Can Great Powers Change Fundamental Norms?

A Theoretical and Empirical Assessment of the Strength of Fundamental Norms in post-2001 International Society

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PhD Dissertation

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Acknowledgements

Ten years ago I began my 'journey' at the Department of Political Science at Aarhus University as an undergraduate student. To study political science was a great dream of mine and I was really excited to begin my studies. Then, a few days into the first semester, on September 11, two airplanes struck into the twin towers of World Trade Center in Manhattan, New York. Almost 3000 people were killed and it was the largest terrorist attack on American soil ever. The following day, the President of United States, George W Bush, went on national television and declared war against the terrorists. Like many others, I sensed that the terror attacks and the American so-called 'war on terror' would have serious consequences for the world. But, had anyone told me that I would write a PhD dissertation on this subject, I would not have believed them. Yet, now ten years later after four years of research I have completed a dissertation on this subject. However, I have not done this on my own. This book has only come to life with the help of many good people. While their help and suggestions have only improved my work, none of them can be blamed for errors or misinterpretations.

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On a personal note, I would like thank family and dear friends. I am so grateful for your love and support. You all have patiently listened to my many

stories about my dissertation and the world of academia in general and you have tried to understand my sometimes non-sense talk. I am deeply grateful to my parents for their wonderful support: your time and patience in my childhood have given me the abilities to write this dissertation today. As a kid I dreamt of becoming a writer, and today I kind of am one. Thank you to my sweet sisters, Julie and Marie, who are my best friends and who always try their best to help and support me. I love having you in my life.

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Johanne Grøndahl Glaving
Aarhus, October 2011

Chapter 1
Introduction

Who killed article 2(4) again?
(Thomas Franck, 2003).

On 25 June 1945, delegations from 46 states gathered in San Francisco to unanimously adopt the Charter of the United Nations (UN). After a bloody beginning of the 20th century with two world wars, the states hoped to enter a new era of peaceful coexistence. To accomplish this goal Article 2(4) of the Charter prohibited any threat of use or use of military force, except the use of force as self-defence against an armed attack or the use of force authorised by the UN Security Council. Today, this general ban on the use of force constitutes one of the fundamental norms of contemporary international society.

Despite its status as an international fundamental norm, the norm on non-use of force has twice been pronounced dead - 'killed' by the great powers. In 1970, the late prominent international lawyer Thomas M. Franck famously declared that Article 2(4) had been killed and was 'mock[ing] us from its grave' (Franck, 1970: 809). The 'murderers' were the two super powers of the world, the US and the Soviet Union. The Cold War, the constant proxy-wars between the two super powers and the risk of a nuclear war had created an unsustainable international system. As Franck explained:

> What killed Article 2(4) was the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defence of their national interests. So long as there are nations – which is likely to be for a very long time – their pursuit of the national interest will continue; and where that interest habitually runs counter to a stated international legal norm, it is the latter which will bend and break (ibid.: 837).

In other words, because states always would pursue their national interests, the norm on non-use of force was destined for an early death.

According to Franck, the norm was 'miraculously reborn' in the 1990s. In this new post-Cold War world, the order of international society was again underwritten by 'the law of the long-languishing Charter' (Franck, 2003: 609). The Security Council changed from being an organ of conflict to an organ of cooperation and crisis-solving, most evident in the rise of UN-authorised in-

terventions in, inter alia, Iraq/Kuwait, Bosnia, Somalia, Rwanda and Haiti. The world had reached 'the end of history', as famously declared by Francis Fukuyama, and the liberal world order had come to stay for good (Fukuyama, 1992). An international society based on solidaristic norms and principles had emerged and replaced the old, power-political system (Knudsen, 1999; Wheeler, 2000).[1] International society was stronger than ever.

In 2003, however, Franck claimed that 'Article 2(4) has died again, and, this time, perhaps for good' (Franck, 2003: 610). This time the 'murderer' was former President of the US, George W. Bush and his administration's claim of a unilateral right to use preventive force against Iraq and its sidestepping of the UN. The US policy was not 'system transformation but system abrogation' indicating a sad return to the age of power politics (ibid: 620). While Franck lamented the Bush administration's policy, it was praised by others. Realists were quick to use this alleged 'murder' of the norm as proof that international relations essentially are a power political game in which norms matter no more than the will of the great powers (Glennon, 2003). Or in the words of Anthony Clark Arend, 'for all practical purposes, the UN Charter framework is dead' (Arend, 2003: 101). The 1990s' honeymoon was over and we were now witnessing a 'return to history', as Robert Kagan (2008) argued. Even traditional defenders of fundamental norms claimed that this norm challenge by the world's only superpower was one too many. According to Tim Dunne, the Bush administration's decision to wage war against Iraq posed a 'critical test for those who believe that states are increasingly caught up in a normative web spun from cosmopolitan thread' (Dunne, 2003: 304).

In this dissertation I question these rather apocalyptical views of the norm on non-use force. I show that although the Bush administration challenged the norm on non-use of force, it did not succeed in killing it. Using the theory of the English School, I argue that norm change is not a material process based on power and might, but rather a social process based on legitimacy and right. Hence, for great powers to change norms, the norm change must be considered legitimate by the states of international society. Because fundamental norms, such as the norm on non-use of force, constitute international society and bring order in an otherwise anarchical world, they are endowed with high legitimacy, as they are highly treasured by the states of international society. Therefore, they are more resistant to norm change than

[1] Some disagreed with this optimistic view, arguing that the practice of humanitarian interventions was challenging the fundamental norms of non-intervention and sovereignty and thus endangering the international order (Jackson, 2000: 249-289; Ayoob, 2002).

other norms, as such a change must be considered even more legitimate than the norm itself. The dissertation poses the critical question whether great powers in fact are stronger than fundamental norms. Or put differently: Did President Bush really kill Article 2(4)?

In the following, I present the research questions that guide the dissertation, the main theoretical and empirical debates to which the dissertation contributes, and finally the research design of the study.

1.1. Research questions

The Bush administration challenged the fundamental norm on non-use of force not only once but twice. First, President Bush tried to change the norm by arguing for a right to use force as self-defence against states harbouring terrorists guilty of grave terror acts and by applying this argument to the Afghanistan war. Second, he tried to change it by claiming a right to use preventive force as self-defence and by implementing this claim in the Iraq war.[2] But whereas the first norm challenge succeeded in changing the norm without causing much debate either among the states or in the field of International Relations (IR), the second norm challenge did not succeed in this. It was considered much more controversial and caused intense debates in the UN Security Council and General Assembly as well as in IR. *And* it led Thomas M. Franck to conclude that the norm on non-use of force had died again, this time probably for good.

IR scholarship has focused mostly on the second norm challenge and its application in the war against Iraq. However, this does not make the first norm challenge less interesting. To assess whether President Bush really killed the norm on non-use of force, I use the first norm challenge as a point of reference – a 'baseline' case so to speak. The first norm challenge is a case of a successful norm challenge and by comparing the two challenges I am able to shed light on the reasons why the second norm challenge did not succeed. Furthermore, the fact that the two norm challenges share many similarities makes them very useful for investigating the relative impact great powers may have on fundamental norms. Both norm challenges are posed against the same norm by the same great power, the US, and both in the context of the 9/11-terror attacks in New York and Washington DC. Due to these similarities it is even more notable that only the first norm challenge succeeded. Thus, the aim of this dissertation is to investigate why the first

[2] As argued in Chapter 5, both kinds of force were considered illegal prior to 9/11 (for an elaboration see Chapter 5).

norm challenge succeeded in changing the norm but the second failed, as this may tell us something about the strength of fundamental norms vis-à-vis the power of great powers.

To determine when and why the second norm challenge failed, I analyse the norm change process of each norm challenge. To do this, we need to know not only how the administration in each case challenged the norm, but also how the other states responded to the challenges. By investigating the Bush administration's norm challenges and the subsequent political debate in the international society of states we can assess the strength of the norm on non-use of force by drawing a picture of the norm's legitimacy compared to the legitimacy of the Bush administration's two norm challenges. More specifically, I will do this by addressing the following research agenda, which consists of four sets of research questions:

1. Theoretical research questions:
   What is a fundamental norm and what is its role in international society? What kind of influence do great powers have on fundamental norms compared to other states? How do we theoretically account for norm change – when do we know whether a great power has successfully challenged and changed a fundamental norm?

2. Methodological research question:
   How do we 'measure' these theoretical concepts of norms, legitimacy and norm change? What empirical 'signs' can we use to assess whether the Bush administration succeeded in its norm challenges?

3. Historical research questions:
   What was the legal and legitimate status of the norm on non-use of force before 9/11? Was the use of force against states harbouring terrorists and the use of preventive force, respectively, considered legal by international law and was it seen as legitimate by the states of international society?

4. Empirical research questions:
   What was the content of the Bush administration's two norm challenges? How did the states of international society respond to the challenges? To what extent did the Bush administration in each case succeed in changing the norm?

Together the answers to these questions provide an answer to the main question driving this dissertation: *To what extent are fundamental norms of*

post-1945 international society stronger than the will of the world's only superpower?

1.2. Theoretical contributions

The dissertation makes two main theoretical contributions: 1) it contributes to the general IR discussion about international norms versus power and 2) it attempts to advance the English School's theory on norms. In the following, each theoretical contribution is elaborated.

1.2.1. IR theory and the role of international norms versus power

Although George W. Bush has been replaced by Barack Obama as president of the United States, the Bush administration's two norm challenges are still highly relevant and theoretically interesting. By investigating whether the Bush administration succeeded in 'killing' the norm on non-use of force, this dissertation engages in a key IR debate about the relationship between international norms and great powers. The question whether norms are stronger than power goes back to Thucydides and has caused endless debates about the true nature of the international system ever since.

According to realism, international relations take place in an anarchical system that has no overarching central authority above the individual collection of sovereign states. The states are conceived as rational actors and the basic motive driving states is survival. They compete with each other for power and security. This competitive logic of power politics makes agreement on universal international norms difficult, as the states do not trust each other (Mearsheimer, 1994-1995). Thus, in this anarchical system, where influence is an effect of material capabilities, norms are irrelevant to understanding state behaviour. Some realists acknowledge the existence of international norms but only as a tool of the great powers. Great powers may set up norms and rules for other states to abide by under the threat of sanctions if they do not, while the great powers themselves only comply with these norms when it suits their interests and violate them when it does not. As argued by Brooks and Wohlforth, great powers have the capabilities to create new norms useful for legitimating their own actions even though these new norms may violate already established norms (Brooks & Wohlforth, 2005, 516-19).[3]

[3] A neo-liberal version of this theory argues that a hegemon without use of coercion can socialise secondary states into following norms that suit the interest of that he-

This dissertation contests these realist claims that international norms are nothing more than the tool of great powers. Using the theory of the English School, it argues that there is more to international relations than power politics. According to the English School, international politics take place in an anarchical international *society* in which the states in a rational quest for order recognise a common interest in developing a common set of fundamental norms guiding their coexistence. These so-called fundamental norms bring order to international society and are so highly treasured by the states that a great power cannot necessarily change the norms when they no longer fit the interests of the great power (Bull, 2002; Knudsen 1999).

However, the focus on international norms does not mean that the English School does not acknowledge that special role of great powers in international relations. Rather, the English School applies a pluralist approach to the study of international relations, as it includes both power and norms in its analyses of international politics (Little, 2007). By recognising the importance of both material and normative factors in international politics, the job of the researcher is not to prove that one is more important than the other, but to investigate under *which* circumstances one factor is more influential than the other (cf. Buzan, 2001: 480). Where does the line go between power and norms, or put differently, in which circumstances is a fundamental norm stronger than the will of the great power?

According to the English School, norms are created by states but they also guide state conduct. The great powers in particular are seen as having a great impact on the creation of international norms, as they are the managers of international society and thus have the capacities to create and change norms (Bull, 2002). But at the same time, all states, including the great powers, are expected to follow the guidelines provided by the norms, as they otherwise would jeopardise the international order. Norms and states thus take part in a mutually constitutive relationship. On the one hand, international norms are made by the states, especially the great powers, and on the other hand norms have the power to impact the conduct of states.

The English School notion that states form an international society shaped by common norms, institutions and interests is shared by constructivism (Bellamy, 2005: 2, 6). However, while the English School argues that international norms guide state conduct, constructivists go a step further. They argue that norms are independent factors with the power to shape the social

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gemon (see Ikenberry & Kupchan, 1990). Although this theory in contrast to realism acknowledges the ideational aspect of international relations, like realism it reduces the role of international norms to the will of the great power.

identity of states and thereby they are able to inform states' interests (Finnemore, 1996; Reus-Smit, 2001). Taken literally, norms do not guide state conduct – they *determine* it. So far most constructivist work has focused on the various effects that norms may have on state behaviour to prove that norms *do* determine state behaviour,[4] while the English School has been more concerned with how various norms may conflict from time to time and how these norm conflicts may affect international society.[5]

Despite this theoretical difference between the English School and constructivism, much can be won by combining the theoretical insights from the two theoretical approaches; especially useful for this study is constructivist theory on the process of norm change. It is a useful supplement to the English School's theory on norm change, which main focus has been on the consequences of norm change and not on the process leading to this change. However, while most constructivist studies so far have investigated how norms may affect state conduct to prove that norms matter, this study turns the causality around and investigates whether a great power is able to change fundamental international norms. Using the two norm challenges posed by the Bush administration on the norm on non-use of force as a case, I investigate whether fundamental norms are strong enough to resist a norm challenge posed by a great power. As the US today is the world's only superpower, the Bush administration's norm challenges thus provide, in political science terms, a 'hard test' of the strength of the norm on non-use of force. Hence, this study may provide new insight into the strength of fundamental norms versus the power of great powers to change these norms.

1.2.2. The English School and the study of international norms

The notion of international norms is quite common in work of the English School, yet its theory on international norms remains a bit under-theorised. For example, although fundamental norms are a key concept of the English School's theory on international norms, the concept has not yet been fully conceptualised. Hence, by focusing on fundamental norms this study not

[4] According to constructivist theory, norms have different prescriptive effects on state behaviour: norms can either be constitutive, regulative in terms of enabling, constraining or even prohibiting a certain kind of behaviour, and evaluative either condemning or applauding specific behaviour (Finnemore & Sikkink, 1998).

[5] One example is the debate about humanitarian intervention, where some argue that the solidaristic norms on human rights are more important than pluralistic norms of international order (see Knudsen, 1999 and Wheeler, 2000 for an example of the former position and Jackson, 2000 for an example of the opposite view).

only brings new insight to the growing IR literature on norms versus power, it also advances the English School theory on fundamental norms and the role they play in international society.

The dissertation follows Barry Buzan's call for a more explicit English School theory on norms. Buzan differentiates between 'normative theory' promoting preferred values and 'theory on norms' in which 'norms and ideas play their role here as different forms of social structure: not normative theory, but theory about norms' (Buzan, 2004: 14). So far the English School's focus on the role of international norms has been dominated by a normative debate fractured along a pluralist/solidarist divide. Alongside this normative wing, an analytical wing led by Buzan has emerged. The former are drawn toward historical narratives of how the international social structure has evolved and changed, while the latter search for analytical explanations of variance between international system, international society and world society (Dunne 2008, 275-76). The dissertation places itself in the middle of these of positions, as it seeks analytical explanations of how and why fundamental norms may change. It combines the normative wing's ontological focus on international society and its most fundamental norms with the epistemology of the analytical wing emphasising a more positivist and explicit methodological approach.

By the same token, the dissertation also contributes to a more explicit research design on how to study international norms. In the book *From International to World Society?*, Buzan (2004) presents a revised theory of the English School. Buzan wants to formulate a theory about norms that offers analytical constructs useful to describe and theorise the empirical world and in this sense Buzan is closer to a positivistic epistemology than the 'pre-positivistic' epistemology commonly used by the English School[6]. However, Buzan only sets the stage for a refinement of the English School, as he does not elaborate on how to actually do a structural analysis of norms and how to measure norms. He makes a strong argument for a more explicit, social science-like English School and leaves it up to others to convert his ideas into practice. This dissertation thus begins where Buzan ends, as a central aim of the dissertation is to develop an explicit research design on how to study international norms. It draws on constructivists insights on norm measurement, as the English School and constructivism share the assumption that norms are inter-subjective objects, which cannot be measured only by studying the behaviour of states.

[6] See Jackson 2000 and 2009 for an elaboration of the concept of pre-positivism.

1.3. Empirical contribution: the debate about the Bush administration's norm challenges

The Bush administration's so-called 'war on terror' and its decisions to wage war against Afghanistan and Iraq have not passed by unnoticed. Both wars have been subject of attention and debate in IR although the latter war has caused a greater and longer-lasting debate than the former.

The Bush administration's manifestation of the first norm challenge, which claimed a right to use force against states harbouring terrorists guilty of grave terror acts, in Afghanistan did cause some debate in IR about the new norm's consequences. However, the debate has mostly revolved around the effects of the war on the norms of conducting war (jus in bello) raising questions about human rights, the use of torture as well as the effects of the counter-terrorism policy on civil rights (see for example Joyner, 2004). The effect of the war on the norms governing the resort to war (jus ad bellum) has been less controversial and has not caused that much debate, except a rather technical juridical debate about whether the war in Afghanistan in fact was 'approved' by the UN Security Council and thus legal.[7] Most IR scholars have simply noted that the Afghanistan war extended the right of self-defence to include the use of force against states harbouring terrorists guilty of grave terror acts although some have discussed the limit of this new right (Byers, 2005: 61-71; Gray, 2008: 199). One exception is Antonio Cassese, who argues that despite the great international support to the Afghanistan war it did not 'amount to the consistent practice and *opinion juris* required for a customary change' (Cassese, 2005: 475). According to Cassese, a change does not take place before both state practice and states' legal convictions are 'express, clear, and consistent, and cover more than one instance' (ibid.). Hence, while the interpretation of the norm change has caused some debate, only few have questioned the fact that the Bush administration succeeded in this norm change. However, none of these scholars have conducted an in-depth analysis of the norm challenge systematically investigating the reactions of the other states. The dissertation contributes to the debate about the effect of the norm challenge as it provides a detailed analysis of the extent to which the norm changed. The dissertation thus challenges Cassese's claim that the first norm challenge did not result in a norm change (or in a change of customary international law to use Cassese's juridical terms). The analysis of the first norm challenge shows that not only was the Afghanistan war supported by almost every state in the world, the support to

[7] This debate is further elaborated in Chapter 7.

the new norm also included other states and other incidents after the war *and* it has been politically and legally institutionalised.

The debate about the Afghanistan war was quickly replaced by a new debate about the Bush administration's second norm challenge and its decision to go to war against Iraq. This debate has primarily revolved around two main subjects. The first subject concerns the state of the norm on non-use of force after the Iraq war. This is the debate I refer to in the introduction of this chapter. As argued there, some claim that this norm challenge 'killed' the norm on non-use of force (Franck, 2003; Arend, 2003). According to Dombrowski and Payne, the Bush administration was very successful in its norm challenge, as a new norm of 'military prevention' has emerged and thus eroded the norm on non-use of force (Dombrowski & Payne, 2006). Using the Iraq war as proof that great powers are stronger than international norms, realists have argued that international relations essentially is a power political game (see for example Glennon, 2003; Kagan, 2008).

The advocates of power politics have thus been loud and many, while the usual defenders of international norms have been remarkably quiet. Focus has been on how to describe and theoretically understand this norm challenge rather than examining whether it really did change the norms governing the use of force (see among others Hurd 2007a; Hurrell 2002a; Kerton-Johnson 2008). At first sight the Bush administration's norm challenge seems to be a hard case for theories arguing that there is more to international relations than just power politics. Apart from a forthcoming article by Tonny Brems Knudsen (Knudsen, 2011), not many have defended the ideational theories of IR and argued that the Bush administration's norm challenge *did not* kill the norm on non-use of force. The dissertation contributes to this debate, as it argues that fundamental norms are not subjects of change, unless the change is seen as legitimate. By systematically analysing the norm challenge and the subsequent process of norm change, I show that the Bush administration did not succeed in changing the norm on non-use of force, because the other states did not consider the new norm on preventive force legitimate. Rather it was seen as a dangerous practice jeopardising international order.

The second subject of debate is more normative and concerns the consequences of the Iraq war, including whether it was a necessary war. Critics of the Bush administration's preventive war norm have accused it of being a dangerous doctrine. According to Tim Dunne (2003), the Bush administration's norm challenge was dangerous, because it changed the international order from a society of states to a hierarchical system by claiming a unilateral right to use preventive force. Justin Morris and Nicholas Wheeler (2007)

have argued that the norm challenge created a crisis of legitimacy in the UN Security Council, as the Council was unable to hinder the American war against Iraq. While these English School scholars mainly were concerned with the state of international society, realist opponents of the so-called Bush doctrine and the Iraqi war pointed to the dangerous consequences of preventive force on the national security of the United States. They asserted that a war against Iraq was unnecessary and that the US would be better off using a policy of containment against Saddam Hussein. Furthermore, they feared that a war against Iraq would be a distraction in the fight against terrorism and Al Qaeda in particular (Mearsheimer & Walt, 2003). In contrast, proponents of the so-called Bush doctrine have argued that preventive use of force by the US to counter threats from terrorism was indeed necessary to uphold the security of not only the US but of the entire world, especially when the UN member states did not have the will or the ability to do so (Lieber, 2007; Steinberg, 2006).

It is not my intention to participate in this normative debate. The dissertation only investigates the character of the normative challenge of the US and whether it changed the norm on non-use of force, and it will not join the debate about whether the US challenge was just. The point of interest is not the actual truth of the claim, but whether the states of international society found it just. However, the conclusion of the dissertation briefly discusses the consequences of the Bush administration's norm challenges for international society.

To summarise, the empirical contributions of this dissertation are several: it provides a detailed analysis of the first norm challenge and the reactions to the challenge, including the war in Afghanistan; it engages in the debate about the Iraq war and whether the Bush administration really killed the norm on non-use of force; by comparing the two norm challenges and the reactions by the other states, the it also provides new insight about why states supported the first norm challenge but not the second.

1.4. Research design, research strategy and data sources

1.4.1. Research design

To investigate the strength of fundamental norms I conduct a qualitative case study of the Bush administration's two challenges of the norm on non-use of force. In other words, it is a study of how easily one great power can change fundamental norms. In this sense it is a theory-testing study, but it is

also a theory-generating study. A keystone proposition in the English School is that fundamental norms are strong and stable. Although the School also recognises that norms are subject to change, as they are crafted by states (Jackson, 2000: 11), it is rather silent about why and when states succeed in changing international norms. The Bush administration's challenge of the norm on non-use of force thus provides a nice opportunity to refine the School's theory and as such the study is just as much theory-generating as it is theory-testing.

Furthermore, recall that most studies of international norms usually investigate how norms affect state behaviour to show that norms are strong and important. This study attempts to prove this fact the other way around by studying how states affect norms. The US challenge of the norm on non-use of force can be described as a 'most-likely' case of norm strength, as the challenger of the norm is the sole superpower and hence the most likely state to successfully change the norm. By using this design, I expose the English School's proposition about fundamental norms to the hardest possible test.

Finally, while the Bush administration's two norm challenges may be empirically overlapping in the sense that preventive force may be used against states harbouring terrorists, the two norm challenges are kept analytically apart. Other norm challenges besides the two investigated here may also be identified. For example, the decisions to depose Taliban and Saddam Hussein from power can be seen as a challenge of the norm of proportionality and would have been interesting to analyse as well. However, I limit my analysis to the two norm challenges on the norm on non-use of force to keep as many factors constant as possible to gain a more robust theoretical insight.

1.4.2. Research strategy

The research strategy takes the form of two in-depth case studies tracing whether the norm challenges succeeded in changing the norm on non-use of force. If they did, the norm change must be reflected in a new legitimate practice. Proof of such a new practice is not only found in the actions of states, but also in their justifications and evaluations of each other's behaviour. I use the method of process-tracing to analyse the process of norm change, as the prime goal is to identify *when*, *in what way* and *why* the norm changed if it changed at all. A set of empirical observable implications has been derived for each phase of the norm change process with the aim to establish a set of empirical criteria for norm change.

Particularly interesting for the study are the wars in Afghanistan and Iraq, as they represent two extreme and highly disputed examples of the use of force as self-defence. Disputed cases in which norms are challenged are very useful for spotting norm change, because the states are forced to explicate what they think is the natural and obvious thing to do. Hence, the study uses the wars in Afghanistan and Iraq as indicators of whether the other states supported the two norm challenges of the Bush administrations.

1.4.3. Data sources

The sources for the study of international norms include verbal and written expressions and statements by 'statespeople' (Jackson, 2000: 37). To analyse the norm challenges posed by the Bush administration I use primary data sources such as presidential speeches and remarks as well as the two National Security Strategies published in 2002 and 2006. Useful data for the analysis of the reaction of the other states to the norm challenges is found in the UN archive and consists of meeting reports of the Security Council and the General Assembly, resolutions from the two bodies and a few reports by the UN Secretary-General. When needed, these primary data sources are supplemented with relevant speeches by state leaders and secondary data sources such as newspaper articles.

1.5. Structure of the work

The thesis is divided into five parts: theoretical investigations, methodological investigations, historical investigations, empirical investigations and a conclusion. Part One sets out the theoretical framework of the dissertation. To analyse how strong fundamental norms are we must first of all know what a fundamental norm is and how it works. This is the research agenda of Chapter 2, which presents the English School's theory on fundamental norms. Second, we must understand the process of norm change, including how a norm changes and the way it changes. This is the aim of chapter 3, which conceptualises norm change and develops a theoretical model of the process of norm change by combining theoretical insights from both the English School and constructivism.

Part Two develops an explicit research design for the study of norm change. Chapter 4 presents the methodology and research design of the dissertation. First, the methodology is presented and then the theoretical model developed in Chapter 3 is operationalised into a set of empirical observable implications useful to assess whether a norm change has occurred.

Part Three offers a legal and historical assessment of the evolvement of the norm on non-use of force. Chapter 5 describes the legal status of the norm of non-use of force prior to 2001, including a presentation of the early evolvement of the norm and its formal adoption in the UN Charter as well as an analysis of whether the use of force against states harbouring terrorists and the use of preventive force as self-defence were regarded as *legal* prior to 2001. Chapter 6 analyses state practice to establish whether the use of force against states harbouring terrorists and the use of preventive force, respectively, were considered *legitimate* by the states prior to 2001.

Part Four provides the empirical analyses of the dissertation. Chapter 7 analyses the Bush administration's first norm challenge and the extent to which it has resulted in a new norm allowing the use of force against states harbouring terrorists guilty of grave terror acts. As a main indicator of state support to this norm challenge I use the states' reactions to the Afghanistan war. Chapter 8 analyses to what extent the Bush administration succeeded in its second norm challenge, which claimed a right to use preventive force. Here, the war against Iraq is used as a main indicator of state support to this norm challenge.

Part Five draws the general conclusions of the study. Chapter 9 first compares the two norm challenges and then moves on to a more general discussion of some of the larger implications of the study.

PART I
THEORETICAL INVESTIGATIONS

Chapter 2
Fundamental Norms and Great Powers in International Society

The purpose of this chapter is to develop the theoretical framework of the dissertation with focus on the relationship between great powers and fundamental international norms constituting international society. The chapter answers the following questions: First, what is a fundamental norm and what role do fundamental norms play in international society? Second, what is a great power and what kind of influence do great powers have on fundamental norms compared to other states? Third, and finally, what happens when fundamental norms and the interest of a great power conflict – to what extent can a great power change fundamental norms? However, to define and conceptualise the special characteristics of fundamental norms, we must first know what an 'ordinary' international norm is.

2.1. Defining international norms

The study of international norms has always been central in the English School. Even under the behavioural revolution, when normative and ideational phenomena were disregarded because they were difficult to measure, classic English School writers like Martin Wight and Hedley Bull emphasised the necessity of such studies to provide an accurate and holistic understanding of international relations.

What then, is an international norm according to the English School? In spite of the School's longstanding tradition of studying normative phenomena, the concept of a norm is relatively new in the English School's vocabulary. Classic English School writers like Wight and Bull only referred to norms a few times, but without elaborating upon the concept.[8] Instead, they preferred the notion of rules.[9] Conversely, contemporary writers like Robert

[8] See Bull (2002: 87, 179) and Wight (1991: 238-39) for examples.

[9] For example, when Bull used the term 'norm', he did it in passing equating it with a rule as illustrated in the following quotes: 'The structure of international coexistence … depends on *norms or rules*' (2002: 87, emphasis added) and: 'In any hostilities to which we can give the name 'war', *norms or rules* … invariably play a part' (2002: 179, emphasis added). This indicates that Bull did not differentiate between the two notions, but that he just preferred the word 'rule' over 'norm'.

Jackson use the notion of norms (see Jackson, 2000). Bull offered many important insights on how rules work but without establishing the equivalence between his notions of rules and Jackson's notions of norms, these insights are not theoretically transferable. The fact that the various concepts are scattered throughout the work of the English School means that it is rarely clear what (if anything) differentiates a norm from a rule and in many usages they seem interchangeable (Buzan, 2004: 163). So the question is what we mean when we speak of norms. Are they identical to rules, or are they something different?

Bull defined rules as 'general imperative principles of conduct' requiring 'prescribed classes of persons or groups to behave in prescribed ways' (2002: 52). Following this definition, a rule is a generalised understanding of conduct that requires people to act in certain ways. Hence, rules are closely connected to order, as rules, in Bull's words, 'spell out the kind of behaviour that is orderly' (ibid.). Bull identified two kinds of rules, namely rules of conduct and rules of law. Rules of conduct are general prescriptions providing the basic defining characteristics of the international order, whereas rules of law are specific legal clauses (ibid.: 6). This implies that rules of conduct are superior to rules of law as changes in the rules of conduct reflect changes in the international order itself. In other words, challenges to the rules of conduct may have more severe consequences for the international order than changes in rules of law. This may also explain why most English Scholars have devoted much of their time to studying the rules of conduct rather than the rules of law.

As I will show, Jackson's notion of norms closely resembles Bull's notion of rules of conduct. Jackson defines a norm as 'a *legal* or *moral* obligation or requirement or expectation, a *standard of human conduct*' (2000: 49, emphasis added). Like Bull, Jackson stresses the term 'conduct' in his definition of a norm and in similarity to Bull this conduct can either be legally or morally based. In other words, Jackson tells us that a norm is a standard of conduct based on either a legal or a moral obligation. The term 'standard' indicates that it is a shared understanding of the right or proper conduct. Hence, both Bull and Jackson posit that rules and norms are shared understandings of conduct telling people how they ought to behave. However, note that conduct is more than actual behaviour – norms are the guidelines by which we judge or justify behaviour – they cannot be equated to the behaviour itself. Jackson operationalises international norms as the justifications invoked by the states in their normative discussions. The states provide justifications as an attempt to connect an action to common standards of appropriate conduct. The dialogue between 'statespeople' reveals which politics or actions

are 'desirable or advisable or appropriate or acceptable or tolerable or prudent or politic or judicious or justified in the circumstances' (ibid.: 37).[10]

To end this comparison, it seems fair to argue that in the terminology of the English School norms and rules are used interchangeably to describe the same normative phenomenon. Jackson's notion of norms in many ways resembles Bull's notion of rules of conduct. Thus, the two notions do not differ conceptually, but rather indicate a 'generation gap' in which the 1970s' terminology of 'rules' now has been replaced by the term 'norms'. Hence, a norm in this dissertation is defined as a 'standard of conduct' following Jackson's definition. For consistency the term norm will be used in the remainder of this dissertation.

2.2. International society and fundamental norms

The importance given to international norms by the English School is quite evident in Bull's definition of an international society. An international society exists when:

> a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions (Bull, 2002: 13).

Following Bull's definition, international society consists of three fundamental components: 1) common interests and values, 2) common norms (rules) and 3) common institutions. The common norms referred to here are by definition fundamental in the sense that without them an international society would not exist. It is the shared consciousness of common interests, norms and institutions that guides the conduct between states and this is what makes an international society different from the realist notion of an international system, which merely supposes contacts and interactions between the states (Hurrell, 2002b: xii; Knudsen, 1999: 39). However, this is not a cosmopolitan understanding of international society in which power politics are dead and gone. Rather, international society is seen as an *anarchical* international society in which a set of a few common norms brings *order* by spelling out the most basic expectations about state behaviour. Bull was very interested in order and how it could be obtained in an otherwise anarchical world (Vincent, 1988: 195). By international order Bull was referring to 'a pattern of activity that sustains the elementary or primary goals of the society of states, or

[10] The operationalisation and measurement of norms are elaborated in Chapter 4.

international society' (Bull, 2002: 8). By creating an international society consisting of common norms and institutions, the states thus set up a kind of orderly anarchy, which helps sustain what is believed to be the primary goal of all states, namely peaceful coexistence.

Following the above, international society is a normative framework in which fundamental norms play an important role in upholding this society. This also means that international society is *not* a world government of some kind. As Jackson tells us, it is important to keep in mind the distinction between international society as the normative framework and the states as the actors. Here, the term 'states' is used as shorthand to describe individuals who act on behalf of states: the 'statespeople' (Jackson, 2000: 132). Even though it is the statespeople who interact in international politics and sign treaties like the UN Charter, their actions only bind the states they represent and not themselves as individuals (Wheeler, 2000: 22-23).[11]

To reiterate, from the definition above on international society we learned that fundamental norms constitute a vital component of international society. But how do fundamental norms differentiate from the 'ordinary' notion of norms just defined above? In the following, I will first offer a definition of fundamental norms before taking a closer look at how fundamental norms are related with the other two components of international society.

2.2.1. Defining fundamental norms

The main characteristic of a fundamental norm is that it constitutes international society. But how do we 'see' a fundamental norm? Or put differently, when do we know when a norm is fundamental or just an 'ordinary' international norm? Although fundamental norms are a cornerstone of English School theory on international society, the concept remains a bit unclear and under-theorised. However, one exception is Jackson's *The Global Covenant* (2000), which analyses the normative structure of post-1945 international society. Instead of using the term 'fundamental norms' he names this kind of norms *grundnorms*. Even though Jackson does not explicitly define a *grundnorm*, he tells us that it constitutes international society *because* it is universally recognised and accepted by all states as a standard of conduct. Hence,

[11] This conceptualisation of states overlooks many other agents involved in foreign policy such as subordinate state officials, citizens, IGOs and NGOs. This does not mean that they are irrelevant, but as Jackson argues, in the end they do not have the same amount of responsibility as state leaders, and this is why the theoretical framework of the English School is rather state-centric (Jackson, 2000: 133).

in more explicit terms we may define a fundamental norm as *a standard of conduct that is universally recognised and accepted.*

Fundamental norms are similar to Bull's category of norms of coexistence, which set out the minimum conditions of the coexistence of the states in international society (Bull, 2002: 66-67). Because the fundamental norms lay out the minimum conditions of state coexistence, they bring order into international society in the sense that their presence transforms the anarchical international system into an international society based on common norms. An elimination of the norm on non-use of force as a fundamental norm may thus have severe consequences for international society, as it would change how states coexist. However, a change of fundamental norms does not necessarily mean that international society ceases to exist but rather that the content of a society changes with new norms providing new guidelines for conduct. The significance of international society thus resides in the states' general willingness to operate by the norms of international society no matter the content of these norms. Hence, international society will exist until the day the states no longer are able to agree on the most basic norms guiding their coexistence, and anarchy will prevail again (Jackson, 2000: 102-5).

According to Jackson, fundamental norms, or *grundnorms*, belong to the category of procedural norms, which 'lay down ways and means of conducting international relations that restrict action' (ibid.: 17). Thus, the norms of procedure centre upon the morality of state sovereignty and in this sense they represent a classic rationalist virtue emphasising states' international responsibility. Fundamental norms have the highest status of all procedural norms governing the conduct of states, because they are universally recognised and adhered to by every sovereign state. The reason these norms are widely accepted by all states is that they only restrict behaviour and do not require state leaders to take actions they are unwilling or unable to take (ibid.).

The actual content of fundamental norms is an empirical rather than a theoretical question, disclosed for example by international law. Like others identifying the most fundamental norms of contemporary international society, Jackson points to the norm on non-use of force, the norm on non-intervention and the of norm sovereignty,[12] which are considered the corner-

[12] Disagreement exists whether sovereignty is an institution or a norm. Bull (2002) did not include sovereignty in his list of institutions and contemporary theorists like Jackson (2000), Wheeler (2000) and Dunne (2003) refer to sovereignty as one of the basic, fundamental norms of international society, whereas Buzan (2004, 2006)

stones of contemporary international society (ibid.: 17, 416-417; see also Dunne, 2003: 310; Wheeler, 2000: 6). The other procedural norms that do not have the status of fundamental norms or *grundnorms* are still important, but they are not vital to international society. Jackson identifies them as the norms of inviolability of frontiers; territorial integrity of states; peaceful settlements of disputes; respect for human rights; equal rights and self-determination of peoples; co-operation among states and fulfilment in good faith of obligations under international law (*pacta sunt servanda*) (Jackson, 2000: 16-17). Some of these norms, like human rights and equal rights, represent a solidarist international society, which is not yet present on a global scale even though they may have the status of fundamental norms in some regional international societies such as the EU (ibid.).

Acknowledging that *realpolitik* sometimes leads states to set aside fundamental norms, Jackson adds a complementary category of prudential norms to his category of procedural norms. Whereas procedural norms are founded in international responsibility and the ethics of principle, the norms of prudence are founded in the ethics of statecraft and the claims of national interests. According to Jackson, the norms of prudence disclose virtues such as patriotism, public-spiritedness and other civic virtues commonly found in the virtues of republicanism, which probably is most evident in the political discourse of the United States. The fact that English School theory includes the notion of prudential statecraft may perhaps explain why the founding fathers, among them Martin Wight and Hedley Bull, were often classified as classic realists (ibid.: 19-21, 116, 170-74).

The procedural norms guide the conduct between states informing the states about their international responsibilities. In contrast, the prudential norms concern the national responsibilities of a state. Prudential norms thus represent the classic realist virtue obligating state leaders to protect national interests and especially national security (ibid.). Sometimes the two norms conflict and the statespeople must decide which one to follow – whether it is more prudent to follow the procedural norm and thus conform with the

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and Holsti (2004) argue that it is one of the most central institutions of international society. To make the confusion even greater, Jackson in an article from 1999 refers to sovereignty as *both* an institution and a norm. However, even though disagreement exists on how to label sovereignty, there is strong agreement that sovereignty is a vital feature of international society. In this dissertation, I follow Bull and Jackson's (2000) conceptualisation and define sovereignty as a basic, fundamental norm of international society. For a further discussion of the ambiguity of the concept see Buzan (2006). For a historical account of the concept see Jackson (1999).

state's international responsibilities or to follow the prudential norm to fulfil the national responsibilities and thus violate the procedural norm. These political dilemmas, which are faced by every state leader from time to time, are elaborated in section 2.3 and section 2.4.

2.2.2. Fundamental norms and institutions

The second component, besides fundamental norms, that constitutes international society is common institutions. Bull defined an institution as 'a set of habits and practices shaped towards the realisation of common goals' (Bull, 2002: 71). Put differently, in the realisation of common goals, understood as peaceful coexistence and a stable international order, the states recognise a common interest in developing a few fundamental institutions that guide the relationship among states by setting out the most basic norms of proper state conduct (Knudsen, 1999: 39). In other words, the fundamental institutions are the 'home' of fundamental norms. Thus, each institution contains a set of norms that ease co-existence among states. This implies that the institutions as well as the fundamental norms of international society are central to maintaining international order (Knudsen, 1999: 43; Holsti, 2004: 25).[13] The English School thus applies a general understanding of institutions. It differs from other IR approaches, which define institutions in more specific terms as an organisation or establishment founded for a specific purpose, e.g. intergovernmental organisations such as UN, WTO, EU or specific legal treaties. The English School does not ignore these kinds of institutions; it refers to them as secondary institutions, whereas the more general institutions are called fundamental institutions or primary institutions (Buzan, 2004: 161-76).

Bull identified five fundamental institutions of international society: international law, diplomacy, balance of power, war and great powers (Bull, 2002). However, as noted by Buzan, Bull did not explain why exactly these five institutions constitute the fundamental institutions of international society or which criteria apply to the inclusion or exclusion of an institution in international society (Buzan, 2004: 167-76; Buzan, 2006: 76-8). By the same token, Bull did not specify which institutions each fundamental norm belongs to. For example, in our case, does the norm on non-use of force belong to the institution of war or the institution of international law? Bull seemed to be more interested in the inherent tension between the institutions of war and international law. According to Bull, on the one hand, the states of international so-

[13] For an elaboration of the relationship between international order and institutions, see Vincent (1988: 201-6).

ciety perceive war as a threat to international society that must be contained, because war brings disorder. On the other hand, the states also value war as an instrument to fulfil the purposes of international society; either to enforce international law or to preserve the balance of power. To be able to handle this tension, the states of international society have restricted the right to make war in four ways. First, only sovereign states have the right to wage war against other sovereign states. Second, the conduct of war is restricted by norms governing *how* to use force (jus in bello). Third, norms also restrict *when* states legitimately can resort to war (jus ad bellum). Fourth and finally, the geographical spread of war has been sought restricted by the norms of neutrality (Bull, 2002: 180-83). Today, all these norms have been legalised in international law, including the norm on non-use force, and embodied in the institutions of both war and international law.[14] They have two homes, so to speak, and a norm change will therefore change both institutions. For example, the Bush-administration's attempt to change the norm on non-use of force could affect not only the institution of war but also the institution of international law.

2.2.3. Fundamental norms and common interests

The third and final component of international society is common interests. Like realism, the English School perceives states as rational actors acting in accordance with their interests. In contrast to realism, the English School does not understand national interests in purely power political terms. Rather than self-interests the School points to the *common* interests of states as an important factor in understanding international relations. Common interests are created by a mutual belief that only together can the states accomplish the primary goal of every state, namely peace and security (Knudsen, 1999: 39). Bull exemplified this with the human desire for safety that leads to a common interest in restricting violence. This sense of common interest creates the ability of the member states of international society to treat each other's interests as ends in themselves and not just as means to an end (Bull, 2002: 51-52).

Even though states make power calculations and on some occasions act solely out of concern for their own interest, they try in the main to act in accordance with the norms of international society as these norms are consis-

[14] An alternative interpretation is found in Holsti's (2004) elaboration of the international institutions in which he implicitly subscribes the norms of jus in bello to the institution of war and the general norms such as non-use of force and the right to self-defence to the institution of international law.

tent with the long-term interest of the states (Evans and Wilson, 1992: 338-39). This point is well illustrated by Little in his study of the American Civil War (1861-1865). Little shows that despite British concerns about US regional hegemony threatening British interest, Great Britain chose not to intervene in the American Civil war because the United States was considered a member of international society and hence an intervention would imperil the long-term interest of maintaining international order (Little, 2007). States do not always act according to international norms, but most often they do because this is in the common interest of all states. The English School's notion of common interest is thus the key to understanding the School's theory on how international norms work. This will be elaborated in the following section.

2.3. The function of fundamental norms

The English School's theory on the function of fundamental norms, as well as 'ordinary' international norms, is based on state rationality.[15] As written above, states' long-term interests in peace and security mean that it is more rational for them to develop a set of common fundamental norms, which all states must obey in their international conduct, than to have no common rules and norms guiding state conduct. Hence, a common set of a few fundamental norms followed by all states brings order to an otherwise chaotic and anarchical international system. Figure 2.1 illustrates this relationship between common interests, common fundamental norms and state conduct.

Figure 2.1. The relationship between common interests, fundamental norms and state conduct

Note that this is not a deterministic relationship, in which common interests determine the fundamental norms, which again in every situation determine state behaviour. According to the English School, norms do not determine behaviour; they only guide it in the sense that they 'inform' states about how

[15] For an elaboration of the English School and the concept of rationality, see Linklater (2001).

a particular behaviour may affect the long-term interests of states. We may refer to this guidance as an *internal* effect of the norm on state behaviour.

To illustrate the School's theory on how norms work, Jackson compares norms with a compass. A compass provides directional bearings for navigators in the same way that norms provide moral and legal bearings for states leaders. They inform them of the moral or legal choice to make but do not make the choice for them (Jackson, 2000: 418). Although state leaders have norms guiding them, this does not eliminate the problem of hard choices in international politics. As noted by Wight, there may be occasions when it is prudent to set norms aside to overriding interests (Wight, 1972: 27-28). Considering its conduct in a given situation, a state can thus either choose to comply with the norms regulating this kind of conduct or it can choose to take another course of action, if this is considered more prudent in the specific situation although it may violate fundamental norms. For example, in some situations it may be more prudent for a state to use military force to counter a threat although the state does not have a legal right to do so. As such, the norm by itself does not have any direct constraining power on state behaviour.

Yet, state leaders cannot legitimately violate fundamental norms by masking every decision as prudent, as they must always justify their actions (Jackson, 2000: 20, 153). Prudence like other norms is not something one can claim for oneself, it is something that is subscribed by other actors if they find your claims morally reasonable. Hence, norm violation always necessitates justification. As Jackson points out, most of the controversy on the use of force today concerns whether or not it can be vindicated – not whether it is legal, but whether it can be justified in other terms. Hence, besides having an internal function guiding state behaviour norms have an *external* function as well in the sense that they provide a common moral framework in which behaviour is evaluated. Thus, norms are used by states to evaluate the behaviour of other states. Jackson captures this nicely when he tells us that norms are used by states to judge 'the correctness, rightness or wrongness, the goodness and badness, of human activity' (ibid.: 78).

It is not without consequences to violate fundamental norms. While norm violation by smaller states may be sanctioned by the other states using military, financial or diplomatic means, this is more difficult to do if a great power violates the norms. Still it is not cost-free for a great power to violate international norms, as it may lose a lot of its legitimacy and goodwill. Hence, when a great power violates a norm, it will always justify its actions by reference to other norms in its search for legitimacy. As pointed out by Hurrell drawing on Wight: 'power is an inherently social phenomenon and the principle problem

of power is the legitimation of power' (Hurrell, 2002a: 189). In other words, even a great power must always try to convince the other states that a norm violation was just. Realists would claim that these spoken justifications are just means to an end, cloaking the real motives. Bull acknowledged this point of view, but argued that the offered justifications are valuable in and of themselves, which makes the reasons states comply with international norms, be they personal, strategic or moral, less important. Following Bull, an international society in which a pretext for starting a war is necessary is radically different from one in which it is not. According to Bull, it is an important aspect of an international society that 'the state which alleges a just cause, even one it does not itself believe in, is at least acknowledging that it owes other states an explanation of its conduct, in terms of rules that they accept' (Bull, 2002: 43, 134).

2.4. The impact of great powers on fundamental norms

So far, I have focused on how international norms affect state conduct by providing them with a 'guidebook' on proper behaviour. Yet, states also have an impact on international norms. Norms do not appear out of the blue; they are created by states, especially the great powers. For example, the norm on non-use of force as laid out by article 2.4 of the UN Charter is not a self-emerging norm but was put into force by the allied great powers after the Second World War. The focus of this section is thus the impact that great powers have on fundamental norms and the extent to which great powers can change fundamental norms that are already highly institutionalised in international society. But first we need to define what a great power is.

2.4.1. Defining great powers

Jackson defines a great power as 'a state whose weight (in military power, political prestige, in economic wealth) is of such magnitude that it is among a very select group of states whose policies and actions can affect the course of international affairs' (Jackson, 2000: 173). Yet, a great power is not defined solely in terms of material resources; it is also a social attribute. As pointed out by Bull, to understand the role great powers play in international relations, we cannot ignore the moral significance and responsibilities a great power has compared to other states. Great powers are the responsible managers of the affairs of international society and are thus recognised as

having special duties but also special rights (Bull, 1979-1980: 437; Bull, 2002: 196).

Special rights refer to the entitlement of a voice in the settlement of issues that are beyond those of immediate concern to the great powers. Bull exemplifies this with the right of the great powers to take part in decisions of special importance for international peace and security. For example, the five great powers after the end of the Second World War (United States, United Kingdom, Soviet Union, China and France) were given permanent membership of the UN Security Council and a right to veto decisions as a consequence of the recognition of such special great power rights (Bull, 2002: 196).

The special duties given to great powers employ them to take into account the interests and views of other states. More specifically, a great power must define its own interests widely enough to encompass the preservation of international society and the interests of the other states (Bull, 1979-1980: 437). The great powers thus enjoy strong support by the society of states, as long as they take their special duties just as seriously as their special rights – otherwise they are no longer seen as legitimate great powers by the other states (Bull, 2002: 221). This indicates that the influence of a great power is not absolute, it is also a matter of legitimacy – even the most powerful state must legitimise its power, as it needs support from others to maintain its status (Hurrell, 2002b: ix).

Currently, the United States is the only truly global great power. With a defence expenditure amounting to nearly half the global total in 2008, the US spends more on defence than any other country in the world. America's GDP constitutes one-quarter of global GDP and thus roughly equals that of China, Japan, Germany, Russia, France and the UK combined. Other great powers such as Russia, China, India, the UK are regional rather than global great powers (Dunne and Mulaj, 2010: 1289; Jackson, 2000: 139-40). Hence, the actions of the US may have greater effect on international society than the actions of any other great powers and in this sense it is the world's only superpower.

2.4.2. Great powers and the change of fundamental norms: the role of legitimacy

Changing international circumstances such as the end of major wars leading to the death of some great powers and the birth of others or great events like the 9/11-terror attack on the US in 2001 may result in requests for new norms that are more suitable for guiding state conduct in this changed context. But

because there is no formal institutional authority competent to change the norms, the states are the primary agents to undertake norm change to meet the changing circumstances. Due to the special rights and duties that great powers have, their impact on the institutional set-up of international society is greater than that of other states and they thus have the capacity to create and change norms (Bull, 2002: 69-70). This is especially true for fundamental norms, which all states agree upon and value, wherefore they are more difficult to change than other norms.

The English School's theory on norm change thus concentrates on how states, especially great powers, seek to change norms. This special role given to great powers is a theoretical proposition that the School shares with realism. In contrast, liberalism would draw attention to the role of international organisations such as the UN, while some constructivists would focus on the role of civilians and NGOs. I do not argue that these actors are not important and that they cannot initiate norm change, but without the support of great powers, an emerging norm is unlikely to become a new established norm of international society. Hence, the English School primarily focuses on the role of states and in particular great powers because the support of great powers to a new norm is a key condition for norm change.

However, although the English School like realism emphasises the role of great powers in norm change, the source of norm change is completely different. In the realist view, *might* is right meaning that a great power can change a norm only by using its material force. According to the English School, *right* is might, which means that the great power must legitimise its desired norm change in order for the change to occur. Hence, legitimacy is a decisive factor in whether a great power may succeed in changing fundamental norms. Norms and power are thus in an interdependent relationship based on legitimacy. A norm must always have 'an aura of legitimacy' to be fully established as a common norm of international society, because states only feel obligated to follow legitimated norms (Florini, 1996: 364-65). Hence, norms and legitimacy are closely related; a norm is not a norm without being considered legitimate, and an action cannot be seen as legitimate without following a norm. However, it is important to be able to distinguish between the two concepts analytically. Unfortunately, sometimes the concepts are used interchangeably with the definition of legitimacy closely re-

sembling the definition of a norm, which makes it even more difficult to distinguish the two.[16]

Legitimacy is a complex concept that must be carefully defined. I follow Ian Hurd, who defines legitimacy as 'an actor's normative belief that a rule or institution ought to be obeyed' (Hurd, 2007b: 7). In contrast to norms, this normative belief may both be subjective and inter-subjective. Legitimacy is a subjective quality when it only refers to one actor's perception of a norm. This means that a policy or an action perceived as legitimate by one state does not imply that other states agree with this perception (ibid.: 31). However, I am more interested in the inter-subjective than the subjective quality of legitimacy, as this is when legitimacy becomes powerful. Following Hurd's definition, legitimacy is inter-subjective when more actors share the belief that a norm should be obeyed. Hence, I am interested in the 'umbrella evaluation' (Suchman, 1995: 574) of a given conduct. In this study, I investigate whether the new norms promoted by the Bush administration were considered legitimate by the states of international society. I deal with the legitimacy of the new norms in the view of the states rather than in the eyes of the citizens of those states. This means that I treat states as unitary actors and do not differentiate between the government and opposition parties, nor do I include the role of non-governmental organisations in the analysis. It is not that these aspects are not interesting or important – they are indeed – but my concern here is international perceptions of legitimacy and not domestic views.

Legitimacy is seldom absolute; even though a new norm promoted by a great power may be supported by a majority of states, there are usually a couple of states that oppose it. Disputes about the legitimacy of norms almost always concern what constitutes the operative norms and how they should be interpreted (Reus-Smit, 2007: 159, 163). This implies that the states of international society will always have discussions about which norms are most legitimate. Martin Wight captures this dynamic side of legitimacy very well when he tells us that legitimacy 'is the answer given by each generation to the fundamental, ever-present question, what are the principles (if any) on which international society is founded?' (Wight, 1972: 1).[17] A great power trying to change a fundamental norm must thus convince the other states that its new norm is more worth believing in than the norm it is trying to

[16] For example, Nicholas Wheeler's definition of legitimacy (2000: 10) as 'standards of acceptable conduct set by the prevailing morality of society' is hard to distinguish from Jackson's definition of norms as 'standards of conduct'.

[17] See Clark (2005) for an elaboration on Wight's work on legitimacy.

change. For example, the question of whether preventive force is legitimate is a norm conflict between a prudential norm telling a state to use force against a potential future threat to protect national security and the procedural norm on non-use of force prohibiting such use of force in protection of the international order.

Legitimacy does not necessarily presuppose legality. For example, if an act of force is illegal (as defined by international law), but morally and politically justifiable, then the use of force may still be considered legitimate. By keeping the concepts of legitimacy and legality apart, Clark argues, legitimacy becomes an important marker of institutional change. Just because a norm has been institutionalised into a legal rule of international law, it does not mean that it is absolute and that international support for that rule is everlasting. New conflicting norms may emerge and thereby abolish support for the legal rule. As Clark points out, it is this political space between legality and legitimacy that contributes to normative change in international society. Rather than the two concepts being the same, legitimacy is one way to redefine legality by pointing to the existence of other norms (Clark, 2005: 166, 211). If there is a consensus supporting one norm over the other and this consensus persists over time, then we might talk of a new legitimate practice (Wheeler, 2000: 2).

Note that there cannot be tension between legitimacy and norms; only between different norms (Clark, 2005: 207). It is in the discussions about the legitimacy of a given norm or action that the norms are 'interpreted, developed, reconciled, transcribed, and consensually mediated' (ibid.: 4). Central in the analysis of whether a great power succeeds in changing a fundamental norm are thus the other states, because it is their views of the most legitimate norm that determine whether the great power succeeds in its norm challenge. Hence, the main theoretical proposition of this dissertation is that a great power can only change fundamental norms if the other states of international society perceive the new norm as more legitimate than the old norm that the great power wishes to change.

2.5. Concluding remarks

As argued in the introduction to this dissertation, we need a theoretical framework capable of capturing both the normative and power political elements of international relations in order to investigate the strength of fundamental norms when they clash with the will of great powers. The English School provides us with such a theoretical framework. Its main focus is on how a set of fundamental norms constitutes an international society and

thereby brings order into an otherwise anarchical and chaotic world. Because states are seen as rational actors, they see it as their long-term interest in their quest for order to comply with these fundamental norms to achieve the primary goals of every state, namely peace and security. The norms of procedure thus offer states a 'guide book' on how to preserve a good relationship with other states and more specifically what counts as good behaviour.

Because norms are made by states, they are also changed by states. As the managers of international society with special rights and duties, great powers have greater impact on the institutional set-up of international society and are thus more likely to change international norms than other states. However, such a norm change is not purely an effect of their material might but also of their social status as a legitimate great power. Hence, a great power cannot enforce a norm change. In order for a fundamental norm to change, the change must be considered legitimate by the other states. In the following chapter, the process of such a norm change is further theorised.

Chapter 3
The Process of Norm Change

How do norms change? Although Hedley Bull's entire book *The Anarchical Society* (2002) is about how the five fundamental institutions affect international order, Bull offered little guidance on how institutions arise and disappear. But, as Buzan points out, by referring to Wight's historical assessment of pre-modern institutions such as messengers, trade and religion and by pointing out some alternative institutions for future international society, Bull did seem to accept the idea that fundamental institutions can and do change (Buzan, 2006: 78; Buzan, 2004: 168). This conclusion is supported by a study of the institutions of international society by Holsti, in which he shows that many institutions in fact have undergone various forms of change; some of them a slow, gradual change, others a more dramatic change. Many of the institutions have not been transformed into anything new; instead their content has grown more complex because their norms have changed (Holsti, 2004: 320). This indicates that when fundamental institutions change, it is a direct consequence of a change in the norms of that institution (Buzan, 2006: 81-82). Thus, societal change begins with a change in the norms leading to a change in the institutions, which again affect the order of international society.

Regarding the possibility of norm change, a brief glance at history reveals that fundamental norms do change occasionally. In fact, some of the most important norms of the classic Westphalian international society such as the right of war and intervention, the right of conquest and the right of colonization were either restricted or abolished in the 20th century with the establishment of the League of Nations and the United Nations. But more important, international society changed fundamentally as a result of the abolition of these norms (Jackson, 2000: 19). This indicates that fundamental norms do change. According to Jackson, norms are a product of their time – they are not static features but historical creations. A norm emerges, evolves and continues to evolve: 'they are crafted by the people involved in an activity and they are reformed by them from time to time in response to changing ideas and circumstances' (ibid.: 131). The question is how this change comes about and this is the subject of this chapter. How do we identify norm change? Or put differently, how can we tell whether the Bush administration's norm challenges succeeded in changing the norm on non-use of

force? Hence, the aim of this chapter is to put forward a theoretical model of norm change.

The chapter first provides a conceptualisation of change, including a discussion of how to identify norm change. Having established what change is, the chapter continues with a theoretical assessment of how this norm change comes about. Combining constructivism and English School theory on norm change, it argues that norm change is best understood as a five-step process starting with a norm challenge, in which a state promotes a new norm and thereby challenges old norms. If the state is successful in promoting the new norm, the norm will reach a tipping point of support, which can lead the norm to cascade and finally the new norm becomes a legally and politically institutionalised practice of international society.

3.1. Conceptualising norm change

Much has been written about change in IR debates and scholars often disagree strongly on whether or not a change has occurred. Different kinds of change are highly under-theorised in political science. Theorists rarely define what they mean when they claim the occurrence of change, and this despite the fact that disagreements about change are driving many of the great theoretical debates in IR (Holsti, 2004: 7). Change is complex. On the one hand, change may be difficult to recognise and even more difficult to describe, and sometimes we fail to see it although it is obvious. On the other hand, our openness to novelty and our limited understanding of history as the periods of time we lived ourselves may blind us to a deeper understanding of change resulting in cries for change 'every time something appears different from the previous day' (ibid.: xiii). If we want to account for change, the concept of change must be conceptualised and differentiated into different kinds of change and different degrees of change (Sørensen, 1999). Conceptualising norm change is therefore a two-step process: First, we must determine what we mean by change (kind of change) and second, how to identify change (markers of change).

3.1.1. Defining change

Norm change is often understood as a replacement process in which norm A is replaced by norm B. However, by understanding change in this somewhat narrow sense, we may overlook other kinds of important change. As pointed out by Holsti, change can take many different forms (Holsti, 2004: 12). A more useful strategy is therefore to distinguish between changes *within* the

norm and changes *of* the norm (Buzan, 2004: 182). Changes *of* norms can be defined as norm replacements, norm transformation or even norm obsolescence in which a norm vanishes without being replaced. Slavery is one example of a norm that has disappeared.

Norm change understood as replacement is a discontinuous idea of change in which an old norm is replaced by a new norm, which usually is the antithesis of the old norm. Because the change is so radical that it does not make sense to speak of a norm transformation, the norm change is better described as novelty. The claims of change as novelty are many in IR, especially in current debates about the character of international relations after 9/11. However, this is not a very historical understanding of change. In fact, scholars and commentators are often too quick to assert qualitative change from mere additions or growing complexity (Holsti, 2004: 13-14, 17). Bull also called for sobriety when analysing change. He warned about overstating the contemporary trends and features, which might appear novel and epoch-making but, when analysed in a historical light, suddenly look more familiar. Instead, he argued for a historical approach comparing the present with previous epochs of change (Hurrell, 2002b: xvi).

A more dialectic form of norm change is norm transformation, in which an old norm is transformed into a new norm, which still includes elements of the old norm (Holsti, 2004: 13-14, 16-17). For example, as shown in Chapter 5, the norm on non-use of force has been transformed from the 19th century's rather broad understanding of non-use of force, which included a right to use preventive force as self-defence, to a more narrow definition of non-use of force as laid out by article 2.4 of the UN Charter, which only allows use force as self-defence *when* an armed attack has occurred.

Changes *within* norms may be more difficult to spot and are perhaps not as exciting as changes of norms, but they may offer a more accurate picture of norm change and are theoretically equally interesting as change *of* norms. Change in norms can be conceptualised as either addition/subtraction or increased/decreased complexity. Conceptualising change in norms as addition or subtraction means that change is seen as more or fewer elements within a norm (ibid.: 15). For example, a norm of environmental security may be added to the prudential norms referring to national security. This is not a replacement or transformation of prudential norms but an addition to the existing set of norms.

Finally, norm change may be conceptualised as increased or decreased complexity, in which the norm and its essential practices remain the same, but the guidelines of the norm may become more elaborated and/or the activities regulated by the norm may expand or decrease (ibid.: 15-16). An

example is the norm of sovereignty, which has become more complex during the last couple of decades. Members of the European Union are still sovereign even though they are members of a supranational union, whereas the new norm of humanitarian intervention has led to a state of conditional sovereignty for some states.

These various understandings of change are very useful in the analysis of the Bush administration's challenges of the norm on non-use of force. Understanding the character of the promoted norm changes enables me more accurately to assess the extent to which the norm changes succeeded – in the two cases was the old norm on non-use of force replaced, transformed or just growing more complex?

3.1.2. Identifying change

The next question is how to identify change – what kind of markers are most useful in identifying change? Norm change may be identified either quantitatively or qualitative – or by a combination of the two. Quantitative markers of norm change often used in research are state behaviour and great events. In our case, state behaviour as a marker of change could be the number of incidents in which for example preventive force has been used as self-defence before and after 9/11. However, the fact that this count of incidents may be statistically evident does not necessary make it theoretically interesting. A quantitative change of this sort is of minor interest unless I can show that it changed the perceptions of legitimate use of force as well. Otherwise, as Holsti notes, the claim of change is nothing more than a claim that things in a quantitative sense are not the same as they used to be. By the same token, without a discussion of how a quantitative change impacts the domain of international relations – does it create new types of patterns, practices or institutions – it is impossible to know when such a quantitative change becomes significant or even transformational (Holsti, 2004: 7-10).

Norm change is also often connected to great events. As argued by Finnemore and Sikkink, great events offer a 'window of opportunity' for change, because they may trigger a search for new ideas (Finnemore and Sikkink, 1998: 909). For example, the end of the Second World War resulted in a new world order with the creation of the UN and the special rights and duties given to the five permanent members of the Security Council. Great events such as wars or the end of wars are often used as great event markers, however, Holsti warns about this. Great events as markers of change have face validity because they frequently have significant consequences, but there is often disagreement about *what* exactly changed and to what extent it

changed (Holsti, 2004: 10, 18). Furthermore, it is important to note that great events in themselves do not result in norm change, but rather the states acting as norm entrepreneurs who see the need for a new norm after a great event and take advantage of it to promote a new norm. In our case, it is not 9/11 as an event that challenged the norm on non-use of force, but how President Bush chose to react. This means that no causal power is ascribed to 9/11 even though Finnemore and Sikkink tell us that great events may foster norm change. It is not the event itself but rather the 'window of opportunity' that it creates for norm entrepreneurs that may result in norm change.

A good qualitative marker of norm change is the legitimacy of the norm in the eyes of the states of international society. Because a normative standard is not a fully established norm before it is believed to be legitimate by the states of international society, legitimacy becomes the decisive yardstick for measuring change within international society (Clark, 2003: 82). Hence, a norm is only changed if the states of international society find the new norm more legitimate than the old norm. As noted by Knudsen, norm change is inherently a social process in which any new norm is 'launched, communicated, interpreted, accepted, reorganized or dismissed by states on the basis of existing norms and practices' (Knudsen, 1999: 46). How, then, to measure legitimacy is another question. This will be discussed in Chapter 4, which explains the methodology and research design of the dissertation.

3.2. The process of norm change

The emphasis on norm change as a social process, in which legitimacy plays an important part, is a theoretical attribute that the English School shares with constructivism. Hence, it makes sense to combine the insights of the two theoretical schools in a model of norm change. Whereas constructivist theory has concentrated upon developing the more theoretical and technical sides of the norm change process, the English School's theory has mainly focused on the likely consequences of norm change. A noteworthy contribution by Martha Finnemore and Kathryn Sikkink (1998) sums up the vast bulk of (American) work on norm change. According to Finnemore and Sikkink, the 'life cycle' of a norm is best understood as a three-phase process, in which a norm emerges, cascades and becomes internalised. This theoretical model corresponds very well with the norm change process cited by Knudsen above. In the following, I follow Finnemore and Sikkink's theoretical model of norm evolvement and supplement it with the theoretical insights of the English School on norm change. Thus, instead of a three-phase model I end up

with a five-phase model, in which the norm emergence phase is divided into two distinct phases (see Figure 3.1.).

Figure 3.1. The five-phased process of norm change

The first stage of the norm emergence phase is the norm challenge, where a state launches and communicates its new norm. The second stage is the immediate reaction by other states to the norm challenge; the new norm will meet both opposition and support by other states, which will interpret, accept, reorganise or dismiss the new norm on the basis of existing norms (cf. Knudsen, 1999: 46). If the state is successful in promoting the new norm, it will reach the third phase, the tipping point, where a majority of states, including the great powers, are supportive of the new norm. If the tipping point is reached, the new norm will begin to cascade, which is the fourth phase. Finally, in phase five, the new norm will be politically and legally institutionalised as a new norm of international society.

This model of the norm change process is a very useful theoretical framework for analysing the degree of success of the Bush administration's two norm challenges, as it enables us to examine in detail the extent to which the norm challenges succeeded and the reasons for their success or failure. In the remainder of this chapter, each phase of the norm change process is described in detail.

3.2.1. Norm emergence: norm challenge

The first stage of the norm change process is a norm challenge, where a new norm is launched and communicated. A central actor in this stage is the norm entrepreneur, who promotes the new norm by trying to convince a critical mass of states to embrace it. According to Finnemore and Sikkink (1998: 901), norm entrepreneurs may be states, individuals or non-governmental organisations or a combination of them all. However, this study focuses only on the role of a state, or more specifically a great power, as a norm entrepreneur. The state is treated as a unitary actor well aware that many different domestic actors may have affected the policy outcome during the various stages of the national policy decision-making process. For example, entire books have been written about how neo-conservatives and

more specifically certain people inside the Bush administration were the creators of the so-called Bush Doctrine (see for example Bob Woodward, 2004). Yet, internal policy decision-making dynamics are a whole other story and it is not mine to tell. I am interested in the official foreign policy of the Bush administration as stated by President Bush and how this challenged the norm on non-use of force, because it was this policy that the leaders of other states had to relate to. For my research project it is of minor importance whether the policy was the product of Donald Rumsfeld and Dick Cheney or neo-conservative think tanks.

Norm entrepreneurs perform a crucial role in the stage of norm emergence, as they call attention to problems that are not properly solved by existing norms. Thus, the evolvement of new norms usually takes the form of a challenge of previous norms. In other words, the emergence of a new norm most often begins with a norm challenge. As stated by international law professor, Anthony D'Amato, 'every violation contains the seeds of a new rule' (cited in Berman, 2005: 97). Norm challenges may come in different forms and in various degrees of seriousness. A state may challenge a norm by actions and/or by words. To assess the seriousness of norm challenges we may distinguish between three kinds of norm challenges: norm violation, norm modification and norm contestation. Norm violation refers to situations in which states more or less deliberately disobey a norm but without wishing to change it, whereas norm modification and contestations refer to situations where a state actively seeks to either change the substance of the norm or perhaps even abolish it. All three are norm challenges, but only the latter two aim to change the norm.

In cases of *norm violation* a state may break a norm once or twice through its actions but it never mounts a normative assault on the norm. In fact, the state often upholds the norm when it justifies its behaviour. As an excuse for its behaviour, the norm violating state generally uses one of the following two excuses: One, it denies that it actually violated the norm and thereby it upholds the norm ('We did not violate norm X, because we support norm X') (Raymond, 2000: 285). Using this excuse, a state may completely deny having used preventive force against another state although it has done so. Second, the state denies that the action falls under an accepted definition of wrongful behaviour ('What we did was not really X but Y and hence we did not violate norm X') (ibid.). An example is the Iraqi invasion of Iran in 1980. Iraq first invoked a right of pre-emptive self-defence based on the allegations that Iran was preparing to invade Iraq, but it quickly shifted its position by invoking self-defence against a prior armed attack by Iran (see Chapter 6). In this case Iraq never admitted using pre-emptive force and

thereby it only violated the norm on non-use of force by using illegal force, but it never contested the norm by saying that it had a right to use pre-emptive self-defence.

However, norm violation does not always mean that a state does not try to change a norm. If the state repeatedly and systematically breaks the norm without offering any justifications for its action, it is a clear example of norm contestation although the state does not verbally contest the norm (cf. Bull, 2002: 70). But, if the state does not wish to change the normative practice, but just found it necessary for prudential reasons to break the norm in this specific incident, it often upholds the norm in its justifications of its actions. Thus, in cases of norm violation the aim is not necessarily to replace an existing norm with a new one, since the norm-violating state often confirms the importance of the old norm when trying to justify the violation (cf. Wheeler, 2000: 5).

In cases of *norm modification*, a state breaks a norm and justifies this by arguing that the norm needs to be modified to include new circumstances. Norm modification thus refers to changes *within* the norm. A state may justify its action by referring to certain qualities of the situation ('We did violate norm X, but there were extenuating circumstances, which need to be included in the norm, however, we still support norm X'). Examples of this kind of norm challenges are humanitarian interventions without UN authorisation such as NATO's intervention in Kosovo in 1999. NATO violated the norm of sovereignty, but it went out of its way to assure international society that it still supported the norm of sovereignty and the practice of UN authorisation, but specific grave, extenuated circumstances such as states committing genocide had to be excluded to this norm. In this case the norm violating states did not contest the sovereignty norm; they only added an exception to it.

Norm contestation refers to situations in which a state actively seeks to replace a norm. It is different from norm modification, as it goes further than a change within the norm but instead argues for a change *of* a norm. In these situations, a state demonstrates through statements and its actions that it is withdrawing its consent from the old norm in question (Bull, 2002: 70). Instead of the old norm, the state advocates a new norm, which is better suited for the situation ('We now support norm Y and not norm X'). When contesting a norm, the state often points to the shortcomings of the old norm to justify the need for a new norm, trying to make its new norm look more legitimate than the old one. In other words, the state seeks to create a 'crisis of legitimacy' for the old norm (cf. Morris & Wheeler, 2007). Thus, the state tries to legitimise its norm contestation by virtue of the very fact that its actions in fact do break the norm – it seeks 'legitimacy through defiance' (Ber-

man, 2005). An example of norm contestation is the Israeli preventive attack on the Iraqi nuclear reactor, Osirak, in 1981. Israel explicitly contested the norm on non-use of force by claiming a right to preventive self-defence justified as 'an elementary act of self-preservation, both morally and legally' (the Israeli delegate cited in Cassese, 2005: 358, footnote 4). Unlike Saddam, Israel did not try to 'hide' its norm violation; instead Israel explicitly contested the norm by proclaiming an inherent right to use preventive force in self-defence.

As implied by Bull, norm contestation, especially contestation of fundamental norms, may have severe consequences for international society, because any attempt to change these norms often results in conflict and perhaps even disorder. Norm change can only take place without causing disorder if there is overwhelming evidence of consensus on norm change in international society, and especially if that consensus embraces all the great powers (Bull, 2002: 70, 91). However, if the norm entrepreneur state does not find support for its new norm, the norm challenge will not end in a norm change and will only be remembered as the exception that proves the rule.

3.2.2. Norm emergence: immediate reaction

Norm challenges in the form of norm modification and norm contestation do not take place without conflict, as they will often provoke reactions from other states. When great powers challenge a norm in order to either change its content or more radically to abolish it, they must always advocate and seek support for their proposal. But, in doing so, they will often encounter opposition from other states who wish to see alternative modifications or who support the existing norm (Morris, 2005: 269). As noted by Finnemore and Sikkink (1998, 897): 'new norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interests'. Hence, norm change rarely happens over night, as a long process of debating and contesting often takes place. A central part of norm change is thus how other states respond to a norm challenge. They can either accept the norm challenge by supporting the need for a new norm or they can oppose the norm challenge by showing their disapproval of the new norm. As argued in Chapter 2, whether or not other states accept another state's norm challenge is a question of legitimacy. As noted by Justin Morris, a norm challenge must be normatively driven in order to success. If the norm challenge is seen as accommodating a short-term policy objective or if the suggested change is very radical, then the degree of opposition to the new norm will be greater (Morris, 2005: 269).

To mobilise support for a new norm, the norm entrepreneur state employs its powers of persuasion directly or indirectly, in the latter case by making international organisations and assemblies support and promote the rules (Bull, 2002: 69-70). International organisations may be used as platforms from which a state promotes a new norm. According to Finnemore and Sikkink, these platforms can be constructed specifically to promote a given norm (for example NGOs like Greenpeace and the Red Cross) or the entrepreneurs can work from existing platforms, i.e. international organisations like the UN (Finnemore and Sikkink, 1998: 899). Ironically, the Bush administration used the UN as a platform to challenge one of the founding norms of this organisation: the norm on non-use of force.

If the norm entrepreneur state is successful in persuading a few other states, these states become norm leaders, which means that they help the norm entrepreneur state persuade other states to support the norm. Norm leading states thus help convince other states that the new norm reflects a widely shared moral sense rather than the moral code of just one state (ibid.: 901; Nadelmann, 1990: 482). The existence of norm leaders who help the norm entrepreneur state promote the new norm is thus a first sign that the new norm in fact is emerging and not just promoted by one single state.

3.2.3. Tipping point

Before entering the fourth phase of norm cascade, a new norm must first reach a tipping point, which occurs when the norm entrepreneur has persuaded a critical mass of states to adopt the new norm. A good place to look for the opinion of other states is international forums, where states may debate each other behaviour. Controversial action, which violates established norms, is particularly likely to result in statements from other states either praising or condemning the behaviour.

It is difficult to predict exactly how many states constitute a critical mass. A quantitative measure is one-third of states. According to Finnemore and Sikkink, empirical studies show that tipping points rarely occur before one-third of the states support the new norm (1998: 901). As an alternative to the quantitative measure, Finnemore and Sikkink mention qualitative measures where focus is on *the kind* of states that adopt the new norm. States are not equal when it comes to normative weight, and the support of some states is thus more 'critical' for the norm to evolve than the support of others (ibid.). Critical states/actors can be great powers, international or regional organisations or states that may be directly affected by the norm change. I call these latter critical states 'vulnerable' states.

Vulnerable states are critical, because they have a 'personal' stake in the adoption of the norm. To exemplify Finnemore and Sikkink use the case of the land mine ban. Here, a vulnerable state is a state that produces land mines, as it would be affected by a general ban on land mines (ibid.: 901). Vulnerable states in this study are failed or weak states that are more exposed than other states to be 'victims' of the Bush administration's norm challenges broadening the right to use force. These are especially states that in the last decade or two have been objects of international interference in domestic affairs and are primarily found in Africa, e.g. Somalia, Sudan and Libya, and in the Middle East, e.g. Iraq, Iran, Syria and Pakistan. If they support the new norm, the norm is indeed reaching the stage of norm cascade.

Great powers are critical states as well, because for a new emerging norm to reach the tipping point it needs their support – otherwise, as argued by Bull, the norm challenge may result in disorder. Without support from some regional great powers, the new emerging norm is not likely to succeed. Thus, great powers are important in studies of norm change, or norm stability for that matter. In this study, the great powers in addition to the US are the UK, France, Russia and China. They are permanent members of the UN Security Council and thus have more impact on the constitution of the international order than other regional great powers, which are not permanent UN members, for example India, Germany and Brazil.

Finally, the support of international and regional organisations can be crucial for a new norm to evolve, as they represent different parts of the world. Examining their position on the new norm gives a clue on how far the norm evolvement process has come in each region – is it a global phenomenon or is the new norm only supported in a few regional interstate societies (cf. Buzan, 2004: 219)?

3.2.4. Norm cascade

After reaching the tipping point, the new norm begins to cascade. Norm cascade is defined as the process in which more and more states adopt the new norm more rapidly without pressure from the norm leaders. The states are socialised into being norm followers of the new norm (Finnemore and Sikkink, 1998: 902).

The theory on norm cascade points out legitimacy as a driving force in the spread of a norm (ibid.: 895; Kelley, 2008: 230). Yet, these studies emphasise internal legitimacy as a motive for following the norm rather than focusing on the legitimacy of the new norm or the legitimacy of the norm entrepreneur (external legitimacy). Using internal legitimacy as an indicator

of norm cascade makes sense in cases of *prescriptive* norms like fair treatment of war prisoners and women's right to vote, because states, which are not following these norms, obviously violate them. But, in the case of the Bush administration's challenges of the norm on non-use of force, this is an attempt to replace a *prohibiting* norm with two *'permission'* norms that allow, respectively, the use of force against states harbouring terrorists and preventive use of force as self-defence. For example, the new norm on preventive force does not require that states use preventive force when they feel threatened; it just gives states permission to use preventive force. Hence, we cannot expect to find states using preventive force as a means to be seen as legitimate. However, this does not mean that we cannot use legitimacy as a theoretical indicator of norm cascade – we just have to tailor the argument to our case. This study thus focuses on external rather than internal legitimacy – if the two new norms are cascading, which means that they are considered legitimate by other states, states using either military force against states harbouring terrorists or preventive force as self-defence should not be exposed to verbal condemnations or material sanctions.

Furthermore, states comply with a new norm to show that they have adapted to the social environment – to show that they belong. They want to be seen as legitimate members of international society (internal legitimacy). This wish to be seen as legitimate is closely connected to what Finnemore and Sikkink call norm dissonance, which takes place when the norm entrepreneur disapproves of states that are opposed to the new norm. Norm entrepreneurs frequently criticise opposing states and try to delegitimate them and their preferred norms. Hence, much norm advocacy involves pointing to discrepancies between words and actions of other actors and holding them responsible for the adverse consequences of their actions (Finnemore and Sikkink, 1998: 903-904).

3.2.5. Norm institutionalisation and internalisation

At the end of a norm cascade, the new norm becomes institutionalised and maybe even internalised. By now, it has given the states new responsibilities or new rights (Finnemore and Sikkink, 1998: 904-5).

A new norm is institutionalised into international society when it has become legally institutionalised into international law and politically institutionalised into the rules of multilateral organisations or in bilateral policy agreements. Norm institutionalisation, especially legal institutionalisation, strongly confirms the status of the new norm as a common, international norm, as it clarifies the content of the norm and specifies what constitutes norm viola-

tion. One example is the new norm prohibiting genocide, which now holds states legally responsible to intervene in cases of genocide. Finnemore and Sikkink note that norm institutionalisation may take place prior to or after a norm cascade. It depends on the specific case and the reasonable conditions of norm institutionalisation (ibid.). In our case, it is not reasonable to expect the Bush administration's new norms on the use of force as self-defence to be institutionalised before a norm cascade has occurred, because making legal rules on the use of force has always been a controversial subject. For example, it has not yet been possible for the UN to agree on a definition of what constitutes aggression. In the theoretical model of this study norm institutionalisation is expected to happen in the last phase of the norm change process.

According to Finnemore and Sikkink, a new norm is internalised when it is widely accepted and taken for granted by the states of international society. It is no longer controversial and hence no longer subject to broad public debate (ibid). However, when it comes to the use of force, 'grantedness' may be difficult to achieve. Because the use of force always is controversial, even though it may be both legal and legitimate, it is difficult to imagine a situation where the use of force against another sovereign state is taken for granted and results in no 'talk' at all, positive or negative. For example, although the norm on self-defence has been widely accepted as a legitimate exception to the norm on non-use of force since the adoption of the UN Charter, even the most just cases of the use of force as self-defence have always caused reactions by some other states – it has never been taken for granted, even though the norm is many decades old and has been legally institutionalised by state practice for centuries and by the UN Charter. Thus, speaking of 'grantedness' with regard to norms governing the use of force may be meaningless, as these norms will never be taken for granted. They will always be subjugated the *grundnorm* on non-use of force, which requires that all states justify their use of force in accordance with international law.

3.3. Concluding remarks

For a state to succeed in changing an existing norm, the new or the modified norm must pass through all five phases of the norm change process to become a new fully established norm of international society. Indicators of such a norm change is support by at least one third of the states, including the support of great powers, so-called vulnerable states as well as international and regional organisations, cascading of the new norm into state practice

and legal and political institutionalisation. The process of norm change can thus be long and complex: sometimes it may happen rather fast, if consensus is quickly established that the new norm is more legitimate than the old norm, but often the norm change is gradual and sometimes an emerging norm dies out because no other states support it.

The norm change process may even be further complicated if the pace of norm change varies in different regional international societies. As noted above, a new norm may reach different stages of the norm change process in various regions of the world resulting in conflicts about the validity of the competing norms. This may bring disorder into international society, as international agreement about the guiding norms of state conduct no longer exists.

PART II
METHOLOGICAL INVESTIGATIONS

Chapter 4
How to Analyse Norm Change?

The main question guiding this chapter is how to empirically investigate the extent to which the Bush administration succeeded in its two norm challenges aiming to change the norm on non-use of force. The chapter consists of two main parts. The first part (section 4.1) is a general discussion about which scientific approach to use when studying international norms and norm change. Since the dissertation follows Barry Buzan's call for a more positivistic English School, it presents this methodological approach and discusses how it differs from the classic English School approach. The objective of the second part of the chapter (section 4.1, 4.2 and 4.3) is to apply this new English School methodological approach to my own research – to inform the reader about what I have actually done in my study. Hence, these sections present the study's research design, methods, operationalisation and data selection.

4.1. The study of international norms: which scientific approach to use?

Examining norm change using legitimacy as an indicator for change calls for an interpretative approach. The English School has commonly been associated with such an approach, as the cornerstone of English School research is analyses of how various understandings of norms and institutions constituting international society have changed over time and how this has affected the international order. The so-called 'classical approach' of the English School used to study these phenomena is commonly described as an interpretative and normative approach based on a hermeneutical epistemology[18] (see Dunne, 1998). The approach is interpretative in the sense that the main aim of the School is to understand how the normative framework of international society affects the international order. The approach is normative in the sense that once the normative framework has been identified and analysed,

[18] There is disagreement about the relative weight of each element. Some stress the hermeneutical element more than others (see for example Roger Epp, 1998), while others put more emphasis on the normative element as an important aspect of the classical approach (see for example Dunne, 1998).

the task becomes normative in asking why these norms should be valued and perhaps even how to protect them (Dunne, 2005a: 78).

Bull famously defended the classical approach against behaviouralism. If we are to meet the demands of behaviouralism on 'strict standards of verification and proof', Bull argued, then 'there is very little of significance that can be said about international relations (Bull, 1966: 361). Similarly, Jackson is a devoted advocate of the classical approach, which he associates with a *pre*-positivistic epistemology. He strongly rejects the positivist argument that a norm can be studied using the methods of natural science. Because a norm is not a physical entity, Jackson argues, it cannot be measured into anything. Norms are social and historical entities in the sense that a certain set of people engaged in a specified activity are subject to the norms at that place and time (Jackson, 2000: 49; Jackson, 2009: 21-24). To study norms in the classical way is hence an expository method, which 'involves observation, discernment, interrogation, diagnosis, and explication' (Jackson, 2000: 81).

Bull and Jackson are right that the study of norms must use other methods than natural science, as norms are not countable or reducible to overt behaviour. They cannot be measured using a definitive scale but must carefully be assessed and evaluated. However, using an interpretative approach does not allow one not to be methodologically ignorant. Bull was well aware of the pitfalls of the classical approach: 'The classical theory of international relations has often been marked by failure to define terms, to observe logical canons of procedure, or to make assumptions explicit.' 'The theory of international relations', Bull continued, 'should undoubtedly attempt to be scientific in the sense of being a coherent, precise, and orderly body of knowledge, and in the sense of being consistent with the philosophical foundations of modern science' (Bull, 1966: 375).[19]

Despite Bull's warning about methodological sloppiness, the English School and its classical approach has on several occasions been criticised for its 'methodological quietism' (Spegele, 2005: 97). Martha Finnemore has criticised English School scholars for not providing systematic discussions about rules of evidence and for not specifying their theoretical propositions. According to Finnemore, there is remarkably little discussion of research methods anywhere in the English School canon: 'simply figuring out what its methods *are* is a challenge' (Finnemore, 2001: 509). Dave Copeland is even more outspoken, as he has criticised the School for not being scientific: 'For American social scientists, it is difficult to figure out what exactly the School is trying to explain, what its causal logic is, or how one would go about measur-

[19] See also Bull (2000: 257) for his own reflection on these comments.

ing its core independent (causal) variable, 'international society'' (Copeland, 2003: 427). Replying to this criticism, Cornelia Navari acknowledges that the School has been methodologically quiet. She compares the classical English School's silence on methods with the treatment of underclothing: it is 'assumed to be there but scarcely discussed in polite society' (Navari, 2009: 1).

In response to these critics, a variety of articles, papers and books have been written about English School methodology (see, e.g., Epp, 1998; Little, 2000; Linklater & Suganami, 2006). Furthermore, Barry Buzan's attempt to renew the School has resulted in two discussion forums in leading international relations journals in which the School's methodology has been a major theme (see *Review of International Studies* 2001 (Vol. 27) and *Millennium* 2005 (Vol. 35)). Most recently, an entire book edited by Navari (2009) has been devoted to English School methods. The book contains contributions by contemporary prominent English School theorists on how to understand and apply English School methods. As this list shows, the debate *about* English School methods is definitely not quiet or dead, it is most certainly alive and loud. However, in spite of the many articles on English School methodology, the critics have a point that methodological considerations are close to absent in empirical analyses. The debate about English School methodology contains many important and insightful works, but all these methodological thoughts now need to be reflected into practice – or in other words English School theorists need to start being more explicit about their own methods. As exemplified by Linklater and Suganami, English School theorists ought to be more conscious of what counts as rules of evidence for identifying a normative principle or an international institution (Linklater & Suganami, 2006: 109).

4.1.1. Buzan's methodological reconstruction of the English School

In an attempt to renew the English School both theoretically and methodologically, Buzan has responded to some of the criticism outlined above, especially the criticism raised by American theorists. So, whereas Bull's main purpose was to disassociate the classical approach from the 'scientific approach' of American social scientists, Buzan aims to bridge the Atlantic divide by redirecting the School into a structural theory based on an epistemology that may be more positivist than hermeneutical (Buzan, 2004: 24). Buzan's understanding of positivism seems to deviate from the behaviouralist

definition of positivism.[20] Behaviouralists associate positivism with the establishment of a social science close to natural science. In contrast, Buzan's understanding of positivism is less strict and law-like. He defines positivism as 'finding sets of analytical constructs with which to describe and theorise about what goes on in the world, and in this sense it is a positivist approach, though not a materialist one' (Buzan, 2004: 14). This definition of positivism is very similar to that offered by Little, who defines positivism as looking for patterns in history (Little, 2000: 404). Buzan and Little thus advocate a more pragmatic and less fanatic understanding of positivism. Hence, Buzan emphasises an analytical approach over a normative approach, which is traditionally regarded as one of the cornerstones of the classical approach. He wants to replace normative theory with a theory of norms.

This reconstruction of the English School's methodology has not gone by unnoticed but has prompted some critical comments. First, Emanuel Adler has questioned whether Buzan's approach is even positivistic. According to Adler, the fact that Buzan characterises his epistemological position as non-normative and systematic, does not make it positivistic. Adler finds that Buzan is closer to a pragmatic than a positivist mode of inquiry (Adler, 2005: 180-81). In his reply to Adler, Buzan points to Wendt's understanding of positivism as 'scientific realism' as inspiration. According to Buzan, this approach is very useful for those who want to study social phenomena that are not directly observable. But Buzan also makes clear that he is not interested in 'the game of pigeon-holing' himself into boxes of philosophy of knowledge. More than anything, Buzan seems to advocate more explicit English School methods regardless of the chosen methodology (Buzan, 2005: 192-93).

Second, it has been questioned whether Buzan's positivist approach is compatible with English School theory (Dunne, 2005a; 2005b). Buzan is not the first to use a positivist approach; he just does so in a more explicit manner. In fact, positivist elements are also visible in the work of the founding fathers of the English School. As noted by Linklater & Suganami (2006: 101), Bull's rejection of the 'scientific approach' is not a rejection of causal reasoning in itself. This is particularly evident in *The Anarchical Society* in which Bull recognises the causal relationship between international institutions and international order. Bull's aversion to positivism only holds true if the term is equated with natural science. Following Buzan's and Little's understanding of positivism as looking for patterns, then positivist elements are incorporated in the work of both Wight and Bull (Little, 2000: 404).

[20] Wendt defines behaviouralism as 'a logical empiricist belief that behavioural laws must be the basis of scientific explanation' (Wendt, 1999: 48).

Third and finally, Dunne has questioned whether Buzan's positivism is compatible with an interpretative approach. According to Dunne, Buzan privileges an analytical representation of international society over a hermeneutical engagement with the beliefs of the actors and thereby hinders an accurate understanding of international society (Dunne, 2005b: 163). Replying to Dunne, Buzan makes clear that he does not abandon an interpretative and historian method; rather it is the combination of analytical comprehensiveness and an interpretative approach that makes the English School attractive and is the key to the School's potential for a grand theory (Buzan, 2005: 184). Furthermore, Buzan makes clear that his reconstruction of the English School is not an attack on the normative wing of the School. By reconstructing the English School into a structural theory, the aim is not to exclude the normative wing but to introduce 'it to its structural sibling' (2005: 185). In Buzan's view, the normative and analytical wings co-exist in the English School; each wing offering its own contribution to the School depending on the research questions asked.

Summing up, the above analysis of Buzan's epistemological reconstruction of English School methodology indicates that it is compatible with English School theory. In fact, the methodological differences within the English School often stand out more like a question of preferred rhetoric and labelling than actual differences. Comparing the English School and regime theory, Evans and Wilson note that the methodological differences are commonly differences of form rather than substance. This difference can essentially be boiled down to a difference of language, as classic English School work does not subscribe to the vocabulary of social science (Evans & Wilson, 1992: 349). This aversion to social science language is particularly evident in the work of Jackson, who makes a virtue of not using 'academic jargon beyond the absolute minimum that is necessary for communicating with other scholars' (Jackson, 2009: 35). Buzan challenges this rather conservative view of scientific language by using much more social science language and by advocating a systematic analytical approach in which the chosen methods are explicit and visible to others. However, this does not mean that he abandons the interpretative and historical approach of the English School.

In this dissertation I follow Buzan's call for a more positivist English School methodology, as this may strengthen both the internal and the external validity of my study. The dissertation thus offers a more positivist and explicit approach to the study of international norms. However, because Buzan has not elaborated on how to actually do a structural analysis of norms and how to measure norms, it is up to others to convert his ideas into practice. The dissertation thus begins where Buzan ends, as one of its central aims is to pro-

vide an explicit research design in which the method used is described explicitly and thoroughly. This chapter develops a research design based on an interpretative method, which systematically and with awareness of positivist standards such as validity and replicability enables me to investigate whether a norm change has occurred.

4.2. Research design and method

The aim of the study is to shed light on the extent to which great powers can change fundamental norms, and the study is thus both theory testing and theory generating. It is theory testing in the sense that it questions realism's proposition that great powers are always stronger than international norms. In contrast, the English School argues that some norms, especially fundamental norms, may be stronger than the will of great powers because they are highly treasured by the states of international society and thus endowed with a high degree of legitimacy. To 'prove' this claim, I must show that great powers cannot always succeed in changing fundamental norms when it suits their interests.

The study is theory generating in the sense that its primary aim is to investigate *when* and *why* great powers are able to change fundamental norms. A central proposition of the English School is that fundamental norms are strong and stable, but at the same time the School acknowledges that fundamental norms also do change and that great powers have a central role in this. But the factors leading to this norm change have remained rather under-theorised, as focus has been upon the likely consequences of such a norm change. Hence, a central aim of the dissertation is to help develop the English School theory on norm change.

To fulfil these two theoretical aims I investigate to what extent the Bush administration succeeded in its two norm challenges of the norm on non-use of force. The study thus takes the form of a comparative single case study. According to John Gerring a case study is defined by its 'intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larger class of cases (a population)' (Gerring, 2007: 20). Here, 'the population' of cases is great powers and the study is a *single*-case study in the sense that it only investigates the norm challenges of *one* great power, namely the US. The study is *comparative* in the sense that it compares *two* norm challenges posed by the same great power, each with a different outcome. The first norm challenge is used as a 'base-line' case or a point of reference to which the other norm challenge can be compared. By doing a comparative single-case study of two norm challenges with different out-

comes posed by the same great power and even the same president, I am able to hold other factors constant. For example the alliance strategies of other states (balancing or bandwagoning with the great power) are kept constant, as the norm challenger is the same state, and the timing of the norm challenges is kept constant, as both challenges occur after 9/11. Hence, by keeping a set of otherwise relevant factors constant I am able to shed light on the character of the two norm challenges and the reasons one succeeded while the other failed. The strength of this design is that it allows me to conduct an 'in-depth' study, which in detail examines and systematically compares norm challenges posed by a great power and the extent to which the challenges resulted in a norm change.

Some may question to what extent my results can be generalised to other cases, as I only investigate norm challenges posed by one great power. But my findings may also be valid for other great powers besides the US, as the population of the study is great powers. This does not mean that the findings only apply to great powers, as the 'potential scope' of the study also includes secondary powers. However, because secondary powers do not have the same special rights as great powers, the norm change process may be a bit different when a norm challenge is launched by a secondary power (cf. Gerring, 2007: 83).

Furthermore, because the US is the most powerful of all great powers in terms of both material and social attributes it is the most likely state to succeed in changing fundamental norms. If the US cannot change the norm, we cannot expect other great powers, and even less secondary states, to able to. By using this design, I thus expose the English School's proposition about fundamental norms to the hardest possible test, as the norm on non-use of force is least likely to 'survive' a challenge posed by the world's superpower compared to a challenge posed by another great power (cf. George & Bennett, 2005: 121-22).

4.2.1. Method: tracing the process of norm change

When investigating the extent to which the Bush administration succeeded in changing the norm on non-use of force, my main interest is the *process* of norm change. By analysing the process we might be able to understand when and why a great power can change even a fundamental norm of international society. A useful method for this task is process tracing. George and Bennett define process tracing as a method which 'attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the

dependent variable' (George & Bennett, 2005: 206). This understanding of process tracing highlights causal effects and derives from a strong deductive logic. Using process tracing methods, the researcher traces the process in a very specific theoretically informed way looking for a series of theoretically predicted intermediate steps (Checkel, 2008: 115). This implies that process tracing is a very good tool for testing theories, but as pointed out by George and Bennett it is also useful for theory development (George & Bennett, 2005: 207).

Since, the purpose of this study is both theory testing (to what extent did the US succeed in its two norm challenges) and theory generating (how can we explain the outcome of the two norm challenges), process tracing seems like a very constructive method. We have a strong theoretical model specifying the process of norm change into five phases, in which more and more states over time consider a new emerging norm legitimate in more and more cases until the norm finally becomes politically and legally institutionalised into the normative framework of international society. Applying this theoretical model on the empirical cases allows us to assess the extent to which the Bush administration succeeded in its two norm challenges and thus whether the realists are right that great powers can always change international norms. But the theoretical model does not specify why some new norms are considered more legitimate than others, so this is where the study becomes theory generating, as a detailed and in-depth analysis of the two norm challenges may increase our understanding of why some norm challenges succeed while other fail.

4.3. 'Measuring' the process of norm change

Having established what process tracing is, the next task is to actually apply the method on this study. In other words, we must know what to look for and where to look to be able to trace the process of norm change. In the following, I first operationalise the central concepts of the study so that we know what to look for. I then specify where to look by carefully deriving a set of observable empirical implications for each phase of the norm change process.

4.3.1. Operationalising the central concepts

In this study norms are defined as 'standards of conduct' – the question is how to 'recognise' these standards of conduct in the empirical world. They are not physical entities and therefore not as easily captured as for instance military strength in terms of weapon stocks where one just has to count. Re-

call that conduct is not reducible to behaviour. Norms are guidelines *of* behaviour and cannot be 'measured' as just average behaviour. Jackson makes an example with a car on the road: We can see it driving, but we cannot see the rules of the road that are supposed to govern the driver of the car (Jackson, 2000: 78-79). Thus, we only have indirect evidence of the existence of international norms. As argued in Chapter 2, one way to identify a norm is through justifications and evaluations of behaviour. Justifications and evaluations of actions leave an extensive trail of communication that can be studied. They provide a good measurement of norms as they are spoken directly to the normative context. This does not mean that behaviour is irrelevant when we analyse norms, as justifications and evaluations are always related to behaviour (Kowert & Legro, 1996: 485). In this study I thus include both state rhetoric and state behaviour to 'measure' a norm in the empirical analysis of norm change.

More specifically, the Bush administration's norm challenges are operationalised as the administration's justifications for the need for the two new norms, not least its justifications for the wars against Afghanistan and Iraq. The legitimacy of the two norm challenges is operationalised as the spoken evaluations and reactions by the states of international society. As pointed out by Finnemore and Sikkink: 'Because norms involve standards of 'appropriate' or 'proper' behaviour', it is only possible to identify 'what is appropriate by reference to the judgement of a community or a society' (Finnemore & Sikkink, 1998: 891-92). Hence, in an analysis of the reactions of international society, the reactions become reflections of the legitimacy of the norms challenges.

4.3.2. Deriving observable implications of norm change

To systematically examine the extent to which the new norms promoted by the Bush administration became fully established norms of international society, I derive a set of empirical observable implications for each phase of the norm change process. Using these observable implications increases the internal validity of the study, because the empirical assessment of the success of the norm change has a strong theoretical grounding (cf. Kelley, 2009). Furthermore, they increase the replicability of the study: as the criteria for norm change become very transparent, it is less complicated for others to replicate and to judge the internal validity of the study.

To further increase the validity of the study, I distinguish between certain and unique implications to determine the strength of the theoretical predictions of the norm change process (ibid.). Following Stephen Van Evera, a cer-

tain prediction is defined as an 'unequivocal forecast' (Van Evera, 1997: 31). This implies that if a theoretical prediction possesses high certainty, the implication must occur if the theory is valid. If the implication is not present this falsifies the theoretical proposition, because failure can only be explained by the non-operation of the theory. If the certainty of the theoretical prediction is low, the implication is not bound to follow even though the theoretical prediction is correct (ibid.).

A unique prediction is defined as forecasts 'not made by other known theories' (ibid.). This means that if a theoretical prediction is highly unique and its implication is found in the empirical analysis, this is strong evidence of the theory since no other theories would predict this outcome. If the implication is not found, this strongly indicates that the theoretical prediction is false. In cases of low uniqueness, other theories may predict the same outcome so a passed test does not necessarily indicate that the theory is valid (ibid.). In the following, the observable implications for each of the five phases of a norm change process are presented and their certainty and uniqueness discussed. Finally, the section discusses the validity of the study.

4.3.2.1. Observable implications of norm challenge (NC)

The observable implications for norm challenge relate to the *kind* of norm challenge posed by the Bush administration. The implications investigate the argument that the two norm challenges were more than norm violations but that they actually tried to change the norm on non-use of force. Hence, if the Bush administration in the two norm challenges acted as a norm entrepreneur trying to change the norm on non-use of force, we should be able to identify the following:

- Observation NC1 (criticism of the old norm): Massive public criticism of the norm by the Bush administration claiming that it is not longer appropriate.
- Observation NC2 (changing the old norm): Statements where the administration argues for a norm change presented as either a norm modification (redefining the norm) or a norm contestation (replacing the norm).

Both implications are rather certain. If the Bush administration did not publicly criticise the norm on non-use of force arguing for a change of the norm, then the wars in Afghanistan and Iraq are not examples of a great power

trying to change international norms, but of a norm violation upholding the existing norms although breaking them with its behaviour.

The implications are quite unique as well, since competing theories such as realism do not pay attention to the various forms of norm challenges. Realists do not differentiate between norm violation and norm contestation, because they do not acknowledge the value of justification. To them, norm violation equates norm contestation despite the fact that many norm violators explicitly uphold the norm in question.

4.3.2.2. Observable implications of immediate reaction (IR)

The following set of observable implications regards how the other states initially responded to the Bush administration's norm challenges. They investigate the extent to which the challenges met opposition and/or support. The first observable implication examines the degree of opposition to the new norms based on the theoretical argument that promotion of new norms meets instant public opposition from supporters of the old norms resulting in a conflict about which norm is the most appropriate. This implies that if the new norms were immediately opposed by some states, we should be able to identify the following:

- Observation IR1 (norm-opposition): Instant criticism of the new norms should be expressed by other states in international forums such as the UN immediately after the Bush administration challenged the norm.

This implication has low certainty. Customary international law is based on state behaviour and other states' reactions to this behaviour, and it is commonly recognised that if states oppose a norm change, they must speak up; otherwise their silence is understood as tacit support to the new norm.[21] However, some states could be afraid to counter the Bush administration's policy and chose not to criticise the norm challenge although they actually opposed it. Consequently, if the implication is not found, this does not necessarily mean that the states did not oppose the norms. Uniqueness is low as well, because other theories would predict the same outcome. For example, offensive realism would argue that states would oppose the new norms to balance the US.

The second observable implication investigates the degree of support to the norm challenges based on the theoretical argument that for a new norm

[21] This argument is further elaborated in Chapter 5.

to emerge it must always be supported by a group of states (so-called norm leaders) helping the norm entrepreneur state to promote it. If the Bush administration succeeded in gathering support for its norm challenges and new norms in fact were emerging, we should be able to identify the following:

- Observation IR2 (norm leaders): A group of states expressing strong support for the new norms thereby helping the Bush administration to promote these norms.

The certainty of this implication is rather high. If the implication is not found, this indicates that there is no support to the new norms at all. The implication is not unique, however, since there are many reasons why some states choose to support the Bush administration's norm challenges. One argument from realism is that states could choose to support the administration's norm challenge due to bandwagoning strategies and not because they actually supported the new norm. Another is that the norm-supporting states were balancing against states that oppose the new norm.

4.3.2.3. Observable implications of tipping point (TP)

The following set of observable implications investigates whether the new emerging norms reached a tipping point, which is the point where the norm entrepreneur state has persuaded a critical mass of states to adopt the new norm. A useful indicator is situations where the norm entrepreneur state manifests its new norm by action. Such actions are always controversial as they break existing norms, raise international attention and force states to explicate whether they support or oppose the behaviour. In this study I use reactions to the wars in Afghanistan and Iraq as indicators of the amount of support to the two norm challenges. The following set of implications thus regards the amount of support to the wars (TP1) and the normative weight of this support (TP2-4).

The first implication examines the theoretical expectation that if the new norms have reached the tipping point, at least one third of the states must support them, whereas implication 2-4 investigates the theoretical exceptions that the new norms must have the support of international/regional organisations, great powers and vulnerable states to reach the tipping point. If the new norms have reached the tipping point, we should be able to identify the following:

- Observation TP1 (1/3 supporters): The support of 1/3 of the UN member states to the new norms and their implementation in the two wars.
- Observation TP2 (organisational support): The support of international and regional organisations to the new norms and their implementation in the two wars.
- Observation TP3 (great power supporter): The support of great powers to the new norms and their implementation in the two wars.
- Observation TP4 (support from vulnerable states): The support of a few vulnerable states with a stake in the old norm such as weak and failed states in Africa and the Middle East to the new norms and their implementation in the two wars.

The four observable implications are all quite certain. For a new norm to become a common norm of international society, it must have the full and open support of a majority of the states. Unless at least 1/3 of the states in the UN openly supported the new norms, the new norms did not reach the tipping point. Furthermore, if the Bush administration could not find support for the new norms among international and regional organisations, great powers, and vulnerable states (this is indeed the most difficult test of the new norms) this is a clear sign that the new norms did not reach the tipping point.

However, none of the four observable implications are unique, as realist theories of power balancing and bandwagoning may explain why states either oppose or support the new norms and their implementation in the wars against Afghanistan and Iraq, respectively.

4.3.2.3. Observable implications of norm cascade (Ca)

This set of observable implications investigates whether a norm cascade has occurred, which means that more and more states accept the new norms as legitimate and therefore apply them in their own behaviour. A good place to look for the legitimacy of a new norm is thus similar incidents, where states use the new norm to justify their behaviour. A main source in identifying these incidents has been the United Nations Yearbooks, which list all incidents with UN involvement. However, the UN Yearbooks are not fully updated (the latest version is 2005), so the accounts are supplemented with newspaper articles as well as textbooks and articles from international journals referring to incidents where the two new norms have been invoked. If the norms have cascaded, more and more states should regard the use of force in these incidents as legitimate and the following should be evident:

- Observation Ca1 (increasing invocations of the new norm): Other states besides the US increasingly invoke the new norm to justify their behaviour.
- Observation Ca2 (external legitimacy): When states invoke the new norm, this is supported by other states and does not result in requests for material sanctions or verbal condemnation.

The certainty of observation Ca1 is low. We should be able to identify an increase in invocations of the new norm if conduct following the norm now is considered a new legitimate practice. However, use of force is not an ordinary thing for states and armed conflicts between states occur rarely, as it is a costly affair although it may be both legitimate and legal. Hence, it is unlikely that we will find a lot of incidents where the new norms have been invoked, even though they are considered legitimate. In contrast, the certainty of observation Ca2 is quite high. Because the use of military force is rather rare, we can reasonably expect a reaction of the other states when the new norm is invoked. Furthermore, the uniqueness of observation Ca1 is high, because other theories cannot easily explain why states suddenly increasingly invoke the new norm, whereas the uniqueness of observation Ca2 is low. Again realist theories of bandwagoning and balancing may also explain why the other states support or oppose the invocations of the new norms.

A final observable implication of whether the Bush administration's new norms cascaded is the support of the next American President, Barack Obama. If the administration succeeded in its norm challenges, making use of force against states harbouring terrorists and use of preventive force legitimate, respectively, President Obama should also support this kind of force. Hence, if the norms have cascaded, we should be able to empirically identify the following:

- Observation Ca3 (support of next president): President Obama's support to the new norms and their implementation in the two wars.

This observation is quite certain, as there is no reason why President Obama should not express his support to the new norms, if they have become a new legitimate practice. Furthermore, it is quite likely that he would try to distance himself from the norms if he does not support them and no longer want them to be part of the official national security strategy of the US. However, the uniqueness of the observation is low, as President Obama may not publicly

support the new norms, because he wants to distance himself from the Bush administration and its policy even though he actually supports the norm.

4.3.2.4. Observable implications of norm institutionalisation and internalisation (I)

This final set of observable implications examines whether the new norms have become institutionalised and internalised. The first observation investigates whether the new norms have been politically institutionalised into the policies of the UN and the second whether they have become legally institutionalised. If the new norms have become institutionalised, we should be able to identify the following:

- Observation I1 (political institutionalisation): Statements/declarations allowing and justifying the new norms in UN policy documents.
- Observation I2 (legal institutionalisation): Specifications in international law allowing the use of force according to new norms.

Observation I1 has high certainty, although political institutionalisation may also take place in other forums such as regional organisations like the EU and OAS or security alliances such as NATO. For the institutionalisation to be global, we must be able to identify support for the new norm in UN policy documents. Likewise, observation I2 is highly certain, as a legal institutionalisation must be reflected in international law. Furthermore, both observations are unique, as other theories cannot explain why the use of force against states harbouring terrorists or the use of preventive force, respectively, suddenly are permitted in policy documents and documents of international law after almost a century of prohibition.

4.3.3. Validity of the observable implications

As argued above, the assesment of certainty and uniqueness of the observable implications helps increase the validity of the study, as it tells us when a theoretical prediction is correct and when it is wrong. Table 4.1 categorises the observable implications into four groups according to certainty and uniqueness.

Only four of the observable implications have both high certainty and high uniqueness, Van Evera calls 'doubly-decisive tests' (Van Evera, 1997: 32). If the tests are passed they strongly validate the theoretical propositions, and if they are 'flunked' they falsify the theory. These tests are of course most

preferable, but they are rare. Instead, we must settle for weaker tests, which is not that bad if we are aware of their strengths and weaknesses.

Table 4.1. The certainty and uniqueness of the observable implications

Uniqueness \ Certainty	High	Low
High	NC1, NC2 I1, I2	Ca1
Low	IR2 TP1, TP2, TP3, TP4 Ca2, Ca3	IR1

Seven of the implications have high certainty and low uniqueness. According to Van Evera, the test of these implications is weak, as a flunked test falsifies the theory, and a passed test validates the finding but not the theoretical explanation of that finding (ibid.: 32). In other words, we do not know whether the other states support the norm challenges because they find the new norm legitimate or if it is just because they do not want to go against the Bush administration. However, this problem is eliminated to a certain degree by my research design, as I investigate the outcome of two norm challenges posed by the Bush administration. Some of the power political factors used by realism to explain the outcome are kept constant in the study, which means that the legitimacy of the norm challenge may explain the variance in state support in the two cases.

One of the implications is a 'smoking-gun test', i.e., high uniqueness but low certainty (ibid.: 31). If this test is passed, it validates the theoretical proposition, but if it is not passed it only gives us little information, as it may be a false-negative falsification of the test. In our case, this observable implication can tell us whether an increasing number of states are invoking the new norm, but even if this not the case, we cannot reject that the states still find the new norm legitimate but just have not found a reason to invoke it yet.

Finally, one of the observable implications have both low certainty and low uniqueness. Van Evera describes these tests as 'straws in the wind'; they are indecisive regardless if they are passed or flunked. However, they are still useful as they can weigh in the total balance of evidence, but they do not provide any validation of the theory by themselves (ibid.: 32).

The uniqueness and certainty of the implications are of course not absolute and may be subject to interpretation and disagreement. However, by explicitly deriving a set of observable implications from the theory and as-

signing the certainty and uniqueness of each implication, I have tried to strengthen both the validity and replicability of the study.

Finally, a reasonable objection against my study of the Bush administration's norm challenges is that even though they have not resulted in a norm change yet, this does not mean that they *never* will. However, as I am not able to foresee the future, the study can only answer to what extent a norm change *has* occurred. The study is still interesting for a number of reasons. First, it speaks to scholars who argue that a norm change has already taken place. If I find that this is not the case, I show that they are wrong, although this does not mean that a norm change will not take place over time. Second, the study will hopefully help us further to understand the norm change process and the role legitimacy plays in norm change.

4.4. Data selection and data processing

This section presents the data sources used in the study. As a variety of sources have been used to analyse the different phases of the norm change process, the section is divided into four sub-sections. Sub-sections 4.4.1 to 4.4.3 present the data used to analyse the Bush administration's norm challenges (phase 1), the reactions of the other states to these norm challenges, including the wars in Afghanistan and Iraq (phase 2 and 3) and the extent to which the new norms began to cascade and became institutionalised (phase 4 and 5). Finally, sub-section 4.4.4 presents the data processing and the coding strategy used in the study.

4.4.1. Data: the Bush administration's norm challenges (phase 1)

The data material used to analyse the two norm challenges posed by the Bush administration consists of official/public presidential statements and speeches made by President Bush from 11 September 2001 to his last day of office, 20 January 2009. This means that official and public documents *prior* to 9/11 are not included in the analysis. 9/11 was chosen as start date of the analysis because this is the day of the terror attacks in New York and Washington, which came to determine the Bush administration's foreign policy mission. Before 9/11, the so-called Bush doctrine was not yet born, as Bush had argued for a more isolationist foreign policy (Jervis, 2003: 365). Furthermore, to delimit the amount of data the Bush administration is treated as a unitary actor, meaning that I only analyse statements and speeches made by President Bush. I may therefore overlook how other members of the ad-

ministration have challenged the norm in each of the two cases. But this is not a serious problem, as my main interests is the official foreign policy of the Bush administration as stated by the President and how this challenged the norm on non-use of force, because it was this policy that the leaders of other states had to relate to.

Data is found in the National Archives of the United States published online by the Office of the Federal Register. The documents selected for analysis are all from *The Weekly Compilation*, which is issued once a week and contains statements, messages, and other Presidential material released by the White House during the preceding week.[22] In order to delimit the number of documents, I applied two selection criteria. The first criterion was type of document, i.e. a document was selected for analysis if it could be classified as one of the following:

- Direct addresses to the Nation (national speeches, radio address)
- Communication to Congress and the Senate (including President's Dinner)
- News conferences, presidential debates broadcasted on television, interviews and exchanges with national and international reporters
- Meetings with foreign leaders
- Statements and remarks made in the course of the presidential duty, such as speeches to the US army
- UN speeches and remarks
- Speeches and remarks to foreign parliaments
- National security strategies

Although many of these speeches and remarks primarily are addressed to American citizens, they are indirectly addressed to other states as US foreign policy is always of great interest to states leaders around the world.

As a second selection criterion, the documents meeting the above requirements were only selected for further analysis if they concerned one of the following themes:

- 9/11
- Terrorism/'war on terror'
- Axis of evil/rogue states
- Afghanistan/Al Qaeda/Taliban

[22] Webpage: http://www.gpoaccess.gov/wcomp/about.html.

- Iraq/Saddam Hussein
- National security
- War/use of force
- Self-defence
- Weapons of mass destruction
- United Nations

After a screening of all documents from 11 September 2001 to 20 January 2009, 779 documents were selected for further analysis.

4.4.2. Data: the reactions of the other states (phase 2 & 3)

To analyse the reactions of the other states to the Bush administration's two norm challenges, the primary data source is UN documents, especially meeting records of Security Council meetings and General Assembly meetings as well as letters from UN member states to the Security Council expressing their positions.[23] These documents are all available online on UN's official webpage.[24]

Regarding the first norm challenge, the analyses of phase 1 (immediate reaction) and phase 2 (tipping point) are based on UN documents in the period 11 September 2001 to 31 December 2002. To identify relevant documents I used the United Nations Yearbooks' account of events and the UN debates on the 9/11-terror attack and the war in Afghanistan (UN Yearbook 2001 and UN Yearbook 2002). In total, 58 documents were included in the analysis of the Bush administration's first norm challenge. Table 4.2 shows the distribution of the types of UN documents.

Table 4.2. Type of data used in the analysis of norm challenge 1

Security Council meetings	Security Council resolutions	General Assembly meetings	General Assembly resolutions	Letters from UN member states	Others
4	3	4	2	43	2

Note: Reports and statements by the Secretary-General and statements by the president of the Security Council.

Regarding the analyses of phase 1 and 2 of the second norm challenge, I followed the same data selection procedure as above. The relevant data was identified using the United Nations Yearbook's account of events and

[23] Some of the letters are sent by a member state representing an international organisation, for example the EU or the AU.
[24] Webpage: www.un.org

UN debates on preventive force and the Iraq war (UN Yearbook 2002 and UN Yearbook 2003). In total, 106 documents from 1 January 2002 to 31 December 2003 were included in the analysis. Table 4.3 shows the distribution of the types of UN documents.

Table 4.3. Type of data used in the analysis of norm challenge 2

Security Council meetings	Security Council resolutions	General Assembly meetings	General Assembly resolutions	Letters from UN member states	Others
22	2	29	0	49	4

Note: Reports and statements by the Secretary-General and statements by the president of the Security Council.

As illustrated by the tables, letters from UN member states have been a useful source on not only the official position of many UN member states with regard to the two norm challenges, but also on the position of many international and regional organisations, which have mainly used this form of communication to inform the UN about their official position regarding the two norm challenges.

4.4.3. Data: Norm cascade and norm institutionalization (phase 4 & 5)

As argued in section 4.3.2.3, I look at the conduct of other states and the reaction to this conduct to analyse the extent to which the two new norms promoted by the Bush administration reached the phase of cascading (phase 4). I used a variety of sources to identify relevant incidents and gather information about them, especially secondary sources such as newspaper articles, IR books and journal articles, as many of the incidents have not been subjects of official debate in the UN. However, when possible a primary data source has been the UN archive and relevant military strategies of the great powers.

Regarding the fifth phase of the norm change process (institutionalisation), a primary data source to analyse legal institutionalisation has been international treaty law such as Security Council resolutions, as these are legally binding for all member states. This was supplemented with secondary data sources such as journal articles on the legality of the two norm challenges, including accounts of the ruling of the International Court of Justice. A primary source to analyse the extent to which the new norms have been politically institutionalised has been UN reports on the subject by the Secretary-General and the High-Level Panel on Threats, Challenges and Change.

4.4.4. Data processing and coding

The data was processed using the qualitative textual analysis program NVivo (see Andersen and Binderkrantz, 2009). NVivo is especially useful for projects with large data sets, as it helps organise the data systematically, and thus may help increase both the reliability and the internal validity of the study. The many documents have been imported to the program and organised chronologically. To systematically analyse the reaction of the other states to the norm challenges, each state has been categorised as a 'case', which made it possible not only to count the number of supporting and opposing states, but also to analyse in detail the reaction of selected states, for example the great powers and the 'vulnerable' states.

To get a detailed and systematic overview of the data, the data coding process began. Coding the data creates the 'building blocks' of the analysis, as the coding reflects the theoretical reasoning behind the data collection (Møller, 2009: 167). In this study I have used a deductive coding strategy, where each document has been coded into various categories derived from the above theoretical expectations. This approach is also named 'focused coding', as it is more selective and conceptual than open or initial coding. Guiding a focused coding is the search for answers to specific questions, whereas in initial coding the data determine both the answers and the questions spoken to the data (Lofland, Snow, Andersen & Lofland, 2006: 201). The data sets, including the coding, are available as an NVivo file upon request to the author.

PART III
LEGAL AND HISTORICAL INVESTIGATIONS

Chapter 5
International Law: The Norm on Non-use of Force and Self-defence

The boundaries of legitimate use of force have been disputed and changed many times prior to 9/11 and the Bush administration's norm challenges. Just as the phenomenon of war has changed over time, so have the norms and rules governing the resort to war. A broad interpretation of Bull's definition of war as 'organized violence carried out by political units against each other' (Bull, 2002: 178) captures the various kinds of war that have evolved over time from holy war, empire wars, wars between sovereign states and civil wars. These different kinds of war fought for various purposes each reflect a certain understanding of war and its purposes. This is even acknowledged by Clausewitz, who tells us that war is a result of changing times and the corresponding change of states interests: 'we shall have to grasp the idea that war, and the form which we give it, proceeds from ideas, feelings, and circumstances which dominate for the moment' (Clausewitz, 1997: 335). Thus, war is not only a political phenomenon; it is indeed normative as well. Following Bull, war takes place within a highly institutionalised set of normative structures that evolve from legal, moral and political grounds. As Bull pointed out: 'war is an inherently normative phenomenon; its is unimaginable apart from rules by which human beings recognize what behaviour is appropriate to it and define their attitudes towards it' (Bull, 1979: 595). Hence, war and the use of force are more than just organised violence; they are highly normative practices reflecting how states think they ought to behave at a given point in time.

Juridical literature on war and armed force distinguishes between the rules governing the resort to armed force (*jus ad bellum*) and the rules governing the actual conduct in armed conflict (*jus in bello*). The former is the centre of attention of this dissertation, as these rules concern *under what circumstances* and *to what degree* states may resort to armed force. This chapter investigates the legal status of the norm on non-use of force and states' legal right to self-defence prior to 2001. There are many legal restrictions on the use of armed force as self-defence, but the chapter focuses on the legal status of two aspects: the legality of the use of force against states harbouring terrorists and the legality of preventive self-defence, as these are in-

volved in the Bush administration's two norm challenges. Thus, the main aim of this chapter is to examine to what extent each aspect constituted a legal exception to the norm on non-use of force prior to 2001. In order to establish the extent to which the Bush administration succeeded in changing the norm on non-use of force, we need to know not only what the administration tried to change the norm *to*, but also what it tried to change the norm *from*.

To understand the legal rules governing the use of force, we need to know their evolvement. The first part of the chapter provides a historical assessment of the evolvement of the norms governing the use of force with special attention to the legal rules of self-defence. The second part examines the legal status of the norm in post-1945 international society. Having the status of a *jus cogens* norm, which means that it is peremptory in nature and that it must not be derogated from by any treaty or any state (Cassese, 2005: 199), the norm on non-use of force has high legal status in post-1945 international society. Only two legal exceptions to this general ban on the use of force exist: self-defence and use of force authorised by the UN Security Council to maintain international peace and security. However, because article 51 of the UN Charters does not define the exact conditions giving rise to the right to self-defence, the chapter analyses the extent to which the use of force against states harbouring terrorists and the use of preventive force were included in the right to self-defence prior to 2001. But, before turning to these two analyses, the chapter begins with a short conceptualisation of the main sources of international law, since understanding this terminology is necessary for reading the rest of the chapter.

5.1. Conceptualisation: treaty law and customary international law

International lawyers distinguish between two main sources of international law: treaty law and customary international law. Treaties are contractual written sources of law entered by two or more states to create binding rules for the parts of the treaty. To be bound by a treaty a state must sign and ratify the treaty. Hence, a state cannot be held responsible under a treaty it has not joined (Byers, 2005: 4). The only exception is peremptory norms. If a treaty is contrary to a peremptory norm, the treaty becomes null and void (Cassese, 2005: 205 – this is elaborated in section 5.3).

The second source of international law is customary international law, which in contrast to treaty law is not a deliberate lawmaking process, but consists of an unwritten body of rules. These rules are derived from a combi-

nation of state practice, which is what states do and say, and *opinion juris*, which is the normative belief of states that their conduct is obligated by international law. Whereas treaty law only applies to states that are part of the treaty, most rules of customary international law are universally binding for all states. This is because customary international law is made by state practice and hence all states contribute to its development and change. When a new rule of customary international law is developing, a state can either support the rule by complying with it or by appraising other states' actions following the rule, or it can actively and publicly oppose it. If the state does nothing it is seen as a tacit acceptance of the new rule. Like norms, new rules of customary international law will not come into force until they receive widespread support among all states of international society (Byers, 2005: 3-4). According to Cassese, it is only possible to change customary international law regulating the use of force if 'practice and the legal conviction of States are express, clear, and consistent, and cover more than one instance' (2005: 475).

5.2. The evolvement of the norm on non-use of force: pre-1945

To systematically analyse the evolvement of the norm on non-use of force from ancient times to 1945, this section is divided into four chronological parts. The aim is not to give a fully detailed account of the norms of war prior to 1945, as this would be a dissertation in itself, but rather to briefly present how norms, rules and ideas of war have changed over time. The first subsection presents natural law's perception of war focusing on the period from the early Middle Ages to the age of Enlightenment. The counterpart to natural law, positivism, is presented in the following sub-section, which analyses the norms governing the use of force in post-1648 Westphalian international society, including an examination of the so-called *Caroline case* and its impact on the rules of self-defence. Finally, sub-section four examines the interwar period between World War I and World War II.

5.2.1 Natural law and the just war doctrine

The history of the law of war is rather Eurocentric, reflecting the shifting attitudes towards war and the use of armed force over time in the European intellectual environment, which slowly and gradually gave birth to modern international law (Neff, 2005: 10). In the early Middle Ages, the 'law' of war was primarily concerned with holy war in the name of the Roman Catholic

Church, which based its view on war on so-called *natural law*. The theory of natural law says that all law (national as well as international) is derived from pure principles of justice and has universal and eternal validity. In the words of Malanczuk, the key thought of natural law was that 'law was to be found, not made' (1997: 15). St. Augustine (AD 353-430) was one of the first theologians to write on the subject. According to St. Augustine, the function of war was to uphold or restore the secular order sanctified by the Church and to protect the lives of all Christians. He laid down the following restrictions for just war: It had to be waged under a proper authority (the church and only the church); as a last resort, with the aim of righting a wrong; and do no more damage than necessary to achieve its purpose (Malanczuk, 1997: 306). St. Augustine's thoughts were accepted in the thousand years to come and are often said to lay the foundation of the *just war* doctrine, which remains influential to this day.[25] In this early version of the just war doctrine self-defence was not very developed; self-defence was understood almost entirely as a prerogative of *individuals*, whereas the waging of just wars was the prerogative of *states*. For example, the Catholic Church disapproved of self-defence because 'it was egoistic action, undertaken by a person strictly for his *own* benefit rather than for that of the community' (Neff, 2005: 60). Nonetheless, states were seen as having a natural right of self-defence, although the thoughts on this natural right were not very developed.

In the late 16th century a more formalistic approach to war began to replace the just war principles of the Catholic Church. New norms on the use of force emerged based on state practice rather than religious prescriptions. International legal thought on war and the use of armed force was, as Neff puts it, 'drifting steadily from Heaven down to Earth' (Neff, 2005: 85). Seeking to preserve the just war doctrine in this new and less religious world, the Dutch writer and philosopher, Hugo Grotius (1583-1645), sought to re-establish the doctrine by revising the understanding of natural law. Whereas natural law originally was regarded as originating from the divine, Grotius argued that law was an inherent consequence of human interaction and hence would have existed even if God had not. According to Grotius, men living together in a human society were capable of understanding that certain rules of conduct were necessary for the preservation of that society. For example, every intelligent man ought to be able to acknowledge that the

[25] The doctrine of just war is a normative theory, which discusses under what conditions it is legitimate to use armed force in the resolution of a conflict and which normative standards should govern the actual use of force. For an elaboration of the just war tradition, see Johnson (1981).

prohibition of murder was a just and necessary rule for the preservation of human society (Malanczuk, 1997: 15-16).

Regarding self-defence, the use of force as self-defence was considered just and therefore permitted. However, being aware that states may invoke self-defence unjustly, Grotius differentiated between different kinds of self-defence depending on timing, which today have resulted in three categories of self-defence: self-defence in response to an armed attack; *pre-emptive* self-defence against imminent threats; and *preventive* self-defence against non-imminent threats.[26] Whereas Grotius considered the use of force as self-defence in response to an armed attack just, the 'justness' of pre-emptive self-defence was in a grey zone and only legitimate under certain conditions. Following Grotius, for pre-emptive use of force to be just the 'danger must be immediate and, as it were, at the point of happening'. Then it is 'lawful to kill a person preparing to kill another' (Grotius cited in Raymond & Kegley, 2008: 108). Preventive use of force, on the other hand, was regarded as clearly unjust and therefore illegitimate. According to Grotius, that 'the bare possibility that violence may be some day turned on us gives us the right to inflict violence on others is a doctrine repugnant to every principle of justice.' It is 'inadmissible to take up arms in order to weaken a rising power, which if it grew too strong, might do us harm' (cited in Raymond & Kegley, 2008: 108). Grotius' rejection of preventive force as just was later supported by another philosopher, Emerich de Vattel (1741-1767), who warned that the state must be careful 'not to act upon vague suspicions, lest it should run the risk of becoming itself the aggressor' (cited in Raymond & Kegley, 2008: 109).

The distinction between pre-emptive and preventive use of force developed by classical just war theorists like Grotius (even though he did not use this terminology) has been a major contribution to international law. As Neff notes, 'The difference between these two conceptions – so subtle and so ill defined and fuzzy at the margins but yet so important – would be very long-lasting in international law, up to our present time' (Neff, 2005: 129).

5.2.2. Positivism and unrestricted war

The just war doctrine was challenged by the Italian political writer Niccolo Machiavelli (1469-1527). Reflecting a more cynical view on war, Machiavelli argued that just use of force should be defined in the interest of the state

[26] Michael Walzer compares pre-emption with a reflex action; it is the 'throwing up of one's arms at the very last minute' (Walzer, 2006: 75). To continue Walzer's metaphor, prevention is hitting the other guy before he hits you.

rather than in the interest of God and the Church. He therefore broadened the concept of just war (or breaking it down) by permitting all kinds of armed force no matter its cruelty as long as it was in the interest of the state (the prince) (Neff, 2005: 85-86). Nor did he see any restrictions for use of force as self-defence. In fact, he only found it prudent to use preventive force against gathering dangers: 'foreseen they can easily be remedied, but if one waits till they are at hand, the medicine is no longer in time as the malady has become incurable' (Machiavelli cited in Raymond & Kegley, 2008: 99). Shifting focus from the interests of the divine to the interest of the state, Machiavelli's more cynical thoughts on war thus became a portent of the view of war in the late Middle age.

The peace of Westphalia, which ended the Thirty Years War in 1648, changed the role of the state. States became sovereign entities and were no longer subordinated the authority of the Church. An international society was born. Central in this new societal system were the norms of sovereignty and non-intervention. All states in this society of states were recognised as independent and equal; everyone possessed the same privileges and responsibilities. Every state was given the right to manage their domestic affairs without interference from other states, and in the matter of foreign affairs they all had the right to participate in treaty negotiations and to form military alliances without the supervision of another state. Moreover, the states all had the right of continued existence allowing them to use military force whenever it was in their vital interest. With this new societal state system the state rather than the Church was effectively affirmed as the only legitimate authoriser of interstate war (Howard, 2001: 16; Raymond & Kegley, 2008: 100).

In practice, however, the creation of this new political order meant that the old just war doctrine distinguishing between just and unjust wars was almost completely abandoned. It was challenged by positivism, a new and more pragmatic notion of law. Whereas natural law saw law as something universally 'given', positivism perceived law as fundamentally a human creation, a product of culture rather than of nature and therefore changeable. Rather than seeing international law as hovering *over* the states as the naturalists did, the positivists perceived international law as a law *between* states, made by the states to meet their own needs (Neff, 2005: 161).

This new understanding of international law also changed the legal attitudes towards war. In the eighteenth and nineteenth centuries Machiavelli's view of war prevailed making war and the use of armed force just as long as it could be justified in the name of vital state interests. But because 'vital interests' were defined solely by the state itself, the resort to force was in reality unrestricted. War thus became an instrument for the advancement of na-

tional interests. The attitude towards war became more hobbesian in the sense that it was seen as an inherent and ineradicable part of international life (Malanczuk, 1997: 307; Neff, 2005: 162). A leading exponent of this hobbesian view of war was the Prussian scholar of war and strategy, Carl von Clausewitz. In his view, war was political, which was clearly expressed by his famous line: 'War is politics just by other means'. In other words, the decision to resort to war was the prerogative of policy, not of law (Malanczuk, 1997: 307; Neff, 2005: 163-64).

Ironically, in this same period war became recognised as an institution of international society. War became such a normal part of international life that legal norms of conduct began to evolve. Hence, the law relating to the conduct of war (*jus in bello*) was in many important ways advanced during this period (Neff, 2005: 161-63). Some significant examples are the Geneva Convention of 1864, which was concerned with the treatment of prisoners, sick and wounded, and the two Hague Conferences in 1899 and 1907, which, like the Geneva Convention, mostly dealt with the actual conduct of war criminalising some acts and outlawing certain munitions (Holsti, 1996: 33). However, as Holsti notes, these rules applied only in Europe. In the colonies outside Europe, European troops often behaved like hunters killing animals on safari rather than professional soldiers waging war (Holsti, 1996: 34).

Meanwhile, small legal regulations regarding *jus ad bellum* took place as well. The Napoleonic Wars (1803-1815) resulted in two peace treaties, The Treaty of Paris and the declaration of the Congress of Vienna, which were the first modern attempts to control the use of armed force between states (Holsti, 1996: 4). Later followed the two Hague Conventions, which required peaceful settlement of international disputes. This may be interpreted as the first small step towards the complete prohibition of use of force or at least the complete prohibition of war. In addition, the second Hague Convention of 1907 required that a formal declaration of war or an ultimatum containing a conditional declaration of war had to precede the use of armed force in war. Furthermore, it prohibited the employment of force for recovery of contract debts (Malanczuk, 1997: 308). The so-called Bryan Treaties of 1913-1914 took another important step in the development of a total prohibition of war by outlawing declarations of war or opening of hostilities until an arbitral commission had taken the dispute under consideration (Detter, 2000: 62). The treaty collection consisted of a number of bilateral treaties negotiated by the US Secretary of State, W.J. Bryan, for the 'Advancement of Peace'. By interjecting a conciliation process into a dispute between parties of the treaties, the drafters of the treaties sought to prevent war from being the tool of conflict resolution, although the parties were free to turn to war after the

commission had handled the dispute. However, because the treaties attempted to remedy the deficiencies of the term 'vital interests', the United States Senate objected to joining the treaties even though its Secretary of State was the founder (and name bearer). In the end, the treaties did not have much influence, as they were concluded only with the participation of the Western and Eastern European countries and only after the outbreak of World War I (Malanczuk, 1997: 22).

5.2.1. The Caroline case and pre-emptive self-defence

Whereas the resort to war underwent small regulations in the 19th century and the beginning of the 20th century, self-defence remained untouched by international law and thus a safe juridical exception to the other restrictions on the resort to war. Under customary international law, there were still no restrictions on the use of force as self-defence and both pre-emptive and preventive self-defence were used by the states. One example of pre-emptive force is the British attack on Denmark during the Napoleonic Wars in 1807. Britain feared that French troops massively present in Northern Germany would conquer the neutral Denmark and use its large fleet to threaten Ireland as well as the coasts of England and Scotland. To prevent this from happening, Britain demanded that Denmark delivered its fleet to Britain for safekeeping during the war. When Denmark refused, the British began a long bombardment of Copenhagen. After three weeks of bombing the city capitulated and the British fleet returned to Britain with 76 Danish ships (Clemmons & Brown, 1996: 222-23). Britain justified this attack on Copenhagen as self-defence against a danger they believed 'was certain, urgent and extreme, as to create a case of urgent, paramount necessity, leaving his Majesty's ministers no choice' (cited in Raymond & Kegley, 2008: 100). This example demonstrates how the states used the right to self-defence to justify virtually any aggressive action (Clemmons & Brown, 1996: 223).

With the so-called Caroline case in 1837 the customary international rules on pre-emptive self-defence began to evolve. The case became very influential in defining the boundaries of pre-emptive use of force as self-defence and is still referred to by international lawyers today (Neff, 2005: 241). The case concerns an incident between Great Britain and United States in 1837. At this time Canada was under British sovereignty but Canadians were rebelling against the British authority. American citizens actively supporting the Canadian rebellion against the British authorities crossed the Niagara River on the steamboat Caroline to provide the insurgents with men and ammunitions. The British forces in Canada attacked the ship to prevent

further reinforcements and supplies from the US to Canada, killed a number of men, set the ship on fire, and set it adrift towards Niagara Falls.

The attack on the Caroline happened on American territory and consequently led to protests from the US Government. A characteristic feature of the Caroline incident is the exchange of diplomatic notes between the US and British authorities following the incident. At first, Britain claimed that its violation of US sovereignty had been rendered necessary by the fundamental right of 'self-defence and self-preservation' and therefore saw no need to apologise. However, through diplomatic correspondence the two states agreed upon a delimitation of the right to pre-emptive self-defence. In a famous letter the US Secretary of State, Daniel Webster, wrote that in order to justify pre-emptive military force the attacking state must show 'a necessity of self-defence … instant, overwhelming, leaving no choice of means, and no moment for deliberation' (Cassese, 2005: 298; DIIS, 2005: 52). The American argument was convincing and in the end the British apologised for violating American territory. Subsequently, other governments accepted the criteria laid out by Webster as new rules of customary international law on self-defence. As Byers concludes, although the *Caroline case* did nothing to prevent further aggression it did lead to an important legal distinction between war and self-defence (Byers, 2005: 54).

5.2.3. The aftermath of World War I: League of Nations and the Kellogg-Briand Treaty

The end of World War I changed the international order – new great powers were born and others were declining. Germany, as the loosing part, lost its colonies as well as one third of its European territory. In contrast, the United States became a truly great power in this new international order. Another rising great power was the newly formed Soviet Union (Malanczuk, 1997: 22-23). The end of World War I also resulted in some major changes in the international legal system, including new restrictions on resort to war (*jus ad bellum*). War was no longer seen as an inevitable part of international life but had become an item of international concern.

The establishment of the League of Nations and the adoption of its Covenant in 1919 increased the number of legal restrictions on the right to use force. Led by the American President Woodrow Wilson, the League of Nations was formed to avoid the carnage of yet another world war. It was a universal organisation, but membership was voluntary and the Covenant of the League was only binding for member states. At its peak it had 63 member states (Clemmons & Brown, 1996: 230). Although Wilson was its founding

father, the United States never joined due to resistance from the US Senate, which undisputedly weakened the League of Nations from the outset (Cassese, 2005: 36).

The League did not prohibit war, but it aimed to prevent wars by demanding that its members solved their disputes peacefully. Article 12 of the Covenant required a cooling-off period of three months, in which the League Council and the Permanent Court of International Justice or an arbitral tribunal would discuss the conflict in question. After that, the member states could legally resort to war. If a member resorted to war disregarding the procedures laid out in Article 12, it was seen as an act of war against all other members of the League (Wight, 1995: 110). The Covenant thus introduced a juridical distinction between legal wars following the procedure and illegal wars disregarding it (Detter, 2000: 62).

However, in most instances the League of Nations was unable to prevent wars but could only condemn them afterwards (Cassese, 2005: 37). Because the League focused narrowly on war and left other kinds of force unregulated, such as the use of force in self-defence and armed reprisals, much war-like force was used by the states. As Neff sarcastically notes, the ink on the League Covenant was hardly dry before the states began to characterise their armed actions as anything but war to circumvent the restrictions of the Covenant (Neff, 2005: 279-80). One example is Japan's invasion of Chinese Manchuria in 1932, which Japan claimed to be an act of self-defence, even though it was a classic example of aggression. The League of Nations also lacked enforcement capacity. It had no power to enforce its own recommendations if a state disobeyed them (Byers, 2005: 54). Another flaw was the fact that the covenant's provisions only applied to the members of the League and not non-member states such as the US and the USSR. As a result, the customary international rules governing war were not affected by the covenant of the League of Nations as far as third states were concerned (Cassese, 2005: 37).

Seeking to obviate the most conspicuous deficiencies of the League, the US and France created the so-called Kellogg-Briand Pact named after the US Secretary of State, Frank Kellogg, and French Foreign Minister, Aristide Briand (the Pact is formally known as the Paris Pact of 27 August 1928 on the Banning of War). The rather short pact consisting of only three articles was initially signed by fifteen countries and eventually ratified by sixty-two. It went beyond the League of Nations by formally outlawing war as an instrument of policy. Furthermore, the parties to the Pact promised to solve their conflicts peacefully. But, like the League of Nations the Pact was only concerned with war and had no explicit reference to self-defence. France raised

the subject of self-defence during the negotiations, which resulted in a side agreement between the US and France providing an exception to the use of force as self-defence. During the drafting of the Pact, US Secretary of State Kellogg argued that self-defence did not need any explicit reference in the Pact because it was 'a natural right'. According to Kellogg, self-defence 'is inherent in every sovereign state and is implicitly in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence' (Kellogg cited in Neff, 2005: 304). This was not by itself controversial, as self-defence was a right of customary international law. However, the limits of this right were not defined, and when the US Senate approved the Pact, it explicitly stated that the Pact did not imperil the Monroe Doctrine[27] (Byers, 2005: 55). Hence, the use of armed force as self-defence remained legitimate and legal, and as concluded by Wright, this was a generous loophole for legitimate war (Wight, 1995: 111). Nonetheless, although the Pact did not outlaw every kind of armed force, its prohibition of war forbade states to be the first to resort to armed conflict thereby at least outlawing aggression (Bederman, 2006: 225).

5.3. The status of the norm on non-use of force in post-1945 international society

The new normative developments prohibiting war were not enough to hinder World War II. Like World War I, World War II did not pass by unnoticed but went down in history as one of the most deadly conflicts with more than 60 million people killed. These bloody war experiences resulted in a desire to set up a world organisation capable of preventing such devastating global wars from ever happening again, and this is how the United Nations were born. The UN Charter was first drafted by the United States, the UK and Russia at the Dumbarton Oaks Conference in Washington, DC in 1944 and later completed and adopted at an international conference with all the allied powers from 46 states in San Francisco in April 1945. Since then, the Charter has been ratified by 192 states (Byers, 2005: 7).

As the preamble of the UN Charter states, the primary aim of the UN is 'to save succeeding generations from the scourge of war, which twice in our

[27] Named after the American President James Monroe, who in 1823 declared that any European interference in the Western Hemisphere would be regarded as a threat to the US and thereby allowed use of force against European states as self-defence if necessary (Byers, 2005: 55).

lifetime has brought untold sorrow to mankind'. To achieve this ambitious goal, the drafters of the United Nations sought to go beyond the League of Nations and the Kellogg-Briand Pact by prohibiting *all* resorts to armed force and not only war (Neff, 2005: 314). The following sections analyse the Charter's restrictions of the use of armed force with primary focus on the rules of self-defence as one legal exception to the general ban of force. It is not the intention to give a detailed account of the UN system or its coming into being.[28]

5.3.1. The Charter of United Nations

At the time of its creation the UN Charter formally recognised the norm on non-use of force as a new *grundnorm* of international society, as it completely outlawed the use of armed force. According to the Charter, members of the United Nations must refrain from using or threatening to use of any sort of military force, 'with or without the label of 'war'' (Cassese, 2005: 12). Article 2(4) of the Charter provides:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations.

The direct interpretation of Article 2(4) is straightforward: the use of force across borders is illegal. This interpretation is supported by the preamble of the Charter and its object and purpose (Byers, 2005: 7). Furthermore, as noted by Malanczuk, the fact that the Charter talks of 'the threat or use of force' and not of 'war' is an important detail that implies that it was very well drafted. As the experiences of the League of Nations and the Kellogg-Briand Pact showed, the states often resorted to the use of force while denying that they technically were in a state of war (Malanczuk, 1997: 309). Applying article 2(4) to all kinds of force effectively closed this loophole. Not only does article 2(4) ban war and other acts of armed aggression, it also forbids lesser forms of intervention by force by one state in the territory of another (Henkin, 1991: 39). Even the threat of using force is now prohibited by the Charter, which is a clear enhancement of the norm on non-use of force compared to the earlier treaties prohibiting war. The ban on the use of force is of universal

[28] Many fine books have been written on this matter. See for example Weiss & Daws (2007) on the functioning of the United Nations and its tasks in general; Luck's (2006) introduction to the UN Security Council; and Lowe et al. (2008) on the UN Security Council and war.

validity and has since 1945 gradually been transformed into a *jus cogens* norm, which means that even the few states that are not members of the United Nations are bound by it as well (Malanczuk, 1997: 309, 311; Cassese, 2005: 56). As written in the introduction to this chapter, *jus cogens* rules are endowed with a special legal force, as states may not derogate from peremptory norms through treaties or customary rules.[29] Thus, the rank and status of *jus cogens* are superior to 'all the other rules of the international community' (Cassese, 2005: 155, 199).

This means that the prohibition of the use of force cannot be violated by any state (or treaty) unless it fulfils the conditions of one of the following two legal exceptions to this general prohibition of force mentioned in the UN Charter: 1) self-defence; and 2) UN authorised force to secure international peace and security. The former is elaborated in detail below, while the latter is briefly presented here. The second exception empowers the UN Security Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendation, or decide what measures shall be taken … to maintain or restore international peace' (UN Charter, article 39). The Security Council consists of fifteen UN member states, five of which, the so-called Big Five or Permanent Five – the UK, China, France, Russia and the United States – are permanent members with the power to veto any proposed resolution sponsored by another Council member. Adoption of a resolution requires that at least nine Council members vote in favour and that none of the permanent members veto it (they are allowed to abstain from voting).

Under chapter VII of the UN Charter, the Security Council has wide authority to determine what constitutes a threat to international peace and security, as the article does not define a threat to the peace, breach of peace or act of aggression (Goodrich et al., 1969: 295). This means that the UN authorisation of force is very flexible and dynamic and that new kinds of threats over time may be recognised as threats to international peace and security. For example, gross violations of human rights are today recognised as a threat to international peace and security, and states may, if authorised by the Security Council, act on behalf of the international society and use force to stop human rights violations (see Knudsen, 1999; Wheeler, 2000).

[29] The Vienna Convention of 1969 defines a peremptory norm as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (Cassese, 2005: 201).

5.3.2. Self-defence

Article 51 of the UN Charter gives states the right to individually or collectively use force as self-defence in response to an armed attack:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

By spelling out the exceptional circumstances in which unilateral resort to armed force is allowed, the UN Charter differs from the Covenant of the League of Nations and the Kellogg-Briand Pact and their rationale that self-defence was such an inherent right of states that it did not even need to be mentioned (Goodrich et al., 1969: 344).

Article 51 does not unrestrictedly allow use of force as self-defence, however. For any state to invoke the right of self-defence it must prove that it has suffered an armed attack, that the state against which it is resorting to force was the source of the attack, that the attack or the threat of an attack is continuing, and that the use of force is a necessary and proportional means to protect the state from further injury (Charney, 2001: 836; Cassese, 2005: 355). Furthermore, acts of self-defence must immediately be reported to the UN Security Council and the right to use force as self-defence terminates as soon as the Security Council takes action. This does not imply that self-defence must cease if the Security Council simply pronounces on the matter; self-defence may continue until the Security Council has taken *effective* action rendering armed force by the victim state unnecessary and inappropriate, and hence no longer legally warranted. If the Security Council fails to take action, self-defence must cease as soon as its purpose, that is, repelling the armed attack, has been achieved (Cassese, 2005: 355).

Likewise, the actual conduct of self-defence is restricted. First, the state using force as self-defence must only use the amount of force that is strictly necessary to repel the attack and is proportional to the force used by the aggressor. Second, the state may only attack 'legitimate military targets' in keeping with principles and rules of international humanitarian law and necessary precautions must be taken to minimize incidental damage to civil-

ians. Three, the state must not occupy the aggressor state's territory, unless this is strictly required by the need to hold the aggressor in check and prevent him from continuing the aggression by other means (ibid).

The rules of self-defence are a particularly contentious part of international law and difficult to analyse because the Charter does not define the exact content of the conditions (Byers, 2002: 405). Regarding the subject of this dissertation, two questions are especially relevant: First, do terrorist attacks constitute an armed attack and may the attacked state use force as self-defence against the state harbouring the terrorists? Second, does a threat of an attack equal an armed attack or is a state prohibited from resorting to force to protect itself if an actual attack has not yet occurred? There are no definitive answers to these questions, as the Charter does not specify its provisions. A positive effect is that the Charter is dynamic and able to adapt to new situations and new kinds of threats against which self-defence may become necessary. A negative effect is that states may use this uncertainty as a pretext for using illegal force thereby violating the norm on non-use of force. The uncertainty thus creates a grey-zone, where the use of force as self-defence becomes disputable.

However, an answer to these questions may be found by looking at how international lawyers and more importantly states have interpreted the rules of self-defence. Below follows an analysis of the two questions based on the opinions of international lawyers and legal textbooks. The aim is to establish the legal status of these types of self-defence. In the following chapter, state practice on the matter is analysed to assess whether these types of self-defence were considered not only legal but also legitimate by the states.

5.3.3.1. The use of force in response to terrorist attacks

Two crucial questions arise concerning the legality of use of force as self-defence in response to terrorist attacks. One, does a terrorist attack constitute 'an armed attack', as required by article 51? And two, if non-state actors such as local or transnational terror groups carry out the terrorist attack, is armed force as self-defence then allowed against the hosting state?

Starting with question number one, we must first know how to define an armed attack. According to Cassese, an armed attack is a 'massive armed aggression against the territorial integrity and political independence of a State that imperils its life or government' (Cassese, 2005: 354). This means that less grave forms of use of force are not considered armed attacks and that an attack must be of such a magnitude that a state cannot repel it with other means than military force. However, the aggressor need not be a state;

it can also be terrorist organisation. Hence, for a terrorist attack to constitute an armed attack it must be large-scale, either destroying territorial state interests or killing and wounding a large number of people (ibid.: 469, 354-55).

Regarding question number two, the common interpretation among international lawyers is that a state is only allowed to use force as self-defence against another state in response to terror acts if the other state bears some responsibility for the terror acts. Although terrorist groups are not normally part of the official apparatus of any state, they may receive varying degrees of support from the state government. If the terrorists are officials of the state or de facto controlled by it, use of force as self-defence against that state is clearly legal (of course only if the other preconditions of self-defence are fulfilled). If the state only actively supports the terrorist group financially, with weapons and/or logistical support such as training facilities or passively supports it by giving it refuge on its territory, then international law is less clear. According to Cassese, in order to legally use military force as self-defence against that state it must be proven that the state is *responsible* for the attack either by assisting or failing to repress terrorists on its territory and the terrorist attack must be of such *gravity* as to authorise self-defence. Finally, if the state unwillingly hosts terrorist groups and is unable control them, then the state is not responsible for terrorist actions by terrorist organisations or units located on its territory, and the use of force against it is illegal (ibid.: 469-72).

Both questions are a matter of discretion and individual judgement from case to case. When is a state responsible for a terrorist attack and when is an attack of such gravity that it authorises self-defence – must a hundred people die or a thousand? International treaty law is not entirely clear on this subject but some answers may be found in the so-called *Nicaragua* case (the Republic of *Nicaragua* versus the United States of America, 1986). In this case, the International Court of Justice ruled that the fact that the Nicaraguan government had provided weapons in support of rebellions in El Salvador did not constitute an armed attack allowing the US to use force as collective self-defence on El Salvador's behalf. Although the Nicaraguan activity did constitute a breach of Article 2(4) and the principles of peace and harmony, the Court argued that it was 'of lesser gravity than an armed attack' (cited in King, 2002-2003: 462). Stated differently, *if* the link between the state and the non-state group is very close, and the rebellion or terrorist attack is very grave, the attack may constitute an armed attack and thus endorse the right to self-defence (Byers, 2002: 407-8).

To sum up, the use of force against states harbouring terrorists is only considered legal by international law in two circumstances and both must be fulfilled. First, the terrorist attack must be of such gravity that it amounts to an

armed attack. Second, it must be proven that the state harbouring the terrorists is responsible for the terrorist attacks. Otherwise, the use of force against states harbouring terrorists is considered illegal.

5.3.3.2. The use of pre-emptive and preventive force as self-defence

Another question regarding the legal boundaries of self-defence is whether pre-emptive and preventive self-defence are included in article 51. The juridical debate is long and complex and will only be presented here in its short version.[30] Some argue that article 51 must be interpreted literally and that the words '*if* an armed attack occurs' mean that an armed attack must already have occurred before force can be used in self-defence. According to this view, the UN Charter allows neither pre-emptive nor preventive self-defence against imminent or looming dangers and it thereby supersedes pre-1945 customary international law. Others argue that pre-emptive self-defence is included in the right of self-defence laid out by article 51 and that the only limitation on self-defence is found in the famous *Caroline* dictum. They deny that the word 'if' must be interpreted as 'if and only if'. Pointing to the phrase 'inherent right of … self-defence', they argue that pre-1945 customary international law remains in place. Finally, a few take an even more extreme position advocating a very broad interpretation of the right of self-defence. Following this position, a state may use force in defence of a large range of interests, including preventive force against non-imminent threats. This view is reminiscent of Clausewitz' 19th century view and is generally disregarded by others so it is safe to say that preventive use of force is considered clearly illegal today, while pre-emptive force is disputed (Malanczuk, 1997: 311-12; Raymond & Kegley, 2008: 101; Henkin, 1991: 45; Cassese, 2005: 358-59).

In the *Nicaragua* case (The Republic of *Nicaragua* versus the United States of America, 1986), the International Court of Justice provides an ambiguous and imprecise answer to the question of whether pre-emptive self-defence is included in article 51. According to the Court, article 51 *does* refer to pre-existing customary international law: 'Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter' (§ 176 or the Court's decision cited in Cassese, 2005: 359). However, the Court did not further specify how to interpret the customary rules referred to in article

[30] See Malanczuk (1997) for a longer and more juridical version of the debate.

51; in particular whether the old right to pre-emptive self-defence is included in these rules. Because the parties to the dispute had not raised this question, the Court found no reason to express a view on the matter. Thus, as Cassese concludes, the Court's important decision on the *Nicaragua* case 'cannot support any interpretation narrowing or broadening Article 51' regarding pre-emptive self-defence (Cassese, 2005: 359). Hence, no decisive answer can be found here.

To reiterate, preventive use of force is most commonly considered clearly illegal prior to 2001. Pre-emptive use of force is more disputed, as some advocate a legal right to pre-emptive self-defence under current customary international law and others dispute this claim.

5.4. Conclusion

The aim of this chapter was to examine the legal status of the norm on non-use of force prior to 2001. The norms and rules governing the use of force have changed back and forth over time from being restricted to only holy just war in the Middle Ages to absolutely no restrictions in the eighteenth and 19th century. In between the philosophical writings on just war and the bloody realities of the many wars fought in this period, the norm on non-use of force evolved gradually.

Before World War I states' right to resort to force was almost unrestricted. War was an institution of international society and just a common means to end conflicts as other political or diplomatic instruments. However, after the bloody experiences of World War I the norm on non-use of force gradually began to replace the old norm of unlimited resort to force. With the establishment of the League of Nations and the adoption of the Kellogg-Briand Pact, the resort to war was now under regulation and military aggression consequently illegalised. By the end of World War II the norm on non-use of force had fully evolved into a *grundnorm* of post-1945 international society as evident in the formal adoption of article 2(4) in the UN Charter, which made the use or the threat of use of force by a state against another state illegal. In contrast to earlier treaties, the UN Charter furthermore specified the legal exceptions to the general ban on force, self-defence being one such exception.

However, because the Charter does not explicitly define the conditions giving rise to the right to self-defence, the exact boundaries of this right are subject to a juridical dispute. Two questions discussed in this chapter were whether the use of force as self-defence against states harbouring terrorists is legal and whether the use of force against imminent and non-imminent

threats is considered legal under international law. Regarding the use of force against states harbouring terrorists, international law is quite clear: unless the attack is very grave and the state harbouring the terrorists is proven to be responsible for the attack, the use of force as self-defence against this state is considered *illegal* under international law prior to 2001. The ICJ ruling in the Nicaragua case supports this interpretation. International law is less clear when it comes to pre-emptive force as self-defence. Whereas preventive force against non-imminent threats is clearly considered illegal by a majority of international lawyers, the legal status of pre-emptive force against imminent threats is less clear. Some argue that the use of force against imminent threats is included in the 'inherent right of self-defence' primarily derived from customary international law, in particular the Caroline case, while others argue that the UN Charter prevails over pre-1945 customary international law and that the use of force is only legal *if* an armed attack has occurred.

One problem with the juridical discussion about the interpretation of article 51 is that it tends to be rather dichotomous, categorising the use of force as either legal or illegal behaviour. If we focus on the legitimacy of these actions instead, the picture becomes more nuanced. Whereas legality clarifies the core obligations relating to force, legitimacy identifies and delimits a zone of exception that takes special circumstances into account (Falk, 2005: 35). Legitimate action accords with the recognised rules, standards, principles, or laws and it is rarely absolute or uncontested; very often it is a matter of degree. As argued in Chapter 4, we may assess the legitimacy of the use of force by looking at the justifications offered by states using force and the reactions of the other states. Chapter 6 turns to state practice to analyse whether the two types of self-defence are considered legitimate exceptions to the norm on non-use of force by the states of international society prior to the Bush's administration's norm challenges.

Chapter 6
Self-defence and State Practice 1945-2001

To assess the status of the fundamental norm on non-use of force prior to 2001, we have to look at its legal status, which was examined in Chapter 5, and at its legitimate status as reflected in state practice, which is the focus of this chapter. State actions and other states' reactions to these actions show what kind of force states find acceptable and unacceptable and thereby inform us about the legitimate exceptions to the norm on non-use of force. Hence, my interest is the spoken justifications and evaluations rather than the 'real motives' of the states, as these justifications and evaluations inform us about the norms in force at a given point in time. The chapter asks whether the use of force against states harbouring terrorists guilty of grave terror acts and the use of pre-emptive and preventive force, respectively, constituted a legitimate exception to the norm on non-use of force prior to 2001.

The chapter is divided into two main parts. The first part examines cases where states have resorted to force against states harbouring terrorists guilty of terrorist acts. These cases are legally controversial, because, as argued in Chapter 5, international law does not allow the use of force against states only *harbouring* but not *sponsoring* terrorists responsible for terrorist acts. Based on literature on the subject, five relevant cases have been identified: Israel versus Lebanon (1968), Israel versus Tunisia (1985), USA versus Libya (1986), USA versus Iraq (1993) and USA versus Afghanistan and Sudan (1998) (cf. Cassese, 2005: 463-81; Byers, 2005: 61-71; DIIS, 2005: 62). These cases are interesting to this analysis, as they all are cases where states have invoked a legal right to use force against other states harbouring terrorists in response to terrorist acts and thereby have challenged the norm on non-use of force.

Part two examines cases of self-defence in response to potential threats, i.e. instances of pre-emptive or preventive use of force.[31] Five cases where the states have challenged the norm on non-use of force by invoking a legal right to use pre-emptive and preventive force have been identified in the period from 1945 to 2001: since preventive self-defence has rarely been in-

[31] Recall from Chapter 5 that pre-emptive force is defined as the use of force against *imminent* threats, whereas preventive force is defined as the use of force against *non-imminent* threats.

voked, only one of them is an example of preventive force (Israel versus Iraq (1981)), while four of them are examples of pre-emptive force (the Six Days War (1967), Israel versus Palestinian refugee camps in Lebanon (1975), South Africa versus its neighbouring countries (1976-1983) and Iraq versus Iran (1980)) (cf. Cassese, 2005: 356). The labelling of a case as either pre-emptive or preventive can be tricky, as the line between imminent and non-imminent threats may be difficult to draw. In addition, the legal distinction between pre-emption and prevention is rather young, which means that in older cases states often refer to preventive force even though the use of force is actually pre-emptive. I have chosen to characterise a case as preventive if there has been *no prior* incidents of armed force between the two states (or between the state and the non-state actor organisation) in the time up to the attack. In contrast, a case is labelled as pre-emptive, if small incidents of conflict have taken place before the attack.

The distinction between state-sponsored terrorism and pre-emptive and preventive self-defence may at times seem ambiguous, since a few of the cases are examples of both. In these cases, the state resorts to force in response to a terrorist attack to prevent further attacks. Because the use of force as reprisals is illegal, the state often justifies the use of force as self-defence against 'continuing' or 'future' attacks. This kind of force may be described as pre-emptive force against states harbouring terrorists thereby combining the two kinds of state action examined in this chapter. These two-sided cases are: Israel versus Palestinian refugee camps in Lebanon (1975), South Africa versus its neighbouring countries (1976-1983), USA versus Libya (1986) and USA versus Afghanistan and Sudan (1998). However, for the sake of analytical clarity I have chosen to distinguish analytically between cases of terrorist-harbouring states and cases of pre-emptive and preventive use of force, even though they in reality may be difficult to tell apart. Thus, a case is characterised as an example of terrorist-harbouring states when the state resorting to force uses this explanation as its main justification or this is the action that is primarily evaluated by the other states. In contrast, a case is characterised as pre-emptive and preventive self-defence when the state resorting to force uses this explanation as its main justification or this is the action that is primarily evaluated by the other states. Hence, the cases of USA-Libya and USA-Afghanistan/Sudan are characterised as examples of a state harbouring terrorists, while Israel-Lebanon and South Africa versus its neighbouring countries are characterised as examples of pre-emptive self-defence.

6.1. States harbouring terrorists

As argued in Chapter 5, the use of force as self-defence against states harbouring terrorists is commonly considered illegal. Nevertheless, the US and Israel for decades claimed a right to use force as self-defence against other states in response to terrorist acts, arguing that giving terrorists sanctuary was the same as giving them 'passive assistance' (Cassese, 2005: 472). In the following, five cases are analysed, including the justifications of the attacking state, the complaints of the offended state(s) and the reactions of third-part states as reflected in UN debates.

6.1.1. Israel versus Lebanon, 1968

Throughout 1968 Israel and Lebanon had many violent episodes breaking the 1967 cease-fire between the two countries. In response to several terror attacks by PLO-groups based in Lebanon, Israel launched a series of air raids against Lebanese villages. Lebanon complained to the Security Council about Israeli aggression and Israel accused Lebanon of not living up to its responsibilities to prevent armed action against Israel. However, it was not until 29 December that the conflict was placed on the agenda of the Security Council after both Lebanon and Israel requested an urgent meeting (UN Yearbook, 1968: 228).

On 28 December Israel raided the civilian international airport in Beirut destroying 13 aircrafts in response to a terror attack on an Israeli airplane in Athens two days earlier. According to Israel, the Israeli civil airplane was attacked by bombs and machine-guns by two members of the Palestine Liberation Front coming from Beirut. An Israeli citizen was killed, a stewardess wounded and the airplane damaged. Lebanon denied responsibility for the Athens terror attack, accused Israel of committing an act of aggression against Lebanon and asked the Council to go beyond the usual condemning resolutions and take effective measures under Chapter VII of the Charter. According to the Lebanese delegate, Lebanon could not be held responsible for acts committed outside its territory and without its knowledge by two uprooted Palestine refugees. Israel argued that Lebanon was responsible for the terror attack by hosting the Palestine Liberation Front's headquarter in Beirut, allowing training bases in Lebanon and by officially encouraging warfare by terror against Israel in violation of the Security Council's cease-fire resolutions. Israel therefore justified its attack on Beirut airport as an exercise of its right of self-defence and asked the Council not to tolerate the con-

tinuation of warfare under the guise of terrorist activities (UN Yearbook, 1968: 228-29).

The Security Council unanimously adopted resolution 262, which condemned Israel for 'its premeditated military action' and warned Israel 'if such acts were to be repeated, the Council would have to consider further steps to give effect to its decisions' (UN doc. S/Res/262). Even the US voted in favour of the resolution, but stressed that it had only done so because it did not find that Lebanon was responsible for the terror attack in Athens. Furthermore, according to the American UN delegate, the magnitude of Israel's attack on Beirut airport was completely disproportionate to the act of individual terrorists in Athens. This last point of disproportionality was repeated by several states (UN Yearbook, 1968: 229-30).

The Communist bloc led by the Soviet Union in strong words condemned the Israeli action, which could not 'be justified in any way' (UN doc. S/PV. 1460: 8). According to Hungary, it showed that Israel did not recognise the UN Charter but systematically rejected its provisions forbidding the use of force (UN doc. S/PV. 1460: 10; UN Yearbook, 1968: 230). Together with the Arab states the Communist bloc moreover supported the Lebanese claim that the Council should take effective measures under Chapter VII; however, this was rejected by the Western states, in particular the US (UN Yearbook, 1968: 228-32).

The case shows that virtually all members of the Security Council rejected the Israeli claim that the Lebanese government could be held accountable for the terror attack in Athens. Hence, the Israeli claim of right of self-defence was purely rejected by the states. Thus, in this case, the use of force as self-defence against states passively harbouring terrorists was not considered a legitimate exception to the norm on non-use of force.

6.1.2. Israel versus Tunisia, 1985

On 25 September 1985 three Israelis vacationing on a yacht in Cyprus were killed. According to Israel, 'irrefutable evidence' showed that the 'butchery' on the yacht was carried out by 'Force 17', the personal bodyguard unit of PLO Chairman Yasser Arafat (UN Yearbook, 1985: 288). Furthermore, Israel added, this was one out of 32 terrorist attacks carried out by PLO during the last 45 days (UN Yearbook, 1985: 285). In response, Israel penetrated Tunisian airspace on 1 October 1985 and bombed PLO headquarters in Tunisia killing and wounding Palestinian refugees and civilian Tunisians. According to Tunisia, the bombs were dropped in a residential urban area, where Tunisian families and a small number of Palestinian civilians lived. Tunisia re-

garded the Israeli bombings as a 'blatant act of aggression against its territorial integrity, sovereignty and independence, and a flagrant violation of international law and the principles of the United Nations Charter' (ibid.). Israel justified the attack as self-defence. According to the Israeli delegate, arguing otherwise would propagate the notion that the victim was not allowed to defend itself and that terrorists deserved sanctuary. The delegate added that Tunisia had convened the Council with the purpose to attack a legitimate act of self-defence and that 'Israel would not accept the notion that the headquarters of terrorist killers should enjoy immunity anywhere, anytime, and Tunisia, which knowingly harboured PLO and allowed it complete freedom of action, bore considerable responsibility' (p. 288).

The UN Security Council considered the case at four meetings on 2-4 October, which resulted in a resolution condemning the Israeli action in rather strong words compared to the 1968 incident. In Resolution 573, echoing the Tunisian statement, the Security Council 'vigorously' condemned 'the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct' (UN doc. S/Res/573). The resolution was adopted with 14 votes in favour, none against, and the US abstaining. Almost every member state of the Security Council expressed concern that Tunisia's sovereignty and territorial integrity had been violated in an attempt to target terrorists assumed to be present in Beirut. They did not accept the Israeli justification that the attack had been carried out in self-defence. As the Moroccan delegate said: 'If self-defence consisted of bombing all territories where Palestinians lived, no country would be safe from Israel's destructive folly' (UN Yearbook, 1985: 289). According to the United Kingdom, Israel was obligated as a member of the UN to settle its international disputes peacefully and not by military means in the name of self-defence. Supplementing this position, the Australian delegate said that even if Israel's version of the events was accepted, 'two wrongs did not make a right' (p. 288). Hence, the opposition against the Israeli attack was widespread among the members of the UN Security Council, which once again did not accept the Israeli justification.

One exception was the US, who now, in contrast to the 1968 incident, explicitly supported the Israeli claim of a right to use force as self-defence against terrorism. According to the US delegate, the US 'recognize[s] and strongly support[s] the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defence recognized in the United Nations Charter' (Ambassador Vernon Walters cited in Paust, 1986-1987: 712). Walter added that each state had the responsibility to take

appropriate steps to prevent terrorists within its sovereign territory from perpetrating terror activities (UN Yearbook, 1985: 287). Compared to the 1968 incident the US had changed its position from not recognising a right to self-defence against states harbouring terrorists to being a devoted proponent of such a right. In other words, the US had become a norm leader supporting Israel in its norm challenge. However, the norm challenge was rejected by a vast majority of the other Security Council members, who still did not accept this as a legitimate exception to the norm on non-use of force.

6.1.3. USA versus Libya, 1986

The relationship between the US and Libya had been tense for many years, but in the early 1980s it went from bad to worse. The US was convinced that Libya was deeply involved with terrorist groups and claimed that Libya had planned to kill President Reagan; carried out terrorist attacks in the UK; planted mines in the Red Sea; and supported the Abu Nidal terrorist group, which was responsible for many terrorist attacks against civilian targets in Western Europe, most notably at the Rome and Vienna airports in December 1985 (Weisburd, 1997: 293).

The conflict between Libya and the US peaked on 5 April 1986 with the bombing of a discotheque in Berlin, which was frequented by American soldiers located in Germany. The bomb killed two people, including an American army sergeant, and injured 230 other people, among them 50 American military personnel (UN Yearbook, 1986: 254). The Reagan administration quickly pointed to Libya as responsible for the terror attack. In response to this attack and pointing to evidence of future attacks, the US launched air strikes against several military targets in Libya and killed, according to Libya, 37 civilians. In a national context President Reagan justified the attack as pre-emptive self-defence 'designed to deter acts of terrorism by Libya', which, Reagan argued, was fully consistent with Article 51 (Reagan cited in Yoo, 2004: 767). Internationally, the US chose to tone down the pre-emptive aspect and justified the attack on the provisions of article 51 claiming that its forces had exercised the right of self-defence by responding to an *ongoing* pattern of attacks by the Libyan government. By referring to ongoing attacks, others could not accuse the US for using force as reprisal or to pre-empt further threats. Thus, the US in this way tried to make the act more legitimate to the other states. The US furthermore claimed that it had observed the principle of proportionality and exercised great care in restricting its military response to terrorist-related targets only to minimize civilian casualties. Its sole objective has had been to destroy terrorist facilities and to discourage future

terrorist attacks from Libya (UN Yearbook, 1986: 252; Weisburd, 1997: 294-95).

Third-state reaction to the American use of force was mixed. Western states and several small Caribbean states supported the raid, whereas the communist bloc, some Arab states and many Non-aligned Movement states condemned it. The reaction of a few other Arab states, however, was more temperate. While Tunisia did not comment on the attack, Egypt, Iraq and Jordan were lukewarm in their criticism. Explaining this lack of support for Libya by some Arab countries, Weisburd argues that many Arab states were tired of Libya and the problems it created in the Middle East (Weisburd, 1997: 296-97). However, speakers from communist, non-aligned or Arab states, who were rhetorically extremely critical of the US, dominated the debate in the Security Council. Nonetheless, a draft resolution condemning the US action was vetoed by the US, UK and France joined by the negative votes of Denmark and Australia, while Venezuela abstained. The UK, in particular, expressed support for the American justification of self-defence. Citing the many incidents of Libyan terrorism in Western Europe and against the US, the British delegate argued that state-directed terrorism was the main policy of Libya. According to the delegate, the UK supported the principles of peaceful settlements of conflicts; however, he very explicitly supported the American claim of a right to self-defence arguing that in this situation the US had the inherent right of self-defence, as reaffirmed in Article 51 (UN Yearbook, 1986: 254). France agreed with the US and the UK that terrorism was a threat to civilians that had to be effectively combated, however it did not in direct terms support the American interpretation of article 51. Its main reason for voting against the resolution was that it found the draft 'excessive and unbalanced', because it did not refer to Libya's responsibility for the conflict (UN Yearbook, 1986: 254). Denmark and Venezuela supported the claim that the resolution was imbalanced, but both objected to the American use of force. According to the Danish delegate, Denmark deplored the US action, which it did not find proportional (UN Yearbook, 1986: 254; Weisburd, 1997: 295-96).

In general, the American use of force against Libya attracted little support. Many states rejected the US use of force as disproportionate having the character of armed reprisals rather than self-defence. As Weisburd concludes, most states did not seem to accept the American justification for its use of force against Libya, but at the same time they did not want to manifest their disapproval of the American actions except rhetorically (Weisburd, 1997: 297). Only the UK seemed unreservedly to endorse the American argument about a right to use force as self-defence against states willingly harbouring terrorists, which indicates that the new norm on states harbouring

terrorists guilty of grave terror acts had found another supporter. However, this case also shows that except for the UK the majority of the states did not find that the use of force against Libya as a terrorist-harbouring state was legitimate, so with merely a few norm-supporting states the new norm was only in an early stage of evolvement.

6.1.4. USA versus Iraq, 1993

In response to Iraqi violations of UN resolutions ordering Iraq to disarm the US launched a series of military pinpricks against Iraq in the 1990s. One such incident took place in late April 1993, when the US bombed missile sites and a nuclear facility near Baghdad in response to an assassination attempt on former President George H. W. Bush on 14 April during a three-day visit to Kuwait City.[32] Justifying the act in the UN Security Council, the US delegate said that the US in accordance with Article 51 of the UN Charter had exercised its right of self-defence by responding to Iraq's unlawful assassination attempt on a former American President. The action was further justified as a last resort of force, as the US concluded, based on the pattern of Iraqi behaviour, that neither new diplomatic initiatives nor economic measures could stop Iraq from planning new attacks on the US. Moreover, the US delegate continued, the attack was in accordance with the principle of proportionality, as the targets had been carefully chosen to minimize risks of collateral damage to civilians (UN Yearbook, 1993: 431).

Although Iraq complained about the American attack calling it a cowardly act of aggression and rejected that it had anything to do with the alleged assassination attempt, the Security Council largely supported the American act declaring that an assassination attempt against a former head of state was regarded as an attack against the state itself and hence invoked the right to self-defence. None of the Council members submitted draft resolutions condemning the American action or requiring the Council to take action (UN Yearbook, 1993: 431). A number of states, in particular the UK and Russia, supported the American justification of self-defence, while only China rhetorically objected to the US action (Cassese, 2005: 473). Hence, in this case the vast majority of states seemed to accept the use of force as self-defence in response to a terrorist attack. However, this is a rather extreme case and the large support may be explained by the fact that the

[32] Other incidents took place in 1994, where the US deployed 54,000 troops and more warplanes to the Gulf responding to Iraq's dispatching soldiers back to Kuwait, and in 1996, the US struck Iraqi missile targets because Iraqi troops intensified their anti-insurgent operations in the northern part of Iraq (Wright, 1998: 57).

terror attack was an assassination attempt on a former head of state. Furthermore, nobody seemed to believe that Iraq was innocent in this case and hence the use of force was found to be legitimate.

6.1.5. US versus Afghanistan and Sudan, 1998

On 7 August 1998 terrorist attacks against US embassies in Kenya and Tanzania killed almost 300 people, including 12 American citizens, and wounded thousands. The terrorist attacks were strongly condemned by a unanimous UN Security Council (UN doc. S/Res/1189). Two weeks later, in response to the attacks, the US bombed an Al Qaeda terrorist training camp in Afghanistan and a Sudanese chemical plant suspected of producing chemical weapons to be used in terror attacks. According to the American President, Bill Clinton, Al Qaeda in Afghanistan and Sudan posed a threat to the national security of the United States. Not only were they believed to be involved in the embassy bombings in Kenya and Tanzania, the US also strongly suspected them of planning additional terror attacks against the US and US interests (Murphy, 1999: 161). In a report to the leaders of the American Congress, Clinton invoked article 51 of the UN Charter and implicitly justified the missile attacks against Afghanistan and Sudan as pre-emptive self-defence: 'The United States acted in exercise of our inherent right of self-defence consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the *imminent* threat of further terrorist attacks against U.S. personnel and facilities' (Clinton cited in Murphy, 1999: 163; emphasis added).

Notifying the UN Security Council of the missile attacks, the US once again toned down the pre-emptive part of its justification instead invoking a right to self-defence against 'continuing attacks' from terrorists located in states willingly harbouring them: 'These 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 Laden organization. That organization has issued a series of blatant warnings that 'strikes will continue from everywhere' against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing' (UN doc. S/1998/780). Furthermore, the US highlighted that the missile attacks had been conducted in accordance with the principles of necessity and proportionality: 'In doing so, the United States has acted pursuant to the right of self-defence, confirmed by Article 51 of the

Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality' (ibid.).

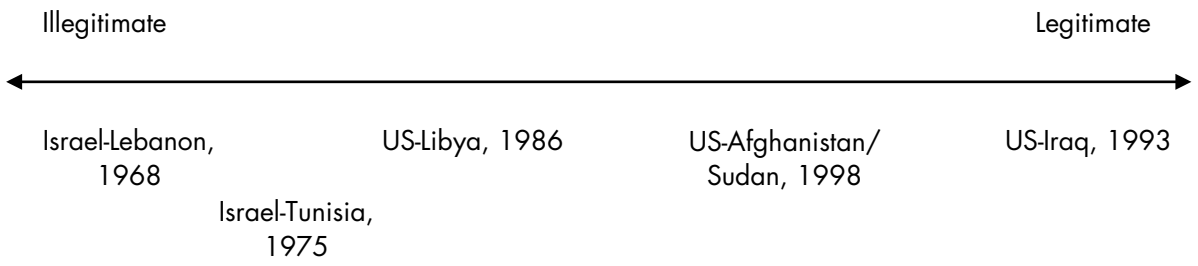
The government of Sudan protested against the missile attacks claiming that the US was responsible 'for this iniquitous act of aggression which is a clear and blatant violation of the sovereignty and territorial integrity of a Member State of the United Nations'. Furthermore, Sudan did not accept the American claim of self-defence because Sudan 'had not committed any action that could be regarded as an attack or a threat against the United States of America' (UN doc. S/1998/786). The Taliban regime, which was not recognised by the United Nations as the legal government of Afghanistan, also formally protested against the American attack (Murphy, 1999: 164).

Although Sudan, the Group of African States, the Group of Islamic States and the League of Arab States each requested a UN Security Council meeting on the matter of the missile attack against Sudan (the use of force against Afghanistan was not included in these requests), it was never placed on the agenda of the Council. Nevertheless, Iran, Iraq, Libya, Pakistan, Russia, Yemen and Palestinian officials all condemned the two American missile attacks, whereas the League of Arab States only condemned the attack on Sudan as a violation of international law and was silent on the attack on Afghanistan. However, the American position was supported by Western states such as Australia, France, UK, Germany and Spain, while Japan expressed its 'understanding' (Murphy, 1999: 164-65). Hence, the emerging norm on states harbouring terrorists guilty of terrorist acts was now considered legitimate by most Western states, while Russia, most African, Arab and Islamic states rejected any right to this kind of force. In other words, the norm was slowly emerging, gathering support from more and more states, but because a large majority still rejected that the right to use force against states harbouring terrorists was included in article 51 the norm never left the phase of norm emergence.

6.1.6. The legitimacy of the use of force against states harbouring terrorists prior to 2001?

Having examined how states justified and evaluated the use of force against states allegedly harbouring terrorists, the above analysis showed that the claims of a few states of a right to use force against states harbouring terrorists have found increasing international support over the years (Figure 6.1 summaries the degree of legitimacy in the five cases analysed above).

Figure 6.1. The degree of legitimacy of the use of force against states harbouring terrorists



In only one case (US versus Iraq, 1993) was the use of force considered legitimate and this was the most extreme case of them all. The attack, which was an attempt to assassinate the former US President, constituted a very serious crime against international criminal law. Furthermore, since no one believed that the Iraqi government did not have a role in the assassination attempt, it is a case of *state terrorism* rather than case of a state more or less willingly harbouring terrorists. Hence, this one case is not enough to argue that the use of force against states harbouring terrorists constituted a legitimate exception to the norm on non-use of force prior to 2001.

The main advocates for a norm change have been Israel and the US. While Israel all along has claimed a right to use force against states harbouring terrorists, the US changed its position from opposing such a claim to supporting it during the 1980s. A key spokesperson for this new policy was the Reagan administration's Secretary of State, George Shultz, who outlined the principles of this new policy, which the American media quickly named the 'Shultz doctrine'. At this time, it was a highly controversial position advocating the use of force not only against terrorists, but also against states supporting, training or harbouring terrorists (Paust, 1986-1987: 711).[33] Rather than analysing the origins of various states' foreign policy or explaining their policy, this chapter analyses *how* states have previously justified the use of force against states harbouring terrorists and evaluated such use of force, and therefore does not answer *why* the US changed its position.

Over the many years analysed, the US was not the only state that changed its position. Also the UK became a supporter of a right to use force against states harbouring terrorists, as it explicitly supported the American

[33] Even more controversially, Shultz also argued for a right to use pre-emptive and preventive force. However, this position was only vaguely supported by a few other members of the Reagan administration (see Paust, 1986-1987 for a discussion of Shultz's policy).

interpretation of article 51 in the 1986 Libya case and in the 1998 Afghanistan/Sudan case. The 1998 case, in particular, represents a normative change among some states, as several Western states found the American use of force legitimate. But, although the use of force against states harbouring terrorists has become increasingly legitimate over the years, the support has not been large enough to argue that the use of force against states harbouring terrorist was considered a legitimate exception to the norm on non-use of force prior to 2001, as a vast majority of states still rejected such a right. Rather, it indicates that a new norm was emerging, pushed by a few states acting as norm entrepreneurs, but that it still had a long way to go before it was considered a new legitimate practice of international society.

6.2. Pre-emptive and preventive force

In the following, the five identified cases of pre-emptive and preventive self-defence are analysed along with the justifications provided by the state using force, the complaints by the 'offended' state and the evaluations of the use of force by the members of the Security Council. The question is whether pre-emptive and preventive use of force, respectively, were considered legitimate exceptions to the norm on non-use of force prior to 9/11.

6.2.1. Israel versus Egypt, Syria, Jordan and Iraq (the Six Days War), 1967

The Six Days War between Israel and an alliance consisting of Egypt, Syria, Jordan and Iraq represents a classic case of pre-emptive use of force, where one state reacts on what it believes to be an imminent threat from another state. During the spring of 1967 the relationship between Israel and its Arab neighbours grew more and more tense, peaking in May when the Egyptian President, Gamal Abdel Nasser, began to mobilise his troops and strengthen military ties with Syria, Jordan and Iraq. Besides dismissing the UN Emergency Force from the Sinai, where it had been deployed and served as a buffer between Egypt and Israel since the 1956 Suez War, President Nasser also announced a blockade of the Straits of Tiran, which was Israel's only waterway to the Red Sea and thus of vital interest to Israel. On top of this, Nasser proclaimed that his goal in any future war with Israel was to destroy the Jewish state (Raymond & Kegley, 2008: 102).

Against this background, Israel saw an Egyptian invasion as inevitable and decided to strike first to maximize its chances of winning the war. On 5 June Israel launched a pre-emptive air strike against the Egyptian air force

completely destroying it. Three days later, on 8 June, Israel destroyed Egypt's army in the Sinai and took over the entire peninsula. In response to an attack by Jordan, Israel launched a set of air strikes destroying Jordan's small air force and took over all of Jordan's territory west of the Jordan River, including the old city of Jerusalem. Meanwhile, the Security Council adopted a number of resolutions calling for cease-fire (UN doc. S/Res/233; S/Res/234; S/Res/235; S/Res/236), which by 8 June were accepted by Israel, Egypt and Jordan. Syria, however, who so far had only been engaged in the conflict in a limited way, continued firing artillery from the Golan Heights at Israeli positions. Responding to the Syrian air raids seeking to eliminate future threats from Syria the Israeli forces invaded the Golan Heights. On 10 June Syria surrendered and turned over the Golan Heights to Israel before signing the cease-fire resolution (Weisburd, 1997: 137).

The reactions of the other states as reflected in the debates of the UN Security Council were very much marked by Cold War politics. The Soviet Union and its satellite states supported the Arab countries throughout the conflict – at one point the USSR even threatened military intervention against Israel. However, turning to more diplomatic means the Soviet Union introduced a Security Council resolution condemning Israeli aggression and demanding that Israel withdraw its troops from Arab territory unconditionally. But the USSR did not succeed in getting the resolution adopted, as only a few other states voted in favour of it. The Soviet position was supported primarily by Arab states, some non-aligned states and communist states. The latter even went so far as to break diplomatic relations with Israel. Not surprisingly, the US supported Israel and was ready to back Israel militarily. Nonetheless, the US argued that it was more useful to solve the crisis once and for all rather than to discuss who was right and who was wrong. This position was supported by Canada, Australia, New Zealand, Japan, most Western European states, most Latin American states and much of Francophone Africa (Weisburd, 1997: 138).

These two different views on the crisis were demonstrated in both the General Assembly and the Security Council. Four General Assembly resolutions were introduced but neither of them received the two-thirds majority required for passage. A General Assembly resolution was finally adopted on 4 July calling upon Israel to rescind the changes it had made in the status of Jerusalem (UN doc. A/6798). By 22 November 1967, the Security Council was able to unanimously adopt resolution 242, which required Israeli withdrawal from its occupied territory in Egypt, Jordan and Syria and the end of violence from all parts. The resolution also affirmed the necessity to guaran-

tee free navigation rights and to resolve the Palestinian refugee problem (UN doc. S/Res/242; Weisburd, 1997: 138-39).

Justifying the war Israel argued that Egypt's decision to close the Straits of Tiran was an act of war by Egypt and that the massing of Egyptian troops on the borders of Israel posed a serious and imminent threat to Israel leaving it no choice but to use pre-emptive force to protect itself. Israel's actions and justifications thus showed that it clearly asserted a right to use pre-emptive force against imminent threats (Franck, 2002: 102-3). Remarkably, neither the debates in the General Assembly nor in the Security Council touched upon the fact that Israel had launched a pre-emptive strike against Egypt. During the six days of war, the Security Council was generally more concerned with demanding cease-fire, while the Communist block and the Arab states, in particular, spent most their energy condemning Israel and blaming the US for being a partner in crime. The question of the legality of pre-emptive force used as self-defence thus never arose, and the Six Days War is a good illustration of how the legitimacy of pre-emptive force is never black or white. The Western states in particular seemed to accept Israel's first strike in the light of the Egyptian threats; yet they found that Israel went too far by invading Egypt, Jordan and Syria thereby undermining the principle of proportionality, whereas the communist and Arab states fully condemned the Israeli use of force. As Franck concludes: 'This does not amount to an open-ended endorsement of a general right to anticipatory self-defence, but it does recognize that, in demonstrable circumstances of extreme necessity, anticipatory self-defence may be a legitimate exercise of a state's right to ensure its survival' (ibid.: 105). In other words, the Western states seemed to accept a limited right of pre-emptive self-defence to counter an imminent threat.

6.2.2. Israel versus Lebanon, 1975

On 2 December 1975 Israel launched pre-emptive airstrikes against Palestinian refugee camps in Lebanon. Prior to this attack, Israel and the Palestine Liberation Organisation (PLO), which had set up bases in Lebanon where hundreds of thousands of Palestinian refugees lived, had been in an ongoing pattern of violence. PLO had carried out several terrorist attacks on Israel to which Israel consistently had responded with force. To pre-empt future terror attacks, Israel bombed Palestinian refugee camps and nearby villages in Lebanon killing 57 people (Chomsky, 1983: 189).

Lebanon brought the case to the UN Security Council complaining about Israeli raids on Lebanese territory and, in particular, on the Palestinian refu-

gee camps killing innocent civilians (UN doc. S/11892). Justifying this and previous attacks against PLO bases in Lebanon Israel argued that the targets were terror organisations responsible for several attacks against Israelis and that it was Israel's duty to protect its people from future attacks. Hence, Israel did not justify its actions as reprisals but rather as a means to prevent additional terror attacks by PLO (Weisburd, 1997: 142). This claim of a need for preventive use of force was totally rejected as a very dangerous doctrine by the Lebanese delegate: 'Israel … has stated that the aggression it undertook was not punitive but preventive in nature. This is a dangerous course to follow in international affairs. Are States to be allowed to determine on their own what should be termed preventive acts? If so, this will lead the world back to the law of jungle, and far away from the international order based on the principles of the Charter of the United Nations' (UN doc. S/PV.1859: 11).

Although the Council failed to act due to disagreement regarding the wording of the resolution,[34] the Israeli attack was condemned not only by developing and socialist states but also by all Western States, including the US, Japan, Sweden, France, Italy and the UK (Cassese, 2005: 360). The member states of the Security Council did not explicitly discuss the question of preventive self-defence; most of them seemed concerned about the death of innocent civilians. The British UN delegate implicitly rejected the Israeli justification of a need for preventive action, saying that the previous attacks on Israel 'could not in any way justify the recent raids by Israel and the scale of losses, which they had caused'. 'No government', the delegate continued, 'had the right to take the law into its own hands in such a way' (UN Yearbook, 1975: 229). Hence, altogether the UN Security Council did not seem to consider the Israeli use of pre-emptive force legitimate.

6.2.3. South Africa versus its neighbouring countries, 1976-1983

From the mid-1970s to the mid-1980s South Africa launched several pre-emptive attacks against military bases belonging to liberation organisations such as the South African ANC (African National Congress) and the Namib-

[34] The US vetoed the draft resolution sponsored by Guyana, Iraq, Mauritania, Cameroon and Tanzania, because the US found the resolution too biased against Israel (all other member states of the Council voted in favour). Having proposed two amendments to the draft resolution, the US was prepared to support it, but the amendments only received seven votes in favour (Costa Rica, France, Italy, Japan, Sweden, United Kingdom and the US) and were not adopted. Thus, the US decided to veto the draft resolution (UN Yearbook, 1975: 229).

ian SWAPO (South West Africa People's Organisation) in the neighbouring countries. All the attacks were strongly condemned by the members of the UN Security Council. I will only present two of the incidents here, as South Africa's actions, its subsequent justifications and the reactions of the Security Council are very similar in all the cases.[35]

One South African attack took place on 11 July 1976 against a Zambian village, where armed South African soldiers, according to Zambia, had planted landmines around a SWAPO camp before attacking it, killing 24 inhabitants and injuring 45 others. In Zambia's words, the South African 'act of aggression … was perpetrated in blatant violation of Zambia's sovereignty and territorial integrity'. Furthermore, the act 'was cruel and totally without justification' (UN Yearbook, 1976: 163-64). Instead of justifying the attack, South Africa denied any knowledge of it. The government claimed it had only learnt about it through press reports 'of what was said to have taken place' (ibid.). The Security Council did not believe South Africa, and Resolution 393, which was adopted by a 14-0 vote with the US abstaining, 'strongly [condemned] the armed attack of South Africa against the Republic of Zambia, which constitutes a flagrant violation of the sovereignty and territorial integrity of Zambia' (UN doc. S/Res/393). The Council did not address the question of pre-emptive force directly, but the resolution did express that it was 'gravely concerned at the numerous hostile and *unprovoked* acts by South Africa' (emphasis added). Hence, the Council did not accept South Africa's use of pre-emptive force, which was considered an act of aggression and therefore illegal.

Another example is South Africa's many attacks on Angola in 1979. The Security Council met twice to take action on this matter, the first time on 28 March 1979. According to Angola, South Africa had bombed several regions and cities in Angola; South African forces had penetrated Angolan territory to a depth of 17 kilometres; and napalm bombs had been used against a SWAPO refugee centre in Angola. Justifying these actions South Africa said that the force was only directed at SWAPO terrorist bases to protect the territorial integrity of South West Africa. Furthermore, South Africa argued that the Security Council ought to condemn 'SWAPO's persistent and incessant acts of violence against inhabitants of South West Africa' (UN doc. S/13180; see

[35] Other incidents of South African pre-emptive use of force in this period are: South Africa against Angola in May 1978 (UN Yearbook, 1978: 229-33), in 1980 (UN Yearbook, 1980: 252-57), in 1981 (UN Yearbook, 1981: 217-21), in 1983 (UN Yearbook, 1983: 173-77); against Zambia in 1979 (UN Yearbook: 221-24); and against Lesotho in 1982 (UN Yearbook, 1982: 313-18).

also UN Yearbook, 1979: 225-26). The second meeting took place on 1 and 2 November the same year. This time Angola accused South Africa of ongoing land and airborne attacks between 27 March and 28 October killing more than 1000 people and damaging vital economic facilities. While denying any acts of aggression, South Africa invoked its right to protect the territory of South West Africa against SWAPO terror attacks originating from Angola and said that 'while this campaign of terror continues, [South Africa] will act relentlessly against all who endanger the security of the Territory and its people' (UN doc. S/13604; see also UN Yearbook, 1979: 230). In both incidents, the Security Council adopted resolutions strongly condemning these 'premeditated' South African attacks on Angola violating the sovereignty and territorial integrity of Angola (UN docs. S/Res/447; S/Res/454). Hence, in neither the Zambia nor the Angola case did the Security Council consider South Africa's pre-emptive use of force legitimate.

6.2.4. Iraq versus Iran, 1980

The eight-year Iraqi-Iranian war (1980-1988) was initiated in 1980 when Iraq invaded Iran after many years of tension between the two countries. Iran and Iraq had been rivalling for influence in the Persian Gulf region for a long time, but the situation deteriorated further after the fall of the Shah of Iran in 1979. The new Iranian leader, Ayatollah Khomeini, had provoked Iraq in number of ways. He tried to foment a sectarian strife between Shia and Sunni Muslims within Iraq; supported a Kurdish insurgency in Northern Iraq; and was involved in the assassination attempt on the Iraqi Foreign Minister. Furthermore, Khomeini publicly called for the elimination of Iraq's Ba'ath Government. Following these events, Iraq attacked Iran without warning on 12 September 1980 to regain control of the whole area of Shatt Al Arab (which Iraq had lost to the Shah of Iran in 1975) and to defuse the threat of the Iranian regime to its internal security (Weisburd, 1997: 47; Wang, 1994: 84).

Iraq first justified the attack as pre-emptive self-defence claiming that Iran was preparing to invade Iraq. On 15 October 1980 the Iraqi Foreign Minister, Saadoun Hammadi, told the UN Security Council that in the light of the Iranian hostile acts, Iraq 'was left with no choice but to direct preventative strikes against military targets in Iran.' Referring to the Caroline case, Hammadi claimed that 'There was … 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moments of deliberations' (UN doc. S/PV 2250). However, Iraq later changed its explanation, instead invoking self-defence against a prior armed attack, claiming that Iran had

undertaken substantial military actions against Iraq (Cassese, 2005: 360, footnote 7; DIIS, 2005: 78). But, as Weisburd notes, this claim proved to be false (Weisburd, 1997: 48).

At the time of the pre-emptive attack, the UN Security Council did not condemn Iraq, but unanimously required both Iraq and Iran to refrain from all use of force and strongly recommended that they accepted mediation (UN doc S/Res/479). According to Weisburd, the fact that the UN Security Council did not call for a withdrawal of the Iraqi forces is remarkable, since Iraq was seizing Iranian territory at the time of the adoption of the resolution. Weisburd's explanation is that the Council's rather neutral reaction in this conflict caused by Iraq was influenced by Iran's otherwise disruptive behaviour in the region and by the regime's disrespect of international norms of conduct as evident in the American diplomats being held hostage in Tehran. By the same token, as noted by Erik Wang, 'Iran did not come to the Security Council with clean hands' (Wang, 1994: 91).

However, UN Secretary General, Perez de Cueller, later concluded in a 1991 report that the Iraqi use of force had been illegal: 'Even if before the outbreak of the conflict there had been some encroachment by Iran on Iraqi territory, such encroachment did not justify Iraq's aggression against Iran … in violation of the prohibition of the use of force, which is regarded as one of the rules of jus cogens' (UN doc. S/23273). Hence, although the pre-emptive use of force by Iraq was not condemned at the time because of political circumstances, the later condemnation by the Secretary-General indicates that the Iraqi use of pre-emptive force was not formally considered legitimate by the UN system.

6.2.5. Israel versus Iraq (Osirak), 1981

The case of Osirak is a classic example of preventive use of military force. On Sunday afternoon, 7 June 1981, Israel launched a surprise attack against an Iraqi nuclear reactor, Osirak, which was under construction. According to the Iraqi government, the reactor was constructed in close cooperation with France for research purposes only. Furthermore, being a party to the Nuclear Non-proliferation Treaty and allowing inspections by the International Atomic Energy Agency, Iraq maintained that it would not use the reactor to develop nuclear weapons. However, Israel feared that once the reactor was fully developed, Iraq would build nuclear weapons to use against Israel. Because the reactor was being built near Bagdad, an attack once it had become active would spread radioactivity throughout the Bagdad area. Hence, Israel decided to launch a preventive attack on the reactor before it

was fully constructed to prevent a nuclear threat from Iraq. The attack was successful in the sense that it heavily damaged the reactor; however a French technician was killed in the attack (Weisburd, 1997: 287-89).

Iraq brought the incident to the Security Council five days later, claiming that Israel was guilty of a 'flagrant act of aggression' against Iraq and demanded sanctions against Israel (UN doc. S/PV.2280). Israel justified its actions by referring to its right to defend itself: 'In destroying Osiraq, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the United Nations Charter' (ibid.). Furthermore, the Israeli UN delegate argued that the attack was 'cleanly and effectively' and had been used as a last resort when it was evident that diplomatic means did not work. According to the delegate, Israel had sought to minimise danger to the Iraqi population by attacking before the reactor became active and to minimise danger to the workers at the reactor by launching the attack late Sunday afternoon on the assumption that the workers would have left the site.

The Security Council strongly condemned the attack. France, having a stake in the case helping Iraq build the reactor, pointed to danger related to unilateral use of preventive force: 'Where would we end up if a State were to proclaim itself judge of the intentions of another State even though the latter was complying with the rules and disciplines of the international community in so sensitive an area as nuclear energy?' According to the French delegate, Israel had disrespected the rules of international law: 'The Israeli attack, directed against the territory of a foreign State, constitutes a violation of the fundamental principles which all States espouse when they sign our Charter – in particular, the right of each State to have its sovereignty and independence respected, as well as the obligation of all not to resort to the use of force but, rather, to seek means of peaceful settlement' (ibid.). France thus proposed a resolution condemning the attack. The Security Council unanimously adopted the resolution, which 'strongly [condemned] the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct' (UN doc. S/Res/ 487). Even the US voted in favour of the resolution. The American UN delegate pointed out that the US vote was motivated only by Israel's failure to exhaust peaceful means to resolve the conflict and asked for the other states to consider the context of the action. Because Iraq did not recognise the existence of Israel as a country, American President Ronald Reagan defended the action saying that 'Israel might have sincerely believed that it was a defensive move' (UN doc. S/PV.2280). Hence, the US implicitly supported the Israeli claim of a right to use anticipa-

tory force as self-defence *if* the threat was believed to be imminent (Cassese, 2005: 360).

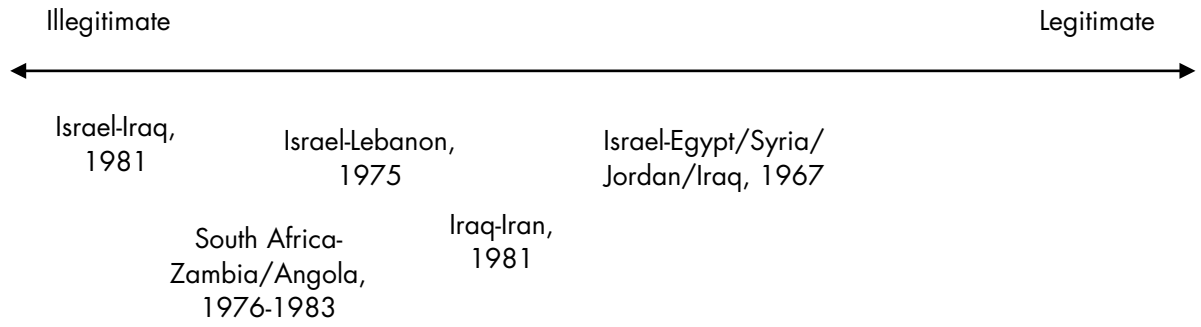
Referring to the Caroline case, the UK argued that the Israeli attack was not an act of self-defence, as there had been no prior attack on Israel by Iraq: 'There was no instant or overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq' (UN doc. S/PV.2280). Thus, the UK seemed to uphold the doctrine of pre-emptive self-defence in case of 'instant and overwhelming necessity' only denying that this was the case in the Osirak case (Cassese, 2005: 360-61). Responding to the British statement, Israel pointed out that times had changed since the Caroline incident, which 'occurred almost a century and a half ago.' 'It occurred precisely 108 years before Hiroshima', the delegate continued. 'To try and apply it to a nuclear situation in the post-Hiroshima era makes clear the absurdity of the position of those who base themselves upon it. To assert the applicability of the Caroline principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence'. Thus, the nuclear age had broadened the scope of right to self-defence, Israel argued, as 'the concept took on a new and far wider application with the advent of the nuclear era' (UN doc. S/PV.2280). Hence, Israel implicitly argued in favour of not only pre-emptive force but also preventive use of force as self-defence in the protection of nuclear, yet non-imminent, threats.

However, the Israeli position on preventive force was completely rejected by the other states as a dangerous doctrine. As the Mexican UN delegate, who at the time was President of the Security Council, conclusively stated: 'It is inadmissible to invoke the right of self-defence when no armed attack has taken place. The concept of preventive war, which for many years served as justification for the abuse of powerful States, since it left it to their discretion to define what constituted a threat to them, was definitively abolished by the Charter of the United Nations' (ibid.). Hence, the only example of preventive force prior to 2001 shows that the use of preventive force clearly was not considered a legitimate exception to the norm on non-use of force.

6.2.6. The legitimacy of pre-emptive and preventive force prior to 2001

Pre-emptive and preventive use of force as self-defence is evidently a rare phenomenon. Only a handful of incidents have taken place since 1945 and in many of the cases, the governments have refrained from claiming pre-emptive or preventive self-defence and have instead justified the use of force as 'ordinary' self-defence. In general, the states have just violated the norm on non-use of force by using pre-emptive and preventive force rather than trying to change it; only in a few cases have the states acted as a norm entrepreneur and actually argued for a legal right to use pre-emptive force. This indicates that the attacking states are aware that pre-emptive and preventive self-defence would not be accepted as legitimate by the other states. Figure 6.2 summarises the degree of legitimacy in the five cases.

Figure 6.2. Degree of legitimacy of pre-emptive and preventive use of force as self-defence



The only case of preventive self-defence was not considered legitimate by any third-party state, as the Israeli attack on the Iraqi nuclear reactor in 1981 was strongly condemned by all member states of the UN Security Council as a clear violation of the norm on non-use of force; even though only one man was killed and the attack in this manner represents the 'cleanest' example of all the cases.

In the other cases the reactions of the other states have been mixed or silent. One explanation may be that these cases were so wrapped up in Cold War politics that the use of pre-emptive force was secondary. The reactions of the other states regarding the Six Days War and the Iraqi use of pre-emptive force against Iran illustrate this point very well. However, in the case of Iraq versus Iran the judgement came eleven years later by the UN Secretary-General, who condemned Iraq's use of pre-emptive force as a clear example of aggression.

Another reason may be that many of the cases are further complicated because they are part of so-called 'continuation wars' (Weisburd, 1997), where the tensions between the involved states had been high for a while with on-going use of armed force. Responding exclusively to pre-emptive use of force, the other states in general condemned it, especially if civilians were killed as in 1975, when Israel used pre-emptive force against Palestinian refugee camps in Lebanon. However, when including the context of the events in their evaluations the states become somewhat more sympathetic towards the use of pre-emptive force. Hence, the context is very important for understanding the reactions of the states. Whether pre-emptive use of force is seen by third-party states as legitimate is a matter not only of legality but also of moral and political circumstances. The Six Days War is the only case where some of the states to a certain degree accepted the use of pre-emptive force as a legitimate measure against really imminent threats. The United States and Great Britain, in particular, seemed to believe that a right to pre-emptive use of force was included in article 51 in cases of imminent threats. However, they stressed the importance of just war principles such as necessity, proportionality and last resort thereby limiting the range of legitimate pre-emptive force.

To reiterate, whereas preventive use of force as self-defence was considered clearly illegitimate by *all* the states prior to 2001, the Western states, especially the US and UK, considered pre-emptive use of force legitimate in response to imminent threats and thus included in article 51, while most communist, African, Arab and Islamic states seemed to reject such a right.

6.3. Conclusion

Because self-defence is the only way states unilaterally can resort to force legally, it became the most common – but often false – justification for the use of armed force in the post-UN Charter period (Weisburd, 1997: 304). Great powers, in particular, have invoked article 51 to justify their use of force to maintain their spheres of influence. Examples are the Soviet Union's intervention in Hungary in 1956 and in Afghanistan in 1979, and the many interventions by the US in Latin and South America, e.g., in the Dominican Republic in 1965, Grenada in 1983 and Panama in 1989. The invocation of self-defence is a very common justification for all kinds of use of force – aggressive, defensive or punitive – and as Mark Weisburd concludes in his historical assessment of state practice regarding the use of force since World War II, the reactions of third-party states were many times very mixed and often influenced by politics (Weisburd, 1997).

In a few instances, the states resorting to force successfully advocated a modification of the norms governing the use of force resulting in a norm change. For example, based on the US interventions in the Dominican Republic in 1965 and in Grenada in 1983 and on Israel's use of force in Uganda in 1976 (Entebbe airport), the right to use force to rescue national citizens abroad is today recognised as a legitimate part of the self-defence right found in article 51. Yet, other times states were less successful in advocating a norm change, as seen in this chapter.

The theme of the chapter has not been all these different kinds of force justified as self-defence, but whether the use of force against states harbouring terrorists and the use of pre-emptive and preventive force constituted legitimate exceptions to the norm on non-use of force prior to 2001. Regarding the former, the analysis of the five cases showed that the use of force against states harbouring terrorists was not in general considered a legitimate exception to the norm on non-use of force, although an increasing amount of (Western) states over time began to support such a right. Israel and the US have acted as norm entrepreneurs trying to change the norm to include this kind of force. However, these norm change attempts have been rejected by a vast majority of the members of the UN Security Council. Only the use of force in response to the assassination attempt against George H. W. Bush was considered legitimate by a majority of the states and this incident is an example of state terrorism more than an example of states harbouring terrorists.

Regarding pre-emptive and preventive self-defence, five cases occurred from 1945 to 2001 – only one of them preventive, which by itself indicates that preventive self-defence is a rare phenomenon. In all cases, the states justified their use of force within the provisions of the UN Charter either claiming a right to self-defence against imminent threats under article 51, claiming to have been using force as 'ordinary' self-defence against an armed attack or denying that anything happened. This clearly shows that the states are aware that both pre-emptive and preventive use of force was controversial and most likely illegal. By justifying the use of force within the provisions of the UN Charter, the states thereby upheld the norm on non-use of force and did not contest it by trying to change it. The reactions of the other states clearly showed that in most incidents the use of pre-emptive and preventive force was considered both illegitimate and illegal. Whereas preventive self-defence was clearly considered illegal by all the states, pre-emptive self-defence was seen as legitimate under certain circumstances by some states. Israel and some Western states, more specifically the US and UK, seemed to uphold the position that pre-emptive force is included in article 51 in cases of

imminent threats. However, they stressed that the use of force had to comply with the principles of the Caroline case, that is proportionality, necessity and last resort. Other states seemed sceptical of such an interpretation of article 51 arguing that it is too dangerous if a state alone can decide whether a threat is imminent – especially communist, Arab and developing countries opposed a right to pre-emptive self-defence.

Summing up, this chapter has shown that neither the use of force against states harbouring terrorists nor pre-emptive and preventive self-defence were considered legitimate exceptions to the norm on non-use of force by the majority of the states of international society prior to 9/11. Hence, the norm on non-use of force had not changed at the end of the 20th century with regard to these two aspects of self-defence. Even though the norm in many cases was violated or abused by the states justifying their use of force as legal exceptions to the norm, the subsequent condemnations by the other states upheld the norm and might even made it stronger.

PART IV
EMPIRICAL INVESTIGATIONS

Chapter 7
Norm Challenge I: the Use of Force against States Harbouring Terrorists and the Afghanistan War

In this chapter, I analyse the Bush administration's norm challenge, which successfully changed the norm on non-use of force. President Bush challenged the norm by claiming a right to use force as self-defence against states harbouring terrorists guilty of grave terrorist acts and thereby broadened the rules of self-defence. As shown in this chapter, the Bush administration was very successful in gathering support for this new norm and its application in the Afghanistan war. Analysing each stage of the norm change process, the aim of this chapter is to investigate to what extent the new norm has evolved into a new legitimate practice and to identify the main reasons for this successful norm change.

The analysis is structured around the theoretical model of the norm change process developed in Chapter 3 and is divided into five main parts. The first part analyses the emergence of the new norm looking at how Bush challenged the 'old' norm on non-use of force: What was the content of the new norm, how was it justified and how did it challenge the old norm on non-use of force? Part two analyses the immediate reaction of the other states to this norm challenge. Did the new norm receive broad support from the beginning, who supported the norm and who opposed it? Part three examines whether the norm reached the so-called tipping point, i.e. the threshold of support new norms need to continue the norm evolvement process. The Bush administration manifested the new norm in the war against Afghanistan, which makes this war very useful for assessing whether other states supported not only the idea of the norm but also its implementation. Based on the findings of part three showing that the new norm did reach the tipping point, part four analyses the extent to which the new norm cascaded as a new legitimate practice. To assess the legitimacy of the new norm beyond the Afghanistan war, I analyse incidents where other states have claimed a right to use force against states harbouring terrorists in the post-9/11 period to see whether the new norm was still regarded as legitimate. Furthermore, this part also investigates whether President Obama also

has supported the new norm, as it otherwise could be a sign that the norm is not cascading. Part five analyses the final phase of norm change, investigating whether the norm has been legally and politically institutionalised. It shows that the new norm to a large extent has been internalised into a new legitimate practice of international society.

7.1. The Norm Challenge

The new norm was presented by President Bush in the immediate context of the 9/11 terror attacks on New York and Washington DC. On the evening of 11 September 2001 the President went on national television to speak to the American nation and to the rest of the world watching along as well:

> Today our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. The victims were in airplanes or in their offices: secretaries, business men and women, military and Federal workers, moms and dads, friends and neighbors. Thousands of lives were suddenly ended by evil, despicable acts of terror. (…) The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. *We will make no distinction between the terrorists who committed these acts and those who harbor them* (Bush, 2001: 11 September, emphasis added).

President Bush told the world that in the process of finding those responsible and bringing them to justice, the US would not differentiate between terrorists and the states harbouring them. The following day, the rhetoric became a little harsher, as Bush now declared that the deadly attacks the day before were more than acts of terror – they were acts of war (Bush, 2001: 12 September). By addressing the terror attacks as acts of war, the Bush administration broadened the means of response to include military means, including the use of force as self-defence against terrorists and their hosting states to counter future terrorist acts. This 'war on terror', as President Bush named the new war, was soon addressed as a global war with no room for neutrality. As the President famously told the world:

> Every nation, in every region, now has a decision to make: Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime (Bush, 2001: 20 September).

Hence, the war on terror and the claimed right of the US to self-defence applied not only to terrorist cells plotting and executing terror attacks, but also to states harbouring them: 'Our war is against networks and groups, people who coddle them, people who try to hide them, people who fund them' (Bush, 2001: 10 October). This was an explicit ultimatum to all states, in particular states known for their connections or support to terrorists: cooperate or face the consequences! According to President Bush, this new norm was the core of the so-called Bush doctrine. Its status became official as the President referred to it on several occasions as the new official doctrine (see for example Bush, 2001: 28 September; 9 October; 2002: 16 October).

The Bush administration justified the new norm as a necessary means to counter terrorism in the new global 'war on terror'. However, it is noteworthy that the Bush administration did not explicitly try to justify its norm challenge beyond referring to the 'war on terror' and the need to hold states harbouring terrorists, and not only the terrorists, accountable. Instead, President Bush simply declared this policy without further justification, as if it had been in place for years. But, as argued in Chapter 5, international lawyers have not previously interpreted the self-defence right laid out by Article 51 in the UN Charter to include the use force against states harbouring terrorists in response to terrorist attacks. Furthermore, as shown in Chapter 6, a majority of the states had so far found such use of force illegitimate. Even though the US and Israel in the 1980s and 1990s tried to advance the claim that use of force against states harbouring terrorists was included in article 51, it was widely rejected by other states. Like previous US governments the Bush administration once again tried to change the norm on non-use of force to include the use of force against states harbouring terrorists guilty of grave terrorist acts. The interesting question is why the Bush administration succeeded.

The norm was initially used to justify the war against the Taliban regime of Afghanistan, but was quickly included as an official principle of the foreign policy of the Bush administration warning other states about going against the US:

> Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril (Bush 2001, 7 October).

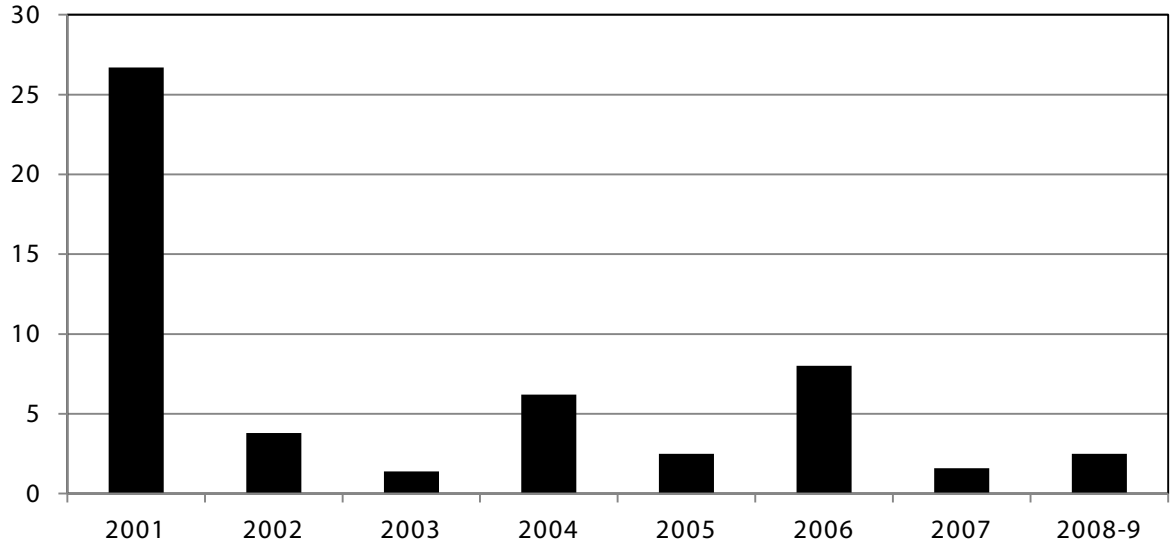
The new norm was not a temporary thing caught in the moment of 9/11 used only to justify the war against Afghanistan, as President Bush upheld it

throughout his presidency although the greatest promotion of the new norm took place in 2001 (see Figure 7.1).

As the figure shows, the new norm was most heavily promoted in 2001 and second most in 2006, the year the Bush administration republished its National Security Strategy from 2002. Although President Bush only referred to the new norm in less than 10 per cent of his speeches each year (except in 2001), the fact that the President *did* refer to it throughout the years indicates that he upheld the norm challenge during his presidency. In other words, it shows that the norm challenge was not just a contemporary policy useful to justify the war in Afghanistan, but that it was a persistent policy of the Bush administration.

To reiterate, the Bush administration challenged the norm on non-use of force by claiming that the right to use force in self-defence also was valid against states harbouring terrorists. From a theoretical perspective, the Bush administration thus modified the content of the norm on non-use of force by adding an exemption to the general ban on the use of force.

Figure 7.1. President Bush's statements claiming a right to use force against states harbouring terrorists. In per cent of the number of cases coded each year [a)]



N 2001 = 75 (for the period 11 September to 31 December only); N 2002 = 104; N 2003 = 142; N 2004 = 97; N 2005 = 118; N 2006 = 100; N 2007 = 64; N 2008 = 75; N 2009 = 4 (only the month of January).

a. The coded cases are speeches by President Bush in which he speaks about the use of force (see Chapter 4 on research design and methods).

7.2. Immediate Reactions to the Norm Challenge

A challenge of a fundamental norm usually results in immediate and momentous critique from states that oppose norm changes. However, this was not the case when the Bush administration introduced its norm challenge modifying the norm on non-use of force to include the use of force against states harbouring terrorists. In fact, the states of international society were very supportive of the American challenge in September 2001 compared to pre-2001 American attempts to change the norm.

Already the day after the 9/11 terror attacks the Security Council unanimously adopted Resolution 1368 (UN doc. S/Res/1368). The resolution, which condemned the terror attacks in the strongest possible terms, was remarkable in a number of ways. First of all, paragraph 1 of the resolution defined the terror attacks as a threat to international peace and security. By doing so, the Security Council invoked Chapter VII of the UN Charter in response to terrorist attacks and thereby opened up for the use of forceful measures. Second, the resolution also invoked the self-defence right found in Article 51 of the UN Charter. According to the preamble of the resolution, the Security Council *'[recognised]* the inherent right of individual or collective self-defence' (ibid.).[36] The fact that the resolution explicitly acknowledged the US' right to use force as self-defence is remarkable, as the Security Council has not previously affirmed that right to any state exposed to terror acts. Third, the resolution did not refer to a target state against which the US could exercise its right to self-defence. Hence, the resolution could thus be seen as a *carte blanche* for the US to use force against any state it believed (and proved) to be responsible for the 9/11 terror attacks. Finally, Resolution 1368

[36] There is some disagreement regarding the interpretation of resolution 1368. Some international lawyers argue that the resolution is ambiguous and contradictory, because the preamble recognises the right to self-defence but the operative paragraph 1 does not refer to the terror attacks as an armed attack, which commonly legalises the use of force as self-defence. Instead, the resolution defines the terror attacks as a 'threat to international peace and security', which means that the juridical responsibility of a response is referred to the Security Council and not the US (see for example Cassese, 2001: 996). Others argue that the resolution does both in the sense that it recognises international terrorism as a threat to international peace and security against which self-defence may be exercised (see for example Franck, 2001: 840). However, this juridical discussion about how to legally interpret resolution 1368 is not the main subject here, as I am more interested in how the states reacted to the resolution. I will return to the subject in section 7.5.1 regarding the legal institutionalisation of the new norm.

echoed the rhetoric of President Bush, as it in paragraph 3 pointed to the responsibility of states harbouring terrorists: the Security Council '[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or *harbouring* the perpetrators, organizers and sponsors of these acts will be held accountable' (ibid.; emphasis added). Mentioning the responsibility of states harbouring terrorists is a new feature compared to pre-2001 terror condemning resolutions. Thus, the resolution implicitly confirmed the US claim of a right to use force as self-defence against states harbouring terrorists.[37]

When the Security Council adopted the resolution at a meeting on 12 September 2001, many states did not comment the resolution's recognition of the right to self-defence even though it was controversial. Many states expressed their support to the resolution and to the United States in particular, but they did not address the subject of self-defence and whether it should be extended to states harbouring terrorists (UN doc S/PV.4370). One reason for this silence may be that the main purpose of the Security Council meeting was to condemn the terrorist acts and to express sympathy with the US – this was not the time to discuss political or military means to combat terrorism or to question the US' right to defend itself. However, the unanimous adoption of Resolution 1368 by the Security Council indicates that the members seemed to support the extended right of the US to use force as self-defence against states harbouring terrorists. Furthermore, support for the new norm reached beyond the member states of the Security Council. Also on 12 September 2001, the General Assembly adopted Resolution 56/1, which in many ways resembled Security Council Resolution 1368. Adopted with consensus that is without a vote, which indicates the support of all 190 UN member states[38], the resolution not only condemned the terrorist acts but also stressed the responsibility of states harbouring terrorists saying that they would be 'held accountable' (UN doc. A/Res/56/1).

[37] Resolution 1368 was followed by Resolution 1373, which was adopted unanimously by the Security Council on 28 September 2001. Besides imposing mandatory counter-terrorism measures on all UN member states, Resolution 1373 reaffirmed the conclusions of resolution 1368, including the US' right to self-defence (this is further elaborated in section 7.5.1).

[38] The UN only had 190 member states in 2001, as Switzerland did not become a UN member until 2002 and Montenegro until 2006.

While many states expressed their support to the Security Council and General Assembly resolutions,[39] the US' claim of a right to self-defence against states harbouring terrorists received strong explicit support from especially European states and Israel (see Table A.7.1 in appendix for a list of the statements). Israel, an old and close ally of the US, quickly positioned itself as a devoted norm leader for the US. Having claimed a right to use force as self-defence against states harbouring terrorists for decades, Israel warmly supported the new norm. In an annex to Security Council meeting on 12 September, the Israeli UN delegate, Aaron Jacob, in explicit terms supported the American claim that states harbouring terrorists are just as guilty as the terrorists themselves:

> Those States which provide active or tacit support for terrorist killers, provide them with weapons, funds or refuge have declared themselves to be the enemies of humankind. They are no less culpable than the terrorists themselves. As the President of the United States stated in his address to the American people last night, we must make no distinction between the terrorists and those who harbour them (UN doc. S/2001/864).

Many Western European states expressed strong support to the new norm as well. Standing side by side with the US, the UK and France strongly supported the adoption of Resolution 1368. As declared by the French UN delegate, 'we stand with the United States in deciding upon any appropriate action to combat those who resort to terrorism, those who aid them and those who protect them' (UN doc. S/PV.4370). The EU, which at this point only included Western European states, supported the US' right to defend itself as well. In a letter to the Security Council President containing the conclusions of a European Council meeting, the European leaders explicitly stated that on the basis of Resolution 1368 a riposte by the US was considered legitimate, also if it was directed at states abetting, supporting or harbouring terrorists (UN doc. S/2001/909). A similar conclusion was put forward by Norway:

> Intensified and concerted international efforts are needed to effectively seek out and hold accountable those who support, harbour and protect terrorists, and to prevent any future assaults. There can be no sanctuary for terrorists. We welcome and strongly support Security Council resolution 1368 (2001), which reconfirms the right to individual or collective self-defence (UN doc. A/56/PV.12).

[39] See meeting records: Security Council meeting UN doc. S/PV.4370 and General Assembly meeting UN doc. A/56/PV.1.

Explicit support to the new norm was also expressed by some Eastern and Central-European states. For example, the Croatian UN delegate strongly supported the US' interpretation of the UN Charter: 'Our Charter indicates that terrorism is a threat to international peace and that every country has the solemn right to defend itself, its citizens and their peace and security. Therefore, such a right on the part the United States should not be questioned' (ibid.).[40] Being post-communist states and thus dependent on the US for protection against Russia, these states had good reasons to support the norm challenge. Support to the new norm was thus high in Europe and in this sense many Western, Eastern and Central European states acted as norm leaders. But the US norm challenge was also explicitly supported by a few non-European states. While South Africa recognised the US' right to self-defence (ibid.), Egypt welcomed the legal restrictions on states providing safe havens to terrorists: 'In particular, our attention was drawn to the affirmation in the resolution – which we support – to refrain from providing safe haven to fugitives implicated in acts of terrorism' (ibid.).

However, even though many states supported Security Council resolutions 1368 and 1373 and consequently the US' right to self-defence (although they did not confirm this explicitly), many also stressed the important role of the UN, in particular the Security Council, in the fight against terrorism. This view was not only put forward by small states, but also by some of the greater powers such as France, Brazil, the EU and China. This point of view was for example strongly expressed by China at a Security Council meeting in November:

The United Nations is the most representative intergovernmental organization. Its Security Council shoulders the primary responsibility for safeguarding international peace and security. The relevant resolutions adopted and the meetings held by the United Nations, including the Security Council, have played an important and irreplaceable role in fighting terrorism and promoting international cooperation. Like many other countries, China supports the United Nations and the Security Council as they continue to play a leading role in the fight against terrorism (UN doc. S/PV.4413).

These explicit references to the importance of the UN indicate that although many states did support the norm change promoted by the US, they also feared the consequences of such a norm change if the counter terrorism measurements, including those making use of force, were not properly controlled by the Security Council. Perhaps fearing for its own safety, Belarus ex-

[40] See also the supporting statements by Georgia (UN doc. S/2001/893) and the Guuam states (UN doc. S/2001/906).

pressed hesitation regarding the right to use force against states harbouring terrorists and stressed the need for an exclusive right of the Security Council to authorise the use of force:

> Belarus is convinced that the response of the international community should be directed at the perpetrators and organizers of the acts of terrorism that were committed – terrorist organizations and their sponsors, not entire countries and peoples. Only such an approach will allow us to avoid the loss of more civilian victims and make the process of responding a managed and therefore predictable one. The decision to use military force in response to the terrorist activities of certain States, if there is sufficient proof of their carrying out and promoting such activities, must be well founded and in accordance with provisions of the Charter. The possibility of any military intervention to combat international terrorism on the territories of other States today can and must be considered from the point of view of threats to international peace and security, exclusively by the Security Council, which has been given authority for this under the Charter (UN doc. A/56/PV.12).

Beyond the Belarusian hesitation, very few states criticised the US. While condemning the 9/11 terrorist attacks Cuba could not help pointing fingers at the US, which Cuba accused of being responsible for terrorism in Cuba during the past 40 years, thereby indicating the presence of double standards (UN doc. S/2001/864). Iraq, as the only state, overtly criticised the US and in strong terms opposed the American norm change allowing use of force against states harbouring terrorists. According to the President of Iraq, Saddam Hussein, this was a dangerous policy amounting to aggression. He warned that the so-called 'war on terror' in reality was a war against Islam – an accusation the US had rejected in strong terms from day one. However, according to Saddam Hussein, this *was* the case:

> When the incident [9/11] occurred, Arab leaders and the rulers of those countries whose peoples are of the Islamic faith hastened to condemn the incident and the Westerners hastened, within hours, to issue statements and adopt decisions, some of them dangerous, in solidarity with the United States and against terrorism, according to what was in their statements and decisions. Even before being sure, those Western Governments decided to join forces with the United States, even if that meant declaring war on the party proven to be involved in what had happened in the United States. It would be natural for us to say that the explanation of the situation is in accordance with what has been said or relates to actions carried out by the United States formerly against specific States. It would suffice for some of those who carried out the operation to have come from the territory of a State named by the United States or to have been sent by someone whom the United States says instigated the

> operation for United States says and Western military retaliation to begin against the so-called 'aggression'. We do not know if they would do the same if any of those who carried out and planned the operation were present in, lived in or bore the nationality of a Western State or whether the intention was already formed and the design made against an Islamic party. It is most probable from the beating of the media war drums that the clear intent of the United States and certain Western Governments is to target a party that comes exclusively within the scope of Islam (UN doc. S/2001/888).

To reiterate, the immediate reaction by other states to the Bush administration's norm challenge was predominately positive. While only Israel and some European states expressed explicit support for the new norm allowing the use of force against states harbouring terrorists, many states silently accepted the norm change and supported Security Council Resolutions 1368 and 1373 and General Assembly Resolution 56/1 without opposition. Only Belarus, while supporting the resolutions, said that the new norm ought to be authorised by the UN Security Council. Furthermore, only Iraq directly criticised the new norm calling it dangerous and equalised it with aggression. Thus, already in its emerging phase the new norm had many supporters and only few opponents.

7.3. The war in Afghanistan: Did the new norm reach the tipping point?

The states of international society were very positive towards the US norm challenge in the weeks following 9/11, but when the US declared war against Afghanistan a month had almost passed and they had had time to think twice. The question is whether the initially large support was still present a month later? In other words, the positive reactions of the other states were put to a test when the US decided to implement the new norm by declaring war against the Taliban, the de facto regime of Afghanistan.[41] Starting with a short description of the prelude to war, this section offers a detailed analysis of the reactions to the war in Afghanistan.

[41] In 1996, the Taliban removed the official government of Afghanistan led by President Burhanuddin Rabbani from power. But Taliban remained a de facto regime, as President Rabbani was still recognised as the formal president of Afghanistan by most states and the UN.

7.3.1. Prelude to War

Evidence quickly placed responsibility for the 9/11 terror attacks on the terrorist network Al Qaeda and its leader, Osama bin Laden. Because Al Qaeda was operating from Afghanistan with the approval of the Taliban regime, the Taliban was pointed out as being partly responsible for the attacks. In a speech to a joint session of Congress on 20 September, President Bush issued an ultimatum to the Taliban: cooperate or face the consequences. The President demanded that Taliban handed over every Al Qaeda leader to US authorities; released all foreign nationals; protected all foreign nationals working in Afghanistan; immediately and permanently closed all terrorist training camps in the country; and gave the US full access to terrorist training camps. Stating these demands, President Bush stressed that there was no room for negotiation (Bush, 2001: 20 September). Taliban, however, rejected the demands and refused to hand over Osama bin Laden unless the US had evidence that he was guilty of the terror attacks. According to the Taliban, they were ready to defend the country against an American attack if necessary (*CBS News*, 2001: 21 September).

The US was not the first to point to the threat from Taliban. Already on 14 September 2001 the official President of Afghanistan and leader of the Northern Alliance, Burhanuddin Rabbani, addressed the threat of the Pakistan-Taliban-Bin Laden axis (UN doc. S/2001/870). The President of Pakistan, Pervez Musharraf, however, quickly promised unconditional support to the US, assuring President Bush of Pakistan's 'unstinted cooperation in the fight against terrorism' (UN doc. S/2001/877). The United Arab Emirates also supported the American demands to the Taliban. On September 24, they informed the UN Secretary-General that they had decided to break off all diplomatic relations with the Taliban regime following its failure to hand over Osama bin Laden (UN Yearbook, 2001: 65).

The Taliban's refusal to hand over Osama bin Laden to the US resulted in a military intervention against Afghanistan on 7 October 2001 by US and UK forces (Operation Enduring Freedom) in cooperation with the United Front, an anti-Taliban coalition of Afghan groups led by President Rabbani.[42] The Taliban regime was officially brought to an end on 13 November, when United Front troops took over Kabul, the capital of Afghanistan (ibid.: 255). However, as evident on this day of writing this did not bring an end to the war, as Taliban has not yet surrendered.

[42] The United Front is also known as the Northern Alliance.

When notifying the Security Council about the military operation, as required by Article 51 of the UN Charter, the US invoked Article 51 and justified the intervention as self-defence in response to the 9/11 terror attacks:

> In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property (UN doc. S/2001/946).

While justifying the use of force saying that 'clear and compelling information' showed that Al Qaeda was responsible for the attack, the US warned that the operation was not necessarily the last act of self-defence, thereby extending its right of self-defence to other terrorist organisations or states: 'There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States' (ibid.). This political manoeuvre was possible because Security Council Resolution 1368 authorising self-defence did not specify the target country of the American right to self-defence.

The American accusations against Taliban and Al Qaeda were supported by the UK, which on 8 October 2001 transmitted a document to the Security Council setting out the case against Al Qaeda and Osama bin Laden. According to the UK, a military intervention was necessary to avert the continuing threat to both the US and the UK from Al Qaeda and Osama bin Laden:

> That organisation has the will, and the resources, to execute further attacks of similar scale. Both the United States and its close allies are targets for such attacks. The attack would not have occurred without the alliance between the Taleban and Usama Bin Laden, which allowed Bin Laden to operate freely in Afghanistan, promoting, planning and executing terrorist activity (UN doc. S/2001/949).

Based on this information the UK justified its participation in the war as an 'exercise of the inherent right of individual and collective self-defence following the terrorist outrage of 11 September 2001' (ibid.). The war was thus justified by the US and the UK on the grounds of the new norm. Both claimed a right to use force as self-defence against Taliban, who was said to support and harbour Al Qaeda and Osama bin Laden. In other words, the new norm was very effectively manifested in the Afghanistan war by the US and UK.

7.3.2. Reactions to the war

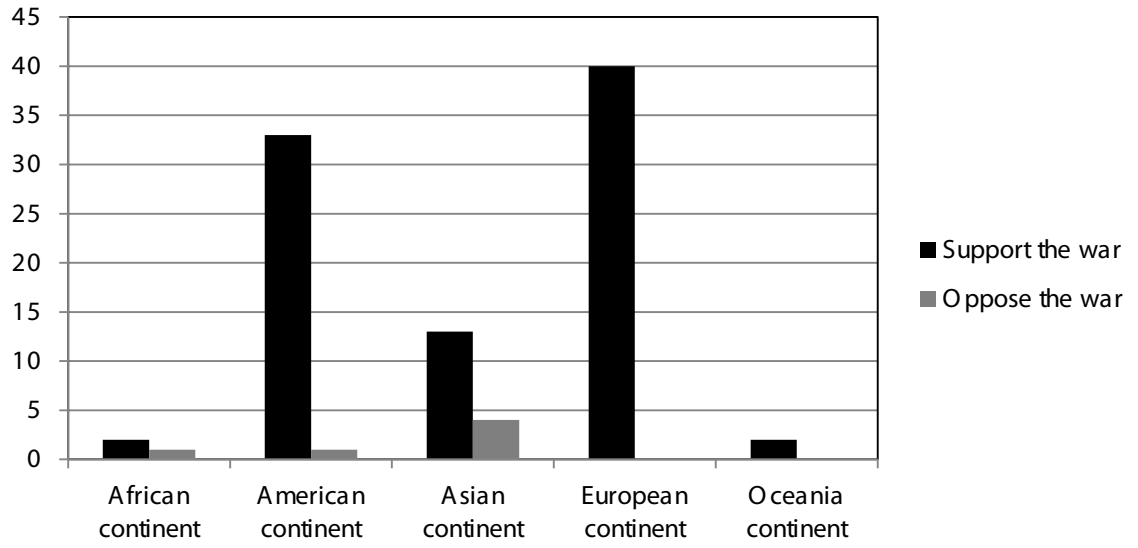
An analysis of the reactions to the war in Afghanistan is very useful in assessing whether other states supported not only the idea of the norm but also its implementation. The war is thus used as an indicator of whether the new norm reached the tipping point, which means that it by quantitative measures must be supported by minimum 1/3 of the states and by qualitative measures must be supported by international/regional organisations, great powers and so-called vulnerable states. In the following the fulfilment of each measure is analysed.

7.3.2.1. Quantitative measure: supporters and opponents

The overwhelming support to the US and its so-called 'war on terror' in the weeks following 9/11 did not disappear with the invasion of Afghanistan, quite the contrary. Again, a large majority of the states of international society expressed their support to the US and 'Operation Enduring Freedom'. Out of 96 states explicitly expressing their opinion in the UN regarding the Afghanistan war 90 states supported the war and only six states criticised the war (see Figure 7.2 below and Table A.7.2. in the appendix for a list of states).

Massive support to the war was expressed by states from the European continent, which also had been very supportive of the US promotion of the new norm prior to the war. As shown in the figure, 40 European states, including Russia, supported the war saying that it was a legitimate act of self-defence; no European states opposed the war. Also Australia and New Zealand, the only two states representing Oceania, strongly supported the US' right to use force as self-defence against Taliban. Many states from the American continent offered strong explicit support as well. Furthermore, two African states (Egypt and Jordan) and 13 states from the Asian continent, including traditional allies such as Israel and Japan, but also China and United Arab Emirates, expressed explicit support to the war and the US' right to use force as self-defence against the Taliban regime. Finally, criticism of the war was only explicitly expressed by six states, including one African state (Sudan), one American state (Cuba), and four Asian states (Iraq, Iran, North Korea and Syria). Their opposition is not surprising as they traditionally have poor relations with the US and thus are more vulnerable to the new norm compared to other states (this is further elaborated below).

Figure 7.2. Number of states in each continent supporting or opposing the Afghanistan war[a)]



a. The count of states is based on two sources. The first source is written or verbal statements of the states to the UN about the war against Afghanistan. To be included in the count, the states must explicitly express support or opposition to the war. The second source is information from the US Ministry of Defense on coalition states in the Afghanistan war.

Summing up, the figure shows that the greatest support to the war in Afghanistan was expressed by European and American states. Out of 90 states supporting the war, 73 states were either from the European or the American continent. In comparison, states from the African, Asian and Oceania continents were remarkably silent, expressing neither support nor criticism of the war. Nevertheless, many of them seemed to accept the US' right to use force as self-defence against Afghanistan, as they all seemed to support both the counter-terrorist resolutions subsequently adopted by the UN and the role of the UN in Afghanistan. Furthermore, based on Security Council Resolutions 1363 and 1973, which declared the US' right to self-defence and were adopted by a unanimous Security Council and supported unanimously by the General Assembly, it is likely that many states did not see the war as illegal or controversial and therefore did not comment on it. It is thus safe to say that by this quantitative measure the new norm reached the tipping point, as only six states opposed the war and 90 states explicitly supported it. In other words, the war was supported by almost 94 per cent of the 96 states that expressed their view regarding the Afghanistan war. Put differently, out of the 190 UN member states 47,4 per cent explicitly supported the war. Hence, also by this measurement the new norm reached the tipping point.

7.3.2.2. International and regional organisations

Representing the states of international society the Security Council supported the war in Afghanistan thereby bestowing it with legitimacy. On behalf of the Security Council the Council President issued a press release after the invasion, expressing the Security Council's support to the war (UN doc. SC/7167). Although the Security Council over time became very much politically and humanitarianly involved in the Afghanistan war, any council meetings discussing the justness of the war never took place and were never demanded by any of its members, as was the case when the US bombed Afghanistan and Sudan in 1998. This clearly indicates that all members of the Security Council supported the war and the American claim of a right to self-defence. Moreover, the UN Security Council further legitimised the war when it authorised deployment of an International Security Assistance Force, ISAF, to help secure primarily Kabul and its surrounding areas (UN doc. S/Res/1386 adopted on 20 December 2001).[43] Many states from different parts of the world contributed with military personnel, equipment or other resources to ISAF over the years, making the war in Afghanistan a multinational rather than an American war, which highly increased the legitimacy of the intervention.[44]

The greatest support to the US and UK intervention in Afghanistan came from the Western regional organisations, which in explicit ways expressed and showed their support to the war. NATO, which immediately after the 9/11 terrorist attacks invoked article 5 of the Washington Treaty and thus declared that the attack on the US was an attack on all NATO allies, was very supportive. On 8 October, the Secretary General of NATO, Lord Robertson, said that all NATO allies fully supported the actions of the US and UK

[43] On 11 August 2003 NATO assumed leadership of ISAF. In October 2003, the UN Security Council adopted resolution 1510, which extended ISAF's mandate to cover all of Afghanistan, not only Kabul and surroundings (see http://www.isaf.nato.int/ history.html).

[44] Because the contributions from the states vary over time and type, an exact overview over the military support to the intervention has been difficult to find. However, lists from the Bush administration shows that by May 2002 37 states provided some sort of military assistance to the war in Afghanistan and the 'war on terror' in general (Department of Defense, 2002); that over time 70 nations in various ways have supported the 'war on terror'; and that 21 nations have deployed more than 16,000 troops to the US Central Command's region of responsibility (United States Central Command: see http://www.centcom.mil/en/countries/coalition/).

and that the alliance would provide military assistance as long as necessary (NATO, 2001). During the next two months Canada, France, Australia, Germany and the Netherlands each notified the Security Council that they would provide military assistance to the US, while New Zealand indicated that it would do so. When doing so, they all invoked Article 51 of the UN Charter saying that the actions were in accordance with their 'inherent right of individual and collective self-defence' (Canada see UN doc. S/2001/1005; France see UN doc. S/2001/1103; Australia see UN doc. S/2001/1104; Germany see UN doc. S/2001/1127; The Netherlands see UN doc. S/2001/1171; New Zealand see UN doc. S/2001/1193). Over time, almost all 19 NATO states had forces directly involved in 'Operation Enduring Freedom'. With this support and the rather quick decision to send military assistance, NATO signalled to other states that the intervention was in accordance with international norms and the right to self-defence and thereby increased the legitimacy of the intervention.

Like NATO, the European Union (EU) was very supportive of the war. In a letter to the Security Council, the EU member states and neighbouring countries associated with the EU[45] expressed their full support of the war and stressed that the war was a legitimate act of self-defence. They furthermore supported the American and British claim that Osama bin Laden and Al Qaeda were responsible for the attacks arguing that all information pointed clearly and convincingly to them (UN doc. S/2001/967). After a conference on combating terrorism (Warsaw Conference, 6 November 2001) Central, Eastern and South-Eastern European countries additionally declared their full support to the war in Afghanistan (UN doc. S/2001/1142).

Other regional organisations explicitly expressed their support as well. Representing Central and South American states and some Caribbean states, the Organisation of American States (OAS) and the Rio Group fully supported the war. In a joint statement, the organisations declared that they fully supported 'the measures being applied by the United States of America and other states in the exercise of their inherent right of individual and collective self-defense' (OAS, 2001; see also UN doc. S/2001/1091).

It may not be surprising that NATO, EU and the OAS supported the US intervention in Afghanistan as they are traditional allies of the United States. It is more remarkable that other regional organisations representing other parts of the world also supported the war, or at least abstained from criticising it. As

[45] Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, the Czech Republic, Cyprus, Malta and Turkey, Iceland, Liechtenstein, Norway and Switzerland.

noted by Ratner, the Organization of the Islamic Conference (OIC), the Organization of African Unity (AU), and the Association of Southeast Asian Nations (ASEAN) all refrained from criticising the US use of force (Ratner, 2002: 910). Instead they engaged enthusiastically in the common debate on combating terrorism, each adopting various declarations and policy documents. One example is the declaration adopted by a group of 27 African states, which emphasised their support to UN Security Council Resolutions 1368 and 1373, but did not comment on the war in Afghanistan (UN doc. S/2001/1021). Only some hesitation was expressed by OIC, which declared that it in general supported the war against terrorism and the view that terrorism is a crime, but stressed that this should not be a pretext for aggression against Islamic states (UN doc. S/2002/362). Furthermore, leading Muslim states, for example Qatar and Saudi Arabia, showed their support to the war by providing access to their airspace and facilities (Murphy, 2002: 49).

7.3.2.3. Great powers

In the process of norm evolvement, great powers must support an emerging norm in order for that norm to reach the tipping point resulting in norm cascade. We have already established that the European great powers such as France and the UK supported the new norm and its manifestation in the Afghanistan war and that the latter even took the position as a strong norm leader standing side by side with the US in the war against Taliban. But what about other great powers such as China and Russia, did they support the war in Afghanistan as well?

Whereas China and Russia opposed the American use of force against Afghanistan in 1998, both states expressed strong support for the war in 2001 in policy statements and actions. In a joint statement from Russia, Tajikistan and the Islamic State of Afghanistan to the UN Secretary-General, Russia declared that it supported the American war to remove the Taliban regime and confirmed its readiness to support Afghanistan in its struggle against Taliban (UN doc. S/2001/1018; UN Yearbook 2001: 260). Russia showed this support militarily as well, as it deployed, among other things, three helicopters to support US-led combat operations (see http://www.centcom.mil/en/russia/). China did not provide military assistance, but it supported the war against Taliban. Together with Russia it participated in the so-called 'six plus two group', whose main task was to help establish a transitional administration in Afghanistan. The group consisted of the states bordering Afghanistan (China, Iran, Pakistan, Tajikistan, Turkmenistan and Uzbekistan) plus Russia and of course the United States (see UN Yearbook,

2001: 260). By participating in this group China and Russia indirectly contributed to the legitimacy of the war, as they signalled support of the war and regime change in Afghanistan.

While supporting the US' 'war on terror', China also stressed that this war was not restricted to the US alone. According to China, other members of the Security Council had problems with terrorism as well. More specifically, China mentioned the 'East Turkestan' terrorist forces, which, according to China, on numerous occasions had launched various kinds of terrorist activities in China and other countries. China also warned about the risk of double standards in the 'war on terror' stressing that all kinds of terrorism are equally bad:

> China believes that the fight against terrorism is a contest between peace and violence. We oppose linking terrorism to any specific religion or ethnicity. China also believes that there should be no double standards with regard to counter-terrorism. The international community should take a common stand against all forms of terrorist acts, condemn them in unison and carry out a resolute fight against them (UN doc. S/PV.4413).

This Chinese note on double standards was backed by Russia, who stressed that there can be 'no bad or good terrorists, whatever slogans they hide behind. The war against them in any part of the world must be waged robustly and decisively' (ibid.). The Russian and Chinese support to the new norm and its manifestation in the war in Afghanistan thus came at a cost, as both countries now reserved the right to fight their own 'wars on terror'. However, this was a price the US and its allies obviously were willing to pay, as China's and Russia's comments met no opposition.

7.3.2.4. Vulnerable states

For an emerging norm to reach the tipping point it must not only be supported by great powers and international and regional organisations but also by so-called vulnerable states. Recall from Chapter 3 that vulnerable states are states that have a stake in the adoption of the norm. In this study vulnerable states are thus states that are more likely than other states to be 'victims' of the Bush administration's new norm, i.e. states that traditionally have been associated directly or indirectly with terrorism, for example some Middle Eastern countries like Iraq, Iran, Syria, Pakistan and Libya or other 'outlaw' states like North Korea and Sudan.

As written above, the new norm was initially supported by many Middle Eastern states and their support did not fade with the war in Afghanistan. Only a handful of states opposed the war. Iraq remained very critical, send-

ing harsh letters to the Secretary-General on the subject. According to President Saddam Hussein, the war in Afghanistan was nothing more than 'brutal aggression' (UN doc. S/2001/1034). Sudan and North Korea joined Iraq in its criticism of the war saying that the attack on the people of Afghanistan for the acts of terrorists was unjustified (Ratner, 2002: 910). Critical, but more nuanced, voices were also heard from Cuba, Iran and Syria. Expressing its general support to the fight against terrorism, Cuba warned that the 9/11 terror attacks should not be used in the name of justice to recklessly begin a war that could 'unleash an endless carnage of innocent victims' (UN doc. S/2001/1037). While Cuba was concerned about the general consequences of the new norm for innocent people, Iran was more concerned with the justness of the specific war and questioned the link between Al Qaeda and the 9/11 terror attacks. As stated by the Iranian foreign minister: 'Under the UN law [the United States has] the right to defend itself, but first those behind the attack should be identified and then punished. (…) No evidence has been offered to show [bin Laden's] implication in the attack. If there is such evidence it should be offered to the people' (cited in Ratner, 2002: 910). As Ratner points out, Iran was thus more concerned about the evidence against Al Qaeda than the new norm allowing the use of military force as self-defence against states harbouring terrorists. Syria viewed the war through the prism of the Arab-Israeli dispute, implicitly accusing the US of double standards. It condemned the US for not taking stronger issue with Israeli violence and blamed it for not seeking greater international approval but instead launching a unilateral operation that should have been a UN operation (New York Times, 2001: 9 October).

Pakistan, usually regarded as an 'outlaw' state, was a great supporter of the US 'war on terror'. As noted, it quickly indicated its support to the US and its full cooperation in the 'war on terror'. When the US intervened in Afghanistan, the initial verbal support was supplemented with military assistance. According to the US Department of Defense, Pakistan has provided basing and overflight permission for all US and coalition forces and has deployed a large number of troops along the Afghan border to support the operation (Department of Defense, 2002).

To reiterate, opposition to the war was only expressed by a few of the vulnerable states. Some were critical of the war but did not comment on the new norm justifying it. They criticised the war for being unjust; either lacking evidence, as argued by Iran, for being biased, as argued by Syria, and for hurting innocent people as argued by them all. Only Iraq and Cuba criticised the new norm and the fact that it allowed the use of force against states harbouring terrorists – the former using a harsher rhetoric than the latter. Thus,

only two of the vulnerable states actually opposed the content of the new norm. However, because these two states are traditionally seen as rather extreme by other states, one can argue that their normative weight is low and their criticism of the new norm most likely did not have much impact on the other states. The war in Afghanistan was thus not only supported by a vast majority of world's states, many international and regional organisations but also by some of the supposedly vulnerable states. By these measures, the new norm thus undoubtedly reached the tipping point enabling it to continue its evolvement towards becoming a new legitimate practice.

7.4. Norm cascade

Having established that the new norm reached the tipping point, the next question is whether it began cascading as well. As suggested in Chapter 3, one sign of cascading is that a new norm is bestowed with external legitimacy, which means that it is accepted as a new legitimate practice by a majority of the states of international society. As written in Chapter 4, a good place to look for the legitimacy of a new norm is similar incidents where states use the new norm to justify their behaviour, for example other post 9/11 incidents, where states have used force against states harbouring terrorists in response to terrorist attacks or have claimed a right to do so.

Since 9/11 many terror attacks have taken place around the world. In 2009 alone approximately 11,000 large and minor terrorist attacks occurred in 83 states, most of them in Asia and the Middle East. This was a small increase of about 6 per cent compared to 2008 (National Counterterrorism Center, 2009: 9). Hence, terrorism is a rather common phenomenon, but most terrorist acts are relatively small-scaled and most take place in already troubled parts of the world. Compared to 9/11, the Madrid bombings in 2004 and the London terror attack in 2005, they have not attracted a lot of attention. Furthermore, they have rarely resulted in any claims about a right to self-defence against others states and therefore they are not particularly relevant to this analysis. Rather, focus is on terror attacks where the attacked state afterwards has claimed the right to use force as self-defence against states harbouring the responsible terrorists. The interesting question is whether third-part states accepted these claims like they did in the case of 9/11 and the Afghanistan war. While claims of a right to use force against states harbouring the guilty terrorists in response to terror attacks have been raised a few times since 9/11, it has only been put into force twice by Israel.

In the following, I first analyse the situations of the verbal claims of a self-defence right and the international reactions to these claims before going on

to analyse the reactions to two incidents, where force actually was used. As another indicator of norm cascade, I finally analyse whether President Obama also supports the new norm.

7.4.1. Verbal claims of a right to use force in self-defence against states harbouring terrorists

Since 2001 only a few states, Israel, Russia and India, have verbally claimed a right to use force in self-defence against states harbouring terrorists in response to grave terrorist acts.[46]

7.4.1.1. Israel

In response to a series of terror attacks in November 2002, Israel claimed a right to use force as self-defence. Two attacks took place in Kenya against Israeli tourists; shoulder-launched missiles were targeted at an Israeli passenger plane departing from Mombasa in Kenya with 261 passengers and 10 crew members on board, but missed their target. Only minutes after in another city, Kikambala, a suicide bomb was detonated outside a hotel mostly frequented by Israeli tourists, killing 13 Kenyans and 3 Israelis. In addition, a terrorist attack by Palestinian gunmen from the al-Aqsa Martyrs Brigade took place in Israel against people waiting to vote outside a polling station in the city Beit Shean (UN Yearbook, 2002: 51). In a letter to the UN about the terror attacks, Israel referred to its right and duty to self-defence, but without invoking article 51 (UN doc. S/2002/1308). But according to Israeli Prime Minister Sharon, the three attacks showed that Israel was a part of the ongoing 'world war against terror', which should be a 'practical, realistic and uncompromising war against all the terror organizations and those who

[46] Even in the two incidents that most resemble the 9/11 terror attack in the sense that they were large-scale attacks against Western capitals, the attacked states did not claim the right to use force as self-defence. These incidents are the 2004 Madrid bombing, killing almost 200 people and wounding 1800, and the London terror attack in 2005 killing approximately 50 people and injuring 700. In neither case did Spain or Great Britain invoke a right to use force as self-defence even though the attacks were unanimously condemned by the Security Council, which also reaffirmed Resolution 1373 (see UN docs. S/RES/1530; and S/RES/1611). A likely reason is that because both Spain and UK were participating in the wars in Afghanistan and Iraq, the two terror attacks were seen as a part of the ongoing war with the terrorists of the Al Qaeda network and thus not as new incidents requiring new wars. In other words, the two incidents neither confirm nor disconfirm whether the new norm was cascading.

harbor them – anywhere and at any time' (Sharon cited in New York Times, 2002: 29 November). Sharon thus echoed President Bush's rhetoric and the new norm of use of force against states harbouring terrorists. Since 9/11, Sharon had several times equalled the Bush administration's 'war on terror' with the Israeli conflict with Palestine, arguing that Yasser Arafat was protecting Palestinian terrorists in the same way that the Taliban protected Osama bin Laden and Al Qaeda. This was rejected by the Bush administration, which was careful, however, not to dismiss any Israeli claim about a right to self-defence (New York Times, 2002: 29 November; New York Times, 2002: 3 December).

In early December 2002, Al Qaeda claimed responsibility for the terror attacks in Kenya and on 13 December the UN Security Council adopted Resolution 1450, which by the vote 14-1 in the strongest terms condemned the attacks in Kenya (UN doc. S/RES/1450).[47] However, while condemning 'other recent terrorist acts in various countries', which is a standard expression by the Council, the Resolution did not mention the terrorist act in Israel. This indicates that while accepting the attacks in Kenya as acts of international terrorism and consequently as a threat to international peace and security, the Israeli conflict with Palestine is not regarded as a part of the global war on terrorism but is seen as a different conflict requiring other and different solutions. However, the adoption of the resolution was by itself quite remarkable, as it is the first UN resolution to explicitly condemn terrorism against Israeli victims, which shows that the political response to terrorism is no longer as controversial as before 9/11. Furthermore, the incident shows that by referring to its right to self-defence Israel supported the new norm, even though it did not act upon it. Although the Security Council did not reaffirm Israel's right to self-defence in Resolution 1450, the Israeli claim was not opposed by any state, which indicates that the new norm was beginning to cascade.

7.4.1.2. Russia

Russia has several times claimed a right to use force as self-defence against states harbouring terrorists. Using the conflict with Chechnya, the Russian President, Vladimir Putin, included Russia in the global war against terrorism by redefining the Chechen conflict from an internal issue to a case of international terrorism saying that Chechen terrorists were collaborating with Al

[47] Only Syria voted against the resolution arguing that it lacked balance because Israel had also committed terrorist acts (UN doc. S/PV.4667).

Qaeda. The new conflict label enabled Russia to broaden the conflict and to look for Chechen terrorists hiding outside the Russian Federation. In February 2002, Russian Defence minister, Sergei B. Ivanov, thus pointed to Georgia referring to the Pankisi Gorge in Caucasus Mountains bordering Georgia and Chechnya as a 'mini-Afghanistan on Russia's doorstep' (Ivanov cited in New York Times, 2002: 28 February).

After a series of small military clashes between Russia and Georgia over the year, President Putin sharpened the tone in a statement to the UN Security Council on 11 September 2002. He warned that if Georgia was unable to establish a security zone in the border area; continued to ignore Security Council resolution 1337 (2001); and did not put an end to the attacks on Russian territory, Russia would be entitled to act in accordance with Article 51 of the UN Charter, 'which lays down every Member States' inalienable right of individual or collective self-defence' (UN doc. S/2002/ 1012). President Putin thus echoed the rhetoric of President Bush arguing that also Russia had a right to use force as self-defence against states harbouring terrorists – in other words against Georgia. In response, Georgia said that it was 'extremely alarmed' by the statement, which contained 'an overt threat to use military force against a neighbouring sovereign State' (UN doc. S/2002/1035). Georgia was surprised by the accusations since Russia had been informed about all arrangements planned and conducted by the Georgian military and law-enforcement agencies to improve the situation in the Pankisi Gorge and the Chechen segment of the Georgian-Russian border. While Georgia respected Russia's territorial integrity and right to protect its citizens, President Putin's statement and the subsequent assignments to Russian law enforcement agencies could be regarded only as a threat of aggression. Therefore, Georgia did not accept Russia's 'liberal, if mildly put, interpretation of Article 51 of the United Nations Charter', which it found 'totally unacceptable' (ibid.).

Even though President Putin was echoing President Bush and thus justified the Russian threats on the basis of the new norm, Russia did not win broad support in Europe or the US. The case was not discussed in the Security Council, but Western state leaders indicated that they did not support the Russian interpretation of Article 51. The US, which early that year had sent special operations forces to train and equip Georgian troops to fight terrorists located on Georgia's territory, expressed support to Georgia. According to Secretary of State, Colin Powell, the Pankisi Gorge was within Georgian sovereignty and thus a Georgian issue (New York Times, 2002: 13 September). The incident shows that although the new norm on the use of force against states harbouring terrorists guilty of terrorist acts in general was endorsed by the majority of the states of international society, there were limits to this

norm. It can be argued that other states did not see Georgia, which obviously was trying to eliminate the terrorists on its territory with some help from the US, as a legitimate candidate for the use of force. Evidently, for the new norm to be invoked a state must be harbouring terrorists and be unwilling to do something about it; otherwise the use of force may be seen as illegitimate by the states of international society.

President Putin restated the claim of a right to use force as self-defence one month later in response to the seizure of a theatre in Moscow and this time the other states supported the claim. On 23 October 2002 armed Chechen rebels took over a theatre and held approximately 800 people hostage. Demanding an end to the war in Chechnya, the rebels threatened to kill the hostages if the demand was not meet. On 24 October the Security Council unanimously adopted Resolution 1440, which condemned the hostage-taking as an act of international terrorism (UN doc. S/Res/1440). Moreover, it demanded the 'immediate and unconditional release of all hostages', but the hostage-takers did not comply. Two days later, Russian troops stormed the theatre, resulting in the death of more than 100 hostages and 50 hostage-takers (UN Yearbook, 2002: 51). Speaking in the aftermath of the 57 hours siege of the theatre, President Putin said that Russia was prepared to strike at international terrorist groups in any country harbouring them: 'Russia will respond with measures that are adequate to the threat to the Russian federation, striking on all the places where the terrorists themselves, the organizers of these crimes and their ideological and financial inspirers are.' 'I stress,' Putin added, 'wherever they may be located' (Putin cited in New York Times, 2002: 29 October). In contrast to the Russian threat against Georgia in September, which was opposed by the Bush administration, the administration now supported the Russian claim of a right to go after terrorists wherever they hide (ibid.). This position was also supported by the NATO Secretary-General, Lord Robertson, who acknowledged that there were international terrorists present in Chechnya and thus expressed his support for Russia's military actions against Chechen rebels. However, he implicitly limited Russia's right to use force to Russia's own borders: 'Russia has a right to deal with breaches of law and order on its own sovereign territory' (cited in New York Times, 2002: 12 November). The EU also expressed its support to Russia in its fight against terrorism, but asked for moderation saying that a military action against Chechnya would not be the best long-term solution to the problem. Instead, the EU encouraged Russia to negotiate with responsible Chechen leaders to try to find a political solution (ibid.). Despite EU's request to solve the conflict with peaceful means, the EU did not oppose the Russian claim of a right to self-defence. The incident thus shows that the new norm was still

standing and that a state was given the right to confront terrorists and hosting states in response to terrorist attacks.

7.4.1.3. India

In response to a series of coordinated terror attacks across Mumbai killing almost 200 people in late November 2008, Indian Prime Minister Manmohan Singh immediately after the attacks threatened to use force as self-defence, saying that the attackers without doubt were based outside India. The Prime Minister promised to use the 'strongest possible measures' to counter future attacks and warned India's neighbours that 'the use of their territory for launching attacks on us will not be tolerated and that there would be a cost if suitable measures are not taken by them' (Singh quoted in CNN, 2008: 27 November). The threat was particularly aimed at Pakistan, as it was suspected and later proved that the terrorists were Pakistanis. However, the Indian government never carried out its threat, probably because it found the consequences too dangerous; both states are nuclear powers and Pakistan had warned that it would regard any military strike by India as a declaration of war.

The attacks were condemned by state leaders from all over the world. While not many of them explicitly said that India had a right to use force, none of them opposed such a right as they had done in the case of the Russia-Georgia conflict described above.[48] Nevertheless, the Indian threats of force were explicitly backed by a few states. British Prime Minister Gordon Brown said that the 'outrageous' attacks would be met with a 'vigorous response' promising India that the UK 'stands solidly with [the Indian] government as they respond, and to offer all necessary help' (quoted in ibid.). A similar statement was made by Russian President Dmitry Medvedev, who said that Russia supported 'resolute actions of the Indian government' (ibid.). Also President-elect Barack Obama supported the Indian claim of a right to use force (ibid., see also section 7.4.3). Hence, India's claim about its right to use force as self-defence was explicitly supported by a majority of the great powers.[49] The use of force as self-defence against states harbouring terrorists guilty of grave terrorist acts was still considered legitimate in 2008, which indicates that the new norm continued to cascade.

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[48] For a list of international reactions to the terror attacks see CNN (2008: 27 November).

[49] While strongly condemning the attacks and expressing his sincere condolences to the Indian people, Chinese Prime Minister Wen Jiabao was silent on the matter of self-defence (see CNN, 2008: 27 November).

7.4.2. Use of force as self-defence in response to terrorist acts

Israel is the only state which actually has carried out claims of a right to use force as self-defence in response to terrorist acts. In the following two incidents are analysed, where Israel has used force against Syria and Lebanon, respectively, in response to terrorist acts.

The first incident took place in early October 2003, where Israel launched an air strike against Syria in response to a suicide bombing the previous day at a restaurant killing 19 Israelis in the Israeli city Haifa. The strike was directed against a civilian site near the village of Ein Saheb and caused physical damage. Syria brought the incident to the Security Council saying that Israel had violated Lebanese and Syrian airspace and committed an act of aggression by launching missiles inside Syrian territory (UN doc. S/PV.4836). Israel justified the air strike as an act of self-defence against Syria, which, according to the Israeli UN delegate, had encouraged terrorist acts against Israel by providing 'safe harbour, training facilities, funding and logistical support' to terrorist organisations. 'For Syria to ask for a Council debate', the delegate continued, 'is comparable only to the Taliban calling for such a debate. It would be laughable, if it was not so sad'. Referring to Security Council Resolution 1373, which makes clear that states must prevent terrorism and refrain from supporting terrorism, Israel invoked its right of self-defence saying that its 'measured defensive response … against a terrorist training facility' was 'a clear act of self-defence in accordance with Article 51 of the UN Charter' (ibid.).

The Israeli claim, which was the first real application of the new norm since 2001, was nevertheless dismissed by a large majority of the Security Council members. Only the US was somewhat supportive of Israel. While it conveniently avoided commenting on the legality of the Israeli use of force, the US in a brief statement said that Syria had to stop harbouring terrorist groups. Hence, without saying so the US supported the Israeli action against Syria. However, all other Security Council members – namely, Spain, the UK, Russia, China, Germany, France, Bulgaria, Mexico, Angola, Guinea, Pakistan, Chile and Cameroon – disagreed with Israel that the terrorist act in Haifa justified an act of self-defence. While condemning the act, they also expressed condemnation of the Israeli response calling it a clear violation of international law and an escalation of the Middle East conflict. Hence, they did not see the terrorist attack in Haifa and the Israeli response as an independent incident but as an integrated part of the Middle East conflict in which one act of violence would lead to another. As the French UN delegate put it: 'We condemn violence from wherever it may come. It is unacceptable and po-

litically ineffective, kills innocent people, obscures the political horizon and can only aggravate the crisis' (ibid.). In other words, the Israeli use of force was not a Resolution 1373 situation giving rise to self-defence. So while the Security Council still supported the new norm, it saw the Israeli use of force as a misuse of it.

The second incident, which was between Israel and Lebanon, took place in the summer of 2006. The conflict is commonly said to take its beginning on 12 July 2006 when Hezbollah launched a cross-border attack on Israeli forces in northern Israel, killed eight Israeli soldiers and abducted two (Gray, 2008: 237). According to Israel, Lebanon was responsible for these acts, which constituted a 'clear declaration of war'. Israel invoked Article 51 of the UN Charter to 'exercise its right of self-defence when an armed attack is launched against a Member of the United Nations' (UN doc. S/2006/515). In response to the attack, Israel mounted a number of extensive attacks on Lebanon, which involved massive destruction, killed one thousand civilians, injured more than 3,500 and displaced almost a million people. Hezbollah responded by firing hundreds of rockets into Israel, killing 50 civilians and 114 military people (Gray, 2008: 238).

In contrast to the 2003 incident, where Israel also justified its use of force as self-defence in response to a terror attack, a majority of the states in the Security Council this time initially supported Israel's claim to self-defence. Explicit support was expressed by Argentina, Japan, Tanzania, Peru, Denmark, Slovakia and Greece, who all recognised Israel's right to self-defence, while Congo expressed a more neutral position condemning the use of force by both Israel and Hezbollah (UN docs. S/PV.5489 and S/PV.5493). However, these states also stressed that Israel had to exercise its self-defence right in accordance with international law and the principles of the UN Charter, as showed by the following quote by the Danish UN delegate:

> Denmark is unwavering in its recognition of the right of States to self-defence – in this case Israel's. However, care must be taken to ensure that the exercise of that right is proportional and measured. All actions must conform to international law and must be carried out with due respect for the obligations of States to protect civilians and civilian infrastructure in times of war. Denmark is gravely concerned about the wide-scale damage caused by Israel's actions to civilian life and infrastructure (UN doc. S/PV.5489).

Hence, while recognising Israel's principle right to self-defence, these states also expressed concerned about the proportionality of the Israeli use of force.

A majority of the great powers seemed also sympathetic to Israel's claim to self-defence. France, the UK, the US and Russia all explicitly recognised

Israel's right to self-defence, however like the above states they also strongly emphasised that the use of force had to be proportionate and in accordance with international law (UN docs. S/PV.5489 and S/PV.5493).[50] Especially Russia expressed concern about the scale of the Israeli use of force, which according to Russia had gone 'far beyond a counter- terrorist operation' (UN doc. S/PV.5493). Only China, together with Qatar and to a lesser extent Ghana, condemned Israel's use of force (UN doc. S/PV.5489).

The conflict lasted for a month with increasing violence and the initial support to Israel was replaced by a condemnation of Israel's use of force as disproportionate by many states. While the UK, Denmark and Greece only called on Israel to show restraint; France and Argentina as well as non-Security Council members such as India, Brazil, New Zealand, Turkey and many Arab states condemned Israel's excessive use of force (UN doc. S/PV.5489; Gray, 2008: 241). Hence, the international disagreement in this case did not regard the legality of the use of force against states harbouring terrorists, but was more a question of proportionality. The incident thus indicates that the new norm was cascading, as a majority of the states recognised Israel's principle right to self-defence against Hezbollah targets in Lebanon.

7.4.3. President Obama and the use of force against states harbouring terrorists

So far, President Obama has not devoted much attention to the new norm on the use of force against terrorist-harbouring states. Rather than spending time justifying it and its application in the Afghanistan war, the President seems to take for granted the right to use force against states harbouring terrorists. Speaking of the Afghanistan war, he has mostly referred to it as a just war, which was legally and legitimately conducted in the name of self-defence: 'The war began only because our own cities and civilians were attacked by violent extremists who plotted from a distant place, and it continues only because that plotting persists to this day' (Obama, 2010: 22 May). Nevertheless, in a speech on the way forward in Afghanistan President Obama in more explicit terms upheld the new norm saying that 'the use of force against Al Qaeda and those who harbored them' was authorised by

[50] While France and the UK explicitly recognised Israel's right to self-defence at a Security Council meeting on 14 July 2006 (UN docs. S/PV.5489), the US and Russia were more neutral in their statements at this meeting. But at a second Security Council meeting on 21 July, they both explicitly recognised Israel's right to self-defence (UN doc. S/PV.5493).

the US Congress. 'An authorization', President Obama added, 'that continues to this day' (Obama, 2009: 1 December). However, Obama delimited the boundaries of the new norm to include only the use of force against states not willing to cooperate to eliminate the terrorists: 'Under the banner of this domestic unity and international legitimacy – *and only after the Taliban refused to turn over Osama bin Laden* – we sent our troops into Afghanistan' (ibid.; emphasis added). Hence, President Obama followed the delimitation of the new norm set by the states of international society in the 2002 Georgia-Russia incident, where Russia threatened to use force in self-defence against Georgia to eliminate Chechen terrorists in the Pankisi Gorge in the Georgian part of the Caucasus Mountains. But, because Georgia unwillingly harboured these terrorists and did everything in its power to eliminate them, the other states did not find the Russian threats of force against Georgia legitimate in this situation.

While President Obama supports the new norm verbally, it remains to be seen whether he also supports a military application of the new norm either by invoking it himself or by supporting another state invoking it. Since Obama's election as President of the United States, only one incident comes close to an actual application of the new norm. Following the Mumbai terror attacks in India in November 2008, President-elect Obama responded to the terror attacks by saying that India had the right to protect itself. In an official statement initially following the attacks, the President-elect only condemned the attacks, which, according to Obama, demonstrated 'the grave and urgent threat of terrorism' (CNN, 2008). However, a few days later at the presentation of his national security team Obama tacitly endorsed India's right to self-defence when asked whether India could follow the same policy towards Pakistan that Obama had advocated during his election campaigns, namely bombing terrorist camps in Pakistan if there was strong evidence of their presence and if Pakistan's government refused to act on it. Not wanting to comment on the specific case, Obama said that sovereign states had the right to protect themselves. However, he did not encourage India to invoke this right but instead advised India to wait and see, letting the investigators reach definite conclusions about the responsibility of the attack and thus give Pakistan a chance to cooperate in eliminating the terrorists (The Times of India, 2008). Hence, by tacitly recognising India's right to self-defence in response to the terror attacks, President Obama upheld the new norm on the use of force against states harbouring terrorists.

7.4.5. Signs of norm cascade?

The analysis of the above incidents shows that the new norm is cascading in the sense that states exposed to terror attacks invoke it by claiming their right to self-defence. The claim is in many instances accepted or at least not opposed by the other states. Thus, it may be argued that rhetorically the discourse of the new norm has cascaded. However, when it comes to the implementation of the norm the interpretation is stricter as shown in the Russia-Georgia incident and the Israel-Syria incident. Other states do not automatically accept justification of use of force with the presence of terrorists in another state. While the Israeli-Syria incident was seen as a part of the long-lasting Middle East conflict and therefore dismissed as a Resolution 1373 situation, the Russia-Georgia incident and the Israel-Lebanon incident illustrate the boundaries of the new norm. Arguably, for the new norm to be legitimately invoked three conditions must be fulfilled: an actual, grave terror act must have been committed; the state harbouring the terrorists must be unwilling to help eliminate the terrorists and the use of force must be proportionate. If these requirements are fulfilled, then the use of force is seen as legitimate by a majority of the states of international society and in this sense the new norm has cascaded.

7.5. Norm institutionalisation

As shown in the previous sections, the evolvement of the new norm has been quite successful. But, recall from Chapter 3 that for a new norm to be a fully established norm of international society it must be legally and politically institutionalised thereby giving the states new responsibilities or new rights. This final section thus investigates whether the new norm has been legally and politically institutionalised to determine whether it has concluded the final phase of the norm change process.

7.5.1. Legal institutionalisation

To assess whether the new norm has become legally institutionalised we must be able to identify some changes in international law. As written in Chapter 5, the body of international law consists of both treaty law and custom international law and hence a change must have occurred in one or both.

Starting with treaty law, a significant increase in the number of Security Council resolutions on terrorism has taken place since 11 September 2001. Of particular importance in this regard are Resolution 1368 and Resolution

1373. Besides recognising that the 9/11 terror attack invoked a right to self-defence and that it constituted a threat to international peace and security, Resolution 1368 and, in particular, Resolution 1373 imposed a set of binding obligations upon the states requiring them by various means to eliminate terrorism. To secure the compliance of all states Resolution 1373 established a Counter-Terrorism Committee (CTC) to monitor compliance and facilitate technical assistance to states to meet the new obligations. Invoking Article 25 of the UN Charter, Resolution 1373 furthermore made the demands of the resolution mandatory for *all* UN member states. As noted by Stiles, this use of Article 25 was unprecedented in scope and magnitude, as the Security Council historically has avoided imposing binding obligations on all member states. Resolution 1373 thus constitutes the 'first-ever legislative acts of the Security Council' (Stiles, 2006: 46). Its demands are legally binding and enforceable upon all member states of the Council, including those that did not participate in the decision making (ibid.). In other words, Resolution 1373 created legal obligations for states by explicitly prohibiting them from supporting terrorists in any way, including providing safe havens for the terrorists (see paragraph 2 of Resolution 1373). Hence, although the Resolution did not explicitly say that the use of force against states harbouring terrorists was legal, it is now considered illegal for a state to harbour terrorist. If a state does not comply with these legally binding obligations, the Security Council has the right to impose Chapter VII measures against it. The Resolution thus shows the will of states to make far-reaching changes in international law in response to the threat from terrorism.

Regarding customary international law, the Bush administration's norm challenge certainly changed how states interpret and apply the rules on self-defence. The Afghanistan war is a key case, as it effectively manifested the new norm allowing the use of force against states harbouring terrorists. However, international lawyers and scholars disagree whether the war created a new legal precedent allowing the use of force against states harbouring terrorists. More specifically, they disagree whether the US invasion of Afghanistan was legal and thus whether customary international law changed as a consequence of this war. Some argue that the UN Security Council *did not* authorise the war because the recognition of a right to self-defence was not stated in the operative paragraph of Resolutions 1368 and 1373 but only in their preambles. Because of this, the argument goes, the Security Council did not authorise the war and hence no precedent was created (see Ulfstein, 2003 and Charney, 2001). Others, dismissing this argument, say that the war *was* authorised by the Security Council and thus that 'the right of self-defence now includes military responses against States which actively sup-

port or willingly harbour terrorist groups who have already attacked the responding State' (Byers, 2002: 409-10; see also Franck, 2001; King, 2002-2003; Arai-Takahashi, 2002).

The latter position is more convincing than the former. Customary international law is based on state practice and state opinions and since almost every state of international society supported resolutions 1368 and 1373 and further supported the US war against Afghanistan, customary international law *did* change as a result of the Afghanistan war. Furthermore, while the debate about the legality of the Afghan war has been a matter of a juridical dispute, it has not been reflected in any political debate between the states. Only a few states have questioned the legality of the war, which is another sign that customary international law has changed. Hence, looking at state practice and state interpretation of international law, it is fair to conclude that the war against Afghanistan created a precedent legally institutionalising self-defence against states harbouring terrorist responsible for terrorist acts as a new legal exception to the general ban on the use of force.

7.5.2. Political institutionalisation

Political institutionalisation is reflected in policy documents, which are political declarations made by the states but unlike Security Council resolutions they are not legally binding. Since 9/11, terrorism has been a key focus point of the UN. Besides the many resolutions adopted on this subject by the Security Council, a large number of policy documents and policy declarations on counter-terrorism have been made as well. Interestingly, all these documents reproduce the discourse of the new norm placing responsibility on states harbouring terrorists. Key documents have been made by the General Assembly, but unlike Security Council resolutions, General Assembly decisions and resolutions are not legally binding. Instead they carry considerable political weight as they are signed by all 192 UN member states. At the 2005 World Summit, which was a follow-up to the UN's 2000 Millennium Summit, terrorism was referred to as 'one of the most serious threats to international peace and security', and all states were obligated to 'take appropriate measures to ensure that their territories are not used for such activities' (UN doc. A/RES/60/1). In 2006, the World Summit Resolution was supplemented with another milestone, namely General Assembly Resolution 60/288. This was a comprehensive global counter-terrorism strategy, which reaffirmed the responsibility of states to eliminate terrorism, stating that all states should 'refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and take appropriate practical

measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens' (UN doc. A/RES/60/288). The General Assembly resolution thus clearly reaffirmed states' responsibilities to fight terrorism in accordance with the new norm and like the Security Council resolutions on terrorism and counter-terrorism the policy documents of the General Assembly state the obligations of each state to counter terrorism and thus help define the boundaries of the new norm. They make explicit the actions a state must conform to in order not to be characterised as a 'state harbouring terrorists'. Put differently, if a terrorist act takes place and the state from which the terrorists originate has not fulfilled its obligations, it may be found guilty of harbouring terrorists and thus subject to the use of military force. This a clear sign that the new norm has become politically institutionalised.

Another sign that the new norm has been politically institutionalised and maybe even taken for granted, i.e. internalised, are reports by Secretary-General Kofi Annan[51] and his High Level Panel on Threats, Challenges and Change.[52] The reports discuss how the UN should handle the challenges of the 21st century, including the fight against terrorism, but interestingly they do not address the legality of the use of force against states harbouring terrorists. They discuss the other norm challenge by President Bush on preventive force, but they do not question the new norm on the use of force against states harbouring terrorists responsible for terrorist acts. It is simply not an issue and this indicates that the new norm is taken for granted even though it may be argued that it violates the *grundnorm* on non-intervention prohibiting states from intervening in the domestic affairs of another state.

To sum up, it is thus fair to say that the new norm has become both legally and politically institutionalised and in this sense it has completed its evolvement from a new norm to a new legitimate practice of international society.

7.6. Conclusion

Having gone through the five stages of norm evolvement, the analysis shows that the Bush administration successfully changed the norm on non-use of force and that the use of force against states harbouring terrorists guilty of terrorist acts now is considered a legitimate exception to the general ban on

[51] See 'In Larger Freedom', UN doc. A/59/2005

[52] See UN doc. A/59/565

force. The norm challenge and its manifestation in the Afghanistan war enjoyed broad support throughout the world. Some states explicitly expressed their support very clearly and some also provided military assistance to the US operation in Afghanistan, while others quietly supported the intervention. Non-Western great powers such as Russia and China supported the war, but their support was contingent on a right of *all* states to use force against states harbouring terrorists. By claiming this right, Russia and China thus indicated that the war in Afghanistan was not an exception to the rule but a new norm that had come to stay. Also many of the so-called vulnerable states, which supposedly have a higher stake in the adoption of the new norm, did not oppose the content of the new norm and the fact that it allowed the use of force against states harbouring terrorists. Instead, they criticised the war against Afghanistan for being unjust, lacking evidence of the responsibility of Al Qaeda or hurting innocent people. Only Iraq and Cuba actually opposed the content of the new norm, arguing that it may have dangerous consequences. To the extent that the new norm was criticised, the main concern was that abuse of the norm should be avoided, which was also the main reason for the broad rejection of Israel's claim of a right to use force against Syria in 2003. In the eyes of most states, this incident exemplified how the new norm could be used as a pretext for aggression and the Israeli use of force was thus condemned by all member states of the Security Council except the US.

How can we in theoretical terms understand this norm change? What has changed and what has remained the same? In theoretical terms, the Bush administration's norm challenge has resulted in a norm change, but not a *norm replacement*. The new norm has not replaced the norm on non-use of force; rather the change has taken place *within* the norm *adding* a new legitimate exception of the norm. In other words, President Bush was successful in adding a new exception to the norm on non-use of force allowing states to use force against states harbouring terrorists guilty of terrorist acts. However, as the Russia-Georgia 2002 incident and the Israel-Syria 2003 incident showed, a state must to invoke the new norm not only have been exposed to a grave terrorist act, but the state subject to the use of force must actively support or willingly harbour the terrorists. If it lives up to its international obligations stated in the many UN resolutions on counter-terrorism, the norm does not apply and hence the use of force is considered illegitimate.

A final question is why the other states accepted the US norm challenge, as the overwhelmingly positive reactions to the new norm are rather unusual in a historical context. Why did the US succeed in changing the norm now and not before 2001? In retrospect, the pre-2001 incidents may have

opened the window a bit for a norm change, so that the states of international society were more open to a norm change when Bush began acting as a norm entrepreneur. But what really changed in 2001 was the perception of the terrorism threat. The 9/11 terror attacks increased international concern about terrorism and almost all states found the US response to the attacks legitimate. Many states said in their solidarity statements after 9/11 that terrorism was no longer a domestic issue but a global threat that needed a global response. Hence, every state now had a responsibility and a plight to fight terrorists within their own borders and if they did not they were just as guilty of terrorism as the terrorists. In other words, the distinction between passive and active support to terrorists no longer exists, states harbouring terrorists without seeking to eliminate them are just as guilty as states directly sponsoring terrorists, and if a terror attack occurs the new norm allows the exposed state to use force in self-defence as protection against further attacks.

Chapter 8
Norm Challenge II: Preventive Force and the Iraq War

This chapter analyses the Bush administration's second norm challenge where President Bush once again tried to broaden the right to self-defence, this time by claiming a right to use preventive force against non-imminent, emerging threats. The President did not succeed in gathering support for this norm change and investigate why, the chapter analyses each stage of the norm change process to determine at which stage the norm challenge failed and the main reasons for this.

As in Chapter 7, the structure of this chapter follows the theoretical model of norm change. Part one of the chapter analyses how the norm challenge emerged focusing on the character of the norm challenge and the Bush administration's justifications. Part two analyses how the states of international society initially responded to this norm challenge. The third part of the chapter analyses whether the norm challenge reached the tipping point. Using the Iraq war as indicator it is shown that although 43 states supported the war the norm challenge failed to reach the tipping point and therefore did not meet the conditions for entering the third and fourth phase of norm change, i.e. norm cascade and norm institutionalisation. However, even if a norm challenge fails to reach the beginning point of norm cascade, it does not necessarily mean that it completely disappears from one day to another. The fourth part of the chapter thus analyses what happened to the norm challenge after the invasion of Iraq and the subsequent rejection of the norm challenge. Examining the status of the norm challenge after the Iraq war, I first investigate whether the Bush administration continued to advocate preventive force before turning to the practice of other states looking at whether they have invoked a right to use preventive force, indicating a delayed norm cascade after all. I then investigate how President Obama has responded to the norm challenge. Did he continue the Bush administration's policy or did he follow international opinion and rejected the use of preventive force to counter non-imminent threats? Finally, the fourth part discusses whether the norm challenge has had any effect on the legal status of preventive force.

8.1. The Norm Challenge

The preventive force norm challenge gradually evolved as a new policy of the Bush administration. First, it was only stated implicitly, then President Bush became more explicit but disguised the new policy of preventive force as pre-emptive force, and finally, in the fall of 2002, the administration explicitly claimed that article 51 of the UN Charter should be rewritten to include the use of force against non-imminent threats and thereby clearly contested the norm on non-use of force.

The norm challenge was first introduced in the President's State of the Union speech on 29 January 2002. Here, President Bush made clear that his administration would use all necessary tools to protect the American nation:

I will not wait on events while dangers *gather*. I will not stand by as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons (Bush, 2002: 29 January; emphasis added).

By saying that the administration would not wait on dangers to gather, President Bush implied that he was willing to use preventive force to counter threats from states possessing weapons of mass destruction (WMD). At a commencement speech at the United States Military Academy in West Point, New York, President Bush was more explicit and told the audience that the US could not defend America by hoping for the best: 'We cannot put our faith in the word of tyrants who solemnly sign nonproliferation treaties and then systematically break them. If we wait for threats to fully materialize, we will have waited too long' (Bush, 2002: 1 June). By arguing that the US should use military force against threats not yet fully materialised, President Bush indicated that the US was willing to use preventive force to counter these threats. However, the President did not use the term 'preventive force'; instead he referred to it as pre-emption:

> Our security will require transforming the military you will lead, a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for *preemptive* action when necessary to defend our liberty and to defend our lives (Bush, 2002: 1 June, emphasis added).

By speaking of threats not fully materialised, it was clear that President Bush implicitly tried to stretch the definition of pre-emption found in the *Caroline case* to include not only the use of force against imminent threats but against *non-imminent* threats as well. However, the fact that President Bush called it pre-emptive force rather than preventive force indicates that he was well

aware how controversial this new policy was. By calling it pre-emptive force President Bush thus tried to make it more acceptable and legitimate, as pre-emptive force would be in accordance with the traditional American interpretation of article 51 and its 'inherent right of self-defence'. Recall from Chapter 6 that also President Reagan and President Clinton in national speeches reserved a right to use pre-emptive force against imminent threats. However, they refrained from claiming this right internationally but justified the use of force against Libya in 1986 and against Afghanistan and Sudan in 1998 as 'ordinary self-defence' to stop an ongoing attack. Thus, they never contested the norm on non-use of force.

In contrast to President Reagan and President Clinton, President Bush advocated his policy on preventive force internationally. In a speech to the UN General Assembly on 12 September 2002, President Bush said that times had changed and that the international community now had to deal with gathering threats to maintain international security: 'We must choose between a world of fear and a world of progress. We cannot stand by and do nothing while dangers gather. We must stand up for our security and for the permanent rights and the hopes of mankind' (Bush, 2002: 12 September). President Bush's challenge of the norm on non-use of force was unprecedented, and although he toned down the norm challenge by not directly using the words 'preventive force', it marked a clear shift in American foreign policy.

Five days later, the Bush administration published its National Security Strategy (NSS), which very bluntly presented the new foreign policy strategy on preventive use of force as a part of the US' right of self-defence:

> While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country … We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends (Bush, 2002: 17 September).

This time the targets of the preventive force were further specified and included terrorists, states harbouring terrorists (which may be seen as a continuation of the first norm challenge) and so-called 'rogue' states. Rogue states were defined as states where state leaders brutalise their own people and misuse national resources for personal gain, threaten their neighbour states, violate international treaties and international law, seek WMD to

threaten other countries, sponsor terrorism, reject human values and 'hate the US and everything for which it stands' (ibid.).

As the above quote shows, the Bush administration once again used the word pre-emption. However, although the administration did not explicitly use the term 'preventive force', the NSS clearly contested the norm on non-use of force by arguing that article 51 had to be rewritten to include the use of force against non-imminent threats:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning (ibid.).

Facing new threats from the combination of terrorism and WMD, the Bush administration thus argued that the concept of imminent threats had to be adapted to these new circumstances. Times had changed and 'ordinary' self-defence based on a first armed attack by the enemy was no longer an option. Consequently, the Bush administration claimed a right to use force as self-defence 'even if uncertainty remains as to the time and place of the enemy's attack' (ibid.). The Bush administration thus explicitly redefined the right to self-defence to include preventive force against non-imminent threats thereby posing a clear challenge to the norm on non-use of force.[53]

The Bush administration was very aware that by stretching the concept of pre-emptive force to include non-imminent threats it was challenging international law on the use of force as self-defence and it openly defended this new policy. In the 2003 State of the Union speech, President Bush criticised those who opposed the administration's concept of imminence:

> Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice

[53] In the following I refer to the Bush administration's new strategy of use of force as preventive force even though the administration still called it pre-emptive force.

> before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late (Bush, 2003: 28 January).

According to President Bush, preventive use of force was necessary to protect American citizens from future devastating terror attacks. The US could no longer wait and see whether growing threats became imminent, the risk of WMD in the hands of terrorists simply made it too dangerous. Hence, President Bush's argument for a norm change was inherently normative, referring to prudential norms of national security. Recall from Chapter 2 that even though states leaders have procedural norms such as the norm on non-use of force guiding them, this does not eliminate the problem of hard choices in international politics as it sometimes may be prudent to set procedural norms aside to overriding national interests. Applying this theoretical argument to the empirical case, the 'war on terror' *was* such an occasion according to the Bush administration and therefore the world had to accept the use of preventive force in self-defence to counter the threats from terrorism and WMD. Moreover, the Bush administration further sought to legitimise this new norm by implicitly referring to just war criteria making clear that the use of preventive force could only be used as a last resort and not as a pretext for aggression (Bush, 2002: 17 September).

8.1.1. The Threat from Iraq

The Bush administration's preventive force norm challenge was closely related to Iraq, which due to its alleged possession of WMD and terrorist ties was claimed to pose a serious threat to the US. President Bush first directed attention to the Iraqi threat in the 2002 State of the Union speech, in which he declared that Iraq together with Iran and North Korea constituted an 'axis of evil'. The Bush administration later described Saddam Hussein as a threat where the risk of inaction was much greater than the risk of action. If the US did not confront the Iraqi threat, President Bush warned, all free nations would be exposed to immense and unacceptable risks. This view of the risks of inaction was closely related to the threats from weapons of mass destruction: 'Facing clear evidence of peril, we cannot wait for the final proof, the smoking gun that could come in the form of a mushroom cloud' (Bush, 2002: 7 October).

The rationale of the Bush administration was that Saddam was a gathering threat that was too dangerous to leave alone. As President Bush explained at a press conference with British Prime Minister Tony Blair:

> See, the strategic view of America changed after September the 11th. We must deal with threats before they hurt the American people again. And as I have said repeatedly, Saddam Hussein would like nothing more than to use a terrorist network to attack and to kill and leave no fingerprints behind (Bush, 2003: 31 January).

If Saddam Hussein did not disarm voluntarily, the US would make him, on its own if necessary. Hence, the Bush administration never denied that it would take action without the UN if it had to, but President Bush still spent a lot of time trying to convince the UN Security Council to remove Saddam Hussein from power. President Bush first presented this demand to the UN General Assembly on 12 September 2002:

> My Nation will work with the U.N. Security Council to meet our common challenge. If Iraq's regime defies us again, the world must move deliberately, decisively to hold Iraq to account. We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced, the just demands of peace and security will be met, or action will be unavoidable (Bush, 2002: 12 September).

The message about going alone was repeated several times. President Bush left no doubt that the US would act alone if the UN did not deal with Saddam Hussein (see also Bush, 2002: 19 September; 26 October; 8 November; and 2003: 28 January). The American threat of unilaterally removing Saddam from power was further emphasised by the adoption of a US Congress resolution on 16 October 2002 granting the President full authority to attack Iraq unilaterally (US Congress, 2002). Hence, Bush's call for a UN solution to Iraq looked more like an ultimatum to the other states than an invitation to find a common solution; the message being that either the UN did it the US way or the US would do it by itself (Knudsen, 2004: 52).

According to President Bush, it was time for the UN to show its strength and to reassure the world that it could stand up for its own decisions: '… the United Nations must show its backbone. And we will work with members of the Security Council to put a little calcium there, put calcium in the backbone, so this organization is able to more likely keep the peace as we go down the road' (Bush, 2002: 1 October). If the UN did not stand up, the President warned, it would become just as irrelevant as the League of Nations (Bush, 2002: 19 September). By comparing Iraq with past incidents like Bosnia, Rwanda and Kosovo, where the UN Security Council had failed to act before it was too late, President Bush argued that the UN had a moral duty to

remove Saddam Hussein from power (Bush, 2003: 15 March). According to the President, it was not the US who violated the procedural norms of the UN Charter; rather it was the other states that prevented the UN from doing its job: 'The United Nations would betray the purpose of its founding and prove irrelevant to the problems of our time. And through its inaction, the United States would resign itself to a future of fear' (Bush, 2002: 7 October). The message was that the other states, not the US, violated the fundamental norms of the UN by doing nothing. By attacking the relevance and credibility of the UN, President Bush thus changed the subject from the legitimacy of the war against Iraq to the legitimacy of the UN thereby creating a 'crisis of legitimacy' (Morris & Wheeler, 2007).

To reiterate, by advocating the need for a new norm allowing unilateral use of preventive force as self-defence the Bush administration challenged the fundamental norm on non-use of force. This challenge went a step further than the first norm challenge as it did not aim to modify the norm but instead contested it by putting aside the provisions of article 51 of the UN Charter arguing that they were no longer suitable for regulating the use of force. In other words, the Bush administration tried to change the norm by replacing it with a new norm broadening the right to self-defence to include preventive force against non-imminent threats. Furthermore, this claim of a unilateral right to use preventive force not only contested the norm on non-use of force but also the authority of the UN and the norm that all use of force beyond self-defence against an armed attack must be authorised by the UN Security Council.

8.2. Immediate reaction to the norm challenge

Because the US combined the preventive force norm challenge with the need to counter the threat from Iraq, the international reaction to the norm challenge was more concerned with a potential war against Iraq than the actual substance of the emerging new norm. Hence, it is difficult to keep the two apart, as the arguments for a war against Iraq is intertwined with the premise of preventive force, and the argument against the war is intertwined with a rejection of preventive force. This section analyses the debate in the UN Security Council and the General Assembly in the last months of 2002 focusing on how the other states of international society initially responded to the promotion of a new norm on preventive force *and* to the threat of applying this new norm on Iraq.

On behalf of the Non-Aligned Movement, South Africa requested an open Security Council meeting about Iraq, as it found that the subject was 'of

importance to the entire membership of the United Nations and the future role of the United Nations in the maintenance of international peace and security'. According to South Africa, all member states should be given the chance to 'express their views on these important developments that directly affect the purposes and principles of the Charter of the United Nations' (UN doc. S/2002/1132). In the view of the Non-Aligned Movement the issue had precedent-affecting abilities, as it could change the interpretation of the UN Charter's articles. The South African request resulted in one among many open Security Council meetings on Iraq on 16 October 2002 with more than 50 additional participants beyond the 15 members of the Council (see UN doc. S/PV.4625 and S/PV.4625, Resumption 1). Several meetings, in which the broader membership of the UN discussed the subject, took place in the General Assembly as well (see for example UN docs. A/57/PV.2; 4; 6; 7; 13; 16; 17; 19). At these meeting, the states quickly positioned themselves into three groups: the new norm-supporting states, the neutral states and the norm-opposing states.

The American claim of a right to use preventive force was explicitly supported by a small group of states: Albania, Australia, Italy and United Kingdom (see Table A.8.1 in appendix). The UK and Australia positioned themselves as norm leaders helping the US promote the new norm, the latter even more strongly than the former. On several occasions, Australia expressed its support for the new norm on preventive force. At the UN Security Council meeting on 16 October 2002, the Australian UN delegate, Mr. Dauth, in strong words supported the American claim that use of force against Iraq was necessary to counter the threat of Iraqi WMD if Iraq would not willingly disarm. Echoing President Bush, the delegate argued that the risks of inaction were 'very real' and rhetorically asked whether the UN could 'afford to be wrong?' thereby indicating Australia's support to preventive force against gathering threats (UN doc. S/PV.4625, Resumption 1).

In Australia, the Howard administration was even more direct in its support of the new norm, however, like President Bush, Prime Minister Howard used the terminology of pre-emptive force and not preventive force. At a press conference in June 2002, Prime Minister Howard said that 'the principle that a country which believes it is likely to be attacked is entitled to take pre-emptive action is a self-evidently defensible and valid principle' (quoted in Reisman & Armstrong, 2006: 539). He added that he would launch a pre-emptive action, if he was 'presented with evidence that Australia was about to be attacked' (ibid.). The Australian Minister of Defence, Robert Hill, supported this policy of pre-emption. Acknowledging that pre-emptive use of force was controversial and not in literal accordance with article 51 of the

UN Charter, Defence Minister Hill in a speech at the University of Adelaide in November 2002 called for a reinterpretation of article 51 of the UN Charter. Referring to the Caroline Case's principles of imminence and necessity, Hill asked how to interpret these principles 'in the age of over-the-horizon weaponry, computer network attack and asymmetric threats when warning times are reduced virtually to zero and enemies can strike almost anywhere?' (Hill, 2002). He went on to argue that the world had changed since the drafting of the UN Charter and that it was now time to find a common understanding of the rules of self-defence, as states would otherwise interpret the rules to suit their own interests. Prime Minister Howard repeated this call for a revision of the UN Charter in December 2002 arguing that the provisions of the UN Charter ought to be amended to effectively deal with the new kind of threats from terrorism and WMD (Dombrowski & Payne, 2006: 117).

Like Australia, the UK undoubtedly supported the American demand for an armed intervention of Iraq if Iraq did not disarm. Already on 24 September 2002, the UK submitted a document to the UN Security Council stating that new intelligence showed that Iraq had developed chemical and biological weapons, acquired missiles capable of attacking neighbouring states, and that it persistently tried to develop a nuclear bomb (UN Yearbook, 2002: 290). At a Security Council meeting in October 2002 the British UN delegate citing Prime Minister Blair implicitly indicated the British support for preventive force:

> it is not that for 10 years Saddam Hussein has not been a problem, he has been a problem throughout the last 10 years. What has changed is first, that the policy of containment isn't any longer working, certainly without a massive change in the way that the regime is monitored and inspected; and secondly, *we know from 11 September that it is sensible to deal with these problems before, not after* (UN doc. S/PV.4625, Resumption 3; emphasis added).

Yet, the British support to the new norm was more discrete than Australia's, as the UK did not argue for a reinterpretation of article 51. While accepting the prudential claim of the necessity to act against non-imminent threats, Prime Minister Blair did not argue that this was a part of a state's inherent right to use force as self-defence. He preferred that the UN Security Council would decide on the issue. Hence, where Australia was a leading *norm* supporter, it may be more correct to characterise the UK as a leading *war* supporter rather than a strong supporter of the new norm.

The group of norm-opposing states opposed in a very explicit manner both the new norm on preventive force and the American threat of a military

intervention of Iraq (see Table A.8.1. in appendix for a list of the states and their remarks). Five states from various parts of the world, however none European, categorically rejected unilateral use of preventive force against Iraq.[54] While Burkina Faso (UN doc. A/57/PV.6) only opposed unilateral preventive action *not* authorised by the Security Council; Cuba (ibid.), Iran (UN doc. S/PV.4625), Malaysia (UN doc. A/57/PV.7) and Yemen (UN doc. S/PV.4625) all rejected *any* preventive use of force against Iraq. The League of Arab states supported this latter position (UN doc. S/PV.4625, Resumption 1) and justified the rejection of the new norm with the argument that preventive force was in conflict with international law and the UN Charter.

North Korea and Barbados also rejected the new norm on preventive force, however without relating their opposition to the norm directly with Iraq. Most likely fearing for its own security after the US accused it of being a part of the 'axis of evil', North Korea dismissed the new norm arguing that it contravened the Charter of the United Nations and the norms of international relations thereby 'challenging world peace and security' (UN doc. A/57/13). Despite its close relations with the US, Barbados, as the only American state besides Cuba, explicitly rejected the new norm on preventive force. Pointing to its own security as a small state, Barbados praised the norm of non-intervention while opposing the use of preventive force:

> For Barbados, as for all small States, the doctrine of non-intervention is of paramount importance for our survival. *Pre-emptive unilateral action, no matter what the apparent cause, is a precedent that occasions in us the gravest discomfort*. It is, therefore, vital that, at this dangerous and uncertain juncture in world affairs, we reaffirm our commitment to multilateralism and to the pre-eminent role of the United Nations in seeking to impose responsible behaviour through diplomacy and dialogue rather than through the use of force (UN doc. A/57/PV.16; emphasis added).

However, Barbados' rejection of the new norm was kept in rather neutral terms, as Barbados did not link its categorical rejection of preventive force to Iraq in any way – in fact, it did not address the issue of disarming Iraq through military force.

[54] Like the Bush administration the states often use the term pre-emptive force even though they are speaking of preventive force against non-imminent threats. To avoid confusion between the two concepts, I use the term preventive force consistently throughout this chapter when the states refer to the use of force against non-imminent threats.

Numerous states in the norm-opposing group voiced their concern about the American threats against Iraq, however without directly criticising the new norm on preventive force. Many Arab states opposed the threat of force against Iraq and some even a new resolution on the subject of disarming Iraq. Pakistan, a close ally of the US in the war against Afghanistan, strongly opposed any use of force against Iraq arguing against American exceptionalism and pointed out that great powers had a special responsibility to respect international law and set a good example for smaller states (UN doc. S/PV.4625). This position was supported by Tunisia, who said that the Security Council's credibility was at stake and that it had to prove that it did not manage the world's affairs by double standards providing a legal cover for unilateral tendencies. The handling of Iraq could, the Tunisian delegate continued, create a 'dangerous precedents that could turn out to be disastrous if they were ever transposed and applied in the resolution of other conflicts and to other areas of tension throughout the world' (ibid.). Other states, mostly Arab, warned about double standards in the UN and questioned why the US and its coalition states only demanded that Iraq disarm and not Israel. In the same line, South Africa in more general terms called for consistency in the Security Council's decisions and urged the Council to avoid subjectivity and vagueness in its resolutions (ibid.).

Finally, the largest group of states positioned themselves in the middle of the discussion of the new norm and the use of preventive force against Iraq. This group of states, primarily European and American states, but also Russia and China, kept a more neutral position and did not directly address the question of preventive force. On the one hand, they supported the American demand that Iraq should disarm and that further Iraqi non-compliance with UN resolutions ought to have consequences forcing Iraq to disarm. On the other hand, they also stressed that Iraq should be disarmed peacefully with the help of IAEA and the UN weapon inspections and that any military acts against Iraq should be authorised by the UN Security Council. Hence, this group of states tried to accommodate the American demand that Iraq should disarm while at the same time praising the multilateral framework of the UN. The following quote by the Danish UN delegate, Margrethe Løj, representing the view of the European Union, captures this 'middle' position very well:

> The existing Security Council resolutions … should constitute the new governing standard for compliance by the Government of Iraq. This governing standard for inspections should be put to a real test as soon as possible. The Government of Iraq should make no mistake about the fact that non-compliance with this

> inspection regime would have serious consequences. (…) The European Union reiterates its full support for the efforts of the Security Council and of the Secretary-General in finding a solution to the Iraq question. The European Union emphasizes the vital importance of safeguarding and respecting the crucial role of the Security Council – present and future – in maintaining international peace and security in accordance with the United Nations Charter and in the solution of international conflicts. We encourage all members of the Security Council to take a speedy decision that maintains strong pressure on Iraq and gathers the widest possible support within the Council (UN doc. S/PV.4625, Resumption 1).

In other words, these states did not argue that Iraq should be left alone, they just opposed the threat of using preventive force in dealing with Iraq and instead emphasised the need for UN weapons inspectors in the country.

8.3. Norm tipping point: the war against Iraq

Having placed Iraq on the international agenda in 2002, the US increased the pressure for an Iraqi intervention in the last months of 2002 and the early months of 2003. The months leading up to the war were marked by intense debates in the UN Security Council ending with the American decision to invade Iraq without UN authorisation in March 2003. The following section first describes the prelude to war, including the most important debates in the Security Council, before analysing the reactions to the war.

8.3.1. Prelude to War

The American threat of war against Iraq pushed the question of disarming Iraqi to the top of the UN agenda. Iraq of course objected to the American threat of war calling it an act of aggression, which would be 'an insult to the international community, the United Nations and international law and constitute a return to the law of the jungle' (UN doc. S/PV.4625). However, the American threat of war apparently had an impact on Iraq, who on 16 September 2002 decided to allow the unconditional return of UN weapon inspectors to Iraq (UN Yearbook, 2002: 290). Nonetheless, the Security Council on 8 November 2002 unanimously adopted resolution 1441 ordering Iraq to disarm. More specifically, acting under Chapter VII of the UN Charter, the resolution found Iraq to be in material breach of its obligations under previous resolutions and required the Iraqi government to account for its entire stock of chemical, biological and nuclear weapons and to fully cooperate with the UN and the IAEA weapons inspectors. Furthermore, the resolution

declared that Iraq would 'face serious consequences' if it continued to violate its obligations (UN doc. S/Res/1441).

The unanimously adopted resolution was the result of hard work and eight weeks of tense negotiations. It represented a compromise between the three groups of states identified above, which by now had merged into only two groups, as the majority of the middle position group had aligned with the norm-opposing group. The resolution on the one hand accommodated the demand of the US and UK that if Iraq did not immediately disarm, the Security Council should authorise use of force to make Iraq disarm. On the other hand, it also met the demand of the war-opposing group of states that the disarmament of Iraq should be done peacefully in cooperation with the UN weapon inspectors and that force should only be used as a last resort in case of Iraqi non-compliance. This latter point was clearly stressed by the war-opposing states in the Security Council, who, in the words of the Russian UN delegate, emphasised that the resolution contained 'no provisions for the automatic use of force' (UN doc. S/PV.4644). This interpretation of the resolution was explicitly supported at the meeting by China, Mexico, Ireland, Columbia, Cameroon and Syria and restated in a joint statement by France, China and Russia (see UN doc. S/2002/1236). This interpretation was also supported by Bulgaria and the UK, who actually belonged to the group of states that supported a war against Iraq. In fact, the British UN delegate explicitly said that the resolution did not automatically authorise the use of force:

> We heard loud and clear during the negotiations the concerns about 'automaticity' and 'hidden triggers' – the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear in response, as a co-sponsor with the United States of the text we have just adopted. There is no 'automaticity' in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required in paragraph 12. We would expect the Security Council then to meet its responsibilities (UN doc. S/PV.4644).

However, commenting on the resolution the American UN delegate was more ambiguous. While promising that the resolution contained no ''hidden triggers' and no 'automaticity' with respect to the use of force', he also declared that the resolution did not 'constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security' (ibid.).

Following the adoption of resolution 1441, a sense of relief spread among the war-opposing states and many states expressed their satisfaction that the UN had reached a compromise on Iraq thereby avoiding a new war, although the delegate of the League of Arab States did stress that the League continued 'to reject totally a strike against Iraq, considering that such a strike would constitute a threat to the national security of all the Arab States' (UN doc. S/2002/1238). However, this sense of cooperation and a united UN approach towards Iraq only lasted a short while. Disagreement on whether Iraq in fact was disarming in accordance with the obligations stated in resolution 1441 quickly arose. The US claimed that Saddam Hussein did not disarm as required. In the 2003 State of the Union speech President Bush declared that '[t]he dictator of Iraq is not disarming. To the contrary, he is deceiving' (Bush, 2003: 28 January). According to the President time was running out for Saddam Hussein and the UN had to take action. President Bush thus requested a Security Council meeting where the US Secretary of State, Colin Powell, would present intelligence proving Iraq's non-compliance. But, as President Bush warned, this was not an invitation to another UN negotiation, only a consultation. 'But let there be no misunderstanding', Bush continued, '[i]f Saddam Hussein does not fully disarm, for the safety of our people and for the peace of the world, we will lead a coalition to disarm him' (ibid.).

The Security Council met on 5 February 2003 as requested by the US to hear Colin Powell's presentation about Iraq's WMD and involvement in terrorism. According to Powell, intelligence consisting of intercepted telephone conversations, satellite photos and personal testimonies showed that the Iraqi government had made no effort to disarm, but actually was concealing its efforts to produce more WMD. Powell also argued that Iraq was cooperating with the Al Qaeda network and was harbouring the terrorist leader Abu Musab al-Zarqawi, thereby invoking the other norm of the Bush doctrine on the use of force against states harbouring terrorists. According to Powell, al-Zarqawi was an associate and collaborator of Osama bin Laden and was responsible for many terror acts in the Middle East and Europe. This cooperation between Iraq and Al Qaeda, Powell argued, made the existence of Iraqi WMD even more threatening to the US and the rest of the world (UN doc. S/PV.4701). At another Security Council meeting on 14 February 2003, where the Council gathered to hear the briefings from the UN weapons inspectors, Powell once again tried to convince the Council members of the need to respond to the Iraqi threat. Implicitly referring to the new norm on preventive force, Powell argued that it was better to act now than later: 'We cannot wait for one of these terrible weapons to show up in one of our cities and wonder where it came from after it has been detonated by Al-Qaeda or

somebody else. This is the time to go after this source of this kind of weaponry' (ibid.).

However, Powell's presentations did not convince the majority of the Council members and was not supported by the UN weapons inspectors led by Hans Blix and IAEA Director Mohamed Elbaradei. Blix and Elbaradei visited the UN Security Council three times from January to March to inform the Council on the situation in Iraq.[55] The general message was that Iraq was cooperating rather well with the weapons inspectors and that the inspectors had not yet found any evidence that Iraq was developing atomic weapons. But Blix and Elbaradei also said that Iraq had not yet proved that it had destroyed earlier stores of chemical weapons and they recommended to continue the weapons inspections. As Knudsen concludes, judging from Blix's and Elbaradei's briefings the likelihood that Iraq possessed or produced WMD, especially nuclear weapons, seemed very small (Knudsen, 2004: 54-55). Both disagreed with the US claim that Iraq continued to produce WMD and therefore was not disarming and so the disagreement on Iraq continued.

In the early months of 2003 the subject of Iraq was heavily debated and the two groups of states grew more and more apart. The war-opposing group of states with France, Russia and Germany in the lead argued that the weapons inspections were yielding results and that a peaceful alternative to war still existed.[56] Many states and international regional organisations supported this view either by expressing their opposition to war against Iraq directly at meetings in the UN General Assembly and the Security Council and/or by sending letters to the Security Council.[57] The many letters and verbal statements from various parts of the world indicate great opposition to

[55] On 27 January 2003 (UN doc. S/PV.4692), on 14 February 2003 (UN doc. S/PV. 4707) and on 7 March 2003 (UN doc. S/PV. 4717).

[56] On 10 February 2003 France, Russia and Germany transmitted a joint statement to the Security Council calling for a continuation of the weapons inspections and emphasising that the use of force should be a last resort (UN doc. S/2003/164). This message was restated in three other joint statements issued on 24 February 2003 (UN doc. S/2003/214), on 5 March 2003 (UN doc. S/2003/253) and on 15 March (UN doc. S/2003/320).

[57] See the letters from the Regional Initiative on Iraq (participating states were Egypt, Iran, Jordan, Saudi Arabia, Syria and Turkey) (UN doc. S/2003/97); African Union (UN doc. S/2003/142); Libya (UN doc. S/2003/207); joint statement from China and Russia (UN doc. S/2003/238); League of Arab States (UN doc. S/2003/247); Non-Aligned Movement (UN doc. S/2003/329 and UN doc. S/2003/357); OIC (UN doc. S/2003/288 and UN doc. S/2003/343); Russia (UN doc. S/2003/347).

the application of the new norm on preventive force on Iraq. In fact, the opposition to the US' demands became even stronger when the US changed policy, now demanding that Saddam Hussein ceded power. On 7 March 2003, the Press Secretary of the Bush administration, Ari Fleischer, announced that Iraqi 'regime change' and not only disarmament was the new policy of the US (Glennon, 2003: 18). This may be seen as yet another norm challenge, now stretching the new norm on preventive force to include preventive regime change as self-defence.

The great disagreement about the war became very distinct when the US together with the UK and Spain introduced a new Security Council resolution on 24 February 2003 and a revised version on 7 March.[58] Acting under Chapter VII of the UN Charter, the revised version of the draft resolution declared that Iraq had 'failed to take the final opportunity afforded by resolution 1441' unless the Council within ten days (deadline being 17 March 2003) concluded that Iraq had 'demonstrated full, unconditional, immediate and active cooperation' (UN doc. S/2003/215, version 2). This may be interpreted as an indirect authorisation of the resort to force against Iraq (Knudsen, 2004: 55). Nevertheless, the revised version of the draft resolution was formulated in softer terms compared to the original version, which without compromise declared that Iraq had 'failed to take the final opportunity afforded to it by resolution 1441' (UN doc. S/2003/215, version 1). Hence, the second chance given to Iraq in the revised version of the draft resolution indicates an American willingness to meet the demands of the opposition group, especially France, Russia and China, who had threatened to veto the resolution. In other words, UN's approval of the war was important for the US and Britain, as it would endow the war with legitimacy. However, the US did not succeed in winning over the support of France, China or Russia. While Russia and China in diplomatic terms said that they would not support the drafted resolution, France more harshly called it 'a pretext for war' and made it clear that 'as a permanent member of the Security Council, France will not allow a resolution to be adopted that authorizes the automatic use of force' (UN doc. S/PV.4714). Although France expressed its understanding of the American 'profound sense of insecurity' as a result of the 9/11 terror attack, France nevertheless dismissed the US claim that a military intervention in Iraq would make the world safer, as it did not believe that any link between the

[58] Version 1 of the draft resolution can be found here: http://www.un.org/News/dh/iraq/res-iraq-24feb03-en.pdf. Version 2 of the draft resolution can found be here: http://www.un.org/ News/dh/iraq/res-iraq-07mar 03-en-rev.pdf.

Iraqi regime and Al Qaeda existed (ibid.). The French, Russian and Chinese opposition to the draft resolution was supported by eight non-permanent Council members, namely Germany, Mexico, Chile, Syria, Pakistan, Angola, Cameroon and Guinea, who also indicated that they would vote against the draft resolution (ibid.).

Compared to the great number of states opposing a war in Iraq, the US and UK did not meet the same kind of support in the months leading up to the Iraq war. Only El Salvador wrote a formal, however rather neutral letter, to the UN expressing its 'deep concern at the failure of the Government of Iraq to comply with its clear disarmament obligations' (UN doc. S/2003/208). By adding that '[s]uch non-compliance poses a serious threat to global peace and security', El Salvador thus implicitly expressed its support for the American position that Iraq was a threat that needed to be dealt with using military means. Some states supported the US verbally at Security Council meetings. Besides the loyal support of the UK, Spain and Australia, who made a number of statements at Council meetings in support of the US, ten other states explicitly expressed their support to the US – namely Albania, Bulgaria, Dominican Republic, Georgia, Japan, Latvia, Macedonia, Marshall Islands, Portugal, and Uzbekistan.[59]

Summing up, the disagreement about Iraq was great and the draft resolution was never put to a vote, as the US did not win over the opponents. Instead, the US chose to take the matter into its own hands and unilaterally declared war against the Iraqi regime.

8.3.1.1. Going to war

Addressing the American nation on 17 March 2003 President Bush issued an ultimatum to Saddam Hussein and his two sons demanding that they surrendered and left Iraq within 48 hours or faced war (Bush, 2003: 17 March). Saddam rejected the American demand the following day and President Bush ordered the bombing of Iraq to begin even though the deadline had not yet expired. On 19 March 2003 President Bush once again addressed the American nation, this time officially declaring that the US together with the UK had begun the war against the Iraqi regime. In the speech, the President implicitly justified the war with the new norm on preventive use of force:

[59] Albania: see UN doc. UN doc. S/PV. 4717. Bulgaria: see UN docs. S/PV.4714 and S/PV.4721. Dominican Republic, Georgia, Japan and Latvia: see UN doc. S/PV. 4717, resumption 1. Macedonia: see UN doc. S/PV.4709. Marshall Islands and Uzbekistan: see UN doc. S/PV. 4709, resumption 1. Portugal: see UN doc. S/2003/335.

Our Nation enters this conflict reluctantly. Yet our purpose is sure. The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now, with our Army, Air Force, Navy, Coast Guard and Marines, so that we do not have to meet it later with armies of firefighters and police and doctors on the streets of our cities (Bush, 2003: 19 March).

However, when he officially justified the war to the UN and the states of international society, President Bush toned down the part about preventive self-defence and instead argued that the government of Iraq 'continue[d] to be in material breach of its disarmament obligations', including resolution 678 (1990), resolution 687 (1991) and resolution 1441. 'In view of Iraq's material breaches', the argument went, 'the basis for the ceasefire has been removed and use of force is authorized under resolution 678 (1990)' (UN doc. S/2003/351). Hence, instead of justifying the war as preventive self-defence, President Bush claimed that the war was authorised by the UN Security Council under earlier resolutions. However, at the end of the official explanation to the UN was a brief, yet very vague, reference to preventive self-defence claiming that the actions undertaken by the coalition force were 'an appropriate response' to the Iraqi regime: 'They are necessary steps to *defend* the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. *Further delay would simply allow Iraq to continue its unlawful and threatening conduct*' (ibid., emphasis added). Rather than invoking a unilateral right to preventive force the US implicitly claimed that the preventive use of force against Iraq was authorised by the UN. Furthermore, by justifying the war with references to earlier UN resolutions, the Bush administration softened its challenge of the UN's authority, as it did not directly contest the norm on UN authorisation but only violated it. Recall that one way to challenge a norm is to violate it while denying that that is what you are doing; another way is to contest it, which means that the consent to the norm in question is explicitly withdrawn. The fact that the Bush administration kept referring to the UN and also actively sought UN authorisation means that it did not contest the procedural norm on UN authorisation. In the end, it violated the norm by intervening in Iraq without UN authorisation, but it never directly contested it, as it justified the war with earlier UN resolutions. Moreover, this indicates that the Bush administration was aware how controversial the new norm on preventive force was.

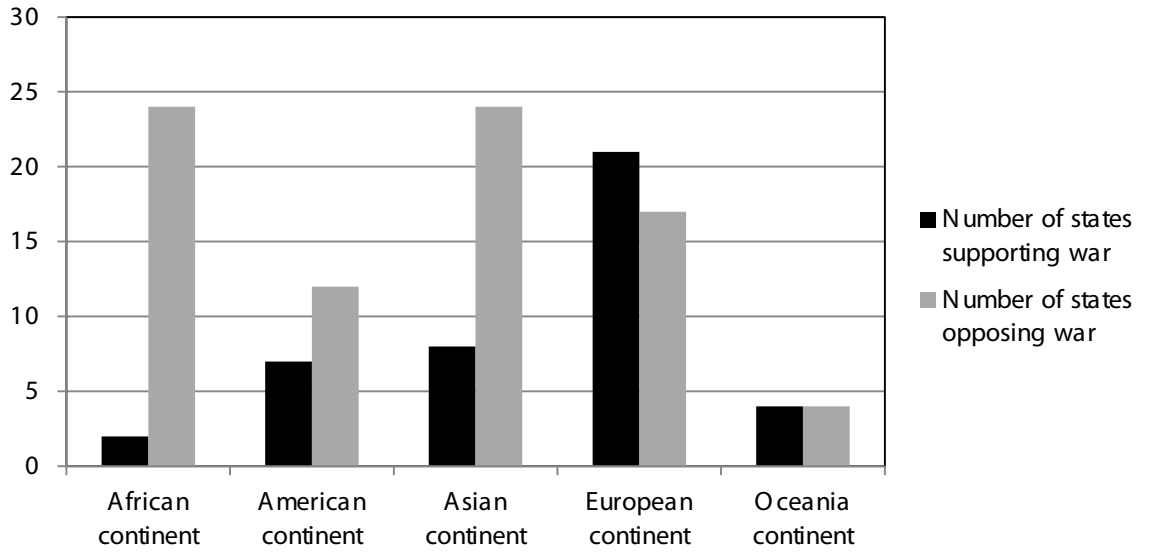
8.3.2. Reactions to the war

As argued in Chapter 3 a new norm reaches the tipping point, which is the condition that must be fulfilled in order for the norm to cascade, when it by quantitative measures has the support of at least 1/3 of the states and when it by qualitative measures receives the support from not only international organisations and great powers but from so-called vulnerable states that have a stake in the new norm as well. In the following, the fulfilment of each of these measures is analysed.

8.3.2.1. Quantitative measure: supporters and opponents

Using the Iraq war as an indicator of the support to the new norm, the quantitative measure requiring the support of at least 1/3 of the states to the new norm was fulfilled. Out of the 124[60] states that more or less explicitly expressed their opinion in the UN regarding the Iraqi war, 43 states supported the war, while 81 states opposed the war[61] (see Figure 8.1).

Figure 8.1. Number of states in each continent supporting or opposing the Iraq war[a)]



a. The count of states is based on two sources. The first source is written or verbal statements of the states to the UN about the war against Iraq, including statements made both before and after the initiation of the war. To be included in the count, the states must explicitly express support or opposition to the war. The second source is information from the US Ministry of Defense on coalition states in the Iraq war.

[60] '124 states' refers to the number of states that have been coded in the UN data material as expressing support or opposition to the Iraqi war.

[61] See Table A.8.3 in appendix for a detailed list of the states either supporting or opposing the war against Iraq.

The table shows that the greatest support to the war was found in the European continent, where 21 states supported the war. Yet, it was also the European continent that was most divided on the issue of war, as 17 states did not support the war. The group of states supporting the war consisted mostly of Central and East European states and a few Western European states such as Britain, Spain, Denmark, Iceland, Netherlands, Portugal, Italy and Malta. The rather great support to the war on the European continent may be explained by the fact that many of the Central and East European states – being old communist states – are militarily dependent on the US to protect them from Russian power and it is likely that they have been pressured by the US to support the war. For example Bulgaria and Ukraine voiced their opposition to a war against Iraq in the months leading up to the war, but whereas the former in the end changed its position to support the war (including a second UN resolution in early March), Ukraine remained critical throughout the negotiation process and did not once at UN meetings express support for the war. But following the initiation of the war, it was included on the Bush administration's list of states in the so-called 'coalition of the willing'[62] and in the fall of 2003 it provided troops to Iraq under Polish command.[63]

Africa and Asia are the two continents where the opposition to war was greatest. In both continents 24 states opposed the war, while only 2 African and 8 Asian states supported it. Note, however, that the Middle East is represented in both continents, which may in some part explain the great amount of opposition. Another, yet related, explanation may be that many African and Middle East states, in particular, were so-called vulnerable states with a stake in the new norm, as they are more likely to be victims of preventive force (I will discuss this argument more fully below). The two only African states explicitly supporting the US were Uganda and Ethiopia, the former being a close ally of the US. This kind of alliance pattern is visible in Asia as well, where most of the eight states supporting the US – namely, Israel, Japan, Kuwait, Uzbekistan, South Korea, Singapore, Philippines and Mongolia – are traditionally strong US allies.

This same pattern of alliance may also explain some of the support and opposition in the case of the Oceania and American continents. In Oceania,

[62] In March 2003 the Bush administration published a list containing the states that, according to the administration, supported the war against Iraq either militarily or just verbally (see White House, 2003).

[63] Due to Ukraine's ambiguous position, first opposing and later supporting the war, Ukraine is not included in the above count of states or in Figure 8.1.

for example the states of Marshall Islands and Micronesia have close ties with the US and their citizens have status of US citizens and may serve in the US army. Regarding the Americas, many of the war-supporting states are close allies of the US, while the war-opposing states are more US-independent, for example Brazil and Argentina.

However, power politics and alliance patterns only explain the position of some states, as also many states which traditionally are close allies to the US or at least very US-friendly were opposed to the war simply because they found it unnecessary, for example, Canada, Germany, New Zealand and Ireland. Throughout the negotiation process they argued for a peaceful solution to Iraq and opposed 'military intervention, except as a last resort', as the Canadian delegate put it (UN doc. S/PV.4717). Most of the smaller states did not address the subject of preventive force explicitly but instead referred to the superiority of the UN Charter and stability of the international order when explaining their opposition to the war. In other words, they did not find the war or the new norm on preventive force legitimate.

Only a few of the smaller states explicitly rejected the new norm on preventive force, mostly Middle Eastern and Asian states.[64] Debating the situation in Iraq at a Security Council meeting on 19 February 2003, Malaysia clearly rejected the use of preventive force arguing that was illegal:

> Lastly, there is no precedent in international law for the use of force as a preventive measure when there has been no actual or imminent attack by the offending State. Unlike the situation in 1991, there has been no indication by Iraq that it intends to attack another country and no evidence of military preparations for such attack. As may be recalled, the Security Council has never authorized the use of force on the basis of a potential threat of violence. All past authorizations have been in response to actual invasions. An attack against Iraq without any credible evidence provided to the international community of the imminent threat it poses is, therefore, illegal and unjustified. The credibility of this Council as custodian in the maintenance of international peace and security will be at stake if it decides to take the path of destructive war instead of that of constructive diplomacy (UN doc. S/PV.4709, Resumption 1).

The Malaysian UN delegate repeated this message on 26 March after the invasion of Iraq, arguing that preventive force undermined the international order, as it 'threatens the very foundation of international law, making war once again the tool of international politics and of the powerful in subjugat-

[64] See Table A.8.2 in appendix for a list of statements on preventive force given after the initiation of the Iraq war by states explicitly supporting and opposing preventive force.

ing the weak and defenceless. It also erroneously asserts the notion that might is right' (UN doc. S/PV.4726). The subject of preventive force was raised at a couple of General Assembly meetings in September 2003 as well. At this time the reverberations of the Iraqi war had softened and the discussion was thus more theoretical than political. On this occasion, Ireland and Saudi Arabia – states, which traditionally have good relations with the US – opposed the idea of including preventive force in the right to self-defence. While Saudi Arabia emphasised the use of preventive diplomacy rather than preventive war (UN doc. A/58/PV.15), Ireland said that it 'would be deeply concerned at the widespread acceptance of a doctrine of pre-emptive strike. Given the ever more lethal nature of modern weapons, the risk of large-scale death, destruction and escalation are enormous' (UN doc. A/58/PV.11). Hence, both Ireland and Saudi Arabia clearly rejected the use of preventive force as dangerous and illegitimate.

Even though a large majority of the world's states were against the Iraq war, this does not change the fact that out 124 states expressing their view at the UN 43 states at least verbally supported the war and thus fulfil the quantitative measure that minimum 1/3 of the states had to support the war for the new norm of preventive force to reach the tipping point. The question is whether these war-supporting states really supported a new norm on preventive force or if they just were supportive of the US decision to go to war with Iraq. Hence, it may be more accurate to distinguish between *norm*-supporting states and *war*-supporting states. If we look at their statements, only 5 of the 43 war supporters implicitly or explicitly supported the new norm on preventive force (see Table A.8.1. and A.8.2 in appendix). Furthermore, even though the UK and Australia made some statements implicitly supporting the idea of preventive force, they did not invoke self-defence, let alone preventive self-defence, when notifying the Security Council about their decision to go to war against Iraq.[65] Instead, they, like the US, justified the war on the basis of earlier Security Council resolutions making the claim that they authorised the use of force against a non-complying Iraq (UN docs. S/2003/350 and S/2003/352). This indicates that they did not dare to explicitly embrace the new norm on preventive force – either because they did not believe in it or because they knew that it was controversial and would de-legitimise the war even further. So by the measure of *norm*-supporting states – and not war-supporting states – the new norm on preventive force

[65] When the UK and Australia notified the Security Council about their participation in the Afghanistan war, both invoked article 51 and the right to self-defence.

did not reach the required threshold of 1/3 norm-supporting states and, it may be argued, did not make it to the tipping point.

8.3.2.2. International organisations

Having assessed that by the quantitative measure it is disputable whether the new norm reached the tipping point, I now analyse the response of international organisations to the norm and its application in the Iraq war starting with the UN's position, before moving on to regional international organisations.

As evident in the analysis, the UN member states were deeply divided on the subject of Iraq and to a lesser degree on the subject of preventive force. Seeking to give the war legitimacy, the US and Britain wanted to involve the UN in the post-invasion situation in Iraq. However, compared to the war in Afghanistan this was not such an easy task. On 22 May 2003 the Security Council adopted Resolution 1483 sponsored by the US, UK and Spain. The resolution's main stipulation was to lift trade sanctions against Iraq. During the negotiations of the resolution France, Russia and China were eager to avoid any statements that could be interpreted as a *post facto* validation of the war. As a result the resolution did not assign any formal responsibility to the UN but instead affirmed that the US and the UK were occupying powers (UN doc. S/Res/1483; Cockayne & Malone, 2008: 402). The US and its partners were luckier in June 2004, when the Security Council unanimously adopted Resolution 1546 declaring the end of the occupation of Iraq and authorising a US-led 'multinational force' in Iraq, which was the new name for the 160,000 coalition troops in Iraq (UN doc. S/Res/1546; Council on Foreign Relations, 2004). While the UN never *post facto* authorised the initiation of the war, Resolution 1546 restored some legitimacy to the coalition force, as the presence of the coalition forces now were mandated by the UN.

Being the Secretary-General of the UN, Kofi Annan urged the member states of the Security Council to find a common solution on Iraq within the provisions of the Charter. In his own diplomatic way he did not hide the fact that in his view a unilateral preventive war would be both illegal and illegitimate. At the opening meeting of the General Assembly on 12 September 2002, Annan ruled out any use of force as self-defence unless an armed attack had occurred. Without making any direct reference to the US and Iraq, Annan thus implicitly rejected the new norm on preventive force (UN doc. A/57/PV.2). Yet, when asked directly about his view on the Bush administration's new policy of preventive force at a press conference on 14 January

2003, Annan very explicitly pointed out how a new practice of preventive use of force could create disorder and insecurity:

> … one can talk of war of prevention, where you see a force arrayed against you, with a visible threat, ready to attack, and you make a pre-emptive strike to stop that attack. There are instances of this in history. Beyond that, where the threat is not imminent and the evidence is not obvious, it becomes a very murky area to deal with. So one will have to be very careful when moving into these areas of pre-emptive strike. Of course, the evidence is usually only with the one who is making the strike. Often, others may claim that it is not verifiable or that the evidence is not convincing. So, except for those situations where the evidence is clear, where there is imminent threat, where it is obvious and so forth, it can lead to lots of confusion and set precedents that others can use (UN doc. SG/SM/8581).

However, the Secretary-General's rejection of a unilateral right to use preventive force as self-defence did not mean that he did not acknowledge the US argument that the new threats of terrorism and WMD made preventive action against non-imminent threats necessary. While pointing out that preventive force could result in 'unilateral and lawless use of force, with or without justification' at his annual address to the General Assembly in September 2003, Annan also expressed his understanding of the legitimate security concerns of some states:

> But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action. (…) The Council needs to consider how it will deal with the possibility that individual States may use force pre-emptively against perceived threats. Its members may need to begin a discussion on the criteria for an early authorization of coercive measures to address certain types of threats – for instance, terrorist groups armed with weapons of mass destruction (UN doc. A/58/PV.7).

Hence, Annan encouraged member states of the UN to discuss how to respond to the new threats of WMD and terrorism. For his own part, he announced the creation of a High-Level Panel on Threats, Challenges, and Change, whose main task was to discuss how the UN should handle threats to international peace and security in a post-9/11 world, including the question whether preventive force against non-imminent threats should be included in article 51. The High-Level Panel submitted its report a year later and its conclusion regarding preventive force was clear – the Panel did not

recommend that preventive force should be included in the right to self-defence. It found that 'in a world full of perceived potential threats' such a right of preventive force would undermine the international order and the fundamental norms on which this order rested: 'Allowing one to so act is to allow all' (UN doc. A/59/565). Yet, the Panel did not entirely dismiss the idea about preventive force, as it argued that 'if there are good arguments for preventive military action, with good evidence to support them' then the Security Council could authorise such action. Thus, it agreed with the Bush administration's premise that in some instances preventive force may be deemed necessary to counter dangerous non-imminent threats, but it argued that the powers given to the Security Council by the UN Charter made it capable of handling such threats and thus there was no need to include preventive force in states' right to self-defence. In other words, it found the American prudential security argument legitimate but disagreed with the US solution allowing non-UN authorised use of preventive force as self-defence. Hence, not only was the new norm on preventive force as self-defence rejected by a large majority of UN's member states, the political secretariat of the UN rejected it as well.

Regarding regional international organisations, they all either clearly rejected a right to use preventive force or were silent on the issue. In other words, no regional international organisation supported the new norm on preventive force. The greatest opposition was stated by Middle East and Muslim organisations. Prior to the war against Iraq, the League of Arab States warned about the consequences of a preventive war against Iraq arguing that it would 'annul the current world order, the United Nations Charter and international law … leading the entire world back to the era of the League of Nations' (UN doc. S/PV.4625, Resumption 1).[66] The Organisation of Islamic States (OIC) strongly opposed a war against Iraq as well. At an extraordinary session held on 19 March 2003, the day before the invasion of Iraq, the member states of OIC urged the Security Council to find a diplomatic and peaceful solution to the disarmament of Iraq and 'categorically rejected the principle of a war against Iraq' (UN doc. S/2003/343). A similar position was stated by the Gulf Cooperation Council, which expressed 'its extreme con-

[66] Furthermore, a few days after the invasion of Iraq the League of Nations adopted a resolution, which in strong words condemned the war and deemed 'this aggression a violation of the Charter of the United Nations and the principles of international law, a departure from international legitimacy, a threat to international peace and security and an act of defiance against the international community' (UN doc. S/2003/365).

cern and deep regret at the current situation in the region, inasmuch as developments had culminated in military confrontation as a result of the failure of the intensified peace efforts made recently' (UN doc. s/2003/376). However, not only Middle Eastern and Muslim organisations opposed the use of preventive force against Iraq, as also critical statements were made by the African Union[67] and the Non-Aligned Movement. The latter emphatically rejected the right of any state to use preventive force stating that the use of force against Iraq was 'an illegitimate act of aggression' and that such an action, which was not authorised by the Security Council and 'not in self-defence against any armed attack, is clearly a violation of the principles of international law and the UN Charter' (UN doc. S/2003/357).

Western regional organisations were less explicit in rejecting preventive force. While the European Union before the war on several occasions called for a peaceful solution to Iraq,[68] it did not condemn the war afterwards probably due to the deep divisions within the organisation regarding Iraq but instead it focused on the humanitarian and political reconstruction of Iraq.[69] Like the EU, NATO was deeply divided as well with the US and the UK standing on one side calling for NATO assistance to the war against Iraq, and France and Germany standing on the opposite side. Unlike the situation after 9/11, where a united NATO for the first time since its creation invoked its musketeer oath and participated in the war against the Afghanistan Taliban regime, NATO this time was absent. Hence, NATO's absence may have delegitimised the war in Iraq even further.

Regional organisations from the American continent were also remarkably silent on the matter of Iraq. While both the OAS and the Rio Group had clearly expressed their support to the war in Afghanistan, this time they kept a rather neutral position. Only the Caribbean Community firmly distanced itself prior to the war from a potential war against Iraq saying that 'any unilateral action taken outside a United Nations Security Council mandate will undermine the integrity of the United Nations and considerably weaken the multilateral system and its machinery for preserving peace and security' (UN doc. S/PV.4709). However, this rather strong rejection of a war against Iraq was not followed by any critical statements after the initiation of the war.

Summing up, no international organisation supported the use of preventive force against Iraq. Even the regional organisations that traditionally back the US did not offer their support. This is a clear indication that most members

[67] See UN doc. S/2003/142.

[68] See for example UN docs. S/PV.4709 and S/PV.4717, Resumption 1.

[69] See UN doc. S/PV.4726.

of these organisations did not find the war legitimate and thus did not wish to support it. Hence, by this measure the new norm on preventive force did not reach the required tipping point to continue its evolvement.

8.3.2.3. Great Powers

The only great power that supported the US in the war against Iraq was the UK, but it supported the principle of preventive force to a lesser extent and was thus a *war* supporter rather than a *norm* supporter. As mentioned, the other three great powers, France, Russia and China, were very critical of the use of preventive force against Iraq. Still arguing strongly for a peaceful solution to Iraq, France on 19 March 2003, the day before the invasion of Iraq, explicitly rejected the new norm on preventive force, which it considered a short-term mean that would result in further radicalisation and violence (UN doc. S/PV.4721). France maintained this position at the opening sessions of the General Assembly in September 2003, where it argued, without referring directly to the Iraqi war, that it was 'the Council that should set the bounds with respect to the use of force. No one can claim the right to use force unilaterally and preventively' (UN doc. A/58/PV.7).

Like France, Russia strongly opposed the war in Iraq and the new norm on preventive force. According to the Russian UN delegate, Russia 'would be prepared to use the entire arsenal of measures provided under the United Nations Charter to eliminate such a threat' if the US showed 'indisputable facts demonstrating that there was a direct threat from the territory of Iraq to the security of the United States of America' (UN doc. S/PV.4721). Thus, Russia indirectly rejected the legitimacy of the use of force against non-imminent threats. Furthermore, on the day of the invasion of Iraq, Russia sent a rather critical letter to the UN in strong words questioning the legality and the legitimacy of the war. According to Russia, the war violated 'the principles and norms of international law and the Charter of the United Nations' and 'nothing' could 'justify this military action'. Russia dismissed the American claim that Iraq was supporting international terrorism and that it was developing WMD calling the war 'a major political mistake' and warned about the consequences of the war with regard to the international order:

> If we allow international law to be replaced by the 'law of the fist', whereby might is always right and is entitled to do anything and, in choosing the means to achieve its ends, is not constrained by anything, then one of the basic principles of international law will be called into question, and that is the principle of the immutable sovereignty of States. And then no one, not a single country in the world, will feel secure, and the vast hotbed of instability that has now emerged

will spread and will have negative consequences for other regions of the world (UN doc. S/2003/348).

Throughout the negotiation process China called for a peaceful solution to Iraq, however in a more subdued and less US-critical manner than France and Russia. Having said that, there is no doubt that China opposed a war against Iraq. Without explicitly rejecting the doctrine of preventive war, China criticised the war saying that it constituted 'a violation of the basic principles of the Charter of the United Nations and of international law' (UN doc. S/PV.4726, Resumption 1).

To sum up, by the measure of great power support to the new norm on preventive force it did not reach the tipping point. The new norm was only supported by the UK and only half-heartedly, as the UK did not explicitly argue for a right to use preventive force and did not invoke the new norm when justifying the war against Iraq. Hence, it may be more accurate to characterise the UK as a war supporter rather than a norm supporter. China, France and Russia all clearly opposed the war in Iraq claiming that it was unnecessary and illegal, and the latter two very explicitly rejected the new norm on preventive force, arguing that it was a dangerous doctrine that would undermine the current world order and lead to increased violence.

8.3.2.4. Vulnerable states

With regard to preventive force, Chapter 4 defined vulnerable states as states that have a higher risk of being exposed to preventive force than other states, i.e. 'axis of evil' states – North Korea, Syria and Iran – and other 'rogue'/outlaw states (from an American point of view).

In contrast to the norm challenge analysed in Chapter 7, the new norm on preventive force did not gather support from supposedly vulnerable states. In fact, many vulnerable states rejected the new norm on preventive force. Debating the Iraqi war in the months leading up to the war and immediately after the invasion, some claimed that preventive force was illegal according to international law and the UN Charter. Cuba called the doctrine of preventive force 'a flagrant violation of the spirit and the letter of the Charter of the United Nations', which would 'turn the inherent right of self-defence into a blank check' (UN doc. S/PV.4709). In similar lines, Iran condemned the war against Iraq and argued that the concept of preventive force 'openly negates the provisions of the Charter' (UN doc. S/PV.4726). Lebanon rejected any right to use not only preventive force but also pre-emptive force pointing out that the right of self-defence exists 'only if an armed attack occurs' (UN doc. S/PV.4726). Other states also addressed potential, dangerous

consequences of such a new norm on preventive force. According to Yemen, preventive war, 'based on mere doubts about the intentions of others, leads to chaos that will undermine the basis of international relations' (UN doc. S/PV.4726).

At the meetings of the General Assembly in September 2003, where the Secretary-General called for a debate on preventive force, Syria categorically rejected any right to preventive force: 'New concepts that are totally alien to the Charter, such as pre-emptive war and unilateral and illegitimate use of force, have been invented. In brief, that course of action has turned the clock back' (UN. doc. A/58/PV.15). Also Myanmar and North Korea criticised the use of preventive force, which in the words of North Korea violated the basic principles of international law and 'plunged' international relations 'into increasingly severe confrontation and antagonism' (UN doc. A/58/PV.17).[70] Thus, no vulnerable state supported the new norm on preventive force, which indicates that the new norm did not reach the tipping point by this measure either.

Overall, the analysis shows that the new norm on preventive force did not reach the tipping point. Even though 43 states in various ways supported the war against Iraq, the support looked more like support to the US than to the new norm, as only a few of the states explicitly expressed their support to preventive force. Furthermore, the analysis of the three qualitative measures also supports this conclusion, as no international or regional organisations supported the war and neither did France, Russia, China nor any of the so-called vulnerable states.

8.4. The future of preventive force: what is the status of the norm of preventive force today?

Although the new norm on preventive force did not reach the tipping point and therefore did not make it far in the norm evolvement process, this does not mean that the norm challenge disappeared and that everybody forgot all about preventive self-defence. As the case of the new norm on the use force against states harbouring terrorists guilty of grave terrorist acts analysed in Chapter 7 showed, this norm was in the emerging process already before 9/11, but without succeeding in gathering the necessary widespread support among the states of international society to reach the tipping point and thus be accepted as a new legitimate practice. This changed after 9/11, where a new perception of the threat of global terrorism imposed new obli-

[70] For Myanmar's statement see UN doc. A/58/PV.15.

gations upon the states to combat terrorism within their own borders and consequently made the use of force against these states legitimate if they were not willing to do so. Hence, the Bush administration successfully changed the norm at this point in time because the other states now found the new norm a legitimate response to terrorism. But until this happened, the norm entrepreneur states such as the US and Israel kept pushing for the norm to spread further by consistently claiming a right to use force as self-defence against states harbouring terrorists and slowly the group of states supporting the norm grew bigger and bigger. Hence, even though the new norm on preventive force did not reach the tipping point, it is worthwhile to take a look at what happened to the norm after the Iraq war – did it completely disappear or is it still in the phase of emerging?

Four questions arise. First of all, did the Bush administration give up the norm challenge after the invasion of Iraq or did it continue to push for a norm change consistently claiming a right to use preventive force in self-defence? Second, has the new norm showed signs of cascading since the Iraq war? Put differently, have other states echoed the Bush administration's norm challenge and claimed a right to use or even used preventive force as self-defence? Third, does the Obama administration support the Bush administration's claim of a right to use preventive force and in this sense is the norm challenge still 'alive'? Fourth, despite the opposition to the Iraq war has the new norm on preventive force had any effect on international law regarding preventive force? These questions will be addressed in the final sections of the chapter.

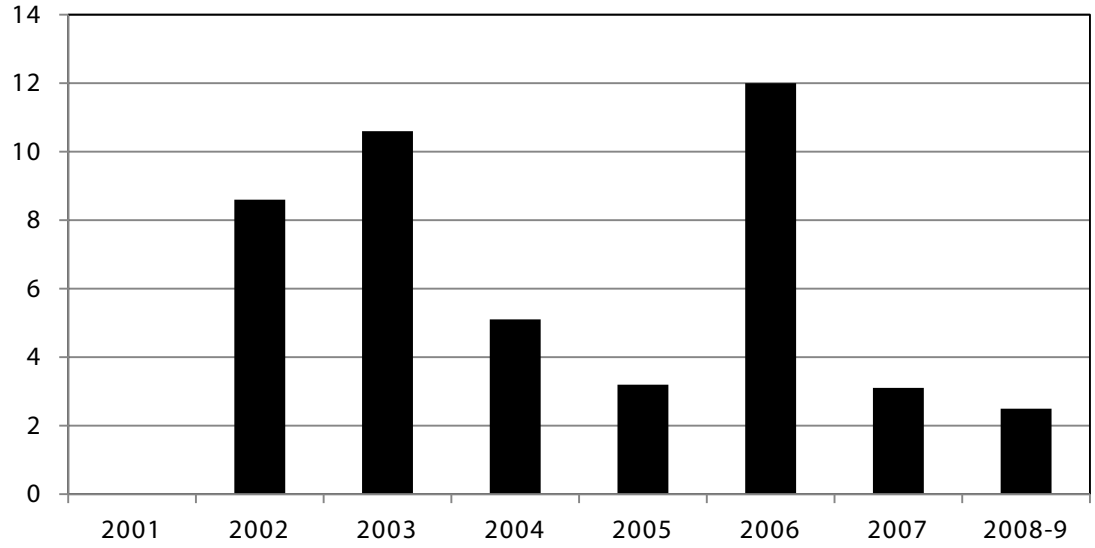
8.4.1. Consistency of the Norm Challenge

The first question to address is whether the Bush administration continued to promote the new norm on preventive force even after the Iraq war. Figure 8.2 shows the number of coded presidential statements referring to preventive use of force[71] during the Bush presidency. The figure illustrates that from 2002 President Bush consistently promoted the new norm of preventive use of force throughout the rest of his presidency. Statements referring to the norm were made especially in 2002, 2003 and 2006. In 2002 and 2003, President Bush referred to the norm in 8.6 per cent and 10.6 per cent of his speeches in which the use of force was a subject. A closer look reveals that the norm was heavily advocated in September 2002, the month the 2002

[71] Recall from Chapter 4 that the data selected for coding the Bush administration's norm challenge only consists of statements referring to the use of force.

National Security Strategy was released and the one-year anniversary of 9/11, and in March 2003, the month the Iraqi war was initiated. This indicates that President Bush used the norm to advocate and justify the war in Iraq. However, the figure also shows that the Bush administration continued to promote the new norm even after the intervention in Iraq. Thus, it would be wrong to say that the norm was only used as window dressing conveniently disguising the real motives behind the war. In fact, the norm was referred to in 12 per cent of the President's speeches in 2006, especially in September 2006, the month the National Security Strategy 2006 was published. This strategy largely reaffirmed the 2002 Strategy's position on preventive force, but focus had changed from the threats of Iraq and North Korea to the threats posed by Iran and Syria, which were accused of sponsoring the terrorist networks Hizbollah and Al-Qaeda (Bush, 2006: 16 March). After 2006, promotion of the norm decreased again, but President Bush still confirmed its validity occasionally, for examples in speeches to the military or when asked about it by reporters.

Figure 8.2. Statements on preventive force by President Bush. In per cent of the number of cases coded each year



N 2001 = 75 (for the period 11 September to 31 December only); N 2002 = 104; N 2003 = 142; N 2004 = 97; N 2005 = 118; N 2006 = 100; N 2007 = 64; N 2008 = 75; N 2009 = 4 (only the month of January).

However, the Bush administration retreated from the unilateral part of the new norm, as it from 2004 no longer claimed a unilateral right to use preventive force *without* Security Council authorisation. After the invasion of Iraq, President Bush modified the norm challenge from a unilateral right to use

preventive force as self-defence to a requirement of UN authorisation or at least long UN cooperation and discussion on the subject. This was also the administration's policy with regard to Iran and North Korea, which President Bush consistently said was a subject for the UN. When asked why the US did not use military force against Iran or North Korea, the President replied that diplomacy was by no means exhausted, as neither Iran nor North Korea had been discussed by the UN Security Council as many times as Iraq had (Bush, 2005: 17 February; 2006: 7 July). Furthermore, he argued that neither Iran nor North Korea could be described as gathering threats, thereby verbally upholding the norm of preventive force but without invoking it. This implies that the unilateral part of the preventive force norm challenge primarily was used to justify the Iraq war and not so much a constant principle of the new norm on preventive force. By going to war without UN authorisation the Bush administration certainly violated the UN's authority, but it only vaguely contested it. The policy of the Bush administration might come off as more unilateral when it is seen in connection with other policy decisions such as the withdrawal of the Anti-Ballistic Missile Treaty, the Kyoto Protocol and the harsh policy towards the International Criminal Court. Analysed separately, however, the unilateral principle of the new norm on preventive force was relatively vaguely formulated and consequently only violated rather than contested the norm on UN authorisation.

To reiterate, even though the Bush administration was not successful in gathering support for its new norm on preventive force, it kept advocating a right to use preventive force to counter emerging threats throughout the presidency but retreated from its claim of a unilateral right to do so.

8.4.2. The use of preventive force since the Iraqi War: signs of norm cascade?

Since the massive condemnation of the Bush administration's use of preventive force against Iraq, which led to the above conclusion that the administration did not succeed in changing the norm on non-use of force making preventive force a legitimate exception to this norm, some states have nevertheless verbally claimed a right to use pre-emptive and preventive force as self-defence – however without doing so – while one state has actually launched a preventive attack on another state. In the following these claims and incidents are analysed.

8.4.2.1. Verbal claims of a right to use preventive force

Russia and France have both claimed a right to use pre-emptive self-defence since the Iraqi war. In a Military Programme for 2003-2008 describing the French national security strategy, the Chirac administration echoed the American claims of new threats from 'dysfunctional states' and 'non-state players'. To counter these threats, the programme noted 'possible preemptive action is not out of the question, where an *explicit and confirmed threat has been recognised* (France, Ministry of Defense, 2003: 6, emphasis added). In contrast to the Bush administration's National Security Strategies, France did not claim a right to use *preventive* force but only *pre-emptive* force against 'explicit and confirmed' threats. France thereby upheld the Caroline Case premise of imminence and thus did not invoke a right to use preventive force. Furthermore, according to the French Military Programme the main purpose of the policy of pre-emption was to 'constitute a deterrent threat for our potential aggressors' such as terrorist networks and enemy states (which, also in contrast to the NSS, were not further specified). In other words, the French policy of pre-emption was mainly a defensive tool of deterrence rather than a military tool designed to offensively counter threats.[72] When Nikolas Sarkozy became president in 2007 pre-emption maintained its position in the new government's security strategy, which also noted a right to use pre-emptive force as self-defence, but clearly 'rule[d] out any form of preventive warfare' (France, Ministry of Defense, 2008: 157). Hence, even though France may have changed its policy on pre-emption since pre-9/11 times, it has not claimed a right to use preventive force.

In contrast to France, Russia has not made pre-emption a part of its Military Doctrine, i.e. its official security strategy. In 2000 Russian President Vladimir Putin issued a new military doctrine to replace the doctrine from 1993. The 2000 doctrine was not replaced until 2010, which means that Russia did not officially change its security strategy during the Bush presidency. Neither the 2000 nor the 2010 version make any reference to preventive or pre-emptive force. In fact, the 2010 version is almost an antithesis to the Bush administration's security strategies as it stresses that military dangers and

[72] Another striking contrast to the American NSS was the great emphasis on cooperation with international organisations such as the EU and the UN. Whereas the American NSS only mentioned the UN in a few passing remarks, France explicitly highlighted the importance of the UN: 'France, one of the permanent members of the UN Security Council, will continue to support the role of the UN as well as multinational processes and multinational commitments. The credibility of the UN remains a key element of international stability' (France, Ministry of Defense, 2003: 5).

military threats should be neutralised using 'political, diplomatic and other non-military means' and many times highlights the importance of international law and norms.[73] But although Russia did not make pre-emptive or preventive force a part of its official security strategy, President Putin has threatened to use pre-emptive force to counter terrorism. Following the seizure of a school in Beslan in the North Ossetia region by Chechen terrorists on 1 September 2004, which resulted in the death of 360 persons, including 172 children (UN Yearbook, 2004: 72), President Putin did not rule out the use of pre-emptive force against terrorists. Yet, he stressed that if Russia decided to do so, it would be 'in strict respect with the law and the constitution and on the basis of international law' (Putin cited in Reisman & Armstrong, 2006: 546). So even though Putin spoke of 'preventive' force, he also stressed the importance of international law, indicating that the potential use of force would be pre-emptive rather than preventive. Russian Defence Minister, Sergei Ivanov, restated this message in October 2004, saying that Russia could not 'rule out pre-emptive use of force if this is dictated by Russia's interests or its commitments to allies' (cited in Washington Times, 2004: 9 September). The Russian claims of a right to use pre-emptive force were supported by British Foreign Secretary, Jack Straw, who said that pre-emptive force was included in every state's right to self-defence: 'The United Nations charter does give the right of self-defense, and the U.N. itself has accepted that an imminent or likely threat of terrorism certainly entitles any state to take appropriate action' (ibid.). However, many other states did not support Straw's interpretation of the UN Charter. While France said that the question ought to be debated within the EU, G8 and the UN, a spokeswoman for the EU said that 'such statements are not the first instrument that will bring results' in the fight against terrorism. According to Turkey, it was a 'one-sided approach' not useful to combat terrorism. Finally, also UN Secretary-Kofi Annan expressed his disagreement with the British interpretation warning that the fight against terrorism should not 'undermine the rule of law and basic civil rights' (ibid.).

Being in a long-standing military conflict regarding the Kashmir province, both India and Pakistan have claimed a right to use preventive force against each other even though both states opposed the Iraq war and the American doctrine of preventive self-defence. In April 2003, Indian Foreign Minister, Yashwant Sinha, echoed the Bush administration's reasons for invoking pre-

[73] See http://merln.ndu.edu/whitepapers/Russia2010_English.pdf. Note that this is *not* an official translation of the Russian Military Doctrine, but an English translation provided by the Military Education Research Library Network.

ventive force declaring that '[i]f lack of democracy, possession of weapons of mass destruction and export of terrorism were reasons for a country to make preemptive strike in another country, then Pakistan deserves to be tackles more than any other country' (cited in Dombrowski & Payne, 2006: 120). By the way India defined pre-emption as surprise attacks it is evident that India did not speak of pre-emption but prevention. In response to the Indian threat, Pakistan said that India was 'a fit case for preemptive strikes', as it possessed 'biological, chemical and other weapons of mass destruction' (ibid.). However, both states quickly toned down their positions on preventive force. A few days later, India said that its comparison of Pakistan and Iraq was rhetorical and not intended as 'advance indication for any kind of imminent action' against Pakistan (cited in Acharya, 2003: 237). This indicates that these claims of preventive force most likely were policy statements caught in the moment of the Iraqi war rather than evidence of an adoption of the new norm on preventive force.

Supporting the Bush administration's norm on preventive force, Japan in April 2003 claimed that it had the right to use pre-emptive force against the increasing threat of a nuclear-capable North Korea. However, Japan only asserted this right if it received firm intelligence information that North Korea was about to launch a missile strike against Japan. Also in April 2003, Taiwan claimed a right to use pre-emptive force against China if evidence showed that China was preparing an attack against the island (Gathii, 2005: 93). Contrary to what is often claimed, China did not responded to Taiwan's declaration by claiming its own right to use pre-emptive force against Taiwan. According to Amitav Acharya, China would of course move quickly faced with the imminent prospect of Taiwanese independence to 'preempt' an American reinforcement of Taiwan, but in general China appears to prefer a strategy of deterrence in handling the Taiwan issue (Acharya, 2003: 238). China may have hardened its policy towards Taiwan, adopting an anti-secession law that authorises 'non-peaceful means' in the case of Taiwanese secessionist actions, as argued by Reisman and Armstrong (2006: 544), but the law does not make explicit or implicit declarations of a right to use pre-emptive or preventive force. Hence, both Japan and Taiwan only invoked a right to use pre-emptive force and did not, like the Bush administration, redefine this right to include preventive force.

Other states that have claimed a right to use pre-emptive or preventive force after the Iraqi war are some of the 'target'-states of the Bush doctrine, namely the so-called rogue states composing an 'axis of evil' such as North Korea and Iran. In response to the increasing crisis between North Korea and the US following the Korean withdrawal from the Treaty on the Non-

Proliferation of Nuclear Weapons in January 2003, the Foreign Minister of North Korea in February 2003 declared that North Korea considered launching a pre-emptive strike against the US rather than let the US strike first. According to North Korea, 'Pre-emptive attacks are not the exclusive right of the US' (cited in Reisman & Armstrong, 2006: 546). In 2004 Iran warned that it considered using pre-emptive force to prevent an American or Israeli attack on its nuclear facilities. In an interview with the news network *Al Jazeera* on 19 August 2004, the Iranian defence minister, Ali Shamkhani, said that Iran 'will not sit and wait for what others will do to us' while adding that preventive operations were not the monopoly of the US (*New York Times*, 2004: 20 August). Neither North Korea nor Iran specified the circumstances in which such use of force would be implemented, so it remains unsettled whether they were speaking of pre-emptive or preventive force. However, both the North Korean and the Iranian claims of a right to use force in a preventive manner were more likely a reaction to the military threat from the US (and Israel) rather than an actual embrace of the new norm on preventive force. If the US was allowed, so were they.

8.4.2.2. Use of Preventive Force

Only one incident of preventive use of force has taken place since the Iraq war. On 6 September 2007 Israel launched a preventive strike against a nuclear facility near al-Kibar in the north-eastern part of Syria. The use of force was in many ways similar to the 1981 Osiraq incident, where Israel in a preventive strike destroyed an Iraqi nuclear reactor under construction: The strike against the al-Kibar reactor was an unmotivated surprise attack; it was a 'clean' strike in the sense that it took place in the early dawn and did not cause any (reported) personnel damage;[74] and, finally, the al-Kibar reactor was under construction as well.

However, the al-Kibar incident was also in many ways different from the Osiraq incident. Unlike the Osiraq reactor, which was being constructed in cooperation with France under the surveillance of IAEA with the purpose of producing research and power, the construction of the al-Kibar reactor was illegal. Furthermore, the construction was surrounded by mystery as the Syrian government neither before nor after the strike gave any firm information

[74] In the Osiraq strike, Israel argued that it had launched the strike on a Sunday evening with the aim to destroy the reactor without causing any personnel damage, as all staff (researchers and construction workers) working at the reactor was expected to be at home. However, one French technician was at the site and was killed.

about the reactor. Hence, there are several stories about the purpose of the reactor. According to CIA, the reactor was built with North Korean assistance to produce plutonium for nuclear weapons. An article in the German weekly, *Der Spiegel*, citing 'intelligence documents', claimed that the reactor was part of a multinational nuclear weapons effort led by Iran in collaboration with Syria and North Korea. Either way, the reactor was illegal, as both Syria and Iran are non-nuclear-weapons state-parties to the Non-Proliferation Treaty, which prohibits non-nuclear states from developing and producing nuclear weapons (Spector & Cohen, 2008: 1).

Even more interesting, the reactions to the al-Kibar incident sharply contrast the Osiraq incident. Whereas the Osiraq incident was debated in the Security Council with explanatory statements from both Israel and Iraq and subsequently strongly condemned by every member state of the Council, the al-Kibar incident was surrounded by silence by the parties involved as well as the other states. In an almost unprecedented way, the Israeli government refused to confirm Israel's involvement in the attack and virtually imposed a total news blackout lasting seven months (ibid.; Zisser, 2008: 1). Even more surprisingly, Syria did not make many comments regarding the strike as well. At first it was silent on the matter, but then it offered a variety of explanations, which intensified the mystery surrounding the strike. First, Syria said that an Israeli aircraft had penetrated Syrian airspace but denied that it had attacked anything. Then, Syria's President, Bashar al-Assad, confirmed that Israel had launched an airstrike against Syria, but said that the Israeli aircraft had attacked an unused military building. Ten days later he modified this explanation saying that the Israeli aircraft had hit an empty military installation in the process of being constructed and so no persons had been injured or killed (Zisser, 2008: 3).

The strike did not result in international comments or criticism. The incident was not discussed in the UN, neither in the Security Council nor in the General Assembly. Every Arab state, without exception, totally ignored the Israeli action and did not press for retaliation against Israel, diplomatic or otherwise. Even Iran, Syria's closest ally, remained silent. Only North Korea strongly condemned the Israeli attack (Spector & Cohen, 2008: 3). This pattern of silence continued even after CIA in April 2008 disclosed that Israel had attacked a Syrian nuclear reactor under construction in a preventive strike. The strike was thus a clear application of the new norm on preventive force, which the states of international society effectively had dismissed in the case of the Iraq war. The question is how to interpret this silence; was it a sign that the states of international society were beginning to embrace the new norm on preventive force after all? Or were the political circumstances

surrounding this incident so special that it is a case of something else? According to Spector and Cohen, regional politics certainly played a role. Being an isolated state with close ties to Iran, Syria was perceived as a disruptive influence in the region by the other Arab states (ibid.: 4). Furthermore, the assassination of the Lebanese Prime Minister, Rafic Al-Hariri, in February 2005, in which Syria was suspected to have role, may also have contributed to Syria's unpopular status in the Arab region. However, Spector and Cohen conclude that even though it 'would be an overstatement to interpret the international silence on the al-Kibar attack as constituting tacit endorsement … that threatened states have a right to preventively attack clandestine foreign nuclear facilities', the persistence of the silence of the other states suggests that they have become 'more tolerant of an affected state using force preventively, beyond the classic rule limiting anticipatory self-defence to cases where a threat is imminent' (ibid.: 5). Despite Spector and Cohen's reservations, their final conclusion still seems too drastic. Another interpretation of this incident may be that it is 'the odd one out', an exception to the rule so to say. The incident was surrounded by mystery and no one really knew what had happened due to both Israeli and Syrian silence. In the case of Israel's use of force against Tunisia in response to a terrorist attack in 1985, which was dismissed by the other states (see Chapter 6), Australia said that 'two wrongs did not make a right', but maybe in this case it did. In contrast to the Osiraq reactor, which was legally built in cooperation with France and subject to IAEA monitoring, the al-Kibar reactor was secretly built most likely with North Korean aid, undeclared, deliberately concealed, not subject to IAEA monitory and thus clearly illegal. In this case, one illegal action triggered another illegal action. Because of the mystery and complexity surrounding the case and the fact that either Israel or Syria called attention to the incident, the easiest solution for the other states was to do and say nothing. This does not necessarily indicate that they supported the Israeli action but rather that silence was the simplest solution to a complex situation. The one situation in which preventive force has been used since the Iraq war thus does not seem to indicate that the new norm is evolving much further.

8.4.3. President Obama and Preventive Use of Force

President Obama has clearly dismissed the Bush administration's norm challenge advocating the right to use preventive force as self-defence against non-imminent threats on several occasions. First of all, there was no mention of preventive force in the Obama administration's 2010 National Security

Strategy. Rather, the strategy emphasised that the use of force is only a last resort and only with international support:

> While the use of force is sometimes necessary, we will exhaust other options before war whenever we can, and carefully weigh the costs and risks of action against the costs and risks of inaction. When force is necessary, we will continue to do so in a way that reflects our values and strengthens our legitimacy, and we will seek broad international support, working with such institutions as NATO and the U.N. Security Council (Obama, 2010: 27 May).

The rejection of preventive force as self-defence does not mean that President Obama has not reserved the right to unilaterally use force as self-defence, but in contrast to President Bush he has done so without contesting the international norms governing the right to self-defence:

> The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force. Doing so strengthens those who act in line with international standards, while isolating and weakening those who do not (Obama, 2010: 27 May).

President Obama strongly emphasised this endorsement of international standards as guiding principles for the use of force in his Nobel Peace Prize speech in Oslo on 10 December 2009. The speech by no means called for a pacific approach regarding the use of force. On the contrary, President Obama argued that the use of force in many situations is necessary to preserve the peace thus recognising the inherent tension between the use of force to enforce international norms of international society and the use of force as a threat to the international order of international society: 'A non-violent movement could not have halted Hitler's armies. Negotiations cannot convince al Qaeda's leaders to lay down their arms. To say that force may sometimes be necessary is not a call to cynicism – it is a recognition of history; the imperfections of man and the limits of reason' (Obama, 2009: 10 December). Hence, it would be wrong to characterise President Obama as a pacifist rejecting any use of force. Rather, he is a rationalist in the English School sense of the word, highlighting the necessity of complying with international norms to secure a stable international order based on legitimacy:

> … I believe that all nations – strong and weak alike – must adhere to standards that govern the use of force. I – like any head of state – reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and

> isolates and weakens those who don't. (…) Furthermore, America – in fact, no nation – can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified (ibid.).

While arguing for a norm-based right to use force grounded in international consensus and legitimacy, President Obama has not only completely dismissed the Bush administration's policy of preventive force redefining international law but also its policy of American exceptionalism and unilateralism.

During his presidential election campaign, Obama was highly critical of the war in Iraq, but after being elected, he has toned down the critique of the war, referring to it in rather neutral terms. While he has focused on moving beyond the disagreement that the Iraq war caused both nationally and internationally, there is no doubt that President Obama has remained critical of the Bush administration's decision to go to war in Iraq, which in contrast to the Afghanistan war is not referred to by the President as a legitimate act of self-defence. Speaking at the US Military Academy at West Point, New York in December 2009, where President Bush paradoxically invoked the doctrine of preventive force seven years earlier, President Obama effectively delegitimated the war in Iraq as nothing more than 'a decision' – and a highly costly one:

> … in early 2003, the decision was made to wage a second war, in Iraq. The wrenching debate over the Iraq war is well-known and need not be repeated here. It's enough to say that for the next six years, the Iraq war drew the dominant share of our troops, our resources, our diplomacy, and our national attention – and that the decision to go into Iraq caused substantial rifts between America and much of the world (Obama, 2009: 1 December).

President Obama has further delegitimated the Iraq war by pointing out that one of the lessons of the war was that 'American influence around the world is not a function of military force alone' (President Obama, 2010: 31 August). Rather, the US should use all its elements of power, including its diplomacy, economic strength and the 'power of America's example', to secure its interests. President Obama has thus clearly, at least rhetorically, abandoned the hard power approach of the Bush administration in favour of a more soft power approach to the conduct of international relations.

Finally, President Obama's rejection of preventive force is also visible in his dealings with Iran. Although Iran officially wants nuclear power, which in the Bush administration's view made it a gathering threat necessary to deal

with, President Obama has so far chosen to focus on non-military solutions to the conflict.[75] In all of his 2009 speeches, President Obama only made one reference to a military option against Iran, saying that he would not rule out military action when it came to US security interests; at the same time, the President emphasised diplomacy as his preferred course of action (see Kerton-Johnson, 2010: 158). Thus, President Obama's focus on international co-operation and international law clearly shows that he has abandoned the Bush administration's attempt to redefine international law on self-defence to include preventive force.

8.4.4. The legal status of preventive force: political and legal institutionalisation

Despite the Bush administration's failure to replace the norm on non-use of force with a new norm on preventive force, its norm challenge did have some spill-over effects on the legal and legitimate status of pre-emptive force, which prior to the US norm challenge was unclarified. As argued above, while rejecting any right to preventive force several states such as Russia and France have claimed a right to use pre-emptive force against imminent threats, although they did not support such an interpretation of article 51 prior to 9/11. Furthermore, UN Secretary-General Annan has argued for a right to pre-emptive force as well. The report of the High-Level Panel as well as the Secretary-General's own report *In Larger Freedom: Towards Development, Security and Human Rights For All* published on 21 March 2005 found that there is an existing right under international law to use pre-emptive force against imminent threats. While the Panel based its view on customary international law, Annan did so on the basis of article 51 arguing that 'Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened' (UN doc. A/59/2005: conclusion point 124).

[75] See for example President Obama's speeches to the UN General Assembly in 2009 and 2010. Bringing attention to the nuclear threat from Iran in 2009, the President called for a firm international solution to the problem showing Iran that 'international law is not an empty promise' (Obama, 2009: 23 September). In the 2010 speech, President Obama declared that the international community had done so through the adoption of UN Security Council resolution 1929 imposing further sanctions on Iran (Obama, 2010: 23 September).

Like the High-Level Panel, the Secretary-General also accepted the American claim that preventive force may be necessary to counter the new threats from global terrorism and WMD but argued that such use of force should be authorised by the Security Council, which had the full authority 'to use military force, including preventively, to preserve international peace and security' (ibid.: conclusion point 125). This claim that pre-emptive force is legal under international law is rather controversial, as states for long have disagreed on whether pre-emptive force is included in article 51 and continue to do so. Therefore, the Secretary-General's claim of pre-emptive force was also rejected by a number of states (Gray, 2006: 566). For example the Non-Aligned Movement explicitly rejected such a right following the release of the High-Level Panel report (see A/59/PV.85). At the UN World Summit in September 2005 the states did not follow the conclusions of the Secretary-General and the High-Level Panel regarding the legality of pre-emptive force, but it was not rejected either. Because the states did not agree on this matter, the *Outcome Document* of the summit only provided a vague statement on the use of force saying that 'the relevant provisions of the Charter is sufficient to address the full range of threats to international peace and security' (UN doc. A/Res/60/1, p. 22). Thus, the summit clearly revealed the deep divisions between the states on the law on the use of force (Gray, 2006: 566). Furthermore, although some European states such as the UK and later also France have supported a right to use pre-emptive force as self-defence, this view has not been reflected in the *EU Security Strategy* published in December 2003. Without addressing the issue of preventive/pre-emptive force directly, the EU Security Strategy rejected the American claim that the new kind of threats is 'purely military' threats that only can be tackled 'with purely military means' (EU, 2003: 7). The strategy was almost strikingly silent on the subject of the use of force. Instead it emphasised the role of international law, in particular the UN Charter, which was seen as 'the fundamental framework for international relations' (p. 9). Without explicitly saying so, the EU security strategy profiled itself as a counterpart to the US National Security Strategy and thus did not seem to support unilateral use of pre-emptive force and most definitely not preventive force.

Moreover, legal institutions such as the International Court of Justice have not confirmed that pre-emptive force is included in article 51 of the UN Charter. Recall that the Court has not earlier specifically addressed the question about the legality of pre-emptive force. In the 1986 *Nicaragua* case the Court argued that self-defence was legal in response to an armed attack and conveniently refrained from addressing the question of the legality of pre-emptive self-defence (see Chapter 5). However, in a recent case from

2005, *Armed Activities on the Territory of the Congo*, which was brought before the Court by the Democratic Republic of Congo (DRC) against Uganda, the Court was required indirectly to address the issue of pre-emptive self-defence. In this case, DRC claimed that the Ugandan military operation 'Safe Haven' against DRC borders constituted an act of aggression. According to Uganda, it had launched this operation to protect itself and its 'legitimate security interests' from the military instability in the DCR and thus implicitly justified the operation on the basis of pre-emptive force to protect itself from armed attacks that had not yet occurred (Reiman & Armstrong, 2006: 535). The Court did not accept Uganda's justification claiming that the specified security needs emphasised in the 'Safe Haven' plan were 'essentially preventative' and noting that Uganda had failed to produce evidence of armed attacks against it: 'While Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of DRC' (the Court cited in ibid.). The Court indicated that it did not accept purely pre-emptive action as self-defence and its ruling in this case thus runs counter to the conclusions of the Secretary-General and the High-Level Panel. This indicates that the legality of pre-emptive force is disputed and that the use of pre-emptive force remains controversial.

8.5. Conclusion

The analysis shows that the Bush administration did not succeed in its norm challenge, as the new norm on preventive force did not make it beyond the stage of emergence in the process of norm evolvement. The Bush administration's decision to apply the new norm on Iraq met considerable opposition from a majority of the states in the UN, by international organisations, great powers and so-called vulnerable states. In general, the new norm was dismissed on the basis that it undermined international law and would lead to a dangerous use of force. In other words, it was seen as highly illegal and illegitimate and as destabilising the order of international society.

After the international rejection of the Bush administration's new norm, the policy of preventive force was nevertheless adopted by a few states: including North Korea and Iran, who claimed that if the US was allowed to use force preventively, so were they; and Israel, who in 2007 launched a preventive strike against a nuclear reactor in Syria. These incidents show that even though a norm challenge is effectively dismissed by the states of international society, it may still have severe consequences for the international order, as one norm violation may lead to another. I will further discuss the normative consequences of norm challenges in Chapter 9.

Finally, while the Bush administration's norm challenge in many ways resulted in the common determination that preventive force was illegal and illegitimate, the norm challenge did have some effect on the status of pre-emptive force. Today more states find pre-emptive use of force legitimate compared to pre-2001 times. Furthermore, even though this new view of pre-emptive force has not been reflected in international law, it has become politically institutionalised in the reports by Kofi Annan and the High-Level Panel, which argue that pre-emptive force is included in article 51 and thus legal. However, consensus on the legality and legitimacy of pre-emptive force still does not exist and it remains stuck in a grey zone of international law.

PART V
CONCLUSION

Chapter 9
The Strength of Fundamental Norms: Did President Bush Really Kill Article 2(4)?

The Bush administration has been accused of killing the norm on non-use of force (Franck, 2003; Arend, 2003). This dissertation has questioned this claim, arguing that fundamental norms are stronger than the will of great powers. Hence, the aim of the thesis has been to examine the strength of fundamental international norms when they are challenged by a great power. My main concern has been to shed light on why great powers in some situations are able to change such norms while they are unable in other situations. To fulfil this aim I have traced the outcomes of two challenges to the fundamental norm on non-use of force posed by the Bush administration. Both norm challenges tried to extend the right of self-defence: while the first norm challenge claimed a right to use force as self-defence against states that harbour terrorists guilty of grave terrorists act, the second norm challenge claimed a right to use preventive force as self-defence. As the US is the world's only superpower, the challenges posed a hard test of the norm on non-use of force. To investigate whether the norm was strong enough to resist the US' norm challenges, I proceeded in four steps.

Using the English School's theory on international norms, I first developed a theoretical framework on the relationship between fundamental norms and great powers. A central theoretical argument of the thesis was that state conduct is inherently normative in the sense that it is always justified with reference to international norms – even state action that violates a norm is justified with reference to another norm. When a state challenges an international norm with the aim of changing it in accordance with its own interests it does so with reference to other norms: It tries either to modify the existing norm or to contest it by trying to replace it with a new norm. The success or failure of this norm challenge depends on whether the other states of international society find the new or modified norm more legitimate than the old norm. To transform this theoretical framework into a workable theoretical model of norm change, the theoretical insights of the English School was integrated with constructivist theory, which shares the English School proposition that norm change is a social process.

As a second step the theoretical model was transformed into a measureable model of norm change. The analysis of norms and norm change called for an interpretative, but not necessarily a normative approach, which otherwise commonly has been associated with the English School. Rather, the thesis has followed Buzan's call for a reconstruction of the theory of the English School into a more positivistic analytical theory (Buzan, 2004: 14). To increase the internal validity and the replicability of the study, the theoretical model was transformed into a measureable model of norm change by operationalising each phase of the process of norm change into a set of observable empirical implications.

To determine whether the Bush administration succeeded in its challenges of the norm on non-use of force, I first had to establish the status of the norm prior to the Bush presidency. Thus, the third step of the dissertation was a legal and historical assessment of the norm on non-use of force prior to 2001. I showed that following the adoption of the UN Charter in 1945 the norm on non-use of force was given the status of a *grundnorm* of international society. The only legal exceptions to this general prohibition on the use of force were self-defence in response to an armed attack or if the use of force was authorised by the UN Security Council to maintain international peace and security. Hence, neither the use of force against states harbouring terrorists guilty of terrorist acts nor the preventive use of force as self-defence were legal according to international law or regarded as legitimate by the majority of states in international society.

As a fourth and final step, the Bush administration's two norm challenges were analysed. Following the theoretical model of norm change, these empirical analyses first examined the content of the norm challenges to determine what *kind* of norm change each norm challenge sought to establish. They proceeded with a systematic analysis of how the other states reacted to the two norm challenges and their manifestations in the wars against Afghanistan and Iraq, respectively, to determine to what extent the states supported the norm challenges. Lastly, it was examined whether the new norms promoted by the Bush administration had cascaded to other states and other incidents and whether they had become politically and legally institutionalised. The specific findings of each analysis are further elaborated below, but the general conclusion is that a great power cannot always succeed in changing a norm by applying all its power and goodwill. If norms are to change, the change must be seen as legitimate by the other states.

In this chapter, I bring the main pieces of the study together. I first compare the findings of the empirical analyses. So far, most studies have focused on the content of the norm challenges or the consequences of the wars in

Afghanistan and Iraq but a systematic study that compares the states' reactions to the two wars has not yet been conducted. The result of this study is thus both theoretically and empirically interesting, as it informs us about the strength of fundamental norms and the extent to which they can be changed by great powers. The chapter then looks at some of the theoretical and empirical implications of the study, starting with a discussion of how to theoretically explain why only the first norm challenge succeeded. This is followed by a discussion of how stable fundamental norms are and whether fundamental norms are always stronger than great powers. I then go on to discuss how successful and unsuccessful norm challenges may affect the order of international society before ending the chapter with a comment on the state of international society today.

9.1. Empirical findings: comparing the cases

The empirical analyses showed that while the Bush administration's first norm challenge successfully led to a norm change, the second norm challenge failed. Before comparing the reactions to the two cases, I briefly describe the outcome of each norm challenge.

In the first case, the Bush administration challenged the norm on non-use of force by claiming that the use of force against states harbouring terrorists was included in the right to self-defence. Prior to 2001 this kind of force was illegal according to international law and was considered illegitimate by most states. However, it was not the first time that this norm challenge was put forward: Both Israel and the US have acted as norm entrepreneurs and tried to change the norm several times prior to 2001. Although the US was successful in obtaining the support of some Western states, especially in the 1998 air strikes against Afghanistan and Sudan in response to the bombings of the American embassies in Kenya and Tanzania, a vast majority of states rejected that such a right to use force was included in Article 51 of the UN Charter. This changed in 2001, as almost every state in the world now supported the Bush administration's claim of a right to use force as self-defence against states harbouring terrorist guilty of the 9/11 terrorist attack. The UN Security Council unanimously adopted Resolution 1368, which not only for the first time in the Council's history declared the right of self-defence in response to terrorist acts but also subscribed this right to the US without limiting it to a specific country. A similar resolution was adopted with consensus by the General Assembly, in which every member state of the UN is represented. The war against Afghanistan manifesting this new norm was supported by a large majority of the world's states (only six states criticised the

war), and support to the new norm proved consistent after the invasion of Afghanistan. Subsequent invocations of this new norm by other states in other incidents were also considered legitimate by the states of international society in cases where a state had been victim of grave terror acts and the terrorist-hosting state did not cooperate in eliminating the guilty terrorists. In other words, it was not just a one-time 'exemption to the rule' allowing only the US to use force against states harbouring terrorists in this particular incident. Finally, the new norm has become politically and legally institutionalised, which means that today all states are obligated to do everything in their power to eliminate terrorists located in their territory; otherwise other states can legally invoke a right to use force against this state if a grave terror act has taken place and the guilty terrorists are located in the territory of that state. Hence, the Bush administration successfully changed the norm on non-use of force; unlike before 2001 the use of force as self-defence against states harbouring terrorists guilty of grave terrorist acts is now considered to be a legitimate exception to the general ban on the use of force.

In contrast, the Bush administration was not that successful when it in 2002 again tried to change the norm on non-use of force this time claiming a right to use preventive force as self-defence against non-imminent threats. Prior to 2001, preventive use of force was clearly illegal according to international law and in the few cases where preventive force had been used, it was considered clearly illegitimate by all states. This did not change when the Bush administration claimed that preventive use of force should be included in the right to self-defence and decided to apply this new norm in the war against Iraq in 2003. Whereas a large majority of the world's states, including the great powers France, Russia and China and the Arab and Muslim world, supported the war against Afghanistan, the same states thoroughly condemned the war against Iraq. Furthermore, later incidents, where other states claimed a right to use preventive force, were clearly dismissed by the states of international society as illegitimate and illegal. Also the new President of United States, Barack Obama, has emphasised that *all* states must follow international rules and has thus rejected his predecessor's claim about a right to use preventive force as self-defence. Finally, the fact that preventive force has been and still is considered illegal has also been confirmed by the reports of the UN Secretary-General and the High Level Panel on Threats, Challenges and Change as well as the International Court of Justice.

A comparison of the two cases reveals great difference in the amount of support to the first challenge and the Afghanistan war and the second norm challenge and the Iraq war. Table 9.1 compares the results of the two quantitative analyses of the level of support to the Afghanistan war and the Iraq

war, respectively. It shows the number of states which explicitly in their statements in the UN either supported or opposed the two wars.

Table 9.1. Number of states opposing or supporting the wars in Afghanistan and Iraq based on statements in the UN

	Support for the war	Opposition to the war
Afghanistan	90	6
Iraq	46	81

As illustrated in the table, the number of states supporting the Afghanistan war almost corresponds with the number of states opposing the Iraq war. In other words, the war in Afghanistan was just as popular as the war in Iraq was unpopular. Comparing the opposition to and support for the two wars, the critique of the Iraq war was almost 14 times higher than the critique of the Afghanistan war, while the support for the Afghanistan was only close to two times higher. The qualitative analysis of great power support showed that besides the US and the UK the other three great powers of the Security Council, France, Russia and China, all supported the first norm challenge and the war against Afghanistan, but opposed the second norm challenge and the war against Iraq.

The great opposition to preventive force and the Iraq war was also visible in the reactions from international and regional organisations. Table 9.2 compares their level of support in each war. As shown in the table, the explicit support for the Afghanistan war expressed by especially Western and American international organisations such as the EU, NATO and OAS turned into silence in the case of the Iraq war. The organisations were deeply divided on the issue and refrained from supporting or condemning the war. The opposite is the case for other regional organisation such as the Non-Aligned Movement, the African Union, the Organisation of Islamic Countries, the League of Arab States, the Gulf Cooperation Council and even the Caribbean Community. While they all were very critical of the Iraq war, they remained rather passive on the Afghanistan war and some were even slightly supportive of the first norm challenge in the sense that they expressed clear support for UN Security resolutions 1368 and 1373. So, whereas the organisations were either supportive or passive with regard to the Afghanistan war, this picture changed in the case of the Iraq war, where the previously supportive organisations became passive and the previously passive organisations now turned very critical.

Table 9.2. The level of support by international and regional organisations based on statements to the UN

International/ regional organisation	Afghanistan war			Iraq war		
	Supportive	Passive	Critical	Supportive	Passive	Critical
UN Secretary-General	X					X
EU	X				X	
NATO	X				X	
OAS	X				X	
Rio Group	X				X	
Caribbean Community		X				X
League of Arab States		X				X
OIC		X				X
Gulf Cooperation Council		X				X
Non-Aligned Movement		X				X
African Union		X				X
ASEAN		X			X	

Furthermore, even the so-called vulnerable states that may be more exposed to American use of force, e.g. Iran, North Korea, Sudan and Syria, were only slightly critical of the Afghanistan war and actually seemed somewhat sympathetic to the content of the first norm challenge: They only expressed concern about the risks of double standards and of hurting innocent civilians in the case of the Afghanistan war, but they did not reject the fundamental right of the US to use force against a state harbouring terrorists. Only Iraq and Cuba were really critical of the first norm challenge and categorically rejected the use of force against states harbouring terrorists guilty of grave terror acts. In the case of the second norm challenge and the Iraq war all vulnerable states condemned the war and categorically rejected that the US had any right to use preventive force against Iraq.

To sum up, the opposition to the Iraq war and the new norm on preventive force generally corresponds to the support to the Afghanistan war and the new norm allowing the use of force against states harbouring terrorists guilty of grave terror acts. In other words, the great support to the Afghani-

stan war turned into opposition in the case of the war against Iraq. Because the two wars against Afghanistan and Iraq are controversial in the sense that they both had the potential to rewrite international law, this may explain the rather clear positions of the states, especially in the case of the Iraq war. Recall that customary international law is made by state action and other states' reactions to these actions. When a state tries to advance a new norm or a new interpretation of a norm, other states can either support the new norm by appraising the actions that articulate the change or they can oppose the new norm by condemning these actions. If a state neither appraises nor condemns the actions but keeps quiet, it is seen as a tacit endorsement of the new norm-in-the-making. Put differently, if a state does not support a new norm of international law it must speak up. This may explain why the general reaction to the Iraq war was greater than the general reaction to the Afghanistan war. If the states did not want preventive use of force to become legal, they had to explicitly say so. And this they did.

These empirical findings of the study contribute to the general debate about the impact of the two wars on the norms governing the use of force. First, the conclusions run counter to those who argue that the first norm challenge and the war in Afghanistan did not change the norms governing the use of force (Cassese, 2005: 475). As shown here, support for the new norm has been 'express, clear and consistent' and it has covered more than one instance. Second, the conclusions contradict those who claim that the Bush administration succeeded in its second norm challenge and that a new norm on preventive force has emerged (Dombrowski & Payne, 2006; Steinberg, 2006; Arend, 2003). The results show that the norm challenge was firmly opposed by a large majority of states and later claims by other states on a right to use preventive force have been clearly opposed as well. Third and finally, by systematically comparing the support to the two norm challenges I have shed new light on how to interpret the level of support in each challenge. Using the Afghanistan case as a base-line model makes the support to the Iraq war by 46 states seem relatively smaller and the opposition by states, including great powers and vulnerable states, and international and regional organisations relatively larger. Furthermore, the comparison opens up for some interesting theoretical insights regarding the strength of fundamental norms versus the will of the great power, which is the subject of the next section.

9.2. Fundamental norms versus great powers' norm challenges: Why did the first norm challenge succeeded but not the second?

The main aim of the dissertation has been to investigate how strong fundamental norms are when they are challenged by a great power. Applying an English School theory, which includes both material and ideational factors in its theoretical framework, the purpose was to shed light on the inherent tension between fundamental norms and great powers. Because great powers are politically, militarily and socially superior to other states, they are given the role as the managers of international society, which implies that they also to a greater extent have the capabilities to create and change norms than smaller states (Bull, 2002). Great powers are often able to make their preferred norms acceptable for other states for long periods of times, because the common desire for order is more powerful for many states than a breakdown of order (Bull, 1980: 438-39). The dissertation has been concerned with the question of how strong norms made by the great powers are when a great power withdraws its support, especially if the norm has the status of a fundamental norm that constitutes international society.

The empirical analyses showed that great powers do not always have the power to change international norms although they try to: the Bush administration only succeeded in its first norm challenge, as the second challenge was heavily opposed by a majority of states. This result thus runs counter to realist theory, which claims that great powers are more powerful than international norms and always can change norms to maximise their own interests (Brooks & Wohlforth, 2005). In contrast, by using the reaction of the other states to the norm challenges as an indicator of whether a norm change took place, this study has shown that in some situations fundamental norms are stronger than power. While the states of international society accepted small changes to the norm on non-use of force in the form of another addition to the existing exceptions to the general ban of force, they did not allow complete abandonment of the fundamental norm and its replacement with a new norm on preventive force. The study thus supports the English School's proposition that fundamental norms constituting international society are more powerful than the will of the great power. They are only subject to change when a vast majority of states find it legitimate and not necessarily when the great power wants it so. Hence, a central argument of this study is that the key explanatory factor is the legitimacy of the norm challenge. Legitimacy, and not the will of the great power, explains why we

see a norm change in the first case but not in the second. This claim is elaborated below, where I will discuss some competing explanations, which point to other factors than legitimacy when explaining the outcome of the two cases.

9.2.1. Alternative explanations

A central competing explanation of why the states supported the first norm challenge but not the second comes from realism. In explaining the pattern of support and opposition to the Iraq war, realists often point to theories of power balancing and bandwagoning (Glennon, 2003). However, because the great power is kept constant in this study, this explanation can only be used to explain why some states where supportive or critical of *both* wars. Band-wagoning theory, for example, may explain why so many Eastern and Central-European states were very supportive of both the Afghanistan and the Iraq war (see Mouritzen, 2006). But these theories cannot explain the variance in states' support to the two norm challenges – why they supported the first norm challenge but not the second. For example, why did the great powers, France, Russia and China, support the war against Afghanistan but not the war against Iraq? Why did traditional US allies from all over the world, such as Canada, Mexico, Kuwait, Barbados, Jamaica, Thailand, South Africa, New Zealand, Ireland and Norway, support the Afghanistan war but not the Iraq war? Or put differently, why did traditional US-critical states from the Middle East support or at least not oppose the Afghanistan war but not the Iraq war?

The answer, as argued above, is legitimacy – the war-opposing states did not find preventive use of force a legitimate solution to the new threats of global terrorism. President Bush justified the war in Iraq as a necessary war of preventive self-defence but this claim was dismissed by many of the war opponents. They found that a legal right to use preventive force would pose a bigger threat than the threat from terrorism, as it would take international society back to pre-1945 times where the use of force was legal as long as it was called self-defence. Hence, an unrestricted right to use preventive force was regarded as dangerous because it would give states the right to use force against every other state seen as a potential threat, which would undermine the current international order based on the fundamental norms of non-use of force, non-intervention and sovereignty. While the use of force against states harbouring terrorists guilty of grave terrorist acts was seen as an appropriate response to the threat from terrorism and thus legitimate, the use of preventive force to hinder terrorist attacks was considered to be over

the top and thus illegitimate, which explains why it quickly was denounced as illegal by a vast majority of states.

However, in response to this realists would point to the variance in the states' self-interests in Afghanistan and Iraq. One could argue that the Taliban regime was already considered an outlaw regime, as it was not formally recognised as the legal government of Afghanistan, and thus nobody cared what the US did to Afghanistan. It is probably true that the legitimacy of the Taliban regime was low and that the support of the other states thus went further than it would otherwise have done. But the Afghanistan war was only the tipping point that made the new norm cascade, as support to the new norm has been consistent since the Afghanistan war. For example, the states of international society supported Russia's invocation of the new norm in response to the terror attack on a theatre in Moscow in 2002 and India's invocation of the new norm following the Mumbai terror attack in 2008. Hence, the low legitimacy of the Taliban regime cannot explain why the first norm challenge succeeded in creating a new norm allowing the use of force against states harbouring terrorists, but it may explain why the states of international society accepted that the military intervention in Afghanistan led to regime change, which otherwise may be seen as a violation of the norm on proportionality.

In relation to the Iraq war, one can argue that state opposition against this war is explained by the fact that many states had economic interests in Iraq, which would be jeopardised by a war. In other words, these states simply justified their opposition to the war by referring to international norms to cover up their real motives. I cannot dismiss the claim that some states were critical of the war against Iraq because of their own interests in the country. However, it is seems unlikely that all 81 war-opposing states had economic interests in the country, especially as much critique came from African and Middle East states as well as regional organisations representing these states. Furthermore, it is never possible to disclose the real motives of state action and this has not been my intention. Rather, I am interested in the states' spoken justifications and evaluations, as they tell us what the ruling norms of international society are (Bull, 2002: 134).

A second alternative explanation of the level of support to the two norm challenges points to the timing of the two challenges and thus draws on the theoretical argument that great events may foster norm change.[76] Accord-

[76] See Finnemore and Sikkink (1998), but note that they only put forward the theoretical proposition of norm change and do not apply this on the two cases discussed here.

ing to this argument the 9/11 terrorist attack was so unique and horrifying that it left the US with enormous amounts of sympathy allowing it to respond in whatever way it wanted (Byers, 2003: 10). The terrorist attack killed almost 3,000 people and injured more than 6,000 people; most of the casualties were civilians from 77 different countries.[77] In those days the whole world sympathised with the US. Hence, according to this argument, the terror attack opened a window of opportunity for the Bush administration to successfully change the norm on non-use of force to include the use of force as self-defence against states harbouring terrorists guilty of grave terrorist acts. While it certainly is true that the horror of 9/11 was unprecedented and shocked everybody to the bone and thus may explain some of the support for the US norm challenge, it is less certain that the event gave the Bush administration *carte blanche* to change international norms – the other states still had to find the norm change legitimate. It is very unlikely that the administration could have gathered broad support for a claim giving the US the right to use preventive force against any potential threat after 9/11. While this argument is counterfactual and hence difficult to prove, it is supported by the fact that the Bush administration without success did use the 9/11 terror attack to justify the second norm challenge, arguing that the use of preventive force was necessary to counter the new threats from global terrorism and weapons of mass destruction. Although the timing of this claim is different from the first norm challenge, which was put forward the day after the 9/11 terror attack, the second norm challenge was presented only four months after the terror attack. In this sense the context of the two norm challenges was almost the same. Hence, great events may result in norm change, as states may be more receptive to changes, but they do not *automatically* foster norm change – the norm change still has to been seen as a legitimate and appropriate solution to the new situation resulting from the great event.

Another more pragmatic argument, which may be used against my claim that legitimacy explains why the first norm challenge succeeded but not the second, is that for a norm change to occur it must be followed by successful implementation. This explanation is often used in relation to the Iraq war claiming that its limited success explains why the norm did not change. According to this argument the use of preventive force would have become a new legitimate practice if WMD had been found in Iraq and the

[77] For a list of the 77 countries whose citizens died as a result of the 9/11 terror attack, see http://www.interpol.int/public/ICPO/speeches/20020911List77-Countries.asp (10.11.10).

elimination of Saddam had resulted in 'peace, love and democracy'. Again, it is difficult to prove or falsify such a counterfactual argument, but let me try. First of all, the US norm challenge on preventive force was rejected by a vast majority of states even before the intervention in Iraq and also right after the intervention, when the outcome of the war was still unknown. Preventive force was dismissed by the states as an illegal and dangerous practice that would undermine the international order regardless of the Iraq war's degree of success. It is possible that had WMD been found in Iraq and had the war not lasted seven years, claiming the lives of thousands of American soldiers and costing more than 3 trillion dollars,[78] the Bush administration would have launched more preventive wars against other axis-of-evil states. However, that would not necessarily make a new norm on preventive force, as a majority of states would probably oppose these wars for the same reasons that they opposed the Iraq war. Instead, the war ended up being the anti-thesis of the rationale of preventive war, demonstrating the danger of legalising preventive use of force, as there were no WMD. Second, while the war in Afghanistan proved to be more expensive and difficult to win than expected – in fact, the Taliban is not yet conquered – this did not result in a later rejection of the new norm. The problems in Afghanistan may make states think twice before they go into war with a terrorist-hosting regime, but this does not change the fact that they now have the right to use force against another state if they have been exposed to a grave terrorist act and if the hosting state refuses to cooperate to bring the guilty to justice.

Finally, sceptics may claim that the norm on non-use of force did not stop President Bush from invading Iraq, although a majority of states did not support this war. They are right in pointing this out; however, this has never been my claim. Norms are guidelines that states can and most often do choose to follow because it is in their interest to do so, but they do *not* determine state conduct (Jackson, 2000). If a state decides to disregard a norm it will do so. Norms do not have the power to control states, but as this study shows this does not mean that states – not even great powers – have the power to control norms. Realists often use the Iraq war as proof that norms are powerless and only used by states as window-dressing to disguise their dirty acts. The norm on non-use of force did not stop the US from into going to war with Iraq, and if the US wanted it could do it again. But, even though the US decided to put aside the norm on non-use of force and used preventive force against Iraq, it did not succeed in gathering support for this norm change. The norm still stands and it is still considered both illegal and illegitimate to

[78] Estimate by the *Washington Post* (2010: 5 September).

use preventive force. This is strong proof that fundamental norms exist and do bring some order into the anarchical world that international society is. As Bull argued, an international society, in which a pretext for using force is necessary, is radically different from one in which it is not (Bull, 2002: 43). To turn the case of the Iraq war on its head, the war is thus proof of the strength of fundamental norms rather than their defeat. The case shows that even though the norm on non-use of force was challenged and violated by the world's only superpower, it did not bend but proved to be a true *grundnorm* of international society, highly treasured by a majority of the states.

9.3. How stable are fundamental norms then?

Fundamental norms are a central part of the English School theory on international society, but they have lived a rather anonymously life. They are defined to constitute international society, but how they differ from other international norms has not been further conceptualised. Classic scholars of the English School acknowledged that these norms are not static features and that they may change. Such a change may have great impact on the order of international society, as a change of fundamental norms leads to a change in the institutions of international society, which again affects the international order (Buzan, 2006: 81-82). But, how this norm change comes about has not received much attention and has only been dealt with rather implicitly, as the main focus so far has been on the consequences of norm change. Thus, a central aim of the dissertation has been to advance the English School's theory on fundamental norms by theorising on the role of fundamental norms in international society and by analysing two empirical cases of norm change attempts posed by a great power on a fundamental norm. Hence, by investigating the Bush administration's two norm challenges on the norm on non-use of force, the stability or strength of fundamental norms has been subjected to a hard empirical test.

The study showed that fundamental norms are subject to change and that great powers to some extent can change fundamental norms. But for this to happen, the norm change must be seen as legitimate by the states of international society and this may depend on the *kind* of norm change the great power seeks to impose. When it comes to small changes *within* a norm, the states may be rather receptive to a norm change that adapts the norm to changing circumstances such as new threats from global terrorism. In the case of the Bush administration's first norm challenge, which only sought to modify the norm on non-use of force by *adding* an exception to the norm allowing the use of force against states harbouring terrorists, a norm

change took place. The second norm challenge was more extreme as it aimed to *replace* the norm on non-use of force with a new norm allowing preventive use of force against non-imminent threats. While the states of international society considered the first norm challenge an appropriate response to the threats of global terrorism, giving states new obligations to eliminate terrorists in their territory, and thus supported the norm change, the second norm challenge allowing the use of preventive force against states posing a *potential* risk by presumably possessing WMD and/or cooperating with terrorists, was considered more dangerous than the threats of global terrorism. Because the judgement of potential threats is always subjective, a new norm allowing the use of preventive force was seen as having 'dire consequences for world peace' (quotation by Burkina Faso's UN delegate, see UN doc. A/57/PV.17), as it would create a new international order, where the use of force in reality would be unrestricted. Hence, when analysing norm change the *kind of change* may be just as important as other factors, as the radicality of the norm change may help us understand why some norm challenges succeed while others fail.

However, this should not be read as a theoretical claim that norm challenges are bound to succeed if they only seek to modify the norm and that more radical norm challenges aiming to replace a norm with a new norm always fail. A pre-positivist like Robert Jackson would argue that the degree of success of a norm challenge is always an empirical question, while a devoted positivist would argue that further research, which systematically investigates how the type of attempted norm change affects a norm challenge's degree of success, could tell us the exact impact of different kinds of norm challenges. The truth probably lies somewhere in the middle of these two different views on the epistemology of science. So it may be safe to say that the theoretical implication of this study is that the more radical a norm challenge, the smaller the probability that a norm change will occur.

9.4. Are fundamental norms always stronger than great powers?

The study has shown that in the case of the Bush administration's two norm challenges on the norm on non-use of force, the norm proved stronger than the great power in the sense that the administration was only able to change the norm when the other states of international society found the change legitimate. The question is whether we can expect that this is always the case. Do the results of the study imply that fundamental norms are always

stronger than great powers? Put differently, to what extent can the results be generalised to other cases?

The Bush administration's norm challenges are a 'most-likely' case, because being a superpower – or even a hegemon – the US is the most likely great power to succeed. But, as evident in this study, the US did not have unlimited power to replace the norm on non-use of force with a new norm on preventive force, which indicates that other great powers will not be able to change fundamental norms whenever it suits their interests.

However, whether norm challenges succeed or not are of course always dependent on the specific situation. It is not a purely theoretical question but also an empirical one, as the degree of success of a norm challenge always depends on whether the other states of international society find the norm change legitimate. The aim of the study has been to establish to what extent great powers can change fundamental norms and thereby expand our knowledge about the strength of these fundamental norms. It is not an either-or question and hence it is not possible to make general claims about whether fundamental norms are always stronger than great powers. While the results of the study are theoretically interesting, as they provide new insight on the extent to which great powers can change fundamental norms, it would be an exaggeration to say that fundamental norms are always stronger than the will of the great power. Furthermore, such a claim requires much more research, including studies examining the ability of various great powers to change one fundamental norm and studies examining the ability of one great power to change various fundamental norms. Rather, the study falsifies the theoretical claim of realism that great powers are always stronger than norms and that great powers can use international norms instrumentally to advance their interests.

So what are the lessons of this study? A theoretical implication is that great powers are not always able to change fundamental norms, as this depends on whether states of international society find it legitimate. The less radical the norm challenge is, the more likely it is that the other states find the norm change legitimate. If a norm challenge only aims to advance changes *within* the norm it is more likely to succeed compared to norm challenges that aim to impose changes *of* the norm, for example by replacing it.

An empirical implication is that norm change attempts are not costless for a great power. Although the US invested a lot of time and effort in its second norm challenge trying to replace the norm on non-use of force with a new norm on preventive force, it did not succeed. Hence, the lesson of the Iraq war is that it may be very costly in terms of goodwill and legitimacy for a great power to try to impose a norm change without the support of the other

states. In the future the US and other great powers may think twice before they single-handedly violate fundamental norms. This argument is supported by the fact that President Obama so clearly has dismissed the Bush administration's claim of a right to use preventive force and instead emphasised the need of *all* states to follow international norms and rules. It is always less costly to be seen as a legitimate great power fulfilling its great power duties and therefore also enjoying a set of special rights than to be a great power that only takes advantage of its special rights but does not fulfil its great power duties and thus is seen as an illegitimate great power.

9.5. How do norm challenges impact the order of international society?

Challenges of fundamental norms – successful and unsuccessful alike – will often have some impact on the institutions of international society and consequently on international society and the international order. Because these norms constitute international society, elimination or even a smaller change of these norms may have severe consequences for the order of international society, as it may change how states coexist. As Bull noted, only if there is widespread consensus on norm change, including consent from all great powers, a norm change may take place without causing disorder (Bull, 2002). Hence, it is not without risk when state leaders decide to challenge a norm, as norm challenges often create conflict and perhaps even disorder. State leaders thus face the essential normative question of whether a norm challenge is worth the risk – or put differently, whether the risk of causing disorder is less severe than the consequences of not trying to change the norm. This is a difficult question that scholars of the classic English School could write about at length. It therefore seems appropriate to end the dissertation with a discussion of the consequences of successful and unsuccessful norm challenges on the order of international society.

9.5.1. The effect of a successful norm challenge on international society

The first norm challenge posed by the Bush administration was successful and consequently resulted in a change within the norm on non-use of force so that the use of force against states harbouring terrorists guilty of grave terrorist acts is now included in the self-defence right. Since this norm is fundamental and embodied in the institutions of international law and war, the

norm change has changed these two institutions and may also potentially affect international society.

Starting with the effect on the two institutions, the norm change only had a small impact on the institutions of international law and war, as it was a small norm change in the sense that it only resulted in a change *within* the norm and not *of* the norm *per se*. Although the Bush administration's norm challenge did establish a new norm allowing states to use force against states harbouring terrorists guilty of grave terrorist acts, this new right is not unlimited. The new norm is not a *carte blanche* for states to use force whenever they want and against whomever they want, as long as they frame the use of force within the new norm. The Israeli use of force against Syria in 2003 is a clear example of this. Despite Israel's attempt to justify the use of force in the terms of the new norm, the claim was rejected by the other states, arguing that this was not a 'Resolution 1373 situation' giving rise to self-defence but rather a misuse of the new norm. This implies that the right to use force can only be invoked and acted upon if a number of conditions are met. As evident in the Russia-Georgia incident in 2002, where Russia claimed that the presence of Chechen terrorists in the Georgian Pankisi Gorge in the Caucasus Mountains made this area Russia's 'mini-Afghanistan' and thus gave Russia the right to use force as self-defence against Georgia, the right was rejected by the other states, because Georgia was unwillingly 'hosting' the terrorists and was already trying to eliminate them. Hence, for this new norm to be invoked an actual grave terror act must have occurred and the state harbouring the guilty terrorists must be unwilling to cooperate to eliminate the terrorists.

Furthermore, the establishment of the new norm does not mean that use of force will follow every time a large-scale terrorist attack takes place. It is not a prescriptive norm telling a state what it ought to do, but a 'permission norm' allowing a state to use force if it wants to. Using force is not without costs, neither in terms of capital spent or human lives lost, and a state may decide that the consequences of legally resorting to war is greater than the risk of yet another terrorist attack. A good example is the attack in Mumbai in 2008 carried out by terrorists from Pakistan. Although many states supported India's claim to a right to use force as self-defence, India assessed that the consequences were too risky. Not only is Pakistan a close ally of the US and the US might not side with India in a potential war against Pakistan; Pakistan like India is also a nuclear power and a war between the two could evolve into a nuclear conflict.

Following the above, the institutional impact of the norm change has been low. Regarding the institution of international law, states' legal right to

use force as self-defence has undergone only small changes compared to the time prior to 2001. First of all, an armed attack must still take place and it must be of a certain gravity to give rise to self-defence. Second, the right to self-defence has now been extended to include not only the use of force against a state responsible for an armed attack but also against a state that is not directly responsible for the attack but willingly harbours the responsible terrorists. Regarding the institution of war, the norm change has resulted in a small norm change as well. Prior to 2001 the use of force was not only considered bad but was also used as a tool of enforcement. States knew that if they launched an armed attack on another state they could expect the other state to launch a counter attack invoking its legal right of self-defence, and they knew that if they threatened other states the Security Council could authorise use of force against them to maintain international peace and security. The new norm did not change the fact that military force can be used as a tool of enforcement; on the contrary, it has strengthened the institution of war, as the use of force may now be used to force a sovereign state to eliminate the presence of terrorists in its own sovereign territory.

A final question is whether and how this norm change has affected the order of international society. Because fundamental institutions and fundamental norms form international society, an institutional change may affect the international society. However, since the norm change only resulted in small changes of the two institutions, the impact on international society has been minor as well. A widespread consensus on the norm change among the states, including the great powers, meant that it passed into the normative structure of international society almost unnoticed without much disagreement and debate. Faced with the new threats of global terrorism, the states of international society considered the new norm to be a legitimate response to these threats and it was easily adopted without conflict or chaos. This norm change is a good example of how a norm challenge can be peaceful if it does not contest the fundamental norms of international society but only seeks a norm change that is integrated in the existing normative structure of international society. A new exception to the norm on non-use of force had been added, giving states the right to use force against other states harbouring terrorists guilty of grave terrorist acts, but the norm on non-use of force remains a strong *grundnorm* of international society.

9.5.2. The effect of an unsuccessful norm challenge on international society

In contrast to the above norm challenge, the preventive force norm challenge had no effect on the institutions of international society. Because the norm challenge did not result in a norm change; neither the institution of international law nor the institution of war has changed. However, the norm challenge still affected the order of international society, as the strong disagreement between the great powers about which norms should govern the use of force threatened to tear apart international society. The likely effect of a norm change allowing preventive use of force on the institutions was the central subject of this disagreement. Opponents of the norm challenge feared that a new norm allowing preventive use of force as self-defence would open up for unrestricted use of force, which would eliminate the norm on non-use of force and the part of the institution of international law regarding *jus ad bellum* and lead to an annulment of the current international order. In contrast, the US and the few states supporting its norm challenge argued that giving states the right to use preventive force as self-defence would deter states from acting 'rogue' by collaborating with terrorists and seeking weapons of mass destruction. In other words, preventive force would strengthen the enforcement mechanisms built into the institution of war.

Even though the norm challenge did not end with a norm change leading to a change of the two institutions, the disagreement between the states threatened the existence of international society. Held together by a common belief in a few fundamental norms embodied in a few fundamental institutions and a common, rational interest in following these norms, international society was put under pressure by the US, which questioned a fundamental norm. As pointed out by Dunne, 'no society can be sustained without a reasonable consensus on *what* constitutes the appropriate conduct, and *who* has the authority to enforce such standards' (Dunne, 2003: 310). The norm challenge and the war in Iraq thus resulted in an international crisis unseen since the Cold War (Knudsen, 2004: 81). The US challenged not only the normative structure of international society but also its organisational framework. By sidestepping the UN after months of negotiations, the US decision to invade Iraq without UN authorisation was a direct normative assault on the Security Council and its authoritative role in international society (Morris & Wheeler, 2007). If the UN could not hinder an illegal war what was the purpose of the organisation? The UN was designed for an international society based on great power multipolarity, but the unilateral war in Iraq gave

rise to fears about its survival in this new post-Cold War hierarchical system (Dunne, 2003).

The Bush administration's preventive war norm challenge is thus a perfect example of the dangerous effects norm challenges may have on international society. This is not to say that states should not try to change international norms if strong national interests tell them to do so. The interplay between state interests and firmly established norms is what makes international society dynamic and capable of survival in an ever-changing world. But there is a fine line between advocating norm change and imposing it on other states. If the new norm lacks the necessary legitimacy, such attempts at norm change will always result in norm conflict rather than norm change. The American insistence on changing the norm despite great international opposition thus posed a huge threat to international society. The US could have acted differently to alleviate the damage of the international norm crisis. If the main political goal was to remove Saddam Hussein from power, the US could have done so without contesting the norm on non-use of force and instead have justified the use of force with already established norms of international society. Then the US would only have violated the norm on non-use of force, as it has done many times before. But by contesting the norm on non-use of force by claiming a right to use preventive force and then implementing this claim in the Iraq war, the US seriously challenged the existence of international society. So, the final question is where the Bush administration's norm challenges left the international society of the 21st century. This is the subject of the final section.

9.6. The state of international society in the 21st century

Has international society recovered since the norm challenges or was Tim Dunne (2003: 317) right when he said that the US has contracted out of international society and that we now face a Hobbesian world based on a hierarchically ordered international system with the US as the leading state?

As shown in this dissertation, when it comes to radical challenges of the fundamental norms, which seek not only to change the content of a norm but to abolish it, then the fundamental norm can be stronger than the state, even if the state is the only superpower of the world. In other words, things are not as bad as envisioned by Dunne. In fact, the results of the norm challenges may even have important positive consequences. First, the Bush administration's successful norm challenge showed that international society is

flexible and receptive to states' new security concerns in an ever-changing world. International society is not static, but able to adapt to changing circumstances. This indicates that the UN, which may be regarded as the organisational framework of international society, works. The states reacted instantly to the grave 9/11 terror acts by adopting Security Council resolutions 1368 and 1373, which not only imposed counter-terrorism measures on all UN member states but gave the US the right to use force in self-defence in response to the terror acts. Hence, the Security Council quickly and effectively accommodated the US claim that new measures had to be introduced to counter global terrorism.

Second, although the second norm challenge threatened the existence of international society, it also shows that the normative framework of international society is stronger than the world's only superpower. Even though the US put a lot of effort into changing the norm and convincing the other states of the need to remove Saddam Hussein from power, it failed. Furthermore, the fact that the Bush administration decided to use force against Iraq without a UN mandate is not proof of the failure of the UN, as claimed by Michael Glennon (2003). If the Security Council had authorised rather than opposed the war against Iraq, it would have been guilty of hypocrisy, as this would have undermined the UN Charter and the entire purpose of the organisation (Knudsen, 2011). The fact that the states stood firm and rejected the second norm challenge even though it came from the only superpower shows the strength of international society and of the UN. As Knudsen points out, 'there is a big difference between ignoring international principles and bodies in the fight against terrorism and rogue states, and being able to establish a broad international acceptance of, and support for such steps' (Knudsen, 2004: 82). Hence, also this norm challenge shows that the UN works and that the Security Council is more than the 'right-hand man' of the great powers.

Third and finally, because the states of international society so strongly opposed the norm challenge on preventive war and its implementation in the Iraq war, the war did not set up a new precedent for preventive force. With the exclusion of self-defence against armed aggression all use of force in international politics must still have the authorisation of the Security Council to be considered legal and legitimate. Furthermore, the fact that the US did not find WMD in Iraq demonstrated the danger of preventive action, weakened the rationale for preventive war and very effectively dealt the deathblow to the new norm on preventive force.

To conclude, the reaction by the states of international society to both of the Bush administration's norm challenges indicates that international society

will survive for a long time. The dissertation has shown that the normative framework of international society is quite strong but not inflexible. While the norm on non-use of force proved open to small changes, the study clearly showed that the fundamental norms are not instrumental tools of the great power that it may change when they no longer suit its interests. The fundamental norm on non-use of force is highly valued by a vast majority of states, which indicates that it is a very strong norm constituted in a strong international society. In other words, President Bush did not kill the norm on non-use of force; rather the norm killed the President's norm challenge on preventive force.

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Table A.7.1. Statements by states supporting the new norm on the use of force against states harbouring terrorists

States	Before the Afghanistan war	After the Afghanistan war
Australia		In accordance with Article 51 of the Charter of the United Nations, I am writing on behalf of my Government to report to the Security Council that Australia has taken measures in the exercise of the inherent right of individual and collective self-defence following the armed attacks against the United States of America on 11 September 2001. (…) *We fully support Security Council resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001, which affirm the inherent right of individual and collective self-defence* and call upon all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these appalling acts of violence (UN doc. S/2001/1104; emphasis added).
Canada		In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report to the Security Council on measures that Canada has initiated following the armed attacks in the United States on 11 September 2001. (…) Our actions are directed against Osama bin Laden's al-Qa'ida terrorist organization and the Taliban regime that is supporting it. (…) *Canada is taking these measures in exercise of the inherent right of individual and collective self-defence, in accordance with Article 51 of the Charter of the United Nations* (UN doc. S/2001/1005; emphasis added).
The Rio Group		…reaffirm their *strong support for the action taken to combat terrorism, in exercise of the right of self-defence*, in the framework of the Charter of the United Nations, the resolutions of the Security Council and applicable international instruments, following the appalling attacks on the cities of New York and Washington, D.C. (UN doc. S/2001/1091; emphasis added)

Croatia	Our Charter indicates that terrorism is a threat to international peace and that *every country has the solemn right to defend itself*, its citizens and their peace and security. Therefore, such a right on the part the United States should not be questioned (UN doc. A/56/PV.12; emphasis added)	
Egypt	In particular, our attention was drawn to the affirmation in the resolution — which we support — to *refrain from providing safe haven* to fugitives implicated in acts of terrorism (UN doc. A/56/PV.12; emphasis added)	
France	Yes, we stand with the United States in deciding upon any appropriate action to *combat those who resort to terrorism, those who aid them and those who protect them* (UN doc. S/PV.4370; emphasis added)	The attacks of 11 September are a major challenge to peace and democracy. The Security Council reacted immediately by adopting resolution 1368 (2001). Pursuant to that resolution, and in exercise of its right of self-defence, the United States has undertaken an armed response against Osama bin Laden and the Al Qaeda network and against the Taliban system that supports them. *France stands in solidarity with that action* (UN doc. S/PV.4413; emphasis added) On instructions from my Government, following the terrorist attacks perpetrated in the United States of America on 11 September 2001, I have the honour to inform you that, in *accordance with the exercise of the inherent right of individual or collective self-defence* (Article 51 of the Charter), referred to in Security Council resolution 1368 (2001), and in response to the encouragement addressed to Member States by the Council in paragraph 5 of its resolution 1378 (2001), France has undertaken action involving the participation of military air, land and naval forces (UN doc. S/2001/1103; emphasis added)
Germany		*In accordance with Article 51* of the Charter of the United Nations, I wish on behalf of my Government to report to the Security Council on measures that the Federal Republic of Germany has initiated following the armed attacks that were carried out against the United States on 11 September 2001. (…) *These measures are solely directed against the terrorist network of Bin Laden, Al-Qaida, and those harbouring and supporting it* (UN doc. S/2001/1127; emphasis added)

Georgia	I fully support the efforts aimed at creating a coalition of countries that would take on the immediate task of seeing that the perpetrators of this horrible crime and those who harbour them are brought to account (UN doc. S/2001/893).	
GUUAM states (Azerbaijan, Georgia, Moldova, Ukraine, Uzbekistan)	A challenge was posed not only to the United States of America, but to the entire world community. The GUUAM States firmly condemn the actions of the terrorists and advocate that the forces which support terrorist acts should be subjected to the severe punishment which they deserve (UN doc. S/2001/906).	
Israel	Those States which provide active or tacit support for terrorist killers, provide them with weapons, funds or refuge have declared themselves to be the enemies of humankind. They are no less culpable than the terrorists themselves. As the President of the United States stated in his address to the American people last night, *we must make no distinction between the terrorists and those who harbour them*. To those States we must say, in a unified and unwavering voice, you will not be tolerated. You are not welcome members in the community of nations. If you place our liberty under attack, we will defend it. If you endanger the safety and security of our people we will uphold them. States which yield to terrorism, which provide the terrorists with the environment in which they can flourish and the infrastructure and support they need to perpetrate their despicable crimes must be dealt with *aggressively* and with unified resolve until they renounce terror, in word and deed, and return to the fold of civilized nations (UN doc. S/2001/864; emphasis added)	
New Zealand		New Zealand fully supports in particular Security Council resolutions 1368 (2001) and 1373 (2001), which *reaffirm the inherent right of individual and collective self-defence* and call upon all States to work together to bring to justice the perpetrators, organizers and sponsors of the terrorist attacks (UN doc. S/2001/1193; emphasis added).

Norway	*International law confirms the right to self-defence.* Norway is fully committed to contributing to the broad alliance that is now forming. (..) Intensified and concerted international efforts are needed to effectively seek out and hold accountable those who support, harbour and protect terrorists, and to prevent any future assaults. *There can be no sanctuary for terrorists.* We welcome and strongly support Security Council resolution 1368 (2001), which reconfirms the right to individual or collective self-defence (UN doc. A/56/PV.12; emphasis added)	The Security Council has acted swiftly and decisively in the face of the terrorist attacks. Resolution 1368 (2001) made it clear that the attacks constituted a threat to international peace and security, and triggered the right to self-defence. *The pursuit of terrorists and their backers in Afghanistan is being carried out in the exercise of that right. We fully support it* (UN doc. S/PV.4413; emphasis added)
The European Union	The European Union will cooperate with the United States in bringing to justice and punishing the perpetrators, sponsors and accomplices of such barbaric acts. *On the basis of Security Council Resolution 1368, a riposte by the US is legitimate.* The Member States of the Union are prepared to undertake such actions, each according to its means. *The actions must be targeted and may also be directed against States abetting, supporting or harbouring terrorists* (UN doc. S/2001/909; emphasis added).	The European Union (EU) declares its full solidarity with the United States of America and its *wholehearted support for the action that is being taken in self-defence* and in conformity with the Charter of the United Nations and Security Council resolution 1368 (2001) (UN doc. S/2001/967; emphasis added) The European Union declares its total solidarity with the United States, with which it shares the objectives of combating terrorism. It reiterates the importance of its close consultations with the United States. *It confirms its wholehearted support for the action taken in the context of legitimate defence and in accordance with the Charter of the United Nations and Security Council resolution 1368* (2001) (UN doc. S/2001/980; emphasis added)
The Netherlands		In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report to the Security Council on measures that the Kingdom of the Netherlands has taken following the armed attacks against the United States of America on 11 September 2001. (…) *The Netherlands has taken these measures in the exercise of the inherent right of individual and collective self-defence* (Article 51 of the Charter). (UN doc. S/2001/1171; emphasis added)

United Kingdom		The attacks of the 11 September 2001 were planned and carried out by Al Qaida, an orgnisation whose head is Usama Bin Laden. That organization has the will, and the resources, to execute further attacks of similar scale. Both the United States and its close allies are targets for such attacks. *The attack could not have occurred without the alliance between the Taleban and Usama Bin Laden, which allowed Bin Laden to operate freely in Afghanistan, promoting, planning and executing terrorist activity* (UN doc. S/2001/949; emphasis added) It is the view of the United Kingdom that we have *actively to confront* terrorism, the financing of terrorism, the drugs trade of terrorists and the *States which harbour terrorists* (UN doc. S/PV.4413; emphasis added)
South Africa	South Africa therefore recognizes the right of the United States Government to track down the culprits and bring them to justice. Any action taken should be informed by thorough investigations and incontrovertible evidence (UN doc. A/56/PV.12)	

Table A.7.2. States supporting and opposing the Afghanistan War[a)]

	African continent	American continent	Asian continent	European continent	Oceania continent
Supporting the war	1. Egypt 2. Jordan	1. Antigua and Barbuda 2. Argentina 3. Barbados 4. Bahamas 5. Belize 6. Bolivia 7. Brazil 8. Canada 9. Chile 10. Colombia 11. Costa Rica 12. Dominica 13. Dominican Republic 14. Ecuador 15. El Salvador 16. Grenada 17. Guatemala 18. Guyana 19. Haiti 20. Honduras 21. Jamaica 22. Mexico 23. Nicaragua 24. Panama 25. Paraguay 26. Peru 27. Saint Kitts and Nevis	1. China 2. India 3. Israel 4. Japan 5. Kuwait 6. Malaysia 7. Pakistan 8. Philippines 9. South Korea 10. Tajikistan 11. Turkmenistan 12. United Arab Emirates 13. Uzbekistan	1. Albania 2. Austria 3. Belgium 4. Bosnia and Herzegovina 5. Bulgaria 6. Estonia 7. Croatia 8. Cyprus 9. the Czech Republic 10. Denmark 11. Finland 12. France 13. Germany 14. Greece 15. Hungary 16. Iceland 17. Italy 18. Ireland 19. Latvia 20. Liechtenstein 21. Lithuania 22. Luxembourg 23. Macedonia 24. Malta 25. Moldova 26. Netherlands 27. Norway	1. Australia 2. New Zealand

	African continent	American continent	Asian continent	European continent	Oceania continent
		28. Saint Lucia 29. Saint Vincent and the Grenadines 30. Suriname 31. Trinidad and Tobago 32. Uruguay 33. Venezuela		28. Poland 29. Portugal 30. Romania 31. Russia 32. Slovakia 33. Slovenia 34. Spain 35. Sweden 36. Switzerland 37. Turkey 38. Ukraine 39. UK 40. Yugoslavia	
Opposing the war:	1. Sudan		1. Iran 2. Iraq 3. North Korea 4. Syria		

a. The count of states is based on two sources. The first source is written or verbal statements of the states to the UN about the war against Afghanistan. To be included in the count, the states must explicitly express support or opposition to the war. The second source is information from the US Ministry of Defense on coalition states in the Afghanistan war.

Table A.8.1. Opposition and support to preventive force *prior* to the war in Iraq

	Rejection of pre-emptive/ preventive force	Support of pre-emptive/ preventive force
Albania		We have followed with deep concern the developments in the Middle East and the threat that Saddam Hussein's regime poses to security, peace and global solidarity against State-backed terrorism. The Albanian Government reaffirms its position, which demands Iraq's full compliance with the relevant Security Council resolutions. Any hesitation or indecisiveness with regard to implementing United Nations decisions and resolutions concerning Iraq would be a challenge to the international community and could have grave consequences for peace and global security. We are convinced that, as President Bush said a few days ago in this Hall, *we cannot stand by and do nothing while dangers gather*. We must stand up for our security and for the permanent rights and hopes of mankind (UN doc. A/57/PV.19; emphasis added)
Australia		*The risks presented by inaction are very real*. It is the risk that an Iraqi Government, which has shown no compunction about using weapons of mass destruction in the past, will once again be able to threaten its neighbours and the world, but this time with a full suite of chemical, biological and nuclear weapons. It is the risk that a regime that has been indiscriminate in its support for terrorist groups will one day hand one of those groups either a chemical, biological or nuclear weapon, or pass on the knowledge to build one. Some may debate the likelihood of either of those scenarios coming to pass. But *can we afford to be wrong*? Is what we are asking Iraq to do so unreasonable that we can afford to be wrong? (UN doc. S/PV.4625, Resumption 1; emphasis added)
Barbados	For Barbados, as for all small States, the doctrine of non-intervention is of paramount importance for our survival. *Pre-emptive unilateral action, no matter what the apparent cause, is a precedent that occasions in us the gravest discomfort*. It is, therefore, vital that, at this dangerous and uncertain juncture in world affairs, we reaffirm our commitment to multilateralism and to the pre-eminent role of the United Nations in seeking	

	to impose responsible behaviour through diplomacy and dialogue rather than through the use of force (UN doc. A/57/PV.16; emphasis added)
Burkina Faso	With regard to Iraq, Burkina Faso welcomes the fact that reason has prevailed. We remain convinced that unilateral *preventive* action that is not authorized by the Security Council would have dire consequences for world peace. In that connection, we would like to pay tribute to the courageous decision of the Iraqi Government, which has just agreed to the return to Baghdad of United Nations weapons inspectors. We earnestly hope that that approach will ultimately lead to a definitive resolution of the crisis, especially since the sanctions imposed on that country are unjust and have made martyrs of the Iraqi people (UN doc. A/57/PV.17; emphasis added)
Cuba	A new war against Iraq already seems inevitable; an aggravation of the situation of constant aggression that that people has lived in over the last ten years. *The buzzword now is 'pre-emptive war', in open violation of the spirit and the letter of the United Nations Charter* (UN doc. A/57/PV.6; emphasis added) The new doctrine of pre-emptive attack that some seek to impose advocates the right to use or threaten to use force in international relations and the right to take unilateral military action against other States, in advance and in the face of indeterminate and vague threats. *That is a flagrant violation of the spirit and the letter of the Charter of the United Nations and seeks to turn the inherent right of legitimate self-defence into a blank check* ... It is very dangerous to attempt to resolve national security concerns through unilateral action or unfounded accusations rather than through cooperation among States parties to treaties and through the use of the procedures defined in them for that purpose (UN doc. S/PV.4709; emphasis added) The United Nations and the Security Council would be dealt a lethal blow that would annihilate their role and prerogatives as guarantors for international peace and security. *It would put their existence in jeopardy and place all States, with no exception, at risk, facing the unpredictable*

	vagaries of a universal tyranny and putting them at the mercy of new pre-emptive wars (UN doc. S/PV.4717; emphasis added)
France	*To those who choose to use force and think that they can resolve the world's complexity through swift preventive action, we, in contrast, choose resolute action and a long-term approach*, for in today's world, to ensure our security, we must take into account the manifold crises and their many dimensions, including the cultural and religious ones. Nothing enduring in international relations can be built without dialogue and respect for the other, without strictly abiding by principles, especially for the democracies that must set the example. To ignore that is to run the risk of misunderstanding, radicalization and spiraling violence (UN doc. S/PV.4721; emphasis added)
Iran	We believe that all States have a clear interest, as well as a clear responsibility, to defend the integrity of international law and order. *Thus, any arbitrary unilateral approach outside international law that may endanger the fragile international security system and set a destructive precedent with far-reaching consequences should be resisted*. Taking on Iraq unilaterally and outside international law would amount to short-sighted actions that may resolve a part of the problem, but will undoubtedly shake the foundations of the international security system predicated on the rule of law. Here, I specifically refer to concepts, such as 'regime change' and *'pre-emptive strike', which are completely alien to and in conflict with international law*. The former runs counter to peoples' right to self-determination, denying in this context the right of the Iraqi people to decide who should rule them. And *the latter distorts, inter alia, the conventional understanding of the right of self-defence as clearly enshrined in customary international law and codified in the United Nations Charter*. We caution each and every member of the Council against any decision that may, in one way or another, be interpreted as underwriting, promoting or endorsing such unprecedented and erroneous concepts as the ones I

	referred to earlier (UN doc. S/PV.4625, Resumption 1; emphasis added) We believe that what is at stake today goes far beyond the mere disarmament of Iraq. The rush-to-war rhetoric is not coming out of a vacuum; neither is the anxiety expressed by the international community hyperbole. We are approaching the peak of a trend, which includes pre-emptive strikes and the use of tactical nuclear weapons against non-nuclear States ... What we witnessed last Friday here in this Chamber and, more importantly, what followed the day after across the globe were clear expressions of concern and alarm over a trend which, willingly or otherwise, is undermining not only the international consensus to eradicate Iraq's weapons of mass destruction, but in fact the very institution and norms that have been instrumental in forging that consensus and in maintaining international peace and security in general (UN doc. S/PV.4709; emphasis added)	
Italy		The lesson we must draw from the events of 11 September is that haste can lead to carelessness, but *delay in taking the necessary action can have terrible consequences*. When terrorist attacks or threats to peace are carried out by networks or regimes that aim at destroying our way of life and our liberal democracies, then democracies have not only the right but also the duty to defend themselves (UN doc. A/57/PV.4; emphasis added)
League of Arab States	*War against Iraq will annul the current world order, the United Nations Charter and international law*. It would expose States, particularly those of the South, to the danger of attacks on the pretext of preventive measures, leading the entire world back to the era of the League of Nations (UN doc. S/PV.4625, Resumption 1; emphasis added) In the light of the conclusions reached by the inspectors, who are the only legitimate authority entrusted with the verification and submission of evidence to the Security Council, there is no justification for waging war against Iraq. Therefore we ask: why a war? *What are the imminent danger and sudden threats that would justify it?* (UN doc. S/PV.4709; emphasis added)	

Malaysia	*A pre-emptive attack against Iraq without any credible evidence being provided to the international community of the threat it poses will have serious implications for the international campaign against terrorism.* Such an attack may produce real cleavages and draw imaginary battle lines between the Muslim world and the West, especially if the continued oppression of the Palestinians remains unattended-to. Such an attack could swell the ranks of the discontented in the Muslim world. It would provide a pretext for depraved extremist groups bent on stoking the flames of populist radicalism to mobilize and multiply. While it is important, therefore, to view the Iraq issue in terms of regional security, it is equally important to understand the broader consequences that will follow (UN doc. A/57/PV.7; emphasis added) Lastly, *there is no precedent in international law for the use of force as a preventive measure when there has been no actual or imminent attack by the offending State*. Unlike the situation in 1991, there has been no indication by Iraq that it intends to attack another country and no evidence of military preparations for such attack. As may be recalled, the Security Council has never authorized the use of force on the basis of a potential threat of violence. All past authorizations have been in response to actual invasions. An attack against Iraq without any credible evidence provided to the international community of the imminent threat it poses is, therefore, illegal and unjustified. The credibility of this Council as custodian in the maintenance of international peace and security will be at stake if it decides to take the path of destructive war instead of that of constructive diplomacy (UN doc. S/PV.4709, Resumption 1; emphasis added)
North Korea	The United States defines the Democratic People's Republic of Korea as its 'prime enemy' that poses a 'threat' to it. It also designates us as the 'axis of evil' and 'target of a pre-emptive nuclear strike' on the pretext of 'anti-terrorism,' thus further aggravating the situation. It is quite unreasonable that the United States antagonizes and threatens us with the use of force for the sole reason that the Democratic People's Republic of Korea firmly adheres to an independent policy and holds different values and ideas. *This also contravenes the United Nations Charter and the norms of international relations.* It is entirely as a result of the consistent peace-loving

	policy and efforts of the Democratic People's Republic of Korea that peace is maintained on the Korean peninsula (…) Radical changes have taken place in the international arena since the '11 September incident.' *Attempts to expand the 'war against terrorism' without justifiable reasons continue and the policy of power supremacy has emerged, openly advocating a theory of pre-emptive nuclear attack beyond the doctrine of nuclear deterrence, thus further challenging world peace and security* (UN doc. A/57/PV.13; emphasis added)	
Russia	If today we really had indisputable facts demonstrating that there was a direct threat from the territory of Iraq to the security of the United States of America, then Russia, without any hesitation, would be prepared to use the entire arsenal of measures provided under the United Nations Charter to eliminate such a threat. However, the Security Council today is not in possession of such facts. That is why we prefer a political settlement, relying on the activities of UNMOVIC and the IAEA, which enjoy the full trust of the international community (UN doc. S/PV.4721)	
Secretary-General	And among multilateral institutions, this universal Organization has a special place. Any State, if attacked, retains the inherent right of self-defence under Article 51 of the Charter. *But beyond that, when States decide to use force to deal with broader threats to international peace and security, there is no substitute for the unique legitimacy provided by the United Nations* (UN doc. A/57/PV.2; emphasis added)	
	If I understand the Washington doctrine properly, that is focused on terrorists or groups or countries that may be planning attacks against them. Therefore the pre-emptive action is, if you wish, an extended doctrine of self-defence. But it is a difficult issue to deal with, because one can talk of war of prevention, where you see a force arrayed against you, with a visible threat, ready to attack, and you make a pre-emptive strike to stop that attack. There are instances of this in history. Beyond that, *where the threat is not imminent and the evidence is not obvious, it becomes a very murky area to deal with*. So one will have to be very careful when moving into these areas of pre-emptive strike. Of course, the evidence is usually only with the one who is making the strike. Often, others may claim that it is not verifiable or that the evidence is	

	not convincing. So, *except for those situations where the evidence is clear, where there is imminent threat, where it is obvious and so forth, it can lead to lots of confusion and set precedents that others can use* (UN doc. SG/SM/8581; emphasis added)	
United Kingdom		it is not that for 10 years Saddam Hussein has not been a problem, he has been a problem throughout the last 10 years. What has changed is first, that the policy of containment isn't any longer working, certainly without a massive change in the way that the regime is monitored and inspected; and secondly, *we know from 11 September that it is sensible to deal with these problems before, not after* (Prime Minister Blair cited by British UN delegate, UN doc. S/PV.4625, Resumption 3; emphasis added) This is a moment of choice for Saddam and for the Iraqi regime. But it is also a moment of choice for this institution, the United Nations. The pre-war predecessor of the United Nations — the League of Nations — had the same fine ideals as the United Nations. But the League failed because it could not create actions from its words. It could not back diplomacy with a credible threat and, where necessary, the use of force, so small evils went unchecked. *Tyrants became emboldened, and then greater evils were unleashed.* At each stage, good men said, 'Wait. The evil is not big enough to challenge'. Then, before their eyes, the evil became too big to challenge. *We slipped slowly down a slope, never noticing how far we had gone until it was too late.* We owe it to our history, as well as to our future, not to make the same mistake again (UN doc. S/PV.4701; emphasis added)
Yemen	Like many others, *we do not concur with those who call for the use of a pre-emptive strike* as the only way for eliminating Iraq's ability to produce weapons of mass destruction and to launch aggressive acts against others in the future. Launching war against others solely on the basis of reading their intentions would open the door wide to explode hotbeds of tension and wars whose roots had been lying dormant (UN doc. S/PV.4625)	

Table A.8.2. Opposition and Support to Preventive Force *after* the initiation of the War in Iraq

	Rejection of pre-emptive/ preventive force	Support of pre-emptive/ preventive force
Algeria	How can the use of such extreme, disproportionate and definitive measures be justified when no present and immediate danger was threatening international peace and security and when the inspections instituted by the Security Council for the peaceful disarmament of Iraq were proceeding in the right direction? (UN doc. S/PV.4726)	
France	It is the Council that should set the bounds with respect to the use of force. *No one can claim the right to use force unilaterally and preventively*. Conversely, in the face of mounting threats, States must be assured that the Council has at its disposal the appropriate means of evaluation and of collective action, and that it has the will to act (UN doc. A/58/PV.7; emphasis added)	
Iran	That is why this war has received almost universal condemnation. Moreover, the stated goal of regime change in Iraq runs flagrantly counter to the norms and principles of international law; and so does *the concept of arbitrary pre-emptive strike, which openly negates the provisions of the Charter of the United Nations* (UN doc. S/PV.4726; emphasis added)	
Ireland	Another issue that has recently come to the fore and was highlighted by the Secretary-General is that of Article 51 of the Charter and the conditions under which Member States have the right to act in self-defence. The development of weapons of mass destruction in the period since the signing of the Charter, and the appearance of non-State actors with the capacity for mass destruction, raise serious questions as to the point at which a State might consider it necessary to act in self-defence. This is also an issue that requires serious reflection. *My Government would be deeply concerned at the widespread acceptance of a doctrine of pre-emptive strike*. Given the ever more lethal nature of modern weapons, the risk of large-scale death, destruction and	

	escalation are enormous. More effective than striking pre-emptively, of course, is to pre-empt the risk of conflict through a wide range of steps in the diplomatic, economic, humanitarian and other areas (UN doc. A/58/PV.11; underscoring added)	
Japan		Weapons of mass destruction are terrible weapons that indiscriminately kill and maim civilians in large numbers. We must seriously consider the situation in which such inhumane weapons are in the hands of a dictator who represses his own people. *In today's world, the question of whether or not one possesses weapons of mass destruction is not something that can be left unanswered* (UN doc. S/PV.4726; emphasis added)
Lebanon	The invocation of the right to self-defence is an invalid argument, since Article 51 of the Charter recognizes the inherent right of individual or collective self-defence *only if* an armed attack occurs against a Member of the United Nations – a condition that is not met in this case (UN doc. S/PV.4726; emphasis added)	
Malaysia	Malaysia takes the position that unilateral military action undertaken without the support and authorization of the Security Council violates international law and the United Nations Charter. Furthermore, *the doctrine of pre-emptive strikes has no foundation in international law*. Malaysia views the unilateral military action undertaken by the United States and its allies as illegal and as being tantamount to an invasion of an independent and sovereign nation. Malaysia wishes to underline that the *pre-emptive use of force threatens the very foundation of international law, making war once again the tool of international politics and of the powerful in subjugating the weak and defenceless*. It also erroneously asserts the notion that might is right (UN doc. S/PV.4726; emphasis added)	

Myanmar	My delegation also shares the Secretary-General's concern that the *pre-emptive use of force could set precedents that could result in a proliferation of the unilateral and lawless use of force, with or without justification* (UN doc. A/58/PV.15; emphasis added)
North Korea	The political situation today is more unstable than ever. We are confronted by new challenges as we try to make this century one of peace and prosperity for humankind. *Countries have been designated, on the basis of extreme national chauvinism and hostility, as part of an axis of evil and as targets of pre-emptive nuclear attacks*. Unilateral military attacks are being openly perpetrated against sovereign States under the pretext of the war against terrorism and on the basis of suspicions that they possess weapons of mass destruction. *The principles of respect for sovereignty and sovereign equality are being violated*, and international relations plunged into increasingly severe confrontation and antagonism, because of neo-imperialist practices that are based on the supremacy of power (UN doc. A/58/PV.17; emphasis added)
Saudi Arabia	Our deeply rooted belief in of the important role that the United Nations can play in dealing with crises and its efforts to avoid the horrors of war and to provide means for international cooperation make us more determined than ever to support this Organization and consolidate its constructive role. *We want the United Nations to take a greater role in handling crises before they occur through the implementation of what is known as preventive diplomacy rather than through pre-emptive wars, in order to preserve stability and maintain international peace and security* (UN doc. A/58/PV.15; emphasis added)
Secretary-General	Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. But until now it has been understood that when States go beyond that and decide to use force to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations.

	Now, some say this understanding is no longer tenable, since an armed attack with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group. Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while the weapons systems that might be used to attack them are still being developed. According to this argument, States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions. *This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years. My concern is that, if it were to be adopted, it would set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification* (UN doc. A/58/PV.7; emphasis added)	
Syria	Attempts by some centres of power in the world to manipulate the profound changes that have taken place in the international balance of power in pursuit of narrow national interests have added insult to injury. Cards have been shuffled and premises have been challenged. *New concepts that are totally alien to the Charter, such as pre-emptive war and unilateral and illegitimate use of force, have been invented. In brief, that course of action has turned the clock back* — contrary to the superficial claims that new prospects were actually being opened (UN doc. A/58/PV.15; emphasis added)	
United Kingdom		Down one route lies a world in which the United Nations strengthens its role as the collective instrument for protecting our peace and security; down the other route lies a world in which collective action becomes a synonym for 'inaction'. We must not take this second route. The Secretary-General's speech was a challenge to all of us. We all share a world in which international terrorists strike down the innocent, regardless of faith or nationality, and we are all less secure when weapons of mass destruction are in reckless hands. *We do not have the luxury simply of*

		rejecting unilateralism, while proposing no multilateral means of confronting and dealing with these threats (UN doc. A/58/PV.11; emphasis added)
Vietnam	The use of force against an independent, sovereign State and Member of the United Nations constitutes a gross violation of the Charter and the fundamental principles of international law. It also renders the United Nations ineffective and sets an extremely dangerous precedent in international relations. *We believe that the unilateral and pre- emptive military actions against Iraq will not help to resolve the world's complex problems or ensure its security*. It increases the risk of further spreading misunderstanding, radicalism and spiralling violence in the Middle East. The outbreak of sheer force of arms in this already volatile region can only exacerbate the tensions and fractures that fuel terrorism. Viet Nam is opposed to the war against Iraq, as the statement by the spokespersons of the Foreign Ministry and the Government of the Socialist Republic of Viet Nam made crystal clear on 20 March 2003 (UN doc. S/PV.4726; emphasis added)	
Yemen	Thirdly, the invasion constitutes in form and content unacceptable conduct that is highly risky to international relations. The declared policy to change the Iraqi regime is an act of aggression carried out against a sovereign, independent State that is a Member of the United Nations, and it constitutes interference in its domestic affairs. *A pre-emptive war, based on mere doubts about the intentions of others, leads to chaos that will undermine the basis of international relations* (UN doc. S/PV.4726)	

Table A.8.3. States supporting and opposing the Iraq War[a)]

	African continent	American continent	Asian continent	European continent	Oceania continent
Supporting the war	1. Ethiopia 2. Uganda	1. Columbia 2. Dominican Republic 3. El Salvador 4. Haiti 5. Honduras 6. Nicaragua 7. Peru	1. Israel 2. Japan 3. Kuwait 4. Mongolia 5. Philippines 6. Singapore 7. South Korea 8. Uzbekistan	1. Albania 2. Bulgaria 3. Croatia 4. Czech Republic 5. Estonia 6. Georgia 7. Hungary 8. Iceland 9. Italy 10. Latvia 11. Lithuania 12. Macedonia 13. Malta 14. Netherlands 15. Poland 16. Portugal 17. Romania 18. Serbia and Montenegro 19. Slovakia 20. Spain 21. UK	1. Australia 2. Marshall Islands 3. Micronesia 4. Samoa

- continues -

	African continent	American continent	Asian continent	European continent	Oceania continent
Opposing the war	1. Algeria 2. Angola 3. Burkina Faso 4. Cameroon 5. Djibouti 6. Egypt 7. Gambia 8. Guinea 9. Jordan 10. Kenya 11. Libya 12. Mali 13. Mauritania 14. Mauritius 15. Morocco 16. Namibia 17. Nigeria 18. Senegal 19. South Africa 20. Sudan 21. Tanzania 22. Tunisia 23. Zambia 24. Zimbabwe	1. Argentina 2. Barbados 3. Brazil 4. Canada 5. Chile 6. Costa Rica 7. Cuba 8. Ecuador 9. Jamaica 10. Mexico 11. Uruguay 12. Venezuela	1. Bahrain 2. China 3. India 4. Indonesia 5. Iran 6. Kuwait 7. Kyrgyzstan 8. Lao 9. Lebanon 10. Malaysia 11. Myanmar 12. North Korea 13. Oman 14. Pakistan 15. Palestine[b)] 16. Qatar 17. Saudi Arabia 18. Sri Lanka 19. Syria 20. Thailand 21. Timor-Leste 22. United Arab Emirates 23. Vietnam 24. Yemen	1. Andorra 2. Belarus 3. Belgium 4. Finland 5. France 6. Germany 7. Greece 8. Ireland 9. Liechtenstein 10. Luxembourg 11. Norway 12. Russia 13. San Marino 14. Slovenia 15. Sweden 16. Switzerland 17. Turkey	1. Fiji 2. New Zealand 3. Saint Vincent and the Grenadines 4. Vanuatu

a. The count of states is based on two sources. The first source is written or verbal statements of the states to the UN about the war against Iraq, including statements made both before and after the initiation of the war. To be included in the count, the states must explicitly express support or opposition to the war. The second source is information from the US Ministry of Defense on coalition states in the Iraq war.

b. Palestine is included in the list even though it is not formally recognised as a state.

English Summary

Chapter 1. Introduction

This dissertation investigates how strong fundamental norms of international society are when challenged by a great power. More specifically, the dissertation analyses the extent to which former American President George W. Bush succeeded in changing the norm on non-use of force, which together with the norms on non-intervention and sovereignty constitute the *grundnorms* of international society. In response to the 9/11 terror attacks, President Bush challenged the norm twice: first by claiming a right to use force against states harbouring terrorists guilty of grave terror acts and then by claiming a right to use preventive force as self-defence against so-called rogue states. However, while the President succeeded in the first norm challenge, the second failed. Hence, a main aim of the dissertation is to shed light on why great powers in some situations are able and in others unable to change fundamental norms.

The dissertation contributes to a number of theoretical and empirical debates. Theoretically, the dissertation challenges realism's proposition that international norms are reducible to be the instruments of great powers and that they therefore are subject to change whenever a great power wants them to change. I put forward the argument that fundamental norms are stronger than that because they are endowed with high legitimacy, as they are highly treasured by the states of international society. Thus, they are only subject to change if the other states find the norm change legitimate. Building the argument on the English School's theory on international norms, the dissertation also advances the School's theory on fundamental norms, which so far has remained a bit under theorised. Empirically, the dissertation contributes to the debates about how 9/11 and the Bush administration's wars in Afghanistan and Iraq, respectively, have affected the norms governing the use of force and whether international society changed as a result of the wars.

PART I: THEORETICAL INVESTIGATIONS

Chapter 2. Fundamental Norms and Great Powers in International Society

In this chapter I present the English School's theory on fundamental norms and the role they play in international society. I define fundamental norms as

standards of conduct that are universally recognised and accepted. Together with fundamental institutions and common interests, fundamental norms constitute international society and thereby bring order into an otherwise anarchical and chaotic world. Because states are rational actors with a rational quest for order, they see it as their long-term interest to comply with these fundamental norms to achieve the primary goals of every state, namely peace and security. To help the states make the right decisions, fundamental norms thus function as a 'guide book' on how to preserve a good relationship with other states.

Norms and states are interdependent. On the one hand, norms impact states' behaviour by guiding them, and on the other hand, norms are made by states, especially by the great powers. Because norms are made by states, they are also changed by states. As the managers of international society with special rights and duties, great powers have a greater impact on the institutional set-up of international society and are thus more likely to change international norms than other states. However, such a norm change is not purely an effect of their material might but also of their social status as a legitimate great power. Hence, a great power cannot enforce a norm change. In order for a fundamental norm to change, the change must be considered legitimate by the other states.

Chapter 3. The Process of Norm Change

Chapter 3 specifies how the process of norm change takes place. By combining the English School's theory on norm challenges and norm change with constructivism's theory on the process of norm change, the chapter develops a theoretical model of norm change consisting of five phases. In the first phase of the norm change process a state acting as a norm entrepreneur poses a norm challenge. To assess the seriousness of the norm challenge, the chapter differentiates between three kinds of norm challenges: 1) norm violation, where a state breaks a norm but without wanting to change it; 2) norm modification, where a state seeks to impose changes within the norm for example by adding or subtracting some exceptions to the norm; 3) norm contestation, in which a state seeks to replace an existing norm with a new norm. The success or failure of the norm challenge depends on the reactions of the other states. In the second phase of the norm change process, the immediate reactions of other states are thus decisive for whether the norm change process continues, as it must be supported by a few states acting as norm leaders helping the norm entrepreneur promote the norm. As a condition for further development, the norm must reach the third phase, the

so-called tipping point, where at least 1/3 of the states must support the norm, including international and regional organisations, great powers and 'vulnerable' states. Having reached the tipping point, the norm may begin to cascade, which is the fourth phase of the norm change process. If the norm is cascading, more and more states must adopt the norm. Finally, in phase five, the norm becomes politically and legally institutionalised into state practice. The norm has now evolved from a norm in the making to a new norm of international society and has given the states new responsibilities or new rights.

PART II: METHODOLOGICAL INVESTIGATIONS

Chapter 4. How to Analyse Norm Change?

Chapter 4 describes the research design of the dissertation. It sets off with a general discussion about which scientific approach to use when studying international norms and norm change. It is argued that although the analysis of norms and norm change calls for an interpretative approach, this does not exclude a more positivistic inspired research design explicating what counts as rules of evidence for identifying norm change. The chapter then presents the research design of the dissertation, which takes the form of a comparative single case study. It is a single case study in the sense that I only investigate the norm challenges of *one* great power. However, because the US is the world's only super power and therefore the most likely state to succeed in changing a fundamental norm, it is argued that the norm challenges posed a hard test of the strength of the norm on non-use of force. It is a comparative study in the sense that it compares *two* norm challenges posed by the same great power, each with a different outcome. To increase the validity and replicability of the study, I transform the theoretical model into a measurable model of norm change by operationalising each phase of the norm change process into a set of observable empirical implications and discuss the certainty and uniqueness of each implication. The chapter ends with a description of the data selection process and the coding strategies.

PART III: LEGAL AND HISTORICAL INVESTIGATIONS

Chapter 5. The Norm on Non-Use of Force and the Law of Self-Defence

Chapter 5 examines the legal status of the norm on non-use of force prior to 2001. To determine the extent to which the Bush administration succeeded in changing the norm, we need to know what it tried to change the norm

from. The first part of the chapter provides a historical assessment of the evolvement of the norms governing the use of force with special attention to the legal rules of self-defence. It shows that the norm on non-use of force gradually evolved out of the unrestricted right to use of force in the 19th century. By the end of World War II the norm on non-use of force had fully evolved into a *grundnorm* of post-1945 international society as evident in the formal adoption of Article 2(4) in the UN Charter, which prohibits the use or the threat of use of force by a state against another state. Only two legal exceptions to this general ban on the use of force exist: self-defence (Article 51) or use of force authorised by the UN Security Council to maintain international peace and security (Article 39).

Because the UN Charters does not define the exact conditions giving rise to the right of self-defence, the second part of the chapter analyses the extent to which the use of force against states harbouring terrorists and the use of pre-emptive and preventive force were included in the right to self-defence prior to 2001. Regarding the former, the chapter shows that unless the terror attack was very grave and the state harbouring the terrorists was proven to be responsible for the attack, the use of force as self-defence against this state was considered illegal under international law prior to 2001. Regarding the latter, preventive force against *non-imminent* threats was clearly considered illegal by a majority of international lawyers, whereas the legal status of pre-emptive force against imminent threats was less clear, as some argued that pre-emptive use force against *imminent* threats was included in Article 51 of the UN Charter.

Chapter 6. Self-Defence and State Practice 1945-2001

Whereas Chapter 5 focused on international law, Chapter 6 turns to state practice to analyse whether the use of force against states harbouring terrorists and the use of pre-emptive and preventive force were considered legitimate exceptions to the norm on non-use of force by the states of international society prior to 2001. Regarding the former, the chapter concludes that the use of force against states harbouring terrorists was in general considered illegitimate. The US and Israel tried to change the norm on non-use of force to include this kind of force several times, but despite the increasing support of Western states these norm change attempts were rejected by a vast majority of the members of the UN Security Council. Regarding the latter, the chapter shows that both pre-emptive and preventive use of force in most incidents was considered illegitimate by the states of international society. Whereas preventive self-defence was clearly considered illegal and

illegitimate by all the states, pre-emptive self-defence was seen as legitimate under certain circumstances by some states. Israel and some Western states, more specifically the US and Great Britain, seemed to uphold the position that pre-emptive force was included in Article 51 in cases of imminent threats.

Based on the findings in Chapter 5 and 6, I thus conclude that at the end of the 20th century neither the use of force against states harbouring terrorists nor the use of preventive force was excepted from the norm on non-use of force. Even though the norm in many cases had been violated or misused by the states, the subsequent condemnations by the other states upheld the norm thereby confirming that it was a strong *grundnorm* of international society.

PART IV: EMPIRICAL INVESTIGATIONS

Chapter 7. Norm Challenge I: the Use of Force against States Harbouring Terrorists and the Afghanistan War

In this chapter, I analyse the Bush administration's first norm challenge. The analysis shows that the administration successfully changed the norm on non-use of force so that the use of force against states harbouring terrorists guilty of terrorist acts now is considered a legitimate exception to the general ban on force. The norm challenge and its manifestation in the Afghanistan war enjoyed broad support throughout the world. The UN Security Council unanimously adopted Resolution 1368, which for the first time in the Council's history declared the right of self-defence in response to terrorist acts. The war against Afghanistan was supported by a large majority of the world's states, including all great powers and many international and regional institutions – even a number of so-called vulnerable states supported the new norm. Furthermore, support to the new norm proved consistent after the invasion of Afghanistan: Subsequent invocations of this new norm by other states in other incidents were also considered legitimate by the states of international society in cases where a state had been victim of grave terror acts and the terrorist-hosting state did not cooperate in eliminating the guilty terrorists. Finally, the new norm has become politically and legally institutionalised, which means that today all states are obligated to do everything in their power to eliminate terrorists located in their territory; otherwise other states can legally invoke a right to use force against this state if a grave terror act has taken place and the guilty terrorists are located in the territory of that state.

Chapter 8. Norm Challenge II: the Use of Preventive Force and the Iraq War

In this chapter, I analyse the Bush administration's second norm challenge. The analysis shows that the Bush administration did not succeed in its norm challenge, as the new norm on preventive force did not make it beyond the second phase of the norm change process. The Bush administration's decision to apply the new norm on Iraq met considerable opposition from a majority of the states in the UN and in contrast to the Afghanistan war the Iraq war was not authorised by the UN Security Council. The new norm met opposition from the great powers France, Russia and China, many regional organisations, in particular Arab, African and Muslim organisations, and vulnerable states. The war was primarily supported by a number of European and American states, but even traditional allies such as Canada, Mexico and Germany rejected the norm change. In general, the new norm was dismissed on the basis that it undermined international law and would lead to a dangerous use of force. In other words, it was seen as a highly illegal and illegitimate norm change that could destabilise the order of international society. Also later incidents, where other states claimed a right to use preventive force, were clearly dismissed by the states of international society. Finally, the fact that preventive force has been and still is considered illegal has been confirmed by the reports of the UN Secretary-General and his High Level Panel on Threats, Challenges and Change as well as the International Court of Justice.

PART V: CONCLUSION

Chapter 9. The Strength of Fundamental Norms: Did President Bush Really 'Kill' Article 2(4)?

In this chapter, I bring the main pieces of the dissertation together. The overall conclusion of the dissertation is that great powers do not always have the power to change international norms although they try to. The empirical analyses showed that the Bush administration only succeeded in its first norm challenge, as the second challenge was heavily opposed by a majority of states. While the first norm challenge and its implementation in the Afghanistan war was supported by almost every state of the world, the opposition to the second norm challenge and its implementation in the Iraq was huge. This result runs counter to realist theory, which claims that great powers are more powerful than international norms and can always change norms to maximise their own interests. While the states of international society ac-

cepted small changes to the norm on non-use of force in the form of another exception to the general ban of force, they did not allow that the norm was completely abandoned and replaced with a new norm on preventive force. In other words, the dissertation shows that the claim that President Bush by advocating for preventive force 'killed' the norm on non-use of force is not true. Rather, it was the strength of the norm that 'killed' the norm challenge on preventive force. The dissertation thus supports the English School's proposition that fundamental norms are more powerful than the will of the great power. They are only subject to change when a vast majority of states find it legitimate and not necessarily when the great power wants it so.

Dansk Resume

Kapitel 1. Introduktion

Denne afhandling undersøger, hvor stærke det internationale samfunds fundamentale normer er, når de udfordres af en stormagt. Mere konkret analyserer afhandlingen i hvilken grad, det lykkedes den tidligere amerikanske præsident George W. Bush at ændre normen om ikke-brug af militær magt, som sammen med normerne om ikke-intervention og suverænitet udgør det internationale samfunds *grund*normer. Som reaktion på terrorangrebet den 11. september 2001 udfordrede præsident Bush normen to gange: først ved at hævde at have ret til at bruge militær magt mod stater, der huser terrorister, der har begået graverende terrorangreb, og derefter ved at kræve ret til forbyggende magtanvendelse som selvforsvar mod såkaldte slyngelstater. Men hvor præsidenten havde succes med sin første normudfordring, så mislykkedes den anden. Hovedformålet med afhandlingen er således at belyse, hvorfor stormagter kan ændre fundamentale normer i nogle situationer men ikke i andre.

Afhandlingen bidrager til en række teoretiske og empiriske debatter. Teoretisk udfordrer afhandlingen realismens antagelse, at internationale normer kan reduceres til ikke at være andet end stormagternes instrumenter, og at de derfor kan ændres, når en stormagt ønsker det. Jeg fremfører argumentet, at fundamentale normer er stærkere end dét, fordi de har høj legitimitet, da de er højt værdsat af staterne i det internationale samfund. De kan derfor kun ændres, hvis disse stater finder normændringen legitim. Argumentet bygger på den engelske skoles teori om internationale normer, og afhandlingen bidrager således også til en videreudvikling af skolens teori om fundamentale normer, som indtil nu har fremstået en smule underteoretiseret. Empirisk bidrager afhandlingen til debatterne om, hvordan 11. september og Bush-administrationens krige i henholdsvis Afghanistan og Irak har påvirket normerne for militær magtanvendelse, og hvorvidt det internationale samfund ændrede sig som resultat af krigene.

DEL I: TEORETISKE UNDERSØGELSER

Kapitel 2. Fundamentale normer og stormagterne i det internationale samfund

I dette kapitel præsenterer jeg den engelske skoles teori om fundamentale normer og deres rolle i det internationale samfund. Jeg definerer fundamen-

tale normer som adfærdsstandarder, der er universelt anerkendte og accepterede. Sammen med fundamentale institutioner og fælles interesser konstituerer fundamentale normer det internationale samfund og bringer således orden ind i en ellers anarkisk og kaotisk verden. Fordi stater er rationelle aktører med en rationel søgen efter orden, ser de det som værende i deres langsigtede interesse at overholde disse fundamentale normer med det formål at opnå alle staters primære mål, nemlig fred og sikkerhed. Fundamentale normer er således en slags 'guidebog', der hjælper staterne med at træffe de bedste beslutninger og opnå gode relationer med andre stater.

Normer og stater er gensidigt afhængige. På den ene side påvirker normer staters adfærd ved at guide dem, og på den anden side er normer skabt af staterne, især af stormagterne. Fordi staterne skaber normerne, er det også staterne, der ændrer normerne. Som bestyrere af det internationale samfund og med særlige rettigheder og pligter har stormagterne større indflydelse på det internationale samfunds institutionelle indretning, og de har derfor også større mulighed for at ændre fundamentale normer end andre stater. Men en sådan normændring vil ikke kun være et resultat af deres materielle magt men også af deres sociale status som en legitim stormagt. Det vil sige, at en stormagt ikke kan tvinge en normændring igennem. For at en fundamental norm kan ændres, må ændringen ses som legitim af de andre stater.

Kapitel 3. Normændringsprocessen

Kapitel 3 forklarer, hvorledes normændringsprocessen finder sted. Ved at kombinere den engelske skoles teori om normudfordringer og normændring med konstruktivismens teori om normændringsprocessen udleder kapitlet en teoretisk model for normændring bestående af fem faser. I den første fase fremsætter en stat, der handler som normentreprenør, en normudfordring. Kapitlet skelner mellem tre slags norm udfordringer: 1) normbrud, hvor en stat overskrider en norm uden at ville ændre den; 2) normtilpasning, hvor staten søger at indføre ændringer inden for normen for eksempel ved at tillægge eller fratrække normen nogle undtagelser; 3) normanfægtelse, hvor staten forsøger at erstatte en eksisterende norm med en ny norm. Succesgraden af normudfordringen afhænger af de andre staters reaktioner. I den anden fase af normændringsprocessen er de andre staters umiddelbare reaktion således afgørende for, hvorvidt normændringsprocessen kan fortsætte, da normen skal være støttet af nogle få stater, der opfører sig som normledere og hjælper normentreprenøren med at promovere normen. Som en betingelse for videre udvikling skal normen nå tredje fase, det såkaldte 'kritiske

punkt', hvor mindst en tredjedel af staterne skal støtte normen, inklusiv støtte fra internationale og regionale organisationer, stormagter og 'udsatte' stater. Når det kritiske punkt er nået, påbegynder en 'normkaskade', hvilket er fjerde fase af normændringsprocessen. Her adopterer flere og flere stater den nye norm. Endelig i fase fem bliver normen politisk og juridisk institutionaliseret ind i statspraksis. Normen har nu udviklet sig fra at være en spæd norm under udvikling til at være en ny norm i det internationale samfund, og den har givet staterne nyt ansvar eller nye rettigheder.

DEL II: METODOLOGISKE UNDERSØGELSER

Kapitel 4. Hvordan analyseres normændring?

Kapitel 4 beskriver afhandlingens forskningsdesign. Kapitlet starter med en generel diskussion af hvilken videnskabsteoretisk tilgang, der er bedst at anvende i analysen af internationale normer og normændringer. Der argumenteres for, at selvom en sådan analyse kalder på en fortolkende metode, behøver dette ikke at ekskludere et mere positivistisk forskningsdesign, der eksplicitерer, hvorledes en normændring kan identificeres. Kapitlet præsenterer derefter afhandlingens forskningsdesign, der er formet som et komparativt single case studie. Det er et single case studie i den forstand, at jeg kun undersøger *én* stormagts normudfordringer. Men da USA er verdens eneste supermagt og derfor også den stat, der med størst sandsynlighed kan ændre en fundamental norm, argumenteres der for, at disse normudfordringer udgør en hård test af styrken af normen om ikke-brug af militær magt. Det er et komparativt studie i den forstand, at jeg sammenligner *to* normudfordringer fremført af den samme stormagt men med hvert sit resultat. For at øge studiets validitet og replicerbarhed laver jeg den teoretiske model om til en målbar model for normændring ved at operationalisere hver fase af normændringsprocessen til et sæt af observerbare empiriske implikationer, hvorefter jeg diskuterer, hvorvidt hver implikation er sikker og unik. Kapitlet slutter med en beskrivelse af dataudvægelsesprocessen og af de anvendte strategier for kodning af data.

DEL III: JURIDISKE OG HISTORISKE UNDERSØGELSER

Kapitel 5. Normen om ikke-brug af militær magtanvendelse og reglerne om selvforsvar

Kapitel 5 undersøger den juridiske status af normen om ikke-brug af militær magt før 2001. For at kunne bestemme hvorvidt det lykkedes Bush-administrationen at ændre normen, må vi først vide, hvad administrationen forsøgte

at ændre den *fra*. Første del af kapitlet redegør for den historiske udvikling af normerne om militær magtanvendelse med særlig fokus på de juridiske regler for selvforsvar. Det vises, at normen om ikke-brug af militær magt gradvis voksede frem af den ellers ubetingede ret til at bruge militær magt i det 19. århundrede. Ved slutningen af Anden Verdenskrig havde normen fuldt udviklet sig til at være en af det post-1945 internationale samfunds grundnormer, hvilket blev tydeliggjort med den formelle vedtagelse af FN-pagtens artikel 2(4), som forbyder trusler om eller brug af militær magt mod en anden stat. Der er kun to undtagelser til dette generelle forbud: selvforsvar (artikel 51) eller FN-autoriseret brug af militær magt til at opretholde international fred og sikkerhed (artikel 39).

Da FN-pagten ikke definerer de eksakte betingelser, der giver ret til selvforsvar, analyserer anden del af kapitlet, hvorvidt brugen af militær magt mod stater, der huser terrorister, og brugen af forbyggende og foregribende magtanvendelse var inkluderet i selvforsvarsretten før 2001. I forhold til førstnævnte viser kapitlet, at medmindre et terrorangreb var meget graverende, og at ansvaret også kunne placeres på staten, der husede de skyldige terrorister, så var brugen af militær magtanvendelse som selvforsvar ifølge international lov betragtet som ulovligt før 2001. Angående sidstnævnte så var *forebyggende* magtanvendelse mod *ikke-overhængende* trusler betragtet som klart ulovligt af et flertal af internationale advokater, hvorimod den legale status for *foregribende* magtanvendelse mod *overhængende* trusler var mindre klar, da nogle argumenterede for, at en sådan ret var inkluderet i FN-pagtens artikel 51.

Kapitel 6. Selvforsvar og statspraksis 1945-2001

Hvor kapitel 5 fokuserede på international lov, kigger kapitel 6 på statspraksis for at undersøge, hvorvidt brugen af militær magt mod stater, der huser terrorister, og brugen af forebyggende og foregribende magt blev betragtet som legitime undtagelser til normen om ikke-brug af militær magt af staterne i det internationale samfund før 2001. I forhold til førstnævnte konkluderer kapitlet, at brugen af militær magt mod stater, der huser terrorister, overordnet blev betragtet som illegitimt. USA og Israel prøvede flere gange at ændre normen om ikke-brug af militær magt til at inkludere denne undtagelse, men på trods af stigende støtte blandt vestlige stater blev disse normudfordringer gentagne gange afvist af et stort flertal i FN's Sikkerhedsråd. Angående sidstnævnte viser kapitlet, at både forebyggende og foregribende magtanvendelse som selvforsvar i de fleste tilfælde blev betragtet som illegitim af staterne i det internationale samfund. Hvor forebyggende magtan-

vendelse klart blev anset som både ulovligt og illegitim af alle stater, så nogle stater foregribende magtanvendelse som legitim under særlige omstændigheder. Israel og nogle vestlige stater, særligt USA og Storbritannien, fandt, at foregribende magtanvendelse var inkluderet i FN-pagtens artikel 51 om selvforsvar i tilfælde af overhængende trusler.

Ud fra analyserne i kapitel 5 og kapitel 6 kan jeg hermed konkludere, at i slutningen af det 20. århundrede var hverken militær magtanvendelse mod stater, der husede terrorister, eller forebyggende magtanvendelse undtaget normen om ikke-brug af militær magtanvendelse. Selvom normen mange gange var blevet brudt og misbrugt af staterne, blev den opretholdt af de efterfølgende fordømmelser af de andre stater, hvilket bekræftede, at der var tale om en stærk grundnorm funderet i det internationale samfund.

DEL IV: EMPIRISKE UNDERSØGELSER

Kapitel 7. Normudfordring I: Afghanistan-krigen og brugen af militær magt mod stater, der huser terrorister

I dette kapitel analyserer jeg Bush-administrationens første normudfordring. Analysen viser, at administrationen succesfuldt ændrede normen om ikke-brug af militær magt, således at militær magtanvendelse mod stater, der huser terrorister, som har begået graverende terrorangreb, nu bliver betragtet som en legitim undtagelse til det generelle forbud mod militær magtanvendelse. Normudfordringen og dens manifestation i Afghanistan-krigen nød stor international støtte fra hele verdens stater. FN's Sikkerhedsråd vedtog enstemmigt Resolution 1368, som for første gang i Rådets historie påberåbte retten til selvforsvar som reaktion på et terrorangreb. Krigen mod Afghanistan var støttet af et stort flertal af verdens stater, inklusiv alle stormagter og mange internationale og regionale organisationer – selv nogle af de såkaldt udsatte stater støttede den nye norm. Støtten til normen forblev intakt efter invasionen af Afghanistan: Efterfølgende påberåbelser af normen af andre stater i andre situationer blev også betragtet som legitime af staterne i det internationale samfund i tilfælde, hvor en stat var blevet udsat for et graverende terrorangreb, og hvor staten, der husede de ansvarlige terrorister, ikke ville hjælpe med at finde og retsforfølge de ansvarlige terrorister. Endelig blev normen også politisk og juridisk institutionaliseret, hvilket betyder, at alle stater i dag er forpligtet til at gøre alt i deres magt for at eliminere terrorisme – ellers kan andre stater lovligt anvende militær magt mod denne stat, hvis et graverende terrorangreb har fundet sted og de skyldige terrorister opholder sig inden for statens territorium.

Kapitel 8. Normudfordring II: Irak-krigen og forebyggende magtanvendelse

I dette kapitel analyserer jeg Bush-administrations anden normudfordring. Analysen viser, at normudfordringen denne gang ikke lykkedes for administrationen, da den nye norm om forebyggende magtanvendelse ikke nåede videre end anden fase i normændringsprocessen. Bush-administrationens beslutning om at anvende den nye norm på Irak mødte stor modstand fra størstedelen af staterne i FN, og i modsætning til Afghanistan-krigen var Irak-krigen ikke autoriseret af FN's Sikkerhedsråd. Den nye norm mødte modstand fra stormagterne Frankrig, Rusland og Kina, fra mange regionale organisationer, især arabiske, afrikanske og muslimske, samt fra udsatte stater. Krigen var primært støttet af en række europæiske og syd-og mellemamerikanske stater, men selv traditionelle allierede som Canada, Mexico og Tyskland afviste normændringen. Den nye norm blev generelt afvist med den begrundelse, at den underminerede international lov, og at den ville skabe en farlig præcedens for brugen af militær magt. Med andre ord blev den anset som en yderst ulovlig og illegitim normændring, som ville destabilisere det internationale samfunds orden. Herudover blev også senere situationer, hvor andre stater hævdede en ret til anvende forebyggende magt, klart afvist af staterne i det internationale samfund. Endelig blev det faktum, at forebyggende magtanvendelse har været og stadig er betragtet som ulovligt, også bekræftet af rapporter af FN's Generalsekretær og hans 'Panel om trusler, udfordringer og forandring' og af Den Internationale Domstol.

DEL V: KONKLUSION

Kapitel 9. Fundamentale normers styrke: 'Dræbte' præsident Bush virkelig Artikel 2(4)?

Dette kapitel sammenfatter afhandlingens resultater. Afhandlingens overordnede konklusion er, at stormagter ikke altid kan ændre fundamentale normer, blot fordi de ønsker det. De empiriske analyser viste, at kun den første normudfordring lykkedes for Bush-administrationen, da den anden normudfordring blev massivt afvist af et flertal af staterne. Hvor næsten alle stater støttede den første normudfordring og dens implementering i Afghanistan-krigen, var der stor modstand mod den anden normudfordring og dens implementering i Irak-krigen. Dette resultat modsiger realistisk teori, som hævder, at stormagter er stærkere end internationale normer, og at de altid kan ændre normer for at maksimere deres egeninteresse. Men staterne i det internationale samfund accepterede kun små ændringer af normen om ik-

ke-brug af militær magt i form af endnu en undtagelse til det generelle forbud mod militær magtanvendelse, og de ville ikke tillade, at den fundamentale norm blev helt forladt og erstattet med en ny norm om forebyggende magtanvendelse. Med andre ord viser afhandlingen, at præsident Bush ikke 'dræbte' normen om ikke-brug af militær magt ved at kræve ret til at bruge forebyggende militærmagt, som det ellers er blevet hævdet. Det var nærmere normens styrke, der 'dræbte' præsident Bushs normudfordring om forebyggende magtanvendelse. Afhandlingen støtter således den engelske skoles antagelse, at fundamentale normer er stærkere end stormagternes krav. De kan kun ændres, når et stort flertal af stater finder det legitimt, og ikke blot når stormagten kræver det.