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Self-Defence and Preventive War at the Beginning of the Millenium

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- I. Introduction
- II. Some Short Reflections on the Evolution of the Concept of Self-Defence
- III. Pre-Emptive Self-Defence According to the Bush-Doctrine (Pre-Emptive Strikes)
- IV. Conclusion

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I. Introduction

Since the attacks of September 11th and the response of the United States through the National Security Strategy (2002),¹ the question of pre-emptive self-defence has loomed large not only among legal scholars, but also among a broader public, to whom a considerable number of press publications has been directed. The discussion has widened to considerable lengths, including the usefulness, efficacy and existence of public international law constraints on the use of force;² the efficacy and reality of United Nations mechanisms;³

¹ See the Report on www.whitehouse.gov/nsc/nss.pdf.

² A question on which *L. Henkin's* book, *How Nations Behave* (1968) still makes very useful reading.

³ See e.g. the anti-UN pamphlet by *Richard Perle*, *Thank God for the Death of the United Nations: Its Abject Failure Gave Us Only Anarchy*, *The Guardian*, 21.3.2003, 26. As can be noted: the anarchy is ascribed to the United Nations, not to unbridled unilateralism outside the United Nations.

and also the exact extent to which self-defence can be taken as granted in international law. In all these fields, there is a tendency to loosen the limits the international legal order imposes on States. This is a regretful event. It seems that the clock of time is being turned back towards more anarchy in international relations, the price of which will be paid by a spread of violence.

The focus of this short contribution will be to offer some reflections on this tendency of loosening the legal limits in the field of self-defence. What appears to be a recent pull towards more State-centered freedom to act preventively appears at closer sight to be a new episode in the age-old push and pull dilemma, by which self-defence has been uninterruptedly torn since the 19th century (to limit ourselves to the modern law of nations). In effect, at some times self-defence appears shrouded in a cloth so subjective and vague that it disappears from the scene of the law, placing itself fully in the realm of politics; it then takes the all-embracing and distorted form of *self-preservation* and opens itself to necessity-related arguments. At other times in history, self-defence has appeared framed in the cloth of a legal nature, being put into an objective and precise form, that is into the form of a reaction to an armed attack; it here becomes the traditional legal argument, as we know it in municipal law. Considering the historical evolution, it can be shown that the whole evolution of the concept is nourished by a constant shuttle between these two poles, that of the State-centered rule of power (self-defence as a means of self-preservation), and that of the community-centered rule of law (self-defence as a reaction to an armed attack).⁴

II. Some Short Reflections on the Evolution of the Concept of Self-Defence

In the 19th century, there was no proper doctrine on self-defence. As there was no general prohibition to use force in international relations, but indeed a *liberum ius ad bellum* by which each state could freely decide when and for

⁴ As the present writer has expressed himself elsewhere: "Le grand problème de la légitime défense est son oscillation permanente entre une doctrine juridique qui tente de la centrer exclusivement sur une attaque armée à laquelle elle répond, et des doctrines politiques qui tentent de s'échapper d'un corset si étroit au bénéfice d'un vague moyen d'auto-conservation ou de protection d'intérêts vitaux, sans autres contraintes techniques que la nécessité auto-appréciée. Il ne fait pas de doute que la doctrine de la 'self-preservation' en vogue au XIXe siècle, et au sein de laquelle gravitait la légitime défense, exerce encore une attraction vivace aujourd'hui, dans un monde divisé, violent et incertain, plein de menaces, où il fait mieux de s'en remettre à sa propre force que de confier en des systèmes collectifs souvent verrouillés ou inefficaces. Or, cela non seulement affaiblit fatalement le droit, mais contribue également à plus de force unilatérale et à plus d'insécurité; et donc à un besoin d'encore plus d'autoprotection et de doctrines de sécurité nationale vagues et agressives. Il y a là un véritable

what reasons to go to war,⁵ it appears clear that the development of a conspicuous doctrine of self-defence for justifying armed action was unnecessary.⁶ To the extent that political justification was sought, States fell back upon the broad concepts of self-preservation, vital interests or necessity,⁷ which were entirely self-judging, and allowed literally unbridled unilateral action. When self-defence was at all invoked, it took the guise of these wider notions, in which it was incorporated in self-extinction. Therefore, there was no legal doctrine of self-defence in the 19th century. The often-quoted precedent of the *Caroline* (1837),⁸ which is sometimes celebrated as the starting-point of the modern law of self-defence, is in reality no more than a precedent of the old law, centered on self-preservation. Simply, as armed action had in that case taken place in times of peace (there was no war between the United Kingdom and the United States in that incident), the conditions of its exercise were discussed somewhat more precisely than would have been the case if war had been declared – for in that case, the discretionary rights of the States involved would have been at stake, and no discussion would have ensued.

As a *ius contra bellum* (legal constraints of waging war) started to take shape after World War I, in particular through the League of Nations Covenant⁹

cercle vicieux. Si les juristes, instruits par l'expérience de la politique de violence, se sont efforcés depuis plus de cent ans de proposer une doctrine de la légitime défense juridiquement domestiquée, centrée autour du pôle objectif de l'attaque armée préalable, les réalités du monde politique ont lutté pour s'en échapper, favorisant le miroir grossissant de l'auto-préservation axée sur une notion de menace toute subjective. La lutte entre les deux acceptions de la légitime défense, l'une domestiquée, modérée et objective, l'autre léviathanesque, agressive et subjective, va encore dominer l'avenir". See *Kolb*, *Ius contra bellum*, *Le droit international relatif au maintien de la paix* (2003) 207–8.

⁵ See e.g. *Dinstein*, *War, Aggression and Self-Defence*³ (2001) 71 et seqs.

⁶ *Ibid*, 159 et seqs.

⁷ See *Brownlie*, *International Law and the Use of Force by States* (1963) 40 et seqs, with further references; *Kolb*, *Ius contra bellum*, *Le droit international relatif au maintien de la paix* (2003) 23, 179.

⁸ On this precedent, see *Meng*, *The Caroline*, *EPIL* I (A–D) (1992) 537–8. See also *Sofaer*, *On the Necessity of Pre-Emption*, *EJIL* 14 (2003) 214 et seqs; *Waldock*, *The Regulation of the Use of Force by Individual States in International Law*, *RCADI* 81 (1952-II) 462 et seqs; *Brownlie*, *op cit*, note 7, 42–3. The often-quoted formula which was produced in that case as describing the law of self-defence is as follows: "[There must be the existence] of necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation ... [and] nothing unreasonable or excessive". It is apparent how much this formula is indebted to the law of the 19th century.

⁹ See *Brownlie*, *op cit*, note 7, 55 et seqs; *Kolb*, *op cit*, note 7, 26 et seqs. As to Commentaries to the Covenant: *Ray*, *Commentaire du Pacte de la Société des Nations* (1930); *Yepes/da Silva*, *Commentaire du Pacte de la Société des Nations*, t I–III (1934–1935); *Schücking/Wehberg*, *Die Satzung des Völkerbundes*² (1924); *Hoijer*, *Le Pacte de la Société des Nations* (1926). See also: *Walters*, *A History of the League of Nations* (1952); *Bassett*, *The League of Nations* (1930). See moreover: *Balladore-Palieri*, *Il problema della guerra lecita nel diritto*

and the Paris Pact (1929),¹⁰ there was the parallel emergence of an international law relating to self-defence. Indeed, if the recourse to force tends to become prohibited for all types of "aggressive" action, there must be some reflection as to the situations in which armed action is not aggressive; and the most obvious case of such an exception is self-defence.¹¹ Thus, for example, the 1924 Geneva Protocol, whose object it was to organise mutual guarantees against aggression and a system of peaceful settlement of international disputes, expressly allows the waging of war for self-defence (article 2). The same is true of the system of the Locarno Treaties of 1925. The Pact of Paris (1928) contains nothing on the exceptions to the renunciation of war as an instrument of national policy. But it was agreed during the drafting that each State would keep its right to self-defence; the United States even appended a reservation to the Pact, expressly reserving a quite broadly defined right to that effect (still reminiscent of the self-preservation doctrines).¹² An agreement on the exact scope of the concept was not attained, since that would have been dependent on some agreement on the scope of a directly related concept, which was at the heart of the debates at that time: the concept of aggression.¹³

internazionale comune e nell'ordinamento della Società delle Nazioni, RDI 9 (1914) 512 et seqs; *Barandon*, Le système juridique de la Société des Nations pour la prévention de la guerre (1933); *Bourquin*, Règles générales du droit de la paix, RCADI 35 (1931-I) 221 et seqs; *Van Vollenhoven*, Du droit de paix, De iure pacis, La Haye 1932, 143 et seqs; *Webberg*, Die Völkerbundssatzung³ (1929).

¹⁰ On the Pact of Paris (Briand/Kellogg), cf *Brownlie*, op cit, 74 et seqs; *Kolb*, op cit, 39 et seqs. See further, *Borchard*, The Multilateral Treaty for Renunciation of War, AJIL 23 (1929) 116 et seqs; *Brierly*, Some Implications of the Pact of Paris, BYIL 10 (1929) 208 et seqs; *Calogeropoulos Stratis*, Le Pacte général de renonciation à la guerre (1931); *Le Gall*, Le Pacte de Paris du 27 août 1928 (1930) (with a bibliography); *Shotwell*, War As an Instrument of National Policy and its Renunciation in the Pact of Paris (1929); *Shotwell*, Le Pacte de Paris (1930); *Webberg*, Le problème de la mise de la guerre hors la loi, RCADI 24 (1928-IV) 234 et seqs; *Weiss*, Le Pacte général de renonciation à la guerre comme instrument de politique nationale (1929); *Wright*, The Meaning of the Pact of Paris, AJIL 27 (1933) 39 et seqs. For a more recent review, cf *Rascher*, The 'Renunciation of War as an Instrument of National Policy', Journal of the History of International Law 4 (2002) 293 et seqs. For State practice, see *Madelstam*, L'interprétation du Pacte Briand-Kellogg par les gouvernements et les parlements des Etats signataires, RGDIP 40 (1933) 537 et seqs and RGDIP 41 (1934) 179 et seqs; *Mandelstam*, L'interprétation du Pacte de Paris par les organes de la Société des nations, RGDIP 42 (1935) 241 et seqs. As to developments after the adoption of the Pact, see *Whitton*, Le renforcement du Pacte de renonciation à la guerre, RGDIP 39 (1932) 5 et seqs; *De Brouckère*, La prévention de la guerre, RCADI 50 (1934-IV) 1 et seqs.

¹¹ See *Brownlie*, op cit, note 7, 66 et seqs, with further references.

¹² See *Miller*, The Peace Pact of Paris (1928); *Bourquin*, Le problème de la sécurité internationale, RCADI 49 (1934-III) 477 et seqs; *Webberg*, Le problème de la mise de la guerre hors la loi, RCADI 24 (1928-IV) 253 et seqs.

¹³ See the review of the efforts in the 1930' by *Serra*, L'aggressione internazionale (1946). See also the very short but exact summary by *Guggenheim*, Les principes de droit international public, RCADI 80 (1952-I) 184 et seqs.

However, what is important to note is a propensity of the system to introduce a legal concept of self-defence. The concept is still halfway in the self-preservation mode, and only halfway in the legal mode as a means of defence to aggression. It had the form of a seed, and would flourish only with the Charter of the United Nations in 1945.

With the Charter of the United Nations, through its Article 51, the concept of self-defence went full way towards a proper legal construction. It established itself with the same meaning which is connoted to it under municipal law. It was thus limited by an objective set of conditions – namely a previous armed attack – which allowed it to escape from the subjectivity of the 19th century notions. Indeed, the beginning of Article 51 reads as follows: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations ...”. Self-defence has become reactive: it may be used if an armed attack occurs; on the face of it, it no longer covers all types of preventive or necessity actions, so typical of the 19th century.

It is obvious that by attempting to impose such a restrictive reading of self-defence in a world of sovereign States, eager to preserve their security and that of their people, and moreover in a world full of threats, the Charter went far in the progressive development of the law (and some said: wishful thinking). But a pace and an objective were set. The developments in the real world after 1945 did not honour the hopes of those who drafted the Charter. The Cold War soon brought the demise of the system of collective security centered on the Security Council of the UN, and in parallel redistributed to the States *uti singuli* the task of providing for their own defence. The collective level of the Charter, which should have forestalled unilateral action (having been so damaging to the world up to World War II), to a large extent collapsed; and therefore, the States, faced with no entity which would defend them if attacked, took some distance from the system of expropriation of the use of force as enshrined in the Charter, trying to reacquire to some extent a faculty of the unilateral use of force. Hence, they interpreted narrowly the principle contained in Article 2 § 4, prohibiting the use of force, and they interpreted largely Article 51, which allows exceptional force, in the case of self-defence.¹⁴

There were several proposals of extensive interpretations of Article 51. Not all were accepted. Some few States attempted more than others to broaden the concept of self-defence. Not rarely, were they condemned for actions undertaken on such broad concepts by the political bodies of the United Nations: one may think of such US invasions as, in the Dominican Republic (1956), or later in Grenada (1983); of the raid of the US in Libya in

¹⁴ *Alibert*, Du droit de se faire justice dans la société internationale depuis 1945 (1983).

1986; of the raid of Israel Osirak (1981) or in Tunis (1982).¹⁵ Some such developments, attempting to broaden the reach of Article 51 should be mentioned.

First, the system of collective security was abandoned for a system centered on organisations of collective self-defence such as the NATO and the Warsaw Pact; these organisations were based on Article 51, which allows collective self-defence. Thereby, the whole system of the Charter was turned upside down, since universal collective security was abandoned in favour of a system of hostile alliances – precisely what the Charter had attempted to avoid. By the same token, Article 51 of the Charter, which had been considered during the drafting at San Francisco as embodying only a subsidiary and provisional right of individual States up to the moment the Security Council would act (and swift action was expected), became at once the pillar of the post-war peace order.¹⁶ Its function and importance were completely redefined. This evolution seems indeed to have been unavoidable if one considers the political events after 1945; in any case, this system ensured for almost 50 years that the peace in the most sensitive zones between the two superpowers, and especially in Europe was kept. It did not ensure that the peace was kept in the “peripheral zones”, torn by the constant intervention of the two superpowers in civil wars, which allowed them to fight each other by “proxy”.¹⁷

Second, some more limited attempts at a further extensive interpretation of Article 51 are here briefly presented.¹⁸ Only some examples will be given, since the legal inventiveness of States on this point was almost boundless, and space is lacking to track down all the arguments presented.

- A first argument was to say that the Charter, in its Article 51, rules only on one modality of self-defence, i.e. the most grave one. It is concerned only with situations where a State is the victim of an armed attack. For all the other cases of self-defence, the Charter contained no rule. It was added that the wording of Article 51, when it speaks of self-defence as an “inherent right” (“droit naturel”), operates a *renvoi* to customary international law. There would thus seem to be two parallel sets of norms, one

¹⁵ For these cases, see the overview by *Oppenheim in Jennings/Watts* (eds), *International Law*⁹ (1992) 423 et seqs. See also *Murphy*, *Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter*, *Harvard International Law Journal* 43 (2002) 45 et seqs.

¹⁶ For its justification, see *Salvin*, *The North Atlantic Pact*, *International Conciliation* (1949) 375 et seqs, 400–1. See also *Saba*, *Les accords régionaux dans la Charte de l'ONU*, *RCADI* 80 (1952-I) 687 et seqs.

¹⁷ See *Duner*, *Proxy Intervention in Civil Wars*, *Journal of Peace Research* (Oslo) 18 (1981) 353 et seqs; *Nolte*, *Eingreifen auf Einladung* (1999); *Farer*, *Harnessing Rogue Elephants: A Short Discussion on Foreign Intervention in Civil Strife*, *Harvard Law Review* 82 (1969) 511 et seqs.

¹⁸ For a fuller account, see *Kolb*, *op cit*, note 7, 184 et seqs.

conventional, limited to armed attacks of self-defence, and on the other hand customary international law, with a more general right to self-defence. This customary law for self-defence allows a State to react short of an armed attack, especially by way of anticipation, if there is an imminent threat to its security. The measure of this right is set down in the *Caroline* precedent with its formula centered on an "instant and overwhelming necessity".¹⁹ This doctrine of the parallel and permissive custom, not abrogated by the Charter, was rejected by the majority of authors,²⁰ but it always loomed in the background, and was from time to time relied upon by States, namely the US and Israel.

- A second argument was to the effect that the limitation on some form of preventive action was indispensably bound, in the opinion of the States drafting the Charter, to the efficacy of the system of collective security. Failing that system, the States again inherit the rights necessary to provide for their own security, and these rights are limited only by manifest unreasonableness. This position has lucidly been expressed in the following words: "The reduction of self-defence to an interim right [until the Security Council acts] was made on the assumption that the international quasi-order, which was to be established by the United Nations, would normally work. ... If ... the Security Council fails to fulfil its appointed function, this task falls back on the individual members of the United Nations. The only limitation which is imposed on their freedom of appreciation is that they must exercise this discretion in good faith. ... [N]o realistic interpretation of Article 51 can ignore this phenomenon".²¹

¹⁹ Such a position has been defended by authors such as: *Bowett*, Self-Defence in International Law (1958) 187 et seqs; *McDougal*, The Soviet-Cuban Quarantine and Self-Defense, AJIL 57 (1963) 600; *Schwebel*, Aggression, Intervention and Self-Defense, RCADI 136 (1972-II) 479 et seqs; Op diss *Schwebel*, *Nicaragua* case (Merits), ICJ, Rep (1986) 347 et seqs; *Waldock*, The Regulation of the Use of Force by Individual States in International Law, RCADI 81 (1952-II) 497-8; *Waldock*, General Course on Public International Law, RCADI 106 (1962-II) 234-6.

²⁰ See *Kolb*, op cit, note 7, 185-6. See also *Randelzhofer*, Article 51, in *Simma*, The Charter of the United Nations – A Commentary² (2002) 793.

²¹ *Schwarzenberger*, The Fundamental Principles of International Law, RCADI 87 (1955-I) 338. As to the criticism of this position, see *Kolb*, op cit, note 7, 187: "Cet argument réaliste est irrésistible dans les faits: sans système de substitution efficace qui garantisse sa sécurité, aucun Etat ne renoncera au *self-help*. Du point de vue normatif, l'argument présente cependant d'évidentes ornières. Car, en invoquant une faiblesse (réelle), il en crée une autre et risque ainsi de barrer la route à tout progrès. Dans une société où la force reflue de proche en proche vers les Etats, le système et l'effort collectif s'atrophient toujours plus; l'anarchie de la force remplace progressivement l'ordre; cela rend à son tour encore plus indispensable le *self-help* de chacun; ainsi s'enclenche un cercle vicieux. L'imperfection n'est pas une raison d'achever la droit, mais plutôt un appel à le perfectionner. C'est la raison pour laquelle beaucoup de parcimonie s'impose face à l'argumentation basée sur l'efficacité du système".

— A third and last proposition holds that Article 51 belongs to a pre-nuclear weapons world, and that the emergence of such weapons of mass destruction have rendered obsolete the limitations imposed in the Charter for the exercise of self-defence. Thus, the first proliferation of atomic weapons produced a shock, which in its turn put heavy pressure on the constraints contained in Article 51. The argument is that, faced with arms which permit instant destruction by a first strike, the criterion of prior armed attack as contained in Article 51 is utterly unrealistic and puts national security into jeopardy. In order to protect oneself, it may thus become necessary to act pre-emptively. The US Government hesitated to endorse such a doctrine, for it would have meant the death of the United Nations system. Moreover, it would have put in danger the global power-equilibrium and the rule of abstention induced from the balance of nuclear terror. However, some authors proximate to governmental circles did not hesitate in putting forward such a doctrine of aggressive self-defence, since according to them it would be impossible "to await the first strike sitting like ducks".²² One will easily notice the similitude of this doctrine with the recent arguments on pre-emptive self-defence. The most marked difference remains in the Governmental role: utmost prudence in the past, don-quixotesque assertiveness recently.²³

These examples of a tendency to expand the conditions of admissibility of self-defence well beyond the Charter-framework have thus been constant since 1945; they cannot be condemned without some qualification, since they did to some extent coincide with international realities in a world torn by conflict and lacking order. However, the addition of such doctrines with their pull towards anarchy is in turn a factor which increases disorder and thus the need for further aggressive assertions of unilateralism. It should not be forgotten that such assertions never stay isolated; they always produce emulation by other States; and thus there is an escalation of violence and eventually the death of even the small amount of order keeping the world globally on the path of peace rather than that of war. Thus, besides the logic of "para bellum", there must be some logic of "para pacem" if anarchy is not to

²² See *McDougal*, The Soviet-Cuban Quarantine and Self-defence, *AJIL* 57 (1963) 597. Other authors, more correctly it seems, have concluded the opposite: the danger of nuclear weapons has rendered even more urgent a strict limitation by the condition of a prior armed attack, since otherwise it would become likely to provoke a nuclear holocaust by error or by escalation: see *Henkin*, *How Nations Behave*² (1979) 141 et seqs.

²³ The US Government did not even invoke the argument of pre-emptive self-defence in the case of the Cuban Missile Crisis (1962) for fear that a precedent could be created, a precedent which in turn could be invoked by the USSR with respect to the US missiles stationed in Turkey. See *Chayes*, The Cuban Missile Crisis, *International Crises and the Role of Law* (1974) 63 et seqs. See also *Gardner* in *AJIL* 97 (2003) 587–8.

triumph completely. Consequently, if the system presents some deficiencies, all efforts should be made to remove these deficiencies, and not to create new ones in order to respond to the existing ones. By engaging in a downward spiral, a solution cannot be found. It was difficult to imagine much possibility of progress during the cold war era. Today, there seem to be many more possibilities for strengthening the collective security level, if only there is a will to do so. This obviously implies that one side does not consider that any limit imposed on it by way of "multilateralism" is unacceptable.

From the analytical point of view, the tendency to multiply the exceptions and allowances under Article 51 can be seen in the light of the eternal swing of the pendulum between the poles of self-preservation and self-defence proper: since 1945 there has been a constant tendency, by some States,²⁴ to inoculate elements of the first into the body of the latter; to put seeds of self-judgement, of a vague and policy-related type into the body of a rule of law-conceived self-defence, based on the response to an armed attack.

III. Pre-Emptive Self-Defence According to the Bush-Doctrine (Pre-Emptive Strikes)²⁵

1. The justification of an apparently new doctrine of self-defence is said to arise from the state of international security, which is portrayed as being full of new threats due to weapons of mass destruction, of rogue States, of shadowy terrorist groups not subjected to the old constraints of deterrence. The following lines are an example of this type of description: "The shift in

²⁴ *Abi-Saab*, Cours général de droit international public, RCADI 207 (1987-VII) 375 et seqs. Rightly insists on the fact that the strains on the system of the Charter, and the stretches of self-defence, have been mainly based on the action of a small minority of States (always the same ones) whereas the system has been upheld by the great majority of the international community. This, it seems, still holds true today.

²⁵ Within the large amount of literature, see, *cf. pro: Byers*, Terrorism, the Use of Force and International Law After 11 September, ICLQ 51 (2002) 410–1; *Capezzuto*, Preemptive Strikes Against Nuclear Terrorists and Their Sponsors: A Reasonable Solution, New York Law School Journal of International and Comparative Law 14 (1993) 375 et seqs; *Clarke Posteraro*, Intervention in Iraq: Towards A Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention, Florida Journal of International Law 15 (2002) 151 et seqs [de lege ferenda]; *Franck*, When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?, Washington University Journal of Law and Policy 5 (2001) 58 et seqs; *Kirgis*, Pre-Emptive Action to Forestall Terrorism, ASIL Insights, (2002) www.asil.org; *Roberts*, The Counter-proliferation Self-Help Paradigm: A Legal regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction, Denver Journal of International Law and Policy 27 (1999) 483 et seqs; *Schmitt*, Preemptive Strategies in International Law, Michigan Journal of International Law 24 (2003) 513 et seqs; *Sofaer*, On the Necessity of Pre-Emption, EJIL 14 (2003) 209 et seqs; *Taft/Buchwald*, Preemption, Iraq and

perspective stems from important strategic realities. The civilized world faces a grave threat from terrorism, especially from groups supported by States. The current threat goes beyond conventional threats from terrorist groups. Globalization has facilitated the capacities of terrorists to travel, move money, and communicate. Technology has enhanced their ability to inflict damage with powerful explosives, modern weapons, and potentially through the use of weapons of mass destruction. [...] For these reasons, the US has advanced, more forcefully than ever, the need for pre-emptive actions".²⁶

From such a picture, a consequence of great simplicity can be drawn: a new law is needed to face such new threats. And hence: the old law, unadapted to the new situation, must be set aside, first by refusing to remain constrained by it, and second by claiming its revision. This type of factual argument is striking in its massive and unaltered repetition, which seems to be like a litany.²⁷ Moreover, the range of that description always remains quite narrow: the objectivity of the facts advanced is not questioned; the data of the

International Law, AJIL 97 (2003) 557 et seqs; *Wedgwood*, The Fall of Saddam Hussein: Security Council Mandates and Pre-Emptive Self-Defence, AJIL 97 (2003) 576 et seqs; *Yoo*, International Law and the War in Iraq, AJIL 97 (2003) 571 et seqs.

Contra: *Bothe*, Terrorism and the Legality of Pre-Emptive Force, EJIL 14 (2003) 227 et seqs; *Bothe*, Der Irak-Krieg und das völkerrechtliche Gewaltverbot, AVR 41 (2003) 261 et seqs; *Di Blase*, Guerra al Terrorismo e guerra preventiva nel diritto internazionale, in *Bimbi* (ed), Not in My Name, Guerra e diritto (2003) 151 et seqs; *Dinstein*, in ASIL Proceedings of the 97th Annual Meeting (2003) 148; *Farver*, Beyond the Charter Frame: Unilateralism or Condominium, AJIL 96 (2002) 359 et seqs; *Franck*, What Happens Now? The United Nations After Iraq, AJIL 97 (2003) 618 et seqs; *Gardner*, Neither Bush nor the Jurisprudes, AJIL 97 (2003) 585 et seqs; *Gray*, The United States National Security Strategy and the New 'Bush Doctrine' on Preemptive Self-Defense, Chinese Journal of International Law 1 (2002) 437 et seqs; *Hofmann*, International Law and the Use of Military Force Against Iraq, GYIL 45 (2002) 29 et seqs; *McLain*, Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq, Duke Journal of Comparative and International Law 13 (2003) 265 et seqs; *Marcelli*, Gli USA contro il diritto internazionale: illecità della guerra preventiva, Giano 42 (2002) 23 et seqs; *Murswiek*, Die Amerikanische Präventivkriegsstrategie und das Völkerrecht, Neue Juristische Wochenschrift 56 (2003) 1014 et seqs; *O'Connell*, The Myth of Preemptive Self-defense, ASIL, Task-force on Terrorism (online: www.asil.org); *Sapiro*, Iraq: The Shifting Sands of Preemptive Self-Defense, AJIL 97 (2003) 599 et seqs; *Schaller*, Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht, ZaöRV 62 (2002) 656 et seqs; *Tomuschat*, Völkerrecht ist kein Zweiklassenrecht. Der Irak-Krieg und seine Folgen, Vereinte Nationen 51 (2003) 41 et seqs.

For a more cautious position, see e.g. *Reisman*, in ASIL Proceedings of the 97th Annual Meeting (2003) 142–3; and *Reisman*, Assessing Claims to Revise the Laws of War, AJIL 97 (2003) 87 et seqs. See finally *Walker*, Anticipatory Self-Defense in the Charter Era: What the Treaties Have said, Cornell International Law Journal 31 (1998) 321 et seqs.

²⁶ See *Sofaer*, op cit, note 25, 209–210. Many other authors could be quoted: see e.g. *Schmitt*, op cit, note 25, 545 et seqs; *Wedgwood*, op cit, note 25, 582 et seqs.

²⁷ See the authors quoted in favour of pre-emptive self-defence, Footnote 25.

American governmental authorities are not questioned; nuances are seldom; the impact of the attitude of the United States itself on the overall picture of security, and the consequences of its doctrines, are often eclipsed. Finally, the urgency of the matter, as suggested, surreptitiously prevents the majority of writers from going further into the argument: the necessity to act by force, perhaps even pre-emptive force, in order to forestall an apocalypse for the United States imposes itself as being rational evidence, not calling for further justification. In that sense, the chain of arguments presented is subtle and powerful.

It may at this juncture be worth quoting the words of the United States National Security Strategy, adopted after the attacks of September 11th. First, a statement by President Bush is revealing: "For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, these strategies still apply. But new threats also require new thinking. Deterrence – the promise of massive retaliation against nations – means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies. We cannot defend America and our friends by hoping for the best. We cannot put our faith in the words of tyrants, who solemnly sign nonproliferation treaties, and then systematically break them. If we wait for threats to materialize, we will have waited too long. [...] Our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives".²⁸

From this awesome picture, the following legal consequences are drawn: "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue States and terrorists do not seek to attack us using conventional means. [...] [T]hey rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning. In other words, the law of self-defense has long permitted military action in anticipation of an imminent attack. However, the requirement of imminence must evolve as the nature of the threat changes. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking

²⁸ Speech of G. Bush Jr., 1st June 2002: www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively".²⁹

From the situation described a severe threat to the nation is shaped; hence the vital necessity to act; and hence the stretch of the criterion of anticipation (imminence) towards the new strands of pre-emptive action. This line of argument is well made to impress. It has the mark of great coherency, rationality and powerfulness. But can we accept it, if some further reflection is taken?

2. It may be useful to first consider which forms of self-defence can exist when considered in a time axis, and in particular with respect to the criterion of "armed attack" as required by Article 51 of the Charter of the United Nations.³⁰ It appears that four different levels can be distinguished.

(1) There is self-defence following an armed attack (*reactive self-defence*). This type of self-defence is obviously that contemplated by Article 51, and it is the less problematic. The objectivity of the facts can still be disputed,³¹ and the intensity of the attack giving rise to self-defence is an object of controversy; but on the whole there is the greatest guarantee that self-defence will not be abused, since the material nature of an attack is to some extent an observable fact of reality. The problem, which can arise here, is that the State claiming to exercise self-defence refuses to bring the action back to the Security Council as soon as possible in order to submit the situation to the collective level of decision-making. Article 51 does in effect give precedence to the action of the Security Council in the context of collective security over the individual (and in that sense anarchic) action of the individual State. This provision, whose realistic character was questioned dready a long time ago,³² has recently been considerably eroded. A particularly striking case was the action of the United States in Afghanistan in 2002. The US only asked the Security Council to give a green light for their action, by way of recognition of the situation of self-defence in some pre-ambular paragraphs of Resolutions

²⁹ See www.whitehouse.gov/nsc/nss.pdf, 15.

³⁰ Article 51 reads as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security". As for a commentary of this provision, see *Randelzhofer*, in *Simma*, *The Charter of the United Nations – A Commentary*² (2002) 788 et seqs.

³¹ As the *Nicaragua* (1986) case at the ICJ shows: ICJ Reports (1986) 38 et seqs.

³² See e.g. *Bourquin*, *L'Etat souverain et l'organisation internationale* (1959) 114.

1368 and 1373. For the rest, they kept the action in Afghanistan under their own control, limiting the Security Council to the role of a ratification chamber *post hoc*.³³ This course of action is not compatible with the letter and spirit of the Charter.

(2) Secondly, there is self-defence once an attack has been launched, but it not having yet struck the territory of the attacked State (*interceptive self-defence*). There are several possibilities here. One example is that of a missile which has been launched, but which is still in the air. Few would doubt that the State towards which it is flying is entitled to shoot it down before it reaches its territory. Another example, with some more temporal remoteness, is that of Pearl Harbor. The Japanese fleet, when it was underway to Pearl Harbor, could have been sunk by an American attack: the last act for the attack by the Japanese had been done, an irreversible course of action was chosen, and the attacked State could forestall the bombardment by acting from the moment the fleet was underway.³⁴ The importance of correct security information is obviously crucial if tragic errors are to be avoided. And this shows the already greater subjectivity of such self-defence with respect to it occurring after an armed attack has been launched. As one can see, interceptive self-defence covers various situations which are slightly different from the point of view of the time-frame: from cases where minutes are at stake (missiles) to situations where even weeks may be involved (sailing fleets). Obviously, under modern conditions, the time frame tends to be narrow since the attacks occur at very short intervals.

(3) There is also self-defence directed against an attack which has not yet been launched, but whose launch is imminent (*anticipatory self-defence*). The criterion of "imminence" is here paramount. Troops may be moved to the borderline, there may be the last preparations for attack, or there may even be some declaration that an attack might or will occur.³⁵ This type of situation has given rise to great controversy over the last 50 years. The opinion held by the slight majority refuses to open the door for anticipatory self-defence in such cases.³⁶ It argues on the basis of the text of the Charter and of its spirit: the danger of opening the door for unilateral forcible action without an objective criterion as to the attack (the threat remaining a threat and not a certitude) seems to these authors too high to be accepted in an international system inclined to endemic violence and to the escalation of force as soon as

³³ See the criticisms on this point by *Corten/Dubuisson*, Opération 'Liberté immuable': une extension abusive du concept de légitime défense, RGDIP 106 (2002) 73–5.

³⁴ See *Dinstein*, War, Aggression, Self-Defense³ (2001) 169 et seqs.

³⁵ To the extent that there is a declaration of war or of attack, a state of war may well be created, and thus the aggrieved State could legally choose to hit first.

³⁶ See e.g. *Brownlie*, op cit, note 1, 257 et seqs, 275 et seqs; *Brownlie*, The Principle of Non-Use of Force in Contemporary International Law, in *Butler* (ed), The Non-Use of Force in International Law (1989) 17 et seqs. See generally *Randelzhofer*, in *Simma*, note 30, 803–4.

the cycle of violence is launched.³⁷ Thus, at the end of the day in international relations, rules refraining more strictly from the use of force are felt as being more important for the common weal than the avoidance of some injustice in the individual case following on from the fact that the door of violence has been tightly closed. Moreover, how could one be sure that the threat would have materialised? Is it not more probable that a State will precipitate war where it could still perhaps be avoidable? And also: how does one measure criteria such as proportionality and necessity, being part of the law relating to self-defence,³⁸ if there is no attack yet? How does one apply e.g. proportionality to a hypothesis?

On the other hand, it is claimed that it is morally, realistically and legally impossible to prohibit to a State which knows it is the object of an imminent attack to stand idly by and face a potentially devastating blow before being able to take up arms.³⁹ The example sometimes given⁴⁰ for a case where anticipatory self-defence holds good, namely the case of Israel and Egypt in 1967, illustrates the problem, since the exact facts and the existence of imminence is sometimes disputed, even by US authors.⁴¹

(4) There is finally a form of purported self-defence which seeks to counter diverse future threats, which have not yet fully materialised and which are certainly not imminent (but which, it is claimed, may become so if no action is taken). That is the proper field of *pre-emptive or preventive self-defence*. Suffice it to say at this stage that such a mode of "self-defence", which is more precisely to be termed preventive war, cannot in any way be fitted into the system of the Charter with its rules on the peaceful settlement of disputes, expropriation of the right to use force by individual States (except for self-defence in cases where an armed attack has occurred) and exclusive powers of the Security Council to take action in order to face threats to world security. Generalised pre-emptive self-defence would obviously mean re-introducing an individual right to force in a wide array of circumstances by way of self-judgement. And that would be to come back to the time-honoured position of the 19th century, with its overall and completely subjective doctrines of self-preservation.

³⁷ All that is made more grave by the prevalence of self-interpretation in international relations.

³⁸ See the *Nicaragua* case, ICJ Reports (1986) 94, § 176; *The Legality of the Threat or Use of Nuclear Weapons* opinion, ICJ Reports (1996) 245, § 41; and the *Oil-Platforms* case (2003), § 51, 73 et seqs.

³⁹ See e.g. *Higgins*, General Course of Public International Law: International Law and the Avoidance, Containment and Resolution of Disputes, RCADI 230 (1991-V) 310–1.

⁴⁰ See *Shapira*, *The Six-Day War and the Right of Self-Defence*, in *Moore* (ed), *The Arab-Israeli Conflict*, vol II (1974) 205 et seqs. See also UNYB 1967, 174 et seqs, 199–200. See also *Martin*, *Le conflit israélo-arabe* (1973) 153 et seqs.

⁴¹ See *O'Connell*, *Lawful Self-Defence to Terrorism*, *University of Pittsburgh Law Review* 63 (2002) 894, with further references.

These four circles must thus be assessed differently as to their legality under the law of the Charter and of general international law. Categories (1) and (2) are granted by the Charter, the first being covered by the text, the second being covered by an interpretation of the text in keeping with the spirit of the system. Category (3) is problematic. It over-steps the text of Article 51 and to some extent also its spirit. It threatens to be the vehicle of the re-introduction of more violence among nations and to consequently function as a starting-point of escalating violence. However, if exercised with great caution, it does not subvert completely the system of the Charter, notwithstanding the dangers to which it exposes it. Category (4), as has been said, is utterly incompatible with the letter and spirit of the Charter and of general international law, to which it forms contempt.

3. Where do we stand at this moment? It is apparent that the spectre of action and of thought is being pulled towards categories (3) and (4), and that in a parallel process the system of the Charter is being attacked from many sides. Some aspects of these tectonic adjustments are quite revealing from the point of view of the general state of the spirit they disclose.

a) There is, first, a quite astonishing *retour en force* of the concept of anticipatory self-defence. As has been explained, this type of self-defence, which has for a long time been founded on the old precedent of the *Caroline* (1837), was for many years considered to be incompatible with the Charter by the majority of writers. The old right to take anticipatory action was held to have been abrogated by the strictures of Article 51. However, we are now confronted with a situation where almost the entirety of US American legal writing considers that such anticipatory self-defence is without any doubt conceded by international law.⁴² This has the advantage of bringing oneself at once closer to the shores of pre-emptive action, since the justification must be only of one step, that of anticipatory action to that of pre-emptive action (through a broadening of the concept of imminence, adapted to modern conditions); otherwise, there would have been two steps to overcome: to justify first the acceptance of anticipatory self-defence with respect to reactive / interceptive self-defence, and then, separately to take the step from anticipatory self-defence to pre-emptive self-defence. This relaxation of the criteria seems to have also influenced, to some extent, European writers⁴³. What is most striking is the way in which all this is taken for granted and the extent to which anticipatory self-defence is allowed as if it had always been undisputedly part and parcel of international law. There is at this juncture an

⁴² See e.g. Yoo, op cit, note 25, 571ss; Sapiro, op cit, note 25, 600ff; Stromseth, op cit, note 25, 637ss; Schmitt, op cit, note 25, 528ss; Kearley, op cit, note 25, 719ss; Clarke Posteraro, op cit, note 25, 182; McLain, op cit, note 25, 271.

⁴³ See e.g. Borbe, op cit, note 25, 231; Hofmann, op cit, note 25, 31-2.

obvious ideological slide towards a position more lenient to the use of force by States in international law.

In this line of argument, the precedent of the *Caroline* is still regarded as good law, settling the point. But, at the very inception, we may well ask ourselves under what guise a precedent of 1837 is still good today. Why should a precedent emanating from a time when the law was dramatically different be good for today? In effect, in 1837, international law was fully amidst its period of *liberum ius ad bellum*, with an unlimited doctrine of self-preservation. It is therefore not surprising that the vague terms of that case for the use of force reflect the surrounding law, i.e. stresses the discretionary element in the use of force. If there are legal criteria at all in this case, it is because the *Caroline* incident was a forcible operation in time of peace. And if it was accepted that each State could pass unilaterally by declaration of war from the time of peace to the time of war (enjoying then the rights of warfare), it was equally accepted that as long as this did not happen, the law of the time of peace applied and thus the integrity of foreign territory was to be respected. But how can we today accept such a precedent, not only based on a law of self-preservation rather than self-defence, but moreover not ruling the situation where a State claims to be able to take action which will constitute a full-fledged armed conflict? There is a curious link established here; and again, what is astonishing is not that the step is taken, but that it is considered that no further justification is needed. It may be added that the US in the precedent of the *Caroline* sharply condemned the anticipatory action taken by the United Kingdom.

b) If one compares the upholding of the *Caroline* with the treatment the same authors reserve for modern law as exposed by the International Court of Justice, mainly in the *Nicaragua* case (*Merits*, 1986)⁴⁴ and in the *Oil-Platforms* case (2003),⁴⁵ the picture becomes even more revealing. The last case is too recent to have prompted academic comment at this stage, but, as it confirms the *Nicaragua* case, it can here be taken as part of the same movement. Now, these two cases are of 1986 and of 2003; and this is much more recent than 1837. Yet, the *Nicaragua* precedent is constantly devalued, if it is mentioned at all. It is presented as being obsolete and inadequate, or even as contradictory.⁴⁶ And, more surreptitiously, one slides towards qualifications such as “*Nicaragua*-opinion”,⁴⁷ suggesting thereby that it was just one opinion, as

⁴⁴ ICJ Reports (1986) 97 et seqs.

⁴⁵ See especially § 40 et seqs of this case.

⁴⁶ This last argument is always particularly interesting, since there is contradiction only with respect to certain often undisclosed preconditions, and those are generally that States should be able to use force as they see fit; then, in effect, a law constraining that freedom becomes contradictory, in the first sense of the word.

⁴⁷ See *Glennon*, Military Action Against Terrorists under International Law: The Fog of Law, *Harvard Journal of International Law and Public Policy* 25 (2002) 543.

there are many others, possibly also that this opinion is to be placed more or less at the same level of that arising from a piece of individual legal writing. Or, there are assertions that the judgment of the Court is "not binding on States",⁴⁸ and does not bind the US to act in the way the law is spelled out there. These are, to say the least, puzzling statements when made by persons whose titles nourish the expectation that they are lawyers. But from the ideological point of view, these statements are highly interesting.

If taken in conjunction, these movements combine to erode the law of the Charter by removing all constraints to use force. Some claims may seem to be infinitesimal questions of vocabulary; but they do tell a long story about the state of mind prevailing in many circles at the present time.

4. A further frequent argument is that the law relating to the use of force (and also to that of pre-emptive force) must be *context-related and not rule-related*. There should be no abstract and general rules on the legitimate and legal use of force; there should be no hard and fast thresholds in that subject matter, but rather a case-by-case assessment according to all the factual circumstances of each unique case. In legal terms, that means that the guiding criterion must be *reasonableness and necessity* in context. There is thus no rule left; there are only singular cases, which carry in themselves their own law, their law of exception. To quote again A. Sofaer: "[T]he rigid and limited view of the propriety of pre-emptive action has no valid historical basis, and is unsound, artificial and futile in attempting to restrict resort to the use of force. The current and proper standard remains necessity, but what is necessary must be determined on the basis of all the relevant circumstances, in the light of the purposes of the UN Charter. [...] [I]t can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context".⁴⁹

Necessity and reasonableness are to be judged according to factors such as: (i) the nature and the importance of the threat; (ii) the risk to the object of the threatened attack if preventive action is not taken; (iii) the existence of credible alternatives to the use of force; (iv) the compatibility of the use of force with

⁴⁸ Cf. Clarke Posteraro, op cit, note 25, 192. He invokes Article 59 of the Statute, saying that there is no binding effect beyond the single case. He thereby overlooks that, according to Article 38 of the Statute, the Court bases its decision on international law, and therefore its findings are expressive of international law. And: international law binds the States. There is an exception only if the Court bases its findings on particular international law (conventions); then, its findings apply only to the parties to the convention.

⁴⁹ Sofaer, op cit, note 25, 212–3, quoting also McDougal and Feliciano. See also: Taft/Buchwald, op cit, note 25, 557 et seqs; Yoo, op cit, note 25, 571 et seqs; Reisman, in ASIL Proceedings of the 97th Annual Meeting (2003) 143; Kamp, Vorbeugende Verteidigung gewinnt Anhänger, Neue Zürcher Zeitung 22, 28.1.2004, 9. And see already McDougal/Feliciano, Law and Minimum Public Order: The Legal Regulation of International Coercion (1961) 217.

the terms and the objectives of the UN Charter and other international agreements; (v) the past record of the target against whom force is used; etc. In particular it is claimed by A. Sofaer that Article 2 § 4 of the Charter does not oppose such a course, as it does not prohibit the use of force generally, but only when contrary to the aims of the United Nations. Then follows an analysis to inform us as to why all these criteria were fulfilled in the case of the war in Iraq (2003). These reasons being: it was lawful to use force in order to disarm a patented aggressor, being the object of various UN sanctions, when moreover there was no intent by the US to annex foreign territory. Finally, we are forcefully told that the criteria of reasonableness and of necessity are objective criteria, and not subjective and vague ones, open to all types of manipulation. First, they do not give rise to more arbitrary assessments than the traditional criteria under the Charter, where there is already controversy on almost every case. Second, both require a precise and motivated justification, which is to be performed by the government seeking to use force.

If one follows such a doctrine, there remains no law on the use of force, and in particular there is no constraint on the use of individual force surviving in international law. International law then simply returns to its state in the 19th century, with the doctrines of self-preservation and indifference as to the causes of war. It would in effect leave judgement as to what is to be done to each member of international society. This would be done in self-judging appreciation with full discretionary power. There is even more: as there is no surviving rule, there is no remaining law; there is only an individual decision, taken in the hazy universe of political opportunities and necessities, and this in unique contexts not linked by any rational chain. The law is merely there to say that it does not regulate the matter, that it will attach (at best!) *ius in bello*-consequences to the choice performed. The law is just a door-opener: it opens the gate and says to any state: "please, proceed"!

There is here no adjustment of the law, but in fact a radical change of system: the civilisational progress made in the first part of the 20th century is jettisoned, the *ius contra bellum*-system is transformed into a *ius ad bellum*, and finally into a *ius pro bello*-system, where discretion is the paramount concept. The new command is: do whatever you feel to be just and/or appropriate from case to case. It is certain that such a rule of reasonableness is in this field a simple non-criterion; it corresponds to an opening to the most elementary arbitrariness: it is a gate to absolute discretion.

Everyone has their own concept of reasonableness, according to their own interests, history, contingencies of life with other nations, ideology, geopolitical position, etc. If it is indeed true that under the Charter-based criteria, with their narrow limits, there is vivid controversy on almost every case of the use of force, if notwithstanding the clear text of Article 51 most different arguments can be made on the lawful use of force, what would be the position – *a fortiori* – under a simple criterion of reasonableness? What is now

multiplicity of opinion on the basis of some objective rules of law would become a plurality of singularities unable to be measured against anything common by way of any objective criterion.

If there are still doubts as to what has been said, a brief intellectual experiment can be made. In order to make it work it is necessary to divest oneself of any rigid ideological sympathies (including Western) and think of the fact that what is felt about politics in the world is dependent on local and personal experience. What is felt as being urgent by the US citizen is not the same as that what is felt as being urgent by some Arab citizens, faced with a life of colonialism, humiliation, double standards, and so on. And moreover, one should avoid the idea that there is *a priori* a better position; all are positions, which can be explained by experience in the life of nations and collective communities. Let us thus apply the criteria of A. Sofaer to a State whose experience with pressures, interventions and threats by the United States has rendered its ideology anti-American. Obviously, there are power problems: the sort of force the US can use will not be open to that purpurative State, which will be (much) too weak. But we must not concern ourselves with that argument here, as we consider just the plane of legal entitlement, not factual possibility. What would be the result of the application of the reasonableness criterion as proposed?

In a contextual judgement, a military intervention against the US would seem to be highly warranted. Let us look at the criteria one by one: (1) the nature and the threat emanating from the US is great: there are many pressures and direct threats, and there is the high probability of some forceful action being taken under the guise of the rogue-State qualification. (2) The danger that the threat will be realised if no pre-emptive action is taken is high: did not the President of the US, G. Bush Jr., publicly claim that he was determined to undertake vigorous action against such States refusing to be stopped by anyone or by any international forum? (3) There are no alternatives to forestall US action other than pre-emptive strikes: there are no peaceful means available, and every attempt at that level would risk provoking even more virulent reactions by the US in order to isolate the rogue State, suffocating its diplomatic *offensive de charme*. Moreover, the UN Security Council is unable to act because of the blocking veto of the US. (4) Finally, the use of force against the US is highly compatible with the aims of the UN Charter, since the supreme goal of that instrument is the preservation of peace. Who, in recent years, has resorted more frequently to force in international relations, often in open defiance to international legality? It is the US. To stop this State in its war-thirsty deviance, to make it have some respect for the system of collective security as enshrined in the Charter, would thus be highly compatible with the aims of the Charter.

One could spend some time, if it was wished, applying the same arguments to all other conflict situations in the world. The result would always be

the same: India/Pakistan, Israel/neighbouring States, Russia/Central-Asian Republics (or Georgia), China/Islamic neighbours, Northern Korea/Southern Korea, etc. In each case, the criterion of reasonableness would open wide the door to the use of force. If that is true, what is the value of such a criterion? It would be less than a veil unable to hide the true position, which would simply be a bow in front of the most naked power-politics. If not for any other reason, this one suffices to reject such a context-oriented approach at the level of individual States. The only body, which has the powers to assess such factors, is the Security Council of the UN under Chapter VII of the Charter.

A small point must be added. It is useless to speak in parallel of reasonableness and necessity. Reasonableness is the sole controlling criterion. Necessity here does not add anything to reasonableness.

5. A pre-emptive self-defence conceded by international law against simple threats to individual States, represents a Pandora's Box whose scourges largely outweigh the benefits. One risks turning back the clock of international law to the 19th century, and what is believed to have been gained in the short term will be exponentially lost in the long run. It must not be forgotten that the pre-emptive doctrine of the 19th century could not even approximately give rise to the dangers of a modern doctrine of this type. The interdependence (in economics and elsewhere) of the world in the 19th century were not comparable to what they are today; the weapons of the 19th century were not comparable to what they are today; the propensity for the quick spread of violence today cannot be compared with the slow-motion world of the 19th century; etc. All these factors concur to make such a doctrine infinitely more dangerous today than it would have been yesterday. And nobody, not even a great power, is interested in having a world in anarchy.

Moreover, in law there is always reciprocity of legal positions:⁵⁰ if you granted one State the right to use pre-emptive force, you would thereby also be granting it to all the other States, each with its own threats.⁵¹ This would be the best way to produce a general conflagration. The pre-emptive doctrine has in effect already been claimed by such States as Israel, India, Australia and

⁵⁰ This distinguishes law from politics: in politics, you may think that a position will be in fact conceded only to one State, the most powerful, and that the other, because they are weaker, will not be able to claim such a right anyway. In law, there is no such discrimination.

⁵¹ In US doctrine, this is qualified as the "loaded gun"-argument: cf *Gardner*, op cit, note 25, 587–8, reminding us that the US Administration avoided the pre-emptive self-defence argument in the case of the Cuban Missile Crisis because it did not want to create a loaded gun, especially in view of its own missiles stationed in Turkey. See also *O'Connell*, *The Myth of Pre-emptive Self-defense*, ASIL, Task-force on Terrorism (online: www.asil.org), 18–9; *McLain*, op cit, note 25, 286. Other authors remind us that there is a general tendency to produce emulation: thus, the arguments of the US with respect to military action in the Dominican Republic (1965) served as model for the USSR when it invaded Czechoslovakia (1968); cf *Faver*, *A Prospect for International Law and Order in the Wake of Iraq*, *AJIL* 97 (2003) 622.

others, such as Russia or China, albeit in more veiled terms.⁵² The criterion for limiting an exponential rise of violence in the doctrine is simply too vague and weak to stand any legal treatment. It too squarely belongs to the realm of self-preservation of the 19th century type and is unable to find any place in a legally disciplined doctrine of self-defence.

A concession of pre-emptive self-defence (or preventive war) would mean leaving States an unfettered faculty to use force in international relations. Why should a State, in the world of today, ever use force other than for good reasons, which will always be presented as a severe threat? And once violence is set in motion, it quickly escalates. Violence, especially when it is felt to be unilateral and unjust, always produces further violence. The case of Iraq (2003) will, on that issue, be with us for a long time. And from escalation to escalation, all international order threatens to disappear under such lethal progression. As *T. Farer* has formulated it: "Once the frame of order is broken, we can reasonably anticipate increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths. The Israeli experience could well prove a microcosmic anticipation of the global system's future in this scenario".⁵³

Thus, either one abandons the notion that law regulates the matter, or one abandons the concept of pre-emptive self-defence against future threats. The only disciplined means to face such threats remains the Security Council. Whether this body is to be reformed or not is another question.⁵⁴ Reforms are not impossible and not even unwise in the abstract, but the heart of the matter lies elsewhere. The point is knowing whether the only remaining superpower accepts being bound by any negative decision at all. If it presents its case and receives a negative answer – as is always possible in the case of multilateral decision-making, whatever the composition of the body and the voting rules – will that power abstain from acting unilaterally? For the moment, this does not seem to be the case. Then, multilateralism is attacked as such; reform of the Security Council will not change that matter, unless it becomes a chamber invariably acclaiming what has been decided in Washington.⁵⁵ Significantly, in the Iraq war, there was no majority in the Council to give a mandate to the US. The problem was not that of the veto, notwithstanding what has been said for reasons of public relations; the problem was the flagrant absence of a majority. Whatever the reform, an action will never be possible in the name of the UN if no majority is willing to back it. It may be added that it is becoming increasingly clearer that the assessment of the

⁵² As for the claim of India, see *Neue Zürcher Zeitung* 234, 9.10.2002, 7.

⁵³ *Farer*, *Beyond the Charter Frame: Unilateralism or Condominium?*, *AJIL* 96 (2002) 364.

⁵⁴ As to the proposals for reform, see www.globalpolicy.org/reform/index.htm.

⁵⁵ See the criticism of *Franck*, *What Happens Now? The United Nations After Iraq*, *AJIL* 97 (2003) 614 et seqs.

Security Council, to refuse the war at that stage, was correct, and that the assessment of the Anglo-Saxon powers was wrong. No weapons of mass destruction were found at all; no link of Saddam Hussein to terrorism could be shown;⁵⁶ no particularly grave violence against the civilian population has been reported in recent years. And conversely, civil war, the upsurge of terrorism and obscure theocratic regimes or otherwise "undemocratic" types of regime will emerge in due course on that territory. And that in turn will be the gauge for long-term violence.

In the face of what has been said, it is particularly disquieting that a growing number of scholars and decision-makers are calling for an "adaptation" of international law in order to accommodate pre-emptive actions against threats.⁵⁷ This would simply constitute a fatal blow to international law. A law that cannot even ensure the most vital common good, i.e. peace is doomed to decline. And the consequences thereof would be paid by the generations to come, through a world that will be entangled in still more violence and anarchy, as is already all too often the case in history. The responsibility for that will have to be endorsed by those who today are lightly playing with the fire.

IV. Conclusion

It seems that more than ever we are entering a phase where in international relations the rule of power will prevail over the rule of law. However, sometimes the realm of such power-oriented approaches is quite short, since the damage caused is so ravaging in the short term that experience recommends a return to a more rule-oriented policy. The death of the UN, so vigorously proclaimed by some,⁵⁸ has soon ended in a position where the US is asking the UN for aid in order to get out of a dramatically intricate and deteriorating situation in Iraq.

Fundamentally, all law on the use of force oscillates between two poles: that of the service to the interests of the State *uti singulus*, and the necessity of its protection; and that of the service to the interests of the international community, with the essential aim of preserving the general peace for the common weal. All provisions of the law in this field represent a complex balance within these poles. And the entire history of the law relating to the use of force represents a provisional equilibrium between them. The spectrum

⁵⁶ Quite the contrary: the al-Qaida cells were highly inimical towards Saddam Hussein's secular régime which suppressed religious fanaticism.

⁵⁷ See e.g. again *Kamp*, Vorbeugende Verteidigung gewinnt Anhänger, Neue Zürcher Zeitung 22, 28.1.2004, 9.

⁵⁸ See above, Footnote 3.

should today not be moved too far toward the short-term interests of the individual State, rather as in internal society it should not move too much towards the faculty of using individual force by each member of a society. Such a move would be the sign of a profound illness and the fever linked to it would not be long in making itself felt. On balance, it is still better to affirm a series of perhaps not too "realistic" rules (in the short term), than to abandon that effort altogether, with the disastrous effects of spreading violence.

As this writer has written elsewhere:

"[L]e choix [doit être] de donner le parti à la Communauté internationale. C'est un choix qui est fondé sur la raison. Le bien de la communauté plus générale doit en principe l'emporter (dans certaines limites) sur le bien de la société plus restreinte. S'il n'en était pas ainsi, l'anarchie et le désordre prévaudraient. On ne saurait imaginer, au sein de l'Etat, que l'individu impose sa loi à la collectivité; cela serait considéré contraire à l'évidence et même subversif; ce serait la fin de l'Etat. Il n'en va pas autrement dans la communauté internationale. Si l'Etat individuel lui imposait sa loi en une matière vitale comme la paix, la société internationale serait vouée à la violence continuelle et donc en définitive à périr.

Ce choix de la raison doit évidemment être tempéré, car il s'agit d'une vision idéale, d'une idée régulatrice vers laquelle il faut tendre [...]. La perception de la réalité commande de dire qu'il nous reste encore un long chemin à faire jusqu'à ce que cette utilité communautaire soit bien comprise et vécue par les peuples, jusqu'à ce que la vision d'intérêts collectifs pénètre dans les réalités au point de commander les actions concrètes. La société internationale est à cet égard encore très arriérée. Les solidarités de conscience qui la traversent sont faibles et en constant danger. En cas de crise, les solidarités des individus tendent à refluer vers leur foyer traditionnel, l'Etat, la nation.⁵⁹ Il n'en demeure pas moins qu'il vaut la peine de s'engager pour la cause

⁵⁹ As *Ch. de Visscher* has written, in *Théories et réalités en droit international public*⁴ (1970) 112: "Dans l'Etat, ce sont les intérêts vitaux, les plus hautement politiques, qui déclenchent les solidarités suprêmes. C'est l'inverse qui se produit pour la communauté internationale. On y relève des solidarités mineures, dans l'ordre économique ou technique par exemple; mais plus on se rapproche des questions vitales, comme le maintien de la paix et de la guerre, moins la communauté exerce d'action sur ses membres; les solidarités faiblissent à mesure que grandissent les périls qui la menacent; celles qui s'affirment refluent vers leur foyer traditionnel, la nation. Les hommes ne contestent pas, en raison, l'existence de valeurs supranationales; dans l'ordre de l'action, ils n'obéissent guère qu'aux impératifs nationaux". Or, in the words of *M. Bourquin*: "On peut espérer qu'un jour viendra où la notion de leur intérêt commun aura sur les peuples autant de puissance que leur mystique nationale et justifiera à leurs yeux les mêmes sacrifices. Mais il faut reconnaître que nous sommes encore loin de cette humanité-là" (*Bourquin*, *Le problème de la sécurité internationale*, RCADI 49 [1934-III] 521). Or, still with the elegant words of *M. Bourquin*: "Le fondement psychologique de l'ordre international est encore extrêmement faible. Tandis que le particularisme national a de profondes résonances dans l'âme humaine et que les grandes divisions politiques et idéologiques du monde y éveillent aussi de puissants échos dans une période troublée comme la nôtre, l'idée de la solidarité universelle des peuples n'a pas encore réussi à y pénétrer profondément. Les hommes ne sentent guère l'unité du genre humain. Moralement, psychologiquement, le monde manque d'unité" (*Bourquin*, *L'Etat souverain et l'organisation internationale* [1959] 17). See also *Kolb*, *Réflexions de philosophie du droit international* (2003) 245 et seqs.

de la communauté internationale, car elle montre le seul chemin qu'a l'humanité si elle désire se sauver. Le droit international doit se présenter dans ces domaines comme la loi de l'humanité ordonnée à ce bien supérieur qu'est la paix. Ou, dans les mots de St. Thomas d'Aquin:⁶⁰ "lex est quaedam rationis ordinatio ad bonum commune".⁶¹

And, in the meantime I have added, for a new edition:

"Le drame de l'homme apparaît ici sans ambages: c'est qu'il n'est pas un être de raison, et dès lors il est et il sera sans doute condamné, comme le légendaire Sisyphe, puni par les Dieux, à refaire éternellement l'expérience de la guerre, qui sera le prix constamment renouvelé de ses faiblesses et de ses turpitudes".

But our fight and our actions must be against that tendency, since it is not necessary to hope in order to act, nor to succeed in order to persevere.

Zusammenfassung

Dieser Beitrag untersucht die Entstehung und den Inhalt des völkerrechtlichen Selbstverteidigungsrechts, und analysiert sodann die neuen Doktrinen des Einsatzes präventiver militärischer Gewalt. Die Schlussfolgerung, die sich ergibt, ist, dass präventive Gewaltanwendung mit dem geltenden Völkerrecht unvereinbar ist, und dass eine Lockerung des Völkerrechts, um solche Praktiken zu ermöglichen, unerwünscht wäre. Sie stellte einen großen Rückschritt dar, und würde nur die Gewalt zur Eskalation bringen.

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⁶⁰ Summa theologica, II, I, q 90, a 4.

⁶¹ See Kolb, *Ius contra bellum*, Le droit international relatif au maintien de la paix (2003) 239.