THE "PREVENTIVE USE OF FORCE" DEBATE WITHIN INTERNATIONAL LAW

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Introduction[1]

In *A Tale of Two Cities* (1859), Charles Dickens started his masterpiece with a paragraph that can be used to perfectly illustrate what is happening right now, in this age, in the international society we live in:

> "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way--in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only". (Dickens, 1859, p. 3)

[1] A very early draft of this paper was once written to be presented at a SPEED (Permanent Seminar on the State and Study of Law) Conference at the NOVA School of Law, Nova University of Lisbon. I would like to thank Professor Armando Marques Guedes for all his unwavering support and all the participants in the conference at the time and their many useful comments. I am also very grateful to Professor José Augusto Colen for encouraging me to publish this study and to the late Professor Avery Plaw for the many discussions and research we did together on the subject.

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In the last couple of years, terrorist attacks took place in the heart of Europe (France and Germany) and there are still ongoing attacks in Africa (Mozambique) and in the Middle East (Irak). While the cure for diseases is found everyday through international cooperation a global pandemic (of Covid-19) is still raging, causing thousands of deaths daily; at the same time humanity appears to get closer around common goals such as fighting global warming or exploring outer space, terror spreads around the world, leading millions into refugee camps or to death at the shores of the Mediterranean, and the European Union is still dealing with the uncertainties of Brexit.

Maybe its only politics as usual but when "War is nothing but the continuation of politics by other means" (Clausewitz, 1832, p. 69), instead of peace and security, we have chaos. In the past the fear of casualties prevented democracies from engaging in distant conflicts at the whim of a leader. Technology has changed this. For instance, President Obama won an election on war fatigue, promising to pull out of Irak, yet during his watch the US took preventive strikes through targeted killing operations to a new level, spanning all over the world. The development of drone technology has made this possible, as wars can now be fought from afar without the fear of body bags coming back to haunt those who order the strikes. With modern warfare being fought by non-state actors literally everywhere and anywhere the temptation to strike first might become more than a wish, a reality and maybe even a necessity. However recent history shows that preventive strikes might lead to serious and unpredictable results.

War in Irak and the emergence of ISIS / Daesh are just such evidence. If we don't want Cicero words *Inter arma enim silent leges* to ring true again, we have to discuss how can law rule over war, how international norms can restrain the use of force.

This paper examines the legal discussion within international law for the use of "preventive" force with an eye to its more innovative and controversial dimensions and

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analyses its likely impacts on the law regulating resort to force and its underlying norms.

Since the purpose of this paper is to show the evolution of the academic debate so that we can take an informed position on the subject, we divided most legal arguments around this issue into three main schools of thought. There are many more possible divisions and arguably a more in-depth study would be needed to further distinguish among them and opt for a more specific one. Still the system adopted here will allow us to go through most of the important points that separate the proponents of the various schools, their main arguments and objections. Hopefully, we will show how most of the debate could be solved if a slightly different approach to the concept of self-defense was adopted by scholars, institutions and states alike.

Terminology

Keeping our descriptive terminology clear, simple and consistent is essential because, as Professor Greenwood (2013, p. 9) has noted "there is no agreement regarding the use of terminology in this field" and even though he says that the term "anticipatory" is usually used to describe a military action against an imminent attack and "preemptive" against a threat that is more remote in time, he still warns the reader to be aware that some authors use the terms interchangeably. Gazzini (2005), for instance, uses the term "preemption" as described by Greenwood, but Shue (2005) uses it as a synonymous of "anticipatory", as an action against an imminent attack leaving the term "preventive" to describe an action against a future threat. On the other hand, Murphy (2005), Reisman and Armstrong (2006), just to quote a few, all use "preemptive" as Shue uses "preventive".

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For the purpose of this paper, we decided to settle on Professor Ruys terminology. Not only has he one of the best researched and acclaimed books on the subject of self-defense[2] but he also chose a terminology, which we believe to be the most accurate.

He starts by distinguishing between "reactive" self-defense to an ongoing armed attack and "anticipatory" self-defense against an attack, whether imminent or not, that has not occurred yet (Ruys, 2013, p. 251). In other words, the term "anticipatory" will be used to describe a "preemptive or preventive" action. He then argues that recently "it has become more common to reserve the concept of "preemptive" self-defense for military action against an imminent or proximate threat of attack and to reserve "preventive" self-defense for non-imminent or non-proximate threats". "Anticipatory" self-defense is thereby regarded as the overlapping denominator" (Ruys, 2013, p. 252).

Body

Since the birth of modern international law, Just War theory transitioned gradually from the realm of Ethics in the western world to that of Law. *Ius ad bellum* principles were adopted, gained normative value and gradually obtained a degree of enforceability.[3]

Central to this issue is the principle of "just cause". The sovereign right to use force as an instrument of foreign policy gave place to a system created from the ashes of the

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[2] Ruys, Tom. *'Armed Attack' and Article 51 of the UN Charter Evolutions in Customary Law and Practice*. New York: Cambridge University Press, 2013.

[3] For an excellent overview of this process see Neff, Stephen C. *War and the Law of Nations*. New York: Cambridge University Press, 2005.

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Second World War aimed at avoiding the unilateral recourse to force by limiting it to a fairly narrowed construed circumstance of Self-defense.[4]

These exact parameters of self-defense as envisioned in Article 51 of the United Nations Charter has been the source of academic debate for almost 70 years now. This paper will only focus on one of the many issues within this debate – that is, the question of whether, or not, "Anticipatory" (Preemptive or Preventive) Self-defense has any support in International Law, but first we have to look where it all started, with the approval of the UN Charter.

"We the peoples of the United Nations" are "determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" asserts the Preamble of the UN Charter. With this in mind the first article[5] articulates the main priority of the institution:

> **"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". (United Nations Charter, 1945)**

Article 2 (4) goes even further and says "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

[4] For a good summary on the subject see the 13th chapter (*The Right of Self-defense in the Period After the Second World War*) by Professor Brownlie (2013, pp. 251-279).
[5] All the articles mentioned in this paper are from the United Nations Charter unless expressly stated otherwise.

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Purposes of the United Nations" (*United Nations Charter,* 1945). As indicated in the preamble and the first article, the first purpose of the UN is to maintain peaceful relations among its members.

Already in 1919, the League of Nations prohibited the recourse to war and in 1928 the Treaty for the Renunciation of War also known as the Kellogg-Briand Pact or the Pact of Paris, was signed. In the article 1 of the Treaty for the Renunciation of War, the signatory states agreed "that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another." Nevertheless, eleven years later World War II started.

With this failure in mind, international institutions, and particularly those connected with the UN, have sought to reinforce the UN Charter's general prohibition on the resort to force. For example, the International Court of Justice in the famous *Nicaragua* judgment, in 1986, subscribed that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[6]

There are only two exceptions to this prohibition, both contained within the UN Charter itself. The first one is the use of force through a Security Council authorization according to article 42[7] under Chapter VII; the second one is an action on Self-defense

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[6] This sentence originally came from Paragraph (1) of the Commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC* Yearbook, 1966-11, p. 247 and was quoted by the Court in International Court of Justice (ICJ). 1986. "Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits.", p. 100, parag. 190.

[7] Article 42 of the UN Charter: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations" (United Nations Charter, 1945).

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according to article 51 that we mentioned before. Therefore, as the conventional law exists today, in particular as articulated in the UN Charter, the use of "anticipatory" force needs necessarily to fit one of the two exceptions in the Charter (article 42 or 51) in order to be lawful.

Since only article 51 deals with the unilateral use of force, we shall focus our analysis on that article, which declares the following:

> **"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…"[8] (United Nations Charter, 1945)**

Since Article 51 clearly asserts that nothing in the Charter (including itself) "shall impair the inherent right of self-defense" which in pre-Charter customary practice is widely thought to include "Anticipatory" use of force in certain circumstances, naturally this ambiguity in the language of Article 51 has given rise to some debate.

Some scholars such as Professor Sean Murphy (2005) from George Washington University, for instance, tried to divide the different interpretations of this article in schools of thought. In his case, he divided it in four: the strict constructionist school, the imminent threat school, the qualitative threat school and the "charter is dead" school.

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[8] The article continues but for the purpose of this paper this first part is the only one relevant. The whole article 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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security" (United Nations Charter, 1945).

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For now, we will simply divide them in three. The first one is in favor of this literal interpretation and only allows self-defense against an armed attack that has occurred or is currently taking place. The second allows an action in self-defense against an "imminent attack" and the third against a "future attack".

Strict interpretation of article 2 (4)

As mentioned, the first school of thought favors a strict interpretation of article 2 (4) and a restrictive concept of Self-defense opposing the "Anticipatory" use of force on principle. Some for political reasons, others for ethical or even religious ones, but many scholars feel the need to rest their case on the law. Article 2 (4) of the UN Charter seems paramount in its wish to prohibit the use of force in general and article 51 wording seems to lend strength to it on this issue.

Oxford Professor, Sir Ian Brownlie (2013, p. 275), arguably the author of the most important book of the 20th century on the use of force in international law, thought that according to traditional means of treaty interpretation, the words "if an armed attack occurs" precluded any right to preemptive action". In other words, because "if an armed attack occurs" is the only condition listed in article 51 and therefore the only condition in which action in self-defense is permissible, it seems correspondingly that in its absence no action in self-defense can be legitimate. The rational reminds us of the controversial Latinism *expressio unius est exclusio alterius* (the express mention of one thing excludes all others).

As we will see further on, there are many scholars supporting this restrictive reading of article 51 and engaging with the other two schools but their main argument remains as simple as recalling the words behind this article.

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Preemption

A second group of scholars argue in favor of "Anticipatory" use of force in the form of "Preemptive" self-defense since they believe that the whole purpose of the right of self-defense is to avoid the suffering, the damage of an unjust aggression. Otherwise, the right of self-defense would only be valid either as "armed reprisals"[9] or as "reactive self-defense". The problem with "reactive self-defense" nowadays is that, in the words of Professor Dereck Bowett (arguably) one of the most important legal scholars of the 20th century on the subject of self-defense, "No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence" (Bowett 1958, pp. 191-192).

Judge Dame Rosalyn Higgins of the International Court of Justice expressed exactly the same concern. She wrote:

> **"In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defense". (Higgins, 1994, p. 242)**

A way of possibly reconciling the seemingly contradictory commitments of Article 51 were discretely presented in a small footnote on page 261 of an relevant book written by the well renown Yale Professor, Myres McDougal, and by Professor Feliciano that have argued that "a proposition that "if A, then B" is not equivalent to, and does not necessarily imply, the proposition that "if, and only if, A, then B" (MacDougal and

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[9] **"Armed reprisals" are punitive actions in their nature, in Professor's Michael Shaw words "Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state" (Shaw 2013, p. 1129).**

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Feliciano, 1961, p. 237). In other words, "if an armed attack occurs" would not be the same as "if, and only if, an armed attack occurs".

Supporting this argument, another judge from the International Court of Justice, Judge Schwebel in his dissenting opinion on the famous Nicaragua judgment, almost 30 years later argued that article 51 should not be interpreted in order to suggest that "Nothing in the present Charter shall impair the inherent right of… self-defense if, *and only if*, an armed attack occurs"[10] (Schwebel, 1986, pp. 347-348).

On this subject, Professor Franck (2009, p. 50) noted that during the historical San Francisco Conference of 1945 the US delegation added the "if an armed attack occurs" requisite. A US State Legal adviser named Green Hackworth apparently mentioned that this sentence "greatly qualified the right of self-defense" and it was the leader of the American Team, Governor Harold Stassen, that replied by saying that "this was international and sound. We did not want to exercise the right of self-defense before an armed attack occurred" (in Franck, 2009, p. 50). Professor Franck (2009, p. 50), therefore concludes "At San Francisco, however, it is beyond dispute that the negotiations deliberately closed the door on any claim of "anticipatory self-defense," a posture soon to become logically indefensible by the advent of a new age of nuclear warheads and long-range rocketry".

Yet this valid concern of Judge Higgins and Professors Bowett, McDougal, Feliciano and Frank Franck, about the logic of such a restrictive requisite are not enough to prove the existence of a right to use force, at least "preemptively" *de lege lata*. The words "if an armed attack occurs" will still remain in article 51 whether or not we approve their

[10] **He continues this quote immediately adding "I do not agree that the terms or intent of Article 51 eliminate the right of self-defense under customary international law, or confine its entire scope to the express terms of Article 51" (Schwebel, 1986, pp. 347-348).**

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logic, besides abrogatory interpretations of the UN Charter would not only be a dangerous precedent but also raise innumerous legal issues of their own.

For all of these reasons, defenders of the second school of thought usually approach the issue from another word within article 51 that opens the interpretation of the right of self-defense to far more complex and yet interesting arguments.

The core of their argument (Maggs, 2007; Dunlap, 2012) is that the right of self-defense existed prior to the UN Charter and that article 51 even acknowledged that by saying that "nothing in the present Charter shall impair *the inherent right* of individual or collective self-defense". The key word for this interpretation is clearly "inherent". In other words "the principal legal argument holds that article 51 of the UN Charter failed to abrogate the broader pre-existing customary right of self-defense" as Professor Tom Ruys (2013, p. 255) explains, and he continues arguing that these scholars believe that the reference to the word "inherent" and the *travaux préparatoires* "indicate that Article 51 was only intended to give particular emphasis in a declaratory manner for self-defense in the case of an armed attack" (Ruys, 2013, pp. 255-256).

We cannot forget however Professor Franck's reference to the Conference of San Francisco appears to prove Professor Ruys wrong at least regarding the reference to the *travaux préparatoires*.

In any case, the *travaux préparatoires* according to Article 32 of the Vienna Convention on the Law of Treaties (1969) is always supposed to be a supplementary means of interpretation so it hardly stands as a definitive argument.

It is far more important to discuss, and we will borrow Judge Higgins words again, this time from a contribution to Professor's Antonio Cassese famous edited book on the Use of Force, that "it is also contended that the continued validity of this pre-charter law on anticipatory self-defense is consistent with the reference in Art. 51 to the right of self-defense being "inherent" (Higgins, 1986, p. 442).

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Looking closer at Judge Higgins claim one must be aware that it has in itself two distinct assumptions. The first one is that pre-charter law allowed "anticipatory self-defense" (whether preemptively or preventively is a matter to discuss later on), the second one is that pre-charter law on the use of force somehow managed to remain intact beyond the approval of the Charter through the word "inherent".

Discussion about Pre-Charter Law

The first assumption faces an obvious question to start with. How is it possible to have any kind of legal pre-Charter "Anticipatory self-defense" right if there was no "prohibition on the use of force" before the 20th century?

In other words, scholars like Professor Quigley (2013, p. 152), for instance, questions the idea that there was a long-established right of pre-emptive self-defense across the centuries preceding the advent of the Kellogg-Briand Pact and ultimately the UN Charter. He argues that, since before the Pact of Paris, there was no prohibition to use force then there was no need of an exception like self-defense to begin with.

This seems too quick and crude argument, however, since even if states did not explicitly appeal to an inherent customary legal right of self-defense (because there was no legal presumption against the use of force and hence no need to invoke a legal right to justify the exception) states did often offer moral justification for the resort to force, and this often involved claims of self-defense. Indeed, self-defense is one of the classic forms of "Just Cause" in Just War doctrine[11]. Moreover, as we will see while discussing ICJ's Nicaragua case, most legal scholars recognize that some of the requisites of self-defense like necessity and proportionality must be inferred from an international

[11] **For a good overview of the Just War doctrine and how Self-defense was considered a "just cause" within *Ius ad Bellum* see Walzer (2006) and Bellamy (2006).**

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custom and practice since they are nowhere to be found in article 51 or other conventions.

Still, even if we deny Quigley's (2013) point and agree that there was an "inherent" right of self-defense prior to the Charter (and that it remains alive today), we have yet to prove that that right allowed an anticipatory or preemptive strike against an imminent threat, albeit there are at least some incidents which seem to very explicitly acknowledge such a right and which have clearly exercised an enormous global influence.

The most famous of these is known as the "Caroline incident". In 1837 a diplomatic dispute between the United States and the United Kingdom became famous. British troops attacked Canadian rebels and torched a boat named *Caroline* in US territorial waters (Dinstein, 2011, pp. 197-198). In a diplomatic protest, then US Secretary of State Daniel Webster (1842) wrote to British diplomat Alexander Baring, 1st Baron Ashburton, that for self-defense to be legitimate, the British had to demonstrate:

> **"…a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation (…) [and involving] 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". (Webster, 1842)**

Some authors like Schmitt (2002, 529-530) argued that "over time, this standard, and its implicit criteria, has become universally accepted as the keystone in the law of self-defense".

Yet some authors are extremely critical of any reference to Caroline. Professor Yoram Dinstein said:

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> **"Reliance on that incident on the context of anticipatory self-defense is misplaced" (…) "There was nothing anticipatory about the British action against Caroline steamboat on the US soil, inasmuch as use of the Caroline for transporting men and material across the Niagara River – in support of an anti-British rebellion in Canada – had already been in progress". (Dinstein, 2011, pp. 187-198)**

Professor Jordan Paust (2010, pp. 242-245) makes the same point that the hostilities were already taking place due to prior incidents and so this would hardly be considered an "anticipatory" action.

One could still argue that it is beyond the point of whether or not reference to the Caroline incident is actually misplaced from an historical perspective. That would certainly be an unfortunate thing for many scholars but it doesn´t necessarily weaken the argument that the reference to *Caroline* incident is not aimed at the incident itself but to the end result of it.

In other words, when states or scholars appeal to the *Caroline* incident they do so on the assumption that they are appealing to international custom and to the language adopted by Daniel Webster, which described almost perfectly, the criteria needed to have a lawful preemptive self-defense military action, if ever one could be found.

Nonetheless, Professor Ruys would still deny this argument for he is not convinced that there is any evidence to support that the customary law since the approval of the Charter ever endorsed such a right. He believes that:

> **"The 'episodic reference' to the 1837 Caroline incident is considered anachronistic and misguided. Indeed, instead of relying on customary practice from the decades immediately preceding the UN Charter, the**

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> **'expansionists' invoke a precedent, which dates from an age where States were essentially free to resort to war against one another and lacking a legal regime of Self-defense" (Ruys 2013, p. 258).**

Professor Lubell, on the other hand, would definitely disagree with Professor Ruys:

> **"Coupled with the fact that the Caroline formula is also still today seen as a legitimizing a limited form of anticipatory self-defense, it would be hard to argue that the Caroline formula is not prove that there exists a limited possibility of anticipatory self-defense against non-state actors" (Lubell, 2011, p. 59).**

Professor Byers (2003, p. 180), in turn, would disagree with both. Firstly he would say to Professor Ruys that: "Until the adoption of the Charter in 1945, these criteria were widely accepted as delimiting a narrow right of preemptive self-defense in customary international law" (Byers, 2003, p. 180). Then he would say to Professor Lubell that "Today, the argument can only succeed if Article 51 of the Charter is ignored, re-read or viewed as having been modified by subsequent state practice—though the practice, as noted in the preceding paragraph, would seem to cut the other way" (Byers, 2003, p. 180).

Still, even allowing that a *prima facie* case may be made for both a customary right of self-defense in the era preceding the Pact of Paris, and that this included the use of preemptive force, at least in some narrowly defined circumstances, it may still be the case that the framers of the Kellogg-Briand Pact and even more importantly the UN Charter shut the door on this right, as we saw before with the reference to the Conference of San Francisco.

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This leaves us with the second assumption of Judge Higgins claim that this "Anticipatory right of self-defense" somehow remained untouched by the Charter.

If not all at least a part of Judge Higgins assumption was supported by the 1986 ruling of the International Court of Justice during the famous Nicaragua case. It is worth quoting the paragraph 176 of that decision:

> **"The Court observes that the United Nations Charter (…) by no means covers the whole area of the regulation of the use of force in international relations. (…) The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content". (ICJ , 1986, parag. 176)**

Professor Greenwood agrees with the Court and concludes that "the customary law status of the right of self-defense and the close relationship between the customary principle and the provisions of Article 51 have been confirmed by the International Court and are not a matter of controversy" (Greenwood, 2003, p. 12).

One could still argue that this doesn't mean there was an "anticipatory right of self-defense" and even that the words of paragraph 176 "even if its present content has been confirmed and influenced by the Charter" might mean that at least a part of this right might have been affected by article 51. Professor Hans Kelsen (1950, p. 792), for instance, certainly believed so since he wrote about article 51, while teaching at the University of California, Berkeley, that: "the Charter extends this right in one respect and limits it in the other". He would even disagree with the Courts since he thought

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that "The effect of article 51 would not change if the term 'inherent' were dropped" (Kelsen, 1950, p. 792).

Even though an argument by a Professor with such an authority and respect among his peers should not be easily cast aside the truth is that almost 50 years later another Court decision by the ICJ would seem to go even further and even more explicit than the Nicaragua decision touching directly on the issue of "Anticipatory self-defense".

In 1996, on its *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict,* specifically on paragraph 105 (2) E: "The Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake" (in Franck, 2009, p. 98). This immediately led scholars to conclude like Professor Thomas Franck that:

> **"Despite its ambiguity, the Court appears to have recognized the exceptional nature and logic of a state's claim to use means necessary to ensure its self-preservation. The same reasoning can lead to the logical deduction that no law - and certainly not Article 51 - should be interpreted to compel the *reduction ad absurdum* that states must await first, perhaps decisive, military strike before using force to protect themselves". (Franck, 2009, p. 50)**

Of course Professor Franck was aware that this *reduction ad absurdum* argument can go both ways since there would be a true risk that the prohibition of article 2 (4) would be eroded if any country would suddenly be allowed to use force unilaterally whenever it felt the survival of a State would be at stake.

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Most importantly though is the fact that it wasn't the first time that Courts indirectly seemed to tolerate a certain level of "Anticipatory" use of force. In truth, they first appeared on key post-WWII jurisprudence as Professor Michael Doyle (2008, p. 15) from Columbia University described, "Indeed, these criteria were applied by the Nuremberg Tribunal to deny Hitler's claim to justifiable preemption in attacking Norway in 1940 and by the Tokyo Tribunal to justify the Netherlands' preemptive declaration of war against Japan in 1941." Professor Gazzini explains the importance of this, clarifying that:

> **"Advocates of anticipatory self-defense argue that the Nuremberg International Military Tribunal indirectly admitted the lawfulness of such a use of force by rejecting on the factual evidence – and not in principle – the claim that Germany had been forced to invade Norway in order to forestall an imminent Allied landing". (Gazzini, 2005, p. 149)**

If we accept that some degree of "Anticipatory" use of force can be lawful according to article 51 (and the interpretation of the right of self-defense) one cannot but ask whether this "anticipatory" action is "preemptive" or "preventive" in nature? The last group of scholars believe it is the later.

Prevention

The third school's perspective on the right of self-defense construes it as encompassing a right to take preventive action to remove threats before they pose immediate danger.

On September 17, 2002 the US government published *The National Security Strategy*, which laid the base to the famous "Bush doctrine", epitome of the third

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school of thought on preventive strikes. We will quote three paragraphs of this document that will be essential for our analysis of the topic.

> **1) "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat-most often a visible mobilization of armies, navies, and air forces preparing to attack" (National Security Strategy, 2002).**
>
> **2) "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means" (National Security Strategy, 2002).**
>
> **3) "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" (National Security Strategy, 2002).**

As we can see, proponents of this school believe that you don't need an "armed attack to occur" nor even an "imminent threat of attack" before you can act in Self-defense, just "a threat" is needed. If it is true that the first school of thought is firmly

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anchored in the expression "if an armed attack occurs" and the second one on the words "inherent" and "imminence", the third one should definitely be associated with the word "prevention."

This claim could sound odd since it is clear that the expression endorsed by the NSS is the term "preemption" and not "prevention", as we argue. Furthermore, if we look closely at paragraph one, we notice that there is even a reference to the term "imminent" which might lead one to think this is just no different from the authors of the second school we mentioned before.

However, this is definitely not the case. It is worth reading Professor Henry Shue, from the Merton College at Oxford University, on this issue as he explains that:

> **"…determining what counts as an imminent attack is a difficult (…) but if there was ever any doubt that when the Bush White House says "preemption," it does not mean preemption, but means instead preventive war, the doubt was settled during the President's appearance on NBC's (…) when he said: "I believe it is essential - I believe it is essential - that when we see a threat, we deal with those threats before they become imminent" (Shue, 2005, p. 16).**

This isn't the only questionable assumption the NSS document makes. As we have seen before throughout the discussion around the word "inherent" and the existence of an international customary law right of anticipatory self-defense was hardly accepted "For centuries". Even if it were the case, this document would be a radical departure from the more common and nonetheless very controversial nature of the "imminent" criteria within Webster's formula and that is probably the reason why countries like

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Spain and Germany (just to mention two) denounced the document (Reisman and Armstrong, 2006).

Arguments against "Preventive" use of force

It is worth noting that the document itself does not present legal arguments to consubstantiate what it claims, with no mentioning whatsoever of article 51 or even to the Caroline incident for that matter, even though it indirectly appeals to customary right of self-defense.

On the other hand if this theory prevails it completely destroys the link between first-use of force and unjust aggression which is basically how the Charter tried to prevent the recourse to war by modern states as it is abundantly clear on this quote by the UN High Panel on Threats, Challenges and Change warned in its 2004 report: "[I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted" (in Svarc , 2007, p. 223).

In addition it is hard to imagine President Bush arguing that all countries should interpret the concept of self-defense as he proposed for the United States Everything points out to another case of "American exceptionalism", except this precise theory was endorsed in past by the worst possible regimes, such as Nazi Germany, when they invaded the Soviet Union during the Second World War (Maggs, 2006, pp. 479-480).

For those who might believe this argument to be somehow overdramatic, we have to keep in mind that both North Korea and Iran later claimed for themselves this same right (Reisman and Armstrong, 2006, pp. 548-549). Additionally, we ought not forget about all the highly unstable regions of the world from the Indian subcontinent to the

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Middle East subject to periodical saber rattling's between countries with nuclear capability that could use this theory to strike first.

Finally, Professor Shue makes a somehow original but excellent point by arguing that "The policy of preventive war makes an heroic assumption: reliable intelligence. One can precisely and firmly designate the predatory governments in time for preventive attack only if one can obtain reliable intelligence in time" (Shue, 2005, pp. 12-13). If nothing else the war on Iraq should stand as a warning.

Half-truths

Nonetheless there are some half-truths on those NSS's paragraphs. For instance, when in the third paragraph that we quoted from NSS's document one can read that "The United States has long maintained the option of preemptive actions."

It is true that some scholars would agree with this claim. Professor Greenwood, for example, argues that since the Caroline incident until now the "United Kingdom and the United States have consistently maintained that the right of self-defense also applies when an armed attack has not yet taken place but is imminent" (Greenwood, 2003, p. 12) lending some force to part of this NSS's claim.

On the other hand, we should not forget Governor Strassen's words in San Francisco, in 1945, that so clearly stated the objective of avoiding the possibility of an "Anticipatory" concept of Self-defense by the insertion of the caveat "if an armed attack occurs" in art. 51 of the Charter. Unfortunately, this only proves that the United States, as probably any other country's occasional claims in favor of an anticipatory action in self-defense, is probably more political motivated than legally sound.

Either way the question then becomes, what should be understood by the term "imminent"?

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Professor Schmitt (2003, p. 533) seems to believe that the term used as in the "Webster formula", "appears to impose a fairly restrictive test in which the defensive force can only be used just as the attack is about to be launched". On the other hand, as Professor Ronzitti (2006, p. 345) says "if it is understood in a broad way, even a simple or future threat becomes an imminent attack".

On this issue, it still seems to be a clear distinction between a restrictive and a broad interpretation of what should be understood as "imminent" and that draws the line between the second and the third school of thought on preventive strikes in self-defense. For the former, an imminent attack is considered to be an ongoing attack, an attack so imminent, so near completion that the window to repel it would not leave any margin to wait and search for another alternative. Imminence is seen at the light of "necessity" and "proportionality" and fits perfectly on Webster's formula.

On the other hand, for "preventive" supporters some threats are so dangerous that as soon as they emerge, they became imminent. The only way to repel the attack is to prevent it… This reasoning eventually will lead to the strongest argument of this school. They argue that the law (at least customary law) didn't stand idly still since the nineteenth century or since 1946 for that matter, it adapted itself to new realities. The global terrorism issue and the evolution to increasingly more frequent asymmetric warfare scenarios make it very hard for states to defend themselves within a restrictive interpretation of self-defense. In other words, and Schmitt summarizes eloquently by saying:

> **"Ultimately, law must be construed in the context in which it is to be applied if it is to remain relevant; and in the twenty-first century security environment, insistence on a passé restrictive application of international**

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> **legal principles to strategies of preemption would quickly impel States at risk to ignore them". (Schmitt, 2002, p. 546)**

Furthermore, Schmitt is definitely not alone in his "realist" perspective, Professor Lucas (2013, p. 65) for example concluded a recent article with the following sentence "That considerable and formidable task, however, will only be undertaken once we have recognized that the case for preventive war is morally legitimate, and legally and politically incumbent" and we are sure Professor David Luban (2010, p. 171) from Georgetown University would agree.

Moreover, Professor Trachtenberg (2010)[12], on a very interesting article about how the Preventive use of force was actually always part of American Foreign Policy[13] tradition, claimed that when push comes to shove, any country, with its own survival at stake, will do whatever is necessary to prevail.[14] Proponents of this theory usually argue that some countries like Israel firmly stand by the US and the UK on this issue since they had in the past to act pre-emptively if not preventively as in the case of the Six Day War.

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[12] He is not alone, Professor Nathanson (2013, p. 145) recently argued "the Bush administration embrace of preventive war did not radically depart from past United States policy."

[13] For an interesting overview of some historical examples from other countries, see the article by All Souls College Professor Hew Strachan at Oxford University, Stratchan, H. "Preemption and Prevention in Historical Perspective." Essay. In Preemption – Military Action and Moral Justification, pp. 23–39. New York: Oxford University Press, 2010.

[14] On page 30 he gives the following example, "No one got upset about the British attack on the French fleet at Mers-el-K´ebir in July 1940. The British were afraid the fleet would fall into German hands, and acted, even though they were not at war with France and even though they could not know with any certainty what would happen if they took no action. But no one got upset, because people understood why it was so important for Britain to take no chances in this matter" (Trachtenberg 2010, p. 30). On the other hand one could argue that "realist" perspective sometimes leads to tragedy, if for nothing else the decision to strike at Pearl Harbor will always be a reminder to Japan of the costs of a preventive war.

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We cannot deny that even though the "Bush doctrine", expressed in the NSS's quotes mentioned earlier, gathered a great deal of opposition, there are still a great number of scholars that admit the use of preventive force under certain circumstances, if not from a legal perspective, at least from an ethical / political one. Professor Chris Brown from the London School of Economics, for example, wrote recently:

> **"To argue that the first use of force is never morally justifiable rules out both humanitarian actions and preventive actions; to make this the central moral prescription is, in effect, to decide that the current state of the world is sufficiently just such that any attempt to change it by force would be unacceptable – this is, I think, a contestable proposition" (Brown, 2013, p. 33).**

That said we have to keep in mind that this is still a very controversial issue. It is worth keeping in mind Professor Tom Ruys conclusion on this issue:

> **"Put briefly, international lawyers agree virtually unanimously that preventive self-defense patently lacks any basis in international law: it is diametrically opposed to the Charter framework on the use of force and is not supported by any shred of customary evidence in the post-1945 era" (Ruys, 2013, p. 324).**

Furthermore he is not alone in his opinion, Professor Lubell, for instance, likewise argued that "there is not, however, any substantial support for the claim that international law has now stretched the boundaries of self-defense so as to allow for preemptive action against anything other than an imminent attack which cannot be prevented without recourse to force" (Lubell, 2011, p. 63).

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Conclusion

Self-defense is not a new legal concept. It pre-dates the UN Charter and it pre-dates the Caroline incident. It is customary law and its part of any legal and ethical system known to man whether domestic or international. As a concept however it must be something determinable.

More than 100 years ago, Daniel Webster chose to frame the right of self-defense in international law in a way that resisted the passage of time. His words were reasonable then and they seem reasonable now.

We believe that most scholars would agree[15] that in theory an action in self-defense whether in domestic law or under international customary law is bound to be somehow "anticipatory" in nature, in the sense that its purpose is not only to react to an ongoing attack, but also to an "imminent" one. This claim might be accepted even by the most positivists scholars, such as Professor Hans Kelsen. After all that is why he argues (as we mentioned earlier) that article 51 actually limits the right of self-defense by requiring among other things that an armed attack has to occur first.

What seems to be open to debate is whether or not this "anticipatory" nature of the right of self-defense actually made it into the post-Charter international law and if so in what terms. We believe that it has in the form of a "Preemptive" and not "Preventive" right of self-defense.

[15] **Professor Bowett (2009, p. 189) for instance wrote "The right [to self-defense] has, under traditional law, always been 'anticipatory', that is to say its exercise was valid against imminent as well as actual attacks or dangers".**

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In other words we join the rank of the proponents of the second school such as Judge Higgins, amongst others[16], that believe that an "imminent attack" triggers the right of self-defense. This, as long as there is: "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation (…) [and involving] nothing unreasonable or excessive (…) justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it" (Webster, 1842) according to the "Caroline" or "Webster" formula.

In the end, Self-defense if given its true traditional meaning, is a very limited concept. Arguably it became a "just cause" under Just War theory as a means to avoid even more "unjust causes". The purpose was not to find an excuse to justify war but to exclude the most unjustifiable ones.

However, what happened to the *Lex talionis* for some reason didn't happen to self-defense as a "just cause". No one questions that Talion's law was a huge leap forward for mankind and a historic mark in the evolution of the most basic legal systems. Nowadays however, most people will agree that an eye-for-an-eye is something slightly less than, if not completely, barbaric. That law had to evolve and so should have the concept of self-defense from "just cause" to just a "right".

In other words, what similarly happened, we argue, is that Self-defense became the excuse, the justification to wage complete war under certain criteria. This is in turn a misconception of a purely defensive right. To be true to its meaning, a defensive right requires an unjust aggression and the means to stop it. Nothing more, nothing less. In that sense "prevention" is not part of self-defense[17] and probably the most fortunate

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[16] Professor Greenwood (2003, p. 15) list Professor Franck, Waldock and Bowett, and ICJ Judges, Fitzmaurice and Schwebel as belonging to this group which we think is a fair claim.

[17] Professor Buchanan (2010, p. 127) would probably disagree with us, he wrote "As Jeff McMahan has pointed out, there is a straightforward sense in which all self-defense action is

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concept would not be the term "preemptive", subject to much misinterpretation, but "interceptive".

If "Preventive" self-defense were to exist, one could easily imagine a situation where two countries could both argue to act in self-defense, though one of them acted preventively. Any law student knows that self-defense of self-defense is a contradiction in terms and so it should remain.

It is true though that if the Charter system would actually be abided by all countries, any use of force would probably be eliminated since none could lawfully use force first. However utopian systems failed short in the past and article 51 is our best contingency plan against those who break the rules. This unfair, problematic and flawed system yet managed some results keeping a certain level of "peace and security" in the last 50 years which is more than it can be said for the previous one where any state could unilaterally use force at will. If for no other reason it helps to keep some pressure against warmongering leaders, now that technology has removed many of the constraints of public opinion by allowing for a faceless war fought mainly with drones from the security of a control room, almost like in a video game.

Yale Professor, John Gaddis, wrote in a book on how 9/11 impacted the US perspective on the use of preventive force, "by expending 19 lives and a few hundred thousand dollars, the attackers managed to kill some 3,000 people, to inflict as much as a hundred billion dollars' worth of property damage, and to refine the nature of our times" (Gaddis, 2005, p. 72). Of course those costs he mentioned are a very conservative estimative from the year 2004 and they don't even measure the

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preventive". Due to the scope of this paper we cannot discuss this in detail but our main disagreement is with the word "Preventive" used by those Professors instead of the word "Preemptive".

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consequences for non-Americans including Iraqi and Afghanistan civilians. That said, we may not agree with but we cannot ignore the true temptation to use "Preventive" force, that US drone pilots face each time they watch 19 or less armed man in the deserts of ISIS / Daesh controlled territory.

For this reason, states must trust that to abide with Charter rules won't compromise their own survival, their own peace, their own security. The only way to assure that, is to reasonably empower those states to lawfully use force "preemptively" but only under very restrictive circumstances such as facing "imminent" attacks under the "Caroline" formula. To restrict beyond reason, to require a state to let an armed attack occur first, is to invite him to disrespect the rules and unleash all its force with[18] only the useless restraints of an ignored law.

There will always be those willing to abuse and extend the concept of self-defense by far more aggressive means, but it seems clear to us that the solution is not to manipulate the same concept in the opposite direction but to stand by what it should truly mean.

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[18] **For a specific discussion of how recent state practice seems to sustain this thesis, please see Plaw, Avery and João Franco Reis. "The Contemporary Practice of Self-Defense: Evolving Toward the Use of Pre-emptive or Preventive Force?" Chapter. In *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare*, pp. 228–256. New York: New York University Press, 2016.**

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Nova de Lisboa. A investigação que faz nas áreas do Direito dos Conflictos Armados e da Ética da Guerra tem sido publicada e defendida em congressos internacionais como a International Studies Association (ISA) Annual Meeting (2014), em Toronto, na American Political Studies Association (APSA) Annual Meeting (2015), em São Francisco, ou na International Studies Association (ISA) North East Conference, em Providence (2017), e publicada com outros autores pelo Journal of Military Ethics ou pela New York University Press.

ABSTRACT

This paper examines the legal discussion within international law regarding the use of "preventive" force with an eye to its more innovative and controversial dimensions, and analyses its likely impacts on the law regulating the use of force and its underlying norms. We will show the evolution of the academic debate, especially within the scope of application of article 51 of the U. N. Charter and argue that it seems reasonable to empower states to lawfully use force "pre-emptively" but only under very restrictive circumstances, such as facing "imminent" attacks under the "Caroline" formula. The so called "Bush doctrine" and the "preventive" use of force against a "non-imminent" threat, seem to remain outside of the legal scope.

KEYWORDS: Preventive force, Self-defense, Preemption, Caroline, Article 51

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