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ESCALATION OF COMMITMENT – ANTICIPATORY SELF-DEFENSE AT THE BOTTOM OF THE CHAIN:

A COMPARATIVE ANALYSIS OF THE LEGAL JUSTIFICATIONS USED BY THE UNITED STATES TO USE FORCE IN IRAQ (2003) AND RUSSIA IN UKRAINE (2022)

Dissertation to obtain a Master's Degree in Law, in the specialty in International and European Law

Supervisor:

Dr. Laura Iñigo Álvarez, Professor at the NOVA School of Law

September 2023

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Anti-Plagiarism Declaration

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

Maria Francisca Bargão Robalo das Neves

Declaration

It is stated that, the body of the present Dissertation, consisting of the Introduction, six Chapters, and Conclusion, occupies a total of 183 668 characters including spaces.

“[on Russia’s invasion of Ukraine] and the decision of one man to launch a holy unjustified and brutal invasion of Iraq. I mean, of Ukraine”

- **George W. Bush, 2022**

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To Maria, who helped me through thick and thin, by giving me the push I sometimes did not know I needed.

To Paris, my home for six months of this process, that welcomed me and unveiled a new world of possibilities.

Quoting and Other Conventions

The citation style used in this Master's dissertation is American Psychology Association (7th Edition).

Throughout this dissertation, quotes follow the rule of in-text citations, which included the following elements presented within parentheses: (i) author's or authors' surname(s) or the designation of the entity responsible for elaborating the source cited; (ii) the year of publication; and (iii) the page(s) from which the information was cited.

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This dissertation follows the rules of American English.

List of Abbreviations

AA – Association Agreement

AEC – Atomic Energy Commission

DoJ – Department of Justice

DRC – Democratic Republic of Congo

EU – European Union

IAEA – International Atomic Energy Agency

ICJ – International Court of Justice

ICL – International Customary Law

ICSS – International Commission on Intervention and State Sovereignty

ILC – International Law Commission

NATO – North Atlantic Treaty Organization

OSCE – Organization for Security and Cooperation in Europe

R2P – Responsibility to Protect

RSIWA – Responsibility of States for Internationally Wrongful Acts

SC – Security Council

UK – United Kingdom

UN – United Nations

UNMOVIC – United Nations Monitoring and Verification Agency

UNSC – United Nations Security Council

UNSCR – United Nations Security Council Resolution

US – United States

VCLT – Vienna Convention on the Law of Treaties

WMD – Weapons of Mass Destruction

Abstract

Russia invaded Ukraine in 2022, the same that the United States did to Iraq in 2003 under justifications of anticipatory self-defense. Both leaders claimed that their countries were under an imminent threat. In the case of the United States, the threat consisted of the Weapons of Mass Destruction in possession of Iraq that would serve either Iraqi forces or terrorist groups to attack the country or other Western states. On his side, Putin stated that the threat to Russia emanated from the expansion of NATO Eastwards towards Russia's border with Ukraine. Both states provided legal arguments to justify the alleged used of anticipatory self-defense. Nevertheless, they also put forward additional justifications to uphold their unjustified uses of force. In the case of Russia, collective self-defense against genocide and, in the case of the United States, previous sanctioning from the Security Council. This dissertation aims to examine the theoretical and historical development of the right to self-defence with a particular focus on the question of the (il)legality of the use of anticipatory self-defence. Within this framework, the cases of both US and Russia will be analysed in order to identify whether it is possible to find a pattern in their justification of the use of anticipatory self-defence. In particular, the dissertation will argue that these leaders call upon additional justifications which could allegedly have a higher degree of authority and complexity, thus recognising the endemic fragilities of anticipatory self-defence.

Keywords: Anticipatory Self-Defense – Use of Force – United States – Russia – Ukraine – Iraq – Legal Justifications

Resumo

A Rússia invadiu a Ucrânia, em 2022, à semelhança do que os Estados Unidos fizeram ao Iraque, em 2003, segundo justificações de legítima defesa antecipada. Ambos os líderes alegavam estar sob uma ameaça iminente. No caso dos Estados Unidos, a ameaça consistia em Armas de Destruição Maciça na posse no Iraque, que serviriam ora as forças iraquianas, ora grupos terroristas para atacar o seu país ou o Ocidente. Do seu lado, Putin afirmava que a ameaça à Rússia emanava da expansão da OTAN para Leste, em direção à fronteira russa com a Ucrânia. Ambos os Estados forneceram argumentos legais para justificar o alegado uso de legítima defesa antecipada. Não obstante, avançaram também com justificações adicionais para sustentar o uso de força injustificado. No caso da Rússia, legítima defesa coletiva contra o genocídio e, no caso dos estados Unidos, sancionamento prévio do uso de força por parte do Conselho de Segurança. Esta dissertação tem como objetivo examinar o desenvolvimento histórico e teórico do direito à legítima defesa com particular foco na questão da (i)legalidade do uso de legítima defesa antecipada. Dentro desta moldura, os casos dos Estados Unidos e da Rússia serão analisados por forma a identificar se é possível encontrar um padrão nas suas justificações no uso de legítima defesa antecipatória. Em particular, esta dissertação argumentará que estes líderes evocam justificações adicionais que podem alegadamente deter um maior grau de autoridade e complexidade, assim reconhecendo as fragilidades endémicas da legítima defesa antecipada.

Palavras-Chave: Legítima Defesa Antecipada – Uso da Força – Estados Unidos – Rússia – Ucrânia – Iraque – Justificações Legais

Table of Contents

1. Introduction

Article 2(4) of the United Nations Charter poses a general prohibition to the threat or use of force in the International Community. The same document foresees some exceptions to this prohibition, self-defense is one of them. In this regard, Article 51, then, states the following:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures 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 action as it deems necessary in order to maintain or restore international peace and security.

Nevertheless, one of the key questions is: when does an armed attack begin? Academic literature on interpreting Article 51 and International Customary Law diverges into two schools of thought: Restrictive and Expansive. While the former does not accept any form of anticipatory self-defense by saying that an armed attack begins when a state is attacked (Van den Hole, 2003, p.84), the latter accepts the customary right to anticipatory self-defense in the face of an imminent threat, following a more broad interpretation of Article 51 of the Charter (Schuller, 2014, p.165).

Despite the non-consensual view of the Expansive School, this reasoning is arguably backed up by several legally binding strains, such as the drafting history of the UN Charter, *opinion iuris,* and state practice (Van den Hole, 2003, p.77), making it legally accepted as stated by Schuller (2014), Van den Hole (2003), or Wood (2016). However, it entails several prerequisites officially inherited from the Caroline Case of 1837 – imminence, necessity, and proportionality (Jennings, 1938, p.89). In short, the use of force to respond to an imminent attack must be necessary to repel the said imminent attack from occurring (Wood, 2016, p.358). Two other criteria, exhaustion or impracticability of peaceful means and flouting international law, were added, but their relevance is more redundant since they can be interpreted as part of necessity.

This dissertation aims to study the legal justifications put forward by Russia and the United States prior to the launching of military occupations in Ukraine and Iraq respectively. In particular, it will be assessed if Bush and Putin's arguments to act in self-defense satisfy the criteria of anticipatory self-defense since none of the operations started as a response to an armed attack but to an allegedly imminent threat, and both claimed to act lawfully under self-defense. However, in both cases, individual self-defense was not the only justification put forward. This dissertation will also analyze each country's additional justifications and compare the level of authority and complexity with those of anticipatory self-defense, to figure out a pattern in terms of legal justifications: which come first, which are directed to the international community, and which are directed to internal audience, and, finally, which hold the highest authority. This aims to conclude that anticipatory self-defense, as predicted by the restrictive school of thought, has endemic problems, mainly related to the capacity of states to fabricate imminent threats as they wish, earning little respect from the international community, leading to states using other more cemented legal justifications on top of anticipatory self-defense. Henceforth, it will be assessed considering the legal justifications provided by states, when using force unjustifiably, what the position occupied by anticipatory self-defense is. Does it hold high authority? Does it confer a sense of lawfulness? Is it feeble?

Chapters 2, 3, 4 and 5 of this dissertation will make up the literature, state practice, and jurisprudence review for the framework for analysis. Chapter 2 will provide a historical overview of the circumscribing of the use of force in International Public Law until the Charter era, followed by a description of the exceptions to the general prohibition of the use of force. Chapter 3 will provide a historical and state practice's overview of the customary right to self-defense until Article 51 of the United Nations Charter. Chapter 4 will also touch upon anticipatory self-defense, putting face to face the restrictive and the expansive schools of thought on Article 51. At last, Chapter 5 will set forth prerequisites of anticipatory self-defense – imminence, necessity, proportionality, exhaustion or impracticability of peaceful means, and flouting international law – which will then be used to assess the anticipatory self-defense justifications provided by the United States and Russia for their use of force.

The final Chapter will offer an overview of the facts leading to the invasions of Iraq and Ukraine, followed by a thorough analysis of the legal justifications provided. This analysis will be divided into two sections, touching upon the individual anticipatory self-defense justification and collective self-defense in the case of Russia and previous sanctioning from the Security Council in the case of the United States.

Finally, a conclusion will be drawn from the comparison between the two cases that will amount to the expected results that anticipatory self-defense is very feeble and serves indeed the political interests of states and, for that reason, states tend to come up with additional justifications whose legitimacy and lawfulness would be harder to contest.

2. The Use of Force in Public International Law

International law comprises a fundamental aspect of global governance, with regulations on using force as a critical component. These rules and principles, such as state sovereignty, independence, and equality, are the foundation for maintaining international order.

2.1. Historical Overview

The use of force between states has been, historically, widespread. Thomas Hobbes, in the 17th century, in his book *Leviathan*, describes that the natural state of humanity was one of constant conflict and war, the "state of war," and that the only way to achieve peace and stability was to create a powerful government that could impose order and security (Spieker, 2011, p.193).

2.1.1. The Classical Period

Until the 20th century, there was a broad acceptance of using force in international relations. International Law was based on a dichotomy between *jus ad bellum* and *jus in bellum*. The former is the concept that establishes the terms and conditions necessary for a state to declare war, consecrating the right of states to resort to the use of force in international relations (Gouveia, 2019, pp. 765-766). The latter consisted of the norms that regulated armed conflicts if such regulation was possible (Gouveia, 2019, p.766).

2.1.2. The Proscription of the Use of Force by States

In the early 1900s, some forms of legal-international restriction to the use of force started to be created, culminating in the general prohibition of the use of force imposed by the Charter of the United Nations.

2.1.2.1. From the 1900s until the United Nations Charter

The Drago-Porter Convention of 1907 established the prohibition of the use of force in case of unpaid debts between states and is conceived as the first international treaty to proscribe the use of force, albeit marginally (Gouveia, 2019, p.678).

Furthermore, the League of Nations was established in 1919, and Article 12 of its Covenant (1919) reads that:

"The members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to an inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council."

The treaty established a *moratorium* on resorting to war because, despite not being an actual prescription, it imposed a delay in the use of force for three months, intending to force the parties to the conflict to achieve an agreement (Brownlie, 1963, p.84). Gouveia (2019, pp.678-679) affirms that the Covenant was the first war limitation, with its resort being only admissible in three scenarios: i) as an *ultima ratio* measure; ii) as a decreed coercive measure and iii) as a legitimate defense.

In 1928, the General Treaty for the Renunciation of War, also known as the Kellogg-Briand Pact was signed. Its Article I reads that "the high contracting parties (…) condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.", while Article II refers to "pacific means" as the solution for "disputes or conflicts" (Brownlie, 1963, p.101).

This treaty explicitly condemned the use of force as an external policy instrument, being admitted only in cases of legitimate defense or as a coercive measure to repel grave violations of International Law. It was the first general prohibition of the use of force in international relations on a substantive level (Brownlie, 1963, p. 102). Nonetheless, its ineffectiveness relied on the fact that it did not establish any sanction mechanism to punish breaches of the law (Gouveia, 2019, p.680).

2.1.2.2. The United Nations Charter (1945)

The United Nations Charter was brought into force in 1945, and all countries in the World are signatories to it, conferring the Charter the highest level of legitimacy. Being drafted in the aftermath of World War II, and after decades of war, its primary goal was to prevent armed conflict, as can be seen right in the preamble:

> *"to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain*

international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples."

Since then, it has provided the legal framework for the use of force in International Law.

Article 2(4) of the Charter establishes not only the generalized prohibition of the use of force but also the means to protect sovereignty (Gouveia, 2019, p. 680) by stating that:

"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."

The use of force and, consequently, Article 2(4) have been central to many discussions throughout the last eighty years. As a result, many clarifications have been made regarding what the UN believes to be the proper interpretation of this article, according to the proscriptive spirit of the Charter. For example, General Assembly's resolutions 2625/1970 and 3314/1974 have reaffirmed the generalized prohibition of the use of force, and so has the International Court of Justice in its opinions on cases such as the Corfu Straight, the Case of diplomatic and consular personnel from the United States in Teheran and also the Nicaragua Case (Gouveia, 2019, p.681).

Despite the clarifications issued by official UN organs regarding Article 2(4), nothing has stopped several authors from accusing the Charter of being *"dead"* and, subsequently, its value erased from the international legal framework which rules the matter. This line of thought was first presented by Thomas Franck, in 1970, in his article "Who Killed Article 2(4)?" in which he points to the imperfections and obsoleteness of the article (Becker, 2004, p. 584). In turn, Louis Henkin, in his article of 1971, "The Reports of The Death of Article 2(4) Are Greatly Exaggerated", gives credit to Frank's concerns but, ultimately, considers it wrongful to declare de death of the Charter (Becker, 2004, p. 593). The debate continued throughout the 20th century but gained a new force at the beginning of the 21st century, in the aftermath of the 9/11 events: the invasion of Afghanistan and, more prominently, Iraq by the United States (US) government and its allies. In 2003, Thomas Franck, once again leading the debate, published the article "What happens now? The United Nations after Iraq", where he denotes a new form of unilateralism in which the US "proclaims a new policy that openly repudiates the Article 2(4) obligation" (Franck, 2003, p.608).

The response of the UN to the questions about the current state of international law regarding the use of force by states, in 2005, in the UN World Summit Outcome document, in which heads of state and government stated (Wood, 2013, p. 354):

> "*The relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting following the purposes and principles of the Charter*".

2.2. Exceptions to the general prohibition of the use of force

The Charter of the United Nations also gives room for two exceptions to the general prohibition set out in Article 2(4), namely legitimate individual or collective self-defense, according to Article 51 of the Charter, and collective actions authorized by the UN Security Council, according to Articles 41 and 42 of the Charter. However, a third exception, humanitarian intervention, is not embodied in the Charter and is, to this day, does not hold authority as an exception, according to scholars.

2.2.1 Legitimate Self-Defense

The first part of Article 51 of the Charter of the United Nations sets out the right to use legitimate self-defense by states:

> *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs*

against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security."

The second part, on the other hand, sets out limitations, namely being subject to the action of the Security Council to that same right:

"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 action as it deems necessary in order to maintain or restore international peace and security."

The right to self-defense will be analyzed closely in the sections below.

2.2.2. Collective actions authorized by the Security Council

Chapter VII of the United Nations Charter establishes collective action, meaning the use of armed force when authorized by the Security Council. In particular, Article 42 of the Charter poses that:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Articles 41 and 42 of the Charter foresee that the Security Council may adopt recommendations or coercive measures, either economic or military, to restore international peace and security in the event of a threat. Ideally, military action should be executed by armed forces at the disposal of the Security Council (Articles 43 and 45 of the United Nations Charter), but, considering States have never worked towards that, military coercive measures are put to place by Member-States, upon request or mandate from the Security Council (Article 48 of the Charter). Thus, the Security Council has legitimized the use of force rather than executing it (Coutinho, 2015, p. 54).

2.2.3. Humanitarian Intervention

Although there is no official legal definition of the notion of humanitarian intervention, Thomas Weiss (2011, p. 427) wrote that "humanitarian intervention seeks to alleviate the unnecessary human suffering caused by violent conflict by intervening in another state with force under certain limited conditions." Its limited support as an exception to the general prohibition of the use of force posed in Article 2(4) arises from the fact that it is not foreseen in the United Nations Charter. Scholars are not confident it can be found in customary international law either (S. M. Wood, 2016, p. 653), even if some state that the Security Council has authorized humanitarian interventions under the premise of "restoring peace and security" (Weiss, 2011, p.432).

When such action is authorized or even solicited by the state in question, there is no doubt about its legitimacy since it fully respects international norms. The problem revolves around cases in which they are not allowed, either tacitly or expressly, which leads to the question of whether there is a right of interference or a duty to protect international values and elementary human rights (Gouveia, 2019, p.706).

Put forward for the first time in 2001, in the International Commission on Intervention and State Sovereign, responsibility to protect (R2P) was adopted during the 2005 UN World Summit and is detailed in paragraphs 138 and 139 of the Summit Outcome Document (General Assembly, 2005, p.30). It is defined as "an international norm that seeks to ensure that the international community never again fails to halt the mass atrocity crimes of genocide, war crimes, ethnic cleansing and crimes against humanity" (Global Centre for the Responsibility to Protect, n.d.). By accepting that modern-state sovereignty is limited rather than absolute (Saxon & Pratt, 2015, p.136), R2P firstly stresses states' obligation to protect their populations from the above-listed crimes. If states fail or are unwilling to do so, the International Community, through the UN, using "appropriate and necessary means," must support and enforce states in fulfilling their duty. Furthermore, it presupposes that peaceful means authorized by Chapters VI and VIII of the Charter of the United Nations also fail. In that case, the Security Council has the power to approve the use of military means, following Chapter VII of the Charter.

By creating R2P, both the ICSS and the World Summit intended to distance themselves from the dubious language and practice of humanitarian intervention (Weiss, 2011, p.434) by actually prioritizing prevention of mass atrocities, incorporating “holistic strategies of engagement,” and “turning attention to the protection of civilians” (Bellamy, 2008, p.630). What remains to this day are the initial concerns regarding this concept, such as self-interest unilateral armed intervention (Bellamy, 2009, p.125), as the result of a non-uniform *de facto* practice by states, that lead to non-intervention both in Syria and Darfur, after severe human rights violations (Gouveia, 2019, p.707) or to the state interests driven intervention in Libya in 2011.

Nevertheless, humanitarian intervention, in the form of responsibility to protect, can be seen as another exception to the general prohibition of the use of force established by Article 2(4) of the UN Charter, as several authors, such as Alex J. Bellamy or Thomas Weiss, point out.

3. The right of Self-Defense

Today, the right to self-defense is the result of legal written provisions, specifically, Article 51 of the UN Charter and Customary International Law. It is not the purpose of this dissertation to examine the concept of international customary law, but due to the importance of the matter for the aim of this chapter, a closer look should be taken. In fact, the relevance of Customary International Law can be taken out of the Statute of the International Court of Justice, which in Article 38(1) states that “the Court, whose function is to decide according to International Law (…), shall apply: (…) b. international custom, as evidence of a general practice accepted as law.”

In order to produce normative effects, Customary International Law derives from “a general practice accepted as law”. This practice, according to the International Committee of the Red Cross, can be found in *de facto* practice, but also in a variety of official documents, such as national legislation and case law. The requirement that this practice is accepted as law is usually referred to as *opinion juris* (ICRC, 2014).

Notwithstanding, before paying a detailed look at the most prominent cases that serve as the basis of Customary International Law on the right of self-defense – the Caroline Case and the Case Concerning Military and Paramilitary Activities in and Against Nicaragua - Nicaragua v. United States of America (from now on, this case will be referred to as the *Nicaragua Case*), it is pertinent to provide some historical background and legal analysis about this notion.

3.1. Historical Background

3.1.1. Legal Development Throughout the Centuries

Hugo Grotius, often considered the father of International Law, argued for the inherent right of self-defense in his work “The Law of War and Peace” from 1625. The author claimed that self-defense was a “natural right, based not on any special divine command, but on the common principles of justice” (Grotius, 2001, p.43), namely the principle of self-preservation, for which he believed that every individual and state have the inherent right to preserve their own existence and protect them from harm (Grotius, 2001, p.63). However, he was also the first to add that all peaceful means must be exhausted before using armed conflict, trying to avoid war at all costs, and also that states must comply with prerequisites for resorting to war, of which stand out necessity and proportionality (Sullivan, 2007, pp.458-459).

Likewise, Thomas Hobbes' central thesis in his book "Leviathan" (1651) revolves around the idea of the state of nature, a hypothetical condition where individuals exist without government or authority. According to Hobbes, the state of nature is a state of war, where life is "solitary, poor, nasty, brutish, and short" (Hobbes, 2009, p. 96). In this state, individuals have a natural right to self-preservation, which forms the basis for their inalienable right to self-defense (Sreedhar, 2008, 782). In his book, he also introduces the concept of social contract, in whose heart lies self-defense (Ferzan, 2008, p.456). However, his view is not that of “self-defense as a right against the state; rather, self-defense is a relationship that exists within the state of nature that is preserved through the social contract” (Ferzan, 2008, p. 457). The state of war makes it legitimate for every man to preserve his integrity in any way, and not even the social contract can “alienate the right to self-defense” from men (Ferzan, 2008, p. 457). “Thus, the right of self-defense can perhaps best be characterized as the right to do what one judges necessary to preserve one’s life” (Sreedhar, 2008, p.784).

Still in the 17th century, in his influential treatises, particularly "Two Treatises of Government" (1690), John Locke discussed the social contract theory and the right to self-defense. Similarly to Hobbes, Locke’s definition of self-defense derives from the “fundamental, sacred, and unalterable law of self-preservation” (Locke, 1764, p.170). It states that it is an inherent aspect of human existence within the state of nature, which is upheld and reinforced by the principles established in the social contract (Ferzan, 2008, p.457). Fundamentally, Locke defines self-defense as being “part of the law of nature that cannot be denied to the community, even against the king” (Locke, 1764, p.208).

Advancing to the 18th century, Immanuel Kant, in his turn, proposes a “law of nations” under which liberal states make an effort to overcome the natural state of war and pursue “perpetual peace” (Hayden, 2000, p.51). In order to explain how to achieve that goal, Kant, in his work of 1795, exposed six “preliminary articles for perpetual peace among states” and then three “definitive articles for perpetual peace among states” (Kant, 1795, pp.1-4), which imply that people must give up on some rights to oblige to the law of nations, except for the right of self-defense (Carson, 1988, p.183). The philosopher Immanuel Kant became one of the first to mention the states’ right to self-defense instead of individuals’ right to self-defense.

Later on, in his work from 1977, “Just and Unjust Wars,” Michael Walzer discussed the concept of *just war*. He uses the doctrine of aggression to elaborate on when fighting constitutes a crime or is permissible (Walzer, 2007, p.59). Summing up this theory in six propositions, Walzer, on proposition number three, defines aggression as “any use of force or imminent threat of use of force against the political sovereignty or territorial integrity of another,” and he then goes on to the fourth proposition, in which he explains that aggression justifies a violent response in self-defense (Walzer, 2007, p.62). At last, in proposition number five, Walzer states that “nothing but aggression can justify war” (Walzer, 2007, p.62), meaning that, in the end, conducting a war that started under the premise of self-defense is conducting a *just war*. Michael Walzer also makes some critical remarks on the importance of limiting the scope of self-defense, which will be discussed further in this dissertation.

Similarly, Briand Orend, in his book "War and International Justice: A Kantian Perspective" (2004), examined the right of self-defense within the framework of just war theory. Bearing a position very close to Walzer on the topic, he also recognized that the resort to war as self-defense constituted a *just cause* (Orend, 2000, p.178) and asserted that the right to self-defense must be circumscribed as well.

Throughout the centuries, the concept of self-defense has evolved, reflecting the changing dynamics of societies and international relations. From its roots in ancient civilizations, where the right to protect oneself and one's property was paramount, to the development of modern international law, the principles governing self-defense have seen significant transformation.

3.1.2. The *Caroline Case* of 1837

The Caroline Case, or the Caroline Incident, of 1837 served as a definition for self-defense before the UN Charter was created and enacted as part of customary international law. A letter sent in 1841 by the US Secretary of State Daniel Webster to the British Minister in Washington presents the admissible conditions under which the use of force in self-defense can be regarded as legitimate. The facts of the case, retrieved from Leo Van den Hole's article "Anticipatory Self-Defense Under International Law" (2003, pp.95-96), go as follow:

Some preparations for the Canadian Insurrection of 1837 took place on US soil. Even though the United States acted against the obtention of arms from its territory by the Canadians, to avoid what is today called international responsibility, the Caroline ship was provisioning rebels with arms and other supplies from American territory, more specifically, from the US border of the Niagara River. In order to prevent the provision of arms and to avoid the escalation of the insurrection, an armed band under British command set fire to the Caroline and cut it loose to float over the Niagara Falls, leading to the destruction of an American ship and the killing of an American citizen with the support of a foreign state in American soil – it was a "flagrant, unprovoked attack against a neutral state" (Waxman, 2018, p.1). When the US Government expressed its discontent regarding this situation, Great Britain argued to have acted to protect its interests under the premise of self-defense and self-preservation since the United States could not or was not willing to do that (Waxman, 2018, p.1).

After three years of high tension between the United States and Great Britain, in 1840, the US detained a British military veteran, Alexander McLeod, who was considered to have taken part in the Caroline incident and was charged with the death of the American citizen (Waxman, 2018, p.4). Following a tension escalation in the diplomatic relations between both states, correspondence was exchanged, in the following years, between the US Secretary of State, Daniel Webster, and the British Minister in Washington after the British requested the release of their citizen. The American counterpart wrote, in 1841, as retrieved from R. Y. Jennings' article "The Caroline and McLeod Cases" (Jennings, 1938, p.89):

> It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.

David Webster intended to set forth a collection of criteria that made it impossible for Great Britain to justify the recourse to self-defense in this particular case (Jennings, 1938, p.90). Instead, by stating that its British counterpart should have a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," he presented the first definition of self-defense as a consequence of necessity, proportionality, and imminence (Van den Hole, 2003, p.95), what was then called the *Caroline Doctrine*.

Nonetheless, one must note that such a definition appeared in a time in which war was still widely accepted as being legitimate. States could find whatever reasons they wanted to resort to war since legal justifications were not required by the little existing International Law or even by the international community.

Hence, the sole purpose of David Webster's letter was to establish the scope of State responsibility for measures undertaken in peacetime, and that was how authors would discuss it, as limiting "extra-territorial uses of force by a state in peacetime against another state which was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the state taking action" (Kearley, 1999, p.325) and preserving territorial integrity (Kearley, 1999, p.329). As previously mentioned in the first section of this dissertation, it was not until 1907 that there was a first attempt to circumscribe the use of force under the Drago-Porter Convention, so it is only natural that these criteria were not immediately adopted by International Law as Customary Law to delineate the use of force by states.

Nonetheless, it is a fact that modern scholars have taken Webster's statement out of context and started using it as a rule of general application (Kearley, 1999, p.331). Examples of this practice are the Parry and Grant Encyclopaedic Dictionary of International Law's definition of self-defense that expressly mentions the Caroline doctrine – "(1) Under customary international law, it is generally understood that the correspondence between the US and the UK of April 24, 1841, arising out of The Caroline Incident... expresses the rules on self-defense" (Barker & Grant, 2009, p.105); as well as the 1995 United Nations: Law, Policy and Practice that refers back to the Caroline doctrine, concerning necessity, proportionality and immediacy (Philipp & Wolfrum, 1995, p.1136).

Kearly (1999, p.338) attributes to Jennings, in his 1938 article "The Caroline and McLeod Cases," the first application of Webster's definition of self-defense as a general rule, when he referred to it as "the locus classicus of the law of self-defense" (Jennings, 1938, p.92), in a time where the circumscription of the use of force was vividly becoming more and more significant. He then enumerates several other authors who, throughout the 20th century, adopted the same vision, leading to its correlation with the interpretation of Article 51 of the UN Charter, which creates an exception to the general prohibition of the use of force outlined in Article 2(4).

The relation between Article 51 and the Caroline Doctrine has to do with the scope of permissiveness of the former. On the one hand, some authors share a restrictive reading of Article 51, focusing on the phrase “if an armed attack occurs,” which, from their point of view, poses an even narrower perspective than the one by Customary International Law of the pre-Charter era. The restrictive reading, consequently, imposes that the strict conditions set in the Caroline Doctrine shall be applicable to all forms of self-defense in International Relations (Kearley, 1999, p.344).

On the other hand, some authors believe that Article 51 should be interpreted more permissively - extensive reading. They focus on the phrase “inherent right of self-defense” of the Article, claiming that it should encompass all forms of self-defense (Kearley, 1999, p.344), including anticipatory self-defense, whose preconditions are outlined in the Caroline Doctrine, as necessity, proportionality, and imminence (Van den Hole, 2003, p.97). Both readings of Article 51 will be examined in detail in this dissertation.

3.1.2.1. The International Court of Justice and the Caroline Doctrine

When dealing with the question of self-defense the International Court of Justice has never explicitly, in any of its decisions or advisory opinions, mentioned the Caroline case. Nonetheless, it often refers to rules of Customary International Law to support its judgments which, for some scholars, can be regarded as including the Caroline Doctrine, particularly concerning the criteria of necessity and proportionality (Green, 2006, p.456). In opposition, other scholars do not see the Caroline Doctrine as a crystallization of Customary International Law but as an “expression of a legal standard.” Given that importance, they argue that it seems somewhat atypical for the Court to use a legal standard of that magnitude without giving it credit, which most likely means that, in the end, it was not taken into consideration (Green, 2006, p.457).

The relationship between the International Court of Justice and Customary International Law norms on self-defense will be further analyzed with the help of the former’s judgments on cases related to this theme.

3.1.3. Article 51 of the UN Charter and its Interpretation

In 1945, within the United Nations Charter, Article 51, which establishes self-defense as one of the exceptions to the general prohibition of the threat or use of force by states, entered into force. In order to analyze the article properly, the

Vienna Convention on the Law of Treaties, elaborated in 1969 by the International Law Commission and which then came into force in 1980, provides some helpful insights.

According to its preamble, “recognizing the ever-increasing importance of treaties as a source of international law” (United Nations, 1969), the Convention also includes rules designed to guide the interpretation of treaties. As such, Article 31 first indicates that the meaning of the provisions should be found in the interpretation of the literal text, bearing in mind the intention of the parties at the time they agreed to it and the context in which it was negotiated. Thus, Article 32 determines that preparatory works can be used as a means to interpret the treaty, more specifically, to confirm the meaning retrieved from Article 31 interpretation, or to determine if Article 31 leaves the meaning ambiguous or obscure, or if it leads to a result absurd or unreasonable.

Following these rules and methods of treaty interpretation, it is essential to mention the preparatory works at Dumbarton Oaks, in 1944, and at San Francisco, in 1945, for the United Nations Charter. Initially, at Dumbarton Oaks, there was no draft provision regarding the right to self-defense since it was rooted entirely in the existent legal order; however, time passed, and in San Francisco, the general feeling was that an explicit provision was needed (Eckert & Mofidi, 2004, p.131), resulting in Article 51, the last provision of Chapter VII, that regulates the use of force.

Going back to the text of Article 51 presented in the first section of this dissertation, its analysis can be divided into two parts. The first part establishes the exception to the *jus contra bellum* rule set forth by Article 2(4) of the Charter, which is the general prohibition of the use of force (Eckert & Mofidi, 2004, p.132) – “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,” stating that, in the event of an armed attack, UN members are authorized to resort to the use of armed force. Nonetheless, problems, which will be addressed later, arise from the terms “inherent” and “armed attack.”

The second part of Article 51, on the other hand, establishes limitations to the right to use force under self-defense by circumscribing its use only “until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council" (Eckert & Mofidi, 2004, p.132). It emanates from the original intention of this being only temporary until the Security Council takes over and applies appropriate measures, taking back the monopoly of the use of force (Gouveia, 2019, p.699).

Following the second part of Article 51, if the Security Council, then, decides that the continued use of armed force is necessary, it falls under the scope of Article 42 of the UN Charter, which authorizes this organ to decide on the use of force to "restore international peace and security." When the Charter was drafted, Article 43 complemented the latter intending to create permanent UN armed forces, with the contribution of the member-states, that would be under direct orders of the Security Council and would, consequently, act in cases of this nature. Notwithstanding, this never materialized, and even if the Security Council rules on the use of force, it shall be applied by member-states' armed forces. One example to consider is Security Council Resolution 1973 (Security Council Resolution 1973 (2011) [on Establishment of a Ban on Flights in the Libyan Arab Jamahiriya Airspace], 2011), which approved the use of "all necessary measures to protect civilians," resulting in the legitimate use of force by NATO-led forces in the country, as approved by the resolution .

This inability of the Security Council to maintain permanent joint armed forces and, consequently act on its own, adds one extra layer to the controversy already revolving around the right to use force under self-defense. Having states repeatedly controlling the use of force has led to the gradual loose of power from the United Nations and the Security Council.

3.1.3.1. The International Court of Justice and the Application of Article 51

The International Court of Justice, throughout its existence, has had the opportunity of, mentioning Article 51 several times in its advisory opinions and judgments, contributing to a better understanding of its scope of application. The next part offers a closer look at some examples.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) (2004)

In 2002, Israel initiated the construction of a wall on the West Bank that would reach a length of 720 kilometers in order to prevent Palestinian suicide bombers from entering its territory (Green, 2009, p.20), leading to the General Assembly requesting an Advisory Opinion from the International Court of Justice regarding this issue.

On a submission to the General Assembly, Israel stated that “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defense and Security Council resolutions 1368 (2001) and 1373 (2001)”, regarding terrorism (*The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004, p.12). As a response, the Court stated that the inherent right to self-defense is admissible in cases of armed attack from a foreign country, which was not the case since the attacks came from Israeli-controlled territory, concluding that the situation is different from the ones derived from the invoked Security Council resolutions and that the call upon Article 51 is not valid (*The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004, p.12).

Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda) (2005)

After supporting the fall of the established dictatorship in the Democratic Republic of Congo (as of now, Congo), states such as Uganda, Rwanda, and Burundi entered the country in 1998 to support groups of Tutsis rebels that were trying to overthrow the newly established democratic government lead by Kabila, which was beginning to implement more independent policies in Congo. One year later, Congo applied to the ICJ, alleging that Uganda violated its sovereignty and territorial integrity by launching military attacks and assisting rebel groups within the DRC. In its response to the Court, Uganda claimed that its presence in the DRC territory had been consented by Congolese authorities since 1998 and denied taking part in rebel efforts to change the regime. Additionally, Ugandan authorities denounced attacks perpetrated by anti-Ugandan forces originating from Congo territory, leading to Uganda taking action, although legitimate, as it acted in self-defense. In its counter-response, Congo asserted that anti-Ugandan attacks never came from its territory and that any action conducted by its forces against Ugandan action was also set under self-defense (Green, 2009, pp.16-17).

In its final judgment on the case, the International Court of Justice, dismissed Uganda's claim of self-defense since it was "not consonant with the concept of self-defense as understood in international law" (*Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 2005, p.8), because it failed to give notice to the Security Council and because it never claimed to have been the victim of an armed attack, a condition defined by Article 51. The Court also stated that the DRC did not engage in a military operation against Uganda, but even if it had been the case, that would be admissible self-defense, as established by Article 51 (*Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, 2005, p.15).

The final example of the relation between the International Court of Justice and Article 51 is the Nicaragua case, although, due to its importance, it will be mentioned in a separate part.

3.1.4. The Nicaragua Case of 1986

3.1.4.1. Facts of the case

In 1984, Nicaragua brought a case before the International Court of Justice regarding the alleged support given by the United States to military and paramilitary actions of the "contra" opposing the Nicaraguan Government. It claimed that the United States had not only supported military and paramilitary activities from the *contras* against the new Nicaragua Government but also used force more expressly by conducting attacks, namely mining Nicaraguan ports or waters and air interventions, "carried out by persons in the pay of the United States government, under the direct command of United States personnel, who also participated to some extent in the operations" (Green, 2009, pp.10-11).

It is crucial to note that the *contras* were rebel forces against the newly established Sandinista Government, whose internal support was found in the National Guard and forces affiliated with the deposed Government of Samoza.

Since the Sandinista Government took power, US-Nicaragua relations worsened, leading to 1981 the US helping revolutionary forces trying to overthrow those in power (Green, 2009, p.11).

After the International Court of Justice admitted having jurisdiction to rule the case, the United States no longer participated, arguing that the ICJ did not have jurisdiction to rule on the matter. It did not present pleadings on the merits of the case and did not take part in the oral proceedings of 1985 as well. However, before withdrawing entirely from the case, it did declare that its actions related to the use of force in Nicaragua were lawful under collective self-defense, as foreseen in Articles 51 of the UN Charter and 21 of the Organization of American States (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.163), as a response to Nicaragua's use of force against neighboring states. The examples that back this argument consisted of alleged Nicaragua's support to the opposition in El Salvador and the Nicaraguan "direct armed intervention" in Honduras and Costa Rica (Green, 2009, pp.11-12).

3.1.4.2. Rulings of the case

Firstly, the Court reaffirmed its jurisdiction to decide on the case under authority provided by International Customary Law (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.162).

Secondly, regarding the facts imputable to the United States, the Court first ruled on the Nicaraguan claim that "the US military personnel or people (…) in the pay of the United States" were responsible for the mining of Nicaragua ports or waters. The ICJ decided that, after the American President authorized the United States Government Agency to lay mines in Nicaragua, in late 1983 or early 1984, the agency then ordered, paid and instructed people to lay the mines, under its supervision and with its logistical support (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.163). Unlike the action of the *contras*, which will be addressed in the next paragraph, the Court found that there was enough involvement from the United States to consider it liable for the mining of ports and waters.

Furthermore, the Court proceeded to examine the action of the *contras* and its relation to the United States support, only to come to the conclusion that the US did not create such force but "financed, trained, equipped, armed and organized it," which was not sufficient, according to the ICJ, to attribute direct combat intervention to the respondent (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, pp.163-164). The Court asserted that "for the United States to be legally responsible, it would have to be proved that the State had effective control of the operations in the course of which the alleged violations were committed" (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.164).

Bearing in mind this ruling of the Court, it is worth opening a small parenthesis to say that it served as the basis for the International Law Commission draft articles on Responsibility of States for Internationally Wrongful Acts (2001), more specifically Article 8, which touches upon *conduct directed or controlled by a state*, and which phrasing is the following: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

So, while it is true that the US provided clear logistical support without which the *contras* would not have been able to act, the financial and strategic resources supplied were not sufficient for the responsibility to be attributed to the United States according to the Court. Even so, some scholars believe that the term *control* in this Article is extensive and not precisely defined, leaving room for misinterpretation.

The Court also found insufficient evidence to attribute responsibility to Nicaragua concerning the American accusation of support to the opposition forces in El Salvador. Although it confirmed that there might have been arms supply coming from Nicaraguan territory, the ICJ warned that it could not affirm with certainty that it was controlled by the Nicaraguan Government, dropping the accusation (*Case Concerning the Military and Paramilitary Activities In and Against*

Nicaragua (Nicaragua v. United States of America), 1986, p.164). Furthermore, on the accusation of “direct armed intervention” from Nicaragua in Honduras and Costa Rica, the Court stated that “certain trans-border military incursions are imputable to the Government of Nicaragua” (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.164).

Nonetheless, regarding the Unites States’ claim of action under collective self-defense, the Court started by clarifying that self-defense, either collective or individual, under Article 51 of the UN Charter, can only be exercised following an “armed attack” and, referring back to the General Assembly’s definition of that term, it did “not believe that the concept of “armed attack” includes assistance to rebels in the form of provision of weapons or logistical other support” (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165). Moreover, the ICJ added that collective self-defense requires the request of the attacked state, which, consequently, requires that the attacked state declares to have been attacked in the first place (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165).

Wrapping up, the Court considers that the US breached Article 2(4) of the UN Charter, the general prohibition of the use of force against other states, by laying mines in Nicaragua waters and attacking specific ports, oil installations, and naval bases, and also by arming and training the *contras* (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165). Despite that, the ICJ admitted that such a breach would be lawful if it could be justified under the exercise of self-defense, which, as exposed in the last paragraph, it cannot and asserted that the principles of necessity and proportionality were not met. Consistently, the Court does not see the American maneuvers held by the Nicaraguan border or the supply of the *contras* as a use of force (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165).

In addition, the ICJ considered that such action by the US amounted to an unjustifiable breach of the principles of non-intervention and territorial sovereignty

(*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.167).

3.1.4.3. Conclusions of the case

In its ruling on the Nicaragua case, the International Court of Justice interpreted the term “inherent” in Article 51 of the UN Charter on self-defense by combining Customary International Law with the UN Charter.

The Court’s decision marks the first judicial interpretation of Article 51, which can be divided into two main topics. The first one is that by dismissing the United States' claims of self-defense, the ICJ states that an actual armed attack must occur to trigger a legitimate response as self-defense (Schuller, 2014, p.174). The second is that the Court gives a particular definition of “armed attack”: “as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands onto the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces” (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165).

Such a definition presupposed two elements, one quantitative and one qualitative: the quantitative element has to do with the threshold of force that an armed attack must have to prompt self-defense (it must have a certain level of gravity or severity, which explains why self-defense claims, in this case, were dismissed). On the other hand, the qualitative element has to do with the employed means of force, which must come through military means.

3.2. The Relation Between Customary International Law and Article 51

Article 51 of the UN Charter, which poses self-defense as one of the legitimate exceptions for the general prohibition of the use of force established by Article 2(4) of the same document, coexists, as introduced earlier in this dissertation, with Customary International Law rules, some of which have been applied long before the UN Charter was drafted. Nevertheless, one question we can pose is: what is the relation between Article 51 and Customary International Law? Should they be looked at as a whole? Does Customary International Law can help to interpret Article 51? Does Article 51 limit Customary International Law? Should Article 51 be regarded as the only authority regarding self-defense?

The interpretation and application of Article 51 have been subject to varying viewpoints, resulting in two primary readings: the restrictive and the extensive. These differing interpretations have sparked extensive debates among scholars, diplomats, and policymakers, shaping the understanding and implementation of the right to self-defense within the framework of international law.

4. Anticipatory Self-defense

Article 51 interpretation is not linear and, while some read the phrasing "if an armed attack occurs" as only and only after an armed attack occurs, others argue for a more extensive reading of armed attack that allows for anticipatory self-defense, in case an imminent threat is identified and states can act in anticipation.

Leo Van den Hole (2003, p.72) defines anticipatory self-defense as "the use of force by a state to repel an attacker before an actual attack has taken place, before the army of the enemy has crossed its border and before the bombs of the enemy fall upon its territory." However, self-defense can be anticipatory, preemptive, or preventative. In precise terms, these three concepts have different meanings: according to the Oxford Learner's Dictionary, the word *anticipatory* means "done in order to prepare for something that you think might happen" (*Anticipatory Adjective - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.Com*, n.d.), *preemptive* means "done to stop somebody taking action, especially action that will be harmful to yourself" (*Pre-Emptive Adjective - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.Com*, n.d.), and *preventative* means "intended to try to stop something that causes problems or difficulties from happening" (*Preventive Adjective - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.Com*, n.d.).

Despite all three concepts sharing one main characteristic: acting before an armed attack occurs and responding to an anticipated threat rather than waiting for another state to initiate an attack, they also have stark differences. In light of the above, and regardless of similarities, it is worth noting that this dissertation will refer only to the right to anticipatory self-defense and will not touch upon its two siblings, whose differences mainly relate to the perception of imminence.

Anticipatory self-defense is not expressly mentioned in Article 51 of the UN Charter, and the International Court of Justice has not been mentioned in its judgments and opinions. In the Nicaragua case, the Court stated that it expressed no view of the issue, which was repeated in the DRC v. Uganda case. In the case concerning the Oil Platforms, anticipatory self-defense was not even mentioned at all, which, in the end, only means that the ICJ has not commented on the matter and not that it is legal or illegal (Green, 2009, p.28). Notwithstanding, the relationship between anticipatory self-defense and the Court will be addressed later in this dissertation.

Ultimately, the divergence between the restrictive and the expansive readings of Article 51 comes down to *anticipatory self-defense* – whether it is permissible or not. Is it lawful for State A to engage in self-defense against State B's attack solely after the attack has commenced?

4.1. The Restrictive School of Thought on Article 51

4.1.1. The Caroline and Nicaragua's Legacy

Going back to the Caroline case of 1837 and the Nicaragua case of 1986, one can draw three main conclusions that guide the traditional (more restrictive) reading of Article 51 of the UN Charter.

Firstly, the International Court of Justice has provided that an armed attack is the condition *sine qua non* for the exercise of the right to self-defense (Green, 2009, p.26). The Court also provided, in its ruling on the Nicaragua case, a definition of armed attack, which essentially posed that "all armed attacks are uses of force, but not all uses of force are armed attacks" by saying that the scope of the provision encompasses not only cross-border actions by regular armed forces but also instances involving an actual or potential breach of the claimant state's substantive rights or attacks on its nationals in foreign territories (Eckert & Mofidi, 2004, p.135). This definition leads to the question, "When does self-defense begin?" which will be dealt with later.

Secondly, the ICJ's ruling of 1986 (Military and Paramilitary Activities in and against Nicaragua) sets forth the time slot states can claim to act in self-defense. According to its interpretation of Article 51, states cannot legitimately use self-defense after the armed attack they have been victims to has ended or after the "Security Council has taken measures necessary to maintain international peace and security" (Charter of the United Nations, 1945). Again, this leaves room for further considerations about anticipatory self-defense: is it permissible? Or, recurrently, when does self-defense begin?

Thirdly and finally, the state victim of the attack must use force that is deemed necessary to safeguard its territory, property, or the safety of its inhabitants (a vessel on the High Seas, for instance), and the level of force applied must be proportionate to the perceived threat. As mentioned earlier, the principles of necessity and proportionality find support in the Caroline incident. The ICJ confirmed them in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case, which stressed that "the entitlement to resort to self-defense under Article 51 is subject to the conditions of necessity and proportionality" (*Legality of the Threat or Use of Nuclear Weapons*, 1996, p.96), referring back to its decision on the Nicaragua case. The concepts of necessity and proportionality will be further considered in this dissertation.

4.1.2. Modern Arguments for the Restrictive School of Thought

A short answer to the question posed in section 4 will be yes. Under the restrictive reading, anticipatory self-defense is not allowed because it accepts that Article 51 has become the only legal source of a state's right to self-defense, which, according to it, the International Court of Justice has made more evident over time in its judgments and advisory opinions.

This school of thought sees self-defense as a means to end an armed attack that is already happening and agrees with the ICJ when it states that, despite an armed attack always amounting to the use of force, not every use of force constitutes an armed attack (Kammerhofer, 2016, p.629). Instead of using force to repel a possible future attack, authors that have a say on the matter of the restrictive view suggest that states can make preparations for a future armed attack or even bring the matter before the Security Council (Van den Hole, 2003, p.84). Nonetheless, bringing a matter related to the use of force before the Security Council might be problematic because of the veto power of the permanent members, that, most likely, will not allow to come to a palpable conclusion (Schuller, 2014, p.185), even considering the restrictive view advocates' fear of minimizing the role of this organ in restoring peace and security before a threat materializes (Deeks, 2016, p.665).

Scholars in favor of this narrow reading of Article 51 do agree that neither the

United Nations (via the Security Council), the International Court of Justice, nor the scarce and inconsistent state practice have explicitly mentioned the existence of a right of anticipatory self-defense, which amounts to one of their biggest arguments. If it is not possible to come to a clear conclusion on the legality of such an issue based on these three legal sources, then it is illegal because of the danger of having ambiguous rules regarding the use of force (Schuller, 2014, p.185; Van den Hole, 2003, p.84).

Adding to the last argument, Leo Van den Hole summarizes, in his work of 2003, three other powerful arguments that are worth mentioning. First, he refers policy considerations in favor of the restrictive approach, which consists of the difficulty in assessing the imminence of an armed attack based on statements from leaders since they often tend to “make aggressive statements without harboring any actual intention to attack” (Van den Hole, 2003, 86). Second, the author mentions pretext concerns and assures that “a jurisprudentially creative nation can use the right of self-defense to virtually justify any aggressive action” (Van den Hole, 2003, p.87). Finally, Van den Hole also mentions concerns about nuclear ballistic missiles. This topic has gained increasing attention over the last decades, stating that these weapons have made the existence of a barrier against preemptive strikes and anticipatory self-defense even more critical. Notwithstanding, he notes that other restrictive reading scholars see weapons of mass destruction as an exception to the unlawfulness of anticipatory self-defense (Van den Hole, 2003, p.88).

4.2. The Expansive School of Thought on Article 51

According to the expansive reading, a short answer to the question posed in the beginning of this chapter is no. This interpretation ultimately defends that Article 51 of the Charter does not exist by itself and, consequently, only imposes the conditions for applying old Customary International Law rules, meaning the pre-existing inherent right of self-defense (Schuller, 2014, p.165).

4.2.1. Drafting History of the Charter

First of all, it is crucial to look at the drafting history of the UN Charter that led to the inclusion of Article 51 and its wording. Going back to Chapter 2 of this dissertation, the Kellogg-Briand Pact of 1928 was the first instrument to outlaw war as a means of international policy. However, it did not mention self-defense at all because it was very well established by customary law that the use of force in order to respond to an attack was legitimate. In fact, during the negotiations of the Pact, the United States, in diplomatic communications dispatched to various other states, extending invitations to join the Kellogg-Briand Pact, wrote the following (Dinstein, 2017, p.164):

> *There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free in all times and regardless of treaty provisions to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defense.*

Furthermore, the Tokyo Judgement of 1948 affirms that "any law, international or municipal, which prohibits the recourse of force, is necessarily limited by the right of self-defense" (Van den Hole, 2003, pp.75-76), further reiterating the inheritance of the right to self-defense.

The UN Charter, in 1945, changed the tradition of not expressly mentioning self-defense in legal documents restraining the use of force, although, according to initial talks in Dumbarton Oaks, that was the first intention. The reasoning behind this last-minute addition was not related to the right to individual self-defense, which, as stated above, was very well rooted in the international community, but to the right to collective self-defense since it raised some concerns. The drafters feared that the concept of collective self-defense without any further clarifications could lead to the declaration that aggression against one American State would be considered an act of aggression against all under the Pan-American Treaty (Van den Hole, 2003, p.76).

In the end, Article 51 was added to Chapter VII of the Charter as a way of keeping the customary right to self-defense unchanged, but also to preclude permanent members of the Security Council from using their veto power to prevent military action from regional organizations (Van den Hole, 2003, p.77). Over time, this proved to be an even more eye-popping provision with the creation of NATO and of its Article 5, which provides that if one Ally is the victim of an armed attack, every other member of the Alliance will consider this act of violence as an armed attack against all members and will take the actions it deems necessary to assist the Ally attacked (North Atlantic Treaty, 1949). Moreover, Senator Vandenberg, a member of the US delegation to the San Francisco Conference, later declared that the addition of Article 51 meant the recognition of the "inherent right of self-defense," which allows any state or group of states to defend against a pending attack until sufficient action is taken by the governing authority (Van den Hole, 2003, p.77).

4.2.2. Modern Arguments for the Expansive School of Thought

The United Nations Charter has been in force for almost eighty years now, and its wording has not been changed once, not even Article 51, which has been at the center of a loud and lengthy debate. The unaltered Article 51 makes one of the main arguments put forward by scholars who defend the expansive school (Kammerhofer, 2016, p.636): if states considered the restrictive view to be the right one, they could have changed the formulation of the Article, on such a sensitive matter, and replaced "if an armed attack occurs" with "if, and only if, an armed attack occurs" (Van den Hole, 2003, p.85). Additionally, when there is compelling evidence of forceful threats and a credible potential for an attack, it can be argued that an armed attack has commenced or is in progress and will then fall in the scope of "if an armed attack occurs," which can consequently be supported by the wording of Article 2(4) that intends for states to refrain from both the use and threat of force, meaning that states can legitimately respond to threats (Van den Hole, 2003, pp.85-86).

Another argument that is pointed out revolves around the French version of the Charter, which shares the same level of validity as the English one. In the former, Article 51 reads as follow: "Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l'objet d'une agression armée." It poses that states must be *objects* of armed attacks and not *victims*. Taking a look at the Oxford's Learner's Dictionaries, one can see that the term *object* gives room to a broader interpretation of armed attack than *victim* (Schuller, 2014, pp.165-166): while the first "refers to a person or thing that is affected by the action of the verb, or that the action is done to or for" (*Object_1 Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.Com*, n.d.), the second consists of "a person who has been attacked, injured or killed as the result of a crime, a disease, an accident, etc." (*Victim Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.Com*, n.d.).

Finally, scholars argue that Article 51, by saying "nothing in the present Charter shall impair the inherent right to self-defense" is referring to customary law, which implies that the right of self-defense existed prior to the UN Charter and is of customary nature and cannot be dissociated from Article 51's interpretation (Kammerhofer, 2016, p.641).

4.3. Conclusion: The Extensive View is More Convincing

Following a discussion of the main arguments of both schools on Article 51, this dissertation argues that the extensive view is more convincing than the restrictive one. The first and one of the main arguments of the restrictive school is textual, and its proponents defend that the occurrence of an armed attack is not one of the (many) circumstances in which self-defense can be triggered but is indeed the only condition established by Article 51 (Dinstein, 2017, p.198). According to this view, if anticipatory self-defense were legitimate under the Charter, it "would require regulation by *lex scripta* more acutely than a response to an armed attack since the opportunities for abuse are incompatibly greater" (Dinstein, 2017, p.198). Furthermore, they argue that, besides being silent on the doctrine of anticipatory self-defense, the Charter also restricts the action of counter-force, in response to an armed attack, to the Security Council (Dinstein, 2017, p.198).

In response to this argument, the proponents of the extensive view refer to the wording of the article "inherent right of self-defense." As mentioned above, the drafting history of Article 51 reflects the clear intention of referring to the pre-existing customary law, which allowed for anticipatory self-defense (Van den Hole, 2003, p.77).

Further, as mentioned previously, the wording “if an armed attack occurs” does not mean the same as “after an armed attack occurs,” as an armed attack can begin before reaching state borders. Taking a look at the Pearl Harbor attack in 1941, the breach of Article 2(4) was initiated before the Japanese reached American borders, which would have given the US the legitimacy to take action to prevent an actual attack under Article 51 (Dinstein, 2017, p.203).

Lastly, Article 2 (4) of the Charter orders Member States to abstain from using force and threatening to use it. Waiting for an armed attack to happen would hinder the preservation of international peace and security, making states accountable for restoring peace rather than maintaining it (Van den Hole, 2003, p.86).

The restrictive school puts forward policy reasons against the expansive reading of Article 51. First, scholars defend the difficulty in acutely determining an imminent armed attack, which could lead to unwarranted and unnecessary conflict. Academics support this argument with *realpolitik*, namely aggressive statements usually made by politicians without intention: during Cold War, the then USSR President Nikita Khrushchev said, “We shall bury you” towards the US. However, he did not mean that the Soviets were to “bury” Americans, but that Communism would strive, and Capitalism would be buried (Van den Hole, 2003, p.86). According to the restrictive school, an unnecessary war would have happened if anticipatory self-defense had been implemented. Notwithstanding, this argument can be countered with the expansive school’s notion that the mere possibility of a misunderstanding cannot restrict an inherent right.

The restrictive reading of Article 51 presents the danger of abuse as one of its main arguments. It argues that “jurisprudentially creative nations” may create virtual justifications to resort to anticipatory self-defense (Van den Hole, 2003, p.87), posing a great danger to the established international order. Nevertheless, anticipatory self-defense is not arbitrary and is restricted by limits and requirements, which are internationally supervised in order to guarantee its lawfulness. Besides, no rules regulate general or traditional self-defense either, making it as easy to circumvent regulations. Moreover, the expansive view observes that possible abuse cannot restrict an inherent right (Van den Hole, 2003, p.88).

One last argument for the restrictive view is connected to the invention of nuclear missiles, which, according to it, highlights, even more the importance of having a steady legal barrier (Van den Hole, 2003, p.85), despite some scholars from the restrictive school having broadened their view precisely because of nuclear missiles. Nonetheless, for the expansive reading, nuclear missiles should trigger anticipatory self-defense regardless due to their short window of time to act before causing irreparable damage and life loss. In sections 4.4. and 4.5., examples of national and international authorities advocating for an extension of the notion of "armed attack" in order to respond to nuclear threats will be presented, namely the then-American President J. F. Kennedy and the Special Rapporteur to the Atomic Energy Commission of the UN.

In conclusion, the broader view of Article 51 seems to be more convincing and advocates for including anticipatory self-defense as part of general self-defense. Nonetheless, some remaining doubts will be clarified by the conclusions drawn on the existence of Article 51 and customary law in the next section.

4.4. Anticipatory Self-defense and the International Court of Justice

As stated above, the International Court of Justice has not expressly deemed anticipatory self-defense legal or illegal, despite having, indeed, brought the term up. In the Nicaragua case of 1986, the Court decided that the parties that argued to be acting in self-defense were responding to an attack that had already occurred (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165), which refers to the traditional meaning of self-defense and not anticipatory. So, the lawfulness of a response to an imminent threat of armed attack was not raised in this case. However, in his dissenting opinion, Judge Schwebel wrote that he differs mainly because of the interpretation of Article 51 of the Charter, which leads to the non-consideration of anticipatory self-defense by the Court. The Judge affirms that he disagrees with an interpretation of the UN Charter as if Article 51 were worded, "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if, and only if, an armed attack occurs" and further states that Article 51 should be regarded as the only source ruling self-defense, eliminating customary international law (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.170).

Still, regarding the Nicaragua case, the Court touched upon the interpretation of the word *inherent*, as mentioned in earlier sections, where it also considers that Customary International Law coexists alongside Article 51.

Regarding the Advisory Opinion on Nuclear Weapons provided by the ICJ, the other case in which it expressly mentioned self-defense, the Court did not, nonetheless, mention anticipatory self-defense in any way.

Thus far, the ICJ has not embraced or rejected the doctrine of anticipatory self-defense after the UN Charter was brought into force. However, it is worth noting that Judge Schwebel's dissenting opinion offers support for the acceptance of this doctrine. Given the Court's acknowledgment of the coexistence of Customary International Law with Article 51, it becomes vital to analyze state practice and *opinion juris* regarding anticipatory self-defense in the post-Charter era to determine the continued existence of this right.

4.5. Customary International Law on the Right of Anticipatory Self-defense before the Bush Doctrine

This section will examine whether there is state practice on the right of anticipatory self-defense in the post-Charter times, leading to conclusions on its status under Customary International Law. Despite focusing mainly on the United States and Israel's practice, the fact remains that these were the most boiling cases of anticipatory self-defense after 1945 and prior to 9/11 events. Furthermore, other states' reaction to these actions, which will also be addressed, are indicative of state acceptance of this practice, This dissertation argues that if there is no evidence of *opinio juris* and state practice indicating that States have unequivocally rejected the doctrine of anticipatory self-defense since 1945, it means that this notion continues to exist as part of Customary International Law alongside the Charter.

4.5.1. The Cuban Missile Crisis of 1962

In 1962, the Soviet Union deployed short-striking distance missiles in Cuba, just around 100 meters off the coast of Florida, without ever expressing a clear intention of using them to attack any state, including the United States. However, such an act was perceived as a direct nuclear threat to the US, despite the fact that an armed attack had never occurred (Schuller, 2014, p.179; Van den Hole, 2003, p.101). Following this threat posed by nuclear warfare, then-American President John F. Kennedy addressed the nation in October of the same year to assert that a "sudden change in their (nuclear weapons) deployment may well be regarded as a definite threat to peace" in order to justify the necessity of its action that imposed a quarantine on Cuba (Schuller, 2014, p.179).

The US then brought the matter before the Security Council on the grounds of a threat to international peace and security, and, despite having reached a solution to the dispute bilaterally, several discussions on the matter were conducted, which reflected most states' acceptance of the anticipatory use of force, in certain circumstances (Martinez, 2003, p.137).

The quarantine prevented any further shipments of offensive military equipment to Cuba, and although it was not a military measure that touched upon the use of force, it was used as an anticipatory self-defense measure. Throughout this process, American authorities were cautious to avoid the usage of the term *anticipatory*; however, the then Legal Advisor at the Department of State later publicly affirmed that the term *armed attack* must be perceived broadly enough to allow anticipatory responses, but with certain limitations (Schuller, 2014, p.180). The reluctance of the American authorities to use the term *anticipatory* in this case and the subsequent "warning" on reading armed attack extensively is a consequence of the US fearing that it might set a precedent that would later be used by the Soviets. Notwithstanding, the Cuban Missile Crisis poses a straightforward example of state practice based on anticipatory self-defense.

4.5.2. The 1967 Six-Day War in the Middle East

In June 1967, Israeli attacked Egypt, Jordan, and Syria, initiating the Six-Day War in response to what it called "imminent military measures" against Israel coming from those three states. The tension between Israel and its Arab neighbors had been escalating for a while, especially with Egypt, whose President ordered the closing of the Straits of Tiran (a crucial maritime way for Israeli trade) and sent Egyptian forces to the Sinai Peninsula (Martinez, 2003, p.138).

Israeli authorities argued for anticipatory self-defense against an imminent attack with the ejection of the UN Peacekeeping force, whose purpose was to maintain peace between Israel and Egypt (Martinez, 2003, p.138). Nonetheless, scholars find that the facts presented amount to small dispersed actions rather than evidence of an imminent armed attack (Martinez, 2003, p.138; O'Connell, 2002, p.9). Following the Security Council discussions on the case, almost, but not every state was against this use of force. However, on the final Resolution regarding the situation, despite its call for the "withdrawal of Israeli troops from the occupied territories and its acknowledgment of sovereignty, territorial integrity, and political independence of every state," the Resolution does not expressly condemn Israeli's actions (*Security Council Resolution 242: The Situation in the Middle East*, 1967, p.1).

Notwithstanding, in the end, Israel stated before the Security Council that such action from its neighboring Middle Eastern states amounted to an armed attack, which made Israeli action lawful under self-defense, as foreseen by Article 51 of the Charter (Martinez, 2003, p.139). Ultimately, the doctrine diverges, and while some commentators and scholars believe that the Six-Day War in the Middle East does not provide an actual example of anticipatory self-defense because of the invocation of Article 51 (O'Connell, 2002, p.9), others completely discard this argument and affirm that Israel's attack clearly amounts to the use of force in anticipatory self-defense (Schuller, 2014, p.174).

4.5.3. The 1981 Bombing by Israel of the Osirik Reactor in Iraq

In 1981, Israel bombed and destroyed an Iraqi reactor under construction, consequently destroying Saddam Hussein's nuclear program, on the basis that Iraq was going to use a yet-to-be-ready reactor to build nuclear weapons that would attack Israel and, ultimately, put its existence in danger (Martinez, 2003, p.139; Van den Hole, 2003, p.103). While some authors believe that the Israeli theory was proven to be accurate because of the 1991 missile strike against

Israel (Van den Hole, 2003, p.103), this falls outside the scope of analysis of this dissertation.

The attack generated an “overwhelmingly critical international reaction” (Schuller, 2014, p.175). Many states around the world condemned the Israeli action, not necessarily because they are against the doctrine of anticipatory self-defense, but because they doubted the terms of the imminence presented by the Israeli authorities and went even further to claim that there was no risk of imminent attack (Schuller, 2014, p.175). The United States, on the other hand, a classic advocate of the doctrine of anticipatory self-defense and an Israel ally, condemned the attack but for the non-exhaustion of all peaceful means (Martinez, 2003, p.139).

In the end, the Security Council issued a Resolution condemning Israel’s attack on the Iraqi nuclear facilities, referring to its danger to international peace and security and its breach of the prohibition of the use of force posed by Article 2(4) of the Charter (*Security Council Resolution 487: The Israeli Military Attack on Iraqi Nuclear Facilities*, 1981, p.10).

Hence, this case marks what might be interpreted as an apparent general acceptance of the doctrine of anticipatory self-defense by states that condemned its far-reaching use rather than its existence.

4.5.4. United States and Terrorism: Libya in 1986

In 1984, after continuing threats of terrorism coming from the Middle East, then-American President Ronald Reagan issued a classified document that contained a general response to terrorism that essentially clarified that the US had the right to protect its “citizens, property and interests” against “state-sponsored activity or directed threats of such action” (Reisman & Armstrong, 2006, p.527). Two years later, after the airport terrorist attacks in both Rome and Vienna, the United States issued National Security Decision Directive 207, which allowed for action “in concert with other nations or unilaterally when necessary to prevent or respond to terrorist acts” (Reisman & Armstrong, 2006, p.527).

Furthermore, this new position got out of classified documents. It became known as the Schulz Doctrine because of Secretary of State Schulz, who advocated for the ability to undertake restricted military measures in response to controllable terrorist threats and even went further and asserted that the exceptions foreseen by the UN Charter to the prohibition of the use of force do not prevent the US from taking (anticipatory) action against terrorism (Reisman & Armstrong, 2006, p.528).

Therefore, in 1986, the United States directed air strikes on five Libyan military targets that were allegedly being used to plan attacks on American citizens abroad. The justification for this action was twofold. The first argument was based on traditional self-defense as foreseen in Article 51 of the Charter, triggered by the 1985 bombings in Vienna and Rome and the 1986 bombing of a club in Berlin known to be frequented by Americans. The second argument, supported by the Schulz doctrine, argued for anticipatory self-defense to prevent further attacks (Martinez, 2003, p.140).

Once again, international criticism arose, not against the doctrine of anticipatory self-defense, but its use by the United States. States argued that there had not been a complete exhaustion of peaceful means before using air strikes and even doubted that there were other imminent attacks in preparation (Martinez, 2003, p.141). Consequently, the Security Council tried to pass a resolution that condemned the American use of military force, but the US veto was followed by the United Kingdom and France (Martinez, 2003, p.141). In the end, the General Assembly passed, with 79 votes in favor, a resolution that condemned the military attack against Libya, which constituted a "violation of the Charter of the United Nations and of International Law" (*Resolution 41/38, 41st Session, 78th Plenary Meeting*, 1986, pp.34-35).

However, this resolution might be interpreted as not rejecting completely the concept of anticipatory self-defense since only the conditions for that right were considered unsatisfied, as mentioned earlier. Henceforth, this case could be considered an argument in favor of the doctrine.

4.5.5. United States and Terrorism: Iraq in 1993

In 1993, the United States attacked Iraqi intelligence forces with twenty-three tomahawk missiles in response to a failed attempt to assassinate then-President

George Bush in Kuwait perpetrated by Iraq. Formal justifications set forth by US authorities were, once more, twofold: first, they consisted of the use of traditional self-defense as stipulated by Article 51, being the armed attack the attempted murder, and second, anticipatory self-defense, by damaging infrastructure and as a result, preventing further attacks (Martinez, 2003, p.142).

Some international criticism revolved around this issue, although not as loud as in previous cases. Again, the criticism was not directed towards the doctrine of anticipatory self-defense, validating it, but to its abuse since they did not fully agree that all peaceful measures had been exhausted and that the imminence criteria was fulfilled. Nonetheless, this time, neither the Security Council nor the General Assembly passed resolutions condemning the attack, and France, Germany, Russia, Canada, and the United Kingdom even stated that they "understood" the action by the US (Martinez, 2003, p.142).

4.5.6. United States and Terrorism: Sudan and Afghanistan in 1998

In 1998, two car bombs exploded just outside the US embassies in Kenya and Tanzania, causing three hundred dead and more than four thousand five hundred injured. Two weeks after these incidents, the United States, which believed that the terrorist organization behind them was under Bin Laden's leadership, launched seventy-nine tomahawk missiles against alleged terrorist outposts of the group both in Sudan and Afghanistan (Lobel, 1999, p.537).

Its legal justifications, as presented in a letter sent by the Administration to Congress, relied on the traditional definition of self-defense, as under Article 51 of the Charter, and on anticipatory self-defense as a necessary and proportionate response to imminent threats, preventing and deterring future attacks (Lobel, 1999, p.537).

The Security Council did not add this event to its agenda, as, in general, international reaction was supportive or, at least, understanding of the American action. Opposition was mainly found in traditional US opponents and did not rely on the doctrine of anticipatory self-defense but on the non-compliance with the Caroline requirements, being them, once again, necessity, proportionality, and the exhaustion of peaceful means (Lobel, 1999, p.538).

4.5.7. Other Examples

Additional instances where the use of force was justified at least in part by resorting to anticipatory self-defense include the 1950 Pakistani invasion of Kashmir, the 1956 attack by Israel on Egypt, the 1980 Iran/Iraq war, and the 1983 Swedish reaction to foreign submarines in Swedish waters. (Lobel, 1999, p.144).

4.6. United Nations Bodies and Anticipatory Self-defense

The concept of anticipatory self-defense has had little attention from UN organs, although it is not completely inexistent. Since the relationship between the doctrine and the International Court of Justice has already been dealt with, the following sections will touch upon what the Atomic Energy Commission and the International Law Commission have said about it.

4.6.1. The Atomic Energy Commission

In 1946, the Atomic Energy Commission issued its first report to the Security Council, which addressed the use of atomic weapons, making recommendations about its regulation. Firstly, it suggested the creation of "an enforceable multilateral treaty or convention, as a system of control of atomic energy" (December 30, 1946', 1947, p.393). Secondly, it suggested that preparations for atomic warfare go against the regulating treaty and should be enough to breach the prohibition of the use of force imposed by Article 2(4) of the Charter. Essentially, the Commission considered that, due to the nature of nuclear weapons, the mere preparation to resort to this kind of conflict constitutes an armed attack "so grave as to give rise to the inherent right of self-defense recognized in Article 51" ('First Report of the Atomic Energy Commission to the Security Council, December 30, 1946', 1947, p.393), which, inherently, implies the recognition of anticipatory self-defense. Although it might be hard to consider a report from 1946 contemporary practice, it still holds some value on the UN bodies' reading of self-defense, reason why it is featured her.

In response to the report, the United States submitted a memorandum to the Security Council that pleaded for a new definition of an armed attack to include atomic weapons (weapons of mass destruction): "include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves, preliminary to such action” (Van den Hole, 2003, p.92).

4.6.2. The International Law Commission

In 1980, Roberto Ago, the Special Rapporteur to the International Law Commission, presented the final part of his report on “state responsibility” that included a section on “necessity” and “self-defense.” He first argued that self-defense should not be seen as a *right* but as a “situation or a *de facto* condition” (Van den Hole, 2003, p.92). He then argued that scholars do not generally accept anticipatory self-defense as legitimate and stated that it had been rejected repeatedly. Furthermore, while he stated that it is not the ILC’s role to put an end to debates such as this one, he asks why it will not approve the restrictive view of self-defense as a formal decision (Van den Hole, 2003, pp.92-93).

Ultimately, Ago’s questions the exclusion of a doctrine that has never been officially put aside by UN organs, even though they have had the means, authority, and opportunity to do that.

4.6.3. The High-Level Panel on Threats, Challenges and Change

In its report of 2004, the High-Level Report on Threats, Challenges and Change appointed by the UN Secretary-General stated that the concept of self-defense as depicted in Article 51 of the Charter did not need any extension or restriction, as “long-established customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate”, and lawyers recognize both attacks on their way and the ones that have already happened (Gray, 2007, p.160), when addressing self-defense.

4.6.4. *In Larger Freedom* Report

Furthermore, the UN Secretary-General’s report *In Larger Freedom* of 2005 claimed that “imminent threats are fully covered by Article 51” and that “lawyers have long recognized that this (Article 51) covers an imminent attack as well as one that has already happened” (Gray, 2007, p.160). Authors like Christine Gray (2007, p.160) read this statement as, not only recognizing that a wider customary law right of self-defense has been preserved, but as considering that Article 51 should be widely interpreted to cover imminent attacks.

4.7. Conclusion: Article 51 Coexists Alongside Customary International Law

From the examples provided above, it is clear that Israel and the United States are the states that have recognized, relied on, and upheld the doctrine of anticipatory self-defense. Other states have accepted it but showed rejection or discontent, in some cases, not because of the doctrine *per se* but because of the non-fulfillment of its requirements.

On the contrary, other states like Mexico, Chile, and Iran have made clear, during pre-charter times, in the aftermath of the ICJ's ruling on the Nicaragua case, in 1987, that they completely reject the doctrine of anticipatory self-defense (Green, 2009, p.126).

There is no universal agreement, not among states and not among scholars. Nevertheless, in theory, the majority of states do not seem to have dismissed anticipatory self-defense. As for the Security Council, it has passed only one resolution condemning the use of anticipatory self-defense, in 1981, on the occasion of the Israeli bombing of the Iraqi nuclear reactor, but, again, not because of the doctrine in itself, but due to the lack of respect for its requirements. The same happened with the General Assembly in 1986 after the US strikes in Libya.

Neither the Security Council nor the General Assembly have, therefore, undoubtedly rejected the doctrine of anticipatory self-defense, only the non-fulfillment of its prerequisites by states, which could mean a tacit acceptance of it. In sum, there is no unambiguous effort to abolish the doctrine of anticipatory self-defense since one is not able to provide unequivocal *opinion juris* and state practice in that way. Consequently, this could mean that the doctrine of anticipatory self-defense seems to continue to exist in Customary International Law alongside Article 51 of the Charter (Martinez, 2003, p.132).

Additionally, this view is consistent with the view that other non-Charter requirements are justifiable reasons to resort to the use of force by states, such as a measure to protect its nationals, to rescue hostages in imminent danger, or to assert the right to self-determination (Martinez, 2003, p.156).

Finally, this view is consistent with the International Court of Justice in the Nicaragua case, in which the Court stated that Customary International Law coexists with written provisions, namely the UN Charter[1]. It further stated that both sets of rules do not provide for the same content in self-defense-related terms, which can also apply to other fields, like non-intervention (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.165). Thus, this dissertation argues that anticipatory self-defense, as regulated by customary international law since before the Charter, remains unrestricted by Article 51 and is only circumscribed by specific requirements that must be complied with, which will be addressed in the following section.

[1] See section 3.1.4.

5. Framework for Analysis – Post-Charter Legal Requirements for Anticipatory Self-Defense

The 2004 Report of the Secretary General's High-Level Panel on Threats, Challenges, and Change declared that a threatened state, according to a long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it (necessity), and the action is proportionate (Lubell, 2016, p.699). Going back to section 3.1.1., which elaborates on the legal thinking on self-defense throughout the centuries, one can observe that since the 17th century, academics have, unwittingly perhaps, set restraints on the use of force in self-defense. On the one hand, Hugo Grotius asserted that, prior to military action under self-defense, one must exhaust all peaceful means and that such action must prove necessary and proportional. Following the same rationale, Thomas Hobbes also provided for the importance of necessity, although superficially. Ultimately, this idea prevailed, as Walzer and Orend still advocated for the same criteria in the 20th and 21st centuries.

Requirements for anticipatory self-defense can be found in the Caroline case of 1837, which have been extended to general self-defense since the former is only a form of the latter, including *imminence, necessity, proportionality,* and *exhaustion of all peaceful means*. Furthermore, the International Court of Justice has confirmed these preconditions in its Advisory Opinion on the Legality of Nuclear Weapons (1996, p.96). Other authors, such as Leo Van den Hole (2003, p.97), extended the criteria of exhaustion of means and added another one: *exhaustion or impracticability of peaceful means* and *proven breach of International Law from the state against which anticipatory self-defense is used.*

Nevertheless, each requirement should be examined individually, considering its particularities (Gill, 2016, p.744)

5.1. Imminence

The criteria of imminence, or immediacy, was born from the Caroline case, when the US Secretary of State Daniel Webster wrote to the British attaché in the United States, stating that a threat should be "instant and overwhelming" (Jennings, 1938, p.89), posing a clear and present danger of an imminent attack and not mere preparations (Van den Hole, 2003, p.95). Imminence is the distinct characteristic that a threat must have in order to trigger a lawful anticipatory self-defense response (Akande & Liefländer, 2013, p.564). For a threat to be considered imminent, a threatening presence, powerful military force, potential danger, or even possessing missiles or the building up of a large army are not enough (Van den Hole, 2003, p.95). It is necessary to add an implicit hostile intent. The formula for an imminent attack requires a hostile intent combined with mobilization of forces (Martinez, 2003, p.170). Furthermore, a threat should be considered if it can change the *status quo* through a chain of events (Akande & Liefländer, 2013, p.564).

Traditional self-defense is restricted by a temporal requirement, which provides that a state must act right after an armed attack has occurred; otherwise, it will not be considered self-defense but a breach of Article 2(4). Determining the temporal requirement for anticipatory self-defense is more complex because it aims to act before an armed attack occurs. Nevertheless, scholars seem to agree that the time to act is when the Security Council would not have been able to take action while the threat still exists (Martinez, 2003, p.172; Van den Hole, 2003, p.104). Authors also mention that in the event of series of threats or attacks, they should be regarded as a whole and give a state a right to act in order to anticipate another attack, which is the rationale behind the American invasion of Afghanistan in 2001 (Van den Hole, 2003, p.105), and the US military attacks in Sudan and Afghanistan, in 1998. Furthermore, the Chatham House Principles, the Leiden Policy Recommendations, and scholars assert that force may be used (in anticipatory self-defense) when its delay will result in an inability to act (Gill, 2016, p.745; Wood, 2013, p.358).

Nonetheless, several imminence-related questions are raised in practice, namely the temporal aspect and the gap between certainty and likelihood (Lubell, 2016, p.702), reason why “it must be an impending attack over which there is a reasonable level of certainty that will occur in the foreseeable future; and it must be a specific and identifiable attack, rather than a vague threat of unknown form” (Lubell, 2016, p.718).

5.2. Necessity

As for necessity in anticipatory self-defense, the threatened state must not have had any means of halting the attack other than armed force (Dinstein, 2017, p.208; Van den Hole, 2003, p.99), which also derives from the Caroline, when the US Secretary of State wrote “leaving no choice of means” (Jennings, 1938, p.89). The UN Charter requires states to exhaust all peaceful means before engaging in anticipatory military action, which should include Security Council action, and only if they fail, can a state resort to anticipatory self-defense (Eckert & Mofidi, 2004, p.144; Van den Hole, 2003, p.99). This is why several authors go more into detail and describe necessity as the “requirement that self-defense be used only where no peaceful alternative exists” (Akande & Liefländer, 2013, p.564). In short, the use of force to respond to an imminent attack must be necessary (Gill, 2016, p.743; Martinez, 2003, p.170).

Some authors believe that imminence and necessity are overlapping concepts (Martinez, 2003, p.170), although this dissertation will support the view that they are not entirely. Despite the imminence of an armed attack, anticipatory self-defense may not be necessary to repel it since peaceful alternatives might bring it to an end (Lubell, 2016, p.700). Thus, one can conclude that since necessity requires imminence, if the latter is not fulfilled, neither can the former. It exists, nevertheless, a causal relation between imminence and necessity. Following this relationship, few are the cases in which necessity is not met despite imminence; although some examples do exist, such as the Israeli attack on the Osirak reactor in Iraq, in 1983, as well as the US bombing of Sudan, in 1998 (Eckert & Mofidi, 2004, p.144).

5.3. Proportionality

The concept of proportionality also derives from the famous letter written by Daniel Webster in the aftermath of the Caroline incident, stating that action must not be “unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity and kept within it” (Jennings, 1938, p.89). Furthermore, Leo Van den Hole (2003, p.103) defined it as “symmetry or approximation between the action and its purpose, namely that of preventing the attack from occurring".

In addition, in 1986, the International Court of Justice recognized that, although not explicit in Article 51 of the UN Charter, it comprises a well-established customary rule that self-defense measures must be proportional and necessary, which was reinforced in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, of 1996, and, then, in the judgments of the *Oil Platforms case* (2003) and *Armed Activities* case (2005) (Dinstein, 2017, p.230).

Despite the difficulty of assessing proportionality in *jus ad bellum*, two elements of it have been set forth: a quantitative element which requires the response to be approximately proportional to the magnitude of the armed attack or the level of threat posed, and a quantitative element that requires the force employed in self-defense should be limited to what is necessary to repel the immediate attack and prevent any future attacks shortly (Akande & Liefländer, 2013, pp.566-567, p.; Gill, 2016, p.744).

To fulfill the latter requirements, the modern customary evaluation must be conducted case by case, naturally, and must assess civilian noncombatants and the nature of targets (Eckert & Mofidi, 2004, p.136). Similarly, scholars tend to read Article 51 as demanding an assessment of the targets, the means available to act, and the methods of the attacking or threatening state (Eckert & Mofidi, 2004, p.136). In the case of anticipatory self-defense, the evaluation of targets must consider the threatening state's capacity to undermine the threatened state's capacity and the imminence of the action (Martinez, 2003, p.172), even though, in the end, civilian casualties may invalidate proportionality.

Nevertheless, the response required to stop and fend off the attack may sometimes need to be more prominent in scale than the initial attack; what is crucial in this context is the outcome achieved through the defensive action rather than the specific forms, substance, or intensity of the action itself (Van den Hole, 2003, p.103). The International Court of Justice confirmed it in *its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996, p.94) that the use of nuclear weapons to respond to a non-nuclear threat or attack is not "unlawful, in an extreme circumstance of self-defense, in which the very survival of a state would be at stake."

5.4. Exhaustion or Impracticability of Peaceful Means

In the previous section on necessity, it was stressed that the use of force in all kinds of legitimate self-defense must occur in case there is no other choice of means, after all peaceful means have been exhausted or proved impractical. Therefore, the author of this dissertation understands that this requisite can be considered part of the necessity requirement. Nonetheless, due to the peaceful nature of the order established by the Charter of the United Nations, its importance makes it relevant for this requirement to have a section of its own.

Similarly to the latter prerequisites, this too originates from the Caroline case, when Daniel Webster enumerated all the possibilities that should have been exhausted before resorting to the use of force (Jennings, 1938, p.89). Nowadays, states must consider the UN Charter in order to know what it means to exhaust all peaceful means. Firstly, Article 2(3) reads “All members shall settle their international disputes by peaceful means, in such a manner that international peace, and security, and justice, are not endangered”. Additionally, Article 33 encourages parties involved in a dispute to seek solutions through negotiation, mediation, arbitration, or other peaceful methods, intending to prevent conflicts from escalating into armed hostilities (Martinez, 2003, p.177). Ideally, states should also try to consult the Security Council before acting, despite the short time window provided by the criteria of imminence (Van den Hole, 2003, p.98).

Impracticability arises when there is insufficient time for the aforementioned measures, thereby reinforcing the urgency and necessity criteria, or when the Security Council's vote is vetoed or anticipated to be vetoed (Martinez, 2003, p.178).

5.5. Flouting International Law

For action in self-defense to be legitimate, the threatening or attacking state must act in breach of international law (Van den Hole, 2003, pp.98-99). Despite this seeming obvious, Van den Hole (2003, pp.98-99) has felt the necessity to include it explicitly in the set of prerequisites. His rational is the one behind the Responsibility of States for International Wrongful Acts document of the International Law Commission, that foresees consequences for wrongfulness perpetrated by states. Its Article 22 (Responsibility of States for Internationally Wrongful Acts, 2001) sees self-defense as a circumstance precluding wrongfulness in the ambit of breaches of obligations regarding use of force in self-defense, agreeing that it must follow the rules established by Articles 2(4) and 52 of the UN Charter, nevertheless.

6. Comparative Analysis of Legal Justifications Used in the Iraq (2003) and Ukraine (2022) Wars

The Iraq war of 2003 and the Ukraine war of 2022 have been two of the hottest topics in international relations in the 21st century, leading to lengthy and complex debates on several areas of International Law, particularly the question of self-defense. The coming sections will, firstly, present a brief summary of the contexts that led to the invasion of Iraq by the United States and of Ukraine by Russia, followed by a comparison of the legal justifications provided in both cases, using the doctrine of anticipatory self-defense as the framework for the analysis.

6.1. The 2003 War in Iraq

6.1.1. The Aftermath of the 9/11 Events

After two decades of small, dispersed terrorist attacks targeting Western nations, September 11, 2001, posed a dramatic overturn in modern international relations. On that date, Al-Qaeda-affiliated terrorists highjacked three American commercial airplanes and proceeded to crash them against the Twin Towers of the World Trade Center, in New York, the Pentagon, in Washington DC, and the Pennsylvania countryside, killing thousands of civilians and destroying the World Trade Center to its entirety (Bergen, 2023)

The world changed after this date, and its justification is threefold. Firstly, it marked the definitive cut with the previous threat paradigm of Cold War bipolarity or even rising China, making clear that small powers that support terrorists with Weapons of Mass Destruction pose as much of a threat that should be contained (Eckert & Mofidi, 2004, p.120). Secondly, the 9/11 events accentuated the threat posed by non-state actors and brought the right to self-defense against them to the discussion (Wood, 2013, p.353). Thirdly, as a consequence of the former two points, George Bush created and acted on the Bush Doctrine, which allows for unilateral preventative action, excluding the Security Council from its role in regulating the use of force (O’Connell, 2002, p.18).

In a Joint Session of the Congress of the United States on September 20, 2001, President Bush, in his speech, declared a resolute war against terrorism, emphasizing the need for a comprehensive and global campaign to combat this new threat. He expressed gratitude for international support and unity while highlighting the United States' determination to bring the perpetrators to justice and dismantle their networks. Bush outlined a multifaceted strategy involving military action, intelligence efforts, financial crackdowns, and diplomatic collaboration to confront the menace of terrorism. This address marked a pivotal moment in shaping US foreign policy and international efforts to counter terrorism in the post-9/11 world (*President Declares "Freedom at War with Fear,"* 2001).

Given this emerging form of aggression, it remains uncertain whether the conventional concept of deterrence can effectively serve against terrorists or states that provide them with support.

6.1.1.1. Operation Enduring Freedom

On October 4, 2001, the United States, in a letter sent to the United Nations, presented evidence linking Al-Qaeda to the *de facto* Government of Afghanistan (Murphy, 2005, p.734; O'Connell, 2002, p.1). On October 7, the US and the UK launched Enduring Freedom, an air operation with some ground forces, and notified the Security Council, claiming to act under individual and collective self-defense, as foreseen in Article 51 of the Charter (O'Connell, 2002, p.1). The aim of the operation was to eliminate Al-Qaeda bases and topple the Taliban regime, which was accepted by the Security Council (Murphy, 2005, p.734).

The grounds for the use of necessary and proportionate self-defense were based on the identification of the 9/11 attacks as armed attacks (Green, 2009, p.124) as part of a series of terrorist attacks that started in 1993 with a failed attempt at the World Trade Center, followed by the embassy bombings in Kenya and Tanzania in 1998 and the attack to the USS Cole in Yemen in 2000, and that more were planned (O'Connell, 2002, p.10). Nevertheless, some authors believe that, due to the fact that the operation did not begin right after the attacks of September 11, it could not be considered self-defense, amounting to preemptive self-defense (Murphy, 2005, p.734). Moreover, after the operation started, evidence pointed out that more attacks were under planning (O'Connell, 2002, p.11).

The US made demands to the Taliban regime before resorting to the use of force: the United States insisted that the Taliban regime in Afghanistan extradited the Al Qaeda leaders to US custody, shut down all terrorist training facilities within its borders, and granted unrestricted access to these sites for verification. All demands were rejected. However, there is no clear indication from the Bush administration that it would not have resorted to the use of force in case diplomatic measures had been successful since, in fact, more non-enforceable means had not been exhausted (Green, 2009, p.81).

Nonetheless, states, in general, accepted the lawfulness of this action under the premise of traditional self-defense, despite its aiming at a state as a response to an attack from a non-state actor, which, authors diverge, might not have had the effective control of the state (Green, 2009, p.157).

6.1.2. The Bush Doctrine

The previously mentioned address of Bush to Congress set the basis for the National Security Strategy of 2002, which, in turn, constituted the (Bush) Doctrine for the War against Terrorism, or War on Terror, that the United States initiated in Afghanistan, in 2002, and that did not end there (*National Security Strategy of the United States of America*, 2002, p.5).

The document recognized the emergence of new threats and challenges arising from “rogue” states that sponsored terrorism, particularly regarding the creation and obtention of Weapons of Mass Destruction (WMD), marking a definitive scission with the Cold War era, in which the only significant threat emanated from another superpower (*National Security Strategy of the United States of America*, 2002, p.13).

Its main goal was to defeat and prevent terrorism, namely the threat and use of WMD, individually or collectively (*National Security Strategy of the United States of America*, 2002, p.2). In order to accomplish that, Bush asserted that the US would “make no distinction between terrorists and those who knowingly harbor or provide aid to them” (*National Security Strategy of the United States of America*, 2002, p.5).

The Strategy confirmed that the United States had used preemptive force in the past to prevent terrorist threats from becoming attacks and proclaimed that, if necessary, it would continue to do so to avert harm from terrorism (*National Security Strategy of the United States of America*, 2002, p.6). For that, Bush argued for adapting the concept of imminent threat (imminence) according to the capacities and objectives of new adversaries (*National Security Strategy of the United States of America*, 2002, p.15). Nonetheless, the document went even further to assure that anticipatory action would be triggered “even if uncertainty remains as to the time and place of the enemy’s attack” (*National Security Strategy of the United States of America*, 2002, p.15). Instead, this statement might reflect a complete rejection of imminence (Schuller, 2014, p.177) by exponentially expanding the range of preemption (Franck, 2003, p.619).

Nevertheless, only “good” states are allowed to act preemptively, as the doctrine denies that right from “rogue” states (Martinez, 2003, p.181). Still, anticipatory action must be available to all states, whether they are “good” or “bad,” because the international legal system cannot promulgate different rules for different actors, as that would question its legitimacy and fairness (Martinez, 2003, p.181).

Furthermore, the Bush Doctrine is silent on the United Nations’ (via Security Council) role in the regulation of the use of force (Gray, 2007, p.157), which led to the belief that it openly repudiates obligations arising from Article 2(4) of the Charter (Franck, 2003, p.608). Consequently, there is not one single mention of Article 51 of the Charter throughout the National Security Strategy document, despite several mentions of “self-defense.” Moreover, the Strategy affirmed that the US would not “hesitate to act alone, if necessary, to exercise the right of self-defense” (*National Security Strategy of the United States of America*, 2002, p.6) and put forward a new interpretation of self-defense that does not mean to follow the customary requirements of imminence, necessity, and proportionality, and that does not need the support of other states, or the Security Council (Franck, 2003, p.619).

Nevertheless, why would the United States disregard entirely the Security Council’s role as guarantor of international peace and security after its competent reaction to the 9/11 attacks? On September 12, it passed a unanimous resolution reacting to the events of the day before, and two weeks later, more mandatory global controls came into force to prevent the further spread of terrorism. It showed the Security Council as a global decision-making forum with the ability to grow, adapt, and respond to the new dangers of non-statal terrorist organizations and their sponsors, along with the flexibility of the Charter to the new exigencies of collective self-defense (Franck, 2003, pp.609-610).

6.1.3. Chronology of Events Leading to the Use of Force Against Iraq

After September 11, 2001, tension between the United States and Iraq escalated far quickly. On January 29, 2002, in his State of the Union speech, Bush named Iraq, Iran, and North Korea as the "axis of evil." He accused them of financing and aiding terrorists, including with Weapons of Mass Destruction, and vowed that the US "would not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons" (Glass, 2019).

Almost a year later, on September 12, 2002, when addressing the opening of the United Nations General Assembly, he encouraged world leaders to address the "grave and gathering danger" of Iraq (*President's Remarks at the United Nations General Assembly*, 2002). Emphasizing Iraq's persistent defiance of the Security Council over the previous decade, Bush pledged to cooperate with the UN Security Council while cautioning that the United States was prepared to take unilateral action if required (*President's Remarks at the United Nations General Assembly*, 2002). In the same month, the National Security Strategy, which contained the provisions of the Bush Doctrine, was released, and it also posed Iraq, along with Iran and North Korea, as threatening states with WMD (*National Security Strategy of the United States of America*, 2002, p.14). On October 16, 2002, Congress passed a joint resolution authorizing the use of force in Iraq by giving the President the authority to "use the Armed Forces of the United States as he determines to be necessary and appropriate" after it recognized that all diplomatic means, through the UN Security Council had been exhausted (Authorization for Use of Military Force Against Iraq, 2002).

On September 16, Iraq announced that it would let UN Monitoring and Verification Agency and International Atomic Energy Agency inspectors return to Iraq. Nonetheless, the United States and the United Kingdom ultimately rejected that (Eckert & Mofidi, 2004, p.124). Further, on November 8, 2001, the Security Council passed Resolution 1441, which established that Iraq was in material breach of obligations derived from previous Resolutions 678 and 687, providing it with one last chance to comply with its disarmament obligations and to allow weapon inspector unfettered access, and reminded the state that it would face serious consequences, should the material breach continue (Security Council Resolution 1441 (2002) [on Decision to Set up an Enhanced Inspection Regime to Ensure Iraq's Compliance of Its Disarmament Obligations], 2002, pp. 3,5)

The UNMOVIC and IAEA's weapon investigation in Iraq resumed on November 27, 2002 (Eckert & Mofidi, 2004, p.124). On January 28, 2003, Bush delivered his State of the Union speech, in which he assured the United States would not allow a dictator like Saddam Hussein to rule. Again, he showed no willingness to wait for an imminent threat, which is the reason why he announced the US would consult the Security Council on the issue, but, even without a UN mandate, it would lead a coalition to disarm Saddam Hussein (*President Delivers "State of the Union,"* 2003). Following the promise of consulting the Security Council, on February 5, Secretary of State Colin Powell addressed that organ, stating that the US had gathered human sources along with satellite photographs and intercepted telephone conversations between Iraqi military officials that indicated that Iraq was evading its disarmament obligations, by trying to deceive the designated inspectors (Powell, 2003).

In the wake of the attempt from the US and the UK to pass a Security Council Resolution that paved the way to the use of force in Iraq by giving it ten days to comply with Resolution 1441 ("UK Proposes March 17 Deadline for Iraq to Comply with UN Disarmament Demands," 2003), France, Germany, and the Russian Federation addressed a letter to the Security Council, on February 24. In order to achieve complete disarmament of Iraq, they argued for the continuation of the ongoing investigations *in loco* together with other peaceful means since there was no evidence that it still possessed WMD. So far, the investigation was functioning without obstacles and was producing results, and finally, Iraqi cooperation was improving (France et al., 2003, p.2). The US-proposed resolution was then withdrawn.

Ultimately, the *coalition of the willing*, constituted by American and British military forces, launched Operation Iraqi Freedom on March 19, 2003.

6.1.4. Legal Justifications for Operation Iraqi Freedom

In short, the justifications used by the *coalition of the willing* to use force in Iraq in 2003 are twofold. On the one hand, the UK and the US use anticipatory self-defense in order to uphold the "military operation". On the other hand, they rely on past Security Council Resolutions (678, of 1990, 687, of 1991, and 1441, of 2002) to assure that the use of force had already been sanctioned by the ruling authority on the matter.

As aforesaid, not only did the National Security Strategy of 2002 not consider the United Nations when acting preemptively - if necessary, the US would act "alone" and "unilaterally" – it also argued for a new understanding (or elimination) of the criteria of imminence. However, it is curious that the Bush Doctrine was not applied when providing legal justifications regarding the war in Iraq. The United States and the United Kingdom have found the need to rely on Security Council authority alongside a not-so-broad version of preemptive self-defense, which does not eliminate the concept of imminence. The following sections will take a closer look at both lines of argumentation.

6.1.4.1. Anticipatory Self-Defense

From the chronology of events leading to the use of military force in Iraq, it is manifest that the supply of legal justifications amounting to self-defense began months before the deployment of military forces. In January 2002, in his State of the Union speech, Bush kicked off the planting of how much of an imminent threat to international security Iraq was with its chemical, biological, and nuclear weapons, reaffirming the same arguments in September when addressing the General Assembly and on his National Security Strategy Document. However, particular attention is due to October 2002, when Congress passed a joint resolution authorizing the use of force in Iraq, and the Department of Justice issued a memorandum on the authority of the President on the same topic.

Despite not being the aim of this dissertation, it is worth highlighting that Bush had to seek validation not only internationally but especially internally. For that, having authorities like the Department of Justice (DoJ) and Congress validating its intent to use force was of the utmost importance. Nevertheless, to the goal of this dissertation, the substantial degree of relevance of the Memorandum from the DoJ derives from its analysis in light of international law – scholars' work, *opinion iuris,* and state practice.

The DoJ straightforward argued that military action in Iraq was legal under anticipatory self-defense, as established by Customary International Law and its codification in Article 51 of the Charter, whose intent is only to reaffirm an already existing right (Forrester, 2012, pp.177-179). It started by asserting, based on the definition of imminence put forward by the International Court of Justice in 1997, that imminence is the result of the assessment of the timing of the threat, its probability, and the magnitude of its harm, going beyond its temporal proximity (Forrester, 2012, p.183). Therefore, the DoJ argued that, when assessing imminence, one should take into account the destructive capacity of nuclear weapons, as the ICJ also stated in 1996, and the fact that its unsophisticated means of delivery cause threats to be more imminent, allowing less time to act (Forrester, 2012, p.183). It then provided a series of examples of state practice to uphold that, since the nuclear era began, states have adopted broader concepts of imminence and, consequently, necessity in order to address threats before it is too late (Forrester, 2012, p.184).

Using this framework, the DoJ understood that Iraq posed an imminent threat to the US by using WMD directly or providing them to terrorists. Previous action of Iraq in Iran, its excellent weapon capability of the 1990s (which had been increased again, despite UN sanctions), the attempt to murder President Bush in 1993 and an Iraqi TV station referring to the 9/11 attacks as the US "reaping the fruits of its crimes against humanity" amounted to reasons as for why Iraq would, according to the Memorandum, consider attacking the United States or selling weapons to terrorists to achieve the same end (Forrester, 2012, p.195).

In sum, the DoJ concluded that "even if the probability that Iraq itself would attack the United States with WMD, or would transfer such weapons to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if they did not use force, the threat would increase, could lead the President to conclude that military action was necessary to defend the United

States" (Forrester, 2012, p.197). However, it also advised that the use of necessary military force should be proportionate, meaning "limited to that which was necessary to eliminate the threat posed by Iraq" (Forrester, 2012, p.197).

In October 2002, the Department of Justice, then used the same arguments that Bush had been using since January, "confirming" their lawfulness. However, as Security Council Resolution 1441 passed in November and weapon inspections resumed in Iraq, the argument of Iraq rebuilding nuclear, biological, and chemical weapons programs was weakened. As a result, February's Colin Powell speech in the Security Council named evidence that the US gathered, proving that those weapons programs were, in fact, in progress to strengthen the self-defense argument (Powell, 2003). This attempt failed. In the end, France, Germany, and Russia threatened to use their veto power when voting for a SC Resolution that would sanction the use of military force in Iraq on the basis that there was room for more diplomatic ways, considering that weapon inspections were going accordingly. Moreover, despite some imports and uranium enrichment, experts believed that Iraq was at least three years away from having a deliverable nuclear weapon, considering the years of sanctions and the bombings it had suffered; besides, many did not consider the satellite pictures and the intel as totally clear (Martinez, 2003, p.190).

Once again, on March 17, 2003, Bush, addressing the nation, gave Saddam Hussein forty-eight hours to leave Iraq; otherwise, a US-led coalition would use military force to attack the country to prevent terrorists armed with Iraqi WMD from attacking the US and other states (Bush, 2003). The argument that Iraq was arming terrorist groups, mainly linked to Al-Qaeda, was determined in two ways: first, internally, to gain popular support; second, it would allow for military action as traditional self-defense, under Article 51 of the Charter, triggered by an armed attack, although the timing would still be debatable (Martinez, 2003, p.190). Bush, nevertheless, reminded that violent measures would be adopted since diplomatic ways had been exhausted and after the Security Council had the opportunity to act but decided against it (Bush, 2003). Finally, two days later, on March 19, the *Operation Iraqi Freddom* was launched.

As described above, the argument of anticipatory self-defense used by the United

States was very permeable. Other states and scholars had a hard time understanding the imminent threat posed by Iraq, which, therefore, undermined the criteria of necessity and proportionality. According to some authors, the United States' best chance to justify its action laid on the ability to link Iraq to Al-Qaeda and, consequently, use self-defense against an armed attack. Nonetheless, the ICJ, in its judgment on the Nicaragua case, demanded a high threshold of effective state control (*Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 1986, p.164) that was not met (Martinez, 2003, p.179).

The United States made extensive efforts to present evidence indicating imminent threat and necessity prior to the military intervention in Iraq. The most comprehensive compilation of these efforts came in Bush's speech delivered two days prior to the commencement of the operation (Bush, 2003). The first thing the Bush Administration argued for was Iraq's flouting of international law based on its alleged possession and production of WMD, violating SC Resolution 678 and 687, which ordered the country's disarmament, ultimately "confirmed" by Secretary of State Colin Powell, who showed evidence gathered by the US to the Security Council, in February 2003 (Powell, 2003).

Secondly, based on previous action from Iraqi and Iraq-affiliated people and organizations, it posed an alleged imminent threat to the United States and other nations, indicating that such weapons might be used against the US or sold to non-state terrorist groups for the same purpose. Such imminence also considered the gravity of the harm caused by WMD and its increased risk if the wait was too long. Thus, such an imminent threat led to an alleged state of necessity to use military force to protect the US territory, people, and the international community since all peaceful means to solve it had been exhausted and proved inefficient. Finally, the criteria of proportionality can only be assessed after the military intervention has begun; however, Bush did not spare words when elaborating on how the US would do whatever was necessary to free Iraq and its people from tyranny and terrorism, trying to deliver some notion of proportionality.

Bush made such an elaborate effort to justify an imminent threat despite having created a self-defense doctrine that undoubtedly reflects preventative action by eliminating the very concept of imminence, the Bush Doctrine. Therefore, necessity, proportionality, and even intrinsic criteria such as the exhaustion or impracticability of peaceful measures and proven illegality from the threatening state were eliminated from the equation. In the end, lawful action in self-defense was only susceptible to a state's will to use military force against another. In fact, Bush dedicated several moments of his word assuring that nothing would prevent the United States from acting alone, discarding support from other states as well from international organizations, namely the United Nations, only not to use it as a legal justification (Schuller, 2014, p.180).

6.1.4.2. Security Council Authorization

Diplomatic action from the United States prior to the invasion made clear to other Security Council members that the US intended to justify military action in Iraq with self-defense. In order to make it legitimate, it tried to pass a Security Council Resolution. Nonetheless, France, Germany, and Russia gave hints that they would use their veto power to prevent the Resolution from passing on the basis that there was no imminent threat coming from Iraq. As a result, the US created its official justification based on past Security Council Resolutions that had allegedly already sanctioned the use of force in Iraq (Green, 2009, p.100).

In its Memorandum on the Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, from October 2002, the Department of Justice's legal justification also entailed Security Council authorization (Forrester, 2012, p.162). The memo firstly referred back to Security Council Resolution 678 of November 1990, which authorized Member States to "use all necessary means" to uphold the implementation of SC Resolution 660 (which demanded the withdrawal of Iraqi troops from Kuwait (SC Resolution 660 (1990) /, 1990), p.19)) and all subsequent resolutions, and to "restore international peace and security in the area" (SC Resolution 678 (1990) /, 1990, pp.27-28). The DoJ then identified SC Resolution 687 as a subsequent resolution, which demanded a cease-fire and the termination of hostilities in the Gulf region (Resolution 687 (1991) /, 1991, p.15) and SC Resolution 688, which ordered Iraq to cease the repression of its civilian population, since its consequences posed a threat to international peace and security in the region (SC Resolution 688 (1991) /, 1991, p.32).

It was DoJ's understanding that SC Resolution 687 should be viewed as having the force of a treaty, according to Article 60 of the Vienna Convention on the Law of Treaties, establishing it as a "written international agreement between states governed by international law." Therefore, SC Resolution 687 was binding for everyone, even states that were not Security Council members at the time of the decision but were members of the United Nations (Forrester, 2012, p.163). Furthermore, Article 62 of the VCLT establishes that a material breach by one of the parties entitles a party "especially affected" or not, depending on the nature of the importance of the treaty, to invoke the breach as grounds for suspending the operation. This conferred, according to the memo, enough grounds for the United States to suspend the cease-fire established by SC Resolution 687 due to Iraq's material breach of its obligations under the same Resolution, such as compliance with UN inspectors to oversee disarmament and cessation of WMD development and destruction of the existing arsenal (Forrester, 2012, pp.164-166).

The DoJ further assured that the United States had the right to unilaterally suspend the cease-fire as a party, needing no agreement from other parties (Forrester, 2012, p.167). Moreover, it argued that there was also no need to get specific authorization from the Security Council to end the cease-fire since obstruction to UN inspectors was still happening and the US was perfectly capable of ascertaining on its own if there had been a material breach of a treaty it was a party to (Forrester, 2012, p.168). Besides, the US 1998 airstrikes against Iraq were launched without a SC Resolution or even a statement from the Security Council (Forrester, 2012, p.168).

Ultimately, the US could suspend the cease-fire due to Iraq's material breaches of SC Resolution 687. Once it was suspended, the US could rely on SC Resolution 678 to use all necessary means to implement it again and restore international peace and security in the area, bearing in mind that Resolution 678 had a continuing effect since its adoption and that the cease-fire of Resolution

687 had not expired (Forrester, 2012, p.168).

The DoJ strengthened its argument by mentioning some examples of state practice, namely the US and UK military attacks of 1993 and 1998 – which posed a suspension of the cease-fire - as a response to Iraq's material breach of Resolution 687 (Forrester, 2012, p.170), and with more than a century of history of partial suspension of a multilateral treaty by the US following material breaches from one of the parties (Forrester, 2012, pp.172-173).

Moreover, the Department of Justice relied on armistice law to prove its point. If one considered, as it did, that Resolution 687 equated to an armistice, then using force to respond to a material breach of the cease-fire would also be consistent with armistice law, as indicated by Forrester (2012, pp.173-174). Also, accordingly, SC Resolution 687 did not terminate the hostilities with Iraq; it only suspended them, and cease-fires allow a party to the conflict to resume hostilities under certain conditions, such as a severe violation from one of the parties, exactly like what happened in 1993 and 1998 (Forrester, 2012, p.173-175).

Finally, according to the DoJ, it could also be argued that the use of force would be occurring under Iraq's breach of SC Resolution 688 by continuing to repress its people, posing a threat to international peace and security associated with refugee flows (Forrester, 2012, p.176).

In sum, the DoJ believed "that the Security Council had authorized the United States to resort to the use of force against Iraq either (1) in response to Iraq's material breaches or substantial violations of the terms of the cease-fire, which permitted the United States to suspend the cease-fire and rely on UNSCR 678 as an authorization to use "all necessary means" to bring Iraq into compliance with UNSCR 687, or (2) in response to violations of UNSCR 688 that threatened international peace and security" (Forrester, 2012, p.177).

Nonetheless, declarations by US state officials paved the way to March 19, 2003, using mainly self-defense arguments. Despite existing, little were mentions of an already approved use of force based on past Security Council Resolutions, and more often was the Iraqi breach of Resolution 687 pointed out. On September 12, 2002, when addressing the United Nations General Assembly, Bush stated for the first time that Iraq was not disarming nor complying with UN inspections and, therefore, breaching Resolution 687 (*President's Remarks at the United Nations General Assembly*, 2002). Regarding the Congress, its joint resolution sanctioning the use of military force in Iraq referred to the purported breach of SC Resolutions 687 and 688. This reference hinted at the possibility of a US-led military intervention based on Resolution 678. This resolution granted authorization for employing any essential measures to enforce Resolution 660, a precedent set in the 1990s (Authorization for Use of Military Force Against Iraq, 2002).

Colin Powell, addressing the Security Council, only mentioned that Iraq had been in material breach of sixteen resolutions over twelve years (Powell, 2003), precisely the same thing that National Security Advisor Condoleezza Rice said in an interview in March 2003 (Condoleezza, 2003). Finally, Bush, in his speech on March 17, briefly mentioned that Resolutions 678 and 687 were still in effect and thus permitted the use of force to "riddle Iraq from arms" (Bush, 2003).

Finally, on the day the hostilities resumed, March 19, Bush issued a report to Congress asserting that the use of force was consistent with the Congress joint resolution of October of the previous year. However, he did not dedicate the same amount of words elaborating on why it was an exercise of the "inherent right of self-defense" (Bush, 2003, p.10), as the spotlight was on his justification upheld by Security Council Resolutions. The report stated that "the Council authorized the use of force in UNSCR 678 concerning Iraq in 1990. This resolution—on which the United States has relied continuously and with the full knowledge of the UNSC to use force in 1993, 1996, and 1998 and to enforce no-fly zones—remains in effect today. In UNSCR 1441, the UNSC unanimously decided again that Iraq has been and remains in material breach of its obligations under relevant resolutions and would face serious consequences if it failed immediately to disarm." (Bush, 2003, p.10).

Consequently, March 19 marked a turning point in the legal justifications provided by the United States regarding the deployment military force in Iraq – the focus was no longer on self-defense but on the application of previous sanctions by the Security Council.

On March 20, both the United States and the United Kingdom addressed letters to the Security Council President, informing them of the beginning of the "military operation" in Iraq along with its grounds. While the UK did not delve into the legal justifications behind this action in detail, opting to emphasize Iraq's material breaches once again (United Kingdom, 2003, p.1), the US provided a more detailed reasoning. Nonetheless, it did add nothing new by simply stating that the Iraqi Freedom Operation was lawful under SC Resolutions 678 and 687 – Iraq's non-compliance with the disarmament ordered by Resolution 687 underpinned the suspension of the cease-fire it also established and "revived the authority to use force under Resolution 678", which too backed a coalition-led use of force in 1993 (United States, 2003, p.1).

To conclude, analyzing the United States' legal justifications for Operation Iraqi Freedom in 2003 reveals a notorious shift over time from an first emphasis on self-defense to a growing reliance on the notion of previous sanctioning from the United Nations Security Council resolutions. This transformation in legal rationale highlights the intricacies inherent in the decision-making process preceding the use of force. The self-defense arguments were predominantly communicated through public speeches and interviews, targeting a broader audience. In contrast, the shift towards invoking SC Resolutions as a primary justification for the use of force reflects a strategic adaptation in response to international skepticism. The latter justification was often confined to specific forums such as the Security Council itself, revealing a calculated effort to garner international support in the face of states that challenged the initial self-defense narrative. This transition in legal rationale highlights the nuanced interplay between domestic and international considerations, underscoring the multifaceted nature of legal justifications in shaping the course of significant international events. Additionally, this path shows the role the United Nations, specifically the Security Council, has regarding the use of force, as its authorization was taken as having a higher authority than self-defense, even if all anticipatory self-defense prerequisites were deemed to be met, according to the United States.

6.2. The 2022 War in Ukraine

6.2.1. Russia-Ukraine Relations from 1991 to 2014

On August 24, 1991, the Ukrainian Parliament, following the fall of the Berlin Wall and the end of the Soviet Union, declared its country's independence. However, Ukrainians would have to wait for the Belovezh Accords, signed on December 8, that formally dissolved the Soviet Union (Haesebrouc & Taghon, 2022, p.1).

Nevertheless, several vital questions remained unsolved, such as the Black Sea Soviet fleet in the port of Sevastopol in the Crimea Peninsula, which was transferred to the Ukrainian jurisdiction in 1954. After 1991, Russia started to contest the legitimacy of the Ukrainian control of Crimea by contesting the legitimacy of the 1954 agreement that transferred the region. However, in 1997, a solution was found that would split the fleet between the two countries, and "Russia was given a 20-year lease of the port facilities, as well as the right to keep up to 25,000 Russian troops at the military base in Sevastopol" (Haesebrouc & Taghon, 2022, p.2).

Until 2004, when highly unpopular Ukrainian President Kuchma was not allowed to run for a third mandate, Ukraine pursued a foreign policy that smoothly balanced between Russia and the West. Notwithstanding, that year's election opposed Yanukovych, the Russia-supported candidate, to Yushchenko, the candidate supported by the US and the EU. Moreover, while polls indicated that Yushchenko was the winner by 52% of the votes, the official outcome was that Yanukovych was the newly elected President. This led to an immediate reaction from the international community, demanding the correction of the results, and to the Orange Revolution upheld by thousands of Ukrainians, also demanding truth reposition. Two weeks later, the Ukrainian Parliament and the Supreme Court deemed the results invalid, and a new election was organized that finally gave the victory to Yushchenko (Haesebrouc & Taghon, 2022, p.2).

The pro-Western policies carried out by Kyiv were not enough for Ukraine to secure EU or NATO membership but were sufficient for the start of negotiations around an Association Agreement between Ukraine and the EU in 2007 that would encompass a Free Trade Area (Haesebrouc & Taghon, 2022, p.3). During

NATO’s Bucharest Summit of 2008, Bush pressured NATO members to announce that Ukraine and Georgia would become members, which France and Germany prevented, but it was enough for Russia to begin pursuing a harsher policy towards its neighbors, giving rise to actual war in Georgia, in 2008 (Mearsheimer, 2022). Russian Ministry of Foreign Affairs, Lavrov declared that Russia would do anything in its power to prevent Ukraine from becoming a NATO member. However, Putin went even further and affirmed to Bush in a NATO-Russia summit that Ukraine was not even a state since half of its territory belonged to Western Europe and the other half was given by Russia (Haesebrouc & Taghon, 2022, p.3).

In 2010, Yanukovych won the presidential election and revived the multi-vector foreign policy of Kuchma, and still in the year he took office, Ukraine signed a deal with Russia that contended a discount on Russian gas along with an extension of the lease on the Sevastopol naval base for more 25 years. At the same time, negotiations with the EU were moving forward, with the signing of the Association Agreement being scheduled for the EU summit in Vilnius in November 2013. Nonetheless, Russia was working on its own regional integration process, the Eurasian Economic Union, which would be incompatible with the Association Agreement between Ukraine and the EU, pressuring the former not to sign it (Haesebrouc & Taghon, 2022, pp.3-4).

6.2.2. From the Annexation of Crimea and War in East Ukraine in 2014 to a Full-On Large-Scale Conflict in 2022

The time from November 2013 to April 2014 marked months of protests from the civilian population in Ukraine that did not support Yanukovych and heated times for both Russia and the West, each trying their best to get Ukraine into their sphere of influence. In the end, Yanukovych fled to Russia, and new elections gave power to a new Government (Walker, 2023, p.6).

Meanwhile, on February 27, 2014, Armed pro-Russian separatists seized government buildings in Crimea and declared the region part of Russia by hoisting the Russian flag. The Ukrainian interim Government summoned Russia's ambassador and warned against further military aggression. Acting President Turchynov also warned Russian forces not to leave their naval base in Crimea

(Siddique et al., 2014). A few days later, on March 1, following Putin's request, the Parliament approved the use of Russian forces in Crimea "until the normalization of the political situation in the country" ("Russian Parliament Approves Troop Deployment in Ukraine," 2014). This was succeeded by separatists announcing a referendum to determine the fate of Crimea, whose result was secession from Ukraine by 95% of the votes (Harding & Walker, 2014). After the EU and the US imposed several sanctions on Russia, following what they believed to be an illegal poll, Putin passed a law formalizing Russia's takeover of Crimea ("Ukraine," 2014).

The result of the Crimean referendum was not acknowledged by the UN General Assembly, with 100 votes against and 11 in favor, which argued for Ukraine's territorial integrity, after Russia's veto prevented the Security Council from passing a resolution condemning the annexation of the territory (United Nations, 2014). Similarly, in November 2014, independence referendums were held in Luhansk and Donetsk, giving victory to separatists (S. Walker et al., 2014).

Petro Poroshenko was elected President in May 2014, returning to a more pro-EU foreign policy. In a turnover after giving it to Russian pressure and deciding not to sign the AA in November 2013, Ukraine and the EU finally signed the AA in 2014, which encompassed the Free Trade Area (*EU-Ukraine Relations - Factsheet | EEAS*, 2022) in the aftermath of almost a year of popular demonstrations of discontent with the increasing repression from Government authorities. At the same time, NATO became a critical advisor for the Ukrainian Government on the situation in Crimea (Haesebrouc & Taghon, 2022, p.5).

In September 2014, members of separatist groups and the "Trilateral Contact Group" (Ukraine, Russia, and the OSCE) gathered in Minsk to negotiate an agreement mediated by France and Germany, later known as Minsk-I Agreement (Russian Federation et al., 2014). Its first and foremost goal was the cessation of hostilities between Russia and Ukraine. The other primary outcome was requested by Russia and entailed clauses on the special status of the Donbass region and local elections and inclusive nationwide dialogue on the separatist Republics of Luhansk and Donetsk (Russian Federation et al., 2014, p.2). That same election occurred on November 2 and approved secession, although Kyiv and the West did not recognize them as legitimate (AFP, 2014).

Following the Minsk-I Agreement, September and October 2014 saw a de-escalation of conflict, with Russia withdrawing thousands of men (N. Walker, 2023, p.19). Nonetheless, the election of November overturned the de-escalation and lightened the conflict again (N. Walker, 2023, p.20). A new ceasefire was then negotiated in February 2015 in a new talk held in Minsk with the heads of state of Russia, Ukraine, France, and Germany. The outcome document, the Minsk-II Agreement, was very similar to the previous Minsk Agreement – Ukraine wanted to regain full sovereignty of its territory. At the same time, Russia supported autonomy for the separatist movements, undermining its relation with the West and Ukraine's pretenses of territorial integrity (Haesebrouc & Taghon, 2022, p.5). In the end, the only provision worth highlighting is the one that established the conduction of local elections in Donetsk and Luhansk, according to Ukrainian law "on interim local self-government in certain areas" of both regions, in order to decide the future of their administration ("Ukraine Crisis," 2015). Again, the results were considered unlawful.

In June 2017, in the wake of a pro-Western foreign policy pursued by Ukraine, the Ukrainian Parliament voted to restore NATO's membership as one of the country's foreign policy objectives, and the Association Agreement with the EU was finally ratified (N. Walker, 2023, p.22). At that time, the US and other NATO members started to sell "defensive weapons" to Ukraine (Mearsheimer, 2022). Almost two years later, as the conflict continued, Ukrainians elected Zelensky as their new President, who affirmed he would not surrender Crimea nor ignore the Russian intervention in Donbass, despite being available to discuss the Minsk Agreements (Haesebrouc & Taghon, 2022, p.5). Zelensky then continued the efforts to obtain NATO membership for Ukraine, securing a NATO Enhanced Opportunity Partner status in June 2020 and approving a new National Security Strategy that allowed for a distinctive partnership's continued development (N. Walker, 2023, p.25).

2021 was the year in which conflict started to escalate once more. In April, Russia and Ukraine started holding military drills, while NATO held emergency meetings to discuss the massing of Russian troops near the Ukrainian border (Tétrault-Farber & Emmott, 2021). One of the drills happened in July when the US and Ukraine co-hosted a major naval exercise in the Black Sea that gathered the presence of more than 32 countries and almost led Russia to fire at a British naval destroyer that entered Russia's territorial waters (Mearsheimer, 2022). In September, Zelensky visited Washington and tried to get a confirmation on the NATO membership topic. However, Biden seemed more determined to condemn Russia's action despite supporting Ukraine's aspirations and intending to get even closer to the former USSR country (President of Russia, 2021).

The increasingly closer relationship between the US and Ukraine led to Russia filling its borders with Ukraine with military troops and material, demonstrating its discontent (N. Walker, 2023, p.27). Around a month later, on November 17, 2021, Putin put forward a list of demands to be met to trigger a de-escalation of the conflict with Ukraine. The most pressing "security guarantees" intended to make sure that Ukraine would not get a NATO membership and that it would limit the deployment of arms and troops on its Eastern side, going back to how it was in 1997, before its expansion to the East; additionally, Russia requested that NATO would not hold drills in Ukraine without previous Russian agreement. Putin ultimately warned that ignoring his demands would lead to a military response similar to the one during the Cuban Missile Crisis (Roth, 2021). This list earned a response from the United States and NATO, which issued separate statements, putting aside the chance of halting NATO's expansion but willing to hold talks on arms control ("US and NATO Deliver Responses to Russian Demands over Ukraine," 2022).

Throughout January 2022, diplomatic efforts were diligently underway to decrease further escalation of the situation. Initially, diplomats from Russia and the US convened in Geneva to deliberate on the future of Ukraine. However, these discussions yielded no tangible results, a pattern that persisted in the subsequent Russia-NATO summit just a few days later. Following these events, the OSCE permanent council held an ordinary meeting, proposing to use the OSCE as a platform for reinvigorated talks concerning European security (N. Walker, 2023, p.29).

Meanwhile, both the West and Russia deployed more and more forces near Ukraine, amounting to the rising tensions, culminating, on February 10, on the most prominent military exercise launched by Russia since the end of the Cold War, including joint maneuvers with Belarus, whose focus was to "suppress and repel external aggression during a defensive operation" (N. Walker, 2023, p.32). Four days later, the Russian ambassador to the EU assured that Russia would lawfully launch a counterattack if it were considered necessary to protect Russian citizens in Eastern Ukraine, although he guaranteed that such would only happen "if provoked" (Boffey & Walker, 2022).

On February 17, the Security Council gathered to discuss the situation in Ukraine. While Russia, backed by China, accused Ukraine of not wanting to implement the Minsk Agreements, Western states expressed their fear that Russia might have been preparing to invade Ukraine (*The Situation in Ukraine - Security Council, 8968th Meeting | UN Web TV*, 2022), a fear that persisted until February 21, when Russia formally recognized the independence of the Republics of Luhansk and Donetsk, by signing Treaties of Friendship, Cooperation and Mutual Assistance with both of them (*Signing of Documents Recognising Donetsk and Lugansk People's Republics*, 2022). Ultimately, after February's peak in militarization and escalation of tensions, Russia launched a "special military operation" in Ukraine on February 24, 2022 (Haesebrouc & Taghon, 2022, p.5).

6.2.3. Legal Justifications for the Launch of the "Special Military Operation" by Russia in Ukraine

From the above chronology of events leading to February 24, 2022, it is visible that, unlike the United States in Iraq, Russia's time span for the provision of legal justifications for the use of military force in Ukraine was larger. Nonetheless, Vladimir Putin pretty much waited until addressing the nation on that same day to lay bare the arguments for the Russian military action, despite clear hints given three days before, when addressing the nation to let it know about the recognition of the People's Republics of Luhansk and Donetsk. Similarly to the US, his justification was twofold, and, on top of individual (anticipatory) self-defense, Russia relied on collective self-defense against genocide.

Some authors believe that other legal justifications were put forward by Putin on that day (Green et al., 2022, p.8; Kotova & Tzouvala, 2022, p.717; Manullang et al., 2022, p.504; Janik, 2022), such as humanitarian intervention, development of ICL rules on the use of force since 1945, genocide against Russian minorities in Ukraine, Ukrainian Government's corruption and a *coupe d'état* in 2014, or even the past illegitimate division of the Russian people and Russia's historic territory into Russia and a separate Ukraine. Nonetheless, for the purpose of this dissertation, some of these claims will be considered within the individual or collective self-defense justifications, like humanitarian intervention or genocide, while others will be regarded only as accusations made by Russia against Ukraine, brought back from several addresses from Putin throughout the period leading to the invasion, not amounting to any legal justification.

6.2.3.1. Individual Self-Defense

From November 2021 until the break of the conflict in Ukraine, following the increased escalation of tensions between Russia and Ukraine, Vladimir Putin held talks with the leaders of France, the United States, the United Kingdom, and Germany, attendant their concerns related to the issue. Still, in November, Putin held a telephone conversation with Charles Michel, the President of the EU Council, in which he addressed his concerns about alleged discrimination against the Russian-speaking population in Donbass (*Telephone Conversation with European Council President Charles Michel*, 2021).

December 2021 was crucial for the laying of justifications for the use of force in Ukraine. During that period, Putin held two conversations with Joe Biden, one with Boris Johnson and another one with Macron, and in all of them, the line of discourse was the same. The main point he touched upon was the legally binding security guarantees he was looking for from NATO since the Organization's movements toward Russian borders and its subsequent deployment of weapons posed an imminent threat to his country. Putin claimed to understand the open-door NATO policy. However, he also asserted that the principle of indivisible security had to be "strictly observed" and that the security of some cannot come at the cost of the security of others, as it was established when NATO and Russia initiated diplomatic relations in 1997 (President of Russia, 2021). Russia's demands on legal guarantees encompassed the non-expansion of NATO towards the East, its going back to the military deployment it had in 1997, and the non-deployment of offensive weapons near the Russian border. These would be discussed in January 2022.

Additionally, two other topics touched upon by Russia's President were the discrimination against Russian-speaking people, mainly in the Donbass region, and Kyiv's unwillingness to implement the Minsk Agreements by breaking them using heavy weaponry and drones. According to Russia, these both served as examples of how Ukraine was worsening the situation between the two countries in an apparent provocation.

January was the month of negotiations of the demands provided by Russia in November. Putin talked on the telephone with Macron on January 28, only to affirm that the responses from NATO and the United States did not address Russia's security concerns, as they were not willing to give in on any of the three main demands posed by Putin's Administration and that the principle of indivisibility continued to be overlooked. Putin also highlighted the importance of dialogue between Ukraine and the representatives from Luhansk and Donetsk in order to legalize their special status (*President of Russia*, 2022a). The same topics were again stressed a few days later to the French President (President of Russia, 2022b).

In February, as tensions in the Ukrainian border rose more and more, Western leaders continued the close dialogue with Russia on the matter, and Putin kept persistently revisiting the same subjects that he had stressed over the last months – the threat to Russian security posed by NATO's action in Ukraine and Russia's eastern borders. Putin pushed for Western states to address his security guarantees while they continued to divert the subject. At the same time, accusations against the Kyiv regime for not following the Minsk Agreements continued to emanate from Moscow. On February 7, Macron visited Putin, and both had the opportunity to discuss the matter in more detail. Putin accused NATO of not being the peaceful organization that it claimed to be, using actions in Belgrade, Libya, Iraq, and Afghanistan as examples. He also addressed that the pumping of Ukraine with modern weapons, right next to the country, which NATO's Military Strategy of 2019 pointed out as its main adversary, was not an act of peace (*News Conference Following Russian-French Talks*, 2022).

Further talks with Biden, Scholz and Macron over the month followed the exact same path, with Putin stating why Russia's security was at stake (*Briefing by Aide to the President Yury Ushakov Following a Telephone Conversation between Vladimir Putin and Joseph Biden*, 2022; *News Conference Following Russian-German Talks*, 2022; *Telephone Conversation with President of France Emmanuel Macron*, 2022c; *Telephone Conversation with President of France Emmanuel Macron*, 2022d). On February 17 and February 21, two Security Council meetings on the conflict in Ukraine were held, in which Russia had the opportunity to, once again, stress its security concerns. On the first one, nevertheless, the Russian representative drew more attention to Ukraine's unwillingness to implement the Minsk Agreements sanctioned by the Security Council (*The Situation in Ukraine - Security Council, 8968th Meeting | UN Web TV*, 2022), while the second Russian intervention was broader, addressing in more detail its security concerns, the same, nonetheless, that had been addressed since November (*Ukraine - Security Council, 8970th Meeting (February 21 2022)*, 2022).

On February 21, Vladimir Putin addressed the nation in an almost one-hour-long speech, whose primary purpose was to declare Russia's recognition of the People's Republics of Donetsk and Luhansk (*Address by the President of the Russian Federation*, 2022) and pave the way for collective self-defense as a legal justification for the use of military force in Ukraine. However, Putin also dedicated, once again, a great deal of his airtime to elaborate on the threat that Ukraine and NATO posed to Russia, adding some new and essential elements to his discourse that provided some robustness to his individual self-defense argument. For instance, Putin stated that he had intel that Ukraine's NATO membership was already decided. Furthermore, although the West affirmed that such a thing would not happen soon, whether it was to become real "tomorrow or the day after," the nature of the threat would not be altered, and it would still be imminent. Ukraine's joining NATO increased the threat to Russia, causing a European security crisis, negatively impacting the International Relations system, and leading to the loss of mutual trust. Furthermore, Putin asserted that "the choice of pathways towards security should not pose a threat to other states, whereas Ukraine joining NATO" did not respect the principle of security indivisibility (*Address by the President of the Russian Federation*, 2022).

Moreover, Putin stated that Russia had clear information that, with the help of Western states, Ukraine would rescue infrastructure and technology from the USSR era to relaunch its nuclear weapons program. Following US/NATO documents that not only allow for preemptive strikes against enemy missile systems but also pose Russia as NATO's main adversary, that could lead to unthinkable consequences, and Russia was left with no other option than to act (*Address by the President of the Russian Federation*, 2022). It was the first time that Putin mentioned the necessity to act anticipatorily in the face of an imminent threat.

Finally, Russia announced the launching of the "Special Military Operation in Ukraine" on February 24 by addressing the nation with a speech which was then annexed to a letter sent to the Security Council, which formally informed this organ of the deployment of military force, obliging with Article 51 of the Charter.

Once more, Putin dedicated most of his airtime elaborating on how much of an imminent threat Russia was under caused by NATO's expansion Eastwards (Russian Federation, 2022, p.2). Once again, he mentioned that Russia exhausted all diplomatic means, namely by trying to negotiate security guarantees, which were never implemented (Russian Federation, 2022, p.3). Putin put the situation as a matter of life and death; Russia's "historical future as a people" along with "the very existence of the Russian state and its sovereignty" were at stake, the reason why it could "no longer continue to merely observe what was occurring" (Russian Federation, 2022, p.5).

NATO's inconsequential actions towards Russia, according to Putin, were the result of non-suitable International Law rules developed after 1945, the reason why Western countries only respect them when they see fit (Russian Federation, 2022, p.2). Illustrative examples of Western's disregard for International Law (Russian Federation, 2022, p.3) were provided, such as Belgrade, Libya, Syria, and Iraq, where military force was deployed without SC sanction or by distortion of its measures. Putin highlighted Iraq, nevertheless, as a case in which a military operation was conducted under fabricated evidence of Weapons of Mass Destruction, and when it became known, the perpetrators were not held accountable (Russian Federation, 2022, p.3).

Some authors believe that Putin's mention of the Western's disregard for International Law served the logic that, since the law had been broken so many times before, it no longer applied or it had been altered by International Customary Law (Milanovic, 2022; McLeod & Archibald, 2023, p.513-515). However, the view of this dissertation is that Western's disregard for International Law served as a way of showing how real the threat posed to Russia was. Since Western states, according to Vladimir Putin, showed no mercy using force indiscriminately in the past, once NATO reached Ukraine, nothing indicated that they would not use the same way of acting against Russia. Therefore, Putin was entitled to act anticipatorily against this alleged imminent threat.

Russia created an imminent threat emanating from NATO's military presence near its borders, which, for several months, served as a basis for Russia's diplomatic talks to request that the situation change; otherwise, they would have to act. In the end, peaceful means did not have a positive outcome for the Russians, leading to a necessary use of force to stop a threat against their country. Such a narrative went along the rules of anticipatory self-defense since there was no armed attack to trigger traditional self-defense (Green et al., 2022, p.8), described in previous sections of this dissertation. Nevertheless, from the justifications provided, nothing could be assessed about proportionality, except when Putin, on February 24, assured that his intention was not to occupy Ukraine or override the nations' right to self-determination (Russian Federation, 2022, p.6), and only to free its people from the horrors of Nazi, just like the USSR did in the 1940s. Nonetheless, it is worth mentioning that, unlike Bush, Putin never used the word imminent; instead, he affirmed several times that an attack would occur somewhere in the future, stretching the concept of imminence to Russia's own needs (Gill, 2022, p.125; Green et al., 2022, p.11).

Indeed, in the final part of his speech, the Russian President stated that there was no other way to defend Russia than the one they would use that day, exerting the failure or impracticability of peaceful means. Notwithstanding, a few paragraphs later, he stated that the “military operation’s” goal was to protect the people who had been subjected to abuse and genocide by Kyiv by demilitarizing and de-nazificating Ukraine under the treaties of friendship and mutual assistance signed with the Republics of Donetsk and Luhansk, but also under the premise of collective self-defense foreseen in Article 51 of the United Nations Charter (Russian Federation, 2022, p.6).

It seems that Putin, just like Bush, after building a whole narrative supporting individual self-defense against an alleged imminent threat, which would also, according to his justification, check all the anticipatory self-defense prerequisites (imminence, necessity, proportionality, and even exhaustion of all peaceful means and flouting from another state), decided that some other more powerful justification was needed to top off individual self-defense. Again, Putin had to justify his actions both internally and externally. While using the necessity to act to defend “Russia’s existence” might work to defend the action internally, it was more difficult for the International Community to feel sympathetic towards that. So, he used a bigger gun, collective self-defense against genocide.

6.2.3.2. Collective Self-Defense

As provided in the previous section of this dissertation, when talking to other leaders, Putin expressed his concerns about the discrimination suffered by Russian-speaking people in Donbass, giving hints as to what might be a possible genocide; however, he did not explicitly use that word until February 21, when Russia recognized the People’s Republics of Donetsk and Luhansk.

On that day speech, after a lengthy historical contextualization of Ukraine, Putin started by asserting that the recognition was not the result of political factors since they cannot be used as principles of statehood. He accused Ukraine of being dominated by “nationalists and radicals that developed into Russophobia and neo-Nazism,” not allowing for the preservation of the Russian identity, language, and culture (*Address by the President of the Russian Federation*, 2022). During his discourse, several mentions of the Soviet fight against the Nazis during World War II were made, creating a bridge between the lawful fight from the 1940s and the one that was about to begin, granting it legitimacy. Ultimately, Putin used the word genocide to describe what the people in the Donbass region were suffering as the reason behind the recognition of Donetsk and Luhansk (*Address by the President of the Russian Federation*, 2022) as if Russia was freeing those people.

On February 24, addressing the nation, Putin did not dedicate most of his time justifying collective self-defense but rather individual anticipatory self-defense. Nonetheless, he saved for last the most potent argument in favor of collective self-defense by explicitly mentioning Article 51 of the United Nations Charter (Russian Federation, 2022, p.6). Putin asserted that, for eight years, Russia tried in vain to exhaust all peaceful means to settle the genocide in Donbass against millions whose hopes were deposited in Russia (Russian Federation, 2022, p.6). For that reason, and following the Friendship and Mutual Assistance treaties signed with both the People’s Republic of Donetsk and Luhansk, along with Article 51 of the Charter, Russia announced a military deployment of force that would protect the people from Donbass, demilitarize and de-Nazify Ukraine (Russian Federation, 2022, p.6).

Putin finished his discourse by guaranteeing that Russia’s “actions are in self-defense against the threats posed to us and against an even greater calamity” (Russian Federation, 2022, p.7). Just like in the example of Operation Iraqi Freedom, this evidenced a hierarchy in the legal justifications provided, in which the second one, the less debated one, ranks higher. In this case, collective self-defense comes as the consequence of an alleged genocide committed against an oppressed minority, which is compared to the Nazi action of the 1940s; the reason why it is regarded by some scholars as humanitarian intervention (Green et al., 2022, p.24), despite the explicit invocation of Article 51. Again, similarly to the US, individual self-defense is feebler due to the ease with which an imminent threat can be questioned.

Notwithstanding, following the literature on the topic, discarding collective self-defense on this issue is also elementary. According to the International Court of Justice ruling on the Nicaragua case of 1986, armed groups or opposition members cannot be provided support under collective self-defense (Janik, 2022). Furthermore, a state must request support for this mechanism to be triggered.

Russia knew that, so they recognized the Republics and signed the friendship treaties, but legally, Donetsk and Luhansk cannot be considered states. Recognition by another state does not fill all the criteria for statehood; instead, following the Montevideo Convention, a state must possess complete sovereignty of its territory and economy, which is not the case since both are under Ukraine's control (Green et al., 2022, p.18; Janik, 2022). Nonetheless, in the end, accusations of genocide carry greater weight than the ones of imminent threat of armed attack.

7. Conclusion

As stated by Janik (2022) “Self-defense has been the most common reason to resort to wars throughout history and even more so in the UN Charter era. Aggressors routinely try to build up their own narratives to justify the unjustifiable as absurd as they may often seem.” Russia and the United States were no exception when acting against Ukraine (2022) and Iraq (2003), respectively.

On the one hand, the US spent almost a year building a narrative of the necessity of self-defense against a fabricated imminent threat posed by Iraq having Weapons of Mass Destruction, violating Resolution 687 of the Security Council, which demanded disarmament. Bush spent many hours of his airtime thoroughly providing evidence to fill anticipatory self-defense requirements. He argued that the imminent threat was not only posed by the mere possession of such a type of weapon. In addition, he argued for a more extensive interpretation of imminence that assessed other factors, such as the little window of time to act in advance of nuclear attacks or the historical support provided to terrorist groups against the West. After assuring both the American people and the International Community that all peaceful means to solve the issue had been exhausted or deemed impractical, Bush “was left with no other choice” than to use force. The criterion of proportionality is the hardest one to assess based on legal justifications, but Bush spared no words on March 19, 2003, to explain how the goal of the United States was only to give the country back to the Iraqi people, hinting that action would be proportionate.

At the same time, Bush and his Administration purposely and constantly linked Iraq to Al-Qaeda. The main target of this connection was not the International Community but the Americans, who would be touched by this after the 9/11 events and would offer public support.

On the other hand, Russia, especially since November 2021, also constructed a narrative of the necessity of self-defense against NATO’s expansion Eastwards in Ukraine, which posed an imminent threat. Putin spent a great majority of his airtime thoroughly providing evidence that NATO’s military influence near Russian borders was not innocent and violated the principle of security indivisibility. This principle was established between the Organization and Russia in 1997 and foresees that the security of some cannot come at the expense of the security of others. Like Bush, Putin also argued that the imminent threat did not merely consist of allocating heavy weaponry near Russia's borders. Instead, he argued for a more extensive interpretation of imminence that would also entail the disregard of Western countries towards International Law and their recurrent use of preemptive self-defense against adversaries, which Russia was, according to NATO's security strategy of 2019. Additionally, his interpretation also contained an expanded reading of the temporal scope of imminence, since NATO assured Russia many times that Ukraine would not join the Organization soon.

After trying to obtain security guarantees, through diplomatic means, that the imminent threat would disappear from November 2021 to January 2022, Putin assured that he was left with no other option than to initiate a "special military operation" in Ukraine. Again, the criterion of proportionality is the hardest to analyze, but Putin seemed to commit to it by stating that he did not intend to occupy Ukraine and only to eliminate the threat emanating from there so that Russia could "exist."

In the end, even if one accepts the expansive reading of Article 51 of the Charter, it is not possible to consider that either Russia or the United States complied with it. All allegations of imminent threats were fabricated and based on lies, leaving no room for these states to evoke the lawfulness of their action. All anticipatory self-defense prerequisites are dependent on the existence of an imminent threat; if such does not exist, then the argument is dead and the use of force does not fall under the scope of this exception to the general prohibition of the threat or use of force established by Article 2(4).

Thus, several parallelisms can be drawn between Russia and the United States' use of alleged anticipatory self-defense to justify the use of force since both narratives followed the same path, even mentioning some of the requirements under Customary International Law. In the same line of thought, both countries saw the feebleness of using individual self-defense as an argument to the International Community – as the Restrictive School of Thought put it, any "jurisprudentially creative nation" can come up with an imminent threat (Van den Hole, 2003, p.87) - so states usually use this to their internal audiences (Kotova

& Tzouvala, 2022, p.717). That said, Russia and the United States dug more profoundly into the justification hole by invoking more complex and higher authority arguments.

The United States, on the one hand, claimed that the use of force in Iraq had already been sanctioned by the Security Council, making it lawful. In a letter addressed to the Security Council on the day of the beginning of the military operation, the US alleged that by breaking disarmament, Iraq was materially breaching SC Resolution 678, giving the United States the right to break the cease-fires established by Resolution 687 to restore peace and security in the area, using all necessary means established, again, in Resolution 678, which was still valid.

Russia, on the other hand, chose collective self-defense against genocide in the Donbass region. Three days before the full scale invasion started, Moscow recognized the independence of the separatist Republics of Donetsk and Luhansk and signed treaties of friendship and mutual assistance with them. Then, on the day the invasion was launched, Putin claimed that Russia was acting to protect the people from Donbass, upon their request, under the treaties of mutual assistance signed, from the genocide against the Russian-speaking people. Although Vladimir Putin expressly mentioned Article 51 and collective self-defense, many have attributed this conduct to Humanitarian Intervention. Either way, what grants this justification a higher place on the ladder is that Russia was allegedly defending people from a crime against humanity, genocide, which would also be happening under the Humanitarian Intervention umbrella.

Against this background, management theory defines the concept of *escalation of commitment* as “committing additional resources to a losing decisional alternative and a tendency to become locked in to a course of action (…) committing resources to a new course of action above and beyond what would be warranted by the objective facts of the situation” (Michailova, 2022, p.1674). In short, when decision-makers’ justifications asses how feeble their legal justifications are, especially to uphold unjustifiable aggressions that show no regard to International Law, they tend to go deeper and deeper into these justifications, escalating its ladder by adding new ones that can be seen as more sophisticated or with a higher degree of authority.

Both Russia and the United States show an escalation of commitment when providing justifications for the use of force against another country which poses individual anticipatory self-defense at the bottom of the chain of escalation because of how subjective an imminent threat might be, and the easiness with which it can be discarded by the International Community, namely the Security Council with its veto power organization.

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