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SELF DEFENSE AS AN EXCEPTION TO PROHIBITION OF USE OF FORCE

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ABSTRACT

The principle of self-defense in international law serves as a recognized exception to the general prohibition on the use of force, as codified in Article 51 of the United Nations Charter. The stance of other regional groups such as NATO has also been discussed. Theexception of self- defense raises critical questions about its implications for other fundamental principles, such as territorial sovereignty and non-intervention. This paper explores whether self-defense, as a justification for the use of force, also precludes the wrongfulness of breaches of these principles. Through an analysis of cases, including the Malvinas (Falklands) Conflict (1982) and the Attack on US embassy in Tehran and Nicaragua case, this research paper examines how states have invoked self-defense to justify military actions and the legal challenges these justifications have faced.

The study further explores the evolving legal framework surrounding self-defense, including the concept of anticipatory self-defense and its compatibility with contemporary international law. It examines the role of the Security Council in assessing the legitimacy of self-defense claims, as well as the influence of regional security arrangements, such as the Organization of American States (OAS) and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). The paper also deals with whether peaceful settlement should be tried according to Article 2(3) of the UN Charter before using self defense.The paper deals with collective as well as individual rights to exercise self defense. Additionally, it considers the impact of customary international law and the Articles on State Responsibility (ARS), particularly Article 21, which addresses self-defense as a circumstance precluding wrongfulness.

By critically assessing the interplay between self-defense, sovereignty, and non-intervention, this paper seeks to clarify the legal parameters of self-defense and its broader implications for international law, state practice, and global security governance.

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INTRODUCTION

The Prohibition of the use of the force refers to a fundamental principle of international law that restricts states from resorting to the use of force in their international relations. It is an important principle of the United Nations Charter, which is a treaty that outlines the purposes and principles of the UN. The use of force has been long standing phenomenon in international relations and is directly linked to the sovereignty of states the limitless power wielded by states to use all possible means to guardand protect their interests.

With the founding of the united nations, the legitimacy of the use of forceby individual states under the international law has been substantially narrowed.The charterof The UN stated its Preamble that the UN is established to succeeding generations from the scourge of war, and its substantive provisions obligate to the member states of the UN to settle their international disputes by peaceful means referred in Article 2(3) and to 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 manner inconsistent with the purpose of United nations article 2(4).

PROBLEM IDENTIFIED

The right of self-defense is an exception to the prohibition of force only, then how to explain the absence of breach of these other principles?

EXISTING LITERATURE

Based on the regulations of the UN Charter and other regulations of international law, there are some principles about the right of self-defense. Firstly, the precondition for the exercise of the right of self-defense is that the sovereign state is under armed attack from another state. In addition, the International Court of Justice affirmed that armed attack should be defined as the gravest forms of the use of force in the Nicaragua case . Besides, the key problem is the armed attack must come from other states instead of persons. Secondly, Self-defence must be exercised and declared by the state under armed attack. In other words, the collective self-defense could be exercised by other related states only at the request of the state under armed attack. Thirdly, this right has to be necessary and proportionate. This means that a force counterattack is the only solution, and the counterattack must be sufficient to effectively curb the other state's armed attack

and achieve the purpose of protecting national security. The injured state has the right to exercise the right of self-defense, which can neither be denied nor authorized by the United Nations Security Council.

However, it cannot be denied that there exist some deficiencies that have not been addressed.

RESEARCH ANALYSIS

Self-Defense in international law refers to the inherent right of a State to use of force in response to an armed attack.

Self -defense as an exception to prohibition of use of force is as codified in Article 51 of the United Nations Charter as well as in North AtlanticTreaty and other regional organizations also. As an exception to the general rule of prohibition of use of force, it has been recognized since the ancient times byphilosophers like HugoGrotius, Cicero, Gentili, De Vattel,etc. Self-defense can be collective, individual and anticipatory in international law. Even India used the right to self-defense in various wars it fought with its neighbouring states and in 2016 Surgical Strike against Pakistan.

Article 21 of ARS does not refer to the effects of self-defense . Also it does not talk about what breaches like sovergnity and territorial integrity occur while exercising the exceptional right of self defense. The commission only identifies 2 functions of self defense: one being the exceptional right intrinsic to prohibition of force an the other being the breach of other legal commitments. It is presumed that when self- defense is used then along with it other breaches should not be considered as a breach. The international law just ignores such breaches per se.In this manner self defense is a counter measure whose function is to justify the braches of territorial integrity and sovereignty.

The principles of territorial sovereignty and non-intervention have already been mentioned as rules impaired by uses of force. But these are not the only ones; forcible measures may also encroach upon other obligations binding the States to the conflict. One such example are commercial obligations, as claimed by the applicants in the **Nicaragua and Oil Platforms cases.**

Under the U.N. Charter, Article 2(4) sets forth the fundamental restriction against the use of force. It prescribes: ". . . 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 manner inconsistent with the Purposes of the United Nations." For many, that provision constitutes a clear example of a peremptory norm of general international law as defined in article 53 of the Vienna Convention on the Law of Treaties. Professor Louis Henkin, among others, has

pointed out that "the principal development in international law in our time is the law of the United Nations Charter outlawing the use of force in international relations."' The main aspects of the general prohibition of the use of force are: (i) the nature and scope of the "force" referred to in article 2(4); (ii) the sphere of application: international relations; (iii) the exceptions or qualifying circumstances; (iv) the degree of restriction that can be inferred from a wording that, verbatim, prohibits the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations," and (v) the consequences of unlawful use of force.

MAIN BODY

Self-defense in international law refers to the use of force to repel an attack or imminent threat of attack directed against oneself or others or a legally protected interest. It refers to the inherent right of a State to use of force in response to an armed attack.

Self-defense may be exercised either individually by a State which has been subjected to an attack, or collectively by one or more States which have been subjected to an attack originating from a common source, or by one or more States which at the request of a State which has been subjected to an attack, elect to come to that State's assistance. Such a request for assistance may be based on a pre-existing commitment to provide assistance in the event of an attack, or be made on an ad hoc basis once an attack has been mounted or is imminent.

PROVISION DEALING WITH SELF DEFENCE AS AN EXCEPTION TO PROHIBITION ON USE OF FORCE

ARTICLE 51 OF THE UN CHARTER

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.

The right to self-defense is a compromise. On the one hand, the U.N. Charter deems the right "inherent," and that it shall not be "impaired by the charter."[2] On the other hand, that very same language necessitates alook back to the contours of the customary right of self-defense pre-Charter, and that right is not very broad. Self-defense is of course allowed in response to an "armed attack," which is noted in Article 51.Classically, preemptive or anticipatory self- defense is judgedunder the 1837 Webster formula, or the Caroline test: the necessity for such self-defense must be: "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[3] In other words, an imminent attack is required. Any use of force of force must be proportionate to defend against such an imminent attack.

Collective self-defense is a key feature of Article 51. Given regional organizations' limited power to respond to breaches of peace under Chapter VIII, many states in the drafting of the U.N. Charter wanted to be assured of their right to have mutual defense pacts in the face of UNSC inaction. Originally, the right of collective self-defense was meant to apply to self-defense pacts (such as NATO) and not regional organizations per se, but the line between the two has subsequently been blurred to the point that such a distinction is obsolete. Thus, a regional body such as the African Union could plausibly invoke self- defense.[4]

The International Court of Justice interpreting this provision maintains that this Declaration demonstrates that "the States represented in the General Assembly [of the United Nations] regard the exception to the prohibition of force constituted by the right of individual or collective self-defense as already a matter of customary international law."[5]

REGIONAL TREATIES CONCERNING THE RIGHT TO SELF-DEFENCE

The most important of such treaties is the North Atlantic Treaty, which in Article 5 provides that "an armed attack against one or more of its members "shall be considered an attack against them all." Provisions similar to those of the North Atlantic Treaty are contained in Articles 4 and 5 of the 1948 Brussels Treaty of Economic, Social and Cultural Collaboration and Collective self-

[2]Christian Wyse," The African Unions' Right of Humanitarian Intervention as Collective Defense", (2018), PL 304
[3]Christian Wyse, "The African Unions' Right of Humanitarian Intervention as Collective Defense", (2018), PL 304
[4]Christoph Schreuer ,"Regionalism v. Universalism",(1995) 6,EUR. J. INT'L,477,490
[5] Case concerning Military and Paramilitary Activities Rep. [1986]OUP 88 [ICJ] 93

Defense between Belgium, France, Great Britain, Luxembourg, the Netherlands, as well as in Article 3 of the 1947 Rio de Janeiro Inter-American Treaty of Reciprocal Assistance and Articles 24 and 25 of the 1948 Bogota Charter of the Organization of American States.

The 1945 Act of Chapultepec concluded at the Inter-American Conference on Problem of War and Peace established the principle that an attack against any American State would be considered an act of aggression against all other American States. [6]Accordingly, pursuant to this Act, when a State comes to the aid of another State, "the legal issue is not whether the assisting state has a right of individual defense but only whether the state receiving aid is the victim of an external attack." As indicated correctly by Schwebel, Article 51 of the Charter of the United Nations was drafted essentially in response to the insistence of the Latin American States that the possibility of action inindividual and collective self-defense according to the Act of Chapultepec be preserved.

RECOGNITION OF THE RIGHT OF SELF-DEFENSE

From ancient times many philosophers, political and social thinkers and subsequently the writers on international law dealt with the idea of the right of self-defense in the context of just war doctrine. Since, at that time the concept of the right of self-defense was not yet precisely defined they generally expressed this right and called it the defensive war, which in substance was considered as the right of self-defense that became subsequently the basic principle of international law.

M. T. Cicero concludes that a lawful war is that which is waged to repel an invasion.[7]

Bruni also maintains that all wars that are waged for the defense of its own territory are just wars arms.[8]

[6] Case concerning Military and Paramilitary Activities Rep. [1986]OUP 88 [ICJ] 347

[7]CICERO, *On the Commonwealth*(First published in 1929,New York, The Liberal Arts, 1976)217

[8] BRUNI*,"*Panegyric to the City of Florence" in KOHL and WITT (eds.), *The Earthly Republics, Italian Humanists on Government and Society(*Philadel-phia, University of Pennsylvania Press, 1978)150

Gentili specifies self- defense as a legitimate cause of war. It seems that Gentili is the first writer who uses the term "self-defense" and defines its meaning. In his view, defense is always and everywhere more to be favored, for it is in accordance with the law of nature. [9]

H. Gortius explains that the "right of self-defense derives its origin primarily from the instinct of self-preservation."[10]

De Vattel indicates that he "who takes up arms to repel the attack of an enemy, carries on a defensive war."[11]He explains that the object of a defensive war is very simple; it is no other than self-defense. He affirms that the right of employing force, or making war, belongs to nations only to the extent that is necessary for their own defense. Then, and not till then, does that nation have the right to repel the aggressor.He states that defensive war is just when made against an unjust aggressor, and this requires no proof. He correctly points out that self-defense against unjust violence is not only the right, but also the duty of a nation, and one of her most sacred duties.

Bentham believes that war may be necessary, in particular, for defense and security against aggression.[12]Thus, he implicitly recognizesddefensive war as legal. Bentham expressly says that "defense is a fair ground for war."

According to Natural Law doctrine, the right of self-defense is the right of the State to defend itself against realState has the right to use all measures necessary to repel any act of aggression against it conducted by the other State(s). However, it must be the response to the attack. There is no right of defense or self-defense in any other situation. The right of self-defense is the right of the attacked State to defend itself against such an attack and the right to request from the other state(s) for assistance in such defense.

THE REQUIREMENTS OF NECESSITY AND RECOURSE TO PEACEFULMEANS

The requirement of necessity for self-defense is not controversial as a general proposition. However, its application in particular cases calls for assessments of intentions and conditions bearing upon the likelihood of attack or, if an attack has taken place, of the likelihood that peaceful

[9]GENTILI," De Jure Belli LibriTres " in SCOTT (ed.), *The Classics ofInternational Law(* Oxford, Clarendon Press, 1933)

[10]Grotious, *The Law of War and Peace(*First Published in 1625,New York, the Classic Club,1949)72

[11]De Vattel, *The Law of Nations(*First Published in 1758, Philadelphia T and J.W.Johns,1849)292
[12]Hinslay, *Power and the Pursuit of Peace* (Cambridge, Cambridge University Press,1963) 81

means may be effective to restore peace and remove the attackers. As a matter of principle, there should be no quarrel with the proposition that force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile. However, to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defense. One is compelled to conclude that a state being attacked is under a necessity of armed defense, irrespective of probabilities as to the effectiveness of peaceful settlement.

The question of necessity was also at issue in the U.S. rescue action in Iran in 1980. Let us assume for the present purpose that the attack on the U.S. Embassy in Tehran and the seizure of hostages was an armed attack on the United States. From the very outset, the United States was faced with the question whether an armed rescue action was necessary to liberate the hostages. For about 6 months (November, 1979 to April, 1980) the United States sought without success to bring about release of the hostages through peaceful means. The fact that such efforts were futile was cited as evidence that armed action was "necessary" to effectuate a rescue. Does this mean that any time after the seizure of the embassy and hostages, the United States was free to use armed force to liberate them? Note that the phrase "at any time" raises two separate questions. First, the question arises whether the attacked state has a right to use force immediately or soon after the attack or whether it must seek peaceful solutions first. This issue was clearly presented in the Tehran hostages case after the seizure.[13]

The second question related to the timing of defense is whether the rightremains available for a substantial period after the attack, where peacefulmeans have failed to achieve a solution acceptable to the attacked state.This issue was also presented by the Tehran hostages case and, in a muchmore far-reaching way, by the Argentine claim to a right to use armed
force to recover the Malvinas-Falkland Islands. It is interesting that theissues concerning the "temporal" aspects of self-defense had received littleattention in the legal writings prior to these events. They are of some importance, as we can now see, and they merit further analysis.We can begin with the proposition that, when an attack occurs against astate (and I would include in that

[13]Schachter,‘ Self Help in International Law: U.S. Action in the Iranian Hostage Crisis,’(Winter 1984),37 J. INTL. AFF. 231

category attacks against state instrumentalities such as warships, planes and embassies), armed force may be usedto repel the attack. Such force must, of course, be proportional (we will consider this requirement later) but except for very unusual circumstancesthe "necessity" of defense to an armed attack requires no separate justification. It is enough for armed defense to be permissible that an attack takeplace. One could not say that a warship or a frontier guard is prohibited torepel an attack on the ground that there is no necessity for such defense because diplomatic steps might be taken to undo the wrong. There is nolegal rule that a state must tum the other cheek because of its obligationunder article 2(3) to seek peaceful settlement.The issue becomes more complicated if the attack succeeds in the capture of territory, property or persons. Must we then consider whether available peaceful means offer the possibility of a just solution and, if so,conclude that there is no necessity for armed force as defense? The answermay seem to be implied by the question - namely, if peaceful solutions areavailable, there would be no need for armed force to rectify the wrong. Thelogic may be compelling but experience suggests caution in accepting thefull conclusion. History and common sense tell us that an aggressor, havingseized the territory of people, might enjoy the fruits of his aggression whileforestalling peaceful solutions through dilatory tactics or unreasonable conditions. The absence of compulsory adjudication on a general basis may becited as a reason for this, but even when compulsory judicial settlement is legally required suit (as in the Tehran hostages case by virtue of treaties in force), it is possible for the recalcitrant state to avoid effective compliance. It is true that, under article 39 conditions, the Security Council may seek to bring about compliance by requiring the aggressor to yield up the fruits of his aggression and to provide reparations for his wrong, but the prevailing political differences and the requirement of unanimity of the permanent members of the Council render such enforcement measures unlikely.

It would be unreasonable to lay down a principle that armed action in self-defense is never permissible as long as peaceful means are available. It would also be unreasonable to

maintain that self-defense is always a right when an attack has occurred,irrespective of the availability of peaceful means or the time of attack. Thedifficulty in proposing a general rule does not mean that a reasonable answer cannot be given in particular cases. In a case involving imminent danger to the lives of captured persons, as in Entebbe or arguably in Tehran, itwould be unreasonable to maintain that the continued pursuit of peacefulmeasures must preclude armed rescue action. In contrast, the "necessity" ofarmed action to recover long-lost territory does not have a similar justification. In such cases, there is no emergency (as evidenced by the danger of

irreparable injury), nor can it be saidthat all reasonable avenues of settlement have been exhausted.[14]

THE RIGHT OF INDIVIDUAL SELF DEFENSE

The right to personal self-defense in international law is not a human right, but an individual right sui generis, since it distinguishes itself from human rights in its social and political functions. The right to self-defense is a genuinely pre-societal right that evolved in the absence of the state. It survived the formation of the state because no state will ever have enough power to perfectly protect individuals

The effectiveness of the United Nations for the maintenance of peace and security requires that restriction be placed on the right of States to use force for the purpose of self-defense only. In this context, Waldock asserts that the "right of individual self-defense was regarded as automatically excepted from both the Covenant of the League of Nations and the Pact of Paris without any mention of it." [15] He affirms that the same would have been "true of the Charter [of the United Nations], if there had been no Article 51, as indeed there was not in the original Dumbarton Oaks proposals." He correctly indicates that Article 51, as is well known, was not inserted for the purpose of defining the individual right of self-defense but of clarifying the position in regard to collective understandings for mutual self- defense, particularly the Pan-American Treaty known as the Act of Chapultepec. According to the U.N. Charter, until the Security Council has taken the measures necessary for the maintenance of international peace and security, exercise of the right of individual self-defense is explicitly recognized as legitimate in the case of an armed attack against a Member State.

Thus, under Article 51 of the Charter of the United Nations, nothing in the Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Under the principles of contemporary international law, which found their expression, inter alia, in the Charter of the United Nations and in other international instruments, the right of individual self-defense exists only in case of armed attack against the State concerned.

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[14]Oscar Schachter,' The Right of States to Use Armed Force'(1984)5(6)Michigan Law Review<https://repository.law.umich.edu/view/>article3592>accessed on 2 April 2024

[15]Waldock ,*The Regulation of the Use of force by Individual States in International Law(*First published in 1952. Recueil des Cours,1952) 496

INDIVIDUAL SELF-DEFENSE IN RUSSIA AND UKRAINE CONTEXT

Now come to the issue of accountability for international crimes, more precisely the consequences for individuals who are engaged in acts, which violate international criminal law. It will try to briefly outline at least some of the issues. As already indicated, the acts we are seeing are not just violations of international law by the state, but they also entail individual criminal responsibility for individuals. The first issue that arises here is, what are the options for holding individuals to account? What mechanisms/tribunals may deal with this question of individual accountability? The second, but interrelated, issue is what crimes may individuals are held criminally responsible for? With respect to the mechanism for establishing accountability under international criminal law, we have three possibilities. First of all, there is the possibility of prosecution before an international tribunal and in this regard, we have the International Criminal Court (ICC). We have seen a referral by a very large group of states to the ICC with the ICC prosecutor opening an investigation. The second possibility is that of prosecution in the domestic courts of Ukraine as and when they are able to exercise such jurisdiction. Then a third possibility is the prospect of prosecutions in foreign domestic courts, in the exercise of universal jurisdiction. A number of states have already opened investigations, and here It is important to recall that the grave breaches provisions of the Geneva Conventions do not just provide a right to exercise universal jurisdiction, but in some cases, they actually impose an obligation to do so. The other issue is the issue of the crimes for which individuals may be held accountable. The jurisdiction of the ICC extends to war crimes, crimes against humanity, genocide and the crime of aggression. However, with respect to Russia's use of force in Ukraine there is a gap. While the Rome Statute, as amended in Kampala, provides for ICC jurisdiction over the crime of aggression, the ICC cannot exercise jurisdiction over the crime of aggression in this situation. There are two reasons for this. The first is that under the Kampala amendments to the Rome Statute, for the ICC to exercise jurisdiction over the crime of aggression, the state that is engaged in aggression must be a state party. Of course, the Russian Federation is not a state party to the Rome statute. The second reason for the absence of ICC jurisdiction over the crime of aggression is that, while the UN Security Council can refer the crime of aggression to the ICC, even with respect to a non-state party, that is clearly not going to happen in this situation. 24. In sum, the ICC is not able to exercise jurisdiction over the crime of aggression. There has been an initiative to create a special tribunal to prosecute the crime of aggression against Ukraine. I suppose the first question that is worth thinking about is why it is important to seek investigation and prosecution of the crime of aggression in this situation. It

might be useful to go back to what the Nuremberg Military Tribunals Nuremberg Tribunal said about the crime of aggression or what was at that time called "crime against peace". The Nuremberg Tribunal spoke about the crime of aggression as being the supreme international crime since it contains within itself the accumulated evil of the whole. We have spoken about the violations of IHL that are occurring in Ukraine, but even if the entire operations were conducted consistently with IHL, the level of suffering that we have seen is tremendous, and that arises principally because of the waging of an aggressive war. That is one reason for trying to fill that gap. The second reason to do so is because of the practical difficulties that sometimes occur with respect to proving the responsibility of senior leaders for war crimes, violations of IHL, in particular situations. To establish individual criminal responsibility, there is a need to tie those individual situations to decisions and/or lack of decisions that are made by the particular individual. 26. The higher the rank and the greater the distance of the person concerned from the acts under consideration, the more difficult is it typically to establish that responsibility. If we look at the record of the ICC over the last 20 years we see the difficulties that the ICC has had with establishing responsibility of senior leaders for the commission of war crimes. We have probably seen nearly as many acquittals as we have seen convictions. Aggression, of course, is a leadership crime but, although it is a leadership crime, it is not just restricted to one or two people. In this particular case, it is probably easier, in terms of proof, to establish responsibility with respect to the waging of an aggressive war, and then it might be for establishing responsibility for individual violations of IHL, which is what you would need in order to prove war crimes. Concerning the initiative to establish a special tribunal for the crime of aggression one question is, how might such a tribunal be established? There are a range of options which might be looked at. One option is to establish a tribunal by treaty between Ukraine and a group of other states. You establish an international tribunal which is created by treaty, but it is an interstate treaty between states. In one sense similar to the model that we had for Nuremberg. A second possibility would be to have a treaty which is between Ukraine and an international organisation establishing an international tribunal. It could be a treaty between Ukraine and the UN, possibly between Ukraine and a more limited international organisation, the EU or some other international organisation. We have a number of models for that as well, we have got the Special Court for Sierra Leone, which was established on this basis, and, the Special Tribunal for Lebanon. Although a UN Security Council Resolution established the latter the original idea behind was cooperation between Lebanon and the UN. A third model is that you can have a tribunal, a hybrid tribunal, established by Ukrainian law but with the support of international organisations and states through some kind of arrangement whereby the international organisations or states provide practical, financial or other

support to the tribunal. Maybe something similar to what we have seen with the Extraordinary Chambers in the Courts of Cambodia or perhaps something more similar to the Kosovo Specialist Chambers. Final thing for now, and then we can open the floor for a discussion: the legal basis for the establishment of such a tribunal with respect to the crime of aggression. The views differ to what the legal basis might be, but again, there is a range of options. Some people speak about a pooling of domestic universal jurisdiction with respect to the crime of aggression and not everybody accepts that there is universal jurisdiction for the crime of aggression. But a number of people have taken that view. Second possibility is a delegation of Ukrainian territorial jurisdiction. It is well accepted that the state against which the crime of aggression has been committed on and on whose territory the crime of aggression has been committed has territorial jurisdiction with respect to the prosecution of those crimes which it can either exercise or could, in particular cases, delegate to an international tribunal. So that is another possibility for the establishment of such a tribunal.

ANTICIPATORY SELF-DEFENCE

The provision of anticipatory self-defense hasn't been mentioned anywhere in Article 51 of UN Charter. This has led to number of controversies and scholarly debates. The question of anticipatory self-defense arises when there hasn't been an act of aggression, but the state believes that an armed attack is imminent. Advocates of anticipatory self-defense argue that the states must be allowed to use necessary and proportionate force in order to prevent imminent armed attack on its territory

Literal Interpretation of Article 51 of UN Charter suggests that the state needs to face an 'armed attack' in order to legitimately use force in self-defense. Thus, the language of Article 51 provides no space for anticipatory self-defense

This has forced the supporters of anticipatory self-defense to cite customary international law in order to support their argument (Brownlie 1963, 729). They refer to the statement of US Secretary of State Daniel Webster, in the Caroline case where he said that the state can exercise Anticipatoryself-defense, provided that the adopted measures is instant, overwhelming, and there is no moment for deliberation (Brownlie 1963, 729).

Furthermore, the UN High has supported the concept of anticipatory self-defense

Level Panel on Threats, Challenges and Change. In its December 2004 report, the panel outlined:

"A threatened state, according to long established international law, can take military action as long as the attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real; for example the acquisition, with allegedly hostile intent, of nuclear weapons making capability."[16]

This paper tends to support the position that, in order to stop an armed attack on its own territory, the state could practice anticipatory self-defense.

SELF-DEFENCE AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

Until 1945, the institution of the state of war (also known as 'formal' or 'technical' war) governed all of the legal relations existing between belligerent states. The state of war wholly excluded the law of peace, and replaced it with the law of war in the relations between belligerents. Moreover, (peace-time) treaties were terminated or, at theveryleast, suspended in the relations between the parties. As a result,the military measures adopted by either party to the conflict could not violate or even impair the rights and obligations which governed their relations during peace. The state of war is now an institution of pure historical interest. Whether it is compatiblewiththeCharter'scollective security system remains debatable,butit is certainly the case that state no longerclaimtobeina'stateofwar' when theyareengaged in armed conflict.In contemporary conditions, states engaged in armed conflict remain 'formally at "peace", which means that all their legal relations remain in force throughout the period of hostilities. In these conditions, the use of force can impair a multiplicity of obligations existing between the two states engaged in conflict. For example, when the use of force occurs in the target state's territory, that force will constitute a breach of the prohibition of force, and it will also, amongothers, be animpairment of thetarget's territorial sovereignty and of its right to be free from intervention.Ordinarily, these impairmentsconstitutebreachesofinternational law. Butwhat if a state resorts to force in self-defense? **Customary international law recognizes the right of states to use force in self-defense when they are the victims of an armed attack. This is a**

[16]UN Doc. A/59/565, 2 December 2004, 54

unanimously accepted entitlement,codified in Article 51 of the UNCharter and regularly described as an 'exception' tothe prohibition of force. Resort to force in self-defense, being excepted from the prohibition of force, does not therefore constitute an infringement of that prohibition. That use of force is lawful by reference to the prohibition of force itself. But what about the other legal relations just mentioned; is defensive force lawful also by reference to these legal relations?,Article21oftheARSisintendedtojustifytheimpairment caused by lawful force on these other legal relations.

THE MALVINAS CONFLICT (1982)[17]

On April 2, 1982, Argentine forces invaded the Malvinas (Falklands) Islands. The following day the Security Council demanded an immediate withdrawal of all Argentine forces from the islands and called upon both Argentina and the United Kingdom to seek a diplomatic solution to the fundamental dispute. Immediately thereafter the British Government, invoking article 51 of the U.N. Charter (the inherent right of individual and collective self-defense), initiated military preparations with the objective of securing the withdrawal of the Argentine forces from the islands. First, by the time the Meeting of Consultation was convoked the Security Council had already adopted Resolution 502, demanding an immediate cessation of hostilities, withdrawal of all Argentine forces from the islands and calling on the governments of both parties to seek a diplomatic solution to their differences., it is doubtful whether Argentina's first use of force, regardless of the fundamental questions of sovereignty, could be regarded as legitimate under the prevailing rules and standards of international law.. Finally, with regard to the Malvinas conflict and the question of collective self-defense, there are two collateral issues that deserve far more extensive consideration than can be given here, namely, the question of the logistical and material assistance provided by the United States to Great Britain and the sanctions the United States applied against Argentina, which were neither based on the right of collective self-defense nor authorized by a competent organ of the international community.

[17]Etienne Henry,"The Falklands/Malvinas War – 1982"(2017)PL18.16

SELF-DEFENCE, TRANSNATIONAL TERRORIST GROUPS AND WEAPONS OF MASS DESTRUCTION

Does the right of self-defense apply at all in response to attacks by non-State actors, including transnational terrorist groups? And, if the question is answered in the affirmative, how does the requirement of imminence apply in relation to attacks by terrorists or with weapons of mass destruction?**Some question whether the right of self-defenseis at all available in response to attacks by non-State actors, such as transnational terrorist groups. Yet in the immediate aftermath of the terrorist attacks of 11 September 2001, the Security Council adopted resolutions 1368 (2001) and 1373 (2001) reaffirming 'the inherent right of individual and collective self-defense as recognized by the Charter of the United Nations'. And State practice, including the practice of the members of the North Atlantic Treaty Organization, the members of the Organization of American States and others,supports such a right.** A subsequent Chatham House study, which developed a set of Principles on the Use of Force in Self-Defense, concluded that necessary and proportionate action could be taken where the territorial State is itself unable or unwilling to take the necessary action.[18]The Leiden Policy Recommendations on Counter-Terrorism and International Law of 1 April 2010 reached a similar conclusion,as did a set of principles published in 2012 by former FCO legal adviser Daniel Bethlehem.[19]The Chatham House and Leiden Principles were the outcome of collective discussions among private individuals (though Leiden was an initiative of the Dutch Government). The Bethlehem Principles may reflect a degree of intergovernmental consultation though the extent to which they represent the views of governments is far from clear.

The Leiden Policy Recommendations set the matter is a wider context. They "recognize that the use of force is a measure of last resort to be employed only where absolutely necessary" and that "States and the Security Council should give priority, wherever possible, to law enforcement measures." They emphasise the need for as much transparency as possible. They give particular emphasis to the role of the Security Council. On the requirement of imminence in the context of

[18]Elizabeth Wilmshurst' PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENSE 'Chathamhouse <https://www.chathamhouse.org/>accessed 4 April 2025

[19]MICHAEL WOOD'INTERNATIONAL LAW AND THE USE OF FORCE: WHAT HAPPENS IN PRACTICE?' Legal.un.org <https://legal.un.org/> accessed accessed 4 April 2025

terrorist attacks, they say: **"Whether an attack may be regarded as imminent falls to be assessed by reference to the immediacy of the attack, its nature and gravity. There must be a reasonable and objective basis for concluding that at an attack will be launched, while bearing in mind that terrorists typically rely on the unpredictability of attacks in order to spread terror among civilians. Armed force may only be used when it is anticipated that delay would result in an inability by the threatened state effectively to avert the attack."**

CIRCUMSTANCE PRECLUDING WRONGFULNESS OF SELF-DEFENCE AND THE USE OF FORCE AGAINST NON-STATE ACTORS

The ILC's work on Article 21 assumed the exercise of self-defense in an inter-state context.So long as self-defense is exercised as between 2 states– including when the armed attack is private but attributable to that state–andtheresort to force complies with the requirements of the jus ad bellum, then self-defense will also produce the incidental effect of justifying collateral violations of the aggressor state's rights belonging to the second set of legal relations described above. **Could non-state actors apply this provision to situations involving unattributable armed attacks; namely, to situations where self-defense is exercised against a non-state actor within the territory of the host state, so as to justify the impairment of host state rights by the defensive force?** Thereisacrucialdistinctionbetweenthe'essential'casecoveredbyArticle21 and in the present scenario there is an additional party: the non-state actor. This additional party intrudes at the level of the first legal relation. The prohibition of force is, of course, owed as between the two states, the victim and the host state. Nevertheless, the exception of self-defense accommodates (or can accommodate) a third party: the non-state actor. The victim state is under an obligation not to resort to force unless it is the victim of an attack, which could include attacks by a private party.In positive terms, a state would be authorized to resort to force in international relations whenever it is the victim of an armed attack– regardless of its source. This authorization is codified in Article 51 of the Charter which, in colloquial terms, takes care of Article 2(4) whenever force is used in self-defense. Article 51 ensures that defensive force is not incompatible with the prohibition in Article 2(4), even if the defensive force is directed against a non-state actor. **But this additional party is not accommodated by the second set of legal relations; these exist as between the victim state and the host state only. It is precisely for this reason that the 'dilemma' arises to begin with; while the victim may have a right of self-defense against**

the non-state actors, the defensive force encroaches upontherights of a different entity, the host state. Scholars have articulated different ways to resolve this dilemma. all these solutions have at their basis the (factual) premise of host stateinvolvementwiththeprivategroupsmountingthearmedattack.Thetypeand degree of involvement seems to be coalescing around a standard, a standard whichremainsvagueandhasbeenabused.Bethatasitmay, of interest here is how the fact of state involvement (whatever the standard may be) has been and can be rationalized into a legal ground of justification that may explain why the host state's rights are not impaired by the use of defensive force againstnon-stateactorswithinitsterritory.

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA V. UNITED STATES OF AMERICA)[20]

OVERVIEW OF THE CASE

On 9 April 1984 Nicaragua filed an Application instituting proceedings against the United States of America, together with a Request for the indication of provisional measures concerning a dispute relating to responsibility for military and paramilitary activities in and against Nicaragua. On 10 May 1984 the Court made an Order indicating provisional measures. One of these measures required the United States immediately to cease and refrain from any action restricting access to Nicaraguan ports, and, in particular, the laying of mines. The Court also indicated that the right to sovereignty and to political independence possessed by Nicaragua, like any other State, should be fully respected and should not be jeopardized by activities contrary to the principle prohibiting the threat or use of force and to the principle of non-intervention in matters within the domestic jurisdiction of a State. The Court also decided in the aforementioned Order that the proceedings would first be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Nicaraguan Application. Just before the closure of the written proceedings in this phase, El Salvador filed a declaration of intervention in the case under Article 63 of the Statute, requesting

[20] Case concerning Military and Paramilitary Activities Rep. [1986]OUP 88 [ICJ] 347

permission to claim that the Court lacked jurisdiction to entertain Nicaragua's Application. In its Order dated 4 October 1984, the Court decided that El Salvador's declaration of intervention was inadmissible inasmuch as it related to the jurisdictional phase of the proceedings.

OIL PLATFORMS (ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)[21]

OVERVIEW OF THE CASE

The U.S. violated the **1955 Treaty of Amity** by unlawfully seizing Iranian assets.**U.S. defense**: The Treaty of Amity should no longer apply because diplomatic relations between the two countries had been severed since 1980,TheICJ ruled that the **U.S. had violated international law** by freezing certain Iranian assets.However, the ICJ also **rejected Iran's demand for full compensation**, stating that Iran had not provided sufficient evidence of damages.The U.S. had already withdrawn from the Treaty of Amity in 2018, but the ICJ still ruled that the treaty was valid when the U.S. actions took place.Both cases highlight the **ongoing legal disputes between Iran and the U.S.**, mainly regarding economic sanctions, asset seizures, and military actions. While Iran has sometimes won partial rulings, the practical impact of these ICJ judgments remains limited due to U.S. non-compliance with ICJ rulings.

SELF-DEFENSE IN CONTEXT WITH INDIA'S STATE PRACTICE

India has been involved in several armed conflicts of an interstate nature since its independence in 1947. It has been involved in wars since 1948–49 till now with its neighbouring states, particularly Pakistan and China.

The Surgical Strike of 2016 in India could also be justified as self-defense force used under international law.[22]

[21]Oil Platforms (Islamic Republic of Iran v. United States of America)(2003)(OUP 74)(ICJ)90

[22]Shivalika Midha,'THE SELF-DEFENSE LAW IN CONTEXT WITH THE INDIAN LAWS'(Jotwani Associates)<https://jotwani.com/the-self-defense-law-in-context-with-the-indian-laws/>accessed 1 April 2024

SUGGESTIONS

For further scope of research in this context, it should be explored how states negotiate or reconcile potential tension between a nation's right of self-defense and obligations under other legal regimes. The evolving geopolitical landscape and how emerging security challenges, such as cyber operations or non-state actor threats, might reshape the understanding of self-defense without breaching other principles should be considered. It can also be compared how different regions (like NATO vs. AU or ASEAN) interpret the right to self-defense and how that affects other legal principles.

Perspectives from other subjects such as political science, ethics, law should be incorporated to assess how notions of self-defense have broader implications for state sovereignty, power dynamics, and ethical considerations and consider empirical studies that look into how states' defense policies evolve in response to these legal interpretations. These suggestions can help explain why the right of self-defense, as an exception to the norm of non-use of force, does not necessarily entail breaches of other principles but instead operates within an intricate balance of legal constraints and state practice.

CONCLUSION

It can be concluded that self defense as an exception to prohibition to use of force can be exercised in proportionality and in necessity. Article UN Charter 51 deals with both individual as well as Individual self defense .regional groups like NATO And African Union states that attack on one member state would amount to attack on all the member states , Therefore the stateon whom the invasion occurs they get assistancefrom allthe member states. Individual self defense is necessary because it is difficult for state to protect each individual .Gentili first used self defense. Cicero defines that self defense should be exercised in repel of invasion The conclusion can be drawn that peaceful settlement is not a plausible option when before using self defense as it has been found that the aggressor state takes advantage from such settlement and the victims state comes in an inferior position. Also self defense can be exercised against no-state actors and also anticipatory aggression also comes in ambit of the self defense.self-defense is no different from countermeasures. While countermeasures' principal function is that of serving the implementation of State responsibility, they also have an additional, incidental, function: that of justifying the breach of the rights of the target State caused by the measure of the injured State, taken in response to the target State's prior unlawful act. Self-defense's function as a secondary rule can analogously be seen as incidental to its principal role of protecting the sovereignty and independence of States.