아태연구 제14권 제2호
2007년 11월 30일
pp.195~233

Peaceful Resolution of Disputes vis-à-vis Counter terrorism and the Use of Force

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Abstract

Since the creation of the International Law, the issue of the peaceful settlement of disputes has attracted the attention of the international community. And with the creation of the United Nations and the adoption of its charter, which places an obligation to states for the pacific settlement of disputes, this idea was closer to the realisation. But, the world division during the Cold War era led these efforts to a stalemate. After its end, the international community entered into a new era of co-operation and development. The belief of a multilateral international system in which states would resolve their disputes by peaceful means with respect to the fundamental principles of International Law, was widely spread. Furthermore, since then conflict prevention has been recognized for its effectiveness by the international community. However, the 9/11 terrorist attacks marked the beginning of a new era in the international relations. They challenged the international environment of security affairs and triggered a debated over the effectiveness of the existing international legal order. One year after the attacks the US administration published its first National Security Strategy in which it drew the attention of the international community toward new threats such as weapons of mass destruction and terrorism and envisaged a new future for the International Law governing the

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use of force and the right to self-defence. For years these issues were, and should be still, regulated by the provisions of the UN Charter, which crystallize the customary law.

The purpose of this paper is to examine the impact that the US NSS (US National Security Strategy) could have if adopted by the majority of stated on the obligation for the pacific settlement of disputes. The main question the paper posses is the prospect for the peaceful resolution of conflicts in a supposed era of unilateral recourse to force, justified by the special character of modern threats posed to the international community. A related issue that would be investigated is the prospect for conflict prevention and the role of United Nations in this field under the new international legal order that the US NSS envisaged. To this end, the focus will be on the existing international legal framework of the peaceful settlement of disputes, with reference to the International Law of the use of force and conflict prevention, through the UN charter as well as other sources, such as the Manila Declaration and the Friendly Relation Declaration of the United Nations General Assembly. And this paper is devoted to the US foreign policy after the attacks in the World Trade Centre and the Pentagon and the development of the so-called Bush Doctrine of preemptive self-defence.

I. Introduction

Since the creation of the International Law, the issue of the peaceful settlement of disputes has attracted the attention of the international community. Special provisions were incorporated into international documents and efforts were made to resolve disputes within international or regional arrangements. These efforts reached their pick with the creation of the United Nations and the adoption of its charter, which places an obligation to states for the pacific settlement of disputes. After its adoption, more documents elaborating the issue have been adopted by the UN organs and the related issue of conflict prevention has been also evolved. But, the world division during the Cold War era led these efforts to a stalemate. After its end, the need for the establishment of a peaceful environment among states was apparent as never before. Having being captured for almost half a century into the rival between East and west for global dominance, the international community entered into a new era of co-operation and development. The belief of a multilateral international system in which states would resolve their disputes by peaceful means with respect to the fundamental principles of International Law, was widely spread. Furthermore, since then conflict prevention has been recognized for its effectiveness by the international community. Most of the international organizations have established special units with their structures with a mandate to anticipate, as much as possible, potential sources of conflicts and to prevent their escalation to violence.

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international relations. They challenged the international environment of security affairs and triggered a debated over the effectiveness of the existing international legal order. One year after the attacks the US administration published its first National Security Strategy in which it drew the attention of the international community toward new threats such as weapons of mass destruction and terrorism and envisaged a new future for the International Law governing the use of force and the right to self-defence. For years these issues were, and should be still, regulated by the provisions of the UN Charter, which crystallize the customary law. But, the US NSS challenged these provisions by invoking the right of anticipatory self-defence as the appropriate response to the new threats and placing it on a new level, different from its initial incarnation, covering also cases where the threat is not imminent and uncertainty exists over the *"time and place of the enemy's attack"*. What actually the National Security Strategy declares, is a new US leadership in the era of international terrorism. Such leadership by the world power is not inherently bad.

But when characterized by unilateralism in the use of military force, it can have a negative effect on its own stated goal, the protection of its own peace and security. The purpose of this paper is to examine the impact that the US NSS (US National Security Strategy) could have if adopted by the majority of stated on the obligation for the pacific settlement of disputes.

The main question the paper posses is the prospect for the peaceful resolution of conflic1ts in a supposed era of unilateral recourse to force, justified by the special character of modern threats posed to the international community. A related issue that would be investigated is the prospect for conflict prevention and the role of United Nations in this field under the new international legal order that the US NSS envisaged. To this end, the focus will be on the existing international legal framework of the peaceful settlement of disputes, with reference to the International Law of the use of force and conflict prevention, through the UN charter as well as other sources, such as the Manila Declaration and the Friendly Relation Declaration of the United Nations General Assembly. The second part of the paper is devoted to the US foreign policy after the attacks in the World Trade Centre and the Pentagon and the development of the so-called Bush Doctrine of preemptive self-defence.

II. The use of force and the settlement of disputes

1. The settlement of international disputes

Most of the public debates and academic writings concerning matters of international peace and security concentrate on the legality or the illegality of the use of force by states. Little attention has been paid on another obligation under

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international Law, that of the pacific settlement of disputes. In general, there are two main categories of means for the peaceful settlement of disputes.[1] The first one refer to the direct communication between the disputants, usually in the form of formal negotiations, to find a common solution to their problem. The great advantages of those kinds of mechanism are the high level of parties' involvement and their ownership of the solution, which increase their commitment to the negotiation process as well as to the implementation of the future agreement. The other main group of mechanisms refers to the engagement of a third party. The literature on conflict resolution suggests that the success of such involvement depends on two main factors: the consent of the parties to the involvement of an outside and their perception for its impartiality.[2] Third party intervention can be further distinguished in two classes: binding and non-binding. The latter may refer to fact-finding commissions or the offer of good offices by the UN Secretary-General or by any other actor, while the former to arbitration and other judicial measures.

Both group of means can be reactive or proactive in their approaches. Reactive efforts are those after a conflict has crossed the threshold of violence while proactive are those which are trying to prevent the escalation of disputes toward violence. Scholars and academics on peace research suggest that violent conflicts are more resistant to resolution and thus reactive approaches are less cost effective.[3] According to conflict resolution theory, there are several methods that the parties to a conflict can use in order to handle it. These are negotiations, mediation, arbitration, inquiry, conciliation, adjudication etc.[4]

In connection with the degree of parties' involvement mentioned above, negotiation and mediation imply the highest level while arbitration and adjudication the lowest. It should be noted here that these methods are different from the teams conflict settlement or conflict resolution. These are broad approaches that can be taken toward conflicts that use the above methods. The last ten years a new approach to conflict has been developed and appreciated for its peace added value. That is peace building, which is highlighted not only by the academic community but also

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1) Antonio Cassese, *International Law*, Oxford: Oxford: Oxford University Press, 2005, p. 279.

2) On the matter see, Luc Reychler and Paffenholz, *Peace-Building – A Field Guide*, Boulder: Lynne Rienner Publishers, 2001; Hugh Miall et al., *Contemporary Conflict Resolution,* London: Polity Press, 1999; Barbara F.Walter, Committing to Peace-The Successful Settlement of Civil Wars, Princeton: Princeton University Press 2002; However, this impartiality should mean absence of actions undermining the purpose of the operation, and thus not passive presence in the field, see The Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809,2000 p.50: available at http://www.un.org/peace/reports/peace_operations/

3) Michael E. Brown and Richard N. Rosecrance, *The Cost of Conflict-Prevention and Cure in the Global Arena,* New York: Carengie Corporation of New York, 1992, p.2; also Kofi Annan, The UN Millennium Report, “We the People”: The Role of the United Nations in the 21st Century, New York, 2000, p.44

4) For a description of each one see J.G. Merrills, *International Dispute Settlement,* Cambridge: Cambridge University Press, 1998, p. 1-164.

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from international organizations such as UN and EU. Especially in his Agenda for peace, the UNSG defined the importance of peace building as "actions to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse to conflict."[5] Although further elaboration on the development of conflict resolution theory would be interesting, it wouldn't be compatible with the purpose here, which is the legal framework of dispute settlement.

Until the adoption of the UN Charter, which place a clear obligation for the pacific settlement of disputes, states could recourse to forceful methods in order to impose their own terms of agreement. The only exceptions were cases in which states were bound by treaties to settle their disputes in an arbitral way. This was the case with the 1899 First Hague Convention on the Peaceful Settlement of Disputes, which established the Permanent Court of Arbitration as well as the Second Hague Convention of 1907, which also provided a provision for the arbitral settlement of disputes.[6] A similar provision was also included in the League of Nation Covenant, although without success.

An attempt to overcome this cap was made in 1924 with the Geneva Protocol for the Pacific Settlement of Disputes. Nonetheless, it didn't have any legal consequence.[7] The only legal document, prior the UN Charter era, with a better lack was the Briand-Kellogg Pact. Apart from the strict prohibition of the use of force as an instrument of foreign policy, it also included a provision for the pacific settlement of disputes.[8]

After the end of the World War II an obligation to settle international disputes by peaceful means was recognized with the adoption of the UN Charter. Article 1(1) states that the purpose of the UN is to maintain international peace and security and to that end to *"bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"*. Article 2(3) provides an obligation for all states *"to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"*. Having in mind the obligation under article 2(4) and the principles of non-interference and state sovereignty and equality, the article under discussion constitute the only legal option for states to resolve their differences, which has been also recognized by the ICJ as rule of customary law.[9] The principle for the pacific settlement of disputes was also reaffirmed by two,

5) Quoted in Hugh Miall et al., *Contemporary Conflict Resolution,* London: Polity Press, 1999, p. 187.
6) Randelzhofer in B. Simma, The Charter of the United Nations. A commentary, Vol. 1, Oxford: Oxford University Press, 2002, Article 2(4), p. 115.
7) Ibid p. 115-116.
8) Tomuschat in B. Simma, The Charter of the United Nations, A commentary, Vol. I, Oxford: Oxford University Press 2002, Article 2(3) p. 103.
9) Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgement of 27 Jung 1986 par. 290.

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relevant to the subject Resolution of the UNGA. The first one was the Friendly Relations Declaration of the Peaceful Settlement of International Disputes.[10)]

Under UN Charter, the responsible organs of the UN for the settlement of disputes are the UNGA, the UNSC and the Secretariat.[11)] Especially, the UNSC acting under Chapter VI *"shall call upon the parties to settle their dispute"* by such means as mentioned in article 33(1) and even make recommendations of how a particular dispute should be solved.[12)] The difference with the other organs is that the UNSC doesn't require the consent of the parties in order to consider a particular dispute.[13)] It should be noted here that the listing in article 33(1) doesn't imply any priority among the methods states can use.[14)] The fact that negotiations are mentioned first is only because this kind of method is the common. There is no legal obligation to use a specific method. States are free to choose the method they consider most appropriate. The only obligation is the settlement of disputes by peaceful means. Furthermore, according to the wording in the end of the paragraph, states can also make use of other methods, not mentioned in the Charter.

In order to understand the obligation under article 2(3), some comments should be made regarding its context and scope of application. The first one refers to whether states have an obligation to settle by peaceful means only their disputes that could threaten international peace and security or it this obligation covesr all possible disputes that can arise between them. Comparing article 2(3) with article 33(1), one can see the broad wording of the former, while the latter refers only to disputes that are *"likely to endanger the maintenance of international peace and security."* However, the formation of the modern international system with the close interaction and interdependence of states leads to the conclusion that any dispute, whether political, economic etc in nature, might has an effect in others and therefore trigger a violent conflict. Thus, it is wisely to regard the obligation for the pacific settlement of disputes in broad terms, covering all possible rivals. The specific reference to threats of international peace and security in article 33(1) is logical, since this article refers to actions taken by the UNSC as a first step to meet its obligation for the maintenance of international peace and security before moving to actions under Chapter VII. The matter was further clarified with UNGA Res. 37/10 adopting the Manila Declaration, which in the beginning reaffirms *"...the*

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10) UNGA Res, 2625 1970 Friendly Relations Declaration and UNGA Res. 37/10 1982, Manila Declarations on the Peaceful Settlement of International Disputes respectively

11) A special role is also recognized to other institutions such as the ICJ under article 36(3).Furthermore, under article 52, the UNSC encourages the development of regional arrangement for the pacific settlement of disputes. Regional organizations have the advantage of proximity and familiarity with the main actors in the conflict and have a greater interest to maintain peace in their region.

12) Articles 33(2), 36(1) and 38 of the UN Charter

13) J.G. Merrills, *International Dispute Settlement*, Cambridge: Cambridge University Press, 1998, p. 221.

14) Ibid, p. 2.

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need to exert utmost efforts in order to settle any conflicts and disputes between states exclusively by peaceful means... .”[15)]

The second point concern the level of application that is whether states have a clear obligation to settle peacefully their international as well as their domestic conflicts. It is obvious that the Charter provide clearly a duty for states to resolve their international disputes in a way that will not jeopardize the peace and security. Article 2(3) refers to international disputes, while article 33(1) provides means for the settlement of disputes, which constitute a threat to the international peace and security. Furthermore, since the Charter is an international treaty between states, it regulates the relations between those states and not between them and other private actors. In addition article 2(7) makes clear that it is not the purpose of UN to interfere in the domestic affairs of its member states. It is logical therefore for someone to assume that the obligation applies only to international disputes, or in order words, to disputes between states. In fact the Friendly Relations Declaration of the UNGA reinforces this view since it refers to disputes with other states.[16)]

However, from the first years of the UN, states had turned to it, in order to settle their disputes with non-states actors. This was the case with the Netherlands, when it asked the UNSC to settle its difference with Indonesia, which at that point wasn't an independent state. Furthermore, the UN was also called to find a solution to internal conflicts by establishing peacekeeping operations in Congo, Cambodia and elsewhere.[17)] Moreover, the assumption that internal conflicts can also pose a threat to international peace and security, led international community to the belief that the principle for the pacific settlement of disputes is also applicable to internal conflicts.[18)] In addition to this practice, the Manila Declaration on the Peaceful Settlement of Dispute by referring to people's right of self-determination, extends the principle also to internal conflicts.[19)] Nevertheless, it should be kept in mind that in order for the principle to be applicable in an internal conflict, it should be respected not only by the state involved, but also by the insurgent group.[20)]

Another issue arises from the nature of the initial act triggered the dispute. Can a state, being the victim of an unlawful act by another state, override its obligation under article 2(3)? Apart from a prohibition of reprisals amounting to the use of

15) UNGA Res. 37/10 1982, Manila Declarations on the Peaceful Settlement of International Disputes, second paragraph available at http://www.un.org/documents/ga/res/37/a37r010.htm

16) UNGA Res. 2625 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states, “Every State shall settle its international disputes with other states by peaceful means in such a manner that international peace and security and justice are not endangered” available at http://habitat.igc.org/open-gates/a25r2625.htm

17) For the role of the UN in peacekeeping operations see James Dobbins et al., *The UN's role in Nation-Building - From Congo to Iraq,* Santa Monica, CA: RAND Corporation, 2005.

18) The clearest examples are the Cyprus conflict and the conflict in Estonia in the beginning of ‘90s.

19) UNGA Res. 37/10 1982, Manila Declarations on the Peaceful Settlement of International Disputes, Chapter I, par. 12 available at http://www.un.org/documents/ga/res/37/a37r010.htm

20) Tomuschat in B. Simma, The Charter of the United Nations. A commentary, Vol. I, Oxford: Oxford University Press, 2002, Article 2(3) p. 109.

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military force and against individuals, either civilians or combatants, during armed conflicts there is no a general prohibition of reprisals "in the international relations of states". However this doesn't mean that economic, political or any other forms of reprisals are permitted. In general, reprisals, or countermeasures in modern legal terminology, are illegal unless it can be justified on the basis of three conditions: existence of an unlawful act that trigger the reprisal, a prior demand for remedies, and proportionality in the sense that the countermeasures taken are equal to the damage that the initial act caused.[21] Furthermore, if a state is bounded by a treaty to settle its disputes peacefully with other member states, then it cannot take counter-measures, even if the act of the other state is against the purposes of that treaty. This was the jurisdiction of the Court of the European Communities regarding the dispute between the European Commission and Luxembourg and Belgium. It stated that "states cannot take the law into their own hands."[22] Given the fact that under article 2(3) of the UN Charter states have a clear duty to resolve their disputes peacefully, it follows that reprisals are illegal concerning the implementation of the Charter's purposes, Furthermore, under article 41, only the UNSC can decide what kind of measures should be taken in order to ensure compliance.

All in all, it can be argued that article 2(3) provides and obligation for states to resolve their disputes, whether international or non-international, of any nature, in a peaceful way. After all, this derives also from the principle of state equality, on which the international legal system is founded. However, one should also look at another obligation of state in order to understand the logic of article 2(3), that of the non-use of force.

2. The prohibition to use force

For a long period, the use of force was a traditional method for the resolution of disputes between states. Since the beginning of the modern international system, with its origin dating back to the Treaty of Westphalia, states have used military force several times in their relations with others. In general, there was no official restriction on their ability to wage wars. Gradually, however, states realized that it was in their common interest to place some limitation on their "right to use force." A series of historical events contributed to this endeavour. Initial efforts were concentrated on the limitation of human suffering during war by placing various restrictions to the conduct of hostilities between states, known as just in bello.[23]

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21) Omer Yousif Elagab, *The Legality of Non-forcible Counter-measures in International Law,* Oxford: Oxford University Press, 1998, p. 37.

22) Ibid, p. 167.

23) Frits Kalshoven, *Constraints on the waging of war - An introduction to International Humanitarian Law,* ICRC, 2001.

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But also just ad bellum, the right to go to war, was about to be evolved. Article 1 of the Third Hague Convention of 1907 concerning the Opening of Hostilities placed a requirement for the hostilities to be legal, that of a formal declaration of war. Furthermore, as mentioned earlier, the Second Hague Convention of 1907 laid down a strict restriction to the use of force for contractual depts. However, this was subject to the debtor's consent to the settlement of the dispute through arbitration.[24] At the same time, the US had signed a series of treaties with a number of states, known as the Bryan Treaties, which obliged states to submit their disputes to a conciliation committee.

However, these efforts were not adequate to prevent World War I from happening. In the period after the war, the League of Nation didn't pay a lot of attention in the development of the law of peace and war.[25] The only remarkable event during the League era was the Briand – Kellogg Pacts, signed in Paris on 1928.[26] In its first article there is a strict condemnation of war and a renouncement of its use as an instrument of foreign policy. It was the first official prohibition placed by states with legal consequences. However, this prohibition cannot be regarded as effective for three main reasons: it didn't include an effective system of sanction in case of no compliance, it referred to war and not to the use of force, giving states a board flexibility as to the definition of their hostile behavior and it didn't define the scope of permissible self-defence.

It was not until the end of the Second World War, that a clear prohibition to use force was put in effect with he adoption of the UN Charter. In its preamble, the central goal of the Organization if highlighted:

"to save succeeding generation from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[27]

Article 1 describes the purpose of the Charter:

"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." [28]

To that end, article 2(4) places a strict prohibition to the threat or use of force by states in "their international relations." This restriction is regarded as one of the

24) Randelzhofer in B. Shimma, The Charter of the United Nations. A commentary, Vol. I, Oxford: Oxford University Press, 2002, Article 2(4), p. 115.

25) The only restriction that the League of Nation Covenant placed on the use of force was article 10, which obliged states not to wage war between them before their dispute had been submitted to judicial settlement and only after three months of the decision.

26) In 1924 the Assembly adopted the Protocol for the Pacific Settlement of Dispute, which placed a similar restriction as the one in article 2(4). However it never became binding.

27) First paragraph of UN Charter's preamble, available at http://www.un.org/aboutun/charter/

28) Ibid.

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most fundamental principles of the UN Charter and it is closely linked with the other principles, such as the peaceful settlement of disputes, the principle of non-interfering in the domestic affairs of other states, respect of human right etc.[29] It has been also recognized as a norm of ius cogens by the ICJ as well as by state s.[30] Two are the primary organs for the regulation of the use of force and the maintenance of international peace and security: the Security Council and the General Assembly. According to the provision of Chapter VIII of the UN Charter, a special role is also recognized to regional organizations.[31] However, an in-depth debate exists over the exact authority that these two organs have on the matter.[32] The function and power of each one is described in articles 10-17 and 24-26. But the statement that UNSC had reached during the Cold War[33], led the General Assembly to adopt Resolution 337A, known as "Uniting for Peace.", in which the security Council is recognized as the primary but not only body responsible for the peaceful settlement of disputes and the containment of the use of force.[34] Comparing article 2(4) with the Briand – Kellogg Pact, the former is of greater significance since it doesn't refer only to war but rather to the use of force (at least armed force) and also to the threat of force. In addition it is accompanied by a system of sanctions to ensure compliance.[35]

However, this restriction is not without problems. Several different opinions have been expressed regarding its interpretation. But, each interpretation should consider the character on the Charter. The UN Charter is an intergovernmental treaty. As such it should be interpreted according to its objects and purpose and its context, including the preamble and the annexes and as secondary source the travaux preparatoires.[36] It is obvious from the preamble that states are obliged to refrain from the use of military force. The problem which arises concerns other forms of force. It seems that it was not the intention of the drafters to include other from such as economic force. If the opposite was true then other formulas should be used such as "the threat or use of any kind of force." During the negotiations, the Brazilian delegation's proposal to include also economic forms of force was rejected.[37] Furthermore, if the article was meant to ban also the economic force,

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29) Antonio Cassese, *International Law*, Oxford: Oxford University Press 2005, p. 67.

30) Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgment of 27 June 1986, pqr.190.

31) On the subject see Christine Gray, International Law and the Use of Force, Fully updated second edition, Oxford: Oxford University Press, 2004, p. 283

32) Oscar Schachter and Christopher C.Joyner, United nation Legal Order, Volume I, American Society of International Law, 1995; Christine Gray, International Law and the Use of Force, Fully updated second edition, Oxford: Oxford University Press, 2004, p. 200

33) Christine Gray in Malcolm D. Evans, *International Law*, Oxford: Oxford University Press 2003, p. 590.

34) GA resolution 337A, 5th session, 1950.

35) Chapter VII of the UN Charter

36) Article 31 of the 1969 Vienna Convention on the Law of Treaties, Emmanuel Roucounas, *International Law I*, Athens: Ant. N. Sakkoulas Publishers, 1997, p. 181.

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or any other kind of force, then there would be no instrument that states could use to exert pressure, which would be lawful.[38] This definition of the notion of force was also reaffirmed by the Declaration on Friendly Relations adopted by the GA, which recognized that the article 2(4) refers only to military force.[39]
This doesn't mean that states are free to use or threat with other forms of force. The ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear weapons stated that the unlawfulness of other forms of force is covered by other rules of International Law and therefore the threat or use of such forms of force is prohibited.[40] In addition in the Nicaragua case the Court held the position that the notion of armed attack in article 51 covers also cases of support to irregulars or other group against the government of a stated "by organizing or encouraging the organization of irregular forces or armed band for incursion to the territory of another state."[41] Therefore, such actions could also constitute a violation of article 2(4).[42] Another problem arises from the notion of the phrase *"in their international relations"* included in the article. States have often misinterpreted it in order to justify actions taken against other countries either on the basis of territorial claim or the characterization of a conflicts.[43] However, such actions even if they are not illegal under article 2(4), they certainty come into conflict with article 2(3), which crystallizes the obligation of states to settle their disputes in a peaceful way.
The most controversial issue arises from the second sentence of the article under discussion. Which acts should be considered as acts against "the territorial integrity and political independence of any state?" The ICJ decision in the Corfu Channel case is of great value. The court rejected the argument made by UK that its acts didn't threaten the territorial integrity or the political independence of Albania.[44] Tacking into account the opinion that international legal order is structured around the principles of state sovereignty and non-interfering, it can be agued that the article 2(4) doesn't refer only to large scale military operations but also to small

37) Oscar Schachter and Christopher C. Joyner, *United Nation Legal Order, Volume I,* American Society of International Law, 1995, p.; 36.
38) Randelzhofer in B. Simma, The Charter of the United Nations. A commentary, Vol. I, Oxford: Oxford University Press, 2002, Article 2(4) p.118.
39) UNGA Res. 2625 (XXV) 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with Charter of the United Nations available at http://www.igc.org:open/-gate/a25r2625.htm
40) ICJ, Advisory Opinion on the Legality to Threat or Use of Nuclear Weapons of 8/7/1996, par. 47.
41) Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgment of 27 June 1986, par. 228.
42) Furthermore the UNGA Friendly Relations Declaration recalls the duty of states "to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State", see UNGA Res. 2625 available at http://www.habitat.igc.org/open-gate/a25r2625.htm
43) Christine Gray in Malcolm D. Evans, *International Law,* Oxford: Oxford University Press, 2003, p. 592.
44) Christine Gray, International Law and the Use of Force, fully updated second edition, Oxford: Oxford University Press, 2004, p. 30.

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scale that do not seem to threaten the existence of another state at first sight. This was also reaffirmed by the ICJ. Again, in it decision for the Military and Paramilitary Actions in and against Nicaragua, the Court held the position that territorial integrity and political independence should not be interpreted narrowly.[45)]

3. Exception to article 2(4) of the UN Charter

However, article 2(4) should be also interpreted according to all the others relevant provisions of the Charter. As mentioned above, the Charter provides a clear prohibition to the threat or use of force. This prohibition, however, is subject to the case under which the use of armed force is permitted, either collectively or unilaterally. Two are the exception to the obligation not to use force according to the UN Charter. The first concerns peace enforcement actions taken by the Security under Chapter VII of the UN Charter and the second unilateral use of force by states in cases of self-defence under article51.

Actions taken by the Security Council

Chapter VII of the UN Charter lays down rules concerning measures that the UNSC can take pursuant “the maintenance of international peace and security;” First thing that the UNSC has to do is “to determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken.”[46)] Left aside the problem of definition of those terms, some authors have argued that the provisions in article 39, linked with article 2(4), implies that it is actually up to the UNSC to decide whether a state's actions violate the prohibition in article 2(4) and thus it loses its legal significanc e.[47)] However, article 39 should be interpreted as an emphasis on the collective character of the actions taken by the UNSC. As a first step, provisional measures can be taken by the UNSC to prevent further escalation of the problem.[48)] In case of insufficiency, the UNSC can move to measures not involving the use of armed force as they are described in article 41.[49)] However, these measure are not

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45) Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgment of 27 June 1986, par. 202.

46) Article 39 of the UN Charter

47) Oscar Schachter and Christopher C. Joyner, *United Nation Legal Order, Volume I,* American Society of International Law, 1995 p 253.

48) Article 40 of the UN Charter

49) Christine Gray, *International Law and the Use of Force,* Oxford: Oxford University Press, 2004, p. 196-211. During the Cold War period, the power of UNSC under article 41 Were undermined by the veto posed by the two superpowers. The only exception was the economic sanctions against South Rhodesia in 1996. However, the end of the Cold War brought a decline in this practice of UNSC members states and along with it a re-birth in UNSC's role in the maintenance of international peace and security.

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without problems.[50] Economic embargos and other forms of sanctions can have a negative effect on both neighbouring countries and local population. As far as the former are concerned, article 50 states that if they face problems due to the sanctions imposed under article 41 *"they shall have the right to consult the Security Council with regard to a solution of those problems."* But nothing in the Charter offers protection to the local population. Nevertheless, it can be argued that International Humanitarian Law and Human Rights Law place some restrictions on the power of UNSC to impose sanctions.[51]

When sanctions are inadequate, the UNSC can, under article 42, take actions by air, sea or land forces in order to maintain international peace and security. This means that whenever a state has committed an unlawful act, it is up to the UNSC to decide what actions should be undertaken to restore international peace and security. Thus states cannot invoke article 42 to use force against another state.[52] Article 25 obliges states to join together in implementing the decision of UNSC. Thus, the peace enforcement actions would be supported by the member states. Article 43 states that the armed forces that shall be made available to the UNSC shall be determined by special agreements between member states and the Council. In case of deployment, these forces would be commanded by the UNSC and Military Staff Committee established with article 47(1). This structure of Chapter VII implies that the initial goal of the framers of UN Charter was to establish an international force deployed whenever was needed. Faced with the failure to establish such force as envisaged in article 43, the UNSC changed its policy by authorizing individual states or groups of states to use force on its behalf. Such practice has become known as "the coalition of the willing."[53]

As it was mentioned earlier, the incapability of the UNSC to take peace enforcement actions under Chapter VII during the Cold war Period, led the UNGA to adopt the resolution "Uniting for Peace;" This expanded the powers of UNGA on security and peace issues. Acting under this resolution, UN deployed UNEF to separate the Egyptian and Israeli forces, in the Suez Crisis.[54] During the course of time this practice went under the authority of the UNSC and eventually led to the development of peacekeeping operations as a distinctive institution of UN. Although peacekeeping operations were not provided by the UN Carter, are often mentioned as Chapter 6 ½. The peace added value of these kinds of operations is that they

50) The problems concerning sanctions have also been acknowledged in the UNSC's Supplement to an Agenda for Peace report par. 70 available at http://WWW.un.org/Docs/SG/agsupp.html

51) According to International Humanitarian Law, civilians cannot be derived from their right to access to food (Additional Protocol I, art. 54). The International Covenant on Economic, Social and Cultural Rights recognizes the "fundamental right of everyone to be free from hunger." (Art.11 (2)).

52) Rabiner Singh QC, Alison Mac Macdonald, Legality to use force against Iraq-Opinion, Public Interest Lawyera On behalf of Peace rights, 2002, par. 11 p.6

53) Thomas M. Franck, *Recourse to force: State Action Against Threats and Attacks,* Cambridge: Cambridge University Press, 2002, p.25.

54) UNGA Res,1000(ES-I)adopted on 5 November 1956

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expanded the notions of threats to the peace, breach to the peace and acts of aggression by allowing UN to get involved also in non-international conflicts. Peacekeeping operations represent the change in the nature of modern wars, from interstate to intrastate conflicts. In its initial incarnation, peacekeeping referred to the impartial deployment of international forces with the consent of the conflicting parties. However, the complexity of different cases soon led the Orgainzing to change its approach to peacekeeping by expanding the mandate of the operations and allowing the use of force beyond self defence.[55] Especially after the end of the Cold War with the increase of intrastate conflicts, the inadequacy of traditional peacekeeping led to the desire to expand the mandate of peacekeeping operation. These inadequacies of peacekeeping were further highlighted by UNSG Boutros-Boutros Gali, as well as his successor Kofi Annan.[56]

Self defence

The other exception to article 2(4) is the use of self-defence. Chapter VII of the UN Charter concludes with article 51 which recognizes and protects *"the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the Unite d Nations."* This is the most important exception to the article 2(4). States' right to self-defence gained its significance when the use of force stated to become more and more restricted. The ICJ in the Nicaragua case has recognized that article 51 is part of customary law.[57] The structure of the article gives a central role to the UNSC. In the final analysis, the UNSC has again the responsibility to decide what kind of actions should be taken. Each country acting under article 51 should report its action to the UNSC and only if the latter doesn't decide, the concerned state can continue making use of its right to self-defence. However two main questions arise from the way the article is structured: Can the right to self-defence restrict the power of the UNSC under article 41 and to what extent states can invoke this right?

In the past there had been strong argument made by some states that actions taken against them under article 41 were against their right to self-defence. If this was true then the powers of the UNSC under article 41 to maintain international peace and security by non-forceful means would be severely undermined. In cases of civil wars, states could claim to be under an external threat and thus military or economic sanctions imposed by the UNSC would prevent them to protect themselves. This was the case with the arms embargos imposed to Yugoslavia in 1991. When Bosnia-Herzegovina became independent it claimed that the embargo

55) For Example ONUC, established to maintain peace in Congo, soon saw its mandate to be expanded by UNSC Res. 4741 on 21/2/1961, see James Dobbins et all, The UN's role in Nation-Building-From Congo to Iraq, Santa Monica CA: RAND Corporation, 2005, p 14.

56) Hugh Miall et al., *Contemporary Conflict Resolution,* London: Polity Press, 1999, P. 186-188.

57) Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgment of 27 June 1986, par 194

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imposed by UNSC Resolution 713 should be lifted in order to exercise its right of self defence against Belgrade.[58] It should be noted however that such interpretation of article 51 is too narrow and neglects the fact that the primary purpose of the measure taken under article 41 is to undo or to prevent unlawful acts. Furthermore, the second sentence of article 51 shows clearly that the right of states to act in self-defence is already subject to actions taken by UNSC and that the power and authority of that body is above that of states, either conventional or customary, when it comes to matters of self-defence.

More complicated is the extent to which countries can invoke article 51 for the use of military force. Two are the most controversial points in the debate: which is the meaning of the armed attack and if such an attack should come only from another state.

Concerning the meaning of the armed attack, the debate is dominated by two primary groups. Those supporting the view that article is only a part of the "inherent right to self-defence", which is wider and covers also situations not amounting to an actual armed attack and those arguing that the article is just a crystallization of this inherent right, which by its nature imposes some restriction.[59] It seems that article 51 places a requirement for the activation of the right to self-defence, that of the occurrence of an armed attack. In comparison with article 2(4), the latter uses a more broad language by prohibiting the threat or use of force without defining it further. Thus if article 51 is interpreted along with article 2(4),it seems that the use of force in self-defence by one country in respond to the use of force by another not reaching the level of an armed attack is unlawful.[60] The fact that article 2(4) also speaks about threats of force, this means that the drafters of the UN Charter were aware of the difference between a threat and an actual use of force. However, they didn't include it in the structure of article 51.[61] Furthermore, article 39 describes under which situations the UNSC can taken action to maintain international peace and security. The article makes use of three broader terms than armed attack: threat to the peace, breach to the peace and act of aggression. Thus, one comes to the conclusion that cases of threats to use force are under the authority of the UNSC.

Thus, the most appropriate interpretation of the meaning of an armed attack in

58) Christine Gray, *International Law and the Use of Force,* Oxford: Oxford University Press, 2004, p. 106.

59) Christine Gray in Malcolm D, Evans, *International Law,* Oxford: Oxford University Press, 2003, p. 600; Anthony Clark Arend named these two groups as restrictionists and counter-restrictionists, see Anthony Clark Arend, International Law and the Preemptive Use of Military Force, Center for Strategic and International Studies and the Massachusetts Institute of Technology, The Washington Quarterly, Spring 2003, p. 92

60) Randelzhofer in B. Shimma, The Charter of the United Nations. A commentary, Vol. I, Oxford: Oxford University Press, 2002, Article 51 p. 790.

61) Jan Wouters and Tom Ruys, The Legality of Anticipatory Military Action After 9/11-The Slippery Slope of Self-Defence, KULeuven - Institute for International Law, working paper Nr. 91, 2006, p. 4.

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article 51 would be that of an actual armed attack. Although a right of self-defence in front of a threat to use force maybe under extreme cases justified or even legitimated, it should be regarded as an exception and not a legal act. But again even so, such self-defence is again subject to article 51 which states that every measure taken under self-defence should be reported immediately to the UNSC. It further recognizes the primary role of that body, even in cases if self-defence by stating that such actions *“shall not in any way affect the authority and responsibility of the security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”*

Regarding the matter of state responsibility in an armed attack the debate focuses primary on the level of state involvement in act by non-state actors. The structure of article 51 doesn't mention if an armed attack should come only from another state or at least a level of state involvement is required. But the issue was elaborated by the ICJ in the Nicaragua case, which came to the conclusion that even the sending of armed bands, groups, irregulars or mercenaries by or on behalf of a state can be regarded as an armed attack.[62] On the contrary the logistical or any other form of support does not amount to an armed attack. However, the Court concluded that such actions can be illegal, against the principles of state sovereignty and non-interference.[63] This is also included in the Definition of Aggression which the Court used to reach its conclusion. According to this document, a considerable level of substantial involvement of a state is required in order for the right of self defence to be invoked. Also states' practice goes along with this belief. States usually claim three general level of state involvement in attacks by non-state actors, aiding and abetting, unwillingness to prevent the actions of the non-state actors and incapability of the state to prevent those actions.[64]

However some argue that after 9/11,article 51 should also cover actions against terrorist groups. They support their opinion by referring to UNSC Resolution 1368, which affirms that self-defence is applicable in any armed attack even in the absence of a sufficient level of state involvement.[65] But this is an extreme interpretation that comes into conflict with the decision of the ICJ, which in its advisory opinion on the West Bank Wall stated that the right to self-defence, as described in article 51, is applicable only “in the case of an armed attack by one

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62) Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgment of 27 June 1986 par. 195.

63) This was also included in the 1965 United Nations General Assembly Resolution 2131(XX). Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, par. 2.

64) Tom Ruys, Sten Verhoeven, “Attacks by Private Actors and the Right of Self-Defence,” *Journal of Conflict and Security Law,* Vol. 10, No. 3, 2005, p. 292-296

65) As it will be discussed later, the resolution didn't actually authorize such use of force. Furthermore, the resolution 1372, adopted 2 weeks later, authorized stated to take non-forceful measures to combat terrorism.

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State against another State".[66] Thus, what seems to be more appropriate is the exhaustion of all means to require the help of the state in which the terrorist group is hosted. Such practice would be compatible with articles 2(3) and 2(4) of the UN Charter. Furthermore, such practice could also put forward the role of the UNSC by requiring its involvement. Only if the state doesn't comply, article 51 could be invoked.[67] If the state involvement is not clear, then according to the principles of necessity and proportionality, the actions taken under self-defence should have as a target the terrorist group and only that the host state should prove its willingness to help to that end by accepting a limitation of its sovereignty.[68]

4. Conflict prevention and International Law

A high related issue with the peaceful resolution of disputes and the non-use of force is the concept of conflict prevention. It is an alternative to the resort to military force, either unilateral or multilateral[69], and reinforces the existing framework for the settlement of disputes and the maintenance of international peace and security. As it is mentioned above, proactive approaches to resolve conflicts are more cost-effective than reactive ones. Thus, it is not surprising that conflict prevention can be of a great value and eliminate human suffering if it is well implemented. Its significance has been recognized not only by academics but also from international organizations and NGOs. Conflict prevention is also mentioned is security strategy document.[70] The theoretical and applied research in this field has been generated since the 1950s, and a promising collection of international, regional, and non-governmental mechanisms for conflict prevention, focused particularly on intrastate conflict, were established or further expanded in the '90 s.[71] But its development and effective use have not been established properly. As the 2000 report of the Panel on United Nations Peace Operations points out, when it comes to improving UN preventive diplomatic and military capacity, there remains a "*gap between verbal postures and financial and political support for prevention*".[72]

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66) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, June 2004, par. 139 available at http://www.icjcij.org/icjwww/idocket/imwp:imwp_advisory_opinion/imwp_advisory_opinion_20040709.htm

67) Dinstein Yoram, *War, Aggression and Self-defence,* Cambridge: Cambridge University Press, 2001, p. 217.

68) Ibid, p. 220.

69) Conflict prevention can involve the use of military force in the form of preventive deployment of troop. However, the preventive character of such deployment with the purpose to eliminate the threat of a further escalation of violence differentiates it from offensive or defensive use of force.

70) Conflict prevention was included in both US NSS of the Clinton and Bush administration. Furthermore, it was also recognized for its value by the European Security Strategy of 2003 entitle "A Secure European in a Better World," Brussels, 12 December 2003, p. 11.

71) Hugh Miall, et al., *Contemporary Conflict Resolution*, London: Polity Press, 1999, p.39-64.

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Especially after the end of the cold war and the change in the nature of conflicts that it caused, new problems have come to the surface. The nature of modern conflicts, from interstate to intrastate, posses' serious problems in the ability of the international community to handle such situation. Furthermore, the end of the rival between West and East unleashed ethno-nationalism and a new self-determination movement in many parts of the world arise. To add in all these, new threats have appeared on the horizon, such as those mentioned in the 2000 US National Security Strategy.[73] But, the biggest difficulty that causes frustration and uncertainty is the variety of different definitions that have been given to the term.[74] However, one should not fail to see the positive points. The end of the cold war released the UNSC from the political games between the two blocks, enabling it to undertake actions to maintain international peace and security. In addition, it seems that the public now is less willing to tolerate inaction by the international community in front of extensive violations of human rights, protracted human suffering etc. Another major characteristic of the new era in which the international community has entered, is the experience that it has gained through previous failures in peacekeeping and peacemaking. Lessons taught helped policymakers to understand their weaknesses and improve or even develop new strategies, such as peacebuilding.

Moreover, recent developments on the international level indicate that conflict prevention is a growing filed with great expectations. Besides the academic research and teaching on conflict prevention, one finds now numerous of NGOs acting on the filed of conflict prevention with a wide range of expertise, from early warning to post-conflict peacebuilding, and from human rights monitoring to reconciliation and restorative justice.

The influence of those two, academic community and NGOs, had led not only to the evolvement of the strategy of conflict prevention itself, but also to its incorporation into governmental and intergovernmental policies. For instance, the 1995 US National Security Strategy of Engagement and Enlargement emphasized preventive diplomacy through support foe democracy, development aid, overseas military presence, and diplomatic mediation "in order to help resolve problems, reduce tensions, and defuse conflicts before they become crises."[75] Also regional international organizations have developed mechanisms for the prevention of conflicts and decrease of violence. Thus, the OAU established a Mechanism for

72) Report of the Panel on the United Nations Peace Operations, New York: United Nations, 2000, par. 33

73) The US NSS mentions three modern threats: weapons of mass destruction, rouge states and terrorism. These threats as it is further elaborated are interconnected. See p. 9; Also the 2003 European Security Strategy to the same threats, see p. 3.

74) International Crisis Group, Issues Report No 2, EU Crisis Response Capability – Institutions and Procedures for Conflict prevention and Management, 26 June 2001, p. 2.

75) A National Security Strategy of Enlargement, The White House, February 1995, p. 7.

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Conflict Prevention, Management, and Settlement, with support from external donors.[76] The Organization for Security and Co-operation in Europe(OSCE) has developed a number of innovative internal mechanisms and practices designed to prevent conflict in Europe, such as fact finding missions, ad hoc groups and actions of the High Commissioner on National Minorities.[77] To add in all these, the European Union is engaged in the development of a culture of conflict prevention.

Conflict prevention has become an integral part in the development of a common European Security and Defence Policy. The Swedish presidency of 2001 placed conflict prevention in the center of its presidency and since then it has been evolved to one of the policies of EU with a well-developed internal mechanism.[78] But what are the instruments under International Law, which can be used by these different actors.

To answer this, one has to look at the UN theory and practice. Regarding the UNCP policy, the UN Charter provides guidance through its provisions, which are almost the same with the provision for the settlement of disputes. In the preamble the Charter states that the aim is "to save succeeding generations from the scourge of war…"which shows the preventive character of the Organization's actions. This preventive character is further elaborated in article 1(1). Key words in this article are "collective", "prevention", "peaceful settlement", "justice"and "international law". Thus, any action, also including the use of force[79], should be characterized by its collectively, guide by justice and the principles of international law, with the purpose to prevent and resolve peacefully any potential threat. The Charter goes on to place two clear obligations to the states. One refers to the obligation for the resolution of disputes by peaceful means [article 2(3)] and the other renounces the unilateral use of force [article 2(4)]. Furthermore, the Charter provides insight into the issue of who is responsible for taking preventive actions.

Article 11(2) provide that the UNGA "may discuss any questions relating to the maintenance of international peace and security"and subject to article 12, "may make recommendations with regard to any such questions". It can also "call the attention of security council to situations which are likely to endanger international peace and security".[80] In addition, article 14 offers the possibility to the UNGA to make recommendations regarding which measures should be used in order to settle a dispute by peaceful means. Finally, an indirect responsibility is recognized to this UN body by approving the UN budget.[81] Following its obligation under those rules

76) Hugh Miall, et al., *Contemporary Conflict Resolution,* London: Polity Press, 1999, p. 37.

77) E. Bakker In Jan Wouters and V. Kronenburger, The European Union Conflict Prevention Strategy, Policy and Legal Aspects, Den Haag, TMC Asser Press, 2004, p. 397-400

78) International Crisis Group, Issues Report No 2, EU Crisis Response Capability – Institutions and Procedures for Conflict Prevention and Management, 26 June 2001

79) The article also speaks about the suppression of acts of aggression, which refers to the use of force.

80) Article 11 (3) of the UN Charter

81) Article 17 of the UN Charter

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the early years of its existence. Thus in 1947 it adopted the resolution prevention, even from rules the UNGA has claimed an active role in the field of conflict prevention, even from the early years of its existence. Thus in 1947 in adopted the resolution 111(II), which established the Interim Committee of the General Assembly, for examining issues of peace and security.[82] The UNSC has also its role in the field of conflict prevention. Article 24 recognizes a "primary responsibility for the maintenance of international peace and security"to this body. In article 34, the early warning responsibility of the UNSC is described. The UNSC should investigate any situation which might lead to the disturbance of peace and security. Under article 36, it may make recommendation to the parties or even decide its own means of adjustment under article 37. The third major organ of the UN, with responsibility to act preventively in cases where peace and security may be in danger, is the Secretariat. In article 99 the most crucial role of the UNSG is described. It provides that "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."This clearly indication the authority of the UNSG to conflict prevention and early warning.[83]

Next to these three major UN organs, the Charter's provision also refer to two other important actors in the field of conflict prevention. Article 36(6) states that the legal aspect of conflict should be addresses to the ICJ. Thus, this international body is responsible for preventing legal dispute from leading to more hostile attitudes and aggressive behaviors. To that end, the Court may take provisional measures until the final judgment is delivered. A role is also recognized to regional organizations. Under Chapter VIII, the UNSC may consider regional arrangement for the resolution of disputes and encourage their development. Especially the wording in article 53 provides that regional arrangements can take measures against aggressive policies by former enemy states during the Second World War *"until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state".* Considering the fact that the majority of states are members of the UN, the characterization of "enemy states"has lost its meaning. Therefore, as mentioned above, the UN established peacekeeping operations which have been evolved to include also conflict prevention actions.[84]

Apart from this legal framework, the UN has provided the international community also with practical mechanism for the prevention of conflicts. Next to the methods

82) Unfortunately, with the UNGA Res. 295(IV), this committee lost its importance. On the matter of the Interim Committee see B. G Ramcharam, *The International Law and Practice of Early Warning and Preventive Diplomacy: The Emerging Global Watch,* Leiden: Martinus Nijhoff Publishers, 1991, p. 71-7.

83) Ibid p. 38.

84) Jan Wouters in J. Wouters and V. Kronenburger, *The European Union Conflict Prevention Strategy, Policy and Legal Aspects,* Den Haag: TMC Asser Press, 2004, p. 372

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described in article 33(1) of the UN Charter for the pacific settlement of disputes, one can find the methods highlighted in the 1992 UNSG Boutros-Boutros Gali Agenda for Peace, which was released in response to the UNSC request six months later. In this document the UNSG recognized the effectiveness prevention by saying that one of the aim should be *"to seek to identify at the earliest possible stage situations that could produce conflict and try through diplomacy to remove the sources of danger before violence results"*.[85] To that end, he defined preventive diplomacy as *"the most desirable and efficient of diplomacy is to ease tensions before they result in conflict – or, if conflict breaks out, to act swiftly to contain it and resolve its underlying causes."* [86] He further outlined five specific mechanisms for the development of preventive diplomacy and the prevention of conflicts: confidence building measures, fact finding, preventive deployment, and demilitarized zones.[87] In addition, he provided guidance in the frustration mentioned above concerning the definition of conflict prevention, by defining it as *"actions to prevent disputes from arising between parties to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur."*[88] But the most impressing fact in the Agenda for Peace is the inclusion of a new concept, that of post-conflict peacebuilding, which *"should be viewed as the counterpart of preventive diplomacy, which seeks to avoid the breakdown of peaceful conditions ."*[89] In the Supplement three years later, the concept of conflict prevention became more attractive. The development of UNCP policy continued throughout the years and an interesting report was published in 1995 entitled *"Strengthening Untied Nations System Capacity for conflict Prevention"*. The innovation that this document brought was the focus on building local capacity for conflict prevention and transformation.[90] More recently, UNSG kofi Annan has stated *"There is near-universal agreement that prevention is preferable to care, and that strategies of prevention must address the root causes of conflicts, not simply their violent symptoms."*[91]

III. US Foreign policy and the use of force in the post 9/11 Era

85) An Agenda for peace. Preventive diplomacy, peacemaking and peace-keeping, A/47/277 – S/24111 17 June 1992 available at http://www.un.org/docs/SG/agpeace.html, p. 15.
86) Ibid, p. 23.
87) Ibid, p.24-33.
88) An Agenda for peace, preventive diplomacy, peacemaking and peace-keeping, A/47/277 – S/24111 17 June 1992 available at http://www.un.org/docs/SG/agpeace.html, p. 20
89) Ibid, p. 57.
90) Jan Wouters in J. Wouters and V. Kronenburger, *The European Union Conflict Prevention Strategy, Policy and Legal Aspects,* Den Haag: TMC Asser Press, 2004, p. 376.
91) Kofi Annan, the UN Millennium Report, "We the Peoples": The Role of the United Nations in the 21st Century, United Nations, 2000, p. 44 available at http://www.un.org/millernnium/sg/report/full.htm

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1. The fight against terrorism: a new global leadership

One question that terrorist action in general and those of 9/11 in particular have raised is how states should respond to these under International Law. One of the contrary, and in conformity with what has been stated in the previous part of the present paper, the more appropriate proactive approach would be what are the legal, political and economic instruments under International Law, if any, which states can use in order to prevent such actions from happening and how can be reinforced. However, it seems that the US administration followed the first path in the fight to counter terrorism. After the attacks in New York and Washington D.C. the initial debate was centred on the issues of who was responsible and how US should respond. The administration's early respond referred to both in general terms, through the words of the US president who said " we will hunt and punish those responsible for these cowardly acts".[92] Later he changed his approach by saying that US will make no distinction between those that carried the attacks and those who provided help to them.[93] Furthermore, he has defined the attacks as an act of war against US. Information, gathered by the US agencies, indicated that behind the attacks were Al Qaeda and its leader Osama bin Landen who had planned and executed the attacks from Afghanistan. Soon after the attacks, the US administration required by the Taliban government the hand over Osama bin Landen and other members of Al Qaeda. When the regime refused, the government of USA engaged in a campaign that would pressure the Afghans by force, which reached its pick with the commencement of the attacks against the Taliban regime.

The rest of the world remained silent in front of the overt US's demonstration of unilateralism and global leadership in the fight against terrorism. Within days after the attacks, old disputes were forgotten and an international support and unity was expressed.[94] One indicator of this was the fact that for the first time in the history of the Organization, article 5 of the North-Atlantic Treaty was activated showing the dominant role and influence of the US in the alliance and in the world in general.[95] Of course this support was given with nothing in return. States suffering by internal rivals saw an opportunity to "upgrade" their internal adversaries into terrorists characterized as branch of the international network of Al-Qaeda. Thus, Russia got freedom of act in Chechnya while Turkey in the Kurdish regions of its territory.[96]

In this context the new American foreign policy was about to evolved, based on

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92) Remarks by the President Upon Arrival at Barkdale Air Force Base, September 11 2001 available at http://www.whitehouse.goc/news/releases/2001/09/20010911-1.html

93) President's speech to the Joint Session of Congress and the American People, 20 September 2001 available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html

94) Christine Gray, *International Law and the Use of Force,* Oxford: Oxford University Press, 2004, p.159.

95) Statement by the North Atlantic Council, Press Release (2001)124, September 12 2001

96) Phyllis Bennis, *Before and After – US Foreign Policy and the War on Terrorism,* Redford, MI: Olive Branch Press, 2003, p. 85.

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two pillars: anticipatory self-defence and anti-terrorism.[97] The administration tried to grand legitimacy for its new global leadership in two levels. At the international level the administration tried to build up a coalition of "friends and allies"that would support the beliefs and acts of the US internationally, primary through the resolutions of the UNSC. One day after the terrorist attacks, the UNSC came into a special session after the call of US. However, in spite the fact that any effort by the Bush to grant an UN authorization to use force by creating a multilateral "coalition of the willing" would had been widely accepted, the US government chose another path. UNSC Resolution 1368 recognized the "inherent right of self-defence" but it didn't actually permit the use of force by any state. Nor did it call for actions under Chapter VII of the UN Charter. It just called on the states to work together to bring into justice those who were responsible for those acts.[98] Moreover the Council preferred to remain "seized on the matter", which in UNSC terminology means that the subject under discussion remains in the agenda of the Council for further discussion and decision in the near future.

The use of force was not authorized even in the second resolution passed two weeks after. Although the resolution passed under Chapter VII of the UN Charter, it referred only to sanctions and judicial measures that states could take against terrorist groups.[99] US officials didn't require an authorization to act. Unilateralism was already evident in their minds. It was also evident in the legislative branch of the US political system. The members of the Congress soon adopted a don't-challenge-the-president-behavior.[100] Two days after the attacks, the Senate voted the bill "Authorization for the use of military force" which states that

"The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[101]

It seems that the preemptive use of force to combat terrorism was also included in the approach that the Congress adopted. Furthermore, it gives to the President a central role in this war against terrorism since he is the one who shall determine

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97) Ibid p.86.

98) UNSC Res. 1368, September 12 2001, par. 3 states that the UNSC "*Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable"

99) UNSC Res. 1373 (2002), 28 September 2001 available at http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement

100) Phyllis Bennis, *Before and After – US Foreign Policy and the War on Terrorism,* Redford, MI: Olive Branch Press, 2003, p.87

101) S.J.Res. 23, Authorization for Use of Military Force, passed by the senate on Friday, September 14, 2001, P.L. 107-40, 115 Stat. 224 (2001)

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which states have “planned, authorized, committed or aided the terrorist attacks”. Nowhere in the Joint Resolution the role of the UNSC in the fight against the terrorism is mentioned or the norms of International Law. After all, the fight against terrorism is a fight of global reach as the administration describes and a matter that concerns the entire international community. Unilateralism was also evident in the mind of the US President who called the US army to be ready because “the hour is coming when America will act”.[102] But he avoided explaining how, when and against whom the acts would be launched. This was part to the belief that US didn't need to justify its right to defend itself and part to the opportunity that was given to the US government for global leadership.[103]

2. The Bush doctrine and the war in Iraq

One year after, the administration published its first National Security Strategy (NSS), which crystallized the perception of the administration regarding the use of force and the matter of self-defence in the face of terrorist attacks. Above all the NNS was designed to protect US in the first place and the free world in general from the new treats that humanity has to face. It speaks out American internationalism which *“will reflect the union of our national interest”* [104]and declares a war of global reach against terrorist groups and against those that provide them with support. In that framework, US NSS described three modern treats to the international peace and security: terrorism, rogue states and weapon of mass destruction. The text of the NSS recognizes a link between these three and characterized it as the biggest threat ever posed to the international community. This link was also recognized by the President in his speech at the West Point during the Military Academy's graduation ceremony.[105]

In front of these threats the NSS recognized that previous doctrines of deterrence and containment are not adequate to combat terrorism. Of course this is not totally wrong. Given the nature of terrorism, as a method of warfare, deterrence and

102)President Bush's address to a joint session of Congress, Washington Post, 21 September 2001, page A24 available at http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId= A1242-2001Sep20

103) Many authors have also referred to this as “a new era of global hegemony”, Phyllis Bennis, 2003, p.83.

104) The National Security Strategy of the United States of America, September 2002, p.1 available at http://www.whitehouse.gov/nsc/nss.html

105) In paragraph 16 the President stated “The greatest danger to freedom lies at the perilous crossroad of radicalism and technology. When the spread of chemical and biological and nuclear weapons along with ballistic missile technology when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends – and we will oppose them with all our power.” available at http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html

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containment are not applicable since it is not clear whom should states deter and contain. Thus, due the imminent character of these treats, states should not wait for "the authors of mass murder to gain weapons of mass destruction."[106) Therefore, the most appropriate response to these treats would be anticipatory self-defence. Bush's NSS argues that this form of self-defence has been recognized from the majority of legal scholars. Therefore, US should "strengthen alliance to defeat terrorism..." and to prevent it from "threatening us, our allies and our friends with weapons of mass destruction". The text further explains this "special collectivism" by saying that the US *"will not hesitate to act alone if necessary, to exercise our right of self-defence by acting preemptively against such terrorists, to prevent them from doing harm against our country and our people."* [107) However what is interesting here is that the NSS goes on to add that the notion of anticipatory self-defence should be broader and apply also to situations were uncertainty about the danger exists. This justification of use of force even in the face of uncertainty had been expressed earlier to the UNSC while Operation Enduring Freedom was still at the first face[108) as well as to the President's State of the Union Address in January 2002, in which the above link was attributed to the "Axis of Evil", namely Iraq, Iran and North Korea.[109)

With the new doctrine of US foreign policy, the new war against terrorism begun, but this time in the fields of Iraq. Again, the US tried to grand legitimacy in both the domestic and international level, for its actions against Iraq and the regime of Saddam Hussein. In October 2002 the congress granted the President another "Authorization for the use of military force against Iraq" authorizing again to use the armed force of US "as he determines to be necessary and appropriate".[110) However this time he didn't meet the same response from the international level. Many states expressed their doubts as to the imminent threat posed by Iraq and the need to respond by force. The effort of the Bush administration to justify the use of force on the basis of the link between rogue states, terrorist groups and weapons of mass destruction on the one hand and on the basis of the UNSC resolutions calling Iraq to comply with the conditional cease-fire established by the UNSC resolution 687 on the other, didn't have the expected results.

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106) Remarks by the President to the Warsaw Conference on combating terrorism, 6 November 2001, available at http://www.whitehouse.gov/news/releases/2001/11/20011106-2.html

107) The National Security Strategy of the United States of America, September 2002, p.6 available at http://www.whitehouse.gov/nsc/nss.html

108) S/2001/946 "There much we do know. Our inquiry is still in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other states.", in Christine Gray, 2004, p. 175.

109) The President's State of the Union Address, Office of the Press Secretary, January 29, 2002, available at http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html

110) Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Office of the Press Secretary, October 2, 2002 available at http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html

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Even until the first days of the war, no exact link between Saddam and the terrorist organization of Osama Bin Landen had been proven. US agencies acknowledged the fact that there were no evidence indication any level of Saddam's involvement in the terrorist attacks in New York and Washington or a sufficient link between him and Al Qaeda.[111] Also the attempt to raise sufficient allegations for the so-called Iraqi programme of weapons of mass destruction as the basis for preemptive use of force raised serious doubts and criticism for the intentions of the US government. Furthermore the fact that the US was the only state among the coalition forces that invoked the right of preemptive self-defence indicated that the seriousness of the doubts for the intention of Iraq to produce such weapons and the necessity to act against it.[112] This persistence of US to act preemptively in the war against terrorism in general and against Iraq in particular has created many discussions around the globe for the future course of the war against terrorism and the legality of anticipatory self-defence.

3. The preemptive use of force under International Law

The most controversial issue that the NSS of the Bush administration has raised is the preemptive use of force as a response to the threats posed by terrorism. The matter of preemptive self-defence (anticipatory self-defence) is not something new. It is recognized by some as part of the customary right of self-defence regulated by the Caroline case. In the nineteenth century a US merchant ship, named Caroline, had been the subject of attack by British troops while it was in the US territorial waters of the Niagara River. The British justification for the attack was the allegation that the ship provided assistance to the Canadian insurgents of that time and therefore Britain had the right to act in self-defence. It should be noted here that the relations between US and UK were in peace at that time. The respond of the then US Secretary of State was direct. From the communication between the two, it came out that for preemptive self-defence to be legitimated, four criteria should be met: necessity of self-defence, instant, overwhelming, leaving no other means of action and no moment of deliberation.[113] These four criteria were being accepted by the British Minister of Foreign Affairs and for a long time regulated the customary law of anticipatory self-defence. The concept of anticipatory self-defence in the face of an imminent threat was also reaffirmed by the Report of the

111) Christine Gray, *International Law and the Use of Force,* Oxford: Oxford University Press, 2004, p. 181; Phyllis Bennis, 2003, p. 182.
112) Ibid 2004 p. 182; Jan Wouters and Tom Ruys, *The Legality of Anticipatory Military action After 9/11 – The Slippery Slope of Self-Defence,* Working Paper Nr. 91, Institute of International Law, February 2006, p. 10.
113) Jan Wouters and Tom Ruys, *The legality of Anticipatory Military action After 9/11 – The Slippery Slope of Self-Defence,* Working Paper Nr. 91, Institute of International Law, February 2006, p. 4.

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UN high level Panel.[114] However the UN NSS has placed the concept of anticipatory self-defence in a new level. The text of the NSS recognizes the right of states to use force preemptively in the face of an imminent threat.[115] It goes on to state that:

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 attack would fail. Instead, they rely on acts of terror and potentially, the use of weapons of mass destruction-weapons that can be easily concealed, delivered covertly, and used without warning.

The united States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction-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.[116]

It seems that the Bush administration envisaged a new framework for the applicability of the preemptive self-defence, which will not require a threat to be imminent and that even if uncertainty exists, the right to self-defence can be invoked. In other words, what the NSS argues is a broader interpretation of the right of self-defence than this described in the UN Charter. Self-defence should be expanded to cover also cases not reaching the level of an armed attack or even not the level of an actual threat, thus leading to preemptive self-defence. Of course this is not the first time that uncertainty is trying to find a common ground with the law. As Michael Bothe mentions, the precautionary principle in the environmental law justifies actions to prevent pollution even in the case of uncertainty.[117] However, regarding the use of force and self-defence, some authors argue that uncertainty would lead to the collapse of the UN system of collective security.[118]Keeping in mind that preemptive self-defence could actually be permitted under exceptional cases, the question if the preemptive self-defence of the Bush NSS which is not far from preemptive self-defence could be legitimated under international Law arises.

The first point of departure in this investigation would be to see the regulations regarding the use of force. As mentioned earlier in this paper, the UN Charter

114) Reports of the High-Level Panel on Threats, Challenges and Change, A/59/565, 2004, par.188 available at http://www.un.org/secureworld/report.pdf

115) The national Security Strategy of the United States of America, September 2002, p. 15 available at http://www.whitehouse.gov/nsc/nss.html

116) Ibid p. 15.

117) Michael Bothe, “Terrorism and the Legality of Preemptive force,” EJIL, Vol. 14 No 2,2003, p. 232.

118) Jan Wouters and Tom Ruys, *The legality of Anticipatory Military action After 9/11 – The Slippery Slope of Self-Defence,* Working Paper Nr. 91, Institute of International Law, February 2006, p. 20.

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places a clear prohibition to use the force in the international relations of states. There are only two exceptions to this prohibition. One of them is the right of states to use force in case of self-defence, which states that:

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

The debate over the interpretation of this article and especially the concept of the "inherent right" has been led by two groups of scholars: the restrictionists and the counter-restrictionists.[119] The first group rejects the idea that there is an inherent right of self-defence, different from the right recognized by the article 51. Thus, self-defence can be invoked only if an armed attack has occurred. Furthermore, they interpret the concept of inherent right as a reference to the same right of states, not yet of the UN.[120] Thus, a preemptive strike would be unlawful under contemporary International Law. On the contrary the other group argues for a broader interpretation of the right of self-defence. According to them, the reference of an armed attack in the article 51 is just an empowerment of the victim state to act. Furthermore, they support the view that the drafters of the UN Charter wished not to exclude the recognized customary right of states to preemptive self-defence, as it was codified by Caroline incident mentioned above, and thus they include the concept of "the inherent right" in the structure of the article 51. However, both groups argue that preemptive self-defence, as a self defence in general, is subject to necessity and proportionality.[121] Thus in both cases the use of force in self-defence should be proportionate to the threat and necessary, meaning that no other option is open to the victim state.

A second point of view would be examine Customary International Law, which is created by states' practice. Two requirements should be met in order for a rule to be regarded as customary law, one actual and one psychological: a constant practice by states and the belief that such practice is *opinio iuris sive necessitatis*.[122] Thus since preemptive self-defence is regarded as customary international

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119) Anthony Clark Arend, International Law and the Preemptive Use of Military Force, Center for Strategic and International Studies and the Massachusetts Institute of Technology, The Washington Quarterly, Spring 2003, p. 92.

120) Jan Wouters and Tom Ruys, *The Legality of Anticipatory Military Action After 9/11 - The Slippery Slope of Self-Defence,* Working Paper Nr. 91, Institute of International Law, February 2006, p. 3.

121) Christine Gray in Malcolm D. Evans, *International Law,* Oxford: Oxford University Press, 2003, p. 602; These principles have been also recognized by the ICJ in its Nicaragua decision par.194.

122) Emmanuel Roucounas, *International Law I,* Athens: Ant. N. Sakkoulas Publishers, 1997, p. 77-78.

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law, states' practice should be also investigated. Three cases are most used from the majority of international law scholars: the Cuban Missile Crisis (1962), the Six-Days War (1967) and the Israeli attack on Iraqi Osirak nuclear reactor (1981). In all these cases, the "alleged" states (USA and Israel) were arguing, more or less, that they were acting under self-defence. However, somebody examines these cases, he will soon make the observation that states were divided concerning the legality of anticipatory self-defence long before the Bush Doctrine and there was no clear consensus on the matter. A second observation would be that despite the disagreement, and even because of this, the UNSC condemned the actions of the "alleged" states, which clearly shows that states were unwilling to legitimize any departure from the provisions of the UN Charter. It should be noted here, that US in the Cuban Crisis case, didn't invoke the right of self-defence but rather acted under Chapter VIII of the UN Charter. A third observation deriving from states' practice is again the importance of necessity and proportionality. An in depth observation of the discussions within the UNSC will show that although states were divided in two groups, the condemnation of the actions was part due to their failure to meet the requirements of necessity and proportionality. Independently from the question of an inherent right of states to act preemptively does actually exists, this right should be always subject to the criteria of necessity and proportionality, which were again reaffirmed by the ICJ in its Advisory Opinion on nuclear weapons.[123)]

Since the case under discussion is the US preemptive use of force, US practice prior the attacks of 9/11 should also be mentioned. Although unilateral use of force was not something new that the NSS invented, US administration were careful in their invocation of preemptive self-defence. Thus, apart from the above mentioned case of the Cuban Missiles Crisis, there are other cases where US held a similar not-openly-expressed preemptive position. During the shooting down of the Iranian Airbus, back in 1988, it claimed that its action was a response to the ongoing attacks against its naval in the Gulf.[124)] In addition, during the discussion in the UNSC of the Israeli attack against the Iraqi nuclear reactor, US rejected the argumentation of Israel on the basis of its failure to meet the requirements placed by the Caroline case.[125)] This reference to the Caroline case shows the recognition by US of the requirements that this case placed, in other words necessity and proportionality. Also in Libya (1986) and Iraq (1993) the US claimed that it used its armed force under article 51 as a response to previous terrorist attack and in order to prevent any future. However, the problem here is that US actions seemed

123) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, par.141.

124) Christine Gray in Malcolm D. Evans(2003), p.601; the argument of an ongoing attack had been used mistakenly also by Israel in its attack against Beirut 1968. see Christine Gray, 2004, p.161; Michael Bothe, 2003, p.235.

125) Jan Wouters and Tom Ruys, *The Legality of Anticipatory Military Action After 9/11 - The Slippery Slope of Self-Defence,* Working Paper Nr. 91, Institute of International Law, February 2006, p. 9.

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more like reprisals, rather than self-defence, which are generally regarded to be unlawful.[126] Even the Clinton's NSS refrained from establishing pre-emption as part of its strategy and made it clear that it would used only in the case of an imminent attack. A last interesting remark is that the incorporation of the phrase "if an armed attack occurs" in the structure of article 51 was made with the initiative of the US delegation.[127]

Therefore, although the issue of the legitimacy of preemptive self-defence is open to further discussion, it is easier to argue that the NNS's concept of preemptive self-defence comes into conflict with previous practice. Even if it is legitimate for a state to act preemptively, such action should be subject to necessity and proportionality, which the US NSS doesn't seem to take into account it arguing for the right to act even if uncertainty exists. What the NSS failed to acknowledge is the exceptional character of preemptive self-defence, apart from necessity and proportionality is also restricted by the second sentence of article 51 of the UN Charter, and its clear difference from preemptive self-defence. This was also reaffirmed by the UN high-level Panel, which stated that the use of force in the face of non-imminent threats should be authorized by the UNSC and a unilateral right to act preemptively would be a danger to international order.[128]

IV. Conclusion: Prospects for the peaceful resolution of conflicts

1. Article 2(3): an option or an obligation

From the above analysis it is evident that next to a strict prohibition to use force, the UN Charter also obliges states to make efforts for the peaceful resolution of their disputes. States cannot make use of force to improve their own terms of agreement. They are obliged to cooperate "in good faith" as the Friendly Relations Declaration states, to bring a peaceful settlement to their disputes. And to that end, the Charter provides them with a non-exhaustive list of methods that can be used. This duty covers both international as well as internal disputes. Furthermore, states

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126) Dinstein Yoram, *War, Aggression and Self-Defence,* Cambridge: Cambridge University Press, 2001, p.198; Military and Paramilitary Activities in and against Nicaragua, ICJ, Judgement of 27 June 1986, par. 249. Also the UNGA friendly Relations Declaration states that "States have a duty to refrain from acts of reprisal involving the use of force." Furthermore, as mentioned above, three requirements are needed in order for such actions to be lawful. See note 21.

127) Thomas M. Franck, *Resource to force: State Against Threats and Armed Attacks,* Cambridge: Cambridge University Press, 2002, p.50; also mentioned in Jan Wouters and Tom Ruys, 2006, p. 6.

128) Report of the High-level Panel on Threats, Challenges and Change, A/59/565, 2004, par.190, available at http://www.un.org/secureworld/report.pdf

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are encouraged to request the help of international bodies, such as UN or regional organs, in their efforts for the resolution of their differences. Unauthorized, unilateral recourse to force by states is clearly forbidden under International Law. The only exception to that is the right to self-defence, which however, this right is not unlimited. It is subject to necessity and proportionality and it is applicable until the UNSC decides to take actions.

Nevertheless, the US NSS challenged this legal framework by claiming a right to unilateral self-defence, even if uncertainty exists as "to the actual time and place of the enemy's attack". This implies that it is at states' discretion to determine whether actions of another state provide support to terrorist groups and thus being a legitimate target of an attack. But such use of force in self-defence is contrary to the requirements placed by the customary law of anticipatory self-defence, which among others, recognizes that the use of force in that cases should be regarded as last resort *"leaving no other means of action and no moment of deliberation"*. This requirement can be interpreted as a reference to the obligation of states under article 2(3) of the UN Charter. Thus, in a supposed scenario of a legitimated preemptive self-defence, states would be allowed to use force without any prior attempt to bring a peaceful solution, whenever they would feel threaten by another state or terrorist group. This could lead to a broad use of force covering every dispute between states. Furthermore, a right to preemptive self-defence even if uncertainty exists, could easily lead to the elimination of the principle of state equality, a fundamental principle for the peaceful resolution of disputes. The argument, that a failed state is not equal to the others, since it is alleged for supporting terrorist actions against civilians, can be raised to deny the right of this state from enjoying the privileges of being member of the UN Charter and thus demand of the peaceful resolution of its disputes with another state or its right and obligation to refer to the UN organs and ask their involvement. Even the US NSS text itself determines the principle of equality by recognizing the right of US to act preemptively while at the same time other states should not *"use preemption as a pretext for aggression."*

2. The ius cogens character of the non use of force

In the same hypothetical scenario, the legal framework of the use of force will be totally changed. States would be allowed to use force in their international relations whenever a link with terrorist organizations and another state could be established. Although such link could be a legitimate basis for the use of force, nothing in the US NSS describes what the criteria for the establishment of such link would be. According to the existing International Law of the use of force, even if such link is established it should be restricted by the principles of necessity and proportionality.

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Therefore, efforts to gain the compliance and cooperation of the alleged state by peaceful mean should be made in advance and if those efforts proved to be fruitless, the use of force to accomplish the required compliance should be proportionate to the supposed threat posed by the link between the state and the terrorist organization. Therefore, according to these principles, if a sufficient link between the state and the organization is not clear, the use of force should only target the terrorist organization and not the state itself. The latter, from its part, should accept a relaxation of its sovereignty.
However, the US NSS, by arguing a right to preemptive self-defence even in a case of uncertainty, challenges these two principles, which as mentioned in this paper are regarded as customary law. The text does not require a sufficient link but rather a mere suspicion to justify the use of force. In other words, the US NSS undermines the *ius cogens* character of the use of force, an already fragile character, and implies its transformation to *ius dispositivum*. But such a transformation would have a devastating effect on the international order, and could lead to the collapse of the entire UN system of collective security.

3. Strengthening International Law and UN system

The UN system of conflict prevention depends on the cooperation of states with others in good faith and with the UN agencies in the exchange of information for potential source of conflict. The UN Charter highlights the responsibilities of institutions such the UNSC and UNSG to take all the appropriate actions to prevent the disturbance of international peace and security. According to the UN Charter, the UNSC, the UNGA and the UNSG can make recommendation on how a specific dispute should be resolved so as international peace and security will not be jeopardized. In situation where a dispute escalates to the level of a violent conflict these organs can intervene in order to prevent such things from happening. The UN Charter describes the role of the UNSC, which under Chapter VII may take the appropriate measures to maintain international peace and security. Furthermore, since its creation, the Organization has developed a promising array of methods for conflict prevention, different from those envisaged in the Charter and has encourages other organizations to adopt such mechanism for the prevention of regional conflicts. To that end, a number of documents have been adopted describing methods such as early warning, preventive diplomacy, disarmament, peacekeeping and peacebuilding that can be of a great value if they are effectively implemented. Such effective implementation depends on the respect by states for the norms of International Law and the international consensus on the legitimacy of the UN to acts in the face of threats to international peace such as terrorism and weapons of mass destruction.

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Yet this spirit of multilateralism and global governance that the UN represents is severely damaged by the claim made by the US NSS. As it was argued above, the UN Charter gives primary role to the UNSC to act in the face of threats to international peace and security. And since terrorism and weapons of mass destruction are undoubtedly a global threat, the responsibility lays solely to the UNSC. States can take preventive measures but of non-forceful nature. Any military action by them should be undertaken when the UNSC fails to anticipate the threat. But even then, such military actions by states have to be immediately reported to the UNSC, which in turn has the responsibility to act. Though the text of the US NSS makes a reference to international cooperation and proactive non-forceful measures to counter the new threats posed to international community, at the same time declares a right to unilateral recourse to force to prevent these threat from realization. This doctrine of preventive/preemptive use of force has already been adopted by a number of states such as Australia, Russia, China and United Kingdom. But such practice takes away the primary role from the UNSC and it passes to National Security Council the responsibility to determine what constitute a threat and what should be the response to it. To see the negative effect of such "transfer of responsibility and authority" to National Security Council, one has to look at the potential impact on internal conflict and the right of self-determination. States could declare national liberation movements as terrorist organizations and invoke the right to use the force in self-defence to counter the threat posed to them.

Therefore it is clear that the US NSS challenges the accountability of the UN and doubts its effectiveness. But when the only superpower with great influence over a number of states doubts the UN effectiveness to combat international threats, in combination with the changing character of the use of force argued above, can lead to the total destruction of the international legal order and put UN into inaction. This inaction had been placed also in the past and it was the mean reason for the collapse of the League of Nation. This inaction was also clear in the recent war that Israel waged against Lebanon, since the frustration and the disagreement that the US policy generated concerning the use of force, led the Organization to play the role of global observer, leaving the role of global defender of international peace and security to US and to states in general.

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국문요약

반테러리즘에 대한 평화적 해결논의와 무력의 사용

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현대 국제법 체계의 등장과 함께 갈등의 평화적 해결이라는 이슈는 국제사회의 큰 주목을 받아왔다. 특히 유엔의 성립과 갈등의 평화적 해결을 명시한 유엔 헌장의 채택으로 이러한 이슈는 더욱 현실적인 의제로 국제사회에 등장 한 것으로 볼 수 있다. 그러나 냉전 시기를 통하여 세계의 양분화 현상은 이러한 노력들이 결코 간단한 선언적 차원의 문제가 아님을 실증적으로 보여주었다. 그 후 냉전의 종식과 함께 국제사회는 새로운 협력과 발전의 시대로 접어 들었다. 세계의 각 국가들이 다극화된 국제체제에서 분쟁을 평화적으로 해결한다는 국제법의 기본 정신을 받아 들이는 것은 지극히 당위적인 결론이었으며, 분쟁 예방의 개념은 국제사회에 더욱 깊이 뿌리내리게 되었다. 그러나 9/11 테러는 국제관계에 있어 새로운 시대에 있어 평화적 분쟁해결의 개념 자체와 그 실질적인 효용성에 관한 근본적인 논쟁을 촉발 시켰다. 국제사회가 대량살상무기와 테러리즘이라는 새로운 위협에 주목하면서부터 국제법은 무력의 사용을 통제해야 한다는 당위성과, 반면 국가의 자위권을 인정해야만 한다는 모순된 의제들에 직면 하였다.

이 글의 목적은 미국 국가안보전략에 있어 갈등의 평화적 해결이 미치는 영향을 분석하는 것이다. 따라서 이 글에서는 현대 국제사회가 직면한 특정 위협에 대하여 특정한 시기에 무력에 의한 평화적 분쟁 해결이 가능한 것인가에 관해 고찰하려 한다. 나아가 새로운 국제법의 질서하에서 미국 국가안보전략과 분쟁예방의 가능성, 그에 수반한 유엔의 역할에 대해 분석할 것이다. 끝으로 평화적 갈등해결을 위한 현존하는 국제법규, 유엔헌장과 이의 후속조치라고 할 수 있는 마닐라선언, UN Declaration on Friendly Relations 등을 통한 분쟁예방에서의 무력 사용이라는 민감한 이슈에 대해 살펴보고, 9/11 이후 미국의 대외정책, 특히 부시 독트린으로 불리는 예방적 자위권의 문제에 대해 논하려 한다.

■ **논문접수일** : 2007년 10월 10일, 논문심사일 : 2007년 11월 8일, 게재확정일 : 2007년 11월 22일

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