

WHETHER ANTICIPATORY ACTIONS IN SELF-DEFENCE IS LEGITIMATE UNDER INTERNATIONAL LAW OR IS ; AN UNSETTLED PRECEPT

INTRODUCTION

This article seeks to clarify the current status of anticipatory self-defense within international law and assess whether it remains unsettled. The examination will begin by scrutinizing the language in **Article 2(4) and 51 of the United Nations Charter**¹, evaluating whether these provisions allow for anticipatory self-defense and if such a concept has become customary international law.

To start with, Self-defence under the charter supra was captured in **Article 51**. It had in black prints that “***nothing in this present charter shall impair the inherent right of self-defence or collective self-defence if an armed attack occurs against a member of the United Nations...***”² This is clearly a break away from Article 2(4) of the charter which preaches abstinence from threats or use of force. What can be said therefore is that where peaceful settlement cannot be met under **Article 2(3) UN CHARTER**³, then use of force within the roof of self-defence becomes apropos – hence no inconsistency as long as the eventual attack knows proportionality and necessity vis-à-vis initial armed attack. It becomes a situation where retaliation is fuelled from threats. Why it is a situation is due to the supposed wilful omission of the word “threats” or its imminence in **Article 51 UN CHARTER** which had for “armed attack” and no more. It is on this score that we look at the legality of pre-emptive strikes as a constituent of self-defence in international law.

ARGUMENT AGAINST ANTICIPATORY SELF-DEFENCE UNDER INTERNATIONAL LAW.

¹ United Nation Charter 1945, Arts. 2(4) and 51.

² Ibd

³ Ibd

Article 51 of the United Nation Charter, by giving it ordinary meaning⁴, refers solely to situations “***If an armed attack occurs***” which implies that State Can only respond to armed attacks that have already occurred and does not permit anticipatory self-defence⁵.Brownlie further argues that “***the view that Article 51 does not permit anticipatory action is correct and...arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence***”⁶ and his argument is based on the fact that a state can never be absolutely certain about the other side’s intentions and may mistakenly launch a pre-emptive strike in a moment of crisis when no real threat exists. Furthermore, allowing an aggressor state to strike the first blow may not in practice result in military disadvantage to the the innocent state as first strikes in interstate hostilities are seldom conclusive. The upholders of this view have argued that until the charter lives to know an amendment, it remains unlawful to share in the communion of pre-emptive strikes. The view is anchored on the premise that since the charter allows for reliance on grounds of an existing armed attack, any other justification is just political as far as the definition of self-defence is concerned.

ARGUMENT IN FAVOUR OF ANTICIPATORY SELF-DEFENCE UNDER INTERNATIONAL LAW.

However, it has been cogently argued that Anticipatory self-defence has become a State practice and opinion Juris since wider acceptance has occurred across the International Community.For example, it was argued before the International Military Tribunal at Nuremberg that the German invasion of Norway in1941 was an act of self-defence in the face of an imminent Allied landing there. Furthermore, The UN High level panel on threats,challenges and change recognized the lawfulness of

⁴ Vienna Convention on the Law of Treaties [1969] ,Art.31. see also In Competence of the General Assembly for the Admission of a state to the United Nations(Advisory Opinion)[1950] ICJ Rep 4,8.

⁵Brownlie, Law and the Use of Force by States, 1963, 27

⁶ Brownlie, Law and the use of force by states, 1963, 278.

anticipatory self-defence⁷. The case of **US. V. NICARAGUA**⁸ is worthy of mention here because it is in this case one can best appreciate that despite arguments from agents of Nicaragua that their sovereignty was disregarded by the militia of United States, it became the way of the Justices that United states can so enter the territory of Nicaragua to possess the nuclear weapons if indeed the act was done in the interest of the world. The crux of this is to show that lawfulness of an action rests in the judgement of the courts as much as it rests on the convention that sets up the lawful act or otherwise. This takes us to *the 1837 Caroline case*⁹ if anticipatory self-defence is to be given a smidgen of a justification in the clothing of legality.

Scholars who support the right to anticipatory self-defence trace the existence of the right from the Caroline incidence between Britain and the United States. The facts have that during the first part of the nineteenth century, an anti-British insurrection was taking place in Canada which at that time, was under the British rule. Canadian rebels were using U.S. territory as staging ground from which to attack British forces in Canada. The rebels used a steamer called Caroline, owned by US nationals, to transport themselves from the U.S. side of the Niagara River to the Canadian side. Meanwhile the United States and Great Britain were at peace. On the night of December 29, 1837, while the ship was moored on the US side of the Niagara River, British troops crossed the river, boarded the ship, killed several US nationals, set the ship on fire and set the vessel over Niagara Falls. This prompted a strong objection from the United States and a series of diplomatic exchanges setting forth each State's position. In one of the exchanges, Daniel Webster, the American Secretary of State, sent a note of protest to the British government and warned that the incident would result in a demand for redress. In response, the British Government claimed that they were acting in self-defence as well as argued that their action was necessitated by the fact that the ordinary laws of United States were not being enforced at the time, and that the laws were, in fact, overtly overborne by the rebels.

⁷ The UNGA 'more secure word;Our shared Responsibility, Report of the High-Level panel on threats, challenges and change' in UNGA 'Note by the secretary-General' (2 December 2004) UN Doc A/59/565.8,para 188.

⁸ Military and paramilitary Activities in and against Nicaragua(Nicaragua v United States of America)1984 ICJ REP.392JAUNE 27,1986.

⁹ The Case of Caroline v United States,11 u.s.496(1813).

In further correspondences, Webster postulated that Britain's action would be justified if it could justify that there was a necessity for self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada – even supposing the necessity of the moment authorized them to enter the territories of the United States et al – did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by the necessity and kept clearly within it. Though pleading, in effect, anticipatory self-defence, the British government apologized, and the dispute ended.

The long and short of the fact supra is that despite the express provision of **Article 51 of the charter**¹⁰ which has for armed attack, the Caroline's case suggests that there is a good ground for self-defence if an armed attack is launched, or is immediately threatened, against a state's territory. The rationale behind this is that there are prevailing circumstances where a state is put under imminent threat of a devastating armed attack thus the way out being to act pre-emptively albeit within the templates of reasonableness. It may be argued that how can one determine proportionality and necessity when the armed attack is yet launched? To this, it should be underscored that the state that has resorted to anticipatory self-defence should only engage in such pre-emptive strikes when it is crystal that other means of dispute settlement will prove abortive; as regards proportionality, it is not expected that such a state blow up lives and properties of citizens of the state suspected to have so threatened. It is in fact nonplussing if the threatened state chooses undue impulse as necessary cause of action and opts to quell their fear of danger by destroying the entire race – this never accounts for reasonableness and is in fact, punishment-worthy. Oppenheim must thus be agreed with when he mentions that ***“while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter being dependent on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory***

¹⁰ Ibid

self-defence than they are in other circumstances.” This answers the question concerning the role of the necessity and proportionality test in the place of anticipatory action in self-defence – it is of higher onus to show the court the proportionality of an armed attack to an imminent threat. The legality therefore being one yet covered by the charter itself is drawn from the precept of international law that an act remains lawful where a viable justification is on the table; even, the legality of such pre-emptive strikes is evinced from all muscles of reasonableness as one does not expect a state under the imminent threat of a mind-blowing armed attack before it, fails to quell it with the use of force if such force is the only option available that peace might so reign and citizens, protected.

The gospel remains that the international community recognizes the respect for every state’s territory and so any armed attack on any state is presumed an abuse or a breach of international precepts vide the corfu channel’s case (***UK. V. ALBANIA***)¹¹. This presumption is a rebuttable one upon the existence of justification that can so fly. The point never subject to moot is that it is always a tiring and strenuous process to convince the court why one engaged another state with pre-emptive strikes because if the justification is not watertight, the state using such mode of self-defence will not escape liability. Be that as it may, even with the diverse state practice as regards anticipatory self-defence, thme modern international law has its whole essence to be to preserve the sanctity of state and its people. It will thus be difficult to see how a state can validly be denied the right to defend itself in an extreme case of threat of force that puts the very survival of the state in jeopardy. This paper avers that the charter indeed excludes threat of force, however, it needs be circumvented that the mere fact that threat of force was not included in the same line as armed attack vide Article 51, does not go to bring it to state of illegality as far as international law is concerned. It can even be queried on this light that cyber-attacks is not in its strict sense within the veranda of armed attack and as such a state should not raise its claws when attacked via the internet and yet call it self-defence. Since that must be flawed for want of reasonableness, it suggests then that if such cyber-attacks can be placed well within the intent of Article 51, then it is safe to say that the word armed attack has a general meaning and as such, the intent of

¹¹ United Kingdom v Albania (Corfu Channel Case), [1949] ICJ Rep 4.

the drafters could not have been to oust a threatened state the power to bite where the perceived danger is overwhelming and capable of quenching the state's existence. The ratio in Caroline's case accords with common sense and fairness as anything short of this reasoning is the assemblage of an iniquitous inequity. The only adjuration should be that many states may so abuse this lawful act and go about striking enemy states for no just cause yet claiming anticipatory self-defence. It is because of the demerits that there is no unanimity in diverse states as far as this point of law is concerned; it is because of this demerit that it be agreed with Oppenheim that the test of proportionality and necessity be given a higher degree due to the uniqueness of the situation and circumstances behind its usage.

The use of pre-emptive strikes is therefore lawful as a matter of law. Its exclusion from Article 51 does not mean its exclusion from modern international tablets. The position of the law remains that an act becomes unlawful upon looking at the existing circumstances of the case. An anticipatory action in self-defence becomes an illegal act where the armed attack does not pass the necessity test. The justification behind the action is what the Justices of the International Court looks at since a high regard is usually placed on every state's territory – a violation which arouses a comeuppance.

CONCLUSION

Conclusively, the debate over anticipatory self-defense under international law remains intricate. While some argue that Article 51 of the United Nations Charter restricts self-defense to cases of ongoing armed attacks, others contend that anticipatory self-defense is recognized through state practice and evolving opinions. The historical context, as exemplified by the Caroline case, suggests that in extreme circumstances where an imminent threat endangers a state's survival, anticipatory self-defense may be justifiable. However, challenges arise in determining the necessity and proportionality of pre-emptive strikes, emphasizing the importance of a thorough justification to avoid liability. The legality of such actions hinges on the specific circumstances and the ability to convince international courts of the imminent danger and reasonableness of the response.