

Are the rules for the right to self-defense outdated to address current conflicts like attacks from non-state actors and cyber-attacks?¹

¿Están las reglas del derecho a la legítima defensa obsoletas para solucionar conflictos actuales como ataques de agentes no-estatales y ciberataques?

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Abstract: The latest US-led coalition's attacks against ISIS in Syria raised the question whether states can use defensive force against non-state actors. Two critical incidents had previously triggered the discussion on the importance and consequences of cyber-attacks as a new form of armed attacks. The first one occurred in Estonia in 2007, when the country experienced extensive computer hacking attacks that lasted several weeks. The second incident happened in 2008, during the Georgia–Russia conflict over South Ossetia, when Georgia experienced cyber-attacks similar to those suffered by Estonia in the previous year. Furthermore, on June 21, 2016, the central banks of Indonesia and South Korea were hit by cyber-attacks on their public websites since activist hacking group Anonymous pledged last month to target banks across the world.

The previous incidents have created, once again, public questioning if the rules on the use of force and the right of self-defense established in the United Nations Charter are sufficient and efficient to address these new forms of attacks.

Key words: Self-defense, United Nations, Pre-emptive Self-defense, non-state actors, cyber-attacks

Resumen: Los últimos ataques de la coalición liderada por Estados Unidos en contra de ISIS en Siria plantearon la cuestión de si los Estados pueden usar la autodefensa contra agentes-no-estatales. Dos incidentes críticos ya habían provocado la discusión sobre la importancia y las consecuencias de los ataques cibernéticos como una nueva forma de ataques armados. La primera tuvo lugar en Estonia en 2007, cuando el país experimentó ataques de piratas informáticos por varias semanas. El segundo incidente ocurrió en 2008, durante el conflicto entre Georgia y Rusia por Osetia del Sur, cuando Georgia, experimentó ataques cibernéticos similares a los sufridos por Estonia en el año anterior. Además, el 21 de junio del año 2016 los bancos centrales de Indonesia y Corea del Sur se vieron afectados por los ataques cibernéticos en sus sitios web por parte del grupo activista de hackers denominado "Anónimos".

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Los incidentes mencionados han creado, una vez más, el cuestionamiento público si las normas sobre el uso de la fuerza y el derecho a la legítima defensa establecido en la Carta de las Naciones Unidas son eficientes y eficaces para hacer frente a estas nuevas formas de ataques.

Palabras claves: *Legítima defensa, Naciones Unidas, legítima defensa preventiva, actores no estatales, ciberataques.*

1. Introduction

This essay will explain that the rules on the prohibition of the use of force established in Articles 2(4), 42 and 51 of the United Nations Charter (UNCH) are in fact outdated to address conflicts in the 21st century. About this, it will be demonstrated that what is outdated are the rules about self-defense in cases of armed attacks by non-state actors like, for example, ISIL. The present essay will first develop the general requirements detailed in the United Nations Charter for the use of force in case of an armed attack and how they have been used by nations to address conflicts. In the second section, it will be analyzed the application of the principle of self-defense as the exception to the prohibition of the use of force. The third section will address the consideration of anticipatory self-defense. In the fourth section, I will discuss the shift in development since the 9/11 attacks on the United States of America, especially the doctrine of pre-emptive self-defense proposed by the United States of America. Finally, I will explain how 21st-century terrorist attacks have forced to extend the scope of application of the rules of the United Nations Charter because the traditional understanding of both state actors and armed attack have changed. On the one hand, during the last decade, not only states but also non-state actors have launched attacks from their states to other states. On the other, the traditional understanding of armed attack is not currently supportive of multiple and technological attacks from hackers or non-states actors to states by means different from those who usually destroy physical assets.

2. The general rules of the prohibition of the use of force under the United Nations Charter

In this section, I will address two main issues. The first aspect to analyze is to understand which is the prohibition's scope if it involves the threat of use of force, the use of force or both. In the second term, I will analyze if the prohibition is absolute or relative, that is, if the use of force is allowed or not when is consistent with the purposes of the United Nations Charter.

The general prohibition of the use of force is a treaty-based rule established in the United Nations Charter (from now on "UNCH") and a rule of customary law that has evolved particularly in recent years.² It is a treaty-based rule because it is recognized in the United Nations Charter, but at the same time is accepted as being representative of customary international law in the terms expressed by the International Court of Justice ("ICJ") in the Nicaragua case.³

Article 2(4) of the UNCH express that members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations (UN). The article reflects the idea that all UN members must abstain from the use of force in their international relations and the threat of the use of force against 1) territorial integrity or 2) political independence of any State.

Furthermore, the prohibition of Article 2(4) has two faces, first, to threat the use of force, and second, to the use of force. In this sense, the International Court of Justice (from now on ICJ) in both the *Nicaragua case* and the *Advisory Opinion on the Legality of Nuclear Weapons* concluded that a threat of force is unlawful where the actual use of the force threatened would be itself illegal.⁴ The pronouncement of the ICJ in the *Nicaragua case* is of extreme importance. Regarding the interpretation of Article 2 (4) of the United Nations Charter, it has established that not only the laying of mines in Nicaraguan waters and attacks on Nicaraguan ports and oil installations by United States forces but also the support for the opposition forces (the *Contras*) engaged in forcible struggle against the government, could constitute a use of force. Even more, the army and training of the *Contras* involved an unlawful use of force against Nicaragua.⁵

On the other hand, in the *Advisory Opinion on the Legality of Nuclear Weapons*, the ICJ held that a threat of force is unlawful where the actual use of the force threatened would be itself unlawful, then refusing to find that mere possession of nuclear weapons was an unlawful threat of force.⁶

Until 1970 there was a discussion whether economic coercion was considered a threat of the use of force or not. However, the UN General Assembly Declaration on Friendly Relations of 1970 settled this discussion, and now there is a broad understanding that economic coercion is expressly prohibited.⁷

In the second term, I will now analyze if the prohibition is absolute or relative, that is if the prohibition is total or can be interpreted to allow the use of force for actions according to the

² Olivier Corten, "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate", *The European Journal of International Law* 16, n° 5 (2006): 803.

³ Christine Gray, "The Use of Force and the International Legal Order", in *International Law*, 4th Ed., ed. Malcolm Evans (Oxford: OUP, 2014), 620.

⁴ Gray, "The Use of Force and the International Legal Order", 621.

⁵ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America), 1981 I.C.J., 14 ICJ Reports 1986 (International Court of Justice 1986).

⁶ Gray, "The Use of Force and the International Legal Order", 621.

⁷ Gray, "The Use of Force and the International Legal Order", 621.

purposes of the UNCH. The purposes of the United Nations are detailed in Article 1 of the Charter in order 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, 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. In consequence, what needs to be analyzed is if the use of force is allowed when consistent with the mentioned purposes.

An absolute interpretation can be found in Olivier Corten's research. He has explained that it is necessary to consider articles 2(4) and 51 of the United Nations Charter to obtain a text-oriented interpretation, according to the rules of sections 31 and 32 of the Vienna Convention on the Law of Treaties.⁸ Corten addressed his arguments to understand that, because the United Nations Charter is a treaty itself, it should be governed and interpreted by the rules of the Vienna Convention; especially, the interpreter must apply the rules for interpretation provided in Articles 31 and 31. Following those standards, the Charter should be interpreted in good faith by the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.

In other words, according to the text, the context and the purposes of the Charter previously explained, the use of force is only allowed when is consistent with the United Nations Charter: that is, in the case of self-defense, the major exception to the general prohibition.

On the other hand, a relative interpretation, which is to consider the use of force outside of the scope of the Charter, has remained exceptional even when there is some discussion about the extent of it as it is reflected in cases of use of force in pursuit of self-determination or the use in pursuit of democracy.⁹ There is a minority opinion by D'Amato that the use of force to restore democratic governments is not prohibited by Article 2 (4) of the Charter.¹⁰ However, this view has not been considered by states.

The conclusion of this section is that the prohibition of the use of force relates to both the threat and use; an absolute interpretation of the prohibition seems to be the right one, as it is with the text, context, and purposes of the Charter. Finally, a relative application of the principle should remain under consideration for exceptional discussion and only for the mentioned cases.

The following section will now address the right to self-defense as the primary exception to the general rule of prohibition of the use of force.

⁸ Olivier Corten, "The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate", 813.

⁹ Gray, "The Use of Force and the International Legal Order", 623.

¹⁰ Gray, "The Use of Force and the International Legal Order", 623.

3. The right to self-defense

The main exception to the prohibition of the use of force is established in Article 51 of the United Nations Charter. It expresses that nothing in the 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. Actions 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 Chart to take at any time such action as it deems necessary to maintain or restore international peace and security.¹¹

The scope of the provision is controversial as to understand if the right to self-defense of Article 51 is exhaustive or, on the contrary, there is a wider customary right that goes beyond the right to respond to an armed attack.¹² A restrictive interpretation of the right to self-defense is based on the text of Article 51 of the Charter; as the provision establishes a restriction on the right to self-defense in response to armed attacks, it seems complicated to preserve a wider right, unlimited by the limitations of Article 51. Also, the right of self-defense is in itself an exception to the principle of the use of force, in consequence, it should be analyzed narrowly. A broad interpretation as to anticipatory self-defense and the necessity of imminent attack will be explained in the following section.

The scope of the right to self-defense cannot be found in Article 51. Nevertheless, self-defense is part of the *corpus* of customary international law. It is agreed that it must be necessary and proportionated.¹³ The scope of the right has been recognized in several decisions by the ICJ such as the *Nicaragua case*.¹⁴ The ICJ adopted a restrictive view of the right of self-defense, although it expressly left open the question of the legality of anticipatory self-defense. The Court recognized that a separate customary international law right of self-defense continues to exist alongside Article 51 of the Charter, but concluded that an armed attack was a pre-condition underpinning both sources.¹⁵

Furthermore, the definition of armed attack cannot be found in the UNCH, and it is also a construction of customary international law.¹⁶ The definition traditionally recognizes as armed attack the one performed by a regular army of one state to the territory of another. Nevertheless,

¹¹ United Nations, "Charter of the United Nations."

¹² Gray, "The Use of Force and the International Legal Order", 628.

¹³ Gray, "The Use of Force and the International Legal Order", 628.

¹⁴ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. the United States of America*), 1981 I.C.J., 14 ICJ Reports 1986 (International Court of Justice 1986).

¹⁵ Andrew Garwood-Gowers, "Self-Defence against Terrorism in the Post-9/11 World", *Queensland University of Technology Law & Justice Journal* 4, n° 2 (2004): 3.

¹⁶ Gray, "The Use of Force and the International Legal Order", 628.

the concept extends beyond attacks by regular forces, also covering attacks by armed bands, irregulars, and mercenaries.¹⁷ It is responsible for saying that this interpretation seems to be accurate because it can cover not only attacks from one state to another but also armed attacks from militant groups from one state to another state, armed attacks within the boundaries of a state. Other interpretation would probably be restrictive.

It is clear is that the right to self-defense requires of an armed attack and that the response from the attacked state needs to be necessary and proportionate. However, a question is raised regarding an armed attack: should states wait until the attack is launched, or is there any international rule to prevent the attack in cases of the imminence of use of force? This discussion will be addressed in the next section.

To summarize the previous part, the present essay has provided grounds to acknowledge that it is unquestionable that the right to self-defense is the core exception to the use of force under the provisions of the United Nations Charter. Likewise, it is also evident that both the scope of the right of self-defense and the definition of armed attack are constructions from customary international law and not sourced in treaty-based rules. Finally, it is necessary to remark that the primary concern is to determine whether the right to self-defense requires an attack that is being committed or the right to defend is also applicable in cases of imminent attacks. The latter will be developed in the next segment of this essay.

4. Anticipatory self-defense

In this section, I will highlight the importance of the discussion whether Article 51 of the United Nations Charter provides a limited exercise of the right of self-defense or if it should consider a wider application of it. Professor Christine Gray has explained that a major controversy of the scope of the right to self-defense was the idea of a right of anticipatory or pre-emptive self-defense.¹⁸ She asks if the right to self-defense only arise after an armed attack has started under Article 51 or if there is a wider¹⁹ right to anticipate an imminent attack.¹⁹

The source of the discussion comes from the reading of Article 51. The Charter as a treaty does recognize the right to self-defense but not the right to an anticipatory self-defense, and the UN General Assembly *Definition of Aggression* and *Declaration on Friendly Relations* neither do so. Therefore, it is necessary to ask the question whether is there a rule of customary law about it?

¹⁷ Gray, “The Use of Force and the International Legal Order”, 629.

¹⁸ Gray, “The Use of Force and the International Legal Order”, 630.

¹⁹ Gray, “The Use of Force and the International Legal Order”, 630.

Following Professor Van den hole, the question has a straightforward answer: yes, and the grounds for the development can be found in the *Caroline* case.²⁰

The *Caroline case* was an incident occurred in the first part of the nineteenth century when the anti-British insurrection was taking place in Canada. At the time, Canada was under British control while the United States of America and The United Kingdom were in an apparent state of peace. There was a vessel owned by U.S. nationals, the *Caroline*, that was allegedly aiding the rebels in Canada. On December 29, 1837, while the ship was on the U.S. side of the Niagara River, British troops crossed the river, boarded the ship, killed several U.S. nationals, set the ship on fire, and sent the vessel over Niagara Falls. The British claimed that they were acting in self-defense, but after some heated exchanges with Secretary of State Daniel Webster, the British government ultimately apologized. The fundamental characteristics of the anticipatory self-defense principle were developed from this case: necessity and proportionality.²¹

Professor Van den hole has explained that the preconditions set in the *Caroline* case, necessity and proportionality, have been extended to the right of anticipatory self-defense in the form of general rule of customary international law.²² The conditions for the application of anticipatory self-defense requires a threat that is instant, overwhelming and leaving no choice of means nor moment for deliberation. Furthermore, what the *Caroline* incident and its following doctrinal analysis had established is that there is an important distinction that requires being understood, that is the imminence of the attack. While the right to self-defense demands the attack being launched, the right to anticipatory self-defense can prevent the attack if the conditions for its application are fulfilled.

It is important to remark that states like the United States of America, the United Kingdom, and Israel have claimed a broad right to self-defense in the terms previously exposed. However, the doctrine is highly controversial that the right has rarely been practiced.²³

As it was explained, this is a controversial issue and remains contested by different states. Furthermore, there is a discussion whether the *Caroline* test is enough to prevent an armed attack or it is necessary a broader analysis that considers that an imminent threat is configured when any further delay would result in an inability by the vulnerable state to defend itself against or avert the attack against it.²⁴ Finally, as a reflect of the controversy, the ICJ deliberately left this analysis unresolved in the *Nicaragua* case and the *Armed Activities on the Territory of the Congo*.²⁵

²⁰ Leo Van den hole, "Anticipatory Self-Defence under International Law", *American University International Law Review* 19, n° 1 (2003): 95.

²¹ Anthony Clark Arend, "International Law and Pre-emptive Use of Military Force", *The Washington Quarterly* 26, n° 2 (Spring 2003): 90.

²² Van den hole, "Anticipatory Self-Defence under International Law", 97.

²³ Gray, "The Use of Force and the International Legal Order", 630.

²⁴ Gray, "The Use of Force and the International Legal Order", 631.

²⁵ Gray, "The Use of Force and the International Legal Order", 630.

Up to this point, this essay has explained the regulation of the provision for the use or the threat of the use of force under the United Nations Charter. Furthermore, it has also provided information regarding the principal exemption to the utilization of the force; that is the right to self-defense. Likewise, I have provided arguments to understand that this is not a simple issue, on the contrary, it is a complex and highly contested one. Following these ideas, this paper has also presented evidence about the discussion of a broad understanding of the right to self-defense regarding the anticipatory self-defense doctrine. The *Caroline case* in the 19th century was the cornerstone for the developing of the theory: it demanded that the attack should be imminent and not necessarily launched to prevent it. Once the conditions of the doctrine were fulfilled, a state can respond in a proportionated way to exercise its right to self-defense. This is important to remark: the response to an attack or an imminent attack should always be proportioned to the attack or the imminence of attack. Otherwise, the proportionality condition of the right to self-defense is not verified and therefore escapes from the scope of the right under the provisions of the United Nations Charter.

As it was explained, an imminent attack is the core condition for the application of anticipatory self-defense. Nevertheless, this topic is still an under constant discussion and analysis by states.

The exercise of the right to self-defense in case of the use or threat of use of the force has been traditionally studied when a state-actor attacks or threatens to attack another state-actor. It is not difficult to find examples of this attacks, in 1990 Iraq invaded Kuwait, the 1950's Vietnam War, the 1950's North Korean invasion of South Korea, among others. However, since the last decade or so conventional or traditional attacks from one state are no longer the general rules. Since the attack the United States of America suffered on September 11, 2001, new actors have raised: non-state actors. The importance and, in particular, the consequences of their actions have created awareness if the rules for self-defense or anticipatory self-defense established in the United Nations Charter can address this attacks. In other words, has the United Nations Charter and rules of customary international law the ability to provide adequate answers to non-state actors attacks?

The next two sections of this essay will present solid arguments to conclude that the provisions of the Charter are outdated and insufficient to deal with non-state actors attacks. I will address that the definition for attacking state and armed attack are both inadequate and outdated to address current problems like attacks from non-state actors, such as IS/ISIS and cyber-attacks, whether they come from state or non-state actors.

5. The impact of 9/11 terrorist attacks on the right to self-defense. A right to a pre-emptive self-defense?

The facts, causes, and consequences of the 9/11 attacks have been extensively studied and explained. Therefore, this essay would not consider those issues in detail.

Attacks from terrorist groups as an example of non-state actors are by no means a new form of conflict. One of the first ones occurred in October 1985, when Israel bombed the Palestinian Liberation Organization headquarters in Tunis, Tunisia. The second major incident took place in April 1986 when the United States attacked Libyan government facilities in Tripoli following a terrorist attack on a Berlin nightclub.²⁶ The third incident was when the United States used force to respond to terrorism when it fired cruise missiles at Iraq in 1993, following the discovery of a plot to assassinate former President George H. Bush while in Kuwait.²⁷ The final significant incident before 9/11 occurred in 1998 when the United States attacked an Al-Qaida terrorist training camp in Afghanistan and an alleged chemical weapons factory in Sudan.²⁸

It is important to highlight that, despite the fact that the attacks were committed by non-state actors, the common characteristic among them is that they were less likely to satisfy the threshold of an armed attack than the 9/11 attacks. At this point is necessary to remind that the definition of armed attack is not provided by the United Nations Charter and is a rule of customary international law. A significant consequence of this is that the concept requires being updated to satisfy current forms of attack. Nevertheless, September 11, 2001, marked a shift towards new considerations to address the conflict of armed attacks from non-state actors.

A new reality was conceived from the 9/11 attacks; non-state actors are capable of projecting extreme violence across the globe. The September 11 attackers were a variety of individuals trained and recruited across different states, which were instructed and funded by a terrorist organisation named Al-Qaeda. This group had acquired the means to launch vicious attacks that within a matter of hours killed more than three thousand people, mostly civilians.²⁹

The attack the United States suffered from the terrorist group Al-Qaeda raised new considerations regarding the use of force as the mean to respond to armed attacks. One of the considerations was the creation of the doctrine of pre-emptive self-defense.

²⁶ C. Greenwood, "International Law and the United States Air Operation Against Libya", *West Virginia Law Review* 89 (1987): 933.

²⁷ D. Kritsiotis, "The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law", *International and Comparative Law Quarterly* 45 (1996): 162.

²⁸ Garwood-Gowers, "Self-Defence against Terrorism in the Post-9/11 World", 10.

²⁹ Sean D. Murphy, "The Doctrine of Pre-emptive Self-Defence", *Villanova Law Review School of Law Digital Repository* 50, n° 3 (2005): 699.

Professors Reisman and Armstrong have provided a definition of this doctrine. Pre-emptive self-defense is a claim to entitlement to use unilaterally, without previous or international authorization, high levels of violence to stop an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen by the potential attacked-state as susceptible to neutralization only at a higher and possible unacceptable cost to itself.³⁰ One can see the main difference between the doctrine of anticipatory self-defense and pre-emptive self-defense. While the former demands the existence of an imminent attack to be launched, the latter excludes that condition for the application of the right to self-defense.

The discussion of this issue was not a simple one. Even when the theory first was developed by the United States of America post-September, 11 attacks the discussion was strictly followed in the United Kingdom. As Daniel Bethlehem explains, the UK House of Commons Foreign Affairs Committee expressed that the idea of imminence should be reconsidered in light of new threats to international peace and security regardless if pre-emptive self-defense is a new legal creation³¹. However, despite the UK support to the US interpretation, the theory has not been internationally agreed, yet.

Following the previous idea, I am of the opinion that the doctrine of pre-emptive self-defense appears to be a far too broad interpretation and application of the traditional concept of the right to self-defense. On the one hand, there is no requirement for a proportionated response. On the other, it does not consider the imminence of the attack. It is precisely the absence of those two conditions that make this interpretation both dangerous and unlimited. First, a state might consider the right to a pre-emptive self-defense even when there is no proof of a possible attack whatsoever. Secondly, if it is unlimited, there could be no restrictions for a state to claim the right how many times it deems as necessary. Finally, the application of the extensive interpretation of the right may lead us to revive a warfare environment similar to the Cold War.

Following Reisman and Armstrong, Professor Donald Rothwell asked the next question, was international law adequate to deal with the threats posed by terrorist organizations or was there a need for new responses?³² He further explains that what is in stakes is the capacity of international law to respond to new scenarios, like terrorist attacks.³³ In other words, the current discussion is if states have the right to take actions against non-state actors even when there is

³⁰ W. Michael Reisman and Andrea Armstrong, "The Past and Future of the Claim of Pre-emptive Self-Defence", *Yale Law School Legal Scholarship Repository* 100, n° 525 (2006): 526.

³¹ Daniel Bethlehem, "Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors", *The American Journal of International Law* 106 (2012): 2.

³² Donald Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism Special Edition: The United Nations and International Legal Order", *University of Queensland Journal* 24, n° 2 (2005): 344.

³³ Rothwell, "Anticipatory Self-Defence", 334.

no imminent attack from them. This problem is not of an easy solution; on the contrary, it is highly complex and debatable.

Reisman and Armstrong have further explained that attacks like 9/11 have moved the international scenario from an actual armed attack as the requisite threshold of reactive self-defense to the palpable and imminent threat of attack, which is the threshold of anticipatory self-defense. The doctrine has also shifted to the conjectural and contingent threat of the mere possibility of an attack at some future time, which is the threshold of pre-emptive self-defense, the self-assigned interpretive latitude of the unilateralist becomes wider. Finally, they said the nature and quantum of evidence that can satisfy the burden of proof resting on the unilateralist become less and less defined and is often, by the very character of the exercise, extrapolative and speculative.³⁴

Professor Andrew Garwood-Gowers has said that the post-9/11 right to use force in self-defense against terrorism is subject to some limitations derived from the general conditions governing self-defense, namely the gravity threshold for an armed attack the need for an actual attack to have occurred, and the principles of necessity and proportionality.³⁵ This means that even when the doctrine of pre-emptive self-defense appears to be too broad to be applied, it still demands compliance of the traditional requirements of the right to self-defense. However, besides this, the issue remains controversial.

The arguments presented by Professors Garwood-Gowers and Reisman and Armstrong reflect on the one hand the complexity of the evolution of the doctrine and on the other the necessity to adequate it to new and complex forms of attacks.

From the previous explanations, is clear that the traditional doctrine of treaty-based self-defense and customary based anticipatory self-defense have demonstrated to be insufficient to protect and prevent states from new manifestations of the use of force. This has created the need for new mechanisms to use force as a tool for self-defense whether anticipatory or pre-emptive. A reflection of this need is the doctrine of pre-emptive self-defense. Under this construction, the US government proposed the elimination of the condition of the imminence of the armed attack to respond by using force against the attacking state. Besides being a proposal from the US, a UN High-level Panel of Experts firmly rejected this doctrine.³⁶

This reflects a shift to adequate the definition of the right to self-defense as the reaction to the use of force. The change obeys to two main issues, first to a wider understanding of armed attacks. Second to the consideration of attacks from non-state actors, both issues will be developed in the final section.

³⁴ Reisman and Armstrong, "The Past and Future of the Claim of Pre-emptive Self-Defence", 527.

³⁵ Garwood-Gowers, "Self-Defence against Terrorism in the Post-9/11 World", 14.

³⁶ Gray, "The Use of Force and the International Legal Order", 634.

6. Why are the rules of the use of force outdated? The case of US-led coalition attacks against ISIS and cyber-attacks

From the previous sections, it is possible to conclude that the scope of the use of force and the right to self-defense have shifted during history. Furthermore, the extent of the right and its interpretation and application has been moved not by the creation of new rules of international law, nor by customary regulations, they have extended the scope by the appearance of new international actors. New attackers and new forms of attack have caused debate whether the existing rules are enough to deal with issues like self-defense and the use of force. It is responsible for saying that the UNCH and the customary international law rules for the use of force and the right to self-defense (and anticipatory self-defense) are outdated and static.³⁷ The definition for attacking state and armed attack are insufficient to address trending issues like attacks from non-state actors and cyber-attacks.

1.1 The case of US-led coalition attacks against ISIS (non-state actors)

The United Nations Charter provisions lay down an aggressive regime of rules against force and states have considered the scheme to be too ambitious. However, these are rare instances, and in the clear majority of cases arguments about the legality of forcible conduct are tailored to fit the Charter regime.³⁸ Nevertheless, this essay firmly believes that the rules must be reviewed and updated. The basis for the following construction is reflected in the US-led coalition attacks to ISIS in Syria and the research done by Professor Monica Hakimi.

As a previous explanation, Operation Inherent Resolve is the name of the air campaign carried out by a Combined Joint Task Force of US-led coalition forces against the Islamic State of Iraq and the Levant, ISIL. The terrorist group is at war with more than 60 nations or groups: coalition nations conducting airstrikes in Iraq include Australia, Belgium, Canada, Denmark, France, the Netherlands, the United Kingdom and the United States; coalition countries conducting airstrikes in Syria include Bahrain, Jordan, Saudi Arabia, the United Arab Emirates and the United States.³⁹ The particular characteristics of ISIS's attacks can be found in the fact that for the first time a terrorist group as a non-state actor can recruit agents to form all around the globe

³⁷ Christian Tams, "The Use of Force against Terrorists", *The European Journal of International Law* 20, n° 2 (2009): 360.

³⁸ Tams, "The Use of Force against Terrorists", 360.

³⁹ Federica D'Alessandra, "Jus and Bellum in Syria: The Meaning of the US Airpower Campaign", *Human Rights Law Working Group Newsletter* (March 2015): 37.

and launch attacks to their own-state-territory and other states claiming their international recognition.

Monica Hakimi has explained that the US-led coalition attacks against ISIL in Syria have again raised the question whether states can use defensive force (right to self-defense) against non-state actors.⁴⁰ This reflects a need for modern interpretation of the rules to be useful in the regulation of the use of force and self-defense from non-state actors. However, the proper analysis on how to deal with these new players is still uncertain and contested.⁴¹ However, the thesis Hakimi presents is somehow limited because she provides a map of the positions that were plausible available when the US operations in Syria began to determine the application of self-defense. This is basically because the law in this area has been poorly settled and in consequence, there is broad legal reasoning that may be invoked.

Hakimi further concluded that the case of US-led coalition attacks against ISIL reflects three main issues. First the fact that international law prohibits the use of defensive force against non-state actors is losing terrain. Second, States for different reasons have decided not to assume a position on this matter. Finally, this ambivalence has created a substantial gap between the rules that are articulated as law and those who reflect operational practice.⁴²

Professor Paust has provided an interesting interpretation to address these issues and to acknowledge the right of both anticipatory and self-defense against non-state actors. Paust's arguments are in the same line of thought than those presented by Professor Hakimi. He said the vast majority of writers agreed that an armed attack by non-state actors on a state could trigger the right of self-defense addressed in Article 51 of the UNCH.⁴³ The grounds for his interpretation are in article 51 of the UNCH; nothing in the language restricts the right to engage in self-defense actions to circumstances of armed attacks by a state. Also, nothing in the language of the UNCH requires a conclusion that a state being attacked can only defend itself within its borders, he argues.⁴⁴ Finally, by application of the rules of interpretation of the Vienna Convention, Article 51 needs to be read by its literal meaning (no exclusion of non-state). Also, the context (Chapter VII, Acts of aggression) doesn't differentiate between state and non-state actors. Finally, by its object and purpose that is provide measures to restore peace.

On the contrary, other authors like Professor Mary Ellen O'Connell have argued that States are restricted from using military force outside of self-defense or authorization from the Security Council. The right to use them must be found in the *Jus ad Bellum*, which would explicitly include the right of self-defense, and that significant military attacks are only lawful in the course of an armed conflict. For these reasons, she seems to be of the opinion that use of primary military

⁴⁰ Monica Hakimi, "Defensive Force against Non-State Actors: The State of Play", *International Law Studies* 91 (2015) 3.

⁴¹ Monica Hakimi, "Defensive Force against Non-State Actors", 3

⁴² Monica Hakimi, "Defensive Force against Non-State Actors", 4.

⁴³ Jordan Paust, "Self-Defence Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan", *Journal of Transnational Law and Policy* 19, n° 2 (2010): 238.

⁴⁴ Paust, "Self-Defence Targetings of Non-State Actors", 239.

force in response to a significant armed attack by a non-state actor outside the context of war should be unlawful.⁴⁵

In other words, she has concluded that attacks from non-state actors cannot be considered to be under the scope of the exception of Article 51 of the Charter unless they can be categorised as to be in the context of war. However, this position seems to have little recognition among international lawyers and governments who would search for any legal, political or military grounds to exercise the right to self-defense against non-state actors. Finally, this issue is not of peaceful resolution and remains controverted. Nevertheless, O'Connell's argument has a substantial flaw. She is the idea that only in the context of war a response to the attack of a non-state actor is permissible. In other words, she left out of the discussion if the non-state actor performed the attack to a state or even if the non-state actor started a war. I firmly believe that this fundamental aspect cannot be taken out of the analysis. That is to say that if a non-state actor launches an attack on a state but it is not considered to be a war the attacked state cannot exercise a lawful right to self-defense? Furthermore, if a state has sufficient proof of an imminent attack from a non-state actor, it is not able to avoid it by anticipating it? These questions are by all means not easy to answer. However and taking into consideration Paust's arguments there is no provision in the UNCH that has established the right to self-defense and even anticipatory self-defense only in cases of attacks from state actors. Another conclusion might lead us to open a door that could never be closed.

The conclusion of this part is that attacks from non-state actors are not covered by the traditional provisions of the United Nations Charter nor by traditional rules of customary international law. However, latest attacks have demonstrated the necessity to adapt the rules and their interpretation with the sole purpose to address this kind of conflicts. The discussions Hakimi, Paust, D'Alessandra, and O'Connell, have presented are the core of the legal debate: are the Charter provisions outdated or are they useful to deal with these conflicts.

1.2 Cyber-attacks

“Cyber” is one of the most frequently used terms in international security discussions today. Thus, it is not a new term in international law. For several decades, international law's specialists in the use of force have dedicated efforts towards understanding this problem and propose regulations. However, certain developments since at least 2007 have pushed the term and what it stands for to a top position on their agendas. The key issue is how to achieve security on the Internet by governments, organisations, and commercial interests when people want to have access to the Internet and all that it offers but not to be harmed by it.⁴⁶

⁴⁵ Paust, “Self-Defence Targetings of Non-State Actors”, 254.

⁴⁶ Mary Ellen O'Connell, “Cyber Security without Cyber War”, *Journal of Conflicts and Security Law* 17, n° 2 (2012): 187.

There are two critical incidents that triggered the discussion on the importance and consequences of cyber-attacks as a new form of attacks. The first one occurred in Estonia in 2007, when the country experienced extensive computer hacking attacks that lasted several weeks. Cyber-attacks were launched targeting the country's infrastructure shutting down the websites of all government ministries, two major banks, and several political parties; hackers even disabled the parliamentary email server.⁴⁷

While the cyber-attacks on Estonia shocked the international community, they could have been far more devastating. In the future, hackers might target nation's traffic lights, water supply, power grids, air traffic controls, or even its military weapon systems creating chaos, violence, and social unrest.⁴⁸ Soon after the attacks on Estonia, North Atlantic Treaty Organization or NATO began developing policies and capacity aimed at cyber-security that was reflected in the Tallinn Manual explained in the following paragraphs.

The second incident happened in 2008, during the Georgia–Russia conflict over South Ossetia, when Georgia experienced cyber-attacks similar to those suffered by Estonia in the previous year.⁴⁹ The methods of cyber-attacks against Georgia primarily included websites and launch of Distributed Denial of Service (DDoS) against numerous targets – methods like those used in attacks against Estonia in 2007. Among them were the National Bank and the Ministry of Foreign Affairs of Georgia.⁵⁰

As Professors Martin Stytz and Shelia Banks have explained, cyber-attacks can be used to control adversary's information, target the portions of cyberspace used for situational awareness and decision-making, as well as lead the opponent to perform unwanted conducts. Furthermore, a cyber-attack diminishes both individual and collective situational awareness, command and control by undermining one or more elements of cyberspace.⁵¹

The question one should ask is if a cyber-attack launched to a State's banks or financial institutions or energy supply facilities or military assets, can be considered an armed attack under Article 51 of the United Nations Charter? Can the impact of that cyber-attacks be measured in the same way of a traditional armed attack? Should the economic impacts be considered an armed attack? The importance of this new form of attacks from individuals or groups to a state is that they don't fit in the definition of armed attacks constructed by the rules of customary international law. Nevertheless, it is impossible not to acknowledge they are a reality that needs to be addressed.

⁴⁷ Steven Herzog, "Revisiting the Estonian Cyber Attacks: Digital Threats and Multinational Responses", *Journal of Strategic Security* 4, n° 2 (2011): 51.

⁴⁸ Herzog, "Revisiting the Estonian Cyber Attacks", 2.

⁴⁹ O'Connell, "Cyber Security without Cyber War", 188.

⁵⁰ "Cyber Attacks Against Georgia: Legal Lessons Identified" (Tallinn, Estonia: Cooperative Cyber Defence Center for Excellence, NATO, 2008).

⁵¹ Martin Stytz and Sheila Banks, "Cyber Warfare Simulation to Prepare to Control CyberSpace", *National Cybersecurity Institute Journal* 1, n° 2 (2014): 9.

To understand the previous doubts, it is important to highlight Professor Zhxiong Huang's research. He provides a clear interpretation on the rules for cyber-attacks. The focus, Huang says, should be on the legal attribution of cyber operations especially whether and how the rules on state attribution can be applied to these activities.⁵² In other words, what Huang presents is the core of the discussion: how and who attribute cyber-attacks. This is not an easy task; however, what it is clear is that the rules of the treaty-based United Nations Charter and the rules of customary international law are not able to provide a solution nor a guidance for this understanding.

To reinforce the previous ideas, Professor Michael Schmitt has explained that one of the most complex challenges states can face in incidents of cyber-attacks is that the scope and manner of the rules of international law applicable have remained unsettled since their conception.⁵³ In consequence, he emphasises, there is a high risk that cyber practice may quickly outdistance agreed understanding as to its governing legal regime.

From the previously stated, it is of great importance to remark, once again, that the Charter rules are outdated and static to address an answer to this matter; the difficulty is to determine what rules can offer guidance to deal with these conflicts. As it was previously explained the rules of the use of force and the right to self-defense contained in both a treaty and in customary international standards, have demonstrated to be ineffective to address this problem. It is not difficult to see why: the Charter was agreed almost 70 years ago when conflicts like cyber-attacks were not even possible or plausible. Thus, rules of customary international law on the right of self-defense have adapted to new scenarios; for example, they have incorporated guidance for attacks from non-state actors and regulations for anticipatory self-defense. Even a discussion of a possible pre-emptive self-defense has been addressed. In this sense, there are two essential provisions to address cyber-attacks as the new means of aggression and both reflect well-established customary rules of international law.⁵⁴

Before continuing it is necessary to make a prevention; the scope of these essay is to provide information and arguments to understand why the United Nations Charter provisions are outdated and unable to address attacks from non-state actors and cyber attacks. In consequence, even when the sets of regulations are presented to provide answers, they will not be dealt in depth because it will exceed the purpose of this paper.

As it was announced, there are two main sets of rules. On the one hand, the International Law Commission's work on state responsibility, also known as the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), are adequate to address this problem.⁵⁵ On

⁵² Zixiong Huang, "The Attribution Rules in the ILC's Articles on State Responsibility: A Preliminary Assessment of Their Application to Cyber-Operations", *Baltic Yearbook of International Law Online* 14, n° 1 (2014): 44.

⁵³ Michael Schmitt, "Tallinn Manual on the International Law Applicable to Cyber Warfare" (Cambridge: CUP, 2013).

⁵⁴ Huang, "The Attribution Rules in the ILC's", 45.

⁵⁵ "Articles on the Responsibility of States for Internationally Wrongful Acts", Report of the ILC on the Work of its Fifty-third Session (International Law Commission, 2001).

the other, the rules contained in the Tallinn Manual, especially Article 5 of control of cyber-infrastructure, are also applicable.⁵⁶

The ARSIWA provisions had established a set of rules for the determination of the attribution of conduct to a State. In principle, conducts of private actors will not be attributed to a State unless it is directed or controlled by the State. Furthermore, the Articles set up three rules for particular situations. First, the conduct of a person or group of individuals carried out in the absence or default of the official authorities. Second, conducts of insurrectional or other movements. Finally, an act acknowledged and adopted by a State as it owns, that shall be considered an act of that State under international law.⁵⁷

The previous raises a fundamental question, are those rules for attribution updated and effective to determine State's responsibility for non-state actors' cyber-attacks? This is a complicated task because these operations have unique particularities. For example, hackers can easily hide their identity under IP tricks and even when cyber-attacks are readily available to non-state actors, most of them come from individuals.⁵⁸ Furthermore, most cyber-attacks come from individuals rather than State, or State sponsored organisations. Thus, it is important to remark that a single actor can pose a devastating threat to a State through cyber-attacks.⁵⁹

Huang has reached the conclusion that the ARSIWA rules have played a key role to determine the attribution of a cyber-attack in a sense they fully apply to the rules of use of the force and the right to self-defense because they ensure responsible attribution.⁶⁰

The importance of this analysis is to recognise two core issues. First, the recognition that the traditional rules for the right to self-defense are outdated, ineffective and insufficient to deal with the complexity of cyber-attacks. Secondly, the rules of attribution presented in the ARSIWA Articles can be considered a step towards an appropriate regulation. However, the own structure of cyber-attacks should force the international community to be in constant awareness for new updates. Nevertheless, I am of the opinion that it is crucial to bear in mind that the ARSIWA rules are a legal construction to determine state's responsibility. They are a creation to try to solve the difficulties in attributing individual acts to a particular state. It is evident they have indeed reduced the risk of loopholes and legislation gaps, but they don't solve the problem. As it was explained, the complexity of cyber attacks might pose an endless loop of determining responsibility to the extent of not being capable of it. Finally, it is clear that further regulations need to be developed to reduce the gap.

The international rules on cyber warfare of the Tallinn Manual on the International Law Applicable to Cyber Warfare, or simply the Tallinn Manual, can also be applied for the

⁵⁶ Schmitt, "Tallinn Manual on the International Law Applicable to Cyber Warfare".

⁵⁷ Huang, "The Attribution Rules in the ILC's", 45.

⁵⁸ D. Holis, "An E-SOS for Cyberspace", *Harvard Law Journal* 52 (2011): 391.

⁵⁹ L. Blank, "International Law and Cyber Threats from Non-State Actors", *International Legal Studies* 89 (2013): 416.

⁶⁰ Huang, "The Attribution Rules in the ILC's", 54.

determination of the attribution.⁶¹ In that sense, Article 5 of the Tallinn Manual provides that a State should not knowingly allow the cyber infrastructure located in its territory or under its exclusive governmental control to be used for acts that adversely and unlawfully affect other States.⁶² The previous rules have recognised a standard of behavior regarding two types of infrastructure. First, to any infrastructure, whether is governmental or not, located on their territory. Secondly, infrastructure located elsewhere but over which the State has either *de jure* or *de facto* exclusive control.⁶³ This is just the reflection of the well-understood principle of respect for the sovereignty of other States.

Finally, on June 21, 2016, when this essay was being edited the central banks of Indonesia and South Korea were hit by cyber-attacks on their public websites since activist hacking group Anonymous pledged last month to target banks across the world. Thus there was no word on who the hackers were.⁶⁴ According to the news agency Reuters, no money was lost during the attacks.

This latest attack reflects once again a problematic reality: treaty-based and customary international rules for the right to self-defense are outdated, insufficient and inefficient to address this issues. Furthermore, they also acknowledge the need for major updates on the rules for a) attribution of the conduct, b) determination of State's responsibility, c) exercise the right to self-defense.

7. Conclusion

As it was explained, the rules of the use of force and right to self-defense are in fact outdated. This is reflected during the past decade through several terrorist attacks that have re-enforced the necessity of updating mechanism to address non-state actors and cyber-attacks.

As it was explained, 21st-century terrorist attacks have forced to extend the scope of application of the rules of the United Nations Charter because the traditional understanding of both state actors and armed attack have changed. On the one hand, during the last decade, not only states but also non-state actors have launched attacks from their states to other states. On the other, the traditional understanding of armed attack is not currently supportive of multiple and technological attacks from hackers or non-states actors to states by means different from those traditionally used. This has led to creating rules for attribution, to determine international

⁶¹ Huang, "The Attribution Rules in the ILC's", 51.

⁶² Schmitt, "Tallinn Manual on the International Law Applicable to Cyber Warfare", 26.

⁶³ Schmitt, "Tallinn Manual on the International Law Applicable to Cyber Warfare", 26.

⁶⁴ Hidayat Setiaji, "Indonesia, South Korea Central Bank Websites Hit by Cyber Attacks. No Losses", Reuters.com, <http://www.reuters.com/article/us-asia-banks-cyber-idUSKCN0Z70KI> [Last seen: 31. May. 2017.]

responsibilities. Finally, even when strong arguments were presented to provide a position on how the United Nations Charter rules are outdated to address sophisticated and modern conflicts; the topic remains controversial and highly contested.