



The Posture of Anticipatory Self-Defense under International Law Underpinning Russo-Ukraine War

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Abstract

The West accuses Russia as aggressor state following her declaration of ‘Special Operation on 24 February 2022’, however, Russia plays down these accusations by arguing that her measures are intended to diffuse the serious national threat posed by NATO’s Eastward expansion, in particular the proposed membership of Ukraine to NATO (i.e., a state back yard to Russia). Therefore, this paper, first, examines whether there is truthfulness in Russia’s claim of anticipatory self-defense. Secondly, if there are grains of truth in Russia’s claim, then it will proceed to investigate whether international law is permissive of such claims. For fruitful analysis, the qualitative approach method has been duly consulted. In this regard, the UN Charter and Customary International will be duly consulted. The finding of the paper reveals that the Russian Federation has the inherent right to anticipatory self-defense due to NATO’s determination to encircle her via its open-door policy to the state’s backyards to Russia.

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ACRONYMS

NATO: The North Atlantic Treaty Organization

RES: Resolution

UNC: United Nations Charter

VCLT: Vienna Convention on the Law of Treaty

WARSAW: Treaty of Friendship, Co-operation and Mutual Assistance

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1. Introduction

International law on the use of force has gone several miles in terms of circumscribing states' rights to have recourse to the use of force. Ended as per what is stipulated under the UNC it is only self-and collective self-defense that states are bestowed with the right to legitimately resort use of force.¹ Despite the relentless efforts made to limit recourse to the use of force, the principal law dealing with the use of force namely, the UNC is devoid of clarity on a major theme concerning the use of force meaning the Charter provision is not lucid on whether anticipatory self-defense is the right of states facing an imminent and grave threat from the adversary party. The center of gravity in the debates lies in the words "Nothing...shall impair" because for the proponents of anticipatory self-defense, these words are not meant to abridge anticipatory self-defense rights states acquired under customary international law; for them in certain situations in which no armed attack occurred, states have the right to strike first in order to defuse the imminent threat, however, protagonists, however, contended, the aforesaid words are inculcated in the Charter merely to affirm that the right to self-defense, which is of course, to be exercised, the aftermath of happening of an armed attack, is not restricted to member states to the UNC rather

available to non-member states, hence, the Charter has no aim of bestowing a very broad right to use of force in the absence of armed attack. Lauterpacht is one of the earliest scholars in the existing debate who insisted on his part that anticipatory self-defense was implicitly extinguished by Article 51 in 1945.²Hence, in due regard to the controversial nature of the status of anticipatory self-defense, this paper will pay visits to the VCLT in as much as the rules of interpretation ingrained there will be much helpful to pass a verdict on whether state's recourse to anticipatory self-defense is legitimate because as tipped herein before, the debate hinge on how to construe article 51 of the UNC to wit on whether it is permissive or prohibitive of anticipatory self-defense.

Corollary to the controversial nature of anticipatory self-defense, the confrontation and rivalry between the Russian Federation and NATO is beyond the grasp of the Russia and Ukraine war, though it has reached the climax following the break out of war between those two states on February 24, 2022.³ The duel for geopolitical supremacy in the Eurasian landmass is over and above the realm of the ongoing Russo-Ukraine war⁴.Throwing the gasoline in the fire, the Russian troops crossed Ukraine's territory from the north, east, and south following the order made by Russian

¹ John H. Currie, *Public International Law* (2nd ed., Toronto, Irwin Law Inc., 2008), p.459, See also, Tom Ruys 'Armed Attack ' And Article 51 Of The UN Charter: Evolutions in Customary International Law and Practice (1st ed., New York, Cambridge University Press, 2010), p. 59

² Murray Colin, *The Inherent Right of Self-Defense in International Law*, New York (Springer, New York, 2013), P.97

³ P.Murphy, T. J., "Here's what we know about how Russia's invasion of Ukraine unfolded," February 24/2022, Available at <https://edition.cnn.com/2022/02/24/europe/ukraine-russia-attack-timeline-intl/index.html> (Accessed on May 28, 2023)

⁴Valur Ingimundarson (2022), "The 'Kosovo Precedent' :Russia's Justification of Military Interventions And Territorial Revisions In Georgia And Ukraine", LSE IDEAS Strategic Update, July 2022, p.9-10

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President Vladimir Putin. On February 24, 2022. At 4:50 A.M. Putin made a public speech, where he asserted that a special military operation was commenced in Ukraine to protect the people, who have been subjected to abuse and genocide by the Kyiv regime for eight years, this allegation of genocide and abuse of Russian speaking societies in Ukraine was also claimed by the Russian separatist in Donbas region. President Putin in his speech also added that Russia has no desire to control the whole of Ukraine.

Coupled with the humbled endeavors of adjudicating the posture of international law on anticipatory self-defense, the paper aims at untangling the riddle of whether the Russian Federation claims that her 'special military operations' are born out of the national threat posed by NATO's vigorous Eastward expansion or it is another case of the wolf in the sheep to wit whether it is a desired pretext for Russia to unlawfully grip territories of a sovereign nation (i.e., Ukraine). As per Russia, it is a forced measure calculated to avert the catastrophe by doing nothing, whilst NATO bombs fall on her soil. For Russians, the Eastward expansion of NATO via openly pursued membership of the state's backyard to Russia is a policy designed to encircle Russia in as much as the proposed membership of Ukraine into NATO will make it convenient for NATO to easily roll its Tanks and war machineries into Russia's territory. Some political and military commentators are convinced by the Russian side of the story,

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while others rebuffed it and argued *that the acts represent Russia's attempt to expand to states formerly members of the Soviet bloc, which typically exemplifies Putin's neo-imperial foreign policy*⁵. For them, NATO's Eastward extension to include states that were formerly under the USSR sphere of influence will be helpful in nurturing democracy and human rights in the region.

For Russia, NATO enlargement speaks another fact. Its position on the matter is summed up in President Putin's February 24 speech in which he announced the "special military operation," he said in reference to Ukraine: -

"The problem is that in territories adjacent to Russia, which I have to note is our historical land, a hostile "anti-Russia" is taking shape. Fully controlled from the outside, they are doing everything to attract NATO armed forces and obtain cutting-edge weapons.... It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty. It is the red line that we have spoken about on numerous occasions. They have crossed it".⁶

Moreover, after the commencement of the war, Putin has given more clarification on the goals of the operation:- On July 29, 2022, Putin stated that the "ultimate aim" of the war in Ukraine is "the liberation of the Donbas, the defense of its people, and the creation of conditions which would guarantee the security of Russia at large."⁷ Those, who rally behind NATO's elongation, argue that its Eastward expansion will make the region a beacon of

⁵ Bartosz Gierczak, "The Russo-Ukraine Conflict", Research Gate, March 10, 2021, Available at <https://www.researchgate.net/Publication/349948624.12.p.7>

⁶ Mary Chesnut, "US/NATO-Russian Strategic Stability and the War in Ukraine", CAN Occasional Paper/8,

Available at <https://www.cna.org/reports/2023/06/US-NATO-Russian-Strategic-Stability-in-Ukraine.pdf>, (Accessed on July 11, 2023), P. 3

⁷ Chesnut, "US/NATO-Russian Strategic Stability and the War in Ukraine", Ibid.,p.8

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democracy, and ensures political stability and democratic reform in Central and Eastern Europe.⁸ They say “No issue is more central to NATO's goal of building a peaceful political order in Europe than relations with Russia.”⁹

In this regard, therefore, the paper harbor interest in investigating whether Russia’s portrayal of the NATO Eastward movement as a threat to her national security stands amenable rational mind; to hit this goal, the paper will undergo a historical audit of the relationship between NATO and Russia, in particular, it will examine how the two rivalry groups namely, the West chiefly, represented by the USA and the Russia Federation formerly known as USSR managed to avert nuke war and canvassed the future security structure of Europe in times when the ideological contestation was at the climax stage practically during the “*Cold War*”,¹⁰ were there was even good news speedily circulating about the hopes that one day Russia will be a member of NATO.¹¹

2. Methodological Approaches of the Paper

The paper in order to address the aforementioned primal legal and factual quarries has deployed doctrinal/qualitative research methodology with the view to get the best palatable answers to the issues the paper invoked. In tune with this, the paper has investigated several legal and political journal

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articles, commentaries, and working papers written by renowned geopolitical commentators and legal writers on the theme at hand and, cross-examined each paper against the other in order to separate the wheat from the chaff. But, a word of a caveat here is in order: the internet nowadays is engulfed with the flux of papers that give deaf ears to the claims raised by Russia, while echoing and amplifying day and night Ukraine’s versions of the facts triggering this bloody war without even sparing minutes to question their validity. Therefore, these facts have drudged the author to examine whether there is any grain of truth in Russia’s allegations that the Eastward expansion of NATO poses a threat to Russian national security, hence, Russia, which could force Russia to quickly act to halt the proposed membership of Ukraine to NATO via the wheels of anticipatory self-defense, whose status under international law will be separately entertained in this paper by aligning the historical reasons that saw the establishment of NATO and detailed scrutiny of the cold war settlement between the two big powers of the then world namely, USA and USSR.

3. Terms of the Cold War Settlement, Dishonorably Acts of the West, and the

⁸ Jeffrey William, “NATO Expansion: Benefits and Consequences”, University of Montana, 2001, Available at

https://scholarworks.umt.edu/etd?utm_source=scholarworks.umt.edu%2Fetd%2F8802&utm_medium=PDF&utm_campaign=PDFCoverPages, (Accessed on July, 11,2023)P. ii

⁹ Gierczak, “The Russo-Ukraine Conflict”, Ibid., P.72

¹⁰ Cold War stands to represent of period of geopolitical tension between the Soviet Union and its satellite states (Eastern and Central European states), and the United States with its allies (the Western European countries)

after World War II (i.e. (1945-1991) were the two superpowers were primarily engaged in an ideological war between the capitalist USA and the communist Soviet Union without engaging in direct large-scale fighting between the two sides, Available on <https://www.drishtiiias.com/pdf/cold-war.pdf>, Accessed on July 11, 2023

¹¹ Vyacheslav Gorskii, “Problems and Prospects of NATO-Russia Relationship: the Russian Debate Final Report “NATO Euro-Atlantic Partnership Council Fellowships Programme 1999-2001, June 2011, p.11

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Status of Anticipatory Self-defense Under International Law

Michael Gorbachev took the initiative to smoothen soar relationship with the West. This has been amplified in his foreign policy that was directed towards eliminating confrontation with the West and as a sign of good gesture towards that road, he made far-reaching concessions in arms control negotiations that aimed to meet the Western demands.¹² It is reasonable to deduce that the USSR would not assent to demolish her image of super military and political power to get nil. *Cleary, domestic factors of economic impoverishment pushed USSR to lean towards the West for financial aid, though the economy may have been limping*¹³, USSR's power back then was untouchable and in equal parity with the USA even in some areas of military exceeding the USA (i.e. interims of Nuclear Stockpiles), hence, in the due account of antagonism and rivalry between the two major superpowers, the author, would like to pose this question "would USSR agrees too such generous terms without the West pledging to give her national security guarantees?. The USSR took political commentators and even the West by surprise when she assented to abolish the WARSAW pact, withdraw half a million of its soldiers from East Germany, and dismantle the Cold War mentality¹⁴ whilst not being stubborn in insisting on the liquidation of the adversary military alliance, whose reasons of existence ab-into was to counterbalance the growing and expanding power of the USSR and her WARSAW Pact, if possible, to annihilate

¹² Lilita Dzirkals, "Glasnotes and the Soviet Foreign Police", A Research Paper Done Under the Sponsorship of RAND Corporation, 1990, p. 1

¹³ William, "NATO Expansion: Benefits and Consequences", Ibid., p.11

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USSR¹⁵?. Take note that East Germany was supposed to serve as a buffer zone and the first line of defense for any West assault against mainland Russia, which goes to explain why there was a garrison of half a million soldiers of the USSR in East Germany. Moreover, corollary to this, the USSR walked the talk in seeing the world free of nuclear war in such a terrifying period when there was even talk of nuclear war by discarding her military alliance (i.e., the WARSAW Pact).

Much relevant to our topic: - unlike how some picture the Cold War settlement, Daniel Deudney, and John Ikenberry render an argument that the prevailing atmosphere leading to the agreement was not take it or leave it mode, ended it was to be remembered rather a unique settlement in history in a sense that the negotiation was not between a victorious and a defeated nation, rather military wise, it was an agreement between equal parties. ¹⁶Hence, the paper will analyze what kind of licit expectation the USSR harbored, whilst coming to terms with the West when she took such decisive measures of withdrawing from East Germany and accords to dismember the WARSAW Pact, moreover, related to this, an inquiry will be made on how Russia perceives security wise the abridgment of the legitimate expectations underpinned in the cold war settlements.

3.1. The Posture of Anticipatory Self-Defense under International Law: Untangling the Riddle via Rules of Treaty Interpretation

¹⁴ Dzirkals, Ibid.,P.7

¹⁵ "NATO's Purpose After the Cold War", p. 1

¹⁶Daniel Deudney & G. John Ikenberry, "The Unraveling of the Cold War Settlement", *Survival: Global Politics and Strategy*, Vol. 51 No. 6, 2011,p.1

As hinted here in before controversy persists on the posture of international law towards anticipatory self-defense. It managed to pull both proponents and opponents. For the opponents the words ‘if an armed attack occurs’, interpreted literally, imply that the armed attack must have already occurred before force can be used in legitimate self-defense; there is no right of anticipatory self-defense against imminent and impending danger of attack.¹⁷ However, supporters of a right of anticipatory self-defense claim that Article 51 does not limit the circumstances in which self-defense may be exercised; they deny that the word ‘if’, as used in Article 51, means ‘if and only if’.¹⁸

3.1.1 The Mother of All Confusions is Sheltered on the Word ‘if an Armed Attack Occurs’

The bone of contention on the status of anticipatory self-defense as hinted before lies in the differing understanding of eminent scholars on the phrase “if an armed attack occurs”, the words that riddle the posture of anticipatory self-defense. The antagonists contended that if we read such words to be permissive of anticipatory self-defense before the actual occurrence of an armed attack, then it will widen states recourse to war, which are something the Charter aims to avoid. This position is extracted from the rendition of the preparatory work of UNC and it is representative of the ‘restrictive school of thoughts’ on self-defense.

¹⁷ Peter Malanczuk, Akehurst’s, *Modern Introduction to International Law* (7th ed., New York, Routledge, 2002), P. 311

¹⁸ Ibid., p.311-312

The antagonists’ opponents based on recourse to the drafting records of the UNC associate self-defense with the ‘happening of armed attack’.] The explications go on to assert:-Self-defense will be lawfully bound to exist whenever an attack is made by a State against another member state.¹⁹ This school of thought bolsters its position by spelling out the statement made by a Colombian representative during the discussions on article 51:- accordingly, the representative said that “if at any time an armed attack occurs, that is, an aggression against a State, self-defense, whether individual or collective ... shall operate automatically ... until such time as the Security Council may take the appropriate punitive measures ...”.²⁰ This restrictive schools epitomized by the antagonists of anticipatory self-defense trough resort to the travaux preparatoires affirms that article 51 qualifies the exercise of individual and collective self-defense by inserting a double procedural condition, as well as a substantive condition, to wit the happening of an ‘armed attack’. The ‘armed attack’ requirement thus constitutes an integral part of Article 51; therefore, no self-defense can be exercised if no armed attack occurs.²¹

Well, Akehurst vehemently rejects the restrictive school of thought in his eloquent expression “From the practical point of view, the exclusion of a right of anticipatory self-defense deprives the ‘innocent’ state of the military advantage of striking the first blow...”²² Nevertheless, the proponents anticipatory self-defense boldly and glaringly altercate for the reading of anticipatory self-

¹⁹ Ruys , ‘*Armed Attack*’, Ibid.,p.64

²⁰ Ibid

²¹ Ruys , ‘*Armed Attack*’, Ibid ., p.67

²² Malanczuk, *Supra* note 15, Id., p. 311-313

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defense under article 51 of the UNC from two sets of angels; from the outset, they blame the antagonists for miss-reading the UNC. This expansionist school of thought, unlike the restrictive, persistently disputes attempt to circumscribe the right to self-defense in cases of occasioning armed attack. For them, the word “inherent” has been deliberately inserted in the UNC art. 51 to denote the existence of an inherent right of self-defense pre-dating the Charter provisions. No argument can, therefore, be drawn from the wording "if an armed attack occurs" in Article 51 intending to impose limitations upon the right of self-defense based on the happening of self-defense. Moreover, relying upon that phrase alone does not lead to the conclusion that armed attack is a necessary prerequisite to self-defense:

[a] proposition that "if A, then B," is *not* equivalent to, and does *not* necessarily imply, the proposition that "if, and only if A, then B." To read one proposition for the other, or to imply the latter from the former, may be the result of a policy choice, conscious or otherwise ... such identification or implication is assuredly not a compulsion of logic.²³

For the expansionist school of thought “if the right to self-defense is juxtaposed with the happening of armed attack then the Charter purpose namely, maintenance of international peace and security will not be realized in as much as Article 2(4) of the Charter requires Members to refrain not only from the use of force, but also from the threat of force. If states had to wait for an armed attack to occur before diffusing imminent threats, then the maintenance of international peace and

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security would be fares and fanfare. If states waited for such an attack, they would then become responsible for the restoration, instead of maintenance, of international peace and security.”²⁴

The Travaux Préparatoires of Article 51 and Art. 31 of the VCLT

Murray Colin Alder provides strong arguments in favor of interpreting Article 51 in a way that embraces the right to anticipatory self-defense prior to the commencement of an armed attack. The position of the author is deeply impeded in the statement that it is unnecessary to go *travaux préparatoires* of Article 51 in order to unlock the stand of the Charter on anticipatory self-defense. Reference to the *travaux préparatoires* is warranted only in times to assist the interpretation of a treaty provision, some ambiguity or obscurity arising from it must be evident or the provision must lead to a manifestly absurd or unreasonable result if plainly applied a treaty provision is full of ambiguity or obscurity arising from it must be evident or the provision must lead to a manifestly absurd or unreasonable result if plainly applied. None of these preconditions appear to have been fulfilled at the time of the creation of the *Charter*, as no controversy arose over the effect of Article 51.²⁵ This means consultation to *travaux préparatoires* will be made (i.e. in line with art. 32 of the VCLT) if the first rules of treaty interpretation ingrained under art. 31 of the VLCT entailed absurd and irrational results, if not no need to visit art. 32. The commentary borrows Brownlee’s disposition on the posture of anticipatory self-defense under the Charter. For Brownlee, the

²³ Leo Van den hole, “Anticipatory Self-Defence under International Law,” *American University of International Law Review*, Vo. 19, Issue 1 (2003), p. 84-85

²⁴ Ibid

²⁵ Van den hole, “Anticipatory Self-Defence under International Law,” Ibid., P. 85

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word “inherent” is inserted uniquely under Article 5, unlike other provisions of the UNC to pull the Charter towards the totality of the right to self-defense including anticipatory self-defense, whose status under customary international law before the promulgation of the Charter is plain and uncontested meaning the width and breadth of self-defense is inclusive of anticipatory self-defense, whilst negotiations were ongoing for drafting of the Charter. For that reason, the word self-defense under Article 51 should be read in line with ordinary understanding in times when the Charter provisions were coined in a sense to be inclusive of anticipatory self-defense. Would we be accused of fetching into the jar unreasonable results for sticking with ordinary meaning approaches to untangle the riddles of Article 51? Not at all because firstly unpacking treaty provisions via recourse to the ordinary meaning of words is one tool of treaty interpretation as envisaged under article 31 of the VCLT, secondly, bypassing the ordinary meaning approach and restoring to travaux preparatoires is justified only whenever the path followed under ordinary /plain/ meaning scheme upshots absurd and ambiguous results, but to the issue at hand such will not be the case because for all intent and purpose interpreting article 15 to be inclusive of anticipatory self-defense enhances inherent right to self-defense by states because forcing state to wait until the commencement of armed attack will severely incapacities the victim state capability to lawfully respond aftermath of entertaining such devastating attack by the enemy; well now a days as we know a state is capable of inflicting fatal injury in an age where many states possess destructive and sophisticated weapons

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following the explosion of technological development.²⁶

3.2. Could NATO be a Reliable Partner for Endeavours to Build Democracy and Human Rights?

Some political figures and commentators openly welcome NATO’s expansion to the East and Central European Countries. The reasons for such an approach are the perception that NATO will accelerate the wheels of Democracy and Human Rights in those regions. However, the reality is far more isolated than the rhetoric. What happened during NATO rides into Libya is a living witness to this assertion. By thwarting the aims underpinned under the UN Resolution 1973 NATO members catalyzed the fall of the Gadhafi regime, which is telling that the West is currently using NATO to get away with regimes not sympathizers and affiliated to them in as much as the overall objectives of the Res. was to save civilian lives by restricting the doing power of the Libyan military (i.e. the Resolution authorizes the UN members to establish ‘no-fly zone on the Eastern part of Libya, not to alter regime), the portrayal of the West as forerunners of human right and democracy is a false flag masking cruel intents of scramble for nation’s resources. During the ride whilst setting aside the overall intent of the resolution the West embarked on hostilities entailing harm to non-combatants, which defies the 1977 UN Additional Protocol to the Geneva Convention of 1949 for the protection of Civilians in international armed conflict (i.e. Protocol I See Article 48). The members of the coalition used armed forces to speed up the demise of the Mohammed Gaddafi regime in

²⁶ Ruys, Supra note 21, Ibid., p.84-89

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Libya though under international law the prerogative of change of government is an inherent right of the Libyan people as part of self-determination. Even evidence is openly circulating that the post-Gaddafi regime established (i.e. the National Transitional Council or NTC) does not have a free hand in the governance of public affairs in Libya. The operation has hit its goal of instilling puppet servants in the West so that the ultimate goal of exploiting the nation's abundant resource (i.e. oil) will be possible in a Neo-Colonialism fashion.²⁷

In the contexts of Eastern and Central, Waltz also decries the role played by NATO expansion in the democratization process in Eastern and Central Europe: "One may wonder, however, why this should be an American rather than a European task and why a military rather than a political economic organization should be seen as the appropriate means for carrying it out. The task of building democracy is not a military one. The military security of new NATO members is not in jeopardy; their political development and economic well-being are."²⁸

3.2.1. Appraisal of the Use of Force in the Russia-Ukraine Conflict

On 24 February 2022, Russia launched what she calls it "special military operation" whilst the West called it an invasion of Ukraine by Russia, or Putin's war. Whichever name was used, on that day Ukraine was under attack by military force or armed force and it is still ongoing. There are different narratives of the war in Ukraine most are biased on some political and geopolitical issues. Here the paper

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will indulge in the analysis of whether there is a grain of truth in Putin's speeches made to explicate the reason behind for pressing peddles of the Russian war machinery that obliterated Ukraine's territorial sovereignty. As per Putin Russia is compelled to launch the special military operation due to the boiling of anti-Russia sentiment in states adjacent to the Russian Federation in particular, if Ukraine joins NATO, then the two will collide to attack Russia, and as a result, the special operation will go ahead with the view to diffuse national threat presented by NATO encirclement path.

Then the lingering theme is to assess and pass a verdict if there is any factual truth in the words of Putin about Russia being threatened by NATO expansion. This examination will be performed by appraising on what basis the West and USSR worked towards the abatement of military confrontation in the periods preceding the demise of the WARSAW Pact. Secondly, the investigation will be made into the factors that caused the coming to the scene of NATO.

Russia didn't declare war on Ukraine, the use of force by Russia against Ukraine was named a special military operation. The first time this name was used in a speech given by Russian President Vladimir Vladimirovich Putin on February 24, 2022. In this speech several justifications for the use of force against Ukraine was provided by Putin, the first justification given by Putin. Putin is this "the expansion of the NATO bloc to the east, bringing its military infrastructure closer to the Russian border", and "the military machine is

²⁷Brooke A. Smith-Windsor, ed., *The North Atlantic Treaty Organization's Intervention in Libya its Political and Legal Implication for Peace and Security*

Architecture of the African Union: A view from Africa, (Rome, NDC Forum Paper Serious, 2013), P.140-143.

²⁸ Eunika Katarzyna, "The Debate on NATO Expansion", *jstor*, Vol. 7, No. 4 (2008), p.7

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moving and, I repeat, is coming close to our borders”.²⁹

From what is stated by President Putin, we can understand that one of the justifications for the use of force by Russia on Ukraine was anticipatory self-defense. Putin claimed that NATO’s military machinery is approaching the Russian border more speedily than anyone can predict, therefore, in his view, pacifying the danger that comes with NATO’s rapid encirclement is a task that does not wait for later deliberation, and hence, if Russia didn’t acted swiftly and decisively, the benevolent ideals of protecting territorial integrity and freedom from destruction will be unachievable. He stated this kind of situation has happened in the past and that this generation should learn from the past mistakes of inaction spelled out in his words “We know from history how in 1940’s and early 1941’s the Soviet Union tried in every possible way to prevent or at least delay the outbreak of war.³⁰This end among other things, he tried literally to the last not to provoke a potential aggressor, did not carry out or postponed the most necessary obvious actions to prepare for repelling an inevitable attack and those steps that were nevertheless taken in the end were catastrophically belated,” “as a result, the country was not ready to fully meet the invasion of NAZI Germany which attacked our motherland on 22 June 1941 without declaring war”.³¹

²⁹Full Text: Putin's Declaration Of War On Ukraine, [spectator.co.uk: https://www.spectator.co.uk/article/full-text-putine-s-declaration-of-war-on-ukraine/](https://www.spectator.co.uk/article/full-text-putine-s-declaration-of-war-on-ukraine/), Accessed on May 28, 2023,

³⁰ Spectator, Supra note 26, Ibid

³¹ Ibid

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3.2.2. Factors Necessitating Establishment of NATO: - Shifting Wheels Beyond the Policy of Containment to Expansionism

NATO was created with the view to counter-balance the growing influence of Stalin’s USSR following the fall of NAZI Germany where the USSR managed to share a slice of the cake by dividing Germany into the sphere of influence namely, the East-West. In 1948 the Soviets embarked on consolidation of its hold over Berlin in defiance of the Western world, which alarmed the mindset of the West about the type of new rivalry they were going to face. Forthwith to counterbalance the Soviets, they formed NATO.³²

NATO included in its Charter the famous Article 5, which states “The Parties agree that an armed attack against one or more of them [...] shall be considered an attack against them all”. This mechanism of collective defense took place in order to punish the potential aggressor, believed to be represented by the Soviet Union itself. After West Germany (the Federal Republic of Germany) entered into NATO (i.e., 1955); the Soviet Union moved to create the Warsaw Treaty, in order to work as a ‘counter-alliance’ to the Atlantic Organization³³. In the Prologue of the Warsaw Pact’s Constitution, the danger of a new war in Europe was mentioned in the form of a Western threat to the national security of the ‘peaceful European states’, namely, the States kept under the control and influence of the Soviet Union.

³² Valdir Da Silva Bezerra, “NATO-Russia’s ‘Conflictual Relationship’: ‘Instability’ As A Defining Factor In the Political Interaction Between Moscow And The Atlantic Alliance”, *Eurasian Research Journal*, ERJ, Vol. 4, No.3(2021), P. 9

³³ Ibid

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Soviet assumed for herself the warden of the socialite's world.³⁴

3.2.3. When the Cold War was at its Climax

The preparation for nuclear war went intensively when the tension was reaching to apex. The Soviet was determined to fight with nuclear if the policy of deterrence failed and war broke out. They have built extensive facilities to protect the Soviet leadership from the American intercontinental USA nuclear strike³⁵. Americans too were nervous about the possibility of a major nuclear war with the USSR. Ronald Reagan gave the green light for the production of costly weapons programs such as the MX missile system, a railroad track of 200 missiles rotated among 4,600 shelters to be constructed along the track in Nevada and Utah, making it more costly for the Soviets to have to hit them all, the Strategic Defense Initiative, anti-ballistic missile system, and deploying the Pershing II missiles in Western Germany all depicts that nuclear war was anticipated.³⁶

The military tension and confrontation continued for decades entailing the division of Europe and fundamentally changing the European soil "from a safety zone to a zone of danger and instability". The soviet leaders came to realize at the end of the 1990s -1990 and the beginning of the 1990s that the wind of change was blowing in the Soviet Satellite states (i.e., East and Central Europe); hence, the USSR must become open and align itself with the liberal economic and political order of the

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West. People's discontent with the sluggish economic situation within the USSR spurred rapprochement with the West faster than anyone expected³⁷.

A word of caveat has to be stated here. Though economic impoverishment forced the Soviet to lean towards the policy of rapprochement towards the West and seeks assistance from the same can never be implied by any standard the Soviets were by far the weak side when they set for tables of negotiation, for instance, the Soviet cut deals with the West for significant reduction in armaments. They entered into negotiations having significant leverage over events in East and Central Europe owing to her military superiority though it was questionable the extent, to which the crawling economy can carry forward the overstretched military infrastructures. There was no confusion in the West that the bargain was between equals. The plain evidence of this can be fetched from the offer tabled by the West German leader Kohl to Gorbachev when he proffered financial assistance if the USSR assented to the Unification of Germany; if there was a feeling of triumphalism from the West then they would have forcefully unified Germany or stated in other words, the Western states were certainly reluctant to use military power for the sake of unifying Germany in as much as they that feared the possibility that Gorbachev or somebody else could use military

³⁴ Ibid

³⁵ Evolution of Soviet Strategy, <file:///C:/Users/wku/Desktop/self/Nuke%20war.pdf>, P. 22

³⁶ "Gorbachev's New Thinking, the Cold War, and the Fall of the Soviet Union", <https://dra.american.edu/islandora/object/0809capstones>

[%3A21/datastream/PDF/view](#), Accessed on July, 14, 2023

P. 21

³⁷ Özlem Tür, "NATO's Relations With Russia And Ukraine", June 2010, <https://www.nato.int/acad/fellow/98-00/tur.pdf>, (Accessed on July 13, 2023) P.4-5, See also Dzirkals, Glasnotes and the Soviet Foreign Police", Ibid., p. 2-3,

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force. In that case, they were even ready to retreat.³⁸

The last leader of the Soviet, Michael Gorbachev, was known to have vigorously pursued the policy and the West was less hostile to the USSR than previously thought. He has encouraged a strategic reassessment that minimizes the theme of inherent Western aggressiveness, highlights the possibilities of East-West cooperation, and identifies the main military threat to the USSR as an accidental nuclear war rather than a premeditated Western attack.³⁹ His foreign policy underscored that the USSR and NATO should cooperate to build stability in Europe⁴⁰. He took unprecedented measures of unilateral reduction of soviet troops from Eastern and Central Europe as well as posed the arm-race, reduced stockpiles, and consented to the unification of Germany.⁴¹

Based on the seeds sown by Gorbachev, Russian leaders trekked on the same path though the USSR was deceased. Russia pursued a pro-Western orientation in foreign policy and continued its close cooperation with the Alliance until the issue of NATO enlargement was proposed, which Russia considers against its vital interests.⁴² To Russian dismay, the West has not reciprocated to the several unilateral unthinkable concessions Russia made since dating back to the commencement of the same by Gorbachev.

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The question worth investigating is why? The reason lies in the USA's (i.e., the main architect of NATO) policy of building a unipolar world that revolves only around the orbits the USA designs, hence, any resilient and resisting power like Russia that stands in the way of the USA's unipolar world must kneel down.

3.3. The Fading A Way of the Cold War Settlement

USSR was deceived by the increasing appearance of the West as a goodhearted, benevolent actor, that would be respectively accommodative of the USSR's interest, hence, the USSR would not lose a thing by reproaching the West, which motivated her to terse down the East-West iron curtain.

⁴³Moscow was not only checked by American power and purpose, but acted in the context of a wider Western system that made American power more restrained and less threatening. This system and the active diplomacy that embodied its principles made Soviet reorientation and retrenchment possible. This new reality made Soviet reorientation possible. In the sequence of events that marked the end of the Cold War, the pivotal juncture was the Soviet Union's decision to withdraw from its extended ramparts in Central and Eastern Europe. This decision was premised upon the judgment of Soviet leaders that the West would not exploit Soviet vulnerability by encroaching on its historic defensive parameter and sphere

³⁸ Tuomas Forsberg (1999) ,“Power, Interests And Trust: Explaining Gorbachev’s Choices At The End Of The Cold War”, <https://library.fes.de/libalt/journals/swetsfulltext/15222750.pdf>, Accessed on July 14, 2023, P.610-611

³⁹Bruce Parrot (1988),”The Politics of Soviet National Security under Gorbachev”, <https://www.ucis.pitt.edu/nceeer/1988-801-10-Parrot.pdf>, Accessed on 14, 2023, p. iii

⁴⁰ Hannes Adomelt (2006), Gorbachev’s Consented to Unified Germany’s Membership into NATO, Working Paper, https://www.swp-berlin.org/publications/products/arbeitspapiere/Consent_to_Nato_ks.pdf, Accessed Retrieved on 07/15/2023 P. 4

⁴¹ Tur,“NATO’s Relations With Russia And Ukraine, Ibid.,P.4-6

⁴² Tur, “NATO’s Relations With Russia And Ukraine, Ibid, p. 3

⁴³ Ibid., P.46

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of influence to threaten core Soviet security interests.⁴⁴

The 20 years since the ending of the Cold War have seen a slow but sure erosion of the principles and architecture of the settlement. Instead of a new world order of comity and integration, the relationship between Russia and the West is marked by grievance, disappointment, and unfulfilled expectations. The sources of this deterioration are several.⁴⁵ But much of this souring is the result of American policies. American foreign policy, so successful at the moment of settlement, has pursued goals contrary to the settlement's principles. America's image of benign, respectful, and accommodationist of the interests of others is long gone promises.

One reason is that domestic interest groups have excessively shaped American grand strategy. The United States has also undermined the settlement by exploiting its advantages without considering Russian interests. An inflated sense of American unipolar prerogatives, combined with the ascent of an aggressive neo-conservative ideology, has generated an American foreign policy that has lost its sense of restraint and sensitivity to the interest of others.⁴⁶

The Cold–War settlements were premised on the overarching belief that NATO would pay respect to the fact that East and Central European territories remained in under the USSR's zone of influence. Stated otherwise, the idea of extensive NATO expansion was simply outside the realm of the thinkable at that

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time.⁴⁷The central point of the deal was to instill cooperation between the Soviets and the West as partners for the security of Europe. The tone of the settlement was most importantly, for the Soviets and the USA to work hand in hand towards the maintenance of European peace and security, back then it was underscored that the two would enter into a new spirit of partnership; a far cry from the previous threatening rhetoric and tensions that had been a hallmark of their relationship for more than a generation.⁴⁸

In sum as far as NATO expansion is concerned two things can be said, firstly the aggressive expansion policy it has pursued backfires upon the terms of the settlement to end the Cold War confrontations, and secondly, NATO elongation part from betrayal to the Cold War agreement that the West made not to expand to the East and Central European state, apart from being the betrayal, the reasons offered for the expansion namely, accelerating the wheels of democracy and human rights is fares and fanfare. The credentials of NATO for democracy and human rights are doubtful because NATO has accepted states with poor records of democratization and human rights into membership. This is confirmed in the case of Portugal, one of the twelve original signatories of the Washington Treaty, which possessed “an authoritarian form of government” until the 1970s. The same situation characterized the admission of Turkey and Greece, which were also not democracies at the time of their accession.⁴⁹

⁴⁴ Deudney & Ikenberry, “The Unraveling of the Cold War Settlement”, *Ibid.*, P. 47

⁴⁵ *Ibid.*, p.49

⁴⁶ *Ibid*

⁴⁷ Deudney & Ikenberry , “The Unraveling of the Cold War Settlement”, *Ibid.*,P.50

⁴⁸Post–Cold War U.S.-Russian Relations—What Went Wrong,

<https://www.jstor.org/stable/pdf/resrep21005.6.pdf>,

P. 6

⁴⁹*Ibid.*,p.10

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Secondly, NATO has not been endowed with a provision that expels states whose record of democracy and human rights slashed down after acceptance to membership. What is also interesting is that “there is no legal basis for the ejection of a state from NATO, within the North Atlantic Treaty or elsewhere. By ejection, I mean revocation of a state’s status as a signatory of the North Atlantic Treaty, and thereby of the benefits of the security commitment in Article 5. The only mention of exit from the treaty is in Article 13, which allows for voluntary exit with a year’s notice.” However, there was a time when NATO “dealt with members whose governments have not always supported democratic values. When such situations arose—for example, with Greek and Turkish military regimes in the late 1960s and early 1970s—other Allies effectively isolated or excluded them from sensitive discussions. In those instances, suspending either or both would have risked sparking a nationalist backlash against the Allies—or possibly a war between the two long-time adversaries.”⁵⁰

If the main adversary party to the West and USA is found to be deceased (i.e. USSR and her WARSAW Pact) then by implication NATO should have been abandoned in as much as the thingness of military alliances is predicated on the existence of another enemy military alliance, therefore, there is no reason for NATO to be durable because the adversary alliance corporality has come to end. The existence of NATO was predicted by the overarching need to pool the military capacities

⁵⁰ Frydrych, “The Debate on NATO Expansion”, *Ibid.*, P.10

⁵¹ Frydrych, “The Debate on NATO Expansion”, *Ibid.*, p. 3

⁵² *Ibid.*,p.3-4

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of all its member states towards defensive lines against a robust threat posed by the then Soviet Union.⁵¹ Now if the existence of the USSR and WARSAW Pact shatters away, so should the existence of NATO.

The two representatives of the neorealist school of thought, Kenneth N. Waltz and John J. Mearsheimer, aired out that “without an external enemy (i.e., the Soviet Union) the Alliance would lose its reason for existence.” Waltz further stated “It is the Soviet threat that provides the glue that holds NATO together. Take away that offensive threat and the United States is likely to abandon the Continent.” This is why many expected the organization to “wither away or, at best, to stagnate and decline in importance.”⁵² If so what reasons lay behind NATO’s enlargement to Central and East Europe? In the view of Kenneth Waltz, the enlargement of the Alliance constitutes “an American policy designed to maintain and extend America’s grip on European foreign and military policies.”⁵³

3.3.1. Russian Federation No Longer Poses Security Threat to the Collective West

“The Cold War is over. The United States won, and we all agreed to this. So why have you decided to re-open the competition?”⁵⁴ The demise of Communism in Europe, the dissolution of the Warsaw Pact, and the collapse of the Soviet Union have ushered in a new era and a new set of challenges and opportunities. Today Europe is whole and free, from the Atlantic to the Urals and beyond. There is no longer a threat looming on the

⁵³ *Ibid.*,P.6

⁵⁴ Thomas M. Hamilton, “Avoiding The Rush: Reasons To Go Slow On NATO Expansion”, <https://apps.dtic.mil/sti/pdfs/ADA399232.pdf>, P.1

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horizon of Europe and, with the Soviet/Russian troop withdrawals and the arms reduction treaties of the Reagan and Bush eras, European and American cities have never been more secure.⁵⁵ Therefore, this all tips an argument that NATO expansion can longer be justified by the grounds of a national threat to the Baltic and adjacent states like Ukraine in as much as the reason for its existence has been dashed out due to the demise of USSR and her military alliance i.e. Warsaw Pact, rather after losing a cause for continuation, NATO is a risky to the Russian Federation national security because while Warsaw Pacta was dismantled, the military alliance of the West not only maintain a presence, it is dangerously and recklessly expanding encircle Russia. There are no convincing grounds for the alliance's unfriendly plans toward Russia to establish what a cordon sanitaire around the country is, in effect; the plans to advance the North Atlantic Alliance eastward are laying the foundation for unfriendly and even confrontational relations between Russia and NATO states in the future.⁵⁶

In toto, the cause for NATO enlargement can be summarized one it is the master plan of the USA to get a free hand at the rich oil and gas fields of Central Asia and fling away any competitor party along that road namely, Russia because Russia is a major power on the region⁵⁷, secondly, the torch towards expansion was lighted in the Clinton campaign for presidency in USA. It was a calculated measure to get favorable votes from voters of East European origin. This was epitomized by the

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events that happened in October 1996. In this period specifically in October of 1996, in the midst of his re-election battle, President Clinton delivered a strong statement in support of accelerating NATO enlargement while campaigning in Detroit, an area rich in voters of East European descent.⁵⁸

Void of cogent legal cause for its continuation, NATO is a curse for Russian national security. Russia perceives NATO's Eastward expansion as a threat because it will weaken Russia's defense capability taking into account that the two forces are foes and NATO is still a military organization⁵⁹. In fact, the USA one of the major powers that drive NATO, its foreign policy is to see weaker Russia in the Eurasian landmass: NATO enlargement was not only a land grab that upset the geopolitical balance in Europe; it also constituted a violation of assurances given by Western leaders to then-Soviet president Mikhail Gorbachev that in exchange for Germany's reunification and NATO membership, the alliance would not expand eastward.⁶⁰

From its inception NATO was an anti-Soviet military bloc, Russia views NATO as a key security threat. Today Russia is virtually surrounded on its western and southern borders by NATO member nations. This expansion refuels concerns that the United States' Europe-based missile defense system could threaten Russia's nuclear deterrence capabilities. To support this, Russian foreign minister Sergey Lavrov emphasized that Washington retains nuclear weapons on

⁵⁵ Ibid., P. 2

⁵⁶ M. Hamilton, Ibid.,P.12-13

⁵⁷ Jonathan Haslam, "Russia's Seat at the Table: a Place Denied or a Place Delayed?", *International Affairs*, Vol. 74, No. 1 (1998), p.129

⁵⁸ Frydrych, "The Debate on NATO Expansion", Ibid., p.7

⁵⁹ Gierczak, "The Russo-Ukraine Conflict", Ibid., p.12

⁶⁰ Ibid., p.8

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European soil that are capable of hitting Russian territory, while Moscow has made dramatic reduction to its arsenal. In addition to the above, the USA is planning to pre-position heavy weaponry in East European countries that border Russia.⁶¹

It can be stated that the alarming rate to which NATO is enlarging and expanding to the East and Central Europe though the reasons for its corporality seized to exists, as well its open door policy towards states with grim record of human rights and democracy coupled with an unsuitability of military alliance to instill human rights and democracy, the hostile attitude officials of the USA harbor towards Russia (i.e. USA being the main gear that shifts the cam meaning NATO) ,the inflammatory military activity the alliance is performing in states neighbouring Russian Federation, together with the near future promised membership of Ukraine to the alliance, end in proffering an argument that the primal reason for NATO elongation is to see weakened Russia influence in Eurasian Mass Land in favour of USA, moreover, the installation of military equipment in states nearby to Russia like Check Republic and the proposal of the same over Georgia tips in favour of argument that the ultimate goals are to ensure that Russia bows down via military encirclement and obliterating Russia's defensive capabilities, corollary to this, if Ukraine becomes NATO member then it will be easy for NATO tanks to roll easily into Russian territory because Ukraine is a state backyard to Russia. Therefore, the only path available to the Russian Federation is to force Ukraine to waive

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the idea of joining NATO via military action-, state in other words, Russia's military operations are underpinned by anticipatory self-defense in as much as Ukraine's membership exposes Russia's first line of defense in due account of eminent membership of Ukraine into NATO.

4. Conclusions and Recommendations

4.1 Conclusions

- NATO's expansion towards East and Central Europe can be explicated by neither the acceleration of the wheels of democracy nor by human rights rather the overarching goals are to see Russia's defensive capabilities weakened via encircling her through speeding up membership of Russia's member states to NATO in as much as it paves the way the USA to establish unipolar economic hegemony in Eurasian Mass Land.
- The UNC lacks lucidity on whether anticipatory self-defense is permissible or prohibited, hence, resorting to the VCLT to untangle the posture of the Charter is found to be mandatory, and upshot to this, the plain/ordinary meaning approach to treaty interpretations is suitable to as far as the final result will be commensurable to the reason why the legal devise of anticipatory self-defense is designed.

4.2 Recommendations

- The UN Charter article 51 should be amended so that it will be a clear restatement of the customary international

⁶¹Zolotukhina, E., "Russia and NATO: Mutual Grave Threats, or Reactionaries?", July 30, 2015,cgsrs.org: <https://cgsrs.org/publications/14>

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law permission of anticipatory self-defense because it will be helpful to avoid recourse to the law of treaties interpretation in the endeavor to have a clear picture of the status of anticipatory self-defense under international law.

- If the legality of the use of force by a permanent member of the UN is presented before the USC, then following the tones of principles of Natural Justice namely, “no one shall be a judge in his own case” (i.e. Nemo Judex In Causa Sua) that permanent member of the UNC should be disbarred from entertaining her own case, for this

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ends the UNC art. 27(2) ought to be amended

- The international community should stop echoing the narratives aired out by the West rather should have ears to the narratives forwarded by both and should endeavor to find a win-win solution for this bloody war, in this regard, it is suggested for that the international community to devise a security arrangement acceptable to Russia, Ukraine and NATO over the East and Central Europe.