Article 51 of the United Nations Charter

Article 51 of the UN Charter recognizes the inherent right of self-defense. It states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹

The triggering condition for the lawful exercise of self-defense under Article 51 is the occurrence of an armed attack ("if an armed attack occurs").

Notwithstanding the literal meaning of that language, many authorities interpret Article 51 to legally permit anticipatory self-defense in response to an imminent attack.

Origin of Definition of “Necessity” in the International Law of Self Defense – the Caroline Affair

Background on the Caroline Affair:
In December, 1837, a group of Canadian insurrectionists hoping to induce Canada to break away and secure it's independence from Britain and establish a Canadian republic, were active on the Canadian side of the Niagara River (Ontario). American supporters of the Canadian insurrectionists were ferrying arms across the Niagara River using the U.S. steamer Caroline as the transfer ship.

On December 29 1837 a British Royal Navy force crossed the Niagara River and seized the Caroline and it’s crew. The Royal Navy towed the Caroline out into the current, fired her and cast her adrift over Niagara Falls. At least one, were killed in the engagement. The Caroline grounded above the Falls, and later broke up and was swept over it.

American citizens were outraged at the British action. President Van Buren protested to the British government to no avail.

In May of 1838 a force of mostly Canadian rebels who were led by an American adventurer retaliated by capturing the British steamer, Sir Robert Peel while it

was in U.S. Waters and then looted and burned it.

In the years following these incidents there was an exchange of letters between the new U.S. Secretary of State, Daniel Webster and the British Special Minister, Lord Ashburton.

In a letter to Ashburton dated July 27, 1842, Webster set forth the requirement of “necessity” in the international law of self defense. Commonly referred to as the Caroline Test, this standard was reaffirmed by the Nuremberg Tribunal and Article 51 of the United Nations charter. Webster argued that a self-defense claimant would have to show that the:

necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation ..., and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.  

The terms "anticipatory self-defense", "preemptive self-defense" and "preemption" traditionally refers to a state's right to strike first in self-defense when faced with imminent attack. In order to justify such an action, the Caroline test has two distinct requirements:

1. The use of force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option (necessity);

2. The response must be proportionate to the threat (proportionality)

In Webster's original formulation, the necessity criterion is described as "instant, overwhelming, leaving no choice of means, and no moment of deliberation". This has later come to be referred to as "instant and overwhelming necessity"

**Standards Since the Establishment of Article 51**

As experience since 1945 indicates, when a State purports to act in self-defense the legitimacy of its action will have to be justified before the Security Council. It would seem from the debates on the Cuban Missile Crisis (1962), the Middle East War (1967) and the bombing of the Osarik Nuclear Reactor (1981), that any State seeking to defend preventive action bears a heavy burden of proof and would have to demonstrate that:

- An armed attack is launched, or is immediately threatened, against a State's

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2 Letter from Daniel Webster, Secretary of State, to Lord Ashburton, August 6, 1842 [http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2](http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2)
territory or forces (and probably its nationals);

- There is an urgent necessity for defensive action against that attack;
- There is no practicable alternative to action in anticipatory self-defense, and in particular another State or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
- The action taken by way of anticipatory self-defense is limited to what is necessary to stop or prevent the infringement i.e. to the needs of defense; and
- The response by way of anticipatory self-defense must be immediate.

**The 2003 Invasion of Iraq**

It cannot be stressed enough that the United States invasion of Iraq in 2003 did not fulfill the criteria and requirements of the doctrine of anticipatory self-defense under the existing international customary law, as:

- There was no immediate or imminent threat of an attack. Iraq has neither attacked any State, nor was there any evidence that an attack by Iraq was imminent. Further, there was no claim or publicly disclosed evidence that Iraq was supplying weapons of mass destruction (WMD) to terrorists.
- The situation in 2003 did not require a necessary and urgent military invasion against Iraq.
- The military strikes against a prospective aggressor must be immediate with no room for deliberations. But the United States' military strikes against Iraq were a well-deliberated and well-planned invasion, which is completely unlawful and illegal under international customary law.
- The other peaceful means of resolution of the dispute and disarmament of Iraq from the weapons of mass destruction (WMD) were not exhausted and the United Nations Weapons Inspectors never not found any incriminating evidence against Iraq.

**Proposed AUMF**

The violations of international law by the United States invasion of Iraq served to set a precedent, in the mind of the United States and ONLY the United States that they had served to dramatically expand the existing customary international law relating to anticipatory self-defense.
This dramatic expansion of international law first advocated in the Bush administration's September 2002 "National Security Strategy" which served to [illegally] authorize preemptive strikes against States based on potential threats arising from possession or development of WMD's and/or links to terrorism.

This illegal expansion by the United States has served to completely destabilize the system of restraints on use of force as established by the United Nations Charter.

In 2003 the Bush administration's reliance on the need for "regime change" in Iraq as a basis for use of force is barred by Article 2 of the UN Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any State."

The inclusion of the language “the United States has taken military action against ISIL in accordance with its inherent right of individual and collective self-defense;” in the draft AUMF is President Obama’s justifying the military attack under Article 51 of the United Nations charter. President Obama, like President Bush before him, is attempting to implement Article 51 however his reasons do not come close to fulfilling the criteria and requirements of the doctrine of anticipatory self-defense under the existing international customary law. If approved by Congress, the United States will find itself in violation of international law and the United Nations charter.