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LL.M. – Minor Dissertation

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The "*Bush Doctrine*" and preemptive strike – a new approach in the right of self-defense?

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I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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The "*Bush Doctrine*" and preemptive strike – a new approach in the right of self-defense?

Chapter I: Introduction

Throughout the history of international law, there have always been acts of aggression, wars, and threats carried out by one state against another, directed against the territory or sovereignty of states, or against other protected interests.

Even though there have been several attempts to restrict the use of force between states, neither the early doctrines of "just war" (*justum bellum*) of *Grotius* and *Thomas Aquinas*,[1] nor subsequent multilateral treaties – the Covenant of the League of Nations of 1919, the "Kellog Briand-Pact" of 1928,[2] and ultimately the Charter of the United Nations (U.N. Charter) of 1945[3] – have been able to eliminate entirely the use of force from the international stage.

As one cannot but accept these realities in international relations, there has however been a significant, yet alarming development in the use of force during the last decades. Heavily influenced by the Cold War-period and the permanent, latent confrontation of the then-superpowers, the United States and the U.S.S.R.[4], the above-mentioned international instruments were based upon the idea that states employ force by conventional means, e.g. standing armies and conventional weaponry. Almost half a century later, with only one superpower remaining, conventional warfare still happens. It is, however, no longer the

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[1] As regards the "just war"-theory: N Blokker, *Chapter 1*: *The Security Council and the Use of Force on Recent Practice*, in: *The Security Council and the Use of Force, Theory and Reality – a Need for Change*?, (2005), eds. N Blokker and N Schrijver, at 3; I Brownlie, *International Law and the Use of Force by States*, (1963), at 4-5.

[2] General Treaty for the Renunciation of War (1928) – "Treaty of Paris".

[3] The United Nations Organization (U.N.O.) was instituted by the 1945 San Francisco Conference and replaced the League of Nations.

biggest threat that states face today. Rather, it seems that nowadays, the most real and severe threat - not only to a state's individual interests, but also to international peace and security in general - is posed by terrorist attacks and weapons of mass destruction (WMD).[5]

The phenomenon of terrorism is not a novelty in international law. Despite the fact that several international instruments have dealt with specific aspects of terrorism,[6] such as the "Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation",[7] or the "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents",[8] so far it has not been possible to reach general consensus upon a universally recognized definition of "terrorism".[9] This does not mean, however, that the existence of terrorism as such would be questioned or even denied. Indeed, in the past, the international community has not hesitated to qualify certain attacks against states, normally carried out by non-state actors, as terrorist attacks. Although terrorist activities seem to be most intense in the field of air navigation (in particular: hijacking and/or destroying civilian aircraft)[10], this is by no means the only technique that is used. In fact, terrorism does not even require the use of force, but can also be carried out, e.g. via the internet.[11]

Besides those threats emanating from terrorist attacks, another kind of major threat to states has emerged during the last few years: the effective or potential possession of WMD, that is, biological, chemical or nuclear weapons.[12] The perceived or actual danger is not grounded on the possession of WMD as such; however, most states are aware of the fact that the consequences of WMD in the "wrong" hands (especially of so-called rogue

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[4] Union of Soviet Socialist Republics; in the following referred to as U.S.S.R.
[5] T Gazzini, *The Changing Rules on the Use of Force in International Law*, (2005), at 182; see also several U.N. resolutions dealing with terrorist threats, *inter alia*, Resolutions 1368 (12 September 2001), 1373 (28 September 2001), 1516 (20 November 2003), 1540 (28 April 2004).
[6] In total, there are 13 major multilateral conventions and protocols elaborated within the U.N. framework, related to specific activities of terrorism. For an overview see: N Rostow, *Before and After: The Changed U.N. Response to Terrorism since September 11th*, 35 Cornell International Law Journal 475 (2001-2002), at 479-480.
[7] United Nations, *Treaty Series*, vol. 974, at 178 (26 January 1973).
[8] United Nations, *Treaty Series*, vol. 1035, at 167 (20 February 1977).
[9] Rostow, at 480. The major stumbling block in finding a comprehensive definition relates to the controversial question whether or not activities of "national liberation movements" should be regarded as terrorist attacks.
[10] Gazzini, at 182; E McWhinney, *Aerial Piracy and International Terrorism. Illegal Diversion of Aircraft and International Law* (1987).
[11] G Weimann, United States Institute of Peace, *www.terror.net: How Modern Terrorism Uses the Internet*, available at: www.usip.org/pubs/specialreports/sr116.html; Gazzini, at 181.
[12] See for example the joint statement of the then-Ministers of the 15 member countries of the European Union on 16 June 2003: "Weapons of mass destruction were a threat to international peace and security".

states or terrorists) could be devastating.[13] In particular the very recent cases of Iraq's alleged possession of nuclear weapons and North Korea's nuclear weapons program have incited the debate about the seriousness of threats posed by WMD.

Threats caused by terrorist attacks or WMD are not confined to a certain region or only to certain states; in fact, they pose a global threat to international peace, security and stability. Terrorism concerns both rich and poor countries (see e.g. the terrorist killings in Israel in May 1972, the killings of Israeli athletes at the1972 Olympic Games in Munich, the very recent bombings in London's public transport system in 2005, but also the attacks on Bali and Bombay). WMD do not only threaten the northern or southern, eastern or western world, as the examples of Iran or Halabja (Iraq) demonstrate.[14]

It becomes clear from these examples that the United States (U.S.) is certainly not the sole victim of (threats of) terrorist attacks; yet, the frequency of the attacks and the way in which many of these attacks were carried out against it seem to allow for the conclusion that the U.S. is a more popular target for terrorism than any other state.

Before the attacks of 11 September 2001, terrorist attacks directed against the United States included, *inter alia*, the suicide bomb attack on the U.S.S. Cole and the attacks on the U.S. embassies in Kenya and Tanzania. Moreover, several attacks either directly targeted U.S. civilians, or its soldiers and military personnel abroad, as in the case of the bombing of a Berlin discotheque in 1986. The attempted assassination of the former President of the United States, G.H.W. Bush, by means of a car bomb, failed, but was nevertheless regarded as a terrorist attack against the United States.

However, the dreadful attacks on the World Trade Center in New York and the Pentagon in Washington D.C. revealed a new dimension of terrorist threat. The airplanes hijacked by the terrorists were not only used in a hitherto unknown way, that is, as lethal weapons against civilians and property on U.S. soil, but also with a hitherto unprecedented magnitude as regards the number of victims and the damage caused. Almost 3,000 people, mainly civilians, died.

Admittedly, the international community as a whole, as well as individual states, are not without protection, but have legal means to counter terrorism and threats posed by WMD. Thus, under the collective security system of the U.N. Charter, the Security

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[13] See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 66, in which the Court held that there is no comprehensive and universal prohibition of the threat or use of nuclear weapons as such; see also J A Ramírez, *Iraq War*: *Anticipatory Self-Defense or Unlawful Unilateralism?,* 34 California Western International Law Journal 1 (2003-2004), at 23.

[14] See the statement of the former U.N. Secretary-General Kofi Annan, *Address to the U.N. General Assembly* (23 September 2003), available at: www.un.org/webcast/ga/58/statements/sg2eng030923.htm.

Council, in order to maintain international peace and security, can take action under Chapter VII of the U.N. Charter. If the Council determines that a particular situation constitutes a threat to the peace or even a breach of the peace in terms of Art. 39, it can take action, either by making mere recommendations or by authorizing military or non-military measures (Art. 39, 42, and 41, respectively). A state which is the victim of an armed attack can – individually or collectively - exercise its right of self-defense under Art. 51. The right of anticipatory self-defense is still disputed, but would enable a state to defend itself against an "imminent threat".[15]

In practice, both security mechanisms have been applied. Hence, in response to the terrorist bombing in Berlin, the U.S. bombed Tripoli for Libya's alleged support of terrorism, and launched a (counter-) attack on the headquarters of the Iraqi Secret Service following the failed assassination of former President Bush. Only a few weeks after the 9/11 attacks, a coalition formed by the U.S. and other states invaded Afghanistan to destroy Al Quaeda and overthrow the Taliban regime. In all of these instances, the U.S. claimed - more or less convincingly with respect to the requirement of an "armed attack" - to have reacted in self-defense.[16]

Besides these (unilateral or collective) military responses, broad solutions to encounter these modern threats were also sought in the international arena within the U.N. and the Security Council in particular.[17] Thus, in the immediate aftermath of the 9/11 attacks, the Security Council not only condemned the terrorist attacks, but was effectively discharging its responsibilities under Art. 24 of the U.N. Charter.[18] However, this activism seemed to decline again during the following years due to political disagreements and diverging positions and opinions amongst the five permanent members of the Security Council (P-5). The failure of the Security Council to agree upon the consequences of Iraq's

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[15] See the *Caroline* case (1837), 29 B.F.S.P. 1137-1138, B.F.S.P. 195-196; described as the *locus classicus* by R Y Jennings, *The Caroline and McLeod Cases*, 32 American Journal of International Law 82 (1938), at 92; see also L van den Hole, *Anticipatory Self-Defence under International Law*, 19 American University International Law Review 69 (2003-2004), at 70 *et seq*.

[16] For example, in response to the 9/11 attacks, the U.S. invoked the right of collective self-defense under Art. 5 of the 1949 North Atlantic Treaty and Article 3 (1) of the 1947 Inter-American Treaty of Reciprocal Assistance (the so-called "Rio-Treaty"); see also D Kritsiotis, *The Legality of the 1993 U.S. Missile Strike on Iraq and the Right of Self-Defense in International Law*, 45 International and Comparative Law Quarterly 162 (1996); M Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 International and Comparative Law Quarterly 401 (2002), at 407.

[17] In the case of Afghanistan, however, the invasion was carried out by N.A.T.O. core members.

[18] Security Council Resolutions 1368 and 1373: "Threats to international peace and security caused by terrorist acts". The Security Council called upon states to "cooperate … to prevent and suppress terrorist attacks and take action against perpetrators of such acts.", at 3 (c).

continuing breach of its disarmament obligations under several Security Council resolutions appears especially to have laid the foundation for the "*Bush Doctrine*".[19]

In September 2002, certainly with a view to the forthcoming invasion of Iraq, President George W. Bush announced the National Security Strategy of the United States of America (N.S.S), the so-called "*Bush Doctrine*".[20] Amongst other important foreign policy decisions, the N.S.S, in Chapters III and V, promotes unilateral action as well as the preemptive use of force to encounter these and other potential threats to national security. As will be seen below, the approach taken in the "*Bush Doctrine*" towards (inter-) national security deviates significantly from the security system envisaged under the U.N. Charter and has therefore provoked harsh criticism and controversy among governments, international lawyers and scholars.[21]

This proposition serves as the focal point of my paper. International law, whether treaty-based or customary in character, provides strict rules for the *jus ad bellum* as well as for the *jus in bello*. While the rules of the *jus in bello*[22] are not relevant for the purposes of this work, the *jus ad bellum* in principle prohibits the use of force between states.[23] The first universally recognized exception to this peremptory rule relates to an authorization by the Security Council under Chapter VII of the U.N. Charter, the second exception relates to the right of self-defense.[24]/[25] Although there are ongoing debates as to the "when" and "how" of the exercise of the latter right, it can be said that the "*Bush Doctrine*" definitively goes further than what has been (more or less) generally accepted under the traditional security system, that is, under the security system provided for by the U.N. Charter, other regional organizations, or under customary law.[26] While the relevant provision on self-defense in the Charter requires no less than an "armed attack",[27] and the doctrine of

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[19] In particular Security Council Resolutions 678 (29 November 1990), 687 (3 April 1991), 1441 (8 November 2002); see also Ramírez, at 22.
[20] Available at: www.whitehouse.gov/nsc/nss.html.
[21] Ramírez, at 24; D J Harris, *Cases and Materials on International Law*, 6th edition, (2004), at 945-955; see also the statement of the former U.N. Secretary-General Kofi Annan, *supra* at note 14. States, eg Great Britain, have also disapproved the approach taken in the N.S.S..
[22] In particular: international humanitarian law.
[23] See Article 2 (4). The prohibition to use force is also recognized as a customary principle; see *Nicaragua v United States,* I.C.J. Reports 1986, 14, at 100.
[24] See Article 51. The corresponding customary right has been acknowledged in *Nicaragua v United States,* at 193.
[25] Other (emerging) exceptions, such as an "intervention for humanitarian purposes" – eg Kosovo (1999) -or for the "protection of nationals abroad" – eg U.K. in Suez (1956) - are not relevant for this work.
[26] Regarding the traditional concepts of self-defense: D W Bowett, *Self-Defense in International Law*, (1958), at 182 *et seq.*; Y Dinstein, *War, Aggression and Self-Defence*, 4th edition, (2005), at 182 *et seq*; Gazzini, at 129 *et seq*.
[27] See Article 51.

"anticipatory self-defense" requires at least an "imminent armed attack",[28] the "*Bush Doctrine*" suggests that the right of self-defense can be based on a mere "potential threat to national security".[29]

Starting off with a description of the evolution of the "*Bush Doctrine*" and its main elements in Chapter II, the following Chapter III is meant to assess the adequacy of the traditional security system. Having elaborated on the collective security system as envisaged by the U.N. Charter, and the right of self-defense under Article 51 and customary law, the focus of this Chapter shall turn to the question if, and how, these modern (global) security challenges can be tackled under the traditional security system. The analysis will show that a state which is the victim of an armed attack has legal means to defend itself. However, if the threat is merely latent, and the Security Council – for whatever reason – does not take action under Chapter VII of the Charter, there is a security gap, meaning that a state's action in using force would no longer have a basis in international law. The question which will be posed in Chapter III is whether the security system as it exists provides an efficient means to meet potential threats posed by terrorist attacks and WMD, and in this context raises the controversial issue of "preemptive strike".

Because of the shortcomings of the traditional security system and with a view to 21st century threats, is the right to strike preemptively an adequate way to encounter today's security challenges? To answer that question, Chapter IV will provide a critical analysis of the "*Bush Doctrine*", including its implications for the international legal system, the United Nations Organization as a whole and the Security Council, if it were to be recognized as a lawful exception to the prohibition of the use of force under the U.N. Charter and customary law. It is not my purpose, however, to engage in the current debate on the legality or illegality of the "*Bush Doctrine*". Rather than asking whether there *is* a legal right to act preemptively, I shall ask whether there *should* be such right. Although I support the basic idea underlying the "*Bush Doctrine*", I shall examine the desirability of a concept of preemptive action, and reflect on alternative approaches towards global security. I shall consider whether global security can be attained by merely reinterpreting or amending the relevant provisions in the U.N. Charter, or under customary law, or whether it requires global support and global action by the international community of states. It is therefore crucial for me to examine possible reform and reinforcement of the Security Council, whether by enlarging the number of members and changing of voting

[28] See the *Caroline* case. See also below, at Chapter III.
[29] N.S.S, at 15: "… sufficient threat… , even if uncertainty remains as to the time and place of the enemy's attack."

requirements, or by assessing a set of rules for (preventive) action, so that failure to act can be avoided for the future. The final Chapter VI resumes the conclusions reached in the preceding chapters and contains some speculations on the future of international law, peace and security.

Chapter II: The "*Bush Doctrine*" – its evolution and main elements

During the following 45 years since the institution of the U.N. in 1945, international relations were significantly shaped by the Cold War, in which the then-superpowers, the United States and the U.S.S.R., found themselves in a constant state of latent confrontation, tension and competition. Against this background, United States' foreign policy, in particular with respect to the ideological adversary, mainly focused on the doctrines of containment and deterrence.[30]

The strategy of containment first became one of the core objectives of U.S. national security policy in the early years of the Cold War under President Truman ("Truman Doctrine").[31] "Containment" describes a policy, which is meant to control and limit the expansion or influence of a hostile power or ideology, by means of maintaining a military presence in many parts of the world as well as by creating strategic alliances with "friendly" regimes, and supporting them militarily or economically.[32] In the context of tense U.S.-U.S.S.R. relations, the basic goal was to contain Communism within its borders.[33] Subsequent Presidents, with the exception of Jimmy Carter,[34] upheld the doctrine,[35] until it was officially buried after the collapse of the Soviet Union in 1991. Although it can be said that strategic containment was still applied even after 1991 in the case of Iraq,[36] the "*Bush Doctrine*" ultimately puts an end to this tactic.

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[30] W P Nagan, C Hammer, *The New Bush National Security Doctrine and the Rule of Law,* 22 Berkeley Journal of International Law 375 (2004), at 406. Other foreign policy strategies are, *inter alia*, the "Doctrine of encroachment" under the Reagan Administration (1981-1989), whose main goal was to "roll back Soviet ideological and territorial influence", and "spend the U.S.S.R. into bankruptcy", see Nagan/Hammer, at 398.
[31] See eg D Merrill, *The Truman Doctrine: Containing Communism and Modernity*, 36 Presidential Studies Quarterly 27 (2006); A A Offner, '*Another Such Victory': President Truman, American Foreign Policy, and the Cold War*, 23 Diplomatic History 127 (1999); Nagan/Hammer, at 395. The original idea of the "*Truman Doctrine*", however, must be attributed to George F Kennan, a famous scholar, historian and diplomat, see *The Sources of Soviet Conduct*, 25 Foreign Affairs 566 (1947).
[32] Definition taken from *The Concise Oxford Dictionary of Politics* (2003); *The American Heritage – Dictionary of the English Language,* 4th edition (2000).
[33] See Kennan's so-called *Long Telegram* from Moscow in 1946.
[34] The Carter Administration's basic aim was to avoid conflict with the U.S.S.R. and expand human rights.
[35] Subsequent administrations have emphasized different aspects of foreign policy; however, the main features of the concept of containment were retained over the years.
[36] Under the first Bush Administration, the U.S. applied a containment policy towards Iraq by imposing severe sanctions or by establishing so-called "No-Fly Zones".

Unlike the containment-strategy, the doctrine of deterrence is first and foremost a military strategy, according to which governments threaten potential aggressors with massive retaliation in case of an attack.[37] During the Cold War, in view of the nuclear build-up on both the U.S. and U.S.S.R. side, the strategy was mainly applied in the form of Mutually Assured Destruction[38] and Mutual Nuclear Deterrence. In order to prevent attacks from the other side, whether by conventional arms or nuclear weapons, each side openly reserved the right to launch a full-scale nuclear attack on the other side, with the possible consequence of total destruction of the aggressor.[39] To date, deterrence still plays a role in U.S. foreign policy towards Russia and other states with minor nuclear capabilities, such as North Korea; however, deterrence is no longer the cornerstone of U.S. foreign policy.

The fall of the Soviet regime in the early 1990's marked the first major shift in U.S. foreign security policy; a shift that was without doubt greatly influenced by the fact that the U.S. emerged from the Cold War as the sole remaining superpower.[40] During the first Bush Administration, U.S. policy was repositioned in the framework of the U.N. Charter, and seemed – albeit for only a short while – to rely on multilateralism and collectivity.[41] Indeed, relations between the U.S. and the former U.S.S.R. (now Russia) in the post-Cold War period became almost cordial. The second major shift took place about 10 years later in the aftermath of the 9/11 attacks, when President George W. Bush on 1 June 2002, in an address at West Point, unveiled a new type of foreign policy, which subsequently became known as the "*Bush Doctrine*". While President Bush recognized that the traditional concept of deterrence and a "reactive posture" have been appropriate means during the Cold War,[42] he also asserted that "with the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation."[43] In response to these profound changes, the current Bush administration, in September 2002, eventually published a formalized collection of several speeches delivered by President Bush on different occasions, entitled "The National Security Strategy of the United States of America", which replaces former policies and marks the beginning of a new era in U.S. (foreign) security policy.

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[37] Nagan/Hammer, at 396.
[38] Also known as the "*Dulles-Eisenhower Doctrine*"; see H W Brands Jr., *Cold Warriors: Eisenhower's Generation and American Foreign Policy*, (1988), at 8-9.
[39] See eg D C Whitmore, Revisiting Nuclear Deterrence Strategy, available at: www.abolishnukes.com/short_essays/deterrence_theory_whitmore.html.
[40] See Nagan/Hammer, at 399.
[41] *Idem*, at 400.
[42] N.S.S., at 15.

I. Evolution of the "*Bush Doctrine*"

The roots of the "*Bush Doctrine*" and of the N.S.S. in its current version of 2002, can be traced back to the early 1990's. In 1992, under the presidency of George H.W. Bush, the then-Under Secretary of Defense for Policy, Paul Wolfowitz drafted a set of guidelines, entitled the "Defense Planning Guidance". These guidelines, henceforth known as the "*Wolfowitz Doctrine*", provided for some very far-reaching proposals as regards U.S. security policy. Amongst other provisions addressing, *inter alia,* the Russian threat and the maintenance of access to oil in the Middle East and Southwest Asia, it was seen as a primary goal to maintain the U.S. status as the sole remaining superpower. Thus, a provision dealing with U.S. hegemony was meant to attribute to the U.S. *the* leading role in the new world order. Most importantly, the "*Wolfowitz Doctrine*" laid the foundation for the political and military concept of unilateralism and preemptive intervention, thereby stretching the international legal system, especially the U.N. Charter, to its limits.[44]

Designed for internal purposes only, the guidelines somehow leaked to the press and were published on 8 March 1992 in *The New York Times*.[45] The general public, however, reacted with harsh criticism and condemned the document mainly for its imperialist approach towards international politics. Following this controversy, former President Bush ordered the document re-written.[46] The revised document was eventually published on 16 April 1992. Its terms were far more moderate; e.g. the notions of "unilateralism" and "preemptive intervention" were entirely avoided.

A few years later, under the presidency of Bill Clinton, a group of foreign policy experts, amongst them Paul Wolfowitz and Donald Rumsfeld (later also referred to as the "neoconservatives"), addressed an open letter to Clinton, in which they expressed their discontent with current U.S. foreign politics in the matter of Iraq: "…we are convinced that current American policy towards Iraq is not succeeding. …We urge you […] to enunciate a

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[43] *Ibid*, at 15.

[44] Excerpts of the original "*Wolfowitz Doctrine*", including excerpts of the revisited document can be found in the articles by Patrick E Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*: *a One-Superpower World, The New York Times,* (8 March 1992) and *Defense Policy Guidance 1992-1994*, *The New York Times*, (23 May 1992); see also D C Lovelace Jr and T D Young, *U.S. Department of Defense Strategic Planning: The Missing Nexus*, at 7-8, 37-38, available at: www.carlisle.army.mil/ssi/pubs/1995/nexus/nexus.pdf.

[45] See Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*: *A One-Superpower World.*

[46] It is worth noting that the revision of the initial document was supervised by the then-Secretary of Defense Dick Cheney and then-Joint Chief of Staff Colin Powell.

new strategy that would secure the interests of the U.S….".[47] President Clinton, however, did not bow to their claim, and rather continued to pursue long-established U.S. foreign policy.

In the aftermath of the 9/11 attacks, the second Bush Administration was basically divided in two camps – the U.S. Department of State camp and the Department of Defense camp. While the former (including Condoleeza Rice and Colin Powell) by and large argued in favor of a continuation of existing U.S. security policy, the latter, led by the so-called "neoconservatives" (including Dick Cheney and Richard Perle), renounced the long-established policy of containment, and basically revived some of the core ideas of the "*Wolfowitz Doctrine*".[48] However, President Bush's position was more in line with the Department of Defense camp, which ultimately won over the Department of State camp. In the end, their policy recommendations can be regarded as the cornerstone of what is today the current national security policy of the U.S., the "*Bush Doctrine*".

Initially, the "*Bush Doctrine*" merely referred to a statement made by President Bush in the immediate aftermath of 11 September 2001, in which he announced that "the U.S. would not only go after terrorists, but also after states who harbored them".[49] This formulation was continuously broadened, until on 17 September 2002, the Bush Administration published a whole new national security policy, entitled the National Security Strategy of the United States of America.[50]

II. The documents of the N.S.S.

The "*Bush Doctrine*" is the present national security strategy of the U.S.[51] The N.S.S., as its primary document, is a collection of six different speeches, held by President Bush between 14 September 2001 and 1 June 2002 in Washington D.C., New York, Berlin and Mexico. The document is divided into nine chapters, which are organized by subject rather than by chronology.[52]

The N.S.S. starts with an "Overview of America's International Strategy". Other chapters deal with, *inter alia*, the promotion of democracy (VII), an enhancement of

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[47] Letter of 26 January 1998, available at: www.newamericancentury.org/iraqclintonletter.htm.
[48] See eg a statement of Vice President Dick Cheney regarding the changing rules of U.S. defense policy after the 9/11 attacks: "If we simply sit back and operate by 20th century standards …, we say wait until we're hit by an identifiable attack from Iraq. …The consequences could be devastating."
[49] See President Bush's speech in Washington D.C. (The National Cathedral) on 14 September 2001.
[50] See *supra* at note 20.
[51] Nagan/Hammer, at 405.
[52] *Idem,* at 405.

economic growth through free markets and free trade (VI), or with aspirations for human dignity (II). Chapters IV ("Work with others to defuse regional conflicts") and VIII ("Develop Agendas for Cooperative Action with the Other Main Centers of Global Power") emphasize the value of cooperation in the discharge of common responsibilities, as well as the importance of building or reinforcing coalitions (in particular: N.A.T.O.). The last Chapter (IX) addresses the transformation of America's national security institutions to counter 21st century threats.

Be that as it may, in light of the main focus of this work, the most important chapters of the N.S.S. are Chapters III and V, entitled "Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends" and "Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction".

1. Chapter III of the N.S.S.

Chapter III of the N.S.S. is based on a speech, which President Bush gave in Washington D.C. on 14 September 2001. While he admitted that after only three days since the events of 9/11, "Americans do not yet have the distance of history", he nonetheless assumed responsibility "to answer these attacks and rid the world of evil".[53] In this regard, he enunciated the well-known formulation that the U.S. would "make no distinction between terrorists and those who knowingly harbor or provide aid to them".[54] The Administration's priority would be to "disrupt and destroy terrorist organizations […] and attack their leadership; command, control, and communications; material support; and finances." This would include in particular the disruption of the financing of terrorism, e.g. by freezing assets.[55]

While the first part of Chapter III seems merely to reinforce firmly established U.S. policy, the next part, dealing with the means by which terrorist organizations, such as Al Quaeda, are to be wiped out, discloses a significant shift from the former policies of containment or deterrence. Explicitly referring to the right of self-defense, President Bush held that effective defense of the U.S., its people and national and international interests requires a threat to be identified and destroyed "*before* it reaches our borders."[56] Indeed,

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[53] N.S.S., at 5.
[54] *Ibid*, at 5.
[55] *Ibid*, at 5-6.
[56] *Ibid*, at 6.

the U.S. would attempt to act with international support; however, he added that "we will not hesitate to *act alone*, if necessary, to exercise our right of self-defense by *acting preemptively* against such terrorists, to *prevent them from doing harm* against our people and our country;….".[57] This point of view can accurately be summed up with President Bush's own words: "…our best defense is a good offense…".[58]

2. Chapter V of the N.S.S.

Chapter V, mainly addressing the threat posed by WMD, forms part of the famous West Point speech, held before a graduation class of the Military Academy on 1 June 2002.[59] First of all, the speech discusses the threats during the Cold War and the strategies of deterrence and Mutually Assured Destruction which were employed in order to encounter the Socialist threat. While deterrence was an effective means of (self-) defense in case of a risk-averse adversary, such as the Soviet Union, the collapse of the U.S.S.R. heralded the start of a profound transformation of the then-existing security environment.[60] Nowadays global security is gravely endangered by rogue states and terrorists.[61]

According to President Bush, rogue states are characterized as states that "brutalize their own people, squander national resources for the personal gain of their rulers, display no regard for international law, threaten their neighbors, violate international treaties, are determined to acquire WMD and other advanced military technology, sponsor terrorism, reject human rights, and hate the U.S. and everything for which it stands."[62] In the face of these modern threats, the U.S. could no longer rely on a "reactive posture".[63] Instead, President Bush proposed a comprehensive strategy, providing for "proactive counterproliferation efforts", that is, detection, defense, and counterforce, "strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for WMD", and an "effective consequence management to respond to the effects of WMD use".[64] Unlike the Soviet Union, rogue states and terrorists no longer regard WMD as weapons of last resort but of choice; a tool

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[57] *Ibid*, at 6.
[58] *Ibid,* at 6.
[59] A separate document, the "National Strategy to Combat Weapons of Mass Destruction" was released in December 2002, and is to be seen as a supplement to the West Point speech contained in Chapter V. Available at: www.defenselink.mil/pdf/NMS-CWMD2006.pdf.
[60] N.S.S., at 13.
[61] *Ibid,* at 13.
[62] *Ibid,* at 13-14.
[63] *Ibid*, at 15.
[64] *Ibid*, at 14.

to intimidate or blackmail the U.S. or its allies.[65] Deterrence would fail against these non-risk-averse enemies, whose "most potent protection is statelessness" itself.[66] The impotence to deter, linked with the immediacy of today's threats and the magnitude of potential harm do not permit the U.S. to "let our enemies strike first".[67]

It follows what can probably be identified as the most important and most far-reaching claim in this Chapter and the whole "*Bush Doctrine*": the (purported) right to strike preemptively against a mere "sufficient threat".[68]

Albeit in a rather vague fashion, the issue of preemption has been raised before in an address delivered by President Bush to the U.N. General Assembly on 12 September 2002, where he stated that: "The first time we may be completely certain [Saddam Hussein] has a nuclear weapon is when, […] he uses one. We owe it to all our citizens to do everything in our power to *prevent* that day from coming."[69]

In the N.S.S., however, which was published only five days later, President Bush – this time unambiguously and even more forcefully - spelled out the U.S.' position on the right of preemptive self-defense: "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."[70] Seemingly recognizing the requirement of an "imminent threat", he describes it as a "visible mobilization of armies, navies, and air forces preparing to attack".[71] However, considering the capabilities and objectives of today's adversaries, who rely on WMD and terrorist acts instead of conventional means, he finds that the concept of "imminent threat" must be adapted accordingly.[72] President Bush's understanding of such an adjustment deserves to be quoted in full: "The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. […] In an age where the enemies of civilization openly and

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[65] *Ibid*, at 15.
[66] *Ibid*, at 15.
[67] *Ibid,* at 15.
[68] *Ibid,* at 15.
[69] See President George W. Bush, Address to the U.N. General Assembly in New York City, 38 Weekly Comp. Pres. Doc. 1529, at 1531-1532 (12 September 2002).
[70] N.S.S., at 15.
[71] *Ibid*, at 15.
[72] *Ibid*, at 15.

actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather."[73]

As has been pointed out, the "*Bush Doctrine*" promotes a broad concept in the field of "unilateral engagement", as well as in the field of "preemptive self-defense". This inevitably influences, changes or even challenges existing and well-recognized international law doctrines, as well as international relations.

Hence, after examining how the traditional security system (excluding the "*Bush Doctrine*") deals with new security challenges from terrorist attacks and WMD, I shall come back to the "*Bush Doctrine*" and reveal how this concept intends to address the aforementioned challenges. While this Chapter merely presented the "hard facts" of the "*Bush Doctrine*", Chapter IV purports to explain the practical implications of the doctrine for several aspects of international law, in particular for the U.N. Charter and for international relations between states.

Chapter III: Security challenges of the 21st century – is the traditional security system still adequate?

Since the U.N. Charter was instituted in 1945, our security environment has undergone profound transformation. The idea underlying the drafting of the Charter, in particular Art. 39 *et seq.* and Art. 51, is that the greatest threat to a state's interests would typically result from hostile military activities carried out by another state.[74] Nowadays this seems to be no longer valid.

As recent events have shown, a state's territory, its nationals, within or without its borders, its aircraft and vessels are scarcely endangered by wars or acts of aggression carried out by conventional military forces and conventional weaponry. Rather, the ways in which recent attacks against the U.S. and elsewhere have been committed, reveal that states are often – if at all – only indirectly involved or responsible, whereas the actual attack is carried out by individual terrorists or terrorist organizations.[75]

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[73] *Ibid,* at 15. The formulation applied in the N.S.S. is very similar to the words used by President Bush in both State of the Union Addresses of 2002 and 2003, respectively. Both documents are available at: www.whitehouse.gov/news/release/2002/01/20020129-11.html and www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

[74] See Gazzini: the notion of self-defense was intended as being "defensive military action against hostile military activities conducted by subjects of international law", at 4.

[75] See eg the 9/11 attacks (as well as other attacks, such as the bombings of the U.S. embassies in Nairobi and Dar es Salam), for which Al Quaeda under the leadership of Osama bin Laden assumed responsibility. Al Quaeda was however closely linked to the then-*de facto* regime in Afghanistan, the Taliban.

Moreover, the possession of WMD is no longer confined to traditional nuclear powers, such as the U.S. or France; indeed, the recent cases of Iraq, Iran, and North Korea[76] have incited vigorous debate as to the possibly devastating consequences, when unpredictable, irrational governments or persons, like Saddam Hussein, are either in possession of WMD or provide such weapons to those who might use them.

In the face of these modern – 21st century – security challenges, the traditional system of collective security (with the only universally recognized exception of the right of self-defense) envisaged by the U.N. Charter has been harshly criticized by the U.S. government and by some of its allies, in particular in the wake of the events relating to "Operation Iraqi Freedom" in 2003.[77] At other times, criticism has ultimately led to a complete disregard for the rules of international law.[78] While it is not my intention to engage in debate about the legality or illegality of any event in the present or past in which the U.N. Charter has been questioned or allegedly been disregarded, these developments in international practice nevertheless raise the legitimate question whether the traditional security system provided by the U.N. Charter is still suitable to counter (perceived or actual) threats posed by terrorism and WMD. As threats and dangers to national and global security have changed considerably and the relevant provisions in the U.N. Charter have remained unaltered, isn't the call for a new, more extensive approach in the field of individual or collective security in fact justified?

To answer this question, the following Chapter will start with an overview of today's gravest threats posed by terrorist acts and WMD. An examination follows of the traditional security system, that is, the system of collective security under Art. 39 *et seq*., of the right to self-defense under Art. 51 and under customary law, and of the question if, and to what extent, terrorism and WMD can be countered by means of those mechanisms. Finally, I shall attempt to assess the adequacy of the present system in the face of these 21st century security challenges.

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[76] Identified by President Bush as the "Axis-of-Evil" in his State of the Union Address 2002, see *supra* at note 73.

[77] The critiques mainly referred to the Security Council's inaction with regard to Iraq's continued non-compliance with several disarmament obligations, see A Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 Michigan Journal of International Law 691 (2003-2004), at 691.

[78] See eg the Israeli air attack on nuclear reactor installations in Osiraq, Iraq. While Israel claimed to have legitimately (re-) acted in self-defense, the Security Council unanimously condemned the Israeli action, see Security Council Resolution 487 (19 June 1981); see also the discussions in: T L H McCormack, *Self-*

Modern threats to global security

There are two major threats to global security today: international terrorism and WMD.

International terrorism

As noted above, a universally accepted definition of "terrorism" has not yet been adopted by the U.N.[79] Several attempts have however been made by governments, non-governmental organizations and individuals.[80] Gazzini aptly describes terrorism as "acts of violence intended to create a climate of terror within the population or to coerce governments or international organizations into given conduct".[81] While perpetrators of terrorist activities are often motivated by religious, ideological or political considerations, this is not a compelling prerequisite to qualify them as terrorists.[82] The N.S.S. characterizes terrorism as "premeditated, politically motivated violence against innocents".[83]

Whatever the controversies and disagreements in finding a comprehensive definition of terrorism may be, there is widespread consensus within the international community that terrorism is unacceptable[84] and must be outlawed.[85]

By and large, terrorist activities can be distinguished from other hostile military activities in relation to three aspects.

First of all, terrorist acts are seldom carried out by states' military forces, nor on behalf of states.[86] Rather, they are committed by terrorist organizations or terrorist networks;[87]

Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor (1996); A D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 American Journal of International Law 584 (1983).

[79] See *supra* at note 9.

[80] See eg the definition employed by the European Union in Art. 1 of the *Framework Decision on Combating Terrorism*, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf; the British *Terrorism Act 2000*; U.S. instruments, eg Chapter 113 B of Part I of Title 18 of the Federal Criminal Code; 28 C.F.R. Section 0.85 of the U.S. Code of Federal Regulation; see also A Cassese, *International Law*, 2nd edition (2004), at 449.

[81] Gazzini, at 181.

[82] *Idem*, at 181; see also the *Convention for the Suppression of the Financing of Terrorism,* General Assembly Resolution 54/109 (9 December 1999).

[83] N.S.S., at 5.

[84] There is disagreement however whether or not the notion "terrorism" should exclude resistance to foreign occupation and activities by those "engaged in the struggle for national liberation", Rostow, at 480; see also Article 5 of the *Convention for the Suppression of the Financing of Terrorism*; General Assembly Resolution 57/27 (15 January 2003), at 2.

[85] See eg several Security Council resolutions, eg Resolution 1368, as well as several addresses by former U.N. Secretary-General Kofi Annan, eg *Words Alone Inadequate as Response to Terrorist Attacks, Secretary-General Tells Opening of Fifty-Sixth General Assembly*, available at: http://www.un.org/News/Press/docs/2001/sgsm7951.doc.htm.

sometimes even an individual act of, e.g. a suicide bomber who is seeking death as a martyr, can be classified as an act of terror. Although in most cases there is no detectable direct link to a state, concluding that terrorism is always and necessarily a transnational phenomenon would be elusive. Terrorist organizations, like other organizations, need support, financial or otherwise, and it is most often states – identified by the Bush Administration as so-called rogue states[88] – which provide for the necessary financing, or which make available their territory as a base or harbor for terrorists. In this regard, the notions of "state-sponsored terrorism" or "asymmetric warfare" have gained certain prominence.

Secondly, terrorist activities are almost never carried out by means of conventional warfare, such as the crossing of boundaries with armies. The techniques employed by terrorists are manifold, including terrorism via the internet, and "electronic" warfare through the hacking and destroying of secured computer systems.[89] Probably the most "common" instruments used by terrorists are car bombs, usually placed close to military or civilian targets.[90] In recent years, the number of (civilian) aircraft hijackings has increased notably, reaching a horrifying peak on 11 September 2001. Although WMD have not yet been employed in the course of terrorist activities, reality has shown that many terrorist networks strive to acquire WMD and their close links to certain sponsoring or supporting states makes it possible that they will succeed one day. Whatever the techniques may be, they all have in common that generally terrorists do not give prior warning as to the time and place of their attack.[91] This is particularly dangerous considering that intelligence services often cannot easily access the relevant information. Terrorists who use aircrafts and WMD are even more dangerous in that they can strike virtually anywhere.[92]

Thirdly, terrorist activities are different from other hostile activities in that they usually do not aim at challenging the territorial integrity of another state, or its political

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[86] Under certain circumstances, however, military actions carried out by belligerents can be qualified as acts of terror, see eg the bombing of Dresden during World War II. Example taken from Gazzini, at 181, footnote 2.
[87] For example, Al Quaeda, Ansar al-Islam; controversial in the case of Hezbollah and Hamas.
[88] The term "rogue state" has been applied by President Bush in Chapter V of the N.S.S. Former Secretary of State Madeleine Albright has previously labeled Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria as rogue states for their alleged sponsoring of terrorism.
[89] See *supra* at note 11.
[90] Gazzini, at 181.
[91] See the State of the Union Address of 2003, *supra* at note 73.
[92] See the Australian Minister for Defense Robert Hill, *John Bray Memorial Oration* (28 November 2002), available at: www.minister.defence.gov.au/2002/694281102.doc.

independence.[93] Rather, terrorists often intend to inflict massive civilian casualties, killings, and destruction, thereby creating a state of terror and a constant threat.

Weapons of mass destruction

The second major threat to global security relates to WMD, that is, biological, chemical and nuclear weapons.[94] While all three sorts of WMD have been the subject of several international instruments and regulations,[95] it is nuclear weapons which have been the major focus of attention since the recent cases of Iraq, Iran and North Korea.

Even though many attempts have been made to restrict certain aspects related to nuclear weapons,[96] the *Nuclear Weapons* Advisory Opinion of the I.C.J. clarified that "there exists neither a conventional norm of general scope nor a customary norm specifically proscribing the threat or use of force of nuclear weapons *per se*".[97] However, the finding that there is no general prohibition of the threat or use of nuclear weapons does not mean that these weapons cannot pose a grave threat to vital security interests of a targeted state and its nationals.

The U.S. describes WMD as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people",[98] broadly speaking a weapon that has the "capabilities to inflict mass casualties and destruction".[99] In contrast to conventional weaponry, which is generally capable of targeting only a specific number or circle of people or other objects, WMD – as the notion itself already implies - are capable of inflicting massive, indiscriminate casualties, killings of an unpredictable number of innocent people and destruction of property, whether civilian or military, the magnitude being unforeseeable.[100] The devastating consequences of the use of WMD might go as far as jeopardizing the very existence of a state.

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[93] "Territorial integrity" and "political independence" are expressly mentioned in Art. 2 (4) as being protected against the threat or use of force.
[94] See eg the *N.A.T.O. Handbook* (2001).
[95] See eg the *Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction*, General Assembly Resolution A/RES/47/39 (30 November 1992).
[96] See eg General Assembly Resolution 1653 (XV) (24 November 1961); Resolution A/RES/56/24R (29 November 2001); see also the *Nuclear Non-Proliferation Treaty* (1970).
[97] At 253 *et seq*.
[98] See the definition in the U.S. Code Title 50, *War and National Defense*, available at: http://www.nti.org/f_wmd411/f1a1.html.
[99] See the U.S. Secretary of Defense, *Proliferation, Threat and Response 2001*, available at: http://www.nti.org/f_wmd411/f1a1.html.
[100] See the U.S. Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks*, stating that of WMD, nuclear weapons are the most potent, because they can kill large numbers of

The greatest danger however lies at the crossroads between terrorism and WMD and is posed by (rogue) states, which possess WMD or wish to acquire them. They are either ready and willing to make use of the weapons against their perceived enemy given the opportunity, or provide WMD to terrorist organizations or other (rogue) states which might ultimately employ them. Moreover, an increasing risk to potential victim states emanates not only from WMD trafficking as such, but also from the relatively easy access to the relevant expertise and technical know-how.

Nevertheless, in evaluating the threat, one certainly has to take into account the "moral characters" of individuals, organizations or states holding, or capable of acquiring, WMD.[101] For example, Saddam Hussein was regarded - at least by the U.S. - as unpredictable and willing to use WMD, as he had previously demonstrated during the attack of Halabja in 1988 on his own people.[102]

The traditional security system under the U.N. Charter and customary law

With the institution of the U.N. Charter, the right of a state to use force against another state was in principle abandoned.[103] Article 2 (4) explicitly states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".

As a corollary to the general ban on the use of force by individual states or groups of states as enshrined in Art. 2 (4), the Charter provides for a system of collective security,[104] effectively exercised through the Security Council, which is under Art. 24 (1) endowed with primary responsibility for the maintenance of international peace and security.[105] The idea of collective security is explicitly mentioned in the Preamble of the Charter, which says that "armed forces shall not be used, save in the *common interest*", as well as in Art. 1 (1), which describes as one of the purposes of the U.N. "to take effective *collective* measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace". Needless to say

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people, but in addition "destroy buildings and infrastructure and contaminate large areas with radioactive fallout", available at: www.anthrax.osd.mil/documents/library/proliferation.pdf.

[101] Ramírez, at 23.

[102] *Idem*, at 23.

[103] See A Randelzhofer, *Article 2 (4),* in: *The Charter of the United Nations, A Commentary*, Vol. I, 2nd edition (2001), ed. by B Simma, at 14; Blokker/Schrijver, *Introduction*, in: *The Security Council and the Use of Force,* at xi.

[104] Randelzhofer, *Article 2 (4),* at 14.

"collective security" is the basic idea underlying the provisions granting the Security Council its extensive powers under Chapter VII of the Charter.[106]

There are, however, at least two generally accepted exceptions to Art. 2 (4). According to Article 51 of the Charter, a state which is the victim of an armed attack, might exercise individual or collective self-defense against the aggressor without prior authorization by the Security Council.[107] In addition, the Security Council, acting under Chapter VII, can take measures involving the use of military force "as may be necessary to maintain or restore international peace and security" (Art. 42), in response to a threat to the peace, a breach of the peace or an act of aggression (see Art. 39).[108]/[109]

Besides these Charter-based exceptions, another exception can be found in customary law, that is, the right of anticipatory self-defense against "imminent threats". Albeit the existence, or at least the details of this right are still controversial, there seems to be broad consensus within the international community that nowadays, states should be allowed to rely on self-defense not only if there is an actual "armed attack", but also in case of a mere "imminent armed attack" to their security interests.

Hence, the security system in its traditional form encompasses (1) collective security through Security Council action or authorization under Art. 39, (2) self-defense under Art. 51, and (3) anticipatory self-defense under customary law.

As elaborated above, security threats to national and global interests have changed at a rapid pace, whereas the security system under the Charter as well as the principles of customary law have remained generally unaltered. The next paragraph is therefore meant to examine whether the traditional security system is capable of dealing with modern challenges posed by terrorism and WMD, and how and to what extent a state which is an actual or potential victim of a terrorist or nuclear attack is protected – in theory, as well as in practice - by means of collective security or by means of individual or collective self-defense.

Security Council action under Chapter VII of the U.N. Charter

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[105] See also Blokker/Schrijver, *Introduction*, at xi.
[106] J Frowein, N Krisch, *Article 39*, in: *The Charter of the United Nations*, at 3.
[107] Regarding self-defense in general: Bowett; Brownlie, at 231 *et seq*.
[108] Blokker/Schrijver, *Introduction*, at xi.
[109] Besides these generally recognized exceptions, there are ongoing debates as to whether an intervention for humanitarian purposes or the protection of nationals abroad could override Article 2 (4); see eg N Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2002); M Byers and S Chesterman,

According to Art. 24 (1), the Security Council is the U.N. organ endowed with primary responsibility to pursue the primordial goal of the U.N., that is, the maintenance of international peace and security.[110] Art. 24 (2) explains that the specific powers granted to the Security Council for the discharge of these duties are laid down, *inter alia*, in Chapter VII.

The first provision of Chapter VII, Art. 39, accordingly reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security." A determination pursuant to Art. 39 thus has three possible consequences: the Security Council can confine itself to mere recommendations (Art. 39); it can take or order measures not involving the use of armed force, such as economic sanctions (Art. 41), or it can take (or rather authorize states to take[111]) measures involving, *inter alia*, the use of military force, such as operations by air, sea or land forces (Art. 42).[112]

The determination under Art. 39 is a necessary prerequisite for the authorization of enforcement measures under Art. 41 and 42. Without a prior determination, a decision made by the Council will not be binding on member states.[113]

Strictly speaking, this means that the effective exercise of collective security against dangers posed by terrorism and WMD depends entirely on the Council's finding of a threat to or breach of the peace, or an act of aggression.

As regards the determination of *what* constitutes such threat or breach, the Security Council – due to the rather political than legal nature of Article 39 - enjoys a considerable margin of discretion.[114]

It can be observed that in practice, the Council is extremely reluctant to determine a "breach of the peace" or an "act of aggression", and is generally much more inclined to find threats to the peace, even in quite obvious situations of breach.[115] Thus, the Council

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Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law, in: J L Holzgrefe and R Keohane, *Humanitarian Intervention: Principles, Institutions and Change* (2002).

[110] See Article 1 (1).

[111] Due to a lack of agreements concluded under Art. 43, most decisions adopted under Art. 42 are implemented by means of the Security Council's so-called "authorization practice", see Frowein/Krisch, *Article 39*, at 19.

[112] The enumeration in Art. 42 is not exhaustive, *idem*, at 16.

[113] Except for recommendations, measures taken or authorized by the Council under Chapter VII are – by means of Art. 25 – binding upon the state targeted by those measures, as well as on all other member states of the U.N. It is also worth noting that the Council need not base its measures on an explicit provision; it suffices if it refers to Chapter VII as such, *idem*, at 26-27.

[114] *Prosecutor v Duško Tadić*, (ICTY Appeals Chamber of 2 October 1995), at 28; Frowein/Krisch, *Article 39*, at 4; M Herdegen, *Die Befugnisse des U.N. Sicherheitsrates*, (1998), at 14-15.

[115] Frowein/Krisch, *Article 39*, at 16.

has found a "threat to the peace" not only in situations of impending, or even ongoing armed conflicts between states,[116] but also in situations which originally have not been envisaged as falling under Art. 39, e.g. entirely internal conflicts.[117]

In the context of terrorism and WMD, the crux of the matter accordingly lies in the question, whether the Council also qualifies those threats as threats to the peace, therewith providing the basis for subsequent intervention.

a) Terrorism as a "threat to the peace"

The early 1990's marked the beginning of a new era of intensified Security Council efforts to combat terrorism. In the aftermath of the so-called "Lockerbie"-incident, the Security Council ordered Libya to extradite two Libyan nationals allegedly responsible for acts of (state-sponsored) terrorism for trial in the victim's domestic courts.[118] When Libya refused to comply with this claim, the Council determined that "the failure by the Libyan Government to demonstrate by concrete action its renunciation of terrorism […] constitutes a threat to international peace and security".[119]

Besides the threat resulting from states' failure to undertake proactive measures against terrorism, the Security Council has now gone a step further and declared that "any act of international terrorism" constitutes a threat to international peace and security.[120]

b) WMD as a "threat to the peace"

Although it would be inappropriate to argue that the Security Council considers WMD as such as a "threat to the peace", Resolution 1540 clearly illustrates that the Security Council regards as a threat to international peace and security the proliferation of "nuclear, chemical and biological weapons, as well as their means of delivery". The Council's gravest concern hereby lies in the "threat of terrorism and the risk that non-State actors […] may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery".[121]

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[116] *Idem*, at 16.
[117] See Security Council practice regarding internal conflicts in Somalia, Sierra Leone, East Timor, etc.
[118] Security Council Resolution 731 (21 January 1992).
[119] Security Council Resolution 748 (31 March 1992). See also Resolution 1054 (26 April 1996) and 1070 (16 August 1996) in the similar case of Sudan.
[120] Security Council Resolution 1373 and 1377 (12 November 2001).

c) Enforcement action

Once the Security Council has determined that certain conduct is to be qualified as a terrorist attack or as the proliferation of WMD, and that it constitutes a threat to peace and security according to Art. 39, the 15 Council members may take or authorize a wide range of coercive (military or non-military) measures, in order to maintain or restore international stability. In doing so, the Council enjoys wide discretionary powers not only with respect to the "if" of an intervention, but also with respect to the "how".[122]

Thus, in combating WMD and terrorism, the Council may confine itself to mere statements condemning, e.g., terrorism or the proliferation of WMD, but it may also order proactive measures, order states to refrain from certain conduct classified as terrorism, or even impose sanctions on a state which through its conduct threatens other states.

Art. 51 of the U.N. Charter

In international practice, the use of force by one state against another state has - in the majority of cases - been justified by the attacking state by means of invoking the sole express exception to Art. 2 (4), that is, the right of self-defense, as it is enshrined in Art. 51.[123]

The latter provision reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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."

The right to self-defense is not only found in the U.N. Charter, but is also recognized as a principle of customary law,[124] and has sometimes even been considered as a right which is inherent in the very notion of "statehood" or "state sovereignty".[125] Whether or not there was an actual need to insert Art. 51 in the Charter, the founding fathers nevertheless felt a need for certain clarification, in particular with respect to collective security and the legitimacy of regional security arrangements, such as the Pan-

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[121] Security Council Resolution 1540 (28 April 2004).
[122] Frowein/Krisch, *Article 39*, at 4.
[123] See O Schachter, *In Defense of International Rules on the Use of Force*, 53 University of Chicago Law Review 113 (1986), at 131; Dinstein, at 178.
[124] See *Nicaragua v United States*, *supra* at note 24.
[125] D R Rothwell, *Anticipatory Self-Defense in the Age of International Terrorism*, in: 24 University Queensland Law Journal 337 (2005), at 353; van den Hole, at 79.

American Treaty.[126] However, Art. 51 neither provides a definition of the right of self-defense, nor determines in detail its preconditions. This vagueness, of course, has made Art. 51 and the right of self-defense in general a popular subject for vast juridical treatise and passionate political debate.

By and large, self-defense can be described as the "permissible military reaction by a State to a [prior] armed attack carried out by another State", with the intention of "preventing the armed attack from proceeding, succeeding and achieving its purpose", [127] or in order to "repel, quell or quash the aggressor state".[128]/[129] Self-defense can be carried out individually or – provided the victim state has requested support – collectively.[130]

In contrast to the right of self-defense under customary law, Art. 51 presupposes that a state which is acting in self-defense immediately reports the measures it has taken to the Security Council.[131]

Despite the fact that Art. 51 does not prescribe how an attacked state is to defend itself, the exercise of the right is by no means unrestricted, but is subject to temporal as well as substantial limits. Besides the many controversies related to the notion of "armed attack", which will be dealt with forthwith, an important temporal limit can be found in Art. 51 itself, which states that: "Measures taken by Members in the exercise of this right of self-defense […] 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." However, the right of self-defense does not necessarily cease to exist when the Security Council adopts resolutions dealing with the alarming situation and these resolutions provide for concrete counter-measures.[132]

Another substantial limit to the right of self-defense is not expressly mentioned in the Charter, but is derived from the general customary principles of necessity and

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[126] Van den Hole, at 76; Dinstein, at 177.
[127] Gazzini, at 129.
[128] Rothwell, at 337. The International Law Commission (ILC) has described self-defense as "an action used to resist to an offensive use of armed force", see *Report to the General Assembly*, 32 YBILC (1980-II), Part 2, at 53.
[129] As a classical example for self-defense was Britain's response to the Argentinean invasion in 1982 (the so-called "Falkland Islands War"); see also K R Simmonds*, The Struggle for the Falkland Islands*, 32 International and Comparative Law Quarterly 262 (1983); F Hassan, *The Sovereignty Dispute over the Falkland Islands*, 23 Virginia Journal of International Law 53 (1982).
[130] Rothwell, at 338; also Security Council Resolutions 1368 and 1373, reaffirming the inherent right of individual and *collective* self-defense.
[131] However, a prior authorization by the Security Council to exercise this right or to take specific measures is not required.
[132] Byers, at 412; see in particular Security Council Resolutions 1368 and 1373, reaffirming the right of *inherent* self-defense.

proportionality. Any defensive measure must be necessary and proportionate with regard to the prior attack suffered.[133]

Self-defense against terrorist attacks and WMD is in principle subjected to the same rules provided by Art. 51 like any other attack carried out by conventional means or weapons. Yet, the problems evolving around the notion of "armed attack" seem to become even more complicated in the face of these modern security challenges. In this regard, three issues deserve particular attention.

a) Defining the scope of the notion "armed attack"

The notion of "armed attack" has not (yet) been conclusively defined. In accordance with the General Assembly *Definition of Aggression*, however, typical examples of armed attacks include, *inter alia,* invasion, bombardment or cross-border shootings.[134]

In extending the original meaning of "armed attack", the I.C.J. held in its seminal *Nicaragua* judgment that "it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces or its substantial involvement therein".[135] In this regard, the judges deemed as insufficient the provision of weapons or mere logistical support.[136]

While this view probably reflects customary law, and is furthermore recognized in the context of state responsibility,[137] the issue of "indirect aggression" is much more delicate when the alleged attack consists merely in harboring terrorists.

Under the *Nicaragua* judgment, neither the harboring of terrorists nor the provision of mere financial or logistical support would seem to qualify as the required "substantial involvement". Since the attacks of 9/11, however, many members of the international

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[133] See the *Caroline* case: "It will be for it to show, also, that the local authorities of Canada, […] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."; also *Nicaragua v United States*; Byers, at 405-406.
[134] See Article 3 (a)-(g) of the *Definition of Aggression*, U.N. General Assembly Resolution 3314 (XXIX); also Randelzhofer, *Article 51*, at 22.
[135] *Nicaragua v United States*, at 195; in accordance with Article 3 (g) of the *Definition of Aggression*.
[136] *Ibid*, at 195.
[137] See Art. 8 of the ILC Draft Articles on State Responsibility, in: *Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session*, Supplement No. 10 (A/56/10), available at: www.un.org/law/ilc/index.htm.

community appear to have adopted a broader approach and are prepared to regard as "armed attacks" any sufficiently grave support of terrorists.[138] To resume Byers' words, "the right of self-defense now includes military responses against States which actively support or willingly harbor terrorist groups who have already attacked the responding State".[139]

b) Terrorist acts as "armed attacks" in the sense of Art. 51 of the Charter

The second issue that must be raised in the context of terrorism is whether an "armed attack" must necessarily be carried out by, or be attributable to, another state, or whether terrorist activities carried out by non-state actors or entities can also constitute such an attack.

The question has gained particular relevance in connection with the 9/11 attacks, which were carried out by Al Quaeda, a terrorist network which maintained close relations to the then *de facto* regime in Afghanistan, the Taliban, but whose actions were not directly attributable to the government of Afghanistan.

It has sometimes been argued that Art. 51 must be read as requiring an armed attack by one state against another state.[140] The Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[141] especially reinforced this point of view and therewith contributed in goodly measure to the confusion. Looking at the text of Art. 51 itself, nothing is mentioned about the nature of the attacker; the text merely talks about the victim *state*. However, the controversies as to whether terrorist activities can constitute "armed attacks" and thus trigger a state's right of self-defense, seem to have been laid to rest since Resolutions 1368 and 1373, adopted by the Security Council as an immediate response to the 9/11 attacks, and in the awareness that the attacks had been carried out by a non-state entity, Al Quaeda.[142]

Arguably, the recognition of a notion of "armed attack" which encompasses attacks of all kinds of different aggressors engages other complicated questions, e.g. if a counter-attack can legitimately be carried out on another state's territory without violating that

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[138] Byers, at 409-410. According to Randelzhofer, it is nowadays no longer adequate to "exclude generally certain types of supporting terrorism from being qualified as substantial involvement", *Article 51*, at 33.
[139] Byers, at 409-410 (with more references). This is also the position of the Bush Administration; see the N.S.S., Chapter III.
[140] See Gazzini, at 129; Randelzhofer, *Article 51*, at 34.
[141] I.C.J. Reports 2004, at 139.
[142] Concurring: Dinstein, at 207; Rothwell, at 341; see also the Separate Opinion of Judge Kooijmans in the "*Wall*"-Advisory Opinion, at 35.

state's sovereignty.[143] A narrow interpretation of Art. 51, however, will hardly be capable of doing justice to today's most threatening adversaries, that is, terrorists and their shady organizations and networks. Consequently, an attacked state cannot and in fact should not be prevented from defending its territory, its nationals, and other legitimate interests against any hostile attack carried out by whomsoever.

c) Immediacy of the attack

Art. 51 unambiguously requires that measures taken in self-defense may only be directed against an "armed attack". The implications of this are twofold: under a strict textual interpretation of Art. 51, a state cannot claim self-defense against mere threats, irrespective of whether they are actual or only perceived. Even a threat resulting from the violation of an international obligation does not justify measures in self-defense unless it amounts to an armed attack.[144] Secondly, armed reprisals in response to an attack which is already over are strictly forbidden under the U.N. Charter security system.[145]

The notion of an "armed attack" has however been stretched in the past: under the "accumulation of events"-theory, a state may assess a series of instantaneous (terrorist) attacks, which – taken individually – would not meet the "immediacy"-requirement, as an "ongoing armed attack" or a "continuing armed attack",[146] and consequently rely on its (Charter-based) right to self-defense.

Thus, the "immediacy"-requirement is not only met if bombs are actually falling, or if missiles are already fired, but if "it becomes evident to the victim state that the attack is in the process of being mounted".[147]

Anticipatory self-defense

In contrast to the right of self-defense under Art. 51, the right of anticipatory self-defense is an unwritten principle found in customary law. It was first articulated in an exchange of diplomatic notes between the U.S. Secretary of State Daniel Webster and the British Government following the famous *Caroline* incident of 1837. In a letter of 24 April

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[143] Byers, at 406-407.
[144] A concerned state may however take measures not involving the use of military force.
[145] See Security Council Resolution 188 (9 April 1964); Byers, at 51.
[146] Gazzini, at 142-143; Byers, at 410-411.

1841, Webster stated: "… under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show what state of facts, and what rules of national law, the destruction of the *Caroline* is to be defended. It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[148]

Put in general terms, anticipatory self-defense can be described as military action launched by a state in response to an "imminent attack" or a concrete "imminent threat" posed by a future potential aggressor.[149] Instead of waiting for an "armed attack" to ultimately materialize, a state which believes it will suffer an attack in the very near future may – under the doctrine – "anticipate" the attack and take necessary and proportionate[150] means to defuse the perceived threat.[151]

It has often been alleged that with the institution of the U.N. Charter, and Art. 51 in particular, which expressly requires an "armed attack", the more generous, customary right of (anticipatory) self-defense has been superseded and can no longer be upheld.[152] Proponents of a wider approach, on the other hand, have referred to, *inter alia*, the wording of Article 51 ("inherent right") and the drafting history of the Charter.[153]

At this point, it is not my intention to (re-) examine relevant state practice and *opinio juris* in order to establish whether or not there is a right to anticipatory self-defense under customary law. In my view, a narrow interpretation of the right of self-defense excluding defensive measures against mere imminent attacks can no longer do justice to modern challenges posed by WMD and terrorism. In this sense, Higgins has accurately formulated that: "… in a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text [Art. 51 of the U.N. Charter] in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of conventional

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[147] Dinstein, at 187; H M Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Recueil des Cours 451 (1952-II), at 498. Dissenting Gazzini: "military reaction must take place when the armed attack is in progress", at 143.

[148] *Letter of Mr. Webster to Mr. Fox* of 24 April 1841, in: 29 British and Foreign State Papers, 1840-1841, at 1137-1138 (1857). Although the British disagreed on the facts, they accepted Mr. Webster's definition regarding the conditions for an action in self-defense, see also *Letter of Lord Ashburton to Mr. Webster* of 28 July 1842.

[149] Gazzini, at 151.

[150] *See supra at note* 133. Any kind of self-defense must respect the principles of necessity and proportionality.

[151] Rothwell, at 338.

[152] H Kelsen, *Principles of International Law* (1952), at 61; I Brownlie, *The Use of Force in Self-Defense*, 37 British Yearbook of International Law 183 (1963), at 244; Q Wright, *The Cuban Quarantine*, 57 American Journal of International Law 546 (1963), at 560.

[153] See van den Hole, at 70 *et seq*., Rothwell, at 337. The International Military Tribunal at Nuremberg also referred to anticipatory self-defense, provided the requirements under the *Caroline* case were met, see Q Wright, *The Law of the Nuremberg Trial*, 41 American Journal of International Law 38 (1947).

warfare, this would seem the only realistic interpretation of the contemporary right of self-defense. It is the potentially devastating consequences of prohibiting self-defense unless an armed attack has occurred that leads one to prefer this interpretation….".[154]

Although this opinion does not (yet) reflect universally recognized law, it seems nowadays appropriate to state – to borrow Kofi Annan's words – that "imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers imminent attack as well as one that has already happened."[155]

In view of threats posed by terrorist acts, WMD and their proliferation, this means that a state may in principle take measures not only in case of an actual terrorist or nuclear attack, but against a mere threat, whose ultimate outbreak would gravely jeopardize its legitimate security interests, provided that this threat is concrete, direct and "practically unavoidable".[156] Even if the details as to the exercise of this right are not entirely resolved and might differ from case to case, each measure which is based on anticipatory self-defense must be borne by concrete evidence as to the time, place and nature of the future attack, and must be carried out within the limits of proportionality and necessity. Thus, a military response would not be justified under the doctrine of anticipatory self-defense, if the threat can be countered by means other than military (e.g. diplomacy, negotiations), if the threat is not yet "imminent" so as to potentially change into an attack at any time, or if the alleged aggressor has not clearly manifested its intent to launch a (terrorist or nuclear) attack.

Assessing the adequacy of the traditional security system in the face of terrorism and WMD

The preceding analysis of the collective security system under Art. 39 *et seq*. and of the right to self-defense under Art. 51 and customary law have displayed that a state which is a victim of a – nuclear or terrorist - threat or an actual attack has legal means to defend its interests, including, if necessary, its very existence. Yet, the analysis has also shown that collective security always depends on a decision of the Security Council to take action,

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[154] R Higgins, *Problems and Process: International Law and How we Use it* (1994), at 242.
[155] *In Larger Freedom: towards Development, Security and Human Rights for All*, available at: www.un.org/largerfreedom/chap3.htm, at 124; see also the Dissenting Opinion of Judge Schwebel in *Nicaragua v United States*, at 347.
[156] According to Rothwell, the threat must be "clear and overwhelming", at 353.

and that unilateral action in self-defense requires an actual armed attack or at least an imminent attack.

Considering the distinct nature of modern security threats, it is in particular these two conditions which risk constituting a major stumbling block to the effective functioning of the security system in its present form.

Failure of the Security Council to take action

In order to effectively discharge its responsibilities under Art. 24, Chapter VII (and especially Art. 39) vests the Security Council with considerable discretionary powers. As elaborated above, the Council can authorize a wide range of (binding) military or non-military measures when it finds that a given situation constitutes a "threat to the peace", a "breach of the peace", or an "act of aggression".

In contrast to the unilateral right of self-defense, which can only be exercised by states in case of an "armed attack" or against an "imminent attack", the Council enjoys wider powers in that it can act against mere threats to international peace and security, without having to assure that the threat is already imminent. This means that the Council is legally entitled to intervene in situations which at this stage only constitute a potential or latent threat, but which risk aggravation in the indefinite future.[157]

Thus, within the traditional security system, the Council is the sole subject of international law which is allowed to take preemptive measures under Chapter VII, if it considers them appropriate to maintain international peace and security.

Despite the fact that its powers are not unlimited,[158] Chapter VII confers on it considerable discretionary powers both in determining what constitutes a threat to or breach of the peace or an act of aggression under Art. 39, and in choosing the measures it deems necessary for the maintenance of peace and security.

It is generally accepted, however, that Art. 39 *et seq*. only empower the Security Council; they do not oblige the 15 Council members to actually take action.[159]

As a consequence, the Security Council – if it is not willing to do so - need not act at all. Even if a given situation in the eyes of the international community obviously constitutes a threat to or breach of the peace, the Council need neither make a

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[157] Ramírez, at footnote 57; Frowein/Krisch, *Article 3*9, at 16: "to determine a threat to the peace engenders the possibility of preventive action".
[158] See eg E de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 136.
[159] Frowein/Krisch, *Article 39*, at 3; Kelsen, at 733, 737; de Wet, at 136 and 184.

determination under Art. 39, nor take coercive measures under Art. 41 or 42.[160] Even if it exercises its discretion under Art. 39 and makes such a determination, this does not mean that it has to act subsequently. It may confine itself to merely declaring that there is a threat to the peace but without authorizing action.

Of more practical relevance are however those situations in which effective action is blocked by the strict voting rules in Art. 27.

While decisions dealing with procedural matters simply require a majority of nine votes (out of 15),[161] decisions on all other matters, including the crucial determinations under Art. 39, 41 and 42, are to be made by an "affirmative vote of nine members including the concurring votes of the permanent members", the so-called P-5 (U.S., France, China, Russia and U.K.).[162] This means that with a single "veto" of one of the P-5, the Security Council is barred from taking the proposed action.[163]

Hence, although the Security Council is in theory capable of meeting terrorist or nuclear threats which are neither actual nor imminent, the unfettered discretion in determining the existence of a "threat to the peace" as well as the procedural framework established by Art. 27 (3) both bear the inherent danger of preventing the Security Council from duly discharging its responsibilities.[164]

Mere "latent" threats

As elaborated above, self-defense in accordance with the traditional security system requires an actual armed attack, or at least an imminent threat of such an attack. Mere latent threats, that is, threats that are merely foreseeable, potential, or even "just conceivable",[165] are consequently not sufficient to justify "defensive" measures against an alleged aggressor.

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[160] The decision to remain inactive is a logical feature of the Council's wide discretionary powers.
[161] Article 27 (2).
[162] Article 27 (3).
[163] Gazzini, at 162, naming as possible reasons for a "veto" direct involvement of a state in a given crisis or strategic interests. Profound disagreements within the members of the Council have led, *inter alia*, to the N.A.T.O. intervention in Kosovo as well as to President Bush's decision in the matter of Iraq in 2003.
[164] Ramírez, at 16-17, drawing a parallel to Security Council paralysis experienced during the Cold War.
[165] Dinstein, at 191.

Admittedly, this limitation might well be justified with respect to conventional attacks, carried out by conventional military forces, which normally give prior warning before attacking, and which visibly mobilize their forces or otherwise openly prepare their strike. Nevertheless, as regards threats posed by WMD and terrorists, such limitation is rather critical.

Terrorist training camps or bases, their capability to launch attacks and their stated and unequivocal will to do so are threats to a concerned state's vital interests which can certainly be qualified as latent. The same is true of threats caused by rogue states (or terrorist organizations) which possess or wish to acquire WMD, and which may possibly use them against an adversary, or provide them to another terrorist network which is ultimately willing to do so.

Under the traditional legal system dealing with the unilateral use of force, Art. 51 and the customary principle of anticipatory self-defense, a state which is or feels threatened by these developments, can in principle do no more than wait for the latent threat to transform into an imminent attack, i.e. wait until the threat is almost unavoidable. In many cases, however, "last-minute action" risks coming too late. While a certain risk is arguably inherent in the very concept of "self-defense" (which is always a reaction to prior, hostile conduct), the ultimate materializing of such a risk would be fatal, in particular when it comes to the use of nuclear weapons. A single nuclear bomb could cause unpredictable, devastating and irrevocable consequences as well as massive killing and suffering.

Leaving these factual realities aside, the rules under the traditional security system are clear in this regard: a state's claim to react in self-defense will only be regarded as legal if it is meant to repel at least an "imminent armed attack". Whatever the consequences of inaction and passivity may be, the mere possibility of an attack in the future is not sufficient.

Preliminary conclusion

With respect to our traditional security system, Dinstein has rightly concluded that "when a country feels menaced by the threat of an armed attack, all that it is free to do – in keeping with the Charter – is make the necessary military preparations for repulsing hostile action should it materialize, as well as bring the matter forthwith to the attention of the

Security Council (hoping that the latter will take collective security measures in the face of a threat to the peace)".[166]

Nevertheless, keeping in mind that the Security Council for various reasons might refrain from using its extensive powers under Chapter VII, this would mean that states which are or feel threatened by terrorist acts and WMD can do no more than "wait like sitting ducks for the wanton destruction and the targeting of innocents by rogue states and terrorists".[167] While mobilizing armies, navies, aircraft, and otherwise preparing for military action might be an appropriate means to repel an attack which is carried out by the same (conventional) means, this will normally prove fairly ineffective in an age of nuclear and terrorist threats. Even if a state need not wait until an attack is in fact launched against it, the requirement of imminence is often too strict when a nuclear bomb is about to be dropped and the vital security interests of the potential victim state are gravely jeopardized.

For these reasons, the security system as it exists cannot be said to provide a sufficiently effective way to meet potential or latent threats posed by WMD and terrorists; in the face of these new security challenges, it is no longer adequate.

Chapter IV: Preemptive action for global security? - Implications of the "*Bush Doctrine*"

The "*Bush Doctrine*", and in particular Chapters III and V of the N.S.S. suggest countering modern threats to global security by means of preemptive action. Even though it has been applied by the U.S. to justify neither the invasion of Afghanistan in 2002 nor "Operation Iraqi Freedom" in 2003, the concept of "preemptive strike" has indeed gained great prominence just before and in the aftermath of these two events.

The formulation taken by President Bush that action in self-defense is admissible as long as U.S. national security is confronted with a "sufficient threat", has aroused great controversy amongst governments, within the U.N. as well as amongst international lawyers both from the U.S. and elsewhere, and has been regarded by many as contradicting and thus violating international law, in particular the U.N. Charter. According to the proponents of the "*Bush Doctrine*", on the other hand, recent changes in our security environment have rendered indispensable corresponding adjustments of the traditional

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[166] Dinstein, at 187

[167] E Zoller, *The Law Applicable to the Preemption Doctrine,* 98 American Society of International Law Proceedings 333 (2004), at 336.

security mechanisms, and thus contributed to the evolution of the doctrine as a new rule of law.[168]

Despite the fact that the U.S. tried hard to justify their invasion of Iraq mainly by invoking three Security Council resolutions, the earliest dating back to 1990, the legality of the "*Bush Doctrine*" has often been examined in connection with the war in Iraq, in particular with respect to the question whether the "*Bush Doctrine*" would have constituted a legal justification for "Operation Iraqi Freedom". A large majority of states have expressed negative views on this question. Nevertheless, especially in the context of Iraq's alleged possession of WMD, it has been asserted that it might have made a difference to the acceptance of the "*Bush Doctrine*" if WMD had in fact been found.

Be that as it may, the legality of the "*Bush Doctrine*", whether one analyzes it on the basis of the situation leading to the Iraqi war, or on an abstract level, is an issue too complex for the limited scope of this paper. The first variant would require investigation of a large number of facts and political statements, some of which might prove, or have already proved, inaccurate or misleading. The second approach appears equally difficult, since a determination of the doctrine's legality would always depend at least to a certain degree on factual circumstances which differ from case to case.

But leaving the purely legal issues aside, the more important – and in my view more interesting – question probably relates to the practical implications of the "*Bush Doctrine*". As the events following the 9/11 attacks have shown, the international legal order is not a static or unchangeable body of rules, but sufficiently flexible to change existing rules or develop new rules if considered necessary by the international community. In this regard, the notion of "armed attack" has been construed as not only encompassing actual attacks by one state against another, but also as including the harboring of terrorists as well as acts carried out by non-state entities.

As a consequence, this means that even if the "*Bush Doctrine*" cannot (yet) be regarded as forming part of the traditional security system under the U.N. Charter and customary law, it is fairly possible that through affirming state practice and *opinio juris*, a new legal rule which allows states to strike preemptively might evolve during the next years or decades.

Thus, assuming that the "*Bush Doctrine*" were to be recognized as a new legal exception to the prohibition of the use of force under Art. 2 (4), what would the consequences be, both legal and factual?

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[168] See for example B Langille, *It's Instant Custom*: *How the Bush Doctrine became Law after the Terrorist*

To answer this question, the following Chapter will provide an analysis of and a critical approach to the "*Bush Doctrine*" and attempt to identify and develop its practical implications – both positive and negative - on the international legal order as well as on international relations. In so doing, the focus will be on the doctrine's potential impact on the collective security system under the U.N. Charter, and in particular on the authority of the Security Council. Bearing in mind that the traditional security system has proved inadequate in the case of threats posed by WMD and terrorist acts, I shall not pose the question whether there *is* a legal right of preemptive strike, but rather whether there *should* be such a right.

I. Preemptive action against terrorist and nuclear threats

It has been explained above that unlike the traditional concepts of self-defense under Art. 51 and customary law, the unilateral use of force according to the "*Bush Doctrine*" neither requires an actual armed attack nor an imminent armed attack, but regards as sufficient a potential threat to national security. This means, that terrorist bases or networks that are engaged in mere preparations for future attacks could be destroyed, or that WMD and their installations could be destroyed long before they can actually be employed. To put it in general terms, the "*Bush Doctrine*" allows (unilateral) action against emerging threats, *before* they are fully formed.[169]

In so doing, it addresses and attempts to correct specifically those two issues, which have been revealed above as the major stumbling blocks to the effective functioning of the system of collective security, that is, the risk of Security Council failure to take action and the restricted right to self-defense against (imminent) armed attacks only. In case the Security Council is unable to reach consensus on a certain matter, the U.S. would (re-) act unilaterally; since the right of self-defense under the U.N. Charter and the *Caroline* doctrine proves too narrow, the U.S. claims the right to act in preemption of potential future attacks.

Notwithstanding the fact that the legality of the "*Bush Doctrine*" has often been heavily criticized; the doctrine's extensive approach towards the unilateral use of force admittedly yields certain practical benefits, which - in the face of modern security challenges combined with the inadequacy of the traditional system to counter these

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Attacks of September 11, 2001, 26 Boston College International and Comparative Law Review 145 (2003).
[169] See the N.S.S., at 14.

challenges – are anything but insignificant. Besides, a solid, dogmatic argument in favor of the "*Bush Doctrine*" seems to be found in the very concept of "self-defense" itself.

Under Art. 51 and the *Caroline* doctrine, the exercise of self-defense is restricted as being permissible against "armed attacks" and "imminent armed attacks" only. But, as the Atomic Energy Commission (AEC) has aptly stated, an armed attack pursuant to Art. 51 "is now something entirely different from what it was prior to the discovery of atomic weapons".[170] The dropping of a single nuclear bomb could instantaneously destroy any capability for defense; preparations for counter-measures are either impossible or risk being useless, when the aggressor is to make the first strike. In this regard, Greenwood has suggested a more flexible approach towards nuclear threats. While a threat posed by WMD can under certain circumstances be regarded as imminent, this is not necessarily the case with a potential attack carried out by conventional means.[171] Furthermore, the Legal Adviser to the Department of State, William H Taft IV, has noted that "in order to prevent a catastrophe resulting from an attack by WMD", one must ensure that "the right of self-defense attaches early enough to be meaningful and effective".[172] This, however, might not be the case if a state is obliged to wait until it is actually being attacked or until an imminent attack is almost unavoidable. The concept of "self-defense" not only vests a state with the privilege to defend its territory, its independence, or other interests against harmful conduct by others, but also imposes a duty and responsibility on the government towards its citizens to do so.[173] Yet, if policies of containment or deterrence do not work against rogue states or terrorist organizations, should a state, or rather must a state not be allowed more freedom and more flexibility to take action?

The risk of inaction is particularly blatant regarding the harm and suffering that WMD can cause, which is far greater than harm caused by conventional attacks or warfare. Is it thus not better to adopt the approach taken in the "*Bush Doctrine*" and prevent this harm before it is too late to do so? Would disallowing a state the right to a preemptive

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[170] See *The First Report of the Atomic Energy Commission to the Security Council,* U.N. SCOR, 2nd Session, Special Supp., Annex 4, U.N. doc. 5/Supplements (1946).
[171] C Greenwood, *Essays on War in International Law* (2006), Chapter 21: *International Law and the Preemptive Use of Force: Afghanistan, Al Quaida and Iraq*, at 676.
[172] W H Taft IV, *Preemptive Action in Self-Defense*, 98 American Society of International Law Proceedings 331 (2004), at 332.
[173] State responsibility to protect its own citizens is to be inferred from the very concept of state sovereignty, see eg the Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), available at: http://www.iciss.ca/report2-en.asp#implications, at 1.35: "…dual responsibility […] internally, to respect the dignity and basic rights of all the people within the state." See also D W Potter, *State Responsibility, Sovereignty, and Failed States*, (2004), available at: http://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf. The responsibility to protect one's own nationals must be distinguished from the (disputed) responsibility to protect the citizens of a foreign state (based on the concept of humanitarian intervention).

strike not mean undermining and rendering irrelevant the very concept of self-defense? On the other hand, is the concept of preemptive action as promoted in the "*Bush Doctrine*" necessarily the golden road to global security?

This question will be answered by analyzing the implications of the doctrine, and in particular by thoroughly elaborating and weighing its dangers and disadvantages.

II. Implications of the "*Bush Doctrine*"

The implications of the "*Bush Doctrine*" are of a legal or political character (or both). They relate to international law (in particular under the U.N. Charter) as well as to international relations between states.

1. A dangerous precedent

The international legal order is based on the idea that each state is equal; there is no such thing as "U.S. exceptionalism"[174] or U.S. supremacy over other states, irrespective of the fact that the U.S. is the sole superpower remaining. This idea is confirmed by Art. 2 (1) of the Charter which states that "the Organisation is based on the principle of the sovereign equality of all its Members".

Thus, if the U.S. claims the right to act preemptively against mere "emerging threats" for itself, the same right must be conceded likewise to any other state which feels threatened in that or another way. This finding, however, involves two critical issues.

The first one has been addressed by former U.N. Secretary-General Kofi Annan in an address to the General Assembly. Assuming that preemptive, unilateral engagement is violating international law, but is nevertheless relied upon by the U.S., this risks, according to Annan, to "open the door to establishing a dangerous precedent that will result in a proliferation of the unilateral and lawless use of force, with or without justification".[175]

Within the international community of states, the U.S. has held and still holds *a* – if not *the* - leading position in the world. Through its great political influence as well as its economic and military dominance, the U.S. often serves as a model for other - often less powerful – states and their conduct and actions on the international stage. Thus, a state might find an easier and probably more acceptable justification for its unlawful conduct if

[174] See H H Koh, *Foreword: On American Exceptionalism*, 55 Stanford Law Review (2002-2003).

it can refer to identical U.S. conduct. Strictly speaking, this means that if the U.S. does not abide by the rules, it is more likely that other states would also refuse to do so.

The second and probably more alarming point relates to the question how the "*Bush Doctrine*" could work in the hands of other states, especially if they are in the possession of WMD. Russia e.g. could rely on the U.S. precedent in order to take (nuclear) action against Chechen rebels. Israel could use preemption against the threat posed by Palestinian militants. India could use the "*Bush Doctrine*" as a pretext to invade Pakistan, which is allegedly supporting terrorist networks.[176]

This result, however, is not only highly undesirable (even on part of the Bush Administration[177]), but is moreover very dangerous, especially with respect to the long-term consequences on other – non-U.S. - intra- or inter-state conflicts, in which an imminent threat is not (yet) existent, but a latent threat can easily be established.[178]

If one follows this reasoning down the line, the universal recognition of the "*Bush Doctrine*" might lead to an increase in international and internal conflicts, since the (temporal) threshold for the permissible use of force is set much lower than that under Art. 51 and the *Caroline* doctrine.[179] Furthermore, assuming that each state would be allowed to invoke the "*Bush Doctrine*", the U.S. possibly risks becoming a victim of its own defense strategy one day. Amongst other states, Iran, for example, would have good reason to feel threatened by the current Bush Administration, and if a perceived threat is sufficient, then would President Ahmadinedschad not be justified in preventing a possible future U.S. attack by striking first?

Admittedly, one cannot negate the moral characters behind the state acting in preemption. Thus, President Bush publicly declared that the U.S. would always act with the aim of promoting universally recognized and respected values like freedom and peace,[180] whereas other states, such as Iran or Israel, have manifested their hostile intent towards enemy states more openly.

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[175] Address to the U.N. General Assembly, (23 September 2003), *supra* at note 14.
[176] Ramírez, at 25 (and footnote 128); also Paulus, at 706.
[177] N.S.S., at 15: "The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression".
[178] M J Kelly, *Bush Foreign Policy 2001-2003: Unilateralist Theory in a Multilateral World, and the Opportunity for Change Offered by Iraq, The Policy Analysis*, 2 Washington University Global Studies Law Review 221 (2003), at 229.
[179] Kelly, at 229.
[180] See for example the Introduction of the N.S.S.

Be that as it may, the principle is - as the High-level Panel has put it - "to allow one to act is to allow all to act".[181] U.S.' reliance on preemption would therefore set a dangerous precedent with hitherto unpredictable consequences for the *jus ad bellum* and international peace and stability in general.

2. Danger of error and abuse

Another problem inherent in the "*Bush Doctrine*" relates to the notion of a "sufficient" or "potential" threat as a requirement for preemptive engagement.

In contrast to the latter "right", the traditional right of self-defense has been shaped strongly by legal doctrine as well as by relevant I.C.J. jurisprudence. Especially the *Nicaragua* judgment has helped clarify the notion of "armed attack" and the unwritten requirements of necessity and proportionality. The same can be said about the right of anticipatory self-defense, in particular about the precondition of an "imminent armed attack", which was initially elaborated in connection with the *Caroline* incident and subsequently refined by legal scholars. In spite of some remaining uncertainties, the large majority nowadays seems to agree both on the definitions of "armed attack" and "imminent armed attack" and on their respective requirements.

This clarity, however, does not yet exist with regard to the notion of a "sufficient" or "potential" threat. So far, not even the U.S. has been able to provide precise and unambiguous criteria for the determination of such a threat.[182]

While the existence of an actual or imminent armed attack is rather easy to establish and can normally be ascertained on the basis of objective facts (e.g. the visible mobilization of armies or preparations to attack), the identification of a mere threat is much more difficult. Due to a (usual) lack of unequivocal evidence, such determination would generally be very vague if not entirely speculative. Too often, it is not backed up or proved by clear facts and information but based on the - potentially inaccurate or biased –

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[181] Report of the High-level Panel on Threats, Challenges and Change, *A more Secure World: Our Shared Responsibility*, U.N. doc. 59/565, at 191.

[182] Gazzini, at 200; see also P von Walsum, Chapter 4: *The Security Council and the Use of Force: the Cases of Kosovo, East Timor and Iraq* 65, in: Blokker/Schrijver, *The Security Council and the Use of Force*, at 71: "…a threat cannot easily be defined."

subjective perception of a state's government.[183] This reality, however, raises several - still unanswered - questions.

Is the threatened state itself to determine what kind of evidence is required and when there is enough evidence to find a sufficient threat? Who is to ascertain the facts?[184] Who is to say whether the mere possession of WMD is sufficient or whether it must be accompanied by a hostile intent?

Especially the fact that the assessment of a given factual situation lies exclusively in the hands of the state claiming self-defense renders the "*Bush Doctrine*" extremely prone to miscalculation and error.[185] Indeed, it is recognized that the onus would lie with the U.S. as the state invoking self-defense;[186] yet, the doctrine provides for unilateral action "even if uncertainty remains as to the time and place of the enemy's attack".[187] However, a state's intelligence might be incorrect or misleading; statements and actions of a state with which relations have been tense before might be misinterpreted or misperceived by the government. And what happens if the attacking state – even if it is acting *bona fide* – is wrong?

Certainly, failure or inability to establish the existence of a sufficient threat would entail state responsibility as well as payment of reparations.[188] But if an attack has already been launched, the harm caused to the victim state and its citizens cannot always be repaired by financial means only, in particular if lives have been lost. And even if reparations are in principle admissible; a state that has acted in putative self-defense might be unwilling or unable to pay and lengthy litigation or conflicts would be the result. Besides financial compensation, the attacked state could attempt to seek help from the Security Council against the attacking state which is falsely relying on self-defense. However, it is neither assured that the Council in fact intervenes and that its action would come in due time.

Due to its vagueness, the notion of "sufficient threat" furthermore opens the door to any sort of abuse.[189] The "war against terrorism" or any other unilateral use of force could

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[183] It is interesting to note that with regard to the "necessity"-requirement, the I.C.J. in the *Oil Platforms* case held that "the requirement […] that measures taken avowedly in self-defense must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion", see Iran v United States, I.C.J. Reports 2003, at 73. On the other hand, the earlier *Naulilaa* case regarded as sufficient the "reasonable belief" that one is being attacked, see the *Naulilaa Arbitration* (Portugal v Germany), 2 R.I.A.A. 1011 (1928).
[184] Paulus, at 722.
[185] Ramírez, at 24., van den Hole, at 86.
[186] See the *Oil Platforms* case, at 57, 61; also Paulus, at 705.
[187] N.S.S., at 15.
[188] Rothwell, at 353.
[189] Ramírez, at 24; Gazzini, at 200.

be misused as a mere pretext to cover different – unlawful – political or strategic goals, such as to secure access to oil. Admittedly, the danger of abuse is inherent in any decision which is made by the self-interested actor himself without *ex ante* control by a superior organ. One could thus argue that the right to preemptive strike is no more susceptible to abuse than the traditional right of self-defense under Art. 51, the exercise of which is also independent of prior Security Council approval. But, as stated above, unlike the action taken in self-defense against an armed attack, the legitimacy for preemptive engagement is generally more difficult, if not impossible, to verify, whether *ex ante* or *ex post*.

Hence, the concept of the "*Bush Doctrine*" is - at its present stage - still far too indeterminate; its recognition would risk generating erroneous or even abusive decisions, and therewith pave the way for the lawless use of force.

3. Adverse effect on international relations

Albeit a purely political repercussion, the "*Bush Doctrine*" strongly risks having an adverse effect on international relations as well as on international peace and stability in general.

Unlike the invasion of Afghanistan, the U.S. invasion of Iraq in 2003 – with the assistance of the U.K. and Australia only - was almost completely lacking support or sympathy from the international community. Former U.S. allies, as well as close friends, such as Germany, opposed U.S. conduct and openly rebuked the Bush Administration for acting contrary to the law.[190] Often, their criticism related not only to the doubtful invocation of Security Council Resolutions 678, 687 and 1441, but also to the possible justification under the doctrine of preemptive strike.

Whether or not the U.S. will ultimately succeed in fighting terror and bringing peace to the Middle East and other regions, the unilateral approach taken with regard to Iraq and promoted in the "*Bush Doctrine*" definitely risks the disruption of close alliances and strategic partnerships. In Chapter III of the N.S.S., President Bush has made it clear that the U.S. would act alone if deemed necessary to defend its security interests, regardless of whether the entire world objects. This, however, signals to (former) friends

[190] Former German Chancellor Gerhard Schröder found that the U.S. attacks were "a bad decision". For further examples of critiques on U.S. politics, see Ramírez, footnotes 11-13.

and allies that their approval or support is indeed desirable, but in the end insignificant if their position is not in line with the U.S. position.[191]

Due to this almost imperialist approach in the case of Iraq, the U.S. has had a rather lonely stance on the international stage during the last 3 or 4 years; in continuing its "war against terrorism", it risks alienation and ultimately isolation from the rest of the world.

Besides, the "*Bush Doctrine*" could provoke turning mere "rival states into potential threats to each other by permitting preventive invasion of potential adversaries based on risk calculations whose indeterminacy makes them inherently unpredictable by the adversary".[192] This effect, however, is not only undesirable but even highly counter-productive to the aims of the doctrine.

Last but not least, U.S. conduct not only risks inciting conflicts with long-standing alliances, but in the long term even enforcing the international support - moral, financial or military - for Iraq and other potential U.S. targets. The concept of preventive strike was certainly intended to deter potential terrorists and thus to lead to a decrease in the number of (attempted) terrorist acts. Through the constant threat of U.S. invasion, however, other states in the Middle East region could feel an even stronger need to show their solidarity with Iraq, Iran, etc. and form close and powerful alliances against the common enemy, the U.S. and the Western world in general.

After all, the last months have shown that the number of attempted or successful terrorist acts still increases and that the U.S.' fight against terrorism is about to assume unmanageable, uncontrollable dimensions; eventually the Middle East might not become a safer, but a more dangerous place in the world.[193]

4. "U.S. unilateralism"

Another adverse effect of the "*Bush Doctrine*" is that it promotes what can aptly be described as "U.S. unilateralism". In Chapter III of the N.S.S., it is proclaimed that the U.S. would "not hesitate to act alone" if support of the international community could not be gained.[194] This provoking announcement was amplified by President Bush in his State

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[191] See Paulus, at 707: „Either follow U.S. lead in the aggressive pursuit of "self-defense" against terrorists and rogue regimes, or become irrelevant and unable to influence U.S. policies any further."
[192] See D Luban, *Preventive War*, 32 Philosophy and Public Affairs 207 (2004), at 227.
[193] See B Herbert, *Hard Sell on Iraq*, The New York Times (10 October 2003), at A 31: "There is a widespread feeling at the U.N. that the policies of the United States [including its preemptive invasion of Iraq] have made the Middle East and parts of the rest of the world substantially more dangerous, rather than less."
[194] N.S.S., at 6.

of the Union Address of 2003 where he declared that the U.S. has the "unique ability to make and enforce decisions, a power that is unavailable to other states".[195] Assuming that under the "*Bush Doctrine*", a state's *unilateral* decision to use force would be permissible (provided all other preconditions are met), in practice this would mean that international law becomes the "law of the strongest"[196] and that the international legal order would in fact allow more freedom and flexibility to powerful states than to smaller and "weaker" states. In reality, there would only be a handful of states (including the U.S.) which would have the military and financial means to make use of the "*Bush Doctrine*" without however relying on the support or approval of other states or regional or international organizations, in particular the U.N. and the Security Council.

5. Principle of proportionality

Like the right of (anticipatory) self-defense under the U.N. Charter and customary law, the right of preemptive strike should be limited by the customary principles of proportionality and necessity. The latter principle requires that action taken in self-defense must be necessary to prevent an imminent armed attack, to remove an ongoing armed attack or to restore the *status quo* before the armed attack took place. Any use of force which does not serve this purpose is not necessary and thus unlawful.[197]

Assuming that in the case of terrorist and nuclear threats, negotiations and diplomatic or other peaceful means have not proved successful, military action taken in preemption would additionally have to meet the principle of proportionality. This means that the means that are applied as well as the damage caused must be proportionate with respect to the threat or the attack suffered. The more severe the attack or threat thereof, the greater is the attacked or threatened state's leeway in choosing the appropriate means and tactics for a counter-attack. Hence, a state acting in self-defense against an actual armed attack would enjoy more flexibility in its counter-actions than a state acting in preemption against a mere threat.

Although the proportionality requirement has in principle been recognized in the "*Bush Doctrine*", saying that the U.S. "will always proceed deliberately, weighing the consequences of our actions", and that "the reasons for our actions will be clear, the force

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[195] President Bush in his commencement speech in West Point 2002, found in Nagan/Hammer, at footnote 205.
[196] This term has been used by former French President Jacques Chirac.
[197] Amongst others, see in particular the *Caroline* case, the *Nicaragua* case (at 103) and the *Oil Platforms* case (at 74).

measured, and the cause just",[198] one could nevertheless ask whether the use of force in preemption against a mere "sufficient threat" would - in theory as well as in practice – in fact ever be able to satisfy the proportionality requirement. Would the disadvantages resulting from military (re-) action not always outweigh the benefits, that is, the removal or diminution of a mere threat to security interests?

In the context of anticipatory self-defense, Brownlie has stated that: "It is possible that in a very limited number of situations force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately. However, in the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality."[199]

The conclusion one could draw from this is that the use of military force against a threat that is not yet imminent but merely potential is *per se* (*ipso facto*) disproportionate and thus unlawful; or, to put it in other words, if a threat has not yet materialized into an imminent attack, the use of force could never be a proportionate means to counter this threat. Arguably, one could think of a fictional situation in which the threat is of such extraordinary magnitude and gravity that the use of force is the last resort and – through modern war technology and very precise destruction of military targets, etc. – could be used proportionally. Situations like these, however, will be the exception.

Hence, in my view, it seems appropriate to state that even if one recognizes the concept promoted in the "*Bush Doctrine*", preemptive action would almost always violate the universal principle of proportionality and for this reason be unlawful.

6. Undermining the collective security system

The collective security system of the U.N. Charter is basically founded on two tenets: the prohibition of the use of force by states and the primacy of the Security Council in all matters of international peace and security. The "*Bush Doctrine*" risks putting both these principles at stake.

According to the provisions in Chapter VII of the Charter, the Security Council is vested with the power not only to determine whether a particular situation constitutes a threat to or breach of the peace, but also what measures are to be taken in order to counter this threat or breach. Thus, proponents of the "*Bush Doctrine*" could bring forward the

[198] N.S.S., at 16.

argument that if the Council can act in response to mere threats, a state should be allowed to do the same. Since it is the Charter's stated purpose to prevent and remove threats to the peace, the U.S. acting preemptively against terrorist or nuclear threats would even promote this purpose, and thus entirely act in accordance with the Charter.[200]

This perspective, however, runs counter to the institutional competence of the Security Council.[201] Pursuant to Art. 24 (1), the U.N. member states have conferred on the Council primary – and exclusive - responsibility to maintain international peace and security. The powers enshrined in Chapter VII have been specifically created to allow the Council to exercise its duties forcefully and effectively. Individual states cannot rely on these provisions, even if a situation could theoretically be qualified as being envisaged by Art. 39 *et seq*. On the contrary, the rights of states have been clearly and – with the exception of anticipatory self-defense - exhaustively defined in Art. 51; their (unilateral or joint) use of force (without Security Council authorization) is restricted to situations of (imminent) armed attacks.[202] In all other cases, the use of force is prohibited by Art. 2 (4).

The substantive difference between Chapter VII, in particular Art. 39, 41 and 42, and Art. 51 would be blurred, if not completely abolished, by the "*Bush Doctrine*". In principle, the idea underlying Chapter VII is that any decision regarding the use of force is to be made multilaterally, that is, by the Council as a collective organ, influenced by a certain number of states with different political, social and cultural backgrounds. The Council provides a forum for discussion and deliberation, and thus guarantees that decisions are made in broad consensus.[203] The whole process of Security Council decision-making eventually imposes "multi-lateral checks on purely self-serving arguments".[204] Unilateralist decisions, on the other hand, are only exceptionally permissible, that is, under Art. 51 regarding the determination of a situation as constituting an "armed attack". Indeed, this concept has been extended to the determination of an "imminent armed attack". According to the "*Bush Doctrine*", however, the hitherto multilateral

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[199] Brownlie, at 259.
[200] See W H Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 Yale Journal of International Law 295 (2004); also D S Mathias, Chapter 9: *The United States and the Security Council* 173, in: Blokker/Schrijver, *The Security Council and the Use of Force*, at 178.
[201] See for example Nagan/Hammer: "… U.S. perspective overrides the principle that the Security Council has primary jurisdiction over matters of collective security.", at 417.
[202] Paulus, at 719-720.
[203] J Brunnée, Chapter 7: *The Security Council and Self-Defense – which Way to Global Security*? 107, in: Blokker/Schrijver, *The Security Council and the Use of Force*, at 112; Paulus, at 709: collective determination is "more reliable and therefore more legitimate than a unilateral assessment not subject to the same international scrutiny."
[204] See Brunnée, at 112; also I Johnstone, *Security Council Deliberations: the Power of the Better Argument*, 12 European Journal of International Law 437 (2003), at 454.

determination of a mere threat to peace and security could also be made unilaterally by the U.S.

This approach appears particularly doubtful with regard to the teleology of the U.N. Charter.[205] The whole security system is based on the concept of "multilateralism", an idea which is also expressed in the Preamble and the core Art. 1 (1).[206] With its unilateralist approach, the "*Bush Doctrine*" not only risks usurping genuine powers of the Security Council, but also throws into profound disorder the clear distinction between collective security and the more limited right of individual self-defense as well as the whole thoroughly developed and intertwined legal regulation of the use of force.[207]

In stretching the limits of the exceptional unilateral use of force so as to include a right to preemptive engagement, the doctrine not only risks threatening Art. 51 to complete irrelevance,[208] but also questions the very existence of Art. 2 (4), the second cornerstone of the Charter. According to this provision, states must "refrain in their international relations from the threat or use of force" against other states. The corollary of this prohibition is the mandatory provision in Art. 2 (3) for members to settle their disputes peacefully.[209]

As a matter of fact, neither Art. 2 (4), nor Art. 2 (3) is absolute. A systematic interpretation of the Charter illustrates that Art. 2 (4) can be superseded by Art. 51. In addition, there is a close interrelation between Art. 2 (4) and Chapter VII; maintaining the ban on the use of force strongly depends on the effective functioning of the collective security system.

Admittedly, the "*Bush Doctrine*" does not negate the ban on the use of force, nor does it intend to abolish it. Nevertheless, preemptive engagement involves the use of armed force prohibited under Art. 2 (4) without it being a clear case of traditional self-defense. This, of course, is first and foremost doubtful for purely legal reasons. But besides questions of legality or illegality, another practical – and more severe – implication of the doctrine is that it jeopardizes the *jus cogens* status of the prohibition on the use of force which so far has been "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".[210] The large majority of states still regard the unilateral use of force under Art. 51 as an exception to this principle.

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[205] T M Franck, *Recourse to Force: State Action Against Threats and Armed Attack* (2002), at 50.
[206] See the Preamble: "…to ensure […] that armed force shall not be used, save in the common interest.…"; Article 1 (1): "… to take effective collective measures for the prevention and removal of threats to the peace…." See also Brunnée, at 108: "… very aim of the U.N. Charter to severely limit unilateral military action, and to place decisions on the use of force primarily in the collective hands of the Security Council."
[207] Gazzini, at 201; in the same sense: O Schachter, *International Law in Theory and Practice* (1991), at 145.
[208] For example: What happens to the reporting requirement in Art. 51?
[209] Rothwell, at 352.

By replacing multilateralism with unilateralism, and defensive with preemptive action, the "*Bush Doctrine"* strongly risks that the exception might suddenly swallow the general rule.[211] As a consequence, Art. 2 (4) would loose its practical relevance and retain a mere descriptive but empty formula.

Moreover, the U.S. should not be allowed to rely on the argument that Art. 2 (4) is too rigid and could only be upheld if the Security Council adequately addresses all its security concerns. Of course, the prohibition on the use of unilateral force requires as a corollary a functioning system of collective security. Yet, with their membership of the U.N., states have surrendered part of their sovereignty, that is, the unrestricted right to wage war and to use military force against other states. This voluntary "loss of power" has been accepted by states as an indispensable precondition for making the U.N. and the collective security system work. Hence, even if the Security Council does not (yet) fulfil its expectations and the collective security system still suffers from severe shortcomings, the principle of *pacta sunt servanda* requires the U.S. and any other member state to abide by the Charter and in particular by Art. 2 (4).

After all, to challenge the Security Council's authority and the core provisions in the Charter, Art. 39 *et seq*. and Art. 51, would mean severely threatening the very *raison d'être* of the U.N., its organs and its instruments in limiting the use of force.[212] Eventually, the U.N. would risk failing for the same reasons as the League of Nations.[213]

III. Preliminary Conclusion

In the face of modern threats posed by WMD and terrorism, the U.S.' claim to counter these threats before they materialize is both understandable and desirable. Too often, the system of collective security has proved unsuccessful or insufficient, and many states felt their vital security interests severely threatened. For these reasons, I agree with President Bush that the international community must become more proactive, and that the collective security system under the U.N. Charter needs to be adapted to better protect international peace and security. But nevertheless, the specific way with which the "*Bush*

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[210] See Article 53 of the Vienna Convention on the Law of Treaties (1969).
[211] Gazzini, at 201: "… there is a point where self-defense ceases to represent the exception to the general ban on the use of force and becomes the negation of the ban itself."
[212] Ramírez, at footnote 16.
[213] The League of Nations failed for several reasons, but in particular due to the institutional weakness of the League's Council; see Nagan/Hammer, at 417. As regards the League's failure see also D W Bowett, *The Law of International Institutions*, 4th edition (1982), at 18.

Doctrine" intends to deal with matters of domestic as well as international security is in my view extremely dangerous.

The fact that the current security system is inadequate in many aspects does not necessarily mean that the "*Bush Doctrine*" is the only – and best – way to global security. Moreover, the success of the doctrine is highly uncertain and has been doubted by a large majority of states and scholars.

Its negative implications, on the other hand, the most important of which have been elaborated above, clearly appear to outweigh its possible benefits. Arguably, its disadvantages and potential dangers are no less of a speculative character than its benefits. Nevertheless, the fierce reactions that the doctrine aroused right after its publication and up to the present day as well as its almost universal rejection imply that it will hardly ever be accepted as a new rule of law. Besides, the fragility of international peace and stability and the already tense relations between the Middle East and Western countries do not seem to allow risky experiments whose long-term consequences and final outcome are uncertain and almost unpredictable.

In this regard, Gazzini aptly observes that the "*Bush Doctrine*" is "far from being an evolution or adaptation of existing legal categories, rendered impellent by the emergence of new forms of terrorism", but rather represents "a huge step backwards to the "*just war*" doctrine and ultimately to unilateral and uncontrolled self-help".[214]

To conclude, I do not think that the U.S. or other states should have a right to act unilaterally other than in cases of (anticipatory) self-defense, nor should there be a general right to preemptive strike.

Chapter V: Reinforcing collective security – an alternative approach towards global security

The foregoing analysis has revealed both the inadequacy of the present system of collective security as well as the inherent ineptitude of the "*Bush Doctrine*" in effectively addressing major 21st century security concerns. What has become clear is that a profound change or adaptation of the current system is urgently needed but that the "*Bush Doctrine*" is by no means the best or "right" alternative. Hence, this Chapter will examine mainly three different ways other than preemptive action to achieve or improve global security. While the first two alternatives mainly turn around the wording and the interpretation of

[214] Gazzini, at 201.

Art. 51 and 2 (4), the suggestions in the third alternative involve changes of a more substantive as well as of an institutional character.

I. Reinterpreting Article 51

Despite its unambiguous wording, Art. 51 has often been interpreted to allow self-defense not only in case of an armed attack but also against an imminent armed attack. This broad reading has recently been confirmed even in the U.N., namely by the Secretary-General in his "In Larger Freedom"-speech.[215] Put in general terms, this reflects the view that the U.N. Charter is not a static, unchangeable body of rules, but open to (re-) interpretation and development. In the face of notable changes of our security situation, it has therefore been asserted that Art. 51 could – or even must – be reinterpreted so as to include a right to preemptive strike against non-imminent threats. In that regard, the "*Bush Doctrine*" itself required an adaptation of the concept of "imminent threat to the capabilities and objectives of today's adversaries".[216] Such a broad conception of self-defense would definitely provide states with more flexibility regarding their defensive actions. Moreover, the complicated evaluation of facts regarding the question whether a state is acting against an imminent or a latent threat and thus legal or illegal would become obsolete, if both cases were to be recognized under the Charter. One can only gather that a reinterpretation of the Charter would in particular accord with the U.S. position.

Admittedly, it would be desirable to reach uniformity and clarity on questions of legality, not only in the interest of the state (allegedly) acting in self-defense and the attacked state, but also in the interest of the international community which must be able to determine without doubt if a state is violating international law.[217] Nevertheless, a reinterpretation of Art. 51 involves two major problems.

First of all, without an amendment of the Charter, the right of preemption would only become part of the traditional security system if there is sufficient relevant state practice and *opinio juris*, a circumstance that appears very unlikely at present stage. Past incidents in the context of which the right of preventive strike has been discussed, e.g. the Cuban missile crisis (or *Cuban Quarantine*) of 1961, or the 1981 Israeli attack on an Iraqi nuclear reactor (Osiraq), have proved to be far from establishing uniform state practice and

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[215] *See supra* at note 155, at 124.
[216] N.S.S., at 15.
[217] Such determination is particularly important with respect to the consequences of the illegal exercise of self-defense, namely state responsibility and reparations.

public opinion; indeed, these incidents have been condemned by the large majority of states.[218] Besides, the fact that the right is not laid down in the Charter explicitly would almost inevitably lead to new disagreement or dispute between states. Even with respect to anticipatory self-defense, there is still no universal agreement, either on its existence or on the detailed conditions under which it operates. Up to the present, the concept of preemptive self-defense is even more contested. As a consequence, the issue of the legality of preemptive action might be solved in theory; in practice, however, many of the existing difficulties and open questions would remain.

Secondly, and more importantly, a reinterpretation of Art. 51 seems to me merely to provide a solution in form, not in substance. Strictly speaking, it is not a new or an improved way towards global security but rather approves the concept of preemption as one finds it in the "*Bush Doctrine*", with the only difference of selling it as legal. This, however, not only negates the inherent dangers and disadvantages of the doctrine, but moreover lacks any constructive idea of how to revitalize the current collective security system. On the contrary, the unilateralist use of force would be reinforced, whereas multilateralism would be weakened. The consequences would thus be the same as those displayed in Chapter IV.

Furthermore, if one considers the declared objectives of the "*Bush Doctrine*" (which by and large correspond with those pursued by the U.N. and the international community), that is, to counter terrorism and the proliferation of WMD, one has to ask what a reinterpretation would contribute to achieving these goals. The answer is: not much. Indeed, with the recognition of preemptive measures states would have more freedom in their choice of action, but the expansion is not a comprehensive strategy in itself to help fight great threats posed by WMD and terrorists.

To conclude, I do not think that a reinterpretation of Art. 51 poses a real alternative to the "*Bush Doctrine*". Rather than proposing new ways towards global security, it merely provides a means of legitimizing preemption and the unilateralist approach launched by the Bush Administration. Hence, in fact, this (supposed) alternative eventually turns out to support the "*Bush Doctrine*" entirely, the only difference being the attempt to found it on unequivocal legal grounds. In my view, this is definitely not the right way to global security.

II. Amending the Charter

[218] Concerning the *Cuban Quarantine*, see Harris, at 929 *et seq*., concerning the attack on Osiraq: Rothwell,

In order to clarify the legal status of preemption, one could also consider not only reinterpreting Art. 51, but officially amending it, so as to ultimately remove any doubts remaining regarding its legitimacy. Admittedly, an express provision in the U.N. Charter would help settle most disagreements as to the legitimacy of actions, such as "Operation Iraqi Freedom" and others, and would at the same time guarantee more wide-spread acceptance within the international community, not least since the majority of states must first of all approve the amendment in the General Assembly (see Art. 108).

Nevertheless, like a reinterpretation of Art. 51, an amendment of the Charter is no true alternative to the "*Bush Doctrine*", either, mainly for the same reasons that have been mentioned above. In particular, due to the many uncertainties related to preemption, it is unlikely that the Charter would conclusively define its preconditions and limits, and rather confine itself to a general recognition of the right as such (as in the case of self-defense). In addition, a Charter amendment would entail severe consequences for the coherence of the entire U.N. security system; in particular, the thoroughly developed rule-exception relation between Art. 51 and Art. 2 (4) would risk great imbalance. Since these are the core provisions of the collective security system, their respective amendment would inevitably have an impact on the rationale of collective security as envisaged under the Charter.

Despite the fact that the relevance of the latter provisions has recently been put into question, loosening the restraints on the right of self-defense (beyond the limits posed by the *Caroline* doctrine) and on the ban on the use of force would neither support the "war against terrorism" by itself nor automatically create worldwide security. It would rather create problems than resolve modern challenges (see Chapter IV). For these reasons, an amendment of the provisions regulating and restricting the individual use of force should not be considered as a means of creating global security.[219]

III. Reinforcing the U.N. and the Security Council

The third and last alternative differs from the two foregoing in that it combines both substantive as well as formal elements both within and outside the U.N. system. Yet, the starting point is an entirely different one: while both other concepts in principle uphold the idea of preemption and merely create a legal ground for it (either factually or *expressis verbis*), the last option decisively rejects the idea of preemption and instead strongly argues

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at 343 *et seq.*

in favor of collective security, thus in favor of the U.N. and the Security Council as its principal organ.[220] According to this (majority) view, unilateralism might only be "a quick-fix solution that earns immediate popular approval but it is no substitute for sustained collaborative action in making lasting peace";[221] or, as Paulus has aptly resumed, "international cooperation is the key".[222]

Indeed, military actions carried out by international (or at least regional) organizations are normally more acceptable and regarded as more legitimate than unilateral actions carried out by individual – self-interested - states.[223] But besides this psychological, or "moral" aspect, this high level of credibility and acceptance involves a very practical benefit: other states will generally be more willing to provide assistance and support for a mission, whether by sending troops or providing financial or other necessary means. This, of course, affects the outcome of a mission positively and often determines success or failure. Strictly speaking, one could say that multilateral actions are in principle more effective than unilateral actions.[224]

Even recent U.S. practice seems to support this finding. The initial invasion of Iraq in 2003 had been carried out without support of the Security Council and most U.N. member states. While overthrowing the Saddam regime seemed to have been a rather easy task for the U.S. military, the post-war situation with its ongoing conflicts and recurring hostile outbreaks has proved unmanageable for the U.S. alone, whether in terms of financial, military or logistical means. In fact, in order to bring peace and stability to Iraq and its people, President Bush eventually had to ask the international community for help.[225] Thus, as the case of Iraq has illustrated, the success of unilateral engagement is usually limited; especially long-term national interests and objectives (such as peacebuilding and peacekeeping) are better pursued through multilateralism.[226]

Be that as it may, the Iraq war and in particular the profound clash between states supporting or opposing the war has led the international community and the U.N. as its institutional embodiment to come to a "fork in the road".[227] While one path - as suggested in the "*Bush Doctrine*" - bypasses the U.N. and would lead to an increase in the unilateral

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[219] See also the identical conclusion of the High-level Panel, *supra* at note 181, at 192.
[220] See for example P Kooijmans, *Foreword*, in: Blokker/Schrijver, *The Security Council and the Use of Force*.
[221] Nagan/Hammer, at 417.
[222] Paulus, at 724.
[223] Brunnée, at 113.
[224] Affirming Paulus, at 721 and 732; Nagan/Hammer, at footnote 210.
[225] Nagan/Hammer, at 437.
[226] Kelly, at 229.

use of force, the other path would lead "to and through a remodelled and restructured U.N. which is able to serve the security interests of its member states in an effective and satisfactory way."[228] What is common to these two paths is that both regard the traditional security system under the U.N. Charter as insufficient to counter modern security challenges.

Without doubt, amongst most members of the international community, the latter - multilateralist - approach is regarded the preferable one.[229] Yet, Kofi Annan has also made clear that "it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can and will be addressed effectively through collective action."[230]

In the months and years following 9/11 and the Iraqi war, the former Secretary-General dedicated a great part of his work to U.N. and Security Council reform. In 2004, the 16 member High-level-Panel on Threats, Challenges and Change, acting upon Annan's mandate, provided him with a blueprint for reconstructing the U.N. security system. In his "In Larger Freedom"-speech, Annan drew inspiration mainly from this report and adopted many of the Panel's proposals.[231] In 2006, he published a second guiding report, entitled "Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy".[232] This report ultimately served as the foundation for the General Assembly Global Counter-Terrorism Strategy, adopted on 8 September 2006.[233]

Despite the fact that both instruments are different regarding their respective addressees (Security Council and General Assembly) as well as their content, they are both based on the concept of *collective* security and attempt to revitalize and strengthen the U.N. and the Council to make the entire organization work more effectively in the fight against terrorism and WMD. Amongst other reform proposals relating to development and human rights, the most important and pioneering ideas in the documents are Security Council reform and a concrete (counter-terrorism) "Plan of action" by the General Assembly.

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[227] The expression has been used by Kofi Annan in his Address to the U.N. General Assembly, *supra* at note 13.
[228] Kooijmans, *Foreword.*
[229] *Idem.*
[230] Address to the U.N. General Assembly.
[231] Available at: www.un.org/largerfreedom/contents.htm.
[232] U.N. doc. A/60/825 (27 April 2006).
[233] Available at: www.un.org/terrorism/strategy-counter-terrorism.html.

1. Security Council reform

The end of the Cold War marked the beginning of increased Security Council activism and effectiveness. In the context of the Iraq war, however, its newly-regained authority suffered an important setback. Proponents as well as opponents of the invasion criticized the Council, either for failing to enforce its own resolutions or for failing to prevent a widely unwanted war.[234] The structural deficiencies underlying this "failure" have been explained above.[235] Nevertheless, in the fight against terrorist and nuclear threats, the Council is indispensable, not least because the U.N. Charter has assigned to it the exclusive role as the "guardian" of international peace and security.[236]

Hence, in order to stop unilateralism and achieve global security, it is unavoidable to reform the Security Council, namely its present composition, its voting requirements and its working method under Chapter VII.

a) Enlargement of the Security Council

In its present composition (15 members including five permanent members[237]), the Security Council strikes a balance of power that can no longer be said to reflect today's realities. Developing countries, for instance, are extremely underrepresented. Amongst the P-5, it is in particular the permanent seat of France which appears to be criticized the most.[238] As Annan has found, "a change in the Council's composition is needed to make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today, and thereby more legitimate in the eyes of the world."[239]

In practice, Security Council reform must be twofold: the numbers of seats must be raised and the internal composition must be changed dramatically. In the future, states like China, India or African states which hold a great percentage of the overall world population should be part of the Council, whereas the overwhelming say of the present P-5 should - at least partially - be restrained.[240] In this regard, the High-level Panel explained that "those who contribute most to the Organization financially, militarily and

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[234] See Secretary-General Kofi Annan, *In Larger Freedom*, at 10.
[235] See Chapter III, at III.
[236] See for example the High-level Panel which has described the Security Council as "the body in the United Nations most capable of organizing action and responding rapidly to new threats", at 247.
[237] Article 23.
[238] Ramírez, at footnote 16.
[239] *In Larger Freedom*, at 168.

diplomatically should participate more in Council decision-making, and those who participate in Council decision-making should contribute more to the Organization."[241]

Arguably, enlarging the Security Council at the expense of the present P-5 will meet great resistance, and it will be difficult to complete this long overdue reform. Yet, this institutional change is absolutely necessary to revitalize the Council's credibility and representative authority, and thus to ensure that it is capable of effectively carrying out its responsibilities under the Charter and that its decisions are universally respected.

b) Change of voting requirements

Besides a change of composition, a comprehensive Security Council reform must also address the organ's anachronistic voting requirements. As elaborated above, any decision on non-procedural matters (i.e. in particular Chapter VII action) can be blocked by the single "no" of a permanent member. Irrespective of the relevance of the "veto" as a safeguard of the interests of the P-5, the High-level Panel has regarded it as "unsuitable for the institution in an increasingly democratic age".[242] Since there seems to be no practical way of completely abolishing the "veto", the Panel suggested that "its use be limited to matters where vital interests are genuinely at stake".[243] Moreover, the P-5 are asked to "pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses".[244]

Even though the Panel's proposal does not contain a substantive change of the Council's voting requirements under Art. 27, it seems to be the only compromise that actually promises practicable realization. In future, one can only hope that the P-5 will use their "veto" with prudence and good sense and with a view to international peace and security.

c) Determining the Council's working methods

As outlined in Chapter III, the Security Council enjoys wide discretionary powers under Chapter VII, both regarding the "when" and the "how" of action. Although this wide

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[240] See also Model A and B suggested by the Panel, at 251 *et seq*. and upheld by the Secretary-General, *In Larger Freedom*, at 170.
[241] *Synopsis,* page 64.
[242] At 256.
[243] *Ibid.*
[244] *Ibid.*

margin of appreciation is necessary in order to respond adequately to threats to or breaches of the peace, it has also been argued that this freedom bears the inherent danger of Security Council failure.

In order to minimize this risk, the High-level Panel has suggested that the Council "adopt and systematically address a set of agreed guidelines, going directly not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be".[245] In considering whether or not the use of military force should be used or authorized, it should always address the following five criteria: (a) Seriousness of the threat, (b) Proper purpose, (c) Last resort, (d) Proportional means and (e) Balance of consequences.[246] In view of the Panel, these guidelines would not only help the Council in finding consensus in disputed matters relating to the use of force but in addition, they would maximize international support for Council decisions and reduce the risk of individual states bypassing the Council.[247]

Admittedly, the Council cannot be obliged to make use of these rules in every relevant case, neither by the Panel nor by the Secretary-General. However, these recommended guidelines – which altogether reflect customary principles on the use of force – provide a useful framework for (and if necessary, limitation of) the otherwise far-reaching and unfettered powers of the Council. In spite of their non-binding character, submitting decisions to the scrutiny of these five criteria will not only make Security Council action more efficient but also more transparent. Within the Council, decisions could less easily be blocked by a permanent member for improper or shady purposes. Within the international community, member states would understand decisions and their underlying reasons more easily; this, of course, would make them more acceptable. And since the Security Council is in need of state support to carry out its resolutions, acceptance is vital for subsequent enforcement.

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[245] At 205.

[246] At 207. In detail, these principles say:

(a) *Seriousness of threat*. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) *Last resort*. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) *Proportional means*. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) *Balance of consequences*. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

Besides, the guidelines accurately reflect the fact that the Council – when using or authorizing military force – is bound by law, in particular by the principles of proportionality and necessity.

Last but not least, a strong and effective Council will hardly be bypassed by individual states; if it lives up to its expectations and fully discharges its responsibilities under Art. 24, states would no longer feel the need to resort to (preemptive) unilateral force. Eventually, the concepts of unilateralism and preemption would probably become obsolete.

2. Global Counter-Terrorism Strategy

The Global Counter-Terrorism Strategy, recently adopted by all 192 members of the General Assembly, is based on the idea that global security cannot be achieved without the support of the international community of states. In contrast to former resolutions, the Strategy (with an annexed Plan of Action) is a unique global instrument that promotes "comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism".[248] In so doing, it links together the indispensable efforts of all principal U.N. organs, that is, the General Assembly, the Security Council and the Secretary-General, as well as those undertaken by individual states and civil society. It recognizes that terrorism cannot be fought on the international level alone but that governments are required to increase efforts at the national level, e.g. by ratifying and implementing relevant conventions or by reforming their criminal justice systems. To put it briefly, the Strategy "serves as a common platform that brings together the counter-terrorism efforts of the various United Nations system bodies into a common, coherent and more focused framework".[249]

Besides the forceful condemnation of (all forms of) terrorism and the repeated praise of cooperation, the core element of the Strategy is the annexed Plan of Action, based on a five-pillar strategy initially proposed by the High-level Panel[250] and subsequently launched and updated by Kofi Annan.[251] In his proposal, Annan identified as key elements "dissuading groups from resorting to terrorism; denying terrorists the means to carry out an

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[247] At 206.
[248] See the *U.N. Global Counter-Terrorism Strategy*, at 2.
[249] See *Coordinating Counter-Terrorism Actions within and beyond the U.N. System*, available at: www.un.org/terrorism/cttaskforce.html, at 1.
[250] See the Report, at 148 *et seq*.
[251] *Uniting against Terror*, *supra* at note 232, at 1.

attack; deterring states from supporting terrorist groups; developing state capacity to prevent terrorism and defending human rights in the context of terrorism and counter-terrorism".[252] Similarly, the Plan provides for (I) Measures to address the conditions conducive to the spread of terrorism, (II) Measures to prevent and combat terrorism, (III) Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard, (IV) Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[253]

In comparison with the above-mentioned proposals, the Strategy provides two major benefits: first of all, the Strategy does not only address the Security Council but includes provisions for all principal U.N. organs, various U.N. departments, specialized agencies and programmes as well as for individual states. In substance, it goes beyond the regulation of the use of force but suggests military and non-military measures and attempts to tackle the roots of terrorism as well as possible negative side-effects of counter-actions (e.g. negation of human rights). Secondly, its universal adoption evidences universal acceptance which in turn is a perfect precondition for the effective implementation of the Strategy.

IV. Preliminary Conclusion

During the years following the war in Iraq, the international community and the U.N., in particular the former Secretary-General Kofi Annan have strongly focused on ways to combat global threats posed by terrorism and WMD. Various new conventions have been developed, whereas older ones have regained new relevance. Various new bodies have been created within and without the U.N. to support counter-terrorism actions.[254] Many reports and speeches have been launched, the most important of which have been examined in this Chapter. All these efforts, however, will fail if they are not sufficiently supported by the international community of states. Nevertheless, the Panel's report and the General Assembly's Strategy are important steps not only in the fight against terrorism and WMD but also (back) towards global security as envisaged under the U.N. Charter. While states are required to unite their counter-terrorist efforts, both

[252] *Ibid.* See also *Adopting a Global Counter-Terrorism Strategy*, available at: www.un.org/terrorism/framework.html, at 1.
[253] See the Annex (Plan of Action) of the *U.N. Global Counter-Terrorism Strategy*, at 3 *et seq*.
[254] For example the Counter-Terrorism Implementation Task Force (CTITF), established by the Secretary-General.

instruments are guided by the ambitious but necessary goal to reinforce and revitalize the U.N. and the Security Council's authority, particularly in the field of the use of force. Yet, only the immediate and full implementation of the instruments by the Security Council (Panel report) and member states (Strategy) promises to become a true and more effective alternative to the unilateralist approach promoted in the "*Bush Doctrine*".

Chapter VI: Concluding remarks

I. Throughout the last few years, the global security situation has changed dramatically. Individual states as well as the international community of states as a whole are more and more endangered by the increasing number of terrorist attacks and the threat emanating from the uncritical proliferation of WMD in the hands of rogue states or irrational individuals like Saddam Hussein.

II. Terrorism and the proliferation of WMD are almost universally regarded as threats to international peace and security. As such, they are principally matters of collective security and can be addressed by the Security Council under Chapter VII of the U.N. Charter. Individual states, however, can counter these threats by means of self-defense only if they amount to an (imminent) armed attack.

III. A security gap arises if the threat is merely latent. The traditional security system under the U.N. Charter and customary law does not provide a legal basis for unilateral action of states involving the use of force against mere threats. On the other hand, the Security Council which is legally empowered to prevent an outbreak of these threats and preserve international peace and security is neither obliged to act, nor is there a guarantee for effective Council action. In particular its present composition, its voting requirements and its working methods are capable of preventing the Council from effectively discharging its responsibilities under the Charter. In fact, the past has shown that Council action had been blocked by P-5 members when it was urgently needed.[255]

IV. In response to 9/11 and the perceived threat posed by the alleged possession of WMD by Iraq, the Bush Administration launched the "*Bush Doctrine*", a document which promotes unilateral, preemptive action against threats to U.S. national security. Its basic idea is that terrorist and nuclear threats must be

[255] For example to stop the Rwandan genocide.

fought before they materialize. This has received broad support within the international community. Yet, as discussed above, the doctrine's negative implications on the international legal order and international relations would highly outweigh its benefits which would achieve no more than short-term successes in the "war against terror".

V. In order to win this global "war against terror", there is in my view no other way than global action, carried out by the international community and its organized embodiment, the U.N. and the Security Council. As Kofi Annan has put it: "The task is not to find alternatives to the Security Council as a source of authority but to make it work better."[256] Even if the system of collective security at present stage is insufficient or inadequate to address the actual or perceived security needs of each individual state, it is by no means irrelevant or should simply be disregarded. In the face of 21st century challenges which do not halt at national boundaries and whose consequences usually have an impact on states other than the victim state (financially, economically, environmentally, etc.), states should rely even more heavily on international cooperation and support, the framework of which is provided by the U.N. Charter.

VI. In order to strengthen Council authority and make collective action more attractive (and effective), it is absolutely crucial to reform and restructure the Council. While the use of force must remain exclusively in the hands of the Security Council, it must be ensured that it is used when necessary and that its decisions are respected and fully implemented by states. Moreover, Council action needs to be complemented by the concerted efforts of the international community of states (organized in the General Assembly), governments, NGO's and, last but not least, civil society.

VII. Recent U.S. practice has put the relevance of the U.N. Charter and the U.N. organization into question, if not at stake. Yet, in spite of their military superiority, the U.S. will not be able to police the world alone; not even the sole remaining superpower can win the fight against terrorism without the support of the rest of the world. Conversely, the world will hardly be able to achieve global security without the assistance of the U.S.

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[256] *In Larger Freedom*, at 126.

VIII. The current security situation represents both danger and chance: after years and months of inaction or at least a too reactive posture, the international community is finally aware of the full extent and dangers of terrorism and WMD, and is prepared to counter them together rather than alone. However, failure on the part of governments and state leaders to agree on a common strategy and undertake collective action would almost inevitably pave the way for increased unilateralist action not only by the U.S., but by any state which feels that the Security Council is not doing enough.

IX. To come back to the very first question raised in the title of this work, whether the "*Bush Doctrine*" is a new approach in the right of self-defense, I do not think that there is a definite answer at this point. Nevertheless, if the planned reforms and new strategies are successfully implemented and collective security under the U.N. Charter is reinforced, unilateralist action (other than in the traditional cases of self-defense and anticipatory self-defense) might no longer be regarded as a necessary alternative to multilateralist action and the "*Bush Doctrine*" would automatically become obsolete.