

Potentials of “Anticipatory Self-Defence” in Taiwan

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Abstract

This article examines the concepts of pre-emptive and anticipatory self-defence, with a focus on its application in international conflicts, notably following the Iraq War, and its potential implications for the People's Republic of China's (PRC) approach to Taiwan. Building on previous research critiquing the Iraq War as a case of disputed pre-emptive action, the study investigates how such precedents might influence the PRC's strategic decisions regarding Taiwan. The analysis also considers the PRC's response to the U.S. doctrine of pre-emption, as well as the impact of emerging technologies like autonomous weapons and outer space capabilities on the evolving concept of self-defence. The findings underscore the need for a balanced approach, emphasizing that while modern threats might sometimes justify pre-emptive actions, they must be weighed against rigorous legal and ethical standards.

Key Words

Pre-emptive self-defence; Iraq War precedent; Taiwan Strait; international law; autonomous weapons

1. Introduction

Pre-emptive self-defence is a contentious concept in international law that allows a state to act militarily against a perceived threat before it fully materialises, which is different from traditional self-defence. Pre-emptive actions, often justified under the concept of anticipatory self-defence as articulated in the ‘Caroline Doctrine’, have been endorsed by customary international law under the principle that the necessity of self-defence must be ‘instant, overwhelming, and leaving no choice of means, and no moment for deliberation’.¹ While Article 51 of the UN Charter does not explicitly reference the Caroline case, the customary law principles established by the case—beyond the principle of imminence, including the principles of necessity and proportionality—are widely recognised as informing and complementing the interpretation and application of the right to self-defence within the UN Charter framework.² The UN High-Level Panel on Threats, Challenges and Change appears to have adopted a somewhat more flexible stance on anticipatory self-defence. The panel stated that ‘a threatened State, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate’.³ This implies that the UN implicitly endorses anticipatory self-defence.

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¹ Louis-Philippe Rouillard, ‘The Caroline Case: Anticipatory Self-Defence in Contemporary International Law’ (2004) 1MJOIL 104.

² T. D. Gill, ‘The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention, and Immediacy’ (2006) 11 J Conflict & Sec L 361.

³ United Nations High-Level Panel on Threats, Challenges and Change ‘A More Secure World: Our Shared Responsibility’ (2004) UN Doc A/59/565.

However, the concept of anticipatory self-defence has evolved into what is now known as pre-emptive self-defence, which is not recognised by the United Nations.⁴ The Bush Doctrine emphasised that the United States (U.S.) would act pre-emptively to address threats, even if those threats were not imminent, marking a departure from the traditional requirement of immediacy in the Caroline Doctrine.⁵ This approach allowed for action based on perceived future threats rather than waiting for an immediate or impending attack.⁶

Proponents argue that Pre-emptive self-defence allows a state to use unilateral military force to prevent a potential future attack, even in the absence of an imminent threat. This is justified by the evolution of more rapid and destructive weapons that can be initiated without warning.⁷ Apart from the U.S., some states like France and Australia have expressed a right to strike pre-emptively against states in the face of a risk that terrorists will acquire weapons of mass destruction from a ‘rogue state’.⁸

Opponents argue that pre-emptive self-defence differs from anticipatory self-defence as it relies on the mere possibility of a future attack rather than an imminent threat, making the burden of proof less defined and often speculative.⁹ An act of pre-emptive self-defence by one state may be seen as ‘serious or hysterical misjudgement’ or ‘cynical or self-deluded and unjustified aggression’ by others, due to the radically different cultures, values, and strategic assessments between international actors.¹⁰ Franck stresses that pre-emptive self-defence is not grounded in law and reciprocity, but rather in the unilateral power of the super power to subordinate the rights of everyone else.¹¹ More seriously, the widespread adoption of pre-emptive defence by other states carries potentially destabilising consequences for the global order.¹²

The Taiwan Strait has been a region of tension for more than 70 years. With Lai Ching-te officially advocating for Taiwan's independence during his inauguration¹³ and the increasing economic decoupling from the People's Republic of China (PRC), the U.S., and other Western

⁴ Secretary-General Kofi Annan and Special Representative for Iraq, Sergio Vieira de Mello, ‘Transcript of Press Conference by Secretary-General Kofi Annan and Special Representative for Iraq, Sergio Vieira de Mello’ (2003) <<https://press.un.org/en/2003/sgsm8720.doc.htm>> accessed 21 August 2024.

⁵ National Security Archive, ‘George W. Bush, State of the Union address’ (2002) <<https://nsarchive.gwu.edu/document/28048-document-08-george-w-bush-state-union-address-january-20-2002>> accessed 21 August 2024.

⁶ The New York Times ‘Text of Bush's Speech at West Point’ (2002) <<https://www.nytimes.com/2002/06/01/international/text-of-bushs-speech-at-west-point.html>> accessed August 21 2024.

⁷ Abraham D. Sofaer, ‘On the Necessity of Pre-emption’ (2003) 14 EJIL 209, 214 <www.ejil.org/journal/Voll4/No2/artl.pdf> accessed 8 Aug 2024; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edh, OUP 1996) 420; Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002) 101.

⁸ Michael Byers, ‘Policing the High Seas: The Proliferation Security Initiative’ (2004) 98 Am J Int'l L 526, 541.

⁹ Chris O'Meara, ‘Reconceptualizing the Right of Self-Defence Against ‘Imminent’ Armed Attacks’ (2022) 71(3) Int'l & Comp LQ 278.

¹⁰ Thomas M. Franck, ‘Pre-emption, Prevention and Anticipatory Self-Defence: New Law regarding Recourse to Force’ (2004) 27 Hastings Int'l & Comp L Rev 425.

¹¹ Ibid.

¹² W. Michael Reisman and Andrea Armstrong, ‘The Past and Future of the Claim of Pre-emptive Self-Defence’ (2006) 100 AJIL 525.

¹³ Liu, Cheng, ‘Lai Ching-te: Taiwan's New President’ The Guardian (Guardian, 2024) <<https://www.theguardian.com/world/article/2024/may/20/lai-ching-te-taiwan-new-president>> accessed 19 August 2024.

countries,¹⁴ the risk of conflict in the Taiwan Strait has escalated.¹⁵ Therefore, it is crucial to explore whether the PRC might adopt pre-emptive self-defence against Taiwan and whether there is a legal basis for such action.

This article will firstly explore whether the PRC could invoke traditional anticipatory self-defence. In light of some current literature advocating a more lenient approach to anticipatory self-defence, especially in the context of pre-emptive actions against devastating weapons and terrorism, this article will examine whether such an approach could justify actions against Taiwan. Thirdly, this article will analyse the Iraq war in 2003 in detail, which is a highly debatable case of pre-emptive self-defence, to explore the implications to the Taiwan Strait. Owing to the current literature primarily focusing on critiquing the subjective interpretation of pre-emptive self-defence, this article will discuss how new rhetoric surrounding a broader concept of pre-emptive self-defence may affect and potentially apply to the Taiwan issue. Fifthly, this article will also combine the emerging threats in the future to discuss the effect on the Taiwan issue. This research will employ doctrinal analysis, case studies, and interdisciplinary methods, relying on historical context, policy documents, and existing literature and legal frameworks to thoroughly examine the topic. Finally, the applicability of pre-emptive self-defence in Taiwan issue would be concluded.

2. Anticipatory Self-Defence for China?

The threshold for the PRC to invoke the Caroline doctrine to justify anticipatory self-defence is exceptionally high. Historically, Taiwan conducted limited operations against the PRC, such as reconnaissance missions, psychological warfare, and small-scale raids.¹⁶ However, by the 1970s, these activities had largely ceased as Taiwan shifted its focus to maintaining the status quo following the normalisation of Sino-American relations.¹⁷ While both sides may be opposed, they are not formally at war, unlike the situation in the Caroline case, which involved insurrections or rebellions.¹⁸ In the Taiwan Strait, there has been a prolonged period of tension lasting almost half a century, yet the situation remains peaceful despite the underlying conflict.¹⁹ Assessing imminent threats in such contexts is challenging. While the ongoing tension in the Taiwan Strait underscores the complex and enduring nature of regional conflicts, it's essential to distinguish between tension and actual threats.

Although some Taiwanese officials advocate for independence, their statements or actions do not constitute a direct threat to the PRC. In the current context, the primary risk might arise from missile tests²⁰, which could potentially be conducted over long distances and with suddenness.²¹ However, Taiwan's missile tests do not directly invade Chinese territory or

¹⁴ Li W, 'Towards Economic Decoupling? Mapping Chinese Discourse on the China-US Trade War' (2019) 12(4) *Chinese J Intl Pol* 519.

¹⁵ Woo-tae Lee, 'After the Taiwan Election: Potential Taiwan Strait Crisis and South Korea's Response' [2024] Korea Institute for Unification online series.

¹⁶ Gary D Rawnsley, 'Taiwan's Propaganda Cold War: The Offshore Islands Crises of 1954 and 1958' (1999) 14(4) *Intelligence & Nat'l Sec* 82.

¹⁷ *ibid*.

¹⁸ Louis-Philippe Rouillard (n 1).

¹⁹ Rawnsley (n 16).

²⁰ Fabian Hamacher and Ann Wang, 'Taiwan Shows Off Missile Firepower in Rare Trip to Sensitive Test Site' (Reuters, 20 August 2024) <<https://www.reuters.com/world/asia-pacific/taiwan-shows-off-missile-firepower-rare-trip-sensitive-test-site-2024-08-20/>> accessed 25 August 2024.

²¹ United States House of Representatives Committee on Oversight and Government Reform, 'The Declining Ballistic Missile Threat' (March 2008) <<https://corpora.tika.apache.org/base/docs/govdocs1/306/306888.pdf>> accessed 25 August 2024.

waters and cannot be deemed an immediate threat.²² Furthermore, despite North Korea's frequent missile tests, its neighbours—South Korea and Japan—have not responded with military force in retaliation.²³ Similarly, during the Cuban Missile Crisis, the U.S. implemented a naval blockade and prepared for potential military action but refrained from initiating substantive military operations.²⁴ These precedents suggest that missile tests alone are insufficient grounds for anticipatory self-defence under the Caroline doctrine. Hence, the PRC could not invoke anticipatory self-defence in the current situation.

2.1. “Weapons of Mass Destruction” Argument

Supporting pre-emptive self-defence mainly comes from the devastating blows, exactly, modern high-tech weapons could inflict overwhelming attacks that the victim state Self-defence might no longer be applicable. These advanced weapons are capable of inflicting overwhelming damage, to the extent that the victim state might be unable to mount an effective defence in response. For instance, during the Six-Day War in 1967, Israel launched a devastating strike against Egypt, destroying the majority of the Egyptian Air Force on the ground.²⁵ This overwhelming attack severely crippled Egypt's ability to defend itself, demonstrating how a swift and devastating strike can effectively neutralise a state's defensive capabilities before it has the chance to respond.²⁶ In the Taiwan Strait, although Taiwan is a smaller and militarily weaker entity compared to the PRC, it possesses advanced weaponry such as the Yun Feng missile and F-16V ‘Viper’ fighter jets, among others.²⁷ If these missiles or strategically placed bombs were to target critical infrastructure, such as the Three Gorges Dam, it could potentially result in catastrophic flooding, submerging vast areas and affecting multiple provinces in the PRC, ultimately leading to a mass disaster.²⁸ Hence, the PRC might use this rhetoric to justify the demilitarization of Taiwan, arguing that the presence of advanced weaponry poses an existential threat.

However, many states possess long-range attack capabilities and critical infrastructure, some of which are even more significant than the Three Gorges Dam, such as nuclear power plants. If the PRC could legally invoke pre-emptive self-defence on these grounds, it could set a dangerous precedent where any state might justify a pre-emptive strike under similar reasoning. Moriarty emphasises that many nations have reinforced, protected, and dispersed their Weapons of Mass Destruction (WMD) facilities, complicating efforts to destroy them through pre-emptive strikes.²⁹ For example, effectively neutralizing or inflicting significant damage on Iran's WMD program would require attacks on multiple sites across the country.³⁰ However, the likelihood of fully destroying these targets while minimizing collateral damage remains uncertain.³¹ This underscores the need for more stringent limitations and criteria to prevent the misuse of pre-emptive self-defence in relation to WMD. On the other hand, Taiwan and

²² Fabian Hamacher and Ann Wang (n20); United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art2.

²³ Dean Cheng, ‘The North Korean Nuclear Development Program and Japan’ (MPhil thesis, Massachusetts Institute of Technology 1994).

²⁴ Thomas M. Franck (n10).

²⁵ Kurtulus EN, ‘The Notion of a Pre-Emptive War: The Six Day War Revisited’ (2007) 61(2) Middle East J 220.

²⁶ *ibid.*

²⁷ Shirley A. Kan, ‘Major U.S. Arms Sales Since 1990’ (Congressional Research Service 2014).

²⁸ Murray SW, ‘Revisiting Taiwan’s Defence Strategy’ (2008) 61(3) Naval War College Rev 12.

²⁹ Tom Moriarty, ‘Entering the Valley of Uncertainty: The Future of Preemptive Attack’ (2004) 167 World Affairs 71.

³⁰ Michael Knights, ‘Target: Nuclear Iran’ (Policy Watch, 28 May 2003) <<https://www.washingtoninstitute.org/policy-analysis/iranian-nuclear-weapons-part-ii-operational-challenges>> accessed 25 August 2024.

³¹ *ibid.*

the U.S. should focus on diplomatic and political solutions rather than introducing WMD, which could increase hostility and escalate tensions in the region.³² This approach is reminiscent of how the U.S. responded to the Soviet Union's attempt to place missiles in Cuba, where the U.S. did not permit missiles near its borders.³³

2.1.1. Case Study: *The Invasion of Iraq in 2003*

In 2003, the U.S. justified the invasion by claiming that Iraq possessed WMDs and posed an imminent threat, thus invoking the concept of pre-emptive self-defence.³⁴ Despite significant skepticism from the international community and a lack of concrete evidence, the U.S. garnered support from many countries, including the United Kingdom, Denmark, the Netherlands, South Korea, and several Eastern European nations, which provided varying levels of military, logistical, and political backing.³⁵ The support of the willing coalition provided a measure of legitimacy to U.S. actions, despite the ongoing controversy regarding the legality of the invasion.³⁶ However, this interpretation does not hold up under international law.

Principle of Necessity

The necessity principle is a fundamental component of the customary international law governing self-defence.³⁷ Even if Iraq had been found to possess WMD, the fact that Iraq was geographically distant from the U.S. means it could not effectively threaten U.S. territory by lacking long-range missiles. Israel's pre-emptive actions against the Osirak nuclear facility in 1981 remain a subject of debate, but at least two neighboring states were concerned.³⁸ Thus, it appears that lessons from the past have had little impact on the U.S. Ironically, it turned out that these weapons did not actually exist.³⁹ In this scenario, the U.S., by recognising and justifying a pre-emptive strike based on perceived threats, could further blur the clarity of the concept of pre-emptive self-defence."

The potential consequences include a more lenient interpretation of what constitutes an imminent threat, even an illusory threat, thereby expanding the scope of pre-emptive actions.

Confuse Collective Self-Defence and Collective Security

Moreover, the concept of 'weapons being used against the U.S. or its allies,' as suggested in the Bush administration's rationale, implies a focus on collective self-defence rather than individual self-defence.⁴⁰ However, considering the previously discussed lack of necessity, it is essential to distinguish between collective security and collective self-defence. The concept of collective self-defence, Lee argues, cannot cover scenarios where one state recruits or solicits

³² Pastor, 'The Paradox of the Double Triangle' (2000) 17(1) *World Policy J* 19.

³³ Barlow, *The Cuban Missile Crisis in Naval Blockades and Seapower* (1st Routledge 2007) 157.

³⁴ Miriam Sapiro, 'Iraq: The Shifting Sands of Pre-emptive Self-Defence' (2003) 97 *AJIL* 599.

³⁵ Edgars Svarenieks, *Eastern Europe and the 2002-2003 Iraq Crisis* (MA thesis, Naval Postgraduate School 2003); Peter Viggo Jakobsen and Jens Ringsmose, 'Size and Reputation—Why the USA Has Valued Its "Special Relationships" with Denmark and the UK Differently Since 9/11' (2015) 13(2) *J Transatlantic Stud* 135.

³⁶ Geoffrey Corn and Dennis Gyllensporre, 'International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defence, the Initiation of Hostilities, and the Impact of the Choice between Two Evils on the Perception of International Legitimacy' (2010) 30 *Pace L Rev* 484.

³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; Thomas Cottier, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18(4) *JWIT* 628.

³⁸ Tamar Meisels, 'Pre-emptive Strikes—Israel and Iran' [2012] *Can J Law & Jurisprudence* 447.

³⁹ *ibid.*

⁴⁰ NSA (n 5).

another to achieve policy objectives such as sharing military burdens.⁴¹ This principle lacks the core ‘come to the rescue’ element inherent in collective self-defence.⁴² Hence, the military action in Iraq resembles a measure of collective security. According to the United Nations Charter, collective security measures require authorization from the United Nations Security Council (UNSC).⁴³ Since the action in question did not receive such authorization⁴⁴, it lacks the necessary legal backing under the Charter for collective security operations. Consequently, the unilateral military action in Iraq taken by the U.S. and its coalition against Iraq lacks a solid legal basis.

Principle of Proportionality

Even if ‘The Invasion of Iraq’ was de facto executed as a unilateral military action, it should have been focused solely on neutralising the perceived threat rather than pursuing extensive military actions aimed at regime change or territorial occupation.⁴⁵ The collapse of the Iraqi state and the failure of the U.S. occupation to effectively rebuild it led to a prolonged period of instability, violence, and insecurity that had severe consequences for the Iraqi population.⁴⁶ This approach clearly violated the principle of proportionality.⁴⁷

International Criticism

Pre-emptive action in Iraq under the guise of self-defence is widely regarded as unjustified aggression and has been condemned by the international community.⁴⁸ For instance, the Spanish Prime Minister, using Iraq as an example of failure, declared, ‘pre-emptive wars, never again; violations of international law, never again.’⁴⁹ Additionally, the Islamic Conference of Foreign Ministers denounced ‘the principle of pre-emptive military strikes against any country under any pretext whatsoever’.⁵⁰

In response, the National Security Strategy of the U.S. clarified that ‘the U.S. will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression.’⁵¹ The U.S. appears to euphemistically acknowledge the limitations of pre-emptive self-defence. However, it also views this as an absolute right to determine who can exercise this right and when it expires. As Brooks and Wohlforth observe, during a time when there are notably few external constraints on its actions within the international system, the U.S. finds itself in a historically privileged position.⁵² This perspective enables the U.S. to use its hegemonic power to reshape standards of legitimacy and institutionalize its preferred solutions

⁴¹ Jaemin Lee, ‘Collective Self-Defence or Collective Security? Japan’s Reinterpretation of Article 9 of the Constitution’ (2015) 8 J E Asia & Int’l L 373.

⁴² *ibid.*

⁴³ United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) art 49, art42.

⁴⁴ UNSC Res 1441 (2002), UN Doc. S/RES/1441.

⁴⁵ Toby Dodge, ‘Iraqi Transitions: From Regime Change to State Collapse’, *Reconstructing Post-Saddam Iraq* (1st Routledge 2007) 153.

⁴⁶ *ibid.*

⁴⁷ *Nicaragua v US* [1986] ICJ Rep 14; *Cottier* (n37).

⁴⁸ *Sapiro* (n 34).

⁴⁹ Irish Independent, ‘Pre-emptive wars not on, say Spanish’ (2004) <<https://www.independent.ie/world-news/europe/pre-emptive-wars-not-on-say-spanish/25912722.html>> accessed 29 Aug 2024.

⁵⁰ Report of the Secretary-General, ‘Final Communiqué of the Thirty-First Session of the Islamic Conference of Foreign Ministers’ (2004) UN Doc A/58/856-S/2004/582, 6.

⁵¹ White House, ‘National Security Strategy of the United States’ (September 2002) <<https://georgewbush-whitehouse.archives.gov/nsc/nssall.html>> accessed 29 Aug 2024.

⁵² Stephen G Brooks and William C Wohlforth, *World Out of Balance: International Relations and the Challenge of American Primacy* (PUP 2008) 208, 216.

to global challenges.⁵³ As a rising superpower, the PRC also has the capability to follow the precedent set by the U.S.

Implications for Taiwan Conflict

Similarly, in the context of the Taiwan Strait, the PRC might claim that perceived WMDs justify unilateral pre-emptive action against Taiwan. Given the proximity of the Taiwan Strait, unlike the vast distance between the U.S. and Iraq, the PRC might argue it has even stronger grounds to claim pre-emptive self-defence against Taiwan. Following the precedent set by Iraq, the PRC could potentially disregard proportionality, opting to occupy Taiwan or establish a puppet government to achieve its strategic objectives. Moreover, the PRC could mimic the U.S. by advocating for stricter regulations on pre-emptive self-defence once pre-emptive actions have been carried out.

The precedent set by the Iraq War allows the PRC to undertake pre-emptive actions against Taiwan with minimal constraints and regardless of proportionality. This precedent extends beyond the concept of pre-emptive self-defence and blatantly violates fundamental principles of self-defence. While such actions are illegal under international law, the U.S.' impunity in this regard could provide other states with a pretext for similar behavior. As the 2004 UN High-Level Panel on Threats, Challenges, and Change warned, 'if one state is permitted to act in this way, it opens the door for all to do so'.⁵⁴ Consequently, this situation could lead to a downward spiral, as states adapt the concept of pre-emption to suit their interests and maintain their security.

2.2. Counter-Terrorism Argument

As discussed in the introduction, in the context of pre-emptive self-defence, anti-terrorism strategies were more strongly supported by the Reagan administration and other states, not just the Bush administration.⁵⁵ Nonetheless, this raises two important questions: the definition of terrorism and the threshold for pre-emptive actions.

Definition of Terrorism

International law has traditionally defined terrorism through specific actions like hijacking and hostage-taking, avoiding broader definitions to sidestep political sensitivities.⁵⁶ However, there is growing debate over the need for a general definition, as evidenced by the United Nations' ongoing efforts to draft a comprehensive international convention.⁵⁷ Despite these efforts, a

⁵³ *ibid.*

⁵⁴ The Secretary-General's High-Level Panel on Security Threats, 'Maximizing Prospects for Success' (35th United Nations Issues Conference, January 13-15, 2004).

⁵⁵ National Security Decision Directive, 'Combating terrorism' (3 April 1984) <<https://irp.fas.org/offdocs/nsdd/nsdd-138.pdf>> accessed 22 August 2024; Jacques Chirac, 'Speech to Strategic Analysts' (20 September 2003) <http://www.jacqueschirac-asso.fr/archives-elysee.fr/elysee/elysee.fr/anglais/speeches_and_documents/2006/speech_by_jacques_chirac_president_of_the_french_republic_during_his_visit_to_the_strategic_forces.38447.html> accessed 22 August 2024; Australia, Ministry of Defence, National Security: A Defence Update 2003 (2003) 16 <<http://www.defence.gov.au/ans2003/Report.pdf>> accessed 22 August 2024; Full Text of Newly Passed Anti-Secession Law' China Daily (15 March 2005) <https://www.chinadaily.com.cn/english/doc/2005-03/14/content_424643.htm>; W. Michael Reisman and Andrea Armstrong (n 12).

⁵⁵ *ibid.*

⁵⁶ Krzysztof Skubiszewski, 'Definition of Terrorism', *Israel Yearbook on Human Rights* (Brill Nijhoff 1989)39.

⁵⁷ Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight against its Financing' (2003) 14 *European Journal of International Law* 365, 368; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature 14 December 1973,

global consensus on a universal definition of terrorism has yet to be reached, and states continue to rely on their own definitions and often broader definitions.⁵⁸ For instance, the U.S. includes ‘an act dangerous to human life, property or infrastructure’⁵⁹, the United Kingdom even encompasses lawful forms of protest that impact the government.⁶⁰ In practice, the U.S. justified the targeted killing of Qasem Soleimani as a pre-emptive measure to prevent imminent attacks on American personnel and interests.⁶¹ In contrast, Iran condemned the designation of Soleimani’s official role as a foreign terrorist organisation, noting that he was engaged in diplomatic activities on the day of the assassination.⁶²

In a similar vein, the PRC could assert that the President or other high-ranking officials of Taiwan, who seek independence through collusion with Tibetan separatists⁶³, are engaging in activities that constitute terrorism. According to the PRC’s Counter-Terrorism Law, ‘terrorism as used in this Law coerce national organs...so as to achieve their political, ideological, or other objectives’⁶⁴. This definition encompasses actions that disrupt social order and threaten national security, potentially categorizing separatist efforts, including those involving Taiwan, Tibet, and Xinjiang, as terrorist activities. This perspective is supported by General Xu’s statements, which highlight the PRC’s view that terrorism is often linked to separatist movements across these regions.⁶⁵

The Qasem Soleimani Incident

The assassination of Soleimani has been condemned for violating the principle of sovereignty in extraterritorial regions⁶⁶ and failing to demonstrate an imminent threat, thus undermining the principle of necessity for unilateral force under pre-emptive anti-terrorism guidelines.⁶⁷ Additionally, members of Congress in the U.S. have voiced strong concerns about the executive branch’s unconstrained use of force against Iran.⁶⁸ Hence, although pre-emptive measures have changed the application environment, the threshold for invoking such actions

1035 UNTS 167 (entered into force 20 February 1977); International Convention against the Taking of Hostages, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); International Convention for the Suppression of Terrorist Bombings, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

⁵⁸ Ben Golder & Williams George, ‘What Is ‘Terrorism’? Problems of Legal Definition’ (2004) 27 UNSWLJ 270.

⁵⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 18 USC (USA).

⁶⁰ Sir David Williams, ‘Terrorism and the Law in the United Kingdom’ (2003) 26 University of New South Wales Law Journal 179, 179.

⁶¹ White House, ‘Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations’ (2020) <https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf> accessed 29 August 2024.

⁶² UNSC ‘Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General and the President of the Security Council’ (3 January 2020) UN Doc S/2020/13.

⁶³ Kristina Kironka, ‘The Dalai Lama’s Visits to Taiwan and Their Intertwined Effects on Cross-Strait Relations’ (Reset Dialogues on Civilizations, 2023) <<https://www.resetdoc.org/story/dalai-lamas-visits-taiwan-intertwined-cross-strait-relations/>> accessed 22 August 2024.

⁶⁴ PRC Counter-Terrorism Law (adopted 27 December 2015, entered into force 1 January 2016) art 3.

⁶⁵ Pianpian Tang, ‘Xu Guangyu: Terrorism in China stems from separatist forces’ (*Phoenix TV*, 30 November 2015) <http://phtv.ifeng.com/a/20151130/41515085_0.shtml> accessed 29 August 2024.

⁶⁶ UNSC ‘Identical Letters Dated 6 January 2020 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council’ (6 January 2020) UN Doc S/2020/15.

⁶⁷ Thomas Clayton *Killing of Qasem Soleimani: Frequently Asked Questions* (Congressional Research Service, 2020) 2; Mostafa Fazaeli, ‘The Assassination of General Soleimani from the Perspective of International Law on the Use of Force’ (2021) 7(2) Q J Comp Res Islam & West Law 170.

⁶⁸ S.J. Res. 68, 116th Cong (2020) <<https://www.congress.gov/bill/116th-congress/senate-joint-resolution/68/text>> accessed 29 August 2024.

still aligns with the anticipatory doctrine. While the PRC may classify Taiwanese separatists as terrorists, the criteria for such classification remain consistent with anticipatory theory.

2.3. Proliferation of other Rhetoric

In 2022, Russia justified its military invasion of Ukraine by claiming that it was acting to prevent NATO's expansion and to protect Russian-speaking populations in Ukraine, framing its actions as necessary to defend against an imminent threat from the West.⁶⁹ In 2019, India launched airstrikes on what it claimed were terrorist camps in Pakistan, following a terrorist attack in Indian-administered Kashmir that was blamed on a Pakistan-based militant group.⁷⁰ Rather than framing its actions as directly offensive, North Korea portrayed its nuclear weapons development and the potential for pre-emptive use as defensive measures essential for ensuring its survival, despite widespread international criticism and sanctions aimed at curbing its nuclear ambition.⁷¹ These precedents might lead more states to unilaterally resort to force. While they do not make the use of force by the PRC against Taiwan legally justified, they may make such actions seem less abrupt. The once-promising system, based on mutual respect for the law to prevent mutual destruction, has been undermined by realpolitik, leading to a grim outlook for international relations.⁷²

China's New Rhetoric

Furthermore, implications for the international community may extend beyond the different rhetoric of pre-emptive self-defence. Powerful states may argue that they can create justifications innovatively to serve their interests. Chinese elites overwhelmingly reject the American concept of the 'pre-emption doctrine', viewing it as neither a legitimate nor useful strategy for China's security.⁷³ They see pre-emptive self-defence as a form of aggressive warfare and a tool to entrench American hegemony, rather than a necessary adjustment to address actual security challenges.⁷⁴ For the PRC, the notion of sovereignty is a 'central aspect of its identity', and pre-emptive self-defence is perceived as fundamentally undermining 'the sovereign equality of all and freedom from the threat of war'.⁷⁵

However, the disagreement with the theory of pre-emptive defence does not mean that the PRC fully adheres to the traditional definition of self-defence or the prohibition on the use of force. The PRC has never concealed its determination or intention to use force to retake Taiwan. Officially, it has introduced the Anti-Secession Law and white papers that consistently threaten the use of force against Taiwan,⁷⁶ albeit under different rhetoric. The PRC prefers to

⁶⁹ Louis René Beres, *Russia's War Against Ukraine—Impacts on Israeli Nuclear Doctrine and Strategy* (Begin-Sadat Center for Strategic Studies, 2022).

⁷⁰ Imdad Ullah, 'India's Pre-Emptive Strike in Pakistan: The Legal Perspective' (2020) XX (1) IPRI Journal 45.

⁷¹ Josh Smith, 'North Korea Passes Law Authorizing Pre-emptive Nuclear Strikes' (Reuters, 2022) <<https://www.reuters.com/world/asia-pacific/nkorea-passes-law-declaring-itself-nuclear-weapons-state-kcna-2022-09-08/>> accessed 29 August 2024.

⁷² W. Michael Reisman and Andrea Armstrong (n 12).

⁷³ Phillip C Saunders, 'China's America Watchers: Changing Attitudes Towards the United States' [2000] *The China Quarterly* 41; David Shambaugh, 'China's Military Views the World' (2000) 24(3) *International Security* 52; Thomas J Christensen, 'Chinese Realpolitik' [1996] *Foreign Affairs* 37; Biwu Zhang, 'Chinese Perceptions of American Power, 1991-2004' (2005) 45(5) *Asian Survey* 667.

⁷⁴ *ibid.*

⁷⁵ Scott A Silverstone, 'Chinese Attitudes on Preventive War and the "Pre-emption Doctrine"', (US Air Force Academy, 2009) 24; 'Six Paradoxes of the Iraq War' *Southern Weekend Renmin Wang* (shanghai, 4 April 2003).

⁷⁶ National People's Congress, Anti-Secession Law (14 March 2005) <http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383917.htm> accessed 23 August 2024; State Council Information Office of the People's Republic of China, White Paper on Taiwan (2022) <<http://www.scio.gov.cn/32618/Document/1681510/1681510.htm>> accessed 23 August 2024.

invoke historical claims and the assumed ‘sovereignty over Taiwan’ under the One China Policy to justify the use of force for unification, a strategy that not only legitimizes military action but also stirs nationalism to garner support from populist sentiments.⁷⁷ Sovereignty, which pre-emptive self-defence may encroach, is crucial to the PRC’s stance because it is a foundation of the One China Policy.⁷⁸ Moreover, pre-emptive self-defence violates China’s cultural preference for a ‘harmonious society’ and peaceful rise. Hence, the PRC may adopt new rhetoric to better serve its interests, rather than using or refining the theory of pre-emptive self-defence.

In this scenario, the anti-secession law is highly controversial because it challenges the principle that ‘sovereign power of a state ceases at its borders’, a concept rooted in the theory of the territorial state, which refutes the application of domestic law extraterritorial.⁷⁹ Furthermore, effective control is a prerequisite for the exercise of sovereignty.⁸⁰ However, an originally controversial issue may become ambiguous under the innovative sovereignty theory, which parallels the U.S.’ Bush theory.

The PRC’s ambition to emulate U.S. rhetoric can be inferred from its promotion of ‘human rights with Chinese characteristics.’ Xi Jinping explicitly referenced this concept in his speech at the United Nations Palais des Nations, signaling a new approach to global human rights governance.⁸¹ Regarding the Taiwan issue, Xi Jinping, on the 40th anniversary of a key cross-strait policy statement, declared that ‘reunification is the historical trend and the right path,’ and emphasised that China ‘makes no promise to renounce the use of force and reserves the option of taking all necessary means.’⁸² These statements indicate China’s intention to enhance its discourse power in the world. On Taiwan, although the PRC has not taken unilateral action, tensions remain high. The PRC’s rejection of the International Tribunal’s ruling on the South China Sea and its ongoing pressure on neighboring states contribute to regional instability.⁸³ These developments suggest an increased risk of conflict in the Taiwan Strait.

3. Autonomous and Outer Space Weapons: New Era of Anticipatory Self-defence?

Autonomous weapons (AWs), such as drones and robotic systems, offer enhanced speed and precision in identifying and engaging targets. As high-tech weapons become increasingly popular among various states, AWs may present two significant challenges. First, they could make judgments about ‘imminent threats’ more precarious. Second, they may mistakenly identify threats or engage in excessive counterattacks, thereby escalating tensions. This is because the nature of AWs—characterized by its speed, unpredictability, decentralized operation, and attribution—could complicate decision-making during crises, potentially

⁷⁷ Zhang Jian, ‘Chinese Nationalism and Its Foreign Policy Implications’ *Asia-Pacific Security: Policy Challenges* (ANU Press 2003) 108.

⁷⁸ Silverstone (n 75).

⁷⁹ United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) art 2(4); Ying-jeou Ma, ‘State, Sovereignty, and Taiwan’ (2000) 23 *Fordham Int’l LJ* 959.

⁸⁰ *Minquiers and Ecrehos Case* (France/United Kingdom) [1953] ICJ Rep 14; *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) [1992] ICJ Rep 351.

⁸¹ Andrea Worden, ‘China Pushes Human Rights with Chinese Characteristics at the UN’ (China Change, 9 October 2017) <<https://chinachange.org/2017/10/09/china-pushes-human-rights-with-chinese-characteristics-at-the-un/>> accessed 24 Aug 2024.

⁸² Lily Kio, ‘All Necessary Means: Xi Jinping Reserves Right to Use Force Against Taiwan’ (Guardian, 2 January 2019) <<https://www.theguardian.com/world/2019/jan/02/all-necessary-means-xi-jinping-reserves-right-to-use-force-against-taiwan>> accessed 24 Aug 2024.

⁸³ Rabbani A, ‘China’s Hegemony in the South China Sea’ (2019) 23 *World Affairs* 66.

leading to miscalculations and unintended escalation.⁸⁴ After a miscarriage, the question of responsibility is significant: should it lie with the developers who create autonomous weapons or with the civilian and military officials who establish their operational conditions?⁸⁵ Whether the weapons themselves should also be held accountable remains a matter of debate.⁸⁶ Hence, the PRC may use AWs as a scapegoat to evade its responsibility.

Satellites play an irreplaceable role in modern military operations, and attacks on these assets can significantly impact a country's military capabilities and strategic decisions. When satellites are compromised, countries may fight ineffectively without the support of critical satellites.⁸⁷ The concept of pre-emptive self-defence may be re-emphasised, potentially leading to renewed ambiguities surrounding its invocation. Additionally, the evolving characteristics of satellites introduce further complexities. For instance, it is debatable whether facing a threat from 'space stalkers'—satellites positioned too close to another country's satellites—justifies pre-emptive self-defence. While Russia and the PRC argue that outer space development necessitates further elaboration and clarification, the U.S. and its allies permit anticipatory or pre-emptive self-defence under certain conditions.⁸⁸ Another point of contention is whether the right to self-defence in outer space extends to actions on Earth.⁸⁹ The increasing divergences introduce greater uncertainties in the Taiwan Strait, yet they also provide the more powerful side with greater latitude to employ pre-emptive self-defence as a strategic tool.

4. Conclusion

The possibility of the PRC employing pre-emptive self-defence against Taiwan can be assessed through various scenarios. According to the anticipatory self-defence doctrine, the PRC cannot currently justify such a measure due to the absence of a substantive threat, rendering the issue of imminence irrelevant. However, it is crucial for Taiwan and the U.S. to avoid deploying WMDs, as this could heighten the risk of the PRC invoking anticipatory self-defence.

While pre-emptive actions against terrorism might gain some endorsement from the international community—especially when contrasted with pre-emptive strikes against states under the Bush Doctrine—the threshold for such actions still hinges heavily on the concept of 'imminence', similar to anticipatory self-defence.

The precedents set by the Iraq War have not only lowered the threshold for what constitutes an "imminent" threat but have also eroded fundamental principles of self-defence, such as necessity and proportionality. The unilateral use of force without accountability may encourage other states to misuse pre-emptive self-defence. More significantly, powerful states like the

⁸⁴ Schmitt, Michael N, *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (2nd edn, CUP, 2017) 350; Nathan Leys, 'Autonomous Weapon Systems, International Crises, and Anticipatory Self-Defence' (2020) 45 *Yale J Int'l L* 377.

⁸⁵ Marcus Schulzke, 'Autonomous Weapons and Distributed Responsibility,' *Philosophy & Technology* 26 (2013) 203-219.

⁸⁶ *Ibid.*

⁸⁷ Fabio Tronchetti, 'The Right of Self-Defence in Outer Space: An Appraisal' (2014) 63 *ZLW* 92.

⁸⁸ United Nations Office for Disarmament Affairs 'Follow-Up Comments by the Russian Federation and China on the Analysis Submitted by the United States of America of the Updated China Draft PPWT' (14 September 2015) CD/2042 <<https://documents.un.org/doc/undoc/gen/g15/208/38/pdf/g1520838.pdf?OpenElement>> accessed 28 August 2024; Secretary of Defence and Director of National Intelligence, 'National Security Space Strategy : Unclassified Summary <http://archive.defence.gov/home/features/2011/0111_nsss/docs/NationalSecuritySpaceStrategyUnclassifiedSummary_Jan2011.pdf> accessed 28 August 2024.

⁸⁹ Brian G Chow, 'Space Arms Control: A Hybrid Approach' (2018) 12 *Strategic Stud. Q.* 2.

PRC might emulate the U.S. in crafting narratives or justifying their reasons for using force, potentially targeting Taiwan. Moreover, the development of AWs and outer space weaponry presents new challenges to the international community, including Taiwan. Modern weaponry further complicates the necessity for pre-emptive actions. Addressing these challenges requires collective efforts and peaceful means to resolve differences, rather than relying on subjective judgments or rhetoric backed by power. This approach should be applied universally to decrease conflicts and promote peace in the Taiwan Strait.