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Research Article

PREEMPTIVE SELF-DEFENCE IN PUBLIC INTERNATIONAL LAW: AN ANALYSIS THROUGH THE LENS OF INTERNATIONAL COURT OF JUSTICE JURISPRUDENCE

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ABSTRACT

Background: *The right to self-defence is one of the fundamental principles of international law, explicitly sanctioned by Article 51 of the Charter of the United Nations. However, the practice of this right, especially on anticipatory or preemptive force, continues to be a contentious issue. Thus, it is questionable to what extent and under what circumstances self-defence can be applied when dealing with non-state actors and potential threats in the future. This paper seeks to address these worrying issues through primary historical references and legal systems focusing on the guidelines of necessity and proportionality measures.*

Methods: *This study systematically analyses case law, international treaties, and the United Nations Charter 51 to explore how self-defence is perceived in different contexts. It also uses a comparative legal research method, informed by the International Court of Justice (ICJ) decision and subsequent literature. Cases like Nicaragua v. United States, the Iranian Oil Platforms case, and those involving Israel, the United States, and the United Kingdom were consulted to understand the issues of necessity, proportionality, and preventive self-defence. By adopting a case analysis method, this research explores the preliminary concept of self-defence in the legal system of public international law regarding the state practice and as interpreted by the International Court of Justice. The choice of examples, such as the conflict in Ukraine and the armed aggression of Russia and Turkey, Syria, and Iraq, was planned and chosen based on their significance in modern international law. Secondary data sourced from scholarly articles and legal publications complemented this study.*

Results and Conclusions: *According to the data, the right to self-defence is the most significant and one of the most contentious issues in international law. For instance, events like the Six-Day War of 1967 demonstrate how states leverage self-defence purposes to carry out military actions. However, findings made by the International Court of Justice in cases such as*

Nicaragua v. United States emphasise and uphold the principle of proportionality and reasonability in self-defence arguments. Anticipatory self-defence is still debated, with the Caroline case for defining particular conditions under which anticipatory self-defence is permissible. However, preemptive self-defence continues to spark debate in public international law, with considerable theoretical and practical implications. Russia's invasion of Ukraine and the tensions between Turkey, Syria, and Iraq contribute to the relativity of the issue in today's politics and law. For example, the Russian-Ukraine War illustrates adjustments that come with embracing old self-defence theories when the global security environment is metamorphosing. It has brought to the foreground issues related to aggression, deterrence, and the legal use of force in dealing with threats that are perceived to be existential. This case allows for consideration of the role played by the ICJ in establishing the parameters of state conduct, as well as an analysis of the realities of legitimate force.

Similarly, the conflicts involving Turkey, Syria, and Iraq show there is a modern trend of utilising anticipatory self-defence as a justification for military actions against non-state actors. They are significant in illustrating how states can maintain their security and simultaneously recognise and uphold the sovereignty of other nations. Additionally, the determination by the ICJ of any such claims assists in understanding the evolving legal regime for these processes. The analysis shows that Article 51 outlines the formal possibility of employing force in self-defence, but at the same time, the interpretation of the given article is often questionable. The international community still faces many challenges defining the differences between preemptive and preventive strikes. The proposal is that nations must be careful while employing self-defence and ensure that what they do is reasonable and necessary concerning the threat. In addition, the United Nations Security Council should actively resolve disputes to reduce the risk of the self-defence doctrine's misuse.

1 INTRODUCTION

The right of nations to self-protection is recognised under the United Nations (UN) Charter.[1] Yet, it remains one of the most contested privileges in contemporary international law. Most importantly, customary international law permits countries to exercise the freedom of self-defence within certain limits. This principle is enshrined in Article 51 of the UN Charter,[2] drafted by UN members, which allows for the use of force in self-defence under specific conditions.

However, Article 2(4) contained in the UN Charter prohibits the usage of power by one nation against another, thereby safeguarding territorial and political autonomy.[3] Deterrence under Article 2(4) aims to settle inter-state conflicts peacefully and prevent wars.

1 UN, *Charter of the United Nations and Statute of the International Court of Justice* (UN Publ 1945) 2-20 <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed 25 September 2024.

2 ibid 10, art 51.

3 ibid 3, art 2(4).

Nevertheless, in exceptional situations, when a fortified attack endangers a country, Article 51 permits the application of power for self-defence.

The legitimate utilisation of power in self-defence is a temporary process with limitations and should comply with the philosophies of international law. Such constraints include the ideals of necessity and proportionality of power, according to which power can be applied only for self-defence and must be relative to the threat faced. Owing to its temporal nature, the right to apply force for self-defence ceases once the UN Security Council intervenes and assumes the obligatory evaluations to sustain peace.

The UN recognises that the Security Council can sanction proactive or anticipatory self-defence if a country reports the matter. However, the non-intervention principle prohibits nations from acting preemptively in anticipation of an attack. Power is allowed only in case of an impending danger of an armed assault, and such force has to be proportionate to the threat.

If the Security Council considers peace is at risk or anticipates hostility, it recommends measures to uphold or reinstate security and stability. The Security Council can determine which protocols must be undertaken to preserve global peace. If the techniques highlighted in Article 41,[4] contained under the UN Charter are insufficient to maintain global tranquillity, then the Security Council may advise on military actions. The freedom to self-defence, as highlighted in Article 51, means that the UN affiliates and non-members can assist a non-member state imperilled by a weaponised event. Article 51 also states that nothing shall harm the intrinsic freedom to self-defence if an armed incident occurs on a member of the UN until the Security Council introduces measures critical for the upkeep of global concord and safety.

A member state can exercise the freedom to utilise power solely in defensive circumstances, specifically in response to a weaponised attack. Additionally, it stands the weight of proof. Member states must account for the measures undertaken in exercising self-protection to the UN Security Council, which holds the authority to arbitrate.[5] Once the Security Council takes the essential procedures to address a dispute and uphold international concord and safety, the state must cease its self-defence actions.

Through customary international law, adopted following the 1837 Caroline event, certain aspects must be confirmed when governing the right to self-defence. The case took place in 1837 when a band of rebels fighting for the independence of Canada from Britain relied on an American ship, Caroline, to ferry supplies from the U.S. into Canada.[6] It involved bringing British forces into U.S. territory, seizing the Caroline, setting the vessel on fire,

4 ibid 9, art 41.

5 ibid 8, art 33.

6 The Open University, 'The Use of Force in International Law: Course' (*The Open University OpenLearn*, 2 September 2017) <https://www.open.edu/openlearn/society-politics-law/the-use-force-international-law/content-section-1.3> accessed 25 September 2024.

and then floating her into Niagara Falls, where she exploded, killing an American civilian on board. They include the necessity to use force, its proportionality, and the prompt nature of the response.

Under the current legal environment, governments cannot interfere in sovereign state integrity. The intervention of the military forces in an independent nation's affairs violates the global standard of non-engagement and utilisation of force deterrence under the UN Charter.

Thesis Statement

Article 51 of the UN Charter clearly states the intrinsic freedom of countries to practice self-defence in an armed conflict. The standards of certainty and proportionality illustrate how this freedom should be approached, mainly when a nation uses proactive self-defence.

2 METHODOLOGY

This study employed a systematic approach to analysing case law, international decisions, and the scholarly analysis of the right of self-defence under Public International Law. International treaties and the UN Charter, mainly Article 51, as well as advisory opinions and decisions of the International Court of Justice (ICJ), such as the Nicaragua case and the legitimacy of the threat or use of nuclear weapons. Secondary data was obtained from articles and legal studies carried out by various scholars. The research compared case laws and legal judgments to determine patterns and challenges in self-defence and underlying difficulties such as proportionality, necessity, and preemptive defence. This method allowed for shaping current discourses regarding legal aspects of self-defence.

Numerous references from Moore's Digest accompany the Caroline case, along with extensive House and Senate reports, providing a thorough account of the events and legal debate. The methodology relied heavily on historical documents in sources, means, and legislative records to comprehensively analyse the facts, interpretations, and subsequent reporting of legal responses. This research places the events that led to the sinking of the Caroline in a broader perspective of international law and neutrality.

The historical facts appear in Moore's Digest and many documents of the Congress; the complete story is linked to the given legal notions of "self-defence" and "sovereignty of states". However, the manuscript may require a more detailed specification of the criteria for selecting these sources and a more precise explanation of the interpretive framework used to arrive at these precedents.

When analysing the Oil Platforms case, the approach shifts to a comparative examination of the processes and outcomes of the International Court of Justice. It focuses on the legal premises arising from Iran and the United States Treaty of Amity, organising the arguments, counterarguments, and procedural decisions successively in the research. The ICJ adopted

this approach in dealing with jurisdictional objections and counterclaims, demonstrating a keen sense of legal analysis to establish treaty breaches. The work relied on ICJ records, pleadings, and decisions as sources, offering a detailed account of the legal positions articulated by the parties.

This study's methodology is case-based, emphasising two primary contexts: Russia's invasion of Ukraine and the conflicts in and around Turkey, Syria, and Iraq. These instances were selected to examine the different uses of anticipatory self-defence under public international law. The Russia-Ukraine conflict is significant in understanding the capacity of the self-defence provision under Article 51 of the United Nations Charter, particularly the criteria of imminence and collective security apparatuses. However, experiences from the conflicts in Turkey, Syria, and Iraq offer lessons on pre-emptive self-defence against non-state actors and the issues of sovereignty, transboundary operations, and the rule of proportionality. Thus, comparing these cases, the study gives a comprehensive insight into how states employ anticipatory self-defence in conventional and unconventional conflicts and enables the assessment of legal understandings and consequences for global peace and security. This methodology properly balances the depth of theory and practical application.

To minimise such biases, different perspectives were obtained by sampling examples involving other states, such as the United States and the United Kingdom, particularly their self-defence claims. Thus, by adopting multiple countries' policies and the specific interpretations of the courts, the study did not have a bias analysis. The choice of methodologies, systematic approach, and a comparison of case studies was appropriate because it reflects the nature of the legal theories involved in international law and gives an idea of how self-defence is implemented in specific situations. This method proved effective in addressing theoretical issues while linking them to actual legal contexts. Integrating ICJ decisions and cases ensured the study was comprehensive and grounded in law.

3 THE RIGHT TO SELF-DEFENCE: ARTICLE 51 OF THE UN CHARTER

Article 51 states that nations have the integral freedom to practice self-defence in case of a weaponised attack. A country must be subject to an armed event and can respond collectively or individually.[7] Despite the wide acceptance of Article 51, there are considerable disagreements among affiliate nations on different ideas of the article. Some questions emanating from such disagreements are: What constitutes an armed attack? Should a nation under the threat of nuclear weaponry attack wait until it is launched and not act proactively? What can governments do if non-state actors, such as criminals, assault them?

7 UN Charter (n 1) 10, art 51.

One point that remains clear is that a member state can invoke Article 51 and utilise force in self-defence,[8] provided it is a crucial protective action against an assault event or has been endorsed by the UN Security Council to uphold global peace and safety.

Article 2(4) contained within the UN Charter is widely regarded as the principle within customary universal rule valid to all nations globally. It should be realised that the orientation to use force rather than war is crucial. It encompasses events where ferocity is utilised but has the drawback of the notion of war's procedural necessities. Nevertheless, although military power is limited under Article 2(4), the UN states that economic authorisations are not permissible when utilised to force nations.[9] Therefore, these limitations have to be observed in the use of self-defence.

Countries' use of power and intervention in an independent country's local affairs are different. Thus, involvement in the affairs of a monarch nation is banned under international law. The non-intervention standard is a segment of customary global law and is founded on the idea of respect for nations' border sovereignty.[10] Article 51 grants states the legal right to use force in self-defence without seeking approval from the UN Security Council so long as such use is proportional and necessary. However, there are ongoing debates about what constitutes an armed attack, particularly regarding non-state actors or the preemptory of self-defence.[11]

These debates have led to discussions about expanding the scope of self-defence to include preemptive actions, reflecting the emerging nature of conflicts. The New Haven School and the analysis of legal pluralism concerning Article 51 are most relevant in understanding the fluid interaction between international, national, and non-state normative systems regulating self-defence. Legal pluralism asserts the existence of many legal orders, suggesting that cultural, regional, and legal differences may influence how self-defence is understood under Article 51.[12] The New Haven School focuses mainly on the norm-generation process, with the participation of actors other than the state, including international-level actors and non-state actors. This approach also effectively questions existing conventional practices of Article 51 based on state-oriented structures and understandings.

As a result, the law on self-defence, like many other international laws, evolves relative to the competing legal orders' interferences and evolutions of the global legal norms, indicative of the pluralist and fragmented international legal system.[13]

8 ibid 12.
9 ibid 13.
10 ibid, 14.
11 Elif Durmuş, 'A Typology of Local Governments' Engagement with Human Rights: Legal Pluralist Contributions to International Law and Human Rights' (2020) 38(1) Netherlands Quarterly of Human Rights 30, doi:10.1177/0924051920903241.
12 ibid 36.
13 ibid.

The International Court of Justice (ICJ) ruled in *Nicaragua v. United States* that a nation has the authority to make judgments about its political, economic, social, and cultural models and to create external choices. In this regard, intervention is deemed ineffective when it entails coercion.[14] Even if meddling in another country's affairs does not include the use of force, it violates universal norms. Additionally, although the Charter prohibits military force intervention, the regulation cannot be deemed absolute.[15] Nevertheless, it acknowledges specific events that may demand force utilisation across nations.

While Article 2(4) of the Charter tends to refrain member nations from threatening or utilising power against any country's national integrity or political autonomy or in any other unpredictable way with a focus on the UN, it forbids states from waging war. Article 51 grants the freedom to individual and joint self-defence against any aggression.[16] Both Articles provide diametrical procedures concerning the application of force. Nevertheless, there is an agreement regarding the idea of aggression. Both articles prohibit aggressive war.[17] Even though armed self-defence is a peremptory right of a nation and is linked with the freedom of existence, it is not deemed an unconditional privilege. It can only be seen as the last resort for existence, perhaps the freedom to fight a battle. It is evident that war does exist as a legal affirmation within the UN Charter, but with certain restrictions.[18] As a result, the liberty of defensive tactics can be used to safeguard the state's everlasting right to exist. The practice of self-defence is justified not only under customary global law but also under the UN Charter.

The ICJ holds that grave violations against Article 2(4) tend to trigger the freedom of self-defence under Article 51. According to the ICJ, the gravest kinds of utilisation of power constitute an offensive attack.[19] The appeal to this perception is quite evident as force and an armed attack are associated with the same subject matter, yet they presumptively encompass unique meanings. Force and armed attack share similar violent characteristics, meaning they can differ only in magnitude and gravity.[20] However, insufficiently grave power usage does not constitute a weaponised attack and does not, in other words, activate the freedom to self-defence.

Moreover, Article 51 also does not permit the utilisation of power against non-state players on the territory of another nation without consent. Non-state players cannot invoke Article 2(4), meaning they cannot launch an armed attack within the framework of Article 51.[21]

14 Yishai Beer, 'Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense' (2021) 59(1) Columbia Journal of Transnational Law 117.
15 Eric Talbot Jensen, 'Right of Self-Defense' (2002) 12 Computer 208.
16 UN Charter (n 1) 15.
17 Beer (n 14) 117.
18 ibid 117.
19 ibid.
20 Jensen (n 15) 209.
21 ibid 210.

If the Security Council fails to discourage any nation from attacking a member nation, that member state has an inherent right to take necessary defensive measures. The right to use self-defence measures for an armed individual should include provisions similar to those outlined in the Chapultepec Act. In this aspect, all members of a group of states agree that a killing against another country is an assault on all of them.

The Six-Day War (1967) is one event that demonstrates states' rights under international law. Israel declared that its attack against Egypt was an act of self-defence because Egypt closed the Straits of Tiran and was threatening to attack.[22] Under Article 51 of the UN Charter, a state is entitled to self-defence if subjected to an armed attack. This approach is based on the 1837 Caroline's case, which set the doctrine for legal self-defence as an instantaneous, unavoidable action and left no choice of method.

The International Court of Justice, in its 1986 Nicaragua case decision, pointed out that self-defence must be necessary and reasonable.[23] As was the case with Israel's military triumph, which transformed the map of the Middle East, this also gave rise to legal discussions on the notion of preemptive defence in international law, especially in territorial and regional conflicts.

This right, especially in the case of occupation due to armed conflict, has raised controversy, especially given UNGA Res. 2625, which banned the recourse to force to settle such issues.[24] The resolution particularly asserts that force shall not be applied to alter borders or even solve existing disputes, including the issue of occupation.

Key elements used to invoke the right to self-defence include the occurrence of an armed attack, the necessity of a defensive response, and the proportionality of that response. In cases where an armed attack persists beyond the initial unlawful attack and the state remains in control of the disputed territory, these criteria are met. In addition, the UN General Assembly also defines aggression, and it is evident that any act of invasion followed by military occupation is considered ongoing aggression. Thus, even if Article 2(4) of the UNGA Res. 2625 prohibits using force in the dispute over territories, the principles of self-defence according to Article 51 of the Charter remain valid in situations where occupation is connected to an armed attack.[25]

Nations sometimes justify intrusion to safeguard nationals overseas as a way of self-defence. This justification often involves broadening the understanding of the phrasing of "an armed

22 PBS, 'The Six Day War' (*American Experience*, 2023) <https://www.pbs.org/wgbh/americanexperience/features/hijacked-wars-threats-responses/> accessed 25 September 2024.

23 The Open University (n 6).

24 Nidaa Iqbal, 'Lawfully Exercising the Right to Self-Defence under Article 51 of the UN Charter to Recover Occupied Territory' (*Diplomacy, Law, and Policy Forum*, 15 April 2023) <https://www.dlpforum.org/2023/04/15/lawfully-exercising-the-right-to-self-defence-under-article-51-of-the-un-charter-to-recover-occupied-territory/> accessed 25 September 2024.

25 ibid.

war" under Article 51 to encompass an attack against a member state.[26] While customary international law fails to provide a steady gridlock, certain leading scholars back up the notion.[27] When invoking self-defence through intervention, nations should abide by three general principles: necessity, proportionality, and absence of any other means. Additionally, nations must abide by certain conditions to comply with international law. First, the intervention should not be a castigatory measure or reprisal. Second, the domestic sovereign must fail or be unable to provide protection. Third, the intervention must be restrained in time and space, meaning a nation should not extend its existence on an overseas border.[28] Fourth, violence against the civilians of the attacked nation has to be arbitrary, which means it has to be unjustified and against the regulation of the least typical applicable to strangers. The other condition is that there has to be no way to liberate the people through less hostility. Finally, a nation cannot resort to armed intervention while an international judicial process is underway for a nonviolent resolution of the dispute.

4 CONSTRAINTS/LIMITATIONS OF THE RIGHT TO SELF-DEFENCE

Necessity and proportionality are significant principles of the freedom of security under global law aimed at deterring excessive power utilisation by member nations. The principle of immediacy, while important, is less emphasised, as responses may be delayed due to the need to collect evidence of the armed attack, identify the aggressor, and collect other forms of intelligence. This time is often required to craft a focused approach and articulate the facts to the UN Security Council, which determines the legitimacy of the practice of self-defence.[29]

Under the concept of obligation, a member state should substantiate the inference that power must be applied against a weaponised matter based on realistic facts available at that time. Any power used for defensive tactics would be considered illegal if not deemed necessary by the UN Security Council.[30] Appropriateness has two major components: the appropriateness of the response to the attack and the respect for ethical standards of warfare in that response.

It might be challenging to ensure that the response to an attack is proportionate. For example, in the case of the Iranian Oil Platform, the ICJ found that it was critical to assess the scope of the mission, which included the deconstruction of two Iranian oil routes and

26 UN Charter (n 1) 15.

27 Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106(4) American Journal of International Law 770, doi:10.5305/amerjintelaw.106.4.0769.

28 Zhang Naigen, 'The Principle of Non-Interference and Its Application in Practices of Contemporary International Law' (2016) 9(3) Fudan Journal of the Humanities and Social Sciences 449, doi:10.1007/s40647-016-0126-y.

29 Bethlehem (n 27) 771.

30 ibid 772.

many aeroplanes, although there were no civilian casualties.[31] In this situation, it was determined that the magnitude of the retaliation was inappropriate to the impending risk. The kind of weapons used in self-defence is a proportionate approach. The proportionality test does not explicitly prohibit the use of nuclear firearms, but such retaliation has to comply strictly with the reasonableness requirements. The matter in integrating the principle is that the nation conducting such an action would have to introduce an initiative that would be later discussed through international courts or the UN Security Council.

In protecting humanitarian regulations of war in the response, a member nation's practice of self-defence ought to comply with the mandates under humanitarian law. In this regard, the principle does not derogate the human right to self-defence.[32] It was contentious to not exclusively prohibit the use of atomic bombs in the Defensive Purposes Act. Nevertheless, the ICJ conversed on member nations' disregard for environmental regulations when utilising nuclear weapons. The Court does not ban a state from practising self-defence due to its mandate towards ecological regulations. Nevertheless, nations are advised to consider the environmental effect when evaluating the proportional employment of force in protecting themselves.[33] Environmental effects can be considered when assessing the action regarding the proportionality standard.

Evaluating the restrictions of the right to self-defence in Public International Law (PIL) can be understood both theoretically and practically. One example of such operation is the 1981 Israel's Operation Opera, during which Israeli fighter planes targeted and destroyed Iraq's Osirak nuclear facility. Despite Israeli authorities' claiming the attack in question as an act of self-defence, the UN Security Council condemned the act of terrorism, underlining that the right of self-defence does not extend to responding to potential future threats,[34] highlighting the problems of proactive self-defence, especially regarding proportionality and need.

The ICJ found that it is self-defence when there is an actual armed attack and not when assistance to military forces preparing for one is given. The Legality of the Threat or Use of Nuclear Weapons (1996) advisory judgment of the International Court of Justice reiterated that utilising atomic weapons would ordinarily be unlawful as it violates the principles of international humanitarian law under which even recourse to force in protection can only be proportionate and necessary.[35] These examples show that the right of self-defence is

31 Naigen (n 28) 450.
32 UN Charter (n 1) 12.
33 Naigen (n 28) 451.
34 Debanish Achom, 'In 1981, Israel Bombed Nuclear Reactor in Iraq. Why It's Relevant Today' (*NDTV*, 11 October 2023) <https://www.ndtv.com/world-news/operation-opera-daring-1981-airstrike-on-nuclear-reactor-in-focus-as-israel-faces-multi-front-war-4471744> accessed 25 September 2024.
35 Women's International League for Peace and Freedom, 'International Court of Justice and Its 1996 Advisory Opinion' (*Reaching Critical Will*, 2002) <https://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4744-international-court-of-justice-and-its-1996-advisory-opinion> accessed 25 September 2024.

circumscribed by narrow circumstances that do not allow for handling multifaceted international security problems, including preemptive actions or anticipatory threats.

Most importantly, there is no accord in global legal doctrine when the protection measures in response to an armed assault may be executed. Some who understand Article 51 argue that the intrinsic right to self-defence by the state justifies anticipatory self-defence if circumstances similar to those in the Caroline case exist.[36] Such a recourse to conventional law expands the right of self-defence stipulated under Article 51.[37] The right to proactive self-defence would be against the phrasing of Article 51. Since the supposed proximity of an armed event cannot be evaluated objectively, any choice at this juncture would be to the will of the nation concerned.[38] The manifested threat of opposition to such discretion would de facto understate the constraint to one particular case of the freedom to self-defence. In this regard, Article 51 has to be understood narrowly as a ban on anticipatory self-defence.

Self-defence is usually permitted only after the launch of a weaponised weapon. Only when one nation provides notice of a plausible armed attack against another nation would defence measures engaging the usage of power be well-matched with Article 51. Such understanding resembles the chief country practice as the standard freedom to anticipatory self-defence has not been induced within the UN Charter.[39] The ban on anticipatory self-defence encompassed under Article 51 is generally in line with the nuclear model of superpowers, only provided that nations are in a position to safeguard themselves against preventive strikes hurled against them. Moreover, Article 51 holds that if a country has recourse to a military attack in defensive tactics, its adopted events must be reported to the UN Security Council. Preventive self-defence against a latent attack that is predictable or believable is deemed illegitimate. Only interception actions executed against a forthcoming, unavoidable, and legitimate armed attack are deemed permissible.[40] Therefore, self-defence cannot be exercised based on assumptions, anticipation, or fear.

Traditional restrictionists assert that Article 51's language limits a nation's authority to use force in different ways. First, a nation can use power to oppose a weaponised war already in progress. Therefore, using energy to prevent future attacks is illegitimate. Second, not every use of strength constitutes a military assault.[41] Proponents of conventional restrictivism recognise that the restraints on applying force could deter states from safeguarding citizens from danger in different settings. While countries could repel critical actions of aggression, they would be deemed helpless in deterring sporadic small-scale attacks by other nations.

36 Bethlehem (n 27) 772.

37 Naigen (n 28) 452.

38 Bethlehem (n 27) 773.

39 Hanna Bourgeois and Patryk I Labuda, 'When May UN Peacekeepers Use Lethal Force to Protect Civilians? Reconciling Threats to Civilians, Imminence, and the Right to Life' (2023) 28(1) Journal of Conflict and Security Law 4, doi:10.1093/jcsl/krac027.

40 Naigen (n 28) 451.

41 Bethlehem (n 27) 773.

Hence, guaranteeing adequate safety for individuals is not the fundamental focus of Article 51. Conventional restrictionists highlight that the intrinsic freedom to self-defence is a constrained prerogative to ward off critical military attacks that are in progress.[42] They contend that limitations on the use of force advance the main objective of the UN Charter by preventing acts of threats of future assaults and low-level assaults from starting a significant worldwide disagreement that would cause many casualties and engulf the entire world in a local or worldwide dispute.

A more significant challenge to conventional restriction comes from elaborating on the rationale for why violence might be attributed to a country that could be considered an armed attack. Article 51's wording does not explicitly prohibit the use of force to thwart assaults by non-state actors, such as international terrorist organisations or private militias. On the other hand, traditional restrictionists are against using energy for self-defence against non-state actors abroad without an international territorial accord since it is unforeseeable and goes against the UN Charter.[43] They emphasise that cross-border military action without a territorial country's consent affects the legal relationship between two nations. Furthermore, they maintain that assigning the function to the geographical state must provide a unique rationale for those actions. Moreover, allowing martial law to intervene without a state's approval or accountability for an earlier act would jeopardise global order and security by increasing the likelihood of violent conflicts between the two countries.[44] The country where violent non-state players reside might perceive overseas intervention within its territories as an armed attack, thus justifying a military response. Conventional restrictionists argue that "armed attack" under Article 51 should be constructed narrowly to encompass only military actions attributable to nations rather than non-state actors to prevent such issues.

5 CONCEPTS AND TYPES OF ANTICIPATORY SELF-DEFENCE

Anticipatory self-defence refers to any application of defensive strength to mitigate the possibility of future armed attacks. It takes two forms: preventive self-defence and anticipatory self-protection. Preventive self-defence is the most expansive kind of anticipatory self-defence. It refers to countering probable future threats of attacks that have not yet materialised or might not.[45] A good instance is the probable acquisition of nuclear weapons by nations such as North Korea and Iran. Preventive self-defence is applying force to deter probable upcoming armed bouts that are not deemed imminent. The idea of preemptive self-defence is founded on conjecture, that is, the existence of uncertain threats at an unidentified point in a distant future. It lies in a pervasive understanding of Article 51,

42 ibid.
43 Bourgeois and Labuda (n 39) 5.
44 ibid 6.
45 ibid 7.

one that provides countries with great flexibility to perform unilaterally away from the communal security platform of the UN Charter. The effect of this understanding is the capacity of the powerful military nations to abuse their right to self-defence. It gives them the right to project military force across their borders in the broadest probable range of events while claiming to function within the confines of legality.[46] Considering the meaning of proximity and the need to construe it in slim or extensive terms, it is crucial to understand that even if the right to preventive self-defence is no longer referenced as it was, its core notion will exist as an idea of academic observation.

In contrast, pre-emptive self-defence is the defensive power utilised to deter armed bouts that are deemed imminent. This kind of anticipatory self-defence has been the target of many inquiries. The right of nations to act in this matter, even during the post-UN Charter period, emanates from the Caroline case. The right to pre-emptive self-defence is the right to apply power in reaction to a weaponised act anticipated to be introduced in the foreseeable future.[47] Therefore, pre-emptive self-defence has deemed the reaction to the sitting duck confusion, which means that Article 51 should not be understood inertly in a manner requiring a nation to agree to its fate before the attack. There is an expanding academic agreement that supports a constrained right to pre-emptive self-defence as a familiar premise, even though there is disagreement about the meaning and interpretation of imminence. The ICJ has not provided its view regarding the right to pre-emptive self-defence. Nevertheless, there are already indications in the jurisprudence of this court that point to the way it might handle such an issue in the future. The ICJ has reliably understood the right to self-defence in a conventional way. It holds that Article 51 may only defend a self-protective application of force within the limits of that article and does not permit the application of force by a nation to safeguard perceived safety and welfare beyond these thresholds.

Regardless of whether international law precisely acknowledges the right of proactive self-protection, the resultant analysis aims to depict that nations have had remedies to the right to preemptive practice to defend the application of force. In such events, the presence or lack of imminence determines the validity of other nations' putatively defensive actions.[48] Most importantly, a nation's compliance with international law can only be evaluated in the coming days. It is crucial to note that several states have backed up the freedom of preemptive self-defence, whereas others have opposed the doctrine of preemption. More recent national practice on this matter refers to combatting international terrorism. During the post-9/11 period, nations have had recourse to the right to defensive tactics used to justify risks posed by terrorist groups.[49] In doing so, they claim that such groups tend to

46 ibid.

47 Marthen Napang, 'The Effectiveness of the United Nation's Role in Responding to Wars of Aggression and Self-Defense' (2022) 5(1) International Journal of Global Community 3.

48 Todd F Buchwald, 'The Use of Force against "Rogue States"' (2019) 51(1) Case Western Reserve Journal of International Law 177.

49 Napang (n 47) 4.

position a pending threat to security. The context of deterring a tenacious terrorist danger has informed how certain nations now understand imminence. The events of national practice are critical to the current endeavours.

It is well-settled that a necessary and proportional response is sanctioned in reaction to the hostile practice or illustration of hostile intent. Nevertheless, self-defence has different forms, including unit, national, and individual self-defence. Most importantly, every category should be regarded separately when analysing the right to self-defence. In the case of preemptive protecting oneself, the goal of national defensive tactics is to react to evidence of aggressive intention.[50] However, an enemy could commit different acts illustrating hostile intent without provoking national authorities to apply anticipatory self-defence. Most importantly, the key to scrutinising the issue is the balance between the risk the adversary poses and the cost of taking action in reaction to the hostile intent.[51]

When considering the legitimacy of anticipatory self-defence, analysis should begin with acknowledging that there are two left and right restraints on the spectrum of the reaction of a country. Pre-emptive attacks are usually launched in retaliation to an instant and known threat, thus leaving no space for inaction. In contrast, preventive attacks occur without an immediate threat and are usually illegal under international law unless there is a belief that they were justified. In this case, the international community usually determines whether an attack was justified. In this regard, it is imperative to provide clear justification along with reasoning for carrying out a preventive attack to the UN Security Council.[52] Moreover, political and military frontrunners must comprehend the distinction between preemptive and preventive attacks to precisely communicate their nation's intentions.

The globally accepted consensus within the customary universal rule is that, despite the phrasing of the UN Charter, anticipatory self-defence is permissible when a threat is deemed imminent. In 2005, the UN Secretary-General identified that imminent threats are entirely covered under Article 51, which protects the intrinsic freedom of nations to defend themselves against military bouts.[53] Where dangers are considered latent but not imminent, the UN Charter provides complete power to the Security Council to apply military power.

Interpreting this, force is permitted under customary international law under the conditions of proximity and inevitability. In terms of imminence, force may be permitted if there is a belief that any delay in a pre-emptive attack would lead to a state's incapacity to defend itself against attacks or avert them.[54] The broader context between players has to be considered in the question of imminence. Force is also permitted if the evaluation is based on facts and in proper faith.

50 Buchwald (n 48) 177.
51 ibid 177.
52 ibid.
53 Napang (n 47) 5.
54 ibid 6.

Most evidently, anticipatory self-defence can be justified on a legitimate basis if the application of force by the threatening state is imminent, leaving no room for deliberation by the threatened nation.[55] Under the necessity principle, the threat has to be deemed instant and leave no choice of means. Additionally, pre-emptive self-defence must be proportional to the anticipated threat.

6 PRINCIPLES AND CONSTITUENTS OF AN ARMED ATTACK UNDER INTERNATIONAL LAW ON SELF-DEFENCE

The privilege to use force in response to ongoing aggression is not the sole aspect of the legislation on self-defence. Article 51 emphasises the right to self-defence until the Security Council takes the necessary action.[56] However, this right is restrained when a definite armed attack has been launched. The freedom to act in self-defence to avert the risk of an imminent attack is broadly recognised but not collectively allowed. Hence, self-defence in situations awaiting an attack depends on imminence and necessity. As established in the Caroline case, necessary measures stipulated may be undertaken as long as a threatened attack occurs.

Force can be used in self-defence only in an armed event that is imminent or in progress. This includes attacks on a nation's borders and armed forces. Force can also be used when an attack includes a threat to use force, when the attacker shows the intention and capacity to attack, or when the event is directed from the outside border coordinated by the state. In case of an endangered attack, self-defence is allowed where there is a definite danger of an attack against the defensive nation itself. In other words, the intrinsic freedom to self-protect in situations of an attack, as acknowledged in Article 51, excludes the overall ban on using force within Article 2(4).[57] Therefore, the use of power in self-defence is a complicated issue.

Under Article 51, an armed militia is not limited to events within a nation's borders but also those directed against its emanations, including embassies overseas. An armed militia may also encompass practices against private civilians or airlines located overseas. However, any deliberate involvement in another nation's territory without its agreement or ensuring compliance is not considered a legitimate act of self-defence.[58]

Most importantly, an armed event entails any utilisation of armed power and does not call for a certain degree of intensity. For an action to be termed an armed attack, the attacker must demonstrate a clear intent behind the attack. For instance, in the Oil Platforms Case, the International Court of Justice made references to the obligation when it queried the idea that the U.S. was capable of proving that specific actions by Iran were

55 ibid.

56 Salar Abbasi, 'A Conceptual Incongruence between International Laws of Self-Defense and the International Core Crime of Aggression' (2018) 6(1) Penn State Journal of Law & International Affairs 179.

57 ibid 179.

58 ibid.

mainly targeted at it or Iran had the specific intention of damaging vessels belonging to the U.S.[59] Additionally, all the peaceful measures of terminating or averting an attack must be exhausted or unavailable. In this case, no real-world non-weaponized option to the planned practice should be appropriate to avoid treatment or terminate an attack.[60] Necessity is usually deemed an edge, and imminence can be considered one of its aspects. Necessity can also be seen as a restraint on the application of force in self-defence as it limits the reaction to the alleviation of an attack, which means it is associated with the standard of balance. In this case, the defensive action must be restrained to what is essential to anticipate or stop the progressive attack.

As previously mentioned, the principles of necessity and proportionality are central to the concept of an armed attack under international law, particularly in the context of self-defence. However, when these concepts are brought to real-life usage, they are often deemed impractical and unclear, specifically regarding justice and fairness in relations between nations. A practical example is Iran v. United States (Oil Platforms Case), ICJ Reports 2003. This case addressed whether the attacks by the United States on Iranian oil platforms in 1987 and 1988 were justified as a measure of self-defence under the 1955 Treaty of Amity between the two countries. Unfortunately, the Court held that the United States' conduct was unwarranted since it did not provide concrete evidence that Iran initiated an armed attack.[61] The International Court of Justice pointed out that using force in self-defence is only justified when it responds to a definite armed attack and is backed by proportionate force. Moreover, the United States had accused Iran of violating the same convention by attacking ships in the Persian Gulf. At the same time, the International Court of Justice could not identify any evidence that Iran's activities had interrupted trade or communication between the two nations. That is why this case clearly illustrates the challenges occurring when theoretical notions of self-defence start to be implemented. The International Court of Justice's leading judgment also indicates that stricter standards and better definitions must be adopted to accurately determine what constitutes an armed attack while ensuring that justice is served for governments making self-defence claims under international law.

A defending nation must identify the proximity of an attack in good faith based on an objective evaluation of available evidence. Facts should be provided in the public domain, provided this is reasonably achieved.[62] However, some categories of evidence may not be easily produced, either due to the source or nature of their existence or because they are the products of understanding many pieces of information. The more far-reaching external actions are, the more a nation ought to accept the mandate of showcasing the justifiability

59 *Oil Platforms (Islamic Republic of Iran v United States of America)* (ICJ, 6 November 2003) <https://www.icj-cij.org/case/90> accessed 25 September 2024.
60 Buchwald (n 48) 177.
61 *Oil Platforms* (n 59).
62 Buchwald (n 48) 177.

of its actions. There should also be effective internal processes for evaluating intelligence and applicable procedural safeguards.[63] The International Court of Justice has also contributed to shaping these distinctions, pointing out that mere use of force amounts to an armed attack only in cases of particularly grave aggression as opposed to border infringement, for instance.[64] For the state to employ self-defence, it must prove immediacy, necessity, and proportionality. The concept of immediacy suggests that the answer must follow the attack without any postponement or leaving room for retaliation. The attacked state must show that there was no option but to use force to counter the aggression.

Proportionality also proposes that force should only be used to counter the attack and prevent anything beyond the threat from being done. In addition, customary international law demands notification to the UN Security Council within the shortest time possible after exercising the right to self-defence further to consider the necessity and proportionality of the action.[65] Even if controversial, The principle of self-defence allows nations to act proactively when eminent aggression is apparent, as opposed to the one in this case. However, such preemptive interventions remain an issue, so they need a high standard of proof to prevent misuse.[66] It is important to note that the force applied should not be excessive due to the need to prevent or stop an attack. Additionally, the Force's physical and economic consequences should not outweigh the collateral expected from an attack.[67] However, some claim that inferring the imminence of an attack is more of an effort to forecast the future than to establish a particular fact. In divergent circumstances, there can be some uncertainty regarding the perfection of obtained information concerning an attacker's plans.

The principle of immediacy has to be considered when undertaking proactive self-defence. It stands for the idea that the action in self-defence has to be taken immediately after the beginning of an attack. However, a separate attack with weapons may not be the primary cause for initiating self-defence. If the time between a weaponised assault and self-defence is long, the latter may still be valid if the wait is justifiable. There is an association of the criteria of immediacy with that of necessity. They argue that an armed attack does not unavoidably have to be followed by the act of self-defence immediately. The understanding of closeness in time between the two actions depends on the setting of every situation. The key disputable issue is when or at what point in time the actions of self-defence are deemed legitimate. There is a view that anticipatory self-defence is justified if it adheres to the

63 ibid 177.

64 Durmuş (n 11) 45.

65 ibid 47.

66 ibid 48.

67 Atul Alexander and Swargodeep Sarkar, 'Shifting Interpretation in International Court of Justice's Decision in the Islamic Republic of Iran v United States of America: A Deliberate Step?' (2022) 43(1) Liverpool Law Review 99, doi:10.1007/s10991-021-09292-1; Fasilat Abimbola Olalere, 'Review of the Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)' (2021) 1(1) Redeemer's University Journal of Jurisprudence and International Law 169.

requirements under the Caroline case. Moreover, there is a lack of a unified understanding of the problem of the lawfulness of the application of force for self-defence when the weapon is already introduced toward the victim nation.

7 PROACTIVE SELF-DEFENCE AGAINST TERRORISM IN INTERNATIONAL LAW

Article 51 provides nations with the right to self-defence against armed attacks and terrorism, specifically when governments support it. Most importantly, reprisals involve the penalty of those who have conducted an illegitimate act for which there is no peaceful redress. For reprisals to be legal under international law, they must comply with particular conditions and limitations.[68] Furthermore, preemption entails striking to deter a planned hostile activity to avoid damage. Any state executing a preventative action has to do so based on the undoubted indication of the scheduled event not to be perceived as an aggressor. Additionally, preemptive action ought to be undertaken when no other means could deter a terrorist attack. There is also retribution, which entails trailing down and gruelling terrorists for the actions that they have done. The U.S. has to have a proactive reaction against terror by creating a civilian-oriented paramilitary department to conduct special functions.[69] However, some believe that retaliation and reprisals are illegitimate under the UN Charter. Articles 2(4) and 51 encompass a minimum order as they safeguard only the central freedom for self-defence in case of armed aggression.

Contrary to the meanings of the UN Charter developers, the communal safety model has been significant, and state hostility is determined through nations' unilateral usage of power. There is an argument that since the routine freedom to self-defence entails actions beyond an armed attack, armed forces may be legally present as an alternative against terrorists.[70]

Though Article 51 refers to the freedom to self-defence as a reaction "if an armed attack occurs," the U.K. and the U.S. have progressively upheld that the liberty of self-defence applies even when such a fortified attack has not yet happened but is imminent. The United States has cited tremendous support for anticipatory self-defence, especially with the 1837 Caroline affair. This argument argues that using force in self-defence is lawful if the danger is immediate and unavoidable, and it leaves no room for an opportunity to select a mode of response and time.[71]

68 Alexander and Sarkar (n 67) 100.
69 ibid 101.
70 Dumitrița Florea, 'The Right to Individual or Collective Self-Defense. Preventive Attack according to the Provisions of the UN Charter' (2021) 16(3-4) Jurnalul de Studii Juridice 15, doi:10.18662/jls/16.3-4/89.
71 The Open University (n 6).

This was further developed after 9/11, with the U.S. advancing anticipatory self-defence against groups like liberations, not states but groups of people. For example, terrorist groups argue that it is only reasonable to respond to threats of attack.

Likewise, the United Kingdom acknowledges the right to pre-emptive self-defence where an armed attack is seemingly imminent but has not occurred yet. For instance, before the 2003 Iraq War, the United Kingdom justified preemptive strikes because Iraq had weapons of mass devastation and thus posed an impending threat.[72] In essence, the presence of an armed man remains one of the necessities for executing the freedom of self-defence instead of the exclusive foundation. Some significant nations also showcase similar sentiments.

In backing up the interpretation of an armed attack, there is a prevailing belief that state backing and sustenance of international terrorists constitute the utilisation of force as stipulated by Article 2(4). Indeed, it is not a wholly idle argument, especially considering that the ban on the utilisation of force in modern international rules cannot be determined by just interpreting Article 2(4).[73] For context, consider the provisions of Articles 39, 51, and 53 of the UN Charter, each containing several terms that differ significantly in meaning. State practice appears to back up the notion that bombings executed by terrorists may constitute an armed conflict, thus justifying proactive self-defence under Article 51.

In recent years, the Security Council has taken decisive action in handling international terrorism, whether state-sponsored or not, due to its threat to global peace. In this regard, even preceding 9/11, the Security Council had categorised Libya's support of terrorism as a danger to worldwide concord and security.[74] As early as 9/11, the UN Security Council described Libya's support of international terrorism as a threat to global peace. This observation would be necessary in shaping the international community's perception regarding state terrorism.

In this case, the question arises: how did the 9/11 attack affect the understanding of weaponised threats under the UN Charter? The issue is whether terrorist attacks qualify as armed attacks which largely depend on interpretation.[75] Even if the freedom to self-defence under international law goes beyond the armed attack notion as seen under the UN Charter, critical hurdles should be overcome before a conventional theory of self-defence is applied in the justification of attacks against terrorists and related facilities situated in another nation.[76]

If the expected practice terrorist attack is not imminent, the use of weapons is not permitted for intimidation. Even if the right to self-defence tends to be above weaponised prerequisites under Article 51 of the UN Charter, using power to punish an attacker following a threat is

72 Florea (n 70) 15.
73 ibid 15.
74 ibid.
75 Alexander and Sarkar (n 67) 102.
76 ibid 103.

not permitted.[77] The UN Charter would also not allow the application of force to deter a less-than-imminent threat.

Additionally, if the previous terrorist activities are too distant in time, responding with force is likely to be categorised as an illegitimate reprisal. It seems that if the right to use force in protection applies in the absence of a violent assault, it encompasses a narrow window of opportunities.[78] Indeed, such opportunities under the conventional criteria for self-defence would rarely be granted in the era of terrorist attacks. Most evidently, the conventional requisites for self-defence are too limited to react suitably to the threat modelled by global terrorism.

Advocates of the progressive customary freedom to preventive self-defence have indicated the impossibility of the verbatim comprehension of Article 51 in the era characterised by the use of lethal weapons, delivery models, and increasing global terrorist activity. They find it absurd that a nation has to refrain from taking measures to protect itself when a different country is preparing for an attack.[79] Considering the devastating capability of contemporary weapons and the speed of their delivery to a target, denying a nation the right to react proactively to a pending attack infringes on its right to self-defence.

A similar rationale applies to nations that have been threatened with impending terrorist attacks on their property or citizenry. Respect for state sovereignty does not imply that a country can anchor the most unconcealed preparation for an assault on another's independent state within its territories with impunity.[80] Adherents to this position maintain that there is no literal stipulation under Article 51 of the UN Charter that an overseas government must conduct an attack for a nation to react. In such scenarios, harbouring terrorism may result in the legal justification of anticipatory military action.

In the nuclear era, banning self-defence unless an armed attack has happened can have a potentially devastating impact; therefore, states prefer the understanding of allowing anticipatory self-defence. Nevertheless, such a claim refers to using power in self-protection and is still constrained by threshold principles.

Even with the appeal of the standard of prudent self-protection, there is minimal foundation for such a leeway in the freedom of self-preservation under the UN Charter. In justifying its attacks on Iraq, the U.S. depended on the idea of preventive self-defence while still seeking to alleviate the ban with customary global law. The concept of preemption, which grants the authority to respond to possible dangers in future decades, needs to be supported by world law.[81]

77 Hazhar Jabar Qadir, 'Humanitarian Intervention versus United Nations Charter: A Critical Appraisal' (2018) 3(1) Qalaai Zanist Journal 1051, doi:10.25212/lfu.qzj.3.1.42.
78 Alexander and Sarkar (n 67) 103.
79 Qadir (n 77) 1052.
80 ibid 1053.
81 Florea (n 70) 15.

The right to anticipatory self-defence founded on a novel principle of emerging threat would lead to considerable uncertainties about determining potential threats that justify pre-emptive action. If such a determination is national-based, opportunistic actions might be justified as anticipatory self-defence. As a result, only nations with the military capacity would be able to utilise the channel, and national interests would inevitably cover unilateral response.[82]

Expanding such rights would likely prompt potential targets to launch attacks first. There is still a debate about whether Operations Enduring Freedom fulfilled the requirement for proportionality. The U.S. case is further complicated by its calls for regime change in rogue nations striving to hold weapons of mass destruction, which the U.S. is eager to eliminate.

From a unilateral point of view, the U.S. articulated its freedom to respond proactively to eliminate the threat posed by nuclear-armed Iraq. Nevertheless, since the availability of a forthcoming danger could not be proved, the President reintroduced the conventional anticipatory self-defence notion and thus alleviated the threshold by replacing it with the depiction of an emerging threat. Most evidently, there not being an association between Iraq and Al Qaeda, the U.S. sought a doctrine that would legalise an attack on Baghdad.[83] The doctrine that fitted best, albeit imperfectly, was the notion of anticipatory self-defence.

The U.S. argues that the conventional regulations on applying force must be reinterpreted or updated to fit the present global settings. The U.S. relies on three arguments of the present international model to justify the need for reinterpretation. The first one is the progress and propagation of weapons of mass obliteration. The second one is the idea of rogue states and non-state terrorists.[84] The third one is the ineffectiveness of conventional prevention methods when applied to such groups.[85] These arguments have become considered to generate more lethal and complicated security settings than ever before. As can be seen, the U.S. proposal to update the Caroline formula to reflect the novel reality is premised on reinterpreting the idea of an imminent attack. A standard comprehension of the concept indicates that a pending attack is about to occur.[86] It depicts the urgency and immediacy rather than just the circumstances of an impending attack. Although such a definition has been deemed imprecise, it contains the central feature: the temporal link between the danger of an about and its commencement shortly. Traditionally, a pending attack was illustrated through the availability of troops on the territory of a country preparing for an attack. Nevertheless, notable signs of preparation for an armed invasion are usually minimal in the contemporary era.

82 ibid.
83 Qadir(n 77) 1052.
84 ibid 1053.
85 ibid.
86 ibid.

8 JUSTIFICATIONS FOR PROACTIVE SELF-DEFENCE

The U.S. asserts that the 9/11 attack changed everything, necessitating countries to revise their doctrines to face novel and divergent threats. Two critical questions arise from this claim. The first one is whether the 9/11 attack has indeed changed everything or is just a reflection of people's perception of a changing world.[87] The second is whether existing regulations and systems controlling the application of power are incapable of addressing risks posed by rogue countries and non-state players.

Contrary to the claims of the Bush regime, the global system did not change in response to the 9/11 attack. International terrorism executed by non-nation players is not a novel subject.[88] Indeed, the international community started handling this issue many years before the attack during the General Assembly's Declaration of Friendly Relations. What set the 9/11 attack apart from others was the magnitude of the damage it caused and the fact that it happened on the territory of the U.S.

According to the National Security Strategy (NSS), conventional notions of deterrence are ineffective against terrorist adversaries whose avowed techniques are wanton damage and targeting innocent individuals.[89] NSS further adds that dissuasion is unlikely to work effectively against the frontrunners of rogue nations.[90] However, recent encounters indicate that deterrence and containment work in association with these nations. Therefore, it is dubious if the U.S.'s thoughts can be extended to non-state terrorism and rogue nations.

Another critical question is whether the available rules and systems on the application of force are sufficient. Although the Security Council is an imperfect radical system, it offers adequate ways of handling terrorist threats. Where a rogue nation or non-nation players are deemed an open threat, and the measures are ineffective or unavailable, the Security Council has the authority to sanction the use of force to handle the threat. Considering the requirement to use proactive force as self-defence, the view of one of the member states practising its veto authority is minimised. Therefore, there is no need to move away from the available mechanisms and establish comprehensive and probably destabilising freedom to preventative self-defence.[91]

The Security Council has the capacity to endorse proactive military action. Once the Security Council establishes the presence of a threat to peace, it has the alternative of sanctioning martial power as stipulated under Article 42 of the UN Charter. Under Article 39, which addresses threats to concord, the Security Council is not restrained from

87 Alexander Gilder, 'The Effect of 'Stabilization' In the Mandates and Practice of UN Peace Operations' (2019) 66(1) Netherlands International Law Review 48, doi:10.25212/lfu.qzj.3.1.42.
88 ibid 49.
89 Qadir(n 77) 1053.
90 Gilder (n 87) 50.
91 Qadir (n 77) 1054.

responding to events that have already happened. However, proactive action to avert such a threat initially targets the collective safety command.[92]

Unlike the notion of anticipatory self-defence – which remains contested – the Security Council's capacity to sanction activity needs to be more restrained in reacting to an imminent threat. Ideally, the Security Council's power is broader and more comprehensive than any other possible freedom a nation might claim under preventive self-protection.

For practical purposes, it is essential to shift the balance towards synthesising theoretical and practical aspects to enhance the justification of proactive self-defence under public international law. The following are examples of practical applications, pertinent court cases, and the International Court of Justice's (ICJ) positions on proactive legitimate defence:

Protection of other states from non-state actors has been a critical aspect of proactive self-defence under international law. If a state cannot control the terrorists living in its territory, another state will launch attacks for self-defence purposes. For instance, following the 11 September attacks in 2001, the United States invaded Afghanistan, asserting that the Taliban was harbouring al-Qaeda. This form of proactive self-defence is meant to avert subsequent attacks.

The 1837 Caroline case remains a classic case in customary international law on self-defence. Preemptive self-defence was invented after the British forces blew up an American ship called Caroline because it was allegedly supplying the Canadian rebels. The United States government later acknowledged the British necessity claim, noting that pre-emptive self-defence can be warranted when the need "is to the extent of necessity which leaves no choice as to time, or means, and is such that anyone refusing to avail himself of it incurs all the perils of defenceless innocence." For this reason, this case remains pertinent in altering the rules regarding the right to act preemptively under international law in self-defence.

In Nicaragua v. United States (1986), the International Court of Justice dismissed the United States' assertion that it was involved in collective self-defence by supporting the Contras against the Nicaraguan authorities. The Court pointed out that self-defence must be reasonable and necessary for the danger identified. This case underscores the importance of identifying an actual and present danger when invoking self-defence as a justification for force.[93]

The International Court of Justice has expressed the view that exercising the right of self-defence enshrined in Article 51 of the UN Charter occurs only in the case of an actual armed attack or where such an attack is threatened. Preemptive self-defence, or the

92 ibid 1055.

93 Samuel Asiimwe, 'Analysis of Public International Law Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America, International)' (*SSRN*, 23 February 2024) <http://dx.doi.org/10.2139/ssrn.4736798> accessed 25 September 2024.

anticipation of self-defence, is still debatable today. The International Court of Justice has generally been reluctant to expand Article 51 to cover anticipation of pre-emptive measures, stressing that this would require clear evidence of an imminent and unavoidable danger.

Additionally, the International Court of Justice has consistently employed the ideas of proportionality and necessity to self-defence claims. Any proactive engagement must be kept to the minimum required to meet the threat and used sparingly.

By incorporating these examples, including the historical cases and the ICJ judgments and interpretations, the discussion on proactive self-defence under public international law gains a more practical and comprehensive perspective.

As discussed throughout, the Security Council also has the authority to respond to threats posed by non-state actors. While non-state actors complicate the application of the law on self-defence, there are no facts that the integrative mechanism cannot address the challenge. The Security Council has the power to initiate actions against the threat of non-state terrorism and state terrorism.[94] However, the actual matter is the willingness of the Security Council to sanction proactive action.[95] Despite the recent dispute over Iraq, the Security Council can handle the danger of the use of weapons of massive destruction. Such potential should translate into rigid practice when the Security Council is approached to handle pressures from non-nation players. The matter will be straightforward, considering that substitutes to the use of power, such as dissuasion, are improbable to influence non-state players. It would be correct to indicate that the only noticeable complicating aspect is the breach of the host nation's border sovereignty, which happens when military force is applied to target a non-state actor within the country.[96]

A more challenging situation is that of a rogue nation. The Security Council would be less persuaded to sanction proactive martial practice to alleviate such dangers than in circumstances engaging non-state terrorism. The main reason is that the force applied against a nation is more likely to be of greater magnitude and have critical effects on the global model compared to a more constrained attack on non-nation players.[97] However, this does not mean a proactive force would never be needed to eradicate threats from rogue nations. If substantial facts of a threat from a scoundrel nation and optional measures have not worked, then the Security Council would sanction the application of proactive force as self-defence.

There is a danger in introducing the right to proactive self-defence as it could return nations to a state of near lawlessness akin to the 19th century. By extending the scope for autonomous

94 Qadir (n 77) 1055.
95 Gilder (n 87) 51.
96 ibid 52
97 Annie Himes and Brian J Kim, 'Self-Defense on Behalf of Non-State Actors' (2021) 43(1) University of Pennsylvania Journal of International Law 241.

practice, proactive self-defence would weaken the general ban imposed by international law on applying force to the level of showcasing the UN Charter as virtually worthless.[98] It would blur the line between self-protective and aggressive force, granting nations the freedom to utilise power unilaterally against other countries or non-state players based on their view of a threat. Unlike self-defence as defined under Article 51 of the UN Charter, which permits the utilisation of power if a weaponised act is in progress, proactive self-defence carries no objectively assessing the presence of an alleged danger. In other words, there is a high possibility that nations can abuse such a right.[99]

Regardless of the aims of the U.S. to limit the validity of its preemption notion, once such a policy is introduced, other nations can seek to depend on it, significantly where it furthers their interests. Different factors, including the legality of actions, usually influence the choice to apply force in self-defence. Nevertheless, speculation about proactive defence can be potentially destabilising. The practice of nations appears to be multi-layered, and the interpretation raises challenging questions regarding how the subsequent practice of a treaty and regulations under customary international law is to be determined.[100] Most importantly, the practice has developed to the point where the right to collectively defend a population as the final resort in case of a government attack has consolidated.

9 CONCLUSIONS

This research demonstrates that the UN Charter should not be merely viewed as a deterrent to nations from utilising power for self-protection but rather as a framework that provides the legal basis for such actions. The Security Council determines the fundamental principles of political well-being for nations through voting. The freedom to self-protection primarily derives from the customary universal rule, particularly the principles established in the Caroline case and Article 51 of the UN Charter. Article 51 explicitly recognises the right of member states to engage in personal or integrative self-protection in response to an armed attack. This liberty permits the application of power under certain conditions, including a fortified attack on a nation and justification of using force as a necessary action by a victim state. However, the intensity of force applied in self-defence should be proportional to the nation's threat. The UN Security Council and the ICJ typically coordinate such actions.

The modern understanding of self-defence remains complex and ambiguous. While all UN member states acknowledge that the freedom to self-protection is contained under the UN Charter, disputes concerning the interpretation of its wording persist. The critical subject of discussion is whether proactive and preventive strikes are permitted under international

98 ibid 241.
99 ibid.
100 ibid.

law. Additionally, there is an ongoing debate concerning whether the desire to safeguard nationals is a solid justification for self-defence.

The right of nations to act in self-defence in reaction to a threat of upcoming armed attacks remains a contentious issue. Although the idea of preventive self-defence has largely disappeared from the legal environment, proactive self-defence against imminent armed attacks is still a matter of discussion.

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RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРЕВЕНТИВНИЙ САМОЗАХИСТ У МІЖНАРОДНОМУ ПУБЛІЧНОМУ ПРАВІ: АНАЛІЗ КРІЗЬ ПРИЗМУ ПРАКТИКИ МІЖНАРОДНОГО СУДУ ООН

Заїд Алі Елґаварі

АНОТАЦІЯ

Вступ. *Право на самозахист є одним із основоположних принципів міжнародного права, безпосередньо закріпленим у статті 51 Статуту Організації Об'єднаних Націй. Проте застосування цього права, особливо щодо превентивної сили, і надалі є спірним питанням. Таким чином, залишається сумнівним, якою мірою та за яких обставин можна застосовувати самозахист, коли маємо справу з недержавними суб'єктами та потенційними загрозами в майбутньому. Ця стаття намагається вирішити ці проблемні питання за допомогою первинних історичних посилань і правових систем, зосереджених на вказівках щодо необхідності та заходів пропорційності.*

Методи. *У цій роботі систематично аналізується прецедентне право, міжнародні договори та стаття 51 Статуту ООН, щоб дослідити, як самозахист сприймається в різних контекстах. Також використовується порівняльно-правовий метод дослідження, який ґрунтується на рішенні Міжнародного суду ООН (ICJ) і зазначеній літературі. Для розуміння питань необхідності, пропорційності та превентивного самозахисту було проаналізовано такі справи, як Нікарагуа проти Сполучених Штатів Америки, справа про іранські нафтові платформи та ті, що стосуються Ізраїлю, США і Сполученого Королівства. За допомогою методу аналізу конкретних справ було досліджено попередню концепцію самозахисту в правовій системі міжнародного публічного права щодо практики держав та її тлумачення Міжнародним Судом ООН. Вибір прикладів, таких як конфлікт в Україні та збройна агресія Росії та Туреччини, Сирії та Іраку, був спланований і обраний з огляду на значення в сучасному міжнародному праві. Вторинні дані, отримані з наукових статей і юридичних публікацій, доповнили це дослідження.*

Результати та висновки. *Згідно з отриманими даними, питання права на самозахист є найважливішим і одним із найбільш дискусійних у міжнародному праві. Наприклад, такі події, як Шестиденна війна 1967 року, демонструють, як держави використовують право на самозахист для проведення військових дій. Однак висновки, зроблені Міжнародним судом ООН у таких справах, як Нікарагуа проти Сполучених Штатів Америки, підкреслюють і підтримують принцип пропорційності та обґрунтованості щодо питання самозахисту. Превентивний самозахист все ще обговорюється, у випадку Керолайн щодо визначення конкретних умов, за яких він є допустимим. Проте превентивний самозахист продовжує викликати дискусію в міжнародному публічному праві, що має значні теоретичні та практичні наслідки. Вторгнення Росії в Україну та напруженість між Туреччиною, Сирією та Іраком сприяють умовності цього питання в*

сучасній політиці та праві. Наприклад, російсько-українська війна ілюструє необхідність коректив, яка виникає із прийняттям старих теорій самозахисту, коли глобальне середовище безпеки зазнає метаморфоз. Це зумовило появу на першому плані питання, пов'язані з агресією, стримуванням і законним застосуванням сили у боротьбі із загрозами, які сприймаються як екзистенційні. Ця справа дозволяє розглянути роль, яку відіграє Міжнародний суд у встановленні параметрів поведінки держави, а також проаналізувати реалії законної сили.

Так само конфлікти за участю Туреччини, Сирії та Іраку показують, що існує сучасна тенденція використання превентивного самозахисту як виправдання військових дій проти недержавних «гравців». Вони є важливими для ілюстрації того, як держави можуть сприяти своїй безпеці та водночас визнавати та підтримувати суверенітет інших націй. Крім того, рішення Міжнародного суду ООН щодо таких позовів допомагають зрозуміти еволюцію правового режиму цих процесів. Аналіз показує, що стаття 51 окреслює формальну можливість застосування сили для необхідної оборони, але в той же час тлумачення цієї статті часто викликає сумніви. Міжнародне співтовариство все ще стикається з багатьма викликами, що визначають відмінності між застережними та превентивними ударами. Пропозиція полягає в тому, що країни повинні бути обережними, застосовуючи засоби самозахисту, і переконатися, що те, що вони роблять, є розумним і необхідним щодо загрози. Крім того, Рада Безпеки ООН повинна активно вирішувати суперечки, щоб зменшити ризик неправильного використання доктрини самозахисту.

Ключові слова: *активний, самозахист, випередження, міжнародне право, превентивний, неминучий, збройний напад, обмеження, стаття 51, Статут ООН, Рада Безпеки та Міжнародний Суд ООН.*