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THE LEGAL REGULATION OF THE PREVENTIVE WAR AND ITS IMPLEMENTATION PROBLEMS

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INTRODUCTION

Relevance of the Topic

The relevance of the problem of the use of force and its limitation is increasing in the modern international law. The classical international law was formed in the 20th century, based on the principle of non-use of force threat of the use of force, which in turn forms the basis of international security. According to the UN Charter[1], the countries today are entitled to use their force in two cases:

1. According to the authorisation of the Security Council when it concludes that there is the situation of the threat to peace, breach of peace, or act of aggression.
2. For self-defence against an armed attack.

Preventive and pre-emptive war issue is directly related to the exercise of the right to self-defence. From a linguistic point of view, the term of "preventive" and "pre-emptive" have a similar meaning. However, in legal literature these concepts are separated and there is no unified position among the authors regarding the content of these terms. The author uses the terms and explanations offered in The Report of the High-level Panel on Threats, Challenges and Change (2004), according to which the anticipatory self-defence contains both pre-emptive and preventive actions, which are based on the belief that force is used only for self-defence. The pre-emptive self-defence is the use of force against an imminent or proximate threat, but the preventive self-defence is the use of force against a non-imminent or non-proximate one. In the author's opinion the Terminology Commission of the Latvian Academy of Sciences should be involved to ensure a harmonized approach to the use of these terms in Latvian language.

[1] 29.01.2018. Charter of the United Nations: international document. *Latvijas Vēstnesis*, No 20.

The requirement for the use of self-defence of the actual existence of an armed attack is one of the more controversial requirements of international law, which highlights poorly regulated areas. Since 1945, the situation has been changed significantly because of the occurrence of new types of threats which encourage of the review of traditional institutes of the use of force in the light of new realities of international life. As a result of the rapid development of new devastating weapons and technologies, it is clear that understanding of the right of self-defence offered by the positivists is not able to provide a full response to the question of what to do if there is no longer a question "Will there be an attack?", but there is the question "When will the attack happen?". Currently there is no consensus among countries and researchers on the practical application of the rules regulating the exercise of self-defence. Since international law cannot "stand still" and is "forced" to develop in order to respond to the topical issues, there is an increasing debate over the possibility of the use of force for pre-emptive self-defence based on strict criteria of the Carolyn case, in response to the inevitable military attacks. Following terrorist attacks in the United States on 11 September 2001, the general prohibition of war begins to be replaced by the doctrine of preventive war as a means of preventing international threats, based on the belief that threats must be answered, even if they are neither inevitable nor foreseeable at the time of action or in near future. The U.S. incorporated this concept into its 2002 National Security Strategy. Australia expressed its support of this strategy. Japanese, the United Kingdom and Russian officials also expressed their support for anticipatory self-defence. The number of the researchers who publicly support a retreat from the traditional narrowing interpretation and the number of positivists starting to recognise the possibility of using anticipatory self-defence in certain cases (e.g. A. Kaseze, R. Varks, S. Aleksandrov) is increasing.

One might think that the use of such unilateral force against another country, bypassing the UN Security Council, is the way to anarchy in international relations as it threatens the world order introduced by the UN Charter. However, supporters of anticipatory (pre-emptive and preventive) self-defence do not deny the need to comply with the requirement under the Article 51 of the UN Charter to notify immediately the Security Council of their use of the right to self-defence and to respect the powers and responsibilities of the Security Council for its decision to maintain or restore international peace and security. Simultaneously, the popularity of anticipatory self-defence is promoted by the inability of the UN Security Council in some cases to respond promptly to threats to peace or security, as well as concerns about the possible political nature and selectivity of its individual decisions. In February 2019, the Chairman of the Munich Security Conference, W. Ischinger, admitted that the idea of an international order based on common rules and an orderly global structure was currently poorly maintained, as the rivalry between the world's major powers is becoming more and more vivid[2]. In 2005, the UN Secretary-General also drew attention to the lack of consensus on when and how force can be used to protect international peace and security and stressed that in recent years there were significant disagreements on whether countries have the right to the anticipatory use of self-defence from imminent threats, and whether they have the right to preventive self-defence from potential or remote threats[3].

Thus, in the light of the shortcomings of the narrow interpretation proposed by the positivists and the diversity of views among researchers, the

[2] Minhenes drošības konferences vadītājs: Eiropai ir jāsagatavojas bruņošanās sacensībai. (Eng. Europe has to prepare for an armed race) 15.02.2019. TVNET/ DIENA. Iegūts no: https://www.diena.lv/raksts/pasaule/eiropa/minhenes-drosibas-konferences-vaditajs-eiropai-ir-jasagatavojas-brunosanas-sacensibai-14214467 [sk. 22. 05.2019.]

[3] Report of the Secretary-General. In larger freedom: towards development, security and human rights. 21.03.2005. General Assembly. A/59/2005, par. 122, 124. Available from: http://undocs.org/A/59/2005 [Accessed on 18.06.2016].

countries read Article 51 of the UN Charter differently and freely, which in turn poses a greater threat to the international peace and security than the current inevitable retreat from the traditional narrowing interpretation of Article 51 of the UN Charter. The author of the doctoral thesis discusses the issue of the use of force, taking into consideration the current objective realities and developments of international life and the diverse and contradictory views existing in scientific literature. The author clarifies the degree of the compliance of the anticipatory self-defence doctrine with the international law, which allows to provide an adequate assessment of it and to provide proposals for possible improvements of international regulation.

The relevance of the thesis is also justified by the fact that until now the issue of the Doctoral Thesis had not been widely reflected in national literature. In this study, researchers' views on legitimacy of the exercise of the anticipatory right of self-defence and certain cases of anticipatory self-defence used by the countries are examined between 1945 and September 2018, with a greater focus on the last twenty years.

In the light of the increase in the number of researchers and countries supporting the concept of anticipatory self-defence, the author predicts the creation of a UN Working Group to address this issue and find solutions, since the existence of the diverse approaches poses a greater threat to the international peace and security than the adoption of an interpretative document for the exercise of the right of self-defence. Since no country, including Latvia, exists separately and isolated from the rest of the world, the Thesis is of practical importance for the further analysis of countries' actions based on the use of anticipatory self-defence and for formulation of national position in this issue. To resolve the problems identified, the author proposes the UN General Assembly draft resolutions and makes proposals for the improvement of the national regulatory framework. This study may also help a reader to better

understanding of the nature of the preventive use of force, its positive and negative aspects.

Scientific Novelty of the Thesis

The novelty is reflected in both the gathering of differing views and proposals from many researchers, in-depth research and comprehensive analysis, considering the rivalry between the researchers of natural and legal positivism schools and in the assessment of differing national practices, which make it possible to give recommendations and provide legal justification appropriate for current circumstances. So far, the issue has been little studied in Latvia, without paying due attention to it.

The novelty is also reflected in the proposed solutions to the identified problems in the form of resolutions of the UN General Assembly, offering the projects that have not been carried out in Latvia until now.

Aim and Objectives of the Doctoral Thesis

The purpose of the Doctoral Thesis is to formulate the preconditions in which the country is entitled to use the forces for self-defence against another country, as well as to devise recommendations for further regulations identified, by studying and analysing the use of right to self-defence by a country from an armed attack of another country and the contradictory theory of the preventive war based on the use of that right. To achieve the aim, the following objectives have been identified:

1) to give an insight into the content of war as a social phenomenon and the use of the term of war in national regulation;

2) to clarify the nature of the legal framework for the principle of the use of force;

3) to examine historical development of the legal framework of the country's right of self-defence from another country's attack, by analysing its nature and practical application, as well as various and controversial views expressed in legal doctrines;

4) to explore historical development of preventive self-defence (preventive war) and pre-emptive self-defence (based on the exercise of the right of self-defence) by analysing their essence and practical applications;

5) to carry out a comparative overview of anticipatory self-defence (which includes preventive and pre-emptive self-defence) and aggression;

6) to provide solutions to the problems identified during the study, by formulating conditions for the lawful use of force and by proposing projects of the regulation.

The object of the thesis is the use of armed force for self-defence in international public relations between countries. **The subject** of the thesis is the international regulation used to justify the concept of a preventive war**.**

The research questions are:

1. In which situations is the concept of preventive war legal in relations among countries?

2. What are the preconditions for the legal use of force for self-defence nowadays?

The methodology used contains general methods of scientific research (historical, analytical, comparative, inductive and deductive methods) and methods of interpretation of the law (grammatical (philological), historical, systemic and teleological (meaning and purpose) methods).

The historical method is used to reveal historical dynamics of the development of the issue. The literature on the matter, containing analysis of its historical development, has been studied.

The analytical method was used to study the legal nature and application of the practices of the use of force for self-defence and the associated

preventive war. The analytical method serves as the base of the conclusions, evaluations and expressed proposals.

The comparative method was used to study different and contradictory scientific views and national practices. Based on their comparison and critical analysis, compromise solutions were proposed in line with the aim of the study.

The inductive and deductive method was used to study the nature of the processes at all levels of scientific research and to sequentially direct the research to achieve its aim. In the process of using the inductive method, both possible models of situations and specific cases of anticipatory self-defence, their evaluation by the international community and the researchers were assessed. Based on the compilation, general opinions on preconditions for the use of force for self-defence have been made. In the process of using the deductive method, individual conclusions were made from generalisations and theoretical findings.

In the analysis of Article 51 of the UN Charter, methods of the interpretation of legal norms, such as grammatical, historical, teleological and systemic methods, were also used. The grammatical method clarified the meaning of Article 51 from a linguistic point of view, in terms of its authentic English, French and Russian versions, and in the light of its translation into Latvian. The historical method clarified the objectives of the authors of the UN Charter which they wanted to achieve during the drafting process.

The role of customary law in the exercise of the right of self-defence by the country has been assessed. Through a systemic method the essence of the right to self-defence embodied in Article 51 was clarified in relation to the rules of customary law and the general prohibition of the threat or the use of force embodied in the par. 4 of the Article 2. On the other hand, with the use of the teleological (meaning and purpose) interpretation method, the meaning of the norm based on a useful and fair purpose (the existence of the country), which

must be achieved by Article 51, was clarified. In the light of the objectives of this article, proposals are made to solve the problems identified.

Overview of Literature and Legal Sources

Studies on the issue of the Doctoral Thesis have so far not been widely reflected in the publications of contemporary Latvian researchers. The issues related have been discussed in the articles published by Professor I. Ziemele[4] and M. Lejnieks, E. Broks and I. Tralmaka[5] in the journal "Jurista vārds". The interpretation of the content of Article 51 of the UN Charter was discussed by Professor J. Bojars in his book[6].

The Doctoral Thesis is based on the works of foreign researchers such as P. Jessup, I. Brownlie, Y. Dinstein, E. David, R. Kolb, B. Simma, A. Randelzhofer, A. Cassese, C. Tomuschat, C. Gray, M. Shaw, N. Lubell, O. Schachter, J. Green, M. Newton, M. Ndulo, C. Greenwood, S. Murphy, M. Glennon, J. Kammerhofer, S. Alexandrov, J. Ohlin, M. Alder, P. Malanczuk, D. Murswiek, M. McDougal, K. Mueller, A. Sofaer, W. Taft, A. Arend, M. Bydoon and G. Al-Own, R. Vayrynen and others.

For the construct of the Doctoral Thesis the following sources were used: the UN Charter, Conventions, the Security Council and the General Assembly resolutions, reports of the UN Secretary-General and special working groups, judgments and advisory opinions of the International Court of Justice,

[4] Ziemele, I. 01.04.2003. Irākas krīze. Vai izaicinājums starptautiski tiesiskajai kārtībai (Eng. Iraqi crises. Is it a challenge to the international legal order). *Jurista vārds*, No 13 (271). Available from: https://www.juristavards.lv/arhivs.php [Accessed on 10.07.2018].
[5] Lejnieks, M., Broks, E. and Tralmaka, I. 11.03.2014. Krievijas iebrukums Ukrainā: starptautisko tiesību aspekti (Eng. Russian invasion of Ukraine: aspects of international law). *Jurista vārds*, No 10 (812). Available from: https://www.juristavards.lv/arhivs.php [Accessed on 10.07.2018].
[6] Bojārs, J. 2007. *Starptautiskās publiskās tiesības* III (Eng. International Public Law). Rīga: Zvaigzne ABC, 140–145.

the Treaty on European Union (Lisbon Treaty), US policy planning documents, as well as national policy planning documents and legislative acts.

Approbation and results are provided in scientific publications, as well as in conferences.

Presentations in the international scientific conferences:

1. Upeniece V. 26–28.11.2014. "War and society", *5th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE*. Riga: Rīga Stradiņš University.

2. Upeniece V. 25.03.2015. "Measures of prevention of threat to the peace", *International Student Conference "Health and Social Sciences"* 2015. Riga: Rīga Stradiņš University.

3. Upeniece V. 2015.gada 3–5.09.2015. "Pre-emptive and preventive self-defence", *Critical Legal Conference 2015* "Law, Space and the Political". Wroclaw: University of Wroclaw.

4. Upeniece V. 11.12.2015. "Preventīvā kara nošķiršana no agresijas: tiesiskās problēmas" (Eng. Separating Preventive War from Aggression: legal issues), *4th International Scientific and Practical Conference "Transformational Processes in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues"*. Riga: Baltic International Academy.

5. Upeniece V. 22.04.2016. "Anticipatory War and UN Charter Article 51", International scientific conference "*25 Years of renewed Latvia, Lithuania and Estonia: Experience of the Baltic States in Europe".* Riga: Latvian Academy of Science Baltic Centre for Strategic Studies.

6. Upeniece V. 23–25.11.2016. "Conditions for the Lawful Exercise of the Right of Self-defence in International Law", *6th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE*. Riga: Rīga Stradiņš University.

7. Upeniece V. 6–7.04.2017. “Legal framework of the use of armed force in international law”, *59th International Scientific Conference of Daugavpils University.* Daugavpils: Daugavpils University.

8. Upeniece V. 8.12.2017. “Valstu tiesību uz pašaizsardzību robežas starptautiskajās tiesībās” (Eng. Limits of national rights to self-defence in international law), *6th International Scientific and Practical Conference “Transformational Processes in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues”*. Riga: Baltic International Academy.

9. Upeniece V. 10–12.10.2018. “Legal commencement of an armed attack”, *7th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE*. Riga: Rīga Stradiņš University.

10. Upeniece V. 7.12.2018. “Valsts pašaizsardzības tiesību izmantošanas ilgums” (Eng. Duration of national self-defence rights), *7th International Scientific and Practical Conference “Transformational Processes in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues”.* Riga: Baltic International Academy.

International scientific publications:

1. Upeniece V. 2016. War and society. In: *5th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE. Conference Proceedings*. Parc d'activités de Courtabœuf: EDP Sciences (included in the database: SHS Web of Conferences 30), 00009, 1–5. Available from: https://www.shs-conferences.org/articles/shsconf/abs/2016/09/shsconf_shw2016_00009/shsconf_shw2016_00009.html

2. Upeniece V. 2016. Preventīva kara nošķiršana no agresijas: tiesiskās problēmas (Eng. Separating Preventive War from Aggression: legal issues). In: *“The Transformation process of Law, the regional economy and economic policies: the relevant economic and political and legal issues. 4th International Scientific and Practical Conference proceedings*, 258–263. Riga: Baltic

International Academy. ISBN 978-9984-47-108-2. Available at: http://bsa.edu.lv/docs/konf11122015.pdf

3. Upeniece V. 2016. Anticipatory War and the UN Charter Article 51. In: *Twenty-five years of Renewed Latvia, Lithuania, and Estonia: Experience of the Baltic States in Europe.* Materials of International Scientific Conference, 163–170. Riga: Latvian Academy of Sciences Baltic Centre for Strategic Studies, ISBN 978-9934-8515-4-4.

4. Upeniece V. 2017. Legal framework of the use of force in international law. In: *Proceedings of the 59th International Scientific Conference of Daugavpils University, Part B. Social Sciences,* 106–113. Daugavpils: Daugavpils University, (included in the database: EBSCOhost). ISSN 2500-9842, ISSN 2500-9869, ISBN 978-9984-14-833-5. In: https://dukonference.lv/files/proceedings_of_conf/978-9984-14-833-5_59_konf_kraj_B_Soc%20zin.pdf

5. Upeniece V. 2017. Nacionālās pašaizsardzības robežas starptautiskajās tiesībās (Eng. Limits of national self-defence in international law). In: *6th International Scientific Conference Transformational Processes in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues proceedings,* 362–368. Riga: Baltic International Academy. ISBN 978-9984-47-155-6. In: http://bsa.edu.lv/docs/2017/sbornik08122017.pdf

6. Upeniece V. 2018. Conditions for the lawful exercise of the right of self-defence in international law. In: *6th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE. Conference Proceedings*. Parc d'activités de Courtabœuf: EDP Sciences (included in the database: SHS Web of Conferences 40), 01008, 1–7. Available from: https://www.shs-conferences.org/articles/shsconf/abs/2018/01/shsconf_shw2018_01008/shsconf_shw2018_01008.html.

7. Upeniece V. 2019. Valsts pašaizsardzības tiesību izmantošanas ilgums (Eng. Limits of national rights to self-defence in international law). In: *7th International Scientific Conference Transformational Processes in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues proceedings,* 365–369. Riga: Baltic International Academy, ISBN 978-9984-47-162-4. In: http://bsa. edu.lv /docs /2018/konf07122018.pdf

8. Upeniece V. Conditions for the legal commencement of an armed attack, in July 2019 submitted to publication in the *6th International Interdisciplinary Scientific Conference SOCIETY. HEALTH. WELFARE. Conference Proceedings*. Parc d'activités de Courtabœuf: EDP Sciences (will be included in the database: SHS Web of Conferences), 1–7.

International scientific theses:

1. Upeniece V. 2015. Pre-emptive and preventive self-defence. In: Critical Legal Conference 2015 "Law, Space and the Political" book of streams and abstracts. Wroclaw: University of Wroclaw, 51.

2. Upeniece V. 2015. Measures of prevention of the threat to the peace. In: International Student Conference "Health and Social Sciences" 2015 Abstracts of Social Sciences. Riga: Rīga Stradiņš University, 31–33. In: https://isc.rsu.lv/uploads/past-conf/2015/social-abstracts-2015.pdf (ISBN 978-9934-8516-3-6).

Some conclusions were approbated by the author: in the framework of the lecture course "International Humanitarian Law" and its seminars delivered to the students of the 3rd year of Rīga Stradiņš University in academic year 2015/2016, by reading the lecture "The State Sytem and Institutions of the Republic of Latvia" to the Instructors' School of the National Armed Forces on 12 May 2015; by reviewing Master Thesis prepared under the Master study programme "Social Sciences in Law" of the Faculty of Law of Rīga Stradiņš University and by supervising Bachelor and Master theses.

The author of the Doctoral Thesis participated in the seminar “How to publish in high-impact reviewed scientific publications?” on 15 April 2016 at Rīga Stradiņš University. From October 26 to November 3, 2016, the author attended lectures and participated in seminars at the Baltic Defence College in Tartu (Estonia) within the framework of the International Law Course.

1 CONCEPT OF WAR AND CURRENT NATIONAL REGULATION

In ancient Greece and Rome, the war was considered as a natural fact of life – regrettable, but inevitable. Historically, war was explained by an increase in selfishness of society and individuals[7]. The author assessed the understanding of the content of the concept of war in Greece and Rome (looking at works of Aristotle and Cicero) and the development of it proposed by scientists up to the 17th century (looking at the works of Augustine, Thomas Aquinas, F. de Vitoria and F. Suarez). The author notes that their works formed the bases for the development of conditions for the use of force, such as proportionality and the requirement to settle the dispute from the outset by peaceful means.

In the 20th century, the Nuremberg Tribunal pointed out that war was violence committed by one state or political organisation against another, namely, war was the pursuit of politics through violence, because wars are disputes related to the use of force among political entities, but people create policies that lead to wars. Thus, it follows from the conclusions of the Tribunal that the legal or illegal nature of war depends on the factors which led to its commencement, namely the intention and the purpose[8].

When assessing the use of the concept of "war" in national laws, regulations and policy planning documents, it has been concluded that Article 22 of the National Security Law[9] provides a definition of the concept of

[7] Regan, R. J. 2013, *Just War Principles and Cases*. The Catholic University of American Press, second edition, 3.

[8] Historical Review of Developments relating to Aggression. 2003. New York: United Nations publication, 85–86. Available from: http://legal.un.org/cod/books/HistoricalReview-Aggression.pdf [Accessed on 12.03.2016].

[9] 29.12.2000. Nacionālās drošības likums: Latvijas Republikas likums (Eng. National Security Law: Law of the Republic of Latvia). *Latvijas Vēstnesis,* No 473/476.

"wartime", namely a time of war sets in when an external enemy has performed military aggression or has turned against the State independence, its constructional structure, or territorial integrity in some other manner.

Although the National Security Concept[10] and the National Defence Concept[11] focus on collective defence of the country, national legislation regulates activities in the case of individual protection, except for Article 8 par. 1 Clause 7 of the National Security Law, which determines the procedure for requesting NATO collective defence support in case of a military attack. National regulation and policy planning documents do not mention the possibility of addressing the UN Security Council in the event of a threat to the national security, which, however, does not prevent Latvia from addressing the UN, if necessary.

According to Article 43 of the Constitution of the Republic of Latvia, the President shall declare war based on a decision of the Saeima[12]. When analysing the constitution of Denmark, Lithuania and Estonia, it was concluded that they do not contain a clear reference to the declaration of war. However, it is arguable that this reference is an illegitimate regulation not complying with international conventions, in particular the 1928 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand pact)[13]. There is also a debatable view on the need to amend Article 43 of the

[10] 27.11.2015. Par Nacionālās drošības koncepcijas apstiprināšanu: Latvijas Republikas Saeimas paziņojums (Eng. On Approval of the National Security Concept: Statement by the Saeima of the Republic of Latvia). *Latvijas Vēstnesis,* No 233.

[11] 17.06.2016. Par Valsts aizsardzības koncepcijas apstiprināšanu: Latvijas Republikas Saeimas paziņojums (Eng. On Approval of the State Security Concept: Statement by the Saeima of the Republic of Latvia). *Latvijas Vēstnesis*, No 117.

[12] 01.07.1993. Latvijas Republikas Satversme: Latvijas Republikas likums, pieņemta Satversmes sapulcē 1992.gada 15. februārī un stājas spēkā 1992. gada 7. novembrī (Eng. Constitution of the Republic of Latvia: Law of the Republic of Latvia, adopted at the Constitutional Assembly on 15 February 1992, in force from November 7 1992). *Latvijas Vēstnesis,* No 43.

[13] Saeimas darba grupas Valsts prezidenta pilnvaru iespējamai paplašināšanai un ievēlēšanas kārtības izvērtēšanai 2016.gada 23. februāra sēdes videoieraksts. Latvijas

Constitution of the Republic of Latvia by including the explanatory notes on the scope of the used term[14]. The author draws attention to the fact that the Hague Convention (III) on the Opening of Hostilities of 1907[15] remains in force and binding on Latvia in the form of customary law[16]. According to the Preamble of the Kellogg-Briand Pact, if the Contracting Party seeks to promote its national interests by resort to a war, it will be denied the benefits furnished by this Treaty[17]. Thus, the commencement of hostilities against the Contracting Party which started the war is lawful and the war of self-defence is not prohibited by the above-mentioned Treaties[18]. It is not necessary to amend Article 43 of the Constitution of the Republic of Latvia by explaining its content.

Moreover, the existing demand for previous warning of commencement of war can be judged positively, because it enables a victim of an aggression to

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Republikas Saeima (Eng. 23 February 2016 video recording of the working group of Saeima on the possible extension of the President's mandate and evaluation of the election procedure). Available from: http://cdn.tiesraides.lv/saeima.lv/2016022318 0603_saeima.lv.3_1 [Accessed on 28.02.2016].

[14] Ar priekšlikumiem grozīt Valsts prezidenta pilnvaras un ievēlēšanas kārtību noslēdz darba grupas diskusijas (Eng. Proposals to amend the powers of the President and the order of election conclude the discussions of the working group). 23.05.2017. *Jurista vārds*, No 22 (976), sub-paragraph of the proposal 7.3.1. Available from: https://www.juristavards.lv/arhivs.php [Accessed on 12.08.2018].

[15] 18.10.1907. Convention (III) relative to the Opening of Hostilities: international agreement. Available from: https://ihl-databases.icrc.org/ihl/INTRO/190?Open Document [Accessed on 15.03.2016].

[16] Upeniece, V. 2016. Anticipatory war and UN Charter Article 51. Riga: Latvian Academy of Sciences Baltic Centre for Strategic Studies, 167–168.

[17] 27.08.1928. Renunciation of war as an instrument of national policy: international agreement. Available from: http://avalon.law.yale.edu/20th_century/kbpact.asp [Accessed on 15.03.2016].

[18] Upeniece, V. 2016. Anticipatory war and UN Charter Article 51. Riga: Latvian Academy of Sciences Baltic Centre for Strategic Studies, 167–168.; Upeniece, V. 2018. Conditions for the lawful exercise of the right of self-defence in international law. 6th International Interdisciplinary Scientific Conference "Society. Health. Welfare.". Parc d'activités de Courtabœuf: EDP Sciences (SHS Web of Conferences 30), 01008, 1. Available from: https://www.shs-conferences.org/articles/shsconf/pdf/2018/01/shsconf_ shw2018_01008.pdf [Accessed on 14.08.2018].

get ready and reduce the negative effect of an aggression. Simultaneously, for the victim of aggression declaration of war does not give any benefit, because the aggressor already knows that it is in the state of war with the victim[19].

However, in view of the minor importance of the proclamation of a war in case of self-defence, if the issue of the exclusion of the declaration of war from national regulation is repeatedly raised, the author proposes editorial changes of the Constitution of the Republic of Latvia, the National Security Law, the Cabinet Structure Law, and the Law on military courts (see proposed amendments in the Summary of National Regulations par. 2).

The Saeima Legal Commission has also recognised the outdated wording of Article 44 of the Constitution of the Republic of Latvia regarding the possibility of taking steps of military defence, "if any other country has declared war on Latvia or the enemy attacks the borders of Latvia", considering the spread of different forms of the hybrid war. However, in the author's opinion, the new article will not cover all elements of hybrid war mentioned by the Committee on Legal Affairs (propaganda, division of society, promotion of social inequality), since the use of military force will not be a proportionate response to such hybrid warfare elements which are not related to military activities or damage to critical infrastructure.

In general, according to the provisions of the National Security Act, the declaration of war and the use of an armed force is possible for the self-defence of the country and that the regulation sets out detailed actions in the case when the country has suffered from an armed attack. Simultaneously, according to Article 22 par. 6 of the National Security Law, the period of war shall take place if "… the external enemy … has turned against the State independence, its constructional structure, or territorial integrity in some other manner". This wording does not limit the decision to use war-appropriate actions only in a

[19] Давид, Э. 2011. *Принципы права вооружённых конфликтов* (Eng. Principles of Law of Armed Conflict). Moscow: МКК, 119–120.

situation of suffering from an actual military attack, since the words "in some other manner" can be referred to another situation.

According to Article 11 par. 1 of the Law On Emergency Situation and State of Exception, the state of exception is a special legal regime to be declared if the state is endangered by an external enemy or if internal disturbances which endanger the democratic structure of the state have arisen or are in danger of arising in the State or any part thereof[20]. According to Article 3 of the Mobilisation law, only the partial mobilisation can be announced in the exceptional state. The general mobilisation shall be announced in case of a war[21]. However, if the "state is endangered by an external enemy", it may be necessary to consider in time the possibility of announcing a general mobilisation, which is currently limited by the legal framework described above. Therefore, it has been proposed to make the relevant amendment to the Mobilisation Law (see proposed amendment in the Summary of National Regulations par. 3).

Evaluating national regulations and political planning documents, membership in NATO is currently rightly selected as an important security guarantor. However, in the light of the increasing tendency among researchers and some countries to support the wide interpretation of Article 51 of the UN Charter, amendments to national laws that unambiguously emphasise the narrow literal interpretation of Article 51 of the UN Charter are not recommended in the future.

In analysing the regulation of the use of armed force at national level, the author does not identify its non-compliance with the current international framework, which is examined in the following chapters.

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[20] 27.03.2013. Likums „Par ārkārtējo situāciju un izņēmuma stāvokli": Latvijas Republikas likums (Eng. Law "On Emergency and Exceptional Situation": Law of the Republic of Latvia). *Latvijas Vēstnesis*, No 61, Article 4, par. 2).

[21] 18.06.2002. Mobilizācijas likums: Latvijas Republikas likums (Eng. Mobilisation Law: Law of the Republic of Latvia). *Latvijas Vēstnesis,* No 91, Article 3.

2 REGULATION OF THE USE OF THE FORCE

During the 1899 and 1907 Hague Peace Conferences, the first serious transnational attempts to limit war took place. According to the Hague Convention III on the Opening of Hostilities (1907), hostilities should not commence without previous warning[22]. The regulation of the Hague Convention (III) only seemingly comes in conflict with the above-mentioned Article 2 (4) of the Charter of the United Nations, which prohibits the threat or use of force[23]. However, The International Military Tribunal at Nuremberg concluded that the Hague Conventions of 1907 had hardened into customary law[24].

Regarding aggressive war, the Nuremberg Tribunal referred to the Kellogg-Briand Pact, stressing that a country can use an armed force to defend itself from aggression and be armed for this purpose. Because the world has not come to such development of civilization that it would be safe to ban war in all circumstances and situations[25].

The UN Charter was signed on 26 June 1945 at the San Francisco Conference; it also included a ban on the use of force. Since its adoption, any use of force may be legitimate only if it is based on the purposes or exceptions of the UN Statute, such as:

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[22] 18.10.1907. Convention (III) relative to the Opening of Hostilities: international agreement. Available from: https://ihl-databases.icrc.org/ihl/INTRO/ 190?Open Document [Accessed on 15.03.2016].

[23] Upeniece, V. 2016. Anticipatory war and UN Charter Article 51. Riga: Latvian Academy of Sciences Baltic Centre for Strategic Studies, 168.

[24] 01.10.1946. International Military Tribunal at Nuremberg, Case of the Major War Criminals, Official Documents, Vollume I, Nuremberg, Germany, 1947, p.253–254. Available from: https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [Accessed on 15.03.2016].

[25] Historical Review of Developments relating to Aggression. 2003. New York: United Nations publication, 87–88. Available from: http://legal.un.org/cod/books/Historical Review-Aggression.pdf [Accessed on 12.03.2016].

1) the Security Council may authorise collective security operations (Article 39);

2) the second exception provides Member states the right to self–defence against an armed attack (Article 51);

3) the third exception is obsolete and is no longer applicable nowadays (Articles 53 and 107)[26].

It should be noted that effectiveness of the functioning of the Security Council affects the interpretation of Article 51 of the UN Charter. This issue is discussed in the following section.

2.1 Actions of the UN Security Council in the Field of Collective Security

The UN was set up as a global collective security organisation to stop aggression through coordinated action of Member States. The Security Council was endowed with primary responsibility for international security, and a secondary role was given to the General Assembly with its general mandate to discuss and adopt the recommendations[27]. Nowadays, however, the Security Council implements not only the executive power, but also the legislative and judicial power[28]. Nevertheless, the post-war period revealed that such sharing of power between the Security Council and the General Assembly is ineffective in the situation of the East-West conflict and sudden increase of the number of Member States. Therefore, the General Assembly began to play a leading role

[26] Kolb, R. 2010. *An Introduction to the Law of the United Nations*. Oregon: Oxford and Portland, 64.
[27] Simma, B. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I. New York: Oxford University Press, 443–444.
[28] Bydoon, M. and Al-Own, G. M. S. 2017. The Legality of the Security Council Powers Expansion. International Journal of Humanities and Social Science, ISSN 2221-0989, Volume 7, No 4, 220. Available from: https://www.ijhssnet.com/journals/Vol_7_No_4_April_2017/24.pdf [Accessed on 03.02.2018].

in deciding upon problems of maintenance of peace and security[29] by adoption of the resolution 377A "Uniting for Peace" in 1950 according to which, in case of absence of consensus between five permanent members of the Security Council when it fails in exercising its primary responsibility, the General Assembly considers the issue immediately[30]. So far as the takeover, the power of the Security Council would be contrary to the Charter of the United Nations, such action of the General Assembly was explained by the will to draw attention that, in case of necessity, the General Assembly could recommend the Member States to take collective measures including the use of force[31]. This unsuccessful attempt can mean a certain stabilisation of the role of distribution of the roles between the General Assembly and the Security Council, or only a peaceful period in the existence of both institutions, which may be changed considering the dynamic development of the organisation, remains an open question[32].

The author notes that Kosovo crisis of 1999 is one of the situations that could be successfully resolved if the Security Council took appropriate decisions in time. The events in the Crimea and Sevastopol between March 1 to March 21, 2014 proved the existence of a well-planned military-political operation and successful use of the instability of the Ukrainian domestic political situation[33]. This operation was not condemned by the Security

[29] Simma, B. 2002. *The Charter of the United Nations.* A commentary. Second edition. Volume I. New York: Oxford University Press, 444.
[30] 03.11.1950. The General Assembly resolution 377A. The "Uniting for Peace" resolution. Available from: http://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf [Accessed on 01.02.2017].
[31] Tomuschat, C. 2011. United for Peace. United Nations Audiovisual Library of International Law. Available from: http://legal.un.org/avl/ha/ufp/ufp.html [Accessed on 01.02.2017].
[32] Simma, B. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I. New York: Oxford University Press, 444–445.
[33] Lakimenko, I. and Pachkov, M. 2014. Le conflit Ukraino-Russe vu de Kiev (Eng. The Ukrainian-Russian conflict observed from Kiev). *I.F.R.I./Politique etranger*, 2, Eté, 85.

Council. Therefore, on March 27 2014 the General Assembly adopted the resolution 68/262[34], in which the Assembly affirmed unity and territorial integrity of Ukraine within its internationally recognised borders and called upon all the states, international organisations and specialised agencies not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the referendum[35]. The Security Council adopted two resolutions[36], concerning the conflict in Ukraine, which have not affected the situation in a clearly positive direction.

Undoubtedly, if the UN is not at its height, Member States and the system of international law and institutions are responsible for such situation[37]. However, it is worth mentioning a realistic assessment of the situation, according to which the Charter of the United Nations' peace-building mechanism, thanks to the Russian, US, British, French and Chinese veto rights in the Security Council, can only operate in practice on rare occasions when these countries are not involved in the conflict or their interests are not connected with it[38]. Although according to Article 24 of the Charter of the

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Available from: http://www.cairn.info/revue-politique-etragere-2014-2-page-81.htm [Accessed on 21.02.2016].

[34] Backing Ukraine's territorial integrity, UN Assembly declares Crimea referendum invalid. 24.03.2014. *UN News.* Available from: https://news.un.org/en/story/2014/03/464812-backing-ukraines-territorial-integrity-un-assembly-declares-crimea-referendum [Accessed on 20.02.2016].

[35] 27.03.2014. The General Assembly resolution A/RES/68/262. Territorial integrity of Ukraine. Available from: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262 [Accessed on 20.02.2016].

[36] UN Documents for Ukraine: Security Council Resolutions. Available from: http://www.securitycouncilreport.org/un-documents/search.php?IncludeBlogs=10&limit=15&tag="Security Council Resolutions"+AND+"Ukraine"&ctype=Ukraine&rtype=Security Council Resolutions&cbtype=Ukraine [Accessed on 20.09.2018].

[37] Ziemele, I. 01.04.2003. Irākas krīze. Vai izaicinājums starptautiski tiesiskai kārtībai (Eng. Iraqi crises. Is it a challenge to the international legal order). *Jurista Vārds*, No 13 (271). Available from: https://www.juristavards.lv/arhivs.php [Accessed on 10.07.2018].

[38] Lejnieks, M., Broks, E. and Tralmaka, I. 11.03.2014. Krievijas iebrukums Ukrainā: starptautisko tiesību aspekti (Eng. Russian invasion of Ukraine: aspects of international

United Nations, in fulfilment of its duties the Security Council has to act in accordance with the purposes and principles of the United Nations; there is always a risk that decisions will be based on the power and political aspects, revealing different interests, calculations and justifications that are compatible with internal interests and desire to raise national power, influence and prestige[39]. G. Reire, in her Doctoral Thesis "The role of the United Nations in the maintenance of international peace and security", has also concluded that the Security Council's capacity to act is as high as allowed by the permanent Member States[40]. In turn, S. Alexandrov rightly emphasised that the limits of interpretation of Article 51 are and will be proportional to the ability of the Security Council to address effectively the situations within its competence[41].

Thus, the more often the situations which the Security Council will not be able to deal with in time and successfully recur, the more relevant will be the use of force for self-defence embodied in Article 51 and variety of its interpretations.

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law). *Jurista Vārds*, No 10 (812). Available from: https://www.juristavards.lv/arhivs.php [Accessed on 10.07.2018].

[39] Upeniece, V. 2017. Legal framework of the use of force in international law. Proceedings of the 59th International Scientific Conference of Daugavpils University. Part B. Social sciences. Daugavpils University: Akadēmiskais apgāds "Saule", 111–112. Available from: https://dukonference.lv/files/proceedings_of_conf/978-9984-14-833-5_59_konf_kraj_B_Soc%20zin.pdf [Accessed on 14.08.2018].

[40] Reire, G., 2010. *Apvienoto Nāciju Organizācijas nozīme starptautiskā miera un drošības uzturēšanā* (Eng. The role of the United Nations in the maintenance of international peace and security). Doctoral Thesis for obtaining doctoral degree in political sciences in sub-group of international politics. University of Latvia, Faculty of Social Sciences, Department of Political Sciences, 274. Available from: https://dspace.lu.lv/dspace/handle/7/5073 [Accessed on 14.08.2018].

[41] Alexandrov, S. A. 1996. *Self-Defense Against the Use of Force in International Law*. The Hague/London/Boston: Kluwer Law International, 295–296.

2.2 Regulation of Self-Defence in the Charter of the United Nations

The authors of the UN Charter hoped that the Security Council and other relevant UN bodies would prevent individual use of force, remaining realistic enough to recognise that such an objective might not be achieved. Therefore, the Statute includes the right to self-defence[42].

For the norm to fulfil its mission effectively, the exception must be clearly defined (*exceptiones sunt strictissimae interpretationis*). B. Simma noted that Article 51 is not designed to allow room for exceptions from the prohibition and is created to make the prohibition incontestable[43]. Despite such conviction, the debate on the content of Article 51 does not stop for a moment.

There is an opinion that the term "armed attack" used in Article 51 of the UN Charter is narrower than the term "the threat or use of force" in Article 2 (4) and therefore not all the violations of Article 2 (4) must be treated as an armed attack[44]. The International Court of Justice in the case *Nicaragua vs. United States* emphasised the necessity to distinguish the gravest forms of the use of force (those constituting an armed attack) from the less grave forms[45]. The Court also explained the meaning of the "armed attack" as "the most grave

[42] Schachter, O. 1986. In Defense of International Rules on the Use of Force. *The University of Chicago Law Review*, ISSN 1939-859X, Volume 53:113, 126. Available from: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.lv/&httpsredir=1&article=4447&context=uclrev [Accessed on 18.07.2018].

[43] Simma, B. 1999. NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law*, ISSN: 1464–3596, Volume 10, Issue 1, 1–22. Available from: http://www.ejil.org/pdfs/10/1/567.pdf [Accessed on 15.07.2017].

[44] Randelzhofer, A. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I., edited by Simmma, B., New York: Oxford University Press, 796.

[45] 27.06.1986. Judgement of the International Court of Justice: "Case concerning military and paramilitary activities in and against Nicaragua" Nicaragua vs. United States of America, par. 191. Available from: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed on 09.08.2017].

form of the use of force"[46] without going deeper into details and explanations of the meaning of the words "grave form of the use of force". Some scholars base their opinion on the above-mentioned Court's decisions, and state that an armed attack constitutes the force which is used in a large scale and with essential effect[47].

However, since the UN Charter does not contain any regulation on the thresholds of the aggressor's use of force, the use of the right to self-defence should not primary depend on the severity of the force used by the offender and the definition of hypothetical thresholds. It should be based on the belief that the use of force by the offender as an unlawful act already creates the right of self-defence. Likewise, the severity of the armed action of the offender state should affect the nature and extent of self-defence activities applied within the framework of the principle of proportionality[48]. Similar views are expressed by: C. Greenwood, who notes that there is no clear textual reason in the Charter of the United Nations to exclude such attacks which are armed attacks but are below the threshold of the courts' specified violence intensity[49]; Y. Dinstein, who notes that if the concept of "armed attack" means that armed attack is not legal, then any armed attack, even a small border incident, is illegal[50]; M. Shaw, who mentions that an attack can take place in different dimensions, considering current political and psychological conditions. The incident which in one

[46] *Ibid.*

[47] Randelzhofer, A. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I., edited by Simmma, B., New York: Oxford University Press, 796.

[48] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

[49] Greenwood, C. 2011. Self-Defence. Max Planck Encyclopedia of Public International Law, Oxford Public International Law. Available from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL [Accessed on 15.07.2017].

[50] Dinstein, Y., 2005, *War, Aggression and Self-Defence*. New York: Cambridge University Press, Fourth edition, 195.

context may seem relatively insignificant, may gain considerable significance in the other, creating the need to respond with the use of force in self-defence[51]; W. Taft, who pays attention to the requirement that an attack reaches a certain level of gravity prior to the use of force in self-defence can make the use of force more frequent, because it can encourage the aggressor to engage in small scale military attacks with the hope that these actions will not become the subject to the response for self-defence[52]; and others (H. Koh, J. Paust, J. Hargrove, G. Fitzmaurice).

Multiple interpretations of the regulation of the right to self-defence point to shortcomings in the UN Charter. Supporters of legal positivism allow the use of force for self-defence only if the country has already suffered from an armed attack. Supporters of a broader interpretation of the UN Charter believe that the UN Charter does not prohibit self-defence in the case of imminent and overwhelming threats, because based on the conviction that it is better to attack the first than to expect an enemy attack, the country can turn the outcome of the conflict to its own advantage by maintaining its defence capabilities and saving its citizens. In the following chapter, the author reviews the various and controversial views expressed in legal doctrines about a country's right to start a preventive war.

[51]Wilmshurst, E. 2005. Principles of International Law on the use of force by states in self-defence. ILP WP 05/01. Independent Royal Institute of international Affairs: Chatham House, 18. Available from: https://www.chathamhouse.org/publications/papers/view/108106 [Accessed on 02.03.2017].

[52] Taft, W. H. IV. 2004. Self-Defence and the Oil Platforms Decision. *Yale Journal of International Law*, *ISSN*: 0889-7743, Volume 29, Issue 2, Article 3, 295, 300. Available from: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article= 1232&context =yjil [Accesseed on 21.07.2017].

3 PROBLEMS OF THE CONCEPT OF PREVENTIVE SELF-DEFENCE

As mentioned above, preventive and pre-emptive war issue is directly related to the exercise of the right to self-defence. In 1981, the Israeli bombardment of a nuclear reactor in Iraq is a clear example of the use of preventive self-defence, which was condemned by the Security Council. However, this condemnation was not based on a clear and unanimous condemnation of anticipatory self-defence[53], as the US, after the vote, mentioned that it agreed with Israel's understanding of the self-defence concept, but considers that Israel did not use other peaceful means to resolve the conflict. The United Kingdom, on the other hand, stated that there was no immediate need for self-defence[54] (i.e. referred to the Caroline criteria). This case, in the author's opinion, underlined the extended understanding of the content of Article 51 by the US and the United Kingdom, which these countries did not yet dare to use openly in their practise at the time.

Legal positivists, by citing Articles 53 and 64 of the Vienna convention on the Law of Treaties of 1969[55], emphasise that Article 2 (4) of the Charter is a part of *jus cogens*, it means that it is accepted and recognised by the international community of states as a norm from which no derogation is permitted and which can be modified only by the subsequent norm of the

[53] Malanczuk, P. 1983. Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International law Commission's Draft Articles on State Responsibility. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *ZaöRV* 43/4, 764. Available from: http://www.zaoerv.de/431983/43198 34a70812.pdf [Accesed on 20.02.2017].

[54] Cassese, A. 2005. *International Law*. Second Edition. New York: Oxford University press, 360–361.

[55] 03.04.2003. Vīnes konvencija par starptautisko līgumu tiesībām: starptautisks dokuments (Eng. The Vienna Convention on the Law of Treaties: international document). *Latvijas Vēstnesis,* No 52.

general international law having the same peremptory character. It also means that the previously existed customary international law of self-defence must not be taken into account[56].

The other researchers state that the purpose of the Charter incorporated in the Article 2 (4) involves not only the rejection of the use of force, but also contains the rejection of the threat to territorial integrity or political independence of any state in international relations, which should be considered. Therefore, the use of force first to disarm an established aggressor, without transforming its territory, or without depriving this state of its sovereign status, is an upshot which is consistent with the purposes of the United Nations[57].

The link between the right to self-defence and natural law was described by the US Secretary of State F. Kellogg on April 28, 1928, in the American Society of International Law. He explained the absence of reference to the term of self-defence in the Kellogg-Briand Pact by stating that this "right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from an attack or invasion and it alone is competent to decide whether circumstances require recourse to war ill self-defence … no treaty provision can add to the natural right of self-defence …"[58]. The statement justifies the extended understanding of the right to self-defence shortly before the adoption of the UN Statute, where legal positivists are traditionally not convinced.

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[56] In Simma, B. 1999. NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law*, ISSN: 1464–3596, Volume 10, Issue 1, 2–3. Available from: http://www.ejil.org/pdfs/10/1/567.pdf [Accessed on 15.07.2017].

[57] Sofaer, A. D. 2003. On the Necessity of Pre-emption. *European Journal of International Law*, ISSN: 1464–3596, Volume 14, No.2, 209–226. Available from: http://ejil.org/pdfs/14/2/411.pdf [Accessed on 03.08.2017].

[58] International Law Commission. 15.12.1948. UN Doc A/CN.4/2. Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States. Memorandum Submitt ed by the Secretary-General, 206. Available from: http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_2.pdf&lang=E [Accessed on 05.04.2017]

Article 51 direct relationship with the customary law is justified by the argument of anticipatory self-defence supporters that the words "if an armed attack" is not a condition for the exercise of the inherent right, but merely indicate the type of general right that is preserved. In addition, the text of the Statute in French preserved the right to self-defence "in case a Member State is an object of an armed aggression" (not in case of an "armed attack"), which is less restrictive than the English version of Article 51[59]. In addition, the wording in Russian, if necessary, can also be translated differently: the words "if an armed attack occurs" (Rus. "если произойдет вооруженное нападение"[60]) may mean that the right to self-defence can be exercised after the factual armed attack or when it is clear that the armed attack will take place in the future.

The supporters of the preventive self-defence consider such qualitative factors as the possibility of an attack at a future point, the availability of peaceful means to settle the situation, and the severity of the potential damage caused by the attack. If these qualitative factors confirm that there is a probability of a very devastating attack in the future, the country can act as necessary and proportionally by using preventive self-defence[61].

The author summarised opinions of S. Murphy, W. Taft, I. Brownlie, B. Simma, C. Gray, S. Alexandrov, A. Cassese, R. Värk, P. Jessup, J. Bojārs, I. Ziemele and others (L. Henkin, M. Alder, J. Ohlin, M. Glennon, R. Ago).

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[59] Murphy, S. D. 2005. The Doctrine of Preemptive Self-Defence. *Villanova Law Review*, ISSN: 00042-6229, Volume 50, Issue 3, Article 9, 712. Available from: https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/9/?utm_source=digitalcommons.law.villanova.edu%2Fvlr%2Fvol50%2Fiss3%2F9&utm_medium=PDF&utm_campaign=PDFCoverPages [Accessed on 20.05.2018].

[60] 24.10.1945. Устав ООН: международный документ (Eng. The UN Charter: international document). Available from: http://www.un.org/ru/charter-united-nations/index.html [Accessed on 03.07.2017].

[61] Murphy, S. D. 2005. The Doctrine of Preemptive Self-Defense. *Villanova Law Review*, ISSN: 00042-6229, Volume 50, Issue 3, Article 9, 715–717. Available from: https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/9/?utm_source=digitalcommons.law.villanova.edu%2Fvlr%2Fvol50%2Fiss3%2F9&utm_medium=PDF&utm_campaign=PDFCoverPages [Accessed on 20.05.2018].

When evaluating their scientific articles, it was noted that the supporters of legal positivism base their conclusions on the belief that Article 51 has no connection with the customary law existing before the Statute. Therefore, in their opinion, the Statute provides for the possibility to use self-defence only if the country is a real victim of an armed attack that has already taken place. These researchers avoid the interpretation and explanation of the references to "inherent right" in Article 51 according to the current situation. Using historical interpretation, they consider that the meaning of the self-defence that existed before 1945 lost its force after the adoption of the UN Charter (B. Simma, P. Jessup, C. Gray, I. Brownlie, S. Alexandrov, A. Cassese, R. Värk, J. Bojārs, I. Ziemele). More detailed historical justification for this argument is provided by P. Jessup and R. Värk. The view of the US delegate H. Sassen, expressed in the minutes of the thirty-sixth meeting of the San Francisco Conference of May 20, 1945, about the reluctance to use self-defence before an armed attack occurred[62], also partly justifies the above-mentioned opinions. However, the author draws attention to the fact that the researchers have not found any direct documentary evidence of exactly what each country was willing to preserve or limit during the preparation of Article 51 of the UN Charter. Moreover, besides the historical interpretation, grammatical, teleological and systemic interpretation methods must be used. Both grammatical and systematic interpretation of Article 51 make it necessary to remember about the rules of self-defence in customary law and about state practice. The words "if... occurs" allow an explanation that the armed attack is starting, but not yet finished. If the views of researchers can always be discussed, the positions of such countries as

[62] Minutes of the Thirty-sixth Meeting of the United States Delegation. Held at San Francisco. 20.05.1945. Department of the State. Office of the historian. Foreign relations of the United States: diplomatic papers, 1945, General: The United States, volume I, 818. Available from: https://history.state.gov/historicaldocuments/frus1945v01/pg_817 [Accessed on 05.08.2017].

the US, the United Kingdom, Australia, Japan in international relations will become more and more difficult to ignore, also acknowledged by A. Cassese.

The teleological method pays attention to the interpreter to the modern reality and to the conclusion that the aim of the creators of Article 51 was not to expect the country to be seriously weakened or destroyed by the first strike of aggression before allowing it to defend itself if the country was able to do so. Such conclusion was made either directly or indirectly by the supporters of legal positivism S. Alexandrov, A. Cassese, R. Värk, J. Bojārs. However, these researchers still do not see legal justification for pre-emptive self-defence and provide to use the case-by-case assessment, by using emotional, moral and political arguments, and encouraging to consider each such case of self-defence in the Security Council. In the author's view, this will lead to greater uncertainty regarding the exercise of the right to self-defence, as it will create confidence among the countries that they will be able to convince the Security Council of the legitimacy of their actions or that they will be able to avoid responsibility through individual interest of members of the Security Council.

Thus, the author has identified researchers among legal positivists who do not exclude the existence of certain exceptional cases when the country can use force for pre-emptive self-defence. Preventive self-defence is clearly considered illegal by these researchers.

The following chapters address the impact of customary law on the interpretation of Article 51, as well as the related issues.

4 THEORETICAL AND PRACTICAL ASPECTS OF PREVENTIVE AND PRE-EMPTIVE SELF DEFENCE

Supporters of anticipatory self-defence draw attention to the fact that the UN Charter is not a static nature and should be read as responsive to new developments[63]. The author recognises as justified a realistic non-legal argument that, with the conviction that striking first is better than being attacked, the country can turn the result of the conflict in its favour, save its defence capabilities from destruction and mitigate the negative consequences of the conflict on its territory[64]. Therefore, it is assumed that pre-emptive action is being taken in the response to the threat of an imminent attack, namely that the Caroline criteria are used (there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and the action taken must not be "unreasonable or excessive", and "limited by that necessity and kept clearly within it"[65]). The conclusions of the Caroline case were used by the Nuremberg Tribunal[66] and the Tokyo Tribunal[67]. Thus,

[63] Randelzhofer, A. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I., edited by Simmma, B., New York: Oxford University Press, 803.
[64] Mueller, K. P., Castillo, J. J., Morgan, F.E., Pegahi N. and Rosen B. 2006. *Striking first Preemptive and Preventive Attack in U.S. National Security Policy*. RAND Corporation, 13–14.
[65] Malanczuk, P. 1983. Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International law Commission's Draft Articles on State Responsibility. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *ZaöRV* 43/4, 754–756. Available from: http://www.zaoerv.de/43_1983/43_1983_4_a_705_812.pdf [Accessed on 20.02.2017].
[66] Historical Review of Developments relating to Aggression. 2003. New York: United Nations publication, 22. Available from: http://legal.un.org/cod/books/HistoricalReview-Aggression.pdf [Accessed on 12.03.2016].
[67] Malanczuk, P. 1983. Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International law Commission's Draft Articles on State Responsibility. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *ZaöRV* 43/4, 762. Available from: http://www.zaoerv.de/43_1983/43_1983_4_a_705_812.pdf [Accessed on 20.02.2017]; Malanczuk, P. 2002.

when interpreting Article 51 from a historical point of view, the author agrees with P. Malanczuk's opinion that it is unlikely that the creators of Article 51 have forgotten recent history lessons (judgments of the Nuremberg and Tokyo Tribunals) and wanted to insist on the obligation to wait for the aggressor's first attack before giving the victim the right to use force for self-defence[68].

A vivid example of a pre-emptive self-defence is Israel's 1967 attack on Egypt, which broke the chain of the events caused by the mobilisation of Egyptian forces near the Israeli border and the expulsion of UN peacekeeping forces from the area. The UN, in its debates in the summer of 1967, did not blame Israel for the outbreak of fighting and did not condemn it for such a use of self-defence[69].

By summarising opinions of P. Malanczuk, M. Shaw, N. Lubell, D. Murswiek, O. Schachter, Y. Dinstein (proposed the concept of "interceptive self-defence"), the author concludes that these researchers justify their support for pre-emptive self-defence mainly on the basis of the Caroline case criteria. Both the above-mentioned supporters of pre-emptive self-defence and supporters of preventive self-defence (M. McDougal, S. Murphy, R. Delahunty and J. Yoo) use the non-legal argument that in a situation where the victim may be destroyed at a great speed, one cannot insist on the obligation for this victim country to wait for the consequences of the attack. However, supporters of

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Akehurt's Modern Introduction to International Law. Seventh revisited edition. New York: Routledge, Taylor&Francis e-Library, 314.

[68] Malanczuk, P. 2002. *Akehurt's Modern Introduction to International Law*. Seventh revisited edition. New York: Routledge, Taylor&Francis e-Library, 314; Malanczuk, P. 1983. Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International law Commission's Draft Articles on State Responsibility. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *ZaöRV* 43/4, 761–762. Available from: http://www.zaoerv.de/43_1983/43_1983_4_a_705_812.pdf [Accessed on 20.02.2017].

[69] Shaw, M. N. 2004. *International Law*. Fifth edition. United Kingdom: Cambridge University Press, 1028–1029; Shaw, M. N. 2008. *International Law*. Sixth edition. United Kingdom: Cambridge University Press, 1137–1138.

preventive self-defence see (either directly or indirectly) the criteria of the Carolina case as outdated.

The author notes that the requirement for the existence of an immediate and imminent threat of an attack is easier to follow in the case of pre-emptive self-defence, as it is necessary to provide convincing evidences that the potential offending state is fully prepared (or the early completion of the preparatory process of the attack) and the willingness of the potential offender state to attack. In the case of preventive self-defence, the moment of potential attack is far remoted in time from the moment of the use of force for self-defence, which significantly increases the possibility of erroneous decisions, as the decision is based on the information or even on the presumption about the potential offending state's future behaviour. This information may be difficult to check. And even if this information is true at a concrete moment, it will almost never be possible to completely exclude the possibility that a potential offender will change its intent because of external or internal factors and will refuse to fulfil his illegal plans.

Despite the above-mentioned problems, the US included a preventive attack in its defence policy planning documents in 2002, by adopting the US National Security Strategy (the Bush doctrine)[70].

The EU, in the European security strategy adopted in 2003, did not express support to the preventive self-defence, by rejecting anticipatory use of force as a solution for elimination of the identified threats. The EU concluded that it is ready to address successfully the challenges identified in the concept, mainly through peaceful means[71]. The Global Strategy for the European

[70] 2002. The National Security Strategy of the United States of America, 13–15. Available from: https://www.state.gov/documents/organization/63562.pdf [Accessed on 21.07.2017]

[71] 12.12.2003. European security strategy. Brussels, 7–8. Available from: https://europa.eu/globalstrategy/en/european-security-strategy-secure-europe-better-world [Acessed on 09.06.2018].

Union's Foreign and Security Policy for 2016 also does not contain information on the possibilities of preventive attacks[72]. Furthermore the Article 42 (7) of the Treaty on European Union (Treaty of Lisbon) explicitly states that if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all means in their power, in accordance with Article 51 of the UN Charter.

The International Court of Justice has analysed the issue of self-defence in several cases (Nicaragua vs. United States of America, Islamic Republic of Iran vs. United States of America, Legal consequences of the construction of a wall in the occupied Palestinian territory, Democratic Republic of the Congo vs. Uganda), but has not addressed the issue of anticipatory self-defence.

In evaluating the actions and public statements of certain countries (US, UK, Japan, Australia), the author concludes that they have retained the desire to maintain the possibility of the use of anticipatory self-defence under the customary law. Support for preventive self-defence was also publicly expressed at a conference held in Moscow in 2012 by high Russian military personnel[73]. Therefore, it would be inappropriate to continue to ignore such changes in the understanding of the right self-defence and to refuse to seek the possibility of including anticipatory self-defence in a clear and unambiguous framework that would simultaneously exclude such forms of self-defence which are undesirable for international community.

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[72] 2016. The Global Strategy for the European Union's Foreign and Security Policy, 18–19, 29–30. Available from: https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf [Accessed on 09.06.2018].

[73] Kramer, A. E. 03.05.2012. Russian General Makes Threat on Missile-Defense sites. *The New York Times.* Available from: https://www.nytimes.com/2012/05/04/world/europe/russian-general-threatens-pre-emptive-attacks-on-missile-defense-sites.html [Accessed on 03.08.2018]; Гальперович, Д. 03.05.2012. Россия знает, что делать с ЕвроПРО (Eng. Russia knows what to do with Euro missile defense). *Радио Свобода*. Available from: https://www.svoboda.org/a/24568404.html [Accessed on 17.08.2018].

Except amending the UN Charter, which involves a complex and time-consuming procedure, the interpretation of Article 51 may be influenced by the following factors:

1. Improvement of content based on state practices. According to Article 38 (1) (b) of the Statute of the International Court of Justice the general practice accepted as law forms the international custom[74]. The reference to the customary law in the case *Nicaragua vs. United States of America*[75] shows that the international customary law exists, is respected by international treaties and can therefore affect the interpretation of Article 51 of the UN Charter, which also highlights the relationship with the international customary law[76]. Article 31 (3) (b) of the Vienna Convention on the Law Treaties also draws attention to the use of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[77]. Thus, state practices, or the uniform exercise of the customary law, can have a significant impact on the interpretation of the Article.

2. The International Court of Justice may pay more attention in its judgments and advisory opinions to the interpretation of Article 51 and of the Regulation of the Right to Self-Defence embodied in the customary law.

3. Conditions for the application of the right to self-defence may change following the changes in the interpretation of Article 51 among scientists.

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[74] 29.01.2018. Starptautiskās tiesas Statūti: starptautisks dokuments (Eng. Statutes of the International Court of Justice: international document). Latvijas Vēstnesis, No 20.

[75] 27.06.1986. Judgement of the International Court of Justice: "Case concerning military and paramilitary activities in and against Nicaragua" Nicaragua vs. United States of America, par. 191. Available from: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed on 09.08.2017].

[76] Steenberghe, R. 2010. Self-Defense in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward? *Leiden Journal of International Law*, ISSN: 1478-9698, Volume 23, Issue 1, 185–186. Available from: https://doi.org/10.1017/S0922156509990380 [Accessed on 15.07.2017].

[77] 03.04.2003. Vīnes konvencija par starptautisko līgumu tiesībām: starptautisks dokuments (Eng. The Vienna Convention on the Law of Treaties: international document). *Latvijas Vēstnesis,* No 52.

However, the changes proposed by the researchers must be accepted by the countries in the form of state practices or by the judgments of the International Court of Justice or UN resolutions[78].

In order to set the legal boundaries for the extended interpretation of the use of right for self-defence, the issue of the detachment of anticipatory self-defence from aggression is discussed in the next chapter.

[78] Upeniece, V. 2018. Valstu tiesības uz pašaizsardzību robežas starptautiskajās tiesībās (Eng. Limits of national rights to self-defence in international law). Collection of scientific research papers, 6th International Scientific and Practical Conference. Riga: Baltic International Academy. 366–367. Available from: http://bsa.edu.lv/docs/2018/sbornik08122017.pdf [Accessed on 12.08.2018].

5 DETACHMENT OF ANTICIPATORY SELF-DEFENCE FROM THE ACT OF AGGRESSION

The Nuremberg Tribunal explained the nature of the act of aggression as an attempt to change international relations with the help of weapons. If this aggression resulted in war, the war was aggressive, and the countries had refused it in the Kellogg-Briand Pact. The Tribunal also noted that war as a tool of national policy, if it aims to resolve international disputes, unequivocally forms an act of aggression[79].

UN General Assembly Resolution 3314 (XXIX) of 14 December 1974 is not a document explaining the concept of aggression used in the UN Charter by the norms with the same force as the UN Charter. However, it contributes significantly to the interpretation of the UN Charter, as it contains guidelines for countries to unambiguously identify individual acts of aggression. The definition of an armed attack, on the other hand, was not proposed in this resolution and was not historically planned[80].

In the UN Charter, the term "armed attack" and in the French language "agression armée"[81] is used only in Article 51 of the Charter. The term "aggression" (in French "agression"[82]), in its turn, is used in Article 1 (1) and in Articles 39 and 53 of the Charter. The Charter does not provide definition or explanation to these terms. When assessing articles of the UN Charter from a linguistic point of view and comparing their English and French versions, it can

[79] Historical Review of Developments relating to Aggression. 2003. New York: United Nations publication, 30, 87. Available from: http://legal.un.org/cod/books/HistoricalReview-Aggression.pdf [Accessed on 12.03.2016].
[80] Randelzhofer, A. 2002. Article 51 in the charter of the United Nations. *The Charter of the United Nations.* A commentary. Second edition. Volume I, edited by Simmma, B. New York: Oxford University Press, 795.
[81] 24.10.1945. La Charte des Nations Unies (Eng. Charter of the United Nations). Art.51. Available from: http://www.un.org/fr/sections/un-charter/chapter-vii/index.html [Accessed on 03.07.2017].
[82] *Ibid*., Art. 39, 53.

be noted that the word “aggression” is used in the French version of Article 51 of the Statute. The author shares the view that the content of English and French versions of Article 51 is different if they are evaluated from a linguistic point of view, because the clause “if”, which is commonly used in the meaning of the condition, means that the fact of an armed attack is a precondition for the use of self-defence, while the French text may mean that an armed attack is only a typical but not exclusive cause of self-defence[83]. The term “aggression”/”agression” used in Article 39 refers to aggression which is a more severe form of action than the “breach of peace” mentioned in Article 39 alongside the aggression. If the term “agression armée” were used in the French text of Article 51 as being equivalent to the notion of “act d'aggression” in Article 39, the French text would limit self-defence possibilities. This point of view is evidenced by the Security Council, which in its Resolution 660 of 2 August 1990, on the basis of Article 39 of the Statute, described the invasion of Iraq in Kuwait[84] in 1990 as a breach of peace, not as an act of aggression[85], even though during the consultations there was a proposal to characterise the situation as an act of aggression[86]. In the preamble of the Resolution 661 of 6 August 1990, the Security Council recognised Kuwait’s right to individual and

[83] Malanczuk, P. 1983. Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International law Commission’s Draft Articles on State Responsibility. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *ZaöRV* 43/4, 756–757. Available from: http://www.zaoerv.de/431983/4319834a705812.pdf [Accessed on 20.02.2017].

[84] Greenwood, C. 2011. Self-Defence. Max Planck Encyclopedia of Public International Law, Oxford Public International Law. Available from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL [Accessed on 15.07.2017].

[85] 02.08.1990. The Security Council Resolution S/RES/660 (1990). Available from: https://undocs.org/S/RES/660(1990) [Accessed on 20.02.2016].

[86] Greenwood, C. 2011. Self-Defence. Max Planck Encyclopedia of Public International Law, Oxford Public International Law. Available from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL [Accessed on 15.07.2017].

collective self-defence[87], which reaffirmed that the term "agression armée" in Article 51 is not comparable to the term "acte d'agression" in Article 39 and should not be translated narrower than the term "armed attack" in the English version of Article 51[88].

According to historical preparatory documents (travaux préparatoires) of the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, the meaning of the "armed attack" ("agression armée") in Article 51 does not necessarily coincide entirely with the term "act of aggression" ("acte d'agression") and that the armed attack is a narrower term than the act of aggression[89].

Thus, the answer to the question of when a country can unilaterally use the force, not recognized as aggression, depends on the interpretation of the term "armed attack" used in Article 51. However, the unequivocal definition of an "armed attack" would not cover all possible cases[90].

The International Court of Justice used the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974 to determine the content of the term "armed attacks" in such cases as: Nicaragua vs. United States of America, Islamic Republic of Iran vs. United States of America, Democratic Republic of the Congo vs. Uganda, Bosnia and Herzegovina vs. Serbia and Montenegro). The author concludes that the Court has analysed each case individually and

[87] 06.08.1990. The Security Council Resolution S/RES/661 (1990). Available from: https://undocs.org/S/RES/661(1990) [Accessed on 20.02.2016].
[88] Greenwood, C. 2011. Self-Defence. Max Planck Encyclopedia of Public International Law, Oxford Public International Law. Available from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL [Accessed on 15.07.2017].
[89] Randelzhofer, A. 2012. Article 51 in the Charter of the United Nations. *The Charter of the United Nations*. A commentary. Third edition. Volume I, edited by Simmma, B. Oxford/New York: Oxford University Press, 1407–1408.
[90] Randelzhofer, A. 2002. Article 51 in the Charter of the United Nations. *The Charter of the United Nations*. A commentary. Second edition. Volume I, edited by Simmma, B. New York: Oxford University Press, 794.

has avoided providing generalised explanations of terms, leaving unresolved controversial issues related to the use of the right to self-defence[91].

The author therefore agrees with M. Shaw's conclusion that the basic problem of the concept of anticipatory self-defence involves subtle calculations of the other side's various steps, since, for example, the previous attack, which too early could be recognised as aggression. It is therefore very difficult to draw the boundary. The situation is also complicated by the fact that the nature of the international system allows the countries to make decisions themselves[92]. Since states have generally not refused from the concept of anticipatory self-defence, the author considers that it necessary to provide clear conditions for the use of force, which would remove doubts about the legitimacy of anticipatory self-defence and thus reduce discussions on its possible similarity with aggression.

In addition, the author wishes to point out that the situation in Ukraine highlighted a significant shortcoming in the UN General Assembly Resolution 3314 (XXIX), according to which the country is recognised as an aggressor only if armed bands, groups, irregulars or mercenaries openly act on its behalf (Article 3 (g)). Therefore, the International Court of Justice in the case *Nicaragua vs. United States of America* concluded that the supply of arms or other forms of assistance (such as financing, training, supplying, equipping) to the rebel forces did not imply the responsibility of the country for the acts of these groups, as such actions did not prove that the country exercise the control

[91] Upeniece, V. 2016. Preventīvā kara nošķiršana no agresijas: tiesiskās problēmas (Eng. Separating Preventive War from Aggression: legal issues). Collection of scientific research papers, 4th International Scientific and Practical Conference. Riga: Baltic International Academy, 262. Available from: http://bsa.edu.lv/docs/konf11122015.pdf [Accessed on 14.08.2018].

[92] Shaw, M. N. 2008. *International Law*. Sixth edition. United Kingdom: Cambridge University Press, 1138–1139.

over them[93]. To prevent situations when a country provides such kinds of assistance to armed groups operating in the territory of another country by weakening it, it has been proposed to expand the General Assembly Resolution 1444 of 14 December 1974. 3314 (XXIX) 3 (see draft resolution in the summary para. 8).

In conclusion, the author notes that formulating conditions for the use of force for self-defence would remove doubts about the lawfulness of anticipatory self-defence and would therefore undermine discussions on its possible alignment with aggression. By summarizing the authors' different views and taking into account the cases of anticipatory self-defence in practice, the author offers conditions for justifying the anticipatory self-defence and proposes the content of the relevant regulation.

[93] 27.06.1986. Judgement of the International Court of Justice: "Case concerning military and paramilitary activities in and against Nicaragua" Nicaragua vs. United States of America, par. 109, 115. Available from: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed on 09.08.2017].

6 CONDITIONS FOR THE USE OF FORCE

Existence of an armed attack eliminates any doubts in case of self-defence, so it is can be concluded that lawful self-defence is limited to the situation of response to the factual armed attack[94]. However, if the armed attack has not yet occurred, it is essential to understand whether and when the country has the right for lawful use of force for self-defence. This chapter and in its sub-chapters reflect the views of researchers on the impact of customary law on the interpretation of Article 51 of the UN Charter, and focuses on some practical issues related to the use of force for self-defence.

According to Article 51, force may be used for self-defence if an armed attack occurs. Nevertheless, international law does not regulate the issue of proof of an armed attack. The International Court of Justice ruled on this issue: in the case *United Kingdom vs. Albania*, the Court stated that the evidence could come from factual findings if they did not leave room for reasonable doubt[95]; in the case *Nicaragua vs. United States of America*, the Court established that there should be adequate direct evidences[96]; in the case *Islamic Republic of Iran vs. United States of America*, the Court stated that the obligation to prove the existence of an attack rested on the country which has exercised its right to self-defence[97]. At the same time, evidence-gathering

[94] Simma, B. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I. New York: Oxford University Press, 805.
[95] 09.04.1949. Judgement of the International Court of Justice: "Corfu channel" United Kingdom vs. Albania, par. 48. Available from: http://www.worldcourts.com/icj/eng/decisions/1949.04.09_corfu1.htm [Accessed on 19.08.2017].
[96] 27.06.1986. Judgement of the International Court of Justice: "Case concerning military and paramilitary activities in and against Nicaragua" Nicaragua vs. United States of America, par. 111. Available from: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed on 09.08.2017].
[97] 06.11.2003. Judgement of the International Court of Justice: "Case concerning oil platforms" Islamic Republic of Iran vs. United States of America, par. 64, 72. Available

problems cannot prevent the Court reviewing the case, since it is the applicant which must bear the consequences of an application that gives an inadequate rendering of the facts and grounds on which the claim is based[98].

There is no unanimous opinion among countries and in the legal doctrine about the moment when the right to self-defence occurs[99], for example, it is proposed to consider as an armed attack the moment when an airplane or fleet is on its way to fulfil its aim (without considering the hypothetical possibility that the order to attack may be cancelled at a time when the armed forces (aircraft or navy) have not yet crossed the border of the victim state)[100]. The author is inclined to agree that it is not appropriate to impose an obligation on the victim country to wait and hope that the order will be revoked. The case of shooting of an Iraqi missile complex by the US in 1998 answers the question whether the situation when the radar guiding the missile is locked on ready to fire can be identified as a beginning of an armed attack. In this case there was a dispute over whether the radar was locked on (as well as whether the planes were entitled to fly above Iraq), but the idea that the armed attack starts with the radar locked on was obviously accepted by Iraq and other countries[101].

As for the question about who is entitled to decide whether the circumstances are sufficient to justify self-defence, R. Ago rightly pointed out

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from: https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf [Accessed on 11.08.2017].

[98] 11.06.1998. Judgement of the International Court of Justice: "Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria" Cameroon vs. Nigeria, par. 101–102. Available from: http://www.icj-cij.org/files/case-related/94/094-19980611-JUD-01-00-EN.pdf [Accessed on 14.08.2018].

[99] Randelzhofer, A. 2012. Article 51 in the Charter of the United Nations. *The Charter of the United Nations*. A commentary. Third edition. Volume I, edited by Simmma, B. Oxford/New York: Oxford University Press, 1421.

[100] Dinstein, Y. 2005. *War, Aggression and Self–Defence*. New York: Cambridge University Press, Fourth edition, 190–191.

[101] Gray, C. 2000. *International Law and the Use of Force*. New York: Oxford University Press, 96.

that a country that considers itself a victim of an armed attack should not seek someone's permission to use self-defence[102].

Accordingly, self-defence can be recognised as proportional use of force against an imminent, threatening, namely, against a clearly known attack[103] that will take place in near future or is already being launched. These requirements are consistent with criterions of the Caroline case, which are part of international law of custom.

6.1 Principle of Imminence as a Base for Self-Defence

In the UN Secretary-General's High-Level Panel on Threats, Challenges and Changes it was mentioned that the threatened state can take military action as long as the threatened attack is imminent[104]. Furthermore, in the Report of the Secretary-General "In larger freedom: towards development, security and human rights" it was emphasised that imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend

[102] Ago, R. 1980. Addendum – Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1). Document: A/CN.4/318/Add.5-7. United Nations. Extract from the Yearbook of the International Law Commission, Volume II (1), 70, par. 123. Available from: http://legal.un.org/ilc/documentation/english/a_cn4_318_add5_7.pdf [Accessed on 05.04.2017].

[103] Randelzhofer, A. 2012. Article 51 in the Charter of the United Nations. *The Charter of the United Nations*. A commentary. Third edition. Volume I, edited by Simmma, B. Oxford/New York: Oxford University Press, 1422.; Dinstein, Y. 2005. *War, Aggression and Self–Defence*. New York: Cambridge University Press, Fourth edition, 190–192.; Shaw, M. N. 2004. International Law. Fifth edition. United Kingdom: Cambridge University Press, 1030.

[104] The Report of the High-level Panel on Threats, Challenges and Change. 02.12.2004. A/59/565, 54, par. 188. Available from: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/565 [Accessed on 03.02.2017].

themselves against an armed attack[105]. The criterion of imminence correlates with the Caroline formula (1842), according to which self-defence can only be exercised in situations where the need to respond is instant, leaving no moment for deliberation[106].

The International Court of Justice has not examined this principle.

There is no legal definition of imminence[107]. As examples of events that may indicate presence of imminent threat of an attack mostly are mentioned: enlargement of armed forces, procurement of weapons and belligerent declarations of intention to start a war, other threatening activities and other evidences that prove that an attack will take place in near future[108]. N. Lubell proposes to interpret this criterion by considering the nature and severity of the threat, as well as military capabilities, means and delivery technologies[109].

By summarising and evaluating the opinions of Y. Dinstein, P. Malanczuk, N. Lubell, and O. Schachter, and by considering that the principle of imminence was discussed in the Security Council after the Israeli attack on the Osirak nuclear reactor in Iraq in 1981, it can be agreed that the anticipatory self-defence is permissible if it corresponds to the requirements of the Caroline case, namely, if the need for self-defence is instant, overwhelming

[105] Report of the Secretary-General. In larger freedom: towards development, security and human rights. 21.03.2005. General Assembly. A/59/2005, par. 124. Available from: http://undocs.org/A/59/2005 [Accessed on 18.06.2016].
[106] Webster, D. 24.04.1841, British-American Diplomacy. The Caroline Case, 29 British and Foreign State Papers (1841) 1137–1138. Available from: http://avalon.law.yale.edu/19th_century/br-1842d.asp [Accessed on 01.02.2016].
[107] Lubell, N. 2015. *The Oxford Handbook of the Use of Force in International Law*. Edited by M.Weller. United Kingdom: Oxford University Press, 702.
[108] Anad, R. 2009. *Self–Defence in International Relations*. United Kingdom: Palgrave Macmillan, 5.
[109] Lubell, N. 2010. *Extraterritorial Use of Force Against Non-State Actors*. New York: Oxford University Press, 62.

and leaving no choice of means, and no moment for deliberation[110], since the existence of immediate and massive threat makes it absurd to require the victim state to expect an actual attack before taking measures for self-defence. This formula is the closest one to the legal standard and can be successfully opposed to the existing concerns of supporters of legal positivism[111]. The principles of necessity and proportionality discussed in the next section also arise from the Carolina case formula.

6.2 Principle of Necessity and Proportionality as a Base for Self-Defence

Necessity requires to decide whether the situation justifies the use of armed force, but proportionality determines the amount of force that can be legally used to achieve the aim[112]. The principles of necessity and proportionality are recognised as requirements of outstanding legal and practical importance for the right of self-defence[113].

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[110] Webster, D. 24.04.1841, British-American Diplomacy. The Caroline Case, 29 British and Foreign State Papers (1841) 1137–1138. Available from: http://avalon.law.yale.edu/19th_century/br-1842d.as [Accessed on 01.02.2016].

[111] Schachter, O. 1985. The Lawful Resort to Unilateral Use of Force. *Yale Journal of International Law*, ISSN: 0889-7743, Volume 10, Issue 2, Article 7, 293. Available from: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.lv/&httpsredir=1&article=1330&context=yjil [Accessed on 18.07.2018].

[112] Gardam, J. G. 1996. Legal Restraints on Security Council Military Enforcement Action. *Michigan Journal of International Law*, ISSN: 1052-2867, Volume 17, Issue 2, 305. Available from: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1493&context=mjil [Accessed on 14.07.2017].

[113] Simma, B. 2002. *The Charter of the United Nations*. A commentary. Second edition. Volume I. New York: Oxford University Press, 805.; Shaw, M. N. 2008. *International Law*. Sixth edition. United Kingdom: Cambridge University Press, 1031; Ndulo, M. B. 2002. International Law and the Use of Force: American's Response to September. *Cornell Law Faculty Publications*, 4-1-2002, paper 56, 6. Available from: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=facpub [Accessed on 20.02.2017].

The International Court of Justice examined the principle of necessity and proportionality in the case *Nicaragua vs. United States of America* and stated that the rule that self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, is well established in customary international[114]; in advisory opinion *Legality of the threat or use of nuclear weapons* the Court underlined that submission of the exercise of the right of self-defence to the conditions of necessity and proportionality was a rule of customary inter-national law and this dual condition applies equally to Article 51 of the Charter, whatever the means of force employed[115]; in the advisory opinion *Legal consequences of the construction of a wall in the occupied Palestinian territory* the Court reaffirmed that the state of necessity is a ground recognised by customary international law and that it can only be invoked under certain strictly defined conditions which must be cumulatively satisfied. One of those conditions is that the act being challenged is the only way for the state to safeguard an essential interest against a grave and imminent peril[116]. Thus, judgments of the International Court of Justice indicate the relationship between the principle of necessity and the "last chance".

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[114] 27.06.1986. Judgement of the International Court of Justice: "Case concerning military and paramilitary activities in and against Nicaragua" Nicaragua vs. United States of America, par. 176. Available from: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed on 09.08.2017].

[115] 08.07.1996. Advisory opinion of the International Court of Justice: "Legality of the threat or use of nuclear weapons" par. 41. Available from: http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf [Accessed on 24.08.2017].

[116] 09.07.2004. Международный Суд (консультативное заключение): Правовые последствия строительства стены на оккупированной палестинской территории (Eng. International Court of Justice (advisory opinion): Legal Consequences of Building a Wall in the Occupied Palestinian Territory), par. 140. Available from: https://www.icj-cij.org/files/advisory-opinions/advisory-opinions-2004-ru.pdf [Accessed on 14.06. 2017].

By summarising and evaluating the opinions of J. Gardam, Y. Dinstein, N. Lubell, O. Schachter, H. Koh, R. Ago, A. Cassese, J. Green, M. Ndulo, M. Shaw, C. Greenwood, M. Walzer, D. Bowett, R. Higgins, H. Waldock, A. Randelzhofer, M. Newton and L. Mayon on the content of principles of necessity and proportionality, the author shares the view of D. Green that the necessity is justified by absolute certainty that no other measures could remove enemy attack. For example, in situations of direct threat to the state survival when the other options, except the use of force, cannot change the situation in a positive way[117].

The principle of necessity is closely linked with the principle of proportionality, since the response can reasonably be considered disproportional if it was not necessary to remove the threat. The principle of proportionality means that the use of force must be proportionate to the aim pursued[118] and must be limited to the neutralisation or abolition of the attack against which a state is defending itself[119]. At the same time, the force used for self-defence may exceed the removed attack or may be smaller than it, since before the use of force it is essential to check whether it is sufficient to change the consequences of the removed armed attack[120].

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[117] Green, J. A. 2015. The ratione temporis elements of self-defence. *Journal on the Use of Force and International law*, ISSN: 2053-1710, Volume 2, No.1, 101. Available from: https://www.tandfonline.com/doi/abs/10.1080/20531702.2015.1043097 [Accessed on 14.06.2016].

[118] Newton, M. and May, L. 2014. *Proportionality in International Law*. New York: Oxford University Press, 15.

[119] Fischer, H. 2007. Proportionality, Principle of. *Crimes of War: What the Public should know*. Revisited and updated edition 2, edited by Gutman, R., Rieff, D. and Dworkin, A. New York: W.W.Norton & Company, 341.

[120] Greenwood, C. 2011. Self-Defence. Max Planck Encyclopedia of Public International Law, Oxford Public International Law. Available from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL [Accessed on 15.07.2017].

Therefore, the principles of necessity and proportionality must be linked to the objective of self-defence of the victim country to deter or stop the attack or to regain the territory lost during the attack of its opponent.

6.3 Principle of Immediacy as a Base for Self-Defence

Another criterion which requires an examination is the principle of immediacy. This criterion of legality of the use of force is more related to cases where an armed attack has already occurred as it follows from the conviction that the action in self-defence must immediately follow the start of an attack[121].

There is a reasonable view that the principle of immediacy cannot be explained directly, because of different bureaucratic procedures a state faces with the beginning of hostilities by the adversary – certain time period passes after state officials make a decision to act in response and give the instruction to the armed forces. That is why if the interval between an armed attack and war of self-defence is long, the war may still be lawful if the delay is objectively justified[122]. Thus, the interpretation of closeness in time between these two actions is dependent on the context of each situation.

This principle is more applicable to cases where there is no longer any serious doubt about the existence of an attack. This is due to proximity of the response to the actual armed attack. In case of anticipatory self-defence, the question of remoteness of self-defence from the expected attack is regulated by the principle of imminence.

Summarising the above-mentioned, the author notes that there is no definition which would apply in all situations, including the situation when

[121] Green, J. A. 2009. *The International Court of Justice and Self-Defense in International Law*. Oxford and Portland, Oregon: Hart Publishing, 101.
[122] Dinstein, Y. 2005. *War, Aggression and Self–Defence*. New York: Cambridge University Press, Fourth edition, 242–243.

there is a threat of the use of force. Scholars generally speak about criteria and preconditions of the use of force with precaution and avoid giving precise definitions. The application of the principles depends on the amount of information available to the parties about the factual situation and reliability of the sources of information, the ability to adequately examine them and the motivation of the parties of the conflict. So, the question of the moment in time which is seen as the point of commencement of an armed attack is also open[123].

6.4 Framework of the Legal Use of Force and the Duration of the Use of Force

The author examined the figure of legitimacy of preventive self-defence and criteria for determining the legality of an act of preventive self-defence, proposed by S. Murphy[124] and the figure of the timeline of self-defence proposed by D. Green[125], and concludes that the application of preventive self-defence to the criteria set by S. Murphy is disputable. The criteria cannot fully justify the validity of self-defence, since the imminence of the attack (the first criterion) is largely linked to remoteness of the anticipated attack from the time of the use of self-defence. The further in future the attack is foreseen, the more

[123] Upeniece, V. 2018. Conditions for the lawful exercise of the right of self–defece in international law. 6th International Interdisciplinary Scientific Conference "Society. Health. Welfare.". Parc d'activités de Courtabœuf: EDP Sciences (SHS Web of Conferences 30), 01008, 5. Available from: https://www.shs-conferences.org/articles/shsconf/pdf/2018/01/shsconf_shw2018_01008.pdf [Accessed on 14.08.2018].

[124] Murphy, S. D. 2005. The Doctrine of Preemptive Self-Defense. *Villanova Law Review*, ISSN: 00042-6229, Volume 50, Issue 3, article 9, 717–718. Available from: https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/9/?utm_source=digitalcommons.law.villanova.edu%2Fvlr%2Fvol50%2Fiss3%2F9&utm_medium=PDF&utm_campaign=PDFCoverPages [Accessed on 20.05.2018].

[125] Green, J. A. 2015. The ratione temporis elements of self-defence. *Journal on the Use of Force and International law,* ISSN: 2053-1710, Volume 2, No.1, 109, 117. Available from: https://www.tandfonline.com/doi/abs/10.1080/20531702.2015.1043097 [Accessed on 14.06.2016].

opportunities are to prevent it by other means without the use of the military force. On the other hand, if the moment of the future attack is so close that it is no longer avoidable, then self–defence from preventive becomes pre-emptive[126]. The second argument (criterion) about the need to evaluate the effectiveness of force used for self-defence is justified. However, the conclusion that the use of preventive force is more acceptable when the level of coercive force used in response is lower can serve as an excuse only for use of military force in when military resources of a potential victim country are limited and its hesitation will lead to a potential attacker's military dominance. S. Murphy noted in his figure that this argument was not accepted by the international community (for example in the case of Israel bombing of Iraq in 1981). Thus, the evaluation of the level of the used force for self-defence should influence the choice of means for resolving the conflict in such a way that, where possible, peaceful means of resolving the conflict would be preferred, especially in cases where a possible attack is predicted in the far future. Simultaneously, if an attack can occur only in the distant future, it is difficult to evaluate the threat to the existence of the state (third criterion). The requirement to determine the level of threat to the existence of a country can lead to a situation that geographically large countries having a higher chance of survival in the case of an armed attack should wait and endure the devastating effects of the first attack before exercising self-defence. Smaller countries in such situations would always have the opportunity to use anticipatory self-defence before the first blow of the attack. Therefore, this criterion is more related to the principle of proportionality, namely a larger country can afford to

[126] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

take weaker steps in hope that they will stop the aggressor from fulfilling its plans.

Schematically, the different views on the use of self-defence can be reflect as follows (see Fig. 6.1).

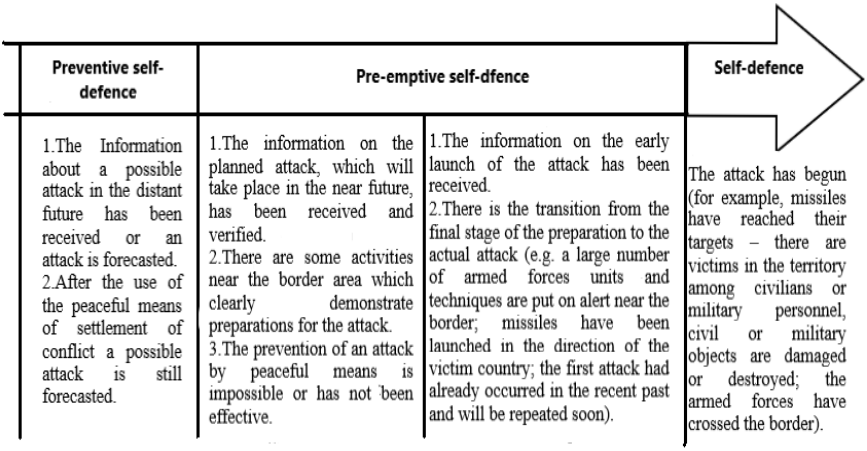

Fig. 6.1 **Differences in the justification for the use of force in self-defence**

The point of view of legal positivists that the apparently started armed attack may not be finished is partly justified. Scholars commonly base this view on the optimistic expectation that the potential aggressor can always withdraw the order to attack given to its armed forces or that launched missiles are guided, and their course can be changed. However, researchers do not give examples of such cases in state practice. Doubts about the alleged attack can be justified by possible technical errors[127]. Prime example of such situation is NATO training that took place in Estonia on August 7, 2018, during which the Spanish fighter accidentally fired AMRAAM class air-to-air missile near the

[127] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

Estonian city of Otepää[128]. Besides technical errors, an accident may be based on a human factor. Countries with a long and not always fenced or labelled border line (for example, Ukraine and Russia) have had situations of unlawful entry into their territory by representatives of armed forces/Border Guard of the neighbouring countries. In this case, after assessing all the evidence in their context (namely, the incident is only one; the guilty state has immediately provided the incident explanatory information or expressed regret about what had happened; the suffered country has no information about the intention of the guilty state to attack), the suffered country's response with the use of force most likely would be seen as aggression[129].

The fundamental problem that has always been encountered in the use of preventive self-defence is its remarkable remoteness in time from the predicted, possible armed attack. As a result, it is difficult to obtain convincing evidence of both the future attack and impossibility of settlement of the dispute by peaceful means (in order to respect the principle of imminence and necessity) and predicted severity of the force used by the potential offender (in order to respect the principle of proportionality). Therefore, proponents of the preventive self-defence often do not mention the principle of immenence as a basis for the use of force for self-defence. However, attack plans, even if already prepared, can never be executed because, for example, the potential

[128] Kupčs, E., Justoviča, P. un Krieviņš, R. 08.08.2018. Igaunijas Aizsardzības ministrija: Igaunijā nejauši izšautā raķete ir ārkārtējs gadījums (Eng. Estonian Ministry of Defense: An accidental missile in Estonia is an exceptional case). *LSM.LV*. Available from: https://www.lsm.lv/raksts/zinas/latvija/latvijas-aizsardzibas-ministrija-igaunija-nejausi-izsauta-rakete-ir-arkartejs-gadijums.a288021/ [Accessed on 23.08.2018]; Spāņu iznīcinātājs nejauši palaidis kaujas raķeti virs Igaunijas (Eng. A Spanish destroyer accidentally launched a combat rocket over Estonia). 08.08.2018. *Sputnik*. Available from: https://sputniknewslv.com/Baltics/20180808/9043952/spanija-igaunija-rakete-nato.html [Accessed on 23.08.2018].

[129] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

offender can be influenced effectively by the simultaneous use of diplomatic, economic or deterrent military means. In this case, the potential victim country should obtain additional convincing evidence that none of its means for peaceful settlement of international dispute has succeeded and will not succeed in the future.

The hope that a bright case of anticipatory self-defence will be brought to the International Court of Justice and that it will not only assess the factual and legal circumstances of the case but will set out a comprehensive set of conditions and criteria for legal use of anticipatory self-defence may not be fulfilled. The present reality confirms the need for sufficiently clear legal framework for use of force for self-defence before the victim state has actually suffered from an armed attack[130].

It is unlikely that the UN Charter will be amended in the light of the difficult process of adopting amendments. Since the adoption of resolutions in the Security Council may be burdened by the veto of its permanent members, such as, for example, the US which supports preventive self-defence and thus may not support the adoption of the resolution about pre-emptive self-defence, the author proposes to adopt the resolution at the UN General Assembly. Thus, preconditions would be provided for such resolution in paragraph 6 of the Summary and the draft resolution in the summary para. 7.

The question, which has also not been clearly answered, is how long the use of force for self-defence can continue. By summarising and examining different point of views of M. Ndulo, M. Glennon, O. Schachter, S. Alexandrov, A. Cassese, M. Shaw, Y. Dinstein, C. Gray, I. Ziemele, T. Franck, F. Patel, E. Rostov, M. Halberstam, A. Chayes, W. Reisman,

[130] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

R. Värk, the author offers to reflect them schematically as follows (see Fig. 6.2).

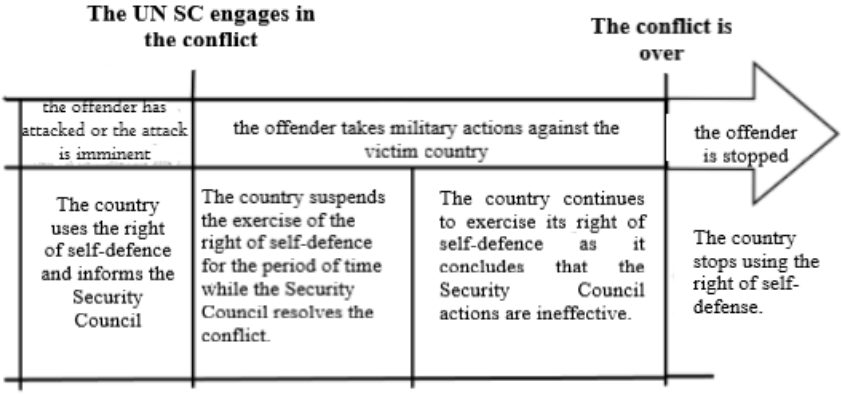

Fig. 6.2 **Duration of self-defence**[131]

Examining Article 51 with:

1) the historical interpretation method, it should be pointed out that researchers who deny use of the right of self-defence if the Security Council has begun to act, have not cited historical documents that would support their point of view[132]. On the contrary, D. Dulles, Senior Advisor to the US Delegation, in 1945 stated that in such situation the countries were not obliged to discontinue their countermeasures taken in self-defence. In other words,

[131] Upeniece, V. 2019. *Valsts pašaizsardzības tiesību izmantošanas ilgums* (Eng. Duration of national self-defence rights). Collection of scientific research papers, 7th International Scientific and Practical Conference. Riga: Baltic International Academy. 368. Available from: http://bsa.edu.lv/docs/2018/konf07122018.pdf. [Accessed on 19.05.2019]

[132] Halberstam, M. 1996. The Right to Self-Defense Once the Security Council Takes Action. *Michigan Journal of International Law*, ISSN: 1052-2867, Volume 17, Issue 2, 241–242. Available from: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1491&context=mjil [Accessed on 14.05.2018].

there is a concurrent power[133]. This opinion is also supported by discussions on the drafts of Article 51 of the UN Charter[134]. If representatives of other delegations did not agree with the opinion of the representative of the USSR delegation, the wording of the article would be much clearer;

2) the grammatical interpretation method. One can agree with the opinion that the word "until" does not mean "until the Security Council has begun to address the issue" or "until the Security Council has taken action" but "until the Security Council has taken measures necessary to maintain international peace and security". Thus, the phrase "necessary to maintain international peace and security" explains the nature of the measures by which the right to self-defence ends. Otherwise, it would not be necessary to state that measures taken by the State should not affect the authority of the Security Council, as they should be terminated as soon as the Security Council has begun to act[135];

3) the method of teleological interpretation. It is unlikely that the 50 countries which ratified the UN Statute and founded the UN, and the 130 countries which subsequently ratified the Statute agreed to refuse their right of self-defence in the situation when the Security Council acts, despite the action it takes and how successful it is[136].

Thus, historical, grammatical and teleological interpretations of Article 51 confirm the right of a country to use self-defence until the aggressor's

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[133] Minutes of the thirty-sixth meeting of the United States Delegation. Held at San Francisco. 11.05.1945. Department of the State. Office of the historian. Foreign relations of the United States: diplomatic papers, 1945, General: The United States, volume I, 666. Available from: https://history.state.gov/historicaldocuments/frus1945v01/pg_666 [Accessed on 05.08.2017].

[134] *Ibid.*, 823–824.

[135] Halberstam, M. 1996. The Right to Self-Defense Once the Security Council Takes Action. *Michigan Journal of International Law,* ISSN: 1052-2867, Volume 17, Issue 2, 230–240. Available from: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1491&context=mjil [Accessed on 14.05.2018].

[136] *Ibid.*, 237–239.

actions are stopped (regardless of who will be able to stop them). The authors of the UN Charter undoubtedly managed the legal language well and, if their purpose was to limit the rights of self-defence so significantly, it would be done clearly and unambiguously. According to the terminology of the UN Charter, the beginning of Article 51 would sound like "States abstain from the use of force, including self-defence, if the Security Council has taken measures under Chapter VII". On the other hand, if exercise of self-defence turns into aggression, the Security Council may take measures provided for in Chapter VII of the Statute. To avoid further discussions on this issue, the author proposes the draft resolution (see full text of the draft resolution in the summary para. 7).

SUMMARY

In the Doctoral Thesis, the issues raised in relation to the right of a state to self-defence in case of an attack by another country and the need to improve regulation have been examined. By studying and analysing the use of the right of self-defence against the actual or forecasted attack of another country, its diverse and contradictory theory and practice, the aim of the Doctoral Thesis has been achieved by formulating conditions for the legal use of self-defence and by making proposals for elimination of the shortcoming identified in the international regulation.

At the same time, suggestions have been made for elimination of the shortcomings identified in the national regulation, namely the author identified a shortcoming solving the mobilisation issue in the national regulation, which she did not want to leave unnoticed. On the other hand, amendments to the national regulation on the declaring war appear to be less important and of purely editorial nature. However, in accordance with the opinion of the Saeima Legal Commission and if the issue regarding the amendments to Article 43 of the Constitution of the Republic of Latvia will be re-raised, the author proposed possible amendments of this article and the related to the national regulation.

At the same time, the author identified the lack of Latvian terms to describe the forms of self-defence. In the author's opinion the Terminology Commission of the Latvian Academy of Sciences should be involved to ensure a harmonized approach to the use of these terms in Latvian language.

The made conclusions and the resulting proposals for international regulation are as follows:

1 Reasons of extended interpretation of Article 51 of the UN Charter

Conclusion. The popularity of the extended interpretation of the UN Charter, authors say, is caused by the following factors:

1.1. The aim of the drafters of the UN Charter was to create an effective peacekeeping and peace enforcement mechanism which, in some cases, is still unable to function effectively (for example, in cases of Kosovo and Ukraine). Thus, the author agrees with S. Aleksandrov's opinion that the limits of interpretation of Article 51 are and will be proportionate to the ability of the Security Council to effectively address relevant situations within its competence.

1.2 Taking into consideration the development of modern military capabilities and destructive weapon delivery technologies, the victim country can significantly lose its defence capability if it is firmly required to expect an actual attack before taking defensive measures.

The author agrees with the opinion, expressed in the Report of the Secretary-General that the state has the right for self-defence in case of imminent threats that are fully covered by Article 51, without waiting for the actual attack of the offender.

2 Description of the concept of armed attack provided by the UN International Court

Conclusion. The right to self-defence should not primary depend on description of the armed attack, proposed by the International Court of Justice in the case "Nicaragua vs. United States of America" (the right for self-defence can only be used if the attack has achieved the certain "scale and effect") because:

2.1 there is no textual reason in the UN Charter to exclude such attacks. As C. Greenwood and Y. Dinstein rightly noted the UN Charter had not made the right to self-defence dependent on graduation of armed attacks according to their severity, importance, intensity or other characteristics;

2.2 the International Court of Justice did not provide a clear definition of a hypothetical threshold of the gravity of attacks;

2.3 if different geographic, demographic and military capability aspects of the countries are not considered, countries which are more endowed in such aspects will have more chances to survive after an attack (as correctly noticed M. Shaw). On the other hand, if these aspects are taken into consideration, larger countries (their population) will be forced to suffer more severe attacks before receiving the right to use force for self-defence;

2.4 there are reasonable concerns, expressed by W. Taft that if the requirement that an attack has to reach a certain level of gravity prior to the use of force for self-defence is clearly defined, the offender will deliberately and purposefully use force that borders but does not violate it and, in this way, will weaken the victim state.

Proposal. Consequently, the right to self-defence should not primary depend on severity of the force used by the offender and the definition of hypothetical thresholds. It should be based on the belief that the use of force by the offender as an unlawful act already creates the right to self-defence. At the same time, severity and intensity of the armed action of the offender state should affect the nature and extent of self-defence activities applied within the framework of the principle of proportionality[137].

[137] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

3 Interpretation of Article 51 of the UN Charter

The grammatical interpretation of the norm does not clarify its content, since the text of the Statute in French and Russian contains less restrictive wording than the English version of Article 51 of the Statute. No evidence was located that the drafters of the UN Charter intended to maintain the possibility of unlimited use of the right of self-defence (pre-emptive and preventive). However, the reference in Article 51 of the UN Charter to self-defence as an inherent right, reminds of the existence of its regulation not only in international treaties (such as the UN Charter and treaties on collective defence), but also in the customary law. Modern customary law is formed in the framework of the state practice, where the self-defence elements that existed in the customary law before the adoption of the UN Charter begin to be used more open (by the US, the United Kingdom, Australia, Japan, Israel, Russia) in their political planning documents or in statements of public officials. The teleological method pays attention to the interpreter to modern reality and to the conclusion that the aim of the creators of Article 51 was not to expect the country to be seriously weakened or destroyed by the first strike of aggression before allowing it to defend itself if the country were able to do so. Thus, with the help of teleological, systemic and partially grammatical interpretations, the extended interpretation of the norm is possible by answering the question of when the attack is considered to be launched.

4 Limits of anticipatory self-defence

Conclusion. The existing diversity of interpretations of Article 51 of the UN Charter among countries and researchers does not address the issue of the use of force for self-defence. Such situation can only enhance the number of

armed conflicts. Therefore, the regulation adopted at the UN level is needed to address this problem.

Proposal. The extended interpretation of Article 51 of the UN Charter is permitted within the following boundaries (principles):

4.1 Principles of necessity and imminence:

4.1.1 the existence of convincing evidence, proving the soon completion of preparations for the devastating attack or proving the attack itself at the moment of its actual commencement;

4.1.2 it is not possible to prevent the attack by other means and methods:

4.1.2.1 the victim country has used peaceful methods of settlement of conflict available to it (diplomatic means, mass media assistance, military deterrence, mechanisms of economic influence), including referring to the Security Council with a request to take the necessary measures to prevent the impending attack, and these actions have not changed the offender's intention to attack;

4.1.2.2 the use of other methods of peaceful settlement of the conflict is an obvious waste of time or there is so little time until the beginning of an attack that its use only for the methods of peaceful attack prevention is inappropriate, namely, there is a reasonable belief that these methods will not change the intent of the offender to attack. However, the victim country does not have to abandon fully the use of peaceful methods of resolving the conflict after the use of force for self-defence.

4.2 The principle of proportionality. The response should be at the same time proportional to:

4.2.1 the means and the scale of an imminent attack (by evaluating the number of potential victims and the property destroyed), provided that the victim country uses less force if it is objectively sufficient to eliminate a threatening attack;

4.2.2 the purpose of defending the victim state. Self-defence must not grow into aggression, by resulting, for example, in annexation of the territory of the offender[138].

5 Issue of legitimacy of the preventive self-defence

Conclusion. Preventive self-defence (or preventive war) is non-compliant with the international law. Failure to comply with the principle of imminence (which requires the existence of the concrete and identifiable threats to be carried out with a high degree of credibility in the future) in case of preventive self-defence excludes the possibility of its legal justification, as it is difficult to find convincing evidence of planning of a possible future attack of a country, the characteristics and potential consequences of such plans, as well as that nothing in the future will be able to change in favour of the potential victim state. The difficulty of determining the nature and severity of a possible attack in such a distant future also makes it difficult to respect the principle of proportionality in case of a preventive attack.

6 Duration of exercise of the right of self-defence

Conclusion. The country that has exercised the right of self-defence must immediately report to the UN Security Council. The content of Article 51 of the UN Charter allows the country to exercise its right of self-defence until the Security Council has taken effective measures to maintain international peace and security, namely the failure of the Security Council to agree on

[138] Upeniece, V. Conditions for the legal commencement of an armed attack. 7th International Interdisciplinary Scientific Conference "Society. Health. Welfare.", the article has been submitted for publication for the collection of conference papers and SHS Web of Conferences.

solutions to the situation, or the ineffectiveness of its decisions should not suspend the right of the country to continue its actions for self-defence. On the other hand, if self-defence becomes aggression, the Security Council is not restricted to carry out the activities provided for in Chapter VII of the Statute.

Proposal. To avoid further discussions on this issue, the following article in the draft resolution has been proposed (see full text of the draft resolution in the summary para. 7):

"4. The Security Council's measures, if they fail to maintain international peace and security, do not suspend the right of the State to exercise self-defence."

7 Inclusion of anticipatory self-defence limits in explanatory document

Conclusion. The adoption of amendments to the UN Charter is a complicated process that explains absence of such amendments in Article 51 since the adoption of the Statute in 1945, up to now, even though the amendments would be necessary to define responses to the armed attacks of non-state actors (terrorists). The adoption of a resolution by the Security Council may be burdened by the veto of permanent members. Therefore, it has been proposed to establish limits of application of Article 51 in cases of an armed attack of one country on another in a General Assembly resolution. The resolution will have the nature of recommendation. However, it will not only introduce greater clarity in the application of the UN Charter, but will also influence state practice on the issue.

Proposal. According to the above-mentioned conclusion the following draft resolution of the UN General Assembly has been proposed:

"United Nations A/…/…
General Assembly
Special Committee on the Question
of exercise of the right to

self-defence: draft resolution

The use of the right to self-defence

The General Assembly,

Having considered the report of the Special, established pursuant to its resolution… for explaining the conditions for the exercise of the right to self-defence, considering new challenges for international peace and security,

Deeply convinced that the adoption of the explanation of the right to self-defence would contribute to the strengthening on international peace and security,

Emphasising the need for the progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Article 1 and 2 of the Charter of the United Nations,

Recalling the role and powers of the Security Council in the maintenance of international peace and security in accordance with the Charter of the United Nations,

Recalling States of their obligation to settle their international disputes by peaceful means in such manner that international peace, security and justice are not endangered,

Calls the attention of the Security Council to the explanation of the use of the right to self-defence, as set out below, and recommends that it should, as appropriate,

Convinced, that the explanation of exercise of the right to self-defence will have a deterrent effect on potential aggressors and will eliminate such use of force for self-defence which creates a threat to international peace and security, supports the explanation of exercise of such self-defence rights:

Article 1

A State may exercise its right of self-defence, regardless of whether another State has declared war on it, if:

(a) the State suffers from an armed attack;

(b) the attack is imminent.

Article 2

If the attack is imminent, the State may exercise its right of self-defence if the following conditions exist simultaneously:

(a) there is reasonable assurance that the attack will take place in near future;

(b) the attack cannot be eliminated by peaceful methods of resolving the dispute, or they have been unsuccessful.

Article 3

The State shall use the force for self-defence only for the purpose of defence and to the extent necessary to achieve this aim, considering the scale and means of the approaching attack.

Article 4

The Security Council's measures, if they fail to maintain international peace and security, do not suspend the right of the State to exercise self-defence.

...plenary meeting"

8 Extension of the definition of aggression

Conclusion. According to the UN General Assembly Resolution 3314 (XXIX), the country is recognised as an aggressor only if armed gangs, groups, irregulars or mercenaries openly act on its behalf (Article 3 (g)). Therefore, the International Court of Justice in the case Nicaragua vs. United States of America concluded that the supply of arms or other forms of assistance (financing, training, supplying, equipping) to the rebel forces does not imply the responsibility of the country for acts of these groups, as it does not prove that the country exercise control over them. Such explanation gives the country, supporting the rebels in the territory of another country, the opportunity to avoid liability.

Proposal. To prevent situations when the country provides such assistance to armed groups operating in the territory of another country by weakening it, the author proposes to expand the General Assembly Resolution 1444 of 14 December 1974, 3314 (XXIX) 3 in the following draft resolution:

"United Nations A/…/…
General Assembly
Special Committee on the Question
extending the definition
of aggression: draft resolution

Extension of the definition of aggression
The General Assembly,

Having considered the report of the Special, established pursuant to its resolution… to assess the compatibility of the definition of aggression, adopted in its Resolution 3314 (XXIX) of 14 December 1974, with new challenges for international peace and security,

Deeply convinced that the definition of aggression contributes to the strengthening of international peace and security,

1. *Considers it necessary* in addition to the list of the acts of aggression, approved by its Resolution 3314 (XXIX) of 14 December 1974, to approve that the military training of armed bands, groups, irregulars or mercenaries, as well

as organising and financing of their armed activities, supplying and equipping them with weapons to be recognised as an act of aggression if they carry out armed acts against another State of such gravity as to amount to acts listed in paragraph 3 of the General Assembly Resolution 3314 (XXIX) of 14 December 1974 or its substantial involvement therein,

2. *Recalling* States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

3. *Calls the attention* of the Security Council to the extension of the definition of the aggression and recommends that it should, as appropriate, take account of it as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

...plenary meeting"

To research the questions of the Doctoral Thesis, the following conclusions and resulting proposals for national level regulation have been provided:

1 Conformity of Article 43 of the Constitution of the Republic of Latvia with international law

Conclusion. According to Article 43 of the Constitution of the Republic of Latvia (1922), the President shall declare war on the basis of a decision of the Saeima. Article 43 does not name situations when Saeima may decide to declare a war. According to Article 6 (9) of the National security law, the Saeima shall decide on declaration and commencement of a war.

Situations of the declaration of war can be divided into two main groups:

1) A situation when a country acts as an aggressor according to the United Nations General Assembly Resolution 3314 (XXIX) of December 14, 1974.

2) A situation when a country uses the right of self-defence, mentioned in Article 51 of the Charter of the United Nations[139].

The Hague Convention (III) on the Opening of Hostilities of 1907 remains in force. According to the Preamble of the 1928 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand pact), if the Contracting Party seeks how to promote its national interests by resort to a war, it will be denied the benefits furnished by this Treaty. Thus, commencement of hostilities against the Contracting Party which started the war is lawful and the war of self-defence is not prohibited by the above-mentioned Treaties. It is not necessary to amend Article 43 which complies with the rules of international law.

Proposals. In view of the minor importance of the proclamation of war in case of self-defence, if the issue of exclusion of the declaration of war from national regulation is repeatedly raised, editorial changes to the Constitution of the Republic of Latvia, the National Security Law, the Cabinet Structure Law, and the Military Court Law have been proposed:

1) the Constitution of the Republic of Latvia:

1. To delete Article 43.

The present wording of Article 43:

"43. The President shall declare war on the basis of a decision of the Saeima."

2. To amend Article 44 (changes underlined):

"44. The President has the right to take whatever steps are necessary for the military defence of the State <u>in case of a military invasion or war before the</u>

[139] Upeniece, V. 2016. Anticipatory war and UN Charter Article 51. Riga: Latvian Academy of Sciences Baltic Center for Strategic Studies, 168.

Saeima is convened. Concurrently and without delay, the President shall convene the Saeima, which shall approve the decision on commencement of the State military defence."

The current wording of Article 44:

"*44. The President has the right to take whatever steps are necessary for the military defence of the State should another state declare war on Latvia or an enemy invades its borders. Concurrently and without delay, the President shall convene the Saeima, which shall decide as to the declaration and commencement of war*."

In the proposed wording, the author used the style of historical expression of the Constitution of the Republic of Latvia.

3. To replace, in Article 73, the words "declaration and commencement of war" with the words "commencement of the State military defence".

The change in Article 73 is underlined:

"73. The Budget and laws concerning loans, taxes, customs duties, railroad tariffs, military conscription, commencement of the State military defence, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations may not be submitted to national referendum."

2) National security law:

1. To make wording of Article 6 clause 9 as follows:

"9) decide on the commencement of the State military defence".

The current wording of Article 6 clause 9:

*"**Section 6. Competence of the Saeima***

The Saeima shall:

(..)

9) decide on declaration and commencement of war"

2. To make the wording of Article 8, par. 1, clause 6 as follows:

"6) propose the issue of commencement of the State military defence for decision in the Saeima".

The current wording of Article 8, pa. 1, clause 6:

*"**Section 8. Competence of the President***

(1) The President shall:

(..)

6) propose the issue of declaration and commencement of war for decision in the Saeima"

3) To make Article 24, par. 1, clause 2 wording as follows:

"2) convene the Saeima for making of a decision to declare and commence war"

The current wording of Article 24, par. 1, clause 2:

*"**Section 24. Powers of the President in Case of War or Military Aggression***

(1) In case of war declared to the State, or military aggression, the President shall immediately:

(...)

2) convene the Saeima for the approval of the decision on the commencement of the State military defence"

3) Cabinet structure law:

"Exclude the words "war has been declared" in Article 30, par. 1^1".

The current wording of Article 30, par. 1^1:

*"**Section 30. Decision-taking***

(...)

(1^1) A Cabinet sitting may be held and a decision may be taken therein with the participation of only the Prime Minister and at least three other members of the Cabinet if a state of exception has been proclaimed in the State, war has been declared or the President has notified the Cabinet of the taking of the steps necessary for military defence (Article 44 of the Constitution)."

4) Law on military courts:

"Replace in the first paragraph of Article 2 the words "war has been declared" with the words "during war"."

The current wording of Article 2, par. 1:

*"**Section 2. The establishment of the military courts.***

(1) If a state of exception has been declared in the State in accordance with the procedures specified in regulation or a war has been declared, the Minister of Justice shall issue an order for the commencement of the work of military courts."

2 Extension of cases of announcement of general mobilisation

Conclusion. According to Article 11, par. 1 of the law "On emergency situation and state of exception":

"(1) State of exception is a special legal regime to be declared if:

1) the State is endangered by an external enemy;

2) internal disturbances which endanger the democratic structure of the State have arisen or are in danger of arising in the State or any part thereof."

Thus, according to the first paragraph of the above-mentioned article, a state of exception is declared when a country is endangered by an external enemy. As such endangerment could be recognised as a threat of an armed attack, for example, the following preconditions which fulfil simultaneously: the concentration of large amount of military units and techniques, put on alert at the border, receiving unambiguous information about the planned future action against territorial integrity of a country (that is, there is no question "Will attack?" but there is a question "When will attack?"). In such situation it may be necessary to consider in time the possibility of announcing a general mobilisation, which is currently limited by Article 3 of the Mobilisation Law,

according to which only partial mobilisation can be announced in the exceptional state. General mobilisation shall be announced in case of war.

Proposal. Therefore, the author proposes to make the relevant amendment to the Mobilisation Law (the change is underlined):

*"**Section 3. Resources and Types of Mobilisation***

(...)

(3) Mobilisation may be general, partial and local:

1) general mobilisation shall be announced in case of war by involving all mobilisation resources and utilising them for the needs of State defence in the amount specified in mobilisation plans. General mobilisation may be announced in exceptional state (..)".

3 Limits of self-defence in Latvian national regulation

Conclusion. Evaluating national regulation and political planning documents, membership in NATO is currently rightly selected as an important security guarantor. However, in the light of the increasing tendency among researchers and some countries (the US, the United Kingdom, Australia, Japan, Israel) to support a wide interpretation of Article 51 of the UN Charter, amendments to national laws that unambiguously emphasise the narrow literal interpretation of Article 51 of the UN Charter are not recommended in the future.

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