

INTERNATIONAL LAW AND CHEMICAL, BIOLOGICAL, RADIO-NUCLEAR (CBRN) EVENTS

Towards an All-Hazards Approach

Edited by
**Andrea de Guttry, Federico Casolari,
Micaela Frulli and Ludovica Poli**



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The Challenge to *Jus ad Bellum* Posed by the Development or Use of CBRN Weapons

Laura Magi

1 Introduction

The development of CBRN weapons is a significant challenge to international stability. They have overwhelming effects causing terrible suffering to those who are exposed to them. Moreover, they have protracted negative consequences on human health and the environment. New delivery systems have made their use still more harmful. For these reasons, sometimes States have invoked their right to act in order to prevent an enemy State from developing and using CBRN weapons against them. In other cases, the employment of CBRN weapons in an internal conflict against insurgents and civilians brought third States to react militarily against the responsible State.

A widespread debate has arisen on the lawfulness of military interventions to counter the proliferation of CBRN weapons and prevent their use against combatants and civilians. Some authors have judged such a debate useless.¹ They believe that *jus ad bellum* has become ‘paper rules’, *ie* ‘rules that lay out aspirational goals for the management of state-sponsored force rather than binding precepts of international law.’²

Moving from the opposite opinion, this chapter assumes that the rules prohibiting the use of force are still alive and have not lost their compulsory nature.³

Against this background, the present chapter will examine whether State practice concerning the development and use of CBRN weapons has brought (or is in the process of bringing) the emergence of new rules allowing States to

1 M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books 2015); MJ Glennon, ‘The UN Security Council in a Unipolar World’ (2003–2004) 44 VandJTransnatlL 91 98–100.

2 MJ Glennon, ‘Pre-empting Proliferation: International Law, Morality and Nuclear Weapons’ (2013) 24 EJIL 109, 111.

3 For an interesting reply to Glennon, see PCR Terry and KS Openshaw, ‘Nuclear Non-Proliferation and Preventive Self-Defence: Why Attacking Iran Would Be Illegal’ (2013) 51 ACDI 165, especially 181 ff.

use military force with the limited aim of preventing the occurrence of imminent or possible CBRN attacks against them or thwarting their use against civilians and combatants.

In what follows, the expression 'anticipatory self-defence' will be used to refer to the use of force in order to repel an attack that is imminent.⁴ The concept of imminence adopted is time-related. An imminent attack will be considered as one that is going to occur and that can be stopped only by neutralising it by means of a military counter-action. In contrast, the expression 'preventive self-defence' will be employed to describe the use of force to counter the risk of an attack that might materialise in the future.

Proponents of preventive self-defence try to blur the dividing line between it and anticipatory self-defence by broadening the concept of 'imminence'. According to them, the requirement of imminence should consider the nature of the threat or the gravity of the threatened attack, precisely in order to take into account current threats like the use of weapons of mass destruction⁵ (WMD). On the contrary, this chapter will refer only to a time-related notion of imminence.

The term 'pre-emptive self-defence' will not be used. While it has frequently been interpreted as meaning the same as preventive self-defence, according to a rigorous approach, the term would be synonymous with anticipatory self-defence in the *Caroline* case sense.⁶ Thus, to avoid confusion, this chapter will not refer to it.

2 Preventive Military Actions against States That Develop and May Use CBRN Weapons

States have voiced their right to act in self-defence against the threat posed by the (alleged) development of CBRN weapons by other States. In 1981, Israel

4 As famously stated by US Secretary of State Webster in 1841, in relation to the *Caroline* incident, a State is permitted to use force in order to counter an attack that has not yet commenced provided there exists 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation': Letter from Daniel Webster to Lord Ashburton (27 July 1842): Yale Law School, The Avalon Project <https://avalon.law.yale.edu/19th_century/br-1842d.asp> (all links were last accessed 20 January 2021).

5 White House Archives, 'National Security Strategy of the United States' (September 2002), <<https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>>; Chatham House, 'Principles of International Law on the Use of Force by States in Self-Defence', 2005, Principle No. 4 and the Commentary to it, <<https://www.chathamhouse.org/2005/10/principles-international-law-use-force-states-self-defence>>; D Bethlehem, 'Self-Defence Against an Imminent or Actual Armed Attack by Non-state Actors' (2012) 106 AJIL 774.

6 M Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' (2003) 97 AJIL 599 at 599.

justified the bombing of the Osirak reactor as preventive self-defence against the purported development of nuclear weapons by Iraq. In 2003, a coalition of States led by the US and the UK attacked Iraq claiming it possessed WMD. Among the intervening States, the US and Australia invoked the right to act in preventive self-defence. In 2007, Israel allegedly bombed the Al-Kibar nuclear reactor in Syria but did not formulate any legal justification.

2.1 *Osirak (1981)*

Israel bombed an Iraqi nuclear reactor which – Iraq maintained – was for peaceful use only. Israel justified its action by invoking the so called ‘Begin doctrine’, named after the Israeli Prime Minister Begin who drafted it in the ‘80s.⁷ Before the United Nations Security Council (UNSC), the Israeli representative acknowledged that the attack was preventive, and justified it as a lawful act of self-defence. Furthermore, it claimed a right to act similarly in the future.⁸

In the debate that followed in the UNSC, many States explicitly and strongly condemned the Israeli strike as an act of aggression contrary to the UN Charter.⁹ They included Middle Eastern States¹⁰ and the nuclear weapons States (France,¹¹ China,¹² the United Kingdom,¹³ the USSR¹⁴ and the US). The US delegate remembered the words of the US President (‘Israel might have sincerely believed it was a defensive move’); meanwhile, he declared that the US was shocked by the Israeli attack and condemned it.¹⁵ SC Resolution 487 (19 June 1981), adopted unanimously, vigorously criticised the Israeli attack as an act in ‘clear violation of the UN Charter’ and called upon Israel to refrain from similar actions and to grant an appropriate redress to Iraq. A few months later, on the 13th of November 1981, the United Nations General Assembly (UNGA) adopted Resolution 36/27 that condemned Israel for its ‘premeditated and unprecedented act of aggression’ against Iraq. The latter was adopted with a large majority, even though 34 States abstained; significantly, the US – that had previously condemned the attack – voted against it.

7 A Yadlin, ‘The Begin Doctrine: The Lessons of Osirak and Deir ez-Zor’, INSS Insight (21 March 2018) <<https://www.inss.org.il/publication/the-begin-doctrine-the-lessons-of-osirak-and-deir-ez-zor/>>.

8 UNSC ‘Complaint by Iraq’ (1981) UN Doc S/PV.2280, para 58.

9 See from UN Doc S/PV.2280 to UN Doc S/PV.2288 (12–19 June 1981).

10 See the opinion of the delegates of Tunisia, Jordan, Algeria (UN Doc S/PV.2280), Kuwait (UN Doc S/PV.2281), Syria (UN Doc S/PV.2284), Turkey (UN Doc S/PV.2286), Libya and Kuwait (UN Doc S/PV.2288).

11 UN Doc S/PV.2288, 15 June 1981, para 39 ff.

12 Ibid, para 89.

13 Ibid, para 104 ff., especially para 106.

14 UN Doc S/PV.2283, 15 June 1981, para 63.

15 UN Doc S/PV.2288, 19 June 1981, para 27.

2.2 *Iraq (2003)*

A coalition of States led by the US and the UK (and originally joined by Australia, Spain and Poland) attacked Iraq in March 2003.¹⁶ The military action was connected with Iraqi non-compliance with SC Resolution 687 (1991).¹⁷ The latter laid down the obligation for Iraq to destroy nuclear, biological and chemical weapons it allegedly possessed and to accept a long-term monitoring system to ensure its compliance with the previously mentioned obligations. In addition, Resolution 687 (1991) established the ceasefire between Iraq, Kuwait and the States authorised by SC Resolution 678 (1990) to use force to repel the Iraqi invasion of Kuwait.

The aggressors formally justified their military actions by invoking the theory of the 'material breach' of the terms of SC Resolution 687 (1991).¹⁸ They claimed that Iraq had not fulfilled the obligation to destroy WMD it possessed as laid down in Resolution 687 (1991) and had repeatedly failed to co-operate with the UN inspectors and the International Atomic Energy Agency (IAEA). In their view, the failure of Iraq to fulfil its obligations re-vitalised the original SC authorisation to use force against Iraq contained in Resolution 678 (1990).¹⁹ The States which supported the military aggression against Iraq, grounded it on the 'material breach' argument.²⁰

The US had also paved the way for a military action by adopting declarations asserting its right of defence in light of the risk to its security represented by the possession of WMD by Iraq.²¹ In the same vein, the Australian 2003 National Security Strategy had provided that the Australian Government was ready to consider requests to support coalition military operations to prevent the proliferation of WMD by rogue States or terrorists.²²

16 For a list, see E MacAskill, 'US Claims 45 Nations in "Coalition of Willing"', *The Guardian* (19 March 2003) <<https://www.theguardian.com/world/2003/mar/19/iraq.usa>>.

17 UNSC Res 687 (3 April 1991) UN Doc S/RES/1687.

18 M Weller, 'The Iraq War – 2003' in T Ruys, O Corten and A Hofer (eds), *The Use of Force in International Law. A Case-Based Approach* (OUP 2018) 641 ff.

19 UN Doc S/1998/1181 and S/1998/1182, 16 December 1998. See also the statements of the delegates of Australia, Spain and Poland before the SC in UN Doc S/PV.4726, 26 March 2003 and S/PV.4726 (resumption 1), 27 March 2003.

20 See the statements of the delegates of Singapore, South Korea, Japan, Macedonia, Iceland, Mongolia, Marshall Islands, El Salvador, Uganda and Bulgaria in UN Doc S/PV.4726, 26 March 2003 and S/PV.4726 (resumption 1), 27 March 2003.

21 See, *ie*, the statement of the US Permanent Representative to the UN after the adoption of the SC Resolution 1441 (2002), UN Doc S/PV.4644, 8 November 2002, 3. See also the statements of US President quoted by J A Ramírez, 'Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?' (2003) 34 *CalWIntlJ* 17 and footnote 81.

22 Ministry of Defence, 'National Security: A Defence Update 2003' 16, quote in WM Reisman and A Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) Faculty Scholarship Series, Paper 957, 539.

The majority of States condemned the coalition's military action as a unilateral use of force in violation of international law and the UN Charter.²³ Among those that complained against the Western-led military attack, were a number of Middle Eastern States, namely, Yemen, Libya, Iran, Lebanon and Syria, some of which, arguably, might have been the most threatened by Iraq's possession of WMD. The majority of States rejected the 'material breach' argument and some of them (Iran and Lebanon) expressly excluded the legality of the preventive self-defence justification as well.

2.3 *Al-Kibar (2007)*

Some years later, in September 2007, Israel bombed the Al-Kibar nuclear reactor in Syria. Syria formally complained about the 'flagrant violation by Israel of its airspace' sending letters to the UNSC and the UNGA.²⁴ Nonetheless, it denied the Israeli attack had caused material damage.²⁵ Later, the Syrian President admitted that Israel had hit a military building.²⁶ Syria is a non-nuclear weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which prohibits States from developing nuclear weapons. Syria's non-compliant conduct explains why it carefully protested against the Israeli attack and did not reveal the real target of it. Syria denied the existence of a nuclear facility until the circulation, in 2008, of a video of a US intelligence briefing, which revealed that the 2007 military attack by Israel destroyed a covert nuclear reactor;²⁷ shortly followed by the IAEA's inspection discovering uranium particles at the Al-Kibar site.²⁸

Differently from what happened after the attack on the Osirak reactor, only one month later, in October 2007, Israel admitted that there had been an attack

23 See the debate before the SC after the beginning of the attack as recorded in UN Doc S/PV.4726, 26 March 2003 and S/PV.4726 (resumption 1), 27 March 2003, especially the statements of the Permanent Representative of Malaysia, also speaking on behalf of the Non-Aligned Movement, and those of the delegates of Algeria, Yemen, Libya, Indonesia, Cuba, Switzerland, Sudan, Viet Nam, Jamaica, Iran, Lebanon, Belarus, Laos, Tanzania, Costa Rica, Sri Lanka, Russian Federation, France, China and Syria. On the 24th of March 2003 the Council of the League of Arab States adopted a decision condemning the aggression against Iraq: UN Doc S/2003/365, annex, paras 1 and 2.

24 UN Doc S/2007/537 and A/61/1041.

25 Ibid.

26 'Assad Sets Conference Conditions' *BBC News* (1 October 2007) <http://news.bbc.co.uk/2/hi/middle_east/7021986.stm>.

27 Office of the Director of National Intelligence, 'Background Briefing with Senior U.S. Officials on Syria's Covert Nuclear Reactor and North Korea's Involvement' (24 April 2008) <https://www.dni.gov/files/documents/Newsroom/Speeches%20and%20Interviews/20080424_interview.pdf>.

28 IAEA, 'Implementation of the NPT Safeguards Agreement in the Syrian Arab Republic' GOV/2008/60, GOV/2009/36, GOV/2009/56, GOV/2010/11.

on an unspecified military installation;²⁹ nevertheless, it continued to deny that the attack was against a nuclear facility until 2018, when the Israeli Prime Minister acknowledged Israel's responsibility.³⁰ Nonetheless, Israel has never justified the attack by invoking preventive self-defence. Because of the reticent conduct of both States involved, the Israeli strike has never been brought up for debate before the SC. Nor has the First Committee of the UNGA, which deals with disarmament and international security, ever addressed it. The outcome was that, in the aftermath of the attack, third States did not take any position on whether or not the Israeli action was lawful,³¹ except for North Korea which condemned it.³² Nonetheless, two years later, in 2009, the 118 Member States of the Non-Aligned Movement (NAM) protested against Israel's conduct. The declaration adopted at the end of the NAM's Heads of State Summit qualified the Israeli action as a flagrant violation of the UN Charter.³³

3 Preventive Military Actions against States 'Unwilling or Unable' to Prevent Non-State Actors from Developing and Using CBRN Weapons

In 1998, the US invoked its right to act in self-defence in accordance with Article 51 of the UN Charter, as a justification for its military airstrike against a facility being used by Al-Qaeda, with the tolerance of the Sudanese Government, to produce chemical weapons in Sudan. In 2014 and 2015, the US, Australia, Canada, Turkey and Germany launched military attacks against the Islamic State of Iraq and the Levant's (ISIL) enclaves on Syrian territory, claiming Syria was 'unwilling or unable' to prevent ISIL from organising military actions against them.

29 'Israel Admits Air Strikes on Syria', *BBC News* (2 October 2007) <<http://news.bbc.co.uk/1/hi/7024287.stm>>.

30 'Israel Admits Striking Suspected Syrian Nuclear Reactor in 2007' *BBC News* (21 March 2018), <<https://www.bbc.com/news/world-middle-east-43481803>>.

31 Surprisingly, when the Syrian Government accused Israel of aggression during the October 2007 session of the UNGA, no other States replied: see UN Doc A/62/PV.12, 1 October 2007.

32 R Weitz, 'Israeli Airstrike in Syria: International Reactions', James Martin Center for Nonproliferation Studies, 1 November 2007, 7 <<https://www.inss.org.il/he/wp-content/uploads/sites/2/systemfiles/Israeli%20Airstrike%20in%20Syria%20%20International%20Reactions%20-%202011.pdf>>.

33 15th Summit of the Heads of States and Governments of the Non-Aligned Movement, Sharm el Sheikh, 11–16 July 2009, NAM2009/FD/Doc.1, <http://cns.miis.edu/nam/documents/Official_Document/15Summit-Final_Compiled.pdf>.

3.1 *Al-Shifa (1998)*

In August 1998, in the context of a missile attack against military bases and facilities connected to Al Qaeda in Afghanistan and Sudan, the US targeted a pharmaceutical plant in Al-Shifa, allegedly used to secretly produce chemical weapons. In the letter, dated 20 August 1998, from the US Permanent Representative to the SC President, the US justified its military actions as an exercise of its right of self-defence in accordance with Article 51 of the UN Charter. It invoked its right to respond to a series of armed attacks against United States embassies and nationals by the terrorist organisation of Bin Laden and to prevent and deter their continuation. The letter provided that the 'attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization.'³⁴

Later, the US President justified the attack officially, stating that Al Qaeda was seeking to acquire chemical weapons and other dangerous weapons;³⁵ the US Department of State also released an official statement saying that, as far as the Al-Shifa factory was concerned, 'the U.S. has reliable intelligence that the Bin Laden network has been actively seeking to acquire weapons of mass destruction – including chemical weapons – for use against United States interests.'³⁶

Sudan qualified the US action as an aggression and asked for the convening of an urgent meeting of the UNSC to discuss the matter.³⁷ It also called upon the UNSC to send a fact-finding mission to the Sudan.³⁸

The States belonging to the Islamic Group and the African Group supported the Sudanese request.³⁹

The SC met at the end of August 1998 to discuss the situation in Afghanistan, but no Member States referred to the bombing in Sudan.⁴⁰ Only one month after the attack, the delegate of Burkina Faso made a general reference to the

34 UN Doc S/1998/780, 20 August 1998.

35 'Statement of President Clinton Concerning U.S. Military Action in Afghanistan and Sudan', as recorded by the Federal Document Clearing House, <<https://apnews.com/article/6dcb03c4a2713bed29f3a32f52f11cb>>.

36 Coordinator for Counterterrorism, U.S. Department of State, 'Fact Sheet: U.S. Strike on Facilities in Afghanistan and Sudan' United States Information Agency, 21 August 1998, <https://1997-2001.state.gov/regions/africa/fs_binladin_facilities.html>.

37 E Cannizzaro and A Rasi, 'The US Strike in Sudan and Afghanistan – 1998' in T Ruys, O Corten and A Hofer (n 18) 542.

38 UN Doc S/1998/786, 21 August 1998.

39 UN Doc S/1998/790, 21 August 1998 and UN Doc S/1998/802, 25 August 1998.

40 UN Doc S/PV.3921 and S/PV.3921 (Resumption), 28 August 1998.

US strike before the SC and qualified it as an 'unacceptable reprisal carried out indiscriminately'.⁴¹

The Arab States condemned the US military action. In a statement dated 21 August 1998, the Secretariat of the League of Arab States qualified it as 'a blatant violation of the sovereignty of a State member of the League of Arab States, and of its territorial integrity, as well as against all international laws and tradition, above all the Charter of the United Nations'.⁴² A few days later, the Council of the League of Arab States adopted Resolution 5781, which reiterated the condemnation expressed by the Secretariat and qualified the US action as an act of aggression against Sudan.⁴³

Nuclear States reacted in different ways. The UK and Israel approved the US conduct; France did not express either open favour or a clear condemnation; the Russian Federation, China and Pakistan harshly criticised the US attack.⁴⁴

3.2 *Syria (2014–2015)*

In 2014, 15 States used military force against the territory of Syria where ISIL was preparing and launching military attacks against Iraq and – according to the intervening States – where the same entity was preparing terrorist attacks against them. Some of the States which acted in a preventive way, namely, the US,⁴⁵ Australia,⁴⁶ Canada,⁴⁷ Turkey⁴⁸ and Germany⁴⁹ grounded their conduct on their right under Article 51 of the UN Charter to act in individual self-defence. In their view, they were entitled to use force to prevent the occurrence of military attacks coming from the territory of a State that was 'unwilling or unable' to prevent non-State actors from threatening their security.⁵⁰ The same States declared their intent to destroy any facility terrorists were suspected of using in order to develop and store CBRN weapons.⁵¹ Syria protested against

41 UN Doc S/PV.3931, 24 September 1998.

42 UN Doc S/1998/789, Annex, 21 August 1998.

43 UN Doc S/1998/800, Annex, 24 August 1998. The condemnation was reiterated in the Resolution 5794 of the 17th of September 1998: see UN Doc S/1998/894, 28 September 1998.

44 J Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *YaleJIntL* 582 at 583.

45 UN Doc S/2014/695, 23 September 2014.

46 UN Doc S/2015/693, 9 September 2015.

47 UN Doc S/2015/221, 3 March 2015.

48 UN Doc S/2015/563, 24 July 2015.

49 UN Doc S/2015/946, 10 December 2015.

50 O Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29 *LJIL* 777.

51 White House, 'US National Strategy to Combat Weapons of Mass Destruction' (December 2002), <<https://fas.org/irp/offdocs/nspd/nspd-17.html>>; see also 'US National Strategy for Countering Weapons of Mass Destruction Terrorism' (2018) 2, 7 f. <<https://www.hsdl.org/?abstract&did=819382>>.

the US-led strikes in its territory, but not until one year after they began.⁵² in December 2015, it also rejected any justification based on the self-defence doctrine.⁵³ Before the SC, third States did not dwell on the foundation of a right to act in self-defence against an 'unwilling or unable' State. Nonetheless, some States⁵⁴ and the League of Arab States⁵⁵ considered the attack as unlawful. The majority of States did not express either a legal or a political position on the issue.

4 Military Actions against States That Use CBRN Weapons against Their People

4.1 Syria (2017–2018)

The Syrian armed forces have used chemical weapons against their own people several times since December 2012.⁵⁶ As a reaction, in April 2017, the US army launched an attack against the Al-Shayrat military airbase in Syria. The US stated that this was in response to the Syrian Government's use of chemical weapons from this airbase against the city of Khan Shaykhun.⁵⁷ One year later, in April 2018, a coalition of States, composed of the US, France and the UK, carried out military airstrikes against sites alleged to be connected with the development, production and stockpiling of WMD in Syria.⁵⁸ The 2018 attacks

52 UN Doc A/70/385-S/2015/727, 22 September 2015.

53 UN Doc A/70/673 and UN Doc S/2015/1048, 4 January 2016; see also UN Doc S/2016/31, 12 January 2016.

54 UN Doc S/PV.7527, 30 September 2015, at 4, 6, 18 and 50; UN Doc S/PV.7504, 17 August 2015, at 4; UN Doc S/PV.7501, 7 August 2015, at 6; UN Doc S/PV.7419, 27 March 2015, at 24.

55 Resolution No. 7987 adopted at the Ministerial Meeting of the Council of the League of Arab States, 'Unified Arab Position on the Violation by Turkish Forces of the Sovereignty of Iraq', 24 December 2015, annexed to UN Doc S/2016/16, 11 January 2016.

56 'Timeline of Syrian Chemical Weapons Activity' (2012–2020) <<https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity>>; see also the reports of the Fact-Finding Mission established in 2014 by the Organisation for the Prohibition of Chemical Weapons (OPCW), <<https://www.opcw.org/fact-finding-mission>>.

57 UN Doc S/PV.7919, 7 April 2017. See also 'Letter of President Trump to Congressional Leaders on United States Military Operations in Syria', 8 April 2017 <<https://www.gpo.gov/fdsys/pkg/DCPD-201700244/pdf/DCPD-201700244.pdf>>.

58 Statement of the 14th of April 2018 the UK Ministry of Defence <<https://www.gov.uk/government/news/raf-jets-strike-chemical-weapon-facility-in-syria>>. See also the statement of Lt. Gen. McKenzie <<https://www.defense.gov/News/Transcripts/Transcript-View/Article/1493749/departament-of-defensepress-briefing-by-pentagon-chief-spokesperson-dana-w-whit/>>.

were justified as reactions to the chemical attack against Douma, which had occurred few days before, in early April 2018.⁵⁹

The acting States invoked a mix of legal arguments to justify their conduct. They expressed their intent to bring the Syrian regime to justice because of the commission of serious crimes against its population. The chemical attacks in Khan Shaykhun and Douma were pictured as 'the tip of the iceberg', the 'red line' that had been crossed by the Syrian Government and that did not permit any State – even taking the blockage of the sc by Russia into account – to wait for other horrific crimes to be committed. The military reaction was intended as a means of last resort to degrade the Syrian military's ability to conduct further chemical attacks and to dissuade the Syrian Government from using chemical weapons again.⁶⁰ The language used, especially during the 2017 US military action, brings to an international lawyer's mind the punitive use of armed reprisals.⁶¹ Instead, following the 2018 attacks, the US expressly excluded a punitive intent as a rationale behind the attacks.⁶² Only the UK expressly invoked the humanitarian intervention justification. Its limited aim was to prevent other 'chemical attacks' against the Syrian people.⁶³ The other

59 'U.S. Says Air Strikes Cripple Syria Chemical Weapons Program', *Reuters* (12 April 2018) <<https://www.reuters.com/article/us-mideast-crisis-syria/trump-says-ordered-precision-strikes-against-syria-chemical-weapons-capabilities-idUSKBN1HJoZS>>; Prime Minister's Office, 'Syria action: UK Government Legal Position', 14 April 2018, <<https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>>. For an overview of States' opinions regarding the authorship of the chemical attacks in Douma, see A de Guttry, 'The Western-led Military Operations in Syria in Response to the Use of Chemical Weapons: A Critical Assessment of the Claim for New Exceptions to the Prohibition on the Use of Force' (2018) 56 *Archiv des Völkerrechts*, especially 477–481; see also OPCW, 'Interim Report on the Progress of the Fact-Finding Mission Regarding an Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018', OPCW Doc S/1645/2018, 6 July 2018 <https://www.opcw.org/sites/default/files/documents/S_series/2018/en/s-1645-2018_e_.pdf>.

60 As for the 2017 military reaction, see the statement released the 5th of April 2017 by the US representative before the UNSC, UN Doc S/PV.7917, 5 April 2017. In the same vein, the US statement of the 7th of April 2017 that followed the US military reaction, UN Doc S/PV.7919. A similar language was used by the representatives of the UK, France, Italy, Japan and Ukraine during the abovementioned sc meeting (UN Doc S/PV.7919, 7 April 2017).

61 For example, see UN Doc S/PV.7919, 7 April 2017.

62 UN Doc S/PV.8233, 14 April 2018.

63 As regards the 2018 attack, see the UK official statement justifying the military action: Prime Minister's Office, 'Syria action: UK Government Legal Position', 14 April 2018 <<https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>>.

intervening States partly alluded to the humanitarian intervention, though they did not refer to it *expressis verbis*.⁶⁴ Some of the States which supported the airstrikes did the same.⁶⁵

Both military interventions gathered expressions of approval and of clear condemnation.⁶⁶

A survey carried out by international law scholars on the reactions of 133 States to the 2018 attacks, reveals a number of elements that are very useful for assessing the consequence of this event on the possible development of a customary rule permitting the use of force against a State that has employed chemical weapons against its people. It discloses that the number of States that definitely considered the attacks as lawful was limited, but the number of States that definitely regarded them as unlawful was also limited. A significant number of States explicitly supported the airstrikes, although they did not explicitly refer to any legal ground in order to justify them. At the same time, a comparable number of States provided expressions of commitment to the UN Charter or other norms involving principles of non-intervention or sovereignty, but did not explicitly condemn the military intervention.⁶⁷

64 As for the US position, see footnote n 60 and White House, 'Statement by President Trump on Syria', April 13, 2018 <<https://www.whitehouse.gov/briefings-statements/statement-president-trump-syria/>>. As for France's legal justification, see 'Communiqué de presse du Président de la République sur l'intervention des forces armées françaises en réponse à l'emploi d'armes chimiques en Syrie', 14 Avril 2018 <<https://www.elysee.fr/emmanuel-macron/2018/04/14/communique-de-presse-du-president-de-la-republique-sur-l-intervention-des-forces-armees-francaises-en-reponse-a-l-emploi-d-armes-chimiques-en-syrie>>. See also the joint declaration of the French Minister for European and Foreign Affairs and of the Minister for Defence, issued on 14 April 2018 <<https://www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/article/declaration-de-m-jean-yves-le-drian-ministre-de-l-europe-et-des-affaires>>.

65 See footnote n 60.

66 In support of the 2017 military attack, the UK, France, Italy, Japan, Ukraine (see UN Doc S/PV.7919, 7 April 2017); against the Russian Federation, Bolivia (see UN Doc S/PV.7919, 7 April 2017), Iran and North Korea. In favour of the 2018 attacks, Côte d'Ivoire, Kuwait, Netherlands, Poland, Sweden, which voted against a draft resolution proposed by the Russian Federation to condemn the aggression by the United States and its allies over suspected chemical weapons use in Syria. The draft proposal was instead approved by Bolivia and China: UN Doc SC/13296, 14 April 2018. Iran condemned the attack, 'Iran's Supreme Leader Says Western Attack on Syria a Crime' *Reuters* (14 April 2018) <<https://www.reuters.com/article/us-mideast-crisis-syria-iran-guards/irans-supreme-leader-says-western-attack-on-syria-a-crime-idUSKBN1HL0DO>>.

67 A Gurmendi Dunkelberg, R Ingber, P Pillai and E Pothelet, 'Mapping States' Reactions to the U.S. Strikes Against Syria of April 2018: A Comprehensive Guide' (7 May 2018) <<https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/>>.

5 States' Inaction

5.1 *Iraq (1987), Iran (2002–), Sudan (2016) and North Korea (2016–)*

In cases other than those just recalled, States have declared themselves to be under a serious threat because of the development of CBRN weapons by other States. This is the case of Israel which, in the last 15 years, has frequently declared that it regards a nuclear-armed Iran as an existential threat⁶⁸ and that it is in the process of evaluating whether to act in preventive self-defence.⁶⁹ In July 2016, North Korea tested intercontinental ballistic missiles, posing a serious nuclear threat to the United States and Japan. The US Secretary of State declared that the US was keeping all options, including a military strike, on the table.⁷⁰

Fortunately, neither Israel nor the US and Japan have reacted to the threats militarily.

In other cases, States made use of CBRN weapons against their people. Iraq employed chemical weapons (during the Iran-Iraq war) to repress the Kurdish insurgency in 1988.⁷¹ Suspected chemical attacks have been carried out by the Sudanese army as part of a major military offensive launched in January 2016 in Jebel Marra against the Sudan Liberation Army.⁷² Third States did not react either to the Iraqi attack against the Kurdish people or to the Sudanese alleged use of chemical weapons in Darfur.

68 L Schloss, 'The Limits of the Caroline Doctrine in the Nuclear Context: Anticipatory Self-Defense and Nuclear Counter-Proliferation' (2012) 43 *Georgetown Journal of International Law* 555, 568.

69 See, for instance, the interview released by Ehud Barak (at that time in charge as Israeli Minister of defence) to *The New York Times* in 2012: 'Will Israel Attack Iran?' *New York Times Magazine* (25 January 2021) <<https://www.nytimes.com/2012/01/29/magazine/will-israel-attack-iran.html>>.

70 R Tillerson, 'Military Action against North Korea Is 'on the Table'' *NBC News* <<https://www.nbcnews.com/news/north-korea/rex-tillerson-military-action-against-north-korea-table-n734771>>.

71 J Hiltermann, 'The 1988 Anfal Campaign in Iraqi Kurdistan' <<https://www.sciencespo.fr/mass-violence-war-massacre-resistance/fr/document/1988-anfal-campaign-iraqi-kurdistan.html>>; see also 'Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Ira and Iraq' UN Doc S/19823, 25 April 1988.

72 According to an Amnesty International investigation, the Sudanese forces committed at least 30 attacks employing chemical weapons: Amnesty International, *Scorched Earth, Poisoned Air: Sudanese Government Forces Ravage Jebel Marra, Darfur*, 2016, <<https://www.amnesty.org/download/Documents/AFR5448772016ENGLISH.PDF>>.

6 Cyber-Attacks and Targeted Killings as New Means to Prevent States from Developing and Using CBRN Weapons or Allowing Non-State Actors to Do So

6.1 *Iran (2010–)*

According to media reports, the United States and Israel are widely believed to have developed the Stuxnet computer virus which cyber-attacked an Iranian nuclear facility, the Natanz uranium-enrichment site in 2010.⁷³ Other cyber-attacks have been launched since then against Iranian nuclear plants.⁷⁴ Most recently, in July 2020, Israel was suspected of being behind the cyber-attack that triggered a fire at the same facility.⁷⁵ Except for Iran's warning that it is ready to 'retaliate' against its cyber-enemies, other States did not protest against the alleged US-Israeli cyber-attacks. The latter have never taken responsibility for the attacks; therefore, no legal justification was submitted for them.

Since 2010, Israel's intelligence service is widely believed to have carried out a series of targeted killings against Iranian scientists, purported to be agents of the Iranian State who have been developing Iranian atomic weapons.⁷⁶ No official protest has ever been advanced against Israel, except by Iran.

7 Assessment of State Practice

7.1 *Three Preliminary Methodological Issues*

Three preliminary issues have to be considered before evaluating the State practice mentioned above. The first concerns State conduct which hasn't been accompanied by legal justifications. Can such conduct be taken into account in order to support the creation of a new customary rule? The second question concerns what weight to give to the practice and the *opinio juris* of States which have a 'legal interest' in the respect of a rule, although they are not specifically

73 'Stuxnet Was Work of U.S. and Israeli Experts, Officials Say' *The Washington Post* (2 June 2012) 'The Secret History of the Push to Strike Iran' *New York Times Magazine* (4 September 2019) <<https://www.nytimes.com/2019/09/04/magazine/iran-strike-israel-america.html>>.

74 'Obama Order Speed Up Wave of Cyberattacks Against Iran' *The New York Times* (1 June 2012) <<https://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>>.

75 <<https://akegroup.com/2020/07/08/iran-nantaz-nuclear-nightmare/>>.

76 F Fassihi, D E Sanger, E Schmitt and R Bergman, 'Iran's Top Nuclear Scientist Killed in Ambush, State Media Say', *The New York Times* (27 November 2020) <<https://www.nytimes.com/2020/11/27/world/middleeast/iran-nuclear-scientist-assassinated-mohsen-fakhrizadeh.html#link-235350d7>>. See also UN Doc A/66/656–S/2012/27, 12 January 2012.

affected by a specific conduct. To what extent is their conduct relevant in the development of a new customary rule?

The third question concerns the value an interpreter should give to States' inaction in the development of customary international law. When a State infringes an existing customary rule or initiates a new practice and the main reaction by third States is silence (or inaction), how should this silence be interpreted? Should it mean tacit acceptance, implied condemnation, lack of interest or absence of a legal opinion?

7.1.1 Express Legal Justifications

According to a formalistic approach, as followed by the ICJ in the *Nicaragua* case, an interpreter does not have the authority to 'ascribe to States legal views which they do not themselves advance'.⁷⁷ It has also been observed that it is only on the basis of a State's legal view justifying its own conduct, that the other States may express their own legal opinions in favour or against it. In the absence of the acting State's legal justification, approval or lack of condemnation by third States could not have any 'bearing on the formation of customary international law'.⁷⁸ This should be the dividing line between law and politics.⁷⁹

This methodological question is relevant for the present analysis. It has been contended that the acting States have not defended the Al-Kibar attack or the military actions against Syria in 2017 and 2018 on legal grounds (more exactly, only some have not in the Syrian case).⁸⁰ The outcome of this reasoning would be that the Israeli attack on the Al-Kibar facility, as well as third States' reactions to it, could not be taken into account as elements of State practice supporting or denying the emergence of a customary norm authorising

77 ICJ, *Case Concerning military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) 27 June 1986, para 207, <<https://www.icj-cij.org/en/case/70/judgments>>. In this vein K J Heller, 'Why al-Kibar Does Not Contribute to Pre-Emptive Self-Defence', *Opiniojuris*, <www.opiniojuris.org>; M Milanovic, 'The Syria Strikes: Still Clearly Illegal', *EJILTALK*, 15 April 2018 <<https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/>>.

78 Ibid. See also A Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?', (2011) 16 *JC&SL* 263, at 284 who believes that because of the absence of a legal justification by Israel for the Al-Kibar attack, the international community's lack of protest cannot be considered acceptance of the Israeli action.

79 Ibid.

80 J Bellinger, 'The Trump Administration Should Do More to Explain the Legal Basis for the Syrian Airstrikes' *Lawfare* (14 April 2018) <<https://www.lawfareblog.com/trump-administration-should-do-more-explain-legal-basis-syrian-airstrikes>>.

States to act in preventive self-defence.⁸¹ In the same vein, in the case of the military attacks against Syria, the fact that both the intervening States and their supporters (except for the UK) avoided the language of humanitarian intervention, would mean that their conduct could not be considered as relevant for the creation of a humanitarian exception to the prohibition on the use of force.

The above-mentioned argument is convincing, so long as it is applied in a non-formalistic way. While it is not for international lawyers to invent justifications for States' conduct,⁸² it is for them to take into account the substantial meaning of statements States make, without limiting their analysis to look only at the employment of standardised formula (*ie* humanitarian intervention theory).

Furthermore, it is appropriate for international lawyers to consider opinions expressed by States in various ways, *ie* not just when they resort to formal statements.

Israel has never withdrawn from the Begin doctrine and has repeatedly asserted its right to act in preventive self-defence against any threat to its existence. Therefore, the absence of an official justification for the Al-Kibar attack can hardly be intended as a change of mind. In such a case, the State's real conduct reasonably includes its *opinio juris* on the matter.

As regards the US and France's statements on the legal justification of their military actions against Syria, while it is definitely true that they were quite general and did not expressly make use of the 'humanitarian intervention' formula, they nonetheless repeatedly referred – among the possible justifications – to their intent to bring an end to the humanitarian crisis affecting the Syrian people. Thus, the humanitarian intervention purpose was sufficiently clear.

7.1.2 Can Conduct of Some States Count More Than That of Others?

In the introduction of its survey on *Customary International Humanitarian Law*, the International Committee of the Red Cross (ICRC) acknowledged that one of the requirements for a customary rule to come into existence 'is that the state practice concerned must be both *extensive and representative*.'⁸³ In the ICRC's view, 'representative' means, in the words of the International

81 E Chachko, 'The Al-Kibar Strike: What a Difference 26 Years Make', *Lawfare* (2 April 2018) <<https://www.lawfareblog.com/>>. This is also the opinion of Andrew Garwood-Gowers, footnote 79.

82 Ibid.

83 J-M Henckaerts and L Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I, Rules* (CUP 2009) xliv.

Court of Justice in the *North Sea Continental Shelf* cases, that the practice must 'include that of States whose interests are *specially affected*.'⁸⁴ According to the ICRC's survey, which States are specifically affected will vary depending on the circumstances:⁸⁵ when rules concern conduct that all States can be held to have a 'legal interest' in, like in the case of humanitarian law rules, 'all States must be considered, whether or not they are "specially affected" in the strict sense of that term.'⁸⁶

This position reflects what Judge Shahabuddeen wrote in his Dissenting Opinion attached to the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where he suggested that '[w]here what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all States are equally affected, for, like the people who inhabit them, they all have an equal right to exist.'⁸⁷

The interests in countering the proliferation of CBRN weapons and avoiding a serious prejudice to peace and security – which may be the result of a military intervention aimed at countering the proliferation of CBRN weapons – are undoubtedly States' shared interests. It is for this reason that the practice of all States, not only of those specifically affected in the strict meaning of this term, is relevant for a new customary rule authorising the use of force to come into existence.⁸⁸

84 Ibid, xlv. See also ICJ, *North Sea Continental Shelf Cases* (Germany v Denmark; Germany v Netherlands) (Merits), 20 February 1969, 43, para 74 <<https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf>>.

85 Ibid, xlv.

86 Ibid, xlv.

87 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996 at 414.

88 The Commentary to the ILC Draft Conclusion 8 on the identification of customary international law adopted in 2018 clarifies that 'in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule ("specially affected States") have participated in the practice'. Nevertheless, no reference is made to cases where all States ought to be considered 'specially affected' because they have a 'legal interest' in a rule being respected: ILC, Draft Conclusions on Identification of Customary International Law with Commentaries, UN Doc. A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part Two.

7.1.3 Value of Third States' Silence

As just concluded, when conduct that is contrary to a rule providing for an *erga omnes* obligation is at stake, the practice of every State counts in order to develop an exception to this rule. But what form may State conduct and *opinio juris* assume? Do silence or inaction count?

A recent survey by Harvard Law School on the 'Quantum of Silence: Inaction and *Jus ad Bellum*', has persuasively observed that 'the general complexities of imbuing silence with legal significance [...] are amplified in the field of *jus ad bellum*.'⁸⁹ It is not a surprise that, in this field, international law scholars have given opposite meanings to third States' silence.

In its work on the 'Identification of Customary International Law', the International Law Commission (ILC) has laid down that State practice may, in certain circumstances, include inaction (Draft conclusion 6, para 1).⁹⁰ In the ILC's Commentary, the Commission has clarified that the State that does not react has to be conscious of refraining from acting in a certain situation because the inaction may count as an element of State practice. Examples include States that abstain from using force.⁹¹

Failure to act may also count as evidence of State *opinio juris* 'provided that States were in a position to react and the circumstances called for reaction' (Draft conclusion 10, para 3). The ILC refers to cases where States which do not react have a direct interest in the issue, so that their inaction is considered as acquiescence. This position has also been held by the ICJ in the *Temple of Preah Vihear* case and, recently, in the *Pedra Branca* case.⁹²

No specific Draft conclusion deals with the value of States' silence or inaction before conduct which is in contrast with an *erga omnes* obligation actually takes place.

Among governments that commented on the Draft conclusions, as adopted by the ILC in 2016, some expressed perplexities that, under certain circumstances, silence could be regarded as acquiescence. In particular, the Governments of the Czech Republic and New Zealand replied that States may not react to conduct of other States due to political and diplomatic considerations or simply because they have not been directly affected (in the strict

89 D A Lewis, N K Modirzadeh and G Blum, 'Quantum of Silence: Inaction and *Jus ad Bellum*', Harvard Law School Program on International Law and Armed Conflict, 2019, 33.

90 ILC Draft Conclusions (n 88).

91 Ibid.

92 ICJ, *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep.; ICJ, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*, (Merits) [2008] ICJ Rep., para 121.

meaning of this term) by the action taken by other States, namely, if they lack a direct interest in the issue.⁹³

These observations suggest that a cautious approach is warranted before giving silence a specific meaning when rules providing for *erga omnes* obligations – like the prohibition against military attacks – are at stake. In fact, where *erga omnes* obligations are concerned, the silence of third States is questionable evidence to establish their approval of the acting State's conduct.⁹⁴ Specifically affected States are expected to react to certain conduct; their inaction – if they have the capacity to react – may rightly be considered as an expression of acquiescence. However, States that have a legal interest in the respect of rules protecting shared values may be prevented by international or domestic political calculations from expressing their opinions about the legality of another State's conduct, even though the conduct is in contrast with the importance they attach to the rules.⁹⁵ For all these reasons, silence by States which have a legal interest in the respect of *erga omnes* obligations is much more enigmatic than in other cases,⁹⁶ and extreme caution should be used to assign it a legal meaning. Thus, in such cases, it is preferable not to invoke silence in support of or against the development of a new rule.

7.2 *Assessment of Preventive Self-Defence Claims*

7.2.1 Claims against Proliferating States

As the previous paragraphs have shown, the Israeli preventive attack on the Iraqi nuclear facility in 1981 encountered widespread condemnations by third States.

Israel did not claim any legal ground after the 2007 attack to the Al-Kibar nuclear plant, although – for the reasons just said – it is reasonable to believe that it was another application of the Begin doctrine. Third States did not react

93 UN Doc A/CN.4/716, 14 February 2018, 39 and 41.

94 ILC, Draft Conclusions (n 88) 133.

95 N S Marques Antunes, 'Acquiescence', *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum ed, 2006) para 16, who refers to *jus cogens* rules, believes that silence should not be 'legally tolerable' where 'overarching issues in which the interests of the international order as a whole' are concerned. Buzzini ('Les comportements passifs des Etats et leur incidence sur la réglementation de l'emploi de la force en droit international general', E Cannizzaro and P Palchetti, *Customary International Law on the Use of Force. A Methodological Approach* (Martinus Nijhoff, 2005), 93–96), observes that while States are expected to react in case of serious violations of *erga omnes* obligations, general international law only recognises a right to react (not an obligation), leaving States some leeway to take into account other interests.

96 A Bianchi, 'The International Regulation of the Use of Force: The Interpretive Method' (2009) 22 LJIL 651, at 663.

immediately after the 2007 Israeli attack. This has led some to consider third States' silence as a telling element of States' support for the development of a right to act in preventive self-defence against nuclear threats.⁹⁷ This conclusion is not convincing because – as said above – when the violation of a rule providing for an *erga omnes* obligation occurs, silence of third States is enigmatic. Third States' absence of complaint might be explained by practical and political considerations. No information on the strike was provided by the governments involved. For Arab States, the close ties developed between Syria and Iran might have been perceived as having a 'disruptive influence in the region', 'making [Syria] a less sympathetic victim of Israeli pre-emption than Iraq in 1981.'⁹⁸

Be that as it may, it must not be forgotten that an important number of States condemned the Israeli attack (the 118 States Parties of the NAM), although this was two years later and so might be considered too late to have any value in the creation of a customary rule.

As for the 2003 attack against Iraq, only two intervening States invoked the plea of preventive self-defence, while the others turned to other legal excuses (namely, the 'material breach' theory). More generally, the attack was widely reputed as unlawful.

The only reasonable conclusion to draw is, therefore, that current international law does not permit States to forcefully and preventively counter the proliferation of CBRN weapons in self-defence. This conclusion is supported by the development, in recent years, of nuclear programmes by Iran and North Korea. States like the US and Israel – which had attacked Iraq and Syria and which might be among those more directly at risk from a nuclear Iran or North Korea – have refrained – at least up to now – from forcefully intervening. This tells us that the practice of the intervening States is not coherent, another element which supports excluding the development of a new exception to the prohibition of the use of force.

Furthermore, this conclusion is also in line with the emergence of new strategies some States have developed to limit the proliferation of their enemies, like the spreading of malware to affect the functioning of nuclear facilities and the targeted killing of individuals, such as eminent scientists believed to have a fundamental role in the development of States' CBRN weapons capabilities. States seem to prefer alternative strategies to that of targeted military attacks against alleged CBRN facilities. Although the lawfulness of the latter

97 E Chachko (n 81).

98 L S Spector and A Cohen, 'Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime' <<https://www.armscontrol.org/>>.

measures remains doubtful as well, they nevertheless mark a new approach, which might diminish the risk of further armed actions against alleged CBRN weapons plants.

7.2.2 Claims against 'Unwilling or Unable' States

The 'unwilling or unable' test has been discussed in scholarly writings for the last couple of decades.⁹⁹ However, a wider debate has since been started by the former Legal Adviser to the United Kingdom Foreign and Commonwealth Office, Daniel Bethlehem, who has advocated in favour of self-defence not only against non-State actors who perpetrate armed attacks, but also against States materially supporting them (at least hosting them).¹⁰⁰ The proposal has several followers.¹⁰¹

The State practice referred to above is not sufficient to support the idea that a customary rule has developed, permitting States to act in self-defence against States 'unwilling or unable' to prevent non-State actors from possessing or developing CBRN weapons. On the other hand, less criticism was expressed against the intervening States acting against non-State actors and facilities allegedly used by them. States that condemned these attacks were numerically speaking less than in the other cases and a larger number of them decided not to take any legal position. Silence is far from meaning support of State conduct. Therefore, the legality of the self-defence plea has to be excluded. However, this silence definitely expresses a higher degree of uncertainty about the current stance of international law and may leave the door more open for further developments of the law.¹⁰²

99 A Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self Defense', (2002) 52 *VaJInt'lL* 483.

100 D Bethlehem (n 5) 770.

101 The Chatham House Principles (n 5), point 6; N Schrijver and L van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law', (2010) 57 *NYIL* 531; L Moir, 'Action Against Host States of Terrorist Groups', in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015), 720; E Chachko and A Deeks, 'Which States Support the 'Unwilling and Unable' Test?' *Lawfare*, 10 October 2016 <<https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>>.

102 According to P Starski, 'Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility And Legislative Responsibility' (2016) MPIL Research Paper Series 2016–20, 42 f., the ambiguity inherent in the claims made by the intervening States and their supporters do not permit 'treating mere silence of in-active States as acquiescence': <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2851809>. *Contra* T Ruys and L Ferro, 'Divergent Views on the Content and Relevance of the Jus Ad Bellum in Europe and the United States? The Case of the U.S.-Led Military Coalition Against "Islamic State"' (10 February 2016) at 23, <<https://ssrn.com/abstract=2731597>>.

7.3 *Is a Rule Authorising States to Act in Anticipatory Self-Defence in Cases of Imminent CBRN Attacks Desirable?*

Counter-proliferating military attacks are always justified by concerns over potential threats to the national security of the intervening States. However, in no case has clear and irrefutable evidence of an imminent attack been found. Nevertheless, is it reasonable to expect a State, faced with proof of the imminence of an armed attack (by a State or a non-State actor), not to intervene? A wait-and-see attitude is far from reasonable, at least when States have interceptive military capacities.

Especially because of the nefarious effects of CBRN weapons, scholars have upheld the lawfulness of an action in anticipatory self-defence. The idea has taken hold not only among those who believe that Article 2(4) of the UN Charter has not precluded the applicability of the pre-Charter era customary rule allowing for anticipatory self-defence,¹⁰³ or among those who argue such a right is in accordance with Article 51.¹⁰⁴ It has also been supported by those who believe that, for the UN Member States, the Charter has swept away the pre-existing customary rule permitting States to act in anticipatory self-defence.¹⁰⁵ However, among the holders of such a view, some have pointed out some conditions the acting States must respect, in addition to those of necessity and proportionality, in order to assess the imminence of the threat. The most interesting of these conditions is that the anticipatory use of force ought to require 'clear and convincing' evidence of an imminent military attack.¹⁰⁶

This opinion is based on a realist evaluation of States' conduct, and convincingly tries to shape legal prohibitions to take into account the need for military defence and, at the same time, to prevent abuses. The real weakness of it is, nonetheless, twofold.

103 This seems to be the opinion of the High-level Panel on Threats, Challenges and Change the UN Secretary-General established in 2004: High-level Panel Report, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565, 2 December 2004, para 188.

104 Among the supporter of this opinion see, *ie*, D W Bowett, *Self-defence in International Law* (Univ. Press, 1958); S M Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law' 136 RdC (1972-III), 463.

105 A Cassese, 'Una modesta proposta sulla legittima difesa preventiva', M Spinedi, A Gianelli and M L Alaimo (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Giuffrè, 2006), 189 ff.

106 *Ibid*; D A Sadoff, 'Striking a Sensible Balance on the Legality of Defensive First Strikes' (2009) 42 VandJTransnatlL 441, 442 (2009); M E O'Connell, 'Lawful Self-Defense to Terrorism' (2002) 63 UPittLRev 889, 889-90, 893.

It does not seem to be applicable to biological and chemical weapons, whose production is easy to hide.¹⁰⁷ Moreover, biological weapons cause more contamination if the pathogens are dispersed by means of air spraying methods other than explosions, the former being more difficult to monitor and prevent. Since biological weapons can be used without warning, it may not be possible to distinguish the temporal proximity of a threat.¹⁰⁸

Furthermore, a military action aimed at destroying a facility from which a radio-nuclear or chemical attack is going to be launched, might cause as much health and environmental damage as the anticipatory attack is intended to prevent. But how to make an *a priori* assessment of the human and material costs of an anticipatory self-defence intervention? How to assess whether the remedy would be worse than the disease?

7.4 *Assessment of Humanitarian Intervention Claims*

As the previous paragraphs have pointed out, in recent years, CBRN weapons have been used by Iraq, Syria and Sudan against their own people; third States have replied by using military force only against Syria.¹⁰⁹ Political and strategic interests might dictate third States' inaction. It makes this practice useless for those who want to ascertain whether a customary rule permitting humanitarian intervention is in the process of developing.

In contrast, the April 2018 airstrikes against Syria have been considered a 'transformative event that may have changed international law concerning humanitarian intervention.'¹¹⁰ Some would argue that the airstrikes have crystallised a new exception in which force is allowed, 'namely to respond to and prevent future use of chemical weapons against civilians when the UNSC is blocked from authorizing humanitarian intervention by a Permanent Member's veto'.¹¹¹ This conclusion is based on a reading of the State practice that gives an important role to the silence of many States before the 2018 attacks. M.P. Scharf, one of the main holders of this view, writes that 'international law considers States that elect not to weigh in on an issue of general concern as providing silent support or acquiescence.'¹¹²

¹⁰⁷ M C Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction' (2009) 31 MichJIntlL, 11–14 and 19.

¹⁰⁸ Ibid, 13.

¹⁰⁹ For a general summary of State practice, see N S Rodley, 'Humanitarian Intervention' in M Weller (n 101) 775.

¹¹⁰ M P Scharf, 'Striking a Grotian Movement: How the Syrian Airstrikes Changed International Law Relating to Humanitarian Intervention' (2019) 19 ChiJIntlL 586.

¹¹¹ Ibid, 593.

¹¹² Ibid, 609.

Scharf undoubtedly focuses on one of the thorny issues every international lawyer has to tackle once he/she confronts the emergence of a new customary rule, even more so in respect to *jus ad bellum* rules. In this field of law, silence is of particular concern.

As already said, while many States considered the attacks against chemical facilities in Syria as legitimate, they were silent on the legal justification for it. Their silence cannot be considered as an element in favour of a right to humanitarian intervention for the reasons already given above.

Furthermore, many States did not invoke the unlawfulness of the attacks, but reiterated the UN Member States' obligations to respect the Charter and the principle of non-intervention. These references suggest the authors of the statements believed the strikes violated at least Article 2(4).

In light of these elements, it is hard to conclude that a right to humanitarian intervention has arisen from the ashes of the 2018 airstrikes against Syria. This should not lead one to underestimate the important precedential value that States' material and verbal reactions to the use of chemical weapons against the Syrian people may have in the future, for the development of a further exception to the prohibition on the use of force.

7.5 *Does the 'Illegal but Legitimate' Argument Work?*

The imminence of an attack with CBRN weapons has paved the way for a debate on the advantages of a customary rule allowing for anticipatory self-defence when specific conditions have been met (see *supra*). The use of the same weapons against civilians and combatants has led to a different debate on the 'unlawful but legitimate' use of force to prevent further uses of them.¹¹³

The argument is based on the premises that humanitarian intervention is prohibited, but it can be morally justified in exceptional circumstances, since the law may not reflect elementary considerations of justice and humanity.¹¹⁴

Proponents of the 'unlawful but legitimate' argument move from a different perspective than those who are in favour of the development of a right to act in

113 Another interesting debate, that cannot be dealt with within the limited confines of this study, concerns the occurrence of a 'paradigm shift' in the international legal order, from a law for States to a 'law of humanity' (RG Teitel, *Humanity's Law* (OUP 2011) that would justify humanitarian intervention. For an interesting reply to this opinion, see C O'Meara, 'Should International Law Recognize a Right of Humanitarian Intervention' (2017) 66 ICLQ 441.

114 The 'unlawful but legitimate' claim was advanced in 2000 by the Report of the Independent International Commission on Kosovo, co-chaired by Richard Goldstone and Carl Tham, <<https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/The%20Kosovo%20Report%20and%20Update.pdf>>.

anticipatory self-defence. The former admit to breaking the law without trying to justify the military action on legal grounds, as they advocate for the raising of a new rule permitting the use of force as a moral imperative. The development of a legal exception to the prohibition on the use of force is instead at the core of the latter approach. Nonetheless the 'unlawful but legitimate' argument shares with the anticipatory self-defence claim the same weakness. Proponents of the 'unlawful but legitimate' formula include among the criteria of legitimacy a cost-benefit analysis intended to assess whether the consequences of an intervention are not worse than the consequences of inaction.¹¹⁵ But how to make an *a priori* assessment of the human and material costs of a humanitarian intervention to prevent further use of CBRN weapons? How to assess if it will produce less damage and suffering than the employment of CBRN weapons will cause (or has already caused)?

When CBRN weapons are at stake, the negative and long-term effects on human health and the environment that their use or their destruction may produce make it more difficult to apply the cost-benefit analysis as a criterion for deciding whether or not to intervene. Moreover, *ex post facto* assessments of the costs and benefits of an intervention always relate to a specific case; their use to foresee the 'costs' of military intervention in different scenarios would be wrong.¹¹⁶

8 Concluding Remarks

The present survey has disclosed that the development of CBRN weapons and the risk of their employment has represented a momentous temptation for States to use force, both to protect their security interests and to defend civilian populations under attack. This chapter has shown that current customary international law does not provide for specific exceptions to the ban on the use of force to respond to the proliferation of CBRN weapons or their use against human beings. It has also brought to the fore that where States have reacted against States that were 'unwilling or unable' to limit the acquisition of CBRN weapons by non-State actors on their own territory or against States that used chemical weapons against their own people, third States have

115 G Evans, 'When Is It Right to Fight? Legality, Legitimacy and the Use of Military Force', 2004 Cyril Foster Lecture, Oxford University, 10 May 2004, <<http://www.gevans.org/speeches/speech105.html>>.

116 M Milanovic, 'Illegal but Legitimate' (*EJILTalk!* 10 April 2017) <<https://www.ejiltalk.org/illegal-but-legitimate/>>.

supported them more than in cases of military actions justified by preventive self-defence. Yet, even in the latter scenario, third States' inaction and silence prevailed; however, this does not justify concluding that the development of new rules permitting the use of force are in the process of emerging. Moreover, accepting that compelling reasons and needs – like the dire humanitarian situation in Syria – might pave the way for the development of new rules, based on limited and contested State practice and *opinio juris*,¹¹⁷ would lead to the abusive application of coercive military force.

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117 This is instead the opinion expressed by Daniel Bethlehem, 'Stepping Back a Moment: The Legal Basis in Favour of a Principle of Humanitarian Intervention' *EJILTalk!* 12 September 2013, <<https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>>.

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