




# The Effect of the Pre-emptive Military Strike Doctrine on Efforts to Establish New International Legal Provisions

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Article Info	Abstract	
<p><b>Keywords:</b> Pre-emptive Military Strike; Legal Establishment; Internasional Law.</p>	<p><b>Introduction:</b> One of the interventional measures that can be justified under international law is self-defence. When there has been an armed attack, on the condition that it is instant, overwhelming situation, leaving no means, no moment of deliberation, that is a justifiable proposition for self-defence.</p> <p><b>Purposes of the Research:</b> To examine and analyze the influence of the doctrine of pre-emptive military strike on efforts to establish new international legal provisions.</p> <p><b>Methods of the Research:</b> This research uses normative juridical research methods with legal materials used, namely primary legal materials, secondary legal materials and tertiary legal materials. The collection technique is carried out through literature studies and then analyzed using qualitative methods.</p> <p><b>Results of the Research:</b> The practice of some countries today in order to anticipate such an attack, pre-emptive military strikes are carried out in the context of anticipatory self-defence, with the aim of conducting self-defence before an attack occurs. The practice of anticipatory self-defence has become a serious conversation among academics, even when the act is practiced repeatedly continuously by a number of countries and recognized for its existence, it is certain to set a precedent that leads to the creation of an international customary law. Self-defence anticipatory measures applied in the doctrine of preemptive military strike have been adopted by several countries before and after the formation of the UN organization. But this has not set a legal precedent, despite efforts to make it an International custom through the practice of countries. If this is allowed to take place, it will at some point become customary international law. The application of the preemptive military strike will affect the establishment of new international law provisions.</p>	

## 1. INTRODUCTION

The act of intervention as one of the means of resolving disputes by means of force, is prohibited by international law, in which a state should not interfere in the internal affairs of another country. This is a principle applied in the international community, "this principle of prohibiting foreign interference is known as the principle of *non-intervention*".<sup>1</sup> The elaboration of the term intervention, "as an activity carried out by a country, a group within a country, or an international organization that forcibly interferes in the internal

<sup>1</sup> Steven L. Spiegel., 1995, *World Politics in A New Era*, Harcourt Brace College Publishers, New Jersey, p. 395

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affairs of another country"<sup>2</sup>. The meaning of state intervention against other countries is that intervention can only be applied, if it is carried out in a certain state only, so there is no justification for state intervention over the sovereignty of other countries. Intervention actions that should be justified under international law include *self-defence*.

Intervention under the pretext of *self-defence* is when there has been an armed attack, on the condition that instant, *overwhelming situation, leaving no means, no moment of deliberation*. In fact, the *self-defence* requirement, articulated from *Caroline's case* as the basis for *anticipatory self-defence*. That self-defence carried out when there has not been an armed attack, according to the principles and provisions of international law contained in the United Nation / UN Charter, is prohibited.

*Caroline case* of 1841, was an assault on the battleship *Caroline* by a British warship. On the grounds that *Caroline's* ship had transported armaments and rebels against the Canadian government, which led to the killing of two United States citizens. Whereas previously there were no armed attacks carried out by the *Caroline* ship against British warships.

According to the case, various diplomacy and internal talks between the governments of the United States and Britain produced two justification criteria for the doctrine of *preemptive use of force*, also including *preemptive self-defense*, namely *necessity* and *proportionality*.<sup>3</sup> The Scholars end up using these two terminologies to determine the need for the use of *preemptive use of force* through the construction of the UN Charter that when a state can apply *necessity* to another state that is preparing its armed forces for assault, and act proportionately, then the use of force can be allowed.<sup>4</sup> This means that *anticipatory self-defence* with the principle of *preemptive use of force* embodied in the *Caroline* Criterion itself is fast, excessive, pays no attention to choices, no deliberation, and action-taking does not have to be *unreasonable*. The debate over the legitimacy of the *anticipatory self-defence*, still continues today.

The tragedy of September 11, 2001 experienced by the United States, as an act of terrorism, made countries feel the need to provide a sense of security and protection for their citizens and the territorial integrity of their country from such attacks. In an effort to do so, the practice of some countries today in order to anticipate such an attack, a *pre-emptive military strike* is carried out in the context of *anticipatory self-defense*, with the aim of conducting self-defense before the occurrence of an attack. The practice of *anticipatory self-defence* has become a serious discussion among academics, because this principle is contrary to the principle of *self-defence* contained in the UN Charter.

## 2. METHOD

The writing of this article uses normative juridical research (*legal research*) which is internal research in legal disciplines, in his Haimin said that normative legal research is a research stage to study and discuss law as norms, rules, legal principles, legal principles, legal doctrines, legal theories

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<sup>2</sup> John Baylis and Steve Smith., 1999, *The Globalization of World Politics: An Introduction to International Relations*, Oxford University Press, United Kingdom, p.395.

<sup>3</sup> Anthony Clark Arend., 2003, *International law and The Preemptive Use of Force*, EJIL, p. 91, cited in <http://leszalombog.blogspot.com/2012/03/relevansi-humanitarian-intervention-and-legality-preemptive-use-of-force-in-invasion-of-the-united-states-against-iraq.html>, accessed June 21, 2014.

<sup>4</sup> *Ibid.*

and another reference to resolve the legal issues studied.<sup>5</sup> The approaches used are: *Statute Approach*, *Case Approach*, and *Conceptual Approach*. The technique of collecting legal materials used in this study was collected through library research, namely by conducting a literature review in the form of laws and regulations, books, and legal journals and scientific papers related to the legal issues being studied.

### 3. RESULTS AND DISCUSSION

#### 3.1 Attempts / Efforts to Establish Legal Provisions Become a Legal Precedent

It is not as easy as thought about the practice of a doctrine in the association of the international community, which can then be claimed to be an attempt at the establishment of new provisions of international law, or in other words it can set a legal precedent. Preferably, it is necessary to understand how something can be adopted into a precedent and can be applied to its applicability. The notion of precedent is defined as something that can be used as an example or can be imitated. Wroblewski, explains the understanding of precedent that, "*insights into the judicial application of law were confined mainly to the statutory norms of continental civil law. Any references to the more openly precedent-based common law systems were said to be there only, to draw attention to analogies, parallels and differences in a macro-comparativistic way*".<sup>6</sup> . It requires a broad insight, into the application of limited statutory testing especially for the legal norms of continental civil law. Precedent-based references are more open to the common law system, it is said to exist only "to draw attention to analogies, similarities and differences in a macro-comparative way. So that understanding gives an idea of a precedent must be born out of a legitimate judicial process. Thus," *since individual judicial decisions-and thereby precedents-were expressly excluded from his field of study, Wroblewski's three ideologies of judicial decision-making effectively evade the impact of precedents on a subsequent judge's legal discretion.*<sup>7</sup> *But what would be the corresponding ideologies of precedent-based judicial decision-making if Wroblewski's frame of analysis were extended to cover judge-made law.* That, from the moment individual judicial decisions, as well as precedents expressly excluded from the field of inquiry, the three ideologies according to Wroblewski are from the judiciary effectively that avoid the impact of precedent on subsequent court decisions, but what would be the appropriate ideology of precedent-based court decision-making, if decision-making according to Wroblewski, within the framework of an expanded analysis includes judges' decisions that it is understood that, in addition to something that can be used as a precedent must come from a valid court decision, there also needs to be a process of analyzing the results of the judgment whether it is worthy of being set a precedent in the future or not.

In order to be understood and understandable about something precedent, Hart distinguishes three powerful dilemmas, which can affect it, namely:<sup>8</sup>

*First, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt... Secondly, there is no authoritative or uniquely correct, formulation of any rule to be extracted from*

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<sup>5</sup> Muhaimin, *Legal Research Methods*, Mataram University Press, 2020, P.55.

<sup>6</sup> Raimo Siltala, 2000, *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law*, Hart Publishing, Oxford-Portland Oregon, pp. 11-2

<sup>7</sup> *Ibid.* p. 12

<sup>8</sup> H.L.A., Hart, 1961, *The Concept of Law*, Clarendon Press, Oxford, pp. 131-2., In Raimo Siltala, 2000, *A Theory of Precedent, From Analytical Positivism to a Post-Analytical Philosophy of Law*, Hart Publishing, Oxford-Portland Oregon, p. 12

cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. Thirdly, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by the courts that are bound by it of the following two types of creative or legislative activity. On the one hand courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted from the precedent, and admitting some exception to it not before considered, or, if considered, left open. This process of 'distinguishing' the earlier case involves finding some legally relevant difference between it and the present case, and the class of such differences can never be exhaustively determined.

Although there are no specific rules regarding the formation of precedents, the following court decisions, can cause differences with previous court decisions, taking into account the subject matter temporarily faced, thus giving rise to legal differences.

On the other hand it says, *in following an earlier precedent the courts may discard a restriction found in the rule as formulated from the earlier case, on the ground that it is not required by any rule established by statute or earlier precedent. To do this is to widen the rule. Notwithstanding these two forms of legislative activity, left open by the binding force of precedent, the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule.*<sup>9</sup>

Thus, there is no absolute certainty of the enactment of the previous court's decision against the subsequent decision of the court. It can be explained that, things do not rule out the binding force of precedent.

To put in the foundation for the broader inquiry, which will be made into a prerequisite of a certain jurisprudence and philosophical in forming precedent norms, then it can be seen at four levels of analysis. Where adequate answers will be attempted on the following four questions:<sup>10</sup>

- 1) What are the *operative* premises of the *ratio* of a case as it is manifested on the linguistic-positivist surface-structure level of judicial adjudication?
- 2) What are the *ideological* premises of precedent-norm formation, or the feasible contents of a judge's precedent ideology (Ross), the rule of precedent-recognition (Hart), or the various ideologies of precedent-based judicial decision-making (Wroblewski)?
- 3) What are the *discourse-theoretical* or *conceptual* prerequisites of legal argumentation "beneath" the level of legal ideology, or the axiomatic postulates of law according to analytical positivism, and what are the discourse-theoretical consequences derived therefrom?
- 4) What are the ultimate or final *infrastructure* level prerequisites of legal norm constitution and judicial signification under precedent-following still "beneath" the discourse-theoretical frame of law?

Thus, the operative place of the ratio of a case to the structure of the language of a court decision, can be found in the argumentation of legal considerations oriented towards the practice of legal dogmatics. Then, about the formation of precedents, the rules of recognition of precedents, as well as the theoretical and conceptual prerequisites of legal argumentation in the process of making court decisions, can be found in legal theory. And in the end, the answer to the main and final prerequisites of the norms of constitutional and judicial law in the meaning of the following precedents, is reflected in the philosophy of law

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<sup>9</sup> *Ibid.*

<sup>10</sup> Raimo Siltala, 2000., *Op.Cit.*, p. 14

The terminology of comprehension within the framework of precedent ideological theory, may have been viewed, since : *an analytical point of view, a precedent comprises two elements: the ratio decidendi and the obiter dicta of a case. Ratio decidendi is equal with the binding element of a previous decision vis-a-vis the subsequent court's legal discretion, extending the normative impact of the earlier case beyond the res judicata or the facts originally ruled upon by the first court. Obiter dicta, by contrast, is the argumentative context of the ratio decidendi. The criteria of distinguishing the ratio from the dicta in a case, and the degree of normative binding force ascribed to the ratio, is the core and essence of the doctrine of stare decisis.*

Seen from the perspective of analysis., the precedent consists of two elements, namely *the decidendi ratio* and *the dicta obiter* of the case. The ratio decidendi is the same as the binding elements of the previous decision confronting each other with the subsequent judgment of the court, which extends the normative impact of the previous case beyond *the res judicata* or the fact it was originally ruled over by the first court. *Dicta obiter*, on the contrary is the argumentative context of the *decidendi* ratio. The criterion of distinguishing ratios from *dicta* in a case, and the degree of normative binding force derived ratios, is the essence and essence of the doctrine of *stare decisis*. Said, "When it is said that a court is bound to follow a case, or bound by the decision, what is meant is that the judge is under an obligation to apply a particular ratio decidendi to the facts before him in the absence of a reasonable legal distinction between those facts and the facts to which it was applied in the previous case".<sup>11</sup> When it is said that the court is bound to follow the case, or bound by a decision, what is meant is that the judge is obliged to apply the ratio decidendi, specifically to the preceding facts, in the absence of a reasonable legal distinction between those facts, and those facts applied in the preceding case.

In the opinion of Raimo Siltana, the ideology about precedent, in fact, was adopted by the Supreme Court in six different legal systems, namely "United States (State of New York), United Kingdom, France, Italy, Federal Republic of Germany and Finland".<sup>12</sup> Finally the description of the conceptual boundaries of the different types of precedent ideologies, in the level of *law in action*, says, "in precedent-following was outlined briefly by relaxing the conceptual confines of the various pure types of precedent ideology, giving effect instead to a set or cluster of ideological fragments in actual case-law adjudication. Thereby, the "still life" image of precedent-following was transformed into a more dynamic conception of judicial reality<sup>13</sup>. Actually, in the precedents, it is briefly outlined about the conceptual boundaries of various kinds of purely precedent ideologies, providing the opposite effect for one or a group of ideological pieces that are actually handling legal cases. In this way, the "still alive" image of the precedent, then became a more dynamic conception of judicial reality.

### **3.2 Implementation of the Pre-emptive Military Strike Doctrine as an Effort to Establish New International Legal Provisions.**

Self-defense is a significant principle known in international law, which originated from custom, was recognized and developed into international customary law, which has been practiced for a long time by many countries of the world. Before talking more about self-defence and its implications for the development of international law, there is an

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<sup>11</sup> R. Cross and J.W. Harris, *Precedent in English Law* (Clarendon Press, Oxford, 4th ed. 1991), 98., dalam Raimo Siltala, 2000, *A Theory of Precedent, From Analytical Positivism to a Post-Analytical Philosophy of Law*, Hart Publishing, Oxford-Portland Oregon, p. 65

<sup>12</sup> Raimo Siltala, *Ibid.*, p. 252

<sup>13</sup> *Ibid.*

interesting point of customary international law that needs to be understood, because the elements contained in international customs have been debated.

There has become a serious debate among international jurists on the formulation of international customs. referred to in Article 38 paragraph (1) (b) of the Statute of the International Court of Justice, which reads "International customs, as evidence of general practice accepted as law". The problem lies in the elements of "practice in general" and "accepted as law". The reason is, " On the one hand there is a view that *emphasizes the opinio juris* element by ignoring the *usage* and on the other hand there are authors who place emphasis on the *usage* by completely setting aside the requirements of *the juris opinio*".<sup>14</sup>

Strupp argues that, "*The usage* are not a necessary element in the rule of customary international law". Van Hoof responded, that:<sup>15</sup> This view is more or less veiled by the complicated role that *usage* plays in his theory. Because Strupp drew conclusions from the behavior of the countries at that time that the country had bound itself from a certain rule in the past. In other words, through the *usage* the true constitutive element of the customary law, i.e. *juris opinio* can be proved".<sup>16</sup>

The point is, "the *juris opinio* element is pre-existing, thus it cannot be identified. Therefore, Strupp's theory contains many legal fictions, which are said to be characteristic of the positivist school, of which Strupp himself was one of its members".<sup>17</sup> A modern theory that ignores the material element of the law of habit, namely the *usage*, is what is referred to as *instant customary law*. This concept was introduced by Cheng. Its main concepts contain the view that "the custom needs to take a long time, and there also is no need for custom in the sense of repeated state practices, provided that the *juris opinio* of the country concerned can be clearly proved. As a result, the law of international customs in reality has only one constitutive element, *the juris opinio*".<sup>18</sup>

The difference in the point of views, according to Van Hoof, "first is whether the rules of customary international law can be formed solely on the basis of the impulse of *the juris opinio* without being accompanied by an *usage*. Secondly, whether the establishment of customary international law can occur by isolating the *usage*".<sup>19</sup> In the synchronization of the two elements of *juris* and *gut* that needs to be sought for common ground, but in many theories it is tantamount to demanding something impossible. Thus, there needs to be a "chronological separation of the two constitutive elements of international customary law". Meijers argues that the separation has its own distinctive features, where the main characteristic of the theory is a distinction between the three stages that every regulation of international law must go through before its existence is recognized.<sup>20</sup> . The three stages are as follows:

At the first stage is described the content and regulations in question. This stage has not alluded to the legal or non-legal nature of the regulation. What happens is the depiction of a certain type of behavior without alluding to the issue of whether or not the regulation

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<sup>14</sup> G.J.H, Van Hoof, 2000 , *Rethinking The Sources of International Law*, Language Transfer; Hata. Alumnii, Bandung, p. 174

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, p. 175.

<sup>20</sup> *Ibid.*, p. 186

will (necessarily) have a binding nature. The second stage is the stage in which in the states concerned are being formed the will for a rule to become a rule of law; or in the words of Meijers is "what happens during this stage is the development of the will to make a rule into law. However, since the formation of the will of these states is an internal process, this stage is referred to as the stage of the will to be bound. At the third stage, the will developed during the second stage should be able to be known by all countries for whom the regulation in question becomes law. This third stage is intended to divide the regulations formed at the first stage into law regulations and not laws. Therefore, this third stage can be called the stage of law creation.<sup>21</sup> The model of Meijers theory is appropriately applied to the process of forming international treaties, although the advantage shown by international treaties is that the first and third stages are clearly distinguishable, although in practice they sometimes overlap.<sup>22</sup> In contrast to customary international law, it is said that:

The problem is not just about overlapping circumstances, but rather with circumstances in which "often the stages are indistinguishable. This seems to be at the corer of the issue of customary international law. The distinction between the two components of international customary law, which here is presented in the form of a distinction between the different stages of the process of creating an international customary law regulation is vital / important. Meijers aptly states that the mixing of these elements, special in terms of time is "one of the reasons why there is no consistent theory that is umum recognized in the formation of the law of international customs has been realized."<sup>23</sup>

Among the reasons added by Meijers is the fact that: Both international treaties and the practice of the courts often neglect to distinguish between the conditions that must be met in the creation of customary international law on the one hand, and for its existence on the other. Consequently, as mentioned is to demand something impossible in which existence is made a condition for creation. Therefore, it is very important to separate these two elements or stages in practice.<sup>24</sup>

Van Hoof came to the conclusion that, "the *usage* that functions at that first stage and through it the content of the rules is described and formulated; *the juris opinio* will be formed during the second stage, and declared or may be recognized in the third stage".<sup>25</sup> . Conceptual problems experienced by customary international law can have an impact on the formation of international law in the future.

The habitual elements embodied in the practice of *self-defence* must meet the categories of necessity and *proportionality* in anticipation of an armed attack, which Ian Brownlie said, "*The latter condition is often described as the essence of self-defence*".<sup>26</sup> This is very important in the context of self-defence to create really favorable conditions in an armed attack. So it can be said that between the act of self-defense must be balanced with the threat of armed attack that occurs.

In the same way, the advisory opinion submitted by the *International Court of Justice (ICJ)*, related to the legality of threats to the use of nuclear weapons in 1996, which reads "*the International Court of Justice reaffirmed the importance of the principles of both necessity and*

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<sup>21</sup> *Ibid.*, pp. 187-188

<sup>22</sup> *Ibid.*, p 188

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, p. 189

<sup>25</sup> *Ibid.*

<sup>26</sup> I. Brownlie, 1963, *International Law and the Use of Force by States*, Clarendon Press, Oxford, p. 279.

proportionality. The Court noted that these dual conditions represent a rule of customary international law that applies equally to Article 51 of the Charter".<sup>27</sup> that the International Court of Justice reaffirmed the importance of the principles of necessity and proportionality. The Court noted that both conditions constitute the rule of customary international law, which also applies equally to Article 51 of the UN Charter. Apparently, because it must have an urgent need and action commensurate with it, it has been used as the main principle in the application of armed force in the framework of *self-defence*.

The category of *necessity* as Webster expressed in *The Caroline* case reminds that, the current there is a need for self-defense is swift, extraordinary, without leaving the choice of means, and there is no time to negotiate it. So, the act of *self-defence* should not be unreasonable or excessive, the act is justified and should be limited only to the needs of self-defense. The point is, in the event that *self-defence* measures are justifiable under customary international law, provided that they must meet the merits of a swift, extraordinary, direct manner, and no alternative action can be taken. In other words, self-defense is permissible if an armed attack has occurred and Article 51 of the UN Charter limits *self-defence* measures only in such situations.

Explicitly, the purpose of Article 51 is to limit the use of force in self-defense. The point is, a state in which an armed attack has actually occurred. Based on this logic, it would violate international law if it was involved in any type of *preemptive self-defence* action. Although Article 51 refers to the "inherent right" to self-defense, that inherent right can only be exercised only after an armed attack has occurred.

The non-responsiveness of a threat to carry out *self-defence* actions, will have an impact on the potential vulnerability for those who do not commit *preemptive self-defence* actions in the context of self-defense. This understanding according to Reisman, "*The claim to preemptive self-defense is a claim to entitlement to use unilaterally, without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen by the potential preemptor as susceptible to neutralization only at a higher and possibly unacceptable cost to itself*".<sup>28</sup> Stated that unilaterally to carry out *preemptive* acts in the context of *self-defence* is a right, without prior international authorization, it is said that the acts of violence taken are placed at the very top in anticipation of the occurrence of something new development that has not yet occurred or anticipate the occurrence of an immediate threat, but if it is allowed to happen, then the potential vulnerability for those who commit such *preemptive* acts is to return them to their original state very difficult and cost more, perhaps even unacceptable to themselves. Reisman's understanding gives the understanding that, preemptive actions must be carried out by considering the risk of impact that will occur if they are really preemptive not implemented, and this is very fatal for the state in making these decisions.

Self-defense is part of the right of the state to make the decision to engage in war, in order to defend the sovereignty of the country. The decision of the war in the framework of self-defence, described by Tarcisio Gazzini is, "*During the development of the just war doctrine,*

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<sup>27</sup> C. Gray, 2000, *International Law and the Use of Force*, Oxford University Press, Oxford, p. 106.

<sup>28</sup> Reisman, M, 2006, *The Past and Future Of the Claim of Preemptive Self – Defense*, 100 American Journal of International Law, hlm. 526., dalam E.O.S. Odhiambo, K. Onkware, J. Kassilly, L.T. Maito, W. A. Oboka, J. W. Wakhungu, O. M. Ntabo., Kenya's Pre - Emptive And Preventive Incursion Against Al - Shabaab In The Light Of International Law, Journal of Defence Resources Management, Vol. 3, Issue 1 (4)/2012., [http://journal.dresmara.ro/issues/volume3\\_issue1/03\\_odhiambo\\_onkware\\_kassilly\\_maito\\_oboka\\_wakhu\\_ngu\\_ntabo.pdf](http://journal.dresmara.ro/issues/volume3_issue1/03_odhiambo_onkware_kassilly_maito_oboka_wakhu_ngu_ntabo.pdf), in access on the date 6 Januari 2015



*the resort to war was still unlimited and remained a state prerogative. Self-defence was of little consideration as states were the final arbiters in determining their right to engage in war*".<sup>29</sup> . Independently of the provisions of international law on the requirements relating to the admissibility of self-defence measures, States have the absolute right to safeguard their territorial sovereignty through acts of self-defence..

Obviously, it takes an armed attack to claim self-defence. Whether or not an armed attack by a country is allowed against another sovereign state, professor Anthea Roberts of The London School of Economics is allowed that, "points out that even in the often sympathetic setting of a humanitarian crisis, the concept "is ultimately not a sustainable position in international law because it will come to be recognized as an exception to the prohibition on the use of force".<sup>30</sup> Often in its arrangements sympathetic to humanitarian crises, this concept, ultimately not in a sustainable position in international law, since it would be recognized as an exception to the prohibition against the use of armed force. Thus it can give rise to a difference of understanding caused by the mindset between the legality and legitimacy of the act. According to Professor Anthea Roberts, because of : *The "illegal but justified" approach also shifts the focus away from questions of legality and towards questions of legitimacy. Attempting to completely divorce legality and legitimacy can ossify the law and undermine its relevance, which increases the risk of self-serving exceptionalism. Relying on legitimacy as an independent justification for action is also problematic because legitimacy is underdefined and open to manipulation by powerful actors.*<sup>31</sup>

There is some explanation that, the relationship between legality and legitimacy cannot be separated, because the validity of something must be obtained from or gained legitimacy from the holder of the right of competent power. Beyond that, it can be said to be *illegal but justified*. The legality of the act of *preemptive military strike* raises a legal question posed by Gregory E. Maggs, a professor at the university of Washington that, "Under the United Nations Charter, how might the United States justify a preemptive strike on a rogue nation's nuclear weapons development facilities? The essay answers this question by arguing that the United States would not have to rely on controversial theories like "self-defense in response to an imminent attack" or "anticipatory self-defense."<sup>32</sup> How could it be possible that under the UN Charter, the United States justified the act of *preemptive strike* against countries that build nuclear weapons facilities. The United States should not rely on controversial theories such as, *self-defense* in anticipation of *imminent attacks* or *anticipatory self-defense*.

The question posed makes clear the gap in the relationship between the act of self-defence under Article 51 of the UN Charter and the anticipatory self-defence in relation to the state that builds nuclear weapons, clearly has no connection of self-defence. That is, self-defence is carried out as long as there is a real threat approaching.

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<sup>29</sup> Tarcisio Gazzini, 2005, *The Changing rules on the use of force in International Law* , Manchester University Press, p. 123.

<sup>30</sup> Anthea Roberts, 2008, *Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?*, in Human Right, Intervention, And The Use Of Force 212 (P. Alston, E. Macdonald, eds., Oxford University Press, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1518290](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518290), dalam Charles J. Dunlap, Jr, 2013., Op.cit.

<sup>31</sup> Anthea Roberts, 2008, *Ibid*.

<sup>32</sup> Gregory E. Maggs, 2007, *How the United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities Under the U.N. Charter*. Syracuse Law Review, Vol. 57, No. 465; GWU Legal Studies Research Paper No. 373; GWU Law School Public Law Research Paper No. 373. Available at SSRN: <http://ssrn.com/abstract=1029660>, in access on the date 6 Januari 2015

Gregory E. Maggs explained that, many authors have discussed the issue of *preemptive strikes* on the construction of nuclear weapons facilities. Where there are three schools on which he is based his thinking, namely:<sup>33</sup> *First, most writers assert that preemptive strikes are not permitted because Article 51 only recognizes a right to use military force in response to an actual "armed attack." Accordingly, these writers believe that the United States cannot engage in a preemptive strike against rogue nations' nuclear weapons development facilities. Second, some writers believe that Article 51 permits a nation to use force in response not just to an actual armed attack, but also when facing an "imminent armed attack."*<sup>34</sup> *However, this broader view still would not justify a preemptive strike unless the United States or its allies faced an immediate threat of attack, which they do not. Third, still other writers, including the President, express a different opinion, and argue for an expanded right of "anticipatory self-defense" that would allow armed attacks, at least against nuclear weapons development facilities.*

The aforementioned dissent, shows that the expansion of the concept of self-defence still requires a clear rule of law, because as long as Article 51 of the UN Charter is still in force, so long as it is also a claim to self-defence there must first be a real threat of armed attack. Explained further, "*most international scholars appear to believe that preemptive military strikes are not permitted under the U.N. Charter*".<sup>35</sup> . In which, academics who are experts in the field of international law believe that the act of *preemption* committed by the armed forces cannot be applied under the UN charter. Concluded by Mary Ellen O'Connell is, "*for instance, has concluded that the only clear exception to the general prohibition on the unilateral use of force is that states may use force in self-defense against an armed attack*".<sup>36</sup> The only explanation for the exception to the unilateral use of armed force is that states can use armed force to defend themselves against armed attacks. The same has also been recognized by professors who are experts in other areas of international law.<sup>37</sup>

The several countries supporting *preemptive self-defence* measures, also want the creation of new rules that legitimize such actions, because the prohibition on the use of armed force under international law still restricts the act of *preemptive self-defence*. As quoted by Jordan Paust, that: *The prohibition of the use of force under international law has been criticized for restricting the pre-emptive use of force after recent terrorist attacks on the United States. Under the Bush doctrine, the United States has been the most vocal exponent of this critique, and its 2003 war against Iraq is the most conspicuous application of the doctrine of pre-emption. Russian President Vladimir Putin, Israeli Prime Minister Ariel Sharon, British Prime Minister Tony Blair, Italian Prime Minister Silvio Berlusconi, and Australian Prime Minister John Howard have also*

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<sup>33</sup> *Ibid.*

<sup>34</sup> Sean D. Murphy, 2005, *The Doctrine of Preemptive Self-Defense*, 50 Vill. L. Rev. 699, 706-19, summarizing a variety of views on the subject., dalam Gregory E. Maggs, 2007. *Ibid.*

<sup>35</sup> Gregory E. Maggs., *Ibid.*

<sup>36</sup> Mary Ellen O'Connell, 2002, *The American Society of International Law Task Force on Terrorism, The Myth of Preemptive Self-Defense*, at 5 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf> (last visited Oct. 13, 2006). Quoted in Gregory E. Maggs, *Ibid.*

<sup>37</sup> Michael J. Glennon, Chris Bordelon, Brendan M. Howe, Jasper S. Kim, Jane E. Stromseth, Richard M., 2002, *Gardner all have reached essentially the same conclusion*, in Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 553 (2002); Chris Bordelon, *The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law*, 9 CHAP. L. REV. 111, 111-12 (2005); Brendan M. Howe & Jasper S. Kim, *Legality, Legitimacy and Justifications for Military Action Against North Korea*, 11 U.C. DAVIS J. INT'L L. & POL'Y 229, 233 (2005); Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 636 (2003); Richard N. Gardner, *Neither Bush nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585, 585-86 (2003)., quoted in Gregory E. Maggs, *Ibid.*

emphasized the importance of the pre-emptive strike doctrine in defending their countries against gathering threats of terrorism and weapons of mass destruction in the hands of leaders such as Saddam Hussein. These states have in one way or another advocated a new rule of international law allowing the pre-emptive use of force.<sup>38</sup>

Strengthened by opinions of René Värk, namely, “Pre-emptive self-defence is clearly unlawful under international law states may not use force against another state when an armed attack is merely a hypothetical possibility, even in the case of weapons of mass destruction.”<sup>39</sup> Consequently pre-emptive for self-defence clearly violates international law. It is impossible for a canyon to use force against other countries when an armed attack occurs, it is only a hypothetical possibility, even in the case of weapons of mass destruction. One example in the history of international military justice, where the Nuremberg Court of Justice held that, “The International Military Tribunals at Nuremberg rejected the argument of Germany that the invasion of Norway was a necessary act of self-defence in order to prevent a future Allied invasion and to preempt subsequent possible Allied attack from there”.<sup>40</sup> The Nuremberg International Military Tribunal rejected the argument from Germany that the Norwegian invasion was a necessary measure against self-defence to prevent a future Allied invasion and to preempt a possible subsequent Allied attack.

Always in the cross-section of opinion against the prevention of armed attacks in anticipatory measures in the context of self-defence, Dinstein argues, “defines the concept as a “preventive measure taken in “anticipation” of an armed attack, and not merely in response to an attack that has actually occurred”.<sup>41</sup> It defines it as the concept of “taken precautions” in anticipation of an “armed attack, and not just in response to an attack that actually occurred. While it is clear that anticipatory self-defence must occur before an actual attack, he uses the term deterrence in defining anticipatory self-defence suggesting that preventive self-defence is seen as synonymous with anticipation of self-defence.

There is a therefore a perceptual similarity between preventive and preemptive measures both have the meaning of prevention, although both preventions do not have an element of imminent threats to carry out self-defence. In connection with the same, it was conveyed by Jack Levy in identifying the difference between *preemption* and *prevention*, which is as follows:<sup>42</sup> First, while pre-emption is usually a tactical response to an immediate threat, prevention tends to be a strategic response to a longer-term threat, or to one that has yet to develop. Second, a pre-emptive attack is designed to forestall deployment of existing forces or weapons. Prevention, on the other hand, aims to halt the development of new forces or new weapons systems. Third, in pre-emption, it is the imminent risk of attack by an adversary that leads a state to take

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<sup>38</sup> Jordan Paust has argued that the claim that a dissenter can sometimes not be bound by norms of customary international law is a minority view and is “illogical, false and threatening” to the nature of customary international law. See Jordan Paust, “Customary International Law in the United States: Clean and Dirty Laundry” (1998) 40 *Germ. Y.B. Int’l L.* 78. Paust is cited with approval by former Justice and Vice-President of the International Court of Justice C.G. Weeramantry. See C.G. Weeramantry, *Universalizing International Law* (Leiden: Martinus Nijhoff, 2004) at 226., dikutip dalam James Thuo Gathii, 2005, *Assessing Claims Of A New Doctrine Of Pre-Emptive War Under The Doctrine Of Sources.*, *Osgoode Hall Law Journal* Vol. 43, No. 1 & 2 2005, [http://www.vedegylet.hu/fejkrit/szvggyujt/gathii\\_preEmptiveWar.pdf](http://www.vedegylet.hu/fejkrit/szvggyujt/gathii_preEmptiveWar.pdf), diakses pada tanggal 6 Januari 2015.

<sup>39</sup> René Värk, 2003, *Op.Cit*

<sup>40</sup> *Ibid.*

<sup>41</sup> Yoram Dinstein, 1994, *War, Aggression, And Self-Defence*, Cambridge University Press, p. 182-183

<sup>42</sup> J. Levy, 1987, *Declining Power and the Preventive Motivation for War*, *World Politics*, October 1987, vol. 40, no. 1, p. 82.

military action against that adversary. In contrast, prevention is caused by the gradual deterioration of a state's relative military power and the strategic risk.

From the opinion above describes two different situations in the use of armed force in anticipation of an armed attack that may occur in the future. *Pre-emption measures* are carried out to prevent the occurrence of imminent or approaching threats. On the contrary, preventive measures are carried out to prevent the occurrence of long-term threats. The simple question is whether Article 51 of the UN Charter has become the only source of a state's right to defend itself in international law and allow anticipatory self-defence. According to professor Dinstein, that: *That Article 51 "only highlights one form of self-defence (namely in response to an armed attack)," and that the right of self-defence is a pre-existing, inherent right recognized in customary international law.*<sup>43</sup>

There is only one legal provision on *self-defence*, which is Article 51 of the UN Charter. It would be naïve for a large country like America to assume the right of anticipatory self-defence while actually not having an element of attack going on or approaching. Thus, *"Anticipatory self-defence, if legitimate under the U.N. Charter, "would require regulation by lex scripta more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater"*.<sup>44</sup> That, an anticipatory self-defence, if valid under the UN Charter, would require clearer regulation, than a response to an armed attack, because of the incomparable chances of misconduct.

In line with that thought, by Van de Hole, explained *"In addition to this, adherents would say that any case of anticipatory self-defence would require a lex scripta more vividly worded than just armed attack"*.<sup>45</sup> Malcom Shaw stated that, *"the UN Charter provision only refers to self-defence in response to an armed attack and that its vagueness is deliberate. The Charter assumes that pre-emption of armed attacks are dealt with by the customary law."*<sup>46</sup> The UN Charter refers only to self-defence in response to an armed attack and that of deliberate vagueness, the Charter assumes that *preemption* against an armed attack is handled by customary law.

According to Shaw's statement, can open up the mindset of forming legal dualism in the enforcement of self-defence actions. That self-defence purely follows the concept of Article 51 of the Charter, whereas the application of *pre-emptive military strike* in the anticipatory shutter of *self-defence* follows the concept of customary international law. Megi Madzmariashvili, also gives the difference between self-defence which is anticipatory in nature and *pre-emptive actions*, which are as follows: *a strict distinction should be made between the notions: "anticipatory" and "preemptive" attack. In many research works these two concepts are confused and mostly used as synonyms describing a preventive attack. However, this attitude is wrong as the notions do not have the same meaning. "Anticipatory" attack is used to describe military action against an imminent threat, while "preemptive" attack is employed to describe the response to a threat that is more remote in time"*.<sup>47</sup>

Finally it is clear that self-defence anticipatory action refers to actions taken in response to threats, while *preemptive self-defence* refers to actions taken in response to perceived threats

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<sup>43</sup> Yoram Dinstein, 2001, *War, Aggression And Self-Defence*, Cambridge University Press 3d Ed., United Kingdom, p. 167

<sup>44</sup> Yoram Dinstein, 2001, *Ibid.*

<sup>45</sup> Leo Van Den Hole, 2003, *Anticipatory Self-defence under International Law*, American University International L Rev 70. p. 84.

<sup>46</sup> Malcolm Shaw, 2008, *International Law*, 6th edn Cambridge University Press 2008, hlm. 1132.

<sup>47</sup> Megi Madzmariashvili, 2011, *Preemptive self-defence againsts State Harboursing Terrorist*. Baltic: The Riga Graduate School of Law, p. 22

that are still too far away. The expanded legality of self-defense measures, will eventually prove to be a necessary and desirable development in response to new threats in the international system remains to be seen. However, it is worth understanding the idea of self-defense now becoming broader, its certainty emerging and evolving because the concept in question has existed before. The doctrine of preemptive self-defence proposed by the United States, would carry the same risks as harassment of sovereign states. Preemptive *military strike* actions when necessary need to be carried out by means of UN Security Council authorization. War within the framework of self-defence by the actions of each willing state, cannot give the same legitimacy as the actions carried out under the flag of UN.

The Charter of the United Nations provides reasons that can justify the use of force. It is ironic when the Charter is only limited to the inherent right to self-defense. But this inherent right, does not limit what the state can do in self-defense. The UN Charter can be interpreted broadly as an act of putting a state under the obligation to accept a first attack, or to strike first, only on the basis of absolute clarity of warning that the threat of an attack is false or imminent. In other words, the recognition of self-defense rights can be carried out, indeed it can be interpreted as a license of preventive attacks on the victim's country in question. This is not to deny the language of Article 51, which does not arise to qualify the right inherent in self-defense by conditioning the phrase, "if an armed attack occurs." But is it accepted that the time interval between attacks and the prevention of aggression is anticipated? In fulfilling the answer to that question. No legal authority can give an answer. If a country is in a reasonable position for a truly imminent threat, it is in a position close enough to, not contrary to law and morals on the territory of preemption. However, the UN Charter, in essence, can, and can be interpreted as war tolerance for deterrence. Such an interpretation may sound legally and politically because it is clearly an offence, though not politically original, of the intent of the Charter. Remember that UN members are obliged to deny the use of force in their international relations, except, of course, in adverse conditions of self-defense.

#### 4. CONCLUSION

Pre-emptive action has not been categorized as a precedent of international law, but it has led to the formation of international customs through the practice of states, so it must at least look for a new formula for the future application of self-defence, in the form of amendments to Article 51 of the UN Charter. If this is accepted, then there must be three conditions that must be fulfilled in order to legitimize precautions for the use of armed force in self-defense, Firstly, there must be clarity of the intended self-defense; Secondly, having the ability to maintain and provide assurance against the minimum level of damage; and thirdly, the obligation to repair property damage caused by the envisaged military intervention.

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