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CAN A MEMBER OF THE UNITED NATIONS UNILATERALLY DECIDE TO USE PREEMPTIVE FORCE AGAINST ANOTHER STATE WITHOUT VIOLATING THE UN CHARTER?

Introduction

This paper focuses on the right of UN members to unilaterally use force against other states preemptively. It explores whether the signatories of the Charter of the United Nations enjoy the right under the said document to use preemptive force against another state without an official approval from the United Nations.

Since the adoption of the UN Charter there has been debate among international lawyers and politicians whether the Charter permits preemptive force in international relations. This debate became more heated, as well as significant, after the tragic events of 11 September 2001 in New York, highlighting the need to ensure the security of countries and citizens against unexpected, unannounced attacks, often perpetrated by terrorist groups equipped with up-to-date technologies and capable of causing immense harm.

In response to these growing and relatively new threats, the Bush administration in its National Security Strategy of 2002 emphasized the necessity of the use of preemptive force against states it considers responsible for or contributing to terrorist acts, for instance, those supporting or harboring terrorist groups. This inspired considerable discussion in academic and political circles about the legality of preemption in the fight with terrorists as well as rogue states.

The purpose of this paper is to answer the question whether it is legal for a UN member to unilaterally use preemptive force against another state. For that, it will be necessary to find out what are the exact meanings of the relevant provisions of the UN Charter, in particular the prohibition of the use of force among states in Article 2(4) and the exception for self-defense in Article 51.

The hypothesis of this work is that unilateral use of preemptive force, as defined later in the paper, is legal under the UN Charter provided the strict requirements of necessity are met.

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By no means does this paper aim to justify or condemn (in the legal or moral sense) any particular uses of force by states, i.e. it will not particularly deal with any wars, conflicts or attacks. The UN Charter makes the legality of the use of force in self-defense subject to the existence of certain circumstances. Thus, this legality in a particular case is not only a question of law but also a question of fact, whereas this paper deals only with legal issues. Obviously, concrete cases will be mentioned, but only to illustrate how the Charter applies to specific events and to show why the issue discussed is really important in the actual world.

This paper deals exclusively with the controversial issue of preemptive use of force and does not cover self-defense in the event of actual armed attack or the so-called interceptive self-defense.[1]

Initially the paper relies on textual interpretation to analyze the meaning of relevant UN Charter provisions by closely examining their texts. Then it applies the "purpose and object test" to the said provisions. The discovery of their true meanings is sought with the help of a wide range of scholarly opinions from authoritative sources as well as judgments of the International Court of Justice that provide valuable interpretation of the said provisions. It then compares what the Charter says with what states have actually done in their international affairs to date, and how other states have reacted to that. Customary law is examined in order to better understand the meaning of Charter provisions. This is done with the help of authoritative interpretations of a number of cases where preemptive force was used.

The paper also compares the practice of preemptive force by states before the adoption of the Charter in 1945 with post-Charter behavior. This is done in order to see what, if any, changes has the Charter brought about, which will also help to better understand the meaning of its provisions in question.

At the beginning, the meaning of preemptive use of force for the purposes of this work will be explained. Then, the paper will proceed with the analysis of the UN Charter framework and the respective practice of states. It will be examined whether preemptive use of force fits into that framework.

I. The Concept of Preemptive Force

Preemptive force is not a new concept. For centuries, the legality of preventing an attack has been discussed. In 1625, Hugo Grotius said, "It [is] lawful to kill him who is preparing to kill".[2] This idea was echoed by Emerich de Vattel in his *The Law of Nations* (1758): The safest plan is to prevent evil where that is possible. A Nation has the right to resist the injury against the aggressor."[3]

This section aims to clarify the meaning of the term preemptive force as used in this paper.

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[1] For related distinctions and a definition of preemption for the purposes of this paper see the section below.

[2] Covery. T. Oliver et. al., *The International Legal System. Cases and Materials,* 4th edition (Westbury, New York: The Foundation Press, 1995), p. 1349.

[3] Id.

A) Inconsistency of Interpretation

There have been a variety of scholarly opinions as to what preemptive force means, yet most seem to avoid a clear definition of preemption in the context of international relations. Nor is preemptive force directly mentioned in the UN Charter. Yet, as this paper deals specifically with the concept of preemptive force, it is important to clearly state what is meant by this term here.

Starting with a simpler component of the term, it should be stressed that the word "force" here means only *armed* force. It does not refer to any political, diplomatic, or economic force that may be exercised among states.

Preemptive use of force is related to the ability to strike first before your enemy strikes at you. In international relations, this means that one nation would attack another in advance of suffering an attack from that state. Thus, it is a preventive attack in self-defense. However the interpretation of the meaning of this term has not been very consistent. The simplest and broadest way to define the concept of preemption would be to say that it is "the use of military force in advance of a first use of force by the enemy."[4] Yet, it should be noted that sometimes preemptive use of force is understood in a narrower sense, adding the circumstances that exist at the time of preemptive attack. For example, Ivo H. Daalder[5] argues that a "preemptive attack is launched only after the state being attacked has either initiated or has given a clear indication that it will initiate an attack."[6] Experts often disagree on whether *imminence* of an attack is an element necessary for preemptive use of force, i.e. whether or not preemptive use of force refers to the situations when the attack from the potential aggressor is imminent.[7]

B) Preemption in the US National Security Strategy 2002

It seems that many of the interpretations of the concept of preemption stem from the way it is presented in the US National Security Strategy 2002. In this document preemptive force seems to be relieved of the element of imminence of an attack, at least in traditional terms:

> *Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.*
>
> *We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.*[8]

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[4] Anthony Clark Arend, "International Law and the Preemptive use of Military Force", *The Washington Quarterly* (Spring 2003), p. 89, <http://www.twq.com/03spring/docs/03spring_arend.pdf> [accessed on 17 May 2005]

[5] Ivo H. Daalder is special adviser on national security at Center for American Progress and senior fellow in Foreign Policy Studies at the Brookings Institution.

[6] Ivo H. Daadler, "Policy Implications of the Bush Doctrine on Preemption", memorandum to members of the Council of Foreign Relations/American Society of International Law Roundtable on Old Rules, New Threats, <http://www.cfr.org/publication.php?id=5251> [accessed on May 15, 2005].

[7] See, for example, Stephen Murdoch, „Preemptive War: Is It Legal?", *Washington Lawyer* (January 2003), < http://www.dcbar.org/for_lawyers/washington_lawyer/january_2003/war.cfm> [accessed on 15 May 2005].

[8] *The National Security Strategy of the United States of America* (September 2002), Part V, <www.whitehouse.gov/nsc/nss.pdf> [accessed on 12 May 2005].

The strategy proceeds to explain how modern technologies, including weapons of mass destruction, have increased the capabilities of today's terrorists as well as rogue states, and how unexpected and devastating their attacks may be. As a result, the Bush Administration declares, "We cannot let our enemies strike first."[9]

Judging form the text of the NSS, the US Government is neither going to wait for an armed attack to occur, nor for it to become imminent according to the traditional understanding of imminence. Bearing in mind the capabilities of today's potential adversaries, it believes it cannot afford to suffer the first blow and thus risk the lives of thousands or even millions of its citizens.

It appears that when some critics speak of preemption they are referring to the preemption concept used in the NSS, i.e. necessarily without the traditional element of imminence. On these grounds, they denounce preemptive self-defense as a whole as incompatible with the UN Charter or international law in general. However, in my opinion, such a view is ungrounded. The US administration simply said that it was going to apply preemptive force even when there is no imminent attack in traditional terms. That does not mean that from now on, any situation where force is used to respond to an imminent attack should not be considered a preemptive use of force. In fact, it is possible to argue that the NSS fully recognizes the imminence requirement, only it changes it to reflect today's realities.

C) Definition and Limits of the Concept in this Paper

For the purposes of this paper, preemptive use of force includes all situations when a state uses armed force in advance of the use of force by its enemy. This includes both the situation when an attack from the enemy is imminent as well as the situation when it is only possible or likely. The peculiar circumstances of a situation will be the factors that determine when preemptive use of force is legal under the UN charter.

Obviously, the definition above does not include armed response to actual attacks. For the purpose of clarity, it should be added that it also does not include self-defense against an attack that is already underway, although the victim has not suffered its effects yet. In this paper this is referred to as interceptive self-defense.[10] According to Sir Humphrey Waldock, "where there is convincing evidence not merely of threats and potential danger but of an attack actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier."[11] The Japanese fleet *en route* to Pearl Harbor during World War II could be a good illustration of a mounted attack.[12] Although not actually experienced by the United States yet, such an attack could be characterized as occurring, and thus use of force by US military against the

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[9] Id.

[10] Patrick McLain, *Settling the Score With Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 Duke J. Comp. & Int'l l. 270 (2003).

[11] C.H.M Waldock, *The Regulation of the Use of Force by Individual States in International Law,* 81 Hague Recueil 451, 498, quoted in: Mary Ellen O'Connell, "The Myth of Preemptive Self-Defense", American Society of International Law, August 2002, <http://www.asil.org/taskforce/oconnell.pdf> [accessed on 15 May 2005].

[12] Id.

Japanese fleet in such circumstances should not be considered as preemptive use of force, but rather as self-defense against an occurring attack. By contrast, "anticipatory self-defense", should be considered synonymous to "preemptive use of force."

This paper deals with the question whether preemptive force can be used unilaterally, and if yes, whether this legality is conditional. If so, then what are the conditions permitting its use?

D) The 'Loaded Gun' Analogy

According, to James Steinberg, vice president and director of foreign policy studies at the Brookings Institution, "preemption is analogous to when a person acts aggressively to protect him- or herself when threatened with a loaded gun."[13] In such a case, when can a person begin to protect himself from such a threat: does he have to wait until the first shot is fired at him? Maybe it is enough to wait until the gun is pointed at him? Or maybe, it is enough for him just to know that the person has a loaded gun, is capable of attacking, and has a bad reputation for having attacked or threatened people. What difference does it make if the potential attacker makes threats or shows other signs of preparing for the attack? To put it in terms of relations between states, does a state have suffer the first blow, i.e. to wait until bombs start falling on its soil before it can respond? If it does not, what are the prerequisites for it to be legal to take preemptive action?

E) Preemption in Changed Circumstances

When considering the legality of preemption under the UN Charter, this paper takes into account the period and the circumstances when the Charter was drafted. In particular it points to the changed circumstances in today's world, marked by the spread of weapons of mass destruction and other dangerous technologies, the expansion of terrorism, and the resulting greater capabilities of terrorist groups and rogue states to strike unexpectedly and with devastating force.

First it should be noted that when the Charter was drafted the potential of weapons of mass destruction was virtually unknown.[14] As a result, the "Charter framework was, as one advisor to the United States delegation, John Foster Dulles, would later say, a 'pre-atomic' document."[15] Therefore, the Charter could not take into account all the threats posed by WMD in today's world and could not envisage the importance of preemptive force in trying to reduce threats of WMD attacks from rogue states or terrorists. As US President Bush has put it, the country "cannot wait for the final proof – the smoking-gun – that could come in a form of a mushroom cloud."[16]

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[13] See note 7: Stephen Murdoch.

[14] Anthony Clark Arend, *International Law and Rogue States, The Failure of the Charter Framework*, 36 New Eng. L. Rev. 742 (2002).

[15] Anthony Clark Arend, *Pursuing a Just and Durable Peace: John Foster Dulles and International Organization* (1988), quoted in: id.

[16] President George W. Bush, 2002 Cincinnati speech, quoted in: „Global Terrorism and Military Preemption: Policy Problems and Normative Perils", *International Politics* (2004, No. 41), http://www.global.ucsb.edu/classes/global_122_s05/case2/kegley_raymond.pdf [accessed on 19 May 2005].

Second, before the adoption of the Charter in 1945 and, to some extent, even before the tragic events of 11 September 2001, it was not known how potentially dangerous terrorist organizations, often backed by rogue states, could be. The drafters of the Charter probably had in mind the traditional uses of force - "clear, overt acts of aggression undertaken by regular military forces of states."[17] However, as evidenced by recent terrorist activities, especially by the attack of 11 September 2001, conventional attack is no longer necessarily the practice of some states, much less terrorist groups. This threat is addressed in the US National Security Strategy 2002: "Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead they rely on terror, and potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning."[18]

The idea that conventional attack is no longer the tactic of rogue states is convincingly supported by Professor Arend, who identifies three challenges posed by rogue states to the current Charter framework:

> *First rogue states often do not engage in obvious armed attacks, but instead use force against other international actors in ways that do not squarely fall under the textbook definition of "armed attack." Second, rogue states frequently engage in actions against their domestic populations that do not constitute international aggression, but nonetheless may be horrible violations of international human rights law. Third, rogue states may possess or seek to possess or develop weapons of mass destruction. While the mere possession of these weapons, or potential possession of these weapons, does not constitute an actual armed attack, such actions by the rogue states may still threaten international peace.*[19]

Considering what has been said above, the legality of preemption under the UN Charter should be interpreted in the light of the present circumstances. Obviously, the Charter of 1945 could not have foreseen all the threats that may arise 60 years later, and therefore the true purpose and objectives of the Charter should be kept in mind in order to understand the meaning of its relevant provisions. "In the case of the Charter, recourse to the object and purpose is 'of special significance' due to its constitutional nature and extreme difficulty of carrying out formal revisions."[20]

II. Charter Framework

This section will examine the rules of the UN Charter in relation to the use of force among states and what it says, if anything, about unilateral use of preemptive force.

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[17] See note 14: Anthony Clark Arend, p. 738.
[18] See note 8: National Security Strategy of the United States of America.
[19] See note 14: Anthony Clark Arend, p. 739.
[20] Martti Koskenniemi, *'The Lady Doth Protest Too Much'. Kosovo, and the Turn to Ethics in International Law*, 65 Mod. L. Rev. 163 (2002).

A) General Prohibition of the Use of Force

It is commonly agreed that the use of force among states is generally prohibited by the UN Charter[21]. In particular, this prohibition is set out in Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[22]

This rule has become a rule of customary international law, and it applies not only to the members of the United Nations, but to all states.[23] The binding character of the Charter is also reinforced by the Charter itself in Article 2(6), which provides that " [t]he organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."[24] As the International Court of Justice noted in its *Nicaragua v. USA* judgment in 1986, the prohibition of the use of force, as testified "in the statements by state representatives" is "not only a principle of customary international law, but also a fundamental and cardinal principle of such law."[25]

It should be noted that the meaning of force is not limited to wars in the traditional sense, since there may be hostilities that cannot be characterized as a war. "Article 2(4) applies to all force, regardless of whether or not it constitutes a technical state of war."[26]

Although Article 2(4) mentions "territorial integrity" and " political independence", it does not mean that force is prohibited only against those two values, because it is added, "or in any other manner inconsistent with the Purposes of the United Nations." Judging from one of the purposes of the United Nations, "to maintain international piece and security" (Article 1), "any breach of international peace is automatically contrary to the Purposes of the United Nations".[27]

Yet, this principle should not be understood too expansively. According to Professor Sofaer, application of the prohibition to absolutely all uses of force would also jeopardize the Charter purposes.[28] There may be uses of force that are in compliance with the purposes and do not compromise the territorial integrity or political independence of states. One of such uses of force is humanitarian intervention, which increasingly recognized as legitimate and necessary. "The use of force to disarm an established aggressor, without altering the territory of that member state, or depriving it of its sovereign status, is an end that is consistent with the 'Purposes' of the United Nations."[29]

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[21] See, for example, Peter Malanczuk, *A Modern Introduction to International Law,* 7th edition (London and New York: Routledge, 1997), p. 309.
[22] Charter of the United Nations (San Francisco, 26 June 1945).
[23] Michael Akehurst, *A Modern Introduction to International Law,* 6th edition (London and New York: Routledge, 1991), p. 259.
[24] See note 22: Charter of the United Nations.
[25] ICJ case: *Nicaragua v. USA,* ICJ Reports, 1986, para. 190.
[26] See note 22: Charter of the United Nations.
[27] See note 21: Peter Malanczuk, p. 310.
[28] Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 Eur. J. Int'l. L 223 (2003).
[29] Id.

B) Exceptions to the Prohibition

Aside from the arguably "legal" use of force for humanitarian intervention, the use of armed force is prohibited under the UN with only two exceptions: force authorized by the UN Security Council and self-defense.

i) Force Authorized by the United Nations

Under certain circumstances, the Security Council may permit the use of force. Apart from cases of defending itself discussed below, if a state wants to use force against another state, it must ask the Security Council for authorization. "The Security Council may authorize the use of armed force and lesser measures by a state when it finds a threat to the peace, breach of the peace, or act of aggression."[30]

This authority of the Security Council to impose military sanctions stems from the provisions of Chapter VII of the UN Charter, in particular Article 42. The first Gulf War, when the Council adopted resolution 678 authorizing the use of force to remove Iraq from Kuwait, is often cited as the best example of how armed force should be authorized by the UN Security Council.[31]

As this paper deals specifically with unilateral use of preemptive force, the exception for force sanctioned by the UN will not be further discussed. Now, the paper will proceed with a thorough analysis of the second exception, self-defense.

ii) The Right of Self-Defense

Absent an authorization from the Security Council, self-defense is the only justification for the unilateral use of force by a state without violating the UN Charter. Self-defense is also a rule of customary international law, recognized by the UN Charter, which refers to this right as "inherent."

Obviously, if self-defense is the only possible excuse for unilateral use of force, the only way to justify preemption is to prove that it fits into the concept of self-defense. As preemption refers to striking in advance of the enemy, the challenge for this paper is to find out how soon self-defense can begin. *Can a state begin to defend itself before it is actually attacked?*

The exception of self-defense to the general prohibition of the use of force is found in Article 51 of the UN Charter:

> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.*[32]

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[30] Marry Ellen O'Connell, "Lawful Responses to Terrorism", legal research website of the University of Pittsburgh Law School, http://jurist.law.pitt.edu/forum/forumnew30.htm [accessed on 19 May 2005].

[31] For example see note 14: Anthony Clark Arend, p. 738.

[32] See note 22: Charter of the United Nations.

Thus, even in a situation where a state defends itself, it does not enjoy complete freedom of action. It must report the situation to the Security Council and can use force in self-defense only until the Security Council has taken appropriate measures.

French Text v. English Text

The biggest controversy about the meaning of Article 51 surrounds the phrase "if an armed attack occurs". These words bear special relevance to the legality of preemption. At first glance it appears to be a simple phrase, but among scholars and international politicians there is widespread disagreement about its true (intended) meaning.

If interpreted literally, the above phrase means that force in self-defense can be used only in response to an attack that has already occurred.[33] That would clearly speak against the legality of preemption.

However the proper interpretation of "armed attack" is less clear if the French instead of English text is read[34]. The French version that "uses the words 'dans le cas ou un membre… est l'objet d'une aggression armée,' which can be translated as, "in the case where a member … is the target of an armed attack," clearly implies that a state can be the object of an attack before the attack occurs."[35] But this controversy is just one of the factors that strengthen the argument that a strictly literal interpretation of the provision in question is not necessarily the best way to find its meaning.

"If" or "Only if "

Back to the English version, the next ambiguity in Article 51 is a result of purely linguistic differences of interpretation of the word "if" in the phrase "if an armed attack occurs." Those who favor the right of preemptive use of force maintain that "Article 51 does not limit the circumstances in which self-defense may be exercised; they deny that the word 'if', as used in Article 51, means 'if and only if'."[36] If this argument is accepted, then the article could be interpreted as allowing use of force not necessarily only in situations of an actual armed attack. Preemption, thus, would be legal.

For example, a leading proponent of the legality of preemption, Professor Myres McDougal, argues that Article 51 does not in any way restrict the customary right of self-defense. The proponents of such a restriction, he says, "substitute for the words 'if an armed attack occurs' the very different words 'if, and only if, an armed attack occurs.'"[37] In simpler terms, McDougal explains: "A proposition that 'if A, then B' is *not* equivalent to, and does *not* necessarily imply, the proposition that 'if, and only if, A, then B.'"[38] If this argument is accepted,

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[33] See note 21: Peter Malanczuk, p. 311.

[34] Article 111 of the Charter provides that "Chinese, English, French, Russian and Spanish texts are equally authentic."

[35] See note 21: Peter Malanczuk, p. 311.

[36] Id., p. 312.

[37] McDougal, *The Soviet Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 597 (1963), reprinted in: Louis Henkin et. al., *International Law. Cases and Materials,* 2nd edition (St. Paul, Minnesota: West Publishing co., 1987), p. 737.

[38] Id.

"[t]he occurrence of an 'armed attack' [is] just one circumstance that would empower the aggrieved state to act in self-defense."[39]

This linguistic-logical manipulation, of course, has not been endorsed by everyone. Without going into too many details, the main representative contra-argument is that "it is hard to imagine why the drafters of the charter bothered to stipulate conditions for the exercise of the right of self-defense unless they intended those conditions to be exhaustive."[40]

The "Inherent Right" Argument

The supporters of preemptive self-defense also often rely on the reference to self-defense as an "inherent right" in Article 51. They claim that "it would be inconsistent for a provision simultaneously to restrict a right and to recognize that right as inherent."[41] An additional argument is that "Article 51, by pledging not to 'impair the inherent right of self-defense', left intact and unchanged the law of customary self-defense predating the adoption of the UN Charter"[42].

It is generally acknowledged that the right to preempt an attack by the enemy was recognized by pre-Charter customary law, i.e. it was part of the recognized right of self-defense. It would follow that the recognition of the right of self-defense by the Charter as "inherent" also includes the recognition of the legality of preemption.

The "Armed Attack" Restriction: The True Intentions

As mentioned above, Article 51 of the UN Charter provides that self-defense is permitted "if an armed attack occurs against a Member of the United Nations." The preceding discussion centered mainly on the differences of literal interpretation of the provisions, which does not provide us with a clear answer about the legality of preemptive strikes. Therefore, what follows is a discussion about the possible purpose and intention of Article 51. Basically, two conflicting approaches will be presented: one restricting and the other expanding the meaning of "if an armed attack occurs."

According to Martii Koskenniemi, "law is now how it is interpreted."[43] He offers the object and purpose test, especially for situations when the meaning of the law might be unclear. "The 'object and purpose' test is not just a technique; it is a replacement of the legal form by a claim about substantive morality."[44]

Moreover, many publicists believe that the purpose and object should be construed with respect to the changed circumstances that could not have been foreseen by the drafters of the Charter. For example, in 1945 it was probably difficult to foresee the spread and scope of terrorism as well as the capabilities and tactics of terrorists and rogue states in 2005, especially when they have access to weapons of mass destruction. As a result, the drafters could not have appreciated the importance of the "first strike" to deter those terrorists or states or to destroy their capabilities.

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[39] See note 4: Anthony Clark Arend, p. 92.
[40] See note 21: Peter Malanczuk, 312.
[41] Id.
[42] See note 12: Marry Ellen O'Connell.
[43] See note 20: Martti Koskenniemi, p. 164.
[44] Id., p. 165.

Some authorities fiercely oppose this view. For instance, Professor Henkin argues:

> *Nothing in the history of its drafting* (*the travaux préparatoires) suggests that the framers of the Charter intended something broader than the language implied. Since the Charter was drafted, the world for which it was written has changed; the United Nations has changed; the quality of force has changed. But neither the failure of the Security Council, nor the Cold War, nor the birth of many new nations, nor the development of terrible weapons, suggests that the charter should now be read to authorize unilateral force even if an armed attack has not occurred.* [45]

But attempts have been made to rebut these arguments with the help of the provisions of the Vienna Convention of the Law of Treaties. Frederic Kirgis maintains:

> *[The Vienna Convention] allows a party to a treaty to suspend the treaty's operation if circumstances constituting an essential basis of its consent have fundamentally changed in a way not foreseen when the treaty was entered into, and if the change radically transforms the extent of obligations still to be performed under the treaty. It may be argued that the same principle would apply to specific provisions in a treaty. Thus it may be argued that circumstances have so fundamentally changed since 1945, when the UN Charter was adopted, that the "armed attack" restriction can no longer be taken literally.*[46]

Article 51 has been subjected to the purpose and subject analysis by many experts of international law, though it appears that this technique has been more popular among the proponents of the expansive interpretation of the article.

For example, Professor McDougal submits that the limitation of self-defense to "actual armed attack" is not supported by "any of the commonly accepted principles for the interpretation of international agreements."[47] The objective of the interpretation of documents like the UN Charter, according to him, is to understand "the genuine expectations, created by the framers and by successive appliers of the agreement, in contemporary community members about what future decisions should be"[48]. Professor McDougal believes that there is absolutely no proof that the framers of the UN Charter "by inserting one provision which expressly reserves a right to self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states."[49]

Another popular argument against the restrictionist approach to Article 51 is that such interpretation would not produce a reasonable result. While discussing the legality of NATO's use of force in the Kosovo situation, Martti

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[45] Louis Henkin, *How Nations Behave* (2nd ed., 1979), reprinted in: see note 37, Louis Henkin et. al., p. 740.

[46] Frederic L. Kirgis, "Pre-emptive Action to Forestall Terrorism", American Society of International Law, <http://www.asil.org/insights/insigh88.htm > [accessed on 20 May 2005].

[47] See note 37: Myres McDougal.

[48] Id.

[49] Id.

Koskenniemi points out that a formalistic approach to Article 51 "is arrogantly insensitive to the humanitarian dilemmas involved."[50] He further observes:

> *It resembles a formalism that would require a head of state to refrain from a pre-emptive strike against a lonely submarine in the North Pole even if that were the only way to save the population of the capital city from a nuclear attack from that ship – simply because no 'armed attack' had yet taken place as required by the language of Article 51. But does the law require the sacrifice of thousands at the altar of the law?*[51]

Martti Koskenniemi believes the law should be interpreted in a way that produces a "reasonable" result. "If it is the *intention* of the self-defense rule to protect the State, surely it should not [be] applied in a way to bring about the destruction of the State."[52] In the words of Patrick McLain, "the UN Charter is not a suicide pact. The Charter will not function if states feel that the fulfillment of Charter obligations may come at the cost of their survival."[53] Survival or at least protecting vital interests, such as the protection of the lives of many citizens, seems today to a certain degree dependent on preemptive self-defense, at least more than it was 60 or even 30 years ago.

In 1979 Professor Henkin wrote: "The argument that 'anticipatory self-defense' is essential to United States defense is fallacious. The United States relies for its security on its retaliatory power, and primarily on its second strike capability."[54] Obviously, that is no longer the case. The National Security Strategy 2002 stipulates clearly that the US cannot and is not going to rely only on the second strike capability at the possible cost of its own security and world peace. Instead, it will rely on the right to preempt possible attacks, a right that has been created by the circumstances of today – WMD, spread of terrorism, rogue states etc.

A similar realist approach to Article 51 provisions is also preached by Lee Casey and David Rivkin, who discredit the arguments of restrictionists because they "are insisting on an unrealistic standard that makes no sense in an age of proliferating nuclear and intercontinental ballistic missile technologies, as well as of biological and chemical weapons."[55] The mentioned authors, who both served in the Department of Justice during the Reagan and George H.W. Bush Administrations, believe self-defense in advance of an armed attack is not outside the "plain meaning" of the Charter and also stress the necessity to take the realities of today into account when interpreting it: "As a practical matter, no state is likely to watch as its destruction (or death or injury of its citizens) is being prepared, taking no action until after these weapons have actually been used. If

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[50] See note 20: Martti Koskenniemi.
[51] Id.
[52] Id.
[53] See note 10: Patrick McLain, p. 265.
[54] See note 45: Louis Henkin.
[55] Lee A. Casey and David B. Rivkin, Jr, "'Anticipatory' Self-defense Against Terrorism Is Legal", *Legal Opinion Letter* (14 December 2001, Vol. 11. No 19), www.wlf.org/upload/**casey**.pdf [accessed 15 May 2005].

international law is to have a meaningful role in ordering international relations, it must reflect and accommodate the realities of the international system."[56]

As an additional argument, it is submitted that the conditions for self-defense stipulated by the article should not be "treated as exhaustive, otherwise the words 'if an armed attack occurs against a member' would have the absurd result of preventing members from protecting non-members against attack."[57] In practice, members do reserve the right to protect non-members. For instance, one of the purposes of NATO was to protect West Germany, even though this country was not a member of the UN until 1973.[58]

A conclusion that follows from what has been said is that the literal interpretation of Article 51 does not always coincide with the Charter purposes and objectives and does not always meet the reasonableness criterion in today's world. And the literal interpretation itself, as mentioned above, has not been consistent. Article 51 does not directly answer the question whether preemption is legal. It is silent about the right of preemption which is generally believed to have existed under the pre-Charter customary law.[59]

Arend admits the ambiguity of the Charter in relation to preemptive use of force and stresses the importance of examining customary law to deal with this ambiguity. He regrets that neither the ICJ nor the UN Security Council has explained the meaning of Article 51 precisely. He points out that in the *Nicaragua* case the International Court of Justice was not eager to give its opinion on the legality of preemptive force under certain circumstances: "the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised…. The Court expresses no view on the issue."[60] As a result, Arend contends, two interpretations about the legality of preemptive force are possible. "Given this state of affairs, it is logical to explore the practice of states in the period after the charter was adopted to determine if recent customary international law has either helped supply the meaning to the ambiguous language of Article 51 or given rise to a new rule of customary international law in its own right that would allow for preemptive action."[61]

Before doing so, it is useful to take a look at the pre-Charter state practice to see how the situation changed after 1945, i.e. whether or not states thought that the rules of the game were changed by the Charter.

Thus, what follows is an analysis of pre-Charter principles and post-Charter state practice related to unilateral preemptive self-defense.

III. State Practice

First, this section will look at the principles of international law before the adoption of the UN Charter in 1945. It will examine whether or not there existed a rule of customary law allowing preemptive self-defense. Then the focus will shift to post-Charter state behavior and the reactions of the international community to

[56] Id.
[57] See note 21: Peter Malanczuk, p. 312.
[58] Id.
[59] See next section for analysis of customary law.
[60] See note 25: *Nicaragua v. USA* , quoted in: see note 4: Anthony Clark Arend, p. 93.
[61] Id.

it in order to see whether or not preemption was considered legal and under what circumstances.

A) Pre-Charter Principles

Although preemptive self-defense was recognized as a right a few centuries ago by famous authorities, such as Hugo Grotius and Emerich de Vattel[62], it is widely acknowledged that criteria for preemptive use of force were first established during the communication between Lord Ashburton, a special British representative to Washington, and US Secretary of State in the 1840s, Daniel Webster, following a US-British incident in 1837, known as the *Caroline* incident. During this incident, which occurred at the time of peace between the United States and Great Britain, British troops attacked a US ship that was suspected by the British to have aided Canadian insurrection against Britain. The ship was destroyed and several US nationals killed. Initially, the British claimed they were acting in self-defense, although later, after heated exchanges of opinions with the State Secretary Daniel Webster, they had to apologize. In the course of communications between the two countries the following criteria for the legality of preemptive self-defense were established: necessity and proportionality.[63]

Thus, the British were pressed to prove that their attack on the US ship aiding the Canadians was necessary and proportional. They were not condemned for the mere fact of acting preemptively without waiting for an attack by the enemy. Instead, they were blamed only because their act, according to the American interpretation, did not meet the criteria set for self-defense. As Abraham Sofaer put it, "Webster's formulation for determining the legality of self-defense was based on his assumption that the attack was unnecessary, because the US was both willing and able to satisfy its obligation to prevent and punish attacks from within its borders."[64]

The *Caroline* case may be considered as representative of the pre-Charter state attitude towards preemptive self-defense, because

> *[t]hroughout the pre-UN Charter period, scholars generally held that these two criteria set the standard for permissible preemptive action. If a state could demonstrate necessity – that another state was about to engage in an armed attack – and act proportionately, preemptive self-defense would be legal.*[65]

In conclusion, "[u]nder the regime of customary international law that developed long before the UN Charter was adopted, it was generally accepted that preemptive force was permissible in self-defense."[66]

B) Post-Charter Practice

It is now reasonable to turn from pre-Charter principles to post-Charter state practice and its evaluation by scholars, governments and the UN itself. The

[62] See note 2: Covery. T. Oliver et. al.
[63] See note 4: Anthony Clark Arend, p. 90-91.
[64] See note 28: Abraham Sofaer, p. 219.
[65] See note 4: Anthony Clark Arend, p. 91.
[66] Id., p. 90.

aim is to see whether the Charter changed the state practice and the interpretation of preemptive self-defense.

Probably the best way to examine the said practice of states is to look at concrete cases related to the use of preemptive force. This paper will consider only three major representative cases: the 1962 Cuban missile crisis, the Six-day war in 1967, and the 1981 Israeli attack on the Osirak reactor in Iraq.

The Cuban Missile Crisis

In 1962, the United States imposed a "defensive quarantine" around Cuba in response to "Soviet military buildup" on this island. This was done to prevent the deployment of Soviet missiles there. The US reserved the right to inspect any vessel or craft proceeding towards Cuba and redirect it or take it into custody depending on the circumstances.[67]

As there was no actual attack from Cuba or the Soviet Union on the United States, this quarantine was clearly an act of preemptive self-defense.

Speaking about the crisis, President Kennedy said: "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril."[68]

Arend notes that in the discussions following the Crisis, preemption was discussed by a number of Security Council representatives: "Although there was no clear consensus in support of such a doctrine, there was also no clear consensus opposing it."[69] Primarily, the discussion was not about the legality of preemption but whether or not the US had met the criteria for preemptive use of force. A delegate from Ghana, for instance, "[accepted] the notion that anticipatory self-defense would be permissible if the criterion of necessity were met."[70]

The Six-day War

This war was launched by Israel 1967 against Egypt, Jordan and Syria "in response to massive troop buildups and the blocking of the Straits of Tiran by the Arab states."[71] As the name of the war suggests, it was ended very quickly, with the victory of Israel. Interestingly enough, there is no consensus as to whether or not these acts by Israel were a preemptive use of force, although clearly force was used by Israel before shots were fired by the enemy.

First, there is disagreement as to whether or not Israel itself claimed preemptive self-defense in this case. Professor Gray, for instance, argues that Israel did not claim anticipatory self-defense but claimed it defended itself against an actual armed attack, which had been mounted by the Arab states.[72] Professor Dinstein supports this view and adds that Israel's acts were in fact interceptive

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[67] Whiteman, "The Cuban Missile Crisis, 1962", *Digest of International Law* (1965, Vol. 4, 523-24), reprinted in see note 44: Henkin, p. 702-703.

[68] William H. Taft, "The Legal Basis for Preemption", memorandum to members of the Council of Foreign Relations/American Society of International Law Roundtable on Old Rules, New Threats, <www.cfr.org/publication.php?id=5250> [accessed on May 15, 2005].

[69] See note 4, Anthony Clark Arend, p. 94.

[70] Id.

[71] See note 10: Patrick McLain, p. 270.

[72] Christine Gray, *International Law and the Use of Force 4* (2000), p. 112-13 quotation in: see note 10: Patrick McLain, p. 270.

self-defense, because the attack of its enemy was already underway.[73] Indeed, Israel's attack could be found similar to the aforementioned hypothetical US attack on Japanese warships on their way to Pearl Harbor. Conversely, Professor Arend maintains that "Israel ultimately argued that it was acting *in anticipation of what it believed would be an imminent attack* by Arab states."[74] Meanwhile, Professor Frank says that although Israel did not claim anticipatory use of force, its attack should be considered an example of the practice because Israel attacked the Arab states in advance of any attack by them.[75] Frank observes that most states found Israel's acts reasonable, because the attack from the Arab states was imminent.[76] He believes this demonstrates that the preemptive use of force "may be a legitimate exercise of a state's right to ensure its survival."[77]

Attack on Osirak reactor

In 1981, Israel destroyed an Iraqi reactor that Israel believed would produce materials for nuclear weapons that would be used to attack Israel.[78] Israel based the legality of its action on the right of anticipatory-self defense.[79] It invoked this right because it believed "that a nuclear attack on its population by Iraq was eventually highly likely if Iraq were allowed to put the reactor into service and develop nuclear weapons."[80] This conclusion was grounded on prior antagonism and aggression from Iraq alleged by Israel.[81] According to Judge Sofaer, "Iraq's missile attacks on Israel during the Persian Gulf War of 1991, in which Israel did not participate, and its aggression against others, tends to justify Israel's unwillingness to face the high degree of risk Iraq's prior conduct and positions created."[82]

Although the Security Council condemned Israel for its action, Arend notes that "the most notable aspect of the debate was the willingness to engage in a discussion of the concept of preemptive self-defense."[83] Though no consensus was reached, the support for this right – subject to the *Caroline* criteria – was greater than in previous cases.[84] "It was unclear whether the Council's condemnation was directed at Israel's claim of anticipatory self-defense or a lack of necessity for action."[85]

In addition, Professor Anthony D'Amato observed, it is significant that although Israel was condemned by the Security Council and many governments,

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[73] Yoram Dinstein, *War, Aggression and Self-defence* (3rd ed. 2001), p. 173, quotation in: id, Patrick McLain, p. 270.
[74] See note 4: Anthony Clark Arend, p. 95, emphasis added.
[75] Thomas M. Franck, *Recourse to Force* 2, 5 (2002), p. 104-05 quotation in: see note 10: Patrick McLain, p. 270.
[76] Id.
[77] Id.
[78] See note 4: Anthony Clark Arend, p. 95.
[79] Id.
[80] See note 28: Abraham Sofaer, p. 222.
[81] Id.
[82] Id.
[83] See note 4: Anthony Clark Arend, p. 95.
[84] Id., p. 96.
[85] See note 10: Patrick McLain, p. 271.

it was not punished in any way.[86] He believes that despite the strict wording of the relevant Security Council Resolution, the international community was in fact "secretly applauding" Israel's attack:

> *Any informed observer looking at the action of the Security Council would have been justified in calling it a gentle pat on the wrist. In actual effect, though not in wording, the resolution can only be seen as covert support for Israel's air strike. My guess is that the international community, via the resolution, was breathing a collective sigh of relief.*[87]

In the light of the analysis above, it is necessary to conclude that the post-Charter state practice and its evaluations do not prove the existence of any rule of customary law prohibiting the use of preemptive self-defense. However, the right to preempt an attack, when recognized, is subjected to strict criteria of necessity.

IV. Criteria of Permissibility

As seen from the analyses in the preceding sections neither the interpretation of the Charter language, bearing in mind its purposes and objectives, nor the relevant state practice support the view that preemptive use of force in self-defense is prohibited by the UN Charter. However, unlike the right of self-defense against an actual attack which is virtually unconditional, the right of preemptive force is subject to very strict limits. A short summary of these limits, i.e. the permissibility criteria, are set out below.

It has already been mentioned that according to some views, the attack from an enemy has to be imminent for preemption to be legal. However, this writer supports the opinion that the imminence criterion is too subjective and, in the light of the current situation of international affairs, outdated. It may have been suitable in the times of conventional warfare, but it is no longer today. It imposes on states too heavy a burden to wait until it may be too late to prevent an attack.

In the words of Walter B. Slocombe, necessity to preempt an attack

> *may exist without an immediate prospect of attack. The right of anticipatory self-defense by definition presupposes a right to act while action is still possible. If waiting for 'imminence' means waiting until it is no longer possible to act effectively, the victim is left no alternative to suffering the first blow.*[88]

This writer thus adopts the view of Professor Abraham Sofaer that the main criterion for the legality of preemptive self-defense is *necessity.* Sofaer argues that the UN Charter does not limit the use of force in self-defense to

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[86] Anthony D'Amato, *Israel's Strike Against the Osiraq Reactor: a Retrospective*, 10 Temp. Int'l. & Comp. L. J. 259 (1996).
[87] Id. p. 262.
[88] Walter B. Slocombe, 'Preemptive Military Action and the Legitimate Use of Force: An American Perspective", paper prepared for the CEPS/IISS European Security Forum, Brussels, 13 September 2003, < www.eusec.org/slocombe.htm> [accessed 10 May 2005].

imminent attacks.[89] Instead, customary law, as well as the Charter, establishes necessity as the standard for the use of force.[90]
In short, "the requirement of necessity means that force may only be used if no other means are available."[91] Yet, Sofaer offers a more comprehensive framework to determine whether or not necessity exists, naming four determining factors:

> *(1) the nature and magnitude of the threat involved; (2) the likelihood that the threat will be realized unless preemptive action is taken; (3) the availability and exhaustion of alternatives to using force; and (4) whether using preemptive force is consistent with the terms and purposes of the U.N. Charter and other applicable international agreements.*[92]

These criteria will not be discussed in greater detail here, as they are not the subject of this paper.[93] Its aim was only to prove that preemptive self-defense is legal under the UN Charter, yet it was important to show that this legality is conditional.

Conclusion

The language of the UN Charter itself does not provide a straightforward answer to the question whether unilateral preemptive use of force is legal. It recognizes the "inherent right of self-defense" but is silent on the pre-Charter rule of customary law permitting self-defense under certain strictly defined circumstances.

As a result, a literal interpretation of the Charter provisions is not sufficient, especially since such interpretations have not been consistent. It is instead necessary to look at the purpose and objectives of the Charter to see if one or another interpretation of the text furthers them. Bearing in mind the potential capabilities of today's terrorists and rogue states, especially due to their increasing attempts to acquire weapons of mass destruction, it is obvious that limiting the right of self-defense to situations where an armed attack has already occurred would render the right of self-defense illusionary, thus contradicting the Charter purposes.

State practice is another factor that may help understand the meaning of the relevant UN Charter provisions. A careful analysis of this practice shows that both before and after the adoption of the Charter, states in principle did not deny the existence of the right of preemptive self-defense.

It is very important to understand that the framers of the UN Charter were definitely not in a position to foresee the circumstances in which states will have to defend themselves, for example, 60 years from 1945. They could not predict the spread of terrorism, rogue states and weapons of mass destruction and other technologies. Consequently, they could not imagine how unexpected and devastating attacks would be or how to appreciate the importance of the first

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[89] See note 28: Abraham Sofaer, p. 220-226, and note 92: Abraham Sofaer.
[90] Id.
[91] Geir Ulfstein, "Terrorism and the Use of Force", *Security Dialogue* (2003, Vol. 34, No. 2), p. 164.
[92] Abraham D. Sofaer, "On the Legality of Preemption", *Hoover Digest* (Spring 2003, No. 2), <http://www.hooverdigest.org/032/sofaer.html> [accessed 10 May 2005].
[93] For a detailed explanation of these factors see: id and note 28 : Abraham Sofaer.

strike against a potential and likely aggressor. Perhaps, that is one of the reasons why preemptive use of force was not explicitly mentioned in the UN Charter. But in the light of current circumstances, it must be considered a part of the "inherent right of self-defense."

Of course, the right of preemptive use of force is subject to strict criteria, and this paper adopts the view that the main criterion is necessity. States must prove there is no other way to prevent an attack from an enemy but to strike it first. However, an objective for further research could be to establish and define the criteria for the legality of preemptive self-defense more precisely in order to prevent any possible abuses of this right and, perhaps, to propose some ways how the notion of preemptive self-defense could be incorporated into the text of the UN Charter to avoid ambiguities in the future.

In the meantime, it is important to understand that the Charter, which recognizes the inherent right of self-defense, cannot and should not be read in a way that significantly diminishes the possibilities of using this right effectively. An excellent summary of this principle was offered by William H. Taft:

> *The purpose of the UN Charter's language preserving the inherent right of self-defense is to help dissuade states from taking aggressive action. Underlying this purpose was the assumption that when a nation was attacked, it would be able to respond. The concept of armed attack and imminent threat must now take into account the capacity of today's weapons. The deterrent effect is diminished when the magnitude of the first aggressive strike would destroy completely one's ability to respond. The inherent right of self-defense embodied in the UN Charter must include the right to take preemptive action; otherwise the original purpose is frustrated.*[94]

Abstract in English

Vytautas Kačerauskis

CAN A MEMBER OF THE UNITED NATIONS UNILATERALLY DECIDE TO USE PREEMPTIVE FORCE AGAINST ANOTHER STATE WITHOUT VIOLATING THE UN CHARTER?

The language of the UN Charter itself does not provide a straightforward answer to the question whether unilateral preemptive use of force is legal. However it recognizes the "inherent right of self-defense".

Framers of the UN Charter were definitely not in a position to foresee the circumstances in which states will have to defend themselves, for example, 60 years from 1945. Consequently, they could not imagine how unexpected and devastating attacks would be or how to appreciate the importance of the first strike against a potential and likely aggressor. Bearing in mind the potential capabilities of today's terrorists and rogue states, especially due to their

[94] See note 68: William H. Taft.

increasing attempts to acquire weapons of mass destruction, it is obvious that limiting the right of self-defense to situations where an armed attack has already occurred would render the right of self-defense illusionary, thus contradicting the Charter purposes.

Therefore in the light of current circumstances, preemptive use of force must be considered a part of the "inherent right of self-defense." Of course, the right of preemptive use of force is subject to strict criteria - States must prove there is no other way to prevent an attack from an enemy but to strike it first.

Abstract in Lithuanian

Vytautas Kačerauskis

AR VALSTYBĖ JUNGTINIŲ TAUTŲ NARĖ GALI VIENAŠALIŠKAI NUSPRĘSTI PANAUDOTI PREVENCINĘ JĖGĄ PRIEŠ KITĄ VALSTYBĘ, NEPAŽEISDAMA JUNGTINIŲ TAUTŲ CHARTIJOS?

Nuo senų laikų buvo diskutuojama, ar tarptautiniuose santykiuose valstybė, siekdama apsisaugoti nuo kitos valstybės agresijos, turi teisę iš anksto užkristi tam kelią, tai yra panaudoti prieš tą valstybė prevencinę jėgą (angl. *preemptive force*). Pagal paprotinės teisės principus tokia teisė egzistavo, nors ir buvo apribota griežtomis sąlygomis. Tarptautinės teisės specialistų visuotinai pripažįstama, kad aiškiausiai ir išsamiausiai šios sąlygos buvo apibrėžtos JAV ir Didžiosios Britanijos diplomatų susirašinėjimo metu po garsiojo XIX a. įvykusio *Caroline* incidento, kurio metu britų kariai užpuolė ir nuskandino amerikiečių laivą, kurį britai įtarė talkinant Kanados sukilėliams prieš Didžiąją Britaniją. Buvo sutarta, kad būtinosios sąlygos leidžiančios panaudoti prevencinę jėgą yra pavojaus artumas (angl. *imminence*), jėgos panaudojimo būtinumas ir proporcingumas.

1945 m. buvo priimta Jungtinių Tautų Chartija. Kadangi JT organizacija siekė užtikrinti pasaulinę taiką ir saugumą, Chartija uždraudė karinės jėgos panaudojimą santykiuose tarp valstybių narių[95]. Tačiau Chartija taipogi ir numatė dvi minėto draudimo išimtis: 1) JT sankcionuotas jėgos panaudojimas[96]; 2) savigyna[97].

Kadangi pagal JT Chartiją vienintelis atvejis, kai galima vienašališkai nuspręsti panaudoti karinę jėgą yra savigyna, šiuo darbu, visų pirma, siekiama išsiaiškinti, ar savigynos sąvoka, naudojama minėtame dokumente, apima prevencinį jėgos panaudojimą.

Šiuo tikslu buvo atlikta išsami atitinkamų Chartijos nuostatų tekstinė ir loginė analizė. 51 straipsnis nurodo, kad savigynos teisė yra „prigimtinė", ir kad valstybės turi teisę individualiai ar kolektyviai gintis, „jei įvykdomas Jungtinių Tautų narės ginkluotas užpuolimas".

Nustatyti šios nuostatos tikrąją reikšmę yra pagrindinis iššūkis. Tarptautinės teisės ekspertai nesutaria, ar 51 straipsnis leidžia panaudoti savigyną tik tuomet, kai ginkluotas užpuolimas *jau yra įvykęs,* ar ir tuomet, kai norima užkirsti kelią tokiam užpuolimui prevenciškai. Ribojančio požiūrio šalininkai

[95] Žr. Jungtinių Tautų Chartija, Žin., 2002, Nr. 15-557, 2(4) str.
[96] Ten pat, 42 str.
[97] Ten pat, 51 str.

griežtai teigia, kad užpuolimas jau turi būti įvykęs, kad galima būtų imtis savigynos veiksmų. Tuo tarpu, priešininkai tvirtina, kad įvykęs užpuolimas tėra viena iš aplinkybių leidžiančių gintis. Autentiškų Chartijos tekstų analizė neleidžia daryti tvirtos išvados, kad prevencinis jėgos panaudojimas yra uždraustas. Tai ypač išryškėja, pritaikius minėtai nuostatos paskirties ir tikslo testą, kuris parodo, kad Jungtinių Tautų tikslams iškiltų pavojus, jei valstybėms narėms būtų draudžiama užkirsti kelią gresiančiai priešiškos valstybės agresijai. Ši išvada daroma, remiantis akivaizdžiais faktais, rodančiais, kad ypač šiame laikmetyje, sparčiai plintant terorizmui, tobulėjant masinio naikinimo technologijoms, joms pakliūnant į neprognozuojamų agresyvių valstybių, dažnai remiančių terorizmą, rankas, JT narės nebegali sau leisti laukti, kol jos bus užpultos, nes netikėtas ir nepaskelbtas užpuolimas, panaudojant naujausias technologijas, galėtų sukelti sunkiai atitaisomą žalą valstybėms ir sukeltų daugybės žmonių žūtį. Be abejo, tenka sutikti, kad rengiant Chartiją 1945 metais, nebuvo įmanoma visiškai numatyti šių dienų realijų. Galbūt todėl, išankstinės savigynos teisė nebuvo nedviprasmiškai įvirtinta šiame dokumente.

Visgi, Chartijoje neužsimenama apie tai, kad iki 1945 m. plačiai pripažinta prevencinės gynybos teisė, praranda galią. To nerodo ir aptariama valstybių narių praktika po Chartijos priėmimo. Valstybės naudojo ir naudoja prevencinę jėgą, nors jos vertinimas tarptautinėje bendruomenėje nevienareikšmis. Vis dėlto, išanalizavus konkrečias situacijas ir reakcijas, būtina pabrėžti, jog kai prevencinis jėgos panaudojimas pasmerkiamas, dažniausiai tai daroma ne stengiantis paneigti tokios jėgos panaudojimo teisėtumą iš esmės, o tik tvirtinant, kad šiai jėgai panaudoti nebuvo pagrindo, t.y. nebuvo įvykdytos tam tikros sąlygos leidžiančios šią jėgą panaudoti.

Atsižvelgiant į šių dienų tarptautinę padėtį ir karinių technologijų paplitimą bei pažangą, daroma išvada, kad Chartijos interpretavimas, uždraudžiantis prevencinės jėgos panaudojimą prieštarautų šio dokumento tikslams, nes paverstų jo įtvirtiną prigimtinę savigynos teisę iliuzine, atimdamas iš valstybių teisę užkirsti kelią gresiančiai pavojingai atakai.

Prevencinis jėgos panaudojimas laikytinas teisėtu pagal JT Chartiją, tačiau šis teisėtumas yra sąlyginis. Esminis reikalavimas yra būtinumas: valstybė, vienašališkai panaudojanti prevencinę karinę jėgą savigynos tikslais, turi būti pasiruošusi įrodyti, kad toks jėgos panaudojimas toje konkrečioje situacijoje buvo būtinas, t.y. kad egzistavo reali ir didelė grėsmė; kad buvo tikėtina, jog ši grėsmė materializuosis, jei nebus imtasi prevencinių veiksmų; kad buvo išnaudotos visos jėgos panaudojimo taikios alternatyvos; ir kad toks jėgos panaudojimas neprieštarauja JT Chartijos tikslams ir kitiems tarptautiniams susitarimams.