

Self-Defense Justifications: from Caroline Case to Russia v Ukraine

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DOI: <https://doi.org/10.22304/piih.v11n3.a3>

Submitted: October 16, 2023 | Accepted: August 19, 2024

Abstract

Russia's invasion of Ukraine on February 24, 2022, attracted international attention when Russia justified the invasion as an act of self-defense based on Article 51 of the UN Charter. This study is a normative legal study that aims to analyze the role of International Customary Laws in determining the legality of the use of self-defense, particularly on Russia's claims in the armed conflict with Ukraine. This study employed conceptual, statutory, political, and historical approaches. In adherence to Article 51 of the UN Charter, relevant Customary International Laws such as the Caroline Test and supplemental relevant rulings from the International Court of Justice were considered essential in evaluating and determining the legality of self-defense. Based on the legal standards set forth in the Caroline Test and ICJ's Rulings, Russia's use of self-defense failed to fulfil the imminency, proportionality, and necessity standards, making the actions illegitimate under International Law. Hence, the action was invalid according to international law.

Keywords: caroline case, Russia v Ukraine, self defense.

A. Introduction

The armed conflict between Russia and Ukraine has been ongoing since February 24, 2022. In a statement to the UN Secretary-General, Russian President Vladimir Putin explained that Russia's "special military operations" were exercises of the right to self-defense under Article 51 of the UN Charter.¹ Russia's Permanent Representative to the United Nations, Vassily Nebenzia, addressed the UN Secretary-General with the following statement.

PADJADJARAN Journal of Law Volume 11 Number 3 Year 2024 [ISSN 2460-1543] [e-ISSN 2442-9325]

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¹ United Nations, "Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General", UN Doc. S/2022/154, 6.

"I have the honor to forward herewith the text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in the exercise of the right of self-defense."

The document referred to the statement of The President of Russia, Vladimir Putin, as follows.

*"... In this regard, in accordance with Article 51 (chapter VII) of the Charter of the United Nations, I have decided to conduct a special military operation with the approval of the Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Luhansk People's Republic, as ratified by the Federal Assembly on 22 February this year"*²

Some countries objected to Russia's actions, leading them to impose sanctions on Russia across various sectors.³ The disapproval of these countries was based on reasons. Russia's defensive measures were based on NATO's perceived eastward expansion rather than in response to a direct threat or physical attack, as outlined in general self-defense law.⁴ This raised questions such as whether Russia's actions were legal under international law since the act was carried out against non-visible or imminent threats and invoked the right of self-defense. In regard to the Russia-Ukraine conflict, there have not been any articles studying the subject using the requirements stated by Caroline Case, and it should be noted that Caroline Case is accepted as a part of Customary International Law and supported by its use in many notable self-defense cases.

Although Article 51 of the UN Charter guarantees every country's right to self-defense, the overly general provision blurs the boundaries of self-defense. In addition to its common redaction, Article 51 is not comprehensive enough. Therefore, Customary International Law is important in determining the legality of any self-defense claims. Nevertheless, Customary International Law has come a long way since the Kellogg-Briand Pact, drafted on August 27, 1928, to renounce war as a means of state dispute resolution.⁵ One of the relevant customary international laws regarding self-defense is the Caroline Case, a British self-defense case concerning the destruction of a United States ship in Canadian waters in 1842. Caroline Case successfully pointed out fundamental and interrelated essential requirements for self-defense that have been utilized as a test in the past Military Tribunal Court and

² United Nations, "Letter dated 24 February 2022", 6.

³ "U.S. follows Canada, Europe on Russian aircraft ban", Reuters, accessed on May 25 2023, <https://www.reuters.com/business/airspace-closures-after-ukraine-invasion-stretch-global-supply-chains-2022-03-01/>.

⁴ United Nations, "Letter dated 24 February 2022", 7.

⁵ Christian Reus-Smit, *Politik Hukum Internasional*, (Bandung: Nusa Media, 2015), 78-85.

ICJ Cases.⁶ Notably, the Caroline Case was also added as a consideration in some ICJ rulings regarding self-defense cases, making it acceptable to be regarded as a self-defense test.

Self-defense practiced by states may take many forms, including anticipatory, pre-emptive, preventive, and interceptive. Not all these forms are based on international law, and some are not in accordance with the law of self-defense.⁷ Therefore, it is important to be able to differentiate between all these types of self-defense. Due to the wide range of interpretations of self-defense, it is frequently obscure and ambiguous for a state to utilize self-defense).⁸ State self-defense is a defensive measure taken against a present or imminent unlawful attack, justifying the repulsion of such an attack.⁹

This study aims to analyze the role of the Caroline Test in helping to determine the legality of states' use of self-defense in general and the legality of Russia's claims of self-defense. Furthermore, to achieve the objectives stated above, this article will be divided into a few writing segments to make each segment correlate with each other. First, the elaboration and explanation of self-defense in international law on general and specific matters. Second, elaborating laws that cover the state's right of self-defense both in positive and customary law. Finally, the Russia-Ukraine situation, its history, and conflict development are followed by Russia's self-defense claim legality determination using relevant laws, the Caroline Test, and ICJ's rulings.

B. Self-Defense in International Law

1. Self-Defense Interpretation Based on Article 51 of the UN Charter

Self-defense is an inherent and absolute right of any sovereign state and is recognized by Article 51 of the UN Charter as follows.¹⁰

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under

⁶ Tracy H Slaghter (et.al.), *Perspectives on International Law*, (United Kingdom: Cambridge University Press, 2023), 459-460.

⁷ Geoffrey S. DeWeese, "Anticipatory and Preemptive Self-defense in cyberspace: the challenge of Imminence," 7th International Conference on Cyber Conflict: Architectures in Cyberspace, (2015): 86.

⁸ Vania Lutfi Safira Erlangga and Sefriani, "The Legality of Israel's Self-Defense Claims of the Strikes on Hamas," *Yustisia Jurnal Hukum*, Volume 11, Issue 3, (2022), 199. DOI: 10.20961/yustisia.v11i3.61262

⁹ Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law*, (Oxford: Oxford University Press, 2017), 5.

¹⁰ Raphaël van Steenberghe, "The Law of Self Defense and the New Argumentative Landscape on the Expansionists Side", *Leiden Journal of International Law*, Volume 29, Issue 1, (2016), 47. DOI: 10.1017/S0922156515000643

the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The question of whether a state can defend itself or not already existed before the UN Charter and had been a subject of debate for an extended period. Most international society agrees that Article 51 does not establish the right to engage in defensive measures against an attack but rather reaffirms an inherent and already existing right.¹¹ The practice of self-defense claims in Article 51's point of view involves various theories developing in international law, including the restrictive, expansive, and qualitative Theories of self-defense.

1. Restrictive Theory states that the use of force in self-defense should only be carried out in response to an actual existing and visible armed attack. The use of force is seen as the last resort, limited to repelling the ongoing attack or preventing an imminent attack, not to start a conflict. The Restrictive Theory emphasizes strict adherence to the principles of necessity and proportionality in self-defense actions and is limited to a response to an armed attack.¹² That being said, any state that invoked their self-defense right but couldn't prove that there was an actual armed attack carried out by an aggressor state against them, in theory, couldn't have used the right of self-defense as a justification for their defensive measures.¹³ This theory was built upon Article 51 of the UN Charter, which indicates that the right of self-defense can only be exercised when an armed attack has occurred.¹⁴
2. Expansive Theory itself uses a much broader point of view of the right to self-defense, which refers to the state's self-defense not only in response to an armed attack but also to prevent or deter potential threats (and the state should provide evidence of whether the defensive measures they have done already fulfills International Customary Law criteria).¹⁵ Expansive considers Article 51 as a provision of defensive measures taken to respond to an armed attack but rejects the idea of pre-emptive self-defense as a legitimate exerciseable right. Pre-emptive self-defense itself is still controversial and inconsistent with International Customary Law.¹⁶
3. Qualitative Theory, an adaptation developed under President of America George W. Bush's administration, is a controversial doctrine that states can exercise defensive measures against a threat that hasn't shown any imminency with self-

¹¹ Alan Schuller, "Inimical Inceptions of Imminence: A New Approach to Anticipatory Self-Defense under the Law of Armed Conflict," *UCLA Journal of International Law and Foreign Affairs*, Volume 18, Issue 2, (2014): 165. <https://www.jstor.org/stable/45302380>

¹² Yoram Dinstein, *War, Aggression, and Self-defense*, (Cambridge: Cambridge University Press, 2011), 167.

¹³ Yoram Dinstein, *War, Aggression, and Self-defense*, 168.

¹⁴ Yoram Dinstein, *War, Aggression, and Self-defense*, 168.

¹⁵ Bruno Simma, *The Charter of The United Nations: A Commentary*, Second Edition, (Oxford: Oxford University Press, 1994): 75.

¹⁶ Bruno Simma, *The Charter of The United Nations: A Commentary*.

defense justification.¹⁷ George W Bush stated in the US National Security Strategy in 2002:

“We must adapt the concept of an imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.”

And he added to his statement:

“The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression ... We will always proceed deliberately, weighing the consequences of our actions.”

This theory emphasizes the use of pre-emptive self-defense towards the defense necessity against the probability of devastating attacks in the future. Referring to this theory, there is an understanding that this self-defense approach could maintain world order as it will daunt any state and non-state actors from ushering or partake in harmful programs or activities that might lead to armed conflict.¹⁸ As different as those theories are, the forms and examples of each of the theories also vary, as shown below:

Theory	Forms	Example of Cases
Restrictive	Conventional Self-Defense (Defensive measures taken against a imminent threat or an already happening attack. The defensive measures should be carried out instantly and fulfil the Customary International Law)	The United Nations Security Council accepted United States' response towards the terrorist attacks on 9/11. It was considered legitimate ¹⁹ because the factual self-defense chronology was

¹⁷ Abraham D. Sofaer, “The Best Defense? Preventive Force and International Security”, *Foreign Affairs*, Volume 89, Issue 1, (2010): 110. DOI: 10.5305/amerjintelaw.105.2.0390

¹⁸ W. Michael Reisman, “Assessing Claims to Revise the Law of War”, *American Journal of International Law*, Volume 97, Issue 1, (2003): 82. DOI: 10.2307/3087105

¹⁹ Sean D. Murphy, “The Doctrine of Pre-emptive Self-Defense”, *Villanova Law Review*, Volume 50, Issue 3, (2005): 734. digitalcommons.law.villanova.edu/vlr/vol50/iss3/9

		straightforward and instant toward imminent attack. ²⁰
Expansive	Anticipatory and Preventive Self-Defense (Defensive measures taken against threats that are existent, foreseeable, and unambiguous; therefore, a state has the chance to prevent the attack before the aggressor state even attacks)	Pearl Harbor attack on December 7 th , 1941, in which the United States could strike down the Japanese Air Vessels before the attack even began (since there were indications of an imminent attack and a chance to prevent it happened). ^{21 22}
Qualitative	Pre-emptive Self-Defense (Defensive measures taken against the threats that are not sufficiently imminent but the state may become an armed target of an aggressor state)	<ol style="list-style-type: none">1. US invasion of Iraq, which sparked differences of opinion even in the UN General Assembly,²³ was carried out to prevent Iraq’s use of mass destruction weapons against the US.²⁴ In this case, it was inevitable that there would not be any imminent threats from Iraq’s side against the US, as defined by Caroline Test.²⁵2. Israel’s destruction of the Osirak Nuclear Reactor owned by Iraq during Iraq and Iran’s war resulted in Iraq’s inability to defend

²⁰ Sean D. Murphy, “The Doctrine of Pre-emptive Self-Defense”, 734.

²¹ Raphaël van Steenberghe, “The Law of Self Defense and the New Argumentative Landscape on the Expansionists Side”, *Leiden Journal of International Law*, Volume 29, Issue 1, (2016): 51. DOI: 10.1017/S0922156515000643

²² Sean D. Murphy, “The Doctrine of Pre-emptive Self-Defense”, 735.

²³ Derek Averre and Lance Davies, “Russia, Humanitarian Intervention and the Responsibility to Protect: The Case of Syria”, *International Affairs (Royal Institute of International Affairs)*, Vol 91, Issue 4, (2015): 818. DOI: 10.1111/1468-2346.12342

²⁴ Ben Forsgen, “Death Star Drones: How Missile Defense Drone Technology Marks the Advent of Contingent Sovereignty”, *Brigham Young University Law Review*, Volume 46, Issue 3, (2021): 871. digitalcommons.law.byu.edu/lawreview/vol46/iss3/8

²⁵ Ben Forsgen, “Death Star Drones: How Missile Defense Drone Technology Marks the Advent of Contingent Sovereignty”, 871.

		itself. ²⁶ Israel's justifications were because of Iraq's aggressive tendency toward them and Iraq's alleged suspicious purchase of Uranium (one of the nuclear bombs' key ingredients). ²⁷
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Article 51 of the UN Charter clearly states that self-defense can only be carried out if an armed attack strikes the country.²⁸ Problems also arise from the interpretation of Article 51 regarding the circumstances under which the right of self-defense can be exercised. The drafters of the UN Charter did not mean "*inherent*" as to reduce the scope of rights arising in customary law and the use of the sentence "*if an armed attack occurs against a Member,*" which raises the question of whether such forms of self-defense like pre-emptive, anticipatory, or preventive self-defense are even allowed in International Law.²⁹ The fundamental differences between those three are imminence (urgency) and the visibility of the threat to be countered by self-defense. Referring to Sadoff's views, preemptive self-defense is self-defense rooted in a state's fear of an imminent threat.³⁰ UN Charter itself considers any self-defense to be legitimate when the act of self-defense is in accordance with Article 51 and or as a punishment regulated in Chapter VII.³¹

Anticipatory self-defense can indicate when an urgent threat manifests itself and becomes severe and harmful to the target state. In contrast, pre-emptive can only indicate the opportunity and contingency of the danger and not in any immediate time in the future, a state may become a target of an aggressor state.³² Preventive has a different temporal aspect between the two. It's a defensive measure taken against non-imminent threats. On that account it is considered illegal in International Law.³³ As a pre-emptive self-defense doctrine, it was an adaptation of the largely controversial use of self-defense carried out by the United States of America during George W Bush administration after the 9/11 tragedy.³⁴ Until this day, the legality of pre-emptive self-defense remained unsolved and left equivocal by the ICJ.³⁵

²⁶ Mark Drumbl (*et.al.*), "Self-Defense in Age of Terrorism", Proceedings of the Annual Meeting (*American Society of International Law*), Volume 97, 143. works.bepress.com/mark_drumb1/53/

²⁷ Joakim Tegenfeldt Lund, "Interceptive Self-Defense" (Ph.D. Diss, University of Lund. Sweden, 2007), 25.

²⁸ Sefriani, *Peran Hukum Internasional dalam Hubungan Internasional Kontemporer*, Second Edition, (Jakarta: RajaGrafindo Persada, 2016), 389.

²⁹ John O'Brien, *International Law*, (United Kingdom: Routledge-Cavendish, 2017), 683.

³⁰ Geoffrey S. DeWeese, "Anticipatory and Preemptive Self-defense in cyberspace", 85.

³¹ Sefriani, "The Dichotomy of Jus Ad Bellum and Jus Ad Bello in the 21st Century: Its Relevance and Reconstruction", *Padjajaran Journal of the Law*, Volume 9, Issue 2, (2022): 221. DOI: 10.22304/pjih.v9n2.a4

³² Geoffrey S DeWeese, "Anticipatory and Preemptive Self-defense in cyberspace", 85

³³ Geoffrey S DeWeese, "Anticipatory and Preemptive Self-defense in cyberspace", 86.

³⁴ Vania Lutfi Safira Erlangga and Sefriani, "The Legality of Israel's Self-Defense Claims of the Strikes on Hamas", 202.

³⁵ Jawahir Thontowi, *Hukum dan Hubungan Internasional*, First Edition, (Yogyakarta: UII Press, 2016), 247.

2. Caroline Case's Role in Constructing Comprehensive International Customary Law Regarding the Law of Self-defense

Caroline Case was the incident of an attack on a merchant (trade) ship owned by the United States, which Britain destroyed as an act of self-defense in 1837.³⁶ In the aftermath of the destruction, United States Secretary of State Daniel Webster corresponded with Lord Ashburton (British Prime Minister) on the circumstances and stated that...*while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."*³⁷

Through the letter, Daniel Webster stated that every act of self-defense, including the measures taken against the ship, had to be tested in terms of necessity and proportionality. Daniel Webster also argued that these two aspects were related to the use of self-defense needed for attacks that occurred (in necessity) so that self-defense actions had to be carried out within the scope of the needs and, therefore, should be done proportionally and did not exceed any needs of both target state and aggressor to prevent further catastrophe and conflicts.³⁸

In a follow-up letter, Daniel Webster also allowed the United Kingdom to present evidence that the self-defense they committed met such aspects as explained: necessity, instant, overwhelming necessity, and no moment of deliberation. Lord Ashburton himself maintained that the attack on Caroline's ship was necessary and was an act of self-defense.³⁹

*I believe I may take it to be the opinion of candid and honorable men that the British officers who executed this transaction and their government who approved it, intended no slight or disrespect to the sovereign authority of the United States. That they intended no such disrespect, I can most solemnly affirm.*⁴⁰

An important principle was established through the back-to-back correspondence between Daniel Webster and Lord Ashburton. It took place in International Law, thereby called the Caroline Test, affirming that any state should not stand by nor

³⁶ James W Houck, "Caroline Revisited: An Imagined Exchange between John Kerry and Mohammad Javad Zarif", *Penn State Journal of Law & International Affairs*, Volume 2, No. 2, (2013), 294. elibrary.law.psu.edu/jlia/vol2/iss2/5

³⁷ See Daniel Webster's Letter to Henry Stephen Fox (British Diplomat) of 6 August 1842 concerning the Case of the Destruction of the Caroline by Great Britain, paragraph 1. Accessed on June 26, 2024, https://avalon.law.yale.edu/19th_century/br-1842d.asp#web2.

³⁸ Also see Daniel Webster's Letter to Henry Stephen Fox (British Diplomat) dated 24 April 1841, paragraph 17. Accessed on June 26, 2024, https://avalon.law.yale.edu/19th_century/br-1842d.asp#web2.

³⁹ James W Houck, "Caroline Revisited: An Imagined Exchange between John Kerry and Mohammad Javad Zarif", 295.

⁴⁰ Maria Benvenuta Occelli, "'Sinking' the Caroline: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law", *San Diego International Law Journal*, Volume 4, Issue 1, (2003): 478. digital.sandiego.edu/ilj/vol4/iss1

stand still and do nothing when other parties threaten the security and safety of the state.⁴¹

To clarify, the Caroline Test is understood as a number of criteria or elements needed as justifications and proofs in every initiation of defensive measures taken, and invoking self-defense rights should be taken against an imminent attack and done proportionally.⁴² Those few important aspects must be fulfilled in order to consider a defensive measure invoking self-defense right to be legal.⁴³ Some say that another form of self-defense, such as pre-emptive use of force, is permissible if the opponent's attack is imminent from the perspective of the international community.⁴⁴ These aspects or principles still have challenges because they are considered ambiguous conceptually, making them difficult to apply in practice.⁴⁵ The criteria set out in Caroline focuses on the temporal aspect as the core of the legal reference for the use of self-defense. However, imminency is considered a very problematic aspect because there is no definite definition of imminent threats since it can be subjective in some cases.⁴⁶ Therefore, a complete and thorough comprehension of self-defense concepts and examples, as well as past cases, is needed in order to identify imminent threats from non-imminent ones.

Caroline Test was repeatedly used as a reference in self-defense cases such as the Cuban Missile Crisis (1962), the Middle East War (1967),⁴⁷ and the Osarik Nuclear Reactor Bombing (1981),⁴⁸ and some of those cases was also using relevant International Court of Justice Rulings as supplementary factors to weigh in and contemplate in self-defense's threshold fulfilment. Some of those cases had differences in the conditions and attacks, determining those claim's legality had its challenges due to the many variables to be considered, and the law has not evolved to that point just yet. These variables were necessity, imminence, proportionality, and some generally accepted aspects of self-defense implementation.⁴⁹ In the context of the International Court of Justice rulings, the self-defense cases mentioned can be used as references in determining the legality of any self-defense claims, as the judgments and their considerations are relevant. Such as the ICJ's Rulings in *Nicaragua v United States of America* (American Military and Paramilitary

⁴¹ Maria Benvenuta Occelli, "'Sinking' the Caroline", 478.

⁴² Alan L Schuller, "Inimical Inceptions of Imminence: A New Approach to Anticipatory Self-Defense under the Law of Armed Conflict", 171-172

⁴³ Matthew C Waxman, "The Caroline Affair in the Evolving International Law of Self-Defense", *Columbia Law School Faculty Publication*, (2018), 2. ssrn.com/abstract=3240618

⁴⁴ Ryan J Hayward, 401-402

⁴⁵ Dapo Akande and Thomas Liefänder, "Clarifying Necessity, Imminence, and Proportionality in the Law of Self Defense", *The American Journal of International Law*, Volume 107, Issue 3, (2013): 56. DOI: 10.5305/amerjintelaw.107.3.0563

⁴⁶ Alan L Schuller, "Inimical Inceptions of Imminence", 173.

⁴⁷ John O'Brien, *International Law*, 682.

⁴⁸ James W. Houck, "Caroline Revisited: An Imagined Exchange between John Kerry and Mohammad Javad Zarif," *Penn State Journal of Law & International Affairs*, Volume 2, No. 2, (2013): 294. elibrary.law.psu.edu/jlia/vol2/iss2/5/

⁴⁹ Alan L Schuller, "Inimical Inceptions of Imminence", 171-172.

Activities on Nicaragua's Soil), Islamic Republic of Iran v United States of America (The Destruction of Iranian Oil Platforms by United States of America), and Israel v Palestine (Construction of the Separation Walls in Palestinian territories by Israel). Those rulings contained significant considerations regarding the legality of acts of self-defense. Therefore, all those rulings should be considered when determining the legality of self-defense, alongside the Caroline Case, which has been recognized as part of International Customary Law.⁵⁰

Referring to the 1962 Cuban Missile Crisis mentioned above, where the United States imposed a blockade on Cuba under the designation of "quarantine" due to "urgent" threats posed by the Soviet Union's missiles and ballistic missiles, this action was deemed a violation of Article 2 (4) of the UN Charter as it was considered as an act of aggression. In such situations, the UN Security Council should have convened beforehand to allow for deliberation and negotiations, even opening a discussion of alternative measures (other options).⁵¹ Additionally, as the presence of long-range missiles alone could not be deemed an armed attack, and the blockade was enforced prior to deliberation by the UN Security Council, it violated Article 51 of the UN Charter. Moreover, there was no evidence of the Soviet Union's intention to utilize the weapons. Consequently, the criteria of imminence and necessity outlined in the Caroline Test were not fulfilled. Furthermore, the overwhelming criterion was not met, as there was neither an armed attack nor a credible threat.⁵²

In the case of Operation Opera in 1981, Israel attacked Iraq's Osirak Nuclear Reactor while Iraq was still at war with Iran. Consequently, Iraq could not retaliate or defend itself against the sudden attacks.⁵³ Based on Israel's reasoning for the attack, it was prompted by allegations that Iraq had purchased a specific quantity of uranium and by Iraq's historical and religious animosity towards Israel. Israel believed that these factors indicated Iraq's development of nuclear weapons intended for use against Israel.⁵⁴ Iraq stated that since there had been no armed attack from their side, Israel's claim of self-defense was deemed unacceptable and illegal.⁵⁵ In this particular case, the necessity aspect was not fulfilled as there were no armed attacks or imminent threats. Consequently, the criteria of overwhelming force and the lack of opportunity for deliberation or negotiations were not met. In this case, the absence of immediate danger significantly weakened Israel's argument for self-defense. Consequently, the United Nations swiftly condemned Israel's actions, viewing them as clear violations of the principles outlined in the UN Charter. This condemnation was a strong reminder of the imperative to adhere to established

⁵⁰ John O'Brien, *International Law*, 682.

⁵¹ William L Standard, "The United States Quarantine of Cuba and the Rule of Law," *American Bar Association Journal*, Volume 49, Issue 8, (1963): 747. books-library.net/files/books-library.net-11231436Ug8P7.pdf

⁵² Joakim Tegenfeldt Lund, "Interceptive Self-Defense", 23.

⁵³ Joshua Kirschenbaum, "Operation Opera: an Ambiguous Success," *Journal of Strategic Security*, Volume 3, Issue 4, (2010): 49-50. DOI: 10.5038/1944-0472.3.4.3

⁵⁴ Joakim Tegenfeldt Lund, "Interceptive Self-Defense", 25.

⁵⁵ Joakim Tegenfeldt Lund, "Interceptive Self-Defense", 25.

international norms and protocols, especially in situations fraught with the potential for military escalation. It underscored the importance of respecting the sovereignty and territorial integrity of nations while also emphasizing the necessity for peaceful resolution of conflicts through diplomacy and negotiation. By condemning Israel's actions, the UN reaffirmed its commitment to upholding global peace and security, urging all parties involved to exercise restraint and seek peaceful resolutions to disputes. Consequently, the Security Council instructed an immediate cessation of the attack.⁵⁶ As a form of reparations for the damage that Israel has done, Israel was instructed to pay sufficient compensation.⁵⁷

The initial attack in each self-defense did not have specific rules of scope in the UN Charter.⁵⁸ However, the UN Charter does regulate the fact that the Security Council must approve every act of self-defense.⁵⁹ Therefore, the International Court of Justice Rulings plays an essential role in helping determine the legality of self-defense claims in world conflicts. In the case of Nicaragua, each self-defense must be able to distinguish between an armed attack and less severe forms of attack based on the scale of force used and the magnitude of the impact.⁶⁰ This ensures that not all minor attacks can be retaliated against based on self-defense.⁶¹ International Court of Justice has affirmed the definition of an armed attack in Article 51, stating that the attack must be more significant than a mere border incident or incident and pose a danger to territorial integrity.⁶² Michael Schmitt also states that the essence of an armed attack is that the risks involve civilian casualties, injuries, and property damage.⁶³ Therefore, every country must be able to distinguish heavily armed attacks from mild forms of attacks to prevent them from escalating.⁶⁴ It is essential to consider various variables when considering the implementation of Article 51, as the article itself lacks detailed guidance. One approach that can be adopted is to utilize the Caroline Test as a benchmark for assessing the legality of self-defense actions. The Caroline Test holds significance as it has been acknowledged as part of Customary International Law. By referencing this test, states can evaluate the appropriateness and legality of their self-defense measures in accordance with established international norms. This reliance on established legal frameworks not

⁵⁶ Security Council Resolution Number 487, 19 June 1981.

⁵⁷ United Nations General Assembly, 36th Session A/RES/36/27, 13 November 1981, 17.

⁵⁸ Ignaz Stegmiller, "The Right of Self-defense under Article 51 of the UN Charter against the Islamic State in Iraq and the Levant," *Die Friedens-Warte*, Volume 90, Issue ¾, 2015, 251. [jstor.org/stable/24868696](https://www.jstor.org/stable/24868696)

⁵⁹ Jeffrey L. Dunoff and Mark A. Pollack, *Interdisciplinary Perspective on International Law and International Relations*, (New York: Cambridge University Press, 2013), 529.

⁶⁰ Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?," *The American Journal of International Law*, Volume 108, Issue 2, (2014): 165. DOI: 10/5305/amerjintelaw.108.2.0159

⁶¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (1984), ICJ Judgement 1986, 91.

⁶² Mary Ellen O'Connell, "The True Meaning of Force," *AJIL Onbound*, Volume 108, 2015, 142. DOI: 10.1017/S2398772300002038

⁶³ Ryan J Hayward, "Evaluating the 'Imminence' of a Cyber Attack for Purposes of Anticipatory Self Defense," *Columbia Law Review*, Volume 117, Issue 2, (2017): 407. ssrn.com/abstract=2838511

⁶⁴ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (1984), ICJ Judgement 1986, 91.

only enhances clarity and consistency but also promotes adherence to principles of international law and fosters stability in global relations. Therefore, utilizing the Caroline Test as a reference provides a valuable tool for navigating the complexities of self-defense within the framework of international law.

It is crucial to thoroughly evaluate the magnitude and impact of each initial attack before invoking the right of self-defense.⁶⁵ This evaluation is necessary because an attack must reach a significant scale to qualify as an "armed attack," as outlined in Article 51 of the UN Charter and the Nicaragua Case. By carefully assessing the scale and effects of an attack, states can ensure that their responses are proportionate and in accordance with international law. This approach helps prevent overreaction and promotes peaceful resolution of conflicts.⁶⁶ Furthermore, in the case of the Islamic Republic of Iran v United States of America, the International Court of Justice reaffirmed a fundamental principle regarding the burden of proof in determining the legality of self-defense. As per the Court's ruling, the burden of proving the legitimacy of self-defense falls on the party claiming it. This includes providing evidence for the reason behind the attack and other pertinent factors. This reaffirmation emphasizes the importance of being transparent and accountable when evaluating the legality of self-defense actions under international law. By requiring the party claiming self-defense to provide evidence, the Court ensures fairness and honesty in assessing these claims. This accountability commitment helps prevent misuse or exploitation of the right to self-defense, safeguarding its integrity and credibility. Thus, the Court's decision maintains trust and upholds the principles of justice within the international legal system.^{67,68} Therefore, every state that exercises the right to self-defense must prove the threats (armed attack) they were fighting against to determine one's self-defense legality, and the International Court of Justice adds that the threats have to be transboundary on the application of Article 51 of the UN Charter (based on ICJ's Advisory Opinion in Israel v Palestine regarding Wall Constructions).⁶⁹

C. Russia's Self-Defense Claims Analysis

One of the main reasons why Russia attacked Ukraine once again in 2022 was because of Russia's obsession with uniting Ukraine as part of the Pan-Russian Nation (*obshcherusskij narod*).⁷⁰ This effort to unite Ukraine was successfully done before when Russia abused the right of self-determination by unilaterally annexing

⁶⁵ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (1984), 91.

⁶⁶ Martin Dixon, *Cases & Materials on International Law*, (United Kingdom: Oxford University Press, 2016), 603.

⁶⁷ Ignaz Stegmiller, "The Right of Self-defense under Article 51 of the UN Charter against the Islamic State in Iraq and the Levant", 251.

⁶⁸ Oil Platforms (Islamic Republic of Iran v. United States of America) (1992), ICJ Judgement 2003, 57, 119.

⁶⁹ Ignaz Stegmiller, "The Right of Self-defense under Article 51 of the UN Charter against the Islamic State in Iraq and the Levant", 251.

⁷⁰ Taras Kuzio, "Why Russia Invaded Ukraine," *Horizons: Journal of International Relations and Sustainable Development*, Issue 21, (2022): 40.

Crimea.⁷¹ Following Crimea Annexation, the ongoing 2022 Russia-Ukraine conflict continued to result in an increasing number of casualties as of the time of writing this article. Given Russia's awareness that they could not invade Ukraine without legal reasons, Russia invoked individual and collective self-defense.⁷² Thus, determining the legality of Russia's claim becomes crucial. Early hypothesis and quick observation indicate that Russia's acts of self-defense fall into the category of anticipatory self-defense and are not conventional, as Russia based its self-defense on the imminent threat of NATO's expansion.⁷³ Anticipatory self-defense is a type of self-defense in which a state takes proactive actions to prevent the consequences of threats and dangers that have not yet occurred.⁷⁴ Anticipatory self-defense highlights the imminence aspect of every attack because the use of self-defense in this form is based on threats that have not happened but have an urgent aspect (imminent), so the threatened party does not have time to negotiate or deliberate.⁷⁵ Referring to the Nicaragua Case, in essence, anticipatory actions were considered legitimate when based on threats that were qualitatively serious and very urgent.⁷⁶ This is supposed to limit any further violations of International Humanitarian Law when any armed conflict has the tendency to violate the law of war conduct. It was proven when the United Nations Human Rights Commissioner reported as of 21st February 2023, the Russia-Ukraine war had 21.293 casualties; 8.006 of them were dead, and 13.287 were injured.⁷⁷ Even 21 of them were civilians, 6 of them were dead, and 15 were severely wounded on Crimean territories.⁷⁸ As it was known, International Law orders that civilians must be protected under Rome Statute 1998 and should not be harmed in any way under any circumstances,⁷⁹ and even affirmed by Nicaragua Case that any state parties to the Geneva Conventions are not to prolong any occurrent armed conflict.⁸⁰

As stated above, initial assessments indicated that Russia's self-defense measures fell into the category of pre-emptive self-defense and not conventional self-defense. Russia justified its initiation of the invasion by citing the expansion of NATO influence and infrastructure, which it perceived as a threat to the country's sovereignty.⁸¹ Russia's justifications could potentially serve as a cover for the

⁷¹ Atul Alexander, "Crisis and General International Law: Lessons from the Russia-Ukraine Conflict", *Indonesian Journal of International Law*, Volume 21, Issue 1, (2023): 9. DOI: 10.2139/ssrn.44618728

⁷² Atul Alexander, "Crisis and General International Law: Lessons from the Russia-Ukraine Conflict", 7.

⁷³ Atul Alexander, "Crisis and General International Law: Lessons from the Russia-Ukraine Conflict", 7.

⁷⁴ John Dever and James Dever, "Cyberwarfare Attribution, Preemption, and National Self Defense," *Journal of Law & Cyber Warfare*, Volume 2, Issue 1, (2013): 37. [jstor.org/stable/26441240](https://www.jstor.org/stable/26441240)

⁷⁵ John O'Brien, *International Law*, 682.

⁷⁶ John O'Brien, *International Law*, 682.

⁷⁷ United Nations Human Rights Commissioner, "Civillian Casualties in Ukraine from 24 February 2022 to 15 February 2023", 1.

⁷⁸ United Nations Human Rights Commissioner, 1.

⁷⁹ Rome Statute 1998, Article 8 section (2) (b) (i)

⁸⁰ Gregory Joshua Manogar and Diajeng Wulan Christianti, "Principle of Neutrality and the Obligation to Prevent International Humanitarian Law Violations: A Case Study of US Military Assistance in Russia-Ukraine War", *Padjadjaran Journal of Law*, Volume 10, Number 1, 2023, 90. DOI: 10.22304/pjih.v10n1.a5

⁸¹ United Nations, 5.

country's agenda, as historical instances have linked the use of self-defense to states' covert agendas.⁸² In Russia's defense, the country did warn NATO when Ukraine submitted requests to join the alliance. Russia perceived NATO's expansion of influence across Europe as a threat, prompting its response.⁸³ In addition to NATO's expanding influence, Russia argued that the people of Donetsk and Luhansk were entitled to exercise their right to self-determination.⁸⁴ These arguments were widely scrutinized by the international community, which deemed them inconsistent with the principles of the UN Charter.

To determine one's legality of self-defense, analyzing the act within the framework of relevant legal principles and precedents is essential. The Caroline Case provides valuable insights into the criteria and guidelines for assessing the legality of initiating self-defense or attacks. According to the Caroline Case, self-defense must be justified by necessity, meaning there must be an imminent threat, and the response must be proportional to the posed threat. This underscores the importance of adhering to established legal standards and principles when considering acts of self-defense.⁸⁵ The imminence aspect of an attack is crucial in the anticipatory self-defense doctrine because it is based on threats that have not yet occurred but possess an urgent nature (imminent), leaving the threatened party no time for deliberation.⁸⁶ Referring to the views of the International Court of Justice's Ruling in the Nicaragua Case, in essence, all anticipatory self-defense measures are considered legitimate if they are based on qualitatively very serious and urgent threats.⁸⁷

Russia's reasons for initiating the invasion indicate that it was based on NATO's influence on Ukraine, which Russia perceived as a threat to its territorial sovereignty. This legal basis is an important aspect of this study. Because it appears that Ukraine did not make any attempts and (or) intention to invade or start an invasion to Russia. In fact, a year before the attack, Russia had already alerted NATO about its aggressive military and security actions that extended across Europe.⁸⁸ As an excuse, after the "threat" that Russia had claimed, Russia stated and perceived that Ukraine needed to be "demilitarized" and "de-Nazified" over the regime's torture and the genocide of local civilians and Russian descendants.⁸⁹

⁸² Sefriani, *Hukum Internasional: Suatu Pengantar*, Second Edition, (Jakarta: Raja Grafindo Persada, 2018), 324.

⁸³ Why is Ukraine not in NATO and is it too late to join? Here's what experts, NATO say", Miami Herald, accessed on 28 August 2023, <https://www.miamiherald.com/news/nation-world/world/article258774458.html#storylink=cpy>

⁸⁴ Atul Alexander, "Crisis and General International Law: Lessons from the Russia-Ukraine Conflict", 10.

⁸⁵ Alan L Schuller, "Inimical Inceptions of Imminence", 171-172.

⁸⁶ John O'Brien, *International Law*, 682.

⁸⁷ Francis Grimal, "Missile Defence Shields: Automated and Anticipatory Self-defense?", *Journal of Conflict & Security Law*, Volume 19, Issue 2, (2014): 328. DOI: doi.org/10.1093/jclskr001

⁸⁸ "Putin warns of unspecified military response if U.S. and NATO continue 'aggressive line'", , The Globe and Mail, accessed on March 16 2023, <https://www.theglobeandmail.com/world/article-putin-warns-of-unspecified-military-response-if-us-and-nato-continue/>.

⁸⁹ United Nations, 6.

Based on Russia's legal justification elaboration, the invasion was carried out against threats that were not imminent since Ukraine had no intention of attacking Russia, making the claim weak and rendering it inaccurate. Therefore, Russia could not justify its self-defense actions using those arguments. According to Russia's legal argument for invading Ukraine, as submitted to the UN Secretary-General, it was meant to exercise the right of self-defense as regulated in Article 51 of the UN Charter.⁹⁰ Based on the data above, the legal analysis of Russia's self-defense claims legality arguments are as follows.

1. Because Russia initiated the invasion despite the absence of threats from Ukraine, and considering the Qualitative Theory elaboration stated before, Russia's claims of self-defense can be categorized as pre-emptive General. Russia argued that the invasion was carried out with Article 51 of the UN Charter as justification. But it was certainly not met and fulfilled because the article clearly states:

*"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations..."*⁹¹

The right of self-defense can only be exercised in response to a threat against a UN Member State. In essence, Russia's claim of self-defense was legally insufficient because legal arguments suggest that NATO's expansion of influence cannot be considered an imminent threat. Although pre-emptive self-defense raises numerous objections and concerns in the academic world, a consensus emerges from debates that even pre-emptive actions may be permissible if there is an imminent armed attack.⁹² Therefore, Russia's defensive measures did not comply with the UN Charter due to the absence of a threat as a basis for the legal implementation of self-defense.

2. The Caroline Test sets out the requirements for justified self-defense, stating that self-defense must meet certain criteria like necessity, imminence, and proportionality before taking defensive actions.⁹³ Russia argued that self-defense was necessary because of NATO's expanding influence and military presence in eastern Ukraine, which shares a border with Russia. However, this expansion wasn't seen as an immediate threat warranting an attack, as there was no indication of any physical threat or intention to use weapons from Ukraine. Moreover, as a defensive alliance, NATO has never attacked Russia and is not expected to do so.⁹⁴ According to ICJ's Nicaragua Case Ruling, a threat must be serious and imminent to justify action, which was not apparent in this scenario. Referring to the 1962 Cuban Missile Crisis, the placement of NATO's weapons

⁹⁰ United Nations, 6

⁹¹ UN Charter Article 51.

⁹² Geoffrey S DeWeese, "Anticipatory and Preemptive Self-defense in cyberspace", 88.

⁹³ Alan L Schuller, "Inimical Inceptions of Imminence", 171-172.

⁹⁴ Robert Person and Michael McFaul, "What Putin Fears Most," *Journal of Democracy*, Volume 33, Issue 2, (2022): 32. DOI: 10.1353/jod.2022.0015

and their facilities establishment were not perceived as an immediate threat, indicating that no threat existed. Hence, NATO's deployment of weapons was intended for defensive purposes⁹⁵ with no indication of either physical or non-physical threats endangering Russia's sovereignty. The assertion of threats was founded solely on suspicions and lacked substantiated evidence from actual circumstances.

Additionally, Russia's invasion was disproportionate because the attacks that commenced on February 24, 2022, went beyond what was necessary for self-defense. According to the principle of necessity, self-defense should only be carried out to the extent required to address imminent threats.⁹⁶ Furthermore, the principle of necessity dictates that the use of force is only permissible when there are no other viable alternatives. Essentially, if another feasible option is available, there would be no need for self-defense.⁹⁷ In terms of proportionality, Russia deployed over 200,000 troops to attack Ukrainian ports, airfields, roads, and cities, solely based on Russia's "fear" of NATO's expanding influence and Ukraine's membership.⁹⁸ This demonstrates unnecessary and disproportionate aggression, especially considering that Ukraine has always maintained a defensive stance. Moreover, Russia's failure to distinguish civilian objects from military targets compounds the issue.⁹⁹ Considering everything, these actions cannot be regarded as legitimate acts of self-defense under International Law.

D. Conclusions

Since the Caroline Case in 1842, the law governing self-defense in armed conflict has evolved significantly over the years. It has transcended from merely a reference case to a benchmark for evaluating any state's self-defense actions. This legal framework has been applied in major historical events such as the Cuban Missile Crisis, the Middle East War in 1967, and several landmark rulings by the International Court of Justice (ICJ) on self-defense, including the Nicaragua Case, the Wall Construction Case, and the Oil Platforms Case. Attempting to determine the legality of one's act of self-defense without considering the Caroline Test would render the analysis incomplete. Therefore, in assessing the legality of Russia's actions in self-defense, it is imperative to examine relevant precedent-setting cases. Russia's initial attack was driven by the objective of incorporating Ukraine into the Pan-Russian Nation without sufficient legal grounds for the action.

This study reveals that Russia's assertion and practice of self-defense were categorized as pre-emptive rather than conventional self-defense. Furthermore, Russia's claims that NATO's expansion into Ukraine is a threat is a lack of justification,

⁹⁵ Joakim Tegenfeldt Lund, "Interceptive Self-Defense", 23.

⁹⁶ John O'Brien, *International Law*, 682.

⁹⁷ Alan L Schuller, "Inimical Inceptions of Imminence", 167-168.

⁹⁸ Robert Person and Michael McFaul, "What Putin Fears Most", 19.

⁹⁹ Gregory Joshua Manogar and Diajeng Wulan Christiati, *Principle of Neutrality and the Obligation to Prevent International Humanitarian Law Violations*, 91.

given the absence of imminent attacks from Ukraine. The lack of imminent threats stemmed from the fact that weapon placement did not constitute an imminent threat. This is based on the logic that self-defense involves proactive actions against existing threats, and the absence of threats allows other choices to be considered as a last resort. As such, the actions should have been chosen as a last resort, and even if it was the final recourse, it should have been executed proportionately to the scope of necessity only to subdue or defeat an ongoing attack. Meanwhile, Russia's disproportionate actions were demonstrated by continuously sending a massive number of military forces to the warfare but failing to refrain from causing further damage and casualties. Finally, this article asserts that Russia's extensive military deployments are not necessarily due to the absence of imminent threats, making its actions violate International Law since they are not in accordance with Article 51 of the UN Charter. This article concludes that Russia's invasion of Ukraine lacks legal justification and considers it as a breach of International Law.

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