

## THE LEGALITY OF PRE-EMPTIVE WAR UNDER INTERNATIONAL HUMANITARIAN LAW

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*“You do not have the right to take another human’s life, unless it’s in strict self-defence.”*

-Michael Moore

### **ABSTRACT**

The military action taken by a State in response to a threat from another State is known as the pre-emptive strike. It is an act of self defence taken by a State when there is an imminent danger. The purpose behind pre-emptive war is to stop the threatening country from carrying out the threat. It is carried out before any actual declaration of war has been made by any State. It is a war that pre-emptively ‘breaks the peace’. The pre-emptive war has its own advantages and disadvantages.

The initiation of armed conflict: that is being the first to ‘break the peace’ when no ‘armed attack’ has yet occurred, is not permitted by the UN Charter, unless authorized by the UN Security Council as a enforcement action. There are various guidelines provided in the Charter which regulates the conduct of the States before carrying out pre-emptive strikes. Article 51 of the Charter protects “the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations.”

This research paper deals with the concept of pre-emptive war or war, the principles of customary international law in this regard and the provision in the United Nations Charter for conduct of pre-emptive strike. The paper further discusses various instances of pre-emptive war across the world since ages, along with the recent non-military pre-emptive war taken by India against the Jaish-e-Muhammad training camp at Balakot, Pakistan. Finally, the paper focuses on the issue of legality of pre-emptive war and its stand in today’s world.

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## **INTRODUCTION**

A preemptive war is military action taken by a country in response to a threat from another country – the purpose of it is to stop the threatening country from carrying out its threat.<sup>2</sup> Preemptive force, military doctrine whereby a state claims the right to launch an offensive on a potential enemy before that enemy has had the chance to carry out an attack.

The advantage of pre-emptive war is that, by being the first to act decisively, a state renders the enemy unable to carry out aggressive intentions.<sup>3</sup> There are also several disadvantages to this strategy. For one, the threatened state might be wrong in its assessment of the threat and launch an unwarranted destructive attack. So it appears to make the side carrying on the war the aggressor. Secondly, it is usually carried out before a formal declaration of war.<sup>4</sup> Thirdly, the use of preemptive force by one State, might set a precedent that would lead to widespread abuse of the preemptive option.<sup>5</sup>

There are, however, several fundamental pre requisites for a preemptive war to be conceived as potentially justifiable. The attack has to come as a reaction to a perceived threat that is both absolutely credible and immediate. The State that reacts to the threat needs to make the case that a preemptive war is the only effective way to defend itself. The preemptive action needs to be proportionate in scope and scale with the perceived threat. The wholly subjective nature of these judgments, however, places the burden firmly on the attacking state to justify its actions to the international community.

Proponents of preemptive force cite Article 51 of the United Nations Charter, as it explicitly protects “the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations.” Opponents of the strategy of preemption argue that the

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<sup>2</sup> Pre-emptive Strikes, BBC, (April 24, 2020, 14:30 PM), <https://www.bbc.co.uk/ethics/war/just/preemptive.shtml>.

<sup>3</sup> Encyclopedia Britannica, Pre-emptive force, Britannica,(April 24,2020, 15:30 PM)  
<https://www.britanica.com/topic/preemptive-force>

<sup>4</sup>Pre-emptive Strikes, BBC, (April 24, 2020, 15:45 PM), <https://www.bbc.co.uk/ethics/war/just/preemptive.shtml>

<sup>5</sup> Encyclopedia Britannica, Pre-emptive force, Britannica,(April 24,2020, 16:00 PM)  
<https://www.britanica.com/topic/preemptive-force>

article clearly conditions a defensive action on the previous occurrence of an attack, not on the perception of the possibility of an attack.<sup>6</sup>

One example is the sixty day war of 1967. Israel was the first to use military force, when it attacked the Egyptians. Egypt had not used force against Israel, so Israel appeared the aggression and in the wrong. But Egypt had carried out actions before Israel struck which provides a moral justification for the attack.<sup>7</sup>

### **PRE-EMPTIVE WAR**

A preemptive war is a war that is commenced in an attempt to repel or defeat a perceived imminent offensive or invasion, are to gain a strategic advantage in an impending war shortly before that attack materializes. It is a war that preemptively ‘breaks the peace’.

A preemptive war is launched to destroy the potential threat of the targeted party, when an attack by that party is not imminent or known to be planned. A preemptive war is launched in anticipation of immediate aggression by another party.

The initiation of armed conflict: that is being the first to ‘break the peace’ when no ‘armed attack’ has yet occurred, is not permitted by the UN Charter, unless authorized by the UN Security Council as a enforcement action.<sup>8</sup>

A modern example of preemptive war occurred in 1967 at the start of Six-Day-War between Israel and its Arab neighbors. In 1967, Egypt and Syria, after weeks of intensifying tensions with Israel concentrated large number of military forces on Israel’s border. The leader of Egypt, Abdel Naseer proclaimed his readiness to make war against Israel and Egyptian forces were later joined by units from Jordan, Syria, Iraq and other Arab states. Naseer also demanded UN peace keeping forces standing between Israel and Egypt to leave the area and blockaded the Straits of Tiran, closing off navigation to Israeli vessels. These were all evident signs of an impending attack against Israel by a massive force of Arab troops. In response to this eminent threat, Israel launched a pre-emptive war against the Arab forces and it began with a surprise attack against

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<sup>6</sup>*Id.*

<sup>7</sup> Pre-emptive Strikes, BBC, (April 24, 2020, 16:30 PM), <https://www.bbc.co.uk/ethics/war/just/preemptive.shtml>

<sup>8</sup> Patrick Kelly, Preemptive Self Defence Customary International Law and the Congolese Wars, E-International Relations, (April 24, 2020, 17:00 PM) <https://www.r-ir.info/2016/09/03/preemptive-self-defense-customary-international-law-and-the-congolese-wars/>

the Egyptian air force that was designed to wipe out as many Egyptian aircraft as possible. This camp was highly successful and Israeli scored several major military victories by destroying enemy forces before they were ready to engage in hostilities and within 5 days Israeli military units were approaching both Egyptian and Syrian capitals. Egypt, Jordan and Syria sought to make peace and lost significant territories to the Israelis as part of the post war settlement. Israel's actions in the Six-Day-War have since stood as a classic example of a successful preemptive war.<sup>9</sup>

The concept of preemption was of particular concern during the Cold War (1946-1991) between the United States and the Soviet Union because of the nature of the ballistic missile weapons that both nations possessed and continue to possess. Nuclear missiles are ideal weapon for a surprise attack. American missiles could destroy each Soviet territory in very short time. This capability had important implications during the time of crisis: if both the US and USSR became convinced that a war was imminent and inevitable, then both nations would have a strong incentive to try to launch their missiles first and thus, preempt the enemy, resulting in an accidental war that neither side may have wanted. Since the fall of the Soviet regime in 1991, the US and new Russian Federation have agreed not to target their missiles at each other so as to lessen this kind of a risk.<sup>10</sup>

## **CHAPTER VII OF THE UNITED NATIONS CHARTER**

Article 51 of the UN Charter stated the following :

“Nothing in the present Charter shall impair the inherent right of collective or individual self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in 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 the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.”

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<sup>9</sup> Preemptive War, Encyclopedia.com, (April 25, 2020, 11:00 AM) <https://www.encyclopedia.com/defense/energy-government-and-defense-magazines/preemptive-war>

<sup>10</sup> *Id.*

International law recognizes a right of self defense, as the International Court of Justice, affirmed in the Nicaragua case on the use of force and has tried to clarify what level of force is necessary to qualify as an armed attack. Some commentators believe that the affect of Article 51 is only to preserve this right when an armed attack occurs, and the other acts of self defense are banned by Article 2(4). The more widely held opinion is that Article 51 acknowledges this general right, and proceeds to lay down procedures for the specific situation when an armed attack does occur.

Under the latter interpretation, the legitimate use of self defense in situations when an armed attack has not actually occurred is still permitted. It is also to be noted that not every act of violence will constitute an armed attack.<sup>11</sup>

### **CUSTOMARY INTERNATIONAL LAW & CAROLINE TEST**

The traditional customary rules on self defense derived from an early diplomatic incident between the United States and the United Kingdom over the killing of one US citizen engaged in an attack on Canada, then a British Colony. The so called Caroline case established that there had to exist ‘a necessity of self defense, instant, overwhelming, leaving no choice of means and no moment of deliberation, and furthermore that any action taken must be proportional, since the act justified by the necessity of self defense, must be limited by that necessity, and kept clearly within it’. These statements by the US secretary of State to the British authorities are accepted as an accurate description of the customary right of self defense.<sup>12</sup>

#### **Imminent threat**

The imminent threat is a standard criterion in international law, developed by Daniel Webster as he litigated the Caroline affair, described as being “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”. The criteria are used in the international law justification of preemptive self defense, self defense without being physically attacked first. This concept was introduced to compensate the strict, classical and inefficient definition of self defense used by Article 51 of the Charter of the United Nations, which states that sovereign

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<sup>11</sup> United Nations, Chapter VII, un.org, (April 25, 2020, 12:30 PM) <https://www.un.org/en/sections/un-charter/chapter-vii>

<sup>12</sup> Matthew Waxman, The Caroline Affair in the Evolving International Law of Self Defence, Law Fare,(April 25, 2020, 14:05 PM)<https://www.lawfareblog.com/caroline-affair>

nations may fend off an armed attack until the Security Council has adopted measures under Charter VII of the United Nations Charter.

The Caroline affair has been used to establish the principle of “anticipatory self defense” and is also now invoked frequently in the course of the dispute around pre-emptive strike.<sup>13</sup>

### **THEORY AND PRACTICE OF PREEMPTIVE WAR**

➤ Prior to World War 1

As early as 1625, Hugo Grotius characterized a state’s right of self-defense to include the right to forestall an attack forcibly. In 1685, the Scottish Government conducted a preemptive war against the Clan Campbell, called the Argyll Whigs. In 1837, a certain legal precedent regarding preemptive wars was established in the Caroline affairs when British forces in Canada crossed the United States border and killed several Canadian rebels and one American citizen who were preparing an offensive against the British in Canada. The US rejected the legal ground of the Caroline case. In 1842, US Secretary of State, Daniel Webster, said that the necessity for forcible reaction must be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’. That formulation is part of the Caroline test, which ‘is broadly cited as enshrining the appropriate customary law standard’.

➤ World War 1 (1914-1918)

Austro Hungarian Chief of the General Staff Franz Conrad argued for a preemptive war against Serbia in 1913. During the course of World War, for the first time in history, the concept of “the war to end the war” began to be seriously considered.

➤ League of Nations period (1919-1939)

During the 1920s, the League peaceably settled numerous international disputes, and was generally perceived as succeeding in the primary purpose. But in 1930s, its effectiveness in preventing wars began to come into question. In the Mukden incident, Japan claimed

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<sup>13</sup> Daniel Bethlehem, Principles relevant to the scope of a State’s right of self defence against an imminent or actual armed attack by non-state actors, un.org, (April 25,2020, 17:15 PM)  
<https://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>

to be fighting a defensive war in Manchuria, attempting to preempt supposedly aggressive Chinese intentions towards the Japanese. According to the Japanese, the Chinese had started the war by blowing up a railway line near Mukden, China. Therefore, Chinese were the aggressors and the Japanese were merely defending themselves.

➤ Second World War (1939-1945)

The start of World War II is generally dated from the event of Germany's invasion of Poland. Germany claimed at the time of its invasion of Poland that it was in fact a defensive war as it had allegedly been invaded by group of Polish saboteurs, signaling a potentially larger invasion of Germany by Poland that was soon to be under way. Thus, Germany was left with no option but to preemptively invade Poland. It was later discovered that Germany had fabricated the evidence. During this period, the hope of somehow definitively ending all war including preemptive war was seriously discussed which led to establishment of United Nations.

➤ United Nations Period (1945-2001)

Israel incorporates preemptive war in its strategic doctrine because of its lack of strategic depth. The Six-Day-War, which began with Israel launching a successful attack on Egypt in 1967 has been widely described as a pre-emptive war. It has also been referred to as an act of interceptive self defense.

➤ Bush Administration Period (2002-2008)

The doctrine of pre-emption gained renewed reputation following the US invasion of Iraq. Bush Doctrine in 2006, said "we do not rule out the use of force before attacks occur. We cannot afford to stand idly by. This is the principle and logic of pre-emption." Bush Administration mainly claimed for the necessity to intervene to prevent Saddam Hussein from developing weapons of mass destruction (WMD) prior to launching an armed attack. At that time, US decision makers claimed Saddam's WMD might be given to terrorist groups and claimed that security of the nation was at a great risk. Soon, the Congress passed its joint resolution authorizing the President to use military force against Saddam's regime. However, it was later confirmed that no nuclear weapons or biological

weapons existed and the suspicion was mistaken. Even questions were raised for the true intention of US to invade Iraq. It is still unclear, whether the US invasion of Iraq is legally justifiable and whether, at the same time, Iraq's resistance to the attack is justifiable.<sup>14</sup>

➤ Post Bush Administration Period (2009 to Present)

US President Obama had modified Bush Doctrine of pre-emption. In 2010, President Obama, in a specific paragraph called 'Use of Force' says "While the use of force is sometimes necessary, we will exhaust other options before the war whenever we can, when force is necessary we will continue to do so in a way that reflects our values and strengthens our legitimacy" which means US will seek international legitimacy before acting. However, Mr. Obama maintains an option 'The US must reserve the right to act unilaterally if necessary'.<sup>15</sup>

### India's Non-Military Pre-Emotive War on Pakistan

#### IAF's target

In a brief, prepared statement, Indian foreign secretary said that the Indian target was Jaish-e-Muhammad training camp at "Balakot". He described the war as 'non-military pre-emptive action' against the Jaish in the face of 'credible intelligence' that the group was preparing more fidayeen for terrorist strikes in India. He defined the action as 'an intelligence led operation' against a key Jaish facility. He did not refer to the location struck as being in 'Pakistan' or 'PoK' though he said 'information regarding the location of training camps in Pakistan and PoJ&K has been provided to Pakistan from time to time'.

#### Damaged Caused

According to the Indian Foreign Secretary, in this operation, a very large number of Jaish-e-mohammad terrorists, trainers, senior commanders and groups of jihadis who were being trained for fidayeen action were eliminated. The Pakistani side insists "no casualties or damage" was

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<sup>14</sup> Sanjay Gupta, The Doctrine of Preemptive Strike, International Political Science Review, (April 26, 2020, 14:45 PM) [https://www.jstor.org/stable/20445135?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/20445135?seq=1#page_scan_tab_contents)

<sup>15</sup> BBC News, Obama modifies Bush Doctrine of Preemptive Strike, BBC, (April 26, 2020, 15:35 PM) <https://www.bbc.com/news.10178193>

caused. If the Indian claim is correct, it is not clear why a large number of terrorists would be gathered in one location – especially a well – known one whose existence Indian intelligence had publicly acknowledged – when it was clear that India was likely to hit back in the wake of the Phulwana attack. One possible explanation is that the Pakistani military assumed Indian action would be confined to kinetic operations along the LoC or inside PoK, rather than elsewhere in Pakistan. In the absence of authentic, verifiable information, Indian television channels have claimed that 300-400 terrorists were killed in the operation.

#### Will the war serve as a deterrent to future terrorist attack?

The 2016 surgical strikes were followed by fierce military attacks at Nagrota and Sunjwan, and Phulwana suicide bombing on February 14, 2019. How hard the Balakot war was is hard to assess, but since terrorist groups are structured and operated differently from regular military formations, the Jaish and others are likely to continue posing a threat to India – especially if the trend of attacking local recruits in Jammu and Kashmir continues.

#### Legality of Indian Action

The international law gives countries the right of self defense but there is less clarity about pre-emptive self defense. Countries like the United State and Israel have invoked this right. This is the first time, India has formally spoken about it.

The official statement after the September 2016 surgical strikes also spoke of ‘very credible and specific information received about some terrorist teams positioned at launch pads along the Line of Control with an aim to carry out infiltration and terrorist strikes in Jammu and Kashmir and in various other metro cities of India’.

However, that action took place along LoC in Pakistan occupied Kashmir, which is legally an Indian territory. The implications of pre-emptive self-defense were not the same in the two cases, as Balakot is inside Pakistan proper.

India’s statement and the reference to the action as “non-military” makes it clear that the Indian side has no intention of escalating matters to war.

#### Will there be a Pakistani response?

The Pakistani denial of any damage having been caused by the Indian Air Force might have allowed the situation to run like a replay of the September 2016 surgical strikes, which Pakistan denied had even happened. Denying any Indian claim of inflicting damage allows the Pakistani side to avoid a military retaliation or escalation.

Also the Indian statement “this non-military pre-emptive action was specifically targeted at the JeM camp and the desire was to avoid civilian casualties. The facility is located in a thick forest on a hilltop far away from any civilian presence” aimed at tamping down the possibility of military retaliation.

### Response of the world

There has been widespread global condemnation of the Pulwana terrorist attack on the CRPF convoy, but there is little appetite in the region or the world for a military confrontation between India and Pakistan. India has a number of multi lateral engagements over the following week, where it was able to present its case, and where its interlocutors were likely to restraint.<sup>16</sup>

### LEGALITY

One of the longest running debates in international law is when a state may use force against another state or non-state armed group before it has been attacked. The UN Charter makes it clear that a state may respond forcibly after it suffers an armed attack, that presents a clear case of self defense. But what happens if a state learns that it is about to become the victim of an armed attack? Must it wait to suffer the blow before it responds? Most states and scholars agree that the answer is no: state can respond in what’s often called “anticipatory self defense”. The Caroline case was the traditional test about when anticipatory self defense is appropriate and was asserted that using force before an armed attack actually has transpired could only be justified in cases where the attack is imminent.

The test however, poses challenges when talking about new technologies and new actors armed terrorists groups which has prompted States to consider how to apply the imminence requirement.

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<sup>16</sup> Raj Chengappa, How India planned IAF airwar in Pakistan, India Today (April 26, 17:35 PM)  
<https://www.indiatoday.in/magazine/cover-story/story/20190325-balakot-airstrikes-pulwama-terror-attack-abhinandan-varthaman-narendra-modi-masood-azhar-1478511-2019-03-15>

People, as a matter of terminology, refer to ‘anticipatory self defense’ as the use of force in self defense to halt an imminent threat of an armed attack, while, in contrast, ‘pre-emptive self defense’ often refers to the use of force in self defense to halt a particular, tangible course of action that the potential victim state perceives shortly will evolve into an armed attack against it but cannot be said to leave no time for deliberation.

One advantage to a pretty strict imminence requirement is that it offers a relatively bright line about when anticipatory force is legally acceptable.

### Preemptive or anticipatory self defense in context of the US campaign against the Islamic State in Syria

The US legal theory for using force against ISIS in Syria is based on the idea that the US is acting in ‘collective self defense’ of Iraq. Iraq has suffered armed attacks from a non-state actor that is partly based in a neighboring state. Those attacks triggered Iraq’s right to self defense against ISIS in Syria, because Syria proved unwilling or unable to suppress the threat posed by ISIS. Iraq asked US to support it in its use of self defense. This theory does not implicate pre-emptive or pre-emptive self defense. But the US airstrikes against the Khorasan Group in Syria may implicate pre-emptive self defense. When the US initiated those strikes in late September, the Pentagon asserted the Khorasan was ‘nearing the execution stage of launching an attack on Europe or the homeland’. Khorasan has not completed any actual attacks on the US, thus, using force against Khorasan would be an action taken in anticipatory self defense. To be lawful, those airstrikes would have to be both necessary to defeat the threat and proportionate to the threat that the group poses, and the threat would need to be actual and serious. On the other hand, if Khorasan group is simply a sub-group or off-shoot of Al-Qaida, the US presumably would argue that it may target Khorasan members as part of its ongoing armed conflict with Al-Qaida.

### UNITED NATIONS CHARTER

The UN Charter’s authorization of preemptive strikes by the Security Council, is ultimately the real division not necessarily over preemption but over multilateral framework under which it is carried out, who holds decision making authority, and the extent to which those arrangements are codified and therefore rendered more stable and predictable. The UN Charter has a general prohibition against the use of force, but authorizes the Security Council to use force even in the

absence of an act of aggression by the target, and permits unilateral and non-UN multilateral acts of self defense under certain constraints. The literal language of the UN Charter, in Article 39, 41 and 42, envisions the use of a range of options, such as economic sanctions and varying degrees of force in response to acts of aggression, breaches of the peace, and threats to the peace. As a result, under the Charter, force may be used against even a mere threat when authorized by the Security Council. For unilateral acts and the multilateral use of force outside of the UN framework, Article 51 of the UN Charter refers to an inherent right of self defense against armed attack, permitting defensive actions until the Security Council addresses the matter, and requires that such a defensive use of force be reported to the Security Council. The literal language of Article 51 seems to roll back the traditional right of self defense, requiring that an armed attack have occurred before self defense can be exercised, and implying that unilateral self defense is an interim measure until the Security Council addresses the situation.<sup>17</sup>

Article 2, Clause 4 of the UN Charter is generally considered to be *jus cogens*, which means compelling law, and prohibits all UN members from exercising the “threat or use of force against the territorial integrity or political interdependence of any State”. But in the modern framework of the UN Charter, it is the phrase “armed attack occurs” in Article 51 that draws the line between legitimate and illegitimate military force. Some scholars believe it is reasonable to assume that if no armed attack has yet occurred that no automatic justification for preemptive self defense has yet been made ‘legal’ under the UN Charter. In order to be justified as an act of self defense, two conditions must be fulfilled which are widely regarded as necessary for its justification. The first is that the actor must have believed that the threat is real, as opposed to merely perceived. The second condition is that the force used in self defense must be proportional to the harm which the actor is threatened. When it comes to a situation where an armed attack is considered as a self defense, it usually narrows realistic options for avoidance by non-violent means such as negotiations, retreat or calling upon higher authorities.<sup>18</sup>

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<sup>17</sup> Pogo Staff, Preemptive War and International Law, [pogo.org](https://www.pogo.org/investigation/2003/12/preemptive-war-and-international-law), (April 27, 2020, 17:00 PM), <https://www.pogo.org/investigation/2003/12/preemptive-war-and-international-law>

<sup>18</sup> United Nations, Chapter I, [un.org](https://www.un.org/uncharter/chapter-i), (April 27, 2020, 19:20 PM), <https://www.un.org/uncharter/chapter-i>

**CONCLUSION**

The intention with a preemptive war is to gain the advantage of initiative and harm the enemy at a moment of minimal protection, for instance, while vulnerable during transport or mobilization; however, the concept of preemptive war can be used to start a war by claiming that the nation would soon be under attack and therefore had to defend itself. The concept is controversial because it can be used as a justification to start a war on questionable grounds.

While the labeling of an attack seldom is controversial, it is much more so in regard to the initiation of a war.

Preemptive military action is taken by the nation when there is an unfavorable shift in military potential in the future which leads to a shrinking bargain range for a peaceful settlement in the current period, but with no credible commitment by the other party to not exploit their improved military potential in the future.

Pre-emptive war is an efficient way to stop the enemy State from attacking and maintaining the State's welfare and peace. However, in order to maintain international peace and security, it is necessary that the State follows the directions of the United Nations Organisation before carrying the pre-emptive strike.