

10th Commission

Problèmes actuels du recours à la force en droit international

A. Sous-groupe sur la légitime défense*

Present Problems of the Use of Force in International Law

A. Sub-group on Self-defence*

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| | |
|----------------------------|-----|
| Travaux préparatoires..... | 77 |
| Délibération..... | 166 |
| Résolution..... | 231 |

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TRAVAUX PREPARATOIRES

Table of contents

| | |
|---|-----|
| I. Provisional Draft | 79 |
| Introduction | 79 |
| Part A. State-to-State self-defence | 80 |
| Interpretation and application by the competent organs of the international community | 80 |
| “ <i>Inherent right</i> ”, but not for sending the mankind back to square one | 82 |
| Treaty law, customary international law | 87 |
| Justiciability | 89 |
| The threshold of an “ <i>armed attack</i> ” and the notion of use of force..... | 90 |
| Territory | 96 |
| The use of force by a State in claim of self-defence for armed attack occurring beyond its territory or instrumentality | 96 |
| The “ <i>response</i> ”: the cardinal rules (principles, requirements) of necessity and proportionality..... | 98 |
| Preparatory measures | 103 |
| Time factor | 104 |
| Establishment of material facts | 104 |
| Reporting to the Security Council..... | 108 |
| Role of the Security Council | 105 |
| “ <i>Until</i> ” the Security Council has taken “ <i>measures</i> ” | 106 |
| Arms embargo and self-defence..... | 107 |
| Threat | 110 |
| Weapons..... | 112 |
| Accumulation of events theory | 113 |
| Intention and motivation | 114 |
| Survival | 115 |
| The problem of “ <i>reactive</i> ” or “ <i>preventive</i> ” self-defence..... | 116 |
| Restrictive reading of Article 51 in this matter | 117 |
| Extensive reading: the claim for preventive self-defence | 118 |
| The World Summit of September 2005 and the invitation to a more active involvement of the Security Council..... | 125 |

78 INSTITUT OF INTERNATIONAL LAW- SESSION OF SANTIAGO (2007)

State of necessity and self-defence 127
Collective self-defence..... 128
Self-defence and Palestine 131
Part B. Specific problems arising from self-defence and non-State actors 131
Possible scenarios 131
Indirect attack against States by other States through non-State actors 132
Attribution of an attack by non-State actors to a State. The input of the
law of State responsibility in the concept of self-defence 134
The case of non-State actors "independently" attacking States..... 138
An "armed attack" from whom ? Armed response to whom? 138
Assessment of the adaptability of Article 51 of the Charter 144
Conclusions 145

**II. Initial Questionnaire and Replies or Observations of the Members
of the Sub-group 146**

1. Initial Questionnaire (December 2006)..... 146
2. Comments of the members..... 148
 Comments by Mr. Benedetto Conforti..... 148
 Comments by Mr. James Crawford 152
 Comments by Mr. Santiago Torres Bernárdez..... 154
 Comments by Mr. Joe Verhoeven 157
 Comments by Mr. Edward McWhinney 162

(*) The provisional draft is expanding the preliminary draft which was sent on December 1, 2006. The preliminary draft is not as such reproduced.

I. Provisional Draft* (June 2007)

Introduction

1. The Charter of the United Nations has created a general environment of prohibition of the use of force [Article 2(4)] aiming at the structural organization of peace. Self-defence under Article 51 is an exception¹ and has to be dealt with as such. There is also general acceptance that the prohibition on the use of force is balanced by the Charter provisions on collective action against threats to international peace and security, breach of the peace and aggression and by the obligation of peaceful settlement of international disputes, and this despite the weaknesses of the system. Early, in 1949 the International Court of Justice (ICJ, the Court) in the *Corfu Channel* case underlined the rejection of “(...) a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law”². “Present defects” in international organization render it imperative that the legal regime of self-defence be defined as clearly as possible and the international community make efforts in this direction. Very few are today those holding the view that the deficiencies of the Charter system give States a rather boundless margin in the subjective appreciation of their actions when claiming self-defence.

2. Under the conditions laid down by international law³ self-defence precludes the wrongfulness of State conduct inconsistent with the general obligation of non-use of force vis-à-vis an attacking State⁴. The circumstances of adoption of Article 51 of the Charter⁵ are sometimes invoked as evidence for diverging interpretations. In this respect it should be reminded that the Dumbarton Oaks Proposals on the United Nations Charter (1944) did not contain any provision

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¹ See Commentary under Article 21 of the International Law Commission's (ILC) Draft Articles on State Responsibility. J. Crawford, *The International Law Commission's Draft Articles on State Responsibility*, Cambridge, 2002, 166. The other exception is the Security Council enforcement action under Chapter VII.

² *I.C.J. Reports 1949*, p. 35.

³ R. Ago, *Report, Addendum to the Eighth Report on State Responsibility*, *Yearbook ILC*, 1980, II (1), 70 and authors cited.

⁴ The exercise of the right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2(4). *Commentary under Article 21*, in J. Crawford, *The ILC's Draft*, *op. cit.*, 166.

⁵ Th. Franck, *Recourse to Force. State Action Against Threats and Armed Attacks*, Cambridge, 2002 (2005), 45 et seq.

on self-defence. In the San Francisco Conference (1945) some delegations deemed it necessary to state in the Charter that if the Security Council does not take immediate measures to “repel or forestall” an aggressor State, the *victim* (attacked, or target, or defending) *State* should have the right to act individually, until the Security Council takes effective action. The reference to collective self-defence was prompted out by Latin American Delegations in order to harmonize the power of the Security Council and action under regional defence treaties or further arrangements and agencies of collective security⁶. If any conclusion could be drawn from the above, is that the drafters intended to recognize self-defence in a derogative sense⁷.

3. Time and again the wider discourse on the non-use of force is elevated on the strand of the values that the international community has to defend and to enforce, individually and collectively⁸, and the analysis of self-defence hardly can be separated from that discourse. On the other hand, recent events invite us to reflect on the general rules concerning the interpretation of treaties and Security Council Resolutions, the making and change of customary international rules, the interaction of custom with treaty⁹. Finally, particular events influence the position of governments, international organizations and theory, often in different if not contradictory, even for themselves, directions. Sometimes also, confusion is not avoided in addressing self-defence between States and self-defence of States against non-State actors.

Part I. State-to-State self-defence

Interpretation and application by the competent organs of the international community

4. During the last sixty-two years almost all those who, *legally or illegally*, used armed force claimed to act under Article 51 of the Charter, while every notion contained in Articles 51 and 2(4) has been challenged, narrowed or broadened by State practice and by theory. Restrictive or extensive interpretations are

⁶ See L. Goodrich, E. Hambro, *Charter of the United Nations. Commentary and Documents*, 2nd ed., London 1949, 301-303.

⁷ I. Brownlie, *International Law and the Use of Force by States*, Oxford, New York, 1963, 270-271. Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge, 2005, 183. S. Alexandrov, *Self-defence Against the Use of Force in International Law*, The Hague, London, Boston, 1996, 80-90. J. Salmon, *Droit des gens*, t. 3, Bruxelles, 1995, 463. L. Wildhaber, “Gewaltverbot und Selbstverteidigung”, W. Schaumann (ed.), *Völkerrechtlicher Gewaltverbot und Friedensicherung*, 1971, 147-173. J. Delivanis, *La légitime défense en droit international public moderne*, Paris, 1971, 50.

⁸ R. Wolfrum, “American-European Dialogue: Different Perceptions of International Law. Introduction”, 64 *ZaöRV*, 2004/2, 262.

⁹ See M. Byers, “The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq”, 13 *EJIL*, 2002/1, 21-41.

given not only for the general concept of self-defence, but also for specific elements of it¹⁰. Article 51 is invoked either as an overall self-contained set of rules, or in conjunction with customary law, and with other provisions of treaty law. It is generally recognized that the right, being an exception to the rule of the non-use of force, is to be interpreted and applied *narrowly*. The opposite doctrine pertains that customary law does not preclude an *extensive* interpretation which is to be determined according to a given situation. Thus self-defence is presented as a normative flux¹¹ that oscillates between what were called “minimalist” (for strict application) and “realist/neorealist” (leading to an altogether denial of the usefulness of Article 51) positions, from those who find Article 51 *sufficient* to cover the actual needs of the international community, to those pretending that the provision is largely *incoherent* or even that it does not express current international law.

5. Facts in justification of the exercise of self-defence are projected either for an isolated armed conflict, or in a wider context of a rhetoric addressing issues amounting or not to an armed conflict, such as the protection of nationals abroad, the fight against terrorism, regime change, economic interests, etc¹².

6. The Security Council and the General Assembly are the main *fora* where States express themselves on the meaning of the provisions of the Charter¹³ and

¹⁰ Y. Dinstein, *War, Aggression and Self-Defence*, *op. cit.*, 175 et seq. Th. Franck, *Recourse to Force*, *op. cit.*, 45 et seq. Ch. Gray, *International Law and the Use of Force*, 2nd ed., Oxford, 2004, 95 et seq. G. Abi-Saab, “Cours général de droit international public”, 207 *RCADI*, 369. J. Verhoeven, “Les ‘étirements’ de la légitime défense”, *AFDI*, 2002, 49 et seq. A. Randelzhofer, “Article 51” in B. Simma (ed.), *The Charter of the United Nations, A Commentary*, 2nd ed., Oxford, 2002, 788-806. P. Lamberti Zanardi, *La legittima difesa nel diritto internazionale*, Milano, 1972. S. Alexandrov, *Self-defense Against the Use of Force in International Law*, *op. cit.*, 93 et seq. B. Conforti, *Diritto internazionale*, Napoli, 2002, 374 et seq. D. Bowett, *Self-defence in International Law*, Manchester, 1958. St. Schwebel, “Aggression, Intervention and Self-defence in Modern International Law”, 136 *RCADI*, 1972 (II), 479. T. Treves, *Diritto internazionale. Problemi fondamentali*, Milano, 2005, chapter X, 3, 445-472.

¹¹ J. Norton Moore, “Opening Remarks, The Bush Administration Pre-emption Doctrine and the Future of World Order”, 98 *ASIL Proceedings*, 2004, 325.

¹² Th. Franck, *Recourse to Force*, *op. cit.*, 31 et seq., presents practice under six headings: Self-defence against State-sponsored terrorists and infiltrators, self-defence against ideological subversion, self-defence against attacks of citizens abroad, anticipatory self-defence, counter-measures and self-help, the purely “humanitarian” intervention. See also D. Bowett, *Self-defence in International Law*, *op. cit.*, 182-193.

¹³ For the purposes of the present Report, see *Repertory of Practice of United Nations Organs*, under Article 51 (1945-1954), vol. II; Supplement No 1 (1954 - 1955), vol. I; Supplement No 2 (1955 - 1959), vol. II; Supplement No 3 (1959 - 1966), vol. II; Supplement No 4 (1966 - 1969), vol. I; Supplement No 5 (1970 - 1978), vol. II; Supplement No 6 (1979 - 1984), vol. III, available online at <<http://www.un.org/law/repertory/art51.htm>>; Supplement No 7 (1985 - 1988), vol. III; Supplement No 8 (1989 - 1994), volume 3; Supplement No 9 (1995 - 1999). See also *Repertory of Practice of United Nations Organs*, under Article 2 para. 4, Supplement No 7 (1985-1988), vol. I, para. 38; Supplement No 8 (1989-1994), vol. I, paras. 32-35; Supplement No 9 (1995-1999), vol. I, paras 25-26.

the international organs test the application of the Charter made by States and by them¹⁴. Hence, although not always in a very clear way during the last six decades, the practice of the organs of the international community contributed in elucidating some basic features of self-defence. In the legal field the 1969 Convention on the Law of Treaties formulated a workable framework for the interpretation of conventional texts, and the International Court of Justice has produced a generally consistent jurisprudence from the *Corfu Channel* case (1949), the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction, 1984, Merits, 1986) and other important cases, such as those on the *Legality of Threat or Use of Nuclear Weapons* (1996), the *Case Concerning the Gabčíkovo Nagymaros Project* (1997), the *Oil Platforms* (2003), the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), to the *Case Concerning Armed Activities on the Territory of the Congo* (2005).

7. Since 1945 the *theoretical input* to the concept of self-defence is very rich. With recent developments in international relations all the old questions came over again and the appearance of new or underestimated issues resulted in an avalanche of doctrinal inquiries. Nonetheless, complexities over substantial and semantic questions should not lead to the finding that self-defence is a legal minefield. The *Institut* endeavors to update and refresh the debate.

8. As for the use of terms, along with the old divergences on the notions of *self-defence (individual and collective)*, *self-help*, *self-protection* or *self-preservation*, more recently the confusion extends to the terms *reactive - interceptive*, *preventive - anticipatory* and *pre-emptive* self-defence. States, international organs and doctrine do not always use these terms with the same meaning, and sometimes there are circumstantial changes of meaning.

“Inherent right”¹⁵, but not for sending the mankind back to square one

9. Much has been said of the expression “inherent right” (original language) in Article 51. If we take the French version “*droit naturel*” as transcending the law, then we enter the unproven here province of *natural law*¹⁶, and the discussion is deemed to depart from its objective. If we attribute to “nature” a non-metaphysical connotation, this could be of some help in keeping the notion

¹⁴ It has been said (by the *High-Level Panel on Threats, Challenges and Change* established in 2004 by the United Nations Secretary-General (see *infra* para. 103.) that the organs of the United Nations and in particular the Security Council perform a sort of *jurying function*; they try to apply international law in a reasonable fashion. See *United Nations, General Assembly*, Doc. A/59/565 (2 December 2004), See also Th. Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium”, 100 *AJIL*, 2006, 101.

¹⁵ *Droit naturel, derecho inmanente, neotemlemoe pravo.*

¹⁶ See J. Salmon, *Droit des gens, op. cit.*, 403.

within the realm of positive law¹⁷. On the other hand, it does not seem advisable to link altogether self-defence under international law with the homonymous concept existing in all national legal systems (with which indeed it presents common aspects), as the legal environments (national and international) are not the same.

10. The *Briand-Kellogg Pact* of 1928 did not contain an explicit reference to self-defence, and during the negotiation the U.S. Secretary of State Frank Billings Kellogg observed that the right was *inherent* and as such did not need to be expressly stated¹⁸. It is not clear if that was the antecedent of the inclusion of the term inherent in Article 51, but in the decades' long controversy some interpretations of the term tended to keep it from a legal point of view either outside or beyond Article 51. It has mainly been argued that

a) If the right is inherent, then Article 51 does not exclude self-defence in situations not supposed to be covered by that Article¹⁹, as at least before the First World War, the right of States to go to war was *inherent in the very concept of sovereignty*²⁰.

b) Self-defence before the Charter mostly reflected an affiliation with the doctrines of *just war*. In this line of thought it is pretended that before the coming into force of the Charter the *inherent right* was also *autonomous* in the sense that it existed independently of legal rules²¹.

c) Around this idea some purported even that self-defence cannot be governed or altered by positive law²². Another assumption is that the drafters of the Charter intended to leave unimpaired that right *as it existed prior* to the Charter²³. It is useful to remind here that before the prohibition of the use of force the concept of self-defence had at least one or all three of the following characteristics: i) it was used mainly to serve political purposes²⁴; ii) its legal

¹⁷ In *The Rights of War and Peace*, Book II, Chapter I, Section III (translated by A. C. Campbell), Washington, London, 1901, Hugo Grotius, as other classic authors before and after him, understood self-defence as “a right that nature has given to every living creature, and not from the injustice or misconduct of the aggressor” (p. 76).

¹⁸ L. Goodrich, E. Hambro, *Charter of the United Nations*, *op. cit.*, 299.

¹⁹ A. Randelzhofer, “Article 51” in B. Simma (ed.), *The Charter of the United Nations*, *op. cit.*, 792-793.

²⁰ B.-O. Bryde, “Self-Defence”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, Amsterdam, New York, Oxford, 1982, 361.

²¹ Analysis of this doctrine in O. Schachter, “Self-defense and the Rule of Law”, 83 *AJIL*, 1989, 259.

²² *Idem*, 260-261.

²³ The opinion expressed by a minority of authors in J. Salmon, *Droit des gens*, *op. cit.*, 463. J. Delivannis, *La légitime défense en droit international public moderne*, *op. cit.*, 49-51. Contra D. Bowett, *Self-defense in International Law*, *op. cit.*, 184-185.

²⁴ E. Jiménez de Aréchaga, “International Law in the Past Third of a Century”, 159 *RCADI*, 1978 (I), 96.

justification was restricted in principle to military operations not occurring in a state of war; iii) presented no real interest for positive law.

11. The theory that Article 51 left unimpaired the inherent right was advanced more systematically some years after the adoption of the Charter²⁵. Since then governments and authors might have changed sides, but the interpretation of the term *inherent* is still in the basket of controversy. As recent historical studies have shown, self-defence at least since the 19th century was not conceived in theory and practice in a uniform manner and was mostly confounded with the diverging meanings of the notions of *self-help*, *self-protection*, etc²⁶. But why then the even briefly stated conditions led down by the Charter?

12. Answers to the above include the following:

a) Inherence in direct reference to sovereignty is still made today in this and other contexts. Yet that discourse on sovereignty encompasses the whole system of international law and seems misplaced if it appears from chapter to chapter. Besides, the concept is subject to constant change²⁷.

b) The very first Commentary of the Charter stressed that “if the right of self-defence is inherent as has been claimed in the past, then each Member State retains the right subject only to such limitations as are contained in the Charter”²⁸. Since then it is generally admitted that self-defence is regulated by Article 51 and customary international law and that there are no two notions of self-defence in international law.

c) To authors sustaining that the right of self-defence as understood before 1945 is still unchangeable by Charter text, subsequent State practice and customary law, it is answered that the “unchangeable” principles are called *jus cogens* and no authority has ever identified a right going beyond Article 51 as *jus cogens*²⁹. Finally, to those who find that a contextual interpretation of the notion of

²⁵ L. Henkin, “Use of Force: Law and U. S. Policy”, in L. Henkin et al. (eds.), *Might v. Right. International Law and the Use of Force*, 1989, 45.

²⁶ Self-help as a descriptive label of intervention even before the Charter “did not represent a scientific division of forcible measures short of war” (C. H. M. Waldock, “The Regulation of the Use of Force by Individual States in International Law”, 81 *RCADI*, 1952, II, 457). It was not accepted by the I.C.J. as a justification in the *Corfu Channel* case (*ibid.*, 501). Other approaches in Y. Dinstein, *War, Aggression, op. cit.* . 175 et seq. Th. Franck, *Recourse to Force, op. cit.*, 9, 109, 133.

²⁷ Y. Dinstein, *War, Aggression, op. cit.*, 180.

²⁸ L. Goodrich, E. Hambro, *Charter of the United Nations, op. cit.*, 301. S. Alexandrov, *Self-defense Against the Use of Force, op. cit.*, 93-95 and authorities cited. J. Zourek, “La notion de légitime défense. Aperçu historique et principaux aspects du problème”, *Rapport provisoire*, 56 *Annuaire de l'Institut de Droit International* (Session de Wiesbaden), 1975, 52, rejects the argument that Article 51 intended only to regulate the role of the Security Council in the process of self-defence.

²⁹ M. E. O’Connell, “The Myth of Pre-emptive Self-defence”, *ASIL Task Force on Terrorism*, 2002, 13 and bibl.

inherence sends to the pre-Charter period, it has been answered that contextual interpretation can lead to the opposite conclusion³⁰.

13. In the *Nicaragua* case the Court held that the term *inherent* refers to customary law: “Article 51 preserved an inherent right of self-defence, one that existed in customary international law prior to enactment of the Charter”³¹. This and other pronouncements of the Court raised controversial interpretations. Nevertheless, it can be said in conclusion that Article 51 of the Charter, while maintaining the right, wiped out its aspects that did not correspond to the Charter conception of the prohibition of illicit use of force in international relations. But due to the brevity of that provision *customary law requirements* in the exercise of the right of self-defence are kept alive³². What are today *inherent* in the notion of self-defence beyond Article 51 *are in particular the rules of necessity and proportionality*³³. Imminence has also its place both in the textual and the customary area covered by inherence³⁴. And the above set of rules is applicable to all States.

14. This is being said without underestimating that Article 51 provides for the right of self-defence “inside the Charter, but outside the veto”, and that “self-defence under Article 51 [is] immune from the paralyzing effect of the veto”³⁵. But the veto (formal or hidden)³⁶ is not always to blame. Its exercise depends on many factors, both political and legal. In each case it is necessary to ask if the exercise of the veto expressing the particular interests of the State concerned does not affect the general interests of the international community, or if the veto is egoistic or simply “automatic” (blind). Furthermore, it is useful to look at who are those and why are they in favor of a resolution of the Security Council blocked by the veto³⁷. It is remarked that in some cases regarding imminent threats to the international peace and security and humanitarian issues the permanent members must develop a pattern of persistent self-restraint in their recourse to the veto³⁸.

15. Not everyone is dazzled by the term *inherent*. Hans Kelsen understood the adjective as “a *theoretical opinion* of the legislator which has no legal

³⁰ M. Bothe, “Terrorism and the Legality of Pre-emptive Force”, 14 *EJIL*, 2003/2, 232.

³¹ *I.C.J. Reports 1986*, p. 94, paras. 175-176.

³² See however J. Verhoeven, *infra* III.

³³ See *infra*, nos 41-52.

³⁴ See *infra*, nos 17-22.

³⁵ C. H. M. Waldock, “The Regulation of the Use of Force by Individual States”, *op. cit.*, 504.

³⁶ See S. Alexandrov, *Self-defense Against the Use of Force*, *op. cit.*, 81-82, 151-152, 176-177, 200-201, 210, 240-241, 247 et seq.

³⁷ See however M. Arcari, “L’intervention armée contre l’Iraq et la question de l’autorisation du Conseil de sécurité”, *XIX Anuario de Derecho Internacional*, 2003, 5-39, at 33 et seq.

³⁸ Th. Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium”, *op. cit.*, 88-106, at 104.

importance³⁹, and Roberto Ago, the *Special Rapporteur* of the International Law Commission (ILC), believed that self-defence *is not even a right*, and in any case not a subjective right. He pursued that “though the expression right of self-defence is used in the Charter, this is an expression (as for the state of necessity) that connotes a situation of *de facto* conditions, not a subjective right. The State finds itself in a position of self-defence when it is confronted with an armed attack against itself in breach of international law. It is by reason of such a state of affairs that, in a particular case, the State is exonerated from the duty to respect vis-à-vis the aggressor, the general obligation to refrain from the use of force⁴⁰”.

16. Finally, it is necessary to distinguish between inherent right and *self-help*. Even before the prohibition of the use of force the notions of self-help, self-protection, self-preservation *were not legal categories* and served to designate different forms of forcible or non-forcible action, such as aggression, reprisals, retaliation⁴¹, sanctions, state of necessity, self-defence. Self-help is mostly understood as a generic term that includes either, only self-defence and state of necessity or minor use of force, or a camouflage of aggression⁴². With the prohibition of the use of force self-defence acquired an important status (a mutation)⁴³ within the *jus ad bellum*. Opinion holds that self-defence should be regarded as the only form of “armed self-help” or “self-protection” under modern international law⁴⁴. Within the above framework the questions of self-help, self-protection, self-preservation appear from time to time in a discussion that also includes the peaceful settlement of disputes⁴⁵, and the international protection of human rights.⁴⁶ It is also reported that the issue of self-defence in relation to the wars of national liberation is now abandoned⁴⁷.

³⁹ H. Kelsen, *The Law of the United Nations*, London, 1950, 791-792.

⁴⁰ R. Ago, *Report, op. cit.*, 53. D. Bowett, *Self-defence in International Law, op. cit.*, 8-9, speaks of a ‘privilege’ or ‘liberty’.

⁴¹ The Security Council repeatedly underlined the prohibition of reprisals and retaliation as incompatible with the purposes and principles of the United Nations. See Resolution 188 (1964). See also *Repertory of Practice of United Nations Organs*, vol. I, Supplement No 1, 1954-1955, para. 17.

⁴² D. Bowett, *Self-defence in International Law, op. cit.*, 10. G. Schwarzenberger, “The Fundamental Principles of International Law”, *RCADI*, 1955 (I), 344.

⁴³ J. Delivanis, *La légitime défense, op. cit.*, 18 et seq.

⁴⁴ R. Ago, *Report, op. cit.*, 53, 56.

⁴⁵ B. -O. Bryde, “Self-help”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law, op. cit.*, 212 et seq.

⁴⁶ See Sp. Aktypis, *L’institution de la légitime défense en droit international : Du droit naturel à l’ordre public international*, Ph. D. Thesis (mimeo), Univ. Panthéon-Assas (Paris II), 2007, 421-518.

⁴⁷ A. Cassese, “Article 51”, J. -P. Cot, A. Pellet, M. Forteau (eds.), *La Charte des Nations Unies. Commentaire article par article*, 3rd ed., Paris, 2005, 1329-1351, at 1356. Cf. R. Bermejo García, C. Gutiérrez Espada, *La disolución de Yugoslavia*, Pamplona, 2007, 250-251.

Treaty law, customary international law

17. Twenty years after the judgment of the ICJ in the *Nicaragua* case⁴⁸ three main issues continue to be raised on this matter: *First*, how to read Article 51 in conjunction with customary international law, *second*, in case of divergence⁴⁹ what is the relation between treaty law and customary international law and which to prefer in a given situation, *third*, once the coexistence of the two sources has been established, what is the input of customary law in the interpretation and application of treaty-law.

18. Doctrinal efforts focus primarily on the use of the means of interpretation provided by the 1969 Vienna Convention on the law of treaties. They refer, either to the *clear text* of Article 51 for restrictive purposes⁵⁰, or to a *functional* interpretation of the provision for extensive purposes. *Restrictive* does not mean *literal* interpretation, and *functional* does not *depart* from the object and the purpose. The guideline should be that interpretation ought primarily to take the text as having a sense⁵¹. In this respect and from that point appears the need to clarify the relationship with customary law. Customary international law and treaty law should be balanced in order to keep workable the thrust of Article 51. Customary international law in conjunction with Article 51 also covers non-Member States of the United Nations.

19. Two reminders on *Nicaragua*: a/ the Court, responding to argument that customary law has been “subsumed” and “supervened” by Article 51 stressed that “the United Nations Charter... by no means covers the whole area of the regulation of the use of force in international relations (...) in the field in question (i.e. self-defence) customary international law continues to exist alongside treaty law. The areas covered by the two sources of law...do not overlap exactly, and the rules do not have the same content”⁵²; and b/ the Court further said “...the Charter, having itself recognized the existence of this right, does not go on to regulate all aspects of its contents”⁵³.

20. What is customary international law and what rules beyond Article 51 contribute to its interpretation? The general statement in Article 51 is

⁴⁸ J. Verhoeven, “Le droit, le juge et la violence”, *RGDIP*, 1987/4, 1159-1239. O. Schachter, “Entangled Treaty and Custom”, in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, Essays in Honour of Sh. Rosenne, Dordrecht, 1989, 717 et seq. M. H. Mendelson, “The *Nicaragua* Case and Customary International Law”, in W. E. Butler, *The Non-Use of Force in International Law*, Dordrecht, 1989, 85-99.

⁴⁹ That would be ‘inconceivable’ for the codification of international law. R. Ago, *Report, op. cit.*, 63.

⁵⁰ So as to not undermine the principle, P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed., London, New York, 2000, 312.

⁵¹ J. Zourek, *Rapport provisoire, op. cit.*, 55.

⁵² *I.C.J. Reports 1986*, p. 94, para. 176. Example, the reporting to the Security Council, *ibid.*, p. 105, para. 200.

⁵³ *Ibid.*

complemented by practice, although it is generally recognized that practice is sometimes contradictory and therefore inconclusive. Practice *before* the Charter is rather irrelevant, because of the then permissive regime with respect to the use of force⁵⁴. As far as important resolutions/declarations adopted by the United Nations General Assembly are concerned, the 1970 *Declaration on Friendly Relations and Co-operation Among States in Accordance with the Charter* (GA Res.2625 (XXV))⁵⁵, and the 1974 *Definition of Aggression* annexed to GA Res.3314 (XXIX)⁵⁶, do not include any provision on self-defence, while the drafters of the 1987 *Declaration on the Non-Use of Force* (annexed to GA Res.42/22, adopted without a vote and quickly forgotten), were satisfied to refer to the Charter (para.13). This did not prevent the Court from making use of the 1970 Declaration on friendly relations and of the 1974 Definition of Aggression. As for the latter it enunciated the customary character of one of its provisions (Article 3, g) in relation to self-defence⁵⁷.

21. Among the different views expressed as to the relationship between the two sources of the law, one is that of the Court, which, while declaring that customary international law and treaty law coexist⁵⁸, asserted that substantially they are identical (and include collective self-defence). Accordingly, any departure from the formal (restrictive) reading of Article 51 is precluded and this position is among others favored by small nations "because the wider the right of self-defence, the wider the authorization for those people who actually can use force to do so"⁵⁹. Another view points out that the Court, clearly took the contents of Article 51 and of customary international law as identical⁶⁰ and thus customary law on this matter existing before the Charter was eliminated by Article 51. If Article 51 presents some *lacunae* these can be covered by another set of customary law, *subsequent to the Charter*⁶¹. And some authors believe

⁵⁴ See J. Verhoeven, *infra* III.

⁵⁵ See G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law*, Alphen, 1979.

⁵⁶ See T. Bruha, *Die Definition der Aggression*, Berlin, 1980.

⁵⁷ *I.C.J. Reports 1986*, p. 103, para. 195. See *infra*.

⁵⁸ *Ibid.*, p. 102, para. 193.

⁵⁹ M. Koskenniemi, in A. Dworkin (ed.), "Iraq and the Bush Doctrine", *Crimes of War Project*, at <www.crimesofwar.org/expert/html> (visited 25 January 2007).

⁶⁰ J. Delbrück, "The Fight Against Global Terrorism: Self-defense and Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'", 44 *German YBIL*, 2001, 14 and authors cited.

⁶¹ On practice subsequent to the Charter see G. Abi-Saab, "Cours général", *op. cit.*, 376-379. See also O. Corten, "Breach and Evolution of Customary International Law on the Use of Force", in E. Cannizzaro, P. Palchetti (eds.), *Customary International Law on the Use of Force*, 2005, 119 et seq. M. Kohen, "The Use of Force by the United States after the End of the Cold War, and its Impact on International Law", in M. Byers, G. Nolte (eds.), *The United States Hegemony and the Foundations of International Law*, Cambridge, 2003, 197-227, at 224-226.

that practice subsequent to the Charter prevented the narrow reading of self-defence under Article 51⁶².

22. Regarding the place of customary law in the field of self-defence, further analysis shows that the divergent positions on the contents of custom depend to a certain degree on the methodological options taken by commentators and leading to a restrictive or an extensive approach to that source of the law⁶³. The extensive approach privileges custom over treaty, is policy-oriented, takes practice, in particular the practice of major states (on this point two important divergent views were expressed in the *Opinion on the Legality of the Threat or Use of Nuclear Weapons* by Judges Shi and Schwebel)⁶⁴ as the dominant element and invokes a rapidly changing custom. The restrictive approach relies on the equality of sources and of States, takes *opinio juris* as the dominant element, and believes that custom evolves gradually⁶⁵. It is noteworthy that “in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule”⁶⁶.

Justiciability

23. In the realm of self-defence the argument has also been made that since the right of self-defence is *natural* or *inherent*, *it is absolute*, and a given State not only has the exclusivity of deciding to exercise it, but also no judicial organ has jurisdiction to appreciate its legality. This argument, advanced by the defendants before the *Nuremberg International Military Tribunal* (1946) was dismissed by the Tribunal⁶⁷, but is repeated from time to time after 1945. Sir Hersch Lauterpacht aptly distinguished the *absolute* character of the right that cannot be ignored by any law, from its *relative* character in the sense that is regulated by law. “It is regulated to the extent that it is the business of the courts to determine whether, how far and for how long, there was a necessity to have recourse to it”⁶⁸.

⁶² A. Randelzhofer, “Article 51”, *op. cit.*, 806. See however G. Abi-Saab, “Cours général”, *op. cit.*, 376-379.

⁶³ O. Corten, “The Controversies Over the Customary Prohibition of the Use of Force: A Methodological Debate”, 16 *EJIL*, 2005 /5, 810.

⁶⁴ *I.C.J. Reports 1996*, Judge Shi, p. 277, Judge Schwebel, p. 312.

⁶⁵ See the analytical scheme presented by O. Corten, “The Controversies”, *op. cit.*, 804 et seq.

⁶⁶ *I.C.J. Reports 1986*, p. 98, para. 186.

⁶⁷ The Tribunal also said: “[B]ut whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced”, *Judgment*, CMD. 6963, p. 30 (cited by I. Brownlie, *International Law and the Use of Force*, *op. cit.*, 239).

⁶⁸ H. Lauterpacht, *The Function of Law in the International Community*, London, 1933, 179-180.

24. In cases involving the use of force, even where this question represents “only a marginal and secondary aspect of an overall problem” as it was claimed by Iran in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*⁶⁹, the ICJ proceeds to the examination of the case. In the *Nicaragua* case the Court had to face objections of the United States regarding *inter alia* the possibility of ruling on the legality in a continuing armed conflict where arguably the issues of use of force and collective self-defence were not justiciable, as they involved a pronouncement on political and military matters, not on matters of the kind a court could usefully attempt to answer. But the Court went on to determine “first whether such (armed) attack has occurred, and if so, whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence”⁷⁰. Furthermore, in the above two cases the ICJ while stressing the primary role of the Security Council in the field of peace and security, did not follow argument that it should not perform its judicial function while the Council exercises its “essential” powers therein.

25. Other arguments tending to exclude the jurisdiction of the Court in this field were also advanced in the *Oil Platforms* case, as well as in the *Legality of Use of Force* case (2004), and the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (2002). They were related *inter alia* to the complexity and the diversity of the issues regarding the conflict, where only some of them were presented before the Court, the “indispensable parties” that had to be parties to the proceedings before the Court, the competence of other international organs on the basis of regional agreements, and the impossibility for the Court to assess the facts in an ongoing armed conflict. The repeated answer of the Court is that in the circumstances of a dispute, the issues raised before it, in the context of the use of force, are issues for which it has competence, and is equipped to determine the legality of the actions involved⁷¹.

The threshold of an “armed attack” and the notion of use of force

26. “Armed attack” (*agression armée*)⁷² figures in the very first part of the first paragraph of Article 51. The Charter does not spell out the meaning of “armed

⁶⁹ *I.C.J. Reports 1980*, p. 8, para. 10. Ch. Greenwood, “The International Court of Justice and the Use of Force”, in *Fifty Years of the International Court of Justice, Essays in Honour of Sir R. Jennings*, Cambridge, 1996, 375.

⁷⁰ *I.C.J. Reports 1986*, pp. 27-28, paras. 34-35. Criticism by Judge Oda, *ibid.*, pp. 219-246, paras. 15-72.

⁷¹ See however Ch. Gray, “The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after *Nicaragua*”, 14 *EJIL*, 2003, 857-905.

⁷² The use of the expression “*agression armée*” in the French text of the Charter induced some authors to give a different, somewhat heavier, interpretation to the requirement of an “armed attack”. J. Verhoeven suggests a construction conciliating the terms “armed attack” and “*agression armée*” (see *infra* III).

attack”, but its drafters intended to make it narrower than the “use of force” prohibited by Article 2(4). The Court, endorsing a position qualified as strongly dominant⁷³ held that “in the case of individual self-defence, the exercise of this right is subject to the State concerned having been (in French *que si*) the victim of an armed attack”⁷⁴. Obviously the same applies in situations of collective self-defence⁷⁵.

27. Questions arise *first* as for the *type of action* that constitutes an armed attack under Article 51⁷⁶. The letter of the Article does not make distinctions as to the gravity of the attack. However, the ICJ in the *Nicaragua* case referred to the *gravity of the acts* and said that is necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”⁷⁷ Accordingly, the State invoking the right of individual self-defence has to show that the attacks were of such a nature as to be qualified as “armed attacks”. The Court in the *Oil Platforms* case⁷⁸, and the *Eritrea-Ethiopia Claims Commission* in its 2005 *Partial Award (Jus ad bellum)* followed the same distinction between grave and less grave forms of use of force⁷⁹. But it is worth noting that although the *Nicaragua* and the *Congo* cases concerned armed bands, in the *Oil Platforms* case the Court seemed to infer that armed attacks of a lesser gravity by the armed forces of a State cannot trigger self-defence by the victim State.

28. The Court, by leaving aside the armed activities of lesser intensity and gravity, took distances from the 1970 Declaration on Principles of International Law on Friendly Relations and Co-operation Among States in Accordance with the Charter (GA Res.2625 (XXV), and endorsed Article 3 (g) of the 1974 Definition of Aggression annexed to GA Res.3314 (XXIX). Article 3 (g) states that aggression is “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry acts of force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein”. On the other hand, the *gravity* of a forcible act referred to in Article 2 of the Definition of Aggression is irrelevant only in case of *first*

⁷³ R. Hoffmann, “International Law and the Use of Military Force Against Iraq”, 45 *German YBIL*, 2002, 30. Randelzhofer, *op. cit.*, 792.

⁷⁴ The French expression “que si” used in the *Nicaragua* Judgment seems to limit much more the conditions of exercise of self-defence.

⁷⁵ *I.C.J. Reports 1986*, p. 103, para. 195.

⁷⁶ An armed attack is a type of aggression, Y. Dinstein, *War, Aggression, op. cit.*, 184.

⁷⁷ *I.C.J. Reports 1986*, p. 101, para. 191. A. Cassese, *International Law, op. cit.*, 354, speaks of “massive” armed aggression.

⁷⁸ *Oil Platforms, I.C.J. Reports 2003*, pp. 186-187, para. 51. See criticism by Judge Simma, p. 331, para. 12.

⁷⁹ *Eritrea-Ethiopia Claims Commission, Partial Award (Jus ad bellum), Ethiopia’s Claims 1-8*, The Hague, December 19, 2005, para. 12. Furthermore, the Commission held that minor incidents in violation of Article 2(4) of the Charter entail international “liability” of the attacking State (para. 16).

strike, where however the Security Council can appreciate that acts of use of force constitute or not aggression. Hence, for the Court, assistance to rebels “in the form of the provision of weapons or logistical or other support” should not be considered as an “armed attack”. In a *scale of actions*, the provision of arms to the nationals of a State who are seeking to overthrow the government, although it could constitute illegal intervention, does not attain the threshold of an “armed attack”⁸⁰. In this line of interpretation, *above the threshold* stands the *crossing of the borders by the armed forces* of a foreign State and the sending of irregulars in such a scale as to amount to armed attack by regular forces.

29. With respect to the gravity of the armed attack as a requirement for the application of Article 51, James Crawford is of the opinion that considerations of gravity are particularly relevant to proportionality. But in order to have recourse to Article 51 there must be some threshold of seriousness of the attack, whatever other steps a State may lawfully take to protect its territorial integrity or rights⁸¹. Benedetto Conforti believes that only the most grave forms of the use of force may justify an armed counter-attack and agrees with case-law. He admits that it is difficult to establish when an illegal attack, and the response are police actions. In fact the borderline between self-defence and counter-measures consisting of the use of “internal force” is not easy. Such borderline is exactly what should be deeply explored in order to make a new and original contribution to a subject which for the rest has been thoroughly studied up to now⁸². Joe Verhoeven stresses that use of force is permitted only in the case of armed attack; smaller scale issues of force do not justify the application of Article 51. A State can use force in a police action with its territory, independently of the gravity of the attack. He sees merit to discuss the question of whether and under which conditions isolated acts of use of force can be treated as constituting an armed attack (issue non resolved by the ICJ)⁸³. Another opinion holds that “anything other than high and conspicuous threshold between an armed attack justifying the exercise of self-defence, and lesser forms of intervention (...) would invite internationalization of essentially civil conflicts”⁸⁴.

30. The restrictive approach of the Court as to the notion of “armed attack”⁸⁵ has been criticized by Judge Schwebel⁸⁶, and a by number of authors⁸⁷ and was

⁸⁰ *I.C.J. Reports 1986*, pp. 103-104, para. 195.

⁸¹ See J. Crawford, *infra* III.

⁸² See B. Conforti, *infra* III.

⁸³ See J. Verhoeven, *infra* III.

⁸⁴ T. Farer, “Drawing the Right Line”, 81 *AJIL*, 1987, 113-114.

⁸⁵ “The exception of Article 51 was limited to the situation ‘if an armed attack occurs’, which is comparatively clear, objective, easy to prove, difficult to misinterpret or fabricate”, L. Henkin, “Force, Intervention, and Neutrality in Contemporary International Law”, 57 *Am. Soc’y Int’l L. Proc.*, 1963, 151.

qualified as weakening the concept of non-use of force further elaborated and adopted by the UN Security Council and General Assembly.⁸⁸ It is also purported that it could encourage “aggression of a low key kind”⁸⁹. Dame Higgins wrote that by adopting the unsatisfactory part of the 1974 Definition of Aggression “the Court appears to have selected criteria that are operationally unworkable”⁹⁰.

31. As to the relationship between the non-use of force in Article 2(4) and armed attack in Article 51 it is reminded that various notions are used to characterize the force in international relations, such as the threat or use of force, armed attack, or aggression. These notions sometimes overlap but are not necessarily identical and have different legal consequences⁹¹. The Court, since the *Corfu Channel* case⁹² is repeating that the prohibition of the use of force in the sense of Article 2(4) covers threats and all uses of armed force⁹³. Moreover, the fact that Article 2(4) contains references to the territorial integrity and the political independence of States gave rise to diverging interpretations⁹⁴. As to the still debatable problem of the relationship between Articles 2(4), 51 and the *peremptory norms* of international law⁹⁵ a further analysis could infer that the prohibition of the use of force and the right of self-defence are linked much more than the doctrine pretends⁹⁶.

⁸⁶ See Dissenting Opinion, Judge Schwebel, *I.C.J. Reports 1986*, pp. 341-346, paras. 167-168, p. 350, para. 177.

⁸⁷ For S. Murphy, “Terrorism and the Concept of Armed Attack”, 43 *Harvard Int'l L. J.*, 2002, 51, “the standards embodied in the Nicaragua case remain obscure.

⁸⁸ Cf. J. Hargrove, “The Nicaragua Judgment and the Future of the Law of Force and Self-defense”, 81 *AJIL*, 1987, 139-140.

⁸⁹ M. W. Reisman, “Allocating Competences to Use Coercion in the Post-Cold War World”, in L. Damrosch, D. Sheffer (eds.), *Law and Force in the New International Order*, 1991, 26.

⁹⁰ R. Higgins, “International Law and the Avoidance, Containment and Resolution of Disputes. General Course of International Law”, 230 *RCADI*, 1991(V), 9-342, at 321.

⁹¹ R. A. Müllerson, “The principle of Non-Threat and Non-Use of Force in the Modern World”, in W. E. Butler (ed.), *The Non-Use Force in International Law*, Dordrecht, 1989, 33. See also elements of information on attitudes of Islamic countries in E. Corty, “Le régime juridique du recours à la force tel qu'interprété par les États membres de l'Organisation de la Conférence islamique”, 7 *J. Hist. Int. L.*, 2005, 211-253.

⁹² *I.C.J. Reports 1949*, p. 35.

⁹³ “The word ‘force’ in Article 2(4) covers only armed or physical force”, C. H. M. Waldock, “Use of Force by Individual States”, *op. cit.*, 402.

⁹⁴ See “le problème des vingt-quatre derniers mots”, R. Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix*, Bâle, Genève, Munich, Bruxelles, 2003, 174 et seq.

⁹⁵ *I.C.J. Reports 1986*, pp. 100-101, para. 190.

⁹⁶ See Th. Christakis, “Vers une reconnaissance de la notion de guerre préventive?”, in K. Bannelier, Th. Christakis, O. Corten, P. Klein (eds.), *L'intervention en Irak et le droit international*, Paris, 2004, 31-33. On the relationship between self-defence and *jus cogens* from the viewpoint of the law of treaties see A. Cassese, “Article 51”, J. -P. Cot, A. Pellet, M. Forteau (eds.), *La Charte des Nations Unies. Commentaire*, *op. cit.*, 1357.

32. The close relation between the prohibition of use of force and self-defence appears also in the probability that action taken under the plea of self-defence can be a pretext for an aggression, or degenerate in aggression⁹⁷. It is thus believed that an extension of the notion of self-defence will put in jeopardy the prohibition of the use of force in general. S. Torres Bernárdez warns that abuse of “self-defence” makes it a weapon against the cornerstone of the existing international legal order, namely in order to weakening the peremptory prohibition of the threat or use of force in international relations provided for in Article 2(4) of the United Nations Charter and contemporary customary international law⁹⁸.

33. In respect of the language used in Articles 39 (aggression) and 51 (armed attack), in the early meetings of the Special Committee on the Question of Defining Aggression it was argued that “armed attack” was a special case of “armed aggression” in the sense of Article 39⁹⁹, but another view considered that it was inconsistent with the Charter provisions to argue that the notion of aggression in Article 39 was different in principle from the notion of armed attack in Article 51¹⁰⁰. The absence of any mention to self-defence in the 1974 Definition of Aggression was mainly due to the fact that discussion was placed “sur le terrain glissant de la ‘menace’ d’agression et fatalement sur celui également glissant de la légitime défense ‘preventive’”¹⁰¹.

34. The Court in *Nicaragua* pointed out that there are acts of physical violence and complicity prohibited by international law but *not* constituting an “armed attack” under Article 51. According to the Court’s reasoning in the above case, in responding to acts prohibited under international law and not constituting an “armed attack”, the victim State could take proportionate *counter-measures* but not exercise the right of self-defence¹⁰². In her separate opinion in the *Opinion on the Wall* Judge Higgins was not convinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter

⁹⁷ The evolution of the concept of self-defence goes hand-in-hand with the evolution of the prohibition of aggression. (*ILC Report on its Thirty-second Session*, 52, para. 2). But from this idea M. Glennon, infers that aggression and self-defence are “opposite sides of the same coin and there is no consensus on either notion”. See “Remarks”, in *Self-defense in an Age of Terrorism*, 97 *ASIL Proceedings*, 2003, 50.

⁹⁸ See S. Torres Bernárdez, *infra* III.

⁹⁹ The Netherlands, Norway, Iraq, Syria. See *Repertory of Practice of United Nations Organs*, vol. II, Supplement No. 2, 1955-1959, Article 51, paras. 122, 126-128.

¹⁰⁰ USSR, *ibid.*, para. 123. Furthermore, the representative of China stated that although armed attack was the most obvious form of aggression, it was the one which stood least in need of definition, and it was not the more dangerous. Particularly since the end of the Second World War, aggressors had been resorting to more subtle forms of aggression. *Ibid.*, para. 129.

¹⁰¹ C. Th. Eustathiades, « La définition de l’agression et la légitime défense », *Études de droit international*, tome IV, 349-461, at 431.

¹⁰² *I.C.J. Reports 1986*, p. 127, para. 249.

“as that provision is normally understood”¹⁰³. The notion of non-forcible counter-measures formally figures now in the Draft Articles on State responsibility adopted in 2001 by the International Law Commission¹⁰⁴.

35. How should acts violating the prohibition of Article 2(4) but not of such gravity as to attain the level required by the expression “armed attack” of Article 51 be treated in the discussion on self-defence?¹⁰⁵ Four series of interpretations have been forwarded on this question :

- a) Referring to the “intent of the drafters”, such acts do not justify self-defence on the grounds that they are violations of the prohibition of the use of force of a lesser gravity not reaching the threshold of an armed attack.
- b) Article 51 being part of Chapter VII uses the expression “armed attack” for acts constituting a threat or breach of international peace and security, and not for every violation of Article 2(4). Consequently, States victims of such acts are not prevented from responding forcibly beyond Article 51¹⁰⁶ (for some analysts on grounds of customary international law)¹⁰⁷.
- c) The historical interpretation of Article 51 shows that the drafters intended to clarify the position in regard to collective understandings for mutual self-defence, were the key problem was external aggression (to be more precise we should remind that the question of self-defence came first at San Francisco during the elaboration of Article 2(4) but was set aside).
- d) Judge Simma suggested that against smaller-scale use of force “*short of Article 51*” defensive action of a military nature also “*short of Article 51*” is to be regarded as lawful¹⁰⁸. Judge Kooijmans was equally critical of the approach adopted by the Court¹⁰⁹. It is worth noting that Article 50 of the

¹⁰³ *I.C.J. Reports 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004, Judge Higgins, Separate Opinion, para. 35, and added: “even if it were an act of self-defence properly called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.” On necessity and proportionality see *infra* nos 41-52.

¹⁰⁴ Articles 49-54, see J. Crawford, *The ILC’s Draft*, *op. cit.*, 281-302.

¹⁰⁵ A. Randelzhofer affirms the presence of “a gap” between Articles 2(4) and 51 and analyzes the doctrinal efforts to deny it. See “Article 51”, *op. cit.*, 791-792.

¹⁰⁶ In a section entitled “Absurdities of the extreme interpretation” J. Stone, in *Aggression and World Order. A Critique of United Nations Theories of Aggression*, London, 1958, wrote: “[t]he extreme view of Article 2{4} prohibiting resort to force by States for the vindication of their rights, save in reaction to armed attack or pursuant to collective decisions, is neither self-evident nor even beyond reasonable doubt in the whole context of the Charter” (98).

¹⁰⁷ D. Bowett, *Self-defense in International Law*, *op. cit.*, 192-193.

¹⁰⁸ *Oil Platforms*, *I.C.J. Reports 2003*, Judge Simma, Separate Opinion, pp. 331-333, paras. 12-13. Contra, Y. Dinstein, *War, Aggression*, *op. cit.*, 194.

¹⁰⁹ *I.C.J. Reports 2005, Case Concerning Armed Activities on the Territory of the Congo*.

ILC's Draft on State Responsibility considered that forcible counter-measures are prohibited by the Charter¹¹⁰.

Territory

36. "Armed attack" is understood as the attack directed against the territory of another State. The notion of territory refers to metropolitan as well as dependent territories overseas¹¹¹. The armed attack can be perpetrated by *land, sea, and air forces*. The ICJ does not exclude the possibility that the mining of a *single military vessel* might be sufficient to constitute an armed attack and bring into play the "inherent right of self-defence"¹¹². But it did not clearly indicate if an attack on *merchant ships* triggers the right to self-defence¹¹³. On the other hand the controversy, if any, on whether the premises of an embassy can be included in the notion of territory was not within the purview of the Court in the *Case of US Diplomatic and Consular Personnel in Tehran*. Finally, in its *Opinion on the Wall* the Court distinguished between an armed attack originating outside the territory and that emanating from an area in which a State exercises control¹¹⁴ and did not include the latter within the ambit of Article 51.

The use of force by a State in claim of self-defence for armed attack occurring beyond its territory or instrumentality

37. Writing in 1989 Oscar Schachter exemplified seven categories of situations in which States used force claiming self-defence for acts that had taken place *beyond* their own territory or instrumentalities in an indicative list as follows: rescue of political hostages; use of force against installations in a foreign State believed to support terrorist acts against nationals of the State¹¹⁵; use of force

¹¹⁰ See L. -A. Sicilianos, "La codification des contre-mesures par la Commission du droit international", *RBDI*, 2005/1-2, 447-500.

¹¹¹ R. Higgins, "International Law and the Avoidance", *op. cit.*, 311.

¹¹² *Oil Platforms*, *I.C.J. Reports 2003*, p. 195, para. 72.

¹¹³ *Ibid*, p. 191, para. 64. See however, N. Ochoa-Ruiz, E. Salamanca-Aguado, "Explaining the Limits of International Law Relating to the Use of Force in Self-defense", 16 *EJIL*, 2005/3, 513.

¹¹⁴ *I.C.J. Reports 2004*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004, (p. 56), para. 139.

¹¹⁵ Controversial is the question of the extension of the notion to include nationals that relates to the issue of *intervention d'humanité* if the exercise of forcible means aims at protecting large numbers of nationals (Ch. Tomuschat, "International Law: Ensuring the Survival of Mankind in the Eve of the New Century", 281 *RCADI*, 1999, 215) or in response to perceived terrorist assault against nationals (R. Higgins, "International Law and the Avoidance", *op. cit.*, 313). A. Remiro Brotóns et al., *Derecho internacional*, Valencia, 2007, 1079, indicate conditions. See also L. -A. Sicilianos, *Les réactions décentralisées à l'illicite. Des contre-mesures à la légitime défense*, Paris, 1990, 467 et seq. It is noticeable that Sir H. Waldock distinguished between self-help and self-protection: He contended that while forcible self-help is prohibited by current international law except in case of self-defence, self-protection (in particular protection of nationals abroad)

against troops, vessels, planes or installations believed to threaten imminent attack by a State with declared hostile intent; use of retaliatory force against a government or military force so as to deter renewed attacks; use of force against a government that provided arms or technical support to insurgents in a third State; use of force against a government that has allowed its territory to be used by military forces of a third State considered to be a threat to the State claiming self-defence; use of force in the name of collective self-defence against a government imposed by foreign forces and faced with large-scale military resistance by many of its people¹¹⁶.

38. Nearly all the above cases have been discussed in United Nations bodies and most governments were reluctant to legitimize expanded self-defence. The majority of States that addressed the issue of lawfulness criticized the plea of self-defence in such situations as contrary to the Charter, in many cases resolutions were not adopted and the few resolutions that passed judgment on the legality of the action denied the right to self-defence. Although political sympathies played a role, few governments defended the legality of the self-defence claim, and in several notable cases, allied or friendly States joined in condemnation of the actions. However, O.Schachter underlined one important feature: “in at least some of these cases, and perhaps all of them, the opposition to the self-defence claims appeared to be based in part on difference of view as to the facts”¹¹⁷. Four cases of use of force, differing as to the facts and their legal parameters, for which the right of self-defence was invoked, attracted much public and doctrinal attention: the 1976 rescue operation by the Israeli armed forces in Entebbe (nationals), the 1981 Israeli attack on the nuclear reactor of Iraq (pre-emptive), the 1983 U.S. intervention in Grenada (nationals) and the 1986 U.S. bombing of Tripoli, Libya (response to an attack on nationals in a third State)¹¹⁸. In all these cases the plea of self-defence was not endorsed by the Security Council or the General Assembly.

39. The list of cases of use of force claiming self-defence after 1990 for actions occurring beyond the State territory is updated by Thomas Franck¹¹⁹, who is in favor of some flexibility under certain conditions, but the reaction of the organs of the international community does not seem to have changed. Practice is also

continued to exist as an inherent right after the Charter. Several other situations of use of force are not to be understood as self-defence and are implicated in the language of reprisals or retaliation.

¹¹⁶ As for the practice of the General Assembly, see *Repertory of Practice of United Nations Organs*, *op. cit.*, and, *inter alia*, GA Res. ES 7-5, 26. 6. 1982 (Israel-Lebanon); GA Res. 38/7, 31. 10. 1983 (US-Grenada); GA Res. 41/38, 20. 11. 1986 (US-Libya); GA Res. 44/240, 29. 12. 1989 (US-Panama).

¹¹⁷ O. Schachter, “Self-defense and the Rule of Law”, 83 *AJIL*, 1989, 272.

¹¹⁸ Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 261-264.

¹¹⁹ Th. Franck, *Recourse to Force*, *op. cit.*, 76-96.

analyzed with the same conclusion by Antonio Cassese in his contribution under Article 51 in *La Charte des Nations Unies* (2005)¹²⁰.

40. In some cases a characteristic shift of attitudes appears in the debates in the Security Council: thus in 1993 the United States invoked self-defence for the raid by the U.S. Air Force on the headquarters of the Iraqi secret services after an attempt against President G. Bush's life while in visit in Kuwait¹²¹. It is noticeable that before the Security Council the representatives of France, Russia, Japan, Brazil, the United Kingdom, New Zealand and Spain, approved the action. China opposed it, while Cape Verde, Djibouti, Morocco, Pakistan and Venezuela took a balanced position¹²².

The "response": the cardinal rules (principles, requirements) of necessity and proportionality

41. International law gives the victim State authority to "repel or forestall" an illegal armed attack. The reaction involves almost in all cases the use of armed force, but it shall operate within a framework determined by international law and regulated by the rules of *necessity and proportionality*. Necessity and proportionality are present in all domestic legal systems¹²³, and the ILC confirms: "the two requirements are inherent in the notion of self-defence"¹²⁴. In international law they make the system of self-defence functional. Necessity is integrated into the concept of self-defence in the sense that it is the *raison d'être* of the former.¹²⁵ Since long ago, necessity and proportionality are interlinked (and depend on the seriousness of the attack), in any case they imply reasonableness¹²⁶, but their interpretation and application are not exempted from difficulties. If necessity can be identified according to some objective criteria¹²⁷,

¹²⁰ A. Cassese, in J. P. Cot, A. Pellet, M. Forteau (eds.), *La Charte des Nations Unies. op. cit.*, 1329.

¹²¹ See letter of 26 June 1993 to the Security Council, S/26003. See analysis in D. Kritsiotis, "The Legality of the 1993 U. S. Missile Strike on Iraq and the Right of Self-Defence in International Law", *ICLQ*, 1996, 163-177.

¹²² S/PV. 3245 (27 June 1993).

¹²³ I. Brownlie, *International Law and the Use of Force by States, op. cit.*, 296.

¹²⁴ *Commentary* under Article 21, in J. Crawford, *The ILC's Draft Articles, op. cit.*, para. 6, p. 169.

¹²⁵ "Nécessaire veut dire ici dans la mesure nécessaire pour arrêter ou repousser l'agression mais pas plus. C'est là le but de la légitime défense, sa seule justification et sa limite en même temps", G. Abi-Saab, "Cours général de droit international public", *op. cit.*, 371. See also J. Verhoeven, *infra* III.

¹²⁶ See however M. Bothe, "Terrorism and the Legality of Pre-emptive Force", 14 *EJIL*, 2003/2, 239. R. Kolb believes that reasonableness is a non-criterion and could open the door to arbitrariness. "Quelques réflexions sur le droit relatif au maintien de la paix au début du XXI siècle", in A. Yusuf (ed.), *African YBIL*, 2005, 193.

¹²⁷ According to the Court "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'", *Oil Platforms, I.C.J. Reports 2003*, p. 196, para. 73.

the issue of proportionality is more complex¹²⁸ but it also constitutes “the essence of self-defence”¹²⁹. The two notions affect the geographical and temporal scope of the conflict, the choice of weapons and targets, as well as the degree of coercion that may be applied against neutrals¹³⁰. Necessity as a component of self-defence is not to be confused with the “state of necessity” dealt with *infra*, although confusion has been frequent at least in the past¹³¹.

42. Necessity and proportionality do not appear in Article 51.¹³² They have customary character, supplementing the Charter provision. In the *Oil Platforms* case¹³³ the Court said: “the conditions for the exercise of the right of self-defence are well-settled: as the Court has observed in the *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* “the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law”¹³⁴; earlier, in the *Nicaragua* case the Court referred to a specific rule “whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it” as “a rule well established in customary international law”¹³⁵.

43. Today all States and all those who claim self-defence take proportionality (with diverging interpretations is true) as a rule or principle of general international law¹³⁶. This has not always been the case. Thirty years ago, opinion of members of the *Institut* responding to Jaroslav Zourek’s provisional Report on this point was rather divided, and one of the reasons for the divergence was that historically proportionality corresponded to the “state of

¹²⁸ R. Higgins, “International Law and the Avoidance”, *op. cit.*, 296. J. G. Gardam, “Proportionality and Force in International Law”, 87 *AJIL*, 1993, 391 et seq. L. -A. Sicilianos, *Les réactions décentralisées à l’illicite*, *op. cit.*, 273-290.

¹²⁹ I. Brownlie, *International Law and the Use of Force*, *op. cit.*, 279, note 2, citing E. J. de Aréchaga.

¹³⁰ Ch. Greenwood, “Self-defense and the Conduct of International Armed Conflict”, in Y. Dinstein, M. Tabory, (eds.), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne*, Dordrecht, Boston, London, 1989, 275.

¹³¹ Not to be also confused with proportionality in situations of counter-measures. For that regime see L. -A. Sicilianos, *Les réactions décentralisées à l’illicite*, *op. cit.*, 273 et seq. E. Cannizzaro, “The Role of Proportionality in the Law of International Counter-Measures”, 12 *EJIL*, 2001, 889-916.

¹³² The ILC in its 1980 *Eighth Report on State responsibility* did not enter (“as it was not asked to do so”) controversies regarding Article 51, but it adopted a neutral position and evacuated the issues of necessity and proportionality by taking the stand that “these are questions which in practice logic itself will answer and which should be resolved in the context of each particular case”, *Report of the ILC on the Work of its Thirty-Second Session*, p. 59-60, paras. 21-22.

¹³³ *Oil Platforms*, *I.C.J. Reports* 2003, p. 198, para. 76.

¹³⁴ *I.C.J. Reports* 1996, p. 245, para. 41.

¹³⁵ *I.C.J. Reports* 1986, p. 94, para. 176.

¹³⁶ J. Gail Gardam, “Proportionality and Force in International Law”, 87 *AJIL*, 1993, 391-413 et seq. Ch. Greenwood, *Essays on War in International Law*, 2006. Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 120.

necessity” (“état de nécessité”) and not to self-defence¹³⁷. However, until recently the legal framework of the cardinal rule of proportionality as a component of the concept of self-defence¹³⁸ has received secondary or marginal treatment.

44. As to the question *proportionate in respect to what* in the *jus ad bellum* one opinion holds that the answer is “proportionate in relation to the injury being inflicted”¹³⁹, another that “proportionality, in further expression of the policy of minimizing coercion, stipulates that the responding use of the military instrument by the target State be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defence under the established conditions of necessity”¹⁴⁰. Disproportional is the use of force that exceeds what is reasonably required to satisfy the objective of protection provided for by self-defence¹⁴¹. Proportionality means that the reaction of the victim State to the armed attack should correspond to the objective of self-defence, i.e., to “repel or forestall” the armed attack while preserving, as far as possible, the *civil population* from indiscriminate attacks (the principles of distinction or discrimination express this requirement). *Many aspects of proportionality are situation-dependent, but the law sketches the framework within which that notion operates.*

45. While in *jus ad bellum* proportionality is based on custom, in *jus in bello* the rule is part of conventional, as well as of customary international law. At least in the field of *jus ad bellum* customary law requires a two steps movement: the first is necessity, and if satisfied then comes proportionality. In the *Oil Platforms* the Court held that “the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion’”¹⁴². Within this reasoning the Court attached most importance to the

¹³⁷ 56 *Annuaire de l'Institut de droit international*, (Session de Wiesbaden), 1975. Doubts were expressed by R. Bindschedler, E. Kastrèn, Ch. Chaumont, while J. Zourek, M. Mc Dougal, F. Vallat had no doubts on the applicability of the rule of proportionality.

¹³⁸ As Myres Mc Dougal has put it “The requirement of proportionality, in further expression of the policy minimizing coercion, stipulates that the responding use of the military instrument by the target State be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defence under the established conditions of necessity”, 57 *AJIL*, 1963, 598.

¹³⁹ R. Higgins, “International Law and the Avoidance”, *op. cit.*, at 297, citing J. L. Hargrove, “The Nicaragua Judgment and the Future of the Law of Force and Self-defence”, 81 *AJIL*, 1987, 136. But according to Lady. Higgins (297) “in certain circumstances proportionality becomes a proportionality in respect of the object legitimately to be achieved”.

¹⁴⁰ M. S. Mc Dougal, “The Soviet-Cuban Quarantine and Self-defence”, 57 *AJIL*, 1963, 598. B. Conforti, cites the example of the Gulf war in 1991, when the forces of the coalition did stop fighting after having freed the territory of Kuwait. See *infra* III.

¹⁴¹ See J. Verhoeven, *infra* III.

¹⁴² *I.C.J. Reports 2003*, p. 196, para. 73.

target of the response and thus discarded the choice of a “target of opportunity”¹⁴³. In the exercise of self-defence the attacked State has to focus on the legitimate target open to attack and not direct an attack at random¹⁴⁴. Then the Court entered the field of proportionality and distinguished between one attack, that had the Court found it necessary, could have been considered proportionate, and another, much larger attack, that taken as a whole and even in parts of it, could not be regarded, in the circumstances of the case, as a proportionate use of force in self-defence¹⁴⁵.

46. In the recent *Case Concerning Armed Activities on the Territory of the Congo* the Court observed that “since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and proportionality”. It added: “[t]he Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of trans-border attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end”¹⁴⁶.

47. The judgment pursues: “[i]n customary law whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence”¹⁴⁷. The guiding line must always be that the main objective of the rule of proportionality is the protection of civilian population and civilian objects. Attempts to widen the list of military objectives in an armed conflict result in weakening the operation of proportionality¹⁴⁸. This is a different issue from the question of adopting criteria-oriented rather than list-oriented military objectives¹⁴⁹.

48. The concept of proportionality is present in a number of chapters of international law sometimes with different contents. It is taken as a general principle not limited in the case of self-defence. In the *Nicaragua* case the concept was also referred to in situations of non-forcible counter-measures¹⁵⁰. In the chapter on self-defence “it is used to limit permitted harm done to others”¹⁵¹.

¹⁴³ *Ibid.*, pp. 196-198, paras. 74-76.

¹⁴⁴ *Ibid.*, p. 187, para. 51.

¹⁴⁵ *Ibid.*, pp. 198-199, para. 77.

¹⁴⁶ *I.C.J. Reports 2005, Case Concerning Armed Activities in the Territory of the Congo* (p. 53), para. 147.

¹⁴⁷ *I.C.J. Reports 1986*, p. 103, para. 194.

¹⁴⁸ W. J. Fenrick, “Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia”, 12 *EJIL*, 384-502.

¹⁴⁹ *Ibid.*, 495.

¹⁵⁰ *I.C.J. Reports 1986*, p. 127, para. 249.

¹⁵¹ R. Higgins, “International Law and the Avoidance”, *op. cit.*, 296.

There is a close relation between the *jus ad bellum* and the *jus in bello* in this field.

49. In its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court reaffirmed the *close link between self-defence and international humanitarian law*. Proportionality entails the obligation of taking protective measures above all towards the civil population under international humanitarian law, including the provisions of Articles 51 et seq. (on the protection of civil population and the preparation of an attack) of the 1977 Geneva First Additional Protocol to the 1949 Conventions on Humanitarian Law. It is worth noting that the feasibility of each of the relevant provisions of the 1977 First Additional Protocol was positively assessed by NATO immediately after the adoption of the Protocol (the present *Rapporteur* was a member of the expert group that scrutinized the text, but he has no information on later developments in Member States). In an ongoing armed conflict¹⁵² the rule of proportionality has territorial and quantitative features¹⁵³. In this field the Protocol is generally considered as expressing customary law¹⁵⁴.

50. The relevant provisions of Additional Protocol I are to be found in Articles 51 and 57 of the Protocol, but also in Articles 48 (basic rules), 52 (general protection of civilian objects) and 54 (protection of objects indispensable to the survival of the civilian population), 85 (grave breaches). Article 51 of Additional Protocol I, considered as one of the “most important”, “key” provisions lays down the conditions for the protection of the civilians during military operations “in all circumstances”¹⁵⁵. It is reminded that the above Article was adopted by the 1977 International Conference on Humanitarian Law by 77 votes in favor, one against (Romania) and 18 abstentions. Opposition or abstentions came mainly from fear that Article 51 of the Protocol would limit the means for the protection of the territory of a victim State from a foreign aggression and occupation. Article 57 of Protocol I contains a list of precautionary measures to be taken in case of an armed attack (as defined in Article 49 of the Protocol) and underlines that in the conduct of military operations constant care shall be taken (“everything feasible”) to spare the civilian population, civilians and civilian objects¹⁵⁶. The attack should not be

¹⁵² J. Gail Gardam, “Proportionality and Force”, *op. cit.*, 406 et seq.

¹⁵³ M. Bothe, K. J. Partsch, W. Solf, *New Rules for Victims of Armed Conflicts*, The Hague, Boston, London, 1982, 309. L. Green, *The Contemporary Law of Armed Conflict*, Manchester, 1993, 330-332. F. Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1987, 99-104.

¹⁵⁴ A. Cassese, *International Law*, 2nd ed., Oxford, 2005, 417. L. Greene, *The Contemporary Law*, *op. cit.*, 331.

¹⁵⁵ *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), Geneva 1987, 613-628, at 617.

¹⁵⁶ *Ibid.*, 677-689.

“excessive”, the words proportional or disproportional having been avoided by the drafters in an exercise of public relations.

51. Before the United Nations organs the question of proportionality is repeatedly invoked since the early days of the international organization¹⁵⁷, including the sixty years’ old conflict in the Middle East. More recently, during the discussion in the Security Council of the above mentioned air raid by the United States against the headquarters of the secrets services of Iraq following an attempt against President G.Bush’s life during his visit in Kuwait in April 1993¹⁵⁸, the U.S. Representative Mrs M.Albright said *inter alia* :

...“We responded directly, as we are entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases. Our response has been proportionate and aimed at a target directly linked to the operation against President Bush. It was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism and deter further acts of aggression against the United States”¹⁵⁹.

Proportionality was also invoked by most of the Representatives who took the floor before the Security Council during the discussion of the “Situation in the Middle East” on 14 July 2006¹⁶⁰.

52. The *jus in bello* influences the *jus ad bellum* in two ways: a) as proportionality is a generally recognized rule of the *jus in bello*, it is *a fortiori* a component of the exercise of the right of self-defence in the sense of the *jus ad bellum*, and b) the conditions of its application could never be lesser in the case of self-defence, as the latter is a step possibly preceding a total military engagement¹⁶¹. It is suggested that in a complex evolution today *the organs of the international community in presence of a concrete situation of exercise of self-defence are gradually influenced by considerations relating to international humanitarian law*.

Preparatory measures

53. In the *Corfu Channel* case the ICJ, after a thorough scrutiny of the facts, and taking into account the *intention* of the United Kingdom to test the exercise of

¹⁵⁷ See examples in *Repertory of Practice of United Nations Organs*, Vol. II, Supplement No 2, 1955-1959, *infra* III, para. 121; Vol. II, Supplement No 5, 1970-1978, paras. 15, 16, 28; 1979-1984, paras. 17, 33, 38, 44, 53.

¹⁵⁸ See *supra*, para. 40.

¹⁵⁹ S/PV. 3245 (27 June 1993), provisional, p. 6.

¹⁶⁰ Russia, Ghana, Greece, Qatar, China, United Kingdom, Congo, Tanzania, Slovakia. Implicitly Argentina, Peru, France. See S/PV. 5489, 5489 Meeting, 14 July 2006. The Security Council Resolution 1701 (2006) of August 11, 2006 does not mention proportionality or self-defence.

¹⁶¹ Cf. J. Gail Gardam, “Proportionality and Force”, *op. cit.*, 394.

the right of innocent passage through straits used for international navigation (“a right which has been unjustly denied”)¹⁶², accepted the legality of measures taken *in preparation of the exercise of the right of self-defence*, as long as they were *reasonable*¹⁶³. Preparatory means of defence are also lawful as a response to a threat against the territorial integrity and the political independence of a State. It is understood that preparatory measures for self-defence shall be distinguished from threats of use of force and of preparation of aggression.

Time factor

54. Defence must be carried out within a reasonable time from the initial attack¹⁶⁴. If self-defence is not exercised within a reasonable for the circumstances time, it risks to reverting to unlawful armed reprisals or aggression¹⁶⁵. But as Article 51 of the Charter does not provide that the reaction of the victim State shall be *immediate*, flexibility as for the timing appears to be fair interpretation. It is argued that after September 11, 2001, the intention of a State to continue *hosting and supporting* a terrorist organization could be considered as justifying the use of force in response against the organization, even if that response did not occur shortly after the event. The victim State has the obligation to report to the Security Council without delay of the action taken in self-defence, and the competent organs of the international community have the right to appreciate also excesses of timing. After the attacks of September 11, the United States Government seized the Security Council, resolutions followed, but the armed response in Afghanistan occurred later. In the *Nicaragua* case the Court included a time factor into the concept of necessity¹⁶⁶. In the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* it did not examine a claim of self-defence for a territorial situation¹⁶⁷ that lasted many years and for which the claimant pretended it occurred out of a “reasonable mistake” or “honest belief”¹⁶⁸. In a wider sense, self-defence cannot be invoked to settle disputes as to territory, whatever the

¹⁶² *I.C.J. Reports 1949*, p. 30.

¹⁶³ *I.C.J. Reports 1949*, p. 31. See also G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, London, 1968, 34.

¹⁶⁴ J. Zourek, *Rapport provisoire*, *op. cit.*, 50. It is argued that the duration of the right depends on the magnitude of the use of force by the attacking State. See Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 121.

¹⁶⁵ M. E. O’Connell, “The Myth of Pre-emptive Self-defense”, *op. cit.*, p. 10.

¹⁶⁶ “These measures were taken only, and begun to produce their effects, several months after the major offensive, etc.”, *I.C.J. Reports 1986*, p. 122, para. 237.

¹⁶⁷ See examples in P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, *op. cit.*, 314-315.

¹⁶⁸ *I.C.J. Reports 2002*, pp. 143-144, paras. 311 et seq.

time of the reaction. This rule is confirmed by the *Eritrea-Ethiopia Claims Commission* in its Partial Award of 2005¹⁶⁹.

Establishment of material facts

55. *Da mihi factum dabo tibi ius*. In the majority of cases brought before international organs the issue of facts¹⁷⁰ was left unresolved¹⁷¹. The Court, the Security Council and the General Assembly mostly don't take position on material facts, although there is a decisive point for the appreciation of a given situation. In the *Nicaragua* case the Court qualified the determination of facts relevant to the dispute as "one of the chief difficulties". In that case there was disagreement between the Parties, not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Furthermore, the respondent State has not appeared during the proceedings on the merits and there was secrecy on some of the conduct attributed to one or the other of the Parties¹⁷². For the Court "widespread reports of a fact may prove on closer examination to derive from one single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source"¹⁷³.

56. It is the litigant seeking to establish a fact who bears the burden of proof. On the other hand, in the *Oil Platforms* case the Court underlined that "public sources' are by definition secondary evidence; and the Court has no indication of what was the original source, or sources, or evidence on which the public sources relied"¹⁷⁴. More recently, in the *Case Concerning Armed Activities on the Territory of the Congo* the Court has been given the possibility for, and performed an extensive examination of material facts¹⁷⁵. In general, disputes about the veracity and the assessment of facts are common and occasionally falsifications are not avoided¹⁷⁶. The Security Council should play a more effective role on this matter.

¹⁶⁹ *Eritrea-Ethiopia Claims Commission, Partial Award, Jus ad bellum*, Ethiopia's Claims 1-8, The Hague December 19, 2005, para. 10.

¹⁷⁰ See J. Salmon, "Le fait dans l'application du droit international", 175 *RCADI*, 1982 (II).

¹⁷¹ Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 96.

¹⁷² *I.C.J. Reports 1986*, p. 38, para. 57. See also Judge Lachs, Separate Opinion, pp. 158-161.

¹⁷³ *I.C.J. Reports 1986*, p. 41, para. 63. The handling of the question of facts in the above Case was criticized by members of the Court, in particular by Judge Schwebel.

¹⁷⁴ *I.C.J. Reports 2003*, p. 190, para. 60. But for Judge Higgins in *Oil Platforms* "there is no attempt by the Court to sift or differentiate or otherwise examine the evidence"; and "the methodology it uses seems flawed", Separate Opinion, p. 235, paras. 38-39.

¹⁷⁵ *Judgment of 19 December 2005*, paras. 106-147.

¹⁷⁶ As Th. Franck notes "lying about facts, it may be said, is the tribute scofflaw governments pay to international legal obligations they violate", in "The Power of Legitimacy and the Legitimacy of Power", *op. cit.*, 96.

Reporting to the Security Council

57. The State that exercises the right of self-defence is duty-bound to report to the Security Council on the measures taken in self-defence. By using the expression “measures *taken*, etc” the drafters of Article 51 considered that the reaction of that State does not depend on any previous formality before the international organization. Notification to the Security Council comes *ex post facto*¹⁷⁷ but “*immediately*”. The Charter does not enunciate the legal consequences from the non-information of the Security Council¹⁷⁸. In any case, the Security Council can act *proprio motu* according to Article 39 of the Charter. In the *Nicaragua* case the ICJ, in a passage where Article 51 was rather indirectly invoked, took non-reporting as an indication that “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”¹⁷⁹. Some States omit reporting, while others over-report, but since the judgment of 1986 reporting has generally improved. The *Eritrea-Ethiopia Claims Commission* in its Partial Award of 2005 underlined the reporting obligation of States under Article 51, and took note of the fact that in one instance Eritrea did not report, while in another instance Ethiopia did¹⁸⁰. The State acting in self-defence must provide the Security Council with detailed credible evidence¹⁸¹.

Role of the Security Council

58. The word *until* “the Security Council has taken the necessary measures to *maintain*, etc.” (the text adds “*and to restore*” in the third sentence), stresses a primary role “in the hands of a strong organ”¹⁸² of the international community. The role assigned to the Security Council by Article 51 is amplified in Articles 39-42 (and 53)¹⁸³ of the Charter¹⁸⁴. Problems of interpretation arise when the Council does not refer to specific provisions of the Charter and the legal basis is

¹⁷⁷ J. Verhoeven, *Droit international public*, Bruxelles, 2000, 680, speaks of an obligation that tests the good faith of the State concerned.

¹⁷⁸ As to the practical limits of reporting, see Sh. Rosenne, “The Perplexities of International Law”, *op. cit.*, 151.

¹⁷⁹ *I.C.J. Reports 1986*, para. 200. Criticized by Judge Schwebel, Dissenting Opinion, p. 277, para. 230.

¹⁸⁰ *Eritrea-Ethiopia Claims Commission, Partial Award. Jus ad Bellum*. Ethiopia’s Claims 1-8, The Hague December 19, 2005, paras. 11 and 17.

¹⁸¹ See J. Charney, “The Use of Force Against Terrorism and International Law”, 95 *AJIL*, 2001, 836.

¹⁸² C. Eustathiades, “La définition de l’agression adoptée par les Nations Unies et la légitime défense”, *op. cit.*, 447.

¹⁸³ J. Combacau, “The Exception of Self-defense in the United Nations Practice”, in A. Cassese (ed.), *The Current Legal Regime of Use of Force*, Dordrecht, Boston, London, 1986, 9.

¹⁸⁴ See G. Arangio-Ruiz, “On the Security Council’s ‘Law Making’”, *LXXXIII Rivista DI*, 609-727, at 621-727.

not clear. In some cases the Council uses the all-embracing sentence “acting under Chapter VII”, but it mostly avoids such reference¹⁸⁵. The Council is not duty-bound to pronounce itself *on the legality* of the exercise of the right of self-defence¹⁸⁶. It has not to “recognize” that right. Sometimes it does not deal at all with that aspect of the use of force and usually calls upon the parties to cease-fire or to cease hostilities. In other cases, it indicates measures to be taken for restoring peace. Rarely, as it did in the 1984 armed attack of South Africa against Angola (Res.546/1984) and in the 1991 invasion of Kuwait by Iraq (Preamble, SC Res.661/1991), and the terrorist attacks against the United States of September 11, 2001 (Preamble, SC Res.1368/2001, 1373/2001), the Security Council makes declaratory statements confirming the right of individual and collective self-defence without other qualifications.

59. In the *Case of Armed Activities against the Congo* Judge Kateka observed that “many tragic situations have occurred on the African continent due to the inaction of the Security Council”¹⁸⁷. And during the armed conflict in the Middle East (July-August 2006) the Security Council took 31 days before calling for “an immediate cessation of hostilities” (Resolution 1701 of 11 August 2006) while M. Kofi Annan, the U.N. Secretary General, “expressing profound disappointment shared by millions of people around the world”, said that “all members of this Council must be aware that its inability to act soon has badly shaken the world’s faith in its authority and integrity”¹⁸⁸.

60. The designation by the Security Council of the aggressor contributes to the acknowledgment of the legality of self-defence¹⁸⁹. On the other hand, in a few cases a Resolution or the Council’s failure to act has been interpreted by commentators as tacit approval or toleration of the use of force in question. Yet situations of silence or delay by the Security Council can also be interpreted the other way round. Nevertheless, it is worth mentioning that an important number of commentators, while recognizing the weaknesses of the United Nations system, in particular the blocking of the Security Council by the express or hidden veto, make an appeal for workable procedural methods of a multilateral character, if not for a *renaissance of collective security* through the Security Council¹⁹⁰.

¹⁸⁵ As for the “realism” of the Security Council, see J. Delivanis, *La légitime défense*, *op. cit.*, 144.

¹⁸⁶ O. Schachter, “Self-defense and the Rule of Law”, *op. cit.*, 263. J. Verhoeven, see *infra* III.

¹⁸⁷ *I.C.J. Reports 2005*, Judgment of 19 December 2005, Judge Kateka, Dissenting Opinion, p. 9, para. 38.

¹⁸⁸ < www.un.org/apps/news > (visited August 8, 2006).

¹⁸⁹ On the moral, political and practical justifications of the determination made by the Security Council see G. Arangio-Ruiz, “On the Security Council’s ‘Law-Making’”, *op. cit.*, 630-635.

¹⁹⁰ M. Bothe “Terrorism and the Legality of Pre-emptive Force”, *op. cit.*, 239.

“Until” the Security Council has taken “measures”¹⁹¹

61. According to the Charter the Security Council *prescribes, authorizes or recommends measures*. Such initiative of the Security Council can take the form of mandatory action entailing forcible or non-forcible measures against the attacking State and be directed to all Member States or to the Organization itself. The question if, in relation to the expression “until”, the right of self-defence is a temporary one, complicates the issue. The same goes for the question who determines that the Security Council has taken the appropriate measures. Sometimes the quarrel over these questions has a negative impact on the maintenance of international peace and security. This having been said, the founding fathers of the Charter, by using the term “until” rather than “when”, intended to clearly reiterate the obligation of the Security Council to be *ipso facto* alerted by the mere fact of the use of force in international relations irrespective of information by the parties. The letter of the Charter infers that the Council has discretionary power to act. This is a weakness of the system when the international peace and security are at stake, in case the veto power of permanent members prevents that organ from taking action¹⁹². Derek Bowett had suggested an objective assessment that would take into account “the diverging views and the measures adopted”¹⁹³. Antonio Cassese speaks of “effective” measures¹⁹⁴. Christian Dominicé distinguishes between situations where the victim State responds to an armed attack occurring on its territory and where the victim State pursues the aggressor on the latter’s territory. He then stresses the respective role of the Security Council in authorizing further action in response to the armed attack¹⁹⁵.

62. Another question regards the effect of measures taken by the Security Council in the exercise of self-defence by the attacked State. For some authors it is not evident from the text that there exists concurrent power of the individual State and the Security Council, while others confirm that there is¹⁹⁶. In practice, while during the *Falkland/Malvinas* islands conflict there has been some controversy on the relationship between the Security Council call for cessation of the hostilities and the actual exercise of the right of self-defence in the period between the beginning of the hostilities and the cease-fire, after the invasion of Kuwait by Iraq the Security Council Resolution 661/1991, imposing sanctions against Iraq, affirmed the actuality of the inherent right of individual and

¹⁹¹ Many authors qualify self-defence as “temporary right”. See Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 103.

¹⁹² See J. Verhoeven, *infra* III.

¹⁹³ D. Bowett, *Self-defense in International Law*, *op. cit.*, 195.

¹⁹⁴ A. Cassese, *International Law*, *op. cit.*, 355.

¹⁹⁵ Ch. Dominicé, “La sécurité collective et la crise du Golfe”, 2 *EJIL*, 1991, 101 et seq.

¹⁹⁶ Th. Franck, *Recourse to Force*, *op. cit.*, 49. Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 104-107.

collective self-defence in accordance with Article 51 *in parallel* with measures prescribed by the Security Council¹⁹⁷. Another problem is the resort to self-defence while a dispute is submitted to international political organs or organs of adjudication¹⁹⁸.

63. *An evolution* of the system of collective security alongside with the exercise of the right of self-defence¹⁹⁹ could appear from recent practice. In the case of the invasion of Kuwait by Iraq in 1990 the Security Council in Resolution 661 affirmed the individual and collective right of self-defence of Kuwait and of those States who would assist it, and further decided, in parallel with the exercise of the right of self-defence, the imposition of economic sanctions against Iraq. Similarly, after the September 11, 2001 attacks against the United States, the Security Council in Resolutions 1368 and 1373 affirmed the right of self-defence even before the armed reaction by the victim State has taken place. However, the entire further action in Afghanistan was kept in the hands of the Coalition and not of the Security Council that was informed and not involved²⁰⁰. Yet in some other situations, such as the 2003 intervention in Iraq, the Security Council, after the *Operation Iraqi Freedom* and without pronouncing on the legality of the Operation has decided to contribute in the governance and state building of Iraq by establishing the *United Nations Assistance Mission for Iraq* (Resolution 1500) and by authorizing a multinational military presence in that country (Resolution 1511). Combining self-defence and further action by the Security Council is quite normal as Article 51 is part of Chapter VII. A number of authors find in such action of the Security Council *a posteriori* legalization of the use of force by the State that claims to have acted in self-defence, but such an interpretation depends in each case *inter alia*, on the position taken by the Member States of the Council (or the General Assembly) during the debates and the wording of the relevant resolutions.

64. The above evolution appears better when the Security Council adopts concrete mandates, determines the timing of an action, and requests reporting by States and international organs involved in operations aiming at the maintenance of the international peace and security.

¹⁹⁷ Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 103.

¹⁹⁸ Y. Dinstein, *War, Aggression*, *op. cit.*, 213 and examples.

¹⁹⁹ See discussion in C. Stahn, "Enforcement of the Collective Will After Iraq", 97 *AJIL*, 2003, 804-823, at 819-823.

²⁰⁰ B. Kolb, "Self-defence and Preventive War at the Beginning of the Millennium", 59 *ZÖR*, 2004, 123.

Arms embargo and self-defence

65. The relationship between an arms embargo decided by the Security Council and the exercise of the right of self-defence cannot be stressed objectively²⁰¹. In principle there is no contradiction between the “inherent” right of self-defence and the primary responsibility of the Security Council to maintain and restore the international peace and security. But the balance between the two rights also depends on many factors, such as the evolution of each conflict, or whether the embargo is addressed only to the attacking State or to all parties. The problem was put in several instances: in the 1970s, during the examination by the Security Council of “the question of South Africa” it was said that, while in strictly legal terms there could be no question of denying any country the right of self-defence in accordance with Article 51, the intention in the situation under consideration was to protest against the stockpiling of weapons intended for purposes of internal repression. In the 1990s, after the dissolution of Yugoslavia, Bosnia-Herzegovina requested from the Security Council to lift the arms embargo decided against Yugoslavia in order to permit to the newly independent Bosnia-Herzegovina to protect itself in self-defence. The Security Council did not endorse the claim. Bosnia-Herzegovina made the same request before the International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (provisional measures)²⁰² but the Court decided that it had no jurisdiction to examine it. The duration of the embargo also depends on the circumstances. In 1994, the Security Council reacting to the acts of genocide imposed an arms embargo on Rwanda. After the change of government, Rwanda obtained from the Security Council the cessation of the measure on grounds of the need of that member State to protect its independence and territorial integrity from outside threats.

Threat

66. The drafters of the Charter addressed the problems of threats to international peace and security in Articles 2(4) and 39. Hence, threat is mentioned in the rule of non-use of force and in the handling of the situation by the Security Council, but not in the exception of self-defence. The question of threat invoked by drafters of the Charter during the discussion on self-defence was not retained²⁰³. Probably the reminiscence of two World Wars (August 1914, September 1939

²⁰¹ See however, Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 105-107. Sp. Aktypis, *L'institution de la légitime défense*, *op. cit.*, 326-335.

²⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, *I.C.J. Reports* 1993, p. 3.

²⁰³ M. Bothe, “Terrorism and the Legality”, *op. cit.*, 229.

and May 1940) that begun with the aggressor invoking imminent threat and self-defence²⁰⁴ played a role in that choice.

67. “A threat of force consists in an express or implied promise by a government of a resort to force conditional on non acceptance of certain demands by that government”²⁰⁵. Until now doctrinal efforts to unfold the parameters of the concept have not been frequent²⁰⁶. The notion was given a wide interpretation by some States and doctrine as well²⁰⁷, but the ICJ is rather restrictive in pinpointing situations that constitute a threat to international peace and security (*Corfu, Nicaragua, Legality of the Threat or Use of Nuclear Weapons*). For the Court “the notions of ‘threat’ and ‘use of force’ under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal -for whatever reason- the threat to use such force will likewise be illegal”²⁰⁸. But in an important for our Report passage the Court held that whether a “threat” is contrary to Article 2 (4) “depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality”²⁰⁹. Proponents of a restrictive interpretation refer to the ordinary meaning of the terms and the context of Article 51 according to the 1969 Vienna Convention on the Law of Treaties. They underline that the sentence reads: “if...an armed attack *occurs*” (meaning if it *actually* occurs) and conclude that conceptually a threat does not constitute an attack.

68. The dangers of *abusive appreciation* of threat are recognized by all, both by those in favor, and those against a broader interpretation of Article 51. It might be interesting to remind that in the course of the elaboration of the 1991 Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission included *threat of aggression* in the list of crimes. But following subsequent comments by a number of governments in the General Assembly, the Commission, in a second reading in 1995, *deleted* from the list of crimes enumerated in the Draft Code the aforesaid reference to the threat to international peace and security. Resolution 3314/1974 on the Definition of Aggression does not either include threat among the elements of aggression.

69. Opinion that Article 51 includes the threat of an armed attack where the attack is imminent goes back to interpretation of the *Caroline* formula (see *infra*

²⁰⁴ J. Salmon, *Droit des gens*, Tome III, *op. cit.*, 464.

²⁰⁵ I. Brownlie, *International Law and the Use of Force by States*, *op. cit.*, 364.

²⁰⁶ See however R. Sadurska, “Threats of Force”, 82 *AJIL*, 1988, 239-268. N. Stürchler, *The Threat of Force in International Law*, Cambridge, 2007.

²⁰⁷ Illustration of different types of threats, in R. Sadurska, *op. cit.*, 254-266.

²⁰⁸ *Legality of Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 246, para. 47.

²⁰⁹ *Ibid.*, pp. 246-247, para. 48.

para. 81) that speaks of an *imminent* attack. Anyway, most of those who accept a broadening of the meaning of Article 51 do not depart from the requirement of *imminence* and from the two key conditions for the response of the potentially victim State, as in an *actual* armed attack, the response to a threat shall be necessary and proportional. As already said the concept of necessity in the presence of a threat confirms once more the danger of abuse, and the general requirement of proportionality is at least problematic in a situation of threat. One recent tendency goes farther that the concept of *imminent threat* and speaks of “*sufficient threat*”²¹⁰. But in such a case acting on their own, a State or a group of States risk to call in question the entire system of the United Nations. There would also be a clear danger that other States invoking the same doctrine as a precedent to embark into military adventures²¹¹.

70. The possibility of taking forcible measures in presence of a threat to the international peace and security is not excluded by the Charter, but these measures depend, as provided by Article 39, on an *authorization* to use force given *by the Security Council alone*²¹². Th.Franck notes to that effect: “...These provisions (on collective measures taken by the Security Council) permit the use of force against many kinds of “threats to the peace” that do not take the form of an actual armed attack. Such action, however, must first be authorized by the Security Council, as it was in response to such threats of the peace as the military coup in Haiti, the disintegration of civil governance in Somalia, and the humanitarian crises in the former Yugoslavia, Albania, and Rwanda. In each instance, the decision to authorize the resort to force was made collectively”²¹³. To complete the above *problématique* on *threat* it is necessary to turn to the question of anticipatory self-defence examined *infra*.

Weapons

71. The Charter in prohibiting the use of force does not distinguish between weapons. As the Court said “the Charter neither prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter”²¹⁴. This does not

²¹⁰ C. Stahn, “Enforcement of the Collective Will”, *op. cit.*, 820.

²¹¹ Cf. M. Reisman, A. Armstrong, “The Past and Future of the Claim to Pre-emptive Self-defense”, 100 *AJIL*, 2006, 547-548.

²¹² R. Hoffmann, “International Law and the Use of Military Force Against Iraq”, 45 *GermanYBIL* 2002, 30-31. M. Koskeniemi is of a different opinion in A. Dworkin (ed.), “Iraq and the Bush Doctrine”, *Crimes of War Project, op. cit.*, R. Falk, “What Future for the UN Charter System in War Prevention? 97 *AJIL*, 2003, 590, 598.

²¹³ Th. Franck, “What Happens Now? The United Nations After Iraq”, 97 *AJIL*, 2003, 619-620, at 620.

²¹⁴ *I.C.J. Reports 1996*, p. 244, para. 39.

mean that prohibitions of construction, stockpiling and use of specific weapons under treaty and customary law are affected by the above remarks.

72. As for the armed attack to which the victim State responds there are mainly two positions. One opinion contends that the Charter does not make the distinction between weapons utilized in the attack; another, that the drafters of Article 51 took into account the *ways and means of warfare* utilized by States *before* the dropping of the atom bomb in Hiroshima and Nagasaki. Since then, the latter say, we entered the era of weapons of mass destruction (WMD) and the right of self-defence could be meaningless if a State cannot prevent an aggressive first strike when the aggressor uses these weapons²¹⁵. The impressive technological developments in air, naval and ground warfare incites authors to consider that the evaluation of the concept of *imminence in the threat of an attack* differs according to the weapons used and make the claim for an expansion of the right to react. It is also pointed out that the type of weapons used in the attack are relevant for the qualification of the armed attack and the triggering of the reaction, because a weapon which will cause major and irreversible harm presents different considerations than one which will not²¹⁶.

73. Furthermore, some authors tend to interpret Article 51 on the (not sufficiently construed from the point of view of law) basis of the capabilities of today's adversaries²¹⁷ and thus to justify claims to anticipatory self-defence, while other authors for the same reasons extend the quest to pre-emptive self-defence (see *infra*)²¹⁸. The problem is not new. Already in 1946 the United States in the framework of the Baruch proposal for international control of the atomic energy "suggested that a treaty providing for such control should define "armed attack" in a manner appropriate to atomic weapons, and include in the definition not only the dropping of an atomic bomb but also certain steps preliminary to such action", as the violation of international control arrangements. As the modification of multilateral treaties becomes more and more difficult, it is not out of context to suggest that the Security Council should a/ take the initiative to call on all members of the United Nations to join in the 1969 Treaty on Non-Proliferation of Nuclear Weapons (as it did indirectly in the Preamble of Resolution 1718/2006 regarding North Korea), b/ determine, in case of doubt, what materials destined to the production of Weapons of Mass Destruction are prohibited²¹⁹; and c/ take measures to

²¹⁵ See Q. Wright, "The Cuban Quarantine", 57 *AJIL*, 1963, 561.

²¹⁶ See J. Crawford. Cf B. Conforti *infra* III.

²¹⁷ On this assertion see A. Angie, "The Bush Administration Pre-emptive Doctrine and the United Nations", 98 *ASIL Proceedings*, 2004, 326.

²¹⁸ W. M. Reisman, "Remarks", in "Self-defence in an Age of Terrorism", 97 *ASIL Proceedings*, 2003, 142.

²¹⁹ See on items, materials, goods, and technology, *UN Doc.* S/2006/814, S/2006/815, S/2006/816.

enhance the system of international control by the International Atomic Energy Agency.

Accumulation of events theory

74. According to this theory, also invoked before the Security Council, a State that suffers minor armed attacks during a period of time could exercise the right of self-defence by taking into account the whole series of attacks against it²²⁰. It is also argued that different attacks would be considered as part of the same conflict, and that continuous are the situations where an armed conflict having come to an end, another attack has taken place and so forth. In the *Oil Platforms* case the Court did not accept that argument, but the expression it used “even taken cumulatively these incidents do not seem to the Court to constitute an armed attack”, has given rise to the contention, also invoked after the *Nicaragua* case, that the Court did not exclude altogether the possibility of a cumulative effect of repeated armed attacks otherwise minor.

75. The accumulation of events came up again in the *Cameroon-Nigeria case*, but the Court did not address its conceptual basis and restricted its appreciation to the non-attribution of the facts to one of the Parties²²¹. The Court has done the same in the *Case of Armed Activities in the Territory of the Congo*²²² where it relied, not on “this series of deplorable attacks that could be regarded as cumulative in character”, but on the evidence before it that the said attacks “still remained non-attributable to the DRC” (the Democratic Republic of the Congo). The Court as of now did not have to directly examine this controversial issue²²³.

76. Other questions arise as to the criteria of necessity and much more of proportionality as a reaction to the accumulation of events, as well as to the case of the continuous character of an armed conflict. According to Michael Bothe “the notion of continuous armed conflict is a dangerous one open to abuse”²²⁴. The general practice seems to be that the Security Council, in presence of separate periods of armed conflict refuses to consider the latest as the continuation of a previous one.

Intention and motivation

77. In principle, intention and motivation of the attacking State do not seem to be relevant in the exercise of the right of self-defence. As Ian Brownlie has put

²²⁰ Ch. Greenwood, “International Law and the U. S. Air Operation Against Libya”, 89 *W. Virg. L. Rev.*, 1987, 953-956. Y. Dinstein, *War, Aggression, op. cit.*, 202.

²²¹ *I.C.J. Reports 2002*, para. 323.

²²² *I.C.J. Reports, 2005*, Judgment of 19 December 2005, p. 53, para. 146.

²²³ Ch. Gray, *International Law and the Use of Force, op. cit.*, 125.

²²⁴ M. Bothe, “Terrorism and the Legality”, *op. cit.*, 236.

it “intention is question-begging category in the field of state responsibility and appears in the case only in specialist roles.”²²⁵ In the *Opinion on the Legality of Threat or Use of Nuclear Weapons* intent has been taken in an indirect way, where the Court distinguished between the use of force intended to be directed against the territorial integrity or political independence of a State, or as a means of defence²²⁶. Intention of armed attack against a State can play a decisive role at least in *alerting, and taking of measures by the Security Council* in case of a *threat* to international peace and security. According to Sir Humphrey Waldock in some cases the motives could be decisive for the characterization of an attack as “armed attack”²²⁷. In the *Case Concerning Oil Platforms* the Court examined two “acts” of the Iranian armed forces in the Gulf but did not find a proof of the “intention” of Iran to hit U.S. targets²²⁸. For Roberto Ago, *Special Rapporteur* of the ILC, “actions even involving some use of force but circumscribed in magnitude and duration (...) carried out for limited purposes without any true aggressive intentions towards the State whose territory is affected are also prohibited by present-day international law”²²⁹. Shabtai Rosenne speaks of the intentions of the State that reacts and questions whether, if the Security Council is unable or unwilling to act, a State or a group of States to prevent or remove grave violations of the Charter which are a threat to international peace and security, may take forcible measures not directed against the territorial integrity or political independence of another State²³⁰.

Survival

78. In its *Opinion on the Legality of Threat or Use of Nuclear Weapons* the ICJ used twice in the same sentence the notion of survival of the State. The Court underlined “the fundamental right to every State to survival, and thus its right to resort to self-defence, in accordance with article 51, when its survival is at stake”²³¹. Then the Court unanimously declared that a threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of the Charter and that fails to meet all the requirements of Article 51, is unlawful.

79. As for the international obligations of States applicable during armed conflict²³² unanimously again the Court said “a threat or use of nuclear weapons should also be compatible with the requirements of international law applicable

²²⁵ I. Brownlie, *State responsibility*, Part I, Oxford, 1986, 47.

²²⁶ *I.C.J. Reports 1996*, pp. 246-247, para. 48.

²²⁷ C. H. M. Waldock, “The Regulation of the Use of Force”, *op. cit.*, 493.

²²⁸ *I.C.J. Reports 2003, Oil Platforms, op. cit.*, para. 64, pp. 191-192.

²²⁹ R. Ago, *Report, op. cit.*, 42.

²³⁰ Sh. Rosenne, “The Perplexities of Modern International Law”, *op. cit.*, 152.

²³¹ *I.C.J. Reports 1996*, p. 263, para. 97.

²³² See L. Doswald-Beck, “Le droit international humanitaire et l’avis consultatif de la CIJ sur la licéité de la menace ou de l’emploi d’armes nucléaires”, 316 *Revue Internationale de la Croix-Rouge*, 1997, 37 et seq.

to armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons”²³³.

80. In the “enigmatic” for one commentator²³⁴, but maybe for the Court as well, paragraph 105 (2)E of the *dispositif*, adopted by the preponderant voice of the President, it is stated: “It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflicts, and in particular the principles of humanitarian law; however, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”²³⁵.

81. The *Opinion* left open the question of the legality of the use of nuclear weapons in self-defence in extreme circumstances, while it seems to have a/ amplified the concept of *necessity*, b/ not elaborated on the force of *proportionality*, and c/ by *not* separating the two notions of *threat* and *use of force* not entered the issue of the *threat* as such.

The problem of “reactive” or “preventive” self-defence

82. As we face a constant rolling in the meaning of terms a warning is here necessary. The relevant terms are not used all the time with the same meaning by governments, international organs and authors. The *chase for new semantics*, although understood in the context of claims for novelty, is characteristic of the efforts to substantiate the interpretation of policies by reference to “reactive”, “interceptive”, “preventive”, “anticipatory”, and the recently resurgent “pre-emptive” self-defence. Furthermore, under the cover of the one or the other term very different situations are sheltered. Example, in some instances governments and authors use the term anticipatory where it seems they mean pre-emptive and *vice-versa*, and the *Rapporteur* is at pains to detect what they qualify for what²³⁶. The *Rapporteur*, without avoiding the use of one-word concepts, will

²³³ *I.C.J. Reports 1996*, p. 266, para. 105 (2) D.

²³⁴ Ch. Greenwood, “L’avis consultatif sur les armes nucléaires et la contribution de la CIJ en droit international humanitaire”, 316 *Revue Internationale de la Croix-Rouge*, 1997, 71. J. Verhoeven, *Droit international public*, Bruxelles, 2000, 683.

²³⁵ *I.C.J. Reports 1996*, para. 105 (2) E.

²³⁶ The United Nations High-Level Panel on Threats, Challenges and Change in its Report entitled *A More Secure World: Our Shared Responsibility, A More Secure World: Our Shared Responsibility*, United Nations, prepared for the Follow-up to the Outcome of the Millennium Summit, under the general heading of anticipatory self-defence distinguishes between *pre-emptive* (against an imminent or proximate threat) and *preventive* (against non-imminent or non-proximate one). See *United Nations, General Assembly*, Doc. A/59/565 (2 December 2004), para. 189. ²³⁶ The U. N. Secretary General in his subsequent Report entitled *In Larger Freedom: Towards*

try to proceed somewhat beyond semantics, by invoking descriptive models of definition that could better serve the discussion. He will examine *the following* situations: a/ *reactive* self-defence, which includes defence in cases of an *actual armed attack* and *interceptive* self-defence, and b/ *preventive* self-defence, which includes *anticipatory and pre-emptive self-defence*²³⁷.

83. Indeed, there are *at least four doctrines* on the question of the triggering of the right of self-defence in response to an armed attack: the first is classic, “if the attack *actually occurs*”; the second adds “once the attack *has been launched* but did not yet reach the territory of the victim State”, the third justifies self-defence “also if the threat of an attack is *imminent*”, and the relatively more recent one alleges that the right of self-defence can further be exercised “if the attack *is supposed* to occur”.

84. In the *Nicaragua* case the Court did not discuss the question of imminent attack as it had to deal with matters related to use of force that already occurred (para.194). On the other hand, when the ILC finalized in 2001 the Draft Articles on State Responsibility in Article 21 maintained the neutral expression “measures of self-defence taken in conformity with the Charter of the United Nations”, without further presenting in the Commentary developments since the 1980s and the 1990s. And the 2005 High Level Panel on Threats, Challenges and Change, set up by the United Nations Secretary General in the Follow-up to the *Outcome of the Millennium Summit* took the stand that is examined *infra* (paras.103-104).

Restrictive reading of Article 51 in this matter

85. a) “*Reactive*” *self-defence* : The *traditional* doctrine, reflecting the position of the vast majority of States, takes as a point of departure that self-defence is an exception to Article 2(4) of the Charter, and that Article 51 is to be interpreted narrowly. The relevant provision says “*if an armed attack occurs*” (in French “dans le cas où un des Membres des Nations Unies est l’objet d’une agression armée”), and means *after* an armed attack occurred²³⁸. Similarly, Article 5 of the 1949 North-Atlantic Treaty (establishing NATO) uses the

Development, Security and Human Rights for All followed the same wording. See *United Nations General Assembly*, Doc. A/59/21005 (21 March 2005), para. 122. Although for practical reasons in principle it is recommended to follow language of official documents, the above wording confuses the meaning of the terms preventive and pre-emptive as recently used in theory and practice. Therefore, the present *Rapporteur* does not find it necessary to change the use of terms in the sense of the two aforesaid Documents that do not seem to express “adopted language”.

²³⁷ R. Kolb, “Self-defence and Preventive War at the Beginning of the Millenium”, 59 *ZÖR*, 2004, 114-134, at 122-124. However, A. Sofaer, “On the Necessity of Pre-emption”, 14 *EJIL*, 2003, 209, 215 assimilates pre-emptive to preventive and anticipatory self-defence.

²³⁸ A condition precedent, G. Abi-Saab, “Cours général de droit international public”, *op. cit.*, 371. “The material nature of an attack is to some extent observable fact of reality”, R. Kolb, *Self-Defence and Preventive War at the Beginning of the Millenium*, 59 *ZÖR*, 2004, 111-134, at 122.

expression “if such an armed attack occurs”. As the triggering of self-defence depends to a great extent on subjective appreciations by the victim State, this doctrine aims at altogether avoiding a rather uncontrolled expansion of the use of force in international relations. Indeed, the problem in reading Article 51 is that *in each step of self-defence, reprisals and aggression are lurking in the dark*.

86. b) *Interceptive self-defence*. Likewise, in presence of *manifestly imminent armed attack (objectively verifiable)* the general stand is to accept a Charter (or a Charter in parallel with customary law) right to a strictly *limited*, that could be qualified *stricto sensu*, anticipatory self-defence²³⁹, as this can be useful for the preservation of the whole system of the Charter. A missile that is already launched, or the navy that moves in combat formation towards the territory of the target State, are examples given by that doctrine. In such situations the right of the so-called *interceptive self-defence*²⁴⁰ can hardly be denied. Many commentators confirm that this type of anticipatory reaction falls within the meaning of Article 51. For Joe Verhoeven only an actual attack that has been started (*un commencement d'exécution au sens où cette notion est utilisée en droit pénal*) justifies action in accordance with Article 51. In case of threat, the threatened State has to turn to the Security Council, except if the nature of the imminence is such that the Council could not possibly react effectively²⁴¹.

87. Sir Humphrey Waldock described a situation “where there is convincing evidence not merely of threats and potential dangers but of an attack being actually mounted, of an armed attack that may be said to have begun to occur, though it has not passed the frontier”²⁴². In 2004 the *United Nations High-Level Panel on Threats, Challenges and Change* stated that “a threatened State may take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate” and added “imminent threats are covered by Article 51”²⁴³. Julius Stone²⁴⁴ and Yoram Dinstein invoked the attack of the Japanese fleet on Pearl Harbor in December 7, 1941. The course of

²³⁹ R. Hoffmann, “International Law and the Use of Military Force Against Iraq”, 45 *German YBIL*, 2002, 31. P. Malanczuk, *Akehurst's Modern Introduction to International Law*, *op. cit.*, 314.

²⁴⁰ Y. Dinstein, *War, Aggression*, *op. cit.*, 190-192. I. Brownlie, *International Law and the Use of Force*, *op. cit.*, 368. M. N. Shaw, *International Law*, Cambridge, 2004, 1030. L. -A. Sicilianos, *Les réactions décentralisées à l'illicite*, *op. cit.*, 403 et seq. B. Conforti, see *infra* III.

²⁴¹ See J. Verhoeven, *infra* III.

²⁴² C. H. M. Waldock, “The Regulation of the Use of Force by Individual States”, *op. cit.*, 495, 498. M. -E. O'Connell, “The Myth of Pre-emptive Self-defense”, writes: “based on the practice of States and perhaps on general principles of law, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming”, *op. cit.*, p. 8.

²⁴³ *A More Secure World*, *op. cit.*, para. 124.

²⁴⁴ J. Stone, *Aggression and World Order. A Critique of United Nations Theories of Aggression*, London, 1958, 100, n. 17.

action was irreversible and the attacked State could forestall the bombardment by acting from the moment the fleet was underway²⁴⁵.

Extensive reading: the claim for preventive self-defence

88. Under the heading of “prevention” many approaches could be included. If some of them are quite clear, other navigate much more in semantic gray zones, while a number of the latter is hardly discernible. The overall doctrine of preventive self-defence poses several profound challenges to international law and has been qualified as a problematic doctrine. In the present Report the term “preventive” self-defence designates a situation in which there is no *actual or objectively discernible manifestly imminent armed attack*.

89. a) *Anticipatory self-defence lato sensu*. The confusion in terminology and the use of the term anticipatory self-defence here and there is almost devastating. In most cases anticipatory²⁴⁶ self-defence goes a step further than interceptive self-defence as described above. The essence of that doctrine is that imminent *threat* of an attack can also trigger the forcible reaction in self-defence. Anyhow, the formula “necessity²⁴⁷ of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation”²⁴⁸ contained in the United States Secretary of State Daniel Webster’s letter to Her Majesty’s Minister Fox (24 April 1841)²⁴⁹ in the *Caroline affair* is referred to *ad nauseam* by commentators and governments alike rather as a *passe-partout* formula. The 169-year old formula²⁵⁰ has been rejected by many contemporary commentators after 1945, and might not seem to fit the present situation of international relations (even if at the time it involved non-State actors), but is now in the package of the constant reference to in the chapter of self-defence. Most governments reject a broader reading of the exception of Article 51²⁵¹. On

²⁴⁵ Y. Dinstein, *War, Aggression and Self-Defence*, *op. cit.*, contains a detailed presentation of the issue, 190-191. See also R. Kolb, “Self-defence and Preventive War”, *op. cit.*, 123.

²⁴⁶ A. Anghie, “The Bush Administration Pre-emption Doctrine”, 98 *ASIL Proceedings*, 2004, 326 underlines that anticipatory self-defence is a very problematic doctrine because it purports to justify the use of force by a party that has not been attacked, based on its own subjective belief. See also L. Henkin, *op. cit.*, 152, 166-167.

²⁴⁷ Necessity because the threat is imminent, and peaceful alternatives are not an option.

²⁴⁸ Y. Dinstein, *War, Aggression, op. cit.*, 243, remarks that for a State, “no moment for deliberation” is a hyperbolic statement, but the doctrine includes the condition of immediacy (209).

²⁴⁹ R. Jennings, “The Caroline and McLeod Cases”, 32 *AJIL* 1938, 82. J. B. Moore, *Digest of International Law*, II, 409-414.

²⁵⁰ “Une sentence (...) ambiguë et isolée”, J. Salmon, *Droit des gens, op. cit.*, 464.

²⁵¹ R. Kolb, “Self-defence and Preventive War at the Beginning of the Millenium”, *op. cit.*, at 125. *Idem*, *Ius contra bellum, Le droit relatif au maintien de la paix*, Bâle, Genève, Munich, Bruxelles, 2003, 184 et seq., and authors cited. For A. Cassese, *International Law, op. cit.*, 361: “Analysis of State and UN practice thus shows that the overwhelming majority of States believe that anticipatory self-defence is not allowed by the UN Charter. However, a number of States (...) take the opposite view. Given the importance and the role of these States, one may not conclude that there is universal

the other hand the controversy over *the timing* where the victim State is expected to react²⁵² is now also complicated by the new means of warfare (nuclear, biological, chemical weapons)²⁵³, as well as by attacks from non-State actors.

90. In principle, anticipatory self-defence *lato sensu* is invoked when an armed attack was not yet launched, but whose launch is imminent. The above doctrine contends self-defence under the above terms is permitted when there is “palpable evidence of an imminent threat”²⁵⁴. Shabtai Rosenne writes that “careful reading of paragraph 96 of the *Opinion on the Threat or Use of Nuclear Weapons* would indicate the use of force to what is called ‘anticipatory self-defence’ is compatible with the Charter”²⁵⁵. Assessment of imminence is in principle subjective and depends on the technological capabilities (including intelligence and detection) of the State deciding to act in self-defence. In the above, as in all situations envisioned by the different doctrines, *reliable information is of capital importance for the State that takes the decision to react in self-defence*.²⁵⁶ Anticipatory self-defence poses in a dramatic way the problem of the assessment of necessity and proportionality²⁵⁷.

91. With respect to the question of imminence of the armed attack in order to trigger the exercise of the right to self-defence, James Crawford is of the opinion that most arguments for a broad view of anticipatory self-defence are self-serving. But it is relevant that there has been a series of individual attacks by an opponent which declares its intent to continue them – the attacked State is not confined to waiting for the next attack in such a case, other criteria being met²⁵⁸.

92. Thomas Franck underlines *the role of the Security Council* in this field. He believes that “the notion of anticipatory self-defence has some logical validity

agreement to the illegality under the Charter of anticipatory self-defence”. For the attitude of the majority of States see Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 130-131.

²⁵² The well-known expression of Myres Mc Dougal on “sitting ducks” (in “The Cuban Quarantine and Self-defence”, 57 *AJIL* 1963, 601) is referred to by both those who favor anticipatory self-defence and those advancing the doctrine of pre-emption.

²⁵³ L. Henkin was of the opinion that the argument for the anticipatory self-defence has specious appeal, but is fundamentally unpersuasive. He added that the original reasons for banning “anticipatory self-defence” in regard to old fashioned war apply even more to the new war. L. Henkin, “Force, Intervention and Neutrality in Contemporary International Law”, 57 *Am. Soc’y Int’l L. Proc.*, 1963, 150.

²⁵⁴ W. M. Reisman, A. Armostrong, “The Past and Future”, *op. cit.*, 526.

²⁵⁵ Sh. Rosenne, “The Perplexities of Modern International Law”, *op. cit.*, 147 note 214.

²⁵⁶ Errors cannot be avoided (example, the downing of an Iranian civil Airbus by the U. S. S. Vincennes in 1998), see A. Lowenfeld, “The Downing of Iran Air Flight 655: Looking Back and Looking Ahead”, 83 *AJIL*, 1989, 336.

²⁵⁷ R. Kolb, “Self-Defence and Preventive War”, *op. cit.*, 124.

²⁵⁸ See J. Crawford, *infra* III.

in the age of nuclear weapons. But he pursues “what is unacceptable is a system in which each State is free to make its own determination of when anticipatory self-defence justifies a waiver of the law prohibiting aggression, freeing it to use force precisely as if the rest of the Charter system had never been established.” The author proceeds to a methodological review and scrutiny of the records of the Security Council in the crises of Korea (1951), the Suez Canal (1956), Grenada (1983), the Iraqi invasion of Kuwait (1990), and cites relevant judgments and opinions of the ICJ²⁵⁹. He further makes a distinction between substantive rules and institutional processes that implement the rules. The more indeterminate a norm is the more essential the process by which, in practice, the norm can be made more specific²⁶⁰.

93. Benedetto Conforti believes that preventive self-defence is not allowed either by Article 51 or by the customary law, with the exception of interceptive self-defence. In the philosophy of the Charter, according to which the interdiction of the use of force is strictly linked to the system of collective security under the direction of the Security Council, he contends that if and when, as often happens, the system does not work, if and when the United Nations are unable to prevent a crisis or to intervene with military operations or other means provided for by Chapter VII of the Charter, the prohibition of preventive self-defence does not work. The result of the paralysis of the Security Council, on one hand, and the absence of rules of customary international law, on the other, are a lacuna in the law of *jus ad bellum*. Hew concludes that in such cases the possible evaluation of unilateral use of force is the *moral* one, and the matter should be put in the context of *natural law*²⁶¹.

94. b) *Pre-emptive self-defence*: As already noted (*supra* paras. 71-73), during the last sixty years a number of governments and authors raised the question of the impact that the dramatic change in the instruments of waging war would have on the very concept of “armed attack” set up by the Charter²⁶². It is argued that production, stockpiling and potentiality of use of weapons of mass destruction, and the various sophisticated missile systems carrying conventional or nuclear weapons have altered the concept of imminence - if such kind of threat was envisioned altogether by the drafters of the Charter. On the unproven condition that Article 51 leaves room to States to respond to *threats*, this is a

²⁵⁹ Th. Franck, “Fairness in the International Legal and Institutional System”, 240 *RCADI*, 1993(II), 280-283.

²⁶⁰ *Idem*, “The Power of Legitimacy”, *op. cit.*, 102.

²⁶¹ See also M. Bothe, *Terrorism and the Legality of Pre-emptive Force*, 228.

²⁶² A. Sofaer, “On the Necessity of Pre-emption”, *op. cit.*, 226, “pre-emption must be considered responsibly, on a case-by-case basis”.

question of inter-temporal interpretation of treaties²⁶³. Another question to be addressed in this context is on whose hands are the weapons of mass destruction, and the comparison is made *inter alia* among those State leaders, who traditionally handle difficult matters of international conflict, and are able to understand the meaning of the zero-sum-game in international relations, and leaders of “failed or reckless States”, who are unpredictable and uncontrolled²⁶⁴, as well as for terrorist organizations.

95. Pre-emptive self-defence is not linked to imminence and means action in presence of “the threat of only the possibility of an attack at some point in the future”²⁶⁵. This doctrine pretends that States may invoke the possibility of “operational activities in other States regarding nuclear, biological and chemical weapons not directly constituting a threat for the State that takes action to prevent their use”²⁶⁶. The doctrine extends to terrorist acts, including pretended terrorist acts. It invites States to forget the conceptual difference between the different conditions triggering reaction in self-defence, focuses on the reaction to a threat, outside the Security Council, and asserts to its legality if it abides by the principles of necessity, proportionality, and discrimination²⁶⁷. It is also pretended that “the use of force pre-emptively is sometimes lawful and sometimes not.”²⁶⁸ For some, pre-emptive use of force is lawful even when it

²⁶³ Or “a strong meta-legal argument”, A. Cassese, *International Law, op. cit.*, 358. As of the inter-temporal aspect an analogy could be drawn from the findings of the I.C.J. in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, p. 32, para. 77.

²⁶⁴ W. M. Reisman, “Remarks”, in “Self-defence in an Age of Terrorism”, *op. cit.*, 143.

²⁶⁵ W. M. Reisman, A. Armstrong, “The Past and Future”, *op. cit.*, 526.

²⁶⁶ W. M. Reisman, “Remarks”, *op. cit.*, 143.

²⁶⁷ See discussion, Th. Breitwieser, “Vorweggenommene Selbstverteidigung und das Völkerrecht”, 47 *Neue Zeitschrift für Wehrrecht* 2005, 45-58. Ph. Weckel, “Nouvelles pratiques américaines en matière de légitime défense?”, *AFDI*, 2005, 128. Ch. Buttler, “Rechtsstreit oder Glaubensstreit?: Anmerkungen zur Debatte um die präventive Selbstverteidigung im Völkerrecht”, in J. Bröhmer et al. (eds.), *Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Röss zum 70. Geburtstag am 21. Januar 2005*, Köln, 2005, 15. Ch. Schaller, *Das Friedenssicherungsrecht im Kampf gegen den Terrorismus: Gewaltverbot, kollektive Sicherheit, Selbstverteidigung und Präemption*, Berlin, 2004. Ch. Eick, ““Präemption”, “Prävention” und die Weiterentwicklung des Völkerrechts”, *Zeitschrift für Rechtspolitik* 2004, 200. O. M. Lepel, “Die präemptive Selbstverteidigung im Lichte des Völkerrechts”, *Humanitäres Völkerrecht* 2003, 77. A. Remiro Brotons, “New Imperial Order or (Hegemonic) International Law?” *Austrian Rev. Int. Eur. Law*, 2003, 25. M. Pérez González, “La legítima defensa puesta en su sitio: observaciones críticas sobre la doctrina Bush de la acción preventiva”, *Rev. española d. i.* 2003, 187. S. Ripol Carulla, “La nueva doctrina global de defensa preventiva: consideraciones sobre su caracterización y fundamento”, in *El imperio inviable: el orden internacional tras el conflicto de Irak*, Madrid, 2004, 141. S. Laghmani, “La doctrine américaine de la ‘Preemptive Self-defence’”, in *Le droit international à la croisée des chemins: force du droit et droit de la force, VI^e Rencontre internationale de la Faculté des Sciences juridiques, politiques et sociales de Tunis*, Paris, 2004, 137. P. Picone, “La guerra contro l’Iraq e le degenerazioni dell’unilateralismo”, *Rivista DI*, 2003, 329. Cf. T. Treves, *Diritto internazionale. Problemi fondamentali op. cit.*

²⁶⁸ W. Taft, T. Buchwald, “Pre-emption, Iraq, and International Law”, 97 *AJIL*, 2003, 558-560.

represents an episode in an ongoing broader conflict initiated by the opponent.²⁶⁹ Yet in the recent 2005 *Case Concerning Military Activities in the Territory of the Congo* the Court did not accept, under the plea of self-defence, facts that could justify pre-emption²⁷⁰. Even those who pretend pre-emption is admitted, underline the requirement of exhaustion of all reasonable means that could stop the threat without recourse to the use of force²⁷¹.

96. S. Torres Bernárdez is of the opinion that “preventive” or “pre-emptive” self-defence is not self-defence at all. There is no practice to justify it. This alleged form of self-defence is nothing else but a new presentation of the preventive wars or armed reprisals forbidden by the United Nations Charter and contemporary general international law. By introducing new semantics such as the expressions “pre-emptive” or “preventive” self-defence and the like attempts are made to enlarge the scope of the concept of “the use of force in self-defence”. For the same opinion such abuse is possible because recourse to self-defence does not need authorisation by the Security Council²⁷².

97. The doctrine of pre-emptive self-defence was reintroduced with vigor by the 2002 *United States' National Security Strategy*, confirmed on this point by the updated 2006 version²⁷³, whose Chapter V entitled *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction* declares: “We must adapt the concept of imminent threat to the capabilities of today’s adversaries (...) The greater the threat, the greater 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”²⁷⁴. The document, focuses on *Weapons of Mass Destruction*, refers to what it calls “Rogue States” (where it spells out the characteristics it gives to this qualification) and “Terrorists” (obviously non-State “private” actors), but specifies “The United States will not use force in all cases to pre-empt emerging threats, nor should nations use force as a pretext for aggression.”

98. A recent comparative survey on pre-emptive self-defence held by W.M. Reisman and A. Armstrong²⁷⁵ arrives at the following conclusions: a/ already under the Ronald Reagan Administration (1984) the claim to pre-emptive self-defence has been made by the United States and was repeated by both Republican and Democrat Administrations; b/ the George W. Bush

²⁶⁹ On the “last opportunity” the Security Council gave to Iraq by Resolution 1441, *ibid*, 563. A. Sofaer, “On the Necessity of Pre-emption”, *op. cit.*, 223.

²⁷⁰ *I.C.J. Reports 2005*, p. 32, para. 143.

²⁷¹ A. Sofaer, “On the Necessity of Pre-emption”, *op. cit.*, 223.

²⁷² See S. Torres Bernárdez, *infra* III.

²⁷³ See <www.whitehouse.gov/nsc/nss/2006> (visited 20 March 2007).

²⁷⁴ *The National Security Strategy of the United States of America* (September 17, 2002). See <www.whitehouse.gov/nsc/nss.pdf> (visited 20 March 2007)

²⁷⁵ W. M. Reisman, A. Armstrong, “The Past and Future”, *op. cit.*, 525-550.

Administration has now a tendency to limit the claim on the rationality of State regimes who are acquiring weapons of mass destruction and/or support terrorists; c/ the 2006 U.S. National Security Strategy places more emphasis on alternatives to military pre-emption and reliance on multilateral solutions; d/ the Security Council went ahead of the ICJ not only on the origin of the armed attack, but also by adopting an attitude that “amount[s] to a tacit acknowledgment that [force] may sometimes be lawfully used anticipatorily and even pre-emptively”²⁷⁶. The same survey presents the positions of “U.S. partners” in Iraq, as well of “non-partners.” It contains appreciation on the possible endorsement of the pre-emptive doctrine²⁷⁷, but also stresses the dangers that the doctrine could entail for the international peace and security²⁷⁸.

99. The 2003 intervention in Iraq widened the gap of entirely divided opinions on pre-emption. It is to be noted at the outset, that although the October 2002 Resolution of the U.S. Houses of Congress used both implied authorization and self-defence²⁷⁹, reportedly, before international organs the U.S. government did not invoke self-defence²⁸⁰. However, the issue of self-defence was widely on the agenda of the discussions regarding *Operation Iraqi Freedom*. Those in favor of the use of force also on grounds of (pre-emptive) self-defence against Iraq invoked that the regime of Saddam Hussein repeatedly violated the Security Council resolutions on the cessation of aggression against the Kuwait²⁸¹. The cooperation between the Iraqi authorities and the International Atomic Energy Agency has been very problematic²⁸². Officials of the Agency cited examples of falsification of documents and obstruction of inspectors and said that a high number of chemical weapons were still uncounted. Iraq, despite the embargo, continued to import chemicals. The regime recorded a bad precedent by the use of chemical weapons against its own population and has embarked in a series of

²⁷⁶ *Ibid.*

²⁷⁷ See however, Ch. Gray, “The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA”, *Chinese Journal of International Law*, vol. 5, 2006, 555-578. The author compares with the *European Union Security Strategy* that does not adopt the doctrine of pre-emptive self-defence, does not expressly identify “rogue States” and does profess respect for international law.

²⁷⁸ L. Henkin argued “to say that whoever sets up ‘offensive weapons’ justifies pre-emptive use of force would justify force by everyone everywhere. All nations are now faced by someone with power to strike them”. *Op. cit.*, 162.

²⁷⁹ See Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 182.

²⁸⁰ J. Brunée, St. Toope, “The Use of Force : International law After Iraq”, *op. cit.*, 794. D. Critsiotis, “Arguments of Mass Confusion”, *15 EJIL*, 2004, 233. Analysis of reasons by Ch. Gray, *op. cit.*, 181-184.

²⁸¹ See debates in the Security Council, S/PV. 4692 (23 January 2003), S/PV. 4701 (5 February 2003), S/PV. 4707 (14 February 2003), S/PV. 4709 (18, 19 February 2003), S/PV. 4714 (7 March 2003), S/PV. 4717 (11,12 March 2003), S/PV. 4721 (19 March 2003), S/PV. 4726 (26,27 March 2003), S/PV. 4732 (28 March 2003) and Resolution 1476 (2003).

²⁸² See statement by H. Blix: “cooperation was often withheld or given grudgingly”, S/PV. 4692 (27 January 2003) 2.

protractions and aggressive rhetoric against a number of western countries. For the above opinion the legal basis for intervention is to be found mainly in Security Council Resolutions 687 (1990), 687 (1991) and 1441 (2002)²⁸³.

100. In the wider context of events of the last decade, in parallel to self-defence, it has also been contended that many arguments, including humanitarian, justified all armed interventions in different parts of the world, levels and situations²⁸⁴. In the line of this opinion²⁸⁵ it is said, regimes such as the one of Saddam Hussein cannot stand in the international community of the 21st century. The legality of intervention was based on several Security Council Resolutions. According to this view self-defence was also the justification for the bombing of Tripoli, and interventions in Somalia, Rwanda, Bosnia-Herzegovina, Afghanistan, where the United Nations proved unable to act, and other means showed the path *from legitimization to legality* in the use of force.

101. As for Iraq, *those opposing intervention* retorted that non-compliance by Iraq with the relevant Security Council resolutions did not mean that the armed conflict was reactivated. There was no proof that the embargo was not effective and that traffic of prohibited materials did not stop, the long sanctions made it difficult for the Iraqi government to produce nuclear weapons. Consequently, according to this opinion, the legal basis, namely armed attack, was missing. The armed conflict that started with the invasion of Iraq in Kuwait ended in 1991 by the success of the Coalition and the repelling of the aggressor. A situation of self-defence no longer existed, and the Security Council by Resolution 687 or otherwise, did not authorize the use of force against Iraq in case of non-compliance with the orders given by that organ. Another resolution of the Security Council authorizing the use of force was necessary. It becomes

²⁸³ Y. Dinstein, *War, Aggression and Self-Defence*, *op. cit.*, 296 et seq.

²⁸⁴ See “Remarks” of M. J. Glennon, 97 *ASIL Proceedings*, 2003, 150-152. The same author (“The Fog of Law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter”, 25 *Harvard J. L. & Pub. Policy*, 2001-2002, 539-558) contends that international rules concerning use of force are no longer regarded as obligatory by States and that the international system has come to subsist in a parallel universe, one *de jure* and one *de facto*. For him *de jure* is the system of the U. N. Charter, a set of illusory rules that would govern the use of force among States in a platonic world of forms. The *de facto* system consists of actual State practice, where between 1945 and 1999 two thirds of the membership of the United Nations fought 291 interstate conflicts. M. Glennon identifies in Article 51 as interpreted by the I.C.J. and scholars the following three “illogics”: a/ providing weapons and logistical support to terrorists does not constitute an ‘armed attack’, b/ defensive use of force to overthrow a Government that provides a safe haven to terrorists is disproportionate *per se* and unlawful, and c/ anticipatory self-defence is not permitted because no armed attack occurred. See also M. Bonefeder, “Here, There, and Everywhere. Assessing the Proportionality Doctrine and U. S. Uses of Force in Response to Terrorism After the September 11 Attacks”, 88 *Cornell LR*, 2002, 155.

²⁸⁵ R. Bermejo García, “El debate sobre la legalidad internacional tra la crisis de Iraq y las Naciones Unidas”, XIX *Anuario de Derecho Internacional*, 2003, 41-69.

finally clear that the *rationale* of self-defence was used as an ancillary argument in that international crisis.

102. In the light of the above, it can be said that the doctrine of pre-emption encompasses unilateral as well as collective reactions against new types of threats. In the same time it *widens the concept* of threat, eliminates the requirement of imminence and goes far beyond Article 51 and customary law²⁸⁶, with or without reference to the *Caroline* formula (see *supra* no 89). It is also argued that under present international law there is no need for the concept of pre-emptive self-defence. "It is clearly incompatible with present Charter law and does not fall within the narrow frame of the concept of anticipatory self-defence"²⁸⁷; it adds confusion in an already controversial area and has been qualified "unnecessary and divisive"²⁸⁸.

The World Summit of September 2005 and the invitation to a more active involvement of the Security Council

103. At the *World Summit* of September 2005 the heads of State and Government failed to address self-defence, though the issue figured in the draft until August 2005. The deletion of the relevant sentence was due to opposing views, among other questions on the dilemma, reactive or preventive (anticipatory in both senses or pre-emptive) self-defence. Thus, the *Outcome Document* limits itself to the commitment of the United Nations Member States to adopt multilateral measures in facing global threats to the peace, or aggression and other breaches of the peace, including terrorism, and "reaffirms that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security"²⁸⁹.

104. Before that, the *High Level Panel* set up by the Secretary-General in the *Follow-up to the Outcome of the Millennium Summit*²⁹⁰ had discussed the issue of self-defence on the basis of Article 51 whose language, it is said, "is restrictive". "However", says the Panel, "a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the reaction is proportionate. The problem arises when the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile

²⁸⁶ According to A. Remiro Brotons, *Derecho Internacional*, *op. cit.*, 1067-1069, it is a doctrine of hegemonic international law.

²⁸⁷ R. Hoffmann, "International Law and the Use of Military Force", *op. cit.*, 33. See also A. Anghie, "The Bush Administration Pre-emption Doctrine", *op. cit.*, 327.

²⁸⁸ Ch. Gray, *International Law and the Use of Force*, *op. cit.*, 193.

²⁸⁹ *United Nations, General Assembly*, Doc. A/Res. /60/1 (24 October 2005), paras. 68-88, para. 79.

²⁹⁰ *A More Secure World: Our Shared Responsibility*, *United Nations, General Assembly*, Doc. A/59/565. See also N. Ronzitti, "The Report of the High-Level Panel on Threats, Challenges and Change", XIV *Italian YBIL*, 2004, 3 et seq.

intent, of nuclear weapons-making capability.”²⁹¹ “The short answer is if there are good reasons for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition time to pursue other strategies, including persuasion, negotiation, deterrence and containment, and to visit again the military option (...).” “For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm on non intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.” And the Panel concluded: “We do not favor the rewriting or reinterpretation of Article 51”²⁹².

105. *In conclusion*, the traditional and dominant position is that current international law is capable to counter any threat to international peace and security. As for the timing of the reaction, there is a tendency to admit that Article 51 including customary law provides, *under strict conditions* (which either are not spelled out or are not the same for all commentators) for the possibility of *stricto sensu* anticipatory, in the sense of interceptive, use of force in self-defence. And the dominant opinion is that pre-emptive self-defence is incompatible with present treaty and customary international law and “would have amounted to a legal license to the State invoking it to act as Judge, Jury and Lord Executioner in its own case”²⁹³.

State of necessity and self-defence

106. Notwithstanding the doubts and objections expressed long ago by governments and authors and repeated during the elaboration by the ILC of the Draft Articles on State Responsibility (*inter alia* because the concept encourages abuses of non-performance by States of their international obligations), the most recent assumption by the Court in *Gabcicovo Nagymaros* is that the concept of “state of necessity” is “a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation”²⁹⁴. The Court added that here again the State concerned is not the sole judge of whether the conditions have been met.

²⁹¹ *A More Secure World, op. cit.*, para. 188.

²⁹² *Ibid.*, paras. 190, 191, 192.

²⁹³ E. McWhinney, “The United Nations and the International Legal Principle of Non-Use-of-Force: Unilateralism, Pre-emptive Strikes, and the Invasion of Iraq”, V. Crnic-Grotic, M. Matulovic (eds.), *International Law and the Use of Force in the Turn of the Centuries*, Rijeka, 2005, 119.

²⁹⁴ *Gabcicovo Nagymaros, I.C.J. Reports 1997*, p. 40, para. 51.

107. After some hesitation the concept of “state of necessity”²⁹⁵ is now codified and cautiously phrased in the negative in Article 25 of the Draft Articles on State Responsibility. Article 25 is understood to operate under a number of cumulative conditions summarized by the ICJ in *Gabcicovo Nagymaros* as follows: (the state of necessity) must be occasioned by an essential interest of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not have “seriously impair[ed] an essential interest” of the State toward which the obligation existed; and *the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”*²⁹⁶. Furthermore, Article 26 discards any exoneration of unlawfulness for acts contrary to a *peremptory norm* of general international law.

108. The question of the distinction as well as the relationship between self-defence and state of necessity has been raised in the first stages of the work of the ILC. At the end of the exercise the Commission maintained the distinction, *first* by presenting two different provisions for the respective concepts (Article 21 on self-defence and Article 25 on “necessity”) and *second* by stating “the plea of necessity is exceptional in a number of respects. Unlike consent (Article 20), self-defence (Article 21), or counter-measures (Article 22) necessity *is not dependent on the prior conduct* of the injured State”²⁹⁷. Nevertheless, confusion is not always avoided, since the principles of necessity and proportionality are decisive for the legality of the operation of the two concepts and the ILC only here refers to *Caroline* (although in self-defence *necessity* is not an abstract notion: what is requested from the State exercising that right is to take the necessary, in opposition to non-necessary, measures)²⁹⁸. It has been noted that the ILC’s distinction between the two concepts is “artificial and erroneous”²⁹⁹. As to prior conduct of the injured State, the problem of conduct is not excluded altogether from the situations provided for in Article 25 (on necessity) of the Draft Articles.

109. There are also cases where both the “state of necessity” and self-defence are invoked for the same action of a State towards another State, and this leads to confusion. Finally, it is affirmed that necessity does not permit derogation

²⁹⁵ A. Laursen, “The Use of Force and (the State of) Necessity”, 37, *Vanderbilt J. Transn'l L.* (2), 2004, 485 et seq. A “safety valve” according to R. Ago, *Report, op. cit.*, 51.

²⁹⁶ In the *Gabcicovo-Nagymaros* case the Court entered the discussion on the “state of necessity” on the occasion of a dispute involving, among other things, issues of protection of the environment.

²⁹⁷ *Commentary*, para. 2, under Article 25, in J. Crawford, *The ILC's Draft Articles, op. cit.*, p. 178.

²⁹⁸ Cf. *I.C.J. Reports 1986*, p. 94, para. 176

²⁹⁹ Y. Dinstein, *War, Aggression, op. cit.*, 247.

from the prohibition of the use of force³⁰⁰. Finally, here again we are faced with a problem of semantics: The ILC uses in English the term “necessity” (but in French the text maintains *état de nécessité*) while the Court uses the accurate expression “state of necessity” that conceptually distinguishes it from the requirement of “necessity” in the application of Article 51 of the Charter. The text of the initial Article 33 adopted on first reading by the ILC had used the expression “state of necessity”³⁰¹.

Collective self-defence

110. As already said, the *ratio* for the introduction of the concept of collective self-defence in the Charter was safeguarding consistency with the then inter-American system of mutual defence and thus enlarging the concept of self-defence³⁰². “Collective” also means action of two or more States outside the framework of these and other regional agreements³⁰³. The option of collective self-defence lies with the target State³⁰⁴. It is conceived as a plurality of acts of “individual” self-defence undertaken collectively and as the case might be, concurrently³⁰⁵. It means defence in favor of another State victim of aggression by a third State, or defence in favor of the totality of the States participating in an alliance, for each other. Derek Bowett elaborated a theory of proximity³⁰⁶, and R.St.J.Macdonald supported the idea that if an agreement does not exist between two or more States, in case of aggression against one State, any other State invoking the right of self-defence has to prove that an armed attack against the victim State is an armed attack against itself³⁰⁷.

111. Judge Oda wrote that collective self-defence was a concept unknown before 1945³⁰⁸, since before the Second World War the *jus ad bellum* was open to all States for any reasons, *just war* was not a legal precept and it had a rather offensive character. In the past there has been some discussion on the autonomous character of the concept of collective self-defence and to its dependency on the individual right. The reasons that prevailed during the elaboration of the Charter for the inclusion of the relevant provision on regional

³⁰⁰ J. Verhoeven, “Les ‘étirements’ de la légitime défense”, *op. cit.*, 75.

³⁰¹ The use of the term necessity was due to the English legal literature of an earlier age. R. Ago, *Report, op. cit.*, 18.

³⁰² H. Lauterpacht, *Oppenheim’s International Law*, II, London, 1952, 155.

³⁰³ R. Ago, *Report, op. cit.*, 68. General discussion in Y. Dinstein, *War, Aggression and Self-Defence, op. cit.*, 252 et seq.

³⁰⁴ L. -A. Sicilianos, *Les réactions décentralisées à l’illicite, op. cit.*, 119-134, at 124.

³⁰⁵ D. Bowett, “Collective Self-Defence under the Charter of the United Nations”, *BYBIL*, 1955-56, 130-161. See however, R. Ago, *Report, op. cit.*, 68.

³⁰⁶ D. Bowett, *Self-Defence in International Law, op. cit.*, 200-238.

³⁰⁷ R. St. Mac Donald, “L’emploi de la force par les Etats en droit international”, in M. Bedjaoui (ed.), *Droit international. Bilan et perspectives*, t. 2, Paris, 1991, 779.

³⁰⁸ Judge Oda, *Dissenting Opinion, I.C.J. Reports 1986*, p. 253-258, paras. 90-96.

agreements in Chapter VIII and not in Chapter VII have been sufficiently analyzed³⁰⁹. In the *Nicaragua* case the Court opted for a limited right of collective self-defence within a precise legal framework.

112. Collective self-defence based on a pre-existing agreement can serve as a deterrent for potential aggressors and that was the objective for the creation of NATO and the Warsaw Treaty. It is suggested that the creation of these regional alliances prevented the international community from experiencing extended use of force at least during the “cold war”. Collective self-defence is also initially conceived as an institution in favor of weaker States.

113. It is however widely recognized that the notion of collective self-defence is open to abuse³¹⁰. It can be used as a pretext for intervention against weaker, but equal and sovereign States members of an alliance, and extend intervention beyond the territorial limits of the States participating in the alliance or set up for the self-defence of the alliance. Alliances invoking self-defence can be involved in civil wars and thus threaten the international peace and security.

114. Organizations of collective self-defence can operate separately, but also collaborate and act under the control of the Security Council (by delegation of power, or as “surrogates”) or, while acting autonomously, receive an *ex post facto* approval by the Security Council³¹¹. It is argued, however, that regional organizations of collective self-defence, that are politically (if not legally) independent vis-à-vis the United Nations, can play a role detrimental to the functioning (if any) of the *collective security system* and thus constitute a *return to the balance of power system*³¹². It is also contended that separated from the *corpus* of the Charter system (a system with weaknesses and failures) regional organizations of collective self-defence can develop hegemonic behaviors and create further difficulties for the Security Council when the Council tries to take measures after the action undertaken by those organizations³¹³.

³⁰⁹ C. H. Waldock, “The Regulation of the Use of Force”, *op. cit.*, 503, reminded the distinction between Chapters VII and VIII of the Charter, and pointed out that the latter “subordinates fully regional arrangements to the Security Council and specifically directs that enforcement action should not begun regionally without the Council’s approval”.

³¹⁰ *I.C.J. Reports 1986*, Judge Jennings, Dissenting Opinion, 543, 544.

³¹¹ Cf. U. Villani, “Les rapports entre l’ONU et les organisations régionales dans le domaine du maintien de la paix”, 290 *RCADI*, 2001, 289 et seq. N. Tsagourias, “The Shifting Laws on the Use of Force and the Trivialization of the UN Collective Security System: The Need to Reconstruct It”, XXXIV *Netherlands YBIL*, 2003, 55 et seq.

³¹² J. Delbrück, “Collective Self-defence”, in *Encyclopedia of Public International Law*, *op. cit.*, vol. I, 1992, 658.

³¹³ “Si l’on continue à laisser cette notion (de légitime défense) dans une imprécision léguée par le droit international antérieur, chacun de ces pactes peut être aisément utilisé à des fins agressives”, J. Zourek, *Rapport provisoire*, *op. cit.*, 4.

115. The prohibition of the use of force and the right of self-defence are valid for international organizations as well. On the other hand, States victims of an armed attack *from* an international organization have the right to respond in self-defence. Yet as in the present state of affairs international organizations have no *locus standi* before the International Court of Justice or other pre-established international court, it is not possible to obtain a judicial assessment of the use of force illegally or in self-defence by an international organization as such. In the *Case Concerning the Legality of the Use of Force* (Serbia-Montenegro v. Belgium, France and other States)³¹⁴ the question of jurisdiction focused on the participation of Yugoslavia in the Statute of the Court, and the issue was not dealt with by the Court.

116. To the question if there is need for a pre-existing agreement (bilateral or multilateral) for the exercise of the right of collective self-defence the answer is *no*. Moreover, is common interest sufficient for the exercise of the collective right of self-defence? The answer is *yes*, on the condition that the victim State requests assistance. There is no right of a State to act unilaterally on self-defence for another State. In that respect the Court in the *Nicaragua* case upheld *two declaratory steps*: *First*, the State victim of an armed attack *must* “form and declare the view that it was so attacked” (para.195) and seek foreign assistance³¹⁵. The Court insisted that the right to use force in collective self-defence could only exist if a State had been the victim of an armed attack and thus had itself the right to use force by way of individual self-defence³¹⁶. *Second*, States participating in collective self-defence in favor of the victim State are likewise requested to inform the Security Council. For the Court, the absence of reporting is an indication or evidence that the intervening States cannot exercise the right of collective self-defence.

117. Indeed, Article 51 provides that “measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council, etc.” This also means that States Members of coalitions, alliances and other international organizations are equally bound to report to the Security Council on measures taken by them. It is to be noted that in the campaign in Afghanistan (2001) the Security Council recognized with gratitude the contribution of NATO and many nations to ISAF³¹⁷ and only requested quarterly reports on implementation of its mandate by the International Security

³¹⁴ *I.C.J. Reports 2004, Case Concerning the Legality of Use of Force (preliminary objections), Judgment of 15 December 2004*. See however the written objections of France, paras. 56, 57 and 58.

³¹⁵ Criticized as formalistic by Judge Schwebel.

³¹⁶ “The decision thus knocks on the head the wholly illogical, but far from uncommon, notion that a group of States, no one of which has a right to take military action by itself somehow acquires a right to use force because they are acting collectively”. Ch. Greenwood, “The International Court of Justice and the Use of Force” in *Fifty Years of the I. C. J., op. cit.*, 382.

³¹⁷ *Ibid.*, preamble.

Assistance Force (ISAF), a multinational force participating in the security, governance, development and counter-narcotics operation in that country³¹⁸.

Self-defence and Palestine

118. In the proceedings concerning the Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Israel claimed, *inter alia*, the right to take non-forcible measures of self-defence. The ICJ noted “detail presented on this line of argument in these proceedings is as yet unknown” and treated the issue in an abstract way. In a brief paragraph 139, the Court stood on the traditional interpretation that Article 51 applies only in inter-State relations and found that this provision was not applicable to the situation, as Israel did not claim that the attacks against it were imputable to a State³¹⁹. The second basis of the *Opinion* for the non-applicability of Article 51 was the fact that “Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory”.

119. The Court found that the situation is different from that contemplated by Security Council Resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not invoke these Resolutions in support of its claim to be exercising a right of self-defence.

Part B. Specific problems arising from self-defence and non-State actors

Possible scenarios

120. Under this heading the following situations could occur: 1/ Armed attack against a State A by non-State actors organized, instigated, assisted by a State B (territorial host or not); 2/ Armed attack against State A by non-State actors sent by State B under the above conditions in order to assist State C; 3/ Armed attack against a State by non-State actors acting “independently” aa/ from area within the jurisdiction of another State, bb/ beyond State jurisdiction.

Indirect attack against States by other States through non-State actors

121. As already mentioned, Article 3 (g) of the Definition of Aggression was taken by the ICJ as expressing customary law. Such a situation qualified as a “constructive armed attack”³²⁰ can trigger, according to Article 51, acts of self-

³¹⁸ See Security Council Resolution 1707/2006, operative para. 5.

³¹⁹ *I.C.J. Reports 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004. See however declaration by Judge Buergenthal, (p. 2), para. 6, and Separate Opinion by Judge Higgins, (p. 7), para. 33.

³²⁰ M. Bothe, “Terrorism and the Legality”, *op. cit.*, 230. Y. Dinstein, *War, Aggression, op. cit.*, 189, citing W. Wengler, in *RCADI*, 1971, 408. In examining the “Cuban crisis” of 1962 Ch. Fenwick was

defence by the victim State³²¹, and the Court adopted strict conditions of application of the rule³²². Non-State actors involved in the attack can be considered *de facto* State organs³²³. Nevertheless, the Court held that violent acts may not constitute armed attacks in the sense of Article 51. They may be completely internal, have no international dimension, or not be of a gravity corresponding to an armed attack³²⁴.

122. Many aspects of that problem were dealt with, and were not met without objection, in the Nicaragua case.³²⁵ In the *Case Concerning Armed Activities on the Territory of the Congo*³²⁶ the Court, in line with its position in the *Opinion on the Wall* examined Article 51 *as between States only*. The critical sentence in paragraph 146 reads as follows: “It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC” (Democratic Republic of the Congo). The ‘armed attack’ to which reference was made came rather from the ADF (a rebel group named Allied Democratic Forces)”. The Court found that there was no sufficient proof of the involvement, direct or indirect, of the Government of DRC in the attacks. These attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, in the sense of Article 3(g) of the 1974 Definition of Aggression. And the Court concluded: “...the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not present”³²⁷.

of the opinion that “the Cuban incident was a clear case of self-defense, since the missile bases with atomic warheads were a ‘constructive armed attack under Article 51 of the Charter’”, *57 Am. Soc’y Int’l L. Proc.*, 1963, 17. But Q. Wright held that the missiles in Cuba and the Soviet transit of missiles to Cuba “did not constitute an armed attack”, *ibid.*, 10. And L. Henkin reminded that in the Cuban crisis the United States government refrained from claiming justification under Article 51. *Ibid.*, 151. Finally, R. N. Gardner, in *97 AJIL* 2003, 585-590, at 587, explains why the United States during the 1962 Cuban crisis did not embrace a concept of pre-emptive self-defence.

³²¹ Y. Dinstein, *War, Aggression, op. cit.*, 247: “Extra-territorial law enforcement is a form of self-defence, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Acadia is unable or unwilling to prevent repetition of that armed attack”.

³²² Cf. O. Corten, F. Dubuisson, “Opération ‘liberté immuable’. Une extension abusive du concept de la légitime défense”, *RGDIP*, 2002, 57 et seq.

³²³ R. Ago, “Report”, *op. cit.* Y. Dinstein, *War, Aggression, op. cit.* A. Cassese, “Terrorism is also Disrupting”, *op. cit.*

³²⁴ D. Jinks, “Remarks”, *97 ASIL Proceedings*, 2003, 144.

³²⁵ Cf. L. -A. Sicilianos, “L’invocation de la légitime défense face aux activités d’entités non-étatiques”, *Hague YBIL*, 1989, 149-168.

³²⁶ *I.C.J. Reports 2005, Case Concerning Armed Activities on the Territory of the Congo, op. cit.*, paras. 146, 160. Cf. J. Kammerhofer, “The Armed Activities Case and Non-State Actors in Self-defence”, *20 Leiden J. Int’l L.*, 2007, 89-113.

³²⁷ *Ibid.*, paras. 131-135.

123. In the above case the Court had to adjudicate a dispute *between States*, and it considered that acts of non-State actors would be assessed only if they were attributed³²⁸ to one of the Parties. It found no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against “armed attacks” by irregular forces *in no relationship with a State*³²⁹.

124. While agreeing with the final conclusion that Uganda’s military intervention was of such a magnitude and duration that it entailed a grave violation of Article 2(4) of the Charter, Judge Kooijmans pointed out that the Court missed a chance to fine-tune the position it took 20 years ago on whether the threshold set out in the *Nicaragua* case is still in conformity with contemporary international law: “Even if one agrees that mere failure to control activities of armed bands cannot by itself be attributed to the territorial host State as an unlawful act, this does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51”³³⁰. In the same line, Judge Simma stressed that the Court should have taken the opportunity to clarify the state of the law “on a highly controversial question which is marked by great controversy and confusion - not the least because it was the Court itself that has substantially contributed to this confusion by its *Nicaragua* judgment two decades ago.”³³¹ Both judges referred to the inherent right of self-defence that does not confine the armed attack to States only, and to the impact of Security Council resolutions 1368(2001) and 1363(2001) on the evolution of the law³³².

125. The reluctance of the Court is understandable in view of the repeated abuses in the use of force since the creation of the United Nations. Many scholars are also of the opinion that Article 51 addresses lawful use of force only in State-to-State relations. However, if the use of force by non-State actors is left outside the Charter, the risk is greater for the victim States to act beyond the principles of necessity and proportionality and for the Security Council to be prevented from exercising its duties and powers in the field of international peace and security under the Charter.

³²⁸ On the problem in general see L. Condorelli, “L’imputation à l’Etat d’un fait internationalement illicite : solutions classiques et nouvelles tendances”, 189 *RCADI*, 1984 (VI), 9 et seq.

³²⁹ *I.C.J. Reports 2005, Case Concerning Armed Activities on the Territory of the Congo*, para. 147.

³³⁰ *Ibid.*, Judge Kooijmans, Separate Opinion, (p. 6), paras. 25-26.

³³¹ *Ibid.*, Judge Simma, Separate Opinion, (p. 2), para. 8.

³³² Judge Kooijmans (p. 6), para. 28. Judge Simma (p. 3), para. 11.

Attribution of an attack by non-State actors to a State. The input of the law of State responsibility in the concept of self-defence

126. Although important in an overall scheme, and considered as a prerequisite by the Court from the *Corfu Channel* case to the *Oil Platforms* case³³³, state responsibility is technically separated from the right of self-defence³³⁴. However, in a situation where a wrongful act by non-State actors is to be attributed to a State, the conditions required for the attribution have to be met³³⁵. This approach is criticized by some on grounds that it does not facilitate a strategy of deterrence of terrorist acts under preparation in a foreign territory. It is added that it risks to permit excessive application and could “render States less likely to support opposition groups in rogue States for fear that their conduct could be imputed to the supporting States”, and thereby “a decline in such support may frustrate global democracy promotion and antiterrorism efforts”.³³⁶ As far as democracy is concerned ideological stances being outside the context of self-defence, it is reminded that in the *Nicaragua* case the Court said that “adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State”³³⁷.

127. According to Article 8 of the ILC’s Draft Articles on State Responsibility “the conduct of a person or group of persons shall be considered an act of a State under international law if the person is in fact *acting on the instructions of, or under the direction and control* of that State in carrying out the conduct”³³⁸. The above provision is restrictive, and takes into account the position held by the ICJ in the *Nicaragua* case. In dealing with the difficult question of “control” the Court held the United States responsible for the “planning, direction and support” given to the “contras”. But it rejected the claim that all the conduct of the “contras” was attributable to the United States. In elaborating on the notion of *control* it stressed the need for *effective control* and said that “for this conduct to give rise to legal responsibility of the United States it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”³³⁹.

³³³ *I.C.J. Reports 2003*, p. 189, paras. 57, 190, para. 61, pp. 191-192, para. 64, p. 195, paras. 71-72.

³³⁴ J. Verhoeven, “Les étirements”, *op. cit.*, 59. Sp. Aktypis, *L’institution de la légitime défense*, *op. cit.* 254-282.

³³⁵ See *I.C.J. Reports 1986*, pp. 60-61, paras. 101-109.

³³⁶ D. Jinks, “Remarks”, *op. cit.*, 146.

³³⁷ *I.C.J. Reports 1986*, p. 133, para. 263. J. Verhoeven, “Les étirements”, *op. cit.*, 63, 65. J. Brunée, St. Toope, “The Use of Force: International Law After Iraq”, 53 *ICLQ*, 2004, 793-796.

³³⁸ Article 8, in J. Crawford, *The ILC’s Draft*, *op. cit.*, p. 110.

³³⁹ *I.C.J. Reports 1986*, pp. 62, 64, paras. 109, 115.

And in the *Case Concerning Armed Activities on the Territory of the Congo* the Court evaluated the proofs of attacks by armed bands and irregulars on the basis of the provision of Article 3(g) of the 1974 Definition of Aggression³⁴⁰.

128. Another important step of the Court in the *Case of Armed Activities in the Congo* is that it proclaimed the *declaratory character under customary international law* of the 1970 Declaration on Friendly Relations providing that “States have the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to (...) involve a threat or use of force”³⁴¹.

129. The ILC Commentary under Article 8 of the Draft Articles takes note of the *Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia* broader interpretation of the notion of “control”. That Chamber was satisfied by the existence of an “overall control” of the non-State actors by the State, and not “effective control”. It is reminded that the legal issues and the factual situations were different in the two cases. The Commentary further says: “Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of Article 8, the three terms “instructions”, “direction”, and “control” are disjunctive; it is sufficient to establish any one of them”.³⁴² On the other hand, Article 11 of the ILC Draft reflects the jurisprudence in the *U.S. Diplomatic and Consular Personnel* case and says that a conduct of non-State actors that is not otherwise attributable to a State, shall be also considered an act of that State under international law, if and to the extent that the State acknowledges and adopts the conduct in question as its own.

130. Many contemporary problems regarding armed activities and non-State entities or groups need further clarification. The *first*, is the extent of the obligation of a State to prevent activities that violate (or cause other harm) to the territory of another State. In the *Corfu Channel* case the Court, after confirming “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”, did not accept an alleged right of intervention³⁴³. *Another* question concerns the State from whose territory the armed attack originates where it does not “instructs, directs, controls” the non-State actors authors of the attack, and the acts cannot be imputable to it. Opinion stresses that the victim (or target) State cannot claim a

³⁴⁰ *I.C.J. Reports 2005, op. cit.*, (pp. 52-53), paras. 143-146.

³⁴¹ *I.C.J. Reports 2005, op. cit.*, (p. 56), para. 162.

³⁴² Article 8, Commentary, para. 7, in J. Crawford, *The ILC's Draft, op. cit.*, p. 113.

³⁴³ *I.C.J. Reports 1949*, p. 22, p. 35.

right of self-defence against that State and should respect its territorial integrity. But others pretend to the contrary.

131. The case of Afghanistan (2001) contributed to an important development of Charter law, as self-defence, individual and collective, operated alongside with collective security. Opinion holds that the military intervention of the Coalition forces was legally based, not only in the Resolutions of the Security Council and the reactions of other international organizations (NATO, OAS) and States³⁴⁴ but also on the fact that the government of the Taliban “*harbored and supported*”³⁴⁵ an organization engaged in terrorist acts, and strenuously refused to cooperate in the curbing of the activities of the said organization³⁴⁶. Supporters of this opinion invoke a series of reasons, such as the scale of incidents, their perception as military attacks, the qualification by other nations, the nature of the acts as criminal under international law.³⁴⁷ Another opinion holds that harboring an organization or complicity lays outside the law of international responsibility, including jurisprudence in *Tadic*, and hence it does not permit by itself the exercise of self-defence.³⁴⁸ However, it is contended that “*contemporary expectations*” go further than earlier views by accepting State responsibility not merely for sending or controlling non-State actors, but also for sheltering them³⁴⁹. It is pointed out that when a State is actively countering terrorist activities of non-state actors operating from its territory, a victim State’s forcible reaction against the territorial State “is simply not a necessary use of force”³⁵⁰. But it is argued that when a State is unable to meet its terrorism prevention obligations it is under an obligation to accept offers of counter-terrorism assistance³⁵¹. A case-to-case treatment is also contemplated in doctrinal works³⁵².

³⁴⁴ See St. Ratner, “*Jus ad Bellum and Jus in Bello After September 11*”, 96 *AJIL*, 2002, 905-921, at 909-910. The author reminds that “only a handful of governments opposed the U. S. attacks. This opposition included strong condemnations by Iraq, Sudan and North Korea (. . .) as well as more nuanced condemnations by the governments of Cuba, Malaysia, Iran” (910).

³⁴⁵ In a speech to the U. S. Congress on September 20, 2001, President G. W. Bush stated: “From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime”. *Weekly Comp. Press*, Doc. 1347, 1349 (September 24, 2001).

³⁴⁶ M. Bothe, “Terrorism and the Legality”, *op. cit.*, 230, speaks of “constructive armed attack”.

³⁴⁷ S. Murphy, “Terrorism and the Concept of Armed Attack in Article 51 of the U. N. Charter”, 43 *Harv. Int’l L. J.*, 2002, 41. G. Gaja, “In What Sense was There an ‘Armed Attack?’”, at <www.ejil.org/forum> (visited 20 April 2007) discusses the impact of Security Council Resolutions 1368 and 133 on Article 51 and concludes that “depending on factual circumstances, the definition of the terrorist acts of September 11, as ‘armed attack’ may not necessarily imply that the concept actually refers to acts that are not attributable to a State”.

³⁴⁸ See St. Ratner, “*Jus ad Bellum and Jus in Bello*”, *op. cit.*, 908.

³⁴⁹ *Idem*, 914.

³⁵⁰ K. N. Trapp, “Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors”, 56 *ICLQ*, 2007, 141-156, at 147.

³⁵¹ *Ibid.*, 147, note 33.

³⁵² See A. Remiro Brotóns, *Derecho Internacional*, *op. cit.*, 1072.

132. The legality of the reaction of the alliance in Afghanistan has been disputed from the opposite view as abusive, mainly on the following grounds:

- a) it went beyond the conditions set up in the *Nicaragua* case, as the attribution of the terrorist acts to the government of the Taliban has not been established;
- b) in the eventuality of a *lacuna* of the law, there has not been amply explained why the gap should be covered by an extension of the exception (self-defence) at the expense of the rule (non-use of force);
- c) the riposte did not correspond to the limited purpose envisaged by international law;
- d) no further involvement of the Security Council was requested;
- e) the requirement of necessity and proportionality seems to have been seriously minimized or simply ignored; should it be confirmed, the acceptance of this type of argument might entail a reversion of the concept of self-defence as a right of self-protection³⁵³.

133. Before the intervention in Afghanistan in 2001 and following the terrorist attacks on the United States Embassies in Tanzania and Kenya in 1998 the United States riposted forcefully against suspected al Qaeda targets in Afghanistan and Sudan³⁵⁴. The United States government reported to the Security Council that it responded in self-defence and the Security Council condemned the terrorist attacks, but did not take position on the reaction. Among most recent developments it is also worth mentioning that the new antiterrorist law adopted by the Parliament of Russia on 26 February 2006, reserves the right to use force in order to eliminate terrorist targets outside the State territory³⁵⁵.

134. Another set of relevant interrogations concern the issue of instructions, direction or control of non-State actors by a State. To answer all these questions

³⁵³ O. Corten, F. Dubuisson, "Opération 'liberté immuable' une extension abusive du concept de légitime défense", *RGDIP*, 2002, 53-76, at 67.

³⁵⁴ See Th. Franck, *Recourse to Force*, *op. cit.*, 94-96. K. N. Trapp, "Back to Basics", *op. cit.*, 149, writes: "The attack in Sudan was widely condemned by the international community -primarily based on an absence of evidence- (...). There was no similar condemnation of the use of force in Afghanistan.

³⁵⁵ <www.Ladocumentationfrançaise/monde/chronologie/russie-cei-2006-html> (visited 10 January 2007). See approaches to the problem of pre-emption by B. Tuzmukhamedov, "Uprezhdeniye Siloy: 'Karolina' i Sovremennost'" (Preemption by Force: "Caroline" and Modernity) - *Rossiya v Globalnoy Politike* (Russia in Global Affairs), 2006, 205-213, <<http://www.globalaffairs.ru/numbers/19/5550.html>>. *Idem*, "K Voprosu ob Uprezhdenii Siloy" (Preemption by Force Revisited) - *Moscow J. IntLaw*, 2006, 374-384. *Idem*, "Uprezhdayushcheye Primeneniye Sily: Vozmozhniye Kriterii Dopustimosti" (Preemptive Use of Force: Suggested Criteria of Admissibility) - *Russian Yb IntLaw*, 2005, 36-55.

it is of crucial importance to further clarify the meaning of *terrorism*³⁵⁶, at least *in contradistinction to that of insurgents, armed bands, rebels, "private armies"*, etc. Some are heading to a vulgarization in particular of the concept of terrorism.

135. In a different level of the *problématique*, Judge Higgins in her separate opinion in *Consequences of the Construction of a Wall* raised a question regarding *the qualitative degree* that an entity should attain in order to be sufficiently considered “an international entity for the prohibition of an armed attack on others to be applicable”³⁵⁷. Another example of legal uncertainty is that of the responsibility of *insurgents who occupy a part of a State territory but do not become the government of that State*; the question was left unanswered by the International Law Commission³⁵⁸. Finally, the issue of the right to self-defence of non-State *recognized* territorial entities has not been dealt with in the framework of contemporary international relations.

The case of non-State actors "independently" attacking States.

An “armed attack” from whom? Armed response to whom?

136. Although the ICJ stated that Article 51 recognizes the existence of the inherent right of self-defence only in case of an *armed attack by one State against another State*, the statement is taken as problematic. Indeed, Article 51 does not specify who is to be in the origin of the armed attack or what should be its legal personality and hence it does not exclude self-defence against an armed attack committed by non-State actors. More than three decades ago, Judge Schwebel made a series of remarks on the question of aggression that may be perpetrated by, or upon, States alone, or by or upon, entities whose statehood is challenged. He wrote “the argument that only States can be the victims or perpetrators of aggression does not withstand analysis”³⁵⁹. Without over-emphasizing the *travaux préparatoires*, it is reminded that draft Article 51 contained the phrase “armed attack *by another State*” but on the insistence of

³⁵⁶ See G. Guillaume, “Terrorisme et justice internationale”, in *La Cour internationale de justice à l'aube du XXI^e siècle. Le regard d'un juge*, Paris 2003, 255-258. A. Cassese, *International Law, op. cit.*, in a Chapter entitled “The international response to terrorism” presents the relevant treaties and resolutions (463-480) and concludes: “we now have a generally accepted definition of terrorism”(480).

³⁵⁷ *I.C.J. Reports 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Judge Higgins, Separate Opinion, (p. 7), para. 34.

³⁵⁸ See E. Roucouas, “Facteurs privés et droit international public”, 299 *RCADI* (2002), 342-348. *Idem*, “Non-State Actors. Areas of International Responsibility in Need of Further Exploration”, in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Leiden, Boston, 2005, 391.

³⁵⁹ S. M. Schwebel, “Aggression, Intervention, and Self-Defence in Modern International Law”, 136, *RCADI* 1972 (II), 471.

France and the United Kingdom for reasons related to the then existing regional agreements the expression was subsequently dropped³⁶⁰.

137. The Security Council has repeatedly considered actions by non-State actors as a threat to international peace and security³⁶¹ and Resolutions 1368 (2001) and 1373 (2001), although in the preamble, confirm *expressis verbis* the right of self-defence.³⁶² The introduction in the Charter of the notion of “use of force” as opposed to the term “war” previously common in international relations, while prohibiting any armed conflict beyond State boundaries, also intended to avoid reliance to the formal aspects of the use of force. However, Article 2(4) of the Charter deals with the prohibition only in interstate relations and ignores non-State actors using force. But this does not mean that international law does not regulate all armed conflicts, international and internal as well. Article 51 of the Charter uses a general language, and an “armed attack” without being attributable to another State (without causal connection) can also originate from non-State actors.³⁶³

138. After the attacks of September 11, 2001³⁶⁴ the tendency is to recognize that the right of self-defence, although originally conceived for State-to-State relations, cannot be confined any more to those relations only³⁶⁵. In principle, the right of forcible response by the victim State does not seem to be challenged in this regard³⁶⁶, and the United Nations Secretary-General in a statement of October 8, 2001 confirmed the right of self-defence of States against

³⁶⁰ S. Murphy, “Self-Defence and the Israeli Wall Advisory Opinion. An *Ipse Dixit* from the I.C.J. ?”, 99 *AJIL*, 2005, 70.

³⁶¹ According to J. P. Quéneudec, “Agression par équivalent”. See “Conclusions, les nouvelles menaces contre la paix et la sécurité et l’ordre public international”, in SFDI, *Journée franco-allemande*, Paris, 2004, 291. G. Gaja, “In What Sense was There an ‘Armed Attack?’”, *op. cit.*, discusses the impact of Security Council Resolutions 1368 and 133 on Article 51 and concludes that “depending on factual circumstances, the definition of the terrorist acts of September 11, as ‘armed attack’ may not necessarily imply that the concept actually refers to acts that are not attributable to a State”.

³⁶² But according to P. -M. Dupuy, “these Resolutions did not amount to a blank cheque giving the victim State carte blanche to do, alone, what it likes and when it likes”, “The Law after the Destruction of the Towers”, at <www.ejil.org/forum>, *op. cit.*

³⁶³ J. Brunée, St. Toope, “The Use of Force: International Law After Iraq”, *op. cit.*, 793.

³⁶⁴ See L. Condorelli, “Les attentats du 11 septembre. Où va la droit international?”, *RGDIP*, 2001, 832 et seq.

³⁶⁵ But M. Kohen, “The Use of Force by the U. S. ”, *op. cit.*, is of the opinion that even assuming that terrorist action could be considered an “armed attack” in the sense of Article 51, the situation emerging from the September 11, terrorist acts, did not fall within the ambit of self-defence”, and that “usually there is no need to use the category of self-defence when dealing with the repression of terrorism” (208-209).

³⁶⁶ A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, 12 *EJIL*, 2001, 993-1001, underlines the need for collective responses. Ch. Tams, “Light Treatment of a Complex Problem: The Law of Self-defense in the Wall Case”, *ibid.*, 16, 2005, 972.

“terrorism”³⁶⁷. The problem is *against whom* the forcible response would be directed and how this reading of Article 51 can be in conformity with the territorial sovereignty of a third State to which the terrorist acts are not necessarily attributable. Interrogations are also formulated as to the *conditions* of the exercise of individual and collective reaction to such terrorist acts of an international (or global) character³⁶⁸.

139. It is open to discussion whether the acceptance of the legality of the use of force in the case of Afghanistan (2001) constituted *a unique situation or a valid precedent* for the law³⁶⁹ that “redefines the contours of self-defence either under custom or through interpretation of Article 51”³⁷⁰. Anyhow, the differences between *jus ad bellum* and *jus in bello* gained in actuality in the case of Afghanistan: while the right under certain conditions (at least in the language of the ILC) to respond in self-defence against a territorial State linked to a terrorist organization that attacks another State acquired support by the actors of the international community (extension of the *jus ad bellum*), the reaction of the same community in the field of *jus in bello* remained *stricter* and did not acquiesce to an interpretation that could depart from the rules of international humanitarian law (*jus in bello*)³⁷¹.

140. In respect to “harboring or tolerating” terrorist organizations some make a distinction between different *categories of States*, as well as between democratic and authoritarian *regimes*. They consequently pretend that a “failed state”³⁷² could be the target of forcible measures in self-defence, but the legal

³⁶⁷ *Secretary General's Statement, Press Release*, UN Doc. SG/SM/7985 AFG/149 (October 8, 2001).

³⁶⁸ J. Verhoeven, “Les étirements”, *op. cit.*, 50 et seq.

³⁶⁹ Cf. R. Falk, “Appraising the war Against Afghanistan”, *After September 11*, Social Science Research Council, at <www.src.org/sept11/essays/falk.htm> (visited May 23, 2007) reminds the aggravating circumstances as follows: “Afghanistan had no diplomatic friends in the world since the Taliban came to power. On September 11, the Taliban government was recognized by only three countries in the world and had been refused the right to represent Afghanistan in the United Nations. Indeed, Afghanistan itself was treated as an outlaw State, a status confirmed by a *Special Rapporteur* appointed by the U. N. Human Rights Commission, who reported annually on the severe human rights abuses and crimes against humanity that were routinely taking place in the country. As well, Afghanistan was the recipient of universal censure, including from Islamic governments, for its insistence on removing any taint of non-Islamic religious devotion by the deliberate destruction of the huge world renowned statutes of The Buddha at Budiman just months earlier”.

³⁷⁰ M. Drumbl, “Introduction, Self-defense in an Age of Terrorism”, *97 ASIL Proceedings*, 2003, 141. See A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, *12 EJIL*, 2001.

³⁷¹ See St. Ratner, “*Jus ad Bellum* and *Jus in Bello* after September 11”, *96 AJIL*, 2002, 905-921, at 913-919.

³⁷² It is purported that for terrorist groups armed with Weapons of Mass Destruction, or against “rogue” States that support them, anticipatory self-defence depends on three factors: First, does a nation have WMD and the inclination to use them? Second, nations will have to use force while

basis of such assumption is weak, and in any case it is submitted that *action could only be triggered through the United Nations*³⁷³. In the present situation of international relations, and unless the whole international system goes to deconstruction, these qualifications do not meet the agreement of the overwhelming majority of the members of the international community, and cannot enter the realm of self-defence under international law. However, it is argued that if a State A is incapable of impeding acts of terrorism using its territory as a basis, and notwithstanding that such acts are not attributable to that State A, the victim State B is not precluded from reacting by military means against bases of terrorists within the territory of the above State A.³⁷⁴ Otherwise, it is said, the latter “would turn out to be a safe heaven for terrorists, certainly not what articles 2(4) and 51 of the Charter are aiming at”³⁷⁵.

141. With regard to the possibility of an armed attack launched by non-State actors, a middle-of-the-ground opinion believes that such an armed attack can be carried out against a non-State entity in certain circumstances. It must be international in character and should not take as a prerequisite a determination of attribution to the State from whose territory the attack is launched. But the difficulty remains as to *against whom and where* the reaction ought to be directed. A solution might be for the attacked State to request the cooperation of the State from the territory of which the attack has been launched. Some pretend that in case of a negative reply, the attacked State may use force against targets within the territory of the former³⁷⁶.

142. In the *Case Concerning Armed Attacks on the Territory of the Congo*, Judge Koroma reminded the constant jurisprudence of the Court to distinguish between armed attack and other “less grave forms of use of force”, and stressed that “according to the Court, it is necessary to distinguish between a State’s massive support of armed groups, including *deliberately* allowing them access to its territory, and a State’s enabling groups of this type to act against another State. Only the first hypothesis could be characterized as an ‘armed attack’ within the meaning of Article 51 of the Charter thus justifying a unilateral response. Although the second would engage the international responsibility of

taking into account the available window of opportunity. If a State waits until a terrorist attack is on the verge of being launched it likely will be unable to protect the civilians. A State may need to act when it has a window of opportunity to prevent a terrorist attack and simultaneously minimize civilian casualties. Third, nations will have to take into account that the degree of harm from a WMD attack would be catastrophic. J. Yoo, “International Law and the War in Iraq”, 97 *AJIL*, 2003, 563-576, at 575-576.

³⁷³ J. Verhoeven, “Les étirements”, *op. cit.*, 60.

³⁷⁴ A. Sofaer, “On the Necessity of Pre-emption”, *op. cit.*, 209. On the contrary, see K. N. Trapp, *Back to Basics*, *op. cit.*, 147, note 33.

³⁷⁵ A. Randelzhofer, in B. Simma (ed.) *The Charter of the United Nations, A Commentary*, *op. cit.*, 802.

³⁷⁶ See J. Verhoeven, *infra* III.

the State concerned, it constitutes no more than a ‘breach of peace’, enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to unilateral response based on self-defence”³⁷⁷.

143. The introduction of the “new”, at least as for its magnitude, situation of “global terrorism” is so salient that it blurs the whole discussion on self-defence in State-to-State relations and risks to jeopardize a legal reasoning that took years to elaborate³⁷⁸. Obviously terrorist non-State actors differ according to their *location, organization, aims and means*. Their identification would also lead to the *roots of the problems* to which they illegally react. However, for the vocabulary of international law the question arises as to the possibility of using the negative qualification “non-State, etc.” only for some situations and distinguishing them from “*insurgents*” or “*parties*” in *internal conflicts* as identified by international humanitarian law. The recent *Case Concerning Armed Activities on the Territory of the Congo*, where different factions with *changing allegiance* were involved, shows the difficulties of separating the situations, but the distinctions are necessary.

144. In an environment of global privatization in which the State gradually loses its uniqueness in power and competences, *international networks* of cooperation, commerce, development, democracy and other peaceful purposes for the common good are growing in a vertiginous speed. Yet alongside with them also grow groups aiming at the perpetration of internationally illicit acts (common crimes and terrorist acts)³⁷⁹.

145. In the realm of *self-defence* two situations are likely to appear:

a) *First*, in case a non-State group attacks State A from the territory of State B (or also C, D, E). In that case, either the State from where the attack originated cooperates in neutralizing and sending to trial the perpetrators of the attack, or

³⁷⁷ Judge Koroma, Declaration (p. 4), para. 9.

³⁷⁸ See further Ch. Walter, “Zwischen Selbstverteidigung und Völkerstrafrecht: Bausteine für ein internationales Recht der “präventiven Terrorismus-Bekämpfung””, in *Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte*, Baden-Baden, 2004, 23. M. Ruffert, “Terrorismusbekämpfung zwischen Selbstverteidigung und kollektiver Sicherheit”, *Zeitschrift für Rechtspolitik*, 2002, 247. Markus Krajewski, “Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen: Der 11. September 2001 und seine Folgen”, *AV*, 2002, 183. G. Zimmer, *Terrorismus und Völkerrecht: militärische Zwangsanwendung, Selbstverteidigung und Schutz der internationalen Sicherheit*, Aachen, 1998. J. González Vega, “Los atentados del 11 de septiembre, la operación “Libertad Duradera” y el derecho de legítima defensa”, *Rev. española d. i.*, 2001, 247. L. N. Caldeira Brant, “Terrorismo internacional: a guerra preventiva e a desconstrução do direito internacional”, *Rev. Brasileira de Estudos Politicos* 2004, 199. Cardona Llorens, “Nuevo orden mundial y mantenimiento de la paz y seguridad internacionales”, *Cursos de derecho internacional de Vitoria-Gasteiz*, 1993, 215.

³⁷⁹ Cf. Ch. Tomuschat, “Der 11 September 2001 und seine rechtlichen Konsequenzen”, 28 *EuGRZ*, 2001, 540.

it does not cooperate. If it does not cooperate, individual and collective self-defence could be exercised in the territory of that State B under conditions obviously stricter than those of the traditional situation of a State-to-State self-defence, since the requirement of cooperation implies a different *timing* and the aim will be the *neutralization* of the non-State entity. Some find here again an evolution of the law of self-defence; in any case the conditions for triggering the use of force by the victim State need more clarity, and *include the active involvement of the Security Council*. It is questionable if such an implication of non-State actors modifies applicable international law. Another opinion disagrees with the contention that practice allows a positive reply to the question of application of the law of self-defence on non-State actors (including serious international terrorist attacks) in the spirit of Security Council resolutions 1368/2001 and 1373/2001. According to that opinion, the only possibility is reaction after the attribution of the armed attack to a State, not when non-State actors act “independently” from a State.

146. b) *Second*, an asymmetric situation can occur *beyond the areas of State jurisdiction*, for example (leaving aside the case of ships sailing without a flag) by ships sailing on the high seas³⁸⁰ in at least two situations: *First*, when a ship governed by non-State actors is bound to a State that has reliable information of the imminence of armed attack by that ship or when a ship transports prohibited materials for weapons of mass destruction. The international community has already experienced different scenarios in the field of the recently established *Proliferation Security Initiative* (that has until now obtained a quite important political acceptance by States, but whose effectiveness remains to be seen)³⁸¹ as follows: *a/* a merchant ship transporting *prohibited materials* flies the flag of a State partner or non partner in the Initiative and that State positively responds to the request of one or more States Parties and authorizes (in conformity /or not with the procedural requirements of Article 110 of the 1982 United Nations Convention on the Law of the Sea - UNCLOS) the exercise of the right of visit of the suspected ship and further cooperates in the adoption of measures in an attested violation of the international rules concerning the illicit transport of the said materials; *b/*, the flag State *does not respond or refuses to give its consent* for the visit of the suspected merchant ship. Existing rules of international law provide for intervention by foreign warships on the high seas only in the five

³⁸⁰ For the State-to-State situation of self-defence on the high seas see C. H. Waldock, “The Regulation of the Use of Force”, *op. cit.*, 464-465. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, 1953, 77 et seq.

³⁸¹ See the comprehensive analysis by J. Ashley Roach, “Proliferation Security Initiative (PSI): Countering Proliferation by Sea”, in M. H. Nordquist, J. N. Moore, Kuen-chen Fu (eds.), *Recent Developments in the Law of the Sea and China*, Leiden, Boston, 2006, 351. *Idem*, “PSI and SUA: An Update”, July 1, 2007. *Idem*, “An American Perspective on Crimes at Sea and Trafficking of Weapons of Mass Destruction”, Conference at Egmond Palace, Brussels, April 27, 2007. M. Byers, “Policing the High Seas: The Proliferation Security Initiative”, 98 *AJIL*, 2004, 526.

cases enumerated by Article 110 UNCLOS, *plus* the provisions on the rights of jurisdiction and control in the Exclusive Economic Zone by the coastal States, *plus* special agreements (in particular the so-called “ship-boarding agreements”)³⁸². On July 7, 2007 the *International Convention for the Suppression of Acts of Nuclear Terrorism* entered into force. It is expected that the international community should also extend its collective action to the monitoring of the prohibition of illicit traffic in narcotic drugs and psychotropic substances regulated by the United Nations Convention of 1988. It is however contended that the question of non-State actors “independently” attacking States is laying outside the purview of this Report³⁸³.

147. The question is if there exists a legal *lacuna*, and if yes what remedy to recommend: a treaty or Resolutions of the Security Council explicitly stating the rule? In the specific case of terrorist acts, *since the Security Council has clearly included the reaction of all States to such acts in the framework of self-defence, it could be argued that the flag State is under an obligation to consent to the boarding of the suspected merchant ship*. Pending acceptance of such an assumption as a legal basis for boarding a merchant ship on the high seas, the reality is that the partners in the *Security Proliferation Initiative*, at least in one case the *Rapporteur* knows, acted without even informing the flag (of open registry) State.

Assessment of the adaptability of Article 51 of the Charter

148. While international law develops through trenches, the adaptability of Article 51 to the various situations of armed attack, regularly puts that provision on trial. The events of September 11, 2001, have raised a number of legal questions³⁸⁴ but it is mostly believed that *the existing legal framework* is capable to address all situations.³⁸⁵ A different opinion stresses that the provisions of Chapter VII of the Charter, including Article 51, “are not sufficient to address the full range of threats to international peace and

³⁸² Between the United States and Belize, Croatia, Cyprus, Liberia, Marshall Islands and Panama.

³⁸³ S. Torres Bernárdez, see *infra* III.

³⁸⁴ See K. Zemanek, “Is the International Legal System Changing?”, 8 *Austrian Rev. Int. Eur. L.*, 2003, 9. P. -M. Dupuy, “The Law After the Destruction of the Towers”, *www.ejil.org/forum*, *op. cit.* N. Quéniwet, “The World After September 11: Has It Really Changed?” 16 *EJIL*, 2002, 561-577.

³⁸⁵ Ian Brownlie writes: “Whilst there have been obvious changes in the political configuration of the world, especially in 1990, these changes have not had any particular effects on the law. The reason for this is quite simple: the interests of individual States have remained the same and the majority of States have a fairly conservative view of the law”, in “International Law and the Use of Force by States Revisited”, 1 *Chinese J. Int'l L.*, 2002. But see interrogations by the same author in *Principles of Public International Law*, Oxford, 6th ed., 2003, 701 et seq. See also O. Corten, F. Dubuisson, “Extension abusive”, *op. cit.*, 63-64 J. Brunée, St. Toope, “the Use of Force”, *op. cit.*, 793. R. Hoffmann, “International Law and the Use of Military Force” *op. cit.*, 33. See also S. Torres Bernárdez, *infra* III.

security”, and that the insufficiency of the Charter is not compensated by customary law, because practice is contradictory and inconclusive.³⁸⁶ But all commentators and most governments highlight the frequent paralysis of the Security Council as the main reason for that situation. Expert opinion also holds that if there is no need to modify the rules on self-defence, the existing normative framework needs clarification or adaptation³⁸⁷ in some controversial aspects, in order to facilitate its application. A most radical view pretends that the regime of self-defence under international law has changed.

Conclusions

Here are the possible conclusions that might be considered by the *Institut*:

1. Article 51 as supplemented by customary international law is sufficient to address the issues relating to the exercise of the right of self-defence. However, in order to enhance the functional character of the normative concept it is advisable to attempt some clarifications in controversial issues (in particular regarding armed attack, weapons, imminence, non-State actors.).
2. The rules (principles, requirements) of necessity and proportionality are indispensable components of the existing normative framework of self-defence.
3. The right of self-defence is set in motion in case of actual armed attack or manifestly imminent armed attack (interceptive self-defence), as long as the Security Council does not take effective measures necessary to maintain the international peace and security.
4. The various doctrines of “preventive” self-defence (beyond actual or manifestly imminent armed attack) do not find sufficient basis in positive international law.
5. In case of alleged threat against a State, the Security Council is competent to determine the action to be taken.
6. The armed attack triggering the right of self-defence shall be of a certain degree of gravity. Acts implying use of force of lesser intensity can, under the conditions enunciated by the International Law Commission, trigger counter-measures by the victim State. It is understood that the latter exercises police actions within its territory.

³⁸⁶ See B. Conforti, *infra* III.

³⁸⁷ Cf. C. Crawford, J. Vehoeven, *infra* III.

7. The type of weapons used in the armed attack is relevant to the exercise of the right of self-defence, in particular for the qualification of the armed attack and the triggering of the reaction.
8. In case of an armed attack against a State the right of self-defence should be coupled with multilateral action, in the framework of international institutions. In this respect it is indispensable in the first place to enhance the role of the Security Council for safeguarding the international peace and security. The adoption of measures by the Security Council could serve as an alternative to the right of self-defence, but in practice sometimes the two courses of action are intertwined.
9. The tendency of the Security Council to combine the right of self-defence, in particular collective self-defence, with measures of collective security, enhances the role of the United Nations.
10. If an armed attack by non-State actors against a State occurs, the following situations could set in motion the application of Article 51 as supplemented by customary law:
 - If a non-State actor launches an armed attack at the “instructions, directions or control” of a State, the latter can be the object of reaction in self-defence by the attacked State;
 - The Security Council shall be activated in case the non-State actor launches the armed attack from, or prepares an armed attack in, an area within the jurisdiction of a State, either without “instructions, directions or control” of the host territorial State, or under unverifiable conditions, the State from which the armed attack is launched has the obligation to cooperate with the Security Council, and, upon request, with the victim State.
 - in case the armed attack by a non-State actor is launched from an area beyond the jurisdiction of any State, the victim State exercises forcible action in that area against that non-State actor.
11. The right of self-defence can also be exercised by and against an international organization, provided that the conditions set out by international law are met. In such case the issue of attribution of actions to a State may also arise.

II. Initial Questionnaire and Replies or Observations of the Members of the Sub-group

1. Initial Questionnaire (December 2006)

The *Institut* could

A/ take stock of the current situation of international relations and, following the stand of the 2005 World Summit that “the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security”, consider that there is no need for changes in the chapter “self-defence”, or

B/ decide that there are aspects of that chapter needing clarification or development.

If the second option is retained the following items could be addressed:

a) Concerning the condition of “armed attack” in order to set the right of self-defence in motion, the effort of interpretation has been developing mainly towards three directions: a) the gravity of the attack, b) the weapons used, and c) the authors of the attack (problem of non-state actors).

i) With respect to the gravity the ICJ persist in requiring a certain degree of gravity. The opposite opinion does not accept this requirement on grounds that Article 51 does not qualify the armed attack. Is there room for conciliation of the two positions?

ii) The type of weapons used in the attack are or are not irrelevant for the qualification of the armed attack and the triggering of the reaction ?

b) Is there any need to further delineate the contents of the rule of proportionality in general, within a framework of the *jus ad bellum*, distinguish according to the target of the response and elaborate on the problem of causal connection?

c) One of the most, if not the most controversial issues is that of self-defence when an armed attack has not yet occurred or materialised. Which of the four assumptions of this provisional Report seems to correspond to the actual state of international law? Are any other distinctions to make?

d) As for *non-State actors*, in the extraordinary circumstances of September 11, 2001, the Security Council has linked the attacks against the United States with the right of self-defence. Yet the ICJ is still considering that Article 51 applies only in State-to-State situations. Is Article 51 *mutatis mutandis* applicable in cases of use of force by non-State actors against States, or there is need to

devise specific rules and if yes, towards what direction? Should the question of *imputability* be revisited?

e) What could be the contribution of the *Institut* in proposing ways and means for the enhancement of the role of the Security Council in the field of self-defence?

f) Is it advisable to propose the establishment by the Security Council of a subsidiary Permanent Expert Body on Threats Against the International Peace and Security and a subsidiary Permanent Fact-Finding Body?

2. Comments of the members

Comments by Mr. Benedetto Conforti

Dear Emmanuel:

First of all, my warm compliments for your remarkable provisional report on self-defence. You have made a formidable job, giving a complete and detailed picture of the extremely heterogeneous points of view put forward on the subject.

[...]

My few observations [...] are the following:

I don't think that the provisions of the Chapter VII of the Charter, including Article 51, are "sufficient to address the full range of threats to international peace and security". In fact, the frequent paralysis of the Security Council when appropriate actions should be taken, together with the very restricted conditions laid down by Article 51 for the exercise of self-defence, have proved insufficient to cover all cases of the use of force occurred in practice. However, if we wonder whether such an insufficiency is compensated by the existence of indisputable rules of customary international law, the answer is no. This is the tragic result of a practice that you correctly describe as "contradictory and therefore inconclusive" (para. 20)³⁸⁸. I will deal with the consequences of this lacuna later on, with regard the most controversial question of preventive self-defence.

a) As far as the gravity of the attack is concerned, I entirely share the view of the ICJ. Only the most grave forms of the use of force may justify an armed counter-attack. As the Court added in the *Oil platform* case, it should not be excluded *a priori* that an armed attack against a warship (and I would add: or a military airplane) may entail an armed response. However, I think that in these cases too a distinction should be made between more and less serious attacks. For instance, if the warship or the military aircraft is compelled by the use of force to land in the territory of the attacking State, and the members of the crew are arrested and detained, an armed counter-attack is hardly to be admitted. The same must be said about an attack against a merchant vessel which does not causes casualties on board.

A light use of the force may justify other countermeasures, but not self-defence. Of course, a countermeasure may consist in what I am used to call the "internal force" of the State, i.e. the *coercive* measures which a State can take against individuals or communities within its territory. In the above mentioned cases,

³⁸⁸ Note by the Rapporteur, current para. 20.

the attack is rather a (wrongful) police action than an armed attack, and the response may consist in a corresponding police action, for instance by temporarily prohibiting a vessel of the attacking State from leaving the territory of the responding State. Perhaps a limited police action may be undertaken also outside the territory of the reacting State, in high seas or other territories nullius. Could we say that exceptionally the same applies to the territory of the attacking State? I think that a limited police action could be accepted, provided that it does not entail invasions, or bombings or attacks provoking casualties, since it is a simple violation of territorial sovereignty which can be justified as a countermeasure. I admit that it is difficult to establish when an illegal attack, and the response, are police actions. In fact the borderline between self-defence and countermeasures consisting of the use of “internal force” is not easy. However, I am convinced that such borderline is exactly what should be deeply explored in order to make a new and original contribution to a subject which for the rest has been thoroughly studied up to now.

b) Regarding weapons, here again I share the opinion of the ICJ according to which a weapon whose use is prohibited by custom or by a treaty bounding the user, remains unlawful in whatever armed conflict is at stake. Particularly, it cannot become lawful when used for a legitimate purpose under the UN Charter, and even for self-defence. All other weapons could be used when it is necessary to react to an armed attack. The question is rather one of proportionality, since it is evident that a State cannot react with atomic bombs or other weapons of mass destruction to a conventional weapons attack.

c) I don't think that the content of the rule on proportionality needs to be further explored. It is clear that the rule covers both the intensity of the response, including the proportionate use of weapons, and the objective pursued by the responding State. Regarding the latter, the reaction shall aim at repelling the attack, i.e. at the restoration of the *status quo ante*. From this point of view, it is emblematic the case of the Gulf war in 1991, when the forces of the coalition did stop fighting after having freed the territory of Kuwait.

Of course, the responding State – as well as the attacking one – shall abide by humanitarian international law, but this is not a particular feature of self-defence, as it covers all cases of the use of force. It covers also, *mutatis mutandis*, the use of what I call “internal force”, and it is worth noting that the respect for rules of humanity was already considered as a limitation of the reprisals in classic international law.

d) In my opinion, preventive self-defence is not allowed by Article 51, with the exception of interceptive self-defence that you describe in para. 78.2(a)³⁸⁹. In fact, as you point out, if a missile has been launched or troops or warships

³⁸⁹ Para. 86b.

clearly move in combat formation towards the territory of the target State, the right of self-defence can be exercised. However, these cases can be easily fitted in the phrase "if an armed attack occurred". It seems to me that any further step is out the clear wording of Article 51.

It is also hard to say that some principles of customary international law have developed in the sense of enlarging the notion of self-defence. Looking at the practice, all attempts and proposals (that you carefully scrutinize) for making preventive self-defence legal, have proved unsuccessful. This is true not only as far as exaggerate claims are concerned, for instance those contained in the document on "The National Security Strategy of the United States of America" (the so-called Bush Doctrine); it is also true with regard to minor cases of use of the force, such as the temporary invasion of a territory of a neighboring State, the bombing of military installations, etc., for reacting to *threats* to the territorial integrity of the invading or bombing State. If customary law needs a general consent, this has never been reached on the subject, especially due to the objections of a relevant number of States against such claims. In addition to the practice of States, worth of noting is the practice of the Security Council which always rejected the legality of the attacks that were motivated by the sole threat of the use of force, such as the various actions taken against neighboring countries by Israel, or South Africa at the time of apartheid.

As preventive attacks are not allowed neither by Article 51 nor by customary international law, they are forbidden by Article 2(4) of the Charter. However, according to the philosophy of the Charter, the interdiction of the use of force is strictly linked to the system of collective security under the direction of the Security Council: if and when, as often happens, the system does not work, if and when the United Nations are unable to prevent a crisis or to intervene with military operations or other means provided for by Chapter VII of the Charter, then the prohibition does not work. As mentioned above (sub A/), the tragic result of the paralysis of the Security Council, on one hand, and the absence of rules of customary international law, on the other, is a lacuna in the law of *jus ad bellum*. The lacuna covers all cases of armed attacks not authorized by the Security Council or by Article 51, like preventive attacks, humanitarian interventions and so on and so forth. At this point, the only possible evaluation of unilateral use of force is the moral one. In brief, I am convinced that what we need is to put the question within the framework of "natural law", seeking support from the doctrine of the "just war", as it has been treated by centuries and centuries of theological and legal speculation until the beginning of the last century.

The idea of placing the matter in the context of natural law is not a mere theoretical speculation. On the contrary, it can open the way to a fruitful discussion within our company. In particular, it would be useful to discuss all

the assumptions of your report about preventive self-defence, in order to make wise suggestions *de lege ferenda*. Of course, the various opinions and claims emerging from the practice should be scrutinized, as they constitute the starting point for selecting those which can be considered reasonable. I am convinced that this is the only feasible way to achieve practical results. I have put forward the same proposal in the field of humanitarian interventions, in my comments to our confrère Reisman's provisional report.

e) The extent to which self-defence covers responses against serious international terrorists attacks coming from non-State actors is also very problematic. Generally speaking, it seems to me that this is another case in which the practice does not allow a positive answer. The two resolutions (1368/2001 and 1373/2001) adopted by the Security Council after the attack to the Twin Towers are very ambiguous in this regard. The word "self-defence" appears only in one "whereas" of the resolutions, while the content of both is noting else than the compelling request to States for adopting a series of *internal* measures, in particular for preventing and suppressing the financing of terrorist acts, freezing funds and other financial assets of persons who are involved in terrorists act or in their planning, denying safe haven to the same persons, and so on and so forth. Detecting the legality of an use of the *international* force in self-defence from one "whereas" of a resolution would be quite unusual, especially when the obligations set forth in its operative part have different objects.

Having said that, I don't see any problem when the terrorists act are conducted on a large scale under the control of a State. The responsibility of the latter is clearly admissible, and the counter-attack may be directed against it. In such a case we only need to take a stand between the notion of "control", respectively upheld by the ICJ and the ICTY. In my opinion, the ICJ's opinion is the correct one, as here we are dealing with a case of *interstate* self-defence which differs from the punishment of a single criminal.

On the contrary, I think that the resort to self-defence is not the appropriate response in the case in which the terrorists "independently" attack a State. Firstly, as you correctly point out, it is difficult to establish against whom the counter-attack should be directed. The State of the territory from which the terrorists come? If so, then we come back to the above mentioned problem of the "control". In fact the reaction to this kind of attacks should be directed solely against the persons committing the crime, and this is exactly what is demanded by the above mentioned resolutions, and by the others which have been subsequently adopted.

f) I don't think that the role of the Security Council could be enhanced until the veto power obtains.

g) I am absolutely contrary to studying and suggesting the establishment of subsidiary expert bodies by the Security Council. The report of the so-called High-Level Panel, in 2004, has proved useless and inconclusive, and repeating the same experience would mean nothing else than wasting money.

[...]

Comments by Mr. James Crawford

Dear Emmanuel

[...] at the end of your valuable memorandum [you suggest that]

The *Institut* could

A/ take stock of the current situation of international relations and, following the stand of the 2005 World Summit that “the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security”, consider that there is no need for changes in the chapter “self-defence”, or

B/ decide that there are aspects of that chapter needing clarification or development.

Response: The 2005 World Summit document had a different concern than ours. No inter-governmental effort to revise or authoritatively interpret Art 2(4)/51 could possibly be helpful or productive and the 2005 conclusion was absolutely correct in its context. That does not exclude comment or analysis by us.

In the second option the following items could be addressed:

a) Concerning the condition of “armed attack” in order to set the right of self-defence in motion, the effort of interpretation has been developing mainly towards three directions:

a) the gravity of the attack, b) the weapons used, and c) the authors of the attack (problem of non-state actors).

i) With respect to the gravity the ICJ persist in requiring a certain degree of gravity. The opposite opinion does not accept this requirement on grounds that Article 51 does not qualify the armed attack. Is there room for conciliation of the two positions?

Considerations of gravity are particularly relevant to proportionality. But there must be some threshold of seriousness, whatever other steps a State may lawfully take to protect its territorial integrity or rights.

ii) The type of weapons used in the attack are or are not irrelevant for the qualification of the armed attack and the triggering of the reaction?

Evidently they are relevant; a weapon which will cause major and irreversible harm presents different considerations than one which will not.

b) Is there any need to further delineate the contents of the rule of proportionality in general, within a framework of the *jus ad bellum*, distinguish according to the target of the response and elaborate on the problem of causal connection?

Proportionality is so important in practice that some reflection on it by us could be helpful.

c) One of the most, if not the most controversial issues is that of self-defence when an armed attack has not yet occurred or materialised. Which of the four assumptions of this provisional Report seems to correspond to the actual state of international law? Are any other distinctions to make?

The question is essentially one of imminence. Most arguments for a broad view of anticipatory self-defence are self-serving. But it is relevant that there has been a series of individual attacks by an opponent which declares its intent to continue them -- the attacked State is not confined to waiting for the next attack in such a case, other criteria being met.

d) As for *non-State actors*, in the extraordinary circumstances of September 11, 2001, the Security Council has linked the attacks against the United States with the right of self-defence. Yet the ICJ is still considering that Article 51 applies only in State-to-State situations. Is Article 51 *mutatis mutandis* applicable in cases of use of force by non-State actors against States, or there is need to devise specific rules and if yes, towards what direction? Should the question of *imputability* be revisited?

i) Imputability is the wrong word. The ILC Articles use attribution.

ii) An armed attack can be carried out by a non-state entity in certain circumstances. But it must be international in character. It should not require as a prerequisite a determination of attribution to the State from whose territory the attack is launched.

iii) As above, it is not a question of devising new rules (which will be partial and controversial) but of providing useful reflection on the problem.

e) What could be the contribution of the *Institut* in proposing ways and means for the enhancement of the role of the Security Council in the field of self-defence?

We should of course stress the role of the Security Council -- which is not, however, limited to cases of self-defence.

f) Is it advisable to propose the establishment by the Security Council of a subsidiary Permanent Expert Body on Threats Against the International Peace and Security and a subsidiary Permanent Fact-Finding Body?

No. The experience of such bodies is dismal.

[...]

Comments by Mr. Santiago Torres Bernárdez

Madrid, 1 February 2007

Dear confrère,

All my congratulations for your excellent provisional draft.

[...]

a) The paper provides a detailed and objective picture on a topic which in recent times, for ideological and political purposes, has been the subject of considerable distortions which have little to do with the present international order and its law. “Self-defence” has indeed been abused so as to make it a weapon against the cornerstone of the existing international legal order, namely in order to weakening the peremptory prohibition of the threat or use of force in international relations provided for in Article 2, paragraph 4, of the United Nations Charter and contemporary customary international law.

b) For those engaged in such a revisionist undertaking “self-defence” appeared as a useful instrumentality mainly because the use of force in situations of self-defence is not subject to any kind of prior authorization by the Security Council. Once they moved away from the Security Council, the only remaining task was to enlarge the scope of the concept of “the use of force in self-defence” itself. Ultimately, as indicated in your report, it was done by introducing new semantics such as the expressions “pre-emptive” or “preventive” self-defence and the like.

c) However, the application of those so-called new forms of self-defence cannot be done without incurring international illegality because as the International Court of Justice declared in December 2005: “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council” (Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda, Judgment, paragraph 148).

d) The so-called “pre-emptive” or “preventive” self-defence is not self-defence at all because it replaces the fundamental presupposition of Article 51 of the Charter, namely the existence of a prior “armed attack” (or at the least the

presence of a manifestly imminent armed attack), by a broad and diffuse notion of “a threat” which includes actual as well as possible, emerging or future threats freely determined by the State concerned. In fact, the so-called “pre-emptive” or “preventive” self defence amounts to a first use of force and not, as in genuine situations of self defence, a response to a prior use of force by another State. As such, this alleged form of self-defence is nothing else but a new presentation of the preventive wars or armed reprisals forbidden by the United Nations Charter and contemporary general international law. Moreover, Article 51 defines self-defence as an “inherent right” of every State while within the doctrine of the pre-emptive or preventive self-defence the latter is “a privilege” reserved to a given State or to a few number of States selected in practice by the former.

e) In the light of the above considerations and bearing in mind the consistent jurisprudence of the International Court of Justice on self-defence (see references in paragraph 6³⁹⁰ of your report), my first conclusion is that our Group should as a general rule exclude from the study of the topic the so-called “preventive” or “pre-emptive” self-defence. We should put aside figures which whatever called have nothing to do with “self-defence” as the concept is understood in the United Nations Charter and current positive international law as well as in international jurisprudence.

f) It is for the partisans of the said doctrinal trend to prove that such a figure has become part and parcel of international law as a new form of self-defence. Rhetorical statements that international law of self-defence has radically changed cannot replace a proof which has not been administered. On the other hand, I do believe that the Institute should not be used to promote regressive developments in the international order and its law.

g) Concerning your provisional suggestions (paragraph 129 of your report), I will begin by joining those that believe that the existing legal framework is capable to address all situations. There is no need for modifications in the present legal regime of “self-defence” as such. But this conclusion of mine does not exclude the study for clarification purpose of certain given aspects or questions in need of further or new clarifications so as to facilitate the interpretation or application of the said legal regime.

h) This should be in my opinion the main task of our Group with a view to reach, if possible, certain general conclusions concerning particular issues or circumstances. In this respect, all the items listed in your report for study are fine to me. I would suggest to add to the list the issues concerning “collective self-defence” so well summarized in paragraphs 96 to 102³⁹¹ of your report.

³⁹⁰ Note by the Rapporteur, current para. 6.

³⁹¹ Paras. 110-118.

i) For me items 1 and 2 relate rather to application than to interpretation and, therefore, its treatment should be rather flexible bearing in mind that factual circumstances vary from case to case. Moreover, those in charge of the application of the law should enjoy a certain degree of discretion in the evaluation of the information on the facts and its proof. For me all the elements that you mention in item 1 are susceptible of intervening, alone or together with other factors, in the qualification of a given use of force as an armed attack and the triggering of self-defence as a response. I still fail to understand the controversy relating to the “degree of gravity” and in particular the opinion of those that reject it on grounds that Article 51 does not qualify the armed attack, because the “armed attack” of Article 51 (“agression armée” in French) is by definition a qualified use of force against a State. However, I am ready to listen to others for conciliation of positions. Concerning item 2, I see merit in taking account of the target of the response and of the causal connection in the assessment of the proportionality rule.

j) Item 3 rises the issue of the triggering of the right of self-defence in response to an armed attack. In this respect, my opinion is that from the four assumptions in paragraph 75³⁹² of your report the one corresponding to the actual state of international law is the first (“if the attack actually occurs”) duly supplemented by the “interceptive self-defence” as described in paragraph 78, 2 (a)³⁹³. Both assumptions seem to me compatible with Article 51 of the Charter. The fourth assumption (“if the attack is supposed to occur”), is quite incompatible with the actual state of international law.

k) As to the third assumption (“if the threat of an armed attack is imminent and not only a possibility”) - namely the form of “anticipatory self-defence” strictu sensu defined in paragraphs 79 to 81³⁹⁴ of your report - I recognize that there is a doctrinal trend supporting it, but the International Court of Justice has for the time being expressed no view on the issue (Nicaragua case, Reports 1986, p. 103, para. 194 - Congo case, Reports 2005, para. 143). Moreover, no international legal text is invoked in support of this justification except the 169 old formula of the Webster’s letter in the Caroline affaire, formula rejected by many commentators after the adoption in 1945 of the United Nations Charter. I have always been quite reserved about this eventual justification and the episode of the now alleged unreliable information on threats invoked to unfold the Irak War confirms my apprehensions about admitting derogations of the rule on prohibition of use of force on the face of mere subjective invocations of the existence of an imminent threat of an armed attack. The conclusions of Tomas Franck on the matter quoted in your report are quite reasonable. I share them.

³⁹² Para. 83.

³⁹³ Para. 86.

³⁹⁴ Paras. 89-92.

l) Concerning item 4 relating to “self-defence and non State actors”. my prima facie position is that a number of interests questions considered in Part II A and B of your report should be tentatively studied by the Group. However, “the case of non-State actors ‘independently’ attacking States” appears to me as laying outside the purview of our topic. It will rise inter alia cumbersome questions on the active and passive subjectivity of those non State actors in international law. Finally, regarding items 5 and 6 I am quite ready to study your proposals, but probably the Institute would be rather reluctant to make recommendations in that respect. We will see.

With my best regards and congratulations

Comments by Mr. Joe Verhoeven

Le 15 janvier 2007.

Mon Cher Confrère,

Votre message – et le rapport préliminaire qui l’accompagnait – m’est bien parvenu. Je vous en remercie vivement, en vous félicitant très sincèrement pour la très grande qualité du travail que vous avez réalisé.

[...]

Le seul point qui m’embarrasse quelque peu tient au statut même de la règle relative à la légitime défense. Je vois mal en effet qu’elle puisse être considérée comme de droit coutumier avant l’entrée en vigueur de la Charte des Nations Unies. A une époque où le principe demeure la liberté de recourir à la force, le problème de la légitime défense ne se pose pas. Elle n’est que l’une des multiples causes « justes » – sans prêter à ce qualificatif l’importance qu’une doctrine bien connue lui a conféré – de la guerre. Cela n’a rien à voir avec l’exception qu’il y aurait lieu d’apporter à un principe – exactement contraire – d’interdiction. A ce titre, je ne vois pas quel crédit sérieux prêter à des pratiques (largement) antérieures à la Charte de San Francisco, sur la base desquelles on chercherait à préciser la portée des dispositions de celle-ci. Il en va notamment ainsi pour la fameuse affaire de la *Caroline*, qui est d’ailleurs liée à une opération de police intervenant dans les relations entre deux États en paix l’un avec l’autre, très étrangère à la légalité du recours à la force en droit international.

Il est difficile de déterminer de manière précise le moment où la règle générale s’est inversée, c’est-à-dire est passée d’une liberté à une interdiction de principe. Ce n’est certainement pas le cas avec le pacte de la Société des Nations. Ce ne l’est pas non plus, me semble-t-il, avec le pacte Briand-Kellogg, en dépit de l’adhésion très large qu’il a rencontré. Il me paraît en effet incompréhensible que des États puissent avoir accepté – sinon à titre purement conventionnel – de renoncer au droit de recourir à la force – sous la réserve

d'ailleurs non explicite de la légitime défense – sans avoir demandé et moins encore obtenu aucune contrepartie en termes de sécurité collective. Ce serait littéralement suicidaire. En 1945, les articles 2, § 4 et 51 de la Charte sont clairement conventionnels, à tout le moins. Et ils le sont, à tout le moins, toujours aujourd'hui. L'universalité des Nations Unies a-t-elle suffi à en faire des règles « coutumières » ? C'est ce que la Cour a affirmé sans ambages dans l'affaire *Nicaragua*. Le motif est quelque peu biaisé dans la mesure où son objet premier est de ne pas paraître négliger totalement la réserve américaine dite Vandenberg. A dire vrai, la réserve portait sur la compétence – antérieurement affirmée par la Cour – et non sur le droit applicable pour décider du bien-fondé de la demande... Il est vrai cependant que l'affirmation est (devenue) très répandue. J'aurais personnellement tendance à croire qu'il y a là plutôt une règle de droit général, ce qui n'est pas exactement la même chose que le droit coutumier. C'est une question doctrinalement difficile, que j'ai brièvement évoqué dans un récent colloque organisé à Angers dont les actes seront prochainement publiés (« Les légitimes défenses », Dir. R. Kherad, Pedone). A toutes fins utiles, je vous joins le texte de cette communication.

Quoi qu'il en soit, il ne me semble pas utile de s'attarder sur cette question dans le cadre de la 10^{ème} commission. L'important est seulement que – coutumière, conventionnelle ou « générale » – la règle énoncée à l'article 51 doit être appréciée selon ses mérites propres, ceux de la Charte, sans que la pratique antérieure à celle-ci soit en la matière d'un grand secours dès lors qu'elle s'appuyait sur un principe de liberté radicalement opposé à celui sur lequel cette charte est construite. Et il me paraît notamment sans intérêt de gloser à cet égard sur la portée des termes « inhérent » ou « naturel » – qui sont loin d'être équivalents –, du moins dans la mesure où ils feraient écho à un état de choses existant avant l'entrée en vigueur de celle-ci.

Cette remarque générale faite, vous me permettrez quelques observations particulières.

p. 10, § 26³⁹⁵

Peut-être serait-il bon de rappeler brièvement la discordance qui existe sur ce point entre la version anglaise (ou espagnole) de l'article 51 – qui parle d'*attaque* – et la version française – qui parle d'*agression* – ... alors qu'il est question d'*agression* dans les trois versions de l'article 39. La divergence peut, en tous les cas partiellement, expliquer pourquoi la doctrine francophone semble généralement donner de l'article 51 une interprétation qui est plus restrictive que celle de la doctrine anglophone. A ce jour aucune interprétation « réconciliatrice » n'a toutefois été trouvée, sachant que les trois versions sont authentiques.

³⁹⁵ Note by the Rapporteur, current para. 26.

p. 12, § 33³⁹⁶

De manière générale, l'« intent of the drafters » me semble sans grande pertinence pour déterminer l'interprétation à donner aux règles de la charte plus de soixante ans après son adoption. Celle-ci demandent à être comprises, me paraît-il, en fonction des besoins « objectifs » de l'organisation de la « communauté » internationale d'aujourd'hui, profondément différente de celle qui existait à l'époque où la charte fut conçue.

Cela dit, je ne crois pas que les « smaller – scale use[s] of force » appellent quelque traitement particulier que ce soit, étant entendu qu'ils ne permettent pas le recours à la force en violation de l'article 2, § 4, de la Charte s'ils ne présentent pas les caractères d'une agression (attaque) au sens de son article 51. Il n'empêche que

- l'adage *de minimis non curat praetor* trouve à s'appliquer en matière de légitime défense comme ailleurs ;
- un Etat est parfaitement en droit de recourir à la force pour exercer la police sur son territoire, quelle que soit la gravité, fût-elle minime, des attaques dont il est l'objet ;
- c'est une autre question que déterminer si des incidents isolés, dont la gravité est en soi inférieure au seuil requis pour l'application de l'article 51, peuvent être, et dans l'affirmative à quelles conditions, traités comme ne constituant qu'une agression (attaque) pour les besoins de la légitime défense. Sauf erreur de ma part, la question indirectement évoquée dans certaines affaires évoquées devant la CIJ n'a pas été à ce jour tranchée par celle-ci (cf. vos §§ 66-68).

p. 13, § 34³⁹⁷

Il me semble que la question des attaques contre des navires de commerce est substantiellement identique à celle qui concerne des attaques contre des particuliers, en raison de leur nationalité, à l'étranger. La légitime défense ne peut en l'occurrence être totalement exclue, à tout le moins lorsque celles-ci présentent à la fois un caractère systématique et une « ampleur » suffisante.

p. 15 et s. (proportionnalité)³⁹⁸

Le *jus in bello* me paraît en tant que tel sans pertinence dans l'appréciation de la proportionnalité. Il doit en tous les cas être respecté, sous les seules réserves ou limites qu'il fixe lui-même et dont l'interprétation peut prêter à controverses. La difficulté est plutôt de s'entendre sur l'étalon par référence auquel on peut établir ce qui est proportionné et ce qui ne l'est pas. Une certaine doctrine ou certains motifs de la jurisprudence de la Cour laissent croire que c'est le

³⁹⁶ Para. 35.

³⁹⁷ Para. 36.

³⁹⁸ Paras. 41-52.

préjudice subi par l'attaqué qui donne la mesure de celui qui peut être causé à l'attaquant. Cette manière de voir me semble difficilement acceptable, sauf à en revenir à une espèce d' « œil pour œil, dent pour dent ». Il me semble que doit être jugé disproportionné tout emploi de la force qui excède ce qui est raisonnablement requis pour satisfaire l'objectif de protection que poursuit la légitime défense, pour autant bien entendu qu'il soit établi que le recours à la force est « nécessaire » à cette fin. La proportionnalité ainsi comprise est l'expression d'un principe très général, nullement spécifique à la légitime défense. Point n'est besoin de dire qu'il n'en va pas de même pour la « nécessité » dont l'appréciation doit être particulièrement stricte, car si l'État peut renoncer à recourir à la force même lorsque celle-ci semble nécessaire, il n'est pas libre d'y avoir recours lorsqu'elle ne l'est pas.

pp. 19-20, §§ 54-58³⁹⁹

Le Conseil de sécurité n'a pas à proprement parler à se prononcer sur la légalité du recours à la légitime défense ; il a pour première responsabilité de prendre les mesures qui s'imposent pour rétablir la paix et la sécurité internationales, et c'est au premier chef pour pouvoir le faire efficacement qu'il doit être informé de ce qui a été entrepris par les intéressés. Il importe peu à cet égard que le recours à la légitime défense soit conforme ou non à l'article 51. Il est sans importance à cet égard que le Conseil ait « reconnu » dans certains cas l'état de légitime défense, notamment au lendemain des attentats du 11 septembre 2001. Une chose doit en tous les cas être clairement affirmée : les États agressés (attaqués) n'ont pas le choix entre la légitime défense et la protection des Nations Unies ; ils ne peuvent exercer la force au titre de la légitime défense qu'aussi longtemps que le Conseil de sécurité n'a pas pris à cet effet les mesures qui s'imposent... ce qu'il devrait faire « immédiatement ». Qu'il ne le fasse pas ne maintient cependant le droit de légitime défense que durant le temps où l'emploi de la force s'avère « nécessaire », et non au-delà.

On ne peut à cet égard que condamner fermement les pratiques qui conduiraient certains États à bloquer le Conseil de sécurité pour conserver le plus longtemps possible le droit d'agir unilatéralement, pour leur plus grand « profit » ou celui de leurs amis.

pp. 21 et s., §§ 61 et ss⁴⁰⁰ (Menace, légitime défense préventive, etc.).

Vos observations sur l'usage « anticipé » de la légitime défense me paraissent très pertinentes et je partage pleinement votre conclusion sur ce point (§ 91).

Il me semble que le recours à la légitime défense ne soulève aucune difficulté lorsque l'agression (attaque) a connu un « commencement d'exécution » au sens où cette notion est utilisée en droit pénal, ce qui peut être bien avant que

³⁹⁹ Paras. 57-62.

⁴⁰⁰ Paras. 67 et ss.

les effets de cette agression (attaque) ne se fassent sentir. Ce n'est que lorsqu'un tel commencement d'exécution fait défaut que les problèmes se posent. Il me semble qu'une menace ne peut jamais par elle-même justifier le recours à la légitime défense, sauf à vider d'une bonne partie de sa substance l'interdiction du recours à la force. Il suffit que l'État menacé puisse demander au Conseil de sécurité de prendre les mesures qui s'imposent pour rétablir la paix et la sécurité, conformément à l'article 39 de la Charte. La seule réserve tient sans doute à l'imminence d'une menace qui soit telle que le CS ne pourrait pas être en mesure d'agir efficacement. Il est certes possible que le Conseil de sécurité se refuse à agir, ou du moins s'en abstienne. A soi seul, cette carence ou ce refus ne donnent toutefois pas à l'État menacé le droit de se prévaloir de la légitime défense en l'absence (de tout commencement d'exécution) d'une agression (attaque) armée. Ce serait, me semble-t-il, sérieusement régresser qu'accepter les formes les plus extrêmes de la « pre-emptive self-defence » qui ont été défendues par certains au lendemain des attentats du 11 septembre 2001.

p. 29, § 86⁴⁰¹

Je ne suis pas en désaccord avec le contenu de votre paragraphe 86. Il me semble seulement que l'administration américaine n'a jamais cherché à justifier sur la base de la légitime défense, préventive ou non, son intervention en Iraq à partir de 2003.

pp. 38 et s. (§ 117 et s.)⁴⁰² (non-State actors)

Il ne me semble pas qu'il faille catégoriquement exclure le recours à la légitime défense en cas d'attaques « privées », c'est-à-dire par des « non-state actors », même s'il est difficile en pareille hypothèse de parler d'« agression ». Après tout, la raison d'être de la légitime défense est de permettre la « défense », et ce besoin de défense ne disparaît pas du seul fait que l'attaque est « privée ». Il n'y a assurément aucun problème lorsque celle-ci peut, d'une manière ou d'une autre, être imputée à un État – elle cesse alors d'être « privée » – fût-ce sur la base de critères différents de ceux qui sont normalement applicables dans la matière de la responsabilité internationale. Mais il ne peut être exclu qu'aucune imputation, même souple, ne puisse être réalisée.

La difficulté n'est pas que l'État qui est victime d'une attaque ne soit pas autorisé à se défendre lorsque cette attaque est « privée », ce qui me paraît devoir être admis. Elle n'est pas non plus qu'il soit en droit de recourir à la force sur son propre territoire, ce pourquoi il n'a nul besoin de se prévaloir de la légitime défense. Elle est seulement que s'il en fait usage en dehors de son territoire national, il sera conduit à infliger des dommages à un État « innocent ». La circonstance suffit-elle à condamner tout recours à la force ?

⁴⁰¹ Para. 98.

⁴⁰² Paras. 136 et ss.

J'hésiterais à l'admettre, à tout le moins à partir du moment où l'État attaqué a vainement cherché à obtenir le concours de l'État sur le territoire duquel il est porté à intervenir. Il ne faut d'ailleurs pas totalement l'exclure dans l'éventualité d'une attaque proprement étatique. Point n'est besoin toutefois de souligner que le respect des exigences de nécessité et de proportionnalité doit en pareil cas être strictement vérifié.

Cela dit, l'hypothèse est assez théorique. Elle ne trouve quelque réalité que dans le cas de « failed states », dont la déliquescence même suffit à altérer l'application « normale » des règles du droit international. Cette situation est trop « spéciale » pour justifier, me semble-t-il, une attention particulière dans une résolution de l'Institut sur la légitime défense. Cela dit, il va de soi que, plus encore que lors d'une attaque proprement étatique, une intervention des Nations Unies devrait en pareil cas faire perdre toute raison d'être à l'intervention d'un État au titre d'une légitime défense en l'espèce particulièrement sujette à caution.

p. 42, § 129⁴⁰³

Je ne crois pas que les règles sur la légitime défense doivent être modifiées ; il me semble toutefois que l'Institut pourrait très utilement en clarifier les implications plus de soixante ans après l'entrée en vigueur de la Charte des Nations Unies. Votre seconde option me paraît dès lors tout à fait justifiée.

Les commentaires qui précèdent devraient vous éclairer sur les directions qui ont mes préférences. Je crois inutile d'y revenir. Je souhaiterais seulement qu'il soit clairement dit que l'État n'a pas le libre choix de la légitime défense ou de la protection onusienne. C'est l'une des obligations fondamentales de la communauté internationale – tout défaillante qu'elle soit – d'assurer au travers de l'ONU la sécurité de ses membres, et ce n'est jamais qu'à titre exceptionnel que ceux-ci sont en droit à cette fin de recourir unilatéralement à la force durant le laps de temps – qu'il faut espérer court – qui est indispensable à l'organisation pour intervenir efficacement, lorsque l'urgence le requiert.

Comments by Mr. Edward McWhinney

Dear Confrère

[...]

My congratulations on your very timely completion of the Provisional Report of the Commission for its sub-section on *Self-Defence*, and for the very full, detailed listing of the assorted doctrinal literature in that field, together with your own very thoughtful, succinct critiques of that material. My comments are broken down, for convenience of presentation, into three general categories:

⁴⁰³ III.

research methodology; legal doctrines as secondary sources; and state practice as primary source.

(1) **Research methodology:** The 10th Commission in its original manifestation, was created by decision of the Bureau at the Berlin biennial reunion, in September, 1999, with permission to employ a “fast-track” procedure with the goal of achieving its Final Report for presentation to the next biennial reunion in 2001. The “fast-track” two-year mandated Commission has been used before in the *Institut's* historical practice, but in those rare earlier cases the *Institut's* classical, three-stage formulae of *Preliminary Report (Questionnaire)*, followed by *Provisional Report (Draft Resolution)* and then *Final Report (and project of Resolution)*, seems to have been applied. Non-adherence to this tried and successful formulae, even within very constrained time limits, may have been one of the contributing reasons for the numerically very limited written responses in 2001 by then Commission members to a very stimulating Report presented by then *rapporteur* of the Commission.

A delayed response by the Commission in plenary session, a further two years on, with the Bruges Resolution on the Use of Force adopted on 2 September 2003, has been followed by the Bureau's decision, at Krakow in September, 2005 to reconstitute the 10th Commission with a somewhat similar overall mandate but one divided, for purposes of its fulfillment, into four separate and distinct sub-sections each with its own separate *rapporteur* and its own separate substantive law mandate. There are some risks that this break-down of the original, comprehensive mandate into the separate and distinct compartments may involve an essentially artificial decision of a legal problem-area whose components have tended to be treated by the main political players involved as alternative or interchangeable for purposes of development and projection of their own legal claims. At a certain point in time, it may be helpful or necessary for the Commission's four sub-sections and their separate *rapporteurs* to attempt some overall synthesis of the legal claims advanced and the legal solutions offered in the main problem-situations of recent times, in particular the NATO-based armed intervention against the rump Yugoslavia in 1999, and the invasion of Iraq in 2003.

(2) **Doctrinal source material:** When you have been so exhaustive in your presentation of the doctrinal sources, particularly recent (*post*-September 11, 2001) literature it may seem like piling Mount Pelion on Ossa to suggest now, an apparent oversight. I will take the opportunity of citing Julius Stone's prescient examination, in 1958, (a full four years before the Cuban Missile crisis of 1962), and his return to the same thesis in 1961, (one year before that same crisis), of the case for preventive self-defence action against another state's nuclear weapons if they are clearly primed and ready to be fired and

waiting only the command signal to be fired. (Stone, *Aggression and World Order* (1958), pp 99-100; Stone, *Quest for Survival. The rôle of Law and Foreign Policy* (1961), p. 47. The persuasive authority of legal doctrinal argumentation advanced *before* the event and not as *ex post facto* rationalization is clear: there is no element in play of what George Scelle categorized as “dédoulement fonctionnel” In the same vein, in the immediate aftermath of the Cuban Missile crisis, Covey Oliver advanced from the Stone thesis the concept of “anticipatory, collective self-defence” under Article 51 of the UN Charter. This concept, and Stone and Oliver’s reasoning as to it, were seriously discussed at the Annual Meeting of the American Society of International Law in 1963, and not seriously contested in the Soviet legal literature in the emerging Peaceful Coexistence phase of the Cold War era that followed on the peaceful resolution of the Cuban Missile crisis. The further elaborations or refinements of that particular doctrine, which are noted in the Provisional Report as to Self-Defence, do not have the same legal *cachet* provided by the testing experience of running the gauntlet of intensive Soviet-Western inter-Bloc legal exchanges and critical debate during the still difficult transitional period of the middle and late 1960s. These latter-day ventures in analogical extension of the original anticipatory self-defence concept, as developed by Stone and Oliver and refined in their early writings – one refers, now, to what the Provisional Report identifies as “interceptive”, “reactive”, and especially “preemptive” self-defence – could perhaps have gained by being submitted to the appraisal and judgment of Commission members, according to classical *Institut* procedures, in responses to a clear and precisely formulated set of questions in a Commission Questionnaire.

(3) **State practice as primary source.** The 10th Commission, as already noted, was created in 1999 in the immediate aftermath of the NATO-based armed intervention against the rump former Yugoslavia, and following on some debate in national Parliaments and similar public for a of NATO member-states, both before and after the actual invasion and its high-level bombing attacks, as to the legal grounds and basis for that action in contemporary International Law. This material is now fairly readily available in public source materials – Parliamentary Hansard reports and the like - as to the Kosovo crisis. It as frequently cited and taken as point of departure for negotiations and discussions and debate over the legal grounds to be offered for later armed intervention against Iraq, whether joint collective action or unilateral. As in the case of the political run-up to the armed intervention against rump Yugoslavia, there was a considerable period of advance time – more than a year before the actual intervention against the former Yugoslavia in 1999, and eighteen months in the case of Iraq invasion in 2003, during which such military action and legal justifications for it – were directly canvassed and discussed and debated, in Parliamentary and also other public

fora. Statements of heads-of-state or heads-of-government, in this particular context, in legal explanation or legal rationalisation of their own state's military action or non-action, must rank as primary source materials as to the proffered legal grounds when adopted by the state concerned. They might, with advantage, now be studied as such. These legal sources as to Canada are substantial, as to both the 1999 and 2003 armed interventions. Even more interesting in regard to the Iraq invasion, might be any similar public records as to the legal positions taken by Chile and Mexico in the Security Council negotiations and debates preceding the Iraq invasion, since these states' legal positions were clearly significant in the final political disposition of the tripartite draft Resolution that had sought a prior Security Council authority and mandate for what would become the March 2003 "unilateral" armed action against Iraq.

DELIBERATIONS DE L'INSTITUT

Troisième séance plénière Lundi 22.10.07 (matin)

La séance est ouverte à 9 h 40 sous la présidence de M. *Lee*.

The *President* invited Mr Roucounas to present his report on the work of the Sub-group on self-defence of the Tenth Commission.

Mr *Roucounas* presented a summary of his report and of his provisory conclusions :

10. Article 51 as supplemented by customary international law is sufficient to address the issues relating to the exercise of the right of self-defence. However, in order to enhance the functional character of the normative concept it is advisable to attempt some clarifications in controversial issues (in particular regarding armed attack, weapons, imminence, non-State actors.).
11. The rules (principles, requirements) of necessity and proportionality are indispensable components of the existing normative framework of self-defence.
12. The right of self-defence is set in motion in case of actual armed attack or manifestly imminent armed attack (interceptive self-defence), as long as the Security Council does not take effective measures necessary to maintain the international peace and security.
13. The various doctrines of “preventive” self-defence (beyond actual or manifestly imminent armed attack) do not find sufficient basis in positive international law.
14. In case of alleged threat against a State, the Security Council is competent to determine the action to be taken.
15. The armed attack triggering the right of self-defence shall be of a certain degree of gravity. Acts implying use of force of lesser intensity can, under the conditions enunciated by the International Law Commission, trigger counter-measures by the victim State. It is understood that the latter exercises police actions within its territory.

16. The type of weapons used in the armed attack is relevant to the exercise of the right of self-defence, in particular for the qualification of the armed attack and the triggering of the reaction.
17. In case of an armed attack against a State the right of self-defence should be coupled with multilateral action, in the framework of international institutions. In this respect it is indispensable in the first place to enhance the role of the Security Council for safeguarding the international peace and security. The adoption of measures by the Security Council could serve as an alternative to the right of self-defence, but in practice sometimes the two courses of action are intertwined.
18. The tendency of the Security Council to combine the right of self-defence, in particular collective self-defence, with measures of collective security, enhances the role of the United Nations.
10. If an armed attack by non-State actors against a State occurs, the following situations could set in motion the application of Article 51 as supplemented by customary law:
 - If a non-State actor launches an armed attack at the “instructions, directions or control” of a State, the latter can be the object of reaction in self-defence by the attacked State;
 - The Security Council shall be activated in case the non-State actor launches the armed attack from, or prepares an armed attack in, an area within the jurisdiction of a State, either without “instructions, directions or control” of the host territorial State, or under unverifiable conditions, the State from which the armed attack is launched has the obligation to cooperate with the Security Council, and, upon request, with the victim State.
 - in case the armed attack by a non-State actor is launched from an area beyond the jurisdiction of any State, the victim State exercises forcible action in that area against that non-State actor.
12. The right of self-defence can also be exercised by and against an international organization, provided that the conditions set out by international law are met. In such case the issue of attribution of actions to a State may also arise.

He explained that the report was divided in two, dealing firstly with the generalities of State-to-State self-defence and, secondly, with self-defence in reaction to non-State actors. While there remain divergences of opinion, there is sufficient practice of States, the United Nations, and International Court of Justice case-law to confirm the central importance of Article 51 of the Charter of the United Nations. The threshold for triggering self-defence is an armed attack, which is more restrictive than a mere use of force. Additionally, the

armed attack must achieve a certain gravity. This element of gravity is not contained in the Charter itself and the requirement of the ICJ for gravity has been criticised for weakening the prohibition on the use of force and encouraging States to engage in low-level uses of force. The report follows the case-law of the ICJ, and sees the element of gravity as relevant to the condition of proportionality in the response of the claimant State. Where the gravity of force is insufficient the State may respond with action within its territory and employ non-forcible countermeasures, as set out by the International Law Commission's Articles on State Responsibility. The response of the victim State must observe the principles of necessity and proportionality. Despite not appearing in Article 51, these principles are clearly established in customary international law. Proportionality may present some difficulty in that it begs the question: proportionate to what? One body of opinion suggests proportionate to the injury inflicted, while another suggests that a response must be limited to what is necessary to repel or forestall an attack. Additionally the ICJ's *Oil Platform* judgment held that self-defence must be directed against a legitimate target rather than randomly. This is itself an example of the influence of *jus in bello* on *jus ad bellum*.

The report highlights the importance of the establishment of material facts in the lead-up to the exercise of self-defence. A suggestion for the establishment of a steering committee of experts for the assessment of facts at the UN, however, was not supported by members of the Sub-group. The report underlines that, where States fail to notify the Security Council of the exercise of the right to self-defence, this may indicate whether the State's claim is genuine or not. The role of the Security Council in self-defence is problematic where it fails to act or does not specify the legal basis for its action, or where the Security Council qualifies how the victim State may react or authorises action concurrently with the victim State. The report underlines that the role of the Security Council should not merely act as an alternative to individual self-defence but also enhance it with the collective dimension.

There is some difficulty with the terminology used to delineate certain types of self-defence: "reactive", "interceptive", "preventive", and "pre-emptive". These are often confused and some are used interchangeably by governments and commentators. The report sets out the following understandings. "Reactive" self-defence is taken to mean a response to an actual armed attack. "Interceptive" refers to a response to an armed attack which has already begun but not been consummated. "Preventive" self-defence includes both "anticipatory" and "pre-emptive" self-defence. "Anticipatory" self-defence refers to a response to a threat of but no actual armed attack. It is not based on an attack being imminent. "Pre-emptive" self-defence refers to a response to the possibility of the use (though not the direct threat) of weapons with devastating capabilities such as nuclear, biological and chemical weapons. The position

must be reported to the Security Council which has sole competence to determine what action will be followed. The “pre-emption” doctrine widens the idea of threat, disregards the need for imminence and goes beyond both Article 51 and customary international law. Another issue raised in the report is the implication that technological advancements in weapons may have on the qualification of an armed attack. This is particularly pertinent to self-defence in relation to non-State actors. The report also refers to certain problems related to collective self-defence, including the conditions necessary and its relationship with Security Council action. The findings relating to self-defence of States relate equally to self-defence by or against an Intergovernmental Organisation.

Regarding self-defence against attacks by non-State actors, the following issues are dealt with by the report. First, an armed attack against State A by non-State actors organised, instigated or assisted by State B (irrespective of whether State B is also the host State); second, an armed attack against State A by non-State actors sent by State B in order to assist State C; third, an armed attack by non-State actors acting “independently”, which may originate either from within the territory of another State, or from an area beyond any State’s jurisdiction. Despite the discrepancy between recent Security Council practice and the ICJ’s Opinion on the *Wall*, it would appear that doctrine and practice support the position that an armed attack, triggering self-defence as contained in Article 51, can be carried out by a non-State actor. In the case of non-State actors operating on the “instructions, directions or control” of another State, the ILC’s Articles on State Responsibility may shed light on issues of attribution. In the case of preparations for an armed attack or an ongoing armed attack, irrespective of whether these can be attributed to the State, the Security Council must be seized and activated. Further, the State from which the armed attack is launched or prepared is under an obligation to cooperate with the Security Council, and by the victim State if so requested. Finally, in the case of armed attack by a non-State actor launched from an area beyond the jurisdiction of a State, the victim State may respond with force against the non-State actor. The report puts forward eleven conclusions to act as the basis for further discussion. The central idea is that the conditions and limits of self-defence must be clarified, while promoting and enhancing a multilateralist approach.

The *President* congratulated Mr Roucouas and was pleased that the point of departure for the report was that the use of force was prohibited and that humanitarian intervention and self-defence should be seen as exceptions to this rule which had to be justified. It was also noted Article 51 of the UN Charter was used as a basic starting point for the exercise of self-defence. It was further noted that Part Two of the report on the use of force by non-State actors was of great interest. The floor was then opened for general debate.

Mr *McWhinney* noted that the preliminary report had been completed in December 2006. The report in its current form had since benefited from the exchange of views between the members of the Sub-group which had been incorporated. It was put forward that there is some artificiality in splitting the issue of the use of force into four distinct sub-groups because the matters that they deal with are all interrelated. Many of the observations put forward during the debates on the different reports are of relevance to each other. As Mr Schwebel had pointed out in the debate on humanitarian intervention the previous day the time is not really ripe now for codification because the law is not sufficiently developed in this area. It should have been noted in the debates on humanitarian intervention that Latin America made a considerable contribution to the law in that area, in particular the regional doctrine known as the Calvo clause. Further, Alejandro Alvarez – a Chilean – who served as a judge on the ICJ after Second World War had also made important jurisprudential contributions. It was also Latin American States that had contributed Article 2(7) to the UN Charter, in the face of concern expressed by the Great Powers, motivated by a concern that force should not be used against them as a means of resolving disputes.

Finally, referring back to yesterday's debate on humanitarian intervention, it was put forward that the UN Security Council and General Assembly were not able to find that massive violations of human rights violations actually constitute a threat to peace. It was also noted that the debate within the Security Council regarding the potential authorisation of the use of force in Iraq was informed by lessons learnt from the prior intervention in Kosovo. NATO had decided to bypass the UN Security Council and General Assembly on the basis of a right to protect. However, NATO was not involved in the delicate negotiations that wound up the situation in Kosovo. Before Kofi Annan worked on the issue of the right to protect there existed a lacuna over the question of who decides when to take action and on what criteria. When the issue of self-defence and weapons of mass destruction in relation to Iraq arose in the Security Council there was a retreat or rearrangement of legal positions that conformed to the earlier advice from foreign ministries' legal divisions that had been ignored in relation to Kosovo. There is a worrying tendency of governments to bypass or ignore the legal division of their respective foreign ministries. Some thought should be given to the degree that governments heed or ignore their own legal divisions when formulating foreign policy.

One should keep in mind that when the Security Council does not act this may be because it does not actually feel that it has grounds to do so. It is the case that the role of the veto in paralysing collective action is exaggerated as a political issue. In this sense it should be noted that a draft motion authorising the use of force was presented to the Security Council but had the support of only three

members and subsequently lapsed. Thus the veto is not a genuine controlling factor in decisions in this area.

It was suggested that attention should be paid to the influence of new State practice and custom. Of interest are studies conducted by parliamentary committees of the United Kingdom and Canada on what was decided in the Security Council and the motivations behind these decisions. What has emerged as the post-Kosovo stance is that any application of the use of force to solve international problems should be made through the UN Security Council or through the UN General Assembly where there is blockage through veto, recognising that action authorised by the General Assembly requires a two-thirds majority of votes. If one is unable to achieve a two-thirds majority then this should prompt a re-examination of whether the decision sought is actually a valid one.

The importance of fact-finding was underlined, especially in relation to anticipatory self-defence. Military action in Kosovo and Iraq was subject to significant periods of political and logistical preparation at the national and international level. In relation to Iraq the investigative work of the commission of Hans Blix provides an excellent example. The fact that Hans Blix asked for more time, and was ultimately unable to find any weapons of mass destruction was crucial to the decision of many States not to agree to authorise the use of force. Fact-finding becomes crucial, therefore. Hans Blix's commission provides a good model for proposing a standing UN fact-finding body. The work of voluntary groups also highlights the importance of fact-finding, such as the role of groups within Iraq reporting on the effect of UN-authorised sanctions before the invasion. By separating the function of fact-finding from the function of determining whether force should be authorised one prevents States becoming judge, jury and high executioner in their own cases.

There is a worrying tendency to suggest that simply by establishing a body that is international in composition – such as a coalition of the willing – one gains international legal authority. This cannot be the case. For instance NATO has authority to act in Afghanistan because it is authorised to do so by the UN. It has to observe those limits.

Finally, it would be extremely useful to see governments expressly propounding the legal bases for their actions in order to have clearer State practice in this area. To a degree these issues may come out during domestic parliamentary discussions.

Mr *Koroma* congratulated Mr Roucouas and the Sub-group. The report recognises that the role of the Institut de Droit International is to exercise influence by promoting the rule of law rather than advancing particular political ideologies. The report reaffirms the right of self-defence, within the framework of multilateralism. That is, that self-defence should be exercised collectively

through the Security Council and General Assembly rather than unilaterally. Wherever a State acts in self-defence this should be reported to the Security Council. If the Security Council goes on to mandate or authorise force then whatever is done must remain within the framework it sets out. There should also be monitoring to verify that a mandate is not exceeded. Agreeing with Mr McWhinney, the importance of the role of the legal division in foreign ministries and in the UN should be emphasised.

Slicing self-defence into different categories, such as anticipatory and pre-emptive can be problematic and it might be advisable to revert to basic principles. Simply put, whenever an armed attack occurs, there are certain consequences. Just as when resorting to self-defence in response to an actual armed attack, the Security Council should be informed whenever self-defence is employed in relation to an attack which is merely anticipated. This would ensure that Article 51 is not undermined.

The blending of self-defence and collective security must also be seen in the context of the Security Council. Caution should be exercised in relation to retrospective authorisation by the Security Council. States should not be given an incentive to “go it alone” and seek approval after the event. Rather, the mandate and authority for using force should come from the Security Council.

It should be underlined that States may only engage in self-defence where there is a grave violation. That is, “pin-prick” attacks should not justify the invocation of self-defence. The Institut de Droit International should send the message that there is a right to exercise self-defence but that it must take place within the existing legal order which embraces both the Security Council and the General Assembly.

Mr *Amerasinghe* posed the question of where within the scheme of self-defence one would place the use of force in favour of the protection of one's nationals, as it does not appear to feature in the report. It has been acknowledged by Franck (among others) that an attack on one's nationals abroad can be considered as a use of force which, if grave enough, can be responded to with self-defence. The view was advanced that this behaviour should fit under Article 2(4) of the UN Charter, and that it could trigger Article 51. However some discussion was necessary on how the use of force against a State in response to an attack against its nationals abroad should be regarded.

Mr *von Hoffmann*, speaking from a private law perspective, noted that self-defence is a concept that is originally one of private law: when one citizen is attacked by another he can use force to protect himself from the attack. Even though there is a monopoly on the exercise of power in favour of the international community in international law, this should not diminish the right of unilateral defence. In private law an individual exercising self-defence is not required to give a calculated and prudent response, and may act excessively

without risk of being penalised. The presumption is that the attacker is in the wrong. The report seems to attack this archaic right of self-defence and place responsibility for supervising and authorising the exercise self-defence onto the Security Council. One should take into account that the Security Council is not a completely independent or efficient body. Therefore one should be reluctant to reduce this archaic right to such rigorous supervision by this body.

M. *Dominicé* remercie le Président et indique que le rapport est extraordinairement riche et dense.

M. *Dominicé* souligne l'intérêt de la conclusion orale du rapporteur, appelant un retour au multilatéralisme. Il note la mutation de l'esprit de la légitime défense et insiste sur le fait que ce principe est une exception à l'interdiction du recours à la force. Si la légitime défense vise à la punition ou à la vengeance, elle est contraire au droit.

M. *Dominicé* met l'accent sur l'affrontement entre l'action unilatérale et l'action collective au nom de la communauté internationale. Il considère que l'action unilatérale l'emporte de plus en plus et qu'il faut réagir à cette tendance. Il attire l'attention sur le fait que bientôt il n'y aura que la couverture de la légitime défense. Il est d'accord avec la conclusion du rapporteur et bien qu'il reconnaisse qu'il y a des questions techniques importantes, il souhaite que la perspective générale demeure d'éviter l'unilatéralisme.

M. *Ranjeva* remercie le Président et se félicite de la qualité du rapport et de la présentation orale du rapporteur.

Il entend faire deux observations. La première concerne des points de détails et la seconde des questions de fond.

En ce qui concerne le premier point, une question sémantique se pose, qui tient à l'utilisation dans la version anglaise du terme « armed attack », et dans la version française, du terme « agression ». Les deux notions participent d'une même finalité, mais il se demande si on n'est pas en train d'envisager deux aspects de la même réalité.

M. *Ranjeva* souligne que l'agression couvre l'attaque d'un Etat contre un autre, alors que l'attaque armée envisage des activités dont l'objectif peut être de porter atteinte à un Etat qui peuvent résulter de l'action des groupes non étatiques. Il souligne le développement des conflits transfrontières et d'autres formes d'attaques qui sont difficiles à qualifier d'agression au sens strict. En outre, l'attaque armée vise des emplois d'armes moins important que l'agression qui ne justifient pas la mise en mouvement du mécanisme de légitime défense. M. *Ranjeva* insiste sur le fait que vouloir rechercher une différence de degré entre ces deux concepts serait excessif.

M. Ranjeva analyse ensuite le rapport entre proportionnalité et nécessité. Il se demande si cette corrélation a un sens pratique. En cas d'agression, la réponse de l'État est normalement foudroyante. Dans ce cas, il s'agit d'une situation qui est presque en dehors du droit. Penser en termes de gravité peut paraître trop subjectif. On envisage certes des mécanismes de contrôle et ceux-ci sont utiles, mais ces institutions sont difficiles à mettre en mouvement dans les relations internationales. Dans le cadre du rapport entre proportionnalité et nécessité, la légitime défense représente la seule idée de guerre juste. Cette notion de guerre juste a une double signification : la guerre doit être conforme à la règle du droit et aussi équilibrée. Il y a un lien qui doit subsister entre les notions d'équilibre et de justice.

Pour M. Ranjeva, le cœur du problème tient, d'une part, à la licéité/légalité en matière de légitime défense et, d'autre part, au problème de la responsabilité. Il rappelle que la légitime défense s'inscrit dans la perspective de renonciation à la guerre et de sécurité collective. Elle ne peut pas être considérée comme autonome et elle doit être vue comme une institution au sein du mécanisme de sécurité collective. Cette sécurité collective présente une dimension multilatérale justement rappelée par M. Dominicé. Ce qui devrait être stigmatisé comme le grand danger est le multilatéralisme de couverture ou de complaisance.

M. Ranjeva considère ainsi que la responsabilité est le secteur où la contribution de l'Institut peut être la plus importante. Pour cela, M. Ranjeva propose dans le cadre de la responsabilité de faire une distinction entre d'une part la constatation de l'illicéité et de l'illégalité au manquement de la règle du droit, telle qu'elle est définie à la Charte et, d'autre part, la mise en œuvre de la sanction c'est-à-dire de la « punition ».

En conclusion, M. Ranjeva estime que, pour que l'Institut puisse continuer à apporter sa contribution d'une manière concrète, le vrai problème est de savoir comment réaliser efficacement la protection et la survie de l'Etat dans le cas de ces opérations.

Mr *Dinstein* congratulated Mr Roucouas for such a complete report. He emphasised that self-defence need not be collective (i.e. multilateral) but can be – and often is – individual (i.e. unilateral). In this case, unilateral use of force is expressly permitted by the Charter, but only in response to an armed attack and as long as the Security Council does not stop it. If the Security Council does not adopt a binding resolution decreeing that self-defence cease and desist, a State is entitled to continue to use force in self-defence in response to an armed attack. However, a reference ought to be added to the obligation to report the exercise of self-defence to the Security Council.

In relation to Conclusion 2 of the report, it should be recalled that customary international law contains three and not two conditions with regard to the

exercise of self-defence. These are: necessity, proportionality, but also immediacy. It is the last of these which seems to be forgotten since the majority judgment of the ICJ in the Nicaragua case used only the first two in its judgment and this mistake has simply been repeated through reiteration of the Nicaragua formulation in later judgments.

In relation to Conclusion 3 of the report, the requirement that an interceptive self-defence must be in response to a manifest armed attack is incorrect. Mr Dinstein reminded the Rapporteur that, whereas Sir Humphrey Waldock used the word “imminent”, he had coined the word. As the author of the term, he would therefore like to point out that interceptive self-defence usually came about in response to an embryonic armed attack which was, by definition, not manifest at all.

In relation to Conclusion 5, it must be underlined that no body other than the Security Council can respond to a threat to the peace. The word “only” should therefore be inserted after the comma. The second line should also be modified to reflect that only the Security Council may determine the existence of the threat as well as the action that should be taken.

In relation to Conclusion 6, Mr Dinstein pointed out that he was one of those who conceded the existence of a “gap” between unlawful use of force as per Article 2(4) of the Charter and an armed attack under Article 51. However, the gap should not be exaggerated. If the gap is a large one, it creates the dilemma reflected in the *Nicaragua* judgment. If one can respond to use of force that does not amount to an armed attack with forcible countermeasures that do not amount to self-defence, the outcome is quite absurd. Hence, the gap ought to be no more than a hiatus.

Conclusion 7 of the Report should be merged with Conclusion 6, in that the type of weaponry used will be inherently linked to the gravity of the attack. The fact that these two issues have been separated betrays some confusion between the *jus in bello* and the *jus ad bellum*.

With regard to Conclusion 10, it is submitted that the right to self-defence can clearly be exercised against non-State actors. The ICJ may have chosen to ignore this in the *Wall* Advisory Opinion but it is clear from the practice of the Security Council, NATO and the OAS following the attacks of “9/11” that an armed attack can be committed by non-State actors, and can be responded to by an act of self-defence. The question then becomes what form of response is permissible. Mr Dinstein believed in what he called “extra-territorial law enforcement”. Attention should be drawn to the separate opinions of judges Kooijmans and Simma in the *Armed Activities (Congo/Uganda)* judgment of the ICJ which referred to this subject. What this meant is that when non-State actors acted from within a foreign State that was unable or unwilling to act against them, the victim State could employ measures of self-defence within the

foreign territory, doing what the sovereign State should have done but failed to do.

Conclusion 10 refers to non-State actors launching an attack from a territory beyond the jurisdiction of any State. It must be questioned what kind of area is envisioned here. Surely this can only refer to outer space (which is currently not a practical possibility) or the high seas. In the case of the latter, such acts can be classed as piracy which is already regulated under the UN Convention on the Law of the Sea.

Finally with regard to Conclusion 11, it is not possible to point to any practice of self-defence being exercised against an international organisation. There was no need therefore to speculate about this highly theoretical and dubious scenario.

Mr *Gaja* congratulated Mr Roucouнас on his report. It was noted that the issue covered by Conclusion 11 on self-defence by an international organisation had previously been discussed by the International Law Commission in the context of circumstances precluding wrongfulness. The example there considered was when international organisations use force themselves and it was considered that an armed attack against UN forces would trigger the right to self-defence. While there might not be existing practice on this question it is not possible to rule out its occurrence in the future.

Regarding Conclusion 6 of the Report, it is acknowledged that the use of force falling short of an armed attack will not give rise to the use of self-defence within Article 51. However, this should not necessarily imply that the reacting State cannot use some measure of force in order to limit the use of force against it or to strike at its source. Surely, some minimal use of force should be permitted perhaps with a stricter application of proportionality and necessity and without the possibility of collective action. Otherwise this area is left open and unregulated.

In relation to Conclusion 10 and the use of force by non-State actors, reference should be made to the situation of non-State actors that are in partial control of the territory of a third State. Surely in this situation some limited forcible action should be permitted against non-State actors.

Mr *Sucharitkul* noted that the question of self-defence is a vast area with a lot of State practice. The criteria applicable to the exercise of self-defence have been used by States for centuries, and Article 2(4) of the UN Charter has not moved away from this. Indeed, the Charter is supposed to be representative of customary international law. The issue of the protection of citizens abroad, just as the protection of economic interests, is relevant to the use of force, but should be kept separate from self-defence.

Regarding responses to “pin-prick” attacks, one could draw on the practice of States such as Thailand, Laos, Myanmar and Cambodia where there are several low-intensity internal armed conflicts that spill over regularly into neighbouring States. Where such overspill occurs the relevant States have employed the principle of good-neighbourliness and examined the intention behind armed attacks. This involves the exercise of tolerance and restraint in relation to neighbouring States where the response is to disarm and neutralise those forces on their territories to avoid continuation of their armed activities. Accordingly, such action between warring factions on a third State’s territory is not treated as an armed attack meriting the exercise of self-defence.

Mr *Treves* thanked the Rapporteur and Sub-group for their report. Regarding the final part of the report on non-State actors it is possible to note that the difference between the approach of the ICJ and the approach of the Security Council may be attributed to their differing points of departure. On one hand the ICJ denies that self-defence can go beyond State-to-State relations, whereas the Security Council considers it can involve State and non-State relations. The ICJ regards the key issue to be the identity of the attacker, while the Security Council considers the identity of the attacked to be more important. One should note that self-defence as a concept exists not only in international law, but also domestic law, and as an abstract concept goes beyond the bounds existing in international law. In the case of terrorist acts, the relationship between the victim State and a terrorist group is only partially regulated by international law; domestic law also comes into play.

Linking terrorist activity to a particular State is problematic. This problem can be seen in the *Nicaragua* case, the *Tadic* case and the *Genocide* case. The report itself helpfully refers (at paragraph 128) to the General Assembly’s resolution adopting the Friendly Relations Declaration of 1970 underlining that the ICJ considered it to represent customary international law. The relevant provision notes that States should not acquiesce to organised terrorist acts in their territory directed at other States. Thus, acquiescence is itself a wrongful act giving rise to the responsibility of the State. However it is unclear whether this in fact places the acquiescing State in the same position as the terrorist group. Agreement was expressed with the last paragraph of Conclusion 10 of the report.

Mrs *Arsanjani* thanked the three Rapporteurs for tackling the use of force. Agreement was expressed with Mr Gaja’s view regarding Conclusion 6 that some use of force should be permitted to a reacting State when it is responding to an use of force that is short of an armed attack. Countermeasures, especially as defined by the International Law Commission to exclude the use of force, are insufficient.

Agreement was expressed with the result arrived at by Mr Dinstein regarding Conclusion 11, though not his reasoning. It is problematic to deal with self-

defence by an international organisation in the context of self-defence by States. However the problem is not a theoretical one since self-defence arises regularly for peacekeeping forces authorised to use force under Chapter VII of the UN Charter. Here the issue is dealt with as one not of self-defence but rather as one of implementation of a mandate. That is to say, if a peacekeeping force is authorised to use force in the execution of its mandate, any use of force it engages in, even if in response to an armed attack, is expressly authorised under the Charter, so the issue of self-defence does not arise in the same way.

Mr *Dinstein* clarified that he did not question that international organisations themselves have and indeed do exercise the right to self-defence. Rather, he was doubtful of the right to exercise self-defence against an international organisation. That is: is it likely that a State is subject to an armed attack by an international organisation as such, in circumstances in which it exercises the right to self-defence against the organisation as such (as distinct from its component States)?

Mr *Schwebel* congratulated the Rapporteur on the report. It was noted that during the Cold War the main problem was not one of armed attack in the traditional sense. Clear instances of armed attacks against States have been dealt with adequately by the Security Council, such as Korea and Kuwait. Rather, during the Cold War the issue was the indirect use of force employed by well-known sources, as exemplified by the Nicaragua case. It was put forward that in that case the ICJ had failed in law and fact. The USA had simply misrepresented the facts before the ICJ. The law that the ICJ laid down on indirect aggression was and still is wrong. To the extent that the Institut de Droit International embraces it by any statement, he would oppose this. A victim of indirect aggression should not be limited to non-forceful countermeasures on its own territory and there should be no preclusion of a third State assisting the victim State. Confidence in the ICJ as fact-finder and law-giver in this contentious sphere had not been enhanced by its conclusion in the Opinion on the *Wall* that Article 51 was confined to States and did not extend to non-State actors. This conclusion is at variance with Security Council and NATO practice as well as public opinion. Surely the Charter should cover such enormous breaches of international peace.

Conclusion 1 of the Report was unobjectionable unless it endorsed what the ICJ has concluded the international law to be in this sphere. Agreement was expressed with Mr *Dinstein's* point on Conclusion 2 regarding immediacy. Agreement was expressed with Mrs *Arsanjani* in relation to Conclusion 6. Regarding Conclusion 7, it should be noted that the type of weapons used will not necessarily be relevant to determining whether the scale of the use of force is sufficient to constitute an armed attack. In the attacks of "9/11" it was merely knives that were used to slaughter the crews of the planes which were then

converted into effective missiles. The sort of weaponry that can be used in an armed attack can range from the most primitive to the most advanced and Conclusion 7 does not really advance things very much in this regard. Regarding Conclusion 8 it was submitted that the right to self-defence must be recognised as individual as well as collective.

Conclusion 10 seems to reject the ICJ's opinion concerning attacks by non-State actors while supporting that of the Security Council. The sub-paragraphs to Conclusion 10 do not address what right of self-defence might exist in relation to a territory that is somehow linked to but factually irrelevant to the actual attack. For instance, in relation to "9/11", Afghanistan's then government was responsible insofar as it sheltered Al-Qaeda. However there were other territories involved that could not really be thought of as the sources of the attack. Sixteen of the nineteen attackers were of Saudi origins, but this does not implicate Saudi Arabia as an attacking State. Neither is Germany an attacking State by the mere fact that part of the planning of the attack took place in Heidelberg. The elusive nature of terrorism makes it difficult to assign responsibility to any State and perhaps Afghanistan in that situation is exceptional. It was suggested that Conclusion 10 be recast to address this problem.

Mr *Feliciano* congratulated the Rapporteur and Sub-group for the report. The importance of the objectives of the reacting State or claimant of self-defence was underlined. Clearly, the permissible objective of the claimant should be quite limited in character to stopping or repelling the armed attack. If the objectives go further then one could doubt the legitimacy of the claim to self-defence. It could lead to situations where the claimant goes beyond repelling the attack, to occupying the territory of the State whence the attack came and this would result in difficult problems. Of course, this assumes that the objectives of the attacking State are themselves also quite limited. Further, it is logical that the notion of stopping or repelling an attack might involve the claimant State seeking to create a situation where repetition becomes improbable. However, the requirement that the claimant State's objectives be limited to stopping or repelling an armed attack should be contrasted against the much broader objective of unconditional surrender that was prevalent during the Second World War. The latter should no longer be treated as acceptable.

It was noted that there are particular problems in applying the criteria of self-defence to non-State actors. It is extremely difficult to know what their objectives are since these tend to be concealed until the last moment, analogously to groups fighting guerrilla warfare. Analysis of a non-State actor's objectives is also problematic since they tend to be quite broad and include the changing of the social and political environment of the target State. Further, the notion of proportionality is more difficult to apply in this context because of the

consequential damages. That is, the damage necessarily sustained by the civilian population of the State whence the attacks originated. In this sense the utility of the concept of reciprocity in relation to non-State actors is limited. One should note that frequently the military response of a reacting State tends to be preceded by surveillance and gathering of intelligence through the use of technologically sophisticated devices or simple word of mouth. The information gathered by these operations should be shared by the claimant State in order to justify its exercise of self-defence. If this is not the case it may give rise to adverse inferences as to the reality of the claim of self-defence.

M. *Momtaz* remercie le Président et félicite le Rapporteur pour son excellent rapport.

M. *Momtaz* indique qu'il a trois remarques à faire. La première concerne la question du seuil présenté au point 6 des conclusions. Cette disposition peut en effet concerner des Etats qui ont de « mauvaises » intentions à l'égard d'autres Etats, et qui pourraient notamment organiser un coup d'État pour que le seuil de l'agression armée soit atteint et ainsi empêcher l'exercice de la légitime défense. M. *Momtaz* considère que cette situation n'est pas réaliste et il propose que le paragraphe 6 fasse référence à la saisine du Conseil de sécurité. Il souligne que d'autres solutions peuvent être envisagées et que la question a été évoquée par le juge *Simma* dans l'affaire des *Plates-formes*.

La deuxième question concerne la nature des armes utilisées pour mener à bien une agression armée. Cette question est évoquée au point 7 des conclusions. M. *Momtaz* pose la question de savoir si une agression armée menée avec des armes de destruction massive autoriserait l'Etat victime de recourir à son tour aux mêmes armes de destruction massive. Si c'est le cas, il en résulterait un certain brouillage entre le *jus in bello* et le *jus ad bellum*. Ce qui est regrettable.

La troisième question concerne l'agression qui serait menée par une entité non étatique, sans pouvoir être imputée à un Etat. Au point 10, paragraphe 2, des conclusions générales, on demande à l'Etat sur le territoire duquel des groupes armés sont installés et qui mènent des actions hostiles contre un autre Etat, de coopérer avec le Conseil de sécurité. M. *Momtaz* s'interroge sur la portée de cette obligation. Il considère que le scénario évoqué est proche de celui qui a été à l'origine du conflit opposant la République Démocratique du Congo et l'Uganda. M. *Momtaz* signale que, dans ces situations, l'Etat ne dispose pas de moyens pour contrôler ces actes hostiles et il se demande comment un tel Etat pourrait coopérer avec le Conseil de sécurité.

Après avoir chaleureusement félicité le Rapporteur, M. *Remiro Brotons* déclare partager le point de vue du juge *Ranjeva* et souligne la nécessité d'une intégration de la notion de légitime défense au système de sécurité collective. Il attire l'attention sur la situation d'un Etat qui n'est pas membre des Nations Unies et qui serait engagé dans un processus séparatiste.

En pareil cas, M. Remiro Brotons se demande si un Etat *de facto* non reconnu par l'Etat d'origine pourrait invoquer la légitime défense s'il est attaqué par cet Etat d'origine. Il se demande également si le recours à la force par cet Etat pour préserver son intégrité territoriale, ce qui est son devoir constitutionnel, pourrait être considéré comme une agression armée par suite de la reconnaissance, éventuellement prématurée, d'États tiers. Et ceux-ci pourraient-ils transformer en un exercice de légitime défense collective leurs actes d'intervention ou d'ingérence ?

M. Remiro Brotons estime que la légitime défense préventive n'a pas de fondement en droit international et il propose la suppression du mot 'suffICIENT' au point 4 du projet de conclusion.

Il souligne par ailleurs que certaines situations considérées comme relevant de la légitime défense devraient être en réalité considérées comme participant d'une action de police de l'Etat hors de son propre territoire, ce qui pourrait être admis à des conditions très strictes. Si c'était le cas, le point 10 devrait sans doute être reformulé, voire supprimé.

Mr *Tomuschat* expressed his gratitude to the Rapporteur. With regard to Conclusion 10, there appeared to be widespread opinion that the ICJ was wrong to say that there existed no right to self-defence in relation to attacks by non-State actors. It was highlighted that not all the acts of non-State actors are necessarily terrorist acts, as terrorist acts tend to be indiscriminate. To think of all non-State actors as necessarily using terrorist tactics was inaccurate and the terms "terrorist" and "non-State actor" should not be used interchangeably. Reference to non-State actors that are under the "control" of the State should be clarified. There exists a danger of confusing the simple fact of finding oneself within a State's jurisdiction with being under its "control" for the purposes attribution. The Conclusions should reflect this.

The idea of "interceptive" self-defence contained in Conclusion 3, was originally directed at preparations for an armed attack where such that an attack seemed imminent. However, Mr Dinstein seems to suggest that "interceptive" means "embryonic" which would imply that a State may exercise self-defence at a much earlier stage. This goes too far in opening the door to abuse of the right of self-defence, as well as meaning that there was no difference between the types of self-defence listed in Conclusions 3 and 4. If the Institut de Droit International were to adopt this approach it would effectively endorse the doctrine of preventive self-defence as expressed by the USA. While support was expressed for the idea of "interceptive" self-defence where the attack was not "imminent" but already in preparation, "interceptive" should not be interpreted as "embryonic".

Mr *Roucounas* explained that "interceptive" in the report is explained not as embryonic, but as a more developed stage, a "commencement d'exécution".

Mr *Dinstein* clarified the meaning of “interceptive”. Originally he had used the phrase “crossing the Rubicon”, giving the example of shooting down war planes once these had been launched but before they had reached the State they were to attack. In a later edition of his book, he used the expression “nipping an armed attack in the bud”. Clearly, there must be a “bud” to begin with. Thus, if the armed attack is still merely notional, this will not bring interceptive self-defence into play. There must be some indication that an armed attack has already been launched. This is what differentiates “interceptive” from so-called “pre-emptive” or “preventive” self-defence.

Mr *Hafner* noted that the legal basis of self-defence is customary international law, and that the Charter sets out when a State can refer to this right. It was asked whether the report reflects this situation. In particular could the right to self-defence override Article 103 of the Charter? For instance, in the case of the arms embargo on Bosnia, was Bosnia entitled to breach the embargo to obtain arms as part of its right to self-defence? Regarding Conclusion 6, agreement was expressed with Mr Gaja and Mrs Arsanjani regarding countermeasures. It was asked whether countermeasures as they feature here were meant to reflect what had been inserted into the ILC Articles on State Responsibility. Regarding Conclusion 10, agreement was expressed with Mr Tomuschat on the issue of “control”. This term should be given the same meaning as in the ILC Articles on State Responsibility. Thus a State should not be deemed to exercise “control” over non-State actors by mere virtue of their presence within its jurisdiction. There does appear to be a gap in the Conclusions in relation to armed attacks by non-State actors, in particular where such attacks are not directed or controlled by a State. Finally, Conclusion 10 states that the Security Council should be “activated” where an attack by a non-State actor occurs. This begs the question as to the identity of who is obliged or entitled to do this.

Mr *Reisman* referred to Conclusion 6 and paragraph 76 of the report. The ICJ in the *Nicaragua* case said that very minor incursions will not give rise to a right of self-defence, but only to recourse to the Security Council or non-forceful countermeasures. The presupposition in the judgment is that the Security Council can actually do something. Surely, in a situation where there is recurrent low-level military action against a State, and the attacking State takes no heed of Security Council calls to cease (or the Security Council simply fails to act at all), there must still exist a right to self-defence. No government would agree with Conclusion 6 as it currently stands. A current example of this is the PKK incursions into Turkey, in response to which the Security Council and Iraq have both failed to act. Turkey should have a right to self-defence in these circumstances.

Agreement was expressed with Conclusion 11. Some international organisations were created expressly for the purposes of employing armed force such as

NATO and the Warsaw Pact. Surely States have the right of self-defence in response to a use of force by an aggressing international organisation, for example Israel in response to an attack by the Arab League. At the same time, we have to ask if there is a right of self-defence against an enforcement action of the Security Council. In this situation it would seem that there is an obligation of compliance on the State and one cannot really claim a right of legitimate self-defence in those circumstances.

Mr *Koroma* agreed that the ICJ's judgment in the *Nicaragua* case and the Opinion on the *Wall* should be criticised, but wished to offer an explanation. The pronouncement of the ICJ that the right of self-defence cannot be exercised against non-State actors has to be seen as the ICJ saying that self-defence as it appears in the UN Charter is inherently a State-to-State phenomenon. Thus if a State acquiesces to or fails to exercise jurisdiction over a territory where the attacks of non-State actors originate, when the reacting State takes action, it will be acting against the territory of another State. The invasion of Afghanistan was not a case of self-defence against Afghanistan or Germany, but against the territory of Afghanistan. Similarly, the case of *DRC v. Uganda* dealt with the activity of non-State actors. Here self-defence was being exercised against these groups four thousand miles into the territory of another State. Were this an example of self-defence against the State itself, it would fail to satisfy the requirements of proportionality and necessity.

La séance est levée à 13 h 10.

Quatrième séance plénière lundi 22 octobre 2008 (après-midi)

Vice-President Lee welcomes the members and opens the discussion. He gives the floor to Mr *Ranjeva*.

Suite aux interventions qui ont eu lieu lors de la Session du matin, M. *Ranjeva* souhaite attirer l'attention du Rapporteur et des membres sur le problème, selon lui capital, de l'administration de la preuve en cas d'agressions ou d'attaques armées. D'une part, il souligne que les preuves apportées par les parties en conflit sont toujours orientées et subjectives, étant destinées à soutenir l'option de la partie qui les présente. Il y a donc une difficulté fondamentale en ce qui concerne l'établissement d'une preuve objective dans ce domaine profondément politique où les parties se livrent également des guerres médiatiques et psychologiques. Il suggère que l'Institut mette cette difficulté en évidence. D'autre part, sans revenir sur des questions théoriques relatives à l'administration de la preuve, il souligne qu'à l'occasion d'un débat judiciaire, ces questions factuelles sont soumises aux exigences habituelles en matière d'administration et d'évaluation des preuves. Certes, ces exigences varient selon les juridictions en cause et elles peuvent ne pas être les mêmes, que l'on soit par

exemple devant une juridiction pénale internationale ou devant la Cour internationale de Justice. A l'évidence, devant cette dernière, ce sont ses règles relatives à l'administration et à l'évaluation des preuves qui sont applicables. Il est souhaitable que ces différences procédurales n'aboutissent pas à des décisions contradictoires.

M. *Torres Bernárdez* félicite le Rapporteur pour les travaux de sa sous-commission et déclare partager la philosophie générale du rapport. Il souhaite ajouter quelques brèves remarques. D'une part, et ainsi que la Cour l'a souligné dans *l'affaire des plates-formes*, tout ne peut pas constituer un objectif lors d'une action en légitime défense ; ce que l'on pourrait appeler « the target of defensive action » mériterait peut être de faire l'objet d'un développement dans le projet de résolution. D'autre part, vu les exigences classiques de nécessité et de proportionnalité, il souligne que, même en situation de légitime défense, l'emploi de certaines armes, notamment de destruction massive, ne devrait pas être permis. Par ailleurs, il déclare marquer son accord sur l'inclusion, au titre de l'article 51 de la Charte, de la notion de « manifestly imminent armed attack ». Cette notion ne peut cependant pas couvrir la « preventive self-defence ». En ce qui concerne le sort à réserver aux acteurs non étatiques, il fait sien la proposition du Rapporteur. Enfin, il fait part de ses interrogations en ce qui concerne le paragraphe concernant la légitime défense « by and against » les organisations internationales. Selon lui, il faut se garder de certaines confusions terminologiques : si l'on parle d'organisations internationales dont l'objet est d'assurer la légitime défense collective de leurs membres, la question est alors seulement celle de la légitime défense collective de ces derniers. Par contre, il estime que la notion de légitime défense de l'Organisation des Nations Unies est quelque peu étrange puisque sa responsabilité est celle de la sécurité collective. Il termine son intervention en réitérant ses félicitations au Rapporteur pour un texte très équilibré qu'il estime pouvoir être adopté dès cette session de l'Institut.

Mr *McWhinney* said that the report did not address the question referred to the intervening international organisation. Regarding this matter, should the UN be considered as the only international organisation or other bodies should also be considered as such? He said that references made earlier to NATO, the Warsaw Pact, and other legal coalitions raised the question. For such reason, he stressed that it would be helpful to address the question in the final report. He added that he personally distrusted the equal treatment of the UN and other international and regional organisations.

Le *Secrétaire général* souhaite faire une remarque à titre personnel au sujet de la légitime défense des organisations internationales. Il doute sérieusement que les organisations soient en droit d'utiliser la force dans les mêmes conditions qu'un État. Selon lui, aucune règle de droit international ne le leur permet, les

Etats et les organisations n'étant pas à mettre sur le même pied à cet égard. Dans le droit interne, où la notion de légitime défense existe également en droit pénal, on voit mal par exemple qu'une société anonyme puisse comme telle exercer un tel droit. Compte tenu de ces difficultés, il suggère qu'une clause soit insérée dans la Résolution, indiquant qu'elle est sans préjudice des droits ou obligations des organisations internationales en la matière. Certes, il est certaines organisations, comme par exemple l'Union européenne, qui sont appelées à être progressivement substituées dans les droits et les obligations de leurs Etats membres. Ces cas demeurent cependant très exceptionnels, bien trop exceptionnels pour justifier que l'on s'y arrête en l'occurrence.

M. *Ranjeva* souligne que la question très délicate soulevée par le Secrétaire général n'a rien de théorique. Il rappelle à cet égard que la Serbie a mis en cause la responsabilité internationale des Etats membres de l'OTAN, faute pour celle-ci d'avoir un *locus standi* devant la Cour. Même si cette affaire n'a pas « prospéré » judiciairement, elle n'en démontre pas moins que l'emploi de la force par les organisations internationales soulève de graves difficultés.

M. *Vignes* souhaite appuyer ce que le Secrétaire général a dit à titre personnel.

Mr *Hafner* expressed that in view of the answer provided by the General Secretary, he felt compelled to make some additional points. He raised the question of a State that did not vote within a collective body in favour of the use of force in a legitimate defence act taken. He questioned what would be the solution; should such State be found responsible for the actions taken in accordance with the above-mentioned decision? He cited the *Behrami* case recently decided by the European Court of Human Rights, where a claim was made to France for torts caused by its soldiers as part of KFOR acting under authorisation by the Security Council. The holding of the case could be interpreted as meaning that international organisations may resort to the use of force. He stressed that the question is highly discussed within the International Law Commission and in the 6th Commission of the UN General Assembly.

M. *Marotta Rangel* souligne la haute qualité du rapport de M. Roucouas et revient sur les propos du Secrétaire général au sujet de la légitime défense des organisations internationales, qu'il déclare partager. Selon lui, il ne revient pas véritablement à l'organisation internationale régionale elle-même d'intervenir pour repousser une agression. Il cite à cet égard le Traité de Rio de Janeiro adopté en 1947 dans le cadre du système interaméricain.

Mr *Tomuschat*, in reference to what was said by the Secretary General, stated that when the Security Council gives a mandate to a peacekeeping force, it states that the units involved may defend themselves if attacked. They have a right of self-defence. This constitutes a standard formula. He considered this to be in the nature of the authorisation given to any peacekeeping operation.

Hence, he stressed that the question of self-defence of international organisations was not theoretical.

Parlant toujours à titre personnel, le *Secrétaire général* considère que toutes les interventions qui viennent d'être faites à propos de l'emploi de la force par les organisations internationales montrent qu'il faudrait pouvoir réfléchir à cette question de manière autonome. Il accepte bien entendu ce qu'a dit M. Tomuschat s'agissant du droit de légitime défense des militaires engagés dans des opérations de maintien de la paix. Selon lui, cette hypothèse ne relève toutefois pas de la légitime défense au sens de l'article 51 de la Charte puisque aucun emploi de la force entre Etats n'est en cause. Cette question relève plutôt d'un pouvoir de police, du maintien de l'ordre. Il estime par ailleurs que la remarque de M. Hafner est tout à fait symptomatique des difficultés qui se posent et qui devraient être traitées distinctement et non pas dans un texte relatif à la légitime défense des Etats. Pour reprendre sa comparaison tirée du droit interne, s'il est vrai qu'un employé de banque peut agir en légitime défense dans certaines circonstances, cela ne signifie pas que la société anonyme qui l'emploie puisse comme telle exercer un tel droit.

M. *Roucounas* revient sur les propos de Mme Arsanjani et de MM. Tomuschat et Hafner, qui démontrent que les questions de maintien de la paix sont distinctes de celles du jus *ad bellum*, et même du *jus in bello*. Il n'est pas convaincu qu'il faille aborder ces questions dans la résolution en projet.

M. *Salmon* considère que la question de la légitime défense par et contre les organisations internationales est complexe. Il rappelle que, à côté de l'article 51, la Charte affirme le principe de la légitime défense collective par les organisations régionales. Par ailleurs, revenant sur l'action introduite par la Serbie contre les membres de l'OTAN suite à la crise du Kosovo, il estime que, d'un point de vue purement juridique et formel, il faut reconnaître que la décision de bombarder la Serbie a été prise, non par les Etats de l'OTAN ou certains d'entre eux, mais par le Conseil de l'Atlantique Nord, lequel est un organe de l'OTAN. Ceci démontre que la question est complexe et mérite une attention particulière.

Mr *Owada* said that what was discussed is a complex problem and that he shared the views expressed by the Secretary General as far as peacekeeping forces are concerned. Different cases involving different organisations seemed to have different solutions. He added one case to be considered by the group. He distinguished the case of United Nations forces and attacks against it as such, from the case of a national contingent under attack. Particularly, he cited the case of an attack specifically directed against a national contingent of a peacekeeping force. This question was debated in Japan when it decided to take part in UN peacekeeping operations. The solution rendered was to consider that

a reaction of such state would be an action of legitimate defence under police action parameters, and not a case ruled by article 51 of the Charter.

Vice-President Lee invited the Rapporteur to reply to the remarks that were addressed to him.

Mr *Roucounas* responded to different observations made during the meeting. First of all, he reiterated that his position is to consider article 51 of the Charter as an exception to the principle enshrined in article 2, paragraph 4, of the Charter. He thanked Mr. McWhinney for his contributions to elaborate the report by imputing material coming from all over the world. He also accepted the idea of taking legal opinions issued by legal departments of different States in the future enactment of the report. He stressed that the problem of self-defence in case of attacks against the UN forces has been raised and should be included in the final report. Responding to Judge Koroma's observations, the Rapporteur stated that many other colleagues pointed out this problem. To the Rapporteur, this problem comes from misunderstanding the difference between the right of individual and collective self-defence. Judge Koroma also sustained that the UN Charter should not be undermined by avoiding to act under a multilateral framework. The Rapporteur endorsed such position.

On the issue of how to protect individuals by means of self-defence, the Rapporteur recalled the failure to obtain endorsement by the Security Council every time such extraterritorial intervention occurred. The Rapporteur said that this explanation was not really an answer to the question raised, but that it is an element to take into account when addressing this problem.

The *Rapporteur* recalled that Mr Verhoeven had referred to the domestic and the international law of self-defence. The Rapporteur said that, while all legal orders recognised a right of self-defence for individuals, the right of States to self-defence was not the same as in national legal orders. The Rapporteur remarked that only the Security Council could decide to adopt coercive measures under international law and that there was therefore no alternative to this role other than the individual and collective self-defence by States.

The Rapporteur recalled that Mr Dominicé has referred to the specific situation where self-defence was prolonged in time, taking on a punitive character. The Rapporteur said this situation was prohibited under international law.

The Rapporteur recalled that Mr Ranjeva has alluded to the problem of evidence. The Rapporteur said that this was indeed a problem and the Institut could usefully recommend procedural aspects concerning questions of evidence. He added that the members of the sub-group were not enthusiastic about the creation of a subsidiary organ of the Security Council for establishing facts justifying self-defence and that perhaps another procedure could be devised.

The issue was a very important one and the Court had had great difficulty with fact finding in the *Oil Platforms* and *Nicaragua* cases. Mr Ranjeva had also referred to the need for equilibrium as between individual and collective self-defence. The Rapporteur agreed that the elements of proportionality and necessity were also applicable to the collective exercise of the right of self-defence. Mr Ranjeva had referred to the difference between the English text of the Charter (“armed attack”) and the use of the term “agression” in the French text of the Charter. This could lead to confusion for those who use French as the working language to analyse the Charter. In reference to the use of the expression “guerre juste”, this no longer reflected the state of the law. As regards the problem of State responsibility within the framework of Article 51 of the Charter, this was indeed an issue. The ILC had not addressed the problem, considering it “technically separate”. The Rapporteur recommended that this issue be examined, without limiting the subject to the State perpetrating an armed attack.

The Rapporteur recalled that Mr Dinstein had correctly said the obligation to report to the Security Council had been omitted from the report’s list of conclusions. This will be taken into account. Mr Dinstein had also referred to the principle of immediacy and had expressed his disagreement with paragraphs 3 and 4 of the provisional conclusions regarding decisions on the immediacy of a threat. The Rapporteur said he would submit these amendments to the Commission’s sub-group. In his opinion, immediacy is included in the concept of necessity. Mr Dinstein had referred to an apparent gap between Article 2, paragraph 4, and Article 51 of the Charter but the Rapporteur did not think there was such a gap. While two judges had indeed spoken of an “Article 51 minus”, the Rapporteur was of the opinion that this did not amount to a gap in the legal sense as it was part of legal interpretation to fill apparent gaps in a text. Mr Dinstein had said that an armed attack from the high seas was an act of piracy. The Rapporteur, however, said that he had doubts on this point.

The Rapporteur recalled that Mr Gaja had referred to the situation where an international organisation was involved in armed conflict or self-defence and had said that the test of gravity of an armed attack was not easily appreciated, mentioning the opinions of Judge Koojimans and Judge Simma who believed that something must be done to not be as strict as the Court has been on the issue of gravity. The Rapporteur said that this deserved to be discussed. There were different degrees of gravity. As Mr Reisman had said, there could be non-grave acts that are repeated over time. The Rapporteur asked what the reaction should be to these situations.

The Rapporteur recalled that Mr Sucharitkul had mentioned the principles of gravity and intention. The Rapporteur said that the Chatham House resolution of 2005 prepared by British jurists speaks of intention. He said that perhaps this

issue should be discussed. Mr Sucharitkul had also mentioned the notion of good neighbourliness and the general obligation of protection of aliens.

The Rapporteur recalled that Mr Treves had mentioned situations that fall beyond the scope of Article 51 of the Charter, which would be considered. The Rapporteur said the extent of those situations was limited and there was some linkage to the text of the Charter. Regarding the relationship between the acts of terrorists and the conduct of States, the Rapporteur said this was indeed problematic. Acquiescence, however, was a wrongful act. The Court in the *Hostages* case had supported this conclusion.

The Rapporteur recalled that Mrs Arsanjani had correctly said that paragraph 6 of the report's conclusions should be re-written. The Rapporteur said there was a problem as regards United Nations peacekeeping forces implementing Security Council decisions. He was not sure that this was confined to *jus in bello*. The Rapporteur had found that self-defence under *jus in bello* was different to its treatment by the rules of *jus ad bellum*.

The Rapporteur recalled that Mr Schwebel had referred to acts of indirect aggression and had said that the Court in the *Nicaragua* case had failed both in fact, due to issues of evidence, and in law. The Rapporteur said that this seems to be a central problem. A decision-making organ needs to be certain of the facts. As regards Mr Schwebel's remarks on paragraph 7 of the report's provisional conclusions, it should be modified as in its present form it seems only to refer to the use of weapons of mass destruction by States. Non-State actors could use any weapons to perpetrate an armed attack.

The Rapporteur recalled that Mr Feliciano had referred to the objectives of the reacting State invoking self-defence. The Rapporteur said that the Court in the *Oil Platforms* case had said that the State's objectives must be correlative to the force being stopped or repelled. Force in self-defence should not be used at random, but rather the State should target the illegal act being repelled. There was already some case-law limiting the objectives of the State acting in self-defence. As regards the principle of reciprocity, the Rapporteur said that his preference was to refer instead to the principle of proportionality.

The Rapporteur recalled that Mr Momtaz had said that the reference in paragraph 6 of the report's conclusions to the question of intensity was not realistic and that he was preoccupied with the question of the nature of the weapons mentioned in paragraph 7 of those conclusions. The Rapporteur said that this would be considered and that perhaps this conclusion may need to be widened. Mr Momtaz had also referred to the obligation to cooperate.

The Rapporteur recalled that Mr Remiro Brotons has raised the sensible question of including a reference of identifying the insurgent or the "other" in this context of self-defence. The questions would include: Does the insurgency

need to be recognised? Does it include the members of a group opposing foreign occupation? The members of a group aspiring to secede from a State? The Rapporteur said he had no answers but was grateful for this point.

The Rapporteur recalled that Mr. Tomuschat had said that not all non-State actors were terrorists. The Rapporteur said that this observation was correct. Mr. Tomuschat had also advised great caution on the question of control by a State. The Rapporteur said that there was rather settled case-law on the question of control but that these questions would be looked at again.

The Rapporteur recalled that Mr Hafner had mentioned the relation between Article 51 of the Charter and customary international law. The Court had considered the notion of “inherence” in Article 51 as meaning integrated within a legal system. Self-defence had been taken from customary international law but was nonetheless found within a legal framework. Custom had also developed after the adoption of the Charter, embracing for example the requirements of necessity and proportionality which are not found in Article 51. Mr Hafner has also referred to the question of counter-measures. The Rapporteur said that the articulation of the right to use counter-measures was the subject of a certain consensus which could have followed various alternative paths. The report had used the term as understood in the current consensus.

The Rapporteur recalled that Mr Torrez Bernárdez had referred to the need to address the principles of proportionality and necessity. He had also been among six or seven members who referred to the problem of international organisations. This problem will not be discussed here for lack of time.

The Rapporteur recalled that Mr Marotta Rangel, in the context of the question of international organisations, had referred to the 1947 Treaty of Rio de Janeiro. The Rapporteur said that there were other instances of this issue, including the initiatives of Latin American States during the negotiation of the Charter.

The Rapporteur recalled that Mr Salmon had referred to the right of collective self-defence within the Charter but not only under Article 51 of the Charter. The Rapporteur said that this was indeed also foreseen by Article 53 of the Charter in the context of regional arrangements.

The Rapporteur recalled that Mr Owada had also referred to the question of international organisations and had said that paragraph 11 of the report's conclusions was useful. The Rapporteur was grateful for this comment.

Vice-President Lee thanked the Rapporteur for his most comprehensive responses to the questions posed by the members.

The *Rapporteur* called for the sub-group of the Commission to meet the following day, to see if a resolution could be adopted and submitted for approval at a next working session or at a following session of the Institut.

Mr *McWhinney* said that he did not see why the approval of the Rapporteur's report should be postponed to the following session, as it had been discussed in detail at this session.

Le *Secrétaire général* relève que les débats n'ont pas soulevé de désaccords fondamentaux entre les membres. Dès lors, il estime qu'il devrait être possible d'adopter au cours de cette session une résolution sur le sujet de la légitime défense et suggère de procéder dès que possible à l'examen d'un projet de texte. Dans cette perspective, il annonce le programme des travaux des jours suivants.

La session est levée à 16 h 45.

Huitième séance plénière Jeudi 25 octobre 2008 (après-midi)

La séance est ouverte à 15 h 25 sous la présidence de M. *Lee*, troisième Vice-Président.

Draft Resolution

19. Article 51 of the United Nations Charter, as supplemented by customary international law, is sufficient to address the issues relating to the exercise of the right of self-defence.

20. The rules of necessity and proportionality are indispensable components of the existing normative framework of self-defence.

21. The right of self-defence is set in motion by the victim state in case of actual armed attack or manifestly imminent armed attack as long as the Security Council does not take effective measures necessary to maintain or to restore the international peace and security. This right is to be exercised where there is no practical alternative with the aim at forestalling or repelling the armed attack.

22. The victim State is under the obligation immediately to report to the Security Council the actions taken in self-defence.

23. The various doctrines of "preventive" self-defence (beyond actual or manifestly imminent armed attack as above) have no base in positive international law.

24. In case of alleged threat against a State, only the Security Council is competent to determine the application of armed force.

25. The armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts implying use of force of lesser intensity may trigger counter-measures in conformity with international law. It is understood that the Security Council has the right to authorize other measures and that the State may exercise police action within its territory.

26. The type of weapons used in the armed attack might be relevant to the exercise of the right of self-defence, in particular for the qualification of the attack and for the triggering of the reaction.

27. When the Security Council decides, within the framework of collective self-defence, of measures required for the maintenance or the restoration of international peace and security, it determines the conditions under which the victim State is entitled to continue to use armed force.

28. In the event of an armed attack against a State by a non State actor, Article 51 of the Charter as supplemented by customary international law applies.

29. The Institute will examine questions related to self-defence and international organizations.

Projet de résolution

1. L'article 51 de la Charte des Nations Unies, tel que complété par le droit international coutumier, est suffisant pour régir les questions relatives à l'exercice du droit de légitime défense.

2. Les règles de nécessité et de proportionnalité sont des éléments indispensables du cadre normatif existant de la légitime défense.

3. Le droit de légitime défense est mis en œuvre par l'Etat victime en cas d'attaque armée réalisée ou d'attaque armée manifestement imminente, aussi longtemps que le Conseil de sécurité ne prend pas les mesures nécessaires et effectives pour maintenir ou rétablir la paix et la sécurité internationales. Ce droit s'exerce lorsqu'il n'existe pas d'alternative praticable dans le but d'empêcher ou de repousser l'attaque armée.

4. L'Etat victime doit faire immédiatement rapport au Conseil de sécurité sur les actions de légitime défense entreprises.

5. Les différentes doctrines de légitime défense « préventive » (au-delà d'une attaque armée réalisée ou manifestement imminente comme ci-dessus) sont sans fondement en droit international positif.

6. En cas de menace prétendue contre un Etat, seul le Conseil de sécurité est compétent pour décider de l'emploi de la force armée.

7. L'attaque armée déclenchant le droit de légitime défense doit être d'un certain degré de gravité. Les actions impliquant un emploi de la force d'une moindre intensité peuvent déclencher des contre-mesures conformément au droit international. Il est entendu que le Conseil de sécurité a le droit d'autoriser d'autres mesures et que l'Etat peut entreprendre une action de police sur son territoire.

8. Le type d'armes utilisées lors de l'attaque armée peut être pertinent pour l'exercice du droit de légitime défense, en particulier pour la qualification de l'attaque et pour le déclenchement de la réaction.
9. Lorsque le Conseil de sécurité décide, dans le cadre de la sécurité collective, des mesures requises pour le maintien ou le rétablissement de la paix et de la sécurité internationale, il détermine les conditions auxquelles l'Etat victime est en droit de continuer à faire usage de la force armée.
10. En cas d'attaque armée d'un Etat par un acteur non étatique, l'article 51 de la Charte, tel que complété par le droit international coutumier, s'applique.
11. L'Institut examinera les questions relatives à la légitime défense et aux organisations internationales.

Le *Secrétaire général* formule deux remarques au sujet du texte du projet de résolution distribué : d'une part, il y a lieu de lire « collective security » en lieu et place de « collective self-defence » au paragraphe 9 ; il insiste d'autre part sur le caractère littéral de la traduction française du projet de résolution soumis par le secrétariat. Il reviendra au comité de rédaction d'améliorer certaines formulations.

The *President* invited the Rapporteur, Mr Roucouas, to present the draft Resolution.

The *Rapporteur* said that the Sub-group had taken into consideration most of the remarks that were made during the discussions taking place in the plenary sessions. The text now reflected the main ideas expressed. Firstly, the necessity that the parameters of the right to self-defence be well defined; secondly, that certain situations have to be taken into account in today's international relations; thirdly, that the interplay between individual and collective self-defence, allowing a multilateral reaction to an armed attack through the UN, should be emphasised.

The *President* invited views on the draft Resolution, proceeding paragraph by paragraph.

Mr *Schwebel* suggested amendments to paragraph 1. The phrase "is sufficient to address" should be replaced by "authoritatively addresses". After "the right of" the words "individual and collective" should be inserted.

M. *Conforti* s'excuse de ne pas avoir pu participer le matin même à la réunion de la sous-commission. Il a des remarques à formuler au sujet des paragraphes 1 et 10 du projet de résolution et se limite ici à celles relatives au paragraphe 1, se réservant de revenir plus tard sur le paragraphe 10 lorsqu'il sera discuté. S'agissant du paragraphe 1, il se demande ce qu'il y a lieu d'entendre par « L'article 51 de la Charte des Nations Unies, tel que complété

par le droit international coutumier ... ». Il pose au rapporteur la question de savoir s'il entend faire référence à d'autres éléments coutumiers que ceux que sont la nécessité et la proportionnalité, lesquels figurent à ce titre dans le rapport. Si d'autres éléments de la coutume sont sous-entendus, il y aurait lieu à son estime de les indiquer. Si ce n'est pas le cas, il faudrait harmoniser les textes des paragraphes 1 et 2, de telle manière à expliciter dans le paragraphe 2 que les éléments mentionnés relèvent du droit coutumier.

Le *Rapporteur* répond que le langage employé reflète celui de la Cour internationale de Justice. La nécessité et la proportionnalité ne sont pas mentionnées *expressis verbis* par l'article 51 de la Charte et relèvent du droit international coutumier. C'est pour cette raison et en cette qualité que le paragraphe 2 les mentionne. La proposition de M. Conforti sera examinée attentivement.

Mr *Feliciano* noted that paragraph 7 dealt with situations where a State is the target of a use of force short of an armed attack, permitting it to respond only with countermeasures. He asked if the general propositions in paragraphs 1 and 2 concerning self-defence also applied to these circumstances.

The *Rapporteur* said that paragraph 1 established that a State may react to an armed attack through the exercise of self-defence. Paragraph 7, in contrast, dealt with other situations short of an armed attack.

Mr *Feliciano* asked for clarification as to whether paragraph 7 was not about self-defence, but about something else.

The *Rapporteur* said that paragraph 7 was not about self-defence, but rather a different situation where a State is allowed to take certain measures.

M. *Ranjeva* remercie le rapporteur et le sous-groupe pour le projet de résolution déposé. A son estime, le paragraphe 1 est fidèle à l'esprit fondamental de la règle de légitime défense et il ne se rallie pas à la suggestion de M. Schwebel d'en modifier le texte. Dire que l'article 51, tel que complété par la coutume, est « suffisant » est tout à fait correct lorsque l'on considère la légitime défense comme une exception au principe de la prohibition de l'emploi de la force. Dire par contre que l'article 51, tel que complété par la coutume, « a toute autorité » ne signifie pas grand-chose dans la mesure où tous les textes normatifs ont pleine autorité. La référence au caractère « suffisant » des règles régissant la légitime défense est par contre très heureuse car l'on indique en même temps leur caractère auto-limité. Il ne voit dès lors que des inconvénients à modifier une formule adéquate.

Mme *Bastid-Burdeau* se demande si le paragraphe 2 a bien sa place là où il est inséré dans le projet de résolution. Elle estime que la nécessité et la proportionnalité sont des conditions relatives à la mise en œuvre du droit de légitime défense, et ne sont pas relatives à la source de ce droit. Elle estime

qu'il faut donc en faire état plus loin dans la résolution, et pas en son début, lequel devrait être consacré à définir les sources de la légitime défense.

The *President* requested Members to direct their comments to consideration of paragraph 1 for now.

Le *Rapporteur* répond que le paragraphe 2, tel que rédigé, suit le paragraphe 1 car il y est question du droit coutumier. Cela étant, il n'est pas opposé à ce que l'on déplace cette disposition.

Mr *Owada* favoured the amendments proposed by Mr Schwebel but asked for two clarifications. He asked if the reference to "as supplemented by customary international law" related to the references in paragraph 3 to "manifestly imminent armed attack", since Article 51 did not mention imminence. He also pointed out that there was no paragraph in the draft Resolution actually covering collective self-defence despite its being mentioned in the report.

The *Rapporteur* said that a separate paragraph on collective self-defence would be inserted into the next draft.

Mr *Tomuschat* said that the wording "is sufficient to address" seemed to be badly drafted and preferred Mr Schwebel's suggestion of "authoritatively addresses".

M. *Mahiou* suggère que l'on discute chacun des paragraphes proposés séparément et les uns à la suite des autres, sauf lorsqu'un lien nécessaire entre l'un ou l'autre paragraphe existe. Il estime que la rédaction du paragraphe 1 est claire, même si l'adjectif « suffisant » peut susciter des hésitations. Signifie-t-il que l'on considère que le droit, contenu dans l'article 51 tel que complété par la coutume, est figé et qu'il n'est pas susceptible d'évoluer ? Il s'interroge sur l'adjectif le plus adéquat pour exprimer l'idée contenue dans le paragraphe 1.

The *President* encouraged Members to offer their comments on the draft Resolution on a paragraph-by-paragraph basis.

The *Rapporteur* said that the word "sufficient" should be replaced with something having a more concrete legal meaning.

The *President* said that he approved of the phrasing "authoritatively addresses".

Mr *Schwebel* said he wished to amend his amendment in light of certain comments. Instead of "authoritatively addresses", he proposed that the "governs" replace "is sufficient to address".

The *Rapporteur* found that there was general agreement on this suggestion.

Mme *Bastid-Burdeau* se demande si le paragraphe 1 n'est pas en réalité consacré à la source du droit de légitime défense, de telle manière que l'on devrait y mentionner que « la source du droit de légitime défense est l'article 51 de la Charte des Nations Unies, tel que complété par la coutume ».

M. *Ranjeva* exprime son désaccord avec Mme Bastid-Burdeau, en ce que l'article 51 viserait à la fois la source du droit de légitime défense et la mesure du contenu de ce droit. Ces deux idées devraient se retrouver selon lui dans la disposition en débat.

Le *Secrétaire général* souhaite que l'on ne perde pas trop de temps sur ces questions. Ce qui compte, c'est de souligner que, s'agissant du droit de légitime défense, les solutions aux questions qui se poseraient doivent être trouvées dans l'article 51 de la Charte, tel que complété par le droit international coutumier. Il concède qu'il est peut-être plus aisé en anglais qu'en français d'exprimer cette réalité, encore que l'on pourrait utiliser à cet égard le verbe « régir ».

Mr *Dinstein* said that Article 51 cannot be regarded as the "source" of the right to self-defence in international law. Article 51 is, of course, the text governing today any recourse to self-defence, yet the framers of the UN Charter did not purport to create a new right. After all, the right to self-defence was considered as existing already at the time of the adoption of the 1928 Kellogg-Briand Pact. What the drafters of Article 51 did was restricting the right to self-defence to a response to an armed attack, adding the dimension of collective self-defence, and aligning the exercise of self-defence with the powers of the Security Council. In essence, they finessed an existing right but did not create a new one.

The *President* invited comments on paragraph 2.

Mr *Dinstein* suggested to the Rapporteur two amendments. First, that the word "rules" should be replaced with "customary conditions". Second, to add "immediacy" after "proportionality". He reminded the assembly that the three conditions of self-defence ("necessity", "proportionality" and "immediacy") distill a famous formula articulated by the US Secretary of State, Daniel Webster, in his exchange of notes with British envoys, in the early 1840s, in resolving the dispute arising between the two countries as a result of the *Caroline* incident. The Webster formula has been cited often subsequently, and has become an integral part of customary international law. Of course, the three conditions were interrelated. Immediacy therefore depended also on the requirement to implement the condition of necessity. The best illustration was the six-month interlude between August 1990 (the invasion of Kuwait by Saddam Hussein) and January 1991 when measures of collective self-defence were undertaken against Iraq (with the blessing of the Security Council). This interlude was not a waste of time. Negotiations were held and, although futile, they proved the necessity to liberate Kuwait by force. Thus, the condition of "immediacy" was stretched in favour of satisfying the condition of "necessity".

The *Rapporteur* said that the proposal to replace "rules" with "customary conditions" could be submitted to the Sub-group for discussion. With reference to immediacy, attention was drawn to cases appearing in the report itself where,

although there was no immediacy, the cases still operated in the framework of self-defence.

S'exprimant en sa qualité de membre, le *Secrétaire général* exprime une réserve quant à la condition d'immédiateté formulée par M. Dinstein. Il considère qu'une référence à la coutume est sans grand intérêt puisqu'il est précisé au § 1^{er} que l'article 51 est « complété par le droit international coutumier », que ce soit au § 2 ou ailleurs. Plus fondamentalement, il doute sérieusement du caractère coutumier de la formule Webster utilisée dans l'affaire de la *Caroline*. Comment un précédent tiré d'une époque où le principe était la liberté d'avoir recours à la force, et l'est demeuré pendant près d'un siècle plus tard, pourrait-il sérieusement être considéré comme exprimant les conditions d'exercice d'une exception à un principe qui est exactement contraire, à savoir l'interdiction du recours unilatéral à la force ? Cela étant, il considère qu'il n'y a pas lieu d'entrer sur ce point dans un débat doctrinal. Il suffit de constater que personne ne conteste que la nécessité et la proportionnalité sont des conditions de la légitime défense, que ce soit au titre d'une coutume ou de la Charte.

The *Rapporteur* recalled from previous discussion that the answer to Mr Dinstein's suggestion regarding immediacy may be that it was in fact implied within the condition of necessity. Nevertheless the proposal would be discussed in the Sub-group.

Mr *Gaja* said that there was neither a need to use the terminology “customary conditions” nor “rules”. The words “The rules” should simply be deleted. Secondly, the word “indispensable” should be replaced with “essential”. Thirdly, the requirement for immediacy should not be stressed as responses to the use of force at the international level often take much longer than responses between individuals at the domestic level.

The *Rapporteur* took note of both of these proposed amendments.

The *President* invited Members to move on to the consideration of paragraph 3.

Mr *Tomuschat* noted that the phrase “is set in motion” was inappropriate since it implied that the target State in effect had a duty to exercise self-defence. Rather, the first line should begin “The right of self-defence arises for the victim State”, since this right need not actually be exercised. Finally, in the third line the word “the” before “international peace and security” should be deleted.

The *Rapporteur* thanked Mr Tomuschat for these proposed amendments.

Mr *Schwebel* suggested that the term “victim” to describe the attacked State should be substituted for “target” or “object” State since “victim” implied that the attack has already taken place. This term should be substituted throughout the draft Resolution.

The *Rapporteur* said it was difficult to find a fitting term. He had also previously suggested “defending” State alongside “target” or “object” but there were difficulties in translating this into French. He asked the Members for their views on which term to use throughout the draft Resolution.

Mr *McWhinney* did not see what problem existed with the term “object” State.

The *Rapporteur* thought that this may prove confusing in the French text.

Mr *McWhinney* said that “target” State had military implications and was not neutral. He proposed keeping a word in English that was close to the French version of the draft Resolution.

Mrs *Xue* said that the words “as long as” were confusing. She asked whether the paragraph was mixing individual self-defence in the face of an armed attack with the situation of where the Security Council actually takes up the matter. These two situations should not be mixed.

The *Rapporteur* said that replacing the wording “as long as the Security Council does not take effective measures” with “until the Security Council takes effective measures” would bring the paragraph closer to the wording of Article 51.

M. *Mahiou* fait part de son hésitation quant au qualificatif qu’il convient d’adopter pour désigner l’Etat qui est en droit d’employer la force en légitime défense. Il pense néanmoins que la notion d’ « Etat *victime* » employée par le projet de résolution est adéquate, tant en français qu’en anglais. Il préfère cette notion, mais il est prêt à accepter un autre terme si l’on parvient à en trouver. Revenant sur la suggestion de M. Tomuschat, selon laquelle le droit de légitime défense « arises for the target State ... », il suggère d’aligner le verbe utilisé dans la première phrase du paragraphe 3 sur celui qui est employé au paragraphe 1, de telle manière à écrire « Le droit de légitime défense *est exercé* par l’Etat victime ... ».

Mr *Gaja* suggested that the second sentence should read: “This right may be exercised only when there is no alternative in practice in order to forestall or repel an armed attack.”

M. *Ranjeva* se rallie à la suggestion de M. Mahiou d’aligner les verbes des paragraphes 1 et 3. Il exprime son hésitation face à la notion d’ « attaque armée manifestement imminente », considérant qu’il y a là quelque chose de très subjectif et d’insuffisant. Il suggère d’utiliser éventuellement des mots comme menace « incontournable », « plus que menaçante », sans proposer à cet égard une formule arrêtée.

Mr *Feliciano* said that Article 51 reads simply “if an armed attack occurs”. In 1945 when there was enthusiasm for the operation of the Security Council it was thought that “armed attack” had a sufficiently clear meaning that entailed moving armed forces across territorial borders. Jurists at the time questioned the

wisdom of the language of Article 51 because of the possibility of attacks being launched from outside the target State, such as the use of missiles. It was precisely because of this that jurists have suggested that “imminent” armed attacks also give rise to the right of self-defence. Further, reference to “forestalling or repelling” in the second sentence should be altered to read: “forestalling, stopping, or repelling”. This would be more complete since “forestalling” refers to an attack that has not yet happened, “stopping” refers to halting an advance and “repelling” involves pushing invading forces back.

The *Rapporteur* noted that this was at the heart of the problem of self-defence. A situation where an armed attack had actually occurred was relatively straightforward, but the problem lay in determining which other situations may give rise to the right of self-defence. The idea of imminence envisaged a situation such as the launch of a missile from one State to another, where the target State should not be expected to await the arrival of the missile before it may react. This is not a case of a mere “threat” or “fear” of attack. Rather, it referred to the situation where an attack had in fact left one territory or was about to enter the target State’s territory. The addition of the term “stopping” would be put to the Sub-group. The term “forestalling” came from the report of Roberto Ago in 1980 to the International Law Commission.

Le *Secrétaire général* rappelle que la version française de l’article 51 de la Charte parle d’« agression », tandis que la version anglaise d’« attaque armée ». Il rappelle également que la Cour internationale de Justice a utilisé ces deux notions dans l’arrêt *Nicaragua*, selon la langue de l’arrêt. Tenant compte de ceci, il estime qu’il ne faudrait pas donner l’impression que l’Institut préfère la notion d’attaque armée à celle d’agression, et suggère en conséquence qu’une note soit insérée dans le projet de résolution pour qu’il soit clair que l’emploi de la notion d’attaque armée n’est pas exclusive de celle d’agression.

Le *Rapporteur* remercie le Secrétaire général de sa suggestion et en prend note.

Mr *Hafner* supported that the wording “set in motion” should be replaced with “arises” as Mr Tomuschat had suggested. He was unsure why “maintain or restore the international peace and security” had been placed together in this paragraph when the two things were kept separate in Article 51. The requirement that there be “no practical alternative” to the use of force was unclear. He asked if this should be taken to refer only to alternatives that were legal under international law and that the word “lawful” might be inserted to make this clear.

The *Rapporteur* said that the idea behind there being “no practical alternative” to the use of force was that measures such as negotiation or good offices should have already been exhausted. Unlawful alternatives to the use of force were never envisaged.

Mr *Owada* approved of the proposal of Mr Tomuschat. He suggested that the second sentence should also contain a reference to the fact that the State may exercise the right to self-defence “until” the Security Council takes effective measures. He also suggested that, although the paragraph expressly provided for self-defence in response to a “manifestly imminent” armed attack, this was probably already implied by the reference in paragraph 1 to “customary international law”. He suggested that paragraph 3 read as: “The right of self-defence arises for the target State in case of actual armed attack or of manifestly imminent armed attack. This right may be exercised only when there is no alternative in practice in order to forestall or repel the armed attack, until the Security Council takes effective measures necessary to maintain or to restore international peace and security.”

Mme *Bastid-Burdeau* estime que la notion d’« Etat victime » n’est pas heureuse, en ce qu’elle a une connotation pénale. Elle suggère l’emploi de la notion d’« Etat visé » pour traduire celle de « target State ». Quant à la notion d’« attaque armée manifestement imminente », elle suggère de la remplacer par celle d’« attaque armée en voie de réalisation ».

Le *Rapporteur* remercie Mme Bastid-Burdeau et mentionne la notion d’« attaque armée en commencement d’exécution ».

S’exprimant à titre personnel, le *Secrétaire général* doute que l’expression proposée par Mme Bastid-Burdeau puisse évoquer l’imminence d’une attaque. Or, c’est cette imminence qui est l’objet de la disposition en débat. Il suggère que le comité de rédaction se charge de cette difficulté terminologique.

Mrs *Bastid-Burdeau* considered that this was not only a matter of expression, but also of substance. She asked if the draft Resolution was intended to address an imminent armed attack such as where forces are amassed along a border ready to move into another State, or whether it was merely intended to address a situation where troops were already moving or a missile had already been launched.

Mr *Tomuschat* said that he agreed with the suggestion of Mr Owada that there should be a full stop after “manifestly imminent armed attack”. Mr Tomuschat proposed that paragraph 3 should read: “The right of self-defence arises for the target State in case of actual armed attack or manifestly imminent armed attack. It may be exercised as long as the Security Council does not take effective measures necessary to maintain and restore international peace and security if there is no practical lawful alternative suited to forestall, stop or repel the armed attack.”

Mr *Gaja* said that the version put forward by Mr Owada, with the wording “until the Security Council takes effective measures” seemed clearer because it

contained a temporal element. This made clear that the State could act if it had no alternative but must stop if the Security Council took effective measures.

Mrs *Xue* said that the word “exercise” in relation to the right to self-defence, as featured in paragraph 1, should be used throughout the draft Resolution. Accordingly, rather than using the proposed amended wording of “arises for”, the phrase “is set in motion by” should be replaced with “may be exercised by”. The second sentence should read “This right is to be exercised only when ...”. She agreed with Mr *Owada*’s proposal to insert a full stop after “immediate armed attack”, and also felt that the wording “until the Security Council takes effective measures” was better than “as long as”.

Mr *Dinstein* suggested that the phrase “may be invoked by” would be preferable to the wording “is set in motion”, “arises for” or “may be exercised by” in the first sentence of paragraph 3. He also noted that, in the French version of Article 51, the language employed is “agression armée”, which is clearer than the counterpart English term “armed attack”. A footnote pointing to the French text of Article 51 might therefore be helpful. He criticised the phrase “manifestly imminent” as an oxymoron. He proposed referring to an armed attack as being “under way”, in order to capture not only armed attacks that are already fully launched but also those that are merely in their initial stages.

Mr *Dinstein* added that the text must not fail to take into account the fact that the Security Council may regard (as it frequently does) recourse to individual or collective self-defence as supplementary to any measures that the Council itself is taking. Differently put, it would be a grave error to believe that, only because the Security Council adopts certain operative decisions concerning a particular armed conflict, the exercise of the right to self-defence must be regarded as lapsed. Forcible action taken in self-defence need not cease unless the Security Council explicitly decrees a ceasefire.

Mr *Dinstein* also pointed out that the final sentence did not belong in paragraph 3 since it is actually a definition of the condition of necessity. As such it should appear in paragraph 2.

The *Rapporteur* queried whether there was any harm in putting this last sentence here, since its meaning, as phrased, was widely accepted.

Mr *Dinstein* said that he objected to the location of this sentence, rather than its meaning. It should be moved from paragraph 3 to paragraph 2.

The *Rapporteur* said that he took the point but that paragraph 2 concerned the exercise of the right to self-defence rather than the definition of the right.

M. *Conforti* s’interroge sur la nécessité de l’inclusion du paragraphe 4, dans la mesure où il ne fait que répéter ce que la Charte dit déjà très clairement.

Le *Rapporteur* indique que deux raisons l'ont poussé à inclure ce qui est devenu le paragraphe 4 : d'une part, durant la précédente session de travail plénière, le problème de l'information du Conseil de sécurité a été soulevée ; d'autre part, la pratique montre que certains Etats s'abstiennent d'informer le Conseil de sécurité de leurs actions en légitime défense. Ceci donne à penser que l'inclusion d'une disposition traitant de l'obligation d'informer le Conseil de sécurité n'est pas sans intérêt.

The *President* noted that the secretariat was prepared to work late that day and that the Sub-group would meet to redraft the Resolution that evening, which meant that all recommendations would be considered. No comments were received for paragraph 4. He invited comments on paragraph 5.

Mr *Schwebel* proposed that the word "basis" be used rather than "base".

The *President* invited comments on paragraph 6.

Mr *Dinstein* said that if the sub-group decided to change the phrase "manifestly imminent" in paragraph 5 to "under way", then this should be reflected in paragraph 6 to avoid any dissonance.

Mr *Schwebel* said that the wording "perceived threat" would be more appropriate than "alleged threat". He also questioned what paragraph 6 would imply if the Security Council were to make no determination at all, which is frequently the case.

The *Rapporteur* said that this scenario went beyond the *Rapporteur's* possibilities, but that Mr *Schwebel* had made a valid point.

Mr *Dinstein* said that the correct wording would not be "determine" but "decide upon". The Security Council "determines" the existence of a threat, but then "decides" what action to take.

Mr *Pocar* said that the word "application" should be substituted for the "use" of armed force.

Mr *McWhinney* said that the English version of the text used "determine" which was wider than the French version "decider". It might be better to alter the French text to follow the English text.

Mr *Schwebel* suggested that paragraph 6 read: "In case of a perceived threat against a State, the Security Council has preclusive authority to decide upon the application of armed force." This was a substantive change as it implied that while the Security Council had supervening authority, if it did not make a determination then the State had residual authority to respond, which was closer to the truth of the matter.

Mr *Feliciano* wondered if he was correct in assuming that paragraph 6 referred to the Security Council being competent to determine the lawfulness of the use

of armed force by the UN or another collective security organisation rather than to the lawfulness of the State's invocation of self-defence.

The *Rapporteur* said that the paragraph stresses the Security Council's authority to permit the target State to react in self-defence, but also established the Security Council's general competence on the issue.

Mr *Gaja* said that he was confused about what was intended. If the Security Council had "preclusive" authority, it meant that if the Security Council did not act, then the State could act. This would mean that the paragraph implied another exception to the use of armed force in response to an armed attack, allowing States to respond to the mere threat of force. It would effectively create another loophole allowing States to use self-defence where there was a mere threat of an armed attack, which would widen the understanding of self-defence that was expressed in the rest of the draft Resolution.

The *Rapporteur* asked if Mr *Gaja* therefore recommended the deletion of paragraph 6.

Mr *Gaja* said that that was not what he was proposing. He merely believed that the paragraph implied a widening of the circumstances where States were permitted to act in self-defence, beyond the existence of an actual or imminent armed attack, and that this should be avoided.

M. *Mahiou* constate que le paragraphe 6 utilise la notion de « menace » sans autre qualification, alors que jusque-là le projet de résolution fait référence à la notion d'« attaque imminente ». Est-ce à dire qu'une simple menace, voire que n'importe quelle menace, déclencherait le droit de légitime défense ?

Le *Rapporteur* indique que c'est bien la notion de « menace », sans autre qualification, qui est utilisée dans le paragraphe 6. En substance, celui-ci signifie que tout Etat qui se sent menacé doit s'adresser au Conseil de sécurité, lequel a seul l'autorité pour décider des mesures armées à prendre.

M. *Marotta Rangel* considère que, tel que formulé, le paragraphe 6 n'est pas acceptable. Il faudrait le formuler de manière plus précise, indiquant par exemple qu'« en cas d'une prétendue menace contre un Etat, mais sans qu'il y ait déjà une attaque armée, seul le Conseil de sécurité est compétent ... ».

Le *Rapporteur* remercie les membres de leurs remarques. Il constate que M. *Schwebel* a suggéré que la notion de menace soit qualifiée, puisqu'il devrait s'agir d'une « perceived threat ».

M. *Mahiou* estime que si l'on ouvre la notion de menace aussi largement, il faudrait alors avoir la garantie que seul le Conseil de sécurité est en droit de décider de l'emploi de la force. Si l'on considère que l'Etat peut agir dès l'instant où le Conseil de sécurité est inactif, on ouvre d'autres perspectives auxquelles il se refuse. C'est pourquoi il estime qu'il faut maintenir qu'en cas

de menace « *seul* le Conseil de sécurité est compétent pour décider de l'emploi de la force armée ».

Mr *Dinstein* supported paragraph 6, but argued that it should be merged with paragraph 5. He suggested that paragraph 5 should read: "In case of mere threat against a State only the Security Council is competent to authorise armed force." The rest of the current text of paragraph 5 could then follow. This would make it clear that the State could not act alone in these circumstances.

Le *Secrétaire général*, tenant compte des remarques formulées, suggère à titre personnel de retenir une formule comme « Lorsque l'attaque ne présente pas le caractère d'imminence visé au paragraphe 3, seul le Conseil de sécurité est compétent pour décider de l'emploi de la force armée ». Comme M. *Dinstein*, il suggère en ce cas de mentionner ensuite ce qui est exprimé actuellement dans le paragraphe 5.

Mme *Bastid-Burdeau* allait suggérer une formule quelque peu différente, mais elle déclare se rallier à la suggestion du Secrétaire général.

Mr *Hafner* agreed with the proposal of Mr *Dinstein*. The word "alleged" confused the issue, begging the question of what would happen if there were an "actual" threat. Further, the reference to "positive international law" in paragraph 5 should read "present international law".

Mr *Feliciano* questioned whether what was under discussion was the threat of an armed attack, and not something of a different nature, character or scope.

The *Rapporteur* confirmed this but underlined that it was the mere threat of an armed attack. Thus, it was not a case of an actual or imminent armed attack, which is why the matter should be referred to the Security Council.

Mr *Feliciano* agreed with this but wanted to confirm that the paragraph referred to the threat of an armed attack and not something lesser.

The *President* invited comments on paragraph 7.

Mr *Schwebel* said that he did not believe this to be a correct statement of the law, even if it reflected the ICJ's *Nicaragua* judgment – which he believed to be wrong in any case. He pointed out that there can be a cumulative series of low-intensity uses of force which can give rise to a right of self-defence when seen together. The phrase "implying use" should be reworded to "embodying". The ICJ was actually very vague about the definition of countermeasures. The result of that reasoning was to leave the target State subject to measures of armed subversion which was a very dangerous situation. In the real world most aggression had been of the indirect sort rather than a massive armed attack. He suggested deleting the paragraph.

The *Rapporteur* said that the problem of the gravity of the armed attack had been examined repeatedly in decisions of international bodies, such as the ICJ's

DRC v. Uganda judgment, the boundary commission in the *Ethiopia/Eritrea* arbitration, and the Security Council during 2006 in its debates on the Middle East. Because gravity features constantly as a relevant factor in the considerations of these bodies it cannot be discounted. He suggested reconceiving the gravity requirement. Rather than requiring that the use of force attain a certain level of gravity, it might be better to understand that limited uses of force cannot be considered to be sufficiently grave. The Sub-group did not consider that this left target States without a remedy since other solutions exist to deal with lesser uses of force. One of these was obtaining authorisation from the Security Council, the other was the availability of countermeasures. He noted that the draft Resolution's reference to countermeasures need to be interpreted as non-forcible as defined by the International Law Commission in the Articles on State Responsibility.

The *President* invited consideration of paragraph 7.

Mr *Tomuschat* said that the last line should be modified so as not to prevent the State from exercising military action as well as police action on its own territory. The latter part of that sentence should read “the State is not limited to exercising police action within its territory”.

The *Rapporteur* asked if “may use appropriate force” would be adequate, to replace “police”.

Mr *Gaja* agreed with Mr *Tomuschat*'s point but asked if the use of force should be limited in various ways. The paragraph should indicate that the State may repel those armed attacks, but replace “within its territory” with “under conditions of strict necessity” to open the small possibility of military response. This ensured that the State was more limited in its response than for self-defence proper, but did allow some use of force.

S'exprimant toujours à titre personnel, le *Secrétaire général* déclare ne pas être sûr de saisir la portée de la remarque de M. Gaja. Il n'est pas contesté qu'un Etat peut employer la force sur son territoire, même s'il existe des limites à cet emploi. La difficulté est seulement de savoir à quelles conditions il peut en faire usage hors de son territoire. Si l'on admet qu'il puisse le faire en l'absence d'une certaine gravité de l'emploi de la force dont il est lui-même victime, on ouvre la porte à des débordements dangereux. Autre chose serait de préciser que la répétition d'incidents isolés peut par accumulation constituer une attaque d'une gravité suffisante pour justifier le recours à la légitime défense.

Mr *Gaja* suggested that the latter part of the third sentence read “the State may repel those minor attacks under conditions of strict necessity”.

Mr *Schwebel* said that the reference in the *Oil Platforms* judgment of the ICJ to the gravity of an armed attack was pure *dicta*. It was not part of the *ratio decidendi*, but rather a political statement and was in any case without merit.

Paragraph 7 would be improved if the second sentence were deleted. The reference to countermeasures was unclear especially if the Rapporteur did not wish to attribute to it the same meaning given by the International Law Commission. It was unrealistic to think that States would confine themselves to non-forcible countermeasures in the case of uses of force short of armed attack.

M. *Conforti* estime que ce qu'exprime le paragraphe 7 est le fait que l'Etat peut prendre des contre-mesures en cas d'actions de moindre intensité. Cela ne signifie pas cependant qu'il ne peut pas utiliser la force, mais seulement qu'il ne peut l'utiliser que sur son propre territoire. Parmi les contre-mesures, il y aurait donc les emplois de la force « internes », qu'il faut distinguer des emplois de la force « internationaux ».

Mrs *Xue* said that Mr Gaja's proposal to use the words "minor attacks" in the last sentence might create uncertainty in view of the use of the term "the use of force of lesser intensity" in the first sentence. She also thought that the term "countermeasures" would create difficulties if it was taken to mean something different from the understanding of the International Law Commission as featuring in the Articles on State Responsibility. She suggested that the second sentence should be deleted, and approved of Mr Gaja's proposal to amend the third sentence.

Mr *Schwebel* said that the second sentence could read "Acts embodying the use of force of lesser intensity may trigger proportionate responsive measures." This might be more appropriate than the current reference to countermeasures.

The *Rapporteur* said that his understanding of the ideas being put forward was that a State should be allowed to respond with force to uses of force short of an armed attack, but that such measures should be strictly proportionate and necessary to a more rigorous extent than for self-defence proper.

Mr *Schwebel* said that this was correct but emphasised that these measures could still consist in the use of force, if they were responding to the use of force short of an armed attack. This was currently exemplified by the situation subsisting between Turkey and Iraq. Turkey could make out a case that its soldiers were being killed by insurgents emanating from Iraq and that it should be allowed to use force to quell these. In these circumstances, Turkey should be allowed to use a proportionate response.

Mr *Ress* said that if reference to "countermeasures" were replaced by "proportionate measures" then this would alter the whole idea of non-forcible responses to lesser uses of force since it permitted the use of force in a proportionate way. He suggested keeping the second sentence and adding a further sentence between the first and second sentence to the beginning of the paragraph to the effect that a multitude of low-intensity uses of force may amount to a measure against which self-defence can be exercised. This would

allow for the use of force against accumulated uses of force short of an armed attack. It would also make clear that States would be confined to non-forcible countermeasures in case of isolated uses of force short of an armed attack.

A titre personnel, le *Secrétaire général* ne juge guère convaincant l'exemple contemporain de la Turquie et de l'Iraq mentionné par M. Schwebel, car il faudrait d'abord que la Turquie s'adresse au Conseil de sécurité. Il estime qu'il ne faut pas abandonner la règle suivant laquelle les contre-mesures excluent l'emploi de la force armée, pas plus que celle qui exige une certaine gravité des attaques armées pour que le droit de légitime défense puisse être déclenché. Il est prêt à accepter des formules plus ouvertes s'agissant des emplois de la force domestiques visant à repousser des attaques d'une moindre gravité, mais il ne souhaite pas non plus qu'il soit fait preuve de laxisme à ce propos.

Mr *Hafner* asked if Mr Gaja's proposal included the deletion of the phrase "within its territory".

Mr *Gaja* said that his proposal was not to include "within its territory" but noted that the Secretary General had a proposal that would combine the two. He noted that there may be situations where the use of force short of an armed attack emanated from the high seas, in which case reference to "within its territory" might be excessively limiting.

Mr *Hafner* asked whether paragraph 7 as it stood included the right to send police into foreign territory.

Mr *Struycken* commented on paragraph 7 from his experience as a reserve officer in NATO. He pointed out that the paragraph did not appear to take account of the preliminary phases in the lead-up to an armed attack. These could include acts of sabotage and propaganda campaigns which might require responses by the target State.

The *President* invited consideration of paragraph 8.

Mr *Dinstein* noted that in the general debate he had suggested merging paragraphs 7 and 8. Paragraph 7 could simply state that the type of weapons used would be relevant to determining the gravity of an armed attack.

The *Rapporteur* said that the wording of paragraph 7 had been intended to reflect the views expressed in the general debate by some members that the paragraph should be deleted or that there could be an armed attack with primitive weapons, such as the "9/11" hijackings. A merger between paragraphs 7 and 8 would be considered by the Sub-group.

Mr *Dinstein* reiterated that paragraph 8 should not feature as a separate provision. The reference to the type of weaponry was relevant only to determining the gravity of the attack. The fact that primitive weapons were used in the "9/11" attacks strengthened his argument because the gravity of the attack

was not necessarily related to the type of weapons used. Paragraph 8 was trying to address a situation involving weapons of mass destruction. To reflect this it would be more appropriate to insert “such as the use of weapons of mass destruction” in the first sentence of paragraph 7.

The *President* invited comments on paragraph 9.

The *Rapporteur* wished to reiterate that the Secretary General’s amendment (replacing “self-defence” in lines 1 to 2 with “security”) would be incorporated into the revised draft. He also noted that there had been cases where the Security Council had authorised the target State to continue to exercise its right of self-defence alongside other measures it had authorised.

Mr *Hafner* said that the latter part of the paragraph was phrased in such a way as to imply that the Security Council had an obligation to make a determination on the conditions under which the target State may continue to use armed force. This was misleading and it should read “it may determine” rather than “it determines”.

Mr *Dinstein* echoed Mr *Hafner*’s comment.

The *President* invited comments on paragraph 10.

M. *Conforti* estime que, jusqu’au paragraphe 9 y compris, le projet de résolution traite de la question classique du droit de légitime défense entre Etats. Le paragraphe 10 traite par contre d’un aspect nouveau et très délicat de l’emploi de la force. Il considère que celui-ci doit faire l’objet d’une attention toute particulière et regrette que le paragraphe proposé soit à ce point lacunaire. Rien n’indique par exemple contre qui l’emploi de la force en légitime défense doit être dirigé en cas d’attaque armée par un acteur non étatique, ni où il faut porter l’action en légitime défense. Les conclusions du rapport présentent à cet égard trois hypothèses et des solutions intéressantes qu’il est regrettable de ne pas retrouver dans le texte du projet de résolution : il y était question du cas où un État est impliqué dans l’attaque réalisée par l’acteur non étatique, du cas où en l’absence de « complicité » étatique, l’État sur le territoire duquel l’acteur se trouve doit pleinement coopérer avec le Conseil de sécurité et de celle où l’attaque provient d’un espace hors juridiction étatique, l’État attaqué pouvant en ce cas agir directement en légitime défense contre l’acteur non étatique dans cet espace. Ne plus faire aucune référence à ces hypothèses prive le paragraphe 10 en projet de toute son utilité. M. *Conforti* se demande si, dans ces conditions, il ne vaut pas mieux le supprimer et aligner la question des acteurs non étatiques sur celle des organisations internationales, pour lesquelles il est indiqué au paragraphe 11 en projet que l’Institut examinera cette question dans l’avenir.

The *President* noted that the *Rapporteur* formerly had several paragraphs on the issue of attacks by non-State actors, and that these had been eventually reduced to the current paragraph 10.

M. *Marotta Rangel* souhaite appuyer l'intervention de M. Conforti. La question de l'emploi de la force contre des acteurs non étatiques étant nouvelle et très complexe, le paragraphe 10, par son caractère sommaire, ne peut être satisfaisant. Cette question ne devrait pas être traitée dans l'urgence ; M. *Marotta Rangel* suggère dès lors que son étude précise soit reportée à une session ultérieure de l'Institut.

Mr *Dinstein* suggested that paragraph 10 was redundant since it added nothing to the reference to Article 51 and customary international law in paragraph 1. In his opinion, there were at least three different scenarios involving armed attacks by non-State actors: first, where non-State actors behaved as *de facto* State organs; second, where non-State actors operated from the territory of a foreign State which was doing whatever it could to suppress their activities but failed to stop them; and thirdly, where they acted out of the territory of a foreign State which was unable or unwilling to take any steps against them.

He suggested that paragraphs 10 and 11 be merged and that further study be undertaken regarding all categories of non-State actors: those that are less than a State, as well as those that are more than a State, that is to say, intergovernmental organisations. Any Resolution adopted in the Santiago session should just focus on inter-State relations. It was not practicable to attempt to incorporate meaningful provisions on non-State actors given the little time that remained.

The *Rapporteur* said that the specific problems posed by non-State actors were considered in paragraphs 120 to 147 of the report. The three possibilities mentioned by Mr *Dinstein* also featured in the conclusions of the report at page 146. The fact that they featured in the report did not necessarily mean that they must also feature in a Resolution adopted at the current Session, but it should be noted that the study on this question had been completed. It was thought that it would be better to simplify the draft Resolution and so more detailed provisions were omitted from the text.

Mr *Ress* agreed with Messrs Conforti and *Dinstein*. He was disappointed by the fact that the extensive discussion on non-State actors in the report did not appear in the draft Resolution. This meant that the questions which the report had attempted to answer were simply left open. He indicated that the draft Resolution should be fleshed out to reflect the conclusions of the report, given the need for the articulation of legal principles on this current issue. It would be very regrettable for the draft Resolution not to reflect the work of the report on this matter.

Mr *Schwebel* said that paragraph 10 should be retained. There was more that should be said, but perhaps at another juncture. Omitting any statement on armed attacks by non-State actors would ignore an important part of the law relating to self-defence. The issue was a pressing one with many States

currently using force in response to the armed attacks of non-State actors. If the Sub-group were able to expand on paragraph 10, then this would be a great benefit but at least it should be retained as it stood. He also said that paragraph 11 was not purporting to codify law and was merely a declaration of a future agenda. It should therefore be deleted.

Le *Secrétaire général* souhaite faire, à titre personnel, une proposition de compromis. Il estime qu'il serait assez incompréhensible que la résolution ne dise pas qu'un Etat peut se défendre en cas d'attaques d'acteurs non étatiques. La mention de l'article 51 en ce cas lui semble dès lors élémentaire. La seule difficulté est que l'emploi de la force peut éventuellement frapper en pareil cas un Etat « innocent ». Il suggère que l'Institut adopte une formule indiquant que l'article 51 de la Charte est applicable en cas d'attaques armées par des acteurs non étatiques, mais que l'Institut se réserve le droit d'examiner plus avant les difficultés qui en résultent.

Mr *Owada* said that for the Resolution to be meaningful it should address both the doctrine of "preventive" self-defence and the situation of non-State actors. The issue in paragraph 10 is different from the issue covered in paragraph 11. The question of intergovernmental organisations is complex, and requires further reflection. The draft Resolution should contain some provision on non-State actors. Either paragraph 10 as it stood should be retained or a more elaborate text could be inserted following further discussion. Deleting paragraph 10 would be unwise. Further, the draft Resolution should contain some provision on collective self-defence, at the least incorporating the ICJ's pronouncements in the *Nicaragua* case, if these were found to be acceptable.

Mr *McWhinney* said that Mr Schwebel's proposals accurately reflected the thinking of the Sub-group. However, it was not possible to elaborate on paragraph 10 without impinging on the time allocated to the remaining Commissions. Paragraph 10 should be retained as it stood and a new commission could be established to address non-State actors in detail.

Mr *Feliciano* said that paragraph 10 in its present form suggested that the entire problem of non-State actors could be assimilated to more traditional forms of armed attack and self-defence, which was not the case. Indeed, this might create infinitely more problems.

Mr *Gaja* said that, if paragraph 10 were left as it stood, it would lead to a conclusion contrary to the position of the ICJ on Article 51 and its application to non-State actors. He suggested that paragraph 10 might be amended to state that the rules regarding self-defence apply in cases where the acts of a non-State actor can be attributed to a State. Further, it could provide that armed attacks may be carried out by a non-State actor from outside the jurisdiction of any State or by a non-State actor which controlled the territory of another State and

that Article 51 could apply in these circumstances. He hoped that the Sub-group would elaborate a text inspired by the conclusions of the Rapporteur's report.

The *President* invited consideration of paragraph 11.

Mr *Ress* said that paragraph 11 should not be in the draft Resolution as it stands and should be deleted. The reference to intergovernmental organisations in the report was interesting and valuable and should feature in a Resolution, but needed further study. The right to self-defence by or against intergovernmental organisations only arose in relation to those with military functions, in particular those capable of falling under Article 53 of the UN Charter. Paragraph 11 should be completely re-written to reflect this, and perhaps a new commission charged to examine the question for a future Resolution.

The *President* invited interested Members to meet informally with the Rapporteur to put their views forward.

The *Secretary General* noted that consideration of the report of Mr Reisman of the Sub-group dealing with humanitarian intervention would be dealt with under the chairmanship of Mr Owada. He also said that the draft Resolution of the First Commission was now ready and would be distributed the following morning. That draft Resolution would be examined after consideration of the draft Resolution on humanitarian intervention.

La séance est levée à 18 h 25.

Dixième séance plénière Vendredi 26 octobre 2008 (après-midi)

La séance est ouverte à 15 h 10 sous la présidence de Mr *Lee*.

The *President* called the meeting to order and referred to the revised draft Resolution that was being distributed at that moment to the Session.

REVISED DRAFT RESOLUTION

The *Institute of International Law*,

Mindful of the present problems raised by the use of force in international relations;

Acknowledging the fundamental importance of the institution of individual and collective self-defence as reaction of States to the illicit use of force;

Acknowledging that the system of collective security established by the United Nations Charter strengthens international peace and security;

Mindful that the problems of self-defence of States facing armed attacks by non State actors, as well as those of the relationship between self-defence and international organizations, require further studies by the Institute;

Adopts the following Resolution:

1. Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.
2. Necessity and proportionality are essential components of the existing normative framework of self-defence.
3. The right of self-defence arises for the target State in case of an actual or a manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice, in order to forestall, stop or repel the armed attack, until the Security Council takes effective measures necessary to maintain or restore international peace and security.
4. The target State is under the obligation immediately to report to the Security Council the actions taken in self-defence.
5. The armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts implying use of force of lesser intensity may trigger counter-measures in conformity with international law. However, in exceptional circumstances of attacks of lesser intensity the target State could also take strictly necessary police measures on its territory. It is understood that the Security Council may take measures as above in paragraph 3.
6. The various doctrines of "preventive" self-defence (beyond actual or manifestly imminent armed attack as above) have no basis in present international law.
7. In case of threat of armed attack against a State, only the Security Council may decide the use of armed force.
8. Collective self-defence, when requested by the target State, must always be exercised in conformity with the United Nations Charter.
9. When the Security Council decides, within the framework of collective security, of measures required for the maintenance or restoration of international peace and security, it may determine the conditions under which the target State is entitled to continue to use armed force.
10. In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.

A number of situations of armed attack by non-State actors have been raised, and a *prima facie* response to the complex problems arising out of them might be :

- a. If non-State actors launch an armed attack at the “instructions, directions or control” of a State, the latter can be the object of reaction in self-defense by the target State.
- b. If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise enforcement action in that area against that non-State actor.
- c. If non-State actors launch an armed attack from an area within the jurisdiction of a State, either without “instructions, directions or control” of the host territorial State, or under unverifiable conditions, the State from which the armed attack is launched has the obligation to cooperate with the target State.

PROJET DE RESOLUTION REVISEE

L’Institut de droit international,

Conscient des problèmes contemporains que pose l’emploi de la force dans les relations internationales ;

Reconnaissant l’importance fondamentale de l’institution de la légitime défense individuelle et collective en tant que réaction des Etats à l’emploi illicite de la force ;

Reconnaissant que le système de sécurité collective établi par la Charte des Nations Unies renforce la paix et la sécurité internationales ;

Conscient que les problèmes de la légitime défense des Etats face aux attaques armées par des acteurs non étatiques, ainsi que ceux des rapports entre légitime défense et organisations internationales, nécessitent des études complémentaires de l’Institut,

Adopte la Résolution suivante :

1. L’article 51 de la Charte des Nations Unies, tel que complété par le droit international coutumier, régit adéquatement l’exercice du droit de légitime défense individuelle et collective.
2. La nécessité et la proportionnalité sont des éléments essentiels de l’actuel cadre normatif de la légitime défense.
3. Le droit de légitime défense naît pour l’Etat cible en cas d’attaque armée (agression armée) en cours de réalisation ou manifestement imminente. Il peut être exercé seulement lorsqu’il n’y a pas d’alternative licite praticable pour empêcher, arrêter ou repousser l’attaque armée, jusqu’à ce que le Conseil de sécurité ait pris les mesures effectives nécessaires pour maintenir ou rétablir la paix et la sécurité internationales.

4. L'Etat cible doit faire immédiatement rapport au Conseil de sécurité sur les actions de légitime défense entreprises.
5. L'attaque armée déclenchant le droit de légitime défense doit avoir un certain degré de gravité. Les actions impliquant un emploi de la force d'une moindre intensité peuvent déclencher des contre-mesures conformément au droit international. Cependant, dans des circonstances exceptionnelles d'attaques de moindre intensité, l'Etat cible peut également prendre sur son territoire les mesures de police strictement nécessaires. Il est entendu que le Conseil de sécurité peut prendre des mesures conformément au paragraphe 3.
6. Les différentes doctrines de légitime défense « préventive » (au-delà d'une attaque armée en cours de réalisation ou manifestation imminente, comme ci-dessus) sont sans fondement en droit international contemporain.
7. En cas de menace d'attaque armée contre un Etat, seul le Conseil de sécurité peut décider de l'emploi de la force.
8. La légitime défense collective, lorsqu'elle est requise par l'Etat cible, doit toujours être exercée conformément à la Charte des Nations Unies.
9. Lorsque le Conseil de sécurité décide, dans le cadre de la sécurité collective, des mesures requises pour le rétablissement de la paix et de la sécurité internationale, il peut indiquer les conditions auxquelles l'Etat cible est en droit de continuer à faire usage de la force armée.
10. En cas d'attaque armée d'un Etat par un acteur non étatique, l'article 51 de la Charte, tel que complété par le droit international coutumier, s'applique en principe.

Un certain nombre de situations d'attaque armée par des acteurs non étatiques ont été soulevées ; les réponses *prima facie* à ces problèmes complexes pourraient être :

- d. Si des acteurs non étatiques lancent une attaque armée sur « les instructions, la direction ou le contrôle » d'un Etat, ce dernier peut être l'objet de la réaction de légitime défense de l'Etat cible.
- e. Si une attaque armée par des acteurs non étatiques est lancée depuis un espace situé hors la juridiction de tout Etat, l'Etat cible peut exercer l'action coercitive dans cet espace contre cet acteur non étatique.
- f. Si des acteurs non étatiques lancent une attaque armée depuis un espace se trouvant sous la juridiction d'un Etat sans « les instructions, la direction ou le contrôle » de l'Etat territorial hôte, ou sous des conditions invérifiables, l'Etat à partir duquel l'attaque armée est lancée doit coopérer avec l'Etat cible.

The *President* pointed out that there was little time available and proposed that the Session could consider the text of the revised draft Resolution paragraph by paragraph, leaving aside for the moment the text of its preamble. He invited the Rapporteur, Mr Roucouas, to make introductory remarks on the revised draft Resolution.

Mr *Roucouas* thanked the President for his invitation. The Rapporteur said that he had tried to accept most of the proposals made by the Members at the previous day's meeting on the draft Resolution. The revised draft had made some substantive and also some minor changes to the previous version.

The *Rapporteur* read the English text of paragraph 1 of the revised draft Resolution. He explained that the text had been changed to include the phrase "adequately governs" and that the words "and collective" had been added before the final word "self-defence". The President invited comments on paragraph 1.

M. *Ranjeva* souligne l'existence d'un risque de mauvaise interprétation de l'article 1, qui pourrait laisser penser que la légitime défense est le seul moyen de répondre à un emploi illicite de la force, ce qui n'est bien évidemment pas le cas. M. *Ranjeva* ne sait pas comment résoudre le problème même s'il pense que l'ajout d'un qualificatif pourrait clarifier le texte.

The *President* proposed that after comments to each paragraph of the revised draft Resolution the Session would take a decision on whether to accept it. He asked whether paragraph 1 could be adopted. No contrary view having been expressed, the President noted that paragraph 1 was so adopted.

The *Rapporteur* read the English text of paragraph 2 of the revised draft Resolution. The Rapporteur explained that a slight modification had been made in adding the word "essential".

The *President* invited comments on paragraph 2.

M. *Rigaux* exprime quelques hésitations quant au texte français du projet de résolution et notamment quant à l'expression « l'actuel cadre normatif de la légitime défense ». La formulation ne lui semble pas très heureuse et il propose d'évoquer plutôt les « règles actuellement applicables à la légitime défense ».

The *President* said that a drafting committee would be appointed to deal with these kinds of observations. He recalled that the Secretary General had asked whether the Session needed to proceed to a vote. While it had initially been agreed, on a proposal by Mr Salmon, to proceed by a formal vote, everyone had after agreed to proceed by consensus. The President added that he was putting to the Session whether paragraph 2 of the revised draft Resolution could be adopted. No contrary views having been expressed, the President noted that paragraph 1 was so adopted.

Le *Secrétaire général* rappelle que, selon les statuts de l'Institut, un vote est requis. L'Institut ne connaît pas le système du consensus négatif ; il est donc nécessaire que tous les membres présents soutiennent positivement le projet de Résolution.

The *President* said that, if there was no objection on a particular paragraph, it would be understood that the paragraph in question was adopted unanimously.

The *Rapporteur* read the English text of paragraph 3 of the revised draft Resolution. The *Rapporteur* explained that the paragraph had been redrafted following various comments by other members.

The *President* invited comments on paragraph 3.

Mr *Hafner* referred to the wording of the second sentence of the paragraph. He suggested to insert the word “and” after the word “attack” so that this second sentence clearly required two conditions for the exercise of self-defence, one of those conditions being that the Security Council having yet to take effective measures to maintain or restore international peace and security. He said an equivalent wording should also be added to the French text.

The *President* said that the draft would be revised to reflect this suggestion.

Mr *Tomuschat* said that he did not think the proposed amendment to the draft was necessary because it did not improve the text.

M. *Marotta Rangel* dit qu'il faudrait choisir entre les termes « attaque armée » et « agression armée ».

Le *Rapporteur* indique que les termes “agression armée” ont été mis entre parenthèse afin de respecter le texte de la Charte des Nations Unies et de montrer que l'Institut ne souhaite pas s'en départir.

Mr *Hafner* said that the reason for including the word “and” was that, if it was not included, the last phrase (“until the Security Council takes effective measures”) could be read as qualifying the first phrase (“only when there is no lawful alternative in practice”). He thought there needed to be an equivalence between the conditions expressed in these two phrases and the word “and” signified that equivalence.

The *President* proposed that this question be submitted to the drafting committee, to which there was no objection. He asked whether paragraph 3 could be adopted. No contrary view having been expressed, the *President* noted that paragraph 3 was so adopted.

The *Rapporteur* read the English text of paragraph 4 of the revised draft Resolution. The *President* invited comments on paragraph 4.

Mr *Schwebel* said that the word “the” before the word “actions” was unnecessary.

The *President* said this observation would also be submitted to the drafting committee. He asked whether paragraph 4 could be adopted. No contrary views having been expressed, the President noted that paragraph 4 was so adopted.

The *Rapporteur* read the English text of paragraph 5 of the revised draft Resolution.

The *President* invited comments on paragraph 5.

M. *Dominicé* a des difficultés à approuver l'article 5, et notamment sa troisième phrase, dont il donne lecture. Il lui semble qu'un Etat n'a jamais l'obligation de tolérer une présence militaire étrangère sur son territoire. Ce n'est donc pas que dans des « circonstances exceptionnelles » que l'Etat est en droit d'expulser les éléments militaires étrangers de son territoire ; il s'agit là d'un droit naturel de légitime défense. M. *Dominicé* propose donc la suppression du membre de phrase « dans des circonstances exceptionnelles d'attaques de moindre intensité ». Il propose également que la troisième phrase devienne la deuxième phrase afin de rendre la rédaction de l'article 5 plus logique.

Mr *Tomuschat* said he also had difficulty with the third sentence. He said it was not useful to refer to measures taken by a State on its territory because within its territory a State enjoyed complete freedom under international law. He thought this was a substantive point that should not be left to the drafting committee and the Session needed to have a consensus on this point immediately.

Mrs *Infante Caffi* asked for a clearer explanation of the difference between military action and police measures. She said that, if an armed attack occurred on a State's territory or its coastal waters, this would not be a question of police measures, which would be directed only to preserving public order and security, but would instead be purely a defence matter. She asked if the draft could use language that accommodated both of these concepts.

Mr *Ress* said that, as far as he understood, this draft paragraph referred to a situation in which a State faced the use of force which was not an armed attack. The second sentence of the draft paragraph spoke of a situation of lesser intensity that could trigger countermeasures. The third sentence of the draft paragraph provided for an exception to the second sentence. In his opinion, the words "on its territory" could be deleted. The idea of this text was to allow a response through the use of force at a very low level, which was not limited to the territory of the target State.

Mr *Gaja* said that, in the same vein, it was not necessary to refer to police measures or to the territory of the target State. He proposed to qualify the sentence by adding the expression "to repel the attack" but otherwise to leave it open.

The *President* noted that these changes would be made to the revised draft Resolution and that the Session could proceed on this basis.

The *Rapporteur* expressed his gratitude for the observations to the draft paragraph. He said that all reactions were valuable because they addressed different issues. He summarised the comments that had just been made. He said the draft paragraph would incorporate the suggestions made by Mr Gaja to its third sentence, which would therefore read as follows: "However, in exceptional circumstances of attacks of lesser intensity the target State could also take strictly necessary measures to repel the attack."

Mr *Schwebel* said that he thought that Mr Gaja's suggestions on the draft were an improvement. Mr Schwebel did not agree with the substance of the paragraph as a whole. He submitted to the drafting committee the suggestion to introduce the word "an" to replace the word "the" before the phrase "armed attack". With respect to the second sentence of the draft paragraph, he suggested that the word "implying" be replaced by the phrase "embodying a". He suggested deleting the phrase "trigger countermeasures" and replacing it with the phrase "trigger responsive measures".

M. *Marotta Rangel* est en désaccord avec la troisième phrase de l'article 5. Une interprétation *a contrario* de cette phrase pourrait en effet laisser à penser qu'un Etat ne peut, en dehors de circonstances exceptionnelles, normalement pas prendre les mesures de police nécessaires à l'expulsion des éléments militaires étrangers de son territoire. Or, il s'agit là d'un pouvoir légitime et normal de l'Etat, que ce soit en présence d'une attaque de « grande » ou « petite » intensité.

The *President* noted that the Secretary General and Messrs Kirsch, Pocar and Tomuschat had asked for the floor.

Mr *Kirsch* said that, in his opinion, the issue was whether the circumstances justifying measures by the target State needed to be exceptional. He said that it would not be exceptional for a State to defend itself in the event of an armed attack. If that was the case, the whole phrase seemed to be unnecessary and the third sentence could begin with the phrase "the target State". He added that the drafting comments made by Mr Schwebel were appropriate.

Le *Secrétaire général* souhaite préciser la portée de l'article 5. Le membre de phrase « dans des circonstances exceptionnelles d'attaques de moindre intensité » a été introduit afin de répondre à l'objection selon laquelle la légitime défense n'est pas admissible en présence d'une attaque de très faible ampleur. Le projet d'article souhaitait indiquer que, dans ce type de situation, trois possibilités existent. L'Etat victime peut d'abord recourir à des contre-mesures n'impliquant pas l'emploi de la force, et le Conseil de Sécurité peut par ailleurs prendre toutes les mesures qui lui semblent appropriées. Mais l'Etat

victime peut aussi recourir à la force pour autant qu'il ne devienne pas à son tour agresseur, c'est-à-dire pour autant qu'il n'emploie pas la force hors de son territoire.

M. Conforti avait proposé de parler de mesures de police et il apparaissait au Secrétaire général qu'une telle formulation serait en accord avec la logique du texte. Cette notion de « mesure de police » ne recouvre pas autre chose que l'idée exprimée précédemment, soit le fait qu'un Etat peut exceptionnellement recourir à la force sur un territoire étranger même en réponse à une attaque de faible intensité. Le terme de police n'est utilisé que pour indiquer que l'Etat victime ne doit pas devenir à son tour agresseur. Il n'a en aucun cas pour objet de remettre en cause le droit de l'Etat d'utiliser la force sur son propre territoire.

Mr *Pocar* said that he was grateful for the discussion which had helped him understand the draft better. He said that the current text of the draft paragraph did not reflect the understanding that had resulted from the discussion because of the use of the word “however”. This word implied that an exception to the second sentence was provided for, whereas he thought that the provision of the third sentence should be additional to the provision of the second sentence, so that a State should be allowed to take countermeasures. The third sentence would allow a State to take police measures. In their current form, the relation between the second and third sentences was not clear. As a further point, the word “could” in the third sentence should be replaced by the word “may”.

M. *Torres Bernárdez* soutient l'interprétation donnée par le Secrétaire général. L'article 5, dans sa forme actuelle, a pour objet d'ouvrir certaines possibilités de recours à la force. On pourrait changer le mot de « police », mais il est en tout état de cause nécessaire d'ouvrir la possibilité d'un emploi limité de la force sur territoire étranger dans le cas d'une attaque ne répondant pas à la qualification d'« attaque (agression) armée au sens de l'article 51 de la Charte des Nations Unies. La seule question que l'Institut doit se poser est donc celle de savoir si le recours à la force en territoire étranger est licite ou non.

The *President* proposed to move on to draft paragraph 6 to allow time for further reflection on draft paragraph 5.

Le *Secrétaire général* précise que réserver l'usage de moyens de police en territoire étranger revient, au pire, à autoriser une attaque qui ne justifierait pas de réaction de la part de l'autre Etat, car il ne s'agirait pas d'une attaque suffisamment grave. La situation serait donc celle de deux recours à la force réciproques ne présentant pas de caractère suffisant pour déclencher l'application du *jus ad bellum*.

Mr *Tomuschat* said that the second sentence of the draft paragraph should not move away from using the word “countermeasures”. With respect to the suggestion by Mr *Schwebel*, Mr *Tomuschat* did not agree with replacing the

word “countermeasures” with “responsive measures” because this latter expression was somewhat vague.

The *President* noted these comments and proposed that the discussion move on to draft paragraph 6.

The *Rapporteur* read the English text of paragraph 6 of the revised draft Resolution.

The *President* invited comments on paragraph 6.

Mr *Struycken* referred to certain preparatory activity that in practice was taken in cases of imminent war. Such activity included measures for the seizure of enemy property, companies and persons. He saw no language in the draft paragraph to provide for this type of activity.

The *President* said that the wording of the draft paragraph took into account military reality. He asked whether paragraph 6 could be adopted. In the absence of any contrary views, the *President* noted that paragraph 6 was so adopted.

The *Rapporteur* read the English text of paragraph 7 of the revised draft Resolution. The *President* invited comments on paragraph 7. In the absence of any comments, the *President* noted that paragraph 7 was adopted.

The *Rapporteur* read the English text of paragraph 8 of the revised draft Resolution. He said that, in response to a comment by Sir Kenneth Keith, this draft paragraph provides that actions of collective self-defence are to be taken in conformity with the United Nations Charter.

The *President* invited comments on paragraph 8.

Mr *Hafner* said that the sense of this paragraph was not clear. He thought that the main question concerned the request of the target State. There was a risk here of an *a contrario* reading. He added that, in addition, there were many different systems of collective self-defence. He thought the draft Resolution should either employ the right wording on this point or deal only with individual self-defence. He requested that the *Rapporteur* explain the meaning of requiring a request by the target State in order to exercise collective self-defence. Perhaps the word “only” could be added to qualify the request of the target State.

The *Rapporteur* said that he would consider this question and provide a further revised text the following day.

The *President* asked whether, in principle and subject to the comments by Mr *Hafner*, draft paragraph 8 could be adopted. No contrary view having been expressed, the *President* noted that paragraph 8 was so adopted.

The *Rapporteur* read the English text of paragraph 9 of the revised draft Resolution. He noted that the phrase “of measures” should instead read “on measures”.

The *President* invited comments on paragraph 9. No comment having been made, the President noted that paragraph 9 was adopted.

The *Rapporteur* read the English text of paragraph 10 of the revised draft Resolution. He explained that this revised draft paragraph attempted to deal, on the basis of various opinions and reactions, with questions raised by armed attacks committed by non-State actors. The current drafting attempted to take account of prior discussion, including proposals to elaborate on the original concise text, and accordingly used very flexible language. He provided a brief description of each of the sub-paragraphs of the text.

The *President* invited comments on paragraph 10.

Mr *Owada* said that he appreciated the efforts of the Sub-group in dealing with a very difficult issue. He observed that each of sub-paragraphs (i) to (iii) referred to different categories. Sub-paragraph (iii) did not speak of the right to self-defence but only that the State from whose territory an armed attack by non-State was launched had an obligation to cooperate. This sub-paragraph could imply that there was no right to self-defence. He recalled that the classic case of the *Caroline* fell within this category. The events of “9/11” would also fall under this category had they been committed from a foreign territory. He therefore wondered whether sub-paragraph (iii) could be redrafted to provide for these situations. With respect to sub-paragraph (ii), he thought the phrase “enforcement action” was misleading and did not reflect international law.

Mr *Treves* said he had a small proposal. In the second sentence of the chapeau, he preferred to change the phrase “a *prima facie* response” to the plural. It would in this way be evident that what followed were instances of possible responses. In addition, agreeing with the comment by Mr *Owada*, he asked why sub-paragraph (ii) did not use the expression “self-defence”.

Mr *Tomuschat* said he had two points. First, with regard to the second sentence of the chapeau, as a drafting point, he preferred to maintain the use of the singular. Secondly, with respect to sub-paragraph (iii), he thought the language used was much too weak. If a State (Israel, for example) was attacked from the territory of another State, it must be able to react, whether or not the attack was done under the control of the other State’s government. If this was not provided for, the draft Resolution ran the risk of taking away important rights.

M. *Torres Bernárdez* pense qu’il y a un malentendu sur la structure interne de l’article 10. Les hypothèses mentionnées à l’alinéa iii) lui semblent déjà couvertes par le chapeau de l’article 10. Le iii) ne fait qu’ajouter une obligation

de coopération entre l'Etat territorial et l'Etat victime ; il ne supprime pas le droit de réagir en légitime défense.

The *Rapporteur* said that the phrase “enforcement action” was not a good one and could be replaced by “self-defence”. He agreed with the suggestion of using the plural in the chapeau of the draft. As regards sub-paragraph (iii), he was inclined to take the interpretation proposed by Mr Torres Bernárdez as a point of departure. In the light of the comments by Mr Owada, he thought that the suggestion of Mr Torres Bernárdez offered a way forward.

Mr *Kirsch* said that the three sub-paragraphs were still not properly aligned. The chapeau referred to the right of self-defence, whereas the last sub-paragraph said nothing about self-defence. This needed to be corrected.

M. *Mahiou* dit que l'interprétation proposée par Mr Torres Bernárdez n'est pas évidente et qu'elle devrait mieux ressortir du texte de l'article. Il s'interroge également sur la relation entre le (iii) et l'article 5 du projet de résolution. L'article 5 donne en effet à l'Etat le droit de réagir pour repousser une attaque, mais il faudrait que ce soit aussi au moins le cas dans l'hypothèse mentionnée au (iii).

Mr *Ress* said that he was also attracted by the suggestion of Mr Torres Bernárdez. He said it was not possible to provide for a number of situations in the second sentence of the current draft paragraph. He suggested that the second sentence begin with the phrase “in addition to general principles” so that the text became inclusive.

M. *Remiro Brotons* propose une formulation qui pourrait recueillir l'adhésion de tous, soit l'ajout au (iii) du membre de phrase « in the area under the control of the non-State actor ».

Mr *Tomuschat* said that, if sub-paragraph (iii) was left as it was, it would be denying the right of self-defence and the only solution was to delete it. As it stood, sub-paragraph (iii) would diminish the right of self-defence.

The *Rapporteur* expressed his thanks for the observations made. He recalled a suggestion by the Secretary General to leave only the first sentence of draft paragraph 10 and to delete the remainder of the text. A second solution would be to follow the suggestion made by Mr Ress of adding a reference to general principles at the beginning of the second sentence. A third option would be to delete sub-paragraph (iii). He asked to be allowed to consider these options overnight and come back with new suggestions. If the further revised text was not acceptable, then he proposed to accept the Secretary General's suggestion of retaining only the first sentence of the current draft.

Mr *Treves* proposed that the *Rapporteur* might consider changing the third sub-paragraph so that it became a new paragraph and was therefore not under the

chapeau of the second sentence of paragraph 10. This would avoid incorrect implications. Perhaps a new wording could be added to provide for self-defence against the area of a State that was controlled by non-State actors.

Mr *Giardina* suggested that the second sentence could be deleted altogether and the sub-paragraphs linked instead to the chapeau of the first sentence of the draft paragraph. If this was acceptable, he would suggest adding the phrase “in particular” at the end of the first sentence. In this way, the entire paragraph would be subordinated to the rules of Article 51 of the United Nations Charter and thus better understood.

Mr *Owada* said that, in order to avoid the danger of misinterpretation, the Rapporteur should consider the suggestions made by Mr *Ress*. In addition, the sub-paragraphs of the draft text should be carefully reconsidered to avoid *a contrario* interpretations. In particular, sub-paragraph (ii) should clarify that the fact scenario which it addresses comes within the scope of the right to self-defence.

La séance est levée à 16 h 45.

Douzième séance plénière Samedi 27 octobre 2008 (après-midi)

La séance est ouverte à 14 h 40 sous la Présidence de M. *Orrego Vicuña*.

Revised 3 Draft Resolution

The Institute of International Law,

Mindful of the problems raised by the use of force in international relations;

Convinced that the system of collective security established by the United Nations Charter strengthens international peace and security;

Acknowledging the fundamental importance of individual and collective self-defence as a response of States to the unlawful use of force;

Mindful that the problems of self-defence of States facing armed attacks by non-State actors, as well as those of the relationship between self-defence and international organizations, require further study by the Institute;

Adopts the following Resolution:

1. Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.
2. Necessity and proportionality are essential components of the normative framework of self-defence.

3. The right of self-defence arises for the target State in case of an actual or manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack, until the Security Council takes effective measures necessary to maintain or restore international peace and security.
4. The target State is under the obligation immediately to report to the Security Council actions taken in self-defence.
5. An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.
6. There is no basis in international law for the doctrines of "preventive" self-defence (in the absence of an actual or manifestly imminent armed attack).
7. In case of threat of an armed attack against a State, only the Security Council is entitled to resort to the use of force.
8. Collective self-defence may be exercised only at the request of the target State.
9. When the Security Council decides, within the framework of collective security, on measures required for the maintenance or restoration of international peace and security, it may determine the conditions under which the target State is entitled to continue to use armed force.
10. In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.

A number of situations of armed attack by non-State actors have been raised, and some preliminary responses to the complex problems arising out of them may be as follows:

- i) If non-State actors launch an armed attack at the instructions, direction or control of a State, the latter can become the object of action in self-defence by the target State.
 - ii) If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defence in that area against those non-State actors.
 - iii) The State from which the armed attack by non-State actors is launched has the obligation to cooperate with the target State.
-

Projet de Résolution révisé No 3

L'Institut de droit international,

Conscient des problèmes que pose l'emploi de la force dans les relations internationales ;

Convaincu que le système de sécurité collective établi par la Charte des Nations Unies renforce la paix et la sécurité internationales ;

Reconnaissant l'importance fondamentale de la légitime défense individuelle et collective en tant que réaction des Etats à l'emploi illicite de la force ;

Conscient que les problèmes de la légitime défense des Etats face aux attaques armées par des acteurs non étatiques, ainsi que ceux des rapports entre légitime défense et organisations internationales, nécessitent des études ultérieures de l'Institut ;

Adopte la Résolution suivante :

1. L'article 51 de la Charte des Nations Unies, tel que complété par le droit international coutumier, régit adéquatement l'exercice du droit de légitime défense individuelle et collective.
2. La nécessité et la proportionnalité sont des éléments essentiels des règles applicables à la légitime défense.
3. Le droit de légitime défense de l'Etat visé prend naissance en cas d'attaque armée (« agression armée ») en cours de réalisation ou manifestement imminente. Il ne peut être exercé que lorsqu'il n'existe pas d'alternative licite praticable pour empêcher, arrêter ou repousser l'attaque armée, jusqu'à ce que le Conseil de sécurité ait pris les mesures effectives nécessaires pour maintenir ou rétablir la paix et la sécurité internationales.
4. L'Etat visé doit faire immédiatement rapport au Conseil de sécurité sur les actions de légitime défense qu'il a entreprises.
5. Une attaque armée déclenchant le droit de légitime défense doit avoir un certain degré de gravité. Les actions impliquant un emploi de la force de moindre intensité peuvent donner lieu à des contre-mesures conformes au droit international. En cas d'attaque de moindre intensité, l'Etat visé peut également prendre les mesures de police strictement nécessaires pour repousser l'attaque. Il est entendu que le Conseil de sécurité peut prendre des mesures visées au paragraphe 3.
6. Les doctrines de légitime défense « préventive », en l'absence d'une attaque armée en cours de réalisation ou manifestement imminente, n'ont pas de fondement en droit international.

7. En cas de menace d'attaque armée contre un Etat, seul le Conseil de sécurité a le pouvoir de recourir à l'emploi de la force.

8. La légitime défense collective ne peut être exercée qu'à la demande de l'Etat visé.

9. Lorsque le Conseil de sécurité décide, dans le cadre de la sécurité collective, des mesures requises pour le rétablissement de la paix et de la sécurité internationale, il peut indiquer les conditions auxquelles l'Etat visé est en droit de continuer à employer la force armée.

10. En cas d'attaque armée d'un Etat par un acteur non étatique, l'article 51 de la Charte, tel que complété par le droit international coutumier, s'applique en principe.

Un certain nombre de situations d'attaque armée par des acteurs non étatiques ont été soulevées et quelques réponses préliminaires aux problèmes complexes qu'elles soulèvent pourraient être les suivantes :

i) Si des acteurs non étatiques lancent une attaque armée sur les instructions, la direction ou le contrôle d'un Etat, ce dernier peut devenir l'objet de l'action en légitime défense de l'Etat visé.

ii) Si une attaque armée par des acteurs non étatiques est lancée depuis un espace situé hors la juridiction de tout Etat, l'Etat visé peut exercer son droit de légitime défense dans cet espace contre ces acteurs non étatiques.

iii) L'Etat à partir duquel l'attaque armée d'acteurs non étatiques est lancée doit coopérer avec l'Etat visé.

Le *Secrétaire général*, souligne que le texte distribué avait déjà été revu par le comité de rédaction. Il indique que le paragraphe 10 ne contenait auparavant pas de sous-paragraphe (iii), mais que la phrase devenait le troisième alinéa du paragraphe 10.

The *Rapporteur* indicated that there were three paragraphs to be considered, namely 5, 8, and 10 as well as the Preamble.

The *President* suggested considering first the three paragraphs and then the Preamble. He stated that paragraph 5 had been the object of an intensive debate, but he invited views from the floor as to whether it should be re-written or merely amended.

Mr *Schwebel* said that while paragraph 5 was not totally wrong, there were some issues that could be improved, and/or re-written in order to obtain greater consensus. He remarked that he had amendments to suggest, and that these had been circulated before the session. While some of the points proposed in the circulated amendments were reflected in the revised draft, there remained others

that could be added. He suggested that from the second sentence, paragraph 5 be re-written to read: “Acts involving the use of force of lesser intensity may justify responsive measures in conformity with international law. It is understood that the Security Council may take measures as in paragraph 3 above”. He noted that this involved deleting references to countermeasures and police measures.

The *Rapporteur* stated that the sub-group had debated the issue intensively. He agreed that “embodying” could be substituted for “involving” and that this would be forwarded to the drafting committee. He noted that countermeasures had been much debated and that the final text reflected the language used predominantly by the relevant international bodies. He stated that the text proposed was intended to maximize the possibility of reaching a consensus. He considered that most of Mr Schwebel’s proposals had in fact been incorporated.

The *President* requested clarification by Mr Schwebel of his proposed alternative version of paragraph 5 before submitting it to a vote.

Mr *Schwebel* repeated his proposed formula. He underlined that his proposal would remove the term countermeasures because it had a distinct and limited meaning as defined by the International Law Commission. He also noted that his proposal would allow the State to respond to lesser uses of force with more than merely police measures on its own territory.

The *President* called a vote on the two parts of the amendment submitted by Mr Schwebel asking first whether the reference to “countermeasures” could be substituted with “responsive measures” and calling for a separate vote on the deletion of the “police measures”. The *President* considered that the two votes had to be positive for the amendment to be adopted.

Le *Secrétaire général* annonce le résultat du vote. La première partie de l’amendement a recueilli 19 voix pour, 8 voix contre et une abstention. L’amendement est donc adopté.

The *President* called there a vote on the second part of the amendment suggested by Mr. Schwebel, that reference to “police measures” be deleted.

Le *Secrétaire général* annonce le résultat du vote. La seconde partie de l’amendement a recueilli 3 voix pour, 22 voix contre et 4 abstentions. L’amendement est donc rejeté.

Le *Président* demande un vote sur l’ensemble du paragraphe.

Le *Secrétaire général* annonce le résultat du vote. Le paragraphe a recueilli 24 voix pour, 3 voix contre et 4 abstentions. Il est donc adopté.

The *President* invited comments from the floor concerning paragraph 8. Since no comments were forthcoming he called a vote on the paragraph.

Le Secrétaire général annonce le résultat du vote. L'amendement a recueilli 30 voix en sa faveur, aucune en sa défaveur et aucune abstention. L'amendement est donc adopté.

The *President* invited comments on paragraph 10 and asked the Rapporteur if any clarification should be made before calling a vote.

The *Rapporteur* said that the provisions contained in sub-paragraphs (i) and (ii) had been debated in the plenary and that the only significant modification to paragraph 10 was that what was currently indicated as sub-paragraph (iii) should in fact feature as a separate non-numbered sub-paragraph within paragraph 10. This was because it merely stated a general principle which was simplified from a previous draft, and that it was uncontroversial in its content.

The *President* invited comments on this paragraph.

Mme *Bastid-Burdeau* indique qu'elle voudrait faire une remarque de forme concernant la version française. Elle fait référence au texte qui indique que « des situations (...) ont été soulevées ». Mme Bastid-Burdeau souligne qu'on ne soulève pas des situations, mais qu'on les envisage. Le mot « soulever » n'est pas approprié.

The *President* indicated that modifying current sub-paragraph (iii) to become a non-numbered sub-paragraph was a simple question of drafting that could be "addressed by the" drafting committee.

Mr *Feliciano* said that sub-paragraph (iii) of paragraph 10 seemed to contradict the declaration contained in the Preamble regarding the question of non-State actors. He noted that originally this question had not been included in the draft Resolution, but was to be left to further discussion. He asked whether, as it stood, it might prejudice further research.

The *Rapporteur* said that the idea was to make reference to undisputed examples of when armed attacks by non State actors gave rise to the right to self-defence. He stated that paragraph 10 seized on the obvious by stating that cooperation was necessary. It was thought that paragraph 10 only stated a general formula and that the Preamble should therefore indicate that the study should be taken further. He said that the language of paragraph 10 presented a flexible approach to a difficult problem.

Mr *Feliciano* stated that as it stood the paragraph seemed to be a partial answer to the issue discussed.

The *President* stated that the question should be considered by the drafting committee. The President invited other comments from the floor. As none were forthcoming he called a vote on the paragraph.

Le Secrétaire général annonce le résultat du vote. L'amendement a recueilli 32 voix pour, aucune voix contre et deux abstentions. L'amendement est donc adopté.

Mr *Schwebel* regretted to have to make a point of order for the record. He declared that he considered that the Secretary General had abusively interfered with substantive matters debated by the Institute, an attitude which he considered inappropriate for the Secretary General who, in his view, should remain impartial and should refrain from taking any position on controversial or even uncontroversial substantive matters. He asked the Bureau to carefully look into that matter because he feared the Secretary General could otherwise lose the confidence of some members.

Mr *Schwebel*'s remarks provoked oral disapproval from the floor and the *President* called the meeting to order. He declared that each member, including the Secretary General, was of course free to express his or her views and that the records would duly report the declaration of Mr *Schwebel*.

The *President* subsequently invited comments on the Preamble from the floor.

Mr *Ress* asked for clarification on whether former sub-paragraph (iii) of paragraph 10 was included as a new paragraph 11 or whether it had been approved as part of paragraph 10.

The *President* clarified that there was no paragraph 11. Rather former sub-paragraph (iii) was now an unnumbered sub-paragraph within paragraph 10. Its inclusion as sub-paragraph (iii) was in fact a mere drafting error. The *President* invited any further amendments to the Preamble, and subsequently called a vote.

The *Secretary General* announced the result of the vote which was 33 in favour, none against and no abstentions. The preamble was adopted.

Mr *Tomuschat* asked if when paragraph 10 was approved, the new final sub-paragraph had also been adopted.

The *President* noted this confusion in the voting and asked for a show of hands from the floor to confirm that paragraph 10 was adopted including the new unnumbered sub-paragraph. The paragraph was approved.

The *President* announced that the Resolution was adopted. He congratulated Mr *Roucounas* for his work.

Mr *Struyken* requested an explanation as to why his recommendations concerning the preliminary phases of an armed attack had not been reflected in the Resolution.

The *Rapporteur* explained that this statement would be reflected on the record, and that it could be discussed in future work within the Institute. However, the debate on substantive provisions should not be reopened.

The results of the roll call of votes as to whether the Resolution as a whole should be adopted were as follows:

For: Messrs Daniel Vignes, Chittaranjan Amerasinghe, Mesdames Geneviève Bastid-Burdeau, Messrs Benedetto Conforti, Vladimir-Djuro Degan, Christian Dominicé, Florentino Feliciano, Giorgio Gaja, Pierre Gannagé, Sir Kenneth Keith, Messrs Vincente Marotta Rangel, Rafael Nieto-Navia, Francisco Orrego Vicuña, Raymond Ranjeva, Georges Ress, François Rigaux, Emmanuel Roucouas, Christian Tomuschat, Santiago Torres Bernárdez, Tullio Treves, Joe Verhoeven, Alexander Yankov, Bernard Audit, Andrea Giardina, Gerhard Hafner, Mesdames Maria Infante Caffi, Jeannette Irigoin Barrenne, Vanda Lamm, Messrs Kazimierz Lankosz, Antonio Remiro Brotons, Natalino Ronzitti, Antoon Struycken.

Against : none.

Abstention : M. Stephen Schwebel.

The Resolution is therefore adopted by 32 votes and one abstention.

La séance est levée à 15 h 30.

RESOLUTION OF THE INSTITUTE

The Institute,

Mindful of the problems raised by the use of force in international relations;

Convinced that the system of collective security established by the United Nations Charter strengthens international peace and security;

Acknowledging the fundamental importance of individual and collective self-defence as a response of States to the unlawful use of force;

Mindful that the problems of self-defence of States facing armed attacks by non-State actors, as well as those of the relationship between self-defence and international organizations, require further study by the Institute;

Adopts the following resolution:

1. Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.

2. Necessity and proportionality are essential components of the normative framework of self-defence.

3. The right of self-defence arises for the target State in case of an actual or manifestly imminent armed attack. It may be exercised only when there is no lawful alternative in practice in order to forestall, stop or repel the armed attack, until the Security Council takes effective measures necessary to maintain or restore international peace and security.

4. The target State is under the obligation immediately to report to the Security Council actions taken in self-defence.

5. An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law. In case of an attack of lesser intensity the

target State may also take strictly necessary police measures to repel the attack. It is understood that the Security Council may take measures referred to in paragraph 3.

6. There is no basis in international law for the doctrines of “preventive” self-defence (in the absence of an actual or manifestly imminent armed attack).

7. In case of threat of an armed attack against a State, only the Security Council is entitled to decide or authorize the use of force.

8. Collective self-defence may be exercised only at the request of the target State.

9. When the Security Council decides, within the framework of collective security, on measures required for the maintenance or restoration of international peace and security, it may determine the conditions under which the target State is entitled to continue to use armed force.

10. In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.

A number of situations of armed attack by non-State actors have been raised, and some preliminary responses to the complex problems arising out of them may be as follows:

- (i) If non-State actors launch an armed attack at the instructions, direction or control of a State, the latter can become the object of action in self-defense by the target State.
- (ii) If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defence in that area against those non-State actors.

The State from which the armed attack by non-State actors is launched has the obligation to cooperate with the target State.

L'Institut,

Conscient des problèmes que pose l'emploi de la force dans les relations internationales ;

Convaincu que le système de sécurité collective établi par la Charte des Nations Unies renforce la paix et la sécurité internationales ;

Reconnaissant l'importance fondamentale de la légitime défense individuelle et collective en tant que réaction des Etats à l'emploi illicite de la force ;

Conscient que les problèmes de la légitime défense des Etats face aux attaques armées par des acteurs non étatiques, ainsi que ceux des rapports entre légitime défense et organisations internationales, nécessitent des études ultérieures de l'Institut ;

Adopte la Résolution suivante :

1. L'article 51 de la Charte des Nations Unies, tel que complété par le droit international coutumier, régit adéquatement l'exercice du droit de légitime défense individuelle et collective.

2. La nécessité et la proportionnalité sont des éléments essentiels des règles applicables à la légitime défense.
3. Le droit de légitime défense de l'Etat visé prend naissance en cas d'attaque armée (« agression armée ») en cours de réalisation ou manifestement imminente. Il ne peut être exercé que lorsqu'il n'existe pas d'alternative licite praticable pour empêcher, arrêter ou repousser l'attaque armée, jusqu'à ce que le Conseil de sécurité ait pris les mesures effectives nécessaires pour maintenir ou rétablir la paix et la sécurité internationales.
4. L'Etat visé doit faire immédiatement rapport au Conseil de sécurité sur les actions de légitime défense qu'il a entreprises.
5. Une attaque armée déclenchant le droit de légitime défense doit avoir un certain degré de gravité. Les actions impliquant un emploi de la force de moindre intensité peuvent donner lieu à des contre-mesures conformes au droit international. En cas d'attaque de moindre intensité, l'Etat visé peut également prendre les mesures de police strictement nécessaires pour repousser l'attaque. Il est entendu que le Conseil de sécurité peut prendre des mesures visées au paragraphe 3.
6. Les doctrines de légitime défense « préventive », en l'absence d'une attaque armée en cours de réalisation ou manifestement imminente, n'ont pas de fondement en droit international.
7. En cas de menace d'une attaque armée contre un Etat, seul le Conseil de sécurité a le pouvoir de décider de l'emploi de la force ou de l'autoriser.
8. La légitime défense collective ne peut être exercée qu'à la demande de l'Etat visé.
9. Lorsque le Conseil de sécurité décide, dans le cadre de la sécurité collective, des mesures requises pour le rétablissement de la paix et de la sécurité internationale, il peut indiquer les conditions auxquelles l'Etat visé est en droit de continuer à employer la force armée.
10. En cas d'attaque armée d'un Etat par un acteur non étatique, l'article 51 de la Charte, tel que complété par le droit international coutumier, s'applique en principe.

Un certain nombre de situations d'attaque armée par des acteurs non étatiques ont été envisagées et quelques réponses préliminaires aux problèmes complexes qu'elles soulèvent pourraient être les suivantes :

- (i) Si des acteurs non étatiques lancent une attaque armée sur les instructions, la direction ou le contrôle d'un Etat, ce dernier peut devenir l'objet de l'action en légitime défense de l'Etat visé.

236 INSTITUT OF INTERNATIONAL LAW- SESSION OF SANTIAGO (2007)

- (ii) Si une attaque armée par des acteurs non étatiques est lancée depuis un espace situé hors la juridiction de tout Etat, l'Etat visé peut exercer son droit de légitime défense dans cet espace contre ces acteurs non étatiques.

L'Etat à partir duquel l'attaque armée d'acteurs non étatiques est lancée doit coopérer avec l'Etat visé.