The use of force is undoubtedly among the most debated topics within international law as well as international relations. Indeed, the rules concerning the use of force form a central part of the international legal system, and, together with other fundamental principles, they have for a long time provided the framework for organised international intercourse and successful co-existence of states. The circumstances in which the use of force might be justified concerned already the earliest legal writers, for example, Aristotle and Cicero, and the topic has remained at the centre of political and legal debates since those early times. Both domestic societies and the international community need to limit and regulate the use of force in order to secure peaceful, harmonious and mutually beneficial co-existence of individuals or states within the respective societies or the international community. The domestic legal systems have generally managed to monopolise the use of force in favour of the governmental institutions, which means that people have given up their right to use force, save for self-defence, in return of the guarantee that the mentioned institutions will instead protect their person and property. The international legal system has attempted to move in the same direction since the end of the First World War, but, due to its characteristic features, the task has proved quite difficult. This is so, because the international legal system lacks an effective enforcement mechanism, which can ensure the observance of international law if necessary. Unlike a domestic legal system, which can utilise different law enforcement authorities, the international legal system has to rely simply on such means as consent, good faith and reciprocity. Moreover, states do not only

* René Värk is a Director for Academic Affairs and Lecturer in International Law, Institute of Law, University of Tartu.
follow international law when planning their conduct, but take into serious consideration also their political preferences and vital interests. These considerations often tend to override the obligations under international law, and therefore the armed forces of states are sometimes engaged in real military operations in addition to numerous military training exercises. Consequently, the use of force very often constitutes a clear violation of international law because the official justifications for such actions are usually based on violent interpretations of the relevant law or simply on political propaganda. Although the law itself is actually reasonably clear on the question of the legality of the use of force and prescribes a very limited number of exceptions to the general prohibition of the use of force, states and legal authors have for a long time advocated additional exceptions in order to further their individual interests or to cope with new developments and problems at the international level. The present article attempts first to describe the current legal regulation of the use of force and then to analyse the recent developments and their influence on the legality of the use of force by states.

1. Legal regulation under the United Nations Charter

The United Nations was created in a mood of popular outrage after the horrors of the Second World War. The war had caused more destruction than any previous armed conflict and urged the leaders of states to take steps to secure and maintain international peace and security in the future and “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”.\(^1\) The creation of the United Nations resulted in the most important and certainly the most ambitious modification of international law in the twentieth century, namely in outlawing the use of force in international relations. Such a rule is prescribed in Article 2, paragraph 4 of the United Nations Charter, which states that “all Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This is accompanied by another underlying principle, enshrined in Article 2, paragraph 3, which demands that “all Members [of the United Nations] shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”.\(^2\) In order to overcome the deficiencies of the international legal system in enforcing international law, the framers of the United Nations Charter also devised a collective security system, controlled by the Security Council, to ensure the compliance of the member of the United Nations with the mentioned rules.

This provision is the most important norm of contemporary international law, which encompasses the primary values of the inter-state system – the defence of state
sovereignty and state autonomy – and declares international peace and security to be the supreme value of the international legal system. However, the general prohibition of the use of force by states for their selfish interests as well as for benign purposes attempts to secure not merely sovereignty and autonomy of a single state, but a fundamental order for all members of the international community. The United Nations Charter declares international peace and security to be more compelling than inter-state justice, more compelling even than human rights or other human values. Although Article 2, paragraph 4 was originally intended to be legally binding only for the members of the United Nations, the provision is no more considered just another contractual international legal norm, but what is known as a peremptory norm of international law or *ius cogens* norm.

This is defined as “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character”. Generally speaking, the body of *ius cogens* norms represents overriding principles of international law which are so fundamental that they must be followed at any time and in any place, for example, the prohibition of aggression, slavery, torture, racial discrimination, genocide and violation of the right of self-determination. *As ius cogens* is essentially a form of customary international law, this is legally binding for all members of the international community, regardless of whether they have expressed their approval or disapproval of a particular norm, or not.

When taking into consideration the characteristics of *ius cogens* norms, the obligations deriving from them are not like usual contractual obligations, but are obligations towards the international community as a whole. This means that every state may feel that its essential interests are breached due to the violation of an *ius cogens* norm, and therefore not only the directly injured state, but also any other state is entitled to invoke the responsibility of the violating state.

### 1.1. Interpretation of Article 2, paragraph 4

Undoubtedly, the wording of Article 2, paragraph 4 is a considerable improvement compared to previous attempts to outlaw the use of force, but at the same time the text of this provision is still not without ambiguities. Below we shall consider the elements of Article 2, paragraph 4 as well as relevant international documents and state practice and try to determine the content and scope of the prohibition of the use of force.

Article 2, paragraph 4 is well drafted in so far as it talks about “the threat or use of force”, not about “war”. The term “war” refers to a narrow and technical legal situation, which begins with a declaration of war and ends with a peace treaty. The war was generally prohibited before the Second World War, but states found a way to avoid such prohibition. For example, Japan refused to declare war on China and called its military operations in Manchuria (1932-1941) an incident in
order not to violate the prohibition of waging war. In the light of such experiences, the term “use of force” was preferred because it covers all forms of hostilities, both technical wars and incidents falling short of an official state of war, which ranges from minor border clashes to extensive military operations. Therefore the prohibition of the use of force is not dependent on how the involved states prefer to define their military conflict.

Now, Article 2, paragraph 4 has several negative, or at least problematic, aspects. First, the provision talks about “force”, not “military force”, and therefore there has always been a dispute over the exact scope of the term “force”. The prevailing and undoubtedly correct view is that in this context the scope of the term “force” is limited to military force and does not include political or economic coercion.

Second, the provision stipulates that the members of the United Nations should refrain from the threat or use of force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. Does this truly mean that the prohibition is conditional, and force can be used for a wide variety of purposes because it is not aimed “against the territorial integrity or political independence of any State”? This line of reasoning has been utilised to justify numerous humanitarian and pro-democratic interventions as well as other “altruistic” uses of force. However, these clauses were never intended to restrict the scope of the prohibition of the use of force, but, on the contrary, “to give more specific guarantees to small States” and therefore they “cannot be interpreted to have a qualifying effect”. The International Court of Justice (ICJ) supported such interpretation in the Corfu Channel case, where the United Kingdom argued that it had a right to intervene and sweep the minefield in the Albanian territorial sea, which is a part of state territory, in order to guarantee the right of innocent passage, and to produce mines as evidence before an international court. The ICJ regarded such an intervention as a “manifestation of a policy of force, which has, in the past, given rise to most serious abuses” and declared that it cannot “find a place in international law” because the “respect for territorial sovereignty is an essential foundation of international relations”. Thus, an incursion into the territory of another state constitutes an infringement of Article 2, paragraph 4, even if the incursion is not intended to deprive that state of part or whole of its territory, and the word “integrity” has to be actually read as “inviolability”. However, the clauses “the territorial integrity” and “political independence” should not distract our attention from the phrase “any other manner inconsistent with the Purposes of the United Nations”. The paramount and overriding purpose of the United Nations is to maintain international peace and security, and to that end to prevent and remove threats to peace and suppress acts of aggression and other breaches of peace.
can potentially endanger that precious and often unstable international peace and security. The Second World War saw unprecedented suffering, and thus the United Nations Charter represents the universal agreement that “even justified grievances and a sincere concern for “national security” or other “vital interests” would not warrant any nation’s initiating war”.15 Therefore, such concepts as humanitarian intervention and pro-democratic intervention cannot be seen as legal, because by furthering the democratic human rights of the peoples of particular states or eliminating despotic and undemocratic governments in other states, the intervening states violate both the territorial integrity and political independence of the relevant states as well as endanger international peace and security (at least on a regional level). Moreover, decisions to intervene are based on the opinion and understanding of one or a few states only, and not on the general consensus of the international community. The United Nations Charter stresses that it is for the organisation “to ensure that armed force shall not be used, save in the common interest”. Unfortunately, state practice indicates that the true reasons for intervention are usually egoistic rather than altruistic and aim to further the political or economic interests of the intervening states.

In conclusion, the United Nations Charter has established a general and unconditional prohibition of the use of force in international relations.

### 1.2. Exceptions to Article 2, paragraph 4

As every rule, the prohibition of the use of force is not without exceptions. Although certain states and legal authors have furthered several, and at least questionable, justifications for lawful use of force, only two explicitly stated legal exceptions to the general prohibition of the use of force exist under the United Nations Charter:

- individual and collective self-defence (Article 51);
- Security Council enforcement actions (Chapter VII).

#### 1.2.1. Individual and collective self-defence

Without a doubt, every state must have the right to defend itself when being attacked. All instruments, which have restricted or prohibited the use of force, have explicitly or implicitly recognised such a right. Similarly, Article 51 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”. Although it may sound clear enough, there is a serious disagreement about the circumstances in which the right of self-defence may be exercised. We shall consider those problems in the next chapter and we shall do so in the light of recent developments and cases.

However, at this point we should pay attention to the fact that states have the right to use force for self-defence from the beginning of an armed attack “until the Security Council has taken measures necessary to maintain international peace
and security”\(^{16}\). In order to ensure that the Security Council can take the measures necessary, the members of the United Nations should immediately inform the Security Council of the measures taken in the exercise of the right of self-defence. What if the Security Council fails to act or does not take the measures necessary to maintain international peace and security? The right to exercise self-defence does not disappear as soon as the Security Council has simply passed on the matter; it continues until the Security Council has taken effective measures rendering the armed responses by the victim state unnecessary and inappropriate.\(^{17}\) Otherwise, the self-defensive military actions must stop when their purpose, repelling the armed attack, has been achieved.

**1.2.2. Security Council enforcement actions**

Taking into consideration the negative experience with the League of Nations, states decided to establish a more advanced and effective collective security system in order to enforce international peace and security and punish the violators of the prohibition of the use of force. The Security Council was conferred the primary responsibility for the maintenance of international peace and security.\(^{18}\) The Security Council consists of fifteen members of which five are permanent members (China, France, Russia, the United Kingdom and the United States) and ten are non-permanent members (elected for two years by the General Assembly). Although the Security Council is undoubtedly a political institution which does not necessarily adopt its decisions on the basis of legal arguments, but rather on political arguments, its resolutions have a legally binding effect on the members of the United Nations, and they are obliged to follow these resolutions.\(^{19}\)

When maintaining international peace and security, the Security Council acts under Chapter VII, which has the promising title of “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. As a watch-dog, the Security Council shall determine, according to Article 39, the existence of any threat to or breach of the peace and act of aggression, and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security. After determining any of those situations, the Security Council may decide upon non-military action, for example, economic sanctions,\(^{20}\) or authorise military action with “air, sea, or land forces as may be necessary to maintain or restore international peace and security”\(^{21}\). Such collective authorisation to use force should ensure that military intervention is not arbitrary, but only what is necessary to further the interest of the whole international community. However, the Security Council cannot compel any state to participate in military operations; the authorisation is more of a recommendation or justification to use force rather than a command, and therefore the Security Council has to rely on the hope that there are states, which, for one reason or another, wish to engage themselves in such operations. The authorisation also has another aspect,
namely that the target state is barred from legally invoking the right of self-defence and later claiming reparations for damage caused by the military operations.

2. Problematic issues and recent developments

As mentioned above, any specific use of force can be regarded lawful only if it can be based on an exception to the general prohibition of the use of force, which is valid as a matter of law. The Security Council authorisation to use force is usually clear enough and rarely results in controversial interpretations. But the right of self-defence has proved problematic and has been used, through strange and violent interpretations, to justify a number of military operations directed against another sovereign state. The majority of states and legal authors insists that the right of self-defence must be interpreted narrowly so that it corresponds to an actual armed attack. Another school prefers a wider interpretation and argues that states may exercise self-defence in an anticipatory or even pre-emptive manner and that this right does not require an actual armed attack. The proponents of this concept have so far been the minority, but the question of whether international law permits or should permit the use of force not merely in response to existing violence, but also to avert future attacks, has taken on added significance in the aftermath of the 11 September 2001 events. Below we shall consider certain aspects relating to the right of self-defence and we shall do that in the light of the events in New York, Afghanistan and Iraq.

2.1. Definition of “armed attack”

To be precise, Article 51 refers to the right of self-defence “if an armed attack occurs”. If this is indeed a prerequisite of the right to exercise a lawful self-defence, then we have to establish the scope of the term “armed attack”. First, according to the rules of the law of treaties, the interpretation of a treaty must start with the “ordinary meaning to be given to the terms of the treaty”. The usual method to determine the ordinary meaning of a word is to refer to dictionaries. In this case different English dictionaries suggest that an attack is an actual action, not merely a threat. Furthermore, we should take into consideration other parts of the United Nations Charter, namely Article 2, paragraph 4. This prohibits both the actual use of force as well as the threat of force, and it is difficult to conceive that the drafter of the United Nations Charter, due to an oversight, simply forgot to add the words “or threatens” to Article 51. Moreover, an interpretation of Article 51, which excludes the threat of an armed attack, is more likely compatible with the main purpose of the United Nations to restrain the unilateral use of force. So, according to an overwhelming majority within the legal doctrine, the definition of armed attack refers to an actual armed attack which has occurred, not simply to threats.

After the events of 11 September 2001, it is necessary to ask whether the concept of armed attack is capable of including a terrorist attack. Article 51 does not specify
that the armed attack has to originate from a state, but this condition may be taken as implicit. Self-defence is an exception to the general prohibition of the use of force and Article 2, paragraph 4, which contains that prohibition expressly concerns states. However, if a state is actually involved to a sufficient degree in a non-state armed attack, it is acceptable that such an involvement is equivalent to an armed attack and may therefore entail the same consequences as an armed attack by a state. The basis for such argument can be found from the Definition of Aggression, adopted by the General Assembly, which defines as an act of aggression, *inter alia*, “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to “an actual armed attack conducted by regular forces” or its substantial involvement therein”. The ICJ has accepted this provision as being an expression of customary international law, although the General Assembly resolution itself is not legally binding. Such a situation can, in legal reasoning, be called a constructive armed attack or a situation equivalent to an armed attack.

Therefore, a non-state armed attack may trigger the right of self-defence if such an attack is of sufficient gravity, and the involvement of a state is of a sufficient degree. The level of violence used in the terrorist attacks of 11 September 2001 undoubtedly reached the level of sufficient gravity, and if those attacks had been the work of a state, they would have been classified as an armed attack for the purpose of Article 51. So, it would indeed be strange to regard the right of self-defence to be dependent upon whether respective violent attacks were carried out by a state or non-state actor. The constructive armed attack is not completely alien to international legal reasoning, but whether such construction has actually become positive international law is another question. It is worth mentioning that the famous *Caroline* dispute, which has been cited to support the wider concept of self-defence, shows that an armed attack need not emanate from a state. Indeed, in that situation the threat came from a non-state group of the kind most would probably call terrorist today. Nowhere in the correspondence between the United Kingdom and the United States or in the subsequent reliance on the Webster formula on self-defence has it been hinted that the applicability of the Webster formula is dependent on the source of armed attack. Nevertheless, the international reaction after the 11 September events confirms that the concept of armed attack is not indeed limited to state acts. The Security Council expressly recognised the right of self-defence in two resolutions adopted in the immediate aftermath of the terrorist attacks. The resolutions do not explicitly state that terrorist attacks equal to armed attacks, but the recognition of the right of self-defence had to mean that the Security Council considered those terrorist attacks as armed attacks for the purpose of Article 51. At that time, it was already known that those attacks were most likely to be the work of a terrorist organisation rather than a state. The position of the Security Council was
widely accepted, and similar positions were adopted by other international institutions. For example, the North Atlantic Council agreed that “if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all”.

2.2. Anticipatory or pre-emptive

Although most authors and politicians use the terms “anticipatory” and “pre-emptive” interchangeably, the distinction between these two terms offers a useful precision. The anticipatory military action refers to military action that is taken against an imminent attack. For example, if one state has learnt that another state has acquired weapons of mass destruction and fears that these weapons may be used against it in the future, then, instead of waiting for the assault to become imminent, it attacks first in order to protect its nationals and prevent possible damages. The pre-emptive military action describes military action that is taken against a threat which has not yet materialised and which is uncertain and remote in time. For example, if one state has learnt that another state has acquired weapons of mass destruction and fears that these weapons may be used against it in the future, then, instead of waiting for the assault to become imminent, it attacks first the buildings where these weapons are kept and destroys the weapons in order to prevent the threat or assault ever becoming even imminent. Now we shall consider both of these concepts in relation to self-defence.

2.2.1. Anticipatory self-defence

Article 51 explicitly requires an “armed attack” as a pre-condition to the use of defensive force; states have the right to exercise self-defence “if an armed attack occurs”. Thus the terms of Article 51 contrast with the terms of Article 4, paragraph 2, because the latter prohibits both the use of force and the threat of force. All this permits to conclude that neither the threat of force nor an imminent armed attack justifies the use of defensive force under the United Nations Charter. This interpretation corresponds to the predominant state practice, since a general right to anticipatory self-defence has never been invoked under the United Nations Charter. The intent of the drafter and the purpose of the United Nations Charter were to minimise the unilateral use of force in international relations, and to draw a line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainties. Indeed, the alleged imminence of an armed attack usually cannot be assessed by means of objective criteria, and therefore any decision for anticipatory action would necessarily have to be left to the discretion of the state concerned. Such discretion involves a mentionable possibility of mistake, which may have devastating results, as well as a manifest risk of abuse, which can seriously undermine the
prohibition of the use of force. Moreover, the argument that an armed attack begins with planning, organisation and logistical preparation is not plausible, because then an armed attack would begin with pencil and paper rather than with bullets and bombs. Once again, there is no reason to suggest that the plain language of Article 51 does not convey precisely the meaning that was intended – an actual armed attack.37

Although the arguments that the United Nations Charter permits anticipatory self-defence are unpersuasive, several states and legal authors have more plausibly and successfully defended the right of anticipatory self-defence under customary international law. True enough, anticipatory self-defence has some basis under customary international law, and in some limited cases it may be seen as lawful. The proponents of anticipatory self-defence refer to the famous Caroline incident.38 The 1837 rebellion in the colonial Canada found active support from American volunteers and private suppliers operating out of the border region in the United States. The steamship Caroline was involved in the supply of both men and materials to rebel-occupied Navy Island in the Cippewa Channel, which served as a base for the volunteers’ attacks on the Canadian riverside and on British vessels. The Government of the United States knew about these activities, but did little to prevent them. Therefore a British force from the Canadian side crossed the border into the United States, seized the Caroline, set her on fire and cast the vessel adrift so that she fell to her destruction over the Niagara Falls. Two citizens of the United States were shot dead aboard the Caroline and one British officer was arrested and charged with murder and arson.39 The British government justified its action as being necessary for self-defence and self-preservation, since the United States did not hinder the threatening activities on its territory; it also cited the perceived future threats posed by the operations of the Caroline. Reply of the U.S. Secretary of State Daniel Webster to the British Government has long been regarded as a definitive statement of the right of self-defence in international law. Webster recognised that the right of self-defence did not depend upon the United Kingdom having already been the subject of an armed attack, but accepted that there was a right of anticipatory self-defence in the face of a threatened armed attack, provided that there was “a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation”.40 The Webster formula has since then been used frequently by states and judicial institutions; even the International Military Tribunals at Nuremberg and Tokyo referred to the formula when rejecting the defence plea that the German invasion of Norway had been an act of anticipatory self-defence.

This may suggest that the right of anticipatory self-defence against an imminent armed attack was a part of customary international law at that time, but whether this is still true today is another question. The restrictionist school – the supporters of a narrower right of self-defence – argues that the customary international law, predating the United Nations, could not
have survived the adoption of the United Nations Charter, and hence Article 51 is the only, true and adequate representation of the right of self-defence in the United Nations Charter era.\textsuperscript{41} The counter-restrictionist school – the supporters of a wider right of self-defence – claims that Article 51, by pledging not to “impair the inherent right of self-defence”, left intact and unchanged customary international law on self-defence predating the adoption of the United Nations Charter.

The so-called “inherent right” theory has numerous weaknesses. First, it may be contended that the right of self-defence is inherent not in natural law, but in state sovereignty. State sovereignty, however, has a variable content, which depends on the stage of development of the international legal order at any given moment.\textsuperscript{42} So, what may have been inherent in state sovereignty after the Caroline incident, namely, the right of anticipatory self-defence, was not necessarily inherent in state sovereignty when and after the United Nations was created. Indeed, the liberty of every state to resort to war whenever it pleased was considered a right inherent in state sovereignty in the nineteenth century, but after the abolition of such a right after the Second World War, state sovereignty still survived, though losing one of its inherent components.

Second, the United Nations Charter was adopted for the very purpose of creating far wider prohibition of the use of force than existed under treaty or customary international law in 1945, let alone in 1837. Even if earlier customary international law allowed anticipatory self-defence, it does not mean that such self-defence was lawful under customary international law as it existed in 1945. To argue that customary international law was exactly the same in 1837 and 1945, one has to disregard the change in the field of regulating the use of force that took place in the 1920s and the 1930s as well as to treat both the Kellogg-Briand Pact and the United Nations Charter as irrelevant. The use of force in reaction to force was the only generally accepted view as to the justified use of force in self-defence, and the delegations at the San Francisco Conference naturally did not regard the wording of Article 51 as being an innovation in its reference to self-defence.\textsuperscript{43} In other words, it is questionable whether the right of anticipatory self-defence even existed at the very moment when different nations prepared the United Nations Charter. Nevertheless, let us suppose that the pre-United Nations customary international law allowing anticipatory self-defence did survive the inter-World War period and Article 51. But this still does not mean that the scope of self-defence was not fixed in customary international law in 1945, and it cannot be reasonably claimed that the customary international law is not susceptible to restrictions in the light of subsequent state practice.\textsuperscript{44}

Third, the supporters of the “inherent right” theory argue that the right of self-defence is unchangeable by the United Nations Charter and subsequent state practice. Indeed, some fundamental principles of international law are only with great difficulty, if at all, changeable by subsequent treaty or state practice. These
are the above mentioned *ius cogens* norms. However, no authority has ever identified the right of anticipatory self-defence as an *ius cogens* norm,\(^45\) whereas the ICJ did identify the prohibition of the use of force as an *ius cogens* norm.\(^46\)

So far, the “inherent right” theory has been widely discredited by the great majority of states and legal authors. Due to the ambiguities and fogginess connected with it, states normally do not expressly advocate anticipatory self-defence, in fear of unleashing an uncontrollable creature. Indeed, there has been little *expressis verbis* support from states for anticipatory self-defence after the creation of the United Nations (if states actually exercise anticipatory self-defence, they do not call it by the true name, but refer simply to their inherent right of self-defence). State practice actually tends to support the opposite position. For example, in 1967 there was a remarkable assembly of armed forces in the Sinai Peninsula, near the southern frontier of Israel. When the United Nations peace-keeping forces were withdrawn from the buffer zone between the two countries, Israel launched air strikes against Egypt, claiming that it had the right to anticipatory self-defence as the Egyptian forces had been deployed as part of an impending armed attack.\(^47\) However, in the Security Council, the other states saw Israel’s first strike as a clear proof that Israel was an aggressor. Even those delegations which were more sympathetic towards Israel, namely the United Kingdom and the United States, refrained from any discussion of the permissibility of anticipatory self-defence.\(^48\) So, Israel was the only state to examine the concept, and we now know that Israel acted on evidence that was little convincing. This example illustrates appropriately the possibility of mistake and the risk of abuse. A state may act forcefully in a situation without proper reason – the imminence of an armed attack proves to be a mistake of interpretation or a falsification on the part of the attacking state. Put simply, the right to anticipatory self-defence is dangerous to international peace and security, since it is open to abuse by powerful states.

Whatever customary international law may have been, or still is, on the matter, states have occasionally exercised anticipatory self-defence, whether calling it so or not. Sometimes other states have understood the need for such action, and they have been ready to accept politically and approve anticipatory self-defence in those specific cases. Indeed, a threat of an armed attack may be so direct and overwhelming that it is not feasible to require the future victim state to wait until the armed attack has actually started and then act in self-defence. In such a case, a situation equivalent to an armed attack exists.\(^49\) To be sure that anticipatory self-defence is not exercised mistakenly or abusively, it must be shown that the other state has “committed itself to an armed attack in an ostensibly irrevocable way”.\(^50\) However, all this does not amount to an open-ended endorsement of a general right to anticipatory self-defence. But it means that, in demonstrable circumstances of extreme necessity, anticipatory self-defence may be a legitimate way to exercise the state’s right to self-defence.\(^51\) The realities of the mod-
ern world and contemporary military capabilities seem to necessitate, in certain proved cases, anticipatory self-defence, because otherwise the United Nations Charter could be called a suicide pact. Common sense does not allow for a state to wait passively and accept its fate before it can defend itself. In a nuclear age and in the face of contemporary conventional warfare, the first attack (resort to non-defensive force) can have so formidably devastating results that the victim state is no longer capable of reacting in self-defence.

Such exceptional cases of anticipatory self-defence are confined to instances where an armed attack of sufficient gravity is imminent; the Webster formula has to be satisfied. The imminence depends on the factual circumstance of a particular case, because where an armed attack by weapons of mass destruction can reasonably be treated as imminent (due to impossibility or difficulty of affording an effective defence against such an attack once it has been launched), an armed attack by conventional means would not be regarded as such.

The permissibility of anticipatory self-defence is least controversial in the situation where, after an armed attack, there is clear and convincing evidence that the enemy is preparing to attack again. The victim state need not wait for a new attack to be mounted, but at the same time the self-defence measures must be carried out within a reasonable time from the initial attack, in order to fit the characterisation of self-defence during ongoing armed attack and not to be considered as an armed reprisal or punishment. The international community confirmed such an approach in relation with the 11 September events. The United States and its allies consistently based their justification for military action against Afghanistan on their right to self-defence, not on any collective security authorisation from the Security Council. The coalition has argued that the 11 September terrorist attacks were part of a series of armed attacks against the United States, which had begun already in 1993, and that even more armed attacks in the same series were planned. The United States and the United Kingdom claimed to have had clear and convincing evidence that the United States faced on-going attacks; NATO members called the evidence “compelling”. After the launch of operation “Enduring Freedom”, the United States found documentary evidence in Afghanistan confirming that more armed attacks in the series were indeed being planned. So, the military operation in Afghanistan was itself justified, but the coalition was rightfully criticised for the extent of collateral damage and the means of warfare.

### 2.2.2. Pre-emptive self-defence

In September 2002, President George W. Bush submitted to the Congress a report on the national security strategy, which asserted, among other things, an evolving right to use force pre-emptively against threats coming from “Rogue States” and terrorists, possessing weapons of mass destruction. The report stated that:

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

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”

There is nothing in contemporary state practice, case law or legal writing which would suggest that such a broad, even overly broad, construction of a situation equivalent to an armed attack is a part of current customary international law. Such an approach is undoubtedly dangerous, and the application of the precautionary principle is alarming and undesirable. In the field of environmental law, the precautionary principle requires action to be taken to protect the environment even in the case of uncertainty about the danger. Now, if one would apply the same principle in connection with self-defence, the rule would read that “in the case of uncertainty, strike”. Such a conclusion is somewhat weird and widely open to mistakes or abuses; it is also difficult to understand how this can contribute to global stability and maintenance of international peace and security.

Pre-emptive self-defence is clearly unlawful under international law – states may not use force against another state when an armed attack is merely a hypothetical possibility, even in the case of weapons of mass destruction. The International Military Tribunals at Nuremberg rejected the argument of Germany that the invasion of Norway was a necessary act of self-defence in order to prevent a future Allied invasion and to pre-empt subsequent possible Allied attack from there.

When Israel attacked the Iraqi nuclear reactor in 1981, Israel specifically argued that Article 51 allowed self-defence in order to pre-empt a threat to Israeli national security. Israel explained that it had been forced to defend itself against the construction of nuclear weapons in Iraq, which would not have hesitated to use such weapons against Israel. The nuclear reactor, Israel argued, was to become operational in a matter of weeks, and Israel decided to strike before the nuclear reactor became an immediate and greater menace to Israel. So, Israel reacted neither to an actual armed attack nor to a situation equivalent to an armed attack, but instead to a potential and remote threat. All members of the Security Council disagreed with the Israeli interpretation of Article 51 and supported without reservations the resolution which declared “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct”.

True, the Security Council did not reject anticipatory self-defence as such, but more likely concluded that Israel failed to demonstrate the imminence of an armed attack from Iraq.
There is no doubt that force can and should be used pre-emptively, but also no doubt that this is the prerogative of the Security Council. As mentioned above, Article 39 states that the Security Council shall determine the existence of any “threat to the peace” and, accordingly, shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security. Nothing in the United Nations Charter suggests that the authority of the Security Council to take pre-emptive measures is limited to those threats that are imminent. The historical importance of the lack of pre-emptive action against Nazi Germany as a cause of the Second World War strongly suggests that the pre-emptive power of the Security Council was intended to be much more far-reaching than the power of individual states to take action as self-defence against a threat of an armed attack. The collective security system should be the best means to fight the threats to international peace and security, because the Security Council is a collective institution which represents better the interests and needs of the international community. Such collective system can also eliminate the cases, where a single state abuses the possibility of a threat or even fabricates a threat in order to further its political or economic interests.

The U.S.-led intervention to Iraq in March 2003 was clearly illegal in the light of the previous discussion. The coalition lacked a clear authorisation of the Security Council to use force as well as the other plausible legal justification for invasion, namely self-defence. Did Iraq attack anyone? Was there an imminent armed attack threatening someone? No! Iraq had not done anything that would have triggered the right of self-defence. There were merely accusations that Iraq was developing nuclear weapons and allegedly conspired with terrorists, especially with Osama bin Laden and al-Qaeda. But these accusations have not been convincingly and publicly proven. Furthermore, the mere possession of weapons of mass destruction without a threat of use does not amount to an unlawful armed attack. Even if a state is forbidden to acquire or is ordered to destroy weapons of mass destruction, the violation of disarmament requirement does not itself amount to an armed attack or a situation equivalent to an armed attack. If the reasons for the invasion of Iraq had been well founded, legitimate and justified, and in the general and common interest of the international community, the United States and its allies would have obtained a proper authorisation from the Security Council. The members of the United Nations conferred upon the Security Council the primary responsibility for the maintenance of international peace and security. States do not have the right either to take over the responsibility of the Security Council or to assume individually a secondary responsibility.

3. Conclusion

Since the oldest times, the international legal system has been preoccupied with one important question: When is the use of force legal? Legal regulation of the use
of force has gone through a considerable evolution; starting with the “just war” doctrine in the ancient times, continuing with the complete liberty to use force from the seventeenth to the twentieth century and ending with the general prohibition of the use of force in the United Nations Charter. The latter recognises two explicit exceptions where states may legally use force, namely individual and collective self-defence and Security Council enforcement actions. The scope of self-defence has proved to be very difficult to determine, but we can still reach certain conclusions. First, all states have the right of self-defence against an actual armed attack. Second, states may have a limited right of anticipatory self-defence against an imminent armed attack of sufficient gravity under customary international law. The arguments that the United Nations Charter permits anticipatory self-defence are unpersuasive. Third, states do not have the right of pre-emptive self-defence against a threat which has not yet materialised and which is uncertain and remote in time. It is the exclusive responsibility of the Security Council to deal with the threats to international peace and security; states do not have the right to exercise their own complementary or parallel responsibility. Fourth, an armed attack need not emanate from a state actor; a non-state armed attack may trigger the right of self-defence if such an attack is of sufficient gravity, and the involvement of a state is of a sufficient degree.

1 Preamble of the Charter of the United Nations.
2 Hereinafter all references to articles are to those of the Charter of the United Nations if not otherwise stated.
4 The International Court of Justice has regarded the prohibition of the use of force as being “a conspicuous example of a rule of international law having the character of ius cogens”, Military and Paramilitary in and against Nicaragua (The Merits), ICJ Reports, 1986, p. 3, para. 190.
5 Article 53 of the Vienna Convention on the Law of Treaties. However, it is important to stress here, that the definition is given in the context of the law of treaties and explains the term by the effect of these norms as being non-derogable by a treaty. But at the same time, this definition has also been adopted to general international law and has been used outside the field of the law of treaties.
7 See, for example, Rudolf Bernhardt, “Customary International Law” in Rudolf Bernhardt, Encyclopedia of Public International Law, Volume I, Amsterdam: North-Holland, 1992, pp. 898-905, for more information on customary international law. Customary international law consists of actual State conduct and beliefs that such conduct is law.
9 For example, Article 1 of the General Treaty for the Renunciation of War (1928), otherwise known as the Kellogg-Briand Pact, reads that states “condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another”.
10 Indeed, the Brazilian proposal to extend the prohibition of the use of force to economic coercion was explicitly rejected by other states. Moreover, other provisions of the United Nations Charter, for example paragraph 7 of the Preamble and Article 44, also support the position that “force” means “military force”. The Friendly Relations Declaration confirms that political and economic coercion is not covered by the prohibition of the use of force, but by the general principle of non-
12 *Corfu Channel*, ICJ Reports, 1949, p. 4.
14 Article 1, paragraph 1 of the Charter of the United Nations.
16 Article 51 of the Charter of the United Nations.
17 Cf. Antonio Cassese, *International Law*, Oxford: Oxford University Press, 2001, p. 305. The British Commentary on the Charter reads that “it will be for the Security Council to decide whether these measures have been taken and whether they are adequate for the purpose”, but at the same “in the event of the Security Council failing to take any action, or if such action as it does take is clearly inadequate, the right of self-defence could be invoked by any Member or group of Members as justifying any action they thought fit to take”. Misc. 9 (1945), Cmd. 6666, p. 9.
18 Article 24, paragraph 1 of the Charter of the United Nations.
19 Ibid. Non-compliance with the obligations imposed by the resolutions of the Security Council, as with all other international obligations, may result in state responsibility under international law.
20 Article 41 of the Charter of the United Nations.
21 Article 42 of the Charter of the United Nations. See, for example, UN Doc. S/RES/678 (1990) with which the Security Council authorised all the members of the United Nations to use “all necessary means” to end the Iraqi occupation of Kuwait and restore international peace and security.
22 However, the United Kingdom, the United States and their allies have argued that, although there was no explicit Security Council authorisation to use force against Iraq in 2003, such authorisation can be found if one interprets the Security Council resolutions 678, 687 and 1441 together. Such an approach is more than doubtful because no interpretation in good faith can result in the authorisation to use force twelve years after the First Iraqi War and because the members of the Security Council assured, while adopting resolution 1441, that it did not intentionally include any automatic or hidden trigger to authorise the use of force against Iraq.
23 Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties. It is true that the convention does not officially apply to the interpretation of the United Nations Charter because the latter was adopted before the convention entered into force, but the same rule exists in customary international law and that definitely applies.
26 Article 2, paragraph 4 demands that all members of the United Nations shall refrain from the threat or use of force and, according to Article 4, paragraph 1, only states can become members of the United Nations.
28 *Military and Paramilitary in and against Nicaragua (The Merits)*, *supra* note iv, para. 195.
30 See Chapter 2.2.1. for more information.
34 The majority of states and legal authors supports this position. For example, Louis Henkin has written that “the fair reading of Article 51 is persuasive that the Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed at-
tack occurs”. Louis Henkin, Nations Behave: Law and Foreign Policy, Second Edition, New York: Columbia University Press, 1979, p. 295. Ian Brownlie has concluded that “the view that Article 51 does not permit anticipatory action is correct” and “arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence”. Ian Brownlie, supra note xi, p. 278. Phillip C. Jessup has stated that “Article 51 very definitely narrows the freedom of action which States had under traditional law” and found that “under the Charter, alarming military preparations by a neighboring State would justify a resort to the Security Council, but would not justify resort to anticipatory force by the State which believed itself threatened”. Phillip C. Jessup, A Modern Law of Nations, New York: Macmillan, 1948, p. 166.

35 Albrecht Randelzhofer, supra note xxv, p. 804.


37 Ian Brownlie, supra note xi, p. 278.


40 BFSP Vol. 29, 1840-1841, p. 1138.

41 It is possible to argue that the application of the Webster formula by the International Military Tribunals at Nuremberg and Tokyo does not prove that the right of anticipatory self-defense was still alive after the creation of the United Nations. The tribunals simply had to apply the customary international law predating the United Nations because they considered state acts which also predated the United Nations.

42 Yoram Dinstein, supra note xxv, pp. 163-164.

43 Ian Brownlie, supra note xi, p. 274.

44 The ICJ has confirmed that the customary international law concerning self-defense continues to exist alongside treaty law, that is, Article 51, but did not specify the actual contents of it. Military and Paramilitary in and against Nicaragua (The Merits), supra note iv, para. 176.


46 See supra note iv.


49 Michael Bothe, supra note xxiv, p. 231.

50 Yoram Dinstein, supra note xxv, p. 172.


52 Mary Ellen O’Connell, supra note xlv, pp. 9-10.


56 Ibid., p. 15.

57 Michael Bothe, supra note xxiv, p. 232.

58 Stanimir A. Alexandrov, supra note xlvii, pp. 159-165.


60 Christopher Greenwood, supra note xxxi, p. 19.

61 Article 24, paragraph 1 of the Charter of the United Nations.