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A CRITICAL ANALYSIS OF THE INTERNATIONAL JUSTICE SYSTEM ON SELF DEFENCE IN INTERNATIONAL LAW

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ABSTRACT:

Self Defence being an inherent right, it can only be regulated and not restrained. Every state under international law is vested with the sovereign power to use defensive force against any unprecedented attacks or aggression. International law permits defensive force and prohibits offensive force. Apart from customary international law, the international justice system plays a predominant role in regulating the right to exercise defensive force by the state. Though defensive forces are considered a lawful use of force, they are not unlimited. It is pertinent to analyse the interpretation of international courts to understand the acceptable application and usage of self-defence. This research predominantly focuses on the judgments and opinions delivered by the Military Tribunals and the International Court of Justice on self-defence arising from pre- and post-Nicaragua. This research limits its focus to the practical aspects of self-defence and provides a vast exploration of the court's interpretation of self-defence. This research contributes to the understanding of the Court's view on the usage of self-defence in international law.

Keywords:

Self Defence, International Justice System, International Court of Justice, Nicaragua and Use of Force.

Introduction:

Self-defence under international law reaffirms a state's inevitable right to the use of force to protect itself from the aggression of another state. It is pertinent to mention that at times, self-defence is in constant conflict with the prohibition to the use of force under international law. The state's inherent right to defend itself by using force is incompatible with the principles on the prohibition of the use of force. However, with the customary international law and state practice, self-defence is rendered as a lawful exception to the prohibition of the use of force, and it is perceived as a lawful extension of the permitted use of force under international law.

Though the ICJ is the principal judicial organ of the UN, its involvement in self-defence

cases was minimal until the 1986 Nicaragua case, which was the first detailed judgment on this subject matter. Since Nicaragua, there has been a significant increase in cases involving the use of force, and the most notable cases that contributed to self-defence jurisprudence after 2000 were Oil Platforms 2003, Israeli Wall Advisory Opinion 2004, and DRC v Uganda 2005.

Self-defence has undergone a phenomenal change; the judgments of the International Court of Justice shed light on its dynamic nature. Under this lens, self-defence has been analyzed from cases arising from pre- and post-Nicaragua.

The **objective** of this research is to analyze the self-defence through the interpretation of the international justice system

to understand its usage and extent of application by the state.

This research relies on both primary and secondary sources.

Chapter I: International Justice System and Self Defence Pre Nicaragua

I. The Major War Criminals Trial 1945

As early as 1942, during World War II, the Allied Powers, the US, UK, USSR, and France agreed that Nazi leaders must be held accountable for their actions. This agreement was reinforced in 1943 through the Moscow Declaration. By early 1945, the Roosevelt administration in the US had developed a plan to hold international trials for top Nazi officials. After Roosevelt's death, President Truman continued the effort, emphasizing the need for justice and legal accountability. To conduct the trials, a new International Military Tribunal (IMT) had to be created. This required drafting a legal Charter that would define the tribunal's powers and the crimes it could prosecute. In July 1945, the London Conference was held with representatives from the US, UK, USSR, and France. This led to the Nuremberg Charter, which outlined the legal basis for the tribunal. One of the key discussions during this time was how to define and punish the act of aggression or starting a war without just cause. Article 6 identified three major crimes: Crimes against peace, War crimes and Crimes against humanity. Under Article 6(a), planning or waging an aggressive war was officially considered a punishable offense. Although an early draft of Article 6 mentioned the right of self-defence, stating that defending against an aggressor or helping a state under attack was not a crime, this language was later removed. Still, the idea of legitimate self-defence remained recognized as a lawful exception to the prohibition on war, consistent with Article 51 of the UN Charter, which had just been adopted. The Nuremberg Trials began in November

1945³⁹¹, after 21 top Nazi leaders were indicted on October 6, 1945³⁹². The trials focused on four main charges, Count I: Conspiracy to commit crimes against peace, war crimes, and crimes against humanity, Count II: Committing aggressive war (violating international agreements and peace), Count III: War crimes (e.g., mistreatment of prisoners, unlawful attacks) and Count IV: Crimes against humanity (e.g., Holocaust, mass persecution). The judgment was delivered on September 30 and October 1, 1946. 12 leaders were found guilty of crimes against peace under Count II. 12 of the accused were sentenced to death by hanging. 3 were given life sentences, and others received lighter punishments. Then Tribunal made it clear that, the Nazi regime had premeditated and carefully planned crimes of aggression, these crimes weren't accidental or defensive they were part of a deliberate strategy to expand German power and each invasion (Poland, France, USSR, etc.) was an act of aggression. The entire Nazi government was held collectively responsible for these unlawful acts. Even though self-defence was not explicitly mentioned in the final version of the Charter, the Tribunal recognized it implicitly. Wars started in genuine self-defence or to help a country under attack would not be considered illegal. But Nazi Germany could not justify its wars as acts of self-defence, as the evidence showed that their military actions were offensive and planned, not reactions to threats. The Nuremberg Trials were a landmark moment in international law, establishing that waging aggressive war is a serious international crime and leaders can be personally held accountable for such actions. Though self-defence remains a valid exception, it must be clearly justified. The trials helped lay the groundwork for modern international

³⁹¹ International Military Tribunal (IMT), Judgment of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nuremberg: IMT, 1947, p. 171.

³⁹² Christopher O Meara, *Necessity and Proportionality and the Right of Self Defence in International Law*, University College London, Oxford University Press, (United Kingdom, 2021)

criminal law, including future tribunals and the International Criminal Court (ICC)³⁹³.

Self-defence and Major War Criminals Trial:

In April 1940, Germany launched a sudden military invasion of Norway, despite having previously given Norway assurances that it would respect its neutrality as long as Norway remained neutral toward Germany. However, just seven months after that pledge, Germany carried out a large-scale invasion involving naval, air, and land forces, targeting major Norwegian cities. At the Nuremberg Trials, the prosecution argued that Germany's invasion was a calculated and pre-planned act of aggression. Germany's defence authority claimed the invasion was an act of preventive self-defence. They argued that the Allied powers (UK and France) had plans to occupy Norway and use it to attack Germany or to cut off Germany's iron ore supply from Sweden (a vital war resource). The defence emphasized that if Britain gained control of Norway, Germany's access to critical resources and control of the North Sea would be threatened; thus, a preemptive strike became a strategic necessity. Germany claimed to have monitored the situation since autumn 1939 and only proceeded with the invasion in February 1940 when they believed action was unavoidable. The judges at Nuremberg rejected Germany's self-defence claim, concluding the invasion was not justified under international law. Evidence showed Germany started preparing plans to invade Norway as early as October 1939, months before any Allied planning. According to international legal standards, particularly the Webster formula from the Caroline incident, a country may use force in self-defence only in the face of an immediate and overwhelming threat, with no time to deliberate. However German act was politically motivated, not defensive. This showed that the operation's true purpose went far beyond any short-term threat; it was a strategic move for territorial expansion.

The Tribunal made it clear that preventive self-defence is only lawful when a real and immediate danger exists. In this case, Germany did not face an imminent attack, and therefore, the invasion of Norway was not a legitimate exercise of the right to self-defence under international law. The attack was categorized as a war of aggression, violating both international treaties and the principles of neutrality. Self-defence in international law is very narrowly defined; it requires a present and unavoidable danger, not speculative threats. Germany's invasion of Norway failed to meet that threshold, as it was based more on long-term strategic goals than an actual imminent threat. The Nuremberg Tribunal reaffirmed that even so-called preventive wars are illegal unless they meet strict criteria making this case a major precedent for the limits of self-defence under international law³⁹⁴.

2. The Trial and Judgment of the Japanese War Criminals 1946

The Tokyo Tribunal, also known as the International Military Tribunal for the Far East, was created following the Potsdam Declaration (July 1945). On 19 January 1946, General Douglas MacArthur, as Supreme Commander of Allied Powers, issued an executive order establishing the Tribunal and approving the Tokyo Charter. The Charter defined three categories of crimes: Crimes against peace, Crimes against humanity, and War crimes. In this case, 28 high-ranking Japanese officials were prosecuted, 7 were sentenced to death by hanging, and the rest received prison sentences from 7 years to life. In 1940, Japan renounced its treaty with the Netherlands concerning the East Indies and offered a new one, which was rejected by the Dutch government-in-exile. In the same period, Japan occupied French Indo-China, conducted espionage missions to Java, Sumatra, and Bali, and the Japanese parliament discussed military plans against the Dutch East Indies in January 1941. The Tribunal found Japan's

³⁹³ Michael Schmitt, *International Law and the Use of Force*, JMO Lecture, US Naval War College (2005), (last visited on 19.04.2025)

³⁹⁴ Kinga Tibori Szabo, *Anticipatory Action in Self Defence – Essence and Limits under International Law, Part 1 – Pre Charter Customary Law on Self Defence*, (TMC Asser Press, Netherlands, 2011) at 131-135

actions part of a broader, long-term strategic and economic plan. Japan's defence argued the invasions were self-defensive responses to economic aggression (like embargoes) by the U.S., U.K., France, and the Netherlands. Japan had no choice but to go to war to preserve national prosperity and security. The Tokyo Tribunal³⁹⁵ rejected these arguments by stating that Japan had clearly planned the invasions well before any declarations of war or acts of economic resistance. Preparations for war in the East Indies began as early as mid-1940, including military strategy discussions and spy missions. There was no actual or imminent military threat from the Netherlands or other Western powers. Economic restrictions were seen as lawful attempts to counter Japan's own aggression in Asia, especially against China. Japan's claim of self-defence was viewed as a pretext for achieving its broader expansionist goals. The declaration of war by the Netherlands was considered a justified act of self-defence, made only after Japan began military aggression. The Tribunal concluded that the Pacific War, including the invasion of the Dutch East Indies, was a long-prepared, offensive military campaign. Japan's goal was to cut off Chinese access to aid, secure the natural resources of neighbouring states, and dominate the South Pacific. The Tribunal did not provide a detailed legal analysis of self-defence (unlike Nuremberg), but affirmed that legitimate self-defence is only acceptable against an imminent threat of attack and ruled Japan's invasions to be wars of aggression, not defensive wars³⁹⁶.

3. Corfu Channel Case 1946

The International Court of Justice (ICJ) ruled on the use of force in international law in this case for the first time. The dispute arose when two British warships were damaged by sea mines while passing through the Corfu

Channel, located in Albanian territorial waters. As a result, the United Kingdom brought a legal case against Albania at the ICJ. The UN Security Council encouraged both countries to submit the matter to the ICJ, aiming for the Court to settle the entire issue. The Court held Albania liable for the damage to the British ships. It ruled that Albania should have been aware of the mines in its waters and failed in its obligation to prevent harm to other states. This ruling relied on a core principle of international law: "Every state has a duty not to knowingly allow its territory to be used for acts that harm other states."³⁹⁷ This principle has since been expanded and referenced in future legal decisions. For example, it has been interpreted to include a "duty of vigilance", meaning states must not tolerate violent acts launched from their land, especially if these acts target the government or peace of another state. It also laid a foundation for discussions on self-defence against non-state actors later in international law. While the UK accused Albania, it also conducted a minesweeping operation in Albanian waters without Albania's permission. The goal of this action was to collect evidence for the ICJ to show who laid the mines. The ICJ, however, rejected the UK's justification and ruled that entering another state's territory, even for investigative purposes, was illegal. The Court emphasized that the UK's action violated the principle of non-intervention and territorial sovereignty. Even if the motive was to support international justice, this did not excuse breaching another state's sovereignty. Self-defence or acting on behalf of the international community did not justify forceful intervention³⁹⁸. The Court warned that allowing such actions could open the door to abuse by powerful countries, which would undermine the peaceful principles of the UN Charter. The ICJ took a strict and cautious view of when force could be legally used. It made clear that force is only allowed in very limited circumstances, such

³⁹⁵ International Military Tribunal for the Far East (IMTFE), Judgment of 12 November 1948, in B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946 – 12 November 1948*, Amsterdam: APA-University Press Amsterdam, (1977), Vol. I-II.

³⁹⁶ Kinga Tibori Szaboat, (n 4), 135-138

³⁹⁷ James. A Green, "The *ratione temporis* elements of self defence", Journal on the use of force and international law, (2015)

³⁹⁸ Corfu Channel (United Kingdom v. Albania), Merits, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4.

as clear self-defence after an armed attack. The broad interpretations of Article 2(4) of the UN Charter prohibit the use of force against territorial sovereignty and the political independence of the state. The Corfu Channel case set a strong precedent in international law by reinforcing the sovereignty of states, the strict limits on when force can be used and the importance of non-intervention and territorial respect. It confirmed that even powerful states must follow international rules and cannot violate another country's territory under the guise of collecting evidence or protecting peace³⁹⁹.

Chapter 2: International Justice System and Self-Defence Post Nicaragua

1. Nicaragua case 1986

The Military and Paramilitary Activities in and against Nicaragua case stands as a landmark in the development and clarification of the doctrine of self-defence in international law, particularly under the framework of customary international law. This case is frequently cited in the legal arena due to its comprehensive articulation of the principles governing individual and collective self-defence and its delineation of the thresholds and conditions required for invoking this right under international law. This case was brought before the International Court of Justice (ICJ) by Nicaragua on 9th April 1984. Nicaragua accused the United States of supporting, and continuing to support, Contra forces—military and paramilitary groups opposed to the Sandinista government of Nicaragua. Nicaragua asserted that this support amounted to a sustained use of force by the United States, thereby violating established principles of international law. Additionally, Nicaragua alleged that the United States had directly used force against it. This included specific actions such as the mining of Nicaraguan ports and aerial incursions into Nicaraguan territory. These actions, as Nicaragua claimed, were executed by agents funded by the U.S. government and were

commanded by U.S. personnel, who also participated directly in the operations. These events occurred during a time of internal revolution in Nicaragua. In 1979, the Sandinistas overthrew the previous regime led by President Anastasio Somoza. The new Sandinista government faced armed opposition from the “contras”, made up mostly of former National Guard members and Somoza supporters. By 1981, relations between the Sandinista government and the United States had significantly deteriorated, and by the end of that year, the U.S. began actively supporting the Contra insurgency⁴⁰⁰.

A significant legal complication arose due to a reservation the U.S. had made when it accepted the ICJ's jurisdiction in 1946 under Article 36(2) of the ICJ Statute. This reservation excluded disputes: “*Arising under a multilateral treaty unless all affected parties to the dispute were also parties to the proceedings*”⁴⁰¹. This was pivotal. The ICJ recognized that the dispute potentially “affected” El Salvador because any judgment would necessarily address whether El Salvador's alleged self-defence against Nicaragua was lawful. Consequently, the ICJ ruled that it could not apply multilateral treaty law, including the UN Charter in this case, because El Salvador was not a party to the proceedings. Thus, the Court restricted its legal analysis to customary international law. However, after the ICJ determined that it had jurisdiction to hear the case, the United States decided to cease participation in the proceedings. It filed no pleadings on the merits and was not represented during the oral hearings held in September 1985. However, prior to withdrawing, the U.S. submitted a counter-memorial on jurisdiction, in which it justified its actions by invoking collective self-defence under customary international law. The United States argued that its conduct, specifically, its support for the Contra rebels operating against the Nicaraguan government, was legally

³⁹⁹ *Ibid*

⁴⁰⁰ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 and Kinga Tibori Szaboat, (n 4)

⁴⁰¹ *Ibid*

permissible on the grounds of collective self-defence. The United States contended that Nicaragua had committed armed aggression against neighbouring states, particularly El Salvador, Honduras, and Costa Rica, by allegedly providing material assistance to insurgent groups operating within those territories. Therefore, the United States claimed its actions were justified as part of a collective response to that aggression. The Court carefully analyzed the factual and legal basis of the U.S. claims. Concerning El Salvador, the ICJ acknowledged that some aid had flowed from Nicaragua to Salvadorian rebels up until early 1981, but it considered the scale of aid to be minimal. Beyond early 1981, there was insufficient evidence to confirm continued support. Regarding the alleged incursions into Honduras and Costa Rica, the Court accepted that some cross-border activities were carried out and that these were attributable to the Nicaraguan government.⁴⁰²

The ICJ proceeded to outline the essential elements of customary international law governing the right of self-defence. The Court affirmed that self-defence, whether individual or collective, required the existence of an armed attack, whereas the right to self-defence arises only in response to an actual armed attack. The Court distinguished this from intervention or support for insurgent activities, which, while potentially unlawful, do not reach the threshold of an armed attack. Necessity and proportionality were considered another essential element in determining self-defence, as even if an armed attack has occurred, the response must meet the requirements of necessity, i.e., self-defence must be the only exercised to repel the attack and proportionality i.e., the scale and effects of the response must not exceed what is required to repel the attack. Another crucial element for collective self-defence was stated to be a compulsory request by the victim state, such a request must be explicit from the state that has suffered the

armed attack. It was stated that a third state may not unilaterally intervene on the claim of defending another without that state's consent. Applying these criteria to the facts before it, the Court found the United States' justification lacking evidence of armed attack. The Court acknowledged that Nicaragua may have provided limited assistance to rebel groups in El Salvador prior to 1981. However, it concluded that this aid was insufficient in scale and scope to qualify as an armed attack under customary international law. Moreover, the evidence of continuing aid after 1981 was found to be speculative and unconvincing. Further, there was no evidence of a request for assistance. The Court found no clear evidence that El Salvador, or any other neighbouring state, had issued a formal and unequivocal request for collective self-defence from the United States. This procedural requirement was considered essential to the lawful exercise of collective self-defence. Furthermore, proportionality and necessity were not met. Even based on an assumption that Nicaragua had engaged in conduct amounting to an armed attack, the scale and nature of the U.S. response, particularly the mining of Nicaraguan harbours and direct military support to the contras, were found to be disproportionate and not necessary to the defence of El Salvador or any other state⁴⁰³.

The ICJ ultimately held that the United States' actions could not be justified under the doctrine of collective self-defence as understood in customary international law. The absence of an actual armed attack, the lack of a formal request from the allegedly affected states, and the disproportionate nature of the military response rendered the U.S. justification legally invalid. Moreover, the Court emphasized that covert or indirect uses of force such as training, arming, and financing insurgent groups can amount to a violation of the principle of non-intervention and, in certain

⁴⁰³ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 and Christine Chinkin, "Self-Defence as a justification of war", Cambridge University Press, (United Kingdom, 2017) at 10-13

⁴⁰² *Ibid*

circumstances, a breach of the prohibition on the use of force under international law. However, such actions do not automatically trigger the right of self-defence unless they meet the stringent criteria established in customary law⁴⁰⁴.

2. The Oil Platforms Case 1992

The *Oil Platforms* case⁴⁰⁵, formally titled *Oil Platforms (Islamic Republic of Iran v. United States of America)*, was adjudicated by the International Court of Justice and involved the United States as the respondent state, similar to the earlier *Nicaragua* case. This dispute arose out of a series of military actions conducted by the United States Navy during the late 1980s, specifically targeting Iranian oil production facilities in the Persian Gulf. The confrontations occurred within the broader geopolitical context of the Iran–Iraq War, during which the U.S. had increased its naval presence to secure maritime navigation and protect shipping interests in the region. The first military incident took place on 19th October 1987, when American destroyers launched attacks against the Iranian Reshadat oil complex. One platform was completely destroyed, and another was heavily damaged. Additionally, a nearby oil installation, the Resalat complex, suffered collateral damage. At the time of these attacks, neither of the complex was operational due to prior strikes by Iraqi forces during the ongoing regional conflict. A subsequent and more extensive attack occurred on 18th April 1988, targeting the Iranian Salman and Nasr platforms. These actions formed part of a wider American military initiative named "Operation Praying Mantis". The ICJ limited its inquiry to the legality of the attacks on the oil platforms specifically, without addressing the broader context of the operation. In response, Iran instituted legal proceedings against the United States on November 1992, alleging violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the two nations. The

primary legal question before the Court was whether the U.S. actions constituted a breach of Article X(1) of the Treaty, which guaranteed freedom of commerce and navigation between the two states⁴⁰⁶.

The U.S. attempted to justify its military conduct under Article XX(1)(d) of the Treaty, which provides that neither party is prevented from adopting measures necessary to protect its "essential security interests." The United States invoked the principle of self-defence as a legal justification for the use of force against Iranian offshore oil installations in the Persian Gulf. The United States contended that two distinct military operations against Iranian oil platforms, one in October 1987 and another in April 1988, were lawful acts of self-defence in response to a series of armed attacks allegedly carried out by Iran against the U.S. and U.S.-flagged vessels in the region. In particular, the U.S. cited the missile attack on the *Sea Isle City*, a Kuwaiti-owned ship flying the American flag, and the mining of the *USS Samuel B. Roberts*, a U.S. naval ship, as constituting armed attacks attributable to Iran. However, the International Court of Justice adopted a stringent evidentiary and legal standard in evaluating the self-defence claim. The Court emphasized that for self-defence to be lawful, there must be clear and convincing evidence that the acts in question were both attributable to the opposing state and of sufficient gravity to qualify as an "armed attack." Moreover, the response must satisfy the criteria of immediacy, necessity, and proportionality⁴⁰⁷.

In applying this framework, the ICJ found that the evidence submitted by the United States was insufficient to attribute the alleged attacks definitively to Iran. In the case of the *Sea Isle City*, although the attack was carried out by a missile of the type Iran possessed, the Court concluded that the available evidence did not meet the threshold necessary to establish Iran's responsibility. Similarly, while the mine that

⁴⁰⁴ *Ibid*

⁴⁰⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, I.C.J. Reports 2003, p. 161.

⁴⁰⁶ *Ibid*

⁴⁰⁷ *Ibid*

damaged the *USS Samuel B. Roberts* bore serial markings similar to those found on Iranian munitions, the Court considered this merely suggestive and not conclusive, especially given the broader context of the Iran–Iraq conflict, during which both parties had been known to deploy naval mines. Because the United States was unable to conclusively prove that it had been the victim of armed attacks by Iran, the Court held that it had not satisfied the burden of proof necessary to invoke the right of self-defence under international law. Consequently, the U.S. actions could not be considered lawful acts of self-defence under Article 51 of the UN Charter. Additionally, the U.S. attempted to justify its conduct under Article XX(1)(d) of the 1955 Treaty of Amity, which permits each party to adopt measures necessary to protect its "essential security interests." The Court interpreted this clause as incorporating the requirements of international law on self-defence. Therefore, a failure to satisfy the criteria under Article 51 of the Charter simultaneously undermined the invocation of this treaty provision⁴⁰⁸.

The *Oil Platforms* case thus reaffirmed the restrictive interpretation of self-defence in international jurisprudence. It reinstated that mere suspicion, circumstantial evidence, or patterns of hostile behaviour do not constitute sufficient grounds for military retaliation.

3. The Nuclear Weapons Advisory Opinion 1996

The ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* was delivered on 8th July 1996, following a request from the United Nations General Assembly made in December 1994. The core question submitted to the Court was whether the threat or use of nuclear weapons could ever be legally permissible under international law. This marked a significant moment in the interpretation of international legal norms, especially in relation to weapons of mass destruction and the regulation of warfare. The International Court of Justice first confirmed

that it had jurisdiction to issue an advisory opinion on this matter, stating that the request fell within the scope of Article 96(1) of the UN Charter, which allows the General Assembly to seek legal clarification on matters of international concern. The Court reinstated that Article 51 of the UN Charter preserves the inherent right of individual or collective self-defence in response to an armed attack. However, this right is not absolute and is constrained by specific legal conditions such as necessity, where the use of force must be strictly necessary to repel an ongoing or imminent attack and proportionality, where the force used must be proportional to the scale and nature of the threat faced. However, the ICJ did not exclude the possibility that the threat or use of nuclear weapons might be lawful in an extreme scenario involving the survival of a state. The Court indicated that, in the most extreme circumstances of self-defence, particularly where the very existence of a state is at stake, the legality of nuclear weapons could not be definitively ruled out. Furthermore, the Court stressed that self-defence does not override the obligations under international humanitarian law (IHL). Therefore, even if a state invokes Article 51, its actions must still respect the basic principles of IHL such as distinction, proportionality, prohibition of unnecessary suffering, etc. The ICJ adopted a restrained and cautious approach and affirmed that self-defence is a recognised right under Article 51. It acknowledged that nuclear weapons may theoretically be used in self-defence, but only in extreme and highly specific conditions and stressed that even in such conditions, the use must comply with international humanitarian law, making lawful use highly unlikely. Though it did not entirely preclude the use of nuclear weapons in self-defence, the Court effectively set a nearly insurmountable legal threshold for such justification.⁴⁰⁹

⁴⁰⁸ *Ibid*

⁴⁰⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 and Christine Chinkin, (n 13) at 18-20

4. The Israeli Wall Advisory Opinion 2004

On 9th July 2004, the International Court of Justice (ICJ) delivered its advisory opinion in the matter concerning the legal consequences of the construction of a wall by Israel in the Occupied Palestinian Territory (OPT), including areas in and around East Jerusalem. This opinion was issued following a request made by the United Nations General Assembly during its Tenth Emergency Special Session in December 2003. The wall, approximately 720 kilometres in planned length, was constructed by Israel beginning in June 2002, with the stated purpose of preventing the infiltration of Palestinian suicide bombers and other threats to Israeli security. At the time of the Court's opinion, about 50% of the wall had been completed. The General Assembly submitted the following question to the ICJ: *What are the legal consequences arising from the construction of the wall being built by Israel in the OPT, considering international law, including the Fourth Geneva Convention and relevant UN resolutions*⁴¹⁰? The Court first assessed whether it had the jurisdiction to render an advisory opinion and whether it should exercise that jurisdiction. Despite objections from some states, including claims that the request raised essentially political, rather than legal questions, or that it was an attempt to bypass direct negotiations, the ICJ affirmed both its competence and its appropriateness in exercising jurisdiction, in accordance with Article 65 of its Statute. The Court found that the construction of the wall, in the context of Israel's prolonged occupation, violated several key principles of international law, including the prohibition on the acquisition of territory by force, derived from Article 2(4) of the UN Charter, which prohibits the threat or use of force against the territorial integrity of any state. The ICJ concluded that Israel's occupation and de facto annexation of parts of the West Bank via the wall's route breached this provision.

Further, the right of self-determination of the Palestinian people was violated. The Court held that the wall seriously impeded the Palestinian population's ability to exercise the freedom of movement, access to education and health services, and the protection of private property thereby constituting a breach of Israel's obligation under international law.

Israel had argued that the construction of the wall was a lawful measure aimed at safeguarding its civilian population from violent attacks, particularly suicide bombings, and therefore constituted an exercise of its inherent right to self-defence. The state invoked Article 51, which affirms the right of a state to defend itself if subjected to an armed attack, asserting that the wall was a necessary response to threats against its security. However, the ICJ decisively rejected the applicability of Article 51 in this context. The Court reaffirmed that the right of self-defence, as codified in the Charter, is applicable only in situations involving an armed attack attributable to another state. In this case, Israel did not claim that the attacks emanated from a foreign sovereign entity, but rather from non-state actors operating within a territory that it effectively controlled. The Court emphasised that the threat Israel faced did not arise from beyond its borders in the sense contemplated by Article 51, but originated within the very territory over which it exercised administrative and military authority. Moreover, the ICJ distinguished the situation from the post-9/11 context in which Security Council Resolutions 1368 (2001) and 1373 (2001) acknowledged a broader understanding of self-defence in relation to terrorism. The Court concluded that these resolutions were not applicable, as Israel had not demonstrated that the attacks were imputable to a state, nor that it had been subjected to an armed attack as defined under customary international law. Consequently, the Court held that Israel could not lawfully invoke Article 51 as a justification for the construction of wall. It asserted that the

⁴¹⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136 and Christopher O Meara, (n 2) at 20-22

preconditions for exercising self-defence were not fulfilled⁴¹¹.

5. DRC v Uganda 2005

The case *Democratic Republic of the Congo (DRC) v. Uganda* arose out of a prolonged and complex conflict in the Great Lakes region of Central Africa. On 2nd August 1998, military forces from Uganda, Rwanda, and Burundi entered the territory of the DRC. Although these states had initially supported the Congolese regime of President Laurent Kabila, their diplomatic relation started to deteriorate due to Kabila's increasingly independent stance and the perceived security threats from rebel groups operating along the borders of Uganda and Rwanda. Despite claims of prior consent from the Congolese government, Uganda's continued military presence after August 1998 became increasingly contentious. The DRC filed an application before the International Court of Justice (ICJ) in June 1999, alleging that Uganda had committed acts of armed aggression and serious violations of international humanitarian law and human rights law. Uganda argued that it had acted lawfully under Article 51 of the UN Charter. It claimed that the Allied Democratic Forces (ADF), a rebel group operating from Congolese territory, had launched attacks against Ugandan territory, and their intervention in the DRC was a legitimate response to these cross-border threats. Uganda further maintained that the DRC either supported or was unable or unwilling to prevent these hostile acts. Therefore, Uganda stated that it had the right to take defensive measures against ADF forces within Congolese territory. However, the ICJ rejected Uganda's claim of self-defence, concluding that the necessary legal conditions under customary international law and the UN Charter had not been satisfied. The court stated that Uganda had failed to provide convincing evidence that the ADF's attacks were attributable to the DRC. According to the Court, for the right of self-defence to be triggered, the

armed attack must be attributable to a state, either directly or indirectly. In this case, the DRC had not supported the ADF, nor was there proof that it exercised effective control over its actions. Further, the ICJ emphasised that the threshold for lawful self-defence was not met. Since there was no evidence of the DRC's complicity or control over the ADF, the requirement of attribution was not satisfied. Uganda stated that its military operations were intended to prevent future attacks. However, the Court reaffirmed that preventive or anticipatory self-defence is not accepted under international law unless a prior armed attack has occurred. In this case, such a prior attack by the DRC had not been established. Furthermore, due to the lack of a valid self-defence claim, the Court held that Uganda's use of force constituted a violation of the prohibition on the use of force under Article 2(4) of the UN Charter. Its military presence, actions, and support for armed groups within Congolese territory were deemed unlawful. The judgment clarified the right of self-defence under Article 51 requires the occurrence of an armed attack attributable to a state, non-state actors do not trigger this right unless their actions can be legally imputed to a state, the territorial integrity of states remains a fundamental principle, and even security concerns do not justify violations of sovereignty without clear legal grounds.⁴¹²

6. Ukraine v. Russian Federation 2022

The case of *Ukraine v. Russian Federation* 2022 before the International Court of Justice emerged in the immediate context of Russia's full-scale military invasion of Ukraine on 24th February 2022. Ukraine brought the matter before the ICJ based on the alleged misuse and misinterpretation of the Convention on the Prevention and Punishment of the Crime of Genocide by the Russian Federation as a legal pretext for its military actions. Ukraine initiated proceedings against Russia under Article IX of the Genocide Convention, which grants the ICJ

⁴¹¹ *Ibid*

⁴¹² Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168

jurisdiction over disputes concerning the interpretation, application, or fulfilment of the Convention. It asserted that the Russian Federation had falsely accused Ukraine of committing acts of genocide against Russian speaking populations in the Luhansk and Donetsk regions, two separatist-controlled areas in eastern Ukraine. It stated that Russia's justification for military intervention was not only factually baseless but constituted an abuse and violation of the Convention's legal framework. Ukraine asserted that the Genocide Convention does not authorize unilateral use of force by a state on the basis of an unproven claim of genocide. It also argued that Russia had no lawful basis under the Genocide Convention to justify the use of military force against Ukraine, and that such action amounted to an unlawful use of force contrary to Article 2(4) of the United Nations Charter. Further, it claimed that Russia's military invasion violated its sovereignty, political independence, and territorial integrity⁴¹³.

The Russian Federation sought to justify its military intervention in Ukraine by invoking the doctrine of self-defence, by stating that its use of force was necessary to prevent and respond to acts of genocide allegedly being committed by Ukrainian authorities against the Russian-speaking population. However, this assertion was not accepted as a conventional self-defence claim under Article 51, because there was no armed attack by Ukraine against its territory. The International Court of Justice critically examined this reasoning in its Order on Provisional Measures issued in March 2022 and found that Russia had not provided credible evidence demonstrating that genocide had occurred or was about to occur in the eastern regions of Ukraine. Consequently, the Court concluded that the conditions required to invoke the Genocide Convention, particularly the presence of actual or imminent acts of genocide, had not been met. More importantly,

the Court reaffirmed that unilateral use of force under the pretext of preventing or punishing genocide is not authorized by the Convention. The Genocide Convention does not provide legal grounds for a state to undertake military operations in the territory of another sovereign state, even where allegations of genocide are made. The Court's reasoning implied that self-defence cannot be lawfully invoked in response to alleged acts of genocide unless such acts constitute an *armed attack* attributable to a state, within the meaning of Article 51 of the UN Charter. The Court was of the view that self-defence requires the occurrence of an armed attack and cannot be invoked pre-emptively based on unverified allegations. Hence, Russia's invocation of self-defence was found to be inconsistent with the Charter of the United Nations and the principles of international law.⁴¹⁴

7. South Africa Vs- Israel 2023

South Africa filed an application against Israel before the International Court of Justice in December 2023, contending that Israel's military actions in the Gaza Strip constitute violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide⁴¹⁵. In January 2024, the ICJ issued an order indicating provisional measures to protect the rights claimed by South Africa under the Genocide Convention and urged Israel not to commit genocide and to provide humanitarian assistance to affected Palestinians in the Gaza Strip. The Court did not order a ceasefire but emphasised the necessity of Israel's compliance with its obligations under the Genocide Convention⁴¹⁶.

Israel has consistently asserted that its military operations in Gaza, especially following the Hamas-led attacks on 7 October 2023,

⁴¹⁴ *Ibid*

⁴¹⁵ "Article II - genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group."

⁴¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024

⁴¹³ *Ukraine v. Russian Federation, Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Order on Provisional Measures, I.C.J. Reports 2022

constitute lawful measures undertaken in self-defence. This argument is premised on the inherent right of a state to defend its population from armed attacks, a right recognised under customary international law and explicitly codified in Article 51 of the UN Charter. In this context, Israel contends that it is responding to ongoing rocket attacks, hostage-taking, and other acts of violence committed by Hamas and affiliated groups operating from within the Gaza Strip. The Israeli government has argued that these operations are directed against legitimate military targets and are designed to neutralise the capacity of non-state actors who pose a direct threat to its national security. From this perspective, Israel maintains that its conduct falls within the legal boundaries of self-defence and is not intended to target the civilian population of Gaza. At the provisional measures stage, the ICJ did not render a final judgment on the validity of Israel's claim to self-defence, as this issue was not central to the specific legal question before the Court. However, the ICJ implicitly addressed the limits of self-defence by reaffirming that all acts of force must comply with international law, regardless of the claimed justification. Furthermore, the Court emphasised that any exercise of the right of self-defence must be proportionate, discriminate, and compatible with the protections afforded to civilian populations under the Geneva Conventions and related legal instruments. Therefore, even if a state invokes self-defence, it does not absolve that state of its obligations under international law. The court is of the view that, while self-defence may justify certain uses of force, it cannot serve as a shield for actions that may plausibly amount to genocide or violate peremptory norms of international law⁴¹⁷.

Conclusion:

Judge Schwebel, in a dissenting opinion in Nicaragua, reinstated that Article 51 must not confine or narrow down the scope of self-defence under customary international law, and

at the same time, the state must not freely use self-defence. This categorically proves that the right of the state to exercise self-defence cannot be prohibited but only regulated, and also further envisions the obligation of every state to abide by the fundamental principles of international law. Though self-defence is an exception to the use of force, its usage is not unlimited but limited under international law. Self-defence has three important limits, within which it must be exercised; if any state exceeds, then such an act would no longer be a defensive force but an offensive force. Necessity, Proportionality, and Immediacy are the cornerstones of self-defence.

As the inherent meaning of self-defence is only to defend the state from its aggressor and not to retaliate or punish the aggressor for the aggression or armed attack, the limitations play a significant role in reinstating the defensive use of force of the state. If these limits are violated, then any act of self-defence would become unlawful under the notion of law.

From the judgments of the International Court of Justice, it's evident that predominant importance has been given by international law and the Court to abide by the limits of self-defence. However, states have always given importance to their state interest, sovereignty, security, and self-preservation. This being the scenario, states on the verge of protecting their right, freedom, independence, integrity, and sovereignty have overstepped the boundaries or limits established by international law in limiting the scope of self-defence. They have, under several circumstances have actively violated the limits of self-defence. However, it is pertinent to mention that if a state exceeds the principles of lawful self-defence or its limitations, then such an act would become unlawful in nature and would lead to aggression or unlawful use of force, which is prohibited by international law.

Though international law does not allow states to exercise their self-defence beyond the limits, it fails to control the same due to states'

⁴¹⁷ *Ibid*

inherent right and state sovereignty. International law, being a weak law, cannot act as a domestic instrument in encompassing a strict restriction, as state cooperation is necessary for international law to thrive. However, according to several scholarly interpretations, the limits of self-defence have already become customary international law and have attained jus cogens norms. This being the scenario, states violation of the limits are a serious violation under international law that must be condemned.

It is predominant to mention that the ICJ, under all cases, time and again, has reiterated that states have an obligation to follow the limits of self-defence and any force exercised by them can be legal and lawful only when the requirements of the limitations are met. Any violation of the same would negate the state's self-defence claim, thereby making their force an unlawful aggression. Hence, under the very basis, a state cannot exceed the limitations of self-defence under international law.

After analyzing and examining the judgments of the International Court of Justice, it is crystal clear that states exceed self-defence limitations when their state sovereignty, state interest, political independence, and territorial integrity have been violated or are on the verge of being violated. In other words, states intent on preserving or protecting their rights and interests have always been their superior concern. Until the threat to their peace and security is eliminated, they continue to use force under the guise of self-defence, showing little or no regard to the limits established by international law.