daniel so aptly points out, the reality of academic debate is not that of the reality of the battlefield and the threat environment which emerges therefrom, when he states, "There is little intersection between the academic debate and the operational realties."[215] He further expounds upon this theme in a very clear reality-based assessment, "*And on those few occasions when such matters have come under scrutiny in court, the debate is seldom advanced. The reality of the threats, the consequences of inaction, and the challenges of both strategic and operational decision-making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states."*[216]

Self-defence against Non-state Actors

There are scholars, such as Yoram Dinstein, who base the legality of cross-border attacks, such as those upon Afghanistan—emanating from the FATA region of Pakistan, upon whether the host state is either *unable or unwilling* to deal effectively with the perpetrators or to prevent such attacks from occurring. This is commonly referred to as the "unwilling or unable test."[217] While this doctrine has previously appeared in different guises and inferences; notably the Chatham house *Principles of International Law on the Use of Force by States in Self-Defence,* back in 2006;[218] it is Ashley Deeks who is remarked for supporting this current terminology. This relatively recent doctrine has created controversy and hostility equal in scope to that pertaining to questions of preemptive self-defense, targeted killing, or the strategic use of armed drones. Many of the same proponents and critics once again find themselves at odds.

According to Deeks the doctrine, in no-nonsense fashion, asserts that "[I]t is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat. During their incursion in to Syria in 2014,the United States laid claim to this right of individual and collective self-defense. The justification under Article 51, and in accordance with this doctrine, was presented in a letter to the UN Secretary General.[219] The United States further noted that the actions taken were in accordance with the principles of necessity and proportionality. Other legal scholars, such as Michael N. Schmitt, lay a greater burden of proof at the doorstep of the targeted victim state for the victim to legitimately resort to self-defense such as delineated under article 51 of the UN Charter.[220] There persist several probing issues related to this doctrine which remain to be clarified under international law, to wit:

1. Whether this doctrine is indeed part of customary law as some have asserted (State practice and opinio juris). Certainly, its limited application would seem to argue against such a premise.
2. Whether the unwilling or unable host state has clearly expressed their inability or unwillingness to deal with the situation. This cannot be merely a speculative and subjective calculation on the part of the belligerent, which would lead to abuse.
3. Finally, and perhaps most importantly: Does an attack by a nonstate actor trigger an exception to the prohibition of force as outlined in Article 2(4), thus permitting the victim state recourse to invoke individual and collective self-defense under Article 51 and the use of preemptive military action, and if so under what specific criteria?

The problem facing states, involved in modern conflicts, is that they are largely dominated by violent non-state actors. These tensions were the focus of a critical scholarly examination by Gelijn Molier, in *The War on Terror and Self-Defense Against Non-State Actors*. The author pointed out that the traditional model of ascribing responsibility for armed aggression, normally attributed to the state from whence such entities operated, and from where such attacks emanated is no longer as clearly defined (due to the transnational nature of the phenomenon). Additionally, it can no longer be as easily and fairly attributed, to a specific State, in the current circumstances, as it has been in the past.

This is particularly relevant regarding so-called failed states, for if such states cannot put their own houses in order and maintain the rule of law, how can they possibly be expected to police such disparate groups of transnational fighters? These foreign fighters are often housed, perhaps temporarily, within their own unsecured and porous borders. There is no clear definition of what

constitutes an armed attack under art. 51 of the UN-Charter, nor from whom such an attack may emanate. Does a cyber-attack, for instance, justify the meaning of this definition?

There have also been some positive efforts to establish a more cohesive set of formal guidelines. Unfortunately, many of these efforts are often driven by personal agendas or blinkered vision. A ten-year study undertaken by the ICRC was but one example. The International Law Association, chaired by Mary Ellen O'Connell, adopted yet another, which resulted in a report conducted by a panel of eighteen experts originating from fifteen different states and presenting five years of investigative research and documentation.

Finally, there is the significant problem of the restrictive interpretation of the article itself. Since the central tenet of the charter is to ostensibly avoid armed conflict, maintain security and ensure peace at all costs. As outlined in Article 2 paragraph 4, many scholars consider the self-defense clause as logically adhering to a more restrictive interpretation, concerning the collective or individual state rights to self-defense.[221] Thus, a state according to this restrictive type of interpretation would only have recourse following an armed attack of significant magnitude, by a formidable opponent resulting in grave injury or harm. A definition with echoes of the criteria cited in the Caroline doctrine. Such a definition would, by necessity, preclude preemptive self-defense and certainly the type being currently practiced internationally.

The UN Charter was ostensibly designed to avoid the madness and bloodshed that had defined the previous two World Wars, and the use of force was to be restricted to only three permissible exceptions. The first was authorization by the United Nations Security Council for the maintenance or reestablishment of peace under Articles 39, and 42 (39 determines the status and while 42 provides authorization for intervention). The second, covered under Article 51, was

the inherent right of self-defense for nations. Finally, the third related to a State invitation for assistance whether or not under the guise of collective self-defense.

James Green concurs that "The inherent right of self-defense is universally accepted as an exception to the general prohibition of the use of force."[222] The difficulty faced today is, that the wording of the Charter itself, and more specifically that of Article 51, pertaining to the rights relating to self-defense, were very loosely worded and allowed several different and opposing interpretations to be drawn

Regarding drone warfare, it is imperative to note that, this legal framework means that air strikes—including those conducted by drones, are and can be considered as an armed attack, thus triggering a State's right to self-defense. Should the government of a state such as Yemen or Pakistan decide that air strikes are prohibited and despite this, a drone attack occurs, drone attacks may be legally construed as an armed attack, and by consequence, afford the victim state the right to armed retaliation in self-defense. Although an unlikely scenario it must nevertheless be considered in light of the ruling.

The fact that threats, imminent or otherwise, were relegated to the category of "less grave forms is problematic for states proposing measures of anticipatory self-defense since according to the courts holding only cases of armed attack justify the resort to self-defense. The aggrieved state must, in the view of the court, take other, proportionate countermeasures. By the same token, however, the court insisted upon the inherent right of states to self-defense against armed attack, under international customary law. Finally, it is useful to bear in mind, the context and nature of the threat. At the time of this ruling international terrorism posed a much less significant threat than it does today.

Preemption vs. Prevention

There has been much heated discussion over the use of anticipatory self-defense, otherwise known as the doctrine of *preemption*. Anticipatory strikes are seen in two different guises, that of preemptive attacks and those categorized as preventative. Depending upon the interpretation assigned anticipatory indicates something that comes before. Anticipatory indicates the temporal characteristic of intervention preceding the actualization of some intended threat. Much like the term preventative, it accords the notion of impending harm. Preemptive carries the notion of heading off an impending threat prior to its actualization and preventative means that the threat may or may not have been declared. While the two terms, preventative and preemptive, are often conflated, Stephen Coleman provides a convenient framework for our consideration, where he employs, "…the term 'pre-emptive attack' in cases where enemy aggression is imminent, and the term 'preventative attack' in cases where enemy aggression is expected at some [unspecified] time in the future [in other words intended]."[223] The trend towards a loosening of the self-defense criteria, to allow a more flexible response, has been particularly supported and advanced by the United States. See the diagram below for clarification.

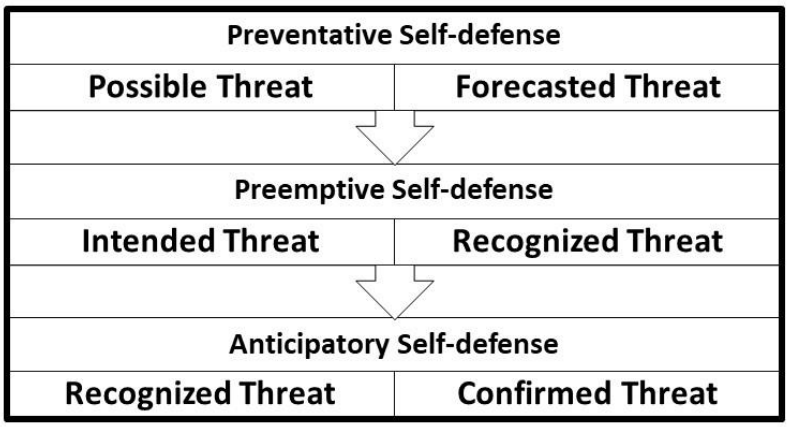


Figure 3© James P. Welch 2018.

The legitimacy of response as a measure of self-defense increases proportionally as the level of threat becomes increasingly evident.

The real key to preemptive intervention depends heavily, in turn, upon yet another concept, that of imminence. Imminence calls to mind the synonym of "immediate" and indeed this was the view adopted by most medieval legal scholars. This was the definition encompassed by the *Caroline incident* of 1837 as well. Additional characteristics include that the menace must be overwhelming and poses a grave threat (e.g., Walzer's supreme emergency) to the state in question. Francisco Vitoria, for example, exhorted that "Self-defence must be a response to an immediate danger, made in the heat of the moment or *incontinenti* as the lawyers say (author's emphasis)."[224] However, is it plausible to consider the same criteria as valid in the fast-paced, technologically advanced environment of 21st-century battlespace? Is the essence of "imminent" as we understand it today, equivalent with that which existed in the 16th century? Probably not.

Given that threats can be far more rapidly organized, transferred, and implemented to pose an immediate transnational threat, makes preemptive interventions incumbent upon the targeted state, to assure a strategically effective and balanced response. The one factor that remains the

same between the evaluations of then and now, is solid verifiable intelligence. Author David Maple defines the realist perspective of preemptive intervention, "Realism insists that at least occasionally, preemptive war can also be an indispensable means of defending the state against grave but nonforceful threats."[225] It is incumbent then, to clearly define what is meant by preemptive as opposed to preventative.

The question of preemption was set according to the precedents of the *Caroline incident* of December 29,1837. The principles of necessity, proportionality, and last resort were firmly established as the foundational criteria underlying state self-defense. The then Secretary of State Daniel Webster outlined the now famous guidelines, "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[226] The concept of preemption was, therefore, the established benchmark for preemptive defense *prior to* the establishment of the UN Charter and particularly Articles 51 and Articles 2(4).

Maple draws an intriguing parallel between the view that it was a failure not to have initiated a preventative war in 1930, to stop the rise of Hitler (The Munich analogy) and that consideration as a possible influence exercised upon George Bush in his [presented as preemptive] decision to invade Iraq.[227] His observation highlights the lack of a clear delineation between the terms preemptive and preventative. Judith Lichtenberg, referring to Walzer, correctly underscores the problem of distinguishing between preemptive self-defense and more offensive preventative intervention. Lichtenberg further addresses the danger posed by conflating them, "But as the threat becomes less imminent, preemptive attack shades into preventative war, which, by definition, responds to a more distant danger and is therefore more difficult to justify."[228] In other words, the further imminence recedes into the background, the larger looms a war of aggression. Lawrence Freedman takes Lichtenberg's logic a step further.

Freedman, rather controversially, if logically, argues in defense of a doctrine of prevention and posits that preemptive interventions are, for all intents and purposes, preventive in nature. His reasoning is that prevention is meant to head off a dangerous situation before it arises to the critical stage of imminence with perhaps attendant catastrophic results. As both Lichtenberg and Freedman correctly indicate the war in Iraq, although dressed up as preemptive, was little more than a preventive war camouflaged using smoke and mirrors. These threats exist along a continuum. The greater the threat posed, and consequences faced, the greater the need for flexibility toward anticipatory self-defense under international law.

According to the so-called *Bush Doctrine*, which was largely formulated from the body of *The National Security Strategy of the United States of America, September 2002*, the outlines for both anticipatory (legally recognized) and preventive (illegal according to international law), figured prominently. The instrument did not banter about or mince words as to its intentions. Nothing would stop a determined United States in its pursuit of national defense, regardless whether it was justified. The justification for such a position was underscored repeatedly by reference to elusive WMDs in the hands of terrorists; WMDs which have never materialized and given the difficulty of procurement, transport, and dissemination, hopefully never shall in any meaningful sense. The document is an odd blend of reasoned judgment and speculation based upon hypothetical projections. While the strategy made sense overall, there exist problematic elements:

> *We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts*

> *of terror*. It then digressed into the realm of speculation …*and potentially the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.* The document then returns, just as abruptly to the conditions of reality…*The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries the United States will, if necessary act preemptively.*[229] While such an approach is certainly justified the use of the term preemptive, and the challenging way in which the wording is expressed, is less than diplomatic.

Preventative war was given new impetus following the *Bush doctrine* implemented by President George W. Bush, during the U.S. invasion of Iraq. While the invasion sparked widespread condemnation and a distinct lack of international support, the consequences of undertaking a preventative war were negligible. Such discussion gives pause for reflection and underscores the importance of developing a well-balanced national security strategy. Such a strategy must strike a balance between constraints imposed by international law and the legitimate use of judicious anticipatory force against grave threats. For instance, it was noted that "The debate over pre-emptive strikes took on particular salience in 2002, Deeks said, when the United States claimed — more clearly and assertively than before — that a state could use force to forestall certain hostile acts by its adversaries. More than a decade later, Deeks' chapter, "Taming the Doctrine of Preemption," reviews where the debate currently stands and where it is heading."[230] Selective interpretation of the language of the UN Charter, particularly regarding the dispute between

Article 51 and the right to preemptive self-defense has resulted in a heated debate over the intent of the article. This debate is largely responsible for the polarized positions which have been adopted regarding the self-defense issue. Arend proposed three possible solutions to break free from this current deadlock:

- Acceptance of the constrained reactive conditions under the Caroline paradigm
- Relaxation of imminence requirement due to the nature of evolving threats
- Abrogate and declare the UN charter framework to be a failure[231]

In its current format, the Charter of the United Nations can be seen simultaneously through two opposing prisms, leaving the concept of imminence to be ultimately loosely determined. If this is indeed the case, and the foundation upon which the U.S. has based its rights to self-defense, then one must question the concept of imminence itself. It appears that there is a dangerous gap, in international law, concerning the definition of the meaning of imminence. The guidelines for the conceptualization concerning the question of imminence were brushed aside under the Bush doctrine, carried forward and even augmented further, by the Obama administration.

Arend recalls, "…in its 2002 National Security Strategy (NSS) that the United States 'must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.'"[232] If such semantic juggling, however, is acceptable (as appears to be the case) then, this completely invalidates the guidelines for entering a just war. Indeed, if they are that outmoded, and out of touch with the reality of modern conflict, then they should perhaps be replaced with a more reasonable and adequate framework.

This is the position of many current thinkers and the also thrust of the current research as well. Some suggestions on how this might be developed are presented in the final chapter. It is,

however, important to emphasize that such modifications must be strictly controlled and created in a spirit of global need, rather than geared towards the desires and national vested interests of individual states. The rules, otherwise, become automatically invalidated by expanding the boundaries largely to suit one's own needs.

Mayer, writing on the Bush policies, highlights the danger of such practices, "By classifying terrorism as an act of war, rather than as a crime, the Bush Administration reasoned that it was no longer bound by legal constraints requiring the government to give suspected terrorists due process."[233] Such an observation obviously precludes the possibility that it can be both a crime as well as an act of war. Additionally, it overlooks the important criteria of geographic origins. It would seem unlikely that the United States would launch a drone attack on Great Britain, or France for instance, even if that were to the point of origin for such an attack. Such positioning recalls realist perspectives advanced in *The History of the Peloponnesian Wars*, by Thucydides: The Athenians dictating to the Spartans pronounced that, "Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."[234] The weak, in our case often refers to those noncombatants caught in the middle of armed conflict. Such thinking was also fundamental to the reflections of Machiavelli (*The Prince*) and Thomas Hobbes (*The Leviathan*), true genitors of realist philosophy. There are critics who oppose such a stance.

Milson and Herman assert that "the International Court of Justice and a majority of writers take the view that Article 51 preserves the 'inherent right' of self-defence that preceded the Charter, which included the right to act to prevent an attack from occurring,"[235] Unfortunately the first part of this premise is flawed. The ICJ never took a position of the question of anticipatory self-defense.

While the ICJ statured on the material in Nicaragua, there has never been a clear delimitation between the actual occurrence of the attack and the act leading up to the attack proper. In both cases, self-defense would appear to be a justified response as argued throughout this work. Michael Schmitt cogently points out that, "pre-emptive self-defence is not a correct legal term; it rather should be labelled anticipatory self-defence, which is recognized as a standard concept in international law."[236] This is more than a question of simple semantics and has a great impact on our understanding of the concept as it applies to international law. The difference between these terms has been indicated in a previous diagram. Quite simply put there is a burden of proof. Such intelligence must be confirmed by multiple sources providing that there was a substantial possibility of impending attack for the act of self-defense to find legitimacy.

In the opinion of this research, for preemption to be justified it would certainly require transparency relating to solid intelligence detailing an imminent threat against the state. This appears to be the only scenario where anticipatory attacks in self-defense could be considered legitimate. On the other hand, a narrow interpretation such as that proposed by O'Connell; waiting, to receive the first blow from a committed aggressor, could quite possibly spell the death knell for a defending victim. Millson and Herman clearly echoed this sentiment in their 2015 policy paper, "Awaiting an 'armed attack' or even allowing one to become 'imminent' may leave a State without an effective ability to defend its people."[237] It appears only logical, therefore, that the magnitude, veracity, and nature of the attack must all enter the calculus of any legitimate self-defense equation.

Many critics have made, and indeed continue to make, assertions concerning the legality and authorization of the use of force and proportionality. They do so by referring to often vaguely worded, misinterpreted, ill-defined or generalized legislation. There are so many circumstances

and variables involved, in modern warfare that an inflexible, "one rule fits all" framework, in the current environment, is an inadequate response. It is nearly impossible to establish a set of rules, concerning anticipatory preemptive self-defense, which is equally applicable to all states, in all situations, and for all armed conflicts. This is particularly true with the advent of threats such as weapons of mass destruction (WMD) and transnational terrorism. Anthony Arend tellingly reiterates the point that "Both WMD and Terrorism pose threats unanticipated by traditional international law."[238] The current situation remains unclear with proponents and critics vociferously spinning their wheels on both sides of the legal debate and achieving no demonstrable results.

The ethical perspective: Walzer's moral argument on Anticipatory Self-defense[239]

Walzer, a steadfast proponent of the non-intervention rule, considers that the only truly ethically justified reason for conducting warfare is a response to aggression levied upon the state. This view incorporates this as his fifth principle in his six-point theory of aggression, which begins with the premise that, "*Nothing but aggression can justify war.*"[240] But the conundrum is, how exactly do we define aggression and what is its relationship to imminence, and even more precisely the concept of intent? Such a restrictive view of the use of armed force, would, at first glance, appear rather shortsighted tending to preclude the notion that occasionally armed force must be employed in the interests of good; to establish peace and to maintain justice. However, Walzer also examines the right to anticipatory self-defense and the character of aggression.

Following the earlier publication of *Just and Unjust Wars*, Walzer qualified his position regarding humanitarian interventions. He distinguishes this type of intervention from others and

proposes that the only justification, for states to violate the non-intervention principle, in support of humanitarian intervention, would be in the case of egregious atrocities which violate universal norms, and then only as a case of last resort, in accordance with just war principles.[241] This type of intervention still supports the original premise first elicited by Walzer regarding intervention as a response to aggression.[242] Some might see this, however, as a form of word-play or semantic manipulation. Walzer has adamantly refused to reflect upon the philosophical dimensions of warfare, preferring instead to adopt a more practical regard.

Despite being an ardent critic of the Caroline/Webster standard, in Chapter 5 of *Just and Unjust Wars*, entitled *Anticipations*, Walzer also recognizes the fact that anticipatory self-defense does indeed exist as a legitimate exception, complementing his own interpretation of just war theory. In this important chapter, he additionally lays out the required criteria for a moral justification of anticipatory self-defense. Walzer establishes several important points worthy of consideration and it, therefore, behooves us to examine the chapter in greater detail.

While Walzer asserts that the right to anticipatory self-defense does indeed exist as a moral right, he also notes that it is, nevertheless, highly restrictive in nature. Restrictive in fact to the point of nonexistence. Walzer presents an excellent argument emphasizing the fact that the Caroline/Webster standard equates imminence with visibility, or a clear manifestation of acts and events. Walzer compares this with an incoming blow being blocked before the punch has actually landed. In other words, any response would be quite likely too late to be effective.

Walzer goes on to emphasize the importance of the criteria of last resort. A criterion which must be based upon reasoned judgment given the gravity of the consequences involved. The decisions made in the cold light of reason must be drawn only after weighing all the relevant

facts. Walzer asserts that the resort to anticipatory self-defense requires a modification of the existing legal framework. A point that has been equally underscored throughout this research as well. A spatio-temporal timeline for resorting to anticipatory self-defense is then established. This timeline is configured with the Caroline standard on one end, corresponding to immediate threats, and preventative war responding to distant threats, at the opposite extreme. Between these two imaginary points there exists a space for determining a morally justified intervention.

Preventative war, explains Walzer is a geopolitical concept configured to maintain the balance of power, avoid the distribution of power from a position seen as balanced to unbalanced with the associated creation of hegemony by a single entity. and the author goes on to examine this phenomenon in more precise detail. Walzer adopts Vattel's formula describing acts as threats and presents the dichotomous nature of the balance of power model as it relates to both war and peace. In this case, acts are considered as moral judgments calling for a military response that is morally understandable. Walzer examines the utilitarian and moral arguments for preventative war.

Despite the fact that the current legal paradigm considers preventative war as always unjustified, Walzer lays claim to its moral justification in certain limited circumstances. According to Walzer, and indeed Vattel before him, preventative war inherently contains an element of just intent (*iusta causa*). According to Walzer, in order to be morally justified, preventative war must be based upon acts not merely speculative assumptions (such as with the Iraqi invasion of 2003).

Provocations and pontification points out Walzer, are not synonymous with threats. Walzer emphasizes the fact that unlike the Caroline standard, "[t]he line between legitimate and

illegitimate first strikes is not going to be drawn at the point of imminent attack but at the point of sufficient threat."[243] Thus, Walzer shifts the burden from a temporal framework to a more logical and reasonable contextual one. Walzer also correctly emphasizes the fact that this specific point, where the threat is sufficient, is understandably context-specific and that there must exist a sufficient preponderance of elements to draw such a conclusion. The author uses the 6-Day War of 1967 as an apt illustration of this concept.

Despite the fact that the threat is always inevitably contextual in nature Walzer provides us with three points of guidance with which to measure a significant threat:

- Manifest intent (clear and evident)
- Active preparation (lacking in the U.S. invasion of Iraq in 2003)
- Inevitability

In addition to these three points presented by Walzer, I would add a fourth and that *is the maintenance or existence of an ongoing threat*.

In a spatio-temporal framework, preventative wars span past and future developments. The Caroline standard relates to the immediate moment at hand. Walzer's construct—a time frame he refers to as "the present," lies somewhere along the timeline between these two previous points. Walzer adopts a relative and contextual judgment for the implementation of a "*Grotius Sanction*," and indeed cites Grotius who presciently envisioned the need for such a model of anticipatory self-defense. A model of the legitimate use of state-sponsored force through the use of anticipatory self-defense.

Summary

The chapter began with a discussion concerning the different rules, regulations and guidelines that pertain to and determine the conduct of armed conflict. Throughout history the concepts of justice and war have been inherently related. The current examination adds deeper insights and builds upon the introductory foundations of previous chapters. There was an in-depth examination of the legal issues, the various bodies of law, and the complex web of rules and regulations relating to war and it's just conduct. It was observed that, while there are countless rules, regulations, agreements, treaties, and precedents that in many cases they fall short. None of these legal statutes are distinctively explicit enough to formulate a clear and comprehensive set of guidelines, which apply to 4th generation insurgent warfare, or the associated rights and protections of self-defense as means of responding to this menace.

In her article, *Unlawful Killing with Combat Drones*, O'Connell fails to recognize and assign proper value to such principles as intent, the scale of risk, probability, and threat levels. The author posits that: "Even where militant groups remain active along a border for a considerable period of time, their armed cross-border incursions are not considered attacks under Article 51 giving rise to the right of self-defense unless the state where the group is present is responsible for their action."[244] This is precisely why this research argues that the current set of rules, in their present form, are no longer applicable, given the changing face of modern warfare. O'Connell also argues that relentless cross-border incursions are not a significant enough factor for a state to resort to self-defense under the principles of Article 51. O'Connell cites the ICJ ruling against Uganda, in Congo v. Uganda.[245] While correct in principle, this also depends, realistically, upon many factors including the size, intensity, and duration of such attacks.

Most of these laws were drawn up with great flexibility and intended to address the risks and dangers of conventional, symmetric state level warfare. The face of warfare today, has little

semblance with anything we have previously encountered. Liberal, humanitarian oriented, society currently imposes far greater restraints upon the conduct of war than ever before, while the face of war itself has become increasingly unconstrained, and the consequences for the victims are often "solitary, poor, nasty, brutish, and short,"[246] with little regard for common decency and no respect for rules whatsoever.

The earlier rules were adequate to address the challenges of traditional warfare; however, they are less capable of adapting to this newer hybrid form of asymmetrical, transnational armed conflict and the responses that it has engendered. The questions, in either paradigm, nevertheless remain the same and relate to the concepts of necessity, proportionality and last resort. However, new answers are required in the face of unique threats and unprecedented challenges. As a result, these various shortcomings in international law have fostered a heated debate and much discord surrounding these controversial subjects. The focus of such concern centers upon questions of legitimacy and defining the limitations of justifiable response.

It was recognized that there exist three areas which give rise to tensions within international law. The first, relates to interpretation, the second related to adherence, while the third concerns the aspect of enforcement. Any weak link along this chain of justice can cause the system to fail. In other words, for international law to be effective there must exist, concordance with the meaning, adherence and respect of the given laws, and finally an efficient mechanism for the enforcement of violations.

Many will see the weakness of such formula immediately. Given the vested interests of different states vying for power, and the limited resources and authority available to international organizations, international law seems like a good idea albeit an unrealistic one. Despite these flaws, however, international law is, nevertheless, often being respected and upheld. On the

downside, violations of sovereignty do occur and historically the number of violations is on the rise. In the balance, this history of violations bears witness to the overall weakness of the U.N. Charter frame work.[247]

For customary practices to become conventional written instruments, such as treaties and protocols, a great deal of flexibility is required when drafting the various documents. A single word or phrase can sabotage the entire process. This is in fact a significant part of the underlying problem in the debate surrounding questions of anticipatory self-defense.

The following section of the chapter dealt with introducing the legal framework. Paramount among these laws is: the law of armed conflict (LOAC), or international humanitarian law; international human rights law; and Article 51 of the United Nations Charter, concerning the right to self-defense. There was an historical view of the development for the legal precedents contained within these statutes.

While some scholars, such as Mary Ellen O'Connell, argue that the existing framework is sufficient, there is also a growing amount of literature stating that this is not entirely the case. The earlier guidelines were established to contend with two specific types of armed conflict: traditional international state level conflict, and non-international armed conflict (NIAC). There were no provisions set out to deal with gray area of transnational armed conflict (TAC). It was shown that despite the existence of such laws, an important part of the problem relating directly to the legal frame work, was their lack of the powers of application, enforcement and adherence. Modern institutions of control are entirely ill-adapted, unprepared and lack the appropriate instruments to deal with the menace, which currently threatens effective international relations. Those agreements, treaties and protocols, which do exist, are often neglected, skirted, or

overlooked and violated with impunity. The overarching framework relating to the topic of self-defense was also introduced at this point.

Both sides of the currently raging debate concerning drone warfare were given equal weight. The essential point to establish here is that the use of armed drones, in no way infringes international law. It is an instrument of legitimate state force, much the same as any other, and if used properly, with respect to the existing laws of war, presents no violation whatsoever, either legally, morally or ethically. As a weapons platform the armed drone does not violate either international humanitarian law during international armed conflict and non-international armed conflict. Additionally, armed drones do not contravene the *jus ad bellum* rules of force, unless they are employed to violate sovereignty without justification, and therefore fail to respect the constraints imposed by international law. Employed in this fashion, they would serve as an extension of an illegal, *jus ad bellum* violation, much the same as would any other ground unit or weapons system. In this respect, if the legal framework regarding the state-sponsored use of force is respected and strictly adhered to, then the legal precepts of *jus ad bellum* and *jus in bello* would suffice.

The key to a legitimate and effective anticipatory self-defense strategy involves transparent operational processes and solid intelligence which confirm a pending threat. In contrast to other authors, who insist that self-defense must occur exclusively as a response to armed attack, this research does not concur with that view. This traditional pacifist perspective, based upon biblical injunctions, is entirely misplaced in the realist world of transnational armed conflict. Waiting for such an attack to occur is not only detrimental to the interests of national security, it is also clearly suicidal.

During the preceding chapter it was further determined that, regardless the legality of drones, it would not be unreasonable to envisage the creation of a well-balanced, international body charged with working to revise outdated and outmoded regulations. While such efforts have been attempted in the past, the results have been less than satisfactory. Such a constitutive body would be related to defining the limits and boundaries of international, as well as non-international, armed conflict, and making them clearer and more applicable to the conflicts of the 21st century (and beyond). The drafting of such a protocol would, inevitably, be a vast and challenging undertaking. Notably a typical existing organ to charge and entrust with such a task would be the International Law Commission; a special UN Commission. Legislation concerning the use of robotics during armed conflict, would necessarily be a part of such legislation or relegated to a separate, more specialized body of arbitration.

The chapter concluded with a discussion of the changing face of global warfare and the threats which must be considered. Again, the composition of the threat and its consequences must be weighed proportionally against the timing and severity of the response. In the case of threats by weapons of mass destruction (WMD's), the response must be firm and immediate, leaving not room for its accomplishment