AN APPRAISAL OF THE DOCTRINE AND PRACTICE OF SELF-DEFENCE IN INTERNATIONAL LAW

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DECLARATION

I declare that the work in this dissertation, entitled ***"An Appraisal of the Doctrine and Practice of self-Defence in International Law"*** has been carried out by me in the Department of Public Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other Institution.

_____ _____

Abubakar Mohammed BOKANI **Date**

CERTIFICATION

This dissertation entitled, **"AN APPRAISAL OF THE DOCTRINE AND PRACTICE OF SELF-DEFENCE IN INTERNATIONAL LAW"** by Abubakar Mohammed BOKANI meets the regulations governing the award of the degree of Master of Laws (LL.M.) of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

To my late grandmother, Nna kaka.

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All praises due to Allah who taught man the use of pen, and has established the religion of peace as a means of maintaining global peace and security. May His peace and blessings continue to be upon our Prophet (S.A.W.) and his companions until the end of time.

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ABSTRACT

This dissertation employs the doctrinal method of research to appraise the doctrine of Self defence as one of the fundamental principles of International law, and as one of the exceptions to the prohibition on the use of force. To this end, this dissertation centers on Article 51 of the United Nations Charter which provides for the right of self defence in International law. The dissertation contends that the provisions of Article 51 have generated some controversies among scholars of International law. These controversies have tended to obscure the scope of self defence in International law. The major problem of this research is that it is not clear whether Article 51 has abrogated or preserved the doctrine of anticipatory Self defence in Customary International law. This problem has been complicated by the use of the phrases 'inherent right of individual or collective self defence' and 'armed attack' in Article 51. The question therefore is that 'does international law expect a State to do nothing where it is a target of an imminent attack'? The objective of this dissertation therefore is to examine the relationship between Article 51 and rules of customary International Law, and the circumstances in which the right of self defence can be exercised. The dissertation makes some findings by submitting that the doctrine of preemptive Self defence is contrary to Articles 2(4) and 51 of the Charter which prohibits unilateral use of force. Furthermore, both Article 51 and customary international law provide different rules for the exercise of the right of self defence .The writer suggests that there is urgent need for an amendment of Article 51 to bring it in line with current global challenges to global security. The phrase 'armed attack' should be well defined and the concept of collective self defence should be deleted from Article 51.

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TABLE OF ABBREVIATIONS

1.	U.N - - - -	United Nations
2.	U.S - - - -	United States
3.	W.M.D - - - -	Weapons of Mass Destruction
4.	I.C.J. - - - -	International Court of Justice
5.	ECOWAS - - -	Economic Community of West African States
6.	P.M.A.D - - - -	Protocol relating to Mutual Assistance on Defence
7.	F.P.C. - - - -	Foreign Policy Concept
8.	A.U. - - - -	African Union
9.	P. - - - -	Page
10.	PP. - - - -	pages
11.	Vol. - - - -	Volume
12.	Ibid. - - - -	Ibidem
13.	Op. Cit. - - - -	Opere Citato
14.	Art. - - - -	Article
15.	O.A.S. - - - -	Organisation of American States
16.	P.C.I.J. - - - -	Permanent Court of International Justice
17.	R.U.F - - - -	Revolutionary United Front
18.	U.N.E.F - - - -	United Nations Emergency Force
19.	N.D - - - -	No date

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1. UN Charter,1945, - - - - - Articles2(4),51,52
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6. The I.C.J. Statute - - - - - article 38
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7. In The Construction of a Wall Case (1986)I.C.J Report,p543- - 126,159

GLOSSARY

1. Opinio Juris ……the psychological factor
2. Jus Cogens …….Peremptory Norm
3. Jus ad Bellum ……..laws governing resort to force
4. Jus In Bellum ……laws regulating conduct of hostilities
5. Travaus Preparatories ……..Preparatory work
6. Prima facie ……..on the face of it
7. Inter alia ……..among other things
8. Strictu Sensu ……... in the strict sense
9. Boko Haram ……Jama at Ahlal- Sunna Lil- Da'awah wal al-Jihad.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The doctrine of self-defence is one of the fundamental principles of International law.[1] The doctrine of self defence is common to all systems of law, and generally, as a legal concept, the function and scope of Self-defence vary with the level of development of each legal system. Thus, International law which is characterized by lack of specialized machinery for the enforcement of International law and protection of the rights of member states has vested the individual member states the right to use force for the protection of certain essential rights.[2]

However, as International law advances, as its processes of enforcement and protection become more effective, the tendency is to allocate duty of protection to a centralized authority such as the United Nations Security Council, and to restrict the right of unilateral action by individual member states. However, no matter how effective the means of protection afforded by the centralized authority is, it will be necessary, for the protection of certain essential rights, and interests of the state to invest the states with the right of self defence until the enforcement machinery of the United Nations (UN) comes to their aid.[3] It is difficult to envisage a legal system in which the prohibition of recourse to force has no exception in the form of the doctrine of self-defence. This is the justification of Self-defence in International law.

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[1] O'Connell, D. P.(1970) *International Law*. Stevens & Sons, London, Volume One, Second Edition, p. 315.See also, Nolan, C.J.(2002). The *Greenwood Encyclopedia of International Relations.* Greenwood Publishing, London, Volume 1V,p.1413.

[2] Bowett, D. W.(1958). *Self-defence in International Law*. Manchester University Press, Manchester, p.3.

[3] Ezdi, A.(1974) Self-defence under Article 51 of the United Nations Charter: A Critical Analysis. Pakistan Horizon, vol. 27, No. 2, (Second Quarter), p.29.

In the United Nations system characterized by a decentralized machinery of its legal system, the enforcement of International law and the protection of rights recognized by International law is, traditionally, a task delegated to the individual members, the sovereign states. Naturally, the right of self-defence in international law features as the basic and fundamental right of every member state. Within the last fifty years, international community has moved towards a degree of centralization hitherto unknown; and with that development the prohibition of individual use of force has come *pari pasu*.[4]Thus, the need to define the right of self-defence with some precision arises from this development, for, as the main exception to the general prohibition of force, the right of self-defence if left undefined and unregulated could virtually deny the prohibition on the use of force any real meaning.

It is against this backdrop therefore that the writer's interest to research in this field is generated noting the fact that the concept of self-defence in international law entails certain essentials such as 'necessity', 'proportionality', and 'Immediacy'.[5] Article 51 of the United Nations Charter defines self-defence in the following terms:[6]

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence 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 action as it deems necessary in order to maintain or restore international peace and security.

The inclusion of the above provisions in the UN Charter is significant in two main aspects. In the first instance, it strongly states that forcible measures (other than self-defence)

[4] Bowett, D. W.(1958) Op.cit p. 4.
[5] Ibid, p. 1025.
[6] Article 51 of the UN Charter,1945.

which were lawful prior to the Charter do not survive its adoption and entry into force.[7] This is due to the fact that, unlike the right of self-defence, such forcible measures as reprisals, wars, etc are not affirmed by the provisions of the Charter. Secondly, the general wording of Article 51 introduces a new normative dimension to the lawful exercise of the right of self-defence whereby treaties, alongside the established principles of customary international law may now be used to govern the lawful exercise of any self-defence actions.[8]

Therefore, by virtue of the foregoing, the objective of this dissertation is to appraise the concept of self defence in international law, and analyze the circumstances in which the right of self defence can be invoked. Furthermore, this work articulates the fact that the right of self-defence arises in the event of a breach of a legal duty owed to state acting in self-defence. This element is essential if self-defence is to be regarded as a legal concept.[9] It is this precondition of delictual conduct which distinguishes self-defence from the 'right of self preservation', 'right of necessity' and other forms of use of force. In essence, self-defence is a reaction against a delict (wrong) which violates certain substantive and essential rights which include territorial integrity and political independence of a sovereign state.

The right of self-defence is not absolute. The measures of self-defence which may be permissible are subject to the conditions governing the right of self-defence, and these conditions are 'necessity', 'proportionality', and 'immediately'.[10] These condition, are in addition to the conditions stipulated in Article 51 of the Charter. Thus, Self defence is subject to certain conditions against which the validity of any act of Self-defence is tested.

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[7] Kritsiotis, D.(1996) The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-defence. *International and Comparative Law Quarterly*, vol. 45, No. 1 (January) p. 165.

[8] Ibid., pp. 165-166.

[9] Bowett, D. W.(1958).Op.Cit. pp. 29-86.

[10] Agwu,F.A.(2005). *United Nations system, state Practice and the Jurisprudence of the Use of force.* Malthouse Press Limited,Lagos,p.66.

Finally, the writer concludes this work by identifying the challenges of the present practice, and proffering viable measures to ensuring an effective understanding of the doctrine and practice of self-defence in international law.

1.2 Statement of the Problem

There is a wide range of disagreements on the circumstances in which states can resort to force in self-defence. Thus, the problem of this research is the scope of self defence in Article 51 of the UN Charter. Some of the issues connected to the scope of Article 51 include; the legality of anticipatory and preventive self-defence in contemporary international law, the extent to which self-defence can be exercised against non-state actors, and the legal consequences for the violation of Article 51 of the UN Charter. It is intended here to highlight some of these issues.

First of all, there are debates as to whether the UN Charter extinguishes the customary right of self-defence or simply preserves it. On the one hand, it has been argued that the UN Charter supplants or extinguishes the customary rules on self-defence, and therefore terminates the right of anticipatory self-defence. On the other hand, it has been argued that Article 51 has not subsumed the rules of customary law on self-defence. Another aspect of the problems associated with Article 51 relates to the scope of 'armed attack'. There is no consensus as to what constitutes 'armed attack'. It is this uncertainty around 'armed attack' that gave room for the expansion of Article 51 to include:

1. Preemptive strikes in the face of alarming military preparation so as to quell any possibility of future attack by another state, even where there is no reason to believe

that an attack is planned, and where no prior attack has occurred (preemptive or preventive self-defence).[11]

2. The use of force against troops, planes, vessels or installations in the event of threats likely to result in imminent attacks, particularly when the state resorting to force has already suffered an armed attack and fears that more attacks are being prepared (anticipatory self-defence).[12]
3. The use of force by a state whose territory or military assets are ostensibly the target of an attack already launched by another state, in order to halt the attack (interceptive self-defence).[13]

Unfortunately, these few categories of self-defence have not been expressly captured by Article 51 of the U.N. Charter. Thus, it is a problem in international law on use of force.

Secondly, there is an issue as to whether self-defence can be exercised against terrorists (non-state actors).That is, whether terrorist act would constitute 'armed attack'. This question is pertinent given the spate of 'terrorists' activities across the globe the implication of which was not contemplated by the drafters of the Charter. Thus, in the event of armed attack by a terrorist group such as *Boko Haram,* how can the right be exercised without violating the rule of non-intervention?

Similarly, since September 11, 2001, the world has seen the emergence of new forms of self-defence that are not based on 'armed attack'. These measures of self-defence have been justified as necessary means to combat terrorism and contain the risk of Weapons of

[11] Natalia, O. and the Esther, S. (2005). Exploring the Limits of International Law relating to the Use of Force in Self-defence. *European Journal of International Law.* Vol. 16, No. 31,(2005), p. 499.
[12] Ibid.
[13] Ibid.

Mass Destruction. Since the possession of Weapons of Mass Destruction is not illegal in International law,[14] to what extent can it justify the resort to preemptive use of force?

Article 51 of the Charter has prescribed a role for the Security Council. This is to ensure due process and transparency in any resort to use of force by an aggrieved state. More also, the Security Council is the only organ of the UN which has the primary responsibility to maintain world peace and security.[15]The state exercising self-defence is required to report to the Security Council. Yet the role of the Council is not clear in the case of exercise of preemptive self-defence?

Another issue relates to cases where international law rules and traditional practices do not clearly apply. Terrorists may strike from areas where no governmental authority exists, or they will base themselves behind what they expect will be the sanctuary of an international border.[16] And they will design their attacks to take place in precisely those 'gray areas' where the full facts cannot be known, where the challenge will not bring with it an obvious or clear-cut choice of response.

Finally, the concepts of 'necessity' and 'proportionality' are at the heart of self-defence in international law.[17] However, what will be 'necessary' and 'proportionate' for the purpose of self-defence is not clear. These conditions, especially proportionality are important when the tendency of States to resort to preemptive force is considered.

[14] Shaw, M. N. (2010) Op .Cit p. 1188.
[15] Article 39 of the UN Charter.
[16] Reisman, M. N.(2006). The Past and Future of the claim of preemptive self-defence. *The American Journal of International Law*. Vol. 100, No. 3, July, pp. 528-529.
[17] Shaw, M. N. (2010) Op.cit p. 1031.

1.3 Aim and Objectives

The essence of this research is to examine and appraise the doctrine of self-defence in international law so that the rules governing the exercise of self-defence can be made clear as much as possible. Misconception of the rules of self-defence has led some states to use force even when there is no justification.

Therefore, the objective of this dissertation therefore is to discover the reasons for the deviation from the provisions of the U N Charter, and proffer solutions for an effective observance by reference to the following issues: (i) to examine certain concepts that bear resemblance with the doctrine of self-defence. (ii) to examine the development of the right of self-defence, nature and scope of Article 51 of the U N Charter, Self-defence as a means of protection, and the categories of self-defence (iii) to examine the role of the U N Security Council in regulating use of force in self-defence and (iv) finally, to highlight the practice of some states on the exercise of self-defence.

1.4 Scope of the Study

The scope of this research work is limited to the doctrine of self-defence in International law as well as the practice of states demonstrating the exercise of the right of self-defence.

Territorially, the scope cannot be defined because all the states of the world are concerned. However, the scope of the appraisal of state practice will be based on the practice of some states that exert a significant amount of influence in world politics. States such as United States, Israel, Russia, China, Britain, France, Australia, Japan, and Nigeria will be discussed for the purpose of analyzing the practice of these states with a view to finding out

whether or not the resort to force in self-defence by states is in conformity with Article 51 of the Charter and rules of Customary International Law.

1.5 Research Methodology

Although there are many methods of research that can be employed to gather facts and information, the dissertation is based doctrinal method of research.[18] The doctrinal method will involve the use of primary documents and secondary documents. The primary documents include the Charter, treaties and decisions of the International Court of Justice and International Military Tribunal whereas secondary documents involve the use of books, articles and newspapers that have been published. Thus, this method will be used to obtain the opinions of experts in international law. This, it is believed, will put the discordant concept in a proper context.

1.6 Justification

The significance of this work cannot be overstated considering the fact that the world is now facing new forms of threats to global peace and security. Thus, this work on self-defence which is an exception to the prohibition on use of force will identify the boundaries of this doctrine and the circumstances in which it can be relied on to justify the use of force. This will instill sanity in the atmosphere of tension and threats of use of Weapons of Mass Destruction.

Accordingly, states, public international organization (e.g. United Nations, African Union, ECOWAS), and diplomats will benefit from this work. It will also benefit ministries

[18] Aboki, Y. (2009). *Introduction to Legal Research Methodology*. Tamaza Publishing Co. Zaria, Second Edition, p. 3.

of Defence, Foreign Affairs and Police as well as members of the Armed Forces. Legal pundits, academicians and students of international law and international relations will benefit as it will expose them to a very topical issue of international discourse. Above all, it is a contribution to literature in this area.

1.7 Literature Review

There is abundant literature in this field of self-defence in International law. This may be due to the fact that fewer areas in international law have attracted the attention of international scholars and jurists than the area of use of force in self-defence.

However, there is no better way of starting this review than first reviewing the work of Bowett (1958),[19] one of the early leading authorities in the area of self-defence in international law. In this work, the author discusses the nature of self-defence in contradistinction to self- preservation, Necessity and Sanctions imposed by the Security Council, the competent organ of the international community. The author noted that the essence of self-defence is that it is reaction against a delict.[20] In Chapters Two and Three, the author analyses the interests for the protection of which self-defence can be exercised. On the basis of the action of the British authorities in the Caroline incident, the author submits that the action of British government was taken by virtue of the 'right of necessity', though the principles governing the exercise of the right are applicable to both necessity and self-defence.[21] In Chapter Four, the author discusses the circumstances that will justify an action in self-defence on the High Seas as well as the protection of nationals. Thus, the author

[19] Bowett, D. W.(1958) *Self-defence in International Law*. Manchester University Press, Manchester.
[20] Ibid, p. 9
[21] Ibid, pp. 59-60.

supports the use of force by a state for the protection of its Nationals within the territory of another.[22]

Chapter Six deals with the concept of 'the defence of economic interest' i.e. whether the right of self-defence can be exercised in respect of a state's economic interest. The learned author submits that 'there is logically no reason why such a position should not be admitted.[23] Thus, self-defence is available in defence of economic interest. Chapter Seven deals with the concepts of Self-defence and War which terms may be indistinguishable but are not entirely the same as far as their legal characters are concerned. In this Chapter, the author traces the origin of the prohibition of war as an instrument of nefarious policy, and the emergence of Article 51 of the Charter as an exception. Chapter Eight deals with Neutrality and Self-defence; that is how the doctrine of Self-defence affects neutrality.[24] For example, it has been noted that neutral state has a duty to assist a state acting in self-defence. Chapter Nine deals with the various parts of the provisions of Article 51 of the Charter. This brings out the inconsistencies and ambiguities in the provisions of Article 51 of the Charter. Finally, in Chapter Ten, collective self-defence is critically considered, its basis and relationship with other regional arrangements.

However, although this work of Bowett (1958) is based on the right of self-defence, there are some odds against it. First, the author has justified anticipatory self-defence but he fails to give conditions that govern its exercise to avoid abuse by more powerful states. Secondly, the work has not considered recent challenges to global peace and security such as Terrorism and Weapons of Mass Destruction as they affect the doctrine of self defence. Thirdly, the author refers to exercise of self-defence against imminent or actual attack.

[22] Ibid, p. 87.
[23] Ibid, p. 107.
[24] Ibid, pp. 162-167.

Unfortunately, the author has not discussed the recent doctrine of preemption which seems to feature in the practice of states such as the United States since September 11, 2001. Finally, the author failed to consider the recent practice of states on self-defence.

The work of Brownlie (1963) [25] is an essential material and a reference point as far as self-defence in International law is concerned. In Part One, the author traces the origin of the legal regulation of the use of force by states prior to 1815,1815-1914 to the period of the emergence of the United Nations Charter. In Chapter Three, the work examines the doctrine of self-defence and the state practice of the period 1920 to 1929, the period of the Kellogg Briand Pact and the current period of the UN Charter emphasizing the recognition of self-defence and the reservations made to some of the treaties which were meant to regulate war as an instrument of national policy. In Chapter Thirteen, the work examines 'the right of self-defence in the period after the Second World War'. Here, the author discusses self-defence in customary international law, especially anticipatory self-defence. According to the author, it is generally assumed that customary international law permitted anticipatory action in the face of imminent danger; that Caroline doctrine permitted preventive action in a context in which self-defence was equated with self preservation.

However, the author has raised some objections to the use of anticipatory self-defence one of which is that it involves the determination of the authenticity of attack which is very difficult to make.[26] The author submits that anticipatory self- defence is contrary to the principle of proportionality.[27] Brownlie (1963) also disagrees with Bowett (1958) that the use

[25] Brownlie, I. (1963) *International Law and the Use of Force by States*. Oxford University Press, Oxford.
[26] Ibid., p.259.
[27] Ibid.

of force in self-defence is allowed in cases of threats to the political independence of a state constituted by subversion or economic measures.[28]

Furthermore, Brownlie (1963) noted that the view that Article 51 of the Charter does not permit anticipatory action is correct and that the arguments to the contrary are incorrect. Lastly, the author examines the various aspect of Article 51 of the Charter such as armed attack, relationship between Article 51 of the Charter and customary international law.

This work of Brownlie (1963) is rich and relatively comprehensive and exhaustive given the period it was published. However, the view of the author that anticipatory self-defence is not legal may no longer be tenable based on the current global challenges of Terrorism and Weapons of Mass Destruction. More also, the author fails to consider the use of preemptive self-defence now used by many states like Israel, United States etc.

The International court of Justice has made many pronouncements on the relationship of Article 51 and rules of Customary International law. Unfortunately, the decisions are not reflected in Brownlie's work. Thus, it is believed that some of these decisions may have altered the views expressed in the book. Consequently, there is an urgent need for a review of this work given its value and significance as a 'pacesetter' in the gamut of literature on self-defence in International law.

Shaw (2008), a contemporary scholar of International Law, is not left out in the review of the literature on self-defence in International law. In this work[29] of Twenty -Three Chapters, the author designed Chapter Twenty to discuss 'International law and Use of Force'. In this chapter, the author highlights the meaning and concept of use of force, the history of use of force, and forms of use of force of which self-defence is one. The author

[28] Ibid., p. 262.
[29] Shaw, M. N. (2008). *International Law.* Cambridge University Press, Cambridge, Sixth Edition.

deals with the concept of self- defence under Customary International Law; the author highlights the I.C.J. judgment on the relationship between Article 51 and customary International law.[30]

More also, the author has analyzed the various aspect of 'armed attack' under Article 51 citing various decisions of the I.C.J. which are relevant to the context. It has been submitted that it will be unacceptable if one concedes to the view that self-defence is restricted to responses to actual armed attacks, and that the concept of anticipatory self-defence is of particular relevance in the light of modern weaponry that can launch attack with tremendous speed which will allow the target state little time to respond to the armed assault.[31] However, the concept of anticipatory self- defence is still controversial.

Shaw noted the suggestions and arguments that have been made in favour of preemptive self-defence. However, it has been submitted by the learned writer that the doctrine of preemption must be seen as going beyond what is currently acceptable in international law.[32] More also, the criteria for the exercise of self-defence are discussed by the author in detail so as to make them less abstract given the practical significance of the right of self-defence.

The author also noted the controversial issue of the exercise of self-defence for the protection of nationals abroad.[33] It is controversial since there is no 'armed attack' and the 'territorial integrity' of the target state is not violated. However, State practice shows the reliance on use of force in self-defence to protect nationals abroad. For example, the United

[30] Shaw, M. N.(2008) Op. Cit. Pp. 1118-1130.
[31] Ibid., P. 1138.
[32] Ibid., P. 1140.
[33] Ibid., P. 1143.

States has in recent years justified armed action in other states on the grounds partly of the protection of American citizens abroad.

This work is very useful and current as it has dealt with the contemporary controversial issues surrounding Article 51 of the Charter. However, the work has not examined recent states' practice to show the effect of the widespread adoption of preemptive self-defence. The work merely focuses on a few states such as United States. Consideration of state practice cutting across membership of the UN is important because it may be an indication of the emergence of a new rule of customary international law.

However, the author appears to support anticipatory self-defence but rejects preemptive self-defence. But this writer is tempted to ask 'what difference does it make?' For practical purposes, no difference appears to exist between the two concepts. The author also goes further to give criteria that will guide the exercise of anticipatory self-defence since the Caroline formula may no longer be enough in this Information age.

The works of Rehman (2009) [34] and Ladan (2009)[35] are replete with materials on International Human Rights Law and International Humanitarian Law. Both works have explored human rights and the rules of engagement in armed conflict situations. However, neither of the works discussed the concept of self-defence in International law. Although the books provide materials for the rules of engagement in armed conflict, and the legal consequences of violation of such rules,[36] the writers do not provide materials for this controversial area of Self defence in International law.

[34] Rehman, J.(2009). *International Human Rights Law*. Pearson, London, Second Edition.
[35] Ladan, M. T.(2009) . *Materials and Cases on Public International Law.* ABU Press, Zaria.
[36] Ibid pp. 249-283; Rehman, J. Op. Cit.

The work of Harris (2010)[37] contains decisions of the I.C.J. on issues related to self-defence such as Nicaragua v. United States (1986), I.C.J. Report at p.14, the Caroline case, Oil platforms case(2003), I.C.J. Report, at page 161 etc. The learned author analyses the provisions of Article 2(4) of the Charter on the prohibition of the use of force, and Article 51 in relation to the judicial pronouncements of the I.C.J. The writer considers the meaning of 'armed attack' based on the Nicaragua case noting that not every use of force is an 'armed attack'. Even though the court's narrow interpretation of 'armed attack' excludes assistance to rebels in form of provision of weapons or logistical or other support, the learned writer stated that state practice concerning 9/11 accepts that terrorist action on the scale and effect of 9/11 attack on the United States may be 'armed attack' justifying self-defence against the state giving the terrorists a base or safe haven.[38]

On the role of the Security Council, the writer has submitted that the right of self-defence is temporary, existing only until the Security Council acts to restore international peace. However, due to the problem of veto, the council may never act and the right of self-defence will be of unlimited duration.[39]

This work is one of the reference points for the use of self-defence in international law. It has included recent cases and practical illustrations to make the 'abstract' concept much less abstract. However, it has not considered the various practices of states on the exercise of self-defence, especially the use of anticipatory or preemptive self-defence. More also, the author has not analyzed the decisions so that the principles can be better understood, and wrong decisions brought to limelight. The author relies on state practice to justify the

[37] Harris, D. (2010) *Cases and Materials on International Law*. Sweet and Maxwell, London, Seventh Edition.
[38] Ibid.p. 248.
[39] Ibid.p. 749.

exercise of self-defence against state harboring terrorists without looking at some international instruments condemning terrorism as well as resolution of the organs of the UN and other regional organization.

Agwu (2005)[40] discusses the concepts of Force and self-defence in international law. In chapter Three, the abolition of use of force is discussed while in chapter Four the elements of Article 2(4) of the Charter are considered. In chapter Five, the author analyses the components of self-defence under Article 51 of the Charter, and the various interpretations of Article 51. In chapter Six, the practice of state on the use of force are highlighted, and in chapter Eight, the juridical problems in state practice such as extra-territorial self-defence, anticipatory and preemptive self-defence are dealt with.

The writer submitted that anticipatory self-defence has been abolished but that state practice still shows indifference to this rule reflecting a conception of the principles of Article 51 as a reservation rather than a grant.[41]The author also gives instances such as in Afghanistan where the US acted against an imminent attack while in the 1967 Arabs/Israel conflict, Israel acted with force to preempt what she anticipated to be impending Arab attack; thus, this work is commendable for such a tremendous contribution to the principles of self-defence.

However, it is submitted that the discussion on anticipatory self-defence is rather terse. Consequently, the discussion on the concept of anticipatory self-defence is inadequate. More also, the author's submission that the doctrine of 'anticipatory' self-defence has been abolished is misconceived as the view is without regard to the rules of Customary International Law on self-defence and current global challenges.

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[40] Agwu, F. A. (2005). *United Nations System, State Practice and the Jurisprudence of the Use of Force*. Malthouse Press Ltd, Lagos.

[41] Ibid. pp. 349-350.

The work of O'Connell (1965)[42] on International law is also resourceful. In this book, the author said that a corollary of the right to independence is the right of self-defense, a right fundamental in every legal system. The author further submits that in the Renaissance period, the formulation of the right of self-defence was much less difficult than it has come to be today because the intrinsic connection with the concept of the Just war made its control relatively self-evident, or so the writers pretended. However, the earlier writers, the author submits, failed to offer any guidance on the degree of injury necessary to justify resort to force in self-defence.

The author stated further that self-defence is not a satisfactory juridical conception if it allows for anticipatory action on the part of a state which fears that its security is imperiled. On self-defence as defined in Article 51 of the UN Charter, the author submits that the problem with Article 51 is whether or not it restricts the traditional right of self-defence to those occasions when an armed attack has actually occurred, and until the United Nations has taken the relevant action. According to the author the debate is relevant because of its implications with respect to acts of self-defence not amounting to repulse of an armed attack. The author opines that there is no right of self-defence for states except that of Article 51, then even a well established doctrine such as that of the Caroline might be found to have been abrogated. According to the author, in analyzing Articles 51of the Charter , it must be first noted that it acknowledges the 'inherency' of the right to self-defence, and it seems that proper interpretation must take into account a basic natural law right beyond the abrogating power of the Charter.

[44.] O' Connel, D.P. (1965). *International Law.* Stevens & Sons Ltd, London. Volume I.

Finally, the author submitted that there is a link between the notion of self-defence and the right to territorial integrity and political independence of UN members, and the violations of these rights legitimize action in self-defence. Furthermore, on the issue of extra-territorial jurisdiction in exercise of the right of self-defence, the author advanced a view that it is impracticable to expect a state to stand by and await attack which is obviously impending, and that the law cannot require it to do so. Measures of self-defence are proportionate to the danger, and they may involve technical violation of the frontier across which attack is expected.

However, one major loophole in this work of O'Connell is that the author did not fully discuss the doctrine of anticipatory self-defence. The author only alluded to the doctrine even though the author stated that the law cannot expect a state to stand by while there is an impending threat, not necessarily an armed attack. More also, even though the author discusses the argument for or against the strict interpretation of Article 51, the author did not give or maintain a position. More importantly, this work having been written much earlier than the aftermath of September 11, 2001 attack, it has not taken some new development such as the doctrine of preemption (Bush doctrine) into account.

A distinguished jurist of international law, Schwarzenberger (1968)[43], wrote on the principles of self-defence. In Chapter Two of the book, the writer discussed self-defence as one of the seven fundamental principles of international law. In the light of judgments of the International Military Tribunals of Nuremberg (1946) and Tokyo (1948), the author examined the meaning of self-defence and submitted that it involves a preventive action in foreign

[43] Schwarzenberger, G. (1968). *International Law as Applied Courts and Tribunals.* Stevens & Sons Ltd, Vol. II, London.

territory which is justified only in case of an 'instant and overwhelming necessity for self-defence, leaving no choice for means, and no moment for deliberation'. The author also did a verification of the exercise of self-defence and examined self- defence and necessity and putative self-defence.

On the scope of self-defence, the author submitted that if the conditions of self-defence are fulfilled, the right of self-defence overrides any competing rights of the target state in international customary law. However, the issue of anticipatory self-defence has not been dealt with by the author. The author's discussion did not go beyond the traditional conception of self-defence. Verily, such an important topic as anticipatory self-defence cannot be ignored when discussing self-defence and the use of force.

The loophole can be traced to the period the book was written as it could not have contemplated recent development in international law, especially the increasing spate of terrorism and the quest for Weapons of Mass Destruction. More also, there is need for a review of the book because most of the illustrations and concepts are based on the facts available as far back as 1960s.

There is an article written by Obayemi[44] on the legal standards of self-defence. The author started by introducing the history of the doctrine of self-defence. The author said the United States has never unilaterally attacked another nations military prior to its first having been attacked or prior to its citizens or interest first having been attacked. But that this posture has changed permanently. Hence, the emergence of the 'Bush Doctrine'.

[44].Obayemi O. K. (2006) Legal Standards Governing Pre-emptive Strikes and Forcible Measures of Anticipatory Self-Defence under the U.N Charter and General International Law". In *Annual Survey of International & Comparative Law*. Vol. 12: Issue One, Article 3.

On the issue of right of self-defence, anticipatory attacks, military incursions, and/or right of pre-emptive strike, the author submitted that the state seeking to take action on any of these grounds must bear a high burden of establishing the following elements which are as follows:

1. That the nation against which military action is being considered poses an actual and/or immediate risk to:
    a. Their neighbours,
    b. international peace, and
    c. international community of states;
2. The nation arguing for military invasion of a failed state must have suffered an injury in fact.
3. There must be a causal connection between the actual or imminent injury and/or risk alleged and the fact that the second state has failed as a nation; and
4. The actual or immediate risk of injury posed by failed states would be redressable through foreign intervention, either by the United Nations or through an International action authorized by the UN.

On satisfaction of the above elements, through evidence satisfying the 'beyond reasonable doubt' standard, the United Nations or any other aggrieved state may move to initiate military action against non-state terrorist fugitives and rogue states. Furthermore, the author considered 'the right of self-defence including pre-emptive strikes and forcible measure of self-defence under customary international law'. He submitted that clearly every nation possesses the inherent right of self-defence in International law. And the author traced the legitimate use of pre-emptive military force in accordance with international law to the

then secretary of state contained in a diplomatic correspondence with the British government. Consequently, certain requirement for a nation to undertake pre-emptive strikes against another nation based upon perceived imminent danger (as different from anticipatory military strike which is based on latent and remote danger) include (a) 'timeliness' and (b) 'proportionality' of the threat. The author stated that although used intermittently, the concept of 'anticipatory self-defence' and 'pre-emptive strike' are two distinct and separate topics of international law.

The author also examines the right of self-defence including resort to pre-emptive and anticipatory strike under the United Nations Charter. Thus, the author appraises the constituents of Article 51 of the Charter. The author concludes that written laws, whether international treaties or domestic laws cannot override a nation's right to self-preservation. Finally, the author considers the development of the right of self-defence by the United States.

However, in as much as states have the right to self-preservation, it is submitted that states must honor and respect their obligations in International law as a state cannot rely on its municipal laws to avoid fulfilling its international obligation. The UN Charter of 1945, particularly Article 51 imposes an obligation on states to exercise restraint in cases of conflict. As such, an 'armed attack' is necessary before a target state can resort to use of force. Any state that reneges on this obligation will be found wanting for state responsibility.

Again, the author attempted to lay down some elements to guide the exercise of anticipatory or preemptive self-defence. But the tests the author laid down are confusing. He stated 'timeliness' and 'proportionality' of threat as the requirement for pre-emptive strike. On

the other hand, he laid down four elements which must be established 'beyond reasonable doubt' before a state can take anticipatory or pre-emptive strike.

Thus, the guidelines for the resort to use of force on account of anticipatory self-defence are not certain. Therefore, there is need for the author to ascertain the elements for all practical purposes for the exercise of the right to anticipatory self-defence.

Kritsiotis (1996) has a work titled, "The legality of the 1993 U.S. Missile Strike on Iraq and the Right of Self-Defence in International Law*".*[45] After the usual introduction, the author submitted that the comprehensive proscription by the UN Charter of the Use of force by states in their relations with one another is widely understood to be a rule of customary international law and has been advanced as a rare exemplar of the concept of *jus cogens.* However, the general prohibition on the use of force in Article 2(4) of the Charter is subject to the exception within the framework of the charter. The author added that Article 51 provides for the inherent right of individual or collective self-defence.

Furthermore, the author discussed the concept of self-defence under customary international law and the UN Charter. Under customary international law, the author identified three criteria which determine the justification for exercise of self-defense. They are; 'Necessity, 'immediacy', and 'proportionality'. Similarly, under the UN Charter, the author considered some conditions such as 'The occurrence of 'an armed attack', 'the target of the armed attack', and finally there is 'the Reporting clause'.

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[45]. Kritsiotis, D.(1996).The Legality of the 1993 U.S. *Missile Strike on Iraq and the Right of Self-Defence in International Law. The International and Comparative Law Quarterly,* Vol. 5, No.1, (1996*),* pp. *162-177.*

Finally, the author submitted that the invocation of the rights of self-defence by the United States in defence of its action on 26 June, 1993 does not conform to any conventional understanding of the concept of self-defence, and to this extent, it is difficult to reach the conclusion that the American Missile Strike of June 1993 was in strict compliance with international law, and that the retaliatory nature of the strike strongly suggest that it was a de facto reprisal which would ordinarily have no basis in international law.

However, on a critical appraisal of the work, it becomes apparent that the author holds the view that missile strike cannot be justified in international law, especially when considered in the light of the action of the US in recent years. More so, the author did not address the issue of anticipatory self-defence. The author only considered the right to self-defence under customary international law. Thus, this omission makes the work bereft of the recent development in international law. Additionally, even though the work is on "The legality of the 1993 U.S. missile strike on Iraq and the right of self-defence in International Law", it is silent also on the new 'bush doctrine' which appears to feature in most military action taken by the US in recent years.

Van den Hole (2005) [46] has contributed to the discourse on anticipatory self-defence. In the introductory part, the author stated the law of recourse to force has changed dramatically over the last centuries. Hence, the emergence of the new doctrine of anticipatory self-defence. The author defined the word 'anticipatory' as a term that refers to the ability to foresee consequences of some future action and take measures aimed at checking or countering those consequences.

[46]. Van den hole, D.(2003) Anticipatory Self-Defence in International law. *American University International Law Review* 19, No.1 ,pp.69-106.

The article is divided into Four Chapters (parts).Part One deals with the question of whether Article 51 of the UN Charter which explicitly refers to the right of self-defence in armed conflict, extinguishes the customary International law of self-defence. The author submitted that the Article 51 of the Charter leaves the customary right of self-defence unimpaired. Part II of the article states that anticipatory self-defence is just one of the many forms of self-defence, and that it is legitimate to expect a state to use force in anticipation of armed attack. Part Three looks at reports and judgments of the UN authorities, which explicitly recognize that states have the right to use pre-emptive force. Finally, Part Four presents the conditions under which international law will accept the plea of anticipatory self-defence.

The author submitted that the classical definition of the *Caroline case* is still relevant for anticipatory self-defence today. More so, the preconditions set in the Caroline case have been extended to the right of Self-defence in general, which is quite logical, as the right of anticipatory self-defence is only a form of the more general customary right of self-defence, and the conditions for the application of both rights have to be more or less the same. The author identified certain condition for anticipatory self-defence as: *'necessity'*, 'proportionality', and 'immediacy'. Additionally, the author said it seems reasonable to add two more conditions: First, an action of anticipatory self-defence will only be justified if the UN Security Council has not yet taken action; and second, the state against which the right of anticipatory self-defence is being exercised has to be in breach of international law.

Van den Hole may be commended for his exhaustive work on the doctrine of anticipatory self-defence. This book has helped to put this doctrine in a proper perspective. Additionally,

this work is a product of in-depth research as it has incorporated recent events demonstrating the recognition now enjoyed by the doctrine of anticipatory Self defence.

'The Myth of Pre-emptive Self-Defence'[47] written by Mary Ellen O'Connel is relevant to the research at hand. After the usual introduction of how the US has suffered terrorist attacks from September 11, 2001, and the aftermath of the attack, the author considered the law against pre-emptive self-defence. According to the author, the UN Charter, a binding treaty to which all but a few states of the world adhere, contains the prohibition on force in Article 2(4) and establishes the Security Council as the authority to take measures against 'Threats to the peace, breaches of the peace and acts of aggression'. Thus, the author considered the general prohibition on force. After that, the author examined the exception of self-defence under Article 51 with its requirements of actual armed attack.

On anticipatory self-defence, the author said that based on the practice of states and perhaps on general principles of law, as well as simple logic, international scholars generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming and that this is the standard in most domestic legal system as well.

Thus, the author submitted that a state may exercise right of 'anticipatory' self-defence where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an attack may be said to have begun to occur, though it has not passed the frontier of the target state. After giving instances of states practice of anticipatory self-defence, the author also examined the concept of 'preemptive self-defence". The author

[47] O'Connell, M.E. The Myth of Pre-emptive Self-defence. Retrieved From: http://www.youscribe.com/catalogue/presentations/actualite. Accessed on 29 may,2014 at 11:45 am.

said that the United Sates is justifiably worried about states that possess weapons of mass destruction, but mere possession of such weapons without more does not amount to an armed attack. And then he considered the policy against pre-emptive self-defence.

However, in as much as the author has done a great job justifying the doctrine of anticipatory self-defence with cogent reasons and facts, the author did not address the conditions for the exercise of such rights. Certainly, there is need for this right to be delimited and defined; otherwise, it will be arbitrarily abused. Thus, the absence of the conditions is fatal to the discussion of the concept. No matter how deep the study of the concept is, if the conditions or criteria are not stated in detail, the concept may be misplaced.

An article titled, 'Anticipatory Self-Defence: A Discussion of the International Law'[48], proves to be extremely resourceful. This article starts with an introduction stating the purpose of the article which is to examine the legality of the doctrine of anticipatory self-defence. In discussing the legality of anticipatory self-defence in international law, the author submitted that the difficulties surrounding anticipatory self-defence are caused in part by the distinction between the relevant treaty law (Charter) and custom. Article 2(4) and 51 of the UN Charter form the foundations of the legal regime governing the use of force. The legal regime represents a manifest departure from that of the League of Nations, and is definitely a product of the International effort after the Second World War. The resort to armed force is prohibited in International law, except where the United Nations Security Council gives permission or where Article 51 permits the use of force if used as a means of self-defence.

[48]. Mulcahy, J. and Mahony, C.O. Anticipatory Self-Defence: A Discussion of the International law. Available at: www.hanselawreview.org/pdf4/Vol2No2Art06.pdf. Accessed on 29 May,2014 at 11:50 am.

International relations, the authors noted that international relations have changed since the Second World War, as have the nature of inter-state disputes. They noted further that the struggles of national liberation movements for independence during the decolonization process did not fit easily into the framework of the Charter regime.

The author identified three schools of thought on the legal status of anticipating self-defence. They are as follows:

1. Those who argue that Article 51 of the UN Charter is exhaustive of the situations under which the use of force can be used.
2. Those scholars that argue that the customary international law that predated the UN Charter still exists.
3. Those legal scholars who suggest that the "emerging threat" (the bush) doctrine provides for the legality of anticipatory self-defence.

The authors also examine 'anticipatory self-defence as a rule of *Jus Cogens'*. They observed that if anticipatory self-defence could be classified as a rule of *Jus Cogens*, then Article 51 or any customary rule prohibiting it could not deny it of its separate existence.

Finally, the authors submitted that the use of force following an armed attack is fundamentally different from the use of force based upon a suspicion that another state may be preparing an attack. Where there are almost insurmountable difficulties in attempting to determine whether a rule is one of *jus cogens,* it is concluded that the evidence supporting the assertion that anticipatory self-defence is a rule of *jus cogens* is scarce and weak.

The authors asked that given the current global climate, "have we reached a stage where anticipatory self-defence is critical if we are to maintain international peace and

security? Is the opening up of broader possibilities for anticipatory self-defence desirable? Should a regime that permits us to unilaterally attack each other before an actual attack occurs be endorsed?" These are the questions the authors attempted to answer. The resourcefulness of this article demonstrated the industry and painstaking research that went into the work. The authors have done a critique of this controversial doctrine in the light of current global events.

Although they did not address the conditions for the resort to anticipatory self-defence, the authors appear to lay down a general rule which is more practical. They suggested that the force used by the state should be judged not on legal concepts which are abstract, but rather should be appraised on the particular factors that gave rise to the employment of force. It is submitted that this approach for all practical purpose is better than the abstract conditions of 'necessity', 'immediacy' and 'proportionality' advanced in other works.

Sanjay Gupta in the work titled, "The doctrine of Pre-emptive strike: Application and Implication during the Administration of President George W. Bush"[49] opines that Pre-emptive strikes by individual nation or group of nations without the authorization of the UN Security Council are prohibited by the UN. The author appraised the concept of pre-emptive strike in light of Article 2(4) and 51 of the UN Charter. The article also took care of various views of the proponents and critics of pre-emptive strike.

Similarly, the articles examine pre-emptive strike and customary international law. The author submits that pre-emptive strikes is justified under customary international law. However, some scholars do not fully accept the argument that customary international law provides binding status for a pre-emptive strike. The article holds that USA is more concerned

[49]. Retrieved from: http://ips.sagepub.com/egi/content/abstract/ 29/2/17. Accessed on 29 May, 2014 at 2:50 pm.

with those aspects of Customary International Law that serves its immediate interests than with compliance with international rules of behavior.

In conclusion, the author stated that the doctrine (Bush doctrine) entail serious consequences for international peace and security. This is because the doctrine makes no distinction between justifiable pre-emption and unlawful aggression. Thus giving leverage to any country to take action against an enemy state. However, as exhaustive as the work appears to be based on pre-emptive self-defence, it has not dealt with the controversial issue of anticipatory self-defence. Even though pre-emptive and anticipatory self-defence share common ground, it is submitted that a discussion on pre-emptive self-defence should also touch on anticipatory self-defence.

Asif(n.d.) in his work titled, 'Self-defence Under Article 51 of the U.N Charter: A Critical Analysis' [50] opines that the right of self-defence is recognized by almost all systems of law. The author examines all aspects of self-defence as an exception to the general rule stated in Article 2(4) of the Charter. The work also considers the interpretation placed on Article 51.However, the work did not take into contemplation current global trends. Consequently, the concept of anticipatory self-defence is not examined in the work. It is submitted that this topical issue ought not to have been ignored in an article on self-defence in International Law.

Therefore, in view of the shortcomings in this literature review, this writer will attempt to fill in some loopholes so that the topical issue will continue to receive more attention.

[50]. Asif, E. Self-defence under Article 51 of the United Nations Charter: A Critical Appraisal Analysis. Retrieved From: http://ww.jstor.org/page/info/about/policies/terms.jsp. Accessed on 28 May,2014 at 5:05pm

1.8 Organizational Layout

Chapter one of this work is on the General Introduction. Here, the doctrine of Self-defence in international law is introduced; the statement of the problem necessitating the study is stated. Then, there are the aim and objectives of the study, and the scope of the study dealing with the particular area of International Humanitarian law as well as geographical area to be covered by the research. There is also a statement of the research methodology, justification for the research and literature review of the books and articles in this area.

Chapter two deals with the conceptual clarification of key terms. These terms are Use of force, Self-defence, Collective Defence, Reprisals, War, and Terrorism. These concepts are important to the understanding of the doctrine of Self-defence. The purpose here is to distinguish these related concepts from the concept of self-defence.

Chapter three of the work examines the development of Self-defence, the origin and interpretations of Article 51 of the United Nations Charter, the rights for which self-defence is a permissible means of protection, conditions of self defence and the categories of self-defence.

Chapter four deals with the policies of some states on self-defence.few states such as United States, Japan, Australia, China, United Kingdom etc will be considered. The selection of these states is based on their role and impart on international relations in this present stage of international law.

Chapter five is the concluding chapter. It summarizes the whole work. Chapter Five comprises of Introduction, Summary, Findings, and suggestions. This chapter makes findings

on the problems identified in the course of the research, and then suggestions are proffered on how to solve the problem of the research.

CHAPTER TWO

CONCEPTUAL CLARIFICATION OF KEY TERMS

2.1 Introduction

The impact of writers on the corpus of international law is never capable of scientific analysis.[1] Thus, fewer areas attract comments from international scholars and jurists than the area of use of force in self-defence.[2] It is believed that much of the debates surrounding this area are influenced by the inadequate definition (or lack) of the various legal terms related to self defence.

More so, the proliferation of comments on the concept of self-defence has contributed to the controversy and confusion surrounding the doctrine of self-defence. Therefore, the objective of this chapter is to clarify certain concepts that are connected or related to the concept of self defence and determine their legality in international law.

2.2 The Meaning and Nature of Self-defence

There is generally no accepted definition of self-defence in international law. Thus, there are many definitions advanced by international instruments, scholars and institutions. The Dictionary of International Law of Armed Conflict defines self-defence thus; "the United Nations Charter authorizes any state member of the United Nations that is the victim of an aggression to exercise its right to self-defence in the way it considers necessary until the Security Council adopts the measures necessary to restore international order.[3] This definition

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[1] Ladan, M.T. (2009). *Materials and Cases on Public International Law*. A.B.U. Press Ltd. , Zaria, p.19.

[2] The Chatham House Principles of International Law on the Use of Force in Self Defence. International and Comparative Law Journal, Vol.55,No.4,(2006),p.963. Retrieved from: http://www.jstor.org/stable/4092626. Accessed on 24 July,2012 at 5:23pm.

[3] Verri, P.(1992).*Dictionary of International law of Armed Conflict*. International Committee of the Red Cross, Geneva, p.39.

reflects the provisions of Article 51 of the U N Charter. However, this definition omits the element of "armed attack" which fulfillment is a condition precedent to the exercise of self-defence under the current legal framework of the UN Charter. Thus, this definition is defective for the purpose of this work.

The Nuremberg International Tribunal defined the right of self-defence as the right of a state threatened with an impending attack to judge for itself in the first instance whether it is justified in resorting to force.[4] However, as relevant as this definition may be, it has the defect of being only an expression of the right of self-defence under customary international law, for it emphasizes 'impending attack', not an 'actual attack'.[5] Moreover, this definition leans towards the conception of self-defence within the exclusive prerogative of a state which decides whether or not to resort to force in self-defence.

Bowett views self-defence as a privilege or liberty which justifies a conduct otherwise illegal, and which is necessary for the protection of certain rights.[6] There are some odds against this definition. This definition compares self-defence with reprisals in the sense of a 'conduct otherwise illegal'. It is submitted that Self-defence is a legal conduct provided it meets the conditions of proportionality and necessity.

Umozurike, rather than define the concept of self-defence, restated the provisions of Article 51 as a definition of self-defence.[7] Unfortunately, the learned author did not explain the various parts of the provisions. The definition did not also consider the rules of proportionality and necessity governing self-defence. Similarly, Shaw gave the traditional

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[4] Agwu, F. A.(2005) .*United Nations System, State Practice and the Jurisprudence of the Use of Force*. Malthouse Press Ltd., Lagos,p.53.
[5]. Ibid.
[6]. Ibid.
[7] Umozurike, U. O.(1993). *Introduction to International Law.* Spectrum Books Ltd., Ibadan, p.205.

definition of self-defence in Customary International Law.[8] This definition is inadequate because it does not consider the new legal regime of the UN Charter encapsulated in Article 51.

The definition of Przetalniki seems to be of wholesome acceptability, and it is that self-defence is the lawful use of force by states in response to the previous unlawful attacks against its territory.[9] This definition is more cognizant of the normative dispensation of self-defence under the charter of the United Nations which does not admit anticipatory or preemptive self-defence. More also, by viewing self-defence as a 'lawful use of force', it presupposes the observation of the principle of 'proportionality' and 'immediacy' by the state exercising the right, otherwise the word 'lawful' will be meaningless in the definition.

Self-defence is one of the fundamental principles of international law. The doctrine of self-defence is embodied in different legal systems and has been considered as a natural right of any human being in any society.[10] Self-defence is necessary for a state to protect its national interest. Thus, an integral part of 'self' in self-defence in International law is concerned with the concept of territoriality or sovereignty or non-intervention.[11] According to Umozurike (1993) and Azif (1974), the essence of self-defence is a wrong done, the violation of an essential legal right available to the state.[12]

Customary International law formulation of self-defence arose in the Caroline incident in 1837 in which some British soldiers seized and destroyed an American vessel (the Caroline) with some Americans on board. In the correspondence which followed the incident,

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[8] Shaw, M. N. (2008). *International Law.* Cambridge University Press, Cambridge, Sixth Edition, p.1131.

[9] Agwu,F.A.Op.Cit.

[10] Section 59, penal Code Law, Laws of Northern Nigeria; Section 32, Criminal Code.

[11] Agwu,F.A. Op.Cit.

[12] Umozurike,U.O.Op.Cit.P.206;Asif,E.(1974).Self-defence under Article 51 of the united Nations Charter: A Critical Analysis. *Pakistan Horizon*, Pakistan Institute of International Affairs, Vol.27, No.2, p.31.

Daniel Webster stated that for self defence to be justified, there had to exist 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[13]

More so, the UN Charter has made a provision for self-defence in International law.[14] The Article provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence 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 action as it deems necessary in order to maintain or restore international peace and security.

Thus, the U N Charter has made adequate provisions for the exercise of self-defence by states. Article 51 of the Charter is now regarded as the current legal framework for self-defence, and all states are required to comply with its provisions. This is in addition to the rules provided in customary international law. Both the treaty law and the customary international law continue to govern the exercise of self-defence.[15]

2.3 Meaning and Nature of War

The term 'war' is used in many different ways. Writers have become accustomed to speaking of Cold War, Hot war, Limited War, Total war, Conventional war, Civil war, Unconventional war, Guerilla war, Preventive war, Propaganda war, and Psychological war

[13] Shaw, M.N. Op.cit.
[14]. Article 51 of the U.N. Charter, 1945.
[15] Shaw, M.N. Op. Cit.

and so on.[16] These conceptions of 'war' have made it difficult to give a precise and accurate definition of war.

However, war has been defined as the use of organized force between two human groups pursuing contradictory policies, each group seeking to rampage its policy upon the other.[17] This definition does not consider the fact that war is governed by international law. More so, by defining war in terms of 'human groups', this definition is necessarily restrictive. War is not restricted to human groups. In fact, war is a common phenomenon among states.

War has also been defined as the "hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state".[18] This definition does not distinguish between Cold War and Hot war. More also, there is no reference to international law rules regulating war. Again war need not be carried out by armed forces.

According to Adeniran (2007), war is a means for achieving a particular end.[19] This definition is quite precise. However, it is not completely true. Firstly, War involves the use of force by armed forces. Secondly, there are other ways of achieving an end which do not involve war. For example, Pacific Settlement of dispute is one of the ways of resolving disputes and achieving some ends. Thus, it can be argued that this definition is misleading.

War has been defined as "armed hostilities between two or more states, carried on by their armed forces and regulated by international law".[20] This definition is true of war but war

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[16] Palmer, N.D. and Perkins, H.C.(2004). *International Relations.* A.I.T.B.S. Publishers, Delhi, Third Edition,p.185.

[17] Nisar, A. M. The Changing Nature of War. Online International Interdisciplinary Research Journal,(Bi-Monthly, ISSN2249-9598, Volume- IV, Issue-V, Sept-Oct 2014. Retrieved from:WWW.oiirj.org/oiirj/Sept-Oct2014/40.pdf. Accessed on 23 October,2015 at 10:45 am.

[18] Black's Law Dictionary, Eight Edition, (2004), p.1164.

[19] Adeniran, T. (2007). *Introduction to International Relations.* Macmillan Nigeria Publishers Ltd, Second Edition,p.214.

[20] Verri, P. Op.cit.p.123.

is not limited to states. Thus, non-state actors sometimes engage in war. A more comprehensive definition for the purpose of self-defence is that war is any difference arising between states and leading to the intervention of members of the armed forces and war exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state.[21] This definition is more progressive and covers non-state actors as well. More also, this definition is more flexible as it accommodates situations where a state victim of armed attack resort to military action in self-defence.

However, there is nothing new about the problem of war. Wars and rumours of war have filled the pages of history. It is clear that war needs no documentation to prove its horrors. It destroys and ruins lives beyond repair, it makes anything like normal existence impossible, it brings about gross violations of human rights, it imposes immense burden on national economies and imperils the freedoms of everyone; it endangers man's very existence on the planet[22]. It is the great curse of the international community, and the endemic disease of the nation – state system.[23] The problem of war, as Edward Earle declared is "the greatest unresolved riddle in politics," and the coming of total war and the nuclear and space age has given it a new and greater urgency.[24]

The causes of war are several and complex. Many scholars have proposed a number of theories on what actually cause war.[25] However, some major causes of war are struggle for control of resources, trade, politico-religious ideologies and the economic growth or direction as well as economic policies. One of the wars the world has witnessed in this decade is the

[21] Shaw, M.N. Op. Cit. p.1190.
[22] Palmer, N.D. and Perkins, H.C. Op.cit.
[23] Ibid.
[24] Ibid.
[25] Adeniran, T. Op.cit.

Iraqi War of 2003 and the Israel/ Palestine war. In Nigeria, the Civil War of 1967-1970 is a good example.

2.4 Meaning and Nature of Terrorism

This century has witnessed many violent and horrific acts on the international scene that have been referred to as 'terrorism'. Therefore, the question that provokes the mind of scholars is the meaning of 'Terrorism'. The Writers with different views and background have discussed 'Terrorism' in relation to diverse issues such as abduction of Ferry Waite (an envoy of the Church of England) in Lebanon in January 1987, the bombing of the Pan American Jumbo jet which killed 270 people on 21st December, 1988, the suicide flights into New York's World Trade Towers on 11 September, 2001, the various suicide bombings in Iraq, India, Chechnya and other recent unconventional attacks on individuals, institutions, and countries in different parts of the world.[26] And Currently, Nigeria is facing the major security challenges posed by Boko Haram.

Current international law contains no binding and acceptable definition of terrorism.[27] International terrorism has been under consideration for years past by an Ad Hoc Committee of the United Nations but no definition acceptable to all states has yet been found.

Thus, terrorism is one of the most difficult and controversial terms for international law scholars to define.[28] The confusion becomes obvious with a statement that: "one man's terrorist is another man's freedom-fighter".[29] This statement is buttressed by a definition of terrorism as comprising "various acts and kinds of behavior ranging from what everyone

[26] Ibid., p.255.
[27] Verri, P. Op.Cit.p.113;Adeniran,T.Op.Cit.pp.255-315.
[28] Hauss, C. (2010) *International Conflict Resolution*. Continuum International Publishing Group Ltd., London,p.136.
[29] Ibid.

certainly regards as illegal to what some regard as illegal and others as legal".[30]However, according to Shaw, 'terrorism' is "the use of terror as a means to achieve political ends only.[31] This definition is also defective. Terrorism need not be to achieve political ends; it can extend to religious, economic and ethno-linguistic ends.

Some countries have had to deal with the tragic consequences of terrorists attacks.[32] However, there is still very little consensus within the international legal community concerning what behavior constitutes an act of terrorism.[33] This lack of consensus has made it virtually difficult to adopt an international convention on Terrorism that includes a legally binding, all-inclusive definition of Terrorism. In the past, the UN Security Council has considered terrorism to include violent acts that have been state-sponsored.[34] However, beyond this general description, little can be learnt from UN Security Council practice about what constitutes Terrorism other than the fact that terrorist acts constitute "a threat to international peace and security".

The main consequence of the absence of a UN Security Council definition is that it is left to states to determine whether violent acts such as 9/11 attacks constitute an act of terrorism.[35] Therefore, states seem to be allowed to develop their definitions of terrorism which may be ambiguous and contradictory.[36] This has in turn allowed states to prosecute

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[30] Verri, P. Op.cit.p114.
[31] Shaw, M.N. Op.cit. p.1159.
[32] For example, United States was attacked by terrorists in 2001.And recently, Nigeria is facing security problems posed by insurgents.
[33] The Difficulties in Defining Terrorism In International law. Retrieved from : Http://www.humanrights.ie/.../the-difficulties-in-defining-terrorism-under-International_law. Accessed on March,2013 at 11:32am.
[34] Ibid.
[35] Ibid.
[36] Walter, C. Defining Terrorism in national and International Law.pp.3-10. Available at: < http://edoc/mpil.de/Conference-on-Terrorism/index.cfm> Accessed on 26th March,2013 at 12:15pm.

dissidents who breach fundamental human rights under the umbrella of UN Security Council Resolutions.

The Security Council, in 2004, attempted to rectify this problem with a non-binding definition of 'Terrorism' in Resolution 1566 which definition refers to terrorism as[37]:

> Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury or taking hostages, with the purposes to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitutes offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature….

However, there are some odds against this definition. This definition is non-binding. Thus, states do not have to adopt the definition in determining their own policy with respect to prosecution of terrorist suspects.

Despite the absence of a single universal definition of terrorism, it is important to indicate that three main elements seem to be required for the crime of international Terrorism. They are as follows:

(a) The acts must constitute a criminal offence under most national legal systems, such as murder, kidnapping, hostage - taking, bombing.

(b) they must be aimed at spreading terror by means of violent action directed to a state, the public, or particular groups of persons;

[37] The Difficulties in Defining Terrorism In International law. Available at: Http://www.humanrights.ie/.../the-difficulties-in-defining-terrorism-under-International law> Accessed on 5 March,2013 at 11:32am.

(c)) They must be politically, religiously, or ideologically motivated.[38] These elements may serve as criteria for determining 'terrorism'.

Lack of internationally recognized operative definition of this concept has prevented the emergence of an effective international counter-terrorism strategy among nations and seriously undermined international effort towards finding a solution to this problem. There is no doubt that a general definition of terrorism is necessary for the international community to fight against terrorism in a precise way.

However, the United Nations has set up the Counter-Terrorism Committee to combat terrorism. The committee was strengthened in 2004 by the establishment of the Executive Directorate, comprising a number of experts and administrative and support staff.[39] A further committee was established by Resolution 1540 (2004) to examine the implementation of the resolution, which requires all states to establish domestic controls to prevent access by non-state actors to Nuclear, Chemical and Biological Weapons, and their means of delivery, and to take effective measures to prevent proliferation of such items and establish appropriate controls over related materials.[40] In addition to the UN activities, a number of regional instruments condemning terrorism have been adopted.[41]They include; The European Convention on the Prevention of Terrorism,1977;The Council of Europe Convention on the Prevention of Terrorism,2005;The European Union Framework Decision on Terrorism, 2002; The South Asian Association for Regional Corporation on the Suppression of Terrorism, 1987 and Additional Protocol of 2005; The Convention of the Organization of the Islamic

[38] Fidanci, S.(2013). Definition of terrorism in International Law. *The Journal of Turkish Weekly*, Tuesday,29,January,2013. Available at <Http;//www.turkish Weekly.net/…/definition-of-Terrorism-in-International law.html. Accessed on 5th March, at 11:47am.
[39] Shaw, M. N. Op.cit.
[40] Ibid.
[41] These show that the world is unanimous on the prohibition of Terrorism.

Conference on Combating International Terrorism,1999;The African Union Convention on the Prevention and Combating of Terrorism,1999 and Protocol of 2005.

International action against terrorism is not without adverse effect on fundamental rights. Thus, there has been collaboration between the Counter-Terrorism Committee and the UN Human Rights Committee in an attempt to prevent the UN Security Council Resolution 1373 and the other instruments being used as a tool for fundamental human rights breaches and violations.

2.5 Meaning and Nature of Customary International law

Customary International law is one of the essential sources of international law.[42] It is dynamic in the light of the nature of the international system and its lack of centralized government organs. The existence of customary rules can be deduced from the practice and behavior of states.[43]

There are disagreements as to the value of a customary rule in international law. Some writers argue that custom cannot be significant today as a source of law, noting that it is too clumsy and slow-moving to accommodate the evolution of international law any more, while others believe that it is dynamic process of law creation and more important than treaties since it is of universal application.[44] Another view recognizes that custom is of value since it is activated by spontaneous behavior and thus mirrors the contemporary concerns of society.[45] There are elements of truth in each of these approaches. In the midst of wide variety of conflicting behavior, it is not easy to isolate the emergence of a new rule of customary law and there are immense problems involved in collating all the necessary information. Moreso,

[42] Article 38 of the I.C.J. Statute.
[43] Shaw, M.N. Op.cit. p.73.
[44] Ibid.
[45] Ibid.

it is not always the best instrument available for the regulation of complex issues that arise in world affairs, but in particular situations, it may meet the contingencies of modern life.

The essence of custom according to Article 38 of the I.C.J. Statute is that it should constitute 'evidence of general practice accepted as law'. Thus, it is clear from the provisions that there are two basic elements of a custom. These are the material facts (behavior of states), and the psychological or subjective belief that such behavior is law.

State practice or material fact is essential element of customary law because customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do.[46] The requirement of the psychological factor (*opinion juris*) that separates customary law from principles of morality or social usage is also essential.[47]

The actual practice of states constitutes the factor to be considered. There are a number of points to be considered concerning the nature of a particular practice by states, including its duration, consistency, repetition and generality.[48] 'Duration' refer to the period of time over which a certain practice is relied upon by a state or states. Repetition represents how often the act is undertaken; 'continuity' connotes the unbroken consistency with which such states engage in such acts; generality refers to how broadly a certain action is undertaken throughout the international community, Thus, the greater the measure of these interrelated characteristics when applied to the specific practice of states, the more powerful the evidence that the practice has become customary international law.[49] In the North Sea Continental Shelf cases, which involved a dispute between Germany on the one hand and Holland and Denmark

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[46] Article 38 of the I.C.J. Statute.
[47] Ladan, M.T. Op.Cit.p.14.
[48] Shaw, M.N.Op.Cit.p.76.
[49] Muehlheuser, J.L.(2003). *Interceptive Self-defence*.(Unpublished) A thesis presented to the Judge advocate General's school, United States army, In Partial Fulfillment of the Requirements for the award of Master of laws(LL.M.) In Military Law,p.12. Retrieved from: Http://www.tdic./mil/dtic/Fulltext/112/9440072.pdf. Accessed on 20 February,2013 at 6:26pm.

on the other hand over the eliminations of the Continental Shelf, the ICJ remarked that state practice "including that of state whose interests are specifically affected, had to be "both exclusive and virtually uniform in the sense of the provision invoked.[50] This was stated to be indispensable to the formation of customary international law.

Once the existence of a specified usage (state practice) has been established[51], it becomes necessary how the state views its own behavior. Is it to be regarded as a moral or political or legal act or statement?[52] *Opinio juris* or belief that a state activity is legally obligatory is the factor which turns the usage into a custom and renders it part of the rules of international law. In essence, States will behave a certain way because they are convinced it is binding upon them to do so.

Thus, the Permanent Court of International Justice buttressed the element of opinion juris in the *Lotus* case.[53] The issue in this case concerned a collision on the High Seas between the Lotus (a French ship) and the Bos-Kourt (a Turkish ship). Several people aboard the latter ship were drowned and Turkey alleged negligence by the French officer of the Watch. When the lotus reached Istanbul, the French officer was arrested on charge of manslaughter. The question turned on whether Turkey had jurisdiction to try him.[54] France maintained that there existed a rule of customary law to the effect that the flag state of the accused (France) had exclusive jurisdiction in such cases and that accordingly the national state of the victim was barred from trying him.[55] To justify this position, France referred to the absence of previous

[50] Shaw, M. N. Op.cit. p.77.
[51] Evidence of State Practice can be obtained from Newspapers, Official documents, diplomatic correspondence, Official Memoirs etc .
[52] Shaw, M.N.Op.Cit.p.84.
[53] Ibid.
[54] Ibid.
[55] Ibid. p.85.

criminal prosecutions by such states in similar situations and from this deduced tacit consent in the practice which therefore became a legal custom.[56]

The Court rejected this and declared that even if such a practice of abstention from instituting Criminal Proceedings could be proved in fact, it would not amount to a custom. The court held that only if such abstention was based on the states being conscious of a duty of abstention would it be possible to speak of an international custom.[57]Thus, the essential ingredient of obligation was lacking and the practice remained a practice, nothing more.

In conclusion, customary international law does not come into existence by one powerful country (superpower) declaring its standards or principles.[58] No single state can unilaterally legislate international law even as 'general practice' in itself is not enough to create customary International law. The requirement of *opinion juris* has to be fulfilled.

2.6 Meaning and Nature of Collective Defence

There are terms[59] that have the same meaning as concept of collective defence thereby making it difficult to distinguish these concepts for practical purposes. However, it is intended to explore the concept of collective defence so as to put it in a proper context.

Thus, the concept of collective defence has been regarded "merely as a pooling of a number of individual rights of self-defence within the framework of a particular treaty or institution."[60]It has also been defined as "an arrangement, usually formalized by a treaty and

[56] Ibid.
[57] Ibid.
[58] Yang, S.S.(2003). Legal Basis for Interception of Shipments on the High Seas: Legality of the Naval Interdiction Under the "Proliferation Security Initiative". Brooklyn Law School,p.14.Retrieved from: http:///cap.org/disarmament/menic-nkinteraction.pdf. Accessed on 6th February, 2013 at 6:30pm
[59] Collective Security, Alliances, Collective Self-defence etc.
[60] Shaw, M.N. Op.cit.p.1146.

an organization, among participant states that commit support in defence of a member state, if it is attacked by another state outside the organization".[61]

It can therefore be safely asserted that collective defence is an arrangement, usually formalized by a treaty and an organization, among participant states that commit support in defence of a member state if attacked by another state outside the organization.[62] The North Atlantic Treaty Organization is the best known collective defence organization. The treaty contains copious provisions which calls on member states to assist a member under attack. It's now famous Article V calls on member states to assist member under attack.[63]

Collective defence has its roots in multiparty alliances, and entails benefits as well as risks. On the one hand, by combining and pooling resources, it can reduce any state's cost of providing fully for its security. Small members of NATO, for example have leeway to invest a greater proportion of their budget on non-military priorities, such as education or health since they can count on other members to come to their defence, if necessary.

On the other hand, collective defence involves risky commitments. Members states can become embroiled in costly wars in which neither the direct victim nor the aggressor benefits. In the First World War, countries in the collective defence arrangement known as the 'Tripple Entente' (France, Britain, Russia) were pulled into war quickly when Russia started full mobilization against Austria-Hungary, whose ally Germany subsequently declared war on Russia.

However, it is important to distinguish collective defence from collective security. Collective security is more far-reaching than collective defence as it addresses a broader range

[61] Collective Military Force.
[62] Retrieved from: http:www.Wikipedia.org/wiki/collective defence. Accessed on 29 May, 2014 at 9:50.
[63] Article 5 of the North Atlantic Treaty,1948.

of threats.[64] Collective security can be understood as a security arrangement regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, peace. Collective Security is more ambiguous than systems of alliance or collective defence in that it seeks to encompass the totality of states within a region or indeed globally and to address a wide range of possible threats.[65]An example of collective Security system is the U.N. Charter which establishes the United Nations.

Organizations such as NATO were established after the Second World War, based on the concept of collective defence under Articles 51 and 52 of the U.N. Charter.[66] By such agreements or treaties, an attack upon one party was treated as an attack upon all. Thus, necessitating the conclusion that collective defence is something more than a collection of individual rights of self-defence, but another creature altogether.[67]

The invasion of Kuwait by Iraq on 2 August, 1990 raised the issue of collective defence in the context of the response of the states allied in the Coalition to that conquest and occupation.[68] The Kuwait government in exile appealed for assistance from other states.[69] Although the military action from 16 January, 1991 was taken pursuant to UN Security Council resolutions, it is indeed arguable that the right to collective defence is also relevant in this context.[70]

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[64] Adeniran, T. Op.cit. P.227; Umozurike, U.O.Op.Cit.PP.202-204.
[65] Onoja, L. (1996) *Peacekeeping and International Security in a Changing World*. Mono Expression Ltd, Jos,(1996),pp.26-31.
[66] Shaw,M.N.op.Cit.P.1146.
[67] Ibid. PP.1146-1147.
[68] Ibid., P.1147.
[69] Ibid.
[70] The UN Charter is also a form of Collective Defence Pact. However, it is generally a Collective Security System.

In West Africa, collective defence is regulated and governed by the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security(the Mechanism).[71] The mechanism provides that the mechanism shall prevent, manage, and resolve internal and interstate conflicts. It also allows for the implementation of the Protocols on Non-aggression, Mutual Assistance on Defence (PMAD) etc.[72]

Prior to the Mechanism, PMAD provides for interventions by ECOWAS in situation of "armed threat or aggression directed against a member state".[73] This intervention however must be at the request of the transgressed state.[74] Thus, this provision limits ECOWAS's interventionist capacity to the scope of a defensive alliance in the mode of organizations like the NATO where an attack on one of the members is treated as an attack on all.

Aside from the collective defence of its members against aggression or armed threats, ECOWAS, prior to the Mechanism, could only undertake peace-keeping missions, which are not explicitly recognized by the UN Charter but have been accepted by necessary implication.[75] This is because the PMAD only allows for the deployment of interpository troops by ECOWAS in situations of attack against a member state.[76] It did not allow for the use of force. Upon the adoption of the Mechanism, it has been applied in cases of aggression or conflict in any member state or threat thereof, in cases of conflict between member states, in cases of internal conflict that threatens to trigger a humanitarian disaster, or that poses a serious threat to peace and security in the sub-region, etc.[77] The Mechanism is thus an

[71] Ladan,M.T.Op.Cit.p.86.
[72] Article 3(b) of the Ecowas Mechanism.
[73] Ladan,M.T.Op.Cit.p.87.
[74] Ibid.
[75] Ibid.
[76] Article 16 of the PMAD.
[77] Article 25 of the ECOWAS Mechanism.

improvement on PMAD which protocol did not authorize or empower ECOWAS to apply force against ECOWAS members.

2.7 Meaning and Nature of Reprisals

Reprisal is one of the concepts that beer close resemblance to the concept of self-defence. Reprisal has been treated differently by different writers. Thus, Umozurike defines it as "an act to compel a state to comply with the law consequent on that state's delict."[78] This definition illustrates the nature of reprisal but it is silent on the element of legality which could otherwise have rendered a purported reprisal illegal.

Shaw opines that reprisals are 'acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state'.[79] This definition may not be adequate as it does not distinguish between reprisals in peace time and those during armed hostilities. Thus, reprisals in time of peace are carried out by a state following unlawful acts committed to its prejudice by another state, and are intended to force that state respect the law.[80] They are intrinsically unlawful but exceptionally justifiable acts, being in response to a previous unlawful act and designed to obtain its withdrawal or reparation or redress for it. Unlike war, peace time reprisals employ a limited and temporary recourse to force that does not alter the state of peace and is without effect on any third state.[81]

[78] Umozurike, U.O.Op.Cit.p.1129.
[79] Shaw,M.N.,p.Op.Cit.p.1129.
[80] Verri, P. Op.cit.p.97.
[81] Ibid.

Reprisals during hostilities and armed conflict are exceptional, intrinsically unlawful measures used by a belligerent state to force its enemy to respect the law of armed conflict.[82] However, such reprisals may lead to widespread breaches. Reprisals are thus distinguishable from Retortion, which are in themselves lawful acts. Retortion is the adoption by one state of an unfriendly and harmful act which is nevertheless lawful as a method of retaliation against the injurious legal activities of another state.[83] Examples of Retortion include the severance of diplomatic relations and the expulsion or restrictive control of aliens as well as economic and travel restrictions.

The case dealing with the law of reprisals is the *Naulilaa despute* between Portugal and Germany in 1920.[84] This concerned a German military raid on the colony of Angola which destroyed properties, in retaliation for the mistaken killing of Three Germans soldiers unlawfully in the Portuguese territory.[85] The Tribunal in discussing the Portuguese claim for compensation emphasized that before reprisals could be undertaken, there had to be sufficient justification in the form of a previous act contrary to International law.[86] If that was proved, reprisals had to be preceded by an unsatisfied demand for reparation and accomplished by a sense of proportion between the offence and the reprisal.[87] The German claim that it had acted lawfully was thus rejected by the Tribunal.

Although reprisal is now seen as obsolete,[88] those general rules are still applicable on the use of force posited by article 2(4) of the United Nations.[89] Thus, reprisals short of force

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82 Ibid.
83 Adeniran, U.O. (1967)Op.Cit.P.92; Schwarzenberger, G.A. A Manual of International Law. Stevens & Sons Ltd, London, Fifth Edition, p.184.
84 Umozurike,U.O.Op.Cit.,p.197.
85 Ibid.
86 Shaw, M.N. Op.cit., p.1129.
87 Ibid.
88 Umozurike, U.O. Op.cit., p.197.
89 Shaw, M. N.(2005). *International Law*. Cambridge University Press, Cambridge, Fifth Edition, P.1023.

may still be undertaken legitimately, while reprisals involving armed force may be lawful if resorted to in conformity with the right of self-defence.[90] Reprisals as such undertaken during peacetime are thus unlawful unless they fall within the framework of the principles of self-defence. The is the point of convergence between Self defence and Reprisal

International humanitarian law forbids reprisal against wounded, sick, or shipwrecked persons, medical or religious personnel, medical units, transports and materials, prisoners of war, the civilian population and civilian persons, civilian objects, cultural properties, objects indispensable to the survival of the civilian population, the natural environment and the buildings and materials used for the protection of civilian population.[91] Consequently, provided the principle of proportionality is met, reprisals in the form of self defence are implicitly allowed against combatants and military objects.[92]

Under contemporary international law, the wrongfulness of an act of a state not in conformity with an obligation of that state towards another state is precluded if the act constitutes a measure legitimate in International law against that other state as a result of an internationally wrongful act of that other state.[93]

However, the taking of countermeasure is subject to conditions such as obligation to submit dispute to pacific settlement, proportionality, restraint from threat or use of force, and respect for human rights, etc.[94] If these conditions are complied with, reprisal covered by counter measures will be legitimate.

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[90] Article 51 of the UN Charter.
[91] Verri, P. Op.Cit.P.97.
[92] Ibid.
[93] Articles 30 and 47 of the International Law Commission Draft Articles on State Responsibility, 1996.
[94] Articles 48,49, and 50, International Law Commission Draft Articles on State Responsibility, 1996.

2.8 Meaning and Nature of Use of Force

The rules governing resort to force form a central element within international law, and together with other principles such as territorial sovereignty and the independence and equality of states provides that framework for international order.[95] The significance of the definition of the use of force lies in the fact that it can be used to distinguish between the legal and illegal use of force and the circumstances under which force can be used in self defence.[96]

The Dictionary of International Law of Armed Conflict has not defined "force". It only states that international law has now prohibited the threat or use of force.[97] According to Harris, Article 2(4) of the Charter prohibits the use of armed force, whether amounting to war or not, it does not prohibit political pressure or economic pressure.[98] Although, this definition is not adequate, it suggests that armed or military force is necessary in the definition of 'force' in Article 2(4).

Use of force has also been defined as the sending of the troops of one state across the borders of another state.[99] According to Sorensen, there is use of force by a state when the latter acts against another state through military force under its command.[100] The key words in these definitions are "troops" and "military force". This means that 'armed' force is required. Perhaps, Adeniran (1967) was overwhelmed by this element of 'military armed force' when he concluded that the general connotation of force is 'armed force', that is force backed with the use of arms.[101]

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[95] Shaw,M.N.Op.Cit.p.1118.
[96] Harris, D.J.(1983). *Cases and Materials on International Law.* Sweet & Maxwell, London, Third Edition,p.638.
[97] Verri, P. Op. Cit.p.52.
[98] Harris, D.J.(2010). *Cases and Materials on International Law.* Sweet & Maxwell, London, Seventh Edition,p.723.
[99] Agwu,F.A. Op.Cit.p.3.
[100] Ibid.
[101] Adeniran, T.Op.Cit.p.92.

Thus, these definitions have something in common which is 'military force'. It is military force that is required for there to be use of force. However, Article 51 of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of states or in any other manner inconsistent with the purpose of the Charter. This proscription is now part of International law, and it is now a rule of *jus Cogens* (Peremptory norm of general International law).[102] Force may be used by states only for self-defence or pursuant to a UN Security Council decision giving appropriate authorization.

However, one point that was considered in the past and is now being reconsidered is whether the term "force" in Article 2(4) includes not only force but also economic force.[103] Whether the use of force includes economic force, political or any other form of coercion is still debatable.[104] In any case, use of force by a state can only be legally admissible as being in existence when there is a physical application by a government of its regular naval, military or air forces and of irregular or volunteer forces.[105]

It is to be emphasized that article 2(4) of the Charter covers threats of force in addition to use of force. This issue was addressed by the International Court of Justice in its Advisory Opinion to the General Assembly on the Legality of the Threat or Use of Nuclear Weapons case. The court stated that signaled intention to use, if certain events occur, could constitute a threat under article 2(4) where the envisaged use of force could itself be unlawful.[106] Examples are threats to secure territory from another state or causing it to "follow or not follow certain political or economic paths.[107]

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[102] Sinclair,I.M. (1973).The Vienna Convention on the Law of Treaties .Manchester University Press,Manchester,p.20.
[103] Shaw,M.N.Op.Cit.p. 1019.
[104] Harris,D.J.(2010) Op.Cit.pp-723-725.
[105] Agwu,F.A. Op.Cit. p.4.
[106] Shaw,M.N.Op.Cit. p.1125.
[107] Ibid.

However, a clear and exhaustive definition of use of force is given by the Rome statute. The Rome Statute defines 'Crime of Aggression' as the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[108]

The Rome Statute has further given examples of uses of force that constitute Aggression. Article 8 (2) of Resolution Rc/Rec.6 provides as follows:

> For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against

[108] Article 8 of Resolution RC/RES.6 adopted at the 13th Plenary Meeting held at Kampala on 11 June, 2010 by Consensus.

another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 5 of the Rome Statute lists the crime of Aggression as one of the core crimes under the jurisdiction of the International Criminal Court. However, the court remained unable to exercise jurisdiction over the crime of aggression as the Statute did not define the crime. The conditions for the entry into force decided upon in Kampala provides that the court will not be able to exercise its jurisdiction over the crime until 1 January, 2017 when a decision is made by State parties to activate its jurisdiction.

The use of force is regulated by the rules of International Humanitarian Law. The Geneva Conventions, 1949, the Hague Convention of 1897 and 1907 and their Additional Protocols of 1977 deal with prohibition of use of force against certain persons (e.g. Prisoners of war, the sick and Wounded) war at sea, Occupied Territories and the treatment of civilians and victims of War. In addition, a number of conventions and declarations[109] detail the types of weapons that must not be used in warfare. Thus, so called 'dum-dum bullets' which cause extensive tissue damage, poisonous gases, and chemical weapons are prohibited, and the use of mines has been restricted.

The provisions governing the resort to force internationally do not affect the right of a state to take measures to maintain order within its jurisdiction.[110] Accordingly, such a state can forcibly quell riots, suppress insurrections and punish rebels without contravening article

[109] The 1992 Biological Weapons Conventions;1993 Chemical Weapons Convention,2008; Convention on Cluster Munition,1980;Convention on the Prohibition of certain Conventional Weapons such as Booby-Traps,1925;Protocol for the Prohibition of the Use of Poisonous or Bacteriological Methods of Warfare.

[110] Shaw, M.N. Op.Cit. p. 1126.

2(4) of the Charter. In the case of injury to alien persons or property, the state may be required to make reparation to the state of the alien(s) concerned.[111]

Finally, globalization and the impact of Information Technology on international law, especially the area of use of force has raised more challenges than ever existed to the global effort to restrict the use of force. There is a new form of use of force based on internet/web (cyber-attack).Cyber-attack involves the use of a country's telecommunications and the internet to disrupt computer systems or networks or the information program on them.[112] For the purpose of self-defence, cyber-attack alone may not amount to armed attack under Article 51 of the Charter. However, where a cyber-attack is prejudicial to the security, territorial integrity, or independence of a target state, it may amount to imminent threat to justify the use of anticipatory self defence even though it is not armed attack.

[111] Ibid.

[112] Waxman, M.C. Cyber Attacks and the Use of Force: Back to the Future of Article 2(4). Available at http://www.yjil.Org/docs/.../36-2-Waxman-Cyber-attacks-and -the-Use-of-Force.pdf.)Accessed on 12th January,2013 at 4:33pm; Hathaway,O.A.The Law of Cyber Attack and the Use of Force.California Law Review,292,PP.5-6. Available at < http://www.Law.Yale.edu/documents/pdf/cg/C/Law . Accessed on 12th January,2013 at 4:35pm.

CHAPTER THREE

THE DOCTRINE OF SELF-DEFENCE IN INTERNATIONAL LAW

3.1 Introduction

The concept of self-defence is perhaps one of the areas of international law that has attracted more comments from international scholars and jurists than any other aspect of the law. The debates among scholars over the doctrine of self defence remind the writer of the story about the blind men and the elephant – each of them touched only one part of their subject and generalized from it. Thus, the controversies and issues surrounding the doctrine have created the impression in some quarters that the concept of self-defence defies legal analysis.[1]

In view of the prevailing circumstances, therefore, this Chapter aims at discussing the doctrine of self defence with particular reference to; development of the doctrine of self-defence in International law, the origin and scope of Article 51 of the Charter, the relationship between customary international law and Article 51 of the Charter, the categories of self-defence and the conditions governing the exercise of self-defence.

3.2 Development of the Doctrine of Self-defence in International Law

According to the historical school of thought, every law is rooted in the past and the legal norms are not the product of abstract reasoning.[2]Therefore, an examination of the development of the doctrine of self defence in international cannot be overemphasized having regard to the present state of international law on self defence.

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[1] Ladan, M.T.(2007)*Materials and Cases on Public International Law.* A.B.U Press Zaria, p.19

[2] Ladan, M.T.(2006). *Introduction to Jurisprudence: Classical and Islamic.* Malthouse Press Ltd, Lagos, p.4.

3.2.1 The Just War Period

The earliest more serious attempts to put restrictions on the right to resort to force dates back to about 330BC which was the start of what is called the 'just war period' [3] The doctrine of the just war arose as a consequence of the Christianization of the Roman Empire and the ensuing abandonment by Christians of pacifism.[4] Shaw noted that force in this period could be used provided it complied with the divine will.[5] The concept of just war embodied elements of Greek and Roman philosophy and was employed as the ultimate sanction for the maintenance of an ordered society.[6]

St. Augustine defined the just war in terms of avenging of injuries suffered where the guilty party refused to make amends.[7] Thus, war was regarded as means of punishment and to restore the peaceful status quo but no further. St. Thomas Aquinas in the Thirteen century took the definition further when he wrote that war could be justified provided it was waged by the sovereign authority, it was accompanied by a just cause (i.e. punishment of wrongdoers) and it was supported by the right intentions on the part of the belligerent states.[8]

However, Grotius, in his systematizing fashion, tried to exclude ideological considerations as the basis of a just war in the light of the destructive seventeenth century religious conflicts and attempted to re-define the just war in terms of self-defence, the protection of property and the punishment for wrongs suffered by the citizens of the particular state.[9] Thus, in this period, self-defence began to emerge as a just cause of war.

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[3] Lund, J.T.(2007) Interceptive Self-Defence; When the Trigger was being pulled (Unpublished*)LLM.* Master thesis Submitted to the Faculty of Law, University of Lund, p.6 available at: www.LundUniversity.lu.Se/lup/publication/1562492. Accessed on 16th October,2014.
[4] Shaw, M.N.(2008) International Law, Cambridge University Press, Cambridge, Sixth Edition, p.1119.
[5] Ibid .
[6] Ibid .
[7] Ibid .
[8] Lund, J.T. Op. Cit. p.77.
[9] Lund, J.T. Op. Cit. p.7, Shaw, M.T. *Op. Cit.* , p.1120.

The right of self-defence was not an independent problem but rather a part of the problem of defining the just war. It illustrated but one of the just causes of war.[10] As adopted, and to some extent secularized by later writers, it became an integral part of the concept of the *bellum justum*, but still essentially based upon natural law. Jurists like Belli, Genetilli, Victoria, Ayala, Wolff and Vattel were equally of the opinion that natural law sanctioned the right of self-defence.[11] The emphasis upon fault on the part of the state against which self-defence is directed is perhaps the most important contribution to the concept of self-defence made by early writers.[12]

3.2.2 Positivist Period

The concept and relevance of just war began to change in the 17th century.[13] And with the establishment of the European Balance of Power system after the peace of West Phalia, 1846, the concept of just war gradually disappeared from international law.[14] In this era, states were sovereign and also equal. Thus, no state could judge whether another state's cause was just or not.

In this period, although war became a legal state of affairs which permitted force to be used and in which a series of regulatory conditions was recognized, there exist various methods of employing force that fell short of war with all legal consequences as regards neutrals and conduct that that entailed.[15] Self-defence, reprisals and pacific blockages were examples of the use of force short of war in this period. However, there was restriction on the extent to which states could resort to such measures in the context of the balance of power of

[10] Bowett, D.W. *Self-Defence in International law.* Manchester University Press, Manchester, 1958, p.4
[11] Ibid, p.5
[12] Ibid, #P.6
[13] Shaw, M.N. Op .Cit. p.1119.
[14] Brownlie, I.(1963). *International law on the Use of Force by States*. Oxford University Press, New York, pp.231-235.
[15] Shaw, M.N. Op. Cit. p.1121.

international relations that to a large extent did minimize the resort to force in the nineteenth century, or at least restrict its application.[16]

In this era, self-defence as a political doctrine (in customary international law) posed a challenge to the effort made to regulate the use of force as a means of obtaining redress. This was because the concept was flexible and could be invoked for the defence of a foreign policy which a country regards as indispensable for the protection of its interest the desirability of which the claimant state saw itself only competent to determine.

The claim of self-defence even when restricted to protection of legal right against delictual conduct came very close in practice to the much more general claims of a right to self-help, that is, the right to respond if necessary with violent measures against all that violate the whole of a state's legally protected interests: The right of territorial integrity, right of political independence, right of protection over nationals and certain economic rights.[17] Consequently, this situation blurred the distinction between self-help/self preservation and the right of self-defence.

Self-defence in customary international law as a political doctrine promoted unilateral action, which was more sanctionary (the character of self-help) than protective (the character of self-defence). And state used the doctrine to justify whimsical foreign policy which manifested very strongly in interventionary acts.[18] Thus, in 1836, the United States had exercised a correspondent forcible action of self-defence against Mexico when predatory Indians and other Marauders from Mexico were carrying out cross-border disturbances and committing great depredations in the United States. The United States Secretary of States

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[16] Ibid.

[17] Agwu, F. A. (2005). *United Nations System, State Practice and the Jurisprudence of the Use of Force*. Malthouse Press Ltd, Lagos., p.61.

[18] For example, United States justified its occupation of the Island of Amelia in 1817 on the ground that it had become a centre of illicit trafficking which was damaging to the United States.

enunciated what could be regarded as a policy of self-defence which did not take cognizance of the norm of territorial inviolability that was known to underline international relations.[19]

When the Mexican – Indians hostilities continued unabated, the succeeding US Secretary of States authorised General Games to the Frontiers with the mandate to occupy, if need be, post within the acknowledged territorial limits of Mexico. In a diplomatic correspondence to the US Minister to Mexico, Forsyth states that the principle of international law bordering on the order to General Games was that of self-defence and urged the minister as follows: "You will find no difficulty in showing to the Mexican Government that it rests upon principles of the Law of Nations, upon the immutable principle of self-defence , upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own… people".[20]

The crux of this diplomatic exchange is that the US will not wait for an injury to be inflicted before it can act. That was the political character of self-defence under customary international law which was not subject to serious restraint. However, it was in the Caroline case that self-defence was changed from a political doctrine or excuse to a legal doctrine.[21] Even though this case is regarded as laying down the definition of self-defence under customary international law, self-defence and self-preservation were used interchangeably in the correspondence that followed.

3.2.3 The Kellogg-Briand Pact

After the World War I, the balance of power ended and questions were asked of the unjust war. Consequently, the League of Nations was created based on the experience of the

[19] Agwu, F.A. Op. Cit. p.66-64.
[20] Agwu, F. A. Op. Cit. p.64.
[21] Zarif –Khonsari, M.(1995). Anticipatory and Preventive Self-defence in International law. *Iranian Journal of International Affairs*, Ministry of Foreign Affairs,Vol.ii,No.2, p.36.

World War I. The emergence of the League of Nations marked a change in the attitude of the international community to the use of force, including self-defence.[22] Unfortunately, there were many gaps in the League of Nations Charter, one of which was inadequate regulation of use of force. That is, the League system did not prohibit the use of force. Nevertheless, the increasing acceptance by states in the period of 1920 and 1939 of the view that war or any use of force can be used as instrument of national policy was not without consequences. The development resulted in the gradual whittling down of the right of self-help and self-preservation.[23]

The quest for the amelioration of the defects of the efforts at the abolition of use of force under the auspices of The League of Nations was pursued further in the Ninth Assembly of the League, where the Special Committee on Arbitration and Security submitted a report which obligated the parties not to take or invade the territory of one another, and in no case to resort to war against another party except in the exercise of the right of self-defence.[24]

Although the Kellogg-Briand Pact outlawed for the first time the war as an instrument of national policy, a condition precedent for the signing of the Kellogg-Briand Pact was agreement by the interested states on reservation of the right of self-defence. Kellogg on 1 March, 1928 assured the French Ambassador that the renunciation of War would not deprive the signatories of the right of self-defence. The United States Note of 23 June, 1928 in which

[22] The change in attitude before the League of Nations is evidenced in Article 8 of the Hague Convention for the Pacific settlement of International Disputes 1899 which came into force on 4th September, 1899. With the creation of the League of Nations, a further change in attitude to the use of force is evidenced in Articles 11 and 12 of the Covenant of the League of Nations, 1919 which was supplemented by the General Treaty for the Renunciation of War in 1928 and the formal demise in 1946.

[23] Ezdi, A. (1974).Self-Defence under Article 51 of the United Nations Charter*: A Critical Analysis. Pakistan Horizon*, Pakistan Institute of International Affairs, Vol. 27, No.2 (Second Quarter), p.31.

[24] Agwu, F.A. op. cit. p.105.

the construction of the United States draft treaty of 3 April, 1928 was explained is of decisive importance.[25] The notes stated with respect to the question of self-defence thus:[26]

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in anyway the right of self-defence. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territories from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case, the world will applaud and not condemn its action. Express recognition by a treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. In as much as no treaty provision can add to the natural right of self-defence, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence since it is far too easy for the unscrupulous to mould events to accord with an agreed definition.

The French Foreign Minister's Note read, "nothing in the new treaty restrains or compromises in any manner whatsoever the right of self-defence. Each nation in this respect will always remain free to defend its territory against attack or invasion. It alone is competent to decide whether circumstances require recourse to war in self-defence."[27]

The Kellogg-Briand Pact was not a complete success because it did not adequately address the recourse to use of force short of war. However, it was a success to the extent that it did sow the seed for the prohibition of use of force which followed in the UN Charter.

3.2.4 The United Nations Charter

It became necessary to prohibit the use of force by states after the two world wars. Thus, delegates from some states met at San Francisco on 25 April, 1945 to create a

[25] Brownlie, I. Op. Cit. p.236.
[26] Ibid.
[27] Agwu, F.A. *Op. Cit.* p.109.

regulation of the behavior of states, especially the use of force, in the drafting of the Charter.[28] Consequently, the UN Charter was established in 14th October, 1945.

The next authoritative provision of the Charter on the Use of Force is Article 2(4) which provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purpose of the United Nations. This provision is regarded as an embodiment of the fundamental principle on the law relating to the initiation of hostilities (Jus Ad Bellum). The Article contains the general rule on the prohibition of the use of force. However, the charter allows for two exceptions. The first is the authorization of the United Nations Security Council.[29] The second is the right to self-defence.[30] Thus, under the current regime of the charter, every member state has the inherent right to self –defence.

3.3 Self-Defence in Customary International Law

Rules of Customary International Law are derived from the practice of states which carry with them recognition that such rules are obligations (*opinion juris*).[31] Historically, the doctrine of self-defence is bond up with the amorphous right of self-preservation, and self-defence in customary International Law had a diffuse character. As Jennings points out, it was in the Caroline case that self-defence was defined.[32] The facts of the incident are as follows:[33] During the insurrection in Canada in 1837, sympathetic commotions occurred at various places in the United States, especially along the Canadian border. The Government of the

[28] Shaw, M.N. Op. Cit. p.1204
[29] Articles 39, 41 and 42 of the UN Charter.
[30] Article 51 of the U.N. Charter.
[31] Article 38 of the I.C.J. Statute
[32] Zarif-Kohnsari, M. op. cit. p.36.
[33] Aralon. Law.yale.edu/19th-centry/br-18420. Asp.miskolc.hu/wwwdrint/mgi/2/rouillard2.doc Accessed on 25 January, 2013 at 9:51am.

United States adopted active measures for the enforcement of the neutrality laws, but the difficulties of the situation were increased by the course of the insurgents, who, when defeated, sought refuge in the United States where they endeavored to recruit their forces. In December, meetings were held in Buffalo, in the States of New York, by Mckenzie and Rolfe, the leaders in the insurrection who made a public appeal for arms, ammunition and volunteers. On 28 December, 1837, the United States Marshall for the Northern District of New York who had proceeded to Buffalo for the purpose of suppressing violations of neutrality reported that he had found 200 or 300 men, mostly from the American State of Niagara River, encamped on Navy Island in upper Canada, armed and under the command of 'General' Van Renseller of Albany, and that the encampment had received accessions till it numbered about 1,000 well armed.

On the 29 December, 1837 the Caroline left Buffalo for the Port of Schlosser, which was also in New York. On the way, the captain caused a landing to be made at black Rock and the American flag to be run. After the steamer left Black Rock, a volley of Musketry was fired at her from the Canadian side but without injuring her. She then landed 'a number of passengers' at Navy Island, and arrived at Schlosser about 3 O'clock pm. Subsequently, in the afternoon, she made two more trips to Navy Island and returned finally to Schlosses about 6:00pm. At midnight, about 70 or 80 armed men boarded the steamer and attacked the men on board with muskets, swords and cutlasses. After this attack, the British forces set the steamer on fire, cut her lose and set her adrift over the Niagara Falls.

The legality of the British acts were discussed in detail in a correspondence in 1841-1842 when Great Britain sought the release of a British subject, McLeod, who had been arrested in the United States on charges of Murder and Arson arising out of the incident. On

27 July, 1842 in a correspondence to Lord Ashburton who had succeeded Mr. Fox as the British Minister in London, Daniel Webster, the U.S Secretary of States, knocked out the argument by Ashburton's predecessor, Fox, that the Caroline was piratical and that the US was inactive in restraining her illicit activities. But on the Britain's claim of acting in self-defence, Webster in the correseponce which built the legal framework of self-defence in customary international law, called upon the British government to show:[34]

> It will be for … (Her Majesty's) Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also that, the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all did nothing unreasonable or excessive, since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and careless to know whether there might not be in her the innocent with the guilty or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed.

Lord Ashburton's reply to Mr. Webster on July 28, 1842 was to the effect that: "it is so far satisfactory to perceive that we are perfectly agreed as to the general principles of international law applicable to this unfortunate case. Respect for the inviolable character of

[34] Harris, D.(2010). *Cases and Materials on International Law* .Sussex & Maxwell, London, Seventh Edition, p.747.

the territory of independent nations is the most essential foundation of civilization.[35] The dispute ended with an apology by Great Britain.

The Celebrated Note of April 24, 1842 from Secretary of State Webster to Mr. Fox in the British – United States controversies over the Caroline (1837) and McLeod (1840) incidents contains a number of the constituent elements of the rules on self-defence. The formulation of self-defence in this Note has also received the approval of the International Military Tribunals of Nuremberg (1946). In the Trial of the Major German War Criminals by the Nuremberg International Tribunal, it was pleaded on behalf of the accused that Germany had invaded Norway in order to forestall a contemplated allied landing there, and thus had acted in self-defence.[36] The tribunals accepted the relevance of the plea and proceeded to elaborate the conditions of self-defence. It strongly relied on the formulation of self-defence in the celebrated diplomatic correspondence between Great Britain and the United States, which arose out of the Caroline (1837) and McLeod (1840) incidents.[37] In a phraseology modeled closely on that of the Note of April 24 1841 from Secretary of State Webster to Mr. Fox, the International Military Tribunal of Nuremberg held that "preventive action in Foreign territory is justified only in case of an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment for deliberation".[38] The Tokyo International Military Tribunal endorsed and expanded this finding of its Nuremberg predecessor. It held that the right of self-defence may also be exercised by a state 'threatened with impending

[35] Ibid.
[36] Schwarzenberger, G.(1968) *International Law As Applied by International Courts and Tribunals.* London & Stevens Ltd., London, Vol. II, p.28.
[37] Ibid.
[38] Ibid, pp.28-29.

attack'.[39] In the *Corfu Channel* (merits) case (1949), the International Court of Justice also contributed to the elucidation of these rules.[40]

Thus, the Webster Correspondence in reality merely stated a right of self-defence which had a more limited application than the vague right of self-preservation and the broad and political concept of self-defence found in the nineteenth-century thought and practice.[41] Proportionality and necessity are today widely accepted as two important restrictions to use of force in self-defence.

3.4 Self-Defence under the United Nations Charter

3.4.1 Origin of Article 51 of the UN Charter

Historically, Article 51 of the United Nations Charter owes its origin to the San Francisco Conference's efforts to solve the Latin American crisis without impairing the authority of the Security Council, or scuttling the whole system of collective security, for the equivalent of Article 51 was not in the Dumbarton Oaks proposals. As a matter of fact, the Dumbarton Oaks proposals contained no provisions at all on self-defence.[42] This is not surprising since in the earlier instrument, the Covenant of the League of Nations and the Pack of Paris, the prohibitions of war were, by general consent, never taken to preclude the right of self-defence. At Dumbarton Oaks in connection with a question raised by China as to who was to determine whether a state claiming self-defence was using force consistently with the

[39] Ibid p.29.
[40] Schwarzenberger, G.A.Op.Cit.p.183.
[41] Brownlie, I. Op. Cit, p.261.
[42] Ezedi, A.(1994). *Self-defence* under Article 51 of the United Nations Charter: A Critical Analysis. *Pakistan Horizon,* Pakistan Institute of International Affairs, Vol. 27, No.2, (Second Quarter), p.35.

purposes and principles of the projected organization, it was agreed that the charter could not deny the inherent right of self-defence against aggression.[43]

What the Dumbarton Oaks Proposal contained was a regional arrangement which risked the veto since its activity was subject to the authorization of the United Nations Security Council. The fear which presented itself to the minds of members of Committee 111/4 was, therefore that by the exercise of the Veto, a single permanent member might prevent the regional organisation from taking any action.[44] To those states which had signed the Act of Chapultepec on 3 March, 1945, at the Inter-American Conference, the problem had real significance, for they had there avowed their intention of resisting aggression by armed force if necessary.[45] The connection between this Act of Chapultepec and the introduction of Article 51 was stated clearly by the Columbian Foreign Minister, Albert Lleros thus:[46]

> The Latin-American countries understood as Senator Vandenberg has said, that the origins of the term 'self-defence' is identified with the necessity of preserving regional systems, with the inter-American one… it may be deduced that the approval of this article implies that Chapultepec is not in contravention of the charter.

This concern was not limited to the members of the inter-American system. The position of the Arab League of certain bilateral security arrangements in Europe to guard against renewed German aggression, and even of the individual state's right to resort to self-defence needed clarification. As Evatt says: "It was essential that there should be clear recognition of the right of a country to defend itself against attack and to call its friends to its

[43] Ibid.
[44] Bowett, D.W. *Op. Cit. p.183.*
[45] Ibid.
[46] Ezdi, A. Op. Cit. P.36; Bowett, D.W. *Op. Ci.t* , p.83.

assistance under regional or other defensive arrangements".[47] The draft of Article 51 appears, after the rejection of an Australian proposal, in the Report of V.K. Wellington Koo, as a Rapporteur of Committee 11/4 to Commission III; its author seems to have been senator Vandenberg, though why the term 'armed attack' appears is not apparent.[48] Certainly the aggression defined in the third paragraph of the Act of Chapultepec is not limited to an 'armed attack', and though the reasons for the insertion of Article 51 are obviously clear, there is no explanation of this curious provision 'if an armed attack'.[49]

3.4.2 Article 51 of the UN charter

Article 51 of the Charter provides:

> Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence 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 action as it deems necessary in order to maintain or restore international peace and security.

The terms of Article 51 might be thought to preclude any view that its content is special and not general since it refers to 'inherent right'; it is not incongruous to regard Article 51 as containing the only right of self-defence permitted by the Charter. Its narrow and precise terms are explicable against the background of the general prohibition in Article 2, paragraph 4, of the Charter and the general assumption made at San Francisco and evident in the text of Article 51, that the organisation was to have a monopoly of the use of armed force.

[47] Ezdi, A. Op. Cit., P.38;Bowett, D.W., Op. Cit, p.184.
[48] Bowett, D.W. Op. Cit., p.184;Ezdi, A. Op. Cit. p.3.
[49] Bowett, D.W. Op. Cit. p.184.

Moreover, the proviso as to self-defense qualified a text which originally had regarded the authorization of the Security Council as necessary in all cases.[50] It is significant to note that in the Japanese Peace Treaty and the Declaration of the Rights and Duties of States drawn up by the International Law Commission, the right of self-defence is defined in the terms of Article 51 or in similar terms.[51]

Although the UN Charter is the multilateral treaty regulating use of force in self-defence, there are other international treaties providing for individual or collective self-defence. Most of these treaties reflect the provision of Article 51 of the Charter. Thus, Article 5 of the North Atlantic Treaty, 1949 provides:[52]

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the party or parties so attacked….

A similar provision is found in the Warsaw Pact which provides:[53]

> In the event of an armed attack in Europe on one or several states that are signatories of the treaty by any state or group of state, each party to this treaty shall, in the exercise of the right to individual or collective self-defence in accordance with Article 51 of the U.N. Charter, render the state or states so attacked immediate assistance…

A less detailed provision for self-defence is contained in the charter of the Organisation of American States (OAS). It provides that:[54]

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[50] Brownlie, I. Op. Cit. p.272.
[51] Ibid.
[52] The Treaty came into force on 24 August, 1949. It has provision for Nuclear Force comprised of allocation from U.S. Strategic Forces, from U.K. Bomber Command, and from Tactical Nuclear Forces now held in Europe.
[53] Article 4, Eastern Europe Mutual Assistance Treaty Signed on 14 May, 1955.
[54] Article 24 of the O.A.S. Charter.

> If the territorial integrity, sovereignty, or political independence of any American state is affected by an armed attack or other act of aggression, or by any extra-terrestrial conflict, or by a conflict between two or more American states, the American states shall apply the measures and procedures established in the special treaties on the subject.

More so, there is a Collective Security Pact signed by Egypt, Syria, Lebanon, Saudi Arabia and Yemen on 17 June, 1950. The Draft of the Pact was unanimously approved by the Council of the Arab League on 13 April, 1950. One of the main provisions of the pact is as follows[55]:

> An armed attack on one of the signatories would be regarded as aggression against all. In the event of such aggression, the other signatories would provide, individually or collectively, all military and other aid consistent with existing obligations under the League Charter and Article 51 of the U.N. Charter.

Finally, there is the Central Treaty Organisation (CENTO) which is both a defence alliance and an organisation for regional corporation in the economic, cultural, and technical fields. One of the main provisions provides thus: "consistent with Article 51 of the U.N. Charter, the parties will cooperate for their security and defence". [56]

All these provisions in the various international treaties on mutual defence re-enforce the provisions of Article 51 of the Charter. Thus, even though these pacts were adopted as part of collective defence, and regional arrangement under Article 52 of the U.N Charter, there is no gainsaying they also make provisions for individual states right of self-defence. However, in the event of conflict between Article 51 and the provisions under any regional

[55] (1968).*Treaties and Alliances of the World (A Survey of International Treaties in Force and Communities of States*) Keesings Publication Ltd, New York, p.126.

[56] Article 3. More also, Article 7 provides that 'This pact remains in force for a period of five years, renewable for further five-year period….'

arrangement, the provision of Article 51 will prevail.[57]Moreso, the treaties have to be read in a manner that will bring them in line with the provisions of Article 51 of the Charter. Hence, the reference to the provisions of Article 51 by the treaties on self defence.

3.4.3 Interpretation of Article 51 of the Charter

The problem of interpreting Article 51 is twofold. Firstly, the article is by all accounts poorly drafted. This is further complicated by the use of 'armed attack' in the Article.[58] Secondly, the correct rules for the interpretation of such a provision are themselves a matter of controversy. Particularly so is the place of the 'travaux preparatories'. Thus, Kunt, relying on the rulings of the Permanent Court of International Justice opines that where a text is clear and unambiguous, no resort should be had to the 'travaux preparatoires' for interpretation.[59] This is a misconception with respect to the principle of interpretation of treaties.

The appropriate approach had been laid down by McDougal and Feliciano when they pointed out that:[60]

> The task of treaty interpretation, especially the interpretation of constitutional documents, devised as was the United Nations Charter, for the developing future, is not one of discovering and extracting from isolated words some mystical pre-existing ratified meaning but rather one of giving that meaning to both words and acts in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement.

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[57] Article 103 of the U.N. Charter.

[58] Christ, R. (2003)Pre-emptive Self-Defence, International Law, and U.S. Policy. *Dialogue*, pp.56-58; Salamnca, A. and Ochoa-Ruiz, N.(2005) Exploring the Limits of International law relating to the Use of Force in Self-Defence. *European Journal of International law*, Vol.; 16, No.3, P. 499-501; Fitzgerald, M.A. (2008) Siezing Weapons of Mass Destruction for Foreign-Flagged ships on the High Seas under Article 51 of the UN Charter. *Virginia Journal of International Law,* Vol. 49, No.2, pp.483-484; *The* Chartham House Principles of International Law on the use of Force in Self-defence under Article 51 of the United Nations Charter. A Critical Analysis: Pakistan Horizon, Pakistan, Institute of International Affairs, Vol. 27, No.2,1974, pp.36-38.

[59] Ezdi, A. Op. Cit. pp.36-37.

[60] Ibid., p.37.

They go further to state that, for determining these "purposes and demands", a rational process of interpretation permits recourse to all available indices of shared expectation including in particular that which Kuntz casually de-emphasized, the preparatory work on the agreement.[61] In the following interpretation, the weight will be given to preparatory work as well as the emerging situations which were not contemplated by the drafters of the charter.

3.4.3.1. Restrictive Interpretation

The views of the proponents of the restrictive interpretation of article 51 is based on 'if an armed attack occurs'. These proponents believe that self-defence can only be exercised where there is occurrence of an armed attack. One of the proponents of the restrictive interpretation of Article 51 is Brownlie. According to Brownlie:[62]

> … it is incongruous to regard Article 51 as containing the only right of self-defence permitted by the charter. Its narrow and precise terms are explicable against the background of the general prohibition in Article 2, paragraph 4…
> The whole object of the charter was to render unilateral use of force, even in self-defence, subject to control…
> … to regard any form of action, formerly held to be self-defence, at a time when self-defence was a phrase regarded as interchangeable with 'self preservation' and necessity, as within a surviving 'customary right', is very arbitrary process. To go further and to assert that the charter's obligations are qualified by vague customary right is indefensible. It is submitted that Article 51 is not subject to the customary law…"

Kelson has also thrown his weight behind Brownlie on the restrictive interpretation of Article 51. According to Kelson:[63]

> The right of self-defence means… the authorization of members to use force in order to defend themselves against an armed attack. The right constitutes an important restriction of

[61] Ibid., p.37.
[62] Agwu, F.A. *Op. Cit* . p.186.
[63] Ibid., p.188.

> the obligation of the members to refrain from the threat or use of force (Article 2, paragraph 4*)*...
> … the charter restricts the right of self-defence by stipulating that the right applies only against 'an armed attack… it is of importance to note that Article 51 (used the) narrower concept of 'armed attack' which means that a merely imminent attack or any act of aggression which has not the character of an attack involving the use of armed force does not justify resort to force as an exercise of the right of self-defence established by Articles 51.

According to Quincy Wright[64]:

> … the Charter intended to limit the traditional right of defence by states to actual armed attack, even though it forbade 'threat of force' and authorized the Security Council to intervene to stop 'threat to peace'.
> The obligation of states to refrain from threats to the peace under Article 2, paragraph 4, and the competence of the United Nations to take action in case of threat to the peace under Article 39, was not intended to give a unilateral right of military self-defense in case of such threats. For that reason, self-defence against threats are excluded in Article 51 and states were explicitly obliged to submit disputes or situations which they think threaten peace, to the United Nations and to refrain from unilateral use of force.
> … Far from extending the meaning of armed attack in Article 51, the meaning should be contracted to forbid defensive action with Nuclear weapons against even an armed attack with conventional weapons, and limiting the use of nuclear weapons of defence against an actual nuclear attack.

Thus, it can be safely asserted that the right of self-defence in customary international law is broader than the right granted under Article 51, which requires the occurrence of 'armed attack' as a condition precedent to the exercise of the right of self-defence under the current legal regime of the United Nations Charter.

The obligation of states to refrain from threats or use of force (Article 2, paragraph 4 of the Charter), and the authority of the Security Council to take action were not intended to give a unilateral right of military self-defence in case of such threats. As such, members are

[64] Ibid.

still required to submit disputes which threaten world peace and security to the United Nations, and self-defence is not available against threats. Holder and Brennan submitted that under the U.N Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council but would not justify resort to anticipatory self-defence.[65]

However, there is no denying that emerging threats to global peace and security makes it desirable to define the requirement of 'armed attack'. This has been supported by some writers who referred to the United States Memorandum No.3 of 12 July, 1946, especially the following statement:[66]

> … it is equally clear that an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty defined armed attack in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action.

Harris states that as to the meaning of Article 51, it is clear that the right of self-defence exists only where there is an 'armed attack' against a state.[67] This interpretation appears to have received the judicial anointment in the case of *Iran v. United State(supra)* where the court held that "…the United States has to show that attacks had been made upon it for which Iran was responsible and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter…".[68] Thus, based on these authorities and based on the principles[69] on which the

[65] Holder, W.E. and Brennan, G.A. Op. Cit., p.816.
[66] Ibid.
[67] Harris, D. Op. Cit., p.748.
[68] Ibid., pp.750-751.
[69] Article 2 of the U.N. Charter.

United Nations was established, the restrictive interpretation would seem to be the best approach.

3.4.3.2 Expansive interpretation

The fundamental thrust of the arguments of the proponents of the expansive interpretation is that states reserve the right to use force when they believe their very existence and vital interests are endangered beyond the possibility of redress if immediate action is not taken, when there is a necessity for action which is 'instant, overwhelming and leaving no choice of means and no moment for deliberation' as was formulated by the Webster letter in the Caroline case.[70]

One of the proponents of the expansive interpretation was Bowett. His sympathy for the customary law standard of use of force spanned his position that the phrase 'territorial integrity and political independence' in Article 2, paragraph 4 should be literally conceived, in which case, there should be a limitation on the obligation of non-intervention, since the right of territorial integrity and political independence of any state was not absolute but conditional on the non-existence of any threat to the security of another state within its borders.[71] As such, the invasion of a territory necessitated by an imminence of attacks from that territory is justified. According to O'Connel, if there is today no right of self-defence for members of the United Nations except that of Article 51, then even the well established doctrine such as that of the Caroline (Anticipatory Self-Defence) might be found to have been abrogated.[72] He continued further that in analyzing Article 51, it must be intended that it acknowledges the 'inherency' of the right of self-defence, and seems to follow that interpretation must take into

[70] Agwu, F.A., *Op. Cit.*, p.177.
[71] Bowett, D. W. *Op. Cit.*, pp.54-55.
[72] O'Connel, D.P.(1965). *International Law.* Stevens & Sons Ltd, London, Vol. 1, p.340.

account a basic natural law right beyond the abrogating power of the Charter.[73] Thus, the author submitted that the content of the right, on this premise, would be basically greater than that which Article 51 provides.[74]

Leo Den Hole (2003) aligns himself with the submission of the proponents of the expansive interpretation. The author said, "… a significant number of publicists have supported the view that the customary right of self-defence includes the use of force in anticipation of an attack in certain circumstances. According to the expansive theory, anticipatory self-defence survives Article 51 of the UN Charter. [75]

Brierly relied on the enabling formula, 'nothing in the present charter shall impair the inherent right of individual or collective self-defence' in Article 51, the *travaux preparatoires,* and the Committee I at San Francisco Conference's assertion that the use of force in legitimate self-defence remains admitted and unimpaired, and opined that the right of self-defence does not have its source in the Charter but is an independent right rooted in the canons of International law.[76] Consequently, the argument of effective (restrictive) interpretation based on the words 'if an armed attack occurs' was not acceptable to Brierly whose argument is as follows:[77]

> One recent writer has insisted that the words 'if an armed attack occurs', in order to give them full meaning, should be treated as restricting the right of self-defence to defence against armed attack. But the words have to be read in their context and Article 51 has to be interpreted as a whole; and when this is done, the appropriateness of applying the principle of effectiveness to the words in question so as to produce a maximum restriction on the right of self-defence becomes very

[73] Ibid.
[74] Ibid.
[75] Leo, V.D.(2003) Anticipatory Self-Defence in International law. *American University International Law Review*, Vol. 19, Issue, 1, p.82.
[76] Agwu, F.A. Op. Cit. p.178
[77] Brierly, J.L. (1963).*The Law of Nation: An Introduction to the International Law of Peace.* Oxford University Press, Oxford, Sixth Edition, pp.418-419.

> doubtful. The question or issue is whether the words were intended to lay down an express restriction on that right or are merely descriptive of a particular category of self-defence with respect to which it was desired to underline that the right of individual, and more especially of collective self-defence had not been taken away in the process of conferring power on the Security Council to take 'preventive' and ''enforcement' measures for the maintenance of peace. When the Article begins with the statement that nothing in the treaty shall impair an inherent ('imprescriptible' in the Russian, 'natural' in the French, texts) right, it is not easy to perform an intention in the following words drastically to impair that right; and there are too many uncertainties and contradictions in Article 51 to make it possible to solve the problem simply by giving maximum effect to the words 'if an armed attack occurs'.

Shaw, even though seemingly undecided on the legally of the expansive interpretation makes a case for anticipatory self-defence. Thus, he submits that the concept of anticipatory self-defence is of particular relevance in the light of modern weaponry that can launch an attack with tremendous speed, which may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small".[78] The learned author also stated that some states have employed preemptive strikes in self-defence.[79]

Certainly, strict observance of the requirement of 'armed attack' will guarantee global peace and security since states cannot use force anticipatorily or preemptively. However, the restrictive interpretation may no longer be tenable due to the emerging threats of Terrorism and Weapons of Mass Destruction (WMD). More also, given the inability of the collective security system to function as envisaged at San Francisco Conference, there can be little doubt that state now resort to the broader category of self-defence.

[78] Shaw, M.N. *Op. Cit*, pp.1187-1138.
[79] Ibid., p.1138.

3.5 The Relationship between Article 51 of the U.N. Charter and Customary International Law

It is settled that the customary International law recognizes that a state can employ self-defence to prevent or restrict the effectiveness of hostile acts against its territory, and reprisal as retaliation against previous acts as a deterrent for the future. However, such a distinction is of little practical significance.[80] The Charter obligations relating to the peaceful settlement of disputes and to the maintenance of international peace and security, and the specific understanding to abstain from the threat or use of force against the territorial integrity of any state, make any use of force by a state prima facie illegal. But because Article 51 of the Charter, specifically reserves to states the "inherent right of self-defence, the distinction between self-defence and reprisals has assumed fundamental importance."[81]

Another aspect of the relationship between Article 51 and Customary International Law is the legality of anticipatory self-defence. Strictly speaking, Article 51 provides that there must be an 'armed attack' before self-defence can be exercised. Thus, Umozurike (1993) asked, "does this exclude anticipatory, preemptive or preventive self-defence within the ambit of Article 51?"[82]Suppose state A amasses troops on its border with state B and evidently prepares for an attack, must state B wait to be attacked or can it attack first to prevent the aggression as Israeli did in the Six-day War with the Arab states in 1967?

Clearly, anticipatory self-defence had been reinforced in the Caroline case, and it has been defended by some scholars such as O'Connell who argued that anticipatory action on the part of a state which fancies that her security is been imperiled is admissible for the law does not require a state to wait until it was actually attacked before taking measures of self-

[80] Greig, D.W.(1970) .*International Law*. Butterworths, London, pp.678-679.
[81] Ibid., p.679
[82] Umozurike, U.O.(1993). *Introduction to International Law*. Spectrum Law Publishing, Ibadan, p.205.

defence.[83] And according to Schwerzenberger, measures of self-defence can be taken against illegal acts or omissions which are attributable to another subject of international law, and measures of self-defence comprise any action, including hot pursuit on territorial waters into the high seas, which is necessary to repel any imminent or present invasion of the rights of a subject of international law.[84]

It is generally assumed that the customary International law permits anticipatory action in face of imminent danger. There can be little doubt that the right of self-preservation and the doctrine of necessity contemplated anticipatory action. The Caroline doctrine permitted preventive action in a context in which self-defence was equated with self-preservation.[85] In many works, preventive action is regarded as an aspect of preservation.[86]

Anticipatory action has been stated to be the exercise of the right of self-defence on several occasions against armed bands operating from neighboring territory or proceeding by sea towards the acting state although still outside territorial waters. Preventive action in case of actual and imminent breaches of neutrality has been regarded as lawful in the recent past.

Defence counsel argued before the Nuremberg Tribunal that the German attack on the Soviet Union had merely anticipated a Soviet attack.[87] The Tribunal would seem to have implicitly accepted the legality of anticipatory action since it dismissed this argument in relation to the facts.[88]It was contended for the defendants that the attack upon the U.SS.R was justified because the Soviet Union was contemplating an attack upon Germany and making

[83] O'Connell, B.P.(1965). *International Law*, Stevens & Sons Ltd, London, Vol. One, Pp.339-340; O'Connell, D.P. (1970). *International Law*, Stevens & Sons Limited, London, Volume One, Second Edition, P.316.
[84] Schwerzenberger, G. Op. Cit, P.183.
[85] Brownlie, I. Op. Cit., p.257.
[86] Ibid.
[87] Gluech, S. (1971). *The Nuremberg Trial and Aggressive War.* Kraus Reprinting CO., P. ix; Bronwlie, I. Op. Cit. P.258.
[88] Brownlie, I. Op. Cit, p.258.

preparations for that end. It is impossible to believe that this view was ever honestly entertained.

The International Military Tribunal for the Far East considered a similar argument. The Netherlands had declared war on Japan on 8th December, 1941, before an attack had occurred against the Netherlands East Indies.[89] However, Japan had laid plans to attack the Netherlands East Indies on that date and the Tribunal rejected the view that the Japanese action was lawful by virtue of the Netherland's declaration of war:[90]

> The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war on the 8th December, and thus officially recognized the existence of a state of war which had been begun by Japan cannot change that war from a war of aggression on the part of Japan into something other than that.

It is possible that the inference can be drawn that the Netherland's action was lawful as anticipatory self-defence but it must be borne in mind that the tribunal was merely considering the quality of the Japanese operations.

However, it has been submitted that the customary rule permitting anticipatory action must be treated with caution.[91] Statements of the rule all too often appear in a context, whether of the Caroline case or Owrks in which no clear distinction was made between self preservation, necessity, and self-defence. It is considered that the right of self-defence in the customary law should be evaluated in relation to the state practice of the past in addition to that of the period of the 'classical law". There is little positive support for preventive or

[89] Ibid.
[90] Ibid.
[91] Ibid.

anticipatory self-defence in the practice of the period 1920 to 1939 except in relation to the alleged right of pursuing armed bands.[92]

Observations made by Bronwlie (1963) are refutable because if there is little support for preventive (anticipatory) self-defence in the practice of the period 1920 to 1939, nor is there any positive support against preventive self-defence in the practice of that period, then what he calls the "classical law" continues to hold good.[93] More also, as Brownlie (1963) himself admits, the Nuremberg Tribunal implicitly accepted the legality of anticipatory action when it dismissed in relation to the facts the defence argument that the German attack on the Soviet Union had merely anticipated a Soviet attack. It is also to be noted that the Caroline incident was based on anticipatory self-defence.

Another aspect of the relationship between Article 51 and customary international law is whether self defence is a grant or not. The nature of the relationship between customary International law and Article 51 has been a subject of long debate. Some writers contended that self-defence under Article 51 is a grant.[94] Kelson argues that Article 51, applies only in the event of armed attack and rejects the proposal or interpretation that the content of Customary International Law is greater than that which is provided under Article 51[95]. However, the view that Article 51 is a reservation is critical. Many writers have argued that Article 51 has not subsumed the rules of Customary International Law.[96] Thus, there has been extensive controversy as to the precise extent of the right of self-defence in the light of Article 51 of the Charter.

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[92] Ibid, p.259
[93] Ezdi, A. *Op. Cit,* p.33
[94] Agwu, F.A Op. Cit., pp.186-193.
[95] O'Connell, D.P. *Op. Cit,* p.340
[96] Agwu, F.A., Op.Cit, Pp.177-186; Umozurike, U.O., *Op. Cit,* P.205; Holder, W.E and Brennan, G. A. Op. Cit. P.815; Bownlie, I. *Op. Cit.,* pp.257-262.

This matter has apparently been settled by the International Court of Justice in the Case of *Nicaragua V. United States.*[97] In this case,[98] Nicaragua claimed that the United States had acted against Nicaragua in ways that were violation of customary international law. Nicaragua claimed that U.S. had used direct armed forces against it by laying mines in Nicaraguan internal and external waters, causing damage to Nicaragua and foreign merchant ships, and damaging ports, oil installations and naval base, and also given assistance to the contras, Nicaraguan guerillas fighting to overthrow the government. The court considered first whether it had jurisdiction in respect of the claims by Nicaragua based on Customary International Law that had the same content as provisions in the U.N. Charter even though the United States had made a reservation to its acceptance of the Court's jurisdiction under Article 36(2) of the I.C.J. Statute excluding disputes arising under a multilateral treaty from the jurisdiction of the Court. Having found that it had jurisdiction, the court went on to consider whether United States had infringed Customary International Law.

The I.C.J. held that:[99]

> The court does not consider that in the areas of law relevant to the present dispute, it can be claimed that all customary rules which may be invoked have content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are formed are not identical in content. But in addition, even, if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the court to take the view that the creation of the Treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute,

[97] *A Case Concerning Military and Paramilitary Activities in and against Nicaragua.* ICJ Reports, (1986), P.14.
[98] Harris, D. *Op. Cit.,* p.727.
[99] Ibid.

> it would exclude the application of any rule of customary international law, the content of which was the same as, or analogous to, that of the treaty – law rule which had caused the reservation to become effective.

Still on the relationship between Article 51 and Customary International law, the I.C.J. held that:[100]

> On one essential point, this treaty itself refers to pre-existing Customary International Law; this reference to customary law is contained in the actual text of Article 51 which mentions the 'inherent right' (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present charter shall impair' and which applies in the event of an armed attack. The court therefore finds that Article 51 of the charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the charter… It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.

This writer is curious. Although it was the view of the I.C.J. that the two sources of law do not overlap exactly, and they do not have the same content, what will be the legal implication of accepting that both rules have the same content? The court answered the question unequivocally thus:[101]

> …. even if the customary norm and treaty norm were to have exactly the same content, this would have been no reason for the court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from that of the treaty norm.The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the

[100] Ibid, pp.727-728.
[101] Ibid., p.728

> North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary law, either because the treaty had merely codified the custom or caused it to "crystallize', or because it had influenced its subsequent adoption… More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own.

Thus, even though Customary International law on self defence continues to exist alongside treaty law (Article 51 of the U.N. Charter) in this field, there was not exact overlap and the rules do not have the same content.

However, as sound as the decision appears to be, there are some odds against it. First, the decision seems to allow the use of anticipatory action in self-defence. This is because states that do not have justification in Article 51 will also fall back on the rules of customary law. Secondly, this decision has cast uncertainty on Article 51 by holding that the rules of customary law exist alongside the Article. This has resulted in the spate of use of force and wars among member states. This is demonstrated by the Afghanistan and Iraqi invasion. Recently, Israel has sent signals to Iran of a possible attack at a suspected uranium enrichment site.

Thirdly, the effect of Article 51 on customary law on self-defence was not directly in issue. The court only considered whether United States was in breach of its obligation under Customary International law, and not under Article 51. The court could not determine the liability of the United States under Article 51 because of the United States reservation to its acceptance of the jurisdiction of the ICJ. Thus, this case was decided based on its merits. Fortunately, the I.C.J did an about-turn-in the case of *Iran v. United States*[102]**.** During the Iran-

[102] Ibid., P.750.

Iraq war, a number of attacks on merchant shipping occurred in the Persian Gulf causing the U.S and other states to provide naval escort for ships flying their flags. In 1987, a Kuwait tanker that had been re-flagged to the U.S. for escort purposes was hit by a missile in Kuwait waters. In 1988, the warship S.S. Samuel B. Roberts was damaged by a mine in international waters while on escort duty. Claiming self-defence, some three or four days after these incidents respectively, the US attacked Iranian Oil Platforms. In this case, Iran claimed that the attacks on its platforms were in breach of the 1955 US-Iran Treaty of Amity, Economic Relations and Consular Rights.

The Court held that:[103]

> … in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to qualify as "armed attack" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the court observed …."in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack.
> …. The conclusion to which the court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the sea isle city has not been discharged.

This decision is significant for it has reiterated the requirement of 'armed attack' as a pre-requisite for the exercise of self-defence. Under Article 51, evidence of armed attack must be adduced to justify the resort to force in self-defence. Thus, this decision has made it clear that the United States is not exempted from the obligations under Article 51. Perhaps, the court was able to determine the issue before it based on the fact that the Treaty said to have

[103] Ibid., Pp.750-751.

been violated was a bilateral treaty for which America's reservation to the acceptance of the I.C.J jurisdiction did not apply.

3.6 Self-Defence as a means of Protection

There are certain essential rights for the protection of which the right of self-defence can be exercised. Thus, it is not every right that can be protected by self-defence. Article 2(4) of the Charter gives a guide on some of the essential rights to be protected. It provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. Bowett (1958) holds the view that Article 2 (4) left the right of self-defence unimpaired and that the right which is an exception was not confined to reaction to 'armed attack' within Article 51 but permitted the protection of certain rights:[104]

> Action undertaken for the purpose of, and limited to, the defence of a state's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other state.

Thus, self-defence operates to protect essential rights from irreparable harm under circumstances in which alternative means of protection are unavailable; its purpose or function is to preserve or restore the legal status quo, and not to have a remedial or repressive character in order to enforce legal rights.[105]

[104] Brownlie, I. Op. Cit, P.269.
[105] Umozurike, U.O. *Op. Cit*, p.206.

3.6.1 The right of territorial integrity

The most obvious essential right for which the right of self-defence serves as a means of protection is the right of territorial integrity, and it is in the defence of state territory that the right of self-defence is most clearly invoked.[106] The analogy between natural persons and states, drawn by the natural lawyers of the Middle Ages was used to identify the territory of the state with the body of the individual and thus recognize an assault upon state territory as the clearest example of a situation affording to the territorial state a right of self-defence.[107] Whilst the basis of analogy no longer serves to describe adequately the right to territorial integrity, it is certain that this right has been accepted as fundamental in international law and an essential foundation of the legal relations between states.[108]

In the United Nations Charter, the concept of territorial integrity is founded in the duty imposed on all members and possibly non-members by Article 2(5) of the UN Charter. It has therefore been regarded as axiomatic that the right of territorial integrity was the right par excellence which right is qualified by the right of self-defence. In an attempt to define 'aggression', the invasion of or attack against the territory of a state has been made the starting point of the definition.[109] It might even be said that a fixation with the 'territorial' concept of aggression has tended to obscure the need to recognize that there are other essentials of the state, the violation of which ought equally well to be termed aggression and the protection of which is equally within the definition of self-defence.[110]

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[106] Bowett, D.W. Op. Cit, p.29.
[107] Ibid.
[108] Article 2(4) of the UN Charter.
[109] Article 1, 3(a)(b)(e)(f)(g), 5 of the Resolution on the Definition of Aggression, 1974 (General Assembly Resolution 3314 (XXIX), G.A.O.R 29th Session).
[110] Bowett, D.N. Op. Cit. p.30.

The formulation of the principle by the International Law Commission in 1950, and the Draft Code of Offences against the Peace and Security of Mankind emphasize the significance of territorial integrity. The latter characterizes as criminal the following acts:[111]

> Article 2(4): the incursion into the territory of a state from the territory of another state by armed bands acting for a political purpose.
> Article 2(8): Acts by the authorities of a state resulting in the annexation, contrary to international law, of territory belonging to another state or of territory under an international regime.

It cannot, therefore, be doubted that the right of territorial integrity is a right which may be protected against violation by the exercise of a right of self-defence. The matter cannot however be stated in such simple terms. It can be rightly said that territorial integrity is far from being an uncomplicated notion.

One difficulty arises over the question of interpretation of the term 'territorial integrity'. The term is not identical with territorial inviolability and it can scarcely be supposed that a state has a right to have its frontiers inviolate in all instances.[112] There might conceivably, be circumstances in which one state is justified in action which, prima facie, constitute a violation of the territory of another state, and this is particularly relevant to the situation in which a state acting in self-defence is forced to take action within the territory of another state. This illustrates the double aspect of the right of territorial integrity. On the one hand, it is a right which may be protected by the exercise of self-defence, and on the other hand, it may be subject to the right of self-defence of other states. It is a right which is nevertheless inviolable but relative to the rights of other states. Examples are not hard to find. The case of Caroline illustrates the claim of one state to justify a prima facie violation of the

[111] Ibid, p.31.
[112] Ibid .

territorial integrity of another state by reference to the rights of self-defence.[113] Likewise, the so-called right of Hot-pursuit by which a state justifies the transgression of the boundaries of a neighboring state in pursuit of marauders who have committed crimes within its territory is based upon the right of self-defence.[114] The Arab states and Israel have claimed to justify military operations outside the territory subject to their jurisdiction as measures of self-defence, as have also Pakistan and India. Britain and France similarly justified their intervention in Egyptian territory in October, 1956 on grounds of self-defence.

A further problem arises from the complexity of the right of territorial integrity and this relates to the position where the sovereignty or territory which a state claims to protect by exercise of a right of self-defence is disputed. Once title to the territory is itself in dispute it can no longer afford a basis upon which to rest the right of self-defence, and again the situation may arise in which two states act under a claim of self-defence in respect of the same territory.[115] The dispute between Bolivia and Paraguay over ownership of the Chico arose in precisely these circumstances. On 25 June, 1932, open hostilities began between these two states, the culmination of a series of 'frontier' incidences since 1928.[116] The League of Nations Commission in its Report of 11 May, 1934, while avoiding the question of responsibility for the war so long as attempts at Pacific settlement were in progress, adverted to the difficulty resulting from disputed sovereignty in these words:[117]

> In this dispute, each party claims ownership of the Chico, and therefore maintains it is waging a defensive war in its own territory. How the aggressor to be determined in such a conflict? No international frontier has been crossed by foreign troops,

[113] The Caroline Case (Supra)
[114] Bowett, D.W. *Op. Cit,* pp.38-41.
[115] O'Conneel, D.P. *Op. Cit,* p.319.
[116] Bowett, D.N. *Op. Cit,* p.34.
[117] Ibid., pp.34-35.

since the Chaco question will only be settled by a determination of this disputed.

Such a situation is exactly that contemplated by the machinery for Pacific Settlement of the Charter as a whole.[118]The action of the United Nations in the Arab-Israel question and in the Kashmir question is at bottom founded on an exclusion of the right of self-defence.[119] It is therefore clear that infringement of its territory has always been considered as the most obvious justification for a state to act in its own defence. And international law has imposed specific duties designed to protect territorial integrity".[120]

3.6.2 The Right of Political Independence

Both Article 10 of the Covenant of League of Nations and Article 2(4) of the Charter provide for respect for territorial integrity and respect for political independence; both together comprise the concrete existence of a state.[121] Thus, delictual conduct of a state which violates the right of political independence will also violate the territorial integrity; the normal aggressive war endangers both rights, yet this is not necessarily so, for the political independence of a state is susceptible to impairment by conduct which need not involve an armed attack or the violation of territorial limits.[122]

It is therefore necessary to give separate treatment to the right of political independence and the exercise of a right of self-defence in protection of a state's political independence. The problem is not simplified by the vagueness inherent in any definition of

[118] Chapter VI (Articles 33-38) of the UN Charter.
[119] O'Connel, D.P. Op. Cit. p.318.
[120] Greig, D.W., *Op. Cit.*, p.672.
[121] Greig, D.W.(1970). *International Law*. Butterworths, London, p.672. Bowett, D.W. Op. Cit. p.42.
[122] Bowell, D.W. Op.Cit., p.42.

this right, for, even as we have seen that the right of territorial integrity has its complexities, the formulation of a right of political independence presents even greater problem.

The right has been described as involving, inter alia, the right 'to establish, maintain and change its own constitution or form of government and select its own ruler, to negotiate and conclude treaties and alliance, and to maintain diplomatic intercourse with other members of the international community.[123] It includes the right to maintain both the internal and the 'external' sovereignty of the state.

It is imperative to dwell on the existence of duties imposed by international law which find their correlation to the right of political independence; only to the extent that such duties exist can there be said to be a right of political independence *strictu sensu,* for the rights of states under general international law are always the reflection of the duties imposed by general international law'.*[124]* Under customary international law, states are under obligation not to organize hostile expeditions within their territory and directed against another; nor must they encourage the formulation of such expeditions by non-state actors or private persons.[125]

Under the UN Charter, states are assured of their rights of political independence. However, this right is subject to limitation based on the authority of the Security Council.[126] The other limitation on a state's right of political independence is the right of self-defence vested in other states.[127] Thus, against the lawful exercise of self-defence, there can be no right of self-defence in the state claiming political independence.

Therefore, the right to political independence is one of the substantive rights for the protection of which self-defence can be exercised. In many instances an attack against the

[123] Ibid. pp.42-43.
[124] Ibid, pp.43-44.
[125] Ibid, pp.44-45.
[126] Chapter VII of the UN Charter.
[127] Article 51 of the UN Charter.

territorial integrity will involve an attack against the political independence, but there are situations in which by encouraging or promoting political agitation a state may endanger the political independence of another without necessarily infringing its territorial integrity.

3.6.3 Right to protection of economic interest

The interest which a state may have in the safe preservation of the national economy, and its essential economic interests, may be equally as great as its interest in safeguarding its territory and political independence, or its people. Indeed states have become increasingly aware of their vulnerability to 'economic aggression', a term used as early as 1916 by the British delegation at the Paris Conference in drafting a resolution calling for joint action after the war by the allies to protect their economic interests against German 'economic aggression' by 'necessary measures in self-defence'.[128]

Since the adoption of the Charter, an increasing concern has been evident about the question of economic aggression and the very real possibility of a political independence becoming valueless if unaccompanied by some kind of economic independence.[129] The original Brazilian proposal at San Francisco to extend the terms of Art 2(4) to include 'economic' force was rejected, but there are cases in which states have complained to the Security Council of various forms of economic aggression.[130] Recently, the problem has achieved prominence in relation to the task of defining 'aggression'. The view has been taken that a definition should comprehend forms of indirect aggression, including economic aggression.[131]

[128] Bowett, D.W. *Op. Cit*, p.106.
[129] Ibid.
[130] Harris, D. *Op. Cit* . P.724., Bowett; D.N. *Op. Cit*, p.106.
[131] Harris, D.J.(1979*)* Cases and Materials on International Law. Sweet & Maxwell, London, Second Edition,

The important question arises, relevant to the concept of self-defence, as to whether or not there exists as a counterpart to this 'economic aggression' a right of self-defence in respect of a state's economic interests. It has been submitted by Bowell that there is logically no reason why such a right should not be admitted.[132] However, this view of Bowett has been challenged by writers such as Brownlie, Harris, Greig , Goodrich, Hambro and Simons.[133]

It has been submitted that although a state is undoubtedly vitally affected by its economic and trading activities, other states (treaty obligations apart) are under no duty to trade with it.[134] If they refuse to trade, or impose restrictions upon trade with it, it is doubtful whether the injured state has legal grounds for complaints. It has also been admitted that the law in this area is inchoate.

The fact that economic interests are not generally recognized as part of the concept of self-defence is attributable to two factors. Firstly, as stated above, there is no duty of non-intervention which, as a parallel to the duty of non-intervention relating to political independence or territorial integrity, generally prohibits action by states detrimental to the economy of another state.[135] Therefore, in the absence of conduct of a delictual character, there can be no violation of a state's legal rights which calls for the exercise of self-defence.

The second factor which tends to preclude recognition of a right of self-defence in relation to the state's economic interest is that the right of Self defence is primarily important as an exception to the prohibition of the use of force.[136] The context in which the right of self-defence has the most significance is that of force, and that context is not normally relevant to

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pp.693-694.
[132] Bowett, D.W. op. cit, p.107; Brownlie, I. *Op. Cit.*, p.262.
[133] Harris, D. *Op. Cit*, p.724, Greig, D.W. *Op. Cit*, pp.672-672; Brownline, I. *Op. Cit*, p.262
[134] Greig, D. W. Op. Cit, p.672.
[135] Bowett, D.W., Op. Cit, p.107.
[136] Ibid

the defence of economic interests.[137] This is so because the injurious conduct of a state against which measures necessary to protect the national economy must be taken will rarely involve the use or threat of force. When it does, then it would invariably examine the right to political independence or territorial integrity for example, and self-defence would be invoked in the defence of these rights rather than in the defence of economic rights.

Thus, the field in which the right of self-defence can apply to those measures of protection which a state takes to protect its economy is, therefore necessarily limited. It can only apply where the injurious conduct is delictual in character, and will rarely, if ever, justify measures involving the use of force.

There are suggestions that unjustified refusal to trade with the deliberate intention of harming the state concerned may be sufficient reason for that state to take retaliatory measures, otherwise of an illegal kind, against the property of the state imposing the boycott.[138] It is hardly likely, however that a plea of self-defence could excuse the use of force in such circumstances.[139] Despite various proposals that have been advanced defining aggression to include "economic aggression", no such principle has yet been accorded recognition or acceptance as a rule of international law.[140]

3.6.4 Protection of Nationals Abroad

It cannot be doubted that the state may defend its nationals or any person within its territorial jurisdiction from hostile attack in so far as such hostile attack emanates from groups within its own territory. The state may rely on the procedures of its own administrative and

[137] Article 2(4) of the Charter.
[138] Harris, D.J. Op. Cit, pp.693-694.
[139] Gerig, D. W. Op. Cit, p.674.
[140] Ibid; Harris, D. Op. Ct, pp.724-724.

legal system to justify the necessary defensive measures.[141] Where, however, the attack emanates from a foreign state, or from groups outside the defending state's own territorial jurisdiction, the necessary defensive measures can be taken in the exercise of a right of self-defence recognized in international law.[142]

The difficult problem arises when the state purports to intervene within the territory of another state to protect its nationals. It is intended here to examine how far the protection of nationals abroad can be said to fall within the concept of self-defence

The right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted both in the writings of jurists and in the practice of states.[143] In the arbitration between Great Britain and Spain in 1925, one of the series known as the *Spanish Moroccan Chims,* Judge Huber, stated:[144]

> However, it cannot be denied that at a certain point the interest of a state in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions. This right of intervention has been claimed by all states; only its limits are disputed.

Oppenheim states in similar terms; 'The right of protection over citizens abroad, which a state holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honor or property of a citizen abroad is concerned'.[145]

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[141] Bowett, D.W. Op. Cit. *p.87,* Shaw, M.N.Op. Cit.
[142] Article 2 (4) and 51 of the UN Charter.
[143] Bowett, D.W. *Op. Cit,* p.87
[144] Ibid, pp.87-88.
[145] Ibid, pp.88

The concern here is in those cases where diplomatic protection in the sense of diplomatic interposition or the presentation of a claim on behalf of a national by his state has either failed or is inadequate to prevent an immediate danger to life or property which would otherwise be irremedial. States have resorted to the threat or use of force as a means of protection. We envisage caution by the protecting state which involves a prima facie violation of the independence and territorial inviolability of the territorial state. In so far as this action takes effect in derogation of the sovereignty of the territorial state, it must necessarily be exceptional in character and limited to those cases in which no other means of protection are available.[146] It presupposes the inadequacy of any other means of protection against some injury, actual or imminent, to the persons or property of nationals and, moreover, an injury which results either from the acts of the territorial state and its authority or from the acts of individuals or groups which the territorial state is unable or unwilling to prevent.[147]

In most cases, the right of the protecting state to intervene in this way is occasioned by a breach of a duty imposed on the territorial state under general international law to use 'due diligence' in safeguarding the lives and property of aliens within the territory from unlawful infringement.[148] To this extent, the notions of state responsibility and protection are supplementary; both depend on the failure of the territorial state to conform to minimum standards based upon general international law, to a 'standard of justice, very simple, very fundamental and of such general acceptance by all civilized nations as to form part of the international law.[149] It is equally clear that not all cases of state responsibility will involve another state's right of protection by means of armed intervention, for many and indeed most

[146] Ibid.
[147] Ibid .
[148] Ibid., 89.
[149] Ibid.

forms of violation do not carry any immediate threat of irreparable injury to the life or property of aliens.[150]

In the nineteenth century, it was clearly regarded as lawful to use force to protect nationals and property situated abroad and many incidents occurred to demonstrate the acceptance of this position.[151] Since the adoption of the UN Charter, however, it has become rather more controversial since of necessity the 'territorial integrity and political independence' of the target state is infringed. An interpretation of Article 51 would deny that an 'armed attack' could occur against individuals abroad within the meaning of that provision since it is the state itself that must be under attack, not specific persons outside the jurisdiction.[152]

The issue has been raised in recent years in several cases. In 1964, Belgium and the United States sent forces to the Congo to rescue hostages (including nationals of the states in question) from the hands of rebels, with the permission of the Congolese government, while in 1975 the United States used force to rescue an American Cargo boat and its crew captured by Cambodia.[153] The most famous incident however was the rescue by Israel of hostages held by Palestinian and other terrorists at Entebbe, following the hijack of an Air France Airliner.[154] The Security Council debate in this case was inconclusive. Some states supported Israel's view that it was acting lawfully in protecting its nationals abroad, where the local

[150] Ibid.
[151] Shaw, M.N. Op. Cit, Pp.1143, Greig, D.W. Op. Cit, P.613.
[152] Article 51 provides that right of self-defence can be exercised where there is an armed attack against a member of the United Nations.
[153] Shaw, M.N. *Op. Cit.* P.1144.
[154] Harris, D.J. (1983)*Cases and Materials on International Law.* Sweet & Maxwell, London, Third Edition , P.669.

state concerned was aiding the hijackers. Others adopted the approach that Israel had committed aggression against Uganda or used excessive force.[155]

The United States has in recent years justified armed action in other states on the grounds partly of the protection of American citizens abroad. It was one of the three grounds put forward for the invasion of Granada in 1984 and one of the four grounds put forward for the intervention in Panama in December 1989.[156]

Another issue is the protection of property of nationals situated abroad. The issue as to whether self-defence can excuse the use of force to protect property abroad is less controversial than the protection of nationals. Hence one finds the U.S. delegate to the Havana Conference of 1928 asking rhetorically what steps the U.S Government was entitled to take if there was a breakdown of law and order in a foreign state and a consequent danger to the lives of U.S nationals, but answering himself in somewhat wider terms by stating that "in such a case a government is fully justified in taking action of a temporary character for the purpose of protecting the lives and property of nationals."[157] However, the position of the law as stated by Shaw is that it is now universally accepted today that it is not lawful to have resort to force merely to save material possession abroad.[158]

3.7 Conditions for the Exercise of Self-Defence

Once a state determines that it has a right of self-defence which is based on the occurrence of an armed attack, it then must assess what specific types of actions it can take in response. The standard inquiry here has three elements: whether the use of force would be necessary, whether the level of force contemplated would be proportional to the attack (or

[155] Ibid, Pp.669-671.
[156] Shaw, M.N. *Op. Cit*, p.1144.
[157] Greig, D.W. Op. Cit. pp. 673.
[158] Shaw, M.N. *Op. Cit*, p. 1145.

imminent threat thereof), and whether the response will be taken at a point sufficiently close to the moment of attack (i.e. immediate).[159]

The concepts of necessity and proportionality are at the heart of self-defence in international law. The Court in the Nicaragua case stated that there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.[160] What will be necessary and proportionate will depend on the circumstances of the case.

3.7.1 Immediacy

This is one of the conditions for the exercise of the right of self-defence. This requirement reflects the condition that 'the need to act must be instant and overwhelming'. The requirement that self-defence is subject to the requirement of immediate exercise can be traced to two sources. The first is the general association of the international law of self-defence with personal self-defence against illegal assault under domestic criminal law.[161] But there is no strict link between the international and national right of self-defence, notwithstanding the former is influenced by the scope and limitation of the latter.[162] The second source is influenced by an attempt to draw a strict line between the right of self-defence and armed reprisals which is illegal in International law.[163]

The requirement of 'immediacy' is based on the need to distinguish between self-defence and reprisals. In the exercise of self-defence, time is of the essence. Thus, where there

[159] Deeks, A.S. "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence. *Virginia Journal of International law,* Vol. 52, NO.3, p.494.
[160] Shaw, M.N. *Op. Cit,* P.1141; Shaw, M.N.(2005). *International Law,* Cambridge University Press, Cambridge, Fifth Edition,p.1031.
[161] S.32(3)(4) Criminal Code, 55-59 & 60 Penal Code; Chukkol, .S.(1988). *The Law of Crimes in Nigeria*. A.B.U Press Ltd, Zaria, pp.106-116.
[162] Medzamrishile, M.(2011) Preemptive Self –Defence Against States Harbouring Terrorists. *RGSL Research Papers,* No.4, Rigo Graduate School of Law, pp.52-61.
[163] Ibid.

is lapse of a reasonable time after the 'armed attack', the purported self-defence will in reality be 'reprisal'. Conversely, where use of force is resorted to immediately after an 'armed attack', provided other conditions are complied with, the use of force in self-defence will be lawful.

It is significant at this point to distinguish 'immediacy' from 'imminence'. The latter is required in the exercise of proactive self-defence (Anticipatory self-defence).[164] Thus, where a threat is imminent, a state will be justified in resorting to force in self-defence. Those who support anticipatory self-defence contend that a state need not wait until it is attacked before it can protect itself.[165] While the opponents argue that there is a serious risk of wrongly evaluating 'imminent' armed attack to exist.[166]

The determination of the requirement of 'imminence' involves the relaxation of the criterion of necessity. Unfortunately, there is great difficulty in relaxing this criterion of necessity.[167] Where does one draw the line? If 'imminence' is no longer going to be a prerequisite for preemptive force, what is? For instance, with respect to WMD, would it be simple possession of such weapons?[168] Such an approach is problematic.[169] A recent example is the U.S invasion of Iraq in 2003 on the suspicion of possessing WMD. After the invasion, there has been no evidence of such possession of WMD on the part of Iraq.

However, the condition of 'imminence' has been complicated by the perceived threats that exist today. The actual issues of WMDs and terrorism are proving difficult in this

[164] The Caroline Incidence (Supra) and Article 51 of the Charter.
[165] Mrazek, J. (2011)The Right to Use Force in Self-Defence, *CYIL*, 2 , p.47.
[166] Ibid.
[167] Arend, A.C International law and the Pre-emptive Use of Military Force. *The Washington Quarterly*, Center for Strategic and International Studies, Massachusetts Institute of Technology, p,98.
[168] The Legality of the Threat or Use of Nuclear Weapons Case.
[169] Arend, A.C. Op. Cit.

respect.[170] The imminence of a terrorist attack is extremely difficult to determine, and in comparison to the movement of troops along a border, is near impossible to detect.[171] Thus, states such as United States have called for the concept of 'imminence' to be adopted to the current threats of terrorism and WMD.

3.7.2 Necessity

The principle of necessity is one of the conditions for the exercise of self-defence.[172] The necessity criterion as will be shown below raises some issues.[173] The criterion is an essential component of international humanitarian law. It means doing what is necessary to achieve war aims. It is the justification for any recourse to violence, within the limits of the general principle of proportionality.[174]

Whether the use of force will be necessary depends on the status of the belligerent state. In a state-to-state context, the victim state must face an imminent threat of attack or an expected repetition of the type of attack it just suffered in order to conclude that it is necessary to use force. The usual inquiry requires a state first to assess whether there are means short of force- such as undertaking diplomatic discussions, imposing sanctions, or severing diplomatic or commercial ties – that would resolve the interstate dispute.[175] When a state determines that it can counter an armed attack only by resorting to force, the necessity requirement is satisfied.[176]

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[170] Rochter, C. (2003).Preemptive Self-defence, International law and US Policy. Dialogue , p.60.
[171] Ibid.
[172] Schwarzenberger, G. *Op. Cit,* P.183; Umozsurike, U.O. Op. Cit, p.205.
[173] Shaw, M. N *Op. Cit,* P.1141
[174] *Verri, P.(1992) Dictionary of International Law of Armed Conflict. International Committee of the Red Cross,* Geneva, p.75
[175] Harris, D. op. cit, p.747.
[176] Ibid.

Evaluating whether it is necessary to use force against a non state actor requires a somewhat different approach. In the interstate context, a victim state considering whether force is necessary generally will be contemplating the use of force on the territory of the state that originally attacked it. In contrast, an attack by a non-state actor almost always is launched from the territory of a state with which the victim state is not in conflict. Thus, the victim state will be contemplating the use of force on another state's (non-enemy) territory.

The determination of the requirement of 'necessity' has two prongs in the context of the non-state actor or terrorists. A victim state consider not just whether the attack was of a type that would require it to use force in response to that non-state actor, but it also must evaluate the conditions in the state from which the non state actor launched the attacks.[177] In this situation, even without consent of the 'rogue' state, states employ the 'unwilling or unable' test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is neither willing nor able, the victim state may appropriately consider its own use of force in the territorial state to be necessary, and if the force is proportional and timely, the use of force is lawful.[178] If the territorial state is both willing and able, it will not be necessary for the victim state to use force, and the victim state's use of force must be unlawful.[179]

Another aspect of the necessity criterion is that the several principles of necessity have been integrated into several provisions of the Geneva Law applicable during an international armed conflict that will condition the possibility of actual measures taken in self-defence during an international armed conflict and they provide useful guidance with respect to methods and means of self-defence in other contexts because all measures of self-defence

[177] Deeks, A. S. *op. cit,* p.495
[178] Ibid.
[179] Ibid.

must comply with the same general principles.[180] For example, Articles 48 and 50-51 of Protocol to the 1949 Geneva Convention's reflect treaty-based and customary international legal requirements concerning necessity and proportionality.[181] These include (1) the need to distinguish between civilians (who are protected from attack "unless and for such time as they take direct part in hostilities") and lawful military targets (the so called principle of distinction) (2) the prohibition of attacks directed at protected civilians or civilian objects, and (3) the prohibition of indiscriminate attacks.[182]

These principles of necessity have been emphasized in so many cases by the International Court of Justice.[183] In the Nuclear Weapons case, the I.C.J stated that:[184]

> The cardinal principles contained in the texts contributing to the fabric of humanitarian law are the following: The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. States must never make civilians the object of attack and consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of the second principle, states do not have unlimited freedom of choice of means in the weapon they use.

The necessity to use force against threat of force is another issue for consideration. Self-defence cannot excuse use of force against threat of force. Threat of force can only be

[180] Rover, C.D. To Serve and to Protect, ICRC, Geneva, 1998, pp.108-115.
[181] Pauss, J.J. (2010)Self-defence Targettings of Non-State Actors and Permissibility of U.S Use of Drones in Pakistan. *Journal of Transnational Law & Policy*, Vol. 19, 2, p.270 . Rehman, J.(2011) *International Human Right Law*. Pearson, London, Second Edition, pp.786-790.
[182] Ibid.
[183] Harris, D. Op. Cit. p.752.
[184] I.C.J. Reports, (1996),p.257, para. 78.

used to counter threat of force. However, it has been submitted that where threat is imminent, the proper action is to report to the UN Security Council.[185]

In conclusion, the necessity to use force should be guided by certain factors which are as follows:

1. Compliance with the rules of International Humanitarian Law applicable in armed conflict situation.
2. The use of force must be the last resort after ways of settlement have failed.
3. The likelihood that threat will be realized if anticipatory strike is not carried out.[186]
4. The gravity of threat involved.[187]

If these conditions are satisfied, then there will be necessity for self-defence.

3.7.3 The Principle of Proportionality

This principle is one of the conditions laid down in the Webster formula in the Caroline incident.[188] The principle seeks to limit damage caused by military operations by requiring that the effect of the means and methods of warfare used must not be disproportionate to the military advantage sought. This principle has long been affirmed, for example, by the prohibition of causing excessive injury or unnecessary suffering and has become increasingly important as International humanitarian law developed.[189]

The '*just war'* doctrine which featured in the development of self-defence provided the over-whelming principle by which the proportionality of a recourse to force was

[185] Holder, W.E, and Brennan, G.A. *Op. Cit.*
[186] Medzamviashville, M. *Op. Cit., p.29.*
[187] Ibid.
[188] Harris, D. *Op. Cit., P.752; Greig, D.W.(1970). International Law*. Butterworths, London, p.677.
[189] Verri,P. Op.Cit., p.91.

assessed.[190] The doctrine proposes that (i) any state resorting to war should calibrate its response in proportion to the demonstrable wrong perpetrated against it, and that (ii) the means deployed as countermeasure against a perpetrator be proportionate to the minimum force necessary to achieve redress.[191] This doctrine ensured that states did not resort to unprincipled and unnecessarily brutal violence under the cover of redressing an alleged wrong.

The impetus for making proportionality a legal requisite of jus in Bello gathered force after World War II, a conflict in which the traditional ratio of military to civilian casualties was radically reversed.[192] For example, the American Siege of Manila, in February and March of 1945, caused the death of 16,000 Japanese and 1,000 U.S. military personnel, and also of 100,000 Filipino civilians.[193]

What response would be regarded as proportionate is sometimes difficult to quantify. It raises the issue as to what exactly is the response to be proportionate to. Is it the actual attack or the threat or likelihood of further attacks? And what if the attack in question is but part of a continuing series of such attacks to which response has thus far been muted or non-existence? In Iran V. United States (the *Oil Platforms* case), the court felt it necessary to consider the scale of the whole operation that constituted the U.S response, which included *inter alia* the destruction of two Iranian frigates and a number of other naval vessels and aircraft, to the mining by an unidentified agency of a single warship without loss of life.[194] The court held that "neither 'Operation Praying Mantis' as a whole, nor even that part of it

[190] Franck, M.T.(2008). On Proportionality of Counter Measures in International law. *American Journal of International law*, American Society of International Law, Vol. 102, No.4, p.719.
[191] Ibid.
[192] Ibid, p.724.
[193] Ibid.
[194] Shaw, M.N. *Op. Cit., p.142.*

that destroyed the Salman and Nasr platforms can be regarded, in the circumstances of the case as proportionate use of force in self-defence.[195]

Similarly, in the *Democratic Republic of the Congo V. Uganda*, the court, while finding that the preconditions for the exercise of self-defence did not exist in the circumstances, stated that 'the taking of airports and towns (by Ugandan forces) many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.[196]

Proportionality, as a criterion of self-defence, may also require consideration of the type of weaponry to be used, an investigation that necessitates an analysis of the principles of international humanitarian law.[197] The court in the Legality of the Threat or Use of Nuclear Weapons case took the view that the proportionality principle may 'not in itself exclude the use of nuclear weapons in self-defence in all circumstances', but that 'use of force that is proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the law applicable in armed conflict.[198]In particular, the nature of such weapons and the profound risks associated with them would be a relevant consideration for states 'believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.[199] For example, use of WMD against the use of ballistic missile will be greatly disproportional.

One issue as it affects proportionality is whether previous series of attacks can be taken into consideration in formulating the level of response in self-defence, rather than just

[195] Harris, D. *Op. Cit, p.752, paragraph 77.*
[196] Shaw, M.N. *Op. Cit.* P.1142.
[197] Verri, P. Op. Cit, p.75, Rover, C.D. *OP. Cit,* pp.100-118.
[198] Shaw M.N, *Op. Cit,* pp.142 .
[199] Ibid.

the attack immediately preceding the act of self-defence. It has been submitted that where such activities clearly form part of sequence or chain of events, then the test of proportionality will be interpreted so as to incorporate these previous attacks.[200] More also, series of activities carried out in respect of an attack will be taken into consideration in determining whether the response is proportional to a single attack which gave rise to the series of attack in self-defence. It is also to be noted that it is the state exercising self-defence that will make such determination of proportionality, although the determination is subject to the consideration by the UN Security council.[201]

In conclusion, it is clear that making the abstract principle of proportionality applicable to the real world of action is not easy. Many factors have to be taken into consideration such as the military strength of the belligerent state, the weapon used, the nature of the attack (armed or threatened), state of the attack (ongoing or ended), military strength of the victim etc. For example, does attack by state A with a huge army but only rudimentary arms justify a nuclear response by the victim, state B, which has only a small army but sophisticated weapons? This underlines the nature of the principle of proportionality. Therefore, what will be proportional will depend on the circumstances of each case.

3.9 New Categories of Self-Defence in International Law

These are categories of self-defence that have emerged based on the provisions of Article 51 of the Charter, the Caroline incidence, and the extent of the manifestation of the conditions of the exercise of self-defence. The emergence of these categories is attributable to the changing circumstances characterized by terrorism and WMD. These categories are : interceptive, anticipatory and preemptive self-defence.

[200] Ibid.
[201] Articles, 39, 41, 42 and 51 of the Charter.

3.8.1 Interceptive Self-Defence

Interceptive self-defence has been recognized as one of the categories of self-defence. It has been defined as the use of force by a state whose territory or military assets are the target of an attack already launched by another state in order to halt the attack.[202] According to Dinstein, 'interceptive self-defense' is the use of force in self-defence which takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way.[203] To illustrate this, the proponents of this doctrine cite as an example of interceptive self-defence the hypothetical situation where, before the attack on Pearl Harbor, the United States' Pacific Fleet was able to intercept the Japanese Carrier Striking Force and sinking it prior to reaching its destination and before a single Japanese naval aircraft got anywhere near Hawaii.

Obviously, Interceptive self-defence is not within the contemplation of Article 51 of the Charter. However, there is plethora of authorities that Interceptive self-defence is regarded as meeting the requirement of 'armed attack'.[204] The fact that an attack is already launched makes it less controversial than the other two categories of self-defence which are merely speculative.

In an effort to distinguish categories of self-defence that are outside the ambit of 'armed attack', Shaw stated that one has to distinguish between anticipatory self-defence and interceptive self-defence (where an attack is imminent and unavoidable) so that the evidential

[202] Natalia, O. and Esther, S.(2005) Exploring the Limits of International Law Relating to the use of Force in Self- Defence. *European Journal of International Law,* Vol. 16, No.31, p.499.
[203] Muetilheuser, J.L. *Op. Cit,* p.123.
[204] Ibid, Shaw, M.N. *Op. Cit,* p.1139.

problems and temptation of the former concept is avoided without dooming threatened states to making the choice between violating international law and suffering the actual attack.[205]

Interceptive self-defence has been extended to protection of territorial waters. It can justify the carrying out of Hot Pursuit into the High Seas, which is necessary to repel any imminent or present invasion of the rights of a subject of international law.[206] But at any relevant time in which interceptive self-defence is sought to be executed, certain conditions must be fulfiled. They are proportionality, necessity and immediacy. These are measures taken in contemplation of interceptive self-defence by states which desire to forestall any attack. For example, the United States developed Aegis Ballistic Missile Defence system Program designed to intercept ballistic missiles. Recently, Japan deployed Anti-Missile Batteries to protect the capital (Tokyo) amidst possible North Korea attack. These measures can be justified on the basis of interceptive self-defence.

3.8.2 Anticipatory Self-Defence

The right of anticipatory self-defence is generally assumed to be rooted in the Caroline incident.[207] Anticipatory self-defence involves the use of force in the face of an imminent attack. Although there are arguments on the validity of anticipatory self-defence, a significant number of publicists have supported the view that the customary right of self-defence includes the use of force in anticipation of an attack in certain circumstances.[208]

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[205] Shaw, M.N. *op. cit*, p.1139

[206] Schwarzenberger, G. op. cit. p[. 183, Yang S.S.(2003). Legal Basis for State Interception of Shipments on High Seas: Legality of the Naval Interdiction under the "Proliferation Security Initiative". Brooklyn Law School,pp.11-6, Available at http:///cap.org/disarmament/menic-nkinteraction.pdf Accessed on 6 February, 2013 at 6:30pm; Fitzgerald, M.A.(2008). Seizing Weapons of Mass Destruction from Foreign-Flogged Ships on the High Seas under Article 51 of the U.N. Charter. Virginial Journal of International Law, Virginia Journal of International Law Association, Volume 49, Issue 2,pp.481-483,501-505.

[207] Brownlie, I. Op. Cit. p.257.

[208] *Leo Van den Hole.(2003). Anticipatory Self Defiance In International law. American University International Law Review, Volume 19, Issue 1, pp.80-83; Agwu, F.A. Op. Cit, P.349-350,Nungesser, D.(2004)*

Thus, Emmenich de Vattel formulated a doctrine that represents the prevailing view of most early scholars:[209]

> A nation has a right to resist an injurious attempt, and to make use of force… against whoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions lest she should incur the imputation of becoming herself an unjust aggressor.

More also, the Nuremberg Tribunal implicitly accepted the legality of anticipatory action when it dismissed in relation to the facts in the defence argument that the German attack on the Soviet Union had merely anticipated a Soviet attack.[210]

In this century, possession of Weapons of Mass Destruction and terrorism and the activities of non-state actors have rendered the rules of self-defence under Article 51 inadequate to guarantee the safety of member states and global peace and security.[211] Infact, anticipatory self-defence becomes more relevant today if long-distant missiles are to be used as there may be little time left for defence 'after the buttons are pressed'.[212] Shaw throws his weight behind Umozurike when he said that "*anticipatory* self-defence is of particular relevance in the light of modern weaponry that can launch an attack with tremendous speed which may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is geographically small".[213] There are instances of states having employed anticipatory self-defence. Israel, in 1967, launched a strike upon its Arab

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United States use of the Doctrine of Anticipatory Self-Defence in Iraq Conflict. Pace International Law Review, Volume 16, Issue 1, p.198; Marriam Sapiro.(2003) Iraq: The Shifting Sands of Pre-emptive Self-Defence. The American Journal of International Law, American Society of International Law, Volume 97, No.3, pp.599-607.

[209] *Nungesser, D.* Op. Cit, *pp.198*-199.

[210] O'Connell, D.P. Op. Cit.

[211] Drumbl, M. et al (2003). Self-defence in an Age of Terrorism, Proceedings of the Annual meeting (American Society of International law, *American Society of International Law,* Volume 97, April 2-5, pp.142-145.

[212] Umozurike, U.O. Op. Cit. p.205.

[213] Shaw, M.N. Op. Cit, pp.1138.

neighbours, following the blocking of the Southern port of Eiliat and the conclusion of a military pact between Jordan and Egypt.[214] This completed a chain of events precipitated by the mobilization of Egyptian forces on Israel border and the eviction of the United Nations Peacekeeping forces from the area by the Egyptian president.[215]

However, as a matter of principle and policy, anticipatory self-defence is open to criticisms. Thus, it involves the determination of the certainty of attack which is extremely difficult to make and necessitates an attempt to ascertain the intention of a government.[216] This process may lead to a serious conflict if there is a mistaken assessment of a situation. A case in point is U.S-Iraq war of 2003. It turned out the United States was under a mistaken belief that Saddam Hussein had WMD.

Another consideration which is usually ignored is the effect of the proportionality rule on the issue. It is possible that in a very limited number of situations, force might be a reaction proportionate to the danger where there is unequivocal evidence of an intention to launch a devastating attack almost immediately.[217] However, in the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality.[218] Furthermore, the acceptance of anticipatory action may well be to accept a right which is wider than that of self-defence in Article 51 and akin to that of self-preservation.[219]

In conclusion, in each case in which a state seeks to resort to anticipatory self-defence, the conditions of "imminence, necessity and proportionality" laid down in the Caroline

[214] Ibid.
[215] Ibid.
[216] Brownlie, I. *Op. Cit,* p.259.
[217] Ibid.
[218] Ibid.
[219] Ibid.

incident must be fulfilled. Additionally, prior approval of the UN Security Council must be sought as the Council is the only body entitled to give authorization for the use of force.

3.8.3 Preemptive Self-Defence

Preemptive self-defence is one of the categories of self-defence in support of which proponents of the expansive interpretation of Article 51 have advanced arguments, and it is described as a surprised attack on another state provoked by the belief that a target state is about to be attacked or to remove a basic threat.[220]

The doctrine is of a relatively recent addition to the debate on anticipatory self-defence. In the wake of tragic events of 11 September, 2001 and a perceived threat from Iraq, the Bush administration promulgated a new National Security Strategy. One critical element of this strategy is the concept of preemption – the use of military force in advance of a first use of force by the enemy.[221] Although preemptive self-defence is a controversial doctrine in International law, the claim to use pre-emptive force has been taken to an even more controversial level by the Bush administration.[222]

The Bush administration proposes that preemptive action may be taken against hostile states and terrorist groups who are alleged to be developing Weapons of Mass Destruction. The doctrine is stated in the following terms in the United States' National Security Strategy 2002:[223]

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[220] *David, A.S(2009).* Striking a Sensible Balance on the Legality of Defensive First Strikes. *Vanderbilt Journal of Transnational Law*, Vol. 42, pp.443- 499; Condron, M.N.(2007). Getting it Right: Protecting American Critical Infrastructure in Cyberspace. *Harvard Journal of Law and Technology*, Vol. 20, No.2, pp.404-421. Nolan,J.C.(2002).*The Encyclopedia of International Relations.*GreenwoodPublishing,London,Vol.111,p.1320.

[221] Gupta, S. The Doctrine of Pre-emptive Strike: Application and Implications During the Administration of George W. Bush. *International Political Science Review, Vol. 29, No. 2, p.81.*

[222] Ibid.

[223] Hofmeister, H. (2006). *Preemptive Strikes – A New Normative Framework.* Archir des Volkerrechts, 44 bd. 2 H, p. 189.

> We must adopt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means … the greater the threat, the greater the risk of inactions – and the more compelling the case for taking anticipatory action to defend ourselves even of uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The claim to preemptive self-defence is a claim to entitlement to use unilaterally, without prior international authorization, high levels of force to arrest incipient development that is not yet operational or directly threatening, but if permitted to mature, could be seen by the potential victim state as susceptible to neutralization, only at a higher and possibly unacceptable cost at all.[224]

The dangers inherent in such an open-ended notion of preemptive self-defence are obvious. First, the lack of clear and objective legal standards could result in increasing global instability and insecurity.[225] If other states act on the same rationale that the US has proposed, and accept such military action as a legitimate response to potential threats, then a 'messy world would become a lot messier'. Once the U.S invokes the broad concept of preemptive self-defence to justify prophylactic military policies, nothing will stop other countries from doing the same. Doctrines that lower the threshold for preemptive action thus exacerbate regional crisis already on the brink of open conflict.[226] For example, States such as Israel and United States might use the doctrine to justify first strike against Iran, and the effect of the US posture may make it very difficult for international organizations to make a case for delay and diplomacy.

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[224] Reisman, M.W and Armstrong, A.(2006) The Past and Future of the Claim of Preemptive Self-Defence. *American Journal of International Law*, the American Society of International law, Vol. 100, No.3, p. 526.
[225] Hofmister, H. Op. Cit, p.190 .
[226] Ibid.

Second, the Bush doctrine may also adversely affect long standing *jus in Bello* on the conduct of warfare. A broad interpretation of preemption would not only weaken restraints on when states might use force, but also on how they may use force.[227] For example, strict compliance with the traditional legal principle of proportionality would be difficult in preemptive war: There is no measure that can be used to assess proportionality against a future attack.

One of the distinguishing features of preemptive self-defence is that it only points to a possibility in a range of possibilities, a contingency. It is merely speculative. As one moves from actual armed attack as the pre-requisite threshold of reactive self-defence to the palpable and imminent threat of attack, which is the threshold of anticipatory self-defence, and from there to the conjectural and contingent threat of the mere possibility of an attack at some future time, which is the threshold of preemptive self-defence, the latitude of the preempting state becomes wider and the nature and quantum of evidence that can satisfy the burden of proof for the exercise of the right becomes less defined.[228]

Recently, the doctrine of preemption has been extended to foreign-flagged ships on the High seas. On May 31, 2003, President Bush announced the Proliferation Security Initiative (P.S.I.) as a step towards new legal agreements authorizing the search of planes and ships carrying suspect cargo.[229] The Mechanism (P.S.I.) is created to prevent and interdict transfer of internationally restricted weapons and related technologies at sea, in the air, and on land.[230]Examples of the use of preemption are the Israel attack on Iraq Nuclear Reactor in

[227] Ibid.
[228] Reisman, M. and Armstrong, A. Op. Cit, p.526.
[229] Sue, S.Y, Op. Cit., pp.1-5.
[230] Hodgkinson, S.L. *et al.(2007).* Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap. *American University International Law Review,* Vol. 22, pp.621-270; Fitzgerald, MA. *Op. Cit.* pp.501-505.

1987, the invasion of Iraq in 2003 and it appears 'It is a matter of when' before Israel launches attack on the alleged uranium site in Iran.[231]

[231] Maggs, G.E.(2006) How The United States Might Justify a Preemptive Strike on a Rogue Nation's Nuclear Weapon Development Facilities under the U.N. Charter. An essay part of a symposium titled "A Nuclear Iran: The Legal Implications of a Preemptive National Society Strategy" held at the Syracuse University College of Law, on October 26-27, pp.55-56.

CHAPTER FOUR

THE PRACTICE OF STATES ON SELF-DEFENCE IN INTERNATIONAL LAW

4.1 Introduction

The ingredients of state practice have been surveyed and attempts made to place them in a relevant context in Chapter Two of this work. It has been stated that it is how states act in practice that forms the basis of customary International law. But evidence of what a state does can be obtained from numerous sources. Examples of such sources include administrative acts, legislations, and decisions of court and activities of States on the international stage.

The State is not a living entity but consists of governmental departments and officials, and state practice is spread across a whole range of national organs. There are the state's legal officers, legislative institutions, courts, diplomatic agents and political leaders. Each of these engages in activities which relates to the international field and therefore one has to examine all such material sources and more in order to discover evidence of what states do. Thus, the obvious way to find out how countries are behaving in relation to the doctrine of self-defence is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse official publication and treaties.

The purpose of this Chapter is to examine a few official documents of some UN member states with a view to discovering their position on the applicability of Article 51 of the UN Charter. This survey is to determine whether there is a pattern in the behavior of states and the tendency among states to resort to anticipatory or preemptive self-defence rather than wait for an armed attack as required by the provisions of the Article.

4.2. Policies and practices of some States on Self-defence in International Law

4.2.1 The United States

In this era, express claims to preemptive uses of military force have been associated prominently with the administration of George W. Bush, but it was actually advocated by previous administrations. Thus, in the United States of America, one can trace a series of indicators of a shift in official thinking towards preemptive military strategies well prior to the attacks of September 11, 2001. In 1984, President Ronald Regan issued a classified National Security Decision Directive outlining his administration's response to Terrorism the extract of which explains[1]:

> State-sponsored terrorist activity or directed threats of such action are considered to be hostile acts and the U.S. will hold sponsors accountable. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measure (sic) to protect our citizens, property, and interests.

This shows a departure from the rule of international law enshrined in Article 51 of the Charter. Against the continuing backdrop of suspected Libyan governmental support for terrorist attacks, a classified directive[2] raised the prospect of unilateral military action to prevent terrorist attacks and it stated that[3]:

> The U.S. government considers the practice of terrorism by any person or groups a potential threat to our national security and will resist the use of terrorism by all legal means available. The United States is opposed to domestic and international terrorism and is prepared to act in concert with other nations or unilaterally when necessary to prevent or respond to terrorist acts. States that practice terrorism or actively support it will not

[1]. Riesman M, W. and Armstrong, A.(2006)The Past and Future of the Claim of Preemptive Self- Defence. *American Journal of International Law*, American Society of International Law, Vol.100, No.3, July,p.527.
[2]. National Security Decision Directive, 2007.
[3]. Riesman Michael, W. and Armstrong, A. Op.cit.

> be allowed to do so without consequence. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have responsibility to take measures to protect our citizens, property, and interests.

Even though this policy was only embedded in classified documents, the new policy was explicitly discussed in newspaper articles and speeches of high government officials, a widely used and internationally legally noted method for establishing national positions. In what later became known as the 'Shuttz doctrine', the Secretary of State George Shuttz argued for the right to take limited military action to address terrorist threats while they are still manageable."[4] After Shuttz speech in October 1984, then Vice President Bush publicly disagreed with the policy noting that, "I think you've got to pinpoint (the respond to terrorism) and we're not going to go out and bomb innocent civilians or something of that nature".[5]

The claim to a right of preemptive self-defence was not limited to Republican administrations. In the National Security Strategy for a New Century, published by the Clinton administration in October, 1998, the possibility of a claim to a right of preemption was indicated, but more by implication:[6]

> Adversaries will be tempted to disrupt our critical infrastructures, impede continuity of government operators, use weapons of mass destruction against civilians in our cities, attack us when we gather at special events and prey on our citizens overseas. The United States must act to deter or prevent such attacks and, if attacks occur (sic) despite those efforts, must be prepared to limit the damage they cause and respond decisively against the perpetrators.

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[4] Ibid.
[5] Ibid.
[6] A National Security Strategy for New Century. Available at: http://www.fas.org/man/does/nssp-98.pdf Accessed 2nd May, 2013 at 12:41pm.

In 1999,United States' jets fired on two missile sites in Iraq's northern "no fly" zone on Monday in two separate incidents when United States' F15E on a routine mission over the "no fly" zone dropped two precision-guided bombs on a ground-based missile launch site near Mosul. The Incidents took place after the US Warplanes were illuminated by Iraq radar. A Pentagon spokesman, Lt. Colonel Patrick Savigny said United States planes acted in self-defence even though there was no damage to the US aircrafts[7].In 2000, however, the Clinton administration issued a new security document, a National Security Strategy for a Global Age[8], in which more explicit attention was given to terrorism. In this document, preemptive action was raised as a means of combating terrorism.

Thus, the attack on the World Trade Centre on September 11, 2001 rather than occasioning a radical change in strategy only reinforced incipient trends. On June 1, 2002, President Bush stated that 'we must take the battle to the enemy, disrupt his plans, and confront the worst threat before they emerge', and on September 17, 2002, the President made explicit and expanded claim to preemptive action in a new National Security Strategy:[9]

> We will disrupt and destroy terrorism organizations by:
> Direct and continuous action using all the elements of national and international power. Our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use Weapons of Mass Destruction (WMD) or their precursors.
> Defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting preemptively against

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[7] US Fies Iraq Missile Sites…Kuwait Army on Red Alert. The Punch, Wednesday, January 13,1999,p.13.

[8] Available at http://www.globalsecurity.org/military/library/policy/national/nss-nss- 0012.pdf Accessed on May 2, 2013 at 12:44pm.

[9] Available at http://www.state.gov/documents/organization/63562.pdf Accessed on April 26, 2013 at 1:35pm.

> such terrorists, to prevent them from doing harm against our people and our country; and
> Denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities.

Even more explicitly, the President's National Strategy to combat weapons of mass destruction, issued in December 2002, stated: "because deterrence may not succeed, and because of the potentially devastating consequences of WMD used against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD – armed adversaries, including in appropriate cases through preemptive measures.[10] This, according to Riesman and Armstrong, is a claim of preemption in a broader sense.[11]

In the released 2006 National Security Strategy of the United States[12], the Bush Administration appeared to have relaxed its initial claims to expansive preemptive strike yet it retained the "right to use preemptive force. The 2006 version places more emphasis on alternative to military preemption and reliance on multilateral solutions.

On May 26, 2010, the latest National Security Strategy was issued by President Barrack Obama. The new strategy was referred to by United Nations Ambassador Susan Rice as a dramatic departure from its predecessor.[13] The strategy advocated increased engagement with Russia, China and India. The strategy also identified Nuclear Non-proliferation and Climate Change as priorities, while noting that the United States' security depended on reviving its economy. The drafter of the new strategy made a conscious decision to remove terms such as "Islamic radicalism", instead speaking of 'terrorism' generally.

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[10] Riesman M. W. and Armstrong, A. op.cit. pp.530-531.
[11] Ibid. p.531.
[12] Available at http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf Accessed on April26, 2013 at 12:40pm.
[13] Available at <http//:en.wikipedia.org/wiki/National_security_strategy_(United States).
Accessed on April 26,2013 at 12:40pm.

Based on the various National Security Strategies of the United States, it is submitted that America has rejected the definition of self-defence in Article 51 of the United Nation Charter which requires the occurrence of an armed attack. Article 51 is reinforced by Article 5 of the North Atlantic Treaty 1949 which requires the occurrence of an armed attack against a member (party) to the treaty to justify exercise of self-defence. Ironically; NATO was a brainchild of the U.S.[14]Furthermore, the United States has not lived up to its obligations as a signatory to the U.N. Charter or the North Atlantic Treaty. This change of attitude may not be wholly attributed to the September 11, 2001 attack since the use of preemptive strike goes back to the early 1980s.It is submitted that the United States has adopted the doctrine as a way of protecting its interest in the light of terrorist threats and proliferation of WMD.

However, this work will appraise two instances where American sought to exercise the right of self-defence in international law. These instances are Operation Enduring Freedom and Operation Iraqi Freedom.

(i) **Operation Enduring Freedom (Afghanistan).[15]**

Terrorism has been recognized as one of the new threats to global security. Thus, efforts are being intensified to combat this modern threat which came to the limelight in 2001 when some terrorist groups attacked the United States. Those individual terrorists were reported to be associated with a non-state actor (al-Qaeda)[16] sited in Afghanistan. Consequently, the United States and a broad coalition of nations characterized this as an

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[14] Henry,T.N.(1985) .*American Foreign Policy, A Search for Security.* Brooks Publishing Co., California, p.34. The Four Elements of the Post War Policy include the Truman doctrine, the Marshall plan, the Theory of Containment and in 1949, the signing of North Atlantic Treaty.

[15]. http://en.wikipedia.org/wiki.war-in-Afghanistan-(2001-present) Accessed May 10, 2013 at 11:53am.

[16]. The Taliban is known for having provided safe haven to all Qaeda and its erstwhile leaders Osama bin Laden.

armed attack, and responded with military force predicated on the individual and collective self-defence that exists under customary international law and is recognized under Article 51 of the Charter.

The self-defence theory propounded in the United States' letter to the Security Council was that Afghanistan was harboring terrorists who attacked the United States, that further attacks might be anticipated, and that military action was needed to deter further attacks.[17] It has been submitted that if the letter to the Security Council stated the necessary elements of a valid claim of self-defence, the claim could have been valid.[18] It is contended that this is not the true position of the law. All the necessary elements (necessity, immediacy and proportionately) must be complied with if the claim of self-defence is to be valid.

The Operation Enduring Freedom has raised serious issues for consideration. The first issue is whether the United States was under an armed attack when it commenced armed action against Afghanistan on October 7, 2001. The attack of September 11, 2001, is an element but is not sufficient. A state that has been the victim of a completed attack cannot use armed force in response and claim self-defence.[19] Armed force may not lawfully be employed to deter attacks generally.[20] A state that does so is said to engage in a reprisal rather than self-defence. Reprisals are not permitted in International law.

The letter of the United States did not rely on the reprisal concept.[21] To the contrary, the letter reflected an acceptance of the prohibition against reprisals.[22] The letter mentioned the attacks of September 11, 2001 but it critically referred as well to "ongoing threat to the

[17]. Quigley, J. The Afghanistan War and Self-Defence. Valparaiso University Law Review, Volume 37, No.2, p.542.Available at http://scholar.valpo.edu/cgi/viewcontent.cgi?article 1287 & context + vulr .Accessed on April 26, 2013 at 11:59am.
[18]. Ibid.
[19]. Article 51 of the Charter.
[20]. Article 2(4) of the Charter.
[21]. Quigley, J. Op.cit., p.543.
[22].Ibid.

United States and its nationals posed by the Al-Qaeda organization. The weakness of the letter was that it did not specify information about any particular anticipated attack. It failed to specify either the anticipated time, location, or target.

Under the U.N. Charter, armed attack to which a state responds must be occurring or be so imminent as to be obvious.[23] In customary international law, force may be used in self-defence only if the need is "instant, overwhelming and leaving no choice of means, and no moment for deliberation."[24]

Article 51, as it appears in the four authentic text of the Charter, other than English; confirms that an armed attack must have commenced, or at least be commencing, before an armed force can be used in self-defence. The Chinese text of the Charter reads: "…at any time any member of the United Nations is attacked by military force".[25] The French text reads: "… a member of the United nations is the object of an armed aggression."[26] The Spanish text reads: "…in the event of an armed attack against a member of the United Nations"…[27] The Russian texts reads: "…if an armed attack shall occur on a member of the organization."[28] All these formulation strongly imply an ongoing attack as the situation in which a state may lawfully use force in self-defence. Thus, by the charter's definition, the United States did not appear to have been under armed attack as of October 7, 2001. It had suffered a serious attack on September 11, 2001 but that attack was complete as of October 7, 2001. Consequently, Operation Enduring Freedom was a violation of Articles 2(4) and 51 of the UN Charter.

[23]. Ibid.
[24]. Caroline Incident, 1842 (Webster Formula)
[25] . Quigley, J. op.cit., p.544.
[26].Ibid.
[27] Ibid
[28] Ibid

It has been observed that it will be difficult to satisfy the requirement of armed attack since a victim state could not always be expected to anticipate attacks.[29] It is submitted with due respect that Article 51 has to be read in the light of Article 2(4) which prohibits use of force. Thus, the difficulty created by 'armed attack' may be an attempt by the charter to discourage the use of force.

The second issue is whether self-defence can be used against non-state actors. September 11, 2001 attack on the United States was not launched by Afghanistan but rather by some terrorists who were linked to the Taliban, a terrorist organization based in Afghanistan.[30] After the September 11, 2001 attack, one question that agitated the minds of international scholars was whether self-defence action can be taken against the Taliban. This question was pertinent given the previous decisions of the ICJ in the Wall Case[31], Nicaragua Case[32], Armed Activities Case[33], and the Legality of the Threat or Use of Nuclear weapons.[34] These cases confirm the fact that United States could not exercise self-defence against Taliban (a non-state actor) unless Taliban was supported by Afghanistan.

Non-state actor (terrorists) demonstrated their capacity to carry out attack on a large scale on September 11, 2001. The international community condemned the attack, and the Security Council via resolutions re-iterated the inherent right of self-defence of states[35], the effects of which is that a state (victim of an attack) can exercise the right of self-defence against a non-state actor (Taliban) even if the victim state will violate the territorial integrity of the state providing safe haven to the terrorist.

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[29]. Franck, M.J. Terrorism and the Right of Self-defence. American Journal of International Law, Asih, Volume 95, Number 4, 2001, p.840.
[30]. It is difficult to ascertain the base of the terrorists who lack a permanent base.
[31]. ICJ Report 1986, p.543.
[32]. ICJ Report, 1986, p.14.
[33]. ICT Report, 2005, p.186
[34]. ICJ Report, 1996, p.226.
[35]. Resolution 1378 (2001)

The new dimension to the operation of terrorist organization, and the desire of these groups to acquire WMD have made it necessary for a reconsideration of the status of terrorist groups for the purpose of exercising the right of self-defence. To insist that a state must be actively involved in the operation of the terrorist group will provide a shield to states to launch attack against other states.

Thus, it has been accepted that an armed attack by a non-state actor on a state, its embassy, its military or other nationals abroad can trigger the right of self-defence provided in Article 51 of the UN Charter, even if selective defensive force directed against a non-state actor occurs within a foreign country.[36] More also, there is no rule of international law that requires consent of a state in which territory a non-state actor operates[37]. In fact, it has been argued that a prior consent exist based on states' membership of the United Nations,[38]

It is therefore submitted that if there was an armed attack (as indeed there was) and the United States responded immediately, the right of self-defence can be exercised against the Taliban even though they are based in a state which does not provide them with a safe haven.

Thirdly, Article 51 of the Charter requires the exercise of the right of self-defence to cease once the Security Council has taken measures necessary to maintain international peace and security. It has been argued that resolutions of the Security Council on any matter of armed attack will suffice to end the exercise of the right of self-defence.[39] It is submitted that the Security Council has to do more than make a resolution. The right of self-defence is

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[36]. Paust, J.J. Self-defence targeting of non-state Actors and Permissibility of U.S. Used of Drone in Pakistan. Journal of International Law and Policy, Volume 19.2, pp.338-339.Available at : http://www.law.au.penn.edu/institutes/cest/conferences/.../papers/praust.pdf. Accessed on 5 March, 2013 at 11:51am.

[37]. Ibid, p.249.

[38] Ibid.

[39] Agwu, F.A.Op.cit., p.175.

inherent and therefore cannot be taken away by the resolution of the Council.[40] This view can be supported by the response of the Security Council to the Kuwait crisis. After the invasion of Kuwait, the Security Council passed a resolution affirming the inherent right to use force in individual or collective self-defence.[41] Four months later, the Council in another resolution authorizing UN member states to use all necessary means to repel Iraq forces. That resolution reaffirmed the council's earlier position on the right of the victim to act in self-defence. Thus, it is clear that measures taken under the Council authority could supplement and co-exist with the inherent right of Self defence of a state and its allies to defend against an armed attack.[42]

However, Article 51 allows defensive force only until the Security Council acts, thereby implying that if the Security Council is in a position to act, a state cannot use force in self-defence.[43] If there is time to approach the Security Council, there will be no right to use force in self-defence by the United States. More so, the Resolution 1373 (2001) relied upon by the United States did not mention Afghanistan, let alone call for invasion of Afghanistan.[44] As a result, the Security Council neither organized, nor authorized armed action by any state in the territory of Afghanistan. Resolution 1373 did refer to the inherent right of self-defence recognized by the UN Charter as reiterated in resolution 1368 but did not specify Afghanistan or any other territory as a permissible target for defensive use of force. It is thus submitted the invasion was a violation of the Security Council resolutions and Article 51 of the Charter.

The requirements of necessity and proportionality are at the heart of self-defence in international law. The Court in the Nicaragua case stated that there was a 'specific rule

[40] Articles 39, 40, 41 and 42 of the UN Charter.
[41] Frank, M.T. Op.Cit., p.841.
[42] Ibid.
[43] Quigley, J. Op.Cit., p.548.
[44] Ibid, p.459.

whereby self-defence would warrant only measures which are proportional to the armed attack (in this case, September 11, 2001 attack) and necessary to respond to it, a rule well established in Customary International Law, and in the Advisory Opinion it gave to the General Assembly on the Legality of the Threat or Use of Nuclear Weapons, it was established that 'the submission of the exercise of the right of self-defence to the conditions of Necessity and Proportionality is a rule of customary international law.[45]

It has been argued that 'necessity is a threshold and the criterion of imminence can be seen to be an aspect of it, inasmuch as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack.[46] The implication of this is that self-defence can only be exercised as a last resort. Where there are other ways of settling or handling an issue of armed attack, then the condition of necessity is not met.

After September 11, 2001 attack, several options were open to the United States. At the same time the United States initiated military action against Afghanistan, the United State Sought to shut off financing to Al-Qaeda.[47] It thereby acknowledged that there was at least this other means, even if it claimed that this means alone might not suffice.[48] Another possible means was criminal prosecution of those responsible in Al-Qaeda. The United States did not however make a credible demand on Afghanistan for the surrender of Al-Qaeda figures.[49] It only made broad-brush demands that Afghanistan surrender those responsible for September 11, attack. United States did not provide names and particulars of the suspects. In extradition practice, a state presents particularized information to meet a probable cause standard of guilt

[45]. Shaw, M.N. Op.Cit. pp.1140-1141.
[46]. Ibid, p.1141.
[47]. Quigley, J. Op.Cit., pp.546-547.
[48]. Ibid, p.547.
[49] .Ibid.

with regard to any individual sought.[50] Thus, there was no necessity for self-defence given the options available, especially the expression of readiness by the Security Council to take action.

Furthermore, it is stated that the state relying on self-defence 'has a heavy burden' to show that its response is necessary and that it does not amount to retaliation or reprisal. It has been stated that:[51]

> The requirement of necessity provides that the use of force must be the only available means of self-defence and no other peaceful means of redress would be effective. Oscar Schechter, a distinguished international law professor…distinguishes between cases where an armed attack is occurring and those where an armed attack has already occurred, but additional attacks are expected. In the former case, the use of force always needs the requirement of necessity, but in the latter case the issue is not as clear.

Thus, the time between the armed attacks (on 11 September 2001) and the invasion of Afghanistan is a relevant consideration. The bombing of Afghanistan is of questionable necessity. The attack of September 11 was over three weeks before the U.S. military strikes began. While the U.S. feared further attacks, they were not imminent. The threats were vague and the bombing was not specifically targeted at the source of the threat. Thus, the invasion was closer to reprisal than self-defence.

Another aspect of the condition of necessity is that any use of force in self-defence must distinguish between civilians, and combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing

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[50]. Ibid.

[51]. Rose, L.M. *Is the U.S. Bombing of Afghanistan Justified as Self-defence in International law?* pp.77-78. Available at: http://www.iad/aiwi.org/.../15%20theo%20U.S.%20bombing%20afgahnistan%20justified%20as.pdf. Accessed on March 5, 2013 at 12:09pm.

between civilian and military targets.[52] It is also prohibited to use weapons to cause unnecessary suffering to combatants.[53] Thus, an aerial bombardment campaign throughout Afghanistan employing heavy handed weaponry causing thousands of civilian casualties, millions of refugees, large scale destruction of public infrastructure, and tremendous suffering was hardly necessary.[54] A well-planned and targeted ground offensive with commands units would have been more effective in battling Al-Qaeda and sympathetic armed militias, and would have kept collateral damage, including civilian casualties, to a minimum.[55] These revelations show that the United States also violated the condition of proportionality.

The principle of proportionality is measured by evaluating the military importance of a particular operation compared to the impacts on civilians and civilian objects. The numerous reports of civilian deaths and damage to civilian infrastructure in Afghanistan demonstrate that the force used by the U.S. was excessive.[56] For example[57], four days after the U.S. began bombing, it was reported that already 76 civilians had been killed and 100 injured. By October 30, there was no electricity and running water in Kandahar.[58] Twice, U.S. bombs hit clearly marked facilities of the International Committee of the Red Cross which contained humanitarian supplies.[59] The use by the United States Air Force of weapons of enormous destruction capacity, including fuel air bombs, B-52 carpet bombing, BLU-825, and CBU-87

[52]. Rehman, J. Op.Cit. pp. 789.
[53]. Ibid.
[54]. Shah S.A.(2010)War on Terrorism: Self-defence, Operation Enduring Freedom, and the Legality of U.S. Drone Attack in Pakistan. Washington *University Global Studies Law Review*, Vol.9:77. pp.105-106.
[55]. Ibid, p.106
[56]. Rose, L.M. Op.Cit,p.78.
[57]. Ibid, p.79.
[58]. Ibid.
[59] Ibid.

cluster bombs reveals the emptiness in the claim that the United States has been trying to avoid Afghan civilian casualties.[60]

It is therefore clear that even though there was armed attack evidenced by the September 11 attack, the use of force in self-defence (Operation Enduring Freedom) did not meet the conditions for the exercise of the right of self-defence under Article 51 and Customary International Law. Consequently, America has violated the principles of International Humanitarian Law even as it is now obvious that the response of the United States amounted to reprisal.

(ii) **Operation Iraqi Freedom**[61]

The United State tagged the 2003 invasion of Iraq "Operation Iraqi Freedom", the war was fought by a "coalition of the willing" made up of US, UK, Australia, Poland and Italy. The war began on March 20, 2003 following the expiration of a 48-hours deadline given by President George W. Bush to Iraq president Saddam Hussein and his two sons. Saddam's regime was toppled after nearly three weeks of fighting. Following this development, the Occupation of Iraq began.

The United States and its allies believed that they were taking a preemptive action to prevent the development of WMD and the spread of terrorism. In invading Iraq, United States has advanced reasons one of which was self-defence.[62]

The United States was justifiable worried about states that possess WMD. However, mere possession of such weapons without more does not amount to an armed attack.[63] More

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[60] Ibid.
[61].http://en.wikipedia.org/wiki/iraq-war/2003-invasion-of-iraq Accessed on May 10, 2013, at 12:05pm.
[62]. Suleiman, A.O. and Ereke, E.U.(2007) Understanding the Global War on Terrorism: An Appraisal of the 2003 U.S. –led, Invasion of Iraq. *International Affairs Quarterly,* Vol.1, No.1, January – March, p.119.
[63]. O'Connell M.E.(2003) The Myth of Preemptive Self-defence. *A Taskforce Paper of American Society of*

also, violation of the 1991 resolution prohibiting Iraq from development of nuclear weapons (following its defeat in the Persian Gulf War), does not of itself amount to an armed attack.[64] In fact, in International law, mere possession of nuclear weapons is not illegal.[65]

The United States relied on the doctrine of preemptive self-defence to invade Iraq. Since there was no prior armed attack by Iraq on United States, Article 51 could hardly be invoked. This doctrine is clearly not within the contemplation of Article 51. The main problem with the doctrine of preemptive self-defence is that it seeks to remove any legal constraints on the unilateral use of force.[66] Preemptive self-defence is not about preempting any immediate and credible security threat, but about foiling the unspecified threats that might occur at some uncertain time in the future.[67] In short, it is an offensive strategic response to a long term threat not a defensive tactical response to an impending attack.[68]More so, by allowing preemptive strike in the absence of the threat of imminent attack, the victim has attempted to create a new precedent that would wreak havoc in international peace and security.[69] Thus, the basis of preemptive self-defence was further questioned after the invasion of Iraq. Even though the U.S. believed that Saddam had WMD, that suspicion was later discovered to be baseless.[70]

International Law, Washington, DC, p.11.

[64] . Ibid.

[65]. The Legality of the Threat or Use of Nuclear Case (Supra).

[66]. Dominika, S. (2008) Military Response to Terrorism and the Jus ad Bellum. *Defence Against Terrorism Review*, Vol.1, No.1, Spring, p.44.

[67] Ibid.

[68] Ibid.

[69]. William, R.T. Dangerous Precedent: America's Illegal War in Afghanistan. P.611 Available at http://www.law.upenn.edu/live/files/145-williams33upajinmtill5632011pdf Accessed on May 10, 2013 at 1:30pm.

[70]. Suleiman, A.O. and Ereke, E.U. Op.Cit., p.120.

Consequently, Operation Iraq Freedom has been widely condemned by both European scholars and leading U.S. scholars as contravening existing International law.[71] The war in Iraq has displayed its own set of challenges, making it more difficult to evaluate the efficacy of preemption.[72] However, some of the lessons learnt from the Iraqi war are discussed below:

Operation Iraqi Freedom confirms, first of all, that the vindication of a right of self-defence beyond the threshold of imminence interferes with the Security Council's general role of maintaining peace and security under Chapter VII of the charter, and most notably if the council has expressly determined that the situation in the specific country poses a threat to international peace and security.[73] Secondly, Operation Iraq Freedom has made clear that requirements of the Webster formular (instant, overwhelming, and leaving no choice of means) cannot be eliminated without the corresponding strengthening of universal discursive institutions such as the Security Council, which ensures that the claim to self-defence is made transparent and compelling to other members of the international community.[74] Lastly, the strong international opposition to the use of force outside the framework of the UN system confers persuasive authority on the claim that the majority of states are still very hostile to the concept of preventive self-defence.[75]

Thus, the position is clear that the invasion of Iraq was illegal and a violation of the rules of international law on self-defence and armed conflict. Since there was no prior armed attack, the invasion of Iraq was illegal *ab initio.* Consequently, Operation Iraqi Freedom is an act of war contrary to Article 2(4) of the U N Charter.

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[71] Stahn, C. Enforcement of the Collective Will after Iraq. *America Journal of International Law,* Vol.97, No.4, October 2003, p.814.
[72]. Kraska, J. (2007).Torts and Terror: Rethinking Deterrence Models and Catastrophic Terrorist Attack. *American University International Law Review,*Vol.22, p.372.
[73]. Stahn, C. Op.Cit., p.821.
[74].Ibid.
[75] Ibid

The Operation Iraqi Freedom and Operation Enduring Freedom constitute acts of Aggression as defined by Article 8 of the Rc/Res.6 under the Rome Statute. However, the jurisdiction of the International Criminal Court cannot be invoked over the crime of aggression. Therefore, Security Council has a role to play in checking the unilateral use of force by United States.

Unfortunately, the Security Council is ineffective in carrying out its mandate. Since the US is the major contributor to the UN budgetary support, it is now the 'Dollar' that rules rather than the rule of Law.[76] US adopted a broader interpretation of self-defence to include, war against terrorism as was the case in Afghanistan in 2001 and combating drug trafficking, which led to the invasion of Panama. In Iraq, US had invoked Article 51 to launch a pre-emptive attack to a regime deemed dangerous to its national interests. It is therefore obvious that in most cases United States invoke Article 51 in controversial situations thereby undermining the credibility and integrity of international law and collective security system. This is normally the case when unilateral force is used bypassing the UN Security Council.

Therefore, the use of force by the United States in Iraq and Afghanistan is a violation of Article 2(4) and 51 of the UN Charter, the International Law Commission Draft Articles on state Responsibility, Article 2(4) of the Draft Code of Offences against the Peace and security of Mankind, and Article 8 of the Rome statute which include Aggression as one of the crime over which the International Criminal Court is vested with jurisdiction.

[76] Hamauswa, S. (2013). A Critique of the United States' Application of Article 51 of the United Nations Charter in Iraq and Afghanistan. International Review of Social Sciences and Humanities,Vol.4,No.2,p.230.

4.2.2 Australia

The Australian government defends the adoption of a preemptive strike policy against terrorist as a liberal interpretation of Article 51 of the UN Charter. The Defence Minister Robert Hill has argued:[77]

> [W]hen an armed attack against a state is imminent, that state is not compelled to wait until the first blow has been struck. But what action can a state legitimately take when that action is to be launched by a non-state actor, in a non-conventional manner, operating from a variety of bases in different parts of the world? There are no tell-tale warning indicators such as the mobilization and pre-deployment of conventional forces.

This submission shows that Australia may have adopted the doctrine of preemptive strike or anticipatory self-defence. This point has been reinforced by the Australia Prime Minister. When asked if the Prime Minister would launch a preemptive strike against terrorists in another country if he had evidence they were about to attack Australia, the Prime Minister answered:[78]

> Oh yes. I think any Australian Prime Minister would. It stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind and you had a capacity to stop it and there was no alternative other than to use that capacity, then of course you would have to use it.

The response of the Prime Minister in addition to reiterating the Australian right to use preemptive or anticipatory self-defence, indicates that preemptive strike is only used as a last

[77] Riesman, M. and Armstrong, A. op.cit., p.538

[78] Catherine, M. P.M. Supports Action through Preemptive Strikes. (A Transcript from A.M., a Programme that is broadcast on Australia at 8:00am ABC Local Radio). Am-Monday, 2 December 2002. Available at http://www.abc.net.au/am/stories/5738657.htm Accessed on April 26, 2013 at 11:30am.

resort. This implies that diplomacy will be used failing which preemptive strike will be invoked. Still justifying preemptive or anticipatory self-defence, the Prime Minister said:[79]

> When the United Nations Charter was written, the idea of attack was defined by the history that had gone before and that is idea of an army rolling across the border of a neighboring country, or in the case of the Japanese in Pearl Habour bombing a base. Now that's different now, you don't get that now. What you're getting is this non-state terrorism which is just as devastating and potentially even more so and all I'm saying, I think many people are saying, is that may be the body of international law has to catch up with that new reality.

It has also been reported that in 2002, a submission to the Australian parliament suggested that the international law relating to self-defence is too ill-defined to provide any detailed guidance on the issue of preemptive military strikes.[80]It is true that Australia faces a terrorist threat is clear from recent history and the rhetoric coming from multiple terrorist groups such as Al-Qaida. Its presence in Southeast Asia is a well-documented fact as is its ability to target Australian interests.

However, neighboring countries do not welcome the Australian adoption of preemptive strike. And specifically, the governments of Indonesia, Thailand and the Philippines condemned Howard's remarks, saying such strikes would flout international law.[81] More also Malaysia has rejected Australian's claim to a right to stage pre-emptive strikes against terrorist on foreign soil. Insisting that Malaysia could resist terrorism, Deputy Prime Minister Najib Razak said, "Malaysia's position is that (Australia has) to respect our

[79] Ibid.
[80] Retrieved from: www.militaryphotos.net/.../showthread.php?...policy...preemptive-strikes... . Accessed on 26 April,2013 at 2:12pm.
[81] Retrieved from: www.guardian.co.uk/world/2002/dec/02/iraq-austrailia. Accessed pm April 26, 2013 at 2:46pm.

sovereignty. We won't allow any preemptive strikes when it comes to our own national territory".[82]

Australia's position as a middling power in a region politically and historically alien to Australia's history puts it in a unique position. Its relations with nations to whom it owes historical ties are vastly stronger than with its regional neighbor is a fact which recent governments have realized may work to Australia's detriment in the future. It is for this reason that Australia should at the very least not promulgate a policy of preemptive strikes since Australia's short and long term interests would be seriously compromised if it carried out a policy of preemption.

Fortunately, in the 2008 National Security Statement, the Australian government has realized the fact that it cannot live in isolation from its neighbours as collective effort to combat Terrorism has become imperative.[83] Consequently, the government is beginning to collaborate with its neighbors such as Malaysia, Indonesia and other partners, including non-state actors such as international organizations to combat these threats to its security.

4.2.3. Russia

On 12 July 2008, Medvedev signed a new edition of the Foreign Policy Concept (FPC), promulgating his first security document as president[84].As to its position in the international arena, the FPC described Russia as a great power with a full-fledged role in the global affairs and as one of the influential centres in the modern world. Because of its status as a resurgent 'great' or 'super' power, Russia claimed to exert a substantial influence on

[82] http://www.smh.com.au/article/2004/09/20/1095651251275.html. Accessed on April 26, 2013 at 11:59am.
[83] http://www.dpmc.gov.au/national-security/nationalsecurity-strategy. Accessed on April 26, 2013 at 11:55am.
[84] www.css.ethzch/publications/pdfs/RAD-62.pdf> Accessed on April, 26, 2013 at 1:05pm.

international developments.[85] In line with its strong international position, the FPC made it clear that Russia would protect the rights and legitimate interests of Russians citizens and compatriots abroad. The development in the international arena has prompted the signing of National Security Strategy through to 2020.[86]

Russia has embraced the use of preemptive strike. Thus, the Russian government acknowledges support and professed the use of preemptive strikes in military operations in Chechnya.[87] According to presidential aide, Sergei Yastrzemski, Russia is prepared to launch preemptive strikes against Guerilla and terrorist training camps in the pars of Afghanistan controlled by the Taliban movement.[88] Russia has consequently, been very quiet in any opposition on the United States' use of preemptive strikes because of its belief that it is a legitimate military use of force when applied justly against known threat.[89] Russia is thus prepared to conduct preemptive strike against known terrorists in Chechnya.

4.2.4. Japan

The Japanese government while not engaged in combat in Iraq, has maintained elements of its self-defence forces in Iraq since December, 2003 to assist in humanitarian and reconstruction efforts. While the Self-Defence Force (SDF)[90] contingents were dispatched in

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[85] Sophia, D. and Andrew, A. Russia's National Security Strategy to 2020: A Great Power in the Making? *Caucasian Review of International Affairs.* Available at: http://www.cria- online.org/10-4.html Accessed on April 26, 2013 at 12:45pm.

[86] Ibid.

[87] Westphal, S.D.92003) Counterterrorism: Policy of Preemptive Action (Unpublished) Research Project, submitted to the U.S. Army War College, p.15. Available at: http://www.au.at.mil/au/awc/aivcgatelarmy-usawc/westphal.pdf .Accessed on April 21, 2013 at 11:23pm.

[88] Ibid.

[89] Ibid, p.16.

[90] It is a de facto armed forces since armed forces with war potential cannot be maintained.

the face of strong protests, it seems that the constitutionality of its decision was left once again unresolved. Under the Japanese constitution, it is provided that:[91]

> 1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.
> 2. In order to accomplish the aim of preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Regarding the above provisions, the majority of scholars and government officials agree that it renounces war as a means of invading other countries. On a comparative reading of Article 9 of the Japanese Constitution vis-à-vis Articles 2(4) and 51 of the UN Charter, it is clear that the Japanese Constitution has truly renounced war as required by international law.

However, there are some movements within Japan to amend the constitution to make the right of self-defence explicit in Article 9.[92] Despite these constitutional impediments, in 2003 the Japanese parliament passed the law concerning measures to ensure National Independence and Security in situation of armed attack.[93] The law addresses situations of armed attack and defines such a situation as one "where an armed attack against Japan from the outside (including a case where an armed attack is imminent) has occurred (or one) where an armed attack is anticipated as tensions arise.[94]

Japan said it could ask the United States forces to launch a pre-emptive strike on North Korean missile bases if Pyongyang was preparing to fire missile at its territory. The Japanese Director-General of the Defence Agency, a Cabinet Minister, Shigeru Ishuba stated:"If (North

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[91] Article 9 of the Japanese Constitution, 1947.
[92] www.comparativeconstitution.org/...dangerous-proposals-for-amending.html. Accessed on April, 26, 2013 at 11:31am.
[93] Japanese Defence Agency, http://www.jda.go.jp/el/pab/wp2002/0304.htm
[94] Ibid

Korea) starts injecting fuel (into missiles) as part of preparations after expressing its intention of throwing Japan into a sea of fire or reducing it to ashes, then it means the start of an attack."[95] The Minister added that under a Security Pact, Japan could entrust the United States with an attack on enemy territory while engaging itself in self-defence as a shield".[96]

In 2003, Japanese Security Committee and Cabinet under Article 9 approved the introduction of a Ballistic Missile Defence System.[97] The Japanese government put forward several reasons for establishing its own missile defence system. First was the international proliferation of ballistic missile and weapons of mass destruction.[98]Secondly, the dictatorship of North Korea poses imminent threat to Japan.[99] Finally, although the conservative Japanese remain dissatisfied with Article 9 of the Constitution which renounced Japan's right to maintain military forces, some opposition has prevented the amendment of the Article. Thus, it remains the basis of Japan's defence policy.

However, Japan does maintain men at arms because Article 9 has been interpreted to mean that it is acceptable to maintain purely defensive military forces, with no offensive capability. Japan's Supreme Court has refused to overrule this interpretation.[100] In 1954, the Dial[101] established a "Self-Defence Agency" which converted the "National Police Reserve" into the Ground, Maritime and Air Self Defense forces with a Force of 270,000.[102] Consequently, complete self-defence against major threats would require a much larger, better equipped force, which would probably strain the existing political compromise and popular

[95] www.theage.com.au/articles/2003/01/24/1042911552277.html Accessed on April 26, 2013 at 11:39am.
[96] Ibid.
[97] Namatame, N. Japan and Ballistic Missile Defence: Debates and Difficulties. Security Challenges, Vol.8, No.3, (Spring 2012), P.4.
[98]. Ibid.
[99] . Ibid.
[100] http://afc.easia.columbia.edu/special/japan_1950_usjapan.htm Accessed on April 26, 2013 at 11:40pm
[101] . The building that houses "House of Councilors and House of Representatives" of Japan.
[102]. . http://afc.easia.columbia.edu/special/japan_1950_usjapan.htm Accessed on April 26, 2013 at 11:40pm

acceptance of the self-defence forces. Under the present circumstances, it would also cause apprehension among Japan's neighbors.

It is submitted the defence policy of Japan is in line with the provisions of Article 2(4) and 51 of the UN Charter. Any attempt to adopt the preemptive use of force as a national policy will be counterproductive, and a violation of the rule against the use or threat of force against member States.

4.2.5. France

Despite France's vocal opposition to the war in Iraq, it also has announced a defence policy that would allow for preemptive action. In a policy statement for 2003 – 2008, the French government noted:[103]

> Outside our borders, within the framework of prevention and projection – action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible preemptive action is not out of the question, where an explicit and confirmed threat has been recognized. This determination and the improvement of long range strikes capabilities should constitute a deterrent threat for our potential aggressors; especially as transnational terrorist networks develop and organize outside our territory, in areas not governed by states, and even at times with the help of enemy states.
>
> ….
>
> Prevention is the first step in the implementation of our defense strategy, whose choices have been confirmed by the appearance of the asymmetric threat phenomenon.

This statement focuses on the asymmetrical threat posed by terrorists. As an additional deterrent to terrorist attacks, President Jacques Chirac stated that retaliations for large state-backed terrorist attacks against France could involve the use of nuclear weapons.[104]

[103] Riesman, W. and Armstrong, A. op.cit., p.544.
[104]. Ibid

Recently, the French white paper[105] on defence and nationality has identified "nuclear deterrence" as one of the essential concepts of national security. The sole purpose of the nuclear deterrent is to prevent any state-originating aggression against the vital interests of the nation wherever it may come from and in whatever shape. Other highlights of the white paper are force protection and land combat capabilities, Drones for surveillance and combat drones, nuclear attack submarines carrying cruise missiles, and air strike component. There is also the detection and early warning capabilities that are aimed at ballistic missile capabilities that could be targeted on France or Europe.

4.2.6. China

China acknowledges the right of self-defence of any sovereign state. After the detonation of its nuclear weapon, China announced:[106]

> To defend oneself is an inalienable right of every sovereign state. And to safeguard world peace is the common task of all peace-loving countries. China cannot remain idle and do nothing in the face of the ever increasing nuclear threat posed by the United States. China is forced to conduct nuclear test and develop nuclear weapons. The development of nuclear weapons by China is for defence and for protecting the Chinese people from the danger of the United States launching a nuclear war. The Chinese government hereby solemnly declares that China will never at any time and under any circumstances be the first to use nuclear weapons (Cohen and Chiu 1974, 1627).

China regards its development of Nuclear weapons as lawful under the right of self-defence in International law. Consequently, the Chinese government has criticized the United

[105].2008 French White Paper on France's National Security Strategy. http://merlin.ndu.edu/whitepapers/france-English,2008.pdf.Accessed on 12th March,2013 at 2:35pm.

[106]. Szewcyk, B.M.J.(2005) *Preemption, Deterrence, and Self-Defence: A Legal and Historical Assessment*. Cambridge Review of International Affairs, Rutledge (Taylor & Frances Group), Vol.18, Number 1, April, pp.130-131. Available at http://myconcordia.concordidshanghai.org/.../process.php....file Accessed on April 26, 2013 at 10;37am.

States preemptive policy because it "mainly relies on subjective judgments, and is very easily abused and used as a pretext for war.[107] Notwithstanding the criticisms, such action appears to be contemplated as permissible in the context of China's claim to Taiwan, in respect to which the Chinese government seems to support a limited version of the right to preemptive action. In March, 2005, the People's Congress of China adopted an anti-secessionist law that authorizes non-peaceful means in the event of overt Taiwanese secessionist actions, or even once "possibilities for a peaceful reunification" are exhausted.[108] Although any action based on the antirecession law will rely on subjective judgment, would be susceptible to abuse, and could be used as a pretext for war, the people's congress seems oblivious to the irony.

On the whole, China pursues a national defence policy which is defensive in nature and in accordance with the constitution of the People's Republic of China, and other relevant laws, the Armed Forces of China undertake the sacred duty of resisting foreign aggression and defending the motherland.[109] Thus, the 2010 China's National Defence Policy stated:[110]

> China unswervingly maintains its five cultural traditions and its belief in valuing peace above all else, advocating the settlement of disputes through peaceful means, prudence on the issue of war, and the strategy of 'attacking only after being attacked'. China will never seek hegemony, nor will it adopt the approach of military expansion now or in the future, no matter how its economy develops.

From this statement, it is clear that China subscribes to the requirement of 'armed attacks provided in Article 51 of the Charter, and opposes the use of preemptive strike.

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[107]. Riesman, M.W. and Armstrong, A. Op.Cit. p.544.
[108]. Ibid
[109] . Gupta, R. Whitepaper on China's National Defence, 2010 IDSA Comment, institute for Defence Studies and Analyses, April 1, 2011. Available at : http://www.idsa.in/idacomments/whilepapersonchinasnationaldefence2010
Also available at: <http://eng.mod.gov.ch/. Accessed on April 26, 2013 at 10:49 am.
[110]. http://eng.mod.gov.ch/database/defencepolicy/indexhtm> Accessed on April 26, 2013 at 10:49am.

4.2.7 United Kingdom

It is the view of some authorities in the United Kingdom that a preemptive strike is a breach of International law. Thus, the United Kingdom denied a United States request to use UK military base in Ciprus as well as in the Atlantic and Indian Oceans for a buildup of military forces in the Golf.[111] These requests were made as part of routine contingency planning for potential military action against war. According to the Guardian:[112]

> It states that providing assistance to forces that could be involved in a preemptive strike would be a clear breach of international law on the basis that Iran, which has consistently denied it has plans to develop a nuclear weapon, does not currently represent 'a clear and present' threat.
> The UK would be in breach of international law if it facilitated what amounted to a preemptive strike on Iran,' said a senior Whitehall source. 'It is explicit. The government has been using this to push back against the Americans.

A rejection by the UK government of a right to act preemptively is consistent with positions previously taken by the UK government. In the lead up to the Iraq war in 2003, the then UK Attorney-General, Lord Goldsmith consistently advised that international law only permits force in self-defence where there is an actual or imminent attack. In this advice to the Prime Minister on 30 July, 2002, the Attorney General made it clear at that time that "development of WMD is not in itself sufficient to indicate such immence.[113]

The submissions of the Attorney General suggest that the UK has not explicitly adopted the preemptive self-defence doctrine described in the U.S. National Security Strategy of 2002. Based on the advice of the Attorney General, preemptive force can be used where an

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[111]. Dapo ,A.(2012) U K Government Rejects Preemptive Self-defence with Respect to Iran. EJIL:Talk, October, 26, Available at http://ww.eji/talk.org/uk-government-rejects-preemptive-self-defence-with-respect-to-Iran Accessed on April 26, 2013 at 1:13pm.
[112]. Ibid.
[113]. Ibid.

attack is imminent. However, the remarks by the Prime Minister, and other top government officials have come to suggest that the UK is in support of the preemptive use of force. In March, 2004 Prime Minister Tony Blair stated:[114]

> Containment will not work in the face of the global threat that Confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically, I am not saying that every situation leads to military action. But we surely have a duty and right to prevent the threat materializing….

In reaction to the statement, a committee of the House of Commons concluded, "the Prime Minister's words appear to support the doctrine of anticipatory self-defence."[115] This statement by the Prime Minister buttressed an earlier finding by the House of Commons in 2002 that:[116]

> "(t)he foreign secretary appears to accept the principle of preemption, as set out in the National Security Strategy of the United States. He told us on 25th September that 'if any nation feels that it is threatened in a direct way then under Article 51 it has an inherent right to take action preemptively.' The Prime Minister has also asserted that "the one thing we have learned Post-II September is that to take actions in respect of a threat that is coming may be more sensible than to wait for the threat to materialize and then to take action.

The main impetus for the United Kingdom's implicit, though inconsistent; support for the U.S. preemption strategy is the need for an effective and timely response to the new type of threats posed by Terrorism. After the attacks on September 11, 2001, the British

[114]. Riesman, M.W. and Armstrong, A. op.cit., p.541.
[115].Ibid.
[116]. Ibid.

government commissioned a new chapter for its Strategic Defence, which had been compiled in 1998. It stated that:[117]

> Experience shows that it is better where possible, to engage an enemy at longer range, before they (sic) get the opportunity to mount an assault on the UK. Not only is this more effective than waiting to be attacked at a point and timing of an enemy's choosing, but it can have a deterrent effect. We must therefore continue to be ready and willing to deploy significant forces overseas and, when legally justified, to all against terrorists and those who harbor them.

The point has to be made here that the position of the U.K. is not certain. It has not expressly adopted the doctrine of preemptive strike as a policy like the United States did in 2002. However, the U.K. has adopted it with caution, and its justification will depend on the particular facts of each situation.

The latest '2010 National Security Strategy: A strong Britain in an Age of Uncertainty'[118]prioritizes the different and more complex range of threats. Those topping the List and grabbing all the headlines are the threat of terrorist attack. Although this 2010 document is silent on the use of preemptive or anticipatory strike, it can be implied from the document. In Paragraph 3.4 of the 2010 strategic document, it is stated:[119]

> Most national security threats arise from actions by states actors: states or non-state actors, who are hostile to our interests. There is much we can do to reduce the likelihood of such risks occurring, on our own or with partners. We will directly disrupt adversaries such as terrorists; we will promote corporation to reduce the motivation of state to be hostile to us.

[117]. Ibid
[118].2010 National Security Strategy: A Strong Britain in an Age of Uncertainty, (October, 2010). Available at http://www.vega.co.uk/in-focus.../uk-national-security-strategy Accessed on April 26, 2013 at 1:19 pm.
[119].Ibid.

Unlike the previous official statement expressly adopting preemptive strike, the 2010 document is silent on it. However, it is provided in the document that United Kingdom will use instruments to directly counter terrorists. What this implies is the use of anticipatory or preemptive strike to deal with any imminent terrorist threat.

4.2.8 Nigeria

Nigeria is one of the member nations of the UN which has ratified the UN Charter, 1945.[120] Consequently, all the provisions of the UN Charter are binding on Nigeria. Thus, Article 51 of the UN Charter has to form part of the defence policy of the Nigerian state.

However, the Fundamental Principles and policy objectives of Nigeria's policy on self-defence as enshrined in the constitution provides as follows:[121]

> The foreign policy objectives shall be –
> ….
> (c) Promotion of international cooperation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations,
> (d) Respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.

From the above provisions, it is obvious that the constitution is very clear on the international obligation assumed by Nigeria by virtue of international treaties. By this provision, Nigeria has rejected war and use of force.[122] Thus, in as much as UN Charter is binding on Nigeria as a member state, Nigeria is bound to restrain from use of force except in self-defence.

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[120]. The activities of insurgents have brought the attention of the world on Nigeria, especially the abduction of the Chibok girls by Boko Haram.
[121]. Section 19 of the 1999 constitution (as amended)
[122]. Ibid.

More so, the constitution has charged the armed forces of the federation with the responsibility of defending Nigeria from external aggression.[123] Thus, even though the right of self-defence is an inherent right of each sovereign state and is encapsulated in Article 51 of the Charter, the constitution has also reinforced Nigeria's right of self-defence against external aggression. It has been submitted that the inherent or traditional duty of the army is the defence of the realm from external forces.[124] This will include either prosecuting a war against an enemy state or defending a war launched on the state by an enemy state.[125]

The 2006 Nigerian National Defence policy is a reflection of the previous versions of the policy, and its objectives are substantially the same as the principles provided in section 19 of the constitution.[126] And the overall objectives of the National Defence Policy are the protection of Nigeria's interests under the ambit of the constitution.

Furthermore, in addition to the constitution and the National Defence Policy regulating Nigeria's position on self-defence, there are other sub-regional instruments to which Nigeria is a signatory. An example is the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of 1991. The Mechanism provides for its application in the event of aggression or conflict in any member state or threat thereof.[127] Thus, by these provisions, Nigeria can invoke the mechanism for the use of force where it is faced with aggression.

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123. S.217(2)a, Ibid.
124. Achike, O.(1978). *Groundwork of Military Law and Military Rule in Nigeria*. Fourth Dimension Publishers, Enugu, p.50.
125. Ibid.
126. Katsina, A.M.(2008) *Nigeria's Defence Policy in the Fourth Republic: A Critical Analysis.* (Unpublished) Thesis submitted to the Department of Political Science and Defence Studies, Faculty of Arts and Social Sciences (Fence Academics (NDA), Kaduna as part of the requirement for the Award of M.Sc. (Degree) in Defence and Strategic Studies, p.99.
127. Article 25 of the Mechanism.

Nigeria has always shown restraint in the use of force on the resolution of conflict with neighbouring countries. For example, at the height of the conflict over Bakassi peninsular, diplomatic ties were strained, and Nigeria again deployed troops to the area.[128] Besides minor skirmishes, the conflict did not degenerate into a full-scale war. The extreme restraint from use of force by Nigeria demonstrated its acceptance of the International Court of Justice ruling that ceded the peninsular to Cameroon, and it is considered as a supreme example for peace.[129]

It is to be noted that Nigeria has not expressly adopted the doctrine of preemptive or anticipatory self-defence in its relations with other states. Nigeria insists on being attacked first. Nigeria justified ECOMOG's use of armed force in its final major military attack, which ultimately led to the overthrow of the junta regime primarily on the right to self-defence.[130] The requirement of an 'armed attack' appears fulfilled with evidence that the military action started as a response to an attack by junta forces on an ECOMOG camp at Lungi. It is submitted that the fact that the attacked ECOMOG forces were on Sierra Leonean territory does not necessarily deprive them of the right to exercise self-defence.[131] Military Units of a state or regional organization abroad may use self-defence when attacked by forces of the territorial state, provided their presence does not constitute armed attack.

However, Nigeria's position seems to be changing, and tilting towards the use of preemptive strike in the face of security challenges posed by Boko Haram, and the rise in insurgency. Attacks by insurgents are now common in the North, especially in Adamawa and

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[128]. Katsina, A.M. Op.Cit., p.90.
[129]. Kuna, M.J. *The Role of Nigeria in Peace Building, Conflict Resolution, and Peacekeeping since 1960.* Available at http://www.ceddert.com/publications/ceddert006.pdf Accessed on April 26, 2013 at 11:19pm.
[130]. Norrot, K., and Schbacker, E.W.(1998). The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone. *American University International Law Review*, Vol.14, Issue 2, p.365.
[131]. Ibid, p.366.

Borno.[132] One of the tactics devised by the Joint Task Force(JTF) to combat the terrorist activities of Boko Haram and other insurgents is raiding[133] of their suspect hideout. This is a form of preemptive use of force by the military. For example, Few days after declaring ceasefire, the Joint Task Force (JTF) raided two training camps of the insurgents in swampy locations in two local government areas of Borno state.[134] The JTF described the siege as a landmark onslaught which led to the discovery of cache of arms and other ammunitions.[135] Similarly, after the departure of President Goodluck who was on a two-day visit to Borno, the JTF ambushed a hideout of suspected Boko Haram members in Maidugurii where the JTF killed 20 of them and recovered sophisticated weapons including guns that had the capacity to bring down aircraft.[136]

Again, sometime in December, 2012, the JTF carried out three days of uninterrupted raids in parts of Maiduguri which led to the killing of four Boko Haram members, and recovery of large cache of arms, improvised explosives and ammunitions meant for deadly attacks on the Christmas Day.[137]

The approach of Raid adopted by the JTF is a response to the new dimension of the security challenges in the country. This can be compared to the change in strategy by the U.S. after September 11, 2001 attack.[138] Thus, new threats to security will require a corresponding change in the strategy for combating the threats. As Nigeria is now faced with terrorist threats

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[132]. Adamu, L.D. Gunmen attack Emir of Kano. Sunday Trust, Sunday, January, 20, 2013. Major attack was on the Emir of Kano on Saturday, January 19, 2013.

[133] . Other words used by the military are 'ambush', 'siege', etc. They all have the same meaning of 'sudden attack made by soldier…in an attempt to seize or destroy something'.

[134]. Idris, H. et al. 17 Insurgents, one Soldier killed in Borno. In: Weekly Trust, p.5., Saturday, February, 2013.

[135].Ibid.

[136]. Idris, H. JTF kills 52 in Maiduguri Battle. In: Sunday Trust, p.1, Sunday, March 10, 2013.

[137]. Idris, H. 4 Boko Haram chieftains killed, 2 soldiers injured in Borno clash. In: Weekly Trust, p.5, Saturday, December 8, 2012.

[138]. After September 11, 2001 attack, the United States adopted the doctrine of preemptive self-defence which is provided in the National Security Strategy, 2002.

perpetuated by insurgents, its security agencies have adopted 'raiding', 'ambushing' or 'siege' to prevent the insurgents from carrying out the attacks on civilians. It is submitted that the JTF may employ raiding but it is still a form of preemptive strike. The difference in nomenclature is immaterial. Therefore, even though Nigeria has not expressly adopted the use of preemptive strike in Nigerian or other neighboring countries such as Cameroon, there appears to be a shift in the Nigeria's position due to the emerging internal threats to the nation's security.

The Federal Government very recently unveiled a new approach to tackling insurgency in the country[139].The new approach includes adopting means of de-radicalizing extremists and stopping others from being radicalized. Other items in the Strategy are new ways of mobilizing the society, Strategic public communication and economic revitalization of the North-East states affected by insurgency.[140]This is an indication that the approach long adopted by the security forces is not adequate. However, Nigeria's response to the situation in Sierra Leone will be appraised to determine its compliance with Article 51 of the UN Charter and international law.

On 25 May, 1997, soldiers in Sierra Leone seized power, overthrowing the 14-month old government of President Ahmed Tejan Kabbah.[141] The rebel soldiers of the Revolutionary United Front ("RUF") forced President Kabbah into exile in neighbouring Guinea and established themselves as Sierra Leone's new government.[142]While on exile in Guinea, President Kabbah invited Nigeria to take military action in order to overturn the coup d'état.

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[139] Ronald, M. " FG Announces 'Soft' Counter-Terror Strategy". In Daily Trust, Wednesday, March 19,2014,P.6.

[140] Ibid.

[141].Ibid.

[142]. Levitt, J.I. Pro-Democratic Intervention in Africa. Wisconsin International Law Journal,Vol.24, No.3, p.799. Available at: http://uhosted.law.NISC.edu/wordpress/wilj/files/2012/02/levitt.pdf .Accessed on 26 April, 2013 at 5:47pm.

In response to Kabbah's request on 26 May, 1997, Nigeria sent forces to Sierra Leone to forestall the conflict and restore constitutional order.[143] When they initially landed, Nigerian forces were met with strong resistance from the junta and were forced to retreat, but later they were able to push back the rebels and secure sections of the country.[144]

On February 5 1998, responding to an attack by junta forces on their position at Lungi ECOMOG launched a military attack on the junta, which led to its removal from power and expulsion from Free Town on 12 February, 1998.[145] By early march, ECOMOG had established itself successful across most of the country. Kabbah returned to the capital city, Freetown on 10 March, 1998 to resume his position as President of Sierra Leone.[146]

Although the intervention of Nigeria in Sierra Leone has raised many issues of international law[147], the focus here is on self-defence as a justification for the intervention. Nigeria justified ECOMOG's use of armed force in its final major military attack, which ultimately led to the overthrow of the junta regime within a week of the attack, primarily on the right of self-defence.[148] Whether the use of force by ECOMOG can be justified based on self-defence depends on the satisfaction of the requirements for the lawful exercise of self defence.

The requirement of an 'armed attack' appears to be fulfilled as a response to an attack by the junta forces on an ECOMOG military camp at Lungi. The fact that the attacked ECOMOG forces were on Sierra Leonean territory does not necessarily deprive them of the right of self-defence.[149]Military units of a state or regional organization abroad may use self-

[143]. Ibid, pp.799-800.
[144]. Ibid, 808.
[145] .Ibid.
[146]. One of the issues was the absence of UN Security Council authorizing use of force against the junta.
[147] . Schbacker, E.W. op.cit p.365;Stahn,C.Op.Cit.p.811.
[148]. Ladan, M.T.Op.Cit., pp.105-106.
[149].Ibid.

defence when attacked by forces of the territorial state, provided their presence does not itself constitute armed attack, which would trigger the right of a territorial state to respond pursuant to Article 51.[150] Thus, the attack on the military camp at Lungi activated the right of ECOMOG to rely on self-defence under Article 51.

However, for the exercise of an act of self-defence to be valid, it must satisfy the requirements of necessity and proportionality. The ECOMOG response was necessary because there was an armed attack, and no other option was open to ECOMOG.[151] The condition of necessity has to be considered based on the mandate of ECOMOG in Sierra Leone, and the history of previous peace agreement between the government and RUF rebels, such as Conakry Peace Plan. Thus, the response was necessary to defend the ECOMOG mission.

The principle of proportionality serves as a limitation on actions of self-defence[152], requiring that action or defensive measures must be reasonably related to the seriousness of the attack.[153]In this instance, it has been submitted that the ECOMOG force went beyond the requirement of proportionality when it toppled the junta regime and restored Kabbah as president. The significant criticism of the claim of self-defence is the lack of proportionality. Any attack on ECOMOG troops most certainly was outmatched by the use of warships and a

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[150]. The AFRC junta was opposed by members of Sierra Leone's Civil Society such as Students Unions, journalist associations, women groups and others. The UN and O.A.U. condemned the coup, and foreign governments' withdrew their diplomatic missions. Ecowas condemned the coup, and by Resolution 1132 of 8th October,1977,the Security Council demanded that the junta relinguish power to the democratically elected president.

[151]. Shaw, M.N. op.cit., pp.1140-1141

[152]. There were other grounds for intervention such as humanitarian ground, and defence of democracy. Nigeria's intervention also received the commendation of the UN Security Council which lifted prohibitions on the supply of oil but maintained the arms embargo.

[153]. Levitt, J.T. op.cit., p.801.

complete invasion of Sierra Leone, although the attack was brief and may have been necessary to cease the continuous threat of attack from the RUF.[154]

The attack and subsequent overthrow of the junta may not by itself render self-defence questionable. The response of the ECOMOG force has to be considered based on their mandate and their mission in Sierra Leone. It is submitted that the action meets the requirement of proportionality.

In any case, the use of force by the Nigerian forces was not based on preemptive self-defence. The ECOMOG attack on the junta was a response to a prior armed attack on the military camp at Lungi. Thus, the use of force in self-defence satisfied the requirement of armed attack. The response which led to overthrow of the government could hardly be seen as breaching the rule of proportionality if the overthrow was part of the mission of the ECOMOG. The Nigerian intervention in Sierra Leone was justifiable on several bases. However, it was the first pro-democratic intervention by a single state, one that was applauded by the whole international community.[155]

Thus, it is submitted that the action of Nigeria can be justified by self-defence having been a victim of an armed attack by the junta soldiers on its military camp in Lungi. Little wonder that Nigeria's action received wide applause from the international community. Article 51 requires the measures taken in self-defence should be reported to the UN Security Council. ECOMOG did not inform the Security Council of such measures taken. But this omission is not fatal to a claim of self-defence since the Council acknowledged the 'outstanding contribution' of ECOMOG in restoring security and stability to Sierra Leone.

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[154]. Stahn, C. Op.Cit., p.812.

[155]. Jenkins, P.A. The Economic Community of West African States and the Regional Use of Force. March 15, 2005, p.25.available at http://11djilp.org/.../theeconomic-community-of-west-african-states-regioonal-use-of-force-peter-A-jenkins.pdf Accessed on 26th April, 2013 at 8:15 am.

4.2.9. Israel

The context in which the Arab – Israeli conflict exists is one which affords a good example of state practice as far as Israel is concerned. Here, legal rules are violated and subjected to political and military expediencies.

The practice of the state of Israel in the Suez Canal crisis of 1956, the 1967 war and other incidents such as the Beirut raid of 1968; the attack and destruction of the Iraqi Nuclear Reactor in 1981; the bombardment of Southern Lebanon in 1982 upon shooting and fatal wounding of Israel Ambassador (Argor) to Britain, and 'Operation Grapes of Wrath' in 1996, are the most dramatic examples. However, the purpose here is to focus on a few examples.

(i) Arab-Israeli War of 1967[156]

In May 1967, Egypt and Syria took a number of steps which led Israel to believe that an Arab attack was imminent. On May 16, 1967 President Nasser ordered a withdrawal of the UN Emergency Forces (UNEF) stationed on the Egyptian-Israeli border, thus removing the international buffer between Egypt and Israel which had existed since 1957. On May 22, Egypt announced a blockade of all goods bound to and from Israel through the straits of Tiran. Israel had held since 1957 that another Egyptian blockade of the Tiran Straits would justify Israel military action to maintain free access to the Port of Eilot. Syria increased border clashes with Israel along the Golan Heights and mobilized its troops.

The U.S. feared a major Arab-Israeli; and superpower confrontation and asked Israel to delay military action pending a diplomatic resolution of the crisis. In accordance with U.S. wishes, the Israeli cabinet voted five days later to withhold military action.

[156] Retrieved from: www.ad/org/israel/record/67war.asp. Accessed on 26 February, 2013 at 11:30am.

However, the U.S. gained little support in the international community for its idea of a maritime force that would compel Egypt to open the waterway and it abandoned its diplomatic efforts in the regard. On May 30, President Nasser and King Husseini signed a Mutual Defence Pact, followed on June 4, by a defence pact between Cairo and Baghdad. Also that week, Arab states began mobilizing their troops.

Against this background, Israel launched a preemptive strike against Egypt on June 5, 1967 and captured the Sinai Peninsula and the Gaza strip. Despite an Israel appeal to Jordan to stay out of the conflict, Jordan attacked Israel and lost control of west Bank and the eastern sector of Jerusalem. Israel went on to capture the Golan Heights from Syria. The war ended in June 10.After the war ended, Israel defended its action relying on self-defence. Prior to Israel's attack, Israel had held since 1959 that another Egyptian blockade of the Tiran straits would justify Israel military action to maintain free access to the port of Eilat, and on May 12, 1956, a view was expressed that given the fourteen incidents of sabotage and infiltration perpetrated in the past month alone, Israel may have no other choice that to adopt suitable counter measures against the Forces of sabotage and their abettors.[157]. This seems to suggest that the military strike initiated by the Israel was in response to the infiltration of the guerillas.[158]

Egypt's blockade of the Waterway known as the Strait of Tiran, which prevented access to Israel's southern part of Eilat was viewed as an act of aggression that led to the Six-Day war in 1967.[159] Justifying the resort to self-defence, Eli Hertz stated that in 1967, the combined Arab armies had approximately 465,000 troops, more than 2880 tanks and 810

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[157] Ibid.
[158] Agwu, F.A. op.cit., p.279.
[159] Hurtz, E.E. Israel's Major Wars, The Legal Aspects of Coming into Possession of the Territories, 2009, p..2. Available at http://www.mythsandfacts.org/media/user/documents/israel%20wars.pdfAccessed on 16 March, 2013 at 11:35am.

aircrafts, preparing to attack Israel at once.[160] Israel, faced with the imminent threat of obliteration, was forced to invoke its right of self-defence, a basic tenet of international law, enshrined in Article 51 of the United Nations Charter.[161]

It was also argued that Israel feared slow economic strangulation because long-term mobilisation of such a majority of the society meant that the Israel economy and polity would be brought to a virtual standstill.[162]Militarily, Israel leaders feared the consequences of absorbing an Arab first strike against its civilian population, many of whom lives only miles from Arab-controlled territory.[163]The foregoing constituted reasons for Israel's preemptive strike against Arab countries in the morning of June 5, 1967, which precipitated the six-day war.

However, in International law as encapsulated by Article 51 of the UN charter, the only point at which the right of self-defence can be exercised is on the occurrence of an 'armed attack'. The basis of Israel attack on the Arab states cannot find support in UN Charter as it is outside the legal conception of 'armed attack'. More also, the guerilla activities targeted at Israeli comprised of firing of Israel farmers cannot be described as "armed attack".

It is true that states are under obligation not to support, condone or encourage the organization of guerillas in their territories against another state.[164] But a breach of this obligation does not avail the right of reprisals.[165] It has been submitted that the right to use

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[160] Ibid.
[161] Ibid.
[162] www.ad/org.Israel/record/67war.asp Accessed on 16 March, 2013 at 12;05pm.
[163].Ibid.
[164]. Paragraph 8 of the Declaration of the Principles of International Law concerning Friendly Relations and Corporation Among States. Article 2(4) of the UN Charter.
[165]. Paragraph 6, Ibid.

force in this context belongs to the Security Council and it is not within the parameter of the right of self-defence against individuals in international law.[166]

On the legality of the blockade, it has been submitted that Egypt's declaration of a blockade and expulsion of Israel shipping in the straits of Tiran could still be termed a legitimate act within a state of war.[167] Therefore the blockade could not amount to an 'armed attack' since there was no military confrontation between Egypt and Israel. In fact, Israel was in breach of Articles 2(4) and 51 of the UN Charter for casting the first stone.[168]

(ii) In the Construction of a Wall Case[169]

The construction of the Barrier started in June, 2002 following a decision by the Government of Israel to approve its first phase. Further plans for the construction of the Barrier in the West Bank were approved on October 2003. While some parts of the barrier have already been completed, its construction is a continuous process. The exact route may be subject to changes, but it is planned to stretch to approximately 660 kilometers in length. The barrier is built largely within the occupied territories and its majority of Israeli settlements will be included on the Israeli side of the border of the Barrier.

The Barrier created Palestinian enclaves within the occupied territories and prevents the access by Palestinians to considerable parts of the occupied territories. The barrier separates not only Israelis from Palestinians but also Palestinians from Palestinians. It severely reduces access to land, workplaces and markets, as well as access to education and

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166. Agwu, F.A. Op.Cit.p.282.
167. Ibid.
168. Barek-Erez.(2006) Israel: The Security Barrier-Between International Law, Constitutional Law, and Domestic Judicial Review. *International Journal of Constitutional Law*,Vol.4, N0.3, P.544.
169. Murphy, S.D. Self-Defence and the Israel Wall Advisory Opinion: An IPSC Dixit from the ICJ? *American Journal of International Law*, Vol.99, p.62.

health institutions within the occupied territories, creating harsh repercussions on the wellbeing of the Palestinian population.

In October, 2003, the Israel Permanent Representative addressed the United Nations General Assembly on why Israel felt compelled to build a lengthy barrier spanning hundreds of kilometers across certain areas of the occupied West Bank of the Jordan River.[170] Among other things, Dan Gillerman stated[171];

> (A) Security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of states to self-defence enshrined in Article 51 of the Charter. International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of states to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.

The International Court of Justice was requested by the United Nations General Assembly on 8 December, 2003 to give an Advisory Opinion on the legal Consequences of the Security Fence under construction by Israel in the West Bank, also called "Security Barrier and "wall".[172] In its Advisory Opinion of 9 July, 2004, the International Court of Justice considered and disposed of this legal argument for the construction of the Israeli barrier in a mere five sentences.[173] The Court held that:[174]

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[170]. Ibid.
[171]. Wedgwood, R. The ICJ Advisory Opinion or the Israeli Security Fence and the Limits of Self-Defence. *American Journal of International Law*, Vol.99, No., p.52.
[172]. Murphy, S.D. op.cit., p.62.
[173] Ibid.
[174] Ibid, pp64-70.Scobbie, I.(2005) Words my Mother Never Taught Me – In Defence of the International Court. American Journal of International Law, Vol.99, No.1, pp.80-87. http://www.diakonia.se/documents/public/ini/noninlform/israelpositionicj.pdf Accessed on May 10, 2013 at 11:37am.

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state. However, Israel does not claim that the attacks against it are imputable to a foreign state.
> The court also notes that Israel exercises control in the occupied Palestinian Territory and that as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those instruments in support of its claim to be exercising a right of self-defence.

Consequently, the court concludes that Article 51 of the Charter has no relevance in this case. The decision of the court in this case has further reiterated the fact that self-defence in Article 51 can only be exercised in the event of an armed attack that originates outside the territory of the state claiming self-defence. The implication is that such an attack must have an international flavor.

Although, the brief reference to self-defence by the ICJ has been criticized by some writers, the neglect of the issue of the security challenge faced by Israel has attracted more condemnation.[175] It has been argued that there is nothing in Article 51 that suggests that an attack must be launched by a state.[176]

However, it is submitted that the approach of the court is appropriate. It appears the main argument that would support this position is that so much of the case concerns the status of Palestinian Territory (an occupied territory).[177] Thus, it cannot technically be regarded as a territory from which armed attack can originate but a part of the occupying power.

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[175] . Wedgwood, R.(2005) The ICJ Advisory Opinion on The Israeli Security Fence and The Limits of Self –Defence. The American Journal of International Law,Vol.99,PP.-57-58; Scobbie, J. Op. Cit.,

[176]. Tams, C.J. Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case. The European Journal of International Law, Vol.16, No.5, 2006, p.969.

[177]. Ibid, pp.969-970.

More also, the measures taken (construction of barrier) could not be said to be necessary and proportional to the anticipated attacks. The construction of the barrier was not the only means for Israel to safeguard the interests at stake.[178] The barrier has been found to infringe on several rights of the Palestinian people including freedom of movement, and right to work, right to health, right to education, and right to an adequate standard of living as well as provisions relating to the protection of property.[179] Thus, it is evident from numerous reports of United Nations agencies, Special Rapporteur for human rights in the occupied Palestinian territories and leading international and local human rights agencies, and NGOs that the construction of such a wall seriously hinders the enjoyment of the most fundamental human rights by the Palestinian population and is in violation of international law.[180]

From the above, it is clear that there was no legal basis for the construction of the wall in the border between Israel and Palestine.[181] It could not be justified under Article 51 of the UN Charter nor does the UN Security Council Resolutions 1368 (2001) and 1373 (2001) authorize such measures. Since there was no armed attack or attack attributable to a state, self - defence in Article 51 could not be invoked by Israel.

Furthermore, the decision of the ICJ is relevant in some respects. First, the UN Security Council resolutions passed after September 11, 2001 attack on US did not contemplate or authorize the construction of a security wall as a measure of preemptive self-

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[178]. The security wall was meant to protect Israel from the frequent attack from Palestine

[179]. Legal Consequences of the Constitution of a Wall in the Occupied Palestinian Territory (Request for Advisory Opinion), Position Paper Presented by the International Federation for Human Rights (FIDH) and the International Commission of Jurists. Available at: http://www.fidh.or/IMG/pdf/112302a.pdf Accessed on May 10, 2013 at 12:08pm.

[180]. Golnitz, H. International Legal Consequences of the Construction of a Barrier by Israel in the West Bank (Unpublished). A Research Dissertation Presented to the Senate in Fulfillment of Part of the Requirements for the Degree of Master of Laws, School for Advanced Legal Studies, Faculty of Law, University of Cape Town, pp.36-54. Available At: http://www.publiclaw.uct.ac.zp/usr/public-law/LLMpapers/goelnitz.pdf. Accessed on May 10, 2013 at 12:17pm

[181]. Self-defence is subject to conditions of immediacy, necessity, and proportionality.

defence. Thus, this shows that preemptive measures are still not recognized under the current legal regime of the United Nations Charter.

Secondly, the decision has reaffirmed the fact that measures of self-defence cannot be taken against threats emanating within or from an occupied territory such as Palestinian. This also supports the argument that the UN Security Council resolutions after September 11 attack did not authorize unilateral acts of self-defence against non-state action based in other states. Lastly, the right of self-defence is not absolute under Article 51, let alone preemptive self defence.[182] Therefore, any measure of self-defence (proactive or reactive) must comply with the rules of International Human Rights Law and International Humanitarian Law. Otherwise, any such use of force will amount to unilateral use of force and Aggression.

[182]. Schbacker, E.W.(1993)The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone. *American University International Law Review*, Vol.14, Issue 2, p.325.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Introduction

Article 51 of the UN Charter has generated controversy and comments among scholars of international law. These controversies have tended to obscure the scope and concept of self defence. Although this research work has attempted to appraise the doctrine and practice of self defence in international law, some of the debates on the doctrine of self defence are still ongoing, and it is difficult to exhaust all issues on self-defence.

However, the purpose of this chapter is to give a summary of this research work as well as give a statement of the findings based on the analysis of the issues in the previous chapters. To this end, appropriate suggestions will be proffered on how to address the problem that necessitated this research.

5.2 Summary

This dissertation starts with General Introduction. The General introduction comprises of the Introduction, Statement of the problem, Aim and Objectives, Scope of the research, Research Methodology, Justification, Literature Review, and Organizational Layout. It gives an overview of the doctrine of self-defence in International law.

This work also discusses concepts of self-defence, War, reprisal, customary international law, Terrorism, collective Self-defence, and Use of force. All these concepts are related to Self-defence as they are all forms of use of force of which Self defence is only an

exception. However, it has been stated that the doctrine of self-defence has long been accepted as one of the fundamental principles of international law.[1]

The work also deals with the development, nature, and scope of the doctrine of self-defence, and the categories of self-defence in international law. The development of the doctrine of self-defence dates back to the just war period when just war was defined in terms of avenging of injuries suffered where the guilty party has refused to make amends. In the 17th Century, the concept of just war began to change. In 1842, after the Caroline incident, self defence developed into a legal doctrine, and the correspondence which followed the incident is regarded as a traditional formulation of self-defence in Customary International law. In the correspondence, Daniel Webster stated: 'it will be for… (Her Majesty's) government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. These rules have been accepted as the conditions governing self-defence.[2]These rules have been re-affirmed by the Nuremberg Military Tribunal that tried the German War Criminals and The International Court of Justice in Nicaragua case etc.

The provision of Article 51 has generated controversies and debates concerning the precise nature and scope of Article 51 of the Charter. Some of the issues generated by Article 51 include; the effect of Article 51 of the Charter on Customary International law, does Article 51 of the Charter allow use of preemptive or anticipatory self-defence? Whether or not self-defence can be exercised against non-state actors, what is the scope of "armed attack" in Article 51?, and the role of the principal organs of the UN, especially the Security Council in the exercise of self-defence. These issues are the cruxes for this research in this area. Based

[1] Schwarzenberger, G. (1968) *International Law as Applied by International Courts and Tribunals.* Stevens & Sons Ltd., London, Vol.11, p.28
[2]Harris, D.J.(2010) *Materials and Cases on International Law*. Sweet & Maxwell, London, Seventh Edition, p.747; Schwarzenberger, G. Op.Cit., p.183.

on these issues, it is clear that controversies surrounding Self-defence are not so much about its legality as the circumstances in which self-defence can be exercised.

Finally, the work highlights the policies of some states on self-defence in international Law. Although preemptive self-defence is not known to international law, state practices show that it is not restricted to the United States. Therefore, some states are also adopting the doctrine of preemptive self defence.

5.3 Findings

The following findings have been made based on the analysis of the doctrine of self defence and the problem of the research. First, States that have not signed and ratified the UN Charter are not bound by its terms. However, when the charter reflects customary international law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule of customary international law of self-defence.

Furthermore, it is now established that even where a treaty rule such as Article 51 of the UN Charter comes into being covering the same ground as a customary rule (the Webster formula of 1842), the latter will not simply be absorbed within the former but will maintain its separate existence. In the Nicaragua case, the court did not accept the argument of the United States that the norms of Customary International law concerned with self-defence have been 'subsumed' and 'supervened' by Article 51 of the United Nations Charter. It has been emphasized that 'even if a treaty norms and a customary norm relevant to the area of self defence present dispute were to have exactly the same content, this would not be a reason for the court to hold that the incorporation of the customary norm into the charter must deprive the Caroline rule of its applicability as distinct from Article 51 of the UN Charter.

It has been submitted that two rules with the same content may be subject to different principles with regard to their interpretation and application. Thus, this approach as well as being theoretically correct is of practical importance. In many cases, such a dual source of existence of a rule may well suggest that the two versions are not in fact identical, as in the cases of self-defence under customary international law and article 51 of the Charter. However, the best approach will always depend on the circumstances of each situation.

Secondly, the doctrine of preemptive self-defence has been adopted by the United States and a number of states to combat recent emerging threat to global peace and security such as Terrorism and WMD. But it has been discovered that this doctrine is not in line with Article 51 of the UN Charter which requires the occurrence of an armed attack. Thus, preemptive self-defence is contrary to the UN Charter.

Recent happenings at the international level such as the Iraq war of 2003 suggest that preemptive self-defence is now becoming norm among the United States and other superior powers. Thus, this doctrine is viewed as creating a basis for the emergence of a new customary rule on self-defence. However, customary international law does not emerge based on state practice alone. And customary International law does not come into existence by one super power declaring its standards or principles. No single state can unilaterally legislate international law as 'general practice' in itself is insufficient to give rise to customary international law. Another requirement of *opinion juris* has to be satisfied. And where there are protests from other countries, as indeed there has been, against the use of preemptive self-defence, the legitimizing process of the norm will be broken. Thus, the use of preemptive force by the United States is only a state practice because it lacks the element of opinion juris, and it is resisted by other states who feel threatened by the United States. Hence it is unlawful.

Thirdly, although the concepts of anticipatory and preemptive self defence are often used interchangeably, there is a line of demarcation between them. Anticipatory self-defence is the use of force in the face of an imminent or foreseeable danger. An example is the attack of Iraq Nuclear Reaction in 1981 by Israel. It is anticipatory self-defence that is contemplated under the Caroline formula laid down in 1842. There has to be an imminent or foreseeable danger or attack for a state to resort to anticipatory self-defence. Anticipatory self- defence is less controversial.

On the other hand, preemptive self-defence is the use of force in the face of alarming military preparation to quell any possibility of future attack even though there is no reason to believe that an attack is planned or imminent. A good example is the Iraq war of 2003.

Fourthly**,** the occurrence of an 'armed attack' is required for the exercise of self-defence in Article 51 of the Charter. There has been argument on the proper interpretation of Article 51 based on the requirement of "Armed attack". While it has been contended that "armed attack" ought to be interpreted strictly, some scholars are of the view that 'armed attack' should be given an expansive interpretation. The world has seen the emergence of new threats to peace and security which threats did not exist at the time of adoption of the Charter. Today, the world faces threats of terrorism, and the acquisition of WMD by terrorists and rogue states. Thus, reliance on strict interpretation may no longer be tenable. The right to self-defence is inherent. It is submitted that the expansive interpretation is a more progressive approach to dealing with these modern threats. Otherwise, strict compliance with the requirement of occurrence of an armed attack may defeat the essence of Article 51. Thus, where an attack is imminent, a state can resort to anticipatory self-defence to defend itself.

Fifthly, United States has relied on the doctrine of preemptive self-defence as a response to the security challenges posed by terrorists. Unfortunately, recent happenings have shown that this doctrine is not well defined, and is capable of being abused. More also, this doctrine seems to derogate from the trite rule of international law on the prohibition of the use of force. This rule against use of force is a rule of *jus cogens* but the United State hide under the guise of preemptive self-defence to overthrow government that are considered threats to their interests or those that are not dancing to the tone of their music. The embarrassment that followed the invasion of Iraq showed the weakness and tendency of abuse associated with preemption. Consequently, there seem to be no sanctions and penalties against states that violate the rule against the unilateral use of force. Furthermore, Article 51 has not stipulated legal consequences for the violation of its provisions.

Sixthly, it is settled that in order for irregular forces to quality as lawful combatants, control over them by a party to an international armed conflict was required and thus a relationship of dependence and allegiance. Thus, use of force in self-defence against non-state actors cannot be lawful. In Nicaragua case (supra), the court did not accept that the right of self-defence extended to situation where a third state had provided assistance to rebels in the form of the provision of weapons or logistical or other support. However, post September 11, 2001 event shows that non-state actors have demonstrated the capacity to carry out large scale attacks against member states of the United Nations. Thus, the UN Security Council passed Resolutions 1373 (2001) and 1368 (2001) in which it referred specifically to the inherent right of individual or collective self-defence in accordance with the Charter. These resolutions declaring 'Terrorism' to be a threat to international peace and security with regard to which the right of self-defence is operative as such leads to the conclusion that large scale attacks by

non-state entities might amount to ‘armed attacks’ within the meaning of Article 51 of the Charter without the necessity to attribute them to another state and thus justify the use of force in self-defence by those state so attacked.

Seventhly**,** it is the Security Council that can issue orders and directives to UN organs and members states. Article 51 of the UN Charter has preserved a role for the UN Security Council in the event of an armed attack which triggers the exercise of the right of self-defence by a victim state. The state resorting to self-defence is required to report to the UN Security Council of the measures taken in self-defence. Additionally, the Security Council is entitled to take measures to restore international peace and security. It is the Security Council that can give orders and directives to UN organs and members states. The General Assembly cannot make recommendations which lack binding force to avoid conflict of authority; the Assembly is actually barred from pronouncing or making resolutions on matters of international peace and security.

However, in practice, the UN General Assembly has never been shy to discuss cases which were at the same time being deliberated by the Security Council. It has been seen to adopt recommendatory resolutions on issues which have been languishing on the Security Council’s agenda. If no action is taken, the UN General Assembly has been empowered to act where there is an impasse in the Security Council.

Thus, it is not only the Security Council that has a role to play in the maintenance and restoration of world peace and security. The General Assembly is also empowered to act. Additionally, although the Security Council has a primary duty to maintain world peace and security, this role or function is not exclusive. More also, the International Court of Justice

has a critical role to play. This can be seen in the light of cases decided by the ICJ involving the use of force in self-defence such as the *Wall case*.

Eighthly, the right of Self-defence is only exercisable by states. It is not available to non-state actors. Therefore, rebels and terrorist groups cannot rely on self-defence to attack member states. This interpretation or approach is more pragmatic and realistic in the light of current global challenges to peace and security. Consequently, a state can be protected by Article 51 where it exercises the right of self-defence in the event of armed attack but a non-state actor cannot exercise self-defence if an attack occurs against it or in the face of an imminent attack.

Ninthly, International law has placed restrictions on the use of force in Self defence. Some conditions are specified in the Article which include; occurrence of 'armed attack', report to be made to the Security Council of action taken in self-defence, self-defence is to be exercised until the Security Council takes measures necessary to restore peace; while the Webster formulae lays down the conditions of 'necessity', 'immediacy' and 'proportionality'. Cumulatively, these conditions tend to narrow or restrict the right to self-defence. Even where there is an armed attack, it is almost impossible to meet all the conditions provided in Article 51 and Customary international law. The invasion of Afghanistan is an example. United States did not show 'necessity' and 'proportionality' and 'immediacy'. Absence of a condition can render a purported use of force in self-defence an aggression.

Finally, there are emerging areas of self defence that have been influenced by the development in Information & Communications Technology. One of such areas is the use of Cyber-attack to launch an attack against another state. The phenomenon was not contemplated by the drafters of the Charter, and there is only little literature in this regard. Thus, there are

no standard rules that will govern the use of internet, and when the use of internet will constitute use of force that will warrant exercise of the right of self-defence.

5.4 Suggestions

Some suggestions are proffered below based on the findings of this work. It is believed that these suggestions will instill certainty in the uncertain area of the use of force in self-defence. The suggestions are as follows:

1. First and foremost, this dissertation calls on the United Nations, especially the International Court of justice to revisit its position that the content of self-defence under Article 51 is not the same with that under customary International law. This is a lacuna in the law of Self-defence in international law. It is therefore suggested that the better position is that even though self-defence under these sources are different in character or content, rules of Self-defence under customary international law have to be read in such a manner as to bring it in conformity with Article 51 of the UN Charter.
2. The use of force preemptively should be sanctioned by the UN Security Council. This is necessary to maintain global peace and security by the UN Security Council. Prior approval of the Council should be obtained before a threatened state can resort to preemptive self-defence. This approach will give legitimacy to the preemptive use of force, and will reduce the tendency of abuse of Article 51. The sanction of the Security Council will remove such a preemptive use of force from the realm of self-defence under Article 51 to the realm of use of force on the authorization of the UN Security Council.

3. The International community represented by the United Nations needs to condemn the principle of preemptive self-defence in its entirety. This will ensure that the prohibition on the use of force remains sacrosanct. In particular, the Security Council should condemn all forms of use of force preemptively as it against the provisions of the U N Charter.
4. The requirement of "armed attack" in Article 51 of the Charter should be further defined with precision. The I.C.J. has to be proactive and progressive in interpreting the concept due to emergence of new threats to global peace and security. An expansive interpretation that will include the right of anticipatory self-defence as well as cyber-attacks will be critical to the continued relevance of the Article in this Information age. It is further suggested that there is urgent need for Article 51 of the UN Charter of 1945 to be reviewed and amended to reflect recent development in international law such as Terrorism, development in Information Technology, and proliferation of WMD. This amendment should be such as will reflect the nature of self-defence as an inherent right of sovereign states. Thus, the phrase 'collective self-defence' should be removed from Article 51 so as to give effect to the right of individual self-defence. This approach will make Article 51 less clumsy.
5. It is suggested that leaders of states that violate Article 51 of the UN Charter should made to face criminal prosecution for Aggression as defined in the Rome Statute. More so, states that violate the rules of self-defence under Article 51 of the UN Charter and customary International law should be compelled to make reparations in addition to other sanctions that may be imposed by the Security Council. This measure

of making reparation will discourage the use of force for self-defence without just cause as well as ensure the rule of law.

6. The concept of "Terrorism" should be defined so as to put the right of self-defence in a proper context in the age of WMD and terrorism. A legally binding and acceptable definition of "Terrorism" will assist states and International institutions determine the circumstances when "Terrorism" can trigger the right to self-defence. More also, a general definition of 'Aggression' should be adopted, and the International Criminal Court should be vested with jurisdiction to try individuals who are responsible for acts of Aggression.
7. It is suggested that the complementary roles played by other principal organs of the UN in situations of use of force in self-defence ought to be clearly spelt out and defined in clear terms. The responsibility for maintaining world peace and security cannot be left in the hands of the Security Council alone. Member states also have a role to play. The roles of the General Assembly and the ICJ should be clearly defined so that in the event of an impasse in the Security Council, the General Assembly can step in to redeem the United Nations. More so, institutions for the pacific settlement of disputes at the regional and sub-regional level should be strengthened so that states would have a better avenue of settling disputes than resorting to war. If this is done, issues of aggression will be contained before they escalate.
8. The view that 'self-defence' cannot be exercised against non-state actors ought to be discountenanced. That view is no longer tenable. It is suggested that the ICJ should reconsider its previous decisions, and make individual terrorists liable to the use of force in self-defence by states.

9. This Dissertation calls for the harmonization of the conditions for the exercise of the right of self-defence in international law. The conditions under Article 51 and customary international law are many and difficult to ascertain. It is therefore necessary to harmonize, consolidate, and standardize the conditions in a single document so as to avoid double standard in cases that warrant resort to self-defence. This will go a long way to reducing tension and controversy as to whether there is violation of one or more of the conditions.
10. Finally, this dissertations call for more research and discussions in this area to clarify the issues arising from the use of force in self-defence. Particularly, rules should be formulated to regulate the use of internet facilities to launch attack, and the circumstances that will warrant self-defence in the event of cyber-attack should be defined. Furthermore, states that have adopted preemptive self-defence should consider taking advantage of the developments in the Information and Communications technology sector to contain the threats by terrorist activities. For example, the Satellite facilities can be employed to track and predict the activities of belligerent states. Use of force in anticipation of an attack will not guarantee the world peace and security.

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