

Self-Defense Right and Anticipatory Self-Defense Under the Rules of Contemporaneous International Law and International Practice

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Abstract

The right of self-defense is one of the most controversial recognized rights in the international law. So, there is wide split in the international law concerning the extent of this right. Where we can see the article (51) and what has stated from legal and political problematic issues, concerning the rule of legitimate defense. Also, in the international jurisprudence two primary streams appeared concerning the field of interpreting the text of article (51) from the charter of the United Nations and its relation with article (2). The first stream was expanded in the interpretation for the concept of self-defense to include the preventive self-defense. As for the second stream, it supported the narrow interpretation and it holds the view that the right of self-defense is limited to the case of being exposed to an armed attack. As the people of the supporting orientation hold the view that the international practices ensure the existence of preventive self-defense right as a fixed right in the rules of customary international law. As for the second stream, it holds the view that the UN charter after its acknowledgment has made a radical change in the use of power in international relations and the use of power became an illegitimate act unless in the case of legitimate self-defense which occurs in the case of being subjected to an actual attack. This research aims study the self-defense and anticipatory self-defense in light of UN charter and international precedents.

Key words: Self-defense; Legitimate preventive defense; The use of armed force

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INTRODUCTION

The UN charter involved a unique leap in the field of using power in the international relations. So, according to its item 4 from the second article, it prohibited resorting to using power or threat in a way that contradicts the aims of UN chart.¹ It also made the use of power restricted and linked to the exceptions mentioned in chapter 7 which is related to measures of social security and self-defense. It also made the use of power in cases other than the mentioned cases to be considered as an illegitimate act which can be described as an international crime in which international responsibility is a consequence of it if it was classified as aggression. That means that the customary legal rule that was acknowledged by item 4 of article 2 is characterized with a description for the commanding rule “Jus cogens” which can’t be violated. This rule represents a binding force in facing all the members of the international community (Erga Omnes). Although that the articles of UN chart that concerns power aimed to prohibit the use of power and the threat of using it in international laws. It also encourages countries to settle their dispute through peaceful means. However, it did not prohibit the use of power completely. In article (51), we can see that the chart included a judgment that enables the use of power without any authorization or license from the Security Council in the case of legitimate self-defense.²

The contemporary international law has acknowledged the principle of prohibiting resorting to war and launching aggression. It also considered the wars in all its kinds and forms to be illegitimate and it formed an international

¹ U.N. Charter art. 2, para. 4 (prohibiting “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”).

² The only exception to the prohibition on the use of force adopted by the Charter is in Article 51: “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...”

crime, unless in one case which is the case of legitimate defense which was specified by article (51) of the UN charter.

This charter imposed -as a correspondence with the international ideology- conditions that authorized to use power as an exceptional temporary procedure. Whereas, article (51) included a right that authorized the use of power as a self-defense an authorization from the Security Council and that's to happen through regulations and constraints under the aims and principles of the international law. This the situation that was insured by the International Court states in the case of *Alavtaúa* opinion in 1996 when it concluded that resorting to power should be analyzed through the provisions of the UN chart which article (51) is one of , which ensured the normal right of individual and collective legitimate defense.³ However the obvious difference and the contrariety in countries attitude and the expansion in interpreting the concept of self-defense that was mentioned in article (51) from the UN chart to include preventive self-defense. It leads to the appearance of several political and legal problematic issues in international conflicts. Article (51) of the UN chart became a legal bond (or a legal support) and a political cover which many countries resort to, in order to justify their military operations in many countries on the basis of legitimate self-defense and preventive defense.

The starting point in the research of preventive legitimate defense - under the international contemporary conventional organization - is presented through article (51) of UN chart and the principle of not using power or threat of using it, which was mentioned in article (2/4). Wherein the International jurisprudence split into two main orientations (streams) in the way of interpreting article fifty one of the UN chart and its relation with the second article. The first streams expanded in interpreting the article and it expanded the extent of legitimate defense to include anticipatory defense. Whereas the opposing stream held the view that the right of legitimate defense is limited to the case of occurring an armed aggression upon the country that resorts to defense. It also doesn't believe that this right has the extension to include anticipatory defense (Lykashook, 1989; Bleshenko, 1982; Tonken, 1983). The International jurisprudence with the support of many countries resorted to adapting the expanded stream to the right of legitimate defense proclaims the legitimacy of anticipatory defense under the provisions of the UN chart and the international practices that followed up the enforceability of the UN chart⁴.

This split was reflected on the actions and decisions of the specialized agencies in supporting international

security and peace. Wherein the decisions of Security Council did not participate in interpreting this vagueness, in spite of the numerous international precedents the international community has witnessed. As the Security Council—most of the time—hangs in identifying the aggressor party and the victim country. So, if the council issued a decision involving a certain disputation, then its decision would be generic and restricted to ask the warring or disputed countries to stop fighting without identifying the responsible party or the initiative country in initiating the conflict or the aggression.⁵

In addition to that, the decisions and recommendations issued by the UN did not participate in providing an objective judgment concerning the right of self-defense, which is something completely clear in the announcements and recommendations of the General Assembly that is concerned with the use of power in international relations (Joseph, 2008). Also, the split and dissension among countries about the concept of aggression have contributed to not putting any clear definition to the right of self-defense in several announcements and decisions that the General Assembly has adopted.

So, this study comes to answer many wonderings and legal problematic issues concerning the reality of self-defense and preventive defense, its extension and the legal conditions concerning this right under the article of (51) from the UN chart, the rules of customary international law, and some decisions issued by the International Court of Justice, by the security council and by the general assembly.

1. THE REALITY OF SELF-DEFENSE AND PREVENTIVE SELF-DEFENSE IN CUSTOMARY INTERNATIONAL LAW

The UN charts itself included some exceptions in which the use of power is legal or legitimate. Also, the text of article (51) of the chart is considered as the most important and most significant exception mentioned in the chart particularly and the international law generally. Article (51) — and what it demanded in the rule of legitimate defense — has arisen several legal and political problematic issues. Whereas the chart did not forbid the use of power totally, as article (51) of it has explicitly granted countries the right of self-defense individually or collectively, if it was exposed to an armed attack or aggression. Provided that this right will be under regulations and constraint organized conditions, until the Security Council takes the required necessary procedures (Mohamad, 2014, p.58). Where we can see that the article (51) has stated this exception explicitly, quoting form

³ ICJ, Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons 1996, accessed on 3rd January, 2014. Retrieved from <http://www.icj-cij.org/docket/files/95/7646.pdf>

⁴ USA and Israel are supportive for this view.

⁵ Resolution. (1701/2006). Adopted by the Security Council at its 5511th meeting, on 11 August 2006 and Resolution 1680 (2009) Adopted by the Security Council at its 6063th meeting, on 8 January 2009.

it: “There’s nothing in this article that would weaken or detract the natural right for the countries, individually or collectively, in defending themselves if an armed force attacked one of the members of the UN”. That would be until the Security Council takes the required necessary procedures to keep the international peace and security. Also, the procedures that the members used — as a use of self-defense—, must be informed the assembly instantly. These procedures does not influence in any way the council’s right—under his authority and responsibility derived from the provisions of this chart—to do at any time what’s necessary to be done to keep the international peace and security or returning them to what they were before.

The starting point in the research of preventive legitimate defense-under the international contemporary conventional organizationis presented through article (51) of UN chart and the principle of not using power or threat of using it, which was mentioned in article (2/4).⁶ As we can see that the customary international law has witnessed a wide expansion in the concept of self-defense to include anticipatory defense. Also, the in the modern era, we can see multiple cases in which a certain country or power has launched an armed attack or used the armed force against another country and the initiative country has claimed that its act is considered a legitimate act, according to article (51) of the UN chart and that because the preventive defense right forms one of the legitimate self-defense forms that the chart has acknowledged.

That’s why, some of the countries have adopted the principle of pre-emptive strike, based on the consideration that blowing the first strike or initiating the armed attack or initiating the use of power would be considered as preventive legitimate act in the aim of avoiding any occurrence of aggression against it. Also, the prevention of the occurrence of aggression is considered a necessity to acknowledge peace and security, and it is a necessity to keep the peace and security of the country that will expose to aggression (Christian, 2009). These countries has founded their convections on the basis that initiating with the preventive strike is a legitimate justified act under the customary international law which was ensured by the article (51) of the UN charter, which aimed to deprive the aggressor from any chance to perform his aggression, and stated the forbidding the preventive strike, preventive attack or the use of preventive armed force. Also, the judgment of the non-legitimacy would necessary lead to giving a chance to the aggressor of the initiate strike which might be a knockdown strike, or could cause several damages in the victim country, especially with the existence of weapons mass destruction in which

through any country can be destroyed without the need to initiate military confrontation (Thomas, 2003, p.143). As Israel performed a pre-emptive aerial strike against Syria between the years of 2012 and 2013. Whereas Israel claimed that their locations were producing chemical and biological weapons. Israel based—in these conditions - on article (51) of the UN chart, as it justifies its military operations through its anticipatory right (Ashley, 2013, p.9).

What’s meant by the self-legitimate defense is the country’s right to use all means—including military means in unusual conditions—in the aim of preventing the danger that is a threat to it, and the non-legitimate act directed against it, or against a certain country, or against an organization trying to harm its interest (Soheel, 2014, p.429). So, self-defense represent a right that is characterized with exceptional and temporary, because the basis is not to resort to power and not to perform acts characterized with aggression, if it occurred in normal familiar situations. However, the occurrence of an armed aggression situation upon the victim country will extract the non-legitimate aggressive characteristic from the use of power and it will acquit the self-defense a legal status (or a legal characteristic) (Al Moosa, 1977; Ibrahim, 1977). Thus, the self-defense right is a reaction (or response) on an actual armed aggression which results with the acquiescing of these acts a justifies legitimate characteristic. So, committing these acts in an ordinary situation will take off the legitimate characteristics from it and make it as violating to rules of international law (Soheel, 2014, pp.210-211). So, from a theoretical aspect, the right of self-defense would arise just in the case of an occurrence of a military aggression upon a country by another country or certain groups, and as a reaction (response) on the illegal act. Thus, we can’t imagine the existence of this right without an occurrence of an actual armed attack, so it is a right that has an exceptional temporary characteristic, and arise in the case of an illegal actual armed attack, and the right of self-defense is a response for that and it will disappear as soon as this aggression is over (Murray, 2012, p.36). For this, the right of self-defense involves the use of armed force which is originally banned by the international law and by article (412) from the UN chart in normal situations. However, this act becomes legitimate in the aim of keeping off any illicit act, which is represented by actual armed attack, so self-defense won’t be a mean that its legitimacy would be acknowledged, but with the borders of the purpose that is was decided for (Brownlie, 1963, p.278; Jessup, 1968, p.156; Jessup, 1968, p.166).

That’s why, the legal basis that self-defense right is based on is armed attack, but with the condition is that it should be in the aim of keeping off an attack or an armed aggression that the defender country is facing and that will be through using force in the aim of preserving its existence and independence, and to

⁶ U.N. Charter art. 2, para. 4 (prohibiting “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”).

stop any imminent danger or damage. That requires the necessity of considering using power in the aim of defense as a necessity and proportional with the act directed against the country which existence and sovereignty are threatened. Also, the attack can't be responded with non-military means. So, the country which is basing on the right of self-defense should committed in its defense and in holding off the attack through making the defense in the size and effect of the attack and it should not exceed it to achieve other purposes or aims. That means that the self-defense must include the condition of proportionality and necessity, otherwise the act and actions done by the victim country would be considered as an act of renege which violates the right of self-defense and the rules of international law.

As for the anticipatory self-defense, it is the prior use of force, when the country finds itself exposed to an attack or danger so, it will initiate the use of force against the violence that became imminent, but not actual. As it can call the first shot, if it knew that it's about to be gone under an attack (Walzer, 2006, p.74). So, it is the act of a country or more to launch prior military attack, according to the kind of danger and its significance against some country or certain groups or terrorist organizations, when it is sure or it has reasons to make her think that another country or terrorist organization will initiate an attack against it or damaging its interests. Thus, anticipatory self-defense right gives the country the right to blow a military strike before it gets under armed attack to keep off a possible danger directed against its lands, military forces or any force that are subsidiary to it outside its territory (Sanja, 2008; Greenwood, 2003).

The idea of anticipatory self-defense is based on "Argumenmenta-Juridigue". As people of this supporting orientation of this idea that the quick technological progress in the field of nuclear weapons, chemical weapons and weapons of mass destruction are making the issue of resorting to pre-emptive strike as an urgent necessity taken for granted. As it's not logical for the country to wait for going under an actual attack that will lead to its partial or total destruction (Thomas, 2003; Gray, 2002). Thus, some believe that the right in preventive defense and in anticipatory defense have developed and expanded as a result for the change in the concept of traditional danger under the development of mass destruction weapons and military potentials for countries in the current era, and the change in targets and enemies (Weise, 2012). Thus, the right of anticipatory defense is increasing and expanding as much as the threat and danger are. Also, the need will be urgent and necessary to do a pre-emptive act, even if there is any doubt or uncertainty about the time and place of the possible attack of the enemy (Matthew, 2009; Riesman, 1990).

From a theoretical aspect, pre-emptive strikes or anticipatory defense are based on the idea of needfulness

as a primary measure in the arousal of this right as a result for doubts about the possibility of the country to undergo danger or attack, without the need to the existence of an actual military attack armed assault upon the country who is exercising this right. That will make this right depend primary on the distinctive standard the belongs to the country as it alleged. As for the legal aspect, the idea of anticipatory defense faces several practical problems in the international practices for two main reasons: The right of self-defense arose for the interest of the victim country as a result of undergoing an attack or military aggression, and not for the county who is starting the military act first. As a result, the country who claims its right in its legitimate defense will become an aggressor. Secondly, the standards of necessity and proportionality in the anticipatory self-defense do not depend on any objective standard, but they are raised and evaluated according to the doubts and size of danger that the aggressor country will decide.

2. THE CONTROVERSIALITY OF SELF-DEFENSE RIGHT AND PREVENTIVE SELF-DEFENSE RIGHT AND ITS REFLECTIONS ON THE INTERNATIONAL PRACTICES

The right of self-defense is described as one of the most controversial acknowledged right in the international law. As there is a wide split in the international law concerning the extent of this right. It appeared two main streams in the International jurisprudence in the field of interpreting the text of article (51) of the UN chart and its relation with the second article. As the people of the supporting stream holds the view that the international practices within and without the UN system ensure the existence of the right of preventive self-defense as a fixed right in the rules of customary international law. That was ensured by the legal form mentioned in the text of the mentioned article and the preparatory work that accompanied the acknowledgment of the collective security system that was mentioned in chapter 7 from the UN charter, and the close relationship between the text of article (51) and the customary international law that was acknowledged by the countries through its actual practices before and after the contemporary international organization. On the other hand, the people who hold the opposite point of view believe that the UN chart after its acknowledgment has made a radical change in the use of force in international relations. As the use of power became something restricted and it considered all forms and kinds of wars are not legitimate unless in the case of legitimate self-defense, as it was prohibited the principle of not using force or threat to use it in international relations against political independence and sovereign territory for each country, or in any other way that contradicts the principles and aims

of the UN chart. That principle is considered a general principle as a base for international relations. There should be an expansion in interpreting the aims and to achieve the purpose of the chart because the principles mentioned in chart items include meanings with fixed significance that must be understood under the conditions that accompanied its acknowledgment. Thus, the right of legitimate self-defense that was mentioned in the text of article (51) of the UN chart is considered as an exceptional case which should be interpreted narrowly in the aim of achieving the generic basis and the ban mentioned in the principles of international law and the UN chart generally. That ensured the change that involved the rules of customary international law in the era of contemporary international organization after the acknowledgment of the UN chart.⁷

2.1 The Stream Proclaiming the Legitimacy of Anticipatory Defense Under the Provisions of the UN Chart

People who are supporting this stream (or this orientation) hold the views that the text of article (51) of the UN chart provides legitimacy on the case of using power and direction for the anticipatory self-defense against an aggression that did not take place yet, and this right is fixed in the contemporary international law, which finds its legal bond (legal support) in the text of article (51) of the UN chart. Followers of this stream founded their point of view on the following basis (Christine, 2000):

(a) The Preparatory work for the UN chart is considered by the followers of this stream as a clear evidence that the contemporary international legal system—as it was mentioned in the UN chart—ensured the legitimacy of anticipatory self-defense. As the first assembly in San Francisco Conference has mentioned in its report in the first stages of making the chart that the use of armed force in the legitimate defense is still accepted and not restricted or contradicting (Christopher & Anthony, 1999-2000). People who are supporting the legitimate anticipatory defense have interpreted that as a reference from the people who created the chart to the customary international law for legitimate defense. As that expresses an acceptance from them to the provisions of this law, which considered the use of force in the case of preventive defense as a legitimate issue and a natural right for the country who's exposed to threat or danger, as it is already decided customary by the "Karoline accident" and what followed it up from issues and cases. Thus, legitimate anticipatory defense is permissible legally and actually by the provisions of item 4, article 2, if it wasn't directed against the territorial integrity of the country or its political independence. That supports that there are no contradictions in the anticipatory self-defense of the provisions of the customary international law that proclaims its legitimacy (Christian, 2009).

(b) The text of article (51) of the chart points out to the inherent right for all countries in self-defense and that sign means that people who put this chart: Their intentions was not directed towards restricting or deprecation that original inherent right connected to each country. The international precedents has confirmed this orientation through several practices which were continued and repeated for a long period of time and it became settled (stable) in the customary international law. That means that the customary international law that is organizing for self-defense right through its extent and its field has not changed nor got affected.⁸ That requires saying that anticipatory self-defense which is an existing legitimate right under the provisions of the UN chart which did not restrict or detract the inherent right for all countries to defend it. This inherent right includes the case of anticipatory self-defense as it was acknowledged by the customary international law (Murray, 2012, pp.63-65).

(c) The French text of article (51) that mentioned "aggression arms" which means in English "Armed attack", However, the term in French is wider (more expanded), and that makes the interpretation of article 51 to include the case of anticipatory self-defense. This issue agrees with the rules of international law that was spread before holding (making) the UN chart. It agrees with the preparatory work for the charter and the article 51. As it also agrees with the aim of the people who have put the chart and with what happened after the enforcement of this chart.

(d) Article 51 provides legitimacy on the use of power in the case of anticipatory self-defense, because the international legal system that the UN provided did not change any of the legal system that was enforced before making the chart in the field of using force as a self-defense. As the function of article 51 was not to create a new legal system to use force as self-defense, but to ensure the international legal system existing in this field (Bowett, 1958 p.31, 256; Schwebel, 1994, pp.570-572). Throughout this, it will become clear that this provision that was mentioned in article 51 did not constraint the legitimate defense right, but it is a fit application for the conditions of legitimate defense case and what it requires as it rose in the customary international law.

(e) The international practices and practical applications after founding the UN has developed to involve new situations and among these practices and applications, the war of Suweis, the Russian interference in the Hungary, the US blockade for Cuba, the Soviet interference inCzechoslovakia, the announcement of Brezhnev theory, and the war of June between Arab and Israeli. Thus, theprovision - settled in item 3 and 4 from the text of the second material – its significance (meaning) and interpretation changes because it represent a dynamic

⁷ Mohammad Salah Aldaen. The Aggression in International Law (p.53).

⁸ Arend, A. C. International Law and the preemptive use of force. p.9101.

provision that gets affected under the international practices that reflects a development in the international law with time differs, which ensures the legitimacy of anticipatory legitimate defense (Christine, 1994, p.26).

2.2 The Stream Which Proclaims the Non-Legitimacy of Anticipatory Legitimate Defense Under the Provisions of the UN Chart

The starting point that follower of the opposing streams is that the general original that the UN chart provided is the principle of prohibiting countries to use force or threat in the international relations against political independence and the territorial integrity for each country or in any other way that would contradict the aims of the United Nations. That's why followers of this stream hold the view that anticipatory legitimate defense forms a legal explicit violation for the principles of customary international law. They based on that on the following argumentation (Ian, 1963, p.278; Henkin, 1990, p.165; Jessup, 1968, p.166):

(a) The UN chart has mentioned one exception that allows countries to resort to power. This exception is related to the case of self-defense which was organized by article 51 of the UN chart. Based on this, when interpreting article 51, it must be taken into consideration, that this article organizes the situations of countries using force as an exceptional characteristic, and breaching the general basis or the general principle that was acknowledged by the UN chart in item 4, article 2, and exception in its nature interprets a narrow interpretation that does not expand in its interpretation without any necessity. The countries' rejection for this argument was seen in the private announcement concerning the principles of friendly relations (1970), and in the special recommendation of defining aggression (1974)

(b) Anticipatory legitimate defense constrictors a legal violation for article 51 of the UN charter. As this article allows countries to use power in the aim of self-defense, only if an armed attack occurs against a member country in the UN. If this article was interpreted in the frame of other provisions, especially the provision of article 2, then it will be clear that these provisions aims to found a generalinternational system that is different to what was prevalent before founding the UN, and it was banning for the use of force or threat to use it in the field of international relation, unless in the narrowest borders. Thus, any wide explanation for article 51 would Incompatible and contradicting to what the international general system requires that the UN chart has acknowledged (Lykashook, 1983; Bleshenko, 1983, pp.118-120; Tonken, 1983, p.46).

(c) There must be several condition available to say the legitimate defense case that authorizes the use of power is available, which is the attack must have occurred actually. So, the possible attack, expected attack or the imminent attack is not enough. If there was a threat to use power,

then it is not allowed to resort to use armed force against the country who threatened as a defensive procedure. However, the country that is exposed to threat can resort to peaceful procedures that were mentioned in the sixth chapter of the UN chart.

(d) The customary international law has surrounded the right of self-defense as temporary procedure and through a group of constraints and conditions that must be available for the emergence of this right, which is proportionality and necessity. As it is impossible to check the conditions of proportionality and necessity and judge its validity under the application of the idea of anticipatory legitimate defense. That's because these conditions and constraints mentioned in article 51 of the charter become meaningless and pointless, if there was an expansion in the application of the field of self-defense right (Alexandrov, 1996, p.27), which makes the accusation of the existence of right in the anticipatory legitimate defense violating to the text of article 51 of the UN chart.

(e) The anticipatory legitimate defense forms an obvious violation of the principles of the international law that was acknowledged by article 2 by the UN chart, which is characterized with the description of the commanding rule "Jus Cogans", which shouldn't be modified unless with a rule that is characterized with a legal power and class. Thus, we shouldn't depend on the "Dynamic Provision" as a legal basis for justifying the veracity of the legal development of anticipatory legitimate self-defense (Vaselenko, 1982, pp.72-73).

2.3 The Problematic Issues in Interpreting the Right of Anticipatory Defense and Their Reflection on the International Applications

The obvious difference and contrast in the countries' attitudes and the expansion in interpreting the content of self-defense mentioned in article 51 of the UN chart to involve the anticipatory self-defense, which lead to the emergence of many problematic legal and political issues in many international conflicts. Article 51 became legal bond (legal support) and a political cover that many countries resort to justify its military operations in many countries on the basis of legitimate anticipatory defense. As we can see that the customary international law has witnessed a wide expansion in the concept of self-defense to include the anticipatory legitimate defense. Also, in the modern era, there are several cases in which a certain country or power launched an armed attack or used armed force against another country and the initiative country claimed that its act is considered as a legitimate act according to the provisions of article 51 of the UN chart.

As the USA and Britain based in its anticipatory defense in what involves the military operations that they did against Iraq in 1999 on the decision of Security Council number 688. As both these countries have to justify these operations as they are self-defense in the aim

of keeping their planes and the pilots secure.⁹ Although these operations lack an y legal bond, but both UK and USA considered the decision of Security Council 688 that was issued in 1991 as the formation of the legal basis, which give these countries the right to proceed in its military operations in north and south of Iraq and it provided a legal and legitimate stamp (Lobel & Ratner, 1999; Amer, 2003). However, many countries refused these justifications and condemned the military operations, such as Russia and China.¹⁰ Also, on the 20th of December of 1989, USA performed a military interference and performed the use of force against Panama and it dropped the government of Norbiga. The US justified its invasion to Panama—through the speech that addressed the Security Council—that the military operations that it did represent a self-defense and a protection for its citizens who were present at the land of Panama.¹¹ Also, the US distinguished between its legal bond in the military operations which was represented by the anticipatory self-defense, and the political aims and interests behind this interference which were represented by the protection of democratic values and the removal of Ortega’s dictatorial regime.¹² However, the proves that the US provided for this was faced with intensive refusal by the international community without decision of condemning due to the use of Veto right by France, Britain and USA for it. As the general assembly has condemned this operation and considered it a gross obvious violation for the rules of the international law and for the article 2/4 and demanded to stop all military operations and the American forces to leave.¹³

As for the Soviet Union in 1968 and in 1956, it performed a military interference in Hungary and Czechoslovakia against the will of these two countries and against the popular will spread amongst them. The Soviet Union based in these two conditions front of the Security Council to the idea of anticipatory self-defense. Also, the Soviate claimed the use of armed force in both cases was to defend the nation of workers and defending the Soviet Union itself. The Soviet union tried to justify their military interference in Czechoslovakia and Hungary through creating a general political legal theory with reference to defending international socialism

and communism, which is considered as new form for the theory of anticipatory legitimate defense without limits, this theory was known as “Brezhnev’s theory” (Jameel, 2010, p.83), but immediately the previous president acknowledged that “Brezhnev’s Doctrine theory”, — that is based on the idea of constrained sovereignty for socialist countries—doesn’t get along with international law provisions (Moosa, 2004, p.117).

From the main example, that our contemporary world has witnessed is the attack that was performed by Israel, Britain, France against Egypt in 1956 (the triple aggression) and it claimed that this attack was justifies because it was a defensive anticipatory defense. As Israel claimed that the purpose of the military operation is to remove all the military basis for commandos from Sina’. While Britain and France claimed that their interference was to defend the interests and security of all people in the world and the users of Suez Canal.

Israel has adopted the idea of legitimate anticipatory defensive strikes, where it launched aerial military operations against Lebanon in 1996 and 2006. In both cases, Israel based on this on article 51 of the UN chart in its right in its anticipatory legitimate defense. As it justified its military operation in its anticipatory legitimate defense.¹⁴ Also, Israel launched a wide field military operation and aerial strikes on Gaza Strip in 2014. It based in this on its right to defend its national security against the strikes of Palestinian sections and against the rockets that were launched by Palestinian legion. However many countries refused this the Israeli excuses and condemned the Israeli military operations, as a result of the excessive use of force, targeting civilians and the non-consistency between the Israeli military operations and the attacked done by the Palestinian legion.

In addition to that, one of the problematic issue that rose concerning the legitimate anticipatory defense and the legal organizing rules for the use of power in the UN chart is the extent of legitimate defense and the dynamic provision according to the text of article 51 of the UN chart and the actual extent of article (2/4), which ensured the main principle that prohibited the use of power in international relations or the threat of using it.¹⁵ One of the cases that the countries claimed a narrow interpretation

⁹ See Resolutions (S/RES/688). (1991) adopted by the Security Council in 1991. Retrieved from <http://daccess-dds ny.un.org/doc/RESOLUTION/GEN/NR0/595/40/IMG/NR059540.pdf?Openement>

¹⁰ UNYB,1999, p.254.

¹¹ In the letter from the Representative of U.S. to the UN addressed Security Council said: “We are supporters of democracy, but not gendarmes of democracy we acted in panama for legitimate reason of self-defense to protect the integrity of canal treaties”. See United Nation yearbook,1999. p.174.

¹² Ibid., pp.174-175.

¹³ See Resolution (A/RES/44/240) 29 December 1989 adopted by the General Assembly at its 44th session of Effects of the military intervention by the United States of America in Panama on the situation in Central America.

¹⁴ Resolution 1701 (2006). Adopted by the Security Council at its 5511th meeting, on 11 August 2006. See also resolution 1057 (1996) Adopted by the Security Council at its 3669th meeting, on 30 May 1996. See also Resolution 1068 (1996). Adopted by Security Council at its 3685th meeting, on 30 July 1996.

¹⁵ The appropriate articles in the UN Charter that will help us in answering these questions are Articles 2(4) and 51 of the Charter. Article 2(4) forbids the use of force against the territorial integrity or political independence of a nation. The article has been described by the International Court of Justice as a preemptory norm of international law for which states cannot derogate (NICARAGUA VS. US) 1986 ICJ Reports 14, at para. 190. Thus, the US, according to this article, will be acting illegally.

for the text of article 2/4 is the Israel launching a military operation against the Ugandan lands in order to rescue one of its kidnapped planes upon the Ugandan lands. Israel based in its justification from of the Security Council to the narrow interpretation of article 2/4, which through it any country could resort to military force in case the UN was incapable to deal with any issues that could be a threat to countries. However, the Israeli excuse was rejected and their behavior was considered as a violation of this article. In addition, the USA claimed the narrow explanation of article 2/4 in its military operation against Grenada in 1983, where USA hanged on the legitimacy of the military operation and the non-violation for article 2/4 of the UN chart, because the principle of not using power must be interpreted under the values and aims that area guaranteed by the rest of the chart articles, such as the protection of the democratic and freedom rights for the human. Thus, its military operations—according to USA claims- do not form any legal violation for the rules of international law which is consistent with the right of anticipatory self-defense.

The external American politics has witnessed after the attacks of 9/11 an applicable intellectual shifts in the protection of national security and they expanded the concept of anticipatory self-defense. As the American Administration adopted since that date the concept of anticipatory military operations in an expanded way and that's through taking all the anticipatory and surprising procedures against any country in order to stop the occurrence of any terrorist works that would be damaging to the US land. Also, the idea of "armed attack" was expanded—contradicted to what was meant of it in the beginning—to include any armed attack that is done by groups who are not characterized as countries (Ahmad, 2003; Sayyid, 2003). That led to justifying many military operations that became forming international precedents that are used to indicate the justification use of power. That would pave the way to eliminate the legal international rules that were laid out by the contemporary international law that article 2 of the chart has included.

So, the right of self-defense faces two primary problems: The first one is presented through the priority of using power to identify the aggressor, with the consistency between the size of losses resulted from the aggression and the right of self-defense, especially that the security council is the only agency specialized in adjusting the aggression and classifying it as aggression. So, the identification of the existence of an aggression is linked to the political will of the member countries in the Security Council. That thing is exposed to oscillates and the non-agreement of member countries of the Security Council. The issue will increase in its difficulty and complications to what's related to the status of legitimate anticipatory defense, as the illegitimate attacking act that requests a case of legitimate defense

does not exist from the beginning, which makes the issue of consistency not subjected to a fixed measure. As for the second problems that the self-defense is facing, it is included in the article 21 of the project of countries' responsibility that denies the feature of non-legitimacy upon the procedures that countries perform in the case of self-defense, if the act was done according the UN charter. Here we should refer to the report issued by the legal international commission concerning article 21 mentioned, as the commission has referred to what concerns the commitments that are imposed by the provisions of the international humanitarian law and human's right, as it excluded that it is an act or behavior for self-defense and legitimate anticipatory self-defense. This result is necessary to split between "the law of war" that organizes the legality of using force, and the humanitarian international law that organizes the behavior that the force is used through. That what can be implicitly concluded from the advisory opinion issued by the International Court of Justice concerning the legitimacy of threat and the use of nuclear weapons, which it ensured that: "If the use of nuclear weapons is violating the international humanitarian law, then it is also considered as violation in the ultimate situations for self-defense.¹⁶ As it also contradicts with the provision of article 2/4 of the UN chart and it does not levy (fit) all the requirements of article 51 of the chart.¹⁷

3. THE LEGAL CONDITIONS TO PRACTICE THE RIGHT OF SELF-DEFENSE AND ANTICIPATORY DEFENSE UNDER THE UN CHARTER

The UN chart itself included some exceptions in which the use of power would be legitimate. As it announced in its 51 article explicitly that the country has the right for self-defense individually or collectively, if it experienced any armed attack or aggression until the Security Council takes the required necessary procedures. Also, the countries were strictly keen to include the UN chart as a text that addresses self-defense after these countries has generated great fears that the security council would have stagnation and paralysis due to the Veto right, that is acknowledged for the countries who has permanent memberships in the security council. As some countries could be exposed to an armed attack or aggression and the security council will not be able to execute its attributed authorities according to chapter 7 of the charter, so the self-defense would be as required and necessary matter in order for the country to keep off the risen aggression

¹⁶ ICJ. Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons 1996. Retrieved 2014, January 3 from <http://www.icj-cij.org/docket/files/95/7646.pdf>

¹⁷ Ibid.

against it to ensure its security, independence and integrity of its land. So, self-defense or legitimate defense would be according to the (refers to) the status in which a victim country respond against an armed aggression in the aim of defending its independence and existence (Ibrahim, 1977, p.333).

Article 51 of the UN chart has stated this exception explicitly based on the right of defense and self-defense if an armed force attacked one of the members countries of the “UN” and that’s until the council takes the required necessary procedures to keep the international peace and security, and the procedures that the member countries took as use for the right of self-defense will be announced to the council immediately. Also, these procedures will not influence in any way the council’s authorities and responsibilities that are derived from the provisions of this chart. So, the right of self-defense will emerge only in the case of a military assault upon a country by another country or certain groups, and as a response against an illegal act. Thus, it can’t be imagined the existence of this right without an actual armed assault occurrence, so it is a right with a temporary and exceptional characteristic and emerges in the case of actual armed illegal assault and as a response against it, until the specialized agency (security council) performs its authorities and its power in the field of keeping the international peace and security (Van de Hole, 2003). So, the aim of self-defense if to be a respond for armed aggression, on the condition that use of power in the aim of self-defense should be necessary and consistent with the act directed against the victim country, so if the assault can be responded with non-military means, then the case of defense is not standing (existing). As the country should be committed to its defense and responding the assault to be the same size of the defense and its effect and not to exceed the it in the aim of achieving other aims.

Although that article 51 involved from conditions, but the international precedents and international practices has revealed an obvious defect and split to what concerns the applications of self-defense and anticipatory. This split is represented through the non-addressing of specialized agencies in the field of supporting international peace and security for this issue in an objective and specific addressing. Theoretically, the case of self-defense requires—as article 51 stated—an existence of an armed attack against a country or more. As practically, article 51 became the legal bond and the political cover that many countries resort to in the aim of justifying it military operations in many countries based on the legitimate anticipatory defense. As many international precedents has revealed that countries may use its military power against other before of an actual military attack exists and it bases in this on the idea of “legitimate anticipatory defense” and it will claims that it is in the case of self-defense or it is practicing its right in the “legitimate anticipatory

defense”,¹⁸ in spite of the lack of the presented excuses for the simplest conditions of self-defense. The military interference that the Soviets has done in Hungary in 1956 and in Czechoslovakia 1968 based on the idea of legitimate anticipatory defense is a good example of the split in the international community for many international precedents

Although that the customary international law has authorized the use of power as self-defense, but this practice of this right is surrounded by group of conditions and constraints, as article 51 of the chart has stated. Although these conditions and constraints are derived from article 51 of the chart and countries ethics, but a wide controversy (a wide argument) is still standing about the extent of the acknowledged right in article 51.

3.1 Undergoing an Armed Attack

Article 51 did not leave the right of self-defense without constraints and conditions, but it aimed to specify and constrain this right with a group of conditions and standards. According to article 51, several conditions must be available to say that there is a case of anticipatory legitimate self-defense that authorize the use of power, which is represented in the necessity of an armed attack occurrence and the attack must has already occurred, so it’s not enough for the attack to be possible or expected or imminent to happen. As for the threat to use force, it is not allowed to resort to the use of armed force against the country that is the source of the threat as a defensive procedure even if that threat is dangerous and serious, but a the force can be used as a defensive procedure only when an armed attack actually occurs. That’ is the country that’s undergoing a threat can resort to perform peaceful procedures that are mentioned in the UN chart. So, if an actual armed attack has occurred, then that’s considered as a “Prime Facia evidence” to the existence of a self-defense case and the country here can use power in the aim of self-defense, on the condition to be committed with the condition of necessity and proportionality.¹⁹ That’s because the basis of legitimate right defense is represented with the availability of an urgent circumstances that require the use of self-defense until the responsible organ for keeping international peace and security interfere. The UN charter has limited these circumstances to the case of armed attack, but in other cases, the responsibility of acknowledging international peace and security will be the responsibility of the international organization (Adel, 2006, p.89). So, the international community has already expressed its attitude when it refused the Venezuelan suggestion in 1981 front of the general assembly of the UN that requires the interpretation of article 51 of the UN charter in a way that authorizes resorting to self-defense

¹⁸ Israel conducted protective military airborne operations against Lebanon in 1996 and 2006, referring to UN article 51.

¹⁹ Broline, The use of force, op .cit, p.366.

against any aggressive act, even if it did not reach the class of an armed attack. As the countries have insisted that the legitimate defense right is restricted on the case of an actual armed attack.²⁰ As the International Court of Justice has adopted this attitude in its decision that was issued in 1986 by the aim of testing the availability of a self-defense case. As the court has refused the American excuse that is based on the self-defense case based on the non-existence of an actual armed attack, so it can't be imagined the existence of a self-defense case unless the trans boundary military operations represents an armed attack only.²¹ The Security Council has ensured this attitude when Israel launched a bombardment against the locations of the Palestine Liberation Organization (PLO) and its offices in Tunisia in 1985. Israel in this operation based on its right in its anticipatory legitimate defense and announced that Tunisia is bound to ban the use of its land completely against any terrorist attacks that might be launched against. However, the Security Council refused the Israeli excuse and the issued its decision with condemnation and described the Israeli operation as an act of aggression that involves a great violation for the provisions of the UN charter.²²

In addition to that, the International Court of Justice has adopted an additional standard to acknowledge the existence of an armed aggression case. As it recognized between the armed aggression that gives the country the right of self-defense, and the "border incidents" that we exclude from it the use of power on the basis of article 2 from the recommendation of the General Assembly No. 3314 issued in the year of 1974, as the court has relied in this division on the significance of the act with its effects and the "circumstances and motives" that lead to this armed acts from another perspective.²³ However, this division was subjected to an intensive criticism because the border incidents are considered as one of the forms of armed attack without the consideration of its size or effects (Yarom, 2001, pp.15-18). Also, some have criticized these standards because the availability of the illegitimate act justifies by itself the right of self-defense that should be necessary and proportional, without the consideration if the military act was very restricted or not. As both of the armed attack and the border incident allows the use of power in the aim of self-defense under the limits of the proportional and necessity constraints (Rosalyn, 1994, p.251).

Although the international practices and precedents acknowledge the comprehensivity of the term "armed

attack" to apply the right of self-defense without considering the party that performed it, whether it was a Regular force, armed group or liberation movement. However, the customary international law has been conditioned for the application of a legitimate self-defense case to have an armed illegal attack, so it is not allowed to make an excuse of self-defense, if the act of armed attack was resulted from an illegal situation. That's because the country that is considered as occupying for province or certain areas doesn't have a legal status, in which through the right of self-defense can be performed. Otherwise, that would be for the aim of Perpetuate the occupation and prevent the occupied nation from practicing its right in self-determination (Al Moosa, 1994, p.84). The international practices in the UN have supported this opinion in many international precedents, when the security council in 1985 condemned the military operations that South Africa performed against some neighboring countries (Christine, 2008, p.100), and it described its operations as involving terrorism against Botswana and other neighboring countries. As many counters have condemned the military operations that Israel did during its illegal existence in South Lebanon, in Gaza strip and in the Western Bank, based on the fact that the occupying country can't make an excuse in defending itself in the occupied land, because its illegal authority and existence do not give it the right to defend itself.²⁴

Based on what preceded, we can see that article 51 of the chart has authorized countries to use power to defend it, if an armed attack occurs against a member country in the UN. If this article was interpreted through the frame of other provisions in the chart, especially the provisions of item 3 and 4 of article 2, then it will be clear that these provision aims to establish an international general system differing from to what was prevalent before founding the UN and banning to use force or the threat to use it in the field of international relations unless in the narrowest borders (limits). Also, the expansion in interpreting the concept of self-defense in the article to include anticipatory defense would be contradicting with the text of article 51 and the provisions of the UN charter, especially that applying the conditions mentioned in article 51 requires commitment to the standards of necessity and proportionality, which is a matter that can't be done in the case of anticipatory legitimate defense due to the non existence of an armed attack.

3.2 Fitting the Act With the Armed Attack

Although the international practices and international law recognize the universality of the concept of "Armed Aggression" for the application of the right of self-defense, regardless of who is making them, whether

²⁰ See UN Doc(A/CN.4/451). 1981, pp.8-10.

²¹ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United State of America) merits, ICJ, Reports (1986) at 112, 215. Retrieved 2014 May 3 from <http://www.icj-cij.org/docket/files/70/6503.pdf>

²² See Resolutions (S/RES/573). (1985). Adopted by the Security Council in 1985 at its (2615 The) meeting, on the 4 October 1985.

²³ Ibid.

²⁴ UNYB. (1988. p.218). And see also Resolution of General Assembly (38/180A) 1983.

it is regular forces or armed groups or movements of Liberation, the contemporary international law requires to apply the state of self-defense that the armed aggression to be illegal. So, it may not be invoked in self-defense if the armed attack reaction is caused by an irregular situation, because the state that is considered occupying regions or certain areas does not have legal status within which it can exercise the right of self-defense, otherwise, it is a tool to perpetuate the occupation and prevent the occupied peoples to exercise their right to self-determination. International practices in the United Nations have supported this view in many international precedents, while the Security Council condemned in 1985 the military operations carried out by South Africa against some neighboring countries, describing them as involving terrorism against Botswana and other neighboring countries. Also Many countries have condemned the military operations carried out by Israel during the illegal presence in southern Lebanon, the West Bank and the Gaza Strip on the grounds that the occupied State may not be claimed self-defense in the occupied territories, because the control and illegal presence do not grant the right of self-defense.

Based on the foregoing, we see that Article 51 of the Charter of the United Nations authorizes states to use force in self-defense if an armed attack against a UN member state occurs. If this article has been interpreted in the context of other provisions in the Charter, in particular the provisions of the third and fourth paragraphs of Article II, it is clear that these provisions are intended to create an international public system which is different to what has been prevailed before the creation of the United Nations and forbidden to use force or threat thereof in international relations, except in the narrowest borders. Also, the expansion in the interpretation of Article "Right of Self-Defense" to include the preventive defense would decrease with the text of Article (51) and the provisions of the Charter of the United Nations. Especially, that the application of the conditions contained in the text of Article (51) requires the mandatory criteria of necessity and proportionality, which can't be done in the case of legitimate preventive defense for the lack of armed aggression.

3.3 Necessity Condition

Although Article 51 of the Charter of the United Nations did not include any direct reference to the requirement of proportionality and necessity, but that customary international law and practices consider that an act of the State invoking the right of self-defense to be described as necessarily and to suit with an act of armed aggression. Where the requirement of necessity and proportionality is one of the basic conditions to use the right of legitimate defense and legitimate preventive defense. According to international law, necessity condition is one of the conditions to be met to justify an act of self-defense and

is described as legitimate. The requirement of necessity and proportionality also contributes to distinguish the illegal acts of revenge & retaliate for self-defense, which is characterized by legitimate (Al Moosa, 1994, p.99).

The wording made by (Daniel Wacater) in 1837 as a result of the first ship incident "Carolina" that is credited to clarify the Necessity requirement clearly. This wording has narrowed considerably circumstances in which the force can be used in self-defense as a result of the severe restrictions that have been placed and must be available in the necessity requirement when invoking the status of self-defense and legitimate preventive defense, such stringent restrictions have represented in the statement:

Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.

According to this wording, the need for self-defense i.e. the need to resort to force in self-defense must be refuge or compelling case, so it does not leave opportunity to choose the means or the time to consult or forethought in the matter, making resorting to military action in self-defense undisputed. The wording made by Daniel Wacater is taken as it is free of any reference to the condition of proportionality, where it has considered that the case of necessity is sufficient for the exercise of the right of legitimate preventive defense (Stanimir, 1996, pp.19-20; Schachter, 1989). This mentioned wording has been criticized for its incompatibility with the rapid advances in nuclear and hydrogen weapons and various weapons of mass destruction and for its incompatibility with also the dangerous rapid progress in and the means of carrying and launching those weapons and their comprehensive and unlimited destructive effects, which is considering with it that the compliance with the restrictions that came in the formulation of Wacater is equal to the national suicide (Schachter, 1989, pp.71-80). This criticism does not mean the abolition of necessity condition or canceling its specified restrictions, but interpreting these restrictions in light of the purpose or objective of legitimate defense itself which is conservation or protection of the legitimate interests and values of the group or the state exercising the right of defense. Requirement that the necessity condition is available does not mean that the aggression or attack had already occurred. Necessity condition is considered one of the common core conditions to be provided in the case of self-defense and the protective self-defense.²⁵ Indeed, these stringent restrictions specified to the requirement of necessity have been formulated in response to the case of preventive legitimate defense

²⁵ In 1983 the Spanish Forces attacked the ship (The Virginsius), then the British ships attacked the French docking ships in Algeria 1940 as acts of protective self defense. See Stanimir A. Alexandrov, op.cit,1996, p.19.

raised in the incident of ship (Carolina) (Jameel, 2010, p.36; Soheel, 2014, p.430). And the reason for developing these restrictions is to try to avoid the claim that the use of force was in self-defense, while it is, in fact, an illegal armed attack and does not represent any facet of self-defense. Despite the restrictions contained in the wording made by Daniel Wacater, but it has been criticized by many politicians and lawyers, as it has been free of any reference to the condition of proportionality, considering that the availability of a state of necessity is sufficient for the exercise of the right of preventive legitimate defense. In addition, some felt that this wording has restricted the use of the preventive right of self-defense considerably, as it does not take into account the technological development in the field of weapons of mass destruction (Beck & Arend, 2013, pp.71-80). This criticism does not mean the abolition of necessity condition or canceling its specified restrictions, but interpreting these restrictions in light of the purpose or objective of legitimate defense itself which is conservation or protection of the legitimate interests and values of the group or the state exercising the right of defense.

Accordingly, it is required in case of necessity as one of self-defense conditions that the threat or risk leading to the emergence of the need to defend to be gaping and raiding, so other means can't be resorted to deflect but the use of force, which can be said that the need for the use of force in self-defense "legitimate preventive defense" becomes serving as an urgent case. But if resorting to means other than the use of force is possible, the risk or threat does not become urgent and necessity for the refuge and compelling state to the use of force in self-defense isn't available, which makes the necessity condition is not available. The force becomes mere aggression and not in self-defense (Jameel, 2012, pp.22-28).

Necessity requirement for the exercise of the right to defend is available if it is not possible to resort to peaceful means or resorting to such means is not feasible, or if just waiting to resort to it will lead to serious damage can't be avoided, such as the occurrence of death for a number of populations. In 1981, the Israeli has launched air armed attack on the Iraqi nuclear reactor and destroyed it, and it claimed that this attack was a defensive and preventive attack which is necessary and indispensable to maintain the existence of Israel that is threatened constantly by the Arab states, as well as to prevent an imminent nuclear threat in the coming years. However, the Security Council has condemned the Israeli actions and considered that this military operation constitutes a clear violation of article (2/4) of the Charter of the United Nations and the norms of international law. As the Security Council has given Iraq the right to seek compensation for all damages sustained as a result of this military operation.²⁶ The

General Assembly has condemned air strikes carried out by Israel describing them as the unprecedented act of aggression.²⁷ It seems that the Security Council and the General Assembly have rejected Israel's grounds and arguments because of absence of Necessity factor in the process carried out by Israel against Iraq.

The international military courts - which were formed to prosecute criminals of World War II—came under the requirement of Necessity and the availability of conditions for the exercise of the preventive legitimate right of defense. These courts have reached that actions taken under the case of preventive legitimate defense are considered legitimate under provisions of the international law, subject to the availability of the urgent necessity case in the actions and measures taken. Accordingly, the International Military Tribunal for the Far East (Tokyo Trial) has refused to accept the arguments and grounds provided by Japan that war Japanese actions against France, the Netherlands, Britain and the United States are considered legitimate acts, fact that the actions taken by Japan are not considered preventive acts necessary to defend the existence of Japan (Schabas, 2004, pp.5-8; Simps, 2007, pp.48-53). But the same court argued that the declaration's Netherlands of war against Japan is considered a legitimate act of preventive legitimate self-defense acts because of the availability of state of urgent necessity (Ibid). Nuremberg Trail court has upheld this trend, where it concluded that preventive actions carried out in foreign territories are legitimate only in the case that the necessity of legitimate defense is urgent and pressing. So it doesn't leave the opportunity to choose between the means nor the time to consult or reflect on the matter. Consequently, the Nuremberg Tribunal rejected the German justification that it invaded Denmark and Norway is a defensive action to avoid the Allied nations to invade and use its territory in offensive actions against it. The Court has made clear that it cannot accept this claim for lack of conditions for the case of Preventive legitimate defense that assumes that there is an urgent need to take defensive measures, so the German invasion is purely considered an act of aggression (Schabas, 2004, pp.5-8). Although the judgments of the Nuremberg and Tokyo Trial required the availability of case of urgent Necessity for the exercise of the right of self-defense, but they did not address the proportionality requirement.

In addition, the International Court of Justice has upheld the idea of availability of Necessity condition for the purposes of the exercise of the right of self-defense, where the Court found in its judgment in 1996 that the right of self-defense scheduled in Article 51 of the Charter is subject to the condition of necessity

²⁶ See Resolutions (S/RES/487). (1981). Adopted by the Security Council in 1981 I at its (2282 The) meeting , on the 15 June 1981.

²⁷ See Resolution (36\27) adopted by General assembly on 13 November 1981.

and proportionality.²⁸ Self-defense is not palatable unless it is proportional to the attack and necessary to respond to it. International Court of Justice has also confirmed in its judgment in the case of Military and Paramilitary Activities in and against Nicaragua that self-defense should be characterized in necessity and proportionality.²⁹ It is clear that the International Court of Justice has not satisfied with only necessity condition for the legality of the legitimate defense case, but also it required that the act should be characterized in proportionality due to the compatibility and coherence between these two conditions to give the defense acts legalization.

3.4 Proportionality of the Act With the Armed Attack

The conditions to be met under customary international law for the exercise of the right of self-defense are proportionality of the act with the armed attack. It is an essential element to support the claim of the right to self-defense and availability of necessity case. The proportionality between military action or force used and between threat or danger that these armed actions or force take to face it a prerequisite condition necessary for the legitimacy of the actions or force used to counter that threat or danger. If the requirement of proportionality negates, the legality of the applied force or military actions used will negate. From the scientific point of view, the necessity and proportionality requirement is prerequisite to report certain military actions. Verification of condition availability represents for states a minimum to ensure that a military action is characterized by self-defense. Also necessity and proportionality requirement contributes to distinguish between the illegal acts of revenge or retribution and self-defense, which is considered legal due to the availability of required conditions.³⁰

For example, it may not resort to a comprehensive armed attack and invasion and occupation of a territory of State or occupying a part of it once responding to some minor border incidents. Necessity condition includes the requirement of proportionality, because the defensive action is justified only within the scope of need to defend. Defensive action must remain within the scope of the need to defend. It may not be surpassed it in any case, otherwise the need to be taken will be negated and thus the requirement of proportionality will be negated.³¹ This is the conclusion of the Nuremberg Tribunal that just minor incidents on the border between Poland and Germany do not justify the land, sea and air mass attack by Germany against Poland in September 1939, because the overall offensive can't be proportional to the threat or

danger arising from some minor border incidents, so it is certainly German aggression against Poland that cannot be considered a preventive defensive action because it is contrary to the requirement of proportionality.³² In summary, the traditional customary international law has recognized the legitimacy of the use of force in the case of preventive legitimate defense if the two essential conditions are available: necessity and proportionality. If it is possible to resort to peaceful measures and methods to remove the threat or danger, it may not then resort to the use of force as a defensive and protective measure.

International justice has been confirmed in more than one occasion to the requirement of proportionality that self-defense must be characterized by necessity and proportionality. This seems clear from the opinions and provisions adopted by the International Court of Justice. In the judgment of the International Court of Justice in 1986, the United States has vowed the right to self-defense, but the court rejected the US allegations due to the unavailability of the requirements of necessity and proportionality. Court has ended with that the use of force is considered illegal by the United States.³³ International Court of Justice came under the necessity and proportionality requirement once again in its Advisory Opinion on the legality of the threat or use of nuclear weapons, issued in 1996. The court has concluded that the right of self-defense scheduled in Article 51 of the Charter is subject to the condition of necessity and proportionality. Self-defense is not palatable unless it is proportional to the attack and necessary to respond to it. The court concluded that the requirement of proportionality may not in itself rule out the use of nuclear weapons in all circumstances. At the same time, for the use of force which is proportionate under martial law in order to be legitimate, it should also meet the requirements of the law applicable in armed conflicts which are of the principles of international humanitarian law and rules.³⁴

In addition, the requirement of necessity and proportionality also enjoys strong importance because it rejects the legitimacy of continuous occupation or any meaningful attempt to perpetuate the occupation in the name of self-defense. The illegal presence of Israel in southern Lebanon from 1978 to 2000 has been convicted, as well as the occupation of South Africa to the buffer zone in Angola from 1981 to 1988 was also convicted due to lack of availability of the condition of necessity and proportionality (Al Moosa, 1994, p.84). The international community refused the military operations carried out by Israel under the pretext of self-defense against Lebanon in 2006 and in Gaza Strip in 2011 and 2014 due to the lack

²⁸ ICJ, Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons, 1996, op.cit.

²⁹ ICJ Reports, (Nicaragua v. United State of America) op.cit.

³⁰ Stanimir A. Alexandrov, op.cit, p.23.

³¹ Yarom Dinstein. War, Aggression, and Self-defense op.cit. p.29.

³² Jameel M. Hussain. Introduction to International Humanitarian Law. op.cit. p.28.

³³ ICJ Reports, (Nicaragua v. United State of America) op.cit.

³⁴ Advisory Opinion of Legality of the Threat or Use of Nuclear Weapons, op.cit.

of proportionality between the force used by Israeli and the military actions directed against it .

The proportionality is one of the conditions that have been unanimously approved by the jurists and judiciary, albeit the difference has been on the scope of application of this condition i.e. its extent and interpretation. Is the requirement of proportionality available if the defensive action is not directed only to remove the threat or danger, but it is also a wave to remove the source of danger or threat? Is the requirement of proportionality available in armed preventive actions which are mainly taken in order to prevent certain attack or armed aggression before it occurs?

The requirement of proportionality can't be achieved between the defense and aggression for defensive and preventive actions taken primarily to prevent aggression before it occurs. This confirms the idea of the illegality of preventive self-defense in all cases, which is contrary to the traditional customary international law recognizing the legitimacy of this kind of defensive acts, especially that the exercise of the right of self-defense requires a commitment to the test of necessity and proportionality, which is measured according to the amount and size of the attack or armed aggression. While the idea of preventive self-defense is based on the hitting the danger or threat sources before they occur, making the search command on the proportionality and necessity impossible. Thus, the exercise of the right of preventive self-defense implies a personal standard not objective and makes it vulnerable to misuse and abuse in use. The United States in 1986 in a military operation carried out against Libya was based on the text of Article 51 of the Charter of the United Nations, which comes in line with the Charter of the United Nations, according to the American point of view. Where the military operations had then highlighted the idea of preventive legitimate defense against terrorist acts against its citizens and to prevent the recurrence of any similar acts in the future (Amer, 1998, p.925; Greenwood, 1987; Rateb, 1998, p.113). The international community has also condemned the military operations carried out by the United States against Grenada and Panama under the pretext of protecting the lives of American citizens from danger in these two countries, for their overriding the stated objectives and the lack of proportionality.³⁵

Based on the foregoing, the availability of proportionality and necessity condition is one of the conditions that are undisputed in the contemporary international law, the international practices and the international judiciary have emphasized that the legitimacy of the right to legitimate self-defense requires compulsion of necessity and proportionality standards, which can't be verified in the case of legitimate preventive defense.

3.5 The Temporary Character of the Self-Defense

The Charter of the United Nations has been keen to inform the right to self-defense until taking appropriate measures in a set of restrictions and to codify this right as much as possible by giving the concerned international body a major role in determining the legitimacy of the acts alleged to constitute a legitimate self-defense. Article 51 of the Charter of the United Nations grants the Security Council a central and essential role. It also obliges Member States to the United Nations, which has taken a number of measures that they widely use for their right to self-defense when the Security Council has taken the measures that it deems necessary to maintain international peace and security. If the Council begins his powers and takes measures and actions to ensure the maintenance of peace and security, there is no longer any room for the exercise of self-defense. In the dispute over the Falkland Islands between Argentina and the United Kingdom in 1982, the Security Council has said that the current conflict poses a threat to international peace and security and then demanded the parties to stop fighting and resort to peaceful means to settle the dispute. But the United Kingdom confirmed that the measures carried out by the Security Council are not of the measures provided for in Article (51) and, therefore, states do not lead to the cessation of its right to defend itself because the case of armed attack still exists. United States and Court of Justice rejected the states when they invoked self-defense, because the measures taken based on this right are within the jurisdiction and powers of the Security Council, which confirms the temporary nature of the right of self-defense.

The temporary spare nature for self-defense arises from the fact that the Charter was not only intended to restrict the use of force by states, but also it sought to make this use central and focused by a particular body that monitors and supervises it. This shows that the right to self-defense is a temporary right which ends when the competent organ takes the measures as it deems necessary to maintain international peace and security. International Court of Justice has confirmed in its judgment in 1986 that States must comply in cases of self-defense with commitment scheduled in Article (51) relating to notify the Security Council of the measures taken to defend. The court has also noted that the lack of reporting the Security Council on measures taken in the case of self-defense is considered an indication that the State is not convinced in the case of self-defense. This emphasizes the oversight role granted by the Charter to the Security Council with regard to measures taken by the State, which is called self-defense or protective self-defense.

International practices have confirmed the keenness of States to respect this obligation because not to do may weaken her claim and were talking by the case of self-defense , especially the Report Security Council measures taken and to provide reports to him makes the state based on their right to self-defense look better legal status , as

³⁵ See Resolution (7\38) and (24\44) adopted by General assembly.

that this helps in determining the health and legal alleges provided by the state (Greig, 1990, p.366). Report also said the Security Council measures and actions been taken in the case of self-defense and the media play a positive political role for the international community.

Failure to comply with this requirement does not lead to the invalidity of the claim by the case of self-defense because the notification required to be done under the legal text represents only a procedural requirement (Ibid., p.367). Failure to comply with this requirement to convey the burden of proving the validity of the claim of the state, which is called the presence of armed assault. Providing state communication to the Security Council informed of inhabitants and military operations in the case of an alleged the existence of legitimate self-defense is considered prima facie evidence of the validity of the claim (Prima facia evidence). We have already shown that the United Kingdom during the discussions in the General Assembly reservation of the failure of the Soviet Union to notify the Security Council of the measures carried out by in Afghanistan, as long as he invoked his right to the exercise of self-defense as a result of the attack on him.

Based on the foregoing, we find that Article 51 of the UN Charter obliges States, which has taken a number of measures are widely used for their right to self-defense to inform the Security Council immediately of such measures, however, that non-compliance with the requirement does not leads to the invalidity of the right to self-defense. Also, the right to defend the same just a temporary right ends when the Security Council has taken the measures it deems necessary to maintain international peace and security. The Council began its powers and taken measures and actions to ensure the maintenance of peace and security, there is no longer any room for the exercise of self-defense.

CONCLUSION AND RECOMMENDATIONS

The Charter of the United Nations has the goal to establish an international global system is different to what prevailed before the United Nations to establish and forbidden to use or threat of force in international relations, but minimalistic, which responded by explicit provisions in the Charter and therefore it may not be the expansion of the interpretation of Article (51) as well as inconsistent with other provisions contained in the Charter of stable and principles of international law, particularly the delivery of these health claims may pave the way for the establishment of an international precedents may undermine the legal rules adopted by the Charter of the United Nations in order to preserve international peace and security. So it must be interpreted in the right to self-defense narrowly according to the explicit text of the article (51) and consistent with the purposes of the United Nations and other provisions of

the Charter. Based on this, the contemporary international law requires to do the right of self-defense in that there should be subjected State armed attacked an interim measure and a set of restrictions and conditions that must be provided to a state of self-defense, a proportionality and necessity and governance validity in light of the application of the idea of self-defense preventive.

Certainly, the Security Council's inability to condemn the aggressive attack of these countries does not mean support for the right of self-defense preventive or preemptive strike. Therefore cannot legally build on these offensive hostilities to say as international precedents indicate the legitimacy of preventive self-defense in the era of the international organization, which grew under the conclusion of the UN Charter.

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