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NEW THREATS AND THE USE OF FORCE

- 1 See United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations), paras. 17-28.
- 2 DUPI (1999) *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs).
- 3 Independent International Commission on Kosovo (2000) *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press).
- 4 ICISS (2001) *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center), p. 32.
- 5 The White House (2002a) *The National Security Strategy of the United States of America* (Washington, DC), p. ii.
- 6 See DUPI (1999), pp. 25-26.
- 7 On the general and customary character of the prohibition, see DUPI (1999), pp. 81-84.
- 8 Security Council authorisation to coalitions of states has become the relevant form of collective military action, since forces have never been made available to the Council as envisaged in Article 43 UN Charter, see DUPI (1999), pp. 58-60.
- 9 For an elaboration of this point see DUPI (1999), pp. 23-25.
- 10 Fixdal, Mona and Dan Smith (1998) "Humanitarian Intervention and Just War", *Mershon International Studies Review*, No. 42, pp. 283-312.
- 11 ICISS (2001), p. 32.
- 12 Annan, Kofi (2003) *The Secretary-General Address to the General Assembly, New York, 23 September*; United Nations (2005) *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, A/59/2005*, 21 March, para. 13.
- 13 Daalder, Ivo H. (2003) "The Use of Force in a Changing World - US and European Perspectives", *Leiden Journal of International Law*, Vol. 16, pp. 171-180; Feinstein, Lee and Anne-Marie Slaughter (2004) "A Duty to Prevent", *Foreign Affairs*, Vol. 83, No. 1 (January/February), pp. 136-150; Glennon, Michael J. (2002) "How War Left the Law Behind", *The New York Times*, 21

- November, p. A33; Valasek, Tomas (2003) "New Threats, New Rules. Revising the Law of War", *World Policy Journal*, Vol. 20, No 1 (Spring), pp. 17-24.
- 14 ICISS (2001), p. vii. See also United Nations (2005).
 - 15 See DUPI (1999), pp. 111-120.
 - 16 European Union (2003) *A Secure Europe in a Better World: A European Security Strategy* (Brussels: The European Council); United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations); The White House (2002a) *The National Security Strategy of the United States of America* (Washington, DC: September).
 - 17 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 164.
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 - 19 Al Qaida has been held responsible for planning and carrying out terrorist attacks in Afghanistan, Indonesia, Kenya, Morocco, Pakistan, Philippines, Saudi Arabia, Singapore, Somalia, Spain, Tanzania, Tunisia, the USA, and Yemen. See Schneckener, U. (2004), p. 15.
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 - 21 Spyer, Jonathan (2004) "The Al-Qa'ida network and weapons of mass destruction", *Middle East Review of International Affairs*, Vol. 8, No. 3 (September), p. 33.
 - 22 Dalgaard-Nielsen, Anja (2004) "Hvordan Vesten slog Al-Qaeda - og forærede den internationale terrorisme en sejr i første runde", *DIIS Brief*, September (Copenhagen: Danish Institute for International Studies).
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 - 24 Spyer, J. (2004); Staan, J. (2004), pp. 26-27.
 - 25 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 109.
 - 26 US Department of Defense (2003) *Annual Report to Congress (Vol. 1)* (Washington, DC: Office of Counterproliferation and Chemical and Biological Defence Programs), p. 5.
 - 27 Lindstrom, Gustav (2004) "Protecting the European homeland: The CBR dimension", *Chaillot Paper*, No. 69 (Paris: Institute for Security Studies, European Union), pp. 11-13.
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- 32 For this fear see Lyman, Princeton N. and J. Stephen Morrison (2004) "The Terrorist Threat in Africa", *Foreign Affairs*, Vol. 83, No. 1 (January/ February), p. 75.
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- 37 The nineteen core partners are: Australia, Britain, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Spain, Singapore, Thailand, Turkey and the US. See Gertz, Bill (2004) "Fight on WMD boasts global backing", *The Washington Times*, 23 December.
- 38 United Nations (2005), para. 100.
- 39 U.S. Department of Energy (2004) *Global Threat Reduction Initiative*, Secretary of Energy Spencer Abraham, Vienna, 26 May.
- 40 Cortright, D., G. Lopez, A. Millar and L. Gerber (2004), p. 8.
- 41 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 135; Staun, Jørgen (2005) "Nuklear terror - en trusselsagenda", *DIIS Report*, No. 4 (Copenhagen: Danish Institute for International Studies), pp. 29-31.

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- 53 The White House (2002a), p. 6.
- 54 European Union (2003), pp. 9, 11.
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- 61 Bush, George W. (2002) *Remarks by the President at 2002 Graduation Exercise of the United States Military Academy, West Point, New York* (The White House, Office of the Press Secretary, June 1); The White House (2002a), p. 15.
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- 98 Associated Press (2004).
- 99 Cf. Bowett, Derek W. (1958) *Self-Defence in International Law* (Manchester: Manchester University Press), pp. 4 et seq.
- 100 Cf. Jennings, R. Y. (1938) “The Caroline and McLeod Cases”, *American Journal of International Relations*, Vol. 32, p. 82: “It was in the *Caroline Case* that self-defence was changed from a political excuse to a legal doctrine”. See also Shaw, Malcolm N. (2003) *International Law*, 5th ed. (Cambridge: Cambridge University Press), p. 1024.
- 101 For a detailed account, see Jennings, R. Y. (1938), pp. 82 et seq.
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- 103 Lord Ashburton’s letter of 28 July 1842, see Jennings, R. Y. (1938), pp. 89-91.
- 104 Webster’s letter of 6 August 1842, see Jennings, R. Y. (1938), p. 91.
- 105 Kelsen, Hans (1951) *The Law of The United Nations*, 2nd impr. (London: Stevens & Sons), p. 791; Bowett, D. W. (1958), p. 133.
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- 107 Cf. among others Bowett (1958), pp. 188-189. On the contrary, Brownlie, Ian (1963) *International Law and the Use of Force by States* (Oxford: Clarendon Press), p. 274, argues that Article 51 broadly reflects the status of customary international law in 1945.
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- 109 Cf. The International Court of Justice, ICJ in ICJ Reports (1949) *Corfu Channel Case*, p. 35; ICJ Reports (1986), *Military and Paramilitary Activities In and Against Nicaragua*, paras. 210-211 and 248-249. See also Brownlie, I. (1963), p. 265; Franck, T. M. (2002), pp. 48 and 131-132.
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- 112 Clearly, the right of self-defence does not terminate simply because the Security Council takes some enforcement measures under Chapter VII UN Charter, cf. Cassese (2001), p. 305; Franck (2001), p. 841. This is confirmed by Security Council Resolution 1373 (2001) in which the Security Council, following 11 September 2001, adopted under Chapter VII a comprehensive

- regime of measures to combat international terrorism, while affirming the (continuing) right of self-defence of the USA.
- 113 Cf. ICJ Reports (1986), para. 235.
- 114 Cf. ICJ Reports (1986), p. 14, para. 176.
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- 116 Quoted from Jennings, R. Y. (1938), p. 89.
- 117 Cf. ICJ Reports (1986), para. 176.
- 118 Cf. ICJ Reports (1996), paras. 74 and 95; Dinstein, Y. (2001), p. 195.
- 119 Cf. ICJ Reports (1986), paras. 195 and 211.
- 120 ICJ Reports (1986), Merits, para. 191. Jf. ICJ Reports (2003), para. 51.
- 121 ICJ Reports (1986), Merits, para. 194.
- 122 ICJ Reports (1986), Merits, para. 194. This view has been criticised by, among others, Dinstein, Y. (2001), pp. 175-176.
- 123 Cf. also Gray, C. (2004) *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press), p. 146, finding that the distinction is “one of degree not of kind”.
- 124 ICJ Reports (1986), para. 231; ICJ Reports (2003), para. 64; Cf. Dinstein (2001), pp. 182 and 203; Gray, C. (2004), pp. 147-148.
- 125 ICJ Reports (2003), para. 72.
- 126 Cf. Dinstein, Y. (2001), p. 174.
- 127 This is criticised by many scholars on legal-political grounds, e.g. Randelshofer, Albrecht (2002) “Article 51” in Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, 2nd ed. (Oxford: University Press), pp. 792-793; Franck, T. M. (2002), p. 110.
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- 133 ICJ Reports (2003), paras. 51-62 (although ultimately rejecting the US response against Iran as unlawful in the absence of evidence that Iran was, indeed, responsible for the attack). Gray, C. (2004) pp. 118-119, considers it doubtful that an attack on a merchant ship abroad could trigger the right of self-defence.
- 134 Security Council Resolution 731 (1992), adopted unanimously.

- 135 See Bowett, D. W. (1958), pp. 87-105 (lawful); Dinstein, Y. (2001), pp. 176-181 and 203-207 (lawful); Harhoff, Frederik (2003) "Krigens folkeret" in O. Espersen, F. Harhoff and O. Spiermann *Folkeret* (Copenhagen: Christian Ejlers' Forlag, pp. 271-300), pp. 276-277 (lawful); Franck, T. M. (2002), p. 96 (lawful or at least legitimate); Cassese, A. (2001), pp. 315-316 (lawful, but only to save nationals); Gray, C. (2004), pp. 126-129 (unlawful, but legitimate if limited to rescue purposes); Brownlie, I. 1963, p. 433 (lawfulness "very doubtful").
- 136 ICJ Reports (1986), para. 195.
- 137 ICJ Reports (1986), para. 195.
- 138 According to Gray, C. (2003) "The Use of Force and the International Legal Order", in Malcolm D. Evans (ed.) *International Law* (Oxford: Oxford University Press), p. 602 the formula "clearly requires a significant degree of government involvement". For support of the Court's approach, see Cassese, A. (2001), p. 311; Brownlie, Ian (2003) *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press), p. 700.
- 139 Dissenting Opinion of Judge Sir Robert Jennings, ICJ Reports (1986), p. 543. In approval Dinstein, Y. (2001), p. 182.
- 140 The International Court of Justice has held that the Declaration is an expression of customary international law, cf. ICJ Reports (1986), paras. 188 and 191. This view is supported by Security Council Resolution 748 on international terrorism sponsored by Libya (adopted 1992, with 10 votes to none, 5 abstentions), reaffirming the position of the 1970 Declaration as being in accordance with Article 2(4).
- 141 See Gray, C. (2004), p. 113. For a somewhat different assessment, see Franck, T. M. (2002), pp 57 et seq. Most recently, the International Court of Justice, in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* (ICJ Reports 2004), in reply to Israel's claim that its construction of a "wall" on the territory of the West Bank was an act of self-defence against terrorist attacks, held that since the terrorist threat against Israel originated from occupied territory, reliance on self-defence was in any event excluded (para. 139).
- 142 See e.g. Security Council Resolution 262 (1968) on Israel-Lebanon - Israel condemned unanimously, Lebanon entitled to redress; Security Council Resolution 270 (1969) on Israel-Lebanon - Israel condemned without a vote for "military reprisals"; Security Council Resolution 425 (1978) on Israel-Lebanon - calling for Israel to cease military action and withdraw, with 12 votes, Czechoslovakia and USSR abstaining; Security Council Resolution 509 (1982) on Israel-Lebanon - unanimously demanding that Israel withdraw; Security Council Resolution 573 (1985) on Israel-Tunesia - Israel condemned by 14 votes, the USA abstaining, for "armed aggression", Tunisia entitled to reparations. In all these cases, the USA accepted Israel's views in principle, see Gray, C. (2004), pp. 161-162.
- 143 Letter of 14 April 1986 from the American Representative to the Security Council, UN Doc. S/17990.
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- 147 Security Council meeting on 27 June 1993, UN Doc. S/PV.3245. See also Franck, T. M. (2002), p. 94; Gray, C. (2004), p. 162.
- 148 Security Council Resolution 1189 (1998).
- 149 Subsequently, considerable doubt has arisen as to whether the chemical plant destroyed was really a chemical weapons factory, cf. Brownlie, I. (2003), p. 713; Franck, T. M. (2002), p. 96; Gray, C. (2004), p. 163 with footnote 21.
- 150 Letter of 20 August 1998 from the American representative to the Security Council, UN Doc. S/1998/780.
- 151 Cf. Franck, T. M. (2002), pp. 94-96; Gray, C. (2004), p. 163.
- 152 Authorization for Use of Military Force, Joint Resolution of Congress, 18/9 2001, Public Law 107-40, 115 Stat. 224, Section 2 (a): "That the President is authorized to use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons".
- 153 The recognition was reaffirmed in Security Council Resolution 1373 (2001).
- 154 Statement of the North Atlantic Council, 12 September 2001, Press Release 124 (2001). NATO Secretary General, Lord Robertson, subsequently confirmed the invocation of Article 5 referring to conclusive evidence presented by the USA that Al Qaeda, protected by the Taliban, were responsible for the attacks, cf. Statement by NATO Secretary General, Lord Robertson, 2 October 2001, Brussels. Similar statements were made by the Organization of American States (OAS), the Australian-New Zealand-US Security Alliance (ANZUS) and the EU.
- 155 Letter of 7 October 2001 from American Representative to the Security Council, UN Doc. S/2001/946.
- 156 Letter of 7 October 2001 from the British Representative to the Security Council, UN Doc. S/2001/947.
- 157 Brownlie, I. (2003), p. 714 stating in the context of Operation Enduring Freedom: "It is difficult to bring forcible regime change within the concept of self-defence or the principle of self-determination. Would the process of occlusion [of future terrorism] justify a regime of occupation unlimited in time?". See also Gray, C. (2004), p. 190, referring to the traditional view that a violent overthrow of a government is illegal in the absence of Security Council authorisation.
- 158 See Gray, C. (2004), pp. 190-193. In legal terms, the different formal positions of the USA and UK may not be decisive. According to the International Court of Justice, what matters is the likely result of military action, rather than express intent, cf. ICJ Reports (1986), para. 241.

- 159 See Security Council Resolution 1193 (1998), 1214 (1998), 1267 (1999) and 1333 (2000).
- 160 Greenwood, Christopher (2002) "International law and the 'war against terrorism'", *International Affairs*, Vol. 78, No. 2 (April), pp. 311-314.
- 161 Cassese, A. (2001), p. 311.
- 162 Franck, T. M. (2002), pp. 64-68 and 96.
- 163 The Security Council had repeatedly condemned the Taliban regime for continuing to provide a safe haven and training to Al Qaeda, Security Council Resolution 1193 (1998), 1214 (1998), 1267 (1999) and 1333 (2000).
- 164 Cf. Franck, T. M. (2001), pp. 840-841; Ratner, Steven R. (2002) "*Jus ad Bellum and Jus in Bello* After September 11", *American Journal of International Law*, Vol. 96, No. 4, p. 906.
- 165 During the Security Council meeting on 12 September 2001, adopting Resolution 1368, only the statement by the American representative may contribute to the interpretation of this passage. Mr Cunningham stated: "We will make no distinction between the terrorists who committed these acts and those who harbour them", UN Doc. S/PV.4370, pp. 7-8.
- 166 Although the host State may not be complicit in the terrorist attack in terms of self-defence, it may be held legally responsible if it has not exercised due diligence in preventing such acts contrary to the rights of other states, cf. ICJ Reports (1949), p. 22; Dinstein, Y. (2001), pp. 214-215; Crawford, James (2002) *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press), p. 82 (concerning Art. 2 of *International Law Commission's Articles on State Responsibility*).
- 167 Brownlie, I. (1963), pp. 278-279; Gray, C. (2003), p. 604.
- 168 Prior to September 11th, 2001 the view has been defended by, among others, Bowett, D. W. (1958), p. 64: "this extended jurisdiction over aliens committing acts abroad detrimental to a state's independence and security is not only reflected in the actual practice of States, but also based on the principle of self-defence"; Dinstein, Y. (2001), pp. 192 and 213-218, labelling this kind of self-defence "extraterritorial law enforcement".
- 169 Cf. the traditional concept applied by, among others, Brownlie, I. (1963), pp. 278-279; Cassese, A. (2001), pp. 311 et seq, and (implicitly) also by the International Court of Justice in the *Nicaragua Case*, ICJ Reports (1986), para. 195.
- 170 Cf. also Jennings, R.Y. (1938), pp. 82 et seq; Bowett, D.W. (1958), pp. 55 et seq; Dinstein, Y. (2001), p. 218 et seq.
- 171 See Gray, C. (2004), pp. 115-117; Franck, T. M. (2002), pp. 63-64
- 172 Security Council Resolution 731 (1992), adopted unanimously.
- 173 ICJ Reports (2004), para. 139. See also Brownlie, I. (2003), p. 713.
- 174 See Gray, C. (2004), pp. 171-172
- 175 Greenwood, Christopher (2003) "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq", *San Diego International Law Journal*, Vol. 4, pp. 17-18; Franck, T. M. (2001), p. 840.

- 176 Dinstein, Y. (2001), p. 217.
- 177 Dinstein, Y. (2001), p. 220; Bowett, D. W. (1958), p. 60.
- 178 Dinstein, Y. (2001), p. 209.
- 179 Security Council Resolution 661 (1990).
- 180 The legal basis of Operation Desert Storm was not collective self-defence, but the specific authorisation for the use of force provided by the Security Council in Security Council Resolution 678 (1990).
- 181 Cf. for a critical view Cassese (2001), p. 305-306; Gray, C. (2004), pp. 121-126.
- 182 ICJ Reports (1986), para. 232.
- 183 ICJ Reports (2003), Merits, para. 51.
- 184 This fact has been criticised by many scholars on legal-political grounds, cf. e.g. Franck, T. M. (2002), p. 110, holding that the gap between law and justice may become so wide as to erode the legitimacy of the legal order.
- 185 General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Annex, adopted by consensus on 24 October 1970.
- 186 ICJ Reports (1986), para. 249.
- 187 International Law Commission Articles on State Responsibility, Article 50(1): "Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations", cf. Crawford, J. (2002), pp. 288-289.
- 188 See Bowett, D. W. (1958), p. 13; Brownlie, I. (1963), p. 281 with further references; cf. also (but not in agreement) Dinstein, Y. (2001), p. 198.
- 189 See notably UN Security Council Resolution 106 (1955), 111 (1956), 171 (1962), 188 (1964), 262 (1968), 270 (1969), 316 (1972), 332 (1973), 573 (1985) and 1322 (2000).
- 190 Even scholars holding that all armed reprisals are prohibited by Article 2(4) admit that the distinction between self-defence and reprisals may sometimes be difficult in practice, Brownlie, I. (1963), p. 282; Gray, C. (2004), p. 122. According to the 1970 *Declaration of Friendly Relations*, the prohibition on the use of force, including forcible reprisals, "shall [not] be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful".
- 191 British Foreign Office report of 25 March 1839, quoted from Jennings, R. Y. (1938), p. 87 (emphasis in original).
- 192 Greenwood, C. (2003), p. 23; Dinstein, Y. (2001), pp. 199-200 and 220; O'Connell, Mary E. (2002): "The Myth of Preemptive Self-Defense", *ASIL Task Force Papers*. American Society of International Law, Task Force on Terrorism, August 2002, p. 9.
- 193 Dinstein, Y. (2001), pp. 198 and 220; O'Connell, M. E. (2002), p. 9.

- 194 Cf. Skubiszewski, Krzysztof Jan (1968) "Use of Force by States. Collective Security. Law of War and Neutrality", in Max Sørensen (ed) *Manual of Public International Law* (London: Macmillan), p. 753; Dinstein, Y. (2001), p. 198.
- 195 Unless the original attack – or a series of attacks – has such scale and effects that an all-out war could be justified as a necessary and proportionate means of self-defence, see Dinstein, Y. (2001), pp. 207 et seq.
- 196 Dinstein, Y. (2001), pp. 199-200, labelling this form of self-defence "defensive armed reprisals", writes that: "To be defensive, and therefore lawful, armed reprisals must be future oriented, and not limited to a desire to punish past transgressions. In fine, the issue is whether the unlawful use of force by the other side is likely to repeat itself. The goal of defensive armed reprisals is to "induce a delinquent to abide by the law in the future", and hence they have a deterrent function". For a similar view see Schachter, Oscar (1984) "The right of States to Use Armed Force", *Michigan Law Review*, Vol. 82, p. 1638; Tucker, R. W. (1972) "Reprisals and Self-Defense: The Customary Law", *American Journal of International Law*, Vol. 66, p. 591; Skubiszewski, K. J. (1968), p. 754.
- 197 Dinstein, Y. (2001), pp.197-198, requiring as imperative "some symmetry or approximation between the dimensions of the lawful counter-force and the original (unlawful) use of force"; Skubiszewski, K. J. (1968), p. 753.
- 198 Although the Court in both cases rejected US claims of self-defence on the facts. In the *Oil Platforms Case*, three judges explicitly labelled the action taken as unlawful reprisals, see Gray, C. (2004), p. 123, with footnote 113.
- 199 ICJ Reports (1986), para. 237.
- 200 ICJ Reports (2003), para. 76.
- 201 ICJ Reports (1986), para. 237; ICJ Reports (2003), para. 77.
- 202 ICJ Reports (2003), paras. 74-76.
- 203 Dinstein, Y. (2001), pp. 213-221, labelling this form of self-defence "extraterritorial law enforcement".
- 204 See e.g. Resolution 270 (1969) on Israel - Lebanon - Israel condemned without a vote for "military reprisals". For further examples of condemnation, see above footnote 50. After September 11th, 2001, Some of Israel's forcible actions in response to terrorism have continued to be criticised by many states as disproportionate and retaliatory, cf. Gray, C. (2004), pp. 172-175.
- 205 Dinstein, Y. (2001), pp. 194-203 and 213-221. As regards the action against Libya in 1986, Dinstein, Y. (2001), p. 201, notes with approval that: "In substance, these were acts of defensive armed reprisals".
- 206 Gray, C. (2004), pp. 163-164; Cassese, A. (2001), pp. 306-307 regards the instances of US action as an abuse of self-defence, since these actions had "strong punitive connotations and also pursued a primarily deterrent purpose". Similarly, as regards the US action against Iraq in 1993, Randelshofer, A. (2002), p. 794.
- 207 Franck, T. M. (2002), pp. 64-68 and 96.

- 208 Letter of 7 October 2001 from the American Representative to the Security Council, UN Doc. S/2001/946.
- 209 Letter of 7 October 2001 from the British Representative to the Security Council, UN Doc. S/2001/947.
- 210 Bowett, D. W. (1958), pp. 188-189; Franck, T. M. (2002), p. 97. For a sceptical view, see Brownlie, I. (1963), p. 274.
- 211 As a matter of fact, in the *Caroline Case* the necessity of anticipatory self-defence was based on previous attacks as evidence of an imminent threat of further attacks (see above Section 1.1), but the Caroline precedent has been recognised as justifying also purely anticipatory self-defence, even in the absence of previous attacks.
- 212 French version: “où un Membre [...] est l’objet d’une agression armée”; Spanish version: “in caso de ataque armado”.
- 213 Bowett, D. W. (1958), pp. 187-189; Goodrich, Leland M., Edvard Hambro and Anne Patricia Simons (1969) *Charter of The United Nations* (New York: Columbia University Press), p. 301; Shaw, M. N. (2003), pp. 1025-1026; Greenwood, C. (2002), p. 312; Franck, T. M. (2002), p. 50; O’Connell, M. E. (2002), p. 8. For further references, see Cassese, A. (2001), p. 308 with footnote 18 (p. 448).
- 214 UNCIO Documents, Vol. 6, p. 459.
- 215 Bowett, D. W. (1958), p. 187-89; cf. also Shaw, M. N. (2003), p. 1026.
- 216 Cf. e.g. Brownlie, I. (1963), pp. 272-275; Gray, C. (2004), p. 98; Randalshofer, A. (2002), pp. 790 et seq. For further references, see Cassese (2001), p. 308 with footnote 20. Dinstein, while rejecting anticipatory self-defence as incompatible with Article 51 (p. 166), includes under Article 51 instances where a state “has committed itself to an armed attack in an ostensibly irrevocable way”, labelling this “interceptive self-defence”, cf. Dinstein, Y. (2001), pp. 169-173. It is doubtful whether this concept is much different from that of anticipatory self-defence, cf. Cassese, A. (2001), p. 309; Greenwood, C. (2003), pp. 14-15.
- 217 Bowett, D. W. (1958), p. 184, however, finds no explanation why the committee preparing the provision on self-defence ultimately inserted the additional clause “if an armed attack occurs”, and thus considers it “curious”.
- 218 Cf. Franck, T. M. (2002), p. 50, referring to statements by US delegates during delegation meetings in May 1945, shows that the initiative to restrict the right of self-defence to cases where “an armed attack occurs” was led by the US Delegation in San Francisco with the deliberate purpose of ruling out a right of anticipatory self-defence. On this basis, Franck concludes that: “it is beyond dispute that the negotiators deliberately closed the door on any claim of “anticipatory self-defence”, a posture soon to become logically indefensible...”. See also Dinstein, Y. (2001), p. 166.
- 219 Bowett, D. W. (1958), pp. 191-192; cf. also Franck, T. M. (2002), pp. 50 and 98; Higgins, Rosalyn (1995) *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press), p. 242, arguing that the inclusion of imminent threats of attack is “the only realistic interpretation of the contemporary right of self-defence”.

- 220 United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations), para. 188.
- 221 United Nations (2005) *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, A/59/2005*, 21 March, para. 124.
- 222 Cassese, A. (2001), pp. 309-310.
- 223 Shaw, M. N. (2003), pp. 1029-1030; Gray, C. (2004), pp. 130-133.
- 224 Greenwood, C. (2003), pp. 13-14; Franck, T. M. (2002), p. 102.
- 225 See the statement by Israel's Foreign Minister in the Security Council on 6 June 1967, S/PV.1348, p. 15.
- 226 See the statement by Israel's Foreign Minister in the Security Council on 6 June 1967, S/PV.1348, pp. 14-19.
- 227 Security Council Resolution 233 (1967); Security Council Resolution 234 (1967); Security Council Res 236 (1967).
- 228 On the Six Day War see Franck, T. M. (2002), pp. 101-105; Gray, C. (2004), pp. 130-131, Dinstein, Y. (2001), p. 173.
- 229 According to Cassese, A. (2001), p. 309, the motivation for non-condemnation was, presumably, chiefly political.
- 230 See Gray, C. (2004), pp. 97 and 131.
- 231 Security Council Resolution 487 (1981).
- 232 Cassese, A. (2001), pp. 309-310; Gray, C. (2004), pp. 130-133; Shaw, M. N. (2003), pp. 1025-1030; Franck, T. M. (2002), pp. 97-108.
- 233 ICJ Reports (1986), Merits, para. 194.
- 234 Cf. Franck, T. M. (2002), p. 107; Cassese, A. (2001), pp. 310-311, finds that: "In the case of anticipatory self-defence, it is more judicious to consider such action as legally prohibited, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and community will eventually condone them or mete out lenient condemnation".
- 235 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 188-190. See also Greenwood, C. (2003), pp. 15-16; Bothe, Michael (2003) "Terrorism and the Legality of Pre-emptive Force", *European Journal of International Law*, 2003, Vol. 14, No. 2, Section 3.
- 236 Greenwood, C. (2003), p. 16, however, seems to indicate that this might suffice to warrant anticipatory self-defence, requiring as a minimum "evidence not only of the possession of weapons but also of an intention to use them".
- 237 International Military Tribunal (Nuremberg) Judgment of 1 October 1946, p. 205.
- 238 Brownlie, I. (2003), p. 702; Franck, T. M. (2002), p. 98; Gray (2004), pp. 171 and 175-79; Dinstein, Y. (2001), pp. 165-169; Greenwood, C. (2003), p. 15; O'Connell, M. E. (2002), p. 5.

- 239 See Franck, T. M. (2002), pp. 99-101; Gray, C. (2004), p. 131.
- 240 See the statement by Israel's representative at the Security Council meeting 12 June 1981, S/PV.2280, p. 11.
- 241 Security Council Resolution 487 (1981).
- 242 Cf. Cassese, A. (2001), p. 309 with reference. See also Gray, C. (2004), p. 133; Franck, T. M. (2002), pp. 105-107.
- 243 Prior to the war, the US had referred to both self-defence and Security Council resolutions as a legal basis, cf. Gray, C. (2004), pp. 181-184. Formally, however, the US letter to the Security Council of 20 March 2003, UN Doc. S/2003/351, while referring also to military actions as "necessary steps to defend the United States and the international community from the threat posed by Iraq", mainly justified military action by reference to the authority of the Security Council.
- 244 The White House (2002a) *The National Security Strategy of the United States of America*, September 2002.
- 245 The White House (2002a) pp. 13-15 (Section 5 entitled: "Prevent Our Enemies from Threatening Us, Our Allies And Our Friends with Weapons of Mass Destruction").
- 246 The White House (2002a), pp. 15-16 (Section 5 entitled: "Prevent Our Enemies from Threatening Us, Our Allies And Our Friends with Weapons of Mass Destruction").
- 247 Cf. Freedman, Lawrence (2003) "Prevention, Not Preemption", *The Washington Quarterly*, Vol. 26, No. 2 (Spring), p. 106.
- 248 The White House (2002a), pp. 13-15.
- 249 Brownlie, I. (2003), p. 702; Farer, T. J. (2002) "Beyond the Charter Frame: Unilateralism or Condominium?" *American Journal of International Law*, Vol. 96 (2002), pp. 359-364; Gray, C. (2004), pp. 171 and 179; Bothe, M. (2003), Section 3; Greenwood, C. (2003), p. 15.
- 250 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 188, cf. paras. 189-190.
- 251 Gray, C. (2004), pp. 175-79 and 194.
- 252 See e.g. the statements by Minister of Defence, Robert Hill, in a memorial oration on 28 November 2002 at the University of Adelaide, pp. 6-8.
- 253 Cf. the statement by the Secretary of State for Foreign and Commonwealth Affairs in response to the second report of the Foreign Affairs Committee, Session 2002-2003, Cm 5793, p. 8 (cited from Gray, C. (2004), p. 179): "There is already scope under international law to take into account all the circumstances, including the likelihood, nature and seriousness of any attack, in determining whether any threat is imminent (...)".
- 254 See e.g. Russia's letter to the Security Council on 11 September 2002, S/2002/1012.
- 255 Under current international law, a state victim of a purely preventive attack is therefore entitled to respond by force in the exercise of its right of self-defence under Article 51.

- 256 See further Chapter 1 above.
- 257 DUPI (1999) *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute for International Studies), pp. 57-61.
- 258 The principle of non-intervention in the internal affairs of a state, “matters which are essentially within the domestic jurisdiction of any state”, cf. Article 2(7) UN Charter, does not limit the competence of the Security Council to take enforcement action under Chapter VII, cf. expressly Article 2(7) i.f.
- 259 Kelsen, Hans (1951) *The Law of the United Nations*, 2nd impr. (London: Stevens & Son), p. 727; Sarooshi, Danesh (1999) *The United Nations and the Development of Collective Security* (Oxford: Oxford University Press), p. 106. Kelsen, H. (1951), pp. 728-729, footnote 7, refers to proposals made at Dumbarton Oaks to limit the freedom of the Security Council by setting up criteria for automatic action, supplemented by discretionary action in other fields. In the end, however, none of these proposals were adopted.
- 260 The General Assembly may, however, ask the Court for an advisory opinion on the legality of Security Council action, cf. Article 96(1) UN Charter, or the Court may be called upon to rule on this issue in the context of an ordinary case between states. See further DUPI (1999), pp. 72-73.
- 261 As regards military threats, there is thus no need of a dynamic interpretation of Article 39, such as has been the case with regard to internal conflicts and humanitarian crises within a state, cf. DUPI (1999), pp. 62-68.
- 262 Kelsen, H. (1951), pp. 732-737.
- 263 Kelsen, H. (1951), pp. 19 and 731.
- 264 See further DUPI (1999), p. 62.
- 265 Kelsen (1951), p. 731: “The Security Council may very well decide that a situation which has not the character of a conflict between two states is a threat to international peace and take enforcement action against a state or a group of people involved in this situation, though the state is not in conflict with another state and the group has not the character of a state”. See also Kelsen (1951), p. 19.
- 266 See also Goodrich, Leland M., Edvard Hambro and Anne Patricia Simons (1969) *Charter of the United Nations* (New York: Columbia University Press), pp. 295-296 referring to early debates over the distinction.
- 267 Sarooshi, D. (1999), p. 106
- 268 The Security Council has only twice authorised the use of force against external threats: against North Korea in 1950 (Security Council Resolutions 82 and 83) and Iraq in 1990 (Security Council Resolution 678). In these cases an armed attack had already occurred, and the Security Council therefore referred to a “breach of the peace”.
- 269 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations), paras. 183 and 193-94; United Nations (2005) *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, A/59/2005*, 21 March, para. 125.

- 270 United Nations (2005), para. 23.
- 271 Cf. also General Assembly Resolution 2625 (1970) and 3314 (1974) mentioned earlier in Chapter 3.
- 272 The International Convention for the Suppression of the Financing of Terrorism (1999) in Article 2(1), *litra b*) defines terrorism as an “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act”. The Security Council in Resolution 1566 (2004), para. 3, refers to “criminal acts, including against civilians, committed with the intent to cause death or serious bodily harm, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act”; The United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 164, defines terrorism as “any action...that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act”. United Nations (2005), para. 91, adopts this definition.
- 273 In the United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 163, it is recommended that the General Assembly should rapidly complete negotiations on a comprehensive convention on terrorism. United Nations (2005), para. 84, adopts this recommendation.
- 274 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 159.
- 275 The United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 150, urges states who have not yet done so to adhere to all twelve conventions and protocols. Cf. also Security Council Resolution 1377 (2001).
- 276 See e.g. General Assembly Resolution 49/60 Declaration on Measures to Eliminate International Terrorism (1994). Security Council measures on counter-terrorism will be referred to in Section 3.2 below.
- 277 Cf. among others Security Council Resolutions 1526, 1530, 1535 and 1566 (2004).
- 278 The USA responded to the attacks by the use of force, cf. Chapter 3.
- 279 The USA and its allies responded by force, initiating *Operation Enduring Freedom* on 7 October 2001. See Chapter 3.
- 280 ICJ Reports (1986), *Military and Paramilitary Activities In and Against Nicaragua*, p. 14 et seq, para. 269.
- 281 The predecessor of these two conventions was the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (1925), signed at Geneva on 17 June 1925.

- 282 Annex to General Assembly Resolution 2826 (XXVI) (1971). Open for signature on 10 April 1972.
- 283 Appendix I to General Assembly 47th session, suppl. 27 = A/47/27, adopted and open for signature on 13 January 1993.
- 284 Cf. also the Security Council in Security Council Resolution 687 (1991).
- 285 Biological Weapons Convention 1972, Article XIII; Chemical Weapons Convention 1993, Article XVI.
- 286 The Non-Proliferation Treaty was supplemented in 1996 by the *Comprehensive Nuclear Test Ban Treaty*. Furthermore, numerous regional treaties have been adopted in order to limit 1) the acquisition, manufacturing and possession of nuclear weapons; 2) the deployment of nuclear weapons and 3) the testing of nuclear weapons, see further ICJ Reports (1996), *The Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, para. 58.
- 287 Annex to General Assembly Resolution 2373 (XXII) (1968). Open for signature 1 July 1968.
- 288 ICJ Reports (1996), paras. 98-103.
- 289 ICJ Reports (1996), para. 98.
- 290 Cf. Security Council Resolution 984 (1995) urging states to implement Nuclear Non-Proliferation Treaty, Article VI. See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 120.
- 291 General Assembly Resolution 1653 (XVI) (1961), and repeatedly confirmed since then, concerning the illegality under international law of the use of nuclear weapons; however, numerous states, including nuclear-weapon states, have not supported this view, cf. ICJ, ICJ Reports (1996), para. 68.
- 292 ICJ Reports (1996), paras. 62-63 and 73. The Court held that although the Nuclear Non-Proliferation Treaty and other treaties on nuclear weapons “point to an increasing concern in the international community with these weapons (and) could be seen as foreshadowing a future general prohibition of the use of such weapons...they do not constitute such a prohibition by themselves”. However, a tiny majority of the Court (7-7 with the President’s casting vote) found that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the rules and principles of humanitarian law. However, in view of the current state of international law, and of the facts at its disposal, the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme situation of self-defence, in which the very survival of a state is at stake, paras. 95-97.
- 293 NPT (1968), Article X.
- 294 Cf. the Security Council in Security Council Resolution 984 (1995). See also United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 124 and 134, recommending that states not party to Nuclear Non-Proliferation Treaty should commit to non-proliferation and disarmament; and that withdrawal from the Nuclear Non-Proliferation Treaty should prompt immediate verification of compliance with Nuclear Non-Proliferation Treaty obligations, if necessary mandated by the Security Council.

- 295 Cf. Security Council Resolutions 660, 661 and 678 (1990), the latter authorising the use of force under Chapter VII.
- 296 Iraq had used chemical weapons during its 1980-88 war with Iran and had also during the 1980s used chemical weapons within Iraq to quell the Kurdish insurgency, killing some 100,000 Kurds altogether.
- 297 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 184 and 204-205.
- 298 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 206.
- 299 ICISS (2001) *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center), p. 32; United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 207. Whereas The ICISS deals only with criteria of humanitarian intervention, the criteria defined by the High-level Panel in *A More secure world* applies to all kinds of threats to international peace and security, external as well as internal, and the five criteria proposed are identical to those defined by the ICISS (the latter also defines a crucial sixth criterion: *right authority*, which, however, is not relevant in the present context of Security Council action, but see Chapter 5).
- 300 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 207.
- 301 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 208-209.
- 302 United Nations (2005), para. 126. Such a resolution would entail a political commitment made by Council members in the name of the Council, but, by definition, would not be legally binding on the Council, which is only bound to act in accordance with the purposes and principles of the UN Charter (Article 24(2)).
- 303 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 207. Cf. also DUPI, pp. 106-107; ICISS (2001), pp. 32-34.
- 304 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 190.
- 305 ICISS (2001), p. 32.
- 306 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 206.
- 307 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 194.
- 308 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 190.
- 309 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 190.
- 310 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 194.
- 311 Cf. the International Court of Justice, ICJ Reports (1949) *Corfu Channel*

- Case, p. 35; DUPI (1999) *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs), pp. 80-84.
- 312 Crawford, James (2002) *The International Law Commission's Articles on State Responsibility*, (Cambridge: Cambridge University Press), p. 160. See also the International Court of Justice in the case concerning the ICJ Reports (1997) *Gabčíkovo-Nagymaros Project*, para. 51, where the Court also held that the defence of necessity is available only "on an exceptional basis". The International Law Commission Special Rapporteur on state responsibility, James Crawford, has characterised necessity as standing "at the outer edge of the tolerance of international law for otherwise wrongful acts", and there was, accordingly, in the International Law Commission a clear consensus to provide the "narrowest possible definition of necessity", Cf. Report of the International Law Commission on the Work of its 51st Session (1999), A/54/10, paras. 378 and 388 respectively. Thus, the defense of necessity is "subject to strict limitations to safeguard against possible abuse", cf. Crawford, J. (2002), p. 178.
- 313 Cf. ICJ Reports (1997), para. 51.
- 314 Crawford, J. (2002), p. 183.
- 315 Crawford, J. (2002), pp. 183-184.
- 316 The International Law Commission Special Rapporteur, James Crawford, and apparently the International Law Commission itself, takes the position that necessity can never be invoked to justify the use of force, the legality of which is regulated by the primary norms of international law, cf. Crawford (2002), pp. 185-186; Report of the International Commission on the work of its 51st Session (1999), paras. 375, 384 and 389. See also DUPI (1999), p. 86; Rytter, Jens Elo (2001) "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond", *New Journal of International Law*, Vol. 70, pp. 133-136. For a different view, Spiermann, Ole (2002) "Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens", *New Journal of International Law*, Vol. 71, pp. 523-543.
- 317 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), 2004, para. 191.
- 318 The "Bush doctrine" apparently warns other nations not to take advantage of the US doctrine: "The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression", The White House (2002a) *The National Security Strategy of the United States of America*, September 2002, p. 15.
- 319 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 191.
- 320 The White House (2002a), p. 15: "But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness".

- 321 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 189.
- 322 The White House (2002a), p. 15: “Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option.... Rogue states and terrorists do not seek to attack us using conventional means. Instead, they rely on terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning. ... 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”.
- 323 See Chapter 4, Section 5.
- 324 It should be stressed that the inclusion of the latter three criteria (the Security Council is blocked; preferably an alternative forum of legitimacy; preferably multilateral action) anticipates the discussion in Section 4 below of the legal-political strategy to be pursued with respect to the unauthorised use of preventive force. The relevance of these three criteria presuppose that no claim of a “general right” of unilateral preventive action (expanding the right self-defence) is asserted.
- 325 See DUPI (1999), pp. 106-111; ICISS (2001) *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center), pp. 32-38.
- 326 ICISS (2001), p. 32.
- 327 ICISS (2001), p. 55.
- 328 ICISS (2001), p. 36; DUPI (1999), pp. 110-111.
- 329 ICISS (2001), p. 55.
- 330 Cf. in the same direction ICISS (2001), p. 55.
- 331 DUPI (1999), p. 108.
- 332 ICISS (2001), p. 50, requires that a formal request for authorisation must have been brought before the Council prior to undertaking unauthorised humanitarian intervention.
- 333 The General Assembly may adopt such a declaration under Articles 10-11 of the Charter or under the 1950 *Uniting for Peace* Resolution. A minimum majority of two-thirds of the UN members present is required, cf. Article 18.
- 334 ICISS (2001) (on humanitarian intervention), p. 48: “It is evident that, even in the absence of Security Council endorsement and with the General Assembly’s power only recommendatory, an intervention which took place with the backing of a two thirds vote in the General Assembly would clearly have a powerful moral and political support”. Also p. 53: “Although the General Assembly lacks the power to direct that action be taken, a decision

by the General Assembly in favour of action, if supported by an overwhelming majority of states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position”.

335 ICISS (2001), pp. 48 and 54.

336 ICISS (2001), pp. 53-54.

337 ICISS (2001), pp. 54-55.

338 DUPI (1999), pp. 108-109; ICISS (2001), p. 36.

339 DUPI (1999), p. 108; ICISS (2001), p. 55.

340 See further DUPI (1999), pp. 111-120.

341 Cf. ICISS (2001), p. 49: “there is no better or more appropriate body than the Security Council to deal with military intervention issues for humanitarian purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty.... That was the overwhelming consensus we found in all our consultations around the world”. There is thus no widespread international support for a legal right of unauthorised humanitarian intervention, cf. DUPI (1999), pp. 118-120; ICISS (2001), p. 54.

342 Cf. High-level Panel (2004), para. 191-192: “in 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. Allowing one to so act is to allow all. We do not favour the rewriting or reinterpretation of Article 51”.

343 Cf. as regards the 2002 *National Security Strategy of the United States*; Gray, C. (2004) *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press), pp. 175-179 and 194 (the UK government prefers a flexible concept of anticipatory self-defence/imminent threat).

344 As was shown in Chapter 3, Section 5.4 state practice contains but a few instances of military force, which might arguably be labelled preventive action, none of which, however, set a clear precedent for preventive action as a legal right of self-defence or even as an acceptable or justifiable resort to force.

345 See also Chapter 4, Section 5.4 on legal-political considerations concerning purely preventive self-defence.

346 In the same vein, the International Court of Justice in the *Corfu Channel Case*, ICJ Reports (1949), firmly rejected the UK invocation of a right of forcible intervention in the Corfu Strait to secure evidence for a claim of damages after two British ships had been sunk by Albanian mines in the Corfu Channel (p. 35): “The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses, and such as cannot, whatever be the present defect in international organisation, find a place in international law”.

- 347 As stated by Franck, Thomas M. (2002) *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press), p. 98: “a general relaxation of Article 51’s prohibitions on unilateral war-making to permit unilateral recourse to force whenever a State feels potentially threatened could lead to another *reductio ad absurdum*. The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law”.
- 348 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 191-192.
- 349 Cf. on the the concept of extenuating circumstances DUPI (1999), p. 25; Franck, T. M. (2002), pp. 174-191 (notably pp. 179 and 183-185). In the *Corfu Channel Case*, although it declared that the United Kingdom had violated international law when, following an incident where two British vessels were hit by mines in the Albanian Corfu Channel, the British Navy had intervened in Albanian waters to sweep the mines, the International Court of Justice recognised that “the Albanian Government’s complete failure to carry out its duties after the explosion and the dilatory nature of its diplomatic notes are extenuating circumstances for the action of the United Kingdom Government”. On this basis the Court concluded that the declaration of a violation of the law was “in itself appropriate satisfaction” and refrained from awarding compensation to Albania, ICJ Reports 1949, p. 35.
- 350 For this process, see Knudsen, Tonny B. (2005) *Humanitarian Intervention and International Society: Contemporary Manifestations of an Explosive Doctrine* (London: Routledge).
- 351 This apt description has been taken from Knudsen, T. B. (2005).
- 352 Betts, Richard K. (2003b) “Suicide from Fear of Death?” *Foreign Affairs*, Vol. 83, No. 1 (January/February), p. 35.
- 353 Macfarlane, S. Neil, Carolin J. Thielking and Thomas G. Weiss (2004) “The Responsibility to Protect: is anyone interested in humanitarian intervention?”, *Third World Quarterly*, Vol. 25, No. 5, pp. 977-992; Roth, Kenneth (2004) “The War in Iraq: Justified as Humanitarian Intervention?”, *Kroc Institute Occasional Paper*, No. 25 (Notre Dame, IN: The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame).