

**SELF-DEFENCE IN INTERNATIONAL LAW – THE DOCTRINE OF
ANTICIPATORY SELF-DEFENCE**

**Lipi Rawat , 3rd Year (Semester 6),BSc. LLB (Hons.),Gujarat National Law
University,Gujarat (India)*

ABSTRACT

Article 2(4) of the U.N. Charter, which prohibits the threat or use of force against the territorial or political integrity of a State, is now considered an archetypal example of the *jus cogens* norm. Self-defence is a universally accepted exception to the prohibition on the use of force, and has been subject to academic scrutiny. The primary objective of this article is to analyse the scope of the right of self-defence, and to examine the legality of “anticipatory self-defence” in international law. It takes into account the arguments put forward by various legal scholars and jurists regarding the right of self-defence. It includes the debate regarding the nature of Art.51 of the Charter, i.e., whether it is exhaustive of the situations where force can be used, or whether the right mentioned in Art. 51 refer to a pre-existing right, one that was recognised by customary international law before the enactment of the Charter. The view of the International Court of Justice on the scope of Art. 51 has also been looked into via the *Nicaragua Case*. It also draws into the legal relevance of the laws that pre-date the Charter, custom, and the principles enshrined in the *Caroline Case*, as well as state practice on the doctrine of anticipatory self-defence. The “emerging threat” or “Bush Doctrine” on anticipatory self-defence has also been analysed. A mention has also been made on the legality of this doctrine in Outer Space, and whether Art. 51 can be extended to it as well.

The Use Of Force In International Law:

The law of recourse to force has changed dramatically with time. In the early 19th and 20th Century, the use of force was governed by the *bellum justum* doctrine¹. According to this doctrine, the use of force as a means to settle disputes would be legitimate only if certain criteria were met relating to the belligerents authority to make war, its objectives and intentions². The purpose of the law regarding the use of force was to maintain status quo between States, and to minimise the use of force, or at least limit its application³.

After the First World War, the concept of maintaining “balance” between States changed. The Covenant of the League of Nations, 1919⁴ made war illegal in 4 situations, namely, when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League; when begun before the expiration of three months after the arbitral award or judicial decision or Council Report; when commenced against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report; and under certain circumstances, when initiated by a non-member state against a member state.

In 1945, the U.N. Charter⁵ was enacted whereby the use of force was strictly prohibited by Art. 2(4) which reads as follows:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”

The International Court of Justice has held that Art. 2(4) forms a peremptory norm of international law from which States cannot derogate⁶. The exceptions to Art.2 (4) are mentioned in Art. 42 (which authorizes the Security Council to use force in order to restore

¹Thomas Remler, *The Right of Anticipatory Self-Defence and the Use of Force in International Law*, University of Cape Town, research dissertation presented for the approval of the Senate, available at http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/remler.pdf. [Thomas Remler]

²Leo Van Den Hole, *Anticipatory Self-Defence under International Law*, (2003) American University International Law Review 69 at 74. [Leo Van Den Hole]

³Malcolm N. Shaw, *International Law* (Cambridge University Press, 6th ed., 2008).

⁴League of Nations, *Covenant of the League of Nations*, June 28, 1919, available at <http://www.refworld.org/docid/3dd8b9854.html>.

⁵United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. [U.N. Charter]

⁶See *Nicaragua v United States*, [1986] ICJ Reports 14, at para 190.

international peace and security) and Art.51 (which deals with individual and collective self-defense.) This article tries to examine the scope of the right of self-defense as provided in Art. 51 and especially aims at delineating the scope of self-defense in international law. It primarily deals with the legality of the doctrine of anticipatory self-defense, and examines the various controversies that this doctrine has created.

Due to the simplicity of Art.51, it has led to several disagreements, mainly regarding the concept of anticipatory self-defence. This refers to the use of force by a State to repel an attacker, *before* an actual attack has taken place. An anticipatory act is able to visualize future conditions, foresee their consequences, and take remedial measures before the consequences occur⁷. The issue that needs to be looked into while discussing anticipatory self-defence is whether Art. 51 of the Charter is the only source of a State's right to self-defence under international law. While some scholars believe that Art. 51 is exhaustive and includes only those situations when an armed attack has *already occurred*⁸, the others are of the view that it lays down only some conditions for applying a pre-existing and inherent right of self-defence⁹. Many also believe that the right of self-defence is an inherent right that predates the Charter¹⁰, and that acts of aggression carried out while exercising the right of self-defence would be pardoned even if there wasn't an Art. 51¹¹.

The "restrictionists" (those who argue that pre-existing customary law on anticipatory self-defence were extinguished when the Charter came into force)¹², state that the words "*if an armed attack occurs*" are sufficient proof that Art. 51 cannot be construed to include the use of force before an armed attack has occurred¹³. Contrary to this, the proponents who argue that anticipatory self-defence is a right in international law (termed "adaptavists" or "counter-restrictionists") rely on the drafting history of the U.N. Charter, and also the customary rules that existed prior to its enactment. They contend that the customary international law that existed prior to the enactment of the Charter permitted the application of the doctrine of

⁷ Anthony Clark Arend & Christopher C. Joyner, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm*, 10 USAFA J. LEG. STUD. 27, 32 (1999-2000). [Clark & Joyner]

⁸ Franck, *Recourse to Force, State Actions Against Threats and Armed Attacks* (Cambridge University Press, 2002). See also, Gray, *International Law and the Use of Force* (Oxford University Press, New York, 2004).

⁹ Clark & Joyner, *supra* note 8.

¹⁰ Yoram Dinstein, *War, Aggression And Self-Defence*, 167 (Cambridge University Press 3d ed. 2001) [Dinstein]

¹¹ Leo Van Den Hole, *supra* note 2 at 74.

¹² Charles O' Mahony and James Mulcahey, *Anticipatory Self Defence: A Discussion in International Law*, *Hanse Law Review* 2 (2006) at 234.

¹³ *Ibid.*

anticipatory self-defence. According to the adaptavist school of thought, U.N Members inserted Article 51 of the U.N. Charter not for the purpose of defining the individual right of self-defence, but for the purpose of clarifying the position in regard to collective understandings for mutual self-defence¹⁴.

Aside from the Covenant of the League of Nations as mentioned above, the 1928 General Treaty for the Renunciation of War¹⁵ (the Kellogg-Briand Pact) also condemned recourse to war for solving international controversies. The adaptavists are of the view that the principle of self-defence was so well established in international law, that it automatically became an exception to the Kellogg-Briand Pact. While negotiating for this pact, the U.S. Government also sent notices to other governments stating that every sovereign state had the liberty to defend its territory from armed attack, irrespective of treaty provisions¹⁶. The main line of reasoning of the adaptavists is the term “inherent right” that is mentioned in Art. 51. They believe that this term is an explicit reference to the customary international law that pre-dated the Charter, wherein anticipatory self-defence was considered as a customary right. The use of the word ‘inherent’ in Article 51 emphasizes that the ability to make an exception to the prohibition on the use of force for the purpose of lawful self-defence against an armed attack is a prerogative of every sovereign State¹⁷. They are also of the view that the words “armed attack” would include planning, organisation, and the logistical groundwork that is carried out for the commission of an armed attack¹⁸.

Furthermore, the restrictive view on Art. 51 are based on textual argument. The adaptavists argue that “there is not the slightest indication in Article 51 that the occurrence of an ‘armed attack’ represents only one set of circumstances (among others) in which self-defence may be exercised.”

As opposed to this broader interpretation of Art.51, the restrictionists believe that if anticipatory self-defence was valid in international law, it would have to be looked into more

¹⁴See *Verbatim Minutes Of The Fourth Plenary Session*, April 28, U.N. Doc. 24 (1945), Reprinted In The United Nations Conference On International Organisation, San Francisco, California, April 25 To June 26, 1945.

¹⁵ Treaty between the United States and other Powers providing for the Renunciation of War as an instrument of national policy, Aug. 27, 1928.

¹⁶Michael Franklin Lohr, *Legal Analysis of US Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 16 (1985) [Lohr] at 17. See also, Dinstein, *supra* note 11, at 164 and Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT'L L. 39 (1933).

¹⁷ *Ibid.*

¹⁸Martinez, *'September 11: Iraq and the Doctrine of Anticipatory Self Defence'*, [2003] 72 UMKC 123 at 134. [Martinez]

acutely since the chances of its misuse are greater¹⁹. If a pre-emptive use of force were to be allowed, it would be under stricter scrutiny of the Security Council²⁰, and the Security Council would have to ensure that the threat was imminent, and the use of force was necessary. Further, to determine with utmost accuracy that an armed attack is going to occur is difficult, and an error in judgement could lead to unnecessary conflict between 2 States²¹. There have been several instances, especially between the former Soviet Union and the U.S., where leaders have made aggressive statements without having an intention or agenda to attack²². The right to use force before an armed attack has occurred can also be used to deliberately portray one's adversary as being positioned to attack, thus giving a State the right to use unilateral force under the pretext of anticipatory self-defence²³. The belief of the restrictionists is that if anticipatory self-defence was made legal, it could be misused to give an unfair advantage to one State to use unilateral force under the garb of anticipatory self-defence. The author believes that mere "probability" that a right "may" be misused is not sufficient ground to completely discredit the right of anticipatory self-defence. Also, several authors have opined that not every unilateral use of force would be protected; only force that is used when the evidence of a threat is compelling, and the need to act is overwhelming, will be protected by this doctrine.²⁴

Moreover, Art. 2(4) of the Charter prohibit not only the use of force, but also the threat of use of force. If States to wait for an armed attack to occur, then maintenance of international peace and security could not take place, but States would rather become responsible for the restoration instead of the maintenance of international peace and security²⁵.

Growth Of The Concept Of Anticipatory Self-Defence: From Caroline To The Emerging Threat Doctrine:

In order to study the development of the doctrine of anticipatory self-defence, definitions of "self-defence" that pre-date the Charter have to be looked into. The traditional definition of the right of self-defence in customary international law that existed prior to the enactment of

¹⁹Dinstien, supra note 11.

²⁰ Ibid.

²¹John Quigley, *A Weak Defence of Anticipatory Self-Defence*, 10 TEMP. INT'L & COMP. L.J. 255, 257 (1996)

²² Ibid.

²³Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defence: the United Nations' Emerging Role*, 45 NAVAL L. REV, 223.

²⁴Lohr, supra note 17.

²⁵ Leo Van Den Hole, supra note 2, at 85.

the Charter occurs in the *Caroline Case*²⁶. The *Caroline Case* of 1837 is considered a central case stating the conditions under which force can be legitimately used in self-defence²⁷.

In 1837 a group of men led by William Lyon Mackenzie rebelled in Upper Canada (now Ontario), demanding a more democratic government. There was much sympathy for their cause in the United States, and a small steamer, the *Caroline*, owned by U.S. citizens, carried men and supplies from the U.S. side of the Niagara River to the Canadian rebels on Navy Island just above Niagara Falls. On the night of Dec. 29, 1837, a small group of British and Canadians loyal to the Upper Canadian government crossed the river to the U.S. side where the *Caroline* was moored, loosed her, set fire to her, and sent her over the falls. 2 American nationals were killed in the incident.

When questions were raised regarding the legality of this British action, they contended that destruction of the *Caroline* was necessary and their actions were justified on the grounds of self-defence and self-preservation. In this context, certain principles were laid down regarding the right of self-defence, termed as the *Caroline Doctrine*²⁸:

“It will be for ... [Her Majesty’s] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it, It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown, that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her ... ”

It can be seen that the essential preconditions for self-defence in general, which can be deduced from the *Caroline*, are “necessity”, “proportionality” and “immediacy”, whether the

²⁶Timothy Kearly, *Raising the Caroline*, 17 Wis.Int’L.J. 325, p. 325 (1999)

²⁷Ibid.

²⁸Extracts from Mr Webster’s letter of April 24, 1841 are to be found in D.J. Harris, *Cases and Materials on International Law*, 5th Edition, 1998, p. 895.

act of self-defence is on a state's own territory or on that of the attacker²⁹. According to the *Caroline* doctrine, a State must have an instant and overwhelming necessity for the use of force on grounds of self-defence. The *Caroline* doctrine establishes two main criteria for legitimate self-defence: first, the use of armed force must be strictly related to the protection of the territory or property and the population of the defending state and second, the proportionality criterion precludes a state from using force beyond that necessary to repel an attack or "to preserve and restore the legal status quo"³⁰. The defending state may not respond to an armed attack in an "unreasonable or excessive" manner, and force used in self-defence must discriminate between civilian and military targets, as required by the laws of armed conflict³¹. It also states that force used must be proportionate, and the recourse to force is taken as a last resort, i.e., after the means to peacefully settle disputes have failed.

This traditional definition of self-defence was affirmed by the International Court of Justice in the *Nicaragua Case*³². In 1979, the right-wing Somoza Government in Nicaragua was overthrown in a revolution by the left-wing Sandinista Government. In 1981, U.S. President Reagan terminated economic aid to Nicaragua on the ground that it had aided guerrillas fighting against the El Salvador Government, which enjoyed good relations with the United States, by allowing USSR arms to pass through its ports and territory en route for El Salvador. In the case, Nicaragua claimed, inter alia, that the United States had, contrary to customary international law:

- (i) Used direct armed force against it by laying mines in Nicaraguan internal and territorial waters, causing damage to Nicaraguan and foreign merchant ships, and attacking and damaging Nicaraguan ports, oil installations and a naval base, and;
- (ii) Given assistance to the *contras*, Nicaraguan guerrillas fighting to overthrow the Sandanista Government.

Nicaragua also claimed that the United States had acted in breach of the bilateral 1956 U.S.-Nicaraguan Treaty of Friendship, Commerce and Navigation.

The U.S. claimed that its use of force against Nicaragua was a lawful act of collective self-defence of El Salvador. The U.S. argued that Nicaragua had used unlawful force in the first

²⁹ Leo Van Den Hole, *supra* note 2 at 97.

³⁰ Thomas Remler, *supra* note 1.

³¹ R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L., p. 91 (1938)

³² Case Concerning Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27)

instance by providing weapons and supplies to El Salvador rebels and had supported cross-border attacks on Costa Rica and Honduras. The U.S. therefore claimed that Nicaragua's actions constituted an 'armed attack'.

While interpreting the scope of Art. 51, the Court held that the exercise of the right of self-defence presupposes that an armed attack has already occurred. Further, it was held that "armed attack" refers to a State's direct sending of troops, armed bands, irregulars, or mercenaries to another State, and supply of weapons does not come under the ambit of "armed attack" as mentioned in Art.51³³. Thus, the unilateral use of force on Nicaragua by the United States was not permitted in international law as the conditions of "armed attack" were not satisfied. In this case, the Court noticed that the parties relied only on the traditional concept of self-defence, i.e., that an armed attack had allegedly occurred. The issue of anticipatory self-defence was not raised, and thus, the legality of the doctrine was never brought into picture.

Judge Shwebel, in his dissenting opinion, stated that the judgement might be open to interpretation. He stated that the wordings of Art. 51 do not suggest that the right of self-defence could be invoked *if and only if* an armed attack occurred. He made further comments on the issue and stated that Art. 51 cannot be interpreted in a way which eliminates the right of self-defence under customary international law, or confine its entire scope to the express terms mentioned therein³⁴.

There are several conclusions that can be made by the *Nicaragua* case. Firstly, that in order to use force in self-defence, the State must be a victim of an armed attack. The definition of an armed attack was given by the ICJ in the *Nicaragua* case as mentioned above. Also, it includes not only an action by armed forces across international borders, but also a blatant violation of substantive rights of the Claimant State or an attack on nationals abroad³⁵.

Secondly, a time aspect is important to exercise the right of self-defence. According to Art. 51, the defending State cannot claim right to self-defence after the Security Council has taken adequate measures necessary to maintain international peace and security. Furthermore, the

³³Ibid at para 230.

³⁴Military and Paramilitary Activities, 1986 I.C.J. at 347 (Judge Schwebel dissenting)

³⁵Amy E. Eckert, Manooher Modifi, *Doctrine or Doctrinaire – The First Strike Doctrine and Pre-emptive Self-Defence under International Law*, 12 Tul. J. Int'l & Comp. L. 135 (2004). [Eckert and Modifi]

“armed attack” has to be ongoing, and the right of self-defence cannot be exercised long after the attack has ended³⁶.

Thirdly, as mentioned in the *Caroline* case, the force used by the State that is a victim of an armed attack must be proportionate to the injury that is caused. This view was also confirmed by the ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case*³⁷, where the Court stated that the “submission of the exercise of the right of self-defence to the condition of proportionality and necessity is a rule of customary international law.”

The principles of necessity, proportionality and immediacy as enshrined in the *Caroline Case* were reiterated by the International Military Tribunal in the Nuremburg judgements³⁸:

“Preventive action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment for deliberation.”

Since there is no concrete position of the ICJ regarding the legality of anticipatory self-defence, state practice on this right needs to be examined. Unless there is no *opinio juris* and state practice that clearly rejects the doctrine of anticipatory self-defence, it will be considered a customary international law right, alongside the Charter³⁹.

There have been instances where States have used unilateral force in anticipation of an “imminent threat”. The debate regarding anticipatory self-defence was brought before the Security Council in several cases. In the Cuban Missile Crisis of 1962, the Security Council did show acceptance to anticipatory self-defence in certain circumstances⁴⁰. In this case, they believed that construction and delivery of nuclear missiles by the Soviet Union at Cuba posed an “imminent threat” to the safety of the United States, and hence the American action of inspecting all the ships that went to Cuba was justified (only after peaceful attempts to settle the dispute had failed.)

³⁶William V. O'Brien, Reprisals, *Deterrence and Self-Defence in Counterterrorism Operations*, 30 VA.J.Int'L L. 421 (1990), p.422.

³⁷Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226

³⁸International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 Am. J. Int'l L. 172, 205 (1947)

³⁹ Thomas Remler, *supra* note 1, at 47.

⁴⁰ Martinez, *supra* note 19.

The *Caroline Doctrine*, i.e., necessity, proportionality and immediacy was affirmed by the Security Council in the 1981 bombing of the Osirik Reactor in Iraq by Israel. Israel's action was condemned, and considered as a "grave breach of international law." as their attack was neither an act of self-defence, nor could it be justified as a forcible measure of self-preservation.⁴¹ Similarly, the Security Council passed a resolution in 1986 condemning the air strike on Libya by the U.S. in 1986, as it did not conform to the principles of necessity, immediacy and proportionality. In the resolution, the Security Council stated that the American action was a "serious threat to peace and security" and could be termed as a breach of the principles of the Charter as well as international law⁴². Other examples of the resort to anticipatory self-defence for justifying the use of force include the 1950 Pakistani invasion of Kashmir, 1956 attack by Israel on Egypt etc.

A breakthrough in the concept of anticipatory self-defence occurred after the terrorist attacks of 9/11. In September 2002, the U.S. Government created the National Security Strategy, which outlines the government's view on possible reactions to international terrorism⁴³. The tenets of this strategy put forth a new view on anticipatory self-defence, termed as the *Bush Doctrine of Pre-emptive Self-Defence*.

In the introduction to the National Security Strategy, President Bush declared that the United States will act against emerging threats even before they are fully formed⁴⁴. This implies that they were willing to act even beyond the principles of international law and the constraints that had been observed in the past. A report on the National Security Strategy states that:

*"The concept is not limited to the traditional definition of pre-emption – striking an enemy as it prepares an attack – but also includes prevention – striking an enemy even in the absence of specific evidence of a coming attack."*⁴⁵

⁴¹Cassese, *International Law*, (Oxford 2001), 310. See also, Stanimir A. Alexandrow, *Self-Defence Against the Use of Force in International Law*, (1996), 160-161.

⁴²G.A. Res. 41/38, 41st Sess., 78th plen.Mtg. (1986).

⁴³U.S. National Security Council, *The National Security Strategy of the United States* (2002). [National Security Strategy]

⁴⁴ *Ibid.*

⁴⁵James B. Steinber, Michael E. O'Hanlon and Susan E. Rice, Policy Brief 113, '*The New National Security Strategy and Pre-emption*' January 2003, available at <http://brook.edu/comm/policybriefs/pb113.htm>.

By this, we can deduce that strikes under the *Bush Doctrine* include not only reprisals and the right of self-defence, but also pre-emptive strikes⁴⁶. The government agreed that pre-emptive strikes involve a certain degree of uncertainty, but this will not prevent them from punishing those that engage in terror and aggression⁴⁷.

The first application of this doctrine is presumed to have occurred in Iraq in 2003. In September 2002, President Bush, in his address to the UN General Assembly, urged world leaders to confront the “grave and gathering danger of Iraq.”⁴⁸ He also promised cooperation with the Security Council, but warned them that the U.S. was willing to act unilaterally without the support of the international community as well. The American Congress then passed a joint resolution which authorised the use of force against Iraq, and also gave the President authority to take unilateral military action against her.⁴⁹

The war on Iraq in 2003 led to serious debate and controversy, and various countries condemned the acts of the U.S, and challenged the validity of the *Bush Doctrine*.

The fundamental problem with this doctrine is its reliance on unilateralism. This coupled with the broader definition of “threat” enshrined in the doctrine gives States more latitude in the unilateral use of force⁵⁰. Also, if the doctrine was accepted as a right in international law, it would lead to a plethora of attacks on the sovereignty and integrity of nations. The lack of clear guidelines as to the use of pre-emptive force leaves the States free to determine when a threat has sufficiently emerged to justify armed pre-emption, suggesting that almost any country could conceivably avail of the doctrine’s legitimising effect against “emerging threats” in neighbouring States under the diluted trigger mechanism.⁵¹ Furthermore, the principles of proportionality and necessity, which are considered customary law, are absent from the *Bush Doctrine*, thus permitting a great degree of guess work as to the actions of the hostile State, as well as their intentions⁵². This theory has also been rejected as it does not

⁴⁶Mike Allen & Karen De Young, Bush: U.S. Will Strike First at Enemies; in West Point Speech, President Lays Out Broader U.S. Policy, Wash. Post, 2 June, 2002, at A 01

⁴⁷ Todd S. Purdun, *Bush Officials Say Time Has Come for Action on Iraq*, N.Y. Times, Sept. 9, 2002

⁴⁸President George W. Bush, Address to the United Nations General Assembly in New York City (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

⁴⁹H.R.J. Res. 144, 107th Cong. (2002) (enacted)

⁵⁰Kelly, M., ‘Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defence Doctrines in International Law’ [2003] 13 1, *Journal of Transnational Law and Policy*.

⁵¹ Ibid.

⁵²Rivkin, D., Casey, L. & DeLaquil, M., ‘War, International Law, and Sovereignty: Re-evaluating the Rules of the Game in a New Century – Pre-emption and the Law in the Twenty-First Century’ [2005] 5 *Chicago Journal of International Law*.

describe the parameters of an “emergent threat”, and also the principles of State practice and reciprocity, both of which are recognised principles of international law⁵³.

This doctrine, however, is not without supporters. Many American scholars and professors believe that the rules on warfare must change with the change in the global security environment⁵⁴. Although many authors believe that the *Caroline* principles regarding the use of unilateral force are anachronistic and unreasonable in contemporary circumstances, this doctrine has not been accepted as a new rule in international law. Many believe that accepting the doctrine as a rule of law would set a very dangerous precedent. The author believes that while preventive war might be useful to challenge the threat of terrorism, it is not an effective solution. A solution can only be achieved when there is international agreement and authorisation of actions that are undertaken.

⁵³Ibid. See also, Eckert & Modifi, supra note 36.

⁵⁴ Glennon, M.J., *'The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of United Nations Charter'*, [2002] 25, Harvard Journal of Law and Public Policy at 539.

CONCLUSION:

The validity of the doctrine of anticipatory self-defence still remains contested in international law. Though its legality still remains in what one may call a “grey area”, it seems to have been recognised by customary law. The *Bush Doctrine* may have supporters, and may be accepted legally in the course of time, but presently, States are still bound by the *Caroline Doctrine* of necessity, immediacy and proportionality in the cases of unilateral use of force. Arguably an examination of the legitimacy of the use of force, and an examination of the facts and circumstances surrounding the action would form a better framework for critiquing the increasing application of the doctrine of anticipatory self-defence⁵⁵. The author believes that the right of anticipatory self-defence is necessary in order to ensure that a State has an opportunity to take flexible defensive measures when it is under a threat, and thus should be recognised as a right in international law. However, it must not be stretched to such an extent that States use unilateral force without any concrete grounds under the garb of anticipatory self-defence. Hence, an in-depth analysis of the importance of this doctrine needs to be done in order to ensure international cooperation and understanding.

⁵⁵Taft & Buchwald, *Pre-emption, Iraq and International Law*, [2003] 97 AJIL 557.