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The legality of anticipatory self-defence under International Law.

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To my parents, that made their education the best school I could ever attend.

Table of Contents

Introduction.

This thesis will explore the legality of the concept of anticipatory self-defence under international law and its multiple sources on which it relies. More specifically, the core premise of the research will be the analysis of the compatibility between this notion and Article 51 of the United Nations Charter. Article 51 of the United Nations Charter assures the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"[1]. This article considered one of the most important of the Charter, first drafted in 1945, is also one of the most controversial 13 lines of those 54 pages of Charter. It addresses the inherent right of self-defence but has created debates on its interpretation. These debates revolve mainly around the scope of actions it permits against imminent threats, thus, attacks that have yet to materialize. In case of an armed attack on any of the Members of the United Nations, the country has the right to defend itself in consequences of the harm until the Security Council has taken the measures needed to stop the conflict or solve it step by step by peaceful means[2]. Where the controversy enters into play is the meanings that Member States are often reading between the lines of situations that differ from the original statement. The purpose of this thesis will be to explore the notion of anticipatory self-defence that would allow a country to act in the prevention of a risk or imminent threat by another country. Investigating whether there exists a right of anticipative self-defence, if it is tolerated by the United Nations, other international organizations, as well as under international law in general, or if the right to self-defence is strictly limited to armed attacks that have already occurred.

The aim of this thesis will be to dive into the ethical and legal dimensions, defining its historical, philosophical and contemporary developments. First and foremost, this study will emphasize the roots of self-defence through Hobbes' state of nature, early stages of warfare with the concept of Just War in order to focus, subsequently, on the evolution of the principle and how this interpretation developed into contemporary legal frameworks. Analyzing this path will permit a clearer understanding of the modern idea, notably by emphasizing the role of the Treaty of Westphalia of 1648 that established

[1] United Nations. (1945). *Charter of the United Nations*. Article 51.
[2] United Nations. (1945). *Charter of the United Nations*. Article 51.

territorial sovereignty and its influence on the United Nations Charter. In order to maintain the most impartial study in the debates and perspectives brought forward, I will analyze multiple points of view and sources to frame the discussion, such as the two main schools of thought, namely, the expansionists and the restrictivists that happen to have complete opposite beliefs on the subject. The debate will also cover the legal challenges surrounding the very definition of the article, its interpretation as well as the characteristics that represent the imminence of a threat. The analysis of these challenges will bring out the tension between state security and global peace and highlight how much they are inextricably linked. The instances I chose to present in my research will cover the historical and legal aspects. I believe that these cases all have a relevant connection with the arguments discussed. From the Caroline incident, the Six-Day War to the Israeli attack on Iraq and Syria, these examples will help complete the facts and common practices to draw a final conclusion on the basis of legality that anticipatory self-defence has under international law.

The thesis will be divided into three chapters. The first chapter will lay the foundation for the comprehension of anticipatory self-defence, by emphasizing the ethical complexities that are at the core of the modern challenges. I will trace its evolution from the historical roots, the moral assessment of the ancient notion to the current status and definition of the principle. The study of the current status of the inherent right to self-defence is essential to mention as it explains the issues that anticipatory and preemptive actions face. I will analyze the different notions present in this aspect of self-defence in making the distinction between preemptive strikes and anticipatory self-defence. In the second chapter, the study will focus on the legality aspect under international law. First, the different theories allowing action against an attack that has yet to materialize will be presented. Thereafter, I will explore the sources on which relies the International Court of Justice listed in Article 38 of the Statute, the legal challenges that emanate from a broader interpretation of the article. Within this chapter, the section dedicated to customary international law will allow me to present two instances I mentioned earlier to assess state practice and its overall impact. To close the second chapter, relevant decisions of other UN bodies will be suggested to advocate for positive evolution of the debate. Lastly, to offer a practical understanding of the previous chapters, the third chapter will introduce two case studies: the 1981 Israeli air strike on the Osirak nuclear reactor and

the current Israeli actions on Syrian territory to offer a practical understanding of the previous chapters. It will be dedicated to the application of these ethical, moral and legal principles previously explained to precise legal cases. Regarding the 1981 attack, which constitutes one of the most violent preemptive strikes of the 20th century, I will explore what constituted a trigger to the actions undertaken, the organization and means used in the attack, to end on the analysis of the aftermath of these strikes, and the territorial, and political impacts it had in the international system. In the third part of this chapter, I will explore a recent and topical case study that is – at the time of the redaction of this thesis – ongoing. I will analyse the current context, set an overview of the ongoing Israeli actions and assess the legality of these acts based on the agreements both parties are binded upon.

In order to study this complex concept, I will strive to investigate the main legal questions to broach the subject. Between the need for territorial sovereignty and a stable balance of power where no country commands another, the line is thin, and the borders hard to draw. The overall purpose of my research will be to get the fullest study possible on the legality of anticipative self-defence under international law. The thesis will be concluded by synthetizing the multiple insights discovered throughout the study, thanks to the historical analysis, the legal challenges and debates leading us to the practical assessment of the research.

Chapter I. Historical development and current status of the notion.

The importance of historical context is crucial in understanding – for the sake of any arguments – the current issues and discussions. I will here give an analysis of the few ethical and moral debates as well as the disparities of the concept of anticipatory self-defence, in order to understand better the contemporary concept as we know it. There are a multitude of debates and disparities regarding the notion, I chose the ones that are mainly relevant to my study. To do so, I will start by describing the human reasoning in such cases and the outcomes of this reasoning. I will strive to set the basis of a concept that has always been seen as justifiable in civil society to, later on, present the counterarguments, in my opinion, prevailing over this long-established notion. We will see how the creation of what Article 51 is now completely shifts the equation of the primitive concept of anticipatory self-defence.

A. The historical aspect of anticipatory self-defence.

Since the beginning of time, harming in any way another human being is considered undoubtedly wrongful in civil society. With the creation of this tacit tradition, came along the intuitive expectation that harming or killing in a motive of self-defence in case of an attack directly targeting you and threatening your life was a valid motive for the use of force. In this first part of the thesis, I am going to try to set a Human and historical approach to the concept, to be able to understand those that shaped the legal rules that were later entered into force. I am convinced that it is a solid foundation for any argument – and especially mine – to look at an individual scale approach first, before looking at the full extent of an argument. I would like to try to understand the roots that led us to Article 51, and moreover its flaws. Before diving into the structured and lawful aspect of self-defence, it is crucial to understand how this concept is anchored into our everyday lives, and how – before order and society as we know it – Humans used to handle the notion. It is indeed a universally shared feature that goes beyond the barrier of language, culture, and education. The principle of self-defence, as I will strive to explain it, is a natural conception of the world's major religious, philosophical, and cultural tacit principles. We will see how subjectivists and objectivists rule this concept trying to find a middle ground in a never-ending moral debate.

1. Self-defence and the "State of Nature"

I would like to fund this very first part on the ever-lasting source of inspiration, that is, The Leviathan of Hobbes, where he stated so well: "*Homo homini lupus est*", meaning: "Man is a wolf to man". I will just briefly refresh the idea for the sake of the chapter. It is clear that the principle of self-defence is part of the very essence of what Hobbes described as the "State of Nature". A state where war is omnipresent, and Man is an asocial and apolitical creature. There are evidently no rules, but one of the most important points of Hobbes, and the one that is the most interesting to us is that, along with the anarchy principle, Men have "natural rights", within these rights, lies as one of the most important ones, the natural right to self-defence. They are not constrained to any specific

behavior by virtue of their "natural liberty", in other words, a total absence of external constraints. However, the absence of constraint does not prevent the existence of the notion of wrongfulness and evil. While looking, and focusing on the historical aspect, many different definitions of what is wrong and what is just, lie in front of you. When usually, reading or listening to an opinion or any argument, you will have the right to agree or disagree, you will have the right to think this person is right or wrong. But, it is in deciding whether you are acting wrongfully or rightfully, that begins the delicate part of the notion of self-defence. The outcome of this natural right of expression, and at last, what you are going to do with it, has, in this case, a life or multiple lives at stake. We will discuss this idea in a deeper way by analyzing the work of Helen Frowe. I will try to balance and consider her rather "non-cautious" approach to self-defence, and why it doesn't necessarily apply to the overall argument of the thesis.

2. Objectivists and Subjectivists School of Thought

As I mentioned earlier, within this debate, lies the objectivist approach and the subjectivist one, for which I believe finding a middle ground would be the solution but remains undeniably complex. We will keep – as Frowe did – the discussion on building the notion around the pieces of information that the Victim is able to receive pre and post-offense from the Attacker. Entering the delicate and fragile realm of permissible use of force, showed me first and foremost that more than any other domain or field, self-defence cases are extremely different from one another, and each case depends on precise and little pieces of information. That being said, it is almost unfeasible to create a rule or a principle under which any cases of self-defence could lie. In order to understand Helen Frowe's point of view, it is important to bring to light two schools of thought that rule the moral judgment of permissible use of force: the objectivists and the subjectivists. The main difference that could characterize them is the dissimilarity in the sorts of facts they both prioritize. Now from the names themselves, one could already start to understand by itself where stands the disagreement between the two. As expected, an objectivist is focused on facts of the matter, or in other words, on "how the world really is"[3]. On the

[3] Helen Frowe, *A Practical account of self-defence,* Law and Philosophy*,* 2009, Part II, l. 81-83.

contrary, a subjectivist would rather fund its opinion on the importance of the expected logical follow-up of the action, or, by caring about "how the world appears" to one [4].

3. Moral assessment of self-defence

Now, for the sake of the argument let's create one instance to discuss on, in order to understand better the reasoning and reactions of an individual when faced with a threat.

Apparent Threat	*Victim is coming back from work, it is late so it is starting to get dark outside. While Victim is about to arrive home which is located in a building on a dead-end street, Victim notices someone. Potential Attacker is barely visible, has a rather fast footsteps pace, and is walking towards them.*

Assuming that perfect knowledge of the intentions of the attacker is impossible to attain in any case, we will call it "artificial knowledge". In this first instance, the knowledge of the presumed victim is limited to a few seconds. The knowledge is the following, first, they might be followed, aggravated by the fact that, they live in a dead-end street which doesn't leave space for many more hypotheses on intentions of the potential attacker. In a few seconds, knowledge of the potential victim sums up to: they are coming towards/for them, thirdly, the behavior and pace of the presumed attacker are not friendly, fourthly, uncertain knowledge of whether the attacker is armed or not raises stress and vulnerability. Let alone the fact that, if the presumed victim is assumed to be female and the presumed attacker to be male, in the majority of the cases, the victim would have many more motives to feel threatened. If we follow a generic Human reaction, assume

[4] Helen Frowe, *A Practical account of self-defence,* Law and Philosophy, 2009, Part I. Introduction, l. 34.

that the victim managed to reach for a sharpened piece of glass that happened to be on the ground in the trash area where people from the building throw theirs. Throws it towards the presumed Attacker who gets seriously injured. After this action, two options would be plausible. The first one is that the Attacker had genuine intentions of killing the victim, in this case, the majority of people would excuse and justify the Victim's actions. However, in the second option, the presumed Attacker had no intentions of harming them in any way: they actually live in the same building, which explains why they were walking in the same direction on the same dead-end street and happened to have a fast pace merely because they were rushing home. Presumed Attacker was not armed and without any harmful intentions. Regarding the judgments, this is exactly where an objectivist and a subjectivist would disagree. The former, in the lack of objective triggering conditions – here, presumed victim assuming instead of being certain of an actual threat – would not justify the action of presumed victim. The latter would justify the action of the presumed victim on the grounds of the subjective prediction that harm was going to occur shortly. According to objectivists, making sure of the validity of the threat beforehand would justify and allow self-defence. But can it be an actual threat if the victim is in any way able to check whether someone is armed, to make sure a gun is unloaded, or to be even able to ask the attacker about its intentions?

I strongly believe that these kinds of solutions would either put victims more at risk or signify that the overall situation could not be perceived as an imminent threat from the beginning. Self-defence is unavoidably a risk-taking action merely because it is always done on account of uncertainty and hypotheses. The lack of knowledge of a victim regarding the intentions of an attacker is a valid motive to justify a self-defence action since the perfect knowledge of the intentions of an attacker is impossible and any assumptions on which they rely are always going to be false or biased. However, from my standpoint, it is not because victims will always have partially or fully false assumptions that they shouldn't act in self-defence. To concur with my previous words, considering the fact that each case is radically different from one another, self-defence represents taking a bet on the intentions of the attacker and how the situation will unfold. It is a delicate decision where you will never hope to be right. It is all about distinguishing praise and blame from right and wrong. You cannot blame someone for trying to act on what they thought were rightful grounds turning out to be wrong. "If victim is permitted

to proceed only if X will kill him and victim cannot know whether X will kill him, it follows that victim cannot know whether or not he is permitted to kill X"[5]. This brings us to the idea that, according to Frowe if all these assumptions and hypotheses will undeniably be biased and false, self-defence should be allowed on certain grounds that should always be met. The first essential one is that, if the victim does not kill the attacker, the attack will kill them. The second one is that the victim is innocent. In fact, if these conditions are not met, self-defence could never be justified. But from a Human aspect, self-defence is more than that. "If self-defence is the right to act on a prediction, then self-defence is also the right to sometimes be wrong."[6] I would like to add that regarding the lack of cautiousness mentioned earlier, Frowe states that if one is permitted to act upon the grounds of permissive self-defence, he must act on it. My opinion slightly differs from Frowe's to the extent that, one always has the choice, so when permitted to act upon a presumed attacker, one is allowed but not obliged. It can appear to some that Helen Frowe, in this case, is not focusing on preventing harm but rather on a self-centered self-defence approach. While looking into moral justice and self-interest, I cannot help but mention the prisoner's dilemma very briefly. This masterpiece of decision analysis is, to my mind, relevant to bring to light for reflection purposes on this first part. Of course, a victim would never have the time in front of a potentially dangerous situation to use the prisoner's dilemma for its final decision. That being said, it is the perfect example of how strategic thinking and overthinking in under-pressure situations can lead to suboptimal and poor outcomes.

4. Issues of the notion: early stages

The instances and analyses made in this first part of the first chapter already present flaws for which a solution is hard to find. These flaws and issues that I will try to examine are what initially makes the foundation of legal notions unstable. The uncertain nature of a prediction regarding an imminent threat is what makes the structure difficult to set up around the concept. I will first analyze the conceptual issues that arise. In a situation of danger that puts an individual under pressure to make a decision and protect itself, the

[5] Helen Frowe, *A Practical account of self-defence,* Law and Philosophy, 2009, Part III, l. 209-212.
[6] Kimberly Kessler Ferzan, *Justifying Self-Defence,* Law and Philosophy, 2005, Part III, p.748.

judgment on making the right choices is too personal and depends on multiple factors. Where one finds itself justifying its actions on the grounds that they felt threatened at that very moment and judged the situation as endangering its integrity, one can hardly judge the person for how they felt in a specific situation. While the notion relies on subjectivity and a personalized perception of what danger is, the judgment of said action that will come after is even more complex. After any action of anticipative self-defence, it will always be difficult to know if the intentions anticipated by the victim turned out to be true. After a preemptive strike, for instance, the individual or country believed to be threatening another will always be able to deny any accusations of harmful purposes of a said situation. Shaping an anticipative self-defence structure on the knowledge of the intentions of the potential attacker would be a utopia; perfect knowledge, in this case, is unattainable. That is why the term "artificial knowledge" was used by Helen Frowe. Lastly, in the conceptual challenges, the lack of consensus between the two schools of thought shows the disparity in the very definition of what constitutes a threat. In facing the consequences when anticipative self-defence is used in the everyday world, we discover practical issues. The lack of perfect knowledge that I just mentioned in the conceptual challenges brings forward the risks of reactions that would be disproportionate, resulting in harming an innocent individual or a group of innocent individuals. The lapse of time granted to the person in danger in this kind of situation could never allow them to make a reasonable and rational choice in protecting themselves. This nature of immediacy of the decision leads to the disproportionality of the reaction. The discrepancies between the motives that triggered the reaction constitute the main flaws of the aspect. Acting on assumptions and hypotheses creates ethical and legal dilemmas. Managing to draw the line between an offensive and a defensive response is fundamental but almost impossible. Thirdly, the most relevant key issues to the study are the legal issues that arise from this subject matter. There is, to this day still, a serious lack of universal standards for what qualifies an imminent threat and a proportionate response. The main challenge of building a structure that could shape the notion is effectively avoiding the use of the doctrine to justify unwarranted aggression. This discussion expresses the early need for a structure and, more precisely, a structured principle of anticipatory self-defence. This discussion leads us to think that there is a need for a theory and rules that could strive to guide presumed victim's actions. But as Ferzan states that

self-defence is the right to sometimes be wrong, can a single person leave space for error when more than their own life is at stake? Furthermore, in the cases I brought to light in this first part, the defensive actions needed to be performed urgently, which means that there was absolutely no time for rational reasoning or to reflect on the best decision for a better outcome. In the following part, I will add the State factor into the equation, which will shift many issues.

B. Premises of the notion under International Law and its current status.

In the previous part, we discussed how it was now common acceptance that a justified use of force could only be valid against an unjust threat. However, this condition does not require any form of successful outcome upon said threat. In this part of the thesis, I will explore one of the most important transitioning phases of anticipatory self-defence under International Law. That is the premises of the notion as we know it now and the road to Article 51 of the UN Charter. One of the founding pillars of contemporary defensive force was the doctrine of Just War, crucial to understanding the current status of the notion and the issues that still arise today. Just War is the basis of what initially shaped how anticipative self-defence is seen now. As a last angle of the historical side of the concept, I will analyze what is one of the most important international agreements in the making of International Law: the treaty of the Peace of Westphalia of 1648. This analysis will allow us to study with all the knowledge needed the premises of the contemporary notion of our study that was mainly based on these founding concept and agreements. To conclude this part, I will present the current status of the principle under International Law.

1. The doctrine of *Just War*

a. Jus ad bellum or the right to war

Jus ad bellum or "right to war" finds its definition in the process that occurs before any actual physical conflict.[7] The doctrine requires any defensive war to have a rational and well elaborated prospect that necessarily leads to success. In other words, waging a defensive war could fully be justified on the grounds of a successful responsive attack. This Just War doctrine requirement appears obvious when saying war must only be waged if the outcome of success is guaranteed. The thought that may instantly arise is, who would go to war knowing there is no hope of victory, just wasting resources and risking lives? For the sake of the argument of the thesis, I would like to analyze this requirement from a different angle. When thinking about the recent conflicts of the past years, taking, for instance, Palestine and Israel or Ukraine and Russia, wouldn't it be unthinkable to see Ukraine and Palestine surrendering without trying to defend themselves against powers that they know are far more likely to prevail? This is why, two conditions of the "prospect of success" requirement are essential. The proportionality condition and the necessity condition. When deciding to go to war as a nation, the legal authority needs to ensure that under this particular circumstance and with these particular actors, it is necessary to first resort to the use of force and second use this certain degree of force. Already the necessity condition seems less strict than a compulsory prospect of success, regarding the possibilities it leaves to smaller countries and power to defend themselves. Before the structure of anticipative self-defence, as we know it, it was already important that defensive war was used as the last resort and be successful in defending a Just cause. Otherwise, the attack was not justified in the eyes of the other powers and as regards to the balance of powers being threatened. Within this success condition, it was perceived almost as important that the decision of war be issued by a legal authority, for which it was the duty. Any political authority must protect its population with each decision it takes. Not only with the duty of protecting the community but also with the duty of

[7] *Just War Theory* | Internet Encyclopedia of Philosophy. (s. d.).

ensuring the integrity of the State along with its Hard and Soft Power. Here, all risks taken when following the Just War doctrine were the full responsibility of the legal authority that could act on behalf of the whole population. But even with bearing the full liability, you could question the legitimacy of leaders deciding to risk lives while usually not risking their own or any sanctions as a consequence. While God was usually the main motive political leaders used to rely on to justify waging war at the time, a certain structure was needed to hold accountable the State and its agents. As a matter of fact, things started to shift, and, instead of the necessity of success in war, the goal started to be re-establishing a peace, where: this former peace would be more desirable than the one that would have prevailed without fighting.

b. Jus in bello or Law in war

In addition to the Just principles of deciding to wage a war, another important aspect of the doctrine is the *Jus in Bello* one, or the War-Conduct rules. After the long process of deciding whether or not to go to war, principles on how to wage this war in a Just way also got decided. The belligerent practice was as important as the prospect of the conflict. The war needed to be waged in a way that it conveyed important moral values, chivalry and professional ethics. At this time, nothing was left to chance or improvisation, the conduct during warfare was as important as the war decision and the results. There were two main principles in the art of waging a Just War. The first one was the same one as in the *jus ad bellum* principles: proportionality. But, this time, proportionality intended to be respected in terms of weaponry and morals. In other words, how much force was morally appropriate to use in order to attain the success prospect but in waging and finishing warfare with dignity and ethics. When planning the artillery needed and the level of force that was going to be used, it was essential that the extent remained reasonable in trying to minimize violence and damages. At the time waging a war was not the main concern, waging it well was. In minimizing the overall casualties, the warfare could be presented as more morally acceptable for the society and the conscience of the belligerents. The second principle in the law of conduct is the discrimination. This rule implies that during an attack, it will always be considered wrongful and unjust to assault an innocent individual that is not taking part in the war. While the discrimination principle strictly

forbids attacking any non-combatant innocent, the only fair target one can come for are the belligerents. Although this seems evident to most, the theory around what makes a combatant a just target is also well thought-out. On a battlefield, there were three things that made a soldier recognizable and attackable. The first two ones are the ones visible by the eye, the arms they were carrying and the uniform they were wearing. The third element was not tangible, as soon as an individual was trained to become a soldier, it would be considered a fair target. During warfare, even a poorly trained soldier, or an armed individual would not have been able to claim an immunity status. They were considered in full capacity to fight and defend themselves. What is important to highlight is that the status of non-combatant or soldier was not irreversible. In other words, once a soldier was trained, or is in possession of a weapon, it did not give permission to civilians or other belligerents to attack them in their everyday life. Once the uniform was put away or once the weapon was down, soldiers were non-combatants. These two principles of Just War – proportionality and discrimination – allowed war crimes and breaches to be judged separately from the original cause the war was serving. Naturally, it didn't impede a nation to wage a war for an unjust cause while fighting justly. This does not mean that the cause of the war ought to be forgotten about, it was the pillar on which one can base a judgment on the warfare. All along during the process of Just War, one thing that always remains is the importance of being held accountable for the actions undertaken. In every act from what was decided, to what was committed the responsibility belonged to the soldiers and decision makers. It also implies that one must keep its free will as an individual and not follow a collective decision if they judge the intention to be immoral in order to go back to their non-combatant civilian life in good conscience.

c. *Jus post bellum* or Law after war

In a world where justice and after-war agreements have often been written by the victors, the doctrine of Just War was not only governing the cause and waging, it was also crucial to show obedience to the judgements and outcomes of warfare. When one country's army achieve their goal and succeed over the other country's army and territory, it will often impose all sorts of traditions and power over the defeated nation. The notion of victory is often referred to submission for the other nation, cessation of lands, economic

slavery and obligation to accept the victorious country ways of proceeding and living. In other words, the submission can be religious, economic, cultural and material. In the *Jus post bellum* principles, there are no such things as complete submission or enslavement of the defeated. The agreements decided upon victory should be moral and respectful of all actors. Civilians should not have to suffer from their army's victory or to endure another humiliation. The objective of the doctrine is to respect and ensure that the territorial, commercial, economic, cultural and religious integrity of the defeated country lives on. Every country and state have an inherent right to keep their identity and sovereignty in times of war and peace. In the case of self-defence wars, the debate shifts on legitimacy A country serving an unjust cause, occupying a territory, and winning over the other country's army would then expect its enemy to wage a defensive war in the name of self-defence. An army deciding to go to war to defend its territory, by pushing back an enemy going forward on their own land would be in all good conscience allowed to do so. Even with a low prospect of success, the cause leading to the decision of war ought to be justified. However, the means and ambitions of this self-defence war should remain proportional, always. Damages and casualties caused to the territory of the occupying country in response to their attack must not affect civilians, innocent individuals or any infrastructures that would endanger the non-combatants lives. For instance, destroying a medical or academic building would make the defeated country culpable of immoral conduct. Lastly, in the case of a victory in a just war against an aggressor, it was strictly forbidden and considered unjust for the whole population to bear the burden of their country's defeat. The victors had absolute rights of life and death over the unjust aggressors, and in demanding compensation for the harm caused.

2. The Peace of Westphalia of 1648

In the wake of the very first Peace Conference in Europe of October 1648, famously known as the Westphalian Peace Conference, a new modern international system of territorial and Sovereign States was born. A system where religious tolerance

was considered essential, and in which States would maximize their own interests and strive for a sustainable balance of power.

The negotiations of these settlements started in 1644 in the Westphalian towns of Munster and Osnabruck and ended four years later when an agreement was reached, and the treaty was signed. During the negotiations, the delegates agreed on territorial redistribution, ecclesiastical settlement and provisions on religious tolerance among States and territories. In the sovereignty that was granted or confirmed over territories, the treaty was mainly favoring France, Sweden and their allies. Without enumerating them all, these powers obtained beyond these territories, strategic points, especially maritime ones enabling them to assert their authority. Another crucial agreement was the amnesty to all those who had been deprived of their belongings, as well as all secular lands were restored to the initial owners that held them in 1618. Furthermore, the ecclesiastical provisions established religious tolerance for the main religious communities: Roman Catholic, Lutheran and Calvinists. This tolerance allowed freedom of worshiping and conscience but also the right to all minorities not belonging to those three main religious communities to emigrate. Constitutionally, the Peace of Westphalia recognized the full territorial sovereignty for all Member States of the empire. Within the empire, all States were allowed to establish agreements and transactions among them, even including foreign powers. The only condition was making sure that these contracts were not disbenefiting the empire. As regard to the sovereignty of each State, it was the first time that the central authority of an empire was almost entirely replaced by the authority of each Member State. The principle of non-interference that was set up with the treaty represented a massive change as well. With this notion was intended that any State action could never be subject to any other legal entity control outside of their borders. In other words, under this principle, no Member State could interfere in the domestic affairs of another Member State, though, as guarantors of the peace inside the empire, France and Sweden were granted an extraordinary right of interference in the affairs of the empire. While the principle of national sovereignty was at the center of the table, States, paradoxically, were not perceived as individual entities, they felt bound by a new *jus inter gentes*, or, law of nations. The differences between State powers were still

present and all States were not perceived as equal under the Peace of Westphalia, as one can understand with France's and Sweden's extraordinary right.

3. The process towards a contemporary notion of anticipatory self-defence

The treaty of the Peace of Westphalia that shaped Europe and new ways of proceeding quickly extended to the whole world. This Westphalian system based on autonomy, territory, mutual recognition, and control, became the legacy of what is now the United Nations. In this part, I will try to assess what was the process towards an international institution that could take on the inheritance of the treaty.

Before trying to understand the process that led from the Peace of Westphalia to the Charter of the United Nations of 1945 I will, for the sake of the argument, bring forward a summary of the main principles that were established after 1648[8]:

[8] *Sovereignty: The UN and the Westphalian legacy,* Peters. L. 2015, p. 70.

1. The principle of *res est imperator in regno* suo (the king is emperor in his own realm).
2. *Cujos regio, ejus religio* (the ruler determines the religion of his realm).
3. All states are equal and one state cannot interfere in the internal affairs of another.
4. All disputes to be settled peacefully and where possible through the use of economic sanctions or through the means of collective security.
5. Human Rights recognized in two spheres—individuals right to exist as a religious minority in a country where the ruler has determined the states' religion and prisoners of war rights to be returned to their home countries after hostilities cease.

a. Issues of the Treaty

In order to assess the long path from the Treaty of Westphalia to the first draft of the Charter of the United Nations, it appears important to me to enumerate the main issues that the Treaty of Westphalia left in Europe's legal system.

First of all, the concept of sovereignty was actually very different from the notion we know now and differing from state to state and leader to leader. When analyzing the Treaty from a contemporary point of view, we realize that the notion was understood as the sovereignty of the leader or the only person ruling over the territory instead of the sovereignty of the population inside its territory. Although the right to sovereignty drafted in the treaty in 1648 was surely intended as protecting the identity and territory for the population, many Sovereigns took advantage of the notion to justify their expansion wars and wrongful transactions with other countries. The treaty was not containing any provisions regarding the limits of the sovereignty principle, or any Law ruling over the

overall concept to which one could refer. In the absence of laws and rules, sovereigns were not submitted to any external judgement or restrictions which made the peace in the Westphalian system almost impossible to maintain stable. As a matter of fact, the treaty was mainly based on power distribution and religious tolerance, when looking further one can assert that it even gave more power to the main states like France without actually setting a structure and balance that could evolve with its time and people. Though the Treaty of the Peace of Westphalia had issues with the legal structure, it surely led the way to a more complete Charter of the United Nations in 1945. Thanks to the Westphalian legacy that showed this terrible need for normative rules that could legislate and balance interactions and possible conflicts without infringing on the freedoms and sovereignty of each state. This perfect balance would be a legal structure where the self-interests of the states could be respected but limited in order to avoid any hegemony from one state or wrongful transactions causing prejudice to the system. In 1648, the road was still long until this kind of international organization. The lack of provisions enforcing these rules in the Westphalian system remained the main issue in the aftermath of the treaty. Furthermore, if peace was not attainable through agreements and force had to be used in order to re-establish a former state of balance of power, no army were foreseen that would be able to act as a neutral entity and appointed with the sole duty to maintain order over the Member States. Lastly, the influence that Westphalia had in the next decades is relevant to question after looking at the events that occurred from 1648 until 1945. From the Westphalian era to the first draft of the Charter of the United Nations, more than 100 wars had been fought. During these years, between the colonial wars, revolutions or wars between nations, 70% of the wars fought were territorial[9]. More importantly, these decades saw the Seven Years War, the Napoleonian era as well as the French Revolution and the two World Wars.

Here are the three articles I will use to study the similarities and divergences of the treaties and norms:

[9] David, C.(2013) . Chapitre 4. Des conflits postmodernes aux guerres prémodernes. *La guerre et la paix Approches et enjeux de la sécurité et de la stratégie.* (p. 139 -174).

Article 1 of The Peace of Westphalia	*§ 1. [Proclamation of Peace] There shall be a Christian and universal peace, and a perpetual, true, and sincere amity, between his Holy Imperial Majesty, and his most Christian Majesty [the king of France]; as also, between all and each of the allies ... And this peace and amity shall be observed and cultivated with such a sincerity and zeal, that each party shall endeavor to procure the benefit, honor and advantage of the other; that thus on all sides they may see this peace and friendship in the roman empire, and the kingdom of France flourish, by entertaining a good and faithful neighborhood.*
Article 123 of the Peace of Westphalia	*That nevertheless the concluded Peace shall remain in force, and all Partys in this Transaction shall be obliged to defend and protect all and every Article of this Peace against any one, without distinction of Religion; and if it happens any point shall be violated, the Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.*
Article 33 of the UN Charter	*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, re-sort to regional agencies or arrangements, or other peaceful means of their own choice.*

The 1648 treaty can appear in any case as the embryo of what is now the nucleus of International Law and collective security. Furthermore, a collective security that protects an "international community guided by common values, common policy prescription and

common legal rules of coexistence"[10]. Firstly, the first Article of the treaty of the Peace of Westphalia was already conveying the importance of addressing disputes by peaceful means without disrupting the international order while striving to keep the peace stable at all times. Looking at the fact that it was brought to light 297 years before the Charter, this was quite *avant-guardiste*. Though, this Article conveyed the same values as the United Nations Charter does now, the notion of peace and sovereignty was not understood in the same terms. The sovereignty of a State was used by the Sovereign for the interests of the Sovereign. Each leader of the Westphalian system, especially France used their power to create strategic alliances and extend their territory, leaving on the side the duty of peace and stability for all. It was thanks to the French Revolution in 1789 that the comprehension of the concept of sovereignty started to change in a individual and more fair meaning. The Enlightenment ideas put into light individual interests and freedom values that were all considered decision of the Ruler beforehand. In France, the sovereignty shifted from the hands of the King to the hands of the population. In questioning the legitimacy of their own Sovereign, the French spread the need for change all around Europe and showed the necessity of a higher institution controlling the power held by each and securing the system as a whole. Europeans understood the importance of setting moral codes and higher laws that each government had to answer to as the primary matter. At this time, Europe was divided between the supporters of this new vision of sovereignty and freedom, and the old regime partisans that struggled until the end of the Napoleonian era to keep their way of thinking and borders safe from the innovation advocates. Still, the division was too important to set up universal rules that could govern the system and prevent wars. Later on, in 1820, during an international conference in Troppau (Opava), the non-intervention principle changed. As a result, the majority present at the conference agreed upon a legitimization of intervention in certain circumstances in the affairs of other States. The strict condition for intervention was if and only if the balance of power was being threatened. Following this decision, it is obvious that the lack of a judgment entity was going to weaken it, but the crisis-management orientation of the decision was clear progress towards greater agreements.

[10] Ove Bring, *The Westphalian Peace Tradition in International Law, International Law Studies, 2000, Vol 75, p.62.*

During a few decades, the road to diplomacy was being paved for a new page of International Law and organizations. However, with these peace treaties and conferences, had to come along an institutional entity capable of handling crisis that had no relation with the involved States. In other words, an organization that could represent these rules, take decisions without any biases of their own interests and enforce them. In 1867, further progress was made, the first peace-oriented NGO was created by Giuseppe Garibaldi and Victor Hugo, international lawyers became active, and soon after, the *Institut de Droit International* and the *Association for the Reform and Codification of the Law of Nations* were founded. Not long after, in 1899, before the first Hague Conference the main powers started to truly express the need for the adoption of rules arbitrating international disputes. Towards the end of the conference, the idea of a permanent court of arbitration arose, one that could take care of the "less important" matter of States. In other words, not the matters of fundamental State interests. Even though it could have been a strong advancement, the project was abandoned due to Germany's recalcitrance. Despite all disagreements and obstacles to consensus, the international society was making great steps after Westphalia towards the introduction of legal restrictions upon States' rights. *In fine*, many key notions of International Law emerged in those years such as the peaceful settlement of disputes, equality of States, or the prohibition of the use of force.

b. The League of Nations

When the League of Nations saw the light of day, it showed an important step of progress towards a universal institution, however the flaws of the Treaty of the Peace of Westphalia were incorporated in the League which made it impossible to efficiently act as a peace-keeping body. The unanimity requirement of the Council and the absence of the United Nations clearly undermined the scope of action of the League.

Article 10 of the Covenant of the League of Nations.

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

In its legislation and ethics, the League was focused on repairing a peace that was already tainted, taking care of the victim of the breach and imposing sanctions on the aggressor. In their economic and military focused field of action, the international organization was weak and having a hard time enforcing provisions and making States respect their power and legitimacy. In prioritizing the victim of the aggression, they were completely overlooking the judgments of the victim's own attempts to defend themselves before any peaceful settlements. Over the years, the peace-making equation shifted in the eyes of the States where on a scale of priority, peace became more important, to the detriment sometimes of the defending state. In other words, a cease-fire was considered more efficient even if it was putting the victim in a status of disadvantage. The safety of the states was put in a secondary place, where even the esteem and reputation of one nation came after the protection of the balance of power. In some way, the flaws and lacks of legal restrictions in the actions of the Sovereign were useful in the realization of its essential role. The United Nations Charter's drafters managed to bring forward a broader interpretation of the means set up to maintain order and security. The Security Council took a less personalized and individualist aspect in their conflicts assessment and judgements. More than state sovereignty, stable and lasting peace became the main objective. In the Westphalian era, the decisions of Member States and enforcement of the treaty provisions were minor and considered as a last step to resort to. States and their Sovereigns were fully masters of their own actions, their duty was solely to keep in mind this necessity to maintain peace at all costs without having a real constraint in making it happen.

The United Nations Charter is mainly the fruit of the Westphalia agreement and the 1899 Hague Conference that led to the imperfect but essential League of Nations and the emergence of our legal and political history in International Law. The real matter became maintaining an already existing balance of power and international peace more than protecting an unstable individual peace.

4. The current status of the principle

Article 51 of the United Nations Charter.	*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*

Article 51 of the United Nations Charter ensures the right of each state to defend themselves in case of an armed attack. The imminent nature of the threat that confers this inherent right to take action for the protection of the nation constitutes a *sine qua non* condition to the extent that the Security Council could have not reacted before. This use of force has to be ceased at the very moment in which the Council can use its authority to the necessary to restore the former state of peace. In these cases, the Security Council will always favor peace and order over the safety of the states, the nature of the role of a state in an international dispute doesn't impact the decisions binding upon all actors. The responsible for the outbreak of the discord or the enumeration of actions that were undertaken by each state for their defense will not in the eyes of the organization affect their conclusions on what means to use to restore a situation of sustainable peace.

Avoiding damages and unfortunate consequences prevail over the causes. This does not apply to all cases and the justice made will always tried to be fair and respectful to both parties. The main goal of the institution is to not fall back into a society and system in which warfare is considered the most efficient method to peaceful results. Where warfare sets chaos and terror, by which one strives to assert its power over the more territory and individuals possible, the United Nations tries to convey the message of a successful new era through which society learns that cooperation towards a safe world is the key. While the safety of the territorial entity can be overlooked, it is the safety of the individuals and future generations that is prioritized. In diminishing harmful events and suffering, the States and world population could shape a more Human-focused system one's security prevails over state security. The key to peace and security might be in the understanding that it is always more important for a leader to know that the population will have a roof to come home to, all safe than making sure that the border of the territory will not recede. This is the watchword of the United Nations. That being said, a system without disagreements and breakouts of conflicts unfortunately appears to be a utopia. This is why self-defence is allowed but well restricted and considered subordinate to collective security. In order to analyze the main challenges that Article 51 brings forward; we will first look into the matter of the definition of the term "armed attack" in this article. In fact, this very term that is only two words long is the cause of many discords. Since the Charter was drafted, it remained unclear whether an "armed attack" could begin before any damage was caused to any other State or whether it referred strictly to the lapse of time during and after an "armed attack". I would like to take as an instance air or naval attacks, in this case, does the beginning of the attack start when a fleet sails away or an airplane takes off with the intent of harm or strictly when it inflicts damage to the other State? If we consider that the "armed attack" takes place while departing, the famous Pearl Harbor attack took place at the time the Japanese fleet sailed away from their coast with the intent of harming the United States three weeks later. However, in my opinion, if the United States had taken action in waging an offensive to defend itself, this action would have never been justified in the eyes of International Law, in the sense that the proof of harmful intentions by Japan would have not been sufficient. Another issue that I would just like to mention regarding the term and its definition is the differences in translation in official languages of the United Nations, with a special focus on French. The article translated

into French allows States to defend themselves against an "*aggression armée*" which brings a wider definition of the term. An "*aggression*" in French could also mainly refer to an action with intent to harm. In the term *aggression*, the notion of intent is really important, it leaves space to include a threat in the definition, while an "armed attack" has a way narrower definition. While this translation issue raises an obstacle to the understanding of the notion, it is often overlooked. Article 51, and the term "armed attack" taken by its literal meaning, has in my opinion, no intention of including attacks that have yet to materialize.

5. Conclusion

This chapter allowed us to explore the historical context of the notion of anticipatory self-defence to understand better the contemporary notion that will be studied in the second chapter and its legality. The principle of self-defence is a natural conception of the world's major religious, philosophical and cultural tacit principles. It is set in the historical roots and the natural instincts that are universally recognized across cultures. Studying this concept with a deep historical aspect, led us to the two main schools of thought regarding the assessment of the notion of anticipatory self-defence: the objectivists and the restrictivists. Objectivists focus on "how the world really is", while subjectivists care about "how the world appears to one". This moral and ethical debate between objective facts and subjective perception is complicates the universal application of self-defence principle and the establishment of legal basis. In the contemporary debates and challenges it is the lack of a middle ground that underscores the settlement of a consensus for the creation of a cohesive framework. Another challenge in the settlement of a stable legal framework is the uncertainty in the imminence of the threats. Indeed, the perfect knowledge of the imminence of a threat and on the intentions of a potential attacker is impossible and any assumptions on which a victim's reaction relies are always going to be biased. The immediacy of a decision often forces individuals to act on limited and subjective information, leading to ethical dilemmas and risks of disproportionate responses. In this first chapter I strived to analyze the notion using comparisons and instances, by assessing the Helen Frowe's work regarding anticipatory self-defence and its critiques. In her paper, she argues that self-

defence should only be allowed on certain grounds, notably if and only if the victim is innocent and faces an imminent-life threatening attack. But as I mentioned earlier, the hypotheses on the intentions of a potential attacker will always be biased or wrong, considering that the perfect knowledge is unattainable. This is why, I brought forward some critique on this chapter particularly on the fact that self-defence is the right to act on a prediction, and thus, the right to sometimes be wrong. My critique on Frowe's work lies in her emphasis on acting when permitted, which can seem overly focused on the victim's prerogative rather than harm prevention. This serious lack of universal standards for what qualifies an imminent threat, and a proportionate response constitutes the main flaw at the core of the construction of a legal basis and the need for a structure governing the concept. I am convinced that this first chapter dedicated to the historical roots, the instinctual and universal aspects of anticipatory self-defence was essential to the study. It let us understand better its legal and ethical complexities that are deeply rooted in uncertainty, subjectivity and biases. Shifting the discussion to the state-level will permit the analysis of more instances, and practices by states to broaden the argument of the legality under international law.

Chapter II. The legality of anticipatory self-defence under the sources of International Law.

In this chapter of the thesis, I will evaluate the basis of the legality of anticipatory self-defence under International Law and the diverse sources on which it relies. Presenting the difference between anticipatory and preemptive self-defence and other theories of the spectrum to study its weaknesses and the debates revolving around it. As in the first chapter, I will introduce the two different schools of thought that rule these debates and what are their relevant contribution to the matter. While the inherent right to self-defence is clearly granted to States under Article 51 of the United Nations Charter, the anticipatory and preemptive right to self-defence is still a delicate debate in International Law. This chapter, in addition to being dedicated to understanding the spectrum of subordinate theories that surrounds Article 51, will also analyze its main theories in the eyes of the sources of International Law as stated in the International Court of Justice Statute in order to try to enumerate what was granted by International Law,

what is clearly forbidden or what lacks in the structure. It is these very lacks and uncertainties that let States shape their own interpretation of the Charter and adjusting their means of actions to defend their country.

A. The theories of self-defence and its sources under International Law.

1. The main theories

In the wake of the creation of the United Nations Charter, was born alongside it, what still represents one of the most controversial questions on the notion of self-defence: *Can self-defence be used only once the "armed attack" has occurred, or can it also be used upon potential imminent threat?* In this section, I will strive to find an answer to whether self-defence can forestall a threat. Before diving into the many issues that arise from the interpretation of this notion under International Law, it is important to give a proper definition of what anticipatory self-defence and preemptive is[11]. On the one hand, the theory of anticipatory self-defence would grant a State the right to defend itself against a threat that they perceive as constituting an imminent attack. In this case, it is the State that often judges by itself the nature of the threat as well as the imminence character. Acting on the basis of anticipatory self-defence means that the potential aggressor is believed to have the sufficient material capacities to initiate the attack. The most important aspect of anticipatory self-defence is the temporality. To justify an action on the grounds of anticipatory self-defence the State had to prevent its safety from an imminent threat that could only be stopped by destroying the material for instance or by striking first in order to halt the planned attack. Preemptive self-defence on the other hand, responds to a need to defend the nation from a threat that is not imminent. In this case, the State would strike preemptively in order to slow down the process of an attack that would happen in the near future. In other words, the degree of certainty in the prediction of the threat can be considered higher in the anticipatory self-defence principle. These two different theories are often considered as subordinates but are rather confusing in

[11] DeWeese, S. G. (2015). *Anticipatory and Preemptive Self-Defense in Cyberspace: The Challenge of Imminence.* NATO Publications.

their definitions. Drawing the line between preemptive and anticipatory self-defence is complex in the terms where you have to decide how imminent a threat actually is. In the spectrum of the theories of self-defence, there is a common denominator that almost links them all, which is that when using it, one will always base its decision and judgments on hypotheses and biased suppositions. Alongside these theories present in the spectrum, there are two other theories that I will mention in this section. The first one is a theory that resembles the preemptive one and is often confused with the former, the preventive self-defence. Preventive self-defence also refers to acting upon a threat that is non-imminent. Again, here, the main difference between preemptive and preventive self-defence is the temporality. The range of time of the said threat to materialize into an actual armed attack is even longer. Preventive self-defence is to my mind, clearly illegal under International Law and would be hardly justifiable since at this point of the potential outbreak of a conflict, the Security Council of the United Nations would be entitled and capable to act in order to prevent said menace way before it occurred, and without causing any casualties. Acting as an advocate of such theory would represent a real challenge. Lastly, I will bring forward the theory that is closest to the core of Article 51, that is interceptive self-defence. Here, the temporality range changes in the sense that it intercepts an attack that is already ongoing, Under this theory, one state could halt an aggressor in the early phases of their attack. That is to say, before they even attained the border of the defending state territory. Interceptive self-defence is the closest to Article 51 and the easiest to justify in case of resort to its principle. In acting upon an attack that has started to materialize but that is not yet fully developed, the defending state has all evidence to account for its actions. As a matter of fact, the aggressor state could not deny their intentions and wrong doings while already having initiated the process. In the next section, I will study the legality of the notion of anticipatory self-defence under the multiple sources of International Law. For the sake of the argument, I presented the main theories of the spectrum but will focus the anticipative theory, to the extent that it is the most controversial as well as the mainly used in State practice. I will mention briefly in my instances preemptive self-defence disregarding the difference in the temporality range for it is too confusing and depends on each case and contexts.

2. Legality of the notion under Treaty Law and general principles

Under International Law, and as stated in the International Court of Justice Statute under Article 38(1), the sources it can rely on are not only represented by the United Nations Charter. In this section, I will firstly present briefly the main sources of International Law under Article 38 of the International Court of Justice Statute and assess the base of the legality of the concept under these sources to try to understand to what extent they allow anticipative self-defence actions and what was set up to structure the notion.

Article 38(1) of the ICJ Statute

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. subject to the provisions of Article 59, judicial decisions, and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

For the sake of the legal argument, I will firstly analyze §a. and §c., treaty law represented by international conventions to which States agreed to be binded by, as well as the general principles of law recognized by civilized nations. I will try to study these first paragraphs of the International Law sources with a special deeper focus on the United Nations Charter to try to assess whether anticipatory self-defence has any legal basis. In the last

section, I wil add the opinions of other UN bodies to try to search for further instances of a legal basis regarding a broader interpretation of the Article.
When using international conventions and treaties as a legal source to understand a notion of relsove a conflict, the interpretation needs to be done in a certain way that includes all intentions and purposes of the international convention to be able to render an opinion carefully shaped by the overall meaning of a treaty and not just a separated article. In this matter, Article 31(1) of the 1969 Vienna Convention on the Law of Treaties recalls the importance of a full interpretation.

Article 31(1) of the 1969 Vienna Convention on the Law of Treaties	1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose

Looking at the treaty as a whole, means first and foremost that we must, before bringing forward any answer, exploring it from the preamble to its last article in order to examine any relevant particular article that could be linked directly or indirectly to the Article we were first interested in. When reading the entirety of the Charter of the United Nations, you quickly stumble upon the 4th paragraph of the second Article that states the following prohibition.

> *4. 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*

Article 51 of the United Nations Charter is inextricably linked to Article 2(4)[12] as it grants the only exception to the prohibition of the use of force, firstly established by the Kellogg-

[12] Haque, A. A. (2020, 9 septembre). *The United Nations Charter at 75 : Between Force and Self-Defense — Part One*. Just Security.

Briand Pact of 1928. In this fourth paragraph of the second article is also mentioned "the threat" of the use of force, which means that a State could not even undertake such physical or verbal actions that could threaten the safety of another State and/or the security and peace of the system. When reading Article 51, a few pages after, one party could then interpret the exception to the prohibition of the use of force as regarding both aspects: the threat and the use. This almost total ban of the use of force is generally recognized as a *jus cogens* norm (or peremptory norm)[13], which makes Article 51 a *jus cogens* norm by extension. A peremptory norm is a recognized rule from which no State can derogate, no exceptions will ever be granted and to which no treaty can overlook the importance in its provisions. A treaty will always be considered null or invalidate if it does not respect in its articles a *jus cogens* norm. A norm that is considered *jus cogens* is mandatory by the fact that it has been universally accepted by the international community. A preemptory norm is linked to Customary Law – that we will discuss in a further section – to the extent that it needs state practice to be generally accepted. Although it is generally accepted as *jus cogens*, derogations of this prohibition exist such as in Article 42, and 51 of the United Nations Charter. If a preemptory norm allows no derogation, even by *ad hoc* consent or by permanent treaty, to what extent can the prohibition of the use of force be considered preemptory? Within what is stated by Article 2(4), what is often considered *jus cogens* is solely the prohibition of the use of force, the prohibition of the threat of the use of force is not integrated in this reasoning mainly for the fact that State often derogates from it.

a. Expansionists and Resctrivists School of Thought

To fully explore the first source of International Law, it is necessary to study the two schools of thought regarding the debate on the interpretation of Article 51 and whether it grants the right to anticipatory self-defence. This discussion opposes the restrictivists to the expansionists[14]. The former believes in a right granted only in case of an "armed attack" in the strict sense of the term, where proportionality joins the scope of

[13] S.T. Helmersen. *The Prohibition of the use of force as jus cogens: explaining apparent derogations.* University of Oslo. (n.d)
[14] V. Steenberghe, R. (2016). *The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side.* Leiden Journal of International Law, *29*(1), 43–65.

the response. In other words, only an ongoing or passed armed attack requires an armed responsive defense. They argue that, on the contrary, if the article was interpreted in a broad way, where anticipatory self-defence was allowed it would be taking a high risk of misuse of the notion, where States could justify their every use of force by self-defence. Furthermore, restrictivists assert that, if anticipatory self-defence was not drafted at first in the United Nations Charter, it was merely because it was not intended. According to this school of thought, if it was not the will of the United Nations Charter's drafters to include such a right, it is not to be discussed. In contrast, expansionists believe that the principle of anticipatory self-defence lives alongside the Charter, and more precisely alongside Article 51. They argue that if a State is not allowed to defend itself against an imminent attack or threat, it would not be following Article 1 of the Charter in maintaining international peace but rather wait for its disruption and restore it afterward. They base their argument as well on the Judgment of the International Military Tribunal of Nuremberg on the 1st of October 1946, where it was declared that: "an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment of deliberation"[15] could justify responsive anticipatory or preemptive self-defence. To this, restrictivists merely respond that the Nuremberg Trials were in fact addressed to individuals and not to States. Lastly, expansionists insist on a revision of Article 51 considering the rapid evolution of technology and principally for the extension of nuclear power to all. Overall, in straightly analyzing the United Nations Charter and its 51st Article, it appears clear that the United Nations Charter does not provide any strong legal basis for anticipatory self-defence. I would have to agree with restrictivists on the grounds that you cannot base the argument for the interpretation of Article 51 as including preemption on the sole fact that it has existed and been practiced a few times in the past. Where I would agree, on the other hand, with expansionists, is a crucial need for an article revision and for anticipatory self-defence to be recognized as an inherent right for certain instances, as much as self-defence itself.

[15] Judgment of the International Military Tribunal (Nuremberg), 1 October 1946, reproduced in (1947) 41 AJIL 172– 333, at 205.

b. Decisions of other UN bodies

It is unconceivable nowadays, that a State could not defend itself from an imminent threat, with the growing discoveries on the construction of nuclear weapons and their useful materials. As I mentioned before, we will additionally look into other relevant documents of UN bodies in order to get a wider perception and interpretation of the notion and see whether the United Nations could have any intention of broadening the interpretation of Article 51 and take into account the evolution of our system in the Charter. The first pertinent document to the study is the Report of the International Control of Atomic Energy issued by the United States government and used by the United Nations in their First Report Of the Atomic Energy Commission to the Security Council. In the Appendix section N°16, of the United States document appears a memorandum dealing with the relations between atomic development authority and the organs of the United Nations submitted to the sub-committee N°1 of the United Nations Atomic Energy Commission. In the third part of the report, within the recommendations to the Security Council regarding safeguards with the rise of nuclear weapons, the Commission integrated the vision of the United States in their final report regarding a more flexible interpretation of the right to self-defence, by adapting anticipatory self-defence to the contemporary world.

> "Interpreting its provisions [Article 51 of the Charter] with respect to atomic energy matters, it is clear that if atomic weapons were employed as part of an 'armed attack', the rights reserved by the nations to themselves under Article 51 would be applicable. It is equally clear that an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define 'armed attack' in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action."[16]

[16] *Report of the International Control of Atomic Energy,* United States government, 1945, Appendix 16.

With nuclear weapons evolution, and an ever-changing concept of warfare in our society, the contemporary principle of self-defence completely shifted, and the whole equation needs to be thought about again. As a matter of fact, a State wouldn't get a second chance in case of an actual nuclear-armed attack. In this case, the restrictive perspective of Article 51 would not even be useful, as the State wouldn't recover from the attack to defend itself. Preventing an attack of this magnitude by striking first in anticipation of the imminent attack would be almost more reasonable than waiting for the territory to be gone. Furthermore, warning the United Nations Security Council or involve another State actor could trigger the aggressor state to act quicker and on more territories. This first report of the commission on Atomic Energy was published in 1947, it was soon after the creation of the United Nations and at the very beginning of the debates on the dangers and advantages of nuclear weapons. The United Nations at this time, was very careful about the rights it was granting States – as it still is – and on the safeguards that it was trying to set around nuclear forces. This suggestion of the United States on a new interpretation of the right to self-defence permitted by Article 51 was innovative and though it surely was a relevant recommendation, it alarmed the United Nations in some way that use in the Report the most secure part for them. At the end of the third part for recommendations to the Security Council, the fourth and penultimate paragraph, the Commission wrote down:

> "In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations."[17]

Instead of choosing the path of innovation and adaptation the notion to the contemporary world, the commission chose the safe road to avoid any outbreaks within States afraid of a too broad interpretation of a new definition of anticipative self-defence. The second relevant document to the argument is the 2004 Report of the High-level Panels on Threats, Challenges, and Change:

[17] *First Report of the Atomic Energy Commission to the Security Council*, United Nations, 1947, Part III, recommandation 4.

> "The language of this article is restrictive: “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 to maintain international peace and security”. However, a threatened State, according to long-established international law, can take military action as long as the threatened 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."[18]

This report was dedicated to a more secured world, submitting recommendations to change and new challenges for the United Nations to take into account. In the third part allocated for collective security and the use of force, the question of legality and guidelines on Article 51 was naturally approached. In the first paragraphs of the section, they recall how States derogated to the prohibition of the use of force countless times, and how Article 51 was rarely considered credible in the eyes of the community. When first tackling the question of interpretation, the Members of the Panel seem to agree on a long-established international law where an imminent threat could be a valid motive to call on the use of their inherent right to self-defence. They recall the importance that the principles of proportionality and necessity are met in order to anticipate in taking military action against a threatened attack. Here, it seems like a UN body has agreed to broadening the interpretation to anticipatory self-defence, but the reasoning strictly refers to a clear imminence of the threatened attack. In the following paragraphs, the Panel argue that as for the preemptive and preventive self-defence, notably if a terrorism threat is suspected, or a threat so great that merely cannot risk until the nature of the threat becomes imminent, they must have “good” arguments and sufficient evidence. The Security Council with their arguments and evidence can authorize such action. Lastly, the council highlights the significance of our global order based on non-intervention, that is according to them: “too

[18] The 2004 Report of the High-level Panel on Threats, Challenges and Change, at 63, para. 188.

great for the legality of unilateral preventive action"[19]. We can understand that in the case of a State acting on the grounds of anticipatory self-defence, there will always be a margin of acceptance by the United Nations if the action is supported by great arguments and evidences of the decisions, but the risk of implementing a legal basis for anticipatory self-defence within the Charter would be too great, and will never prevail over the greatness of keeping our system of order and peace stable.

In these documents, the interpretation of Article 51 is often thought of being renewed but never actually broadened. There is no strong legal basis for anticipatory self-defense under these sources of international law. This is why, I will, in the next section, turn my study toward the notion of anticipatory self-defence and its basis under International Law customs, with the same intent to find a strong legal basis for a broader interpretation of Article 51.

B. The notion of anticipatory self-defence under Customary International Law.

After the study of the legality of the notion of anticipatory self-defence under the jurisdiction of international conventions and other decisions from UN bodies, I will strive to assess whether there exists a legal base for a broader interpretation of Article 51 of the Charter under customary international law and its requirements. I will dedicate this section to putting forward relevant instances of the use of anticipatory self-defence, its usefulness, to try to analyze within these example cases if it demonstrates enough state practice and *opinio juris* to consider anticipatory self-defence as having a legal basis under this source of international law. It is first primordial to recall what customary law is and what are its *sine qua non* foundations. It refers to international obligations arising from international practices, as opposed to obligations arising from formal written conventions and treaties. Customary International Law results from two main requirements: a general and consistent practice of States that they follow from a sense of legal obligation, and a general belief of States that they are legally constrained to submit to the legitimacy of the norm, also known as *opinio juris*. I will strive to analyze already existing State practice to try to understand whether anticipatory self-defence could be

[19] The 2004 Report of the High-level Panel on Threats, Challenges and Change, at 63, para. 188.

considered a *jus cogens* norm. Before diving into the first case, I would like to remind according to Article 38, §1(b) of the ICJ Statute, that the International Court of Justice is submitted to "international custom, as evidence of general practice accepted as law" as a source of its decisions as much as it is submitted to treaties and international conventions such as the United Nations Charter. I will study three cases that are to my mind relevant to the analysis of anticipatory self-defence in customary law. For each case, I will explore State practice along with *opinio juris,* after briefly recalling the circumstances. The first case will be the Caroline incident of 1837, the second one the Cuban Missile Crisis and I will end with the Six-Day War. I am bringing all this cases into the study since I believe them relevant to the assessment and will help understand better whether anticipatory self-defence has any legal basis under customary international law and furthermore whether the interpretation of Article 51 of the UN Charter could be taken in a broader sense. These cases are great instances of attempts to anticipatory self-defence by States.

1. The Caroline incident

Caroline incident as I indicated before is the starting point for the expansionist school on the matter. The Caroline incident occurred in 1837 when the Canadian population insurrected themselves against the colonial rules that the British government had set upon them. Soon after the beginning of this insurrection, Americans, mainly the ones close to the border, got involved by the side of the Canadian nationals after the failed attempt of the invocation by the American government of the Neutrality Act of 1818. Troops of the ally initiated the occupation of the Navy Island situated in Upper Canada. There, a provisional regional government was established in an attempt to overthrow British colonial rules. This is where the famous incident takes its name from: the Caroline ship, which was an American steamer destined to provide supplies to belligerents. This ship was taken over while docked on the American side by the British troops in an attempt to blockade the road to supplies of their enemies. They entered into possession of this steamship and let it sink nearby, in the Niagara Falls. As a result of the incident, the US Secretary of State, Daniel Webster, expressly demanded from the British government that they provide solid proof of: "a necessity of 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 at all, - did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[20] This is indeed the basis of the necessity and proportionality principles that I discussed in a prior section used by the school of expansionists on the matter. Again, a necessity here implies that no other action could have prevented the escalation of the situation and proportionality implies that this very degree of action undertaken by the defensive State was the one strictly needed to act on self-defence. While this case is considered by many the first stone to the edifice of anticipatory self-defence, one could claim that the Navy Island occupation earlier on was an ongoing armed attack only justifying the use of self-defence. On the other hand, the United States of America tried to refrain their nationals from taking part in the insurrection and any sort of action with hostile intent. This supports the idea that anticipatory self-defence was not used by the British troops against a hostile State but rather against hostile non-state actors.

2. The Cuban Missile Crisis of 1962

The second case that appears pertinent to study is the Cuban Missile Crisis of 1962. It is after the failed attempt by the United States to overthrow the Castro regime in Cuba by invading the the Bay of Pigs and during the organization of the mission Mongoose, the second attempt at overthrowing Castro's regime that Cuba felt a clear need to secure its territory more consistently and secretly elaborated a deal with the Khrushchev regime. The agreement was setting up some Soviet nuclear missiles on the Cuban territory to dissuade the Americans from any other invasion attempt or harm to the Castro regime. It is when the United States discovered the ongoing construction on Cuban territory that the crisis started. While doing some routine surveillance flights, the pilots saw the construction sites as well as the presence of Soviet armament. The president of the United States of the time, John Kennedy, issued the first warning on the presence of

[20] Extract from the note sent by Daniel Webster to Lord Ashburton.

Soviet nuclear missiles on the Cuban territory but the construction and transactions continued under the worried eyes of the US. At that moment, the United States had two options. Destroy the armament by striking the Cuban territory or blocking any further attempt of provision and pressure the USSR to remove at the earliest possibility all prior pieces of equipment. The former implied the use of force, while the latter had low prospect of success. It is also important to recall that, at the moment of the Cuban Missile Crisis in 1962, the two superpowers were in the middle of the Cold War, where the environment was extremely tensed. This event was the time the United States and the Union of Soviet Socialist Republic came closest to the nuclear conflict. On October 22, the president decided on solution half-way from the two options. The established a naval quarantine of Cuba, that was in some way securing the Americans from any further escalation of the situation without giving the impression of an aggression from them. The term quarantine was not insignificant, it allowed the United States to set up a form of blockade around the territory without shifting into a state of warfare with the USSR and Cuba. After the decision was taken and implemented, the President of the United States expressed to the USSR leader, once again, its zero-tolerance policy about the presence of their missiles and the construction of nuclear sites in Cuba. In addition, he publicly stated on national television that in case any nuclear missiles were to be launched from Cuba on any nation of the system, he would consider this action as a clear attack of the Soviet Union on the United States. He shared with the American population his decision of the quarantine and assures a proportional response from the United States upon the Soviet Union in case of attack. Soon after, the Soviet leader responded to Kennedy in significating that their quarantine around the Cuban territory was already an act of aggression and threatening that the Soviet ships placed in Cuba would proceed. At that time, the situation was still cold, though extremely tensed and no country was ready to pull back first. Soon after, the United States continuing to do their surveillance flights over Cuba understood that the nuclear sites that were under construction had reach an almost-ready level. The United States recognized that the only way to make the Soviets withdraw their missiles and stop the construction of these nuclear sites was to strike Cuba. Nevertheless, the American government gave another try to the peaceful and diplomatic way of resolving the dispute. But, at this point, the tensions brought the situation to a stalemate, until it took a surprising turn with a message from Khrushchev. In this message,

he suggested a rather unexpected deal, resolving and putting an end to this situation by not only pulling their respective forces from the zone, but also by "relax[ing] the forces pulling on the ends of the rope, let us take measures to untie that knot."[21], and adding "we are ready for this"[22]. It is the hope of a peaceful ending that this message was conveying that completely shifted the situation, but the next day, the Soviet Union forwarded another message enumerating some conditions with the mandatory elements that the deal had to include, in particular the removal of the US Jupiter missiles from Turkey. Kennedy made the choice to respond to Khrushchev's first message only by suggesting a process of withdrawal of their missiles under the supervision of the United Nations and the assurance that the United States will not undertake any attack on Cuba. On October 28, 1962, Khrushchev agreed to dismantle and remove all Soviet missiles from Cuba, and on November 20, the US ended the naval quarantine they had established.

3. The Six-Day War

The last instance is one of the most famous and topical examples of anticipatory self-defence use. It takes place in 1967, when, the recent alliance between Egypt, Syria, Iraq, and Jordan raised the tense climate in the region, and President Nasser decided to evict all UN Peacekeeping forces from the Sinai Peninsula and the Gaza Strip as well as impose, on May 22, a naval blockade on Israel's only access to the Red Sea. Eight days after, Jordan and Egypt signed a mutual defense pact, placing Jordan forces under Egyptian command. Soon after, Iraq joined the pact too. The accumulation of the alliance between the other countries of the region, the withdrawal of the United Nations troops and the Egyptian blockade was perceived as an imminent threat by Israel which decided to take the matter into its own hands to prevent any further escalation of the situation. This is why, on June 5, they launched preemptive air strikes on the military airfields of Egypt. This instantly neutralized 90% of the Egyptian air force capabilities that were out on their tarmac. Israel carried out the same thing on the Syrian Airforce. From all the

[21] *The Cuban Missile Crisis, October 1962.* Milestones in the history of U.S. Foreign Relations - Office of the Historian. (n.d.).

[22] *The Cuban Missile Crisis, October 1962.* Milestones in the history of U.S. Foreign Relations - Office of the Historian. (n.d.).

territories that Egypt had wished to withdraw the UN troops from, Israel managed as a result from their strikes to win back the Gaza Strip and the Sinai Peninsula. On June 7, the United Nations Security Council called for a cease-fire, that was immediately accepted by Israel and Jordan, and by Egypt the following day. However, Syria continued to raid Israeli villages for which Israel responded by launching an assault on June 9. Thanks to this attack, Israel made Syria submit to the cease-fire on the next day. In the aftermath of this war, Israel had the smaller number of casualties, while Egypt had the worst amount of victims in its population. This war was also the starting point of one of the fundamental resolutions of the United Nations regarding the Israeli Palestinian conflict. A few months after the war, the UN passed resolution 242 that called for Israel's withdrawal of all territories it had captured in the war in exchange for long-lasting peace in the region. As for the actions Israel had undertook during the Six-Day War, it based its actions on anticipatory self-defence arguing that Egypt blocking their way to the Red Sea and evicting all UN peacekeeping troops proved hostile intentions towards their territory and constituted an imminent threat to their security. These justifications are calling for debate considering the fact that Israel continued to annex territories after its first air strikes, which went beyond the limits of the proportionality and necessity principle of anticipatory self-defence. This is still, to this day, one of the most controversial conflicts, which is now, additionally, at the center of one of the major territorials, historical, cultural, and religious disputes.

4. Conclusion

As a result, in analyzing these cases that the expansionist school considers as the very basis that put in place the notion of anticipatory and preemptive self-defence in Customary International Law, I will try to come to a conclusion and analyze whether they represent a legal basis for anticipatory self-defence.

In the Caroline incident, the main weakness of the argument is the fact that the defending State did not use self-defence against another aggressor, it defended itself using force against non-state actors that were admittedly hostile, but in no way constituting an American threat or supported by the United States government. Furthermore, the British decision of sinking the American ship used for supplies was not responding to an

imminent threat, which is the most fundamental requirement for the justification of the use of anticipatory self-defence. In this first instance, and following the principles of customary international law, the Caroline incident does not show evidence of state practice or *opinio juris* that could advocate for the recognition of self-defence as a *jus cogens* norm and sustain a broader interpretation of Article 51 towards a potential legal basis for anticipatory self-defence.

The example of the Cuban Missile Crisis is different from the two other cases in the sense that instead of bringing forward a pillar to the use of anticipatory self-defence, it abetted the cause for a strict interpretation and definition of the notion. During the Cuban Missile Crisis, the climate reached a level of tension that was rarely seen between the two superpowers of the Cold War. This crisis brought extremely close the two countries to a nuclear catastrophe and held the breath of the whole world for a year. The outcome of this almost-cold conflict is what is relevant to the assessment. In this instance, the threat for both countries had clearly materialized, the United States were in the middle of trying to organize with the overthrowing of the Castro regime, to which the Soviet Union and Cuba fairly responded by displaying power too in placing nuclear missiles on the Cuban territory to dissuade the United State of another attempt. After all this direct and indirect communications and threatening, the two superpowers came to an agreement of avoiding a nuclear catastrophe through a mutual dismantling of their respective missiles and armament present within the zone and the promise of the United States to not attack Cuba as it threatened to. Khrushchev and Kennedy managed to reach a peace settlement before the situation escalated. As for the case of the Cuban Missile Crisis, there was again no clear evidence of state practice and *opinio juris* reinforcing the idea of a legal basis for anticipatory self-defence.

Lastly, the third instance of the Six-Day war proved the importance of the principles of imminence and proportionality emanating from the notion. The materialization of the threat, its imminence and the vulnerability of Israel at that very moment could appear as a valid trigger for acting in accordance with Article 51 of the Charter. Its preemptive strikes that immobilized the air forces of the neighboring countries could have been justified on the grounds of self-defence, yet Israel after succeeding in slowing down the other countries' forces and protecting its territory from external attack

continued to annex other territories going beyond the proportionality of their response. It turned the territory into the aggressor it was at first defending itself against.

Looking into all these instances, there was a significant lack of examples of State practice and *opinio juris*, which also proved that the notion is too conditional. Every case and examples have its own flaws and rights which makes the implementation of a legal basis difficult to achieve. This fits with the conclusion of the High-Level Panel on Threats, Challenges, and Change in its 2004 Report that I discussed earlier: " We do not favor the rewriting or reinterpretation of Article 51".[23] Is it *in fine* the goal of the United Nations to leave too few judgments and legal basis on allowing a wider interpretation of Article 51, in order to maintain strict and close restrictions on maintaining peace?

Chapter III. A Case Study: Israel's Practices of Anticipatory Self-Defence.

This last chapter will be dedicated to analyzing all the principles, requirements and different opinions I mentioned in the previous sections in two topical study cases. I will strive to use these instances to discern whether anticipatory self-defence could have a legal basis under international law and its sources. The two conflicts I chose for this chapter are, firstly, the 1981 Israeli air strike on an Iraqi nuclear reactor by the name of Osirak, and, secondly, the 2024 Israeli airstrikes on Syrian territory after the fall of the Bachar Al-Assad regime. The preemptive attack on the Osirak nuclear reactor is a very interesting case for our research. It is a perfect instance of a country defending itself on the grounds of anticipatory self-defence, where a menace is arbitrarily seen as so and from which a government tried to protect its territory and people by acting upon it using force, before the other country could proceed. In order to study this *dossier,* we will deeply focus on assessing what triggered Israel in attacking Iraq and, more precisely, its reactor, to be able to look into the attack and the means used to take action. I will additionally explore the international responses and reactions to these acts to understand if such operation is justified in the eyes of other countries, international organizations and international law.

[23] *Report on "A more secure world: Our shared responsibility",* of the High-Level Panel on Threats, Challenges and Change for the UN Secretary-General, Part 3, IX, A. 1, page 63, note 192.

Lastly, after analyzing the actions of Israel of 1981 on Iraqi territory, the final section will be dedicated to bringing light on the current actions of Israel in Syria that are forecasting a long and complex road to the establishment of a legal basis for preemptive strikes. The purpose of the last analysis will be to have a point of comparison with the actions of Israel taking place in a contemporary context. This section is crucial to set an overall judgement at the end of the chapter on the decision-making, the attacks and all of their characteristics that can be based to the fullest extent on the context, the causes, the means, the ethics and the damages. Indeed, the conclusion I will try to draw at the end of this thesis must take into account the more facts and points of view possible. This is why; in this chapter I will strive to explore the study case in the broadest perspective possible.

A. The 1981 Israeli strike on Osirak.

We will see why Saddam Hussein first approached French President Jacques Chirac in November 1975 to ask for the acquisition of a French nuclear reactor for Iraq in the process of an Iraqi nuclear program. Before the nuclear program, and still, as of now, Iraq was a resourceful nation thanks to its oil-rich terrains that allowed the nation to become and thrive to stay an important and respected country. Analyzing what constituted the trigger that led the Israeli to take action is going to help understand to what extent the attack could be justified on the grounds of anticipatory self-defence . Diving into the reasoning before the attack, the means and the organization will allow me to make parallels with the requirements mentioned before. I will start by dedicating this section to the nuclear reactor transaction that represented the starting point of the conflict in an attempt of grasping the general intentions of Iraq at the moment of the acquisition. Secondly, I will set up the portrait of Iraq through the eyes of Israel to acknowledge the feeling of insecurity felt by the Israeli government at that moment.

1. The nuclear reactor transaction

It has always been said that the reactor was bought at first for the symbolic status of becoming a nuclear power country and to balance regionally their reputation against

Israel, mostly in regard to the already existing tensions in the Middle East region. Regarding the acquisition *in se* of this nuclear reactor from the French government, a version of a Mutually Assured Destruction within the Middle East was not seen as a great idea for Israel but was desired by most countries in the region. This nuclear deal process between Iraq and France made Israel and its government feel vulnerable since the situation was not turning out to be in their favor and was threatening their strength in the region. This transaction was triggering a country that was, in that context, not coping with emerging threats in a peaceful way but rather following aggressive and defensive postures. In addition, the feeling of vulnerability was not only coming from the nuclear reactor acquisition but also from the geographic factor and the geostrategic depth of the country in comparison to the scope of impact of this nuclear reactor. Indeed, Israel's surface size was, at that time, around 20 770 km^2 according to the country file of the Europe and Foreign Affairs French Ministry, while Iraq was about 438 517 km^2. If Iraq were to possess a nuclear-grade weapon and use it, Israel was obviously convinced that they were in great danger. This highly qualified French physician at the time, who wished to stay anonymous, supported the point of view of Israel in the actual intentions of Iraq in the construction of a nuclear site: "The problem of the Iraqi fuel cell followed by deliveries of enriched uranium is much more political and national than technical. Indeed, without even going into the details of a technical argument, it would seem that it is possible, at least in principle, that Iraq plans to build atomic weapons using this pile and will succeed in doing so. If so, how can we fail to consider what we would do in such an eventuality? Let's not forget that Iraq is directly involved in the struggle for hegemony in its part of the world. It has taken part in conflicts with Israel. It is at war with Iran to regain territory; this war, of the conventional type, is not in its favor, and it is bogged down in it. Such a country, like many others, can only hope to gain an advantage over its neighbors through the possession of atomic weapons."[24]At the time, it was easier to believe, because of this struggle for hegemony in the region, that Iraq – as promised – was solely going to be using its French reactor for research and peaceful intentions. Just like this French physician, highly qualified people that were convinced of the contrary were not expressing their true feelings, afraid of stating the "too" controversial. Israel, for which method mainly relied on strong alliances to survive and keep a certain balance of

[24] *Dossier Osirak*, La gazette nucléaire, n. 45.

power, was certainly worried about a shift of balance in case of the successful construction of a nuclear weapon by Iraq, which would make non-nuclear neighboring countries more submitted to their power as well. In other words, Iraq would climb the ladder of a Middle East hegemony too fast for Israel, that was worried that it would then jeopardize its alliances. These alliances were a great and major technique to compensate for any weaknesses and lack of armament, and a major part of Israel's plan of action. Besides, Israel's nuclear doctrine at this time, the Begin Doctrine – for its Prime Minister – was strict and unflexible. Under no circumstances could any neighboring country in a state of war or tensions with Israel be permitted to construct a nuclear reactor that could seriously threaten the survival of their state. By purchasing this nuclear reactor and fuel, Iraq knew it was sending a clear indirect threat message to Israel and other countries of the region to not make any *faux* pas. The cooperation of France and Italy in that transaction process is what also worried Israel, the more actors present for that transaction, the more worried it made them. Although the reactor had been bought from France for "peaceful purposes," as France and Iraq both assured that the reactor had been built in a way that could not be used for nuclear weapons construction, the capability of Iraq to reach nuclear weapons-grade power remained threatening. Israel tried to act upon this feeling of threat and vulnerability in a diplomatic way first, by asking the French government to stop the transaction; the tensions rose when Israel understood that their efforts were going to be vain. Still, as of now, the real motivation for that purchase is not certain, but the hypotheses are multiple. In 1960, Iraq and the USSR had a deal for a nuclear program where the Soviets would build a nuclear reactor outside Baghdad and train Iraqis in nuclear physics and plant operations. Ten years after the end of the construction, when Iraq needed this reactor to be refueled, the Soviets agreed to provide Iraq fuel enriched with 80 percent uranium, which was an enormous change compared to the nuclear fuel they were initially given, enriched with 10 percent uranium. Iraqis tried to advocate for an even higher percentage of uranium, but the Soviets didn't take the risk, as anything over 90 percent could make weapons-grade nuclear materials. After trying with Japan, which also declined, Iraq went to France, which agreed to a 93 percent uranium nuclear fuel in exchange for oil and purchase of their arms. Not even a couple of months after France's deal, Iraq signed an agreement with Italy that would provide equipment and assistance. This assistance included processes that were intended to create weapons-grade

nuclear material. Israel saw France spend 260$ million to help Iraq get a nuclear reactor provided with the fuel capable of becoming nuclear weapon material. While the construction of a nuclear weapon is still, to this day, one of the most plausible motives for this purchase by Iraq, there clearly is a more "acceptable" explanation put forward by Iraq. Their transaction with France could help them supply the electricity needed to the industrial and population centers, improving the quality of life of the country. This appears as a valid justification for such a purchase, only if, on the first hand, Iraq's industrial, commercial, and residential demand was high enough to need a new system, and, on the other hand, if Iraq was not an oil-rich country for whom it would be significantly cheaper to use petroleum by building electrical generation plants than using uranium with nuclear ones.

2. Iraq's portrait from Israel's eyes

This situation that triggered the attack can also be understood by making a quick portrait of Iraq from Israel's point of view. Overall, Iraq had always sent clear signs of aggression through offensive rhetoric and abrasive foreign policy against their State. Iraq never recognized Israel as a state and, in 1949, refused to sign the armistice agreement that allowed Egypt, Syria, Jordan, and Lebanon to reach an official cessation of the hostilities with Israel. Iraq, alongside Saudi Arabia, never signed any agreement with Israel. Furthermore, Saddam Hussein made it clear in every intervention in public or private discussions that Israel being its worst enemy the war between Arabs and Israel would never end until one of them totally prevailed over the other. "It is either Israel or the Arabs […]. Either the Arabs are slaves to Israel, and Israel controls their destinies, or the Arabs can be their own masters, and Israel is like Formosa's location to China, at best."[25]. All these hostile threats to Israel, such as the constant propaganda of hate and war and the early stages of their nuclear search program, truly shaped a credible menace to the survival of their state with the acquisition of the French nuclear reactor. In the case of the successful construction of a nuclear weapon from Iraq, Israel was facing the risk of letting Iraq become the first Arab country to possess an atomic weapon. On August 19,

[25] Brands. H, Palkki. D. *Why did Saddam want the bomb? The Israel factor and the Iraqi nuclear program.* (2011).

1980, Saddam Hussein, in an interview about Iraq's nuclear capabilities and ambitions, made it clear that Iraq was capable of producing a nuclear bomb. The message intended by Hussein was that their nuclear program had peaceful purposes but wanted to highlight the fact that in case of threats or hostile behaviors, the country had the full capacity to hit back. Israel took this statement as an evident imminent threat that Iraq was going be attacking Israel with the nuclear weapon they were building thanks to the help of France and Italy. On Israel's side, the Prime Minister of the time, Begin, was applying a foreign policy known for being very much reactive and personalized. In other words, he was known for his reputation as an autocratic leader who rarely sought advice from his cabinet and considered the country as its own identity. In the times before the attack, his reputation was starting to drop, and he was perceived with less strength and strictness than before. In his eyes, the strikes on the nuclear reactor could have bolstered its reputation and helped the country with its patriotism level and naturally, its security against external threats. This is why, after attempting to stop the transaction through diplomacy, as well as the construction of the nuclear site and the supply of powerful nuclear fuel, Israel decided to take the matter into its own hands by organizing the attack for the complete destruction of the Iraqi nuclear reactor.

3. The Israeli airstrike on Osirak.

This attack of Israel on the Osirak nuclear reactor on the 7th of June 1981 ranks amongst the most important aerial bombardments of the 20th century. We will study how Israel managed to make any other Middle East nuclear weapon-seeking country refrain from its ambitions and slow down the entire Iraqi nuclear research program. I am here trying to examine how Israel organized the mission and attacked the Iraqi reactor, its means, and its timing. This attack was a risky bet from Begin, the Prime Minister, in case of failure of the mission, the consequences on his mandate and the safety of the country would have been devastating.

The choices of the mean prior to the attack were the result of a long and meticulous process. The vain attempt of diplomatic pressure to preempt the construction of this reactor and the wartime status between Israel and Iraq pushed the government to think that these strikes were justified and necessary. While planning Operation Opera, Israeli

forces started to explore two options. The first one was a commando attack with the Israel Defense Forces, and the second one was an air strike operated by their Air Forces. The former was difficult to perform because of the reactor's location, which would make the insertion and extraction too complex and dangerous. Osirak was in the middle of the desert, more than 100km away from Israel, which is why the amount of machinery it required was hardly attainable. At this point in the reflection, the air strike outweighed the commando in many aspects: benefits, costs, and, more importantly, margin of success. The final decision was a precision airstrike conducted by the Israeli Air Forces aimed directly at the core of the reactor. The air strike had the lowest risk for human lives and was definitely better for public opinion after the discovery of the attack. After deciding on the type of mission, Israel gathered any information they could find on the reactor, using secret services software, including the FBI's top-secret pieces of information. At that time, their Air Forces was one of the best in the world. The government saw it as an opportunity to justify the 50% defense budget allocation to the modernization of these aerial armaments. The last couple of issues encountered were the need for refueling mid-way towards the reactor and the speed required for a safe extraction. Getting away from the explosion after launching bombs as close as possible to the target was a delicate maneuver. The solution of fuel was found by using the newest Eagle aircraft and Falcon 3rd generation engine that could handle the full duration of the attack without the need for refueling. It required precise pieces of equipment for the route, the strike, the risks, and the sortie. The goal was the complete destruction of the reactor.

After years of planning and an extremely precise plan of realization, the mission remained secret until the very last moment, even for the military forces undertaking the mission. Only the time and risks of the plan were known, the nature and target were kept confidential. The code name used to designate the strike was Operation Opera or Operation Babylon. In order to leave almost no chance for failure, pilots practiced over 9 months prior to the attack. As I mentioned before, the extraction was an extremely delicate maneuver as the bombs released from the aircraft could have destroyed within 9 seconds the engine and its pilot along with the actual target. At the time of the execution of the attack, the pilots departed from Etzion Air Base, where Israel had put a few aircraft a couple of days before, to avoid any suspicion. Arrived at the target, 16 Mk84 bombs were

launched at the center of the reactor in less than two minutes. The goal of complete destruction was attained. This air strike remains an aviation exploit feat.

B. International reactions.

In the wake of the destruction of the Osirak reactor by Israel, the damages it had caused were not solely material. For the Israeli government, the strike, in terms of performance and realization, was a clear success. This preemptive self-defence attack drastically slowed down the Iraqi nuclear program and opened a political dilemma for all allies of Israel and their neighboring countries. Indeed, Iraq lost an incredible amount of nuclear assets, which raised an obstacle to the pace of their program development. After years of negotiation for reactors, fuel, and equipment, Israel destroyed everything in a matter of seconds. Iraq was now, once again, at its starting point, years away from being a nuclear-weapon country. As for the international reactions, there are quite a few. I will first briefly mention the main countries that reacted to the attack but for whom the reaction is not the most significant to the research, secondly, I will explore Iraq's reaction to the aggression, as well as Arab nations. To finish, I will describe France's, Britain's, and the United States' reactions to end with the International Organizations, namely, the United Nations and the International Atomic Energy Agency.

1. Neighboring countries and Iraq

Egypt strongly reprimanded Israel for the attack but could not afford at the time to be too vulnerable or opposed in any way to Israel. Many European nations, as well as Japan, the West German Ministry, Greece, and Argentina, condemned, like Egypt, the actions but never truly penalized Israel for its initiative. The reason was most certainly the same as Egypt's worries for their own safety. In Iraq, after the successful Israeli mission, the military officers in charge of protecting the strategic targets in the country are hanged in public execution for incompetence. It was on June 23, 1981, that Saddam Hussein publicly addressed the public for the first time. For his intervention, he chose the peace

speech calling on all countries to help Arab nations become nuclear weapons-grade countries in order to balance Israel's power, which was at the time suspected of possessing a small arsenal of nuclear weapons already. He also recognized the French as partial accomplices of what Israel did in the attack and criticized its country's Atomic Energy administration for the lack of security on site as well as for not anticipating the attack. He mentioned that Israel had to compensate Iraq for the damages caused, but to this day, no compensation was ever given from Israel. Among the countries and non-state actors that denounced Israel's actions on Iraq's territorial sovereignty, there was Morocco, Bahrain, the Palestine Liberation Organization, Syria, and the United Arab Emirates. In addition, the Council of the Arab League, or, formally, the League of Arab States, had firmly condemned Israel's actions and recalled the rights of all nations to peaceful technological and nuclear development programs. The League also called on all nations providing any type of aid to Israel, especially the United States, to stop and help put an end to this Israeli aggression. Libya, on the other hand, had a pretty aggressive approach, they called on all Arab countries to attack the Israeli Dimona nuclear reactor.

2. Superpowers

As for the main powers of the time, only France and Britain clearly condemned the attack. Starting with France, the government was upset after the attack, considering the role that they had played in Iraq's nuclear program. The question of Iraq's atomic aspirations rising again was not what the country was expecting to hear after just finishing its construction. France also lost, alongside the attack, their contracts and deals with Iraq and its resources. The Foreign Affairs Minister of the time, Claude Cheysson, qualified the attack as a violation of International Law, doing the opposite of serving the cause of peace. He justified, once again, that the nuclear reactor provided was solely for scientific research and that its use for military purposes was strictly prohibited in their agreement. In addition to defending the agreement they had and Iraq in the situation, French officials and some members of its nation's intelligence started leaking classified information on Israel's nuclear reactor, which France had helped construct decades before. The flow of materials from France to Iraq slowed down after the attack but didn't stop, and France's diplomatic channels with Israel didn't cease either. Regarding Britain, it was Margaret

Thatcher at the time who said that no attack of this scale could be acceptable under any circumstances. She agreed with the French government on qualifying it as a breach of International Law. Furthermore, Britain exposed the CIA by calling them out for letting Israel have access to restricted satellite photographs that even Britain couldn't access. The CIA checked the access that was granted to Israel and found a breakdown in the system providing full access to Israel. The last great power was the United States, which had a pretty different reaction to the attack. The aftermath of the attack left the United States bothered by the lack of prior notifications that constituted a breach of the US Arms Export Control Act. They agreed that even being an ally of Israel, there needed to be a sanction and condemned along with the other countries the strikes on the nuclear reactor. They were mainly trying to avoid other countries to which they were also supplying armament, hitting back and creating other breaches of the US Arms Export Control Act. They decided to suspend the shipment of F-16s to Israel, although it was only temporary as the flows resumed quietly a few months later. The United States sanctions and condemnations were just a *façade* to keep a stable balance of power and their alliances going. Indeed, what made their reactions different from the others is that they stayed on Israel's side and helped their ally in the eyes of the United Nations and the International Atomic Energy Agency.

3. International organizations

On June 19, 1981, the United Nations Security Council unanimously adopted Resolution 487, in which they were condemning the attack, stating that Iraq should be compensated for the damages Israel had caused. Alongside the resolution, they invited Israel to sign the Nuclear Non-Proliferation Treaty and asked it to place its nuclear program under the International Atomic Energy Agency safeguards. The United Nations further qualified the attack as a clear breach of their Charter. This resolution also underlined the right of Iraq to develop its own nuclear program for peaceful purposes only and asked Israel to refrain from any similar actions in the future. Israel obviously rejected the resolution and called attention to the biases, claiming that the attack was justified on the grounds of anticipative self-defence to protect Israel from "another

Holocaust"[26]. Iraq was only partially satisfied with the resolution for its lack of actual sanctions against Israel. To try to take further action, on November 13, 1981, the UN General Assembly passed Resolution 36/27, noting the non-compliance by Israel to Resolution 487. Only Israel and the United States voted against this new resolution that was warning Israel once again about its actions and threats, also reiterating the call to all already-aiding nations to cease as it enabled Israel to commit such attacks on other nations. However, the part in which the United States played the biggest role as Israel's ally was with the International Atomic Energy Agency. Like every other country and organization, they started by verbally condemning the attack in mid-June 1981, recognizing the attack as an assault on their system. It was in 1982, the year after, that the United States played an important role. The Board of Governors of the IAEA presented the removal of Israel's participation in the organization. As a response, to efficiently reject the suggestion, the United States froze its funding to the organization. It suspended its membership until the threat eventually made them yield to the pressure. This clearly avoided any kind of significant sanctions for Israel. At this point, no consequential sanctions had been given to Israel, which was a risk of showing to other countries that taking actions in such a way could be put up with by other countries and international organizations. Although most countries, the United Nations and the International Atomic Energy Agency, had condemned Israel for its actions and tried to impose sanctions upon them, the process did not reach its full extent, mainly because of the United States intervention. The IAEA, as a last resort, suspended on September 26 all technical assistance to Israel.

Analyzing this case has brought to light that the notion of anticipative self-defence in International Law has more than one legal challenge. Every case and instance is different, and it is difficult to sort things out between imminent threats and speculative risks. Unfortunately, the free will and freedom of thought of each individual come into play. It plays a huge role in the decision-making of whether or not each situation represents a risk to a nation and whether or not it is imminent. This instance of Israel's actions highlights once again the need for clear, enforceable norms and collective mechanisms. Unilateral

[26] Micah Hancock. J. (2024). *Operation Opera: 43 years ago, Israel destroyed an Iraqi nuclear reactor in a daring and dangerous raid and established a core defense doctrine.* AllIsrael.

military actions will remain efficient only for a little while but will always damage the balance of power in the long run.

C. Israel and its latest attacks on Syrian territory.

At the wake of the fall of the Assad regime in Syria on December 8, 2024, Israel carried out a series of air strikes across the country.[27] These air strikes were reported to be targeting military facilities, weapons, ammunition depots, and other strategic zones.[28] The primary motive for the destruction of these areas was the potential housing of "chemical weapons stocks and long-range missiles"[29] These specific measures were reportedly taken to maintain security after the fall of the regime in Syria and to prevent armed groups from threatening Israeli territory. Netanyahu argued that there were all temporary defensive positions taken to prevent hostile forces from establishing themselves near the Israeli border. [30] I will strive to assess the limits of these actions taken on what it seems like the right to act preventively. In a previous section, I defined and explained the definition of self-defence as it is intended now by Article 51 of the United Nations Charter. Before starting the analysis of the actions of Israel in prevention on Syrian territory, it is important to remind that the right to self defence requires as said in Article 51 an ongoing or completed attack against said state. Now, the legality of right to act in anticipation of such an attack has never been agreed on by the International Court of Justice. The ICJ stated that: "self-defence does not extend to the protection of a state's security interests"[31] On Israel's side, the fall of the Syrian regime that surely left uncertainties that may have created worries revolving around the choices of a new regime and the future event of the country needs to be acknowledged. Whether Syria will choose peaceful or hostile relations towards Israel and many more actors is still to be determined.

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[27] N. Tsagourias. (2025). *Israel's actions in Syria and the outer limits of self-defence.* Articles of War.
[28] N. Tsagourias. (2025). *Israel's actions in Syria and the outer limits of self-defence.* Articles of War.
[29] M.Krever. (2024). Israel strikes Syria 480 times and seizes territory as Netanyahu pledges to change face of the Middle East. CNN World.
[30] N. Tsagourias. (2025). *Israel's actions in Syria and the outer limits of self-defence.* Articles of War.
[31] International Court of Justice. (2022). *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda).*

This tensed environment is understood by the ongoing conflict between Israel and Syria, in which the core issue is the division of the two countries on the recognition of a legitimate Jewish State on Arab lands.[32] Considering that the two countries were already in a state of war at the time of the Israeli air strikes, the question of the use of anticipatory self-defence by Israel remains complex. Did the fall of the Al-Assad regime impact the nature of the conflict? While Israel is claiming that it is the fall of the Syrian regime that made them feel threatened by a potential chaos, the events of December 8 have not changed the legal situation of Syria and Israel.[33] Therefore, the current attacks of Israel in Syria could not be justified as self-defence under Article 51 of the UN Charter. Israel is not responding to an ongoing or completed attack. In a public statement, the day of the fall of the Assad regime, Prime Minister Netanyahu stated "[it] means we have to take action against possible threats. One of them is the collapse of the separation of Forces Agreement from 1974 between Israel and Syria"[34]. The agreement mentioned by the Prime Minister that collapsed alongside the Al-Assad regime is the Separation of Forces Agreement ratified on the 31st of May 1974, by Israel and Syria in which they agreed to a ceasefire on land, sea and air and to refrain from any military actions against each other[35]. With this agreement, both army got separated in accordance with designated lines: between Line A and B the area was designated as an area of separation, a demilitarized zone. The East of the lines was under Syrian administration and the West side of the same lines (A and B) was under Israeli administration. The forces designated to station in-between Lines A and B were the United Nations Disengagement Observer Forces. This demilitarized zone was crucial to the respect of the agreement and the durability of the peace. The result of the collapse of this agreement according to Benjamin Netanyahu was that: " the Syrian army abandoned its position". He further stated that: " [they] gave the Israeli army the order to take over these positions to ensure that no hostile forces embeds itself next to the border of Israel"[36]. In order to proceed, "Israel deployed ground troops both into and beyond this demilitarized buffer zone for the first time in 50 years"[37]. But

[32](n.d.). *Syria vs. Israel* - Peace Research Center Prague - Charles University Center of Excellence.
[33] N. Tsagourias. (2025). *Israel's actions in Syria and the outer limits of self-defence.* Articles of War.
[34] R. Avraham. (2024). *Prime Minister Benjamin Netanyahu's Statement from the Golan Heights*. GPO.
[35] United Nations Security Council. (1974). *Separation of Forces Agreement between Israel and Syria.* United Nations Peacemaker.
[36] R. Avraham. (2024). *Prime Minister Benjamin Netanyahu's Statement from the Golan Heights*. GPO.
[37] M.Krever. (2024). *Israel strikes Syria 480 times and seizes territory as Netanyahu pledges to change face of the Middle East.* CNN World.

in hitting 480 strikes on Syrian territory, Israel did more than ensuring "that no hostile forces" embedded themselves around their border. The goal was hitting most of Syria's strategic weapons stockpiles[38]. Through these actions, Israel also wants to avoid Iran to reestablish itself in Syria or allow Iranian weapons or any weapons to be transferred to Hezbollah or others[39]. This choice and feeling of vulnerability are justified by the fact that the "Assad regime was an ally of the Islamic Republic of Iran and a part of the latter's so-called Axis of Resistance against Israel"[40]. Israel, following the fall of the Assad regime had multiple motives to destroy the regime's weapons sites, firstly due to the fact that Syria has never formally recognized Israel's existence and secondly to act before they could fall into the hands of forces hostile to the country. Although Israel has been very much present lately in the Syrian territory, it assured that they will not become involved in the new Syrian regime and that its seizure of the buffer zone established in 1974 was a purely defensive move. But these attempts of Israel to "preemptively disarm" Syria are lawless[41]. The UN special rapporteur, Ben Saul on the promotion of human rights while countering terrorism stated: "There is absolutely no basis under international law to preventively or preemptively disarm a country you don't like […] if that were the case it would be a recipe for global chaos"[42]. Indeed, this "bombing campaign"[43]that Israel started that consisted of hundreds of air strikes on Syrian territory and the destruction of Syrian Navy in port was not well received internationally. Egypt officially asserted that they "violate international law, undermine the unity and integrity of Syrian territory and exploit the current instability to occupy more Syrian land"[44]. Moreover, Israel's UN ambassador sent a letter on December 8 to the Security Council of the United Nations to put it under notice of their actions, in this letter the ambassador stated that: "Israel will

[38] M.Krever. (2024). *Israel strikes Syria 480 times and seizes territory as Netanyahu pledges to change face of the Middle East.* CNN World.
[39] L. Berman and T. Staff. (2024). *Israel wants "correct ties with new Syrian regime but will attack if necessary"*. The Times of Israel.
[40] L. Berman and T. Staff. (2024). *Israel wants "correct ties with new Syrian regime but will attack if necessary"*. The Times of Israel.
[41] The New Arab Staff and Agencies. (2024). *Israeli strikes on Syria "completely lawless" UN experts say*. The New Arab.
[42] The New Arab Staff and Agencies. (2024). *Israeli strikes on Syria "completely lawless" UN experts say*. The New Arab.
[43] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[44] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.

continue to act as necessary in order to protect the State of Israel and its citizens, in full accordance with international law", adding that: "Israel is not intervening in the ongoing conflict between Syrian armed groups ; our actions are solely focused on safeguarding our security"[45]. But, looking at Israel's actions, it is "beyond dispute that bombing a State's military assets qualifies as a "use of force" against that State"[46] and that it identifies as an action prohibited by Article 2(4) of the United Nations Charter and its customary international law. Additionally, taking control of another State's territory is a use of force as well. Both of these actions are defined in Resolution 3314 (XXIX). In this case, the context triggers questions on whether the fall of the Assad regime may have affected the status of these assets that were attacked by Israel and the territory taken by the former on the application of the prohibition of the use of force. On this matter, according to international law, "it is the state itself that is protected by Article 2(4)'s prohibition of the use of force"[47]. The status of the material or territory attacked by Israel did not change with the overthrowing of the Syrian regime[48]. Israel has used force against the State of Syria and its territory, and this use of force is violating the United Nations Charter values and rules. That being said, the only exception Israel could use to justify its actions is the provision of Article 51 granting a right to the use of force for self-defence in the face of an "armed attack"[49]. Israeli officials to date have not mentioned the terms of Article 51 yet.

We will see why Israel's actions cannot be justified as self-defence. Although it didn't invoke to the Security Council the right to self-defence, as I stated before, Prime Minister Netanyahu justified Israel's actions as prevention from "jihadists"[50] to use Syrian military assets. It remains unclear whether he was referring to the new Syrian government – considering that Syrian terrorist group "Hay' at Tahrir al-Sham" (HTS) has jihadists roots – or to other armed groups. Bearing in mind the definition I mentioned earlier in this

[45] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[46] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[47] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[48] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[49] United Nations. (1945). *Charter of the United Nations*. Article 51.
[50] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.

paper of self-defence, anticipatory self-defence and what is publicly known as of now, "it is difficult to conclude that there will be an imminent armed attack against Israel by Syria or by armed groups operating within Syria that would use Syrian government assets"[51]. Evidently, it is important to highlight the fact that most of these groups are hostile to Israel and characterized as "jihadists" or "terrorists" according to the US Foreign Terrorist Organizations list issued by the Bureau of counterterrorism. It is thus understandable that Israel could perceive the current events as threatening but from those threats alone, one could not infer an anticipatory self-defence right to counter it. In this case, a "see-and-wait"[52] approach would be more suitable to act according to international law. Moreover, it seems that the Syrian priority is more set towards consolidation of a devastated state rather than on attacking the State of Israel.[53]

In this case, Israel's actions did not meet the proportionality principle of the response nor the necessity one, a more proportionate response of waiting to observe the development of the events would have been feasible in this situation. "As international law stands today, Israel's use of force against Syrian territory could not be justified from an *ad bellum* standpoint.

Conclusion.

As a conclusion, I would firstly like to state again the primary objectives of my research. The main goal of the thesis was to analyze the already existing bases of the legality of the notion of anticipatory self-defence as well as the debates and challenges to a broader interpretation of this concept with the intention of understanding whether anticipatory self-defence can be considered as a legal right under international law. To attain the goal set for this study, I specifically made parallels with Article 51 of the United Nations Charter that represented the basis and starting point of the paper. Throughout this

[51] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[52] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.
[53] M. Milanovic and M. Schmitt. (2024). *Israel's use of force against Syria and the Right of Self-Defense.* Blog of the European Journal of International Law.

thesis, I strived to address the main flaws and issues of the subject, the critical questions that emanated from the discussion with regard to ethics, morality, and legality to be able to make the case for the practical application of anticipatory self-defence. The three main pillars of my research were the historical roots, the theoretical debates and the real-life cases that, gathered all together, allowed me to dive into the complex notion of anticipatory self-defence without overlooking any essential aspects of the subject.

I will conclude by synthetizing the insights I was able to find along this process of research starting with its historical foundations. The first chapter highlighted the ancient and deep historical roots from which anticipatory self-defence emerged. Analyzing the philosophical thought and the natural law traditions presented the concept as natural and universal which finds its core elements in cultures, religions and ethics. All of these notions remained throughout the whole evolution of anticipatory self-defence. In mentioning the state of nature presented by Hobbes, I cared about first describing the concept as intuitive and innate in our world system, as well as setting the first characteristics of self-defence to its evolution. The historical aspect constitutes the ethical basis of the modern legal structure, which is why it was essential to me to introduce my research with this perspective. Additionally, in the historical approach of the study, the Just War doctrine appeared to be a crucial element in the path to contemporary self-defence. I studied the main three concepts, namely *jus ad bellum*, *jus in bello*, and *jus post bellum* that cover practices in warfare from the prospects to the peace settlements. It is essential since it laid the groundwork for necessary, proportional and moral use of force. As a matter of fact, this first chapter highlighted legal and structural insights. The main flaw of anticipatory self-defence is its conditional nature that sets the challenge for a legal structure. Indeed, it is subject to multiple requirements and conditions that necessarily need to be met, and that change depending on each situations, actors and context. The tension rising from this legal challenge emerged mainly from the historical debates such as those between the two main schools of thought I presented; the objectivists and the subjectivists that find great difficulty in settling a consensus on the interpretation of the principle. The disagreement appears between factual triggers for actions and subjective hypotheses against those imminent threats. This discord significantly slows down the process of the construction and response towards a legal structure. As regard to the legal structure, the last key point of the first chapter was the importance of the treaty of

Westphalia of 1648 in the creation of the United Nations and Article 51 as we know it today. It marked a turning point in the perception of state sovereignty and the principle of non-interference that now constitute core principles of our international system. Understanding the influence this treaty had on anticipatory self-defence, allowed us to grasp the concept with a wider perspective. This broad point of view on the subject was indispensable to discuss the legal challenges it encounters and obstacles it has to face.

The second chapter was dedicated to emphasizing the complexity of the notion under international law and the legal sources it relies on, and on which one could base its reasoning. The two main key points I would like to highlight from this chapter are the analysis of the two very different perspectives on the interpretation of Article 51 as well as the complication that rises from the determination of what constitutes an imminent threat. The first central point is represented by the restrictivists and expansionists that argue over the broadness of the interpretation that could be granted to Article 51. These two extreme points of view greatly challenge the legality of anticipatory self-defence in dividing the debate into a dilemma. On the one hand, I must agree with the restrictivists' warning on the misuse of anticipatory actions that could lead to a constant use of force and creating a pretext for unfounded aggression. On the other hand, I would not agree with a complete exclusion of suggestions to new interpretations and changes to adapt to an ever-changing world and international system. It is true that anticipatory actions could help maintain a stable peace and prevent greater harm, when used following the requirements I enumerated in the second chapter. As for the determination of the imminence of a threat, it remains ambiguous and extremely conditional too. Finding a consensus on what constitutes the requirements to define the level of imminence stays one of the greatest challenge towards the legality of anticipatory self-defence. In other words, the decision to act upon an attack that has yet to materialize relies on one's arbitrary choice. This choice is not supported by any universal or legal standards that could shape a general definition of the imminence of a threat, a definition that could express whenever a threat is sufficiently imminent to justify defensive action. In the second chapter, I identified this issue as the lack of perfect knowledge about a state's intentions and prospects. The biases and misinformation significantly complicate the proportional, necessary and legitimate responses. This chapter dedicated on the legality of anticipatory actions highlighted the poor and limited support that international law

sources offer to a wider interpretation of Article 51. The study cases showed the important lack of state practice and *opinio juris* in the establishment of anticipatory self-defence as a legal norm. This obstacle is mainly bolstered by the constant overlooking by states of one or more ethical principles, that are crucial to the avoidance of harmful consequences on innocent individuals.

All issues in the conditions of the permissible use of force can be found in the two case studies I analyzed in the third and final chapter of the thesis. As mentioned previously, the 1981 preemptive airstrike on Iraq's Osirak nuclear reactor illustrates very well the principles and requirements discussed throughout the research. In the wake of this violent attack, Israel justified its action as a response to an imminent threat that Iraq represented for them. The construction of a nuclear site in Iraq and the risk of Iraq becoming the first Arab country detainer of the atomic weapon was a great trigger but the biases in the decision-making were quite a few. While Israel destroyed the Iraqi nuclear reactor without the absolute assurance of the true intentions of Iraq, it raised significant legal questions. Israel protected its territory against a threat that was not truly imminent, but the main flaw of this anticipatory self-defence act is quite different. By destroying the entire nuclear reactor at its core, Israel drastically slowed down the process of Iraq's nuclear research program and dissuaded quite a few countries along. My main critique and observation on this case study revolves to the question of maintaining or restoring peace. In acting upon said threat, Israel may have protected their territory and prevented an attack, it didn't maintain any peace nor restored a previous state of peace. As I analyzed in the section dedicated to the aftermath of the attack, the climate of tension in the region and the race to hegemony through fear and power did not diminish and surely did not stop. The balance of power in the international system following the aggression remained more disrupted than adjusted. The evidence of the imminence of the threat was so low that no nation felt safer after the destruction of this nuclear reactor. This represents the core of the risks of misuse of the notion. Begin, the Israeli Prime Minister of the time, bolstered its power and reputation with this attack, proving that he was capable of anything for his nation without actually including into its reasoning the necessity, proportionality and consequences of its actions. Though the necessity requirement could be discussed, the proportional condition of the anticipatory response was not appropriate at all. The international reactions and the condemnations by international organizations

seriously weakened the reliability of any legal basis regarding anticipatory self-defence. Its controversial nature brings forward the lack of state practice. Learning to balance national security concerns with the necessity for international peace remains the greatest step ahead for the establishment of general norms and the adoption of an extended interpretation of self-defence rights. The last section of the chapter was essential too in order to draw this conclusion. Analyzing a recent and ongoing conflict between Israel and Syria showed that the road ahead for peace building and legal norms for anticipatory self-defence is still long and complex. In analyzing these two instances, multiple similarities in the actions, discourse and justifications emanated. After the assessment of the situation, it was clear that Israel and all actors were not feeding their progress with lessons learnt from past mistakes. In this case, again, the attack could not be justified on the grounds of anticipatory self-defence or preemptive strike considering the context of the situation that was not constituting an imminent threat or an ongoing attack on Israel. As I quoted earlier in the thesis: "There is absolutely no basis under international law to preventively or preemptively disarm a country you don't like"[54]. Israel, since the fall of the regime of Bachar El-Assad in Syria on December 8, 2024, attacked a territory that was weakened by the collapse of its regime and violated the Separation of Forces Agreement and its borders along with the aggressions. Just as with the 1981 attack on Osirak, the international reactions on the attempts of Israel to defend itself by attacking Syrian territory did not receive a warm welcome.

As a result, this thesis highlighted critical gaps and identified multiple areas for improvement in the current legal framework. As of now, we understood that the United Nations did not have any intention of broadening the interpretation of Article 51, nor clarifying the ambiguity around the definition of "armed attack" and its extent. Although it creates space for misuse and wrongful interpretations, it is the state's duty to interpret the article in a peaceful way that will not prejudice the balance of power of our international system. This duty of maintaining peace appears to be even more worthy with the evolution of warfare and the arrival of nuclear weapons through technological advancements. The discovery of nuclear weapon-grade shifted the equation of self-defence and the definition of the imminence of a threat. This innovation raises the need

[54] The New Arab Staff and Agencies. (2024). *Israeli strikes on Syria "completely lawless" UN experts say*. The New Arab.

for an adaptive legal structure that could take into account the modern aspect of warfare. Among the necessity and implications that arose from the research, the main restructuring international law would need would be the hardest to achieve. As a matter of fact, to prevent the misuses and ensuring that states can protect themselves from genuine threats, clear guidelines and norms on imminence, proportionality and necessity would be crucial for the international legal progress to go forward. This also implies that the foundation of international law must be borne in mind by all states at all times, that is, the balance between state sovereignty and collective security.

As a conclusion, I would assert that anticipatory self-defence is supported by insufficient and poor legal basis. It stands in an unreliable position under international law mainly weakened by the instinctive need for self-protection and the imperative duty for peace and global order within the international system. These two extreme notions hinder a biases-free decision-making regarding anticipatory actions. I concur with the decision of the United Nations to restrict any revision of Article 51 avoiding justified wrongful acts and the legitimization of a constant use of force. This decision of not revising the article is helpful to a certain extent, the uncertainty around the interpretation remains unresolved. Therefore, as I stated earlier, all states must resort to the fulfillment of their most important duty, within an international community that strives for a balance that safeguards the preservation of peace and global order, managing to keep it stable and sustainable.

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