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PROBING THE SCOPE OF SELF DEFENSE IN INTERNATIONAL LAW

EUSTACE CHIKERE AZUBUIKE*

INTRODUCTION

The concept of self defense is one field of international law that has generated, and continues to generate, much controversy. The controversy is not as to the legality of self defense, but rather springs from a proper identification of the circumstances under which it applies. Thus, the International Court of Justice and other tribunals have received criticisms from states and academics for a perceived misapplication of the principle of self defense. The interpretation of the concept, like other important concepts in international law, has not been free from political considerations. Does this situation imply that the boundaries of self defense are as yet to be determined or cannot be determined? This work is set to delineate the scope of self defense in international law. It examines the various aspects of self defense and exposes the myriads of controversies surrounding this concept that could make or mar the efforts at international peace and security. This work will argue that the doctrine of anticipatory self defense cannot be inferred from a reading of Article 51 of the United Nations Charter.

The article is divided into five parts. The first part traces the origin of the doctrine of self defense from the period pre-dating the twentieth century up to the League of Nations and moves to the era of the United Nations Charter. It also highlights the concept of just and unjust war. Part two gives attention to the general rule which prohibits the use of force by states. This rule is found in the provision of Article 2(4) of the Charter of

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the United Nations. It explains the problems that arise from the variegated interpretations given to some of the words used in that provision. Part three discusses the two regimes of self defense: customary international law and the UN Charter. It attempts to show the relationship between them and explains the various situations in which claims to the right of self defense may be raised. The principle of anticipatory self defense, which is a current problem arising from the nuances ascribed to the doctrine of self defense, forms the core of part four. This part also delves into the debate between advocates of a restricted interpretation of Article 51 of the UN Charter, on the one hand, and proponents of its liberal interpretation, on the other hand - a debate that has consumed too much space in the literature of international law. Part four terminates with some discussion on the preemptive doctrine, a relatively new, but controversial aspect of the doctrine of self defense. Part five is devoted to collective self defense. It explores some of the findings of the International Court of Justice in the Nicaragua case as they relate to collective self defense. A conclusion follows. The article finds that Article 51 of the Charter of the United Nations is limited to situations of armed attacks and does not admit of an exercise of the right of self defense to ward off an imminent or future attack. It also concludes that the Caroline incident does not offer a clear, incontestable ground upon which to found the right to anticipatory self defense in international law and that even though some states have invoked it under customary international law, there is no sufficient indication that that regime of law recognizes anticipatory self defense.

I. SELF DEFENSE IN A HISTORICAL CONTEXT

A. THE PERIOD BEFORE THE TWENTIETH CENTURY AND UNDER THE LEAGUE OF NATIONS

Self defense in international law has a very long history and as such, it has not been easy to give an accurate account of how the doctrine evolved. For many centuries, there were no clear cut regulations on the use of force and the conduct of war. Societies resorted to war on every perceived provocation, no matter how slight the provocation was. However, for the advanced societies resort to war could be had only on serious grounds. Thus, the Babylonian Talmud developed a distinction between voluntary wars fought with the object of extending territory and obligatory wars waged against an enemy displaying some belligerency towards Israel or against the seven nations inhabiting Canaan.¹ With

1. The Babylonian Talmud, v (London, 1935) 108; vi (1935) 223.

time, war assumed a legal status,² and there arose a corresponding need to regulate its conduct. War became categorized into two: “just war” and “unjust war.” This distinction was present in both Ancient Greece and Ancient Rome.³ In Ancient Rome, the determination of whether or not a foreign state had committed a breach of her duties towards the Romans rested on the shoulders of a group of priests called the *fetiales*. It was the practice that any foreign nation that violated her obligations⁴ towards the Romans would, on demand, make reparation for such violation. A refusal of the offending state to make reparation would lead the *fetiales* to certify to the Senate that a just cause of war had arisen.

It has been observed that the notion of just war is a product of the Christianization of the Roman Empire and the abandonment by Christians of their pacifism.⁵ With the collapse of the Roman Empire, Christian Theology took hold of the concept of just war. St. Augustine⁶ came up with his analysis of the just war concept. While condemning conquest, he had this to say of just wars:

Just wars are usually defined as those which avenge injuries, when the nation or city against which war-like action is to be directed has neglected either to punish wrongs committed by its own citizens, or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains.⁷

Implicit in the above comment is that to St Augustine, war could be embarked upon only to avenge injuries or to restore what had unjustly been dispossessed of a state. Such war must also receive the tacit consent of God. Absent these characteristics, there can only be an unjust war.

St. Thomas Aquinas⁸ brought some embellishment to the notion of just war. He espoused the conditions that a just war should satisfy. In his view, apart from the wrongful act of the wrongdoer, there was a need to

2. See Shih-Tsai Chen, *The Equality of States in Ancient China*, 35 A.J.I.L. 641, 648-649 (1941); Roswell S. Britton, *Chinese Interstate Intercourse Before 1700 BC*, 29 A.J.I.L. 616, 623 (1935), for war as a legal institution in China between 722- 481 BC

3. See COLEMAN PHILLIPSON 2, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME*, 179 (London, 1911); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS*, 5 (New York, 1962)

4. Other bases upon which just war could be begun included violations of the rights of a state, infliction of injuries or damage on a state or its citizens. These are akin to present day justifications for states to engage in self defense.

5. See MALCOLM SHAW, *INTERNATIONAL LAW*, 681 (3rd ed., Grotius Publications Ltd, Cambridge, 1991)

6. AD 354- 430

7. *Quaestiones in Heptateuchum*, vi, 10b

8. AD 570- 636

punish his guilty mind as well. A just war must be fought by a sovereign authority; have been necessitated by a just cause, and be backed by the right intentions on the part of the belligerents.⁹ That is, the intention of the belligerents must be to advance good or to avoid evil.

Just war acquired a new meaning with the rise in Europe of sovereign states who began to view the doctrine from individual perspectives.¹⁰ The result was that there became no objective standard for determining the justness of a war. War, therefore, could be just on both sides¹¹ as there was no impartial authority to appraise the justice of the cause in particular cases. With this state of affairs, the secularization of war became inevitable, and this impacted negatively on the international plane by posing a threat to international co-existence. A further consequence of this development was a shift of emphasis from the use of force to suppress wrongdoers to a concern for a peaceful co-existence by recourse to peaceful means. There were also attempts to set out the circumstances that constituted just causes for war. Here two main categories of actions were identified: redress for wrong and defense against wrong.¹²

Grotius¹³ entered the scene with his rationalist, secular treatment of just war and presented to us a view that was devoid of ideological considerations as the basis of just war. He offered a definition of just war in terms of self defense, the protection of property, and the punishment for wrongs suffered by citizens of a particular state.¹⁴ His justification for war was on the basis of morality, rather than law. He believed that the right to war was the right of self defense which has its root in nature.¹⁵ With the treaties leading to the Peace of Westphalia in 1648, there was remarkable peace and disappearance of wars in European countries, and the concept of just war seemed to have gone into oblivion. The idea of

9. See *Summa Theologica*, II, 40; Von Elbe, "The Evolution of the Concept of the Just War in International Law" 33 *A.J.I.L.*, 669 (1939); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE*, 62- 63 (Cambridge, 1988)

10. See MALCOLM SHAW, *INTERNATIONAL LAW*, 540 (Grotius Publications Ltd, Cambridge, 1986)

11. See ALBERICO GENTILI, *DE JURE BELLI*, Book 1, 48- 52 (1612); *Classics of International Law*, 31- 33 (Translated by John C. Rolfe)

12. See Francisco de Victoria, *De Indis et de Jure Belli*, Second *Reflectio*, 429, para 13 (1696); Francisco Suarez, Selection from Three Works, *De Triplice Virtute Theologica, Fide, Spe, et Charitate* (1621). Suarez maintained that the only just cause for war was a grave injustice which could not be avenged or repaired in any other way.

13. See Hugo Grotius, *De Jure Belli Ac Pacis*, 15, Chapter 1

14. See MALCOLM SHAW, *supra* note 10, 541

15. See STANIMIR ALEXANDROV, *SELF DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW*, 6 (Kluwer Law International, The Hague, 1996)

European public peace and public law¹⁶ dominated the scene and was to translate into a Balance of Power, where all states were sovereign and equal,¹⁷ and therefore no state had the authority to judge the justness or otherwise of the actions of another state. Despite the foregoing, wars did occur between states, leading to the invocation of the law of neutrality,¹⁸ which applied between the warring states and third parties. By the eighteenth century, the concept of neutrality had been firmly established and required neutral states to desist from ascertaining which of the warring states had a just cause, except where there was an alliance treaty between a neutral and the belligerents.¹⁹ But on its part, the positive Law of Nations lacked the capacity to inquire into the justice of wars since no nation could assume the functions of a judge.²⁰ Only the natural Law of Nations was concerned with just causes of wars.²¹ The natural Law of Nations is concerned with the conscience of sovereigns, while the positive or voluntary Law of Nations deals with the relationship of nations.²² The lawfulness of wars began to be measured on the basis of the legality of the means, rather than on the justice of the cause. And so the ultimate indicator was a violation of the norms of international law and not the intrinsic injustice of the cause of war.²³

With the desuetude of the distinction between just and unjust wars, war was freely employed by states, and the right to war became one of the attributes of a sovereign nation. No wonder that the eighteenth and nineteenth centuries witnessed large scale wars and conquests in Europe. Outside of wars, there were other coercive measures short of war, utilized by states in disputes. These hostile measures were in the forms of “retorsion” and “reprisal.” Retorsion refers to measures that are “unfriendly” but are not prohibited by international law, such as severance of diplomatic relations, shutting of ports to vessels of an unfriendly state, imposition of travel restrictions or denial of visas for its nationals, suspension of foreign aid, trade restrictions not contrary to treaty obligations, or the display of naval forces near the waters of an

16. See OGG, *EUROPE IN THE SEVENTEENTH CENTURY*, 5th ed., 175-180, 248-249.

17. See MALCOLM SHAW, *supra* note 10, 541

18. The law of neutrality seemed to be predicated on the assumption that the war in question was lawful on both sides. In order to qualify for treatment as a neutral, a state had to show an attitude of impartiality towards the belligerents. Grotius’ view was that third parties could support the side they felt had a just cause. See *De Jure Belli Ac Pacis*, *supra*, Chapter XVII.

19. See Von Elbe, *supra*

20. See *Jus Gentium Methodo Scientifica Pertractatum*, 1749 (The Classics of International Law, 454, Vol. II, para. 888 Oxford, 1934)

21. See EMRICH de VATTEL, *THE LAW OF NATIONS*, note 1.29, Book III, Chapter III, Para 24 (1758), 3 Classics of International Law, 243 (1916).

22. See EMRICH de VATTEL, *supra*, note 21, 1.29, Book III, Chapter XII, paras 188-189, Classics, *supra* 21, 304-305.

23. See Joseph L. Kunz, *Bellum Justum and Bellum Legale*, 45 A.J.I.L., 528 (1951).

unfriendly state.²⁴ Reprisals constitute measures otherwise prohibited by international law that are nevertheless justified as responses to prior violations. "They are an act of self help on the part of the injured state, an act corresponding after an unsatisfied demand to an act contrary to the law of nations on the part of the offending state..."²⁵ The resort to these measures was subsumed under the function of war as a part of the broader concept of defense of a legal right, by war or other forcible means short of war, and a remedy against refusal to compensate for a violation of a legal right.²⁶ Although there were circumscriptions on the right to utilize such measures under international law, it has been contended that those limitations are probably best understood in the context of balance of power mechanism of international relations that largely helped reduce the resort to force in the nineteenth century, or at least restrict its application.²⁷ With the broad concept of defense of a legal right and all it entailed, it became necessary to draw a clear line between self defense, on the one part, and self preservation and self help, on the other part. The positivist view of self defense as an inherent right went on,²⁸ alongside the absence of an objective determination of the justice of it. There was still the view that each state was by tradition unrestricted in its freedom to decide what circumstances called for a recourse to war in self defense, which reflected in the different standards employed by states to ascertain the legality of the resort to self-defense.²⁹ However, self-defense was finally given some legal recognition in the Caroline incident,³⁰ though that incident seemed not to have been dispositive of the issue of the distinction between self-defense and self-preservation.³¹ Self defense was still treated as coterminous with self preservation, and sometimes as an aspect of self-preservation.³² However there appears to be a difference between the two concepts. Self preservation is broader than self defense, and is associated with the

24. See Restatement (Third), Sections 203(3) and 905, comment a; Stone, *Legal Controls of International Conflict* 288, Rev. ed. (1959); VON GLAHN, *LAW AMONG NATIONS*, 637-640, 6th ed. (1992)

25. See the *Naulilaa Incident*, reported in 2 U.N. Rep. Int'l Arab Awards 1011 (1949)

26. See STANIMIR ALEXANDROV *supra* note 15, 11

27. See MALCLM SHAW *supra* note 10, 684

28. See JOHN WESTLAKE, *THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW*, note 1.88, 306 (Cambridge, 1914)

29. See HERBERT W. BRIGGS, *THE LAW OF NATIONS*, 2nd ed., note 1.60, 984-985 (1952)

30. See 2 MOORE DIGEST, *DIGEST OF INTERNATIONAL LAW*, 412 (1906); Hyde, *International Law*, 239 (1945)

31. See WESTLAKE, *supra*, note 28, 1.113, 116-118; CHARLES G. FENWICK, *CASES OF INTERNATIONAL LAW*, 2nd ed. (Chicago, 1951)

32. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 43, 46 (Clarendon Press, Oxford, 1963)

security of the state.³³ It is observed that to extend the concept of self defense to cover self preservation implies giving it a scope that is quite inadmissible.³⁴

War became a last resort in settling disputes between states, after the exhaustion of all peaceful measures. The First World War signaled the end of the Balance of Power system, and resurrected the ghost of the concept of unjust war.³⁵ It equally raised the concern of the international community for a peaceful coexistence among nations and to at least restrict the resort to war by nations. The result was the emergence of numerous peace plans,³⁶ including the League of Nations in 1919.

The League of Nations was formed principally to prevent the occurrence of wars between states, and its Covenant reflected the efforts of the drafters to establish machinery that would realize this objective.³⁷ This was to be achieved not by a total prohibition of war, but by the provision of safeguards against war.³⁸ The Covenant of the League of Nations, by placing restrictions on resort to war, derogated from the customary law position.³⁹ War, not being generally prohibited, thus was recognized by the Covenant as a means of settling disputes.⁴⁰ But this was only as a last resort as states were obligated to submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the Council of the League.⁴¹ Article 13(4) of the Covenant restricted the resort to war by imposing upon member States the obligation not to resort to war against a member of the League which complied with an arbitral award or a judicial decision. In addition, states were to refrain from resorting to war until the expiration of three months following the arbitral award or judicial decision or report by the Council.⁴² One far-reaching change brought by the Covenant was that it made any war between states a subject of international concern, with the result that “war was no longer

33. See Oscar Schachter, *Self Defense and the Rule of Law*, 83 A.J.I.L. 259 (1989); EMRICH de VATTEL, *supra*, note 21, 1.29

34. See HUMPHREY WALDOCK, ed, JAMES BRIERLY, *THE LAW OF NATIONS*, 6th ed., note 1.86, 404 (Oxford 1963)

35. See MALCOLM SHAW, *supra* note 10, 684

36. See Hemleben, *Plans for World Peace Through Six Centuries, 138-181*; WEHBERG, *THE OUTLAWRY OF WAR*, 7-9 (Washington, 1931); LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, 381-382, 2nd ed. (London, 1912)

37. See JOHN S. BASSETT, *THE LEAGUE OF NATIONS: A CHAPTER IN WORLD POLITICS*, 15 (New York, 1930)

38. See *Foreign Relations of the United States: Paris Peace Conference*, 201, 319, 692, Vol. III (Washington, 1943)

39. See IAN BROWNLIE, *supra* note 32, 56

40. See IAN BROWNLIE, *supra* note 32, 56

41. See Article 12 (1), *Covenant of the League of Nations*

42. See MALCOLM SHAW, *supra* note 10, 684

to have the aspect of a private duel, but of a breach of the peace which affected the whole community"⁴³.

So far, it can be seen that the Covenant of the League of Nations designed a system of peaceful settlement of disputes, which restricted the right to resort to war.⁴⁴ It also founded a presumption against the legality of war as a means of self help implying that war could be employed as a means of self defense only where there existed no other means of enforcing legal rights.⁴⁵ Thus, a state was susceptible to sanctions if it went to war in violation of Articles 12, 13, and 15.⁴⁶ In providing for a partial prohibition of war, the Covenant⁴⁷ introduced a new concept in international law, namely, a distinction between legal and illegal wars on the basis of "the formal criterion of compliance or non compliance with obligations to use procedures for pacific settlement of disputes".⁴⁸ In essence, the Covenant discarded the just-unjust war doctrine.

Thus, the Covenant of the League of Nations restricted the right to resort to war and not the use of force in general. This led to some uncertainty as to whether measures short of war were allowed as a means of self-help.⁴⁹ However, members of the League of Nations seemed to hold the general view that the use of armed force short of war without a first recourse to pacific settlement was in violation of the Covenant.⁵⁰

The Covenant of the League of Nations did not contain any reservation of the right of self defense. The reasons alluded for this were that such a

43. See IAN BROWNLIE, *supra* note 32, 56; Article 11 of the Covenant

44. See Secretariat of the League of Nations: League of Nations: Ten Years of World Cooperation, 19-48 (London, 1930)

45. See ALEXANDROV, *supra* note 15, 32

46. See Article 16 of the Covenant.

47. See Articles 12, 13, and 15.

48. See IAN BROWNLIE, *supra* note 32, 57

49. This uncertainty acted itself out in the bombardment and occupation of Corfu by Italy in 1923. Following this incident, the Council of the League of Nations set up a Commission of Jurists to determine whether coercive measures lacking the character of war were consistent with the Covenant when employed without first resorting to arbitration, judicial settlement or conciliation. In its report, the Commission stated that "coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant", and suggested that the Council should decide in each particular case "whether it should recommend the maintenance or the withdrawal of such measures". See Minutes of the Twenty Eight Session of the Council, Sixth Meeting, March 13, 1924, League of Nations Official Journal 524 (1924). See also HERSCH LAUTERPACHT, ed., LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, 152, 7th ed., Vol. 2 (1952)

50. See WALDOCK *supra* note 34, 1.86, 412; James L. Brierly, *The Prohibition of War by International Law*, in HERSCH LAUTERPACHT AND C.H.M. WALDOCK, eds., THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY ATE JAMES LESLEY BRIERLY, 280 (Oxford, 1958)

reservation would be unnecessary since self defense is an inherent right,⁵¹ and that an express provision authorizing the use of force in self defense is required only “within a legal order which generally prohibits the use of force in self-defense”.⁵² The fact that the Covenant prohibited war only under certain circumstances, which did not touch on the right of self defense using counter war, implied that resort to war in self defense was generally compatible with the Covenant provisions.⁵³ This position still could not insulate the scope of the right to self defense from varying interpretations.⁵⁴

The League of Nations Covenant was replete with many gaps⁵⁵ in its provisions, which led to some indeterminacy as to the prohibition or otherwise of war in its ramifications. The international community therefore had to search elsewhere for a better system prohibiting war completely. This search led to the signing in 1928 of the General Treaty for the Renunciation of War (the Kellogg- Briand Pact)⁵⁶ and ultimately, gave birth to the Charter of the United Nations in 1945.

B. THE PERIOD OF THE UNITED NATIONS

As earlier noted, the Charter of the United Nations is a product of the shortcomings of the previous international documents, such as the Kellogg-Briand Pact and the Covenant of the League of Nations, in providing adequate safeguards against resort to war and the use of force short of war. The United Nations Charter was revolutionary in that, for the first time, it included a general prohibition of the use of force with two exceptions: individual and collective self defense. Article 2(4) of the Charter, which has attained the status of custom in international law,

51. See ALEXANDROV, *supra* note 15, 37

52. See ALEXANDROV, *supra* note 15, 37

53. See Hans Kelsen, *Collective Security and Collective Self Defense Under the Charter of the United Nations*, 42 A.J.I.L. 783, 791 (1948); Waldock, *supra* note 34, 476. In its report to the Assembly in 1931, the First Committee had stated as follows: “one point appears beyond dispute—namely, that... in the Covenant of the League in its present form... the prohibition of recourse to war [does not] exclude the right of legitimate self defense”. See Report to the Assembly by the First Committee, Records of the Twelfth Assembly (1931), Meetings of Committees, Minutes of the First Assembly, 146 (Annex 18, point 5 of the Report)

54. See BOWETT, *SELF DEFENSE IN INTERNATIONAL LAW*, (1958) 1.44, 124

55. For example, Ian Brownlie has noted that the Covenant employed the term “resort to war”, which had a restrictive meaning and which could result in an embarrassment to the victim of an act of aggression, where the aggressor refrained from declaring war or admitting the existence of a state of war. He argues that in such a situation, the victim might appear to be the one violating the Covenant if it declared war while acting in self defense. See IAN BROWNLIE, *supra* note 32, 60. Another gap was Article 15 (7) which allowed states to engage in war where the Council failed to adopt a unanimous report. Thus, members of the League reserved “to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice”.

56. For a detailed treatment of the Kellogg-Briand Pact, see IAN BROWNLIE, *supra* note 32, 74-95

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 Purposes of the United Nations." Not only is the use of force prohibited, but also its threat. The reference to "force" rather than "war" has been viewed as beneficial and as covering situations in which violence is employed which falls short of the technical requirements of the state of war.⁵⁷

The Soviet Union, the United Kingdom, and the United States (USA), in their proposals⁵⁸ preliminary to the drafting of the United Nations Charter, while advocating for a general prohibition of the use of force with the exception of preventive or enforcement action undertaken by the organization itself, said nothing about self defense. The non inclusion of self defense in these proposals stemmed from the argument that since the prohibition of the resort to war under the Covenant of the League of Nations was generally believed not to have removed the right of self defense, it would not be necessary to expressly reserve the right of self defense in those proposals.⁵⁹ In other words, the prohibition of the threat or use of force did not affect the right of self defense, which right was considered inherent.⁶⁰ During the Dumbarton Oaks Conference, China exhibited some apprehension over the non-express inclusion of the right of self defense in the proposals, especially in relation to the powers of the future Security Council. China's fears were, however, allayed by an explanation and assurance that the use of force by a state without the authorization of the Security Council would be prohibited, except in cases of lawful self defense.⁶¹

At the San Francisco Conference preceding the drafting and adoption of the Charter of the United Nations, the issue of the right of self defense was heavily deliberated upon, especially the propriety of a specific reservation of it in the proposed Charter. States proffered various views

57. See MALCOLM SHAW, *supra* note 10, 686.

58. See the documents on the proposals of the Dumbarton Oaks Conference, China available in *Foreign Relations of the United States 1944*, 614-713, Vol. I (Washington, 1966); RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940-1945*, 990-995, Appendix F (Washington, 1958)

59. See *Proposals for the Establishment of a General International Organization*, in *Foreign Relations of the United States 1944*, *supra*, 890-900

60. For the view of the United Kingdom, see Geoffrey L. Goodwin, in *BRITAIN AND THE UNITED NATIONS*, 32-33 (New York, 1957). For the United States' view, see *FOREIGN RELATIONS OF THE UNITED STATES, 1945*, 229-230, Vol. I (Washington, 1967).

61. See Antonio Cassese, *Article 51*, in JEAN-PIERRE COT AND ALLAIN PELET, eds., *LA CHARTE DES NATIONS UNIES*, 771, 773-774, 2nd ed. (Paris, 1991)

regarding the right.⁶² The deliberations at the Conference, and other proposals and their harmonization, ultimately led to the adoption and signing of the UN Charter in 1945, which permits or rather, preserves expressly, the inherent right of self defense in its Article 51.

II. GENERAL PROHIBITION AGAINST THE USE OF FORCE

A. BACKGROUND

In line with the central objective of the United Nations to maintain international peace and security, states are not allowed to resort to the use of force in their international relations. Even in situations of conflict, states are required to settle disputes through peaceful means. This is provided for in Article 2(4) of the UN Charter. Despite the prohibition against the use of force in international law, states have continued to engage in actions that are inconsistent with this general prohibition on the pretext that those actions are not within the contemplation of Article 2(4). This they achieve by proffering an interpretation that is capable of defeating the objective of that provision. Article 2(4) has therefore been subjected to various interpretations.

B. THE PROBLEM OF DEFINITION

The provision of Article 2(4) of the Charter of the United Nations has continued to raise definitional problems. Many, if not all, of its key terms are susceptible to varying interpretations. However, one thing is clear, namely, that Article 2(4) was intended to outlaw war or the employment of military force by states to acquire territory. The drafters of the UN Charter discarded the term “war,” which had appeared in the Covenant of the League of Nations and the Kellogg-Briand Pact, and adopted the wider term “force.” This choice of word was predicated on the fact that during the pre UN Charter period, states usually did engage in hostilities that had the trappings of war without declaring a war situation. An aggressor could avoid the use of the term “war” even if the victim proclaimed that a war situation existed, such as happened in the Anglo-French invasion of Egypt in 1956 with the help of Israel.⁶³ The reference to force rather than war serves a good purpose in that it covers situations in which violence is perpetrated which falls short of the technical

62. Some states advocated for an inclusion in the Charter a provision permitting self defense in response to an attack by another state. See the statement of Turkey, UNCIO Documents, Vol. 4, 675. New Zealand called for a provision that the member States should undertake a collective obligation to “resist every act of aggression against any member”. See Proposal of New Zealand, UNCIO Documents, Vol. 3, 486-487; Vol. 6, 342-343

63. See UMOZURIKE, *INTRODUCTION TO INTERNATIONAL LAW*, 201, 3rd ed. (Spectrum Books Ltd, Ibadan, 2005)

requirements of a state of war.⁶⁴ “Force,” as one of the key terms adopted in Article 2(4), has been subjected to some polysemy. The term can be given a very wide interpretation to include all forms of coercion. It covers “war of aggression,” “invasion,” attack, and undoubtedly military attack and armed attack by the regular military, naval, or air forces of a state. It is also argued that based on the principle of attribution, militia and security forces, including police forces and forces emanating from unofficial or non-state agents, like armed bands, are assimilated in the meaning of force under Article 2(4).⁶⁵ The expression “use of force” as contained in Article 2(4) has even been given a sweeping meaning as to extend to both the use of arms and a violation of international law, which entails a territorial exercise of power, short of the use of arms.⁶⁶ This view, especially the second leg, is in no way supported by even a generous interpretation of Article 2(4). Implicit in the second aspect of this view, which is championed by Kelsen, is that any act or conduct by a state on the territory of another state, which constitutes a violation of international law, amounts to use of force under Article 2(4). This would be taking that provision to a ridiculous height that is beyond the reach of the UN Charter.

Attempts have been made to use the term “force” to embrace all kinds of coercion, including economic and physical coercion.⁶⁷ When Article 2(4) of the UN Charter was being drafted, Brazil presented a proposal for the inclusion of a prohibition against the use of “economic measures” against a state. The proposal was rejected.⁶⁸ Two possible conclusions could be drawn from the rejection of that proposal. The one is that it could imply that economic aggression was not within the scope of “force;” the other is that “force” was wide enough to cover it, thereby rendering an express mention of it unnecessary.⁶⁹ There are international documents prohibiting the use by states of economic measure or coercion on another state.⁷⁰ The existence of these documents could be a basis upon which to

64. See MALCOLM SHAW, *supra* note 10, 686

65. See IAN BROWNIE, *supra* note 32, 361.

66. See Kelsen, *Collective Security Under International Law*, International Law Studies, US Naval War College, 57

67. See SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 110-113 (1991)

68. See 6 Docs. Of the U.N. Conf. on Int'l Org. 335

69. On this reasoning, see GOODRICH HAMBRO and SIMONS, *CHARTER OF THE UNITED NATIONS*, 49, 3rd ed. (1969)

70. For example, the *1970 Declaration on Principles of International Law* required states to “refrain... from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state”; the *Charter of Economic Rights and Duties of States*, approved by the General Assembly in 1974, provided that “no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights”; the *International*

found an argument that the use of economic pressures against a state, especially when the motive is to induce a change in the policy of that state, is inconsistent with the UN Charter.⁷¹ Another dimension of the definitional problem posed by Article 2(4) is whether “force” includes indirect force used by a state against another state, for example where a state allows its territory to be used by troops fighting in another country, or in cases of indirect aggression, where a state lends military or other assistance to one or the other side in time of war. The weight of opinion tends to be that force embraces both direct and indirect force used against another state.⁷² However, with regard to aid given to rebel forces, Brownlie identifies a distinction between situations where the rebels are “effectively supported and controlled by another state,” and “cases in which aid is given but there is no agency established, and there is no exercise of control over the rebels by the foreign government.” He argues that while the former qualifies as a use of force, it is very doubtful if the same could be said of the latter.⁷³ This view seems to represent the “effective control” test adopted by the International Court of Justice in the Nicaragua case, where the Court, after finding that the United States’ assistance to rebels seeking to overthrow the Nicaraguan government constituted violations of Article 2(4) of the UN Charter, refused to attribute all the actions of the rebels to the United States’ government, arguing that there was no basis for the attribution as Nicaragua had failed to prove that the United States directly and effectively controlled their actions.⁷⁴ But in the Tadic case, the International Criminal Tribunal for the former Yugoslavia rejected the “effective control” test as adopted by the court in the Nicaragua case and adopted a lower standard in attributing the conduct of a paramilitary group to a foreign government that had given it substantial support.⁷⁵

Article 2(4) makes reference to the use of force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” This poses yet another problem of interpretation. Are these words to be given a

Covenants on Human Rights adopted in 1966 provided for the right of all peoples to freely pursue their economic, social, and cultural development.

71. See *The Arab Oil Incident* discussed in LILLICH, (ED) *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER*, (1976), and PAUST and BLAUSTEIN, (EDS) *THE ARAB OIL WEAPON*, (1977).

72. See Schachter, *supra* note 67 110-113; FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, 262 (1964); Ian Brownlie, *supra*, 370; The 1952 Report of the Secretary-General on the Question of Defining Aggression, U.N. Doc. A/221 (Oct. 3, 1952)

73. See Ian Brownlie, *supra* note 32, 370

74. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) 1986 I.C.J. 14 103-123

75. See *Prosecutor v. Tadic*, I.C.T.Y. Case No. IT-94-1-A, 38 I.L.M. 1518, Judgment on Appeal from Conviction (July 15, 1999)

restrictive interpretation, so as to allow the use of force that does not directly impinge on the territorial integrity or political sovereignty of a state, provided it is not inconsistent with the purposes of the United Nations, or is the phrase to be interpreted liberally to cover every use of force against a state? There is a good consensus of academic opinion in support of the latter view. Brownlie has argued that to give the words a plain meaning is of little value, as “political independence and territorial integrity” is all encompassing and accommodates the totality of legal rights a state has.⁷⁶ Schachter, in defense of the broad interpretation of Article 2(4), observes that a textual interpretation of the qualifying words in Article 2(4), would in no small measure whittle down the scope of its provision. Noting that the only exceptions to the general prohibition of the use of force are Article 51 provision of self defense and military enforcement measures under Chapter VII, he submits that every “coercive incursion of armed troops into a foreign state without its consent impairs that state’s territorial integrity, and any use of force to coerce a state to adopt a particular policy or action must be considered as an impairment of that state’s political independence.”⁷⁷ The underlying element in this view is the issue of consent. It implies that any use of force against a state without its consent and which does not fall under the Charter exceptions, whether or not such force is consistent with the purposes of the UN, is a violation of Article 2(4). But, it is doubtful if use of force can be consistent with the purposes of the UN if it does not constitute an exception under the Charter.

A restrictive interpretation of the qualifying words used in Article 2(4) was adopted by the United Kingdom in the Corfu Channel case,⁷⁸ where it argued that its employment of force in entering the Albanian waters to recover evidence that might give a clue as to who was responsible for the destruction of two British warships by mines was not in violation of Article 2(4) because its action “threatened neither the territorial integrity nor the political independence of Albania,” and that “Albania suffered thereby neither territorial loss nor any part of its independence.” The ICJ rejected this contention, and held that it “can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to serious abuses and such as cannot ... find a place in international law.”

76. See Ian Brownlie, *supra*, note 32, 268

77. See Schachter, *supra* note 67, 110-113; LORI F. DAMROSCH, et al, INTERNATIONAL LAW: CASES AND MATERIALS, 1147, 5th ed. (West Publishing Company, Minnesota, 2009)

78. See ICJ Reports, 1949, 4, 35

There have also been attempts by states to project the view that Article 2(4) allows the use of force in circumstances where the machinery of the United Nations is ineffective⁷⁹ or for the realization of other values recognized by the UN Charter.⁸⁰ The conclusion to be drawn from a plethora of academic opinions seems to be that any use of force by a state against another state, which is not justified under the Article 51 and Chapter VII exceptions, is a violation of Article 2(4).

C. THREAT OF FORCE

Threat of force is prohibited under Article 2(4). But while it may be easy to identify the circumstances involving the actual use of force, it is always difficult to find cases of threat of force. A threat of force exists when there is an “express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.”⁸¹ Threat of force is the precursor of anticipatory self defense, and its existence can only be determined from the circumstances of a particular case. This determination is not easy to make owing to the interplay of power relations and the difficulty of demonstrating coercive intent.⁸² The imbalance of power among states thrusts upon international law the challenge of properly delineating threat of force. This disparity is most evident in the possession of nuclear weapons by bigger powers. Such capabilities on the part of bigger states tend to constitute a threat of the use force on the weaker states. In some situations, such stronger powers go to the extent of declaring that they possess certain weapons and that they would not hesitate in using them in self defense against any state violating their territorial integrity or political independence. In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapon,⁸³ the ICJ was faced with a determination of whether or not such declaration of intention to use force upon the occurrence of certain events amounts to a “threat” within Article 2 (4) of the UN Charter. The court made the following observation:

79. Israel was involved in this argument in 1976 concerning the *Entebbe Incident*, in addition to its defense of self defense. See Malcolm Shaw, *supra* note 10, 696

80. This was one of the grounds raised by the United States in defending its attacks on Grenada and Panama in 1984 and 1989 respectively. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE*, 31, 77, 127, 293, 2nd ed. (Oxford University Press, Oxford, 2004)

81. See Ian Brownlie, *supra* note 32, 364

82. See Schachter, *supra*, note 10, 111

83. 1996 I.C.J. 226

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The notions of 'threat' and 'use' of force under Article 2, paragraph 4 of the Charter stand together in the sense that if the use of force itself in a given case is illegal- for whatever reason- the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a state to use force must be a use of force that is in conformity with the Charter.⁸⁴

This seems to represent the true position.

III. SELF DEFENSE UNDER CUSTOMARY INTERNATIONAL LAW AND THE UN CHARTER

A. BACKGROUND

The right of self defense is one of the exceptions to the general prohibition of the use of force in international law. This right is recognized both under customary international law and the UN Charter. In fact, it has its root in the former, and it has always been argued that what the latter did was to codify the right, which existed long before the establishment of the United Nations. Like other concepts of international law, the right to self defense is susceptible to differing interpretations by states. Its real boundaries seem to elude the international community. Each state, when involved in a case touching on the right of self defense, supports the interpretation that will protect its interest. Even though there are laid down standards that an action founded on the exercise of the right of self defense should meet, some indeterminacy still exists in appraising whether or not these standards are met in a particular case. This is owing to the fact that the circumstances or events, in the forms of attacks or threats that trigger the right of self defense, vary. Despite the foregoing, the right to self defense has attained the status of *jus cogens* in international law, and both the customary law and UN Charter are relevant in a consideration of this right.

B. CUSTOMARY INTERNATIONAL LAW

The right to self defense is founded on the natural law theory, which gave each state the right to defend itself in the face of a grave threat to its

84. On the issue of whether or not the possession of nuclear weapons is itself an unlawful threat to use force, the court held that, that depends on the purpose to which the weapons are intended, that is, "whether the particular use of force intended would be directed against the territorial integrity or political independence of a state, or against the Purposes of the United Nations, or whether, in the event that it were intended as a means of defense, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances, the use of force, and the threat to use it, would be unlawful under the law of the Charter".

power or way of life.⁸⁵ This right was considered natural and as a component of the powers of a state. Some scholars have on this basis, maintained that Article 51 of the UN Charter reflects this right by its use of “inherent right”.⁸⁶ Thus, states could wage war according to their whims and caprices. There was no international law limitation on a state’s right to go to war. The only control was internal. This posed some difficulty in establishing a functional international law rule regarding a state’s right to self defense. This traditional approach to the right of self defense was broad in outlook. Although at a later time, war became outlawed as an instrument of international policy, as evident in the League of Nations Covenant of 1919 and the Kellogg-Briand Pact of 1928, the right to self defense was “so firmly established in international law that it was automatically exempted from the Kellogg- Briand Pact without any mention of it.”⁸⁷ However, in a diplomatic correspondence before the coming into effect of the Pact, the United Kingdom clearly indicated that it did not oppose the right of self defense, which was viewed as right to defend security interests in any part of the British Empire.⁸⁸ But the situation changed with the drafting of the UN Charter, which while prohibiting the use of force and not just war, affirmed the right of self defense as one that is not impaired by the general prohibition of the use of force in Article 2(4) of the Charter.

The concept of self defense under customary international law received some formal content and recognition in the Caroline incident.⁸⁹ It established that self defense should be limited to cases in which the “necessity of that self defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁹⁰ Moreover, an action taken in pursuance of self defense must not be unreasonable or excessive, “since the act, justified by the necessity of self defense, must be limited by that necessity, and kept clearly within it.”⁹¹ In modern times, the conditions for the exercise of the customary law right of self defense have crystallized into a more concise form – the requirements of

85. See Donald Nungesser, *United States’ Use of the Doctrine of Anticipatory Self Defense in Iraqi Conflicts*, 16 Pace Int’l Law Rev. 193, at 195 (2004)

86. See Schachter, *supra* note 10, 135

87. See Leo Van den hole, *Anticipatory Self Defense Under International Law*, 19 American University Int’l Law Rev., 69, at 75 (2003)

88. See HERSCH LAUTERPACHT, (ed.), OPPENHEIM, INTERNATIONAL LAW: A TREATISE, Vol. I, Disputes, War and Neutrality, 187, 7th ed. (1952)

89. See 2 MOORE, DPGEST OF INTERNATIONAL LAW, 412 (1906); HYDE, INTERNATIONAL LAW, 239 (1945); Jennings, *The Caroline and McLeod Cases*, 32 A.J.I.L., 82 (1938). For its notoriety under international law, an elaborate discussion of the facts of the *Caroline Incident* is dispensed with here.

90. See Moore, *supra* note 88, 412

91. See Malcolm Shaw, *supra* note 10, 692

necessity and proportionality.⁹² This means that for the right to avail a state, it must first show, not only that the defensive action taken by it is necessary to protect itself or its citizens, but also that the action is proportional to the attack being defended.⁹³ Measures taken in self defense must be proportionate to the seriousness and scope of the attack. Since retaliation and punitive actions are not permitted, the actions are restricted to those necessary to repulse the attack.

The coming into effect of Article 51 of the UN Charter has triggered some controversy as to the proper scope of the right to self defense, especially in relation to customary law. Does Article 51 differ from customary international law? In other words, did the drafters of the UN Charter intend to limit the pre-existing right to only cases of armed attack?⁹⁴ One side of the argument is that Article 51, together with Article 2(4), renders all use of force illegal, except in the exercise of the right of self defense if an “armed attack occurs”, and in no other circumstances.⁹⁵ The other side of the argument holds the view that the wording of Article 51 – “nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs” – is a testimony of the fact that there is still in existence a customary international law right of self defense beyond that provided in Article 51.⁹⁶ On this score, the view has been held that the UN Charter only recognizes the inherent right of self defense, and does not go on to regulate all aspects of the right.⁹⁷ The pre-conditions under Article 51 for the exercise of the inherent right seem too vague to found an assumption that the drafters of Article 51 intended to substitute the customary right of self defense with a statutory one.⁹⁸ The advocates of this second view fortify themselves with the point that the right of self defense is an inherent right bestowed on states under customary law, and that Article

92. See MYRE McDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 217 (1961)

93. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 I.C.J. 168, para. 147, the court in holding that the preconditions for the exercise of the right to self defense were not satisfied, stated as follows: “The court cannot fail to observe, however, that the taking of airports and towns 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 defense, nor to be necessary to that end”. See also *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 138, 195, para. 140

94. This issue basically turns on whether Article 51 should be given restrictive or broad interpretation

95. See Ian Brownlie, *supra* note 32, 265

96. See Waldock, *General Course on Public International Law*, 166 HR, 6, 231-237; O’Connell, *International Law*, 3127, 2nd ed., vol. I (1970)

97. See Timothy McCormack, *Self Defense in International Law – The Israeli Raid on the Iraqi Nuclear Reactor*, 119 (1996)

98. See Myres McDougal, *The Soviet – Cuban Quarantine and Self Defense*, 57 Am. J. Int’l. Law 597, 599- 600

51 provision was an afterthought and was not part of the original drafts of the Charter. It found its way into the Charter relatively late through the *travaux* leading to the adoption of the Charter and was a product of the concerns expressed by Latin American States who had sought for a guarantee of the legality of regional collective self defense arrangements, such as the Act of Chapultepec.⁹⁹

The International Court of Justice in the Nicaragua case¹⁰⁰ held that the right to self defense is one that exists as an inherent or natural right under customary international law and under the UN Charter.¹⁰¹ The two contrasting views held by scholars as to the proper scope of the right of self defense under international law are both built on strong arguments. It would therefore be safe to contend that Article 51 is not a comprehensive provision on the right of self defense; rather it renders just an aspect of that right, leaving the other aspects under the regulation of customary international law. This conclusion appears reasonable, since Article 51 only recognizes the inherent right of self defense in cases of “armed attack” and neither expressly abrogates nor incorporates the other components of that right. This means a co-existence of customary international law and the UN Charter – a position that is in accord with the Nicaragua judgment.

C. UN CHARTER

(i) The Duty to Report to the Security Council

Article 51 of the UN Charter states that:

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

99. See Gill T, *The Temporal Dimension of Self Defense: Anticipation, Preemption, Prevention and Immediacy*, 11 Journal of Conflict and Security Law 361, 363 (2006)

100. 1986 I.C.J. 14, 103- 123

101. The court, while recognizing the reservations in the United States’ declarations in its acceptance of the court’s compulsory jurisdiction, the effect of which robbed the court of jurisdiction over the United States under the UN Charter, but not under customary international law, stated that “Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self defense and it is hard to see how this can be other than of 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”.

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 purport of this provision is that any state which has acted in self defense has an obligation to report its actions to the Security Council. While the existence of this obligation is indisputable, it is not clear whether this obligation is mandatory or directory. In other words, can the lawfulness of an action taken in exercise of the right to self defense be affected by the failure of a state to report such action to the Security Council? There is no authoritative ground to hold that the Article 51 reporting requirement is mandatory. However the judgment of the I.C.J. in the Nicaragua case can offer some lead in this regard. The court, while noting that the requirement to report measures taken in self defense to the Security Council pursuant to Article 51 does not constitute a part of customary international law, held that "the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self defense."¹⁰² The court was of the view that where the plea of self defense is raised to justify actions which would otherwise be in violation of both customary international law and the UN Charter, it is to be expected that the provisions of the Charter should be observed. However, the court failed to determine whether, if the Charter provisions were applicable, a non-compliance with the reporting requirement vitiates the action taken in self defense. The effect of the pronouncement of the I.C.J. is that a failure on the part of a state to adhere to this reporting requirement would affect the genuineness of a state's claim to be acting in self defense.¹⁰³ This view had been accorded recognition by states even before the Nicaragua case. During the Vietnam conflict in 1964, the United States took some military actions purportedly in self defense against Vietnam in reaction to alleged attacks by North Vietnam. The United States lodged a report of its self defensive actions with the Security Council in line with the provision of Article 51. The United Kingdom observed that the gesture exhibited by the United States in reporting to the Security Council was evidence that it was actually acting in self defense.¹⁰⁴ Following the conflict involving Libya and the United States in the Gulf of Sirte in 1986, it was the contention of the United States that the failure of Libya to report its actions to the

102. *Nicaragua case*, *supra* note 100, para. 2000

103. *See* CHRISTINE GRAY, *supra* note 80, 102

104. *See* 1964 UNYB 147

Security Council was an indication that its actions were not in self defense.¹⁰⁵

State practice shows that states still adhere to the reporting requirement and tend to interpret Article 51 as requiring continuing reports, especially in cases of prolonged conflicts.¹⁰⁶ It would seem that even if the requirement of Article 51 is more than directory, it is not mandatory, although practice reveals some consistency of obedience by states to this requirement. Thus, the reporting requirement is merely procedural, and a failure by a state to comply with the provision does not in itself invalidate a claim to self defense.

(ii) Self Defense as a Temporary Measure

A state, which is a victim of armed attack, is entitled to exercise its inherent right of self defense until the Security Council has taken measures necessary to maintain international peace and security. This provision presupposes that the right to self defense remains exercisable so long as the Security Council has not taken any of its authorized measures. In other words, the right becomes extinguished and is spent, as soon as the Security Council takes measures necessary to restore international peace and security. The reporting requirement discussed above is a “prelude to action of some sort by the Security Council that would bring to an end the need for the state, which has been a victim of an armed attack, to continue to exercise its right of self-defense.”¹⁰⁷ This shows that the right of self defense is a provisional measure. The UN Charter provides for a centralized system of use of force and thus appears to have clothed the Security Council with the power to decide when measures terminating the right to self defense have been taken. While a state decides whether or not to use force in exercise of the right of self defense, the rightness of its decision is determined by the United Nations.¹⁰⁸ However, a pertinent issue here is what would be the position when the measures taken by the Security Council to maintain international peace and security prove ineffective? Would such measures

105. See S/PV 2671; S/17938; S/PV 2668

106. In the period of the conflict between Iraq and Iran in 1980- 1988, both countries were involved in this piece-meal reporting to the Security Council. Similarly, in the Falklands conflict between the United Kingdom and Argentina, the two countries reported individual incidents of self defense to the Security Council. See CHRISTINE GRAY, *supra* note 80, 103. Some writers, however, are of the view that the reporting requirement has not always been observed by states. See Schachter, *Self Defense and the Rule of Law*, 83 A.J.I.L. 259, at 263 (1989); Jean Combacau, *The Exception of Self Defense in U.N. Practice*, in ANTONIO CASSESE, ed., *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE*, 9, at 15 (Dordrecht, 1986)

107. See Omar Abubakar Bakhshab, *The Relationship Between the Right of Self Defense on the Part of States and the Powers of the Security Council*, Vol. 9 JKAU: Econ & Adm., 3-28, at 4 (1996)

108. See Waldock, *supra* note 96, 495

only have the effect of putting in abeyance a state's right of self defense, which the state was exercising prior to the intrusion of these measures, which have proved ineffective, and as such, would entitle the state to revive its right to self defense? A state may claim that measures employed by the Security Council lack the potency necessary to maintain international peace and security, and therefore cannot be said to have terminated their right to self defense. Following the Argentine invasion of the United Kingdom colonial territory during the Falklands conflict in 1981, the UN Security Council found that a breach of the peace had occurred and passed Resolution 502 (10-1-4), calling for immediate cessation of hostilities and withdrawal of all Argentine forces. It also called on the two parties, Argentina and the United Kingdom, to seek diplomatic solution to their conflict. The United Kingdom contended that the action of the Security Council did not qualify as "necessary measures to maintain international peace and security," which terminated its right to self defense against Argentina, since Argentina remained in occupation of the Falklands.¹⁰⁹ Once the Security Council has decided that the measures it has taken to maintain international peace in a case of armed attack are appropriate, a state is expected to accept such decision and stop the exercise of its right to self defense. This is because only the Security Council has the competence to determine whether it has taken the measures necessary to maintain international peace and security, and ipso facto, whether the exercise of the right to self defense has to stop.¹¹⁰

(iii) Security Council Measures and Self Defense

The UN Charter in Article 51 recognizes the right of a state to self defense, while Chapter VII gives the Security Council certain powers with respect to threats to the peace, breaches of the peace, and acts of aggression. The powers of the Security Council under Chapter VII sometimes infringe on a state's right to self defense, despite the proviso in Article 40 that the measures taken by the Security Council pursuant to Article 39 shall be without prejudice to the rights, claims, and positions of the states, which no doubt, include the right of self defense. How are these two provisions to be reconciled? The measures taken by the Security Council in exercise of its Chapter VII powers have at one point or the other been criticized and even rejected by states as violating their right to self defense granted by Article 51. In a majority of the cases, the Security Council has not been swayed by this argument and thus has sustained its actions taken under Chapter VII. But in some very few instances, it has heeded calls by some states for a suspension of a

109. See 1982 UNYB 132

110. See Stanimir Alexandrov, *supra* note 15, 1050

particular measure taken by it, which it has considered appropriate to set aside as an intrusion into the state's right of self defense. In 1951, Egypt, despite the conclusion of an armistice agreement between it and Israel, invoked its right of self defense in reaction to the restrictions imposed on the passage of goods to Israel through the Suez Canal. In support of its action, it argued that the armistice agreement did not end the state of belligerency, thus entitling it to self-defense.¹¹¹ The Security Council, in its Resolution, rejected this argument.¹¹² However, in disregard to the Resolution of the Security Council, Egypt did not withdraw its interference with the goods being shipped to Israel, a situation which, in 1954, led Israel to request the Security Council to "confirm and reinforce its earlier Resolution."¹¹³ Egypt, again, contended that the earlier Resolution of the Security Council could not put a stop to the exercise of its right of self defense.¹¹⁴ Like the previous one, the Security Council rejected this argument.¹¹⁵

The relationship between a state's right of self defense under Article 51 and the powers of the Security Council under Chapter VII was the subject of consideration during the conflict in the former Yugoslavia in 1991. Following the conflict, the Security Council, in exercise of its Chapter VII powers, had placed an arms embargo on the entire Yugoslavia with the consent of the government of Yugoslavia, by passing Resolution 713.¹¹⁶ Upon its attainment of self government and becoming a member of the United Nations, Bosnia- Herzegovina challenged the arms embargo, claiming that it contravened its right to self defense under Article 51 and placed Bosnia-Herzegovina in a precarious position as the embargo deprived it of weapons to defend itself from its enemies as it could neither acquire arms nor call on other states to assist it militarily. Furthermore, it argued that its right to self defense under Article 51 had overriding effect over the embargo, and that

111. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS*, 213-216 (Oxford, 1963)

112. In its Resolution, the Security Council remarked that the armistice agreement, which had existed for almost two and a half years, was of a permanent character, thereby disentitling both parties to the exercise of right of self defense. It noted that the action of Egypt could not, in the prevailing circumstances, be justified on the ground that it was necessary for self defense. See Res. S/2322, September 1, 1951.

113. See *Repertoire of the Practice of the Security Council 1952-1955*, 161 (United Nations, New York, 1956), UN Doc. ST/PSCA/1/Add.1.

114. Egypt posited that: "Self defense may not be overridden in favor of the Security Council except in so far as the states concerned are so well protected by the resources available to the Security Council that the abandonment of their right of self defense will not harm them". See *Repertoire of the Practice of the Security Council 1952-1955*, *supra*, 161

115. The Security Council held that its earlier Resolution was still valid, and continued to have effect. See *Repertory of Practice of United Nations Organs, Suppl. No.1, Vol. 1*, at 361 (United Nations, New York, 1958); 10 SCOR, 687th and 688th Meetings (January 4 and January 13, 1955)

116. See UN Doc. S/Res. 713 (1991)

the right could not be exercised without the lifting of the embargo. In the light of these assertions, Bosnia-Herzegovina sought the lifting of the embargo by the Security Council. The Security Council refused to accept this argument and thus did not lift the arms embargo.¹¹⁷ Bosnia-Herzegovina took out proceedings against Yugoslavia (Serbia and Montenegro) before the I.C.J., requesting the court to lift the arms embargo. The court held that it lacked the jurisdiction to entertain the claim.¹¹⁸

On the other hand, during the crisis in Rwanda, the Security Council imposed an arms embargo on Rwanda in 1994. But unlike the case of Yugoslavia, the embargo was not with the consent of the then government of Rwanda. The purpose of the embargo was to forestall further violence. In response to calls on it by Rwanda to lift the arms embargo, the Security Council accepted the argument of Rwanda; the argument was similar to that raised by Bosnia-Herzegovina in the Yugoslavia conflict. The Security Council, after a consideration of the reports of military invasion of Rwanda by the supporters of the former government, lifted the embargo. But the lifting of the arms embargo was only in relation to arms designated for the government of Rwanda, and not otherwise.¹¹⁹ It would seem that what weighed heavily on the mind of the Security Council in lifting the embargo in Rwanda were the military attacks on Rwanda from outside forces that were rendering aid to the former government. There was therefore the need for Rwanda to exercise its right of self defense, which it could only exercise by having the embargo lifted.

The Security Council jealously guards its powers under Chapter VII of the UN Charter, and thus cannot readily succumb to any argument that the imposition of arms embargo pursuant to the exercise of its Chapter VII powers infringes on a state's right of self defense under Article 51. This position makes sense, considering the fact that a contrary view would weaken the power of the Security Council in maintaining international peace and security. If states are allowed the contention that the right of self defense under Article 51 supersedes the powers of the

117. Members of the Security Council who favored the lifting of the embargo raised the following argument. First, that the accession of Bosnia-Herzegovina to the United Nations superseded the embargo. Second, that the Resolution containing the embargo should be interpreted as not having application on Bosnia-Herzegovina and, third, that assuming the Resolution applied to Bosnia-Herzegovina, then the Resolution was invalid as it was beyond the powers of the Security Council because it infringed upon the right to self defense of Bosnia-Herzegovina. See Christine Gray, *supra*, 106

118. See The International Court of Justice, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures) I.C.J. Reports 1993, 3, 325

119. See 1994 UNYB 281; 1995 UNYB 370, at 380, SC Res 1011.

Security Council under Chapter VII, there will be no limit to the extent to which states under an embargo will take this argument and that will jeopardize the collective security system of the United Nations. There is, no doubt, some veracity in the assertion that “an arms embargo may affect the right to self defense but does not actually deny that right.”¹²⁰

D. SELF DEFENSE AND AGGRESSION

It is not so clear whether or not acts of aggression could give rise to the exercise of the right to self defense, that is, whether it is equated to armed attack. The Charter of the United Nations employed the term “armed attack” rather than “aggression” to describe the acts that can trigger the exercise of the right of self-defense.¹²¹ There had been several attempts to define “aggression” during the period of the League of Nations¹²² and after the adoption of the UN Charter.¹²³ A proposal to include a definition of aggression in the UN Charter at the San Francisco Conference was rejected by the United States, which had maintained that no definition of aggression in the Charter could be so comprehensive as to cover all cases of aggression and have the capacity to envisage the various situations which might come into play in the determination of aggression in a particular case.¹²⁴ This view was accepted. The debate on the definition of aggression in the United Nations represented two major approaches. While some states favored an enumerative definition that would contain a list of the acts that constitute aggression, others suggested a general definition similar to that contained in Article 2(4) of the UN Charter.¹²⁵ These approaches had implications on the relationship between aggression and armed attack. The acts listed under the enumerative approach as qualifying as acts of aggression are comparable to armed attacks. The second approach, which seemed to have adopted the definition in Article 2(4) of the UN Charter considered aggression as any illegal use of force, that is, any use of force which is not in exercise of the right to self defense against an armed attack under Article 51 or

120. See CHRISTINE GRAY, *supra* note 80, 107

121. See Stanimir Alexandrov, *supra* note 15, 106; Article 51 of the UN Charter.

122. See Bengt Broms, *The Definition of Aggression*, 154 Hague Recueil 299, 305-312 (1977); Ian Brownlie, *supra* note 32, 351- 355; BENJAMIN FERENEZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE, A Documentary History and Analysis*, Vol. 1 (Dobbs Ferry, New York, 1975)

123. The Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX) (Dec. 14, 1974) in Article 1 defines aggression as “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...” Article 3 goes on to enumerate some of the acts, which qualify as acts of aggression.

124. See LORI DAMROSCH, et al, *supra* note 77, 1153

125. See Broms, Bengt, *supra* note 122, 299, 386

which does not amount to coercive action by the United Nations.¹²⁶ An attempt to add the concept of economic aggression as falling under the definition of aggression was vehemently criticized as liable to extend the concept to indefinite limits. It was rejected also because of its implication on the right of self defense, in that states could readily raise a claim to the right of self defense against economic coercion.¹²⁷ Not surprisingly, economic coercion was not included in the 1974 Definition of Aggression, although several resolutions of the General Assembly have condemned it as undermining sovereign rights of states.¹²⁸ The meaning ascribed to aggression in the 1974 Definition of Aggression seems to suggest that there is a correlation between aggression and self defense. But it has been observed that this view overlooks the fact that armed attack and self defense, on the one hand, and aggression, on the other hand, are used differently in the UN Charter, in the sense that the definition of aggression is more relevant in the determination of the circumstances under which the Security Council could invoke its powers under Chapter VII of the UN Charter to maintain or restore international peace and security, while self defense consists mainly in identifying the circumstances under which a state may use force to defend itself from armed attack.¹²⁹ Because of the interrelatedness of aggression and armed attack, especially as can be gleaned from the definition of the former in the Resolution on the Definition of Aggression, and the fact that most acts of aggression are carried out with the aid of arms and weapons, even if it is accepted that some acts of aggression, such as economic

126. See Stephen Schwebel, *Aggression, Intervention and Self Defense in Modern International Law*, 136 Hague Recueil 411, at 439 (1972-II). There were however, other proposals, which tended to define aggression as direct and indirect use of force, and as including indirect aggression, which covered economic aggression. See the proposals of China contained in (UN Doc. A/AC.66/L.4/Rev. 3, Report of the Special Committee on the Question of Defining Aggression, 9 GAOR, Suppl. No. 11, UN Doc. A/2638, at 14, and UN Doc. A/C.6/L.336/Rev.1 and 3, 9 GAOR, Annexes, Item 51, at 7-8); the proposals of Paraguay, UN Doc. A/C. 6/L.334/Rev.1 and UN Doc. A/AC.77/L.7, Report of the Special Committee on the Question of Defining Aggression, 12 GAOR, Suppl. No. 16, UN Doc. A/3574, Annex II, at 31); UN Doc. A/2211, at 58 (Oct. 3, 1952).

127. See Report of the Special Committee on the Question of Defining Aggression, Aug. 24-Sept. 21, 1953, 9 GAOR, Suppl. No. 11, UN Doc. A/2638, at 8-10; Report of the Sixth Committee, Dec. 2, 1954, UN Doc. A/2806, 9 GAOR, Annexes, Item 51, at 10-12.

128. See, for example, Article 32 of the Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX) (Dec. 12, 1974), reprinted in 14 I.L.M. 251 (1975); Declaration of the Principles of International Law Concerning Friendly Relations and Co-operation among States, G.A. Res. 2625 (XXV) (Oct. 24, 1970); Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX) (Dec. 21, 1965)

129. See STANIMIR ALEXANDROV, *supra* note 15, 113-14.

aggression, cannot give rise to self defense, it would seem that most acts of aggression would implicate the right of self defense.¹³⁰

E. SELF DEFENSE AGAINST ACTUAL ARMED ATTACKS

While it can be said that there is unanimity of opinion among states on the recognition of the right of self defense against armed attack under Article 51 of the UN Charter, a similar assertion cannot be made in reference to the definition of armed attack. Nowhere in the Charter is the concept of armed attack defined, and during the San Francisco Conference states thought there was no need to render a definition of the concept, perhaps due to the view that the concept was sufficiently clear and self-evident.¹³¹ But recent events have proved this argument unhelpful. A determination of what constitutes armed attack in order to entitle states to the right of self defense is necessary in view of the development of different forms of weapons by states and the corresponding need to categorize the weapons.¹³² There was a view that for an attack to ground the exercise of the right of self defense under Article 51, it must be so serious as to threaten the inviolability of the victim state.¹³³ Another view was that a single shot from a rifle fired by an armed soldier across the border of a country could amount to an armed attack.¹³⁴ At the San Francisco Conference, an attempt was made to define the concept of armed attack, especially as it relates to the right of self defense, from two approaches. These approaches were that while an armed attack should result in only the exercise of collective self defense, the exercise of individual self defense should not be so restricted.¹³⁵ However, this line of argument did not make any headway and was jettisoned.

In the *Nicaragua case*, the ICJ was faced with the question of what constituted armed attack as a ground for the exercise of the right of self defense. In response to the argument of the United States that its use of

130. The 9/11 attacks on the United States qualified as acts of aggression, which entitled the United States to the right of self defense, and it did exercise such right by its military action against Afghanistan. The action of the United States was endorsed by the international community.

131. See IAN BROWNIE, *supra* note 32, 278.

132. Such weapons include modern missiles and naval mines. Concerning nuclear weapons, see Boisson de Chazounes and Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (1999). On naval mines and modern missiles, see O'Connell, *The Influence of Law on Sea Power*, 70, (1975). On computer warfare, see Schmit, "Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework", 37 *Columbia Journal of Transnational Law*, 885 (1998-1999).

133. See Josef Mrazek, *Prohibition of the Use and Threat of Force: Self Defense and Self Help in International Law*, 27 *Canadian Yearbook of International Law* 81, 109 (1989).

134. See Gerald Fitzmaurice, *The Definition of Aggression*, 1 I.C.L.Q. 137, at 139 (1952).

135. See STANIMIR ALEXANDROV, *supra* note 15, 98.

force against Nicaragua was justified as collective self defense of Costa Rica, Honduras, and El Salvador in reaction to armed attacks on those states by Nicaragua, the ICJ rejected that claim and held that the alleged acts committed on those states by Nicaragua did not amount to armed attack such as would entitle the United States to use force against Nicaragua in exercise of collective self defense. The Court made a distinction between the gravest forms of the use of force which constitute armed attack, and other forms which are less grave. The court held as follows:

There appears now to be general agreement on the nature of the acts, which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g) of the Definition of Aggression ... may be taken to reflect customary international law. The court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states...¹³⁶

The Court’s view that assistance to rebels in the form of the provision of weapons or logistical or other support does not amount to armed attack met with much criticism. While Judge Schwebel from the United States, in his dissenting opinion, criticized the judgment for having taken a narrow definition of armed attack, such as would limit the right of self defense and encourage the super powers to overthrow the weaker states,

136. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) 1986 I.C.J. 14, 103-123, paragraph 195.

Judge Jennings from the United Kingdom, in his dissenting view, accused the judgment of being unrealistic.¹³⁷ It may appear there is no clear basis for the distinction the court had made above. Does the court's view imply that actions of armed bands and irregular forces, which are of minimal scale and effect, do not amount to armed attack? Even with the judgment of the ICJ in the Nicaragua case, a generally acceptable definition of the concept of armed attack still eludes the international community. It has been observed that the consequence of the problem of the definition of armed attack is that states now assume the freedom to determine what meaning is to be given to armed attack in their bid to exercise their right of self defense, until the Security Council intervenes, in the exercise of its Chapter VII powers, to maintain or restore international peace and security, at which point the competence to determine what amounts to armed attack reverts to the Security Council.¹³⁸

F. SELF DEFENSE AGAINST NON-STATE ACTORS

A new dimension has been added to the concept of self defense with the rise in cases of armed attacks by actors who are not states or state agents. In the past, there existed attacks from non state actors in the form of insurgencies, terrorist attacks and other non-state threats, and governments tapped from the resources of international law to respond to these occurrences. Such attacks were mainly of small scale compared with the present situation. To buttress this position is the Caroline incident of 1837,¹³⁹ which raised legal arguments on forcible action across an international boundary with a view to suppressing insurrections. At present, attacks by non state actors constitute a top ranking issue in discussions of the right to self defense, especially terrorist attacks such as those launched on the United States on September 11, 2001 (the 9/11 attacks).

(i) The 9/11 Attacks

On September 11, the United States territory was attacked. Two American commercial airliners crashed into the World Trade Centre towers in New York and a third into the Pentagon near Washington, D.C. A fourth plane crashed in a small city in Pennsylvania, USA. Responsibility for these attacks was attributed to the Al Qaeda terrorist organization headed by Osama bin Laden and protected by the Taliban

137. See Dissenting Opinion, paras. 543-544.

138. See STANIMIR ALEXANDROV, *supra* note 15, 98.

139. See MOORE, *supra* note 89, 412.

regime in Afghanistan. On September 14, 2001, the then United States president, George W. Bush, announced that: “war has been waged against us by stealth and deceit and murder. The nation is peaceful, but fierce when stirred to anger. This conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing.”¹⁴⁰ On the day following the attacks, the United Nations Security Council passed Resolution 1368 (September 12, 2001) condemning the acts, characterized them “like any act of international terrorism,” as a threat to international peace and security, and called for increased international co-operation to suppress terrorist acts.¹⁴¹ The Resolution also affirmed the right of individual and collective self defense as provided under the UN Charter. On its part, NATO invoked Article 5 of its treaty, which provides that “an armed attack against one or more of [the parties] in Europe or North America shall be considered an attack against them all...,”¹⁴² and therefore declared that all member states should act in collective self defense. Following the refusal of the Taliban regime in Afghanistan to the United States’ demand that the Taliban government should surrender Osama bin Laden and other members of Al Qaeda, and subject Afghanistan to United States inspection, on October 7, 2001, the United States launched a military action in Afghanistan.¹⁴³ The action was called Operation Enduring Freedom, and its purpose was to destroy the bases of terrorist activities in Afghanistan and to unseat the Taliban government which had provided shelter to Osama bin Laden and his cohorts. The United States founded its action on Article 51 of the UN Charter and attracted more supporters than critics from the international plane.¹⁴⁴ Although a state is generally responsible for the acts of its organs, which constitute a breach of international law obligation,¹⁴⁵ a position that arises from the general principle that only states are subjects of international law, and that a state, being an abstract concept, can only act through its organs or agents; in appropriate cases, a state could be internationally responsible where it neglects, fails or refuses to prevent its national from committing an act which amounts to an international

140. See George Walker Bush, President’s Remarks at National Day of Prayer and Remembrance (September 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html>.

141. See SC Res 1368.

142. See Article 5 of the North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

143. See Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L. 237, at 246 (2002); Byers, “*Terrorism, the Use of Force and International Law after 11 September 2001*”, 51 I.C.L.Q., 401 (2002).

144. At the commencement of the operation, the United States received military assistance from the United Kingdom, while other states like Canada, Germany, France, and Australia made pledges to support it militarily. Iraq disagreed with the legality of the United States action.

145. See The 2001 International Law Commission, Articles on State Responsibility, Article 4.

derelict.¹⁴⁶ The September 11 attacks qualify as armed attacks entitling the United States to the exercise of its right to self defense, and its military operation in the territory of Afghanistan is justified on the basis of the principle of attribution. Some commentators have however argued that the position taken by the United States after the terrorist attacks, that it would not make any distinction between terrorists and those harboring them, and that it would treat any state that harbors terrorists as a hostile regime,¹⁴⁷ would amount to overstretching the concept of self defense in international law, which is not permissible.¹⁴⁸ There is ample evidence that the Taliban government was inextricably connected to the Al Qaeda network and was in fact supporting it.¹⁴⁹ This link that existed between them satisfied the effective control test.¹⁵⁰ The Taliban government provided the bases from which Osama bin Laden and the Al Qaeda operated, and the latter were so assimilated into the former to the extent it became unclear “which one was controlling the other.”¹⁵¹ No one questioned the propriety of the US action, and it would appear that that action crystallized an expanded scope of the right of self defense which includes the right to proceed against a state which is harboring terrorists, even if those terrorists are non-state actors.

G. PROTECTION OF NATIONALS ABROAD

The situations that call for an assessment of the legality of an exercise of the right to self defense under Article 51 of the United Nations Charter seem to be unending. The invocation of the right of self defense to protect nationals of a country in another state is yet one of those situations. In the period preceding the emergence of the United Nations Charter, there was a popular view allowing the use of force in self defense to protect the lives of nationals of a state abroad.¹⁵² This was predicated upon the belief that the concept of statehood extends to the nationals of a state. In other words, a state is an embodiment of its

146. See ILC Articles on State Responsibility, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), 2007 I.C.J. 191.

147. See Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L., 237 (2002).

148. See Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond*, 35 Cornell I.L.J., 532 (2002); Myer and White, *The Twin Towers Attack: An Unlimited Right to Self Defense*, 7 *Journal of Conflict and Security*, 5 (2002).

149. On the nexus of the Al Qaeda with the Taliban, see Lawrence Azubuik, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 *Conn. J. Int'l. L.* 127, at 134-136.

150. See the Nicaragua case, *supra* note 100.

151. See Lawrence Azubuik, *supra* note 149, at 140.

152. See Akehurst, *The Use of Force to Protect Nationals Abroad* 5 *International Relations*, 3 (1977); D'Angelo, *Resort to Force to Protect Nationals*, 21 *Va JIL*, 485 (1981), Friedmann, *United States Policy and the Crisis of International Law*, 59 *A.J.I.L.* 857, 867 (1985).

nationals. And so whoever treated badly a national of another state offended the state itself since the state owed its nationals the duty of protection.¹⁵³ However with the coming into effect of the UN Charter, the acceptability of this view started waning and has been subjected to much controversy. Can an armed attack occur against the nationals of a state abroad under Article 51 of the UN Charter since it is the state itself that must be under attack, not specific persons outside the jurisdiction?¹⁵⁴ Doubts have been expressed on the validity of a claim to the exercise of the right of self defense to protect the lives of nationals abroad.¹⁵⁵ It seems in the majority of the cases where self defense has been advanced by states to protect their nationals abroad, the Security Council or the General Assembly has disapproved of such conduct. In the Suez Canal incident of 1956, an aspect of the United Kingdom's claim that its intervention in Egypt was necessary in order for it to protect its nationals abroad was discountenanced by the General Assembly. But since this justification put up by the United Kingdom was just one of the many reasons the UK adduced, coupled with the fact that that justification did not seem to have any foundation in fact, its rejection by the General Assembly cannot be taken as conclusive of its validity in law.¹⁵⁶

In the popular Entebbe raid of 1976, an Air France airliner was hijacked and some Israeli nationals were taken and held hostage by Palestinian and other terrorists at Entebbe, Uganda. Israel used force to free its nationals and invoked the provision of Article 51, arguing that it had the right to use force to protect its nationals on the basis of self defense. It therefore contended that its action was within the limits imposed by the *Caroline incident*. While Israel received tacit support from the United States, a majority of the members of the Security Council did not agree with the argument of Israel, and some states pointed out that self defense could only be used when the state itself is the victim of an armed attack.¹⁵⁷ The right of self defense to protect nationals was among the

153. See Vattel, *supra* note 21, note 1.29, Book II, Chapter VI, para. 71; Classics, *supra*, 136.

154. See MALCOLM SHAW, *supra* note 10, 696.

155. Ian Brownlie has noted as follows: "... it is considered that it is very doubtful if the present form of intervention has any basis in the modern law. The instances in which states have purported to exercise it, and the terms in which it is delimited, show that it provides infinite opportunities for abuse. Forcible intervention is now unlawful. It is true that the protection of nationals presents particular difficulties and that a government faced with a deliberate massacre of a considerable number of nationals in a foreign state would have cogent reasons of humanity for acting, and would also be under very great political pressure. The possible risks of denying the legality of action in a case of such urgency, an exceptional circumstance, must be weighed against the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in the pursuit of national rather than humanitarian interests" See Ian Brownlie, *supra*, 301.

156. See IAN BROWNLIE, *supra* note 32, 297.

157. Romania, S/PV.1942, at 22; India, S/PV. 1942, at 62; Cuba, S/PV. 1943, at 47.

grounds raised by the United States to justify its invasions of Grenada¹⁵⁸ in 1983 and Panama¹⁵⁹ in 1989. The Grenada invasion was condemned by the General Assembly, which described it as a flagrant violation of international law and of the independence, sovereignty and territorial integrity of Grenada.¹⁶⁰ An effort to obtain the Security Council's condemnation of the invasion was vetoed by the United States.¹⁶¹ In the Panama case, a Security Council resolution denouncing the action of the United States could not be adopted due to the veto by France, the United Kingdom, and the United States. But the General Assembly adopted a resolution condemning the invasion and called for the immediate cessation of the intervention and the withdrawal of the United States from Panama.¹⁶²

A central issue in the disposition of the question of the legality of the use of self defense to protect the nationals of a state abroad is the recurring question of whether or not such right is covered by Article 51 of the UN Charter, or as many writers have contended that Article 51 preserves the customary law right of self defense, whether such customary law recognized the use of self defense for the protection of nationals abroad. The argument that self defense as it existed before the drafting of the UN Charter extended to the right of intervention for the protection of nationals abroad ignores the fact that the then existing customary law seemed to have equated self defense with self preservation and self protection. Assuming that was the case, it is doubtful if such position can continue under Article 51 of the UN Charter. It has been suggested by Waldock that the exercise of the right of self defense to protect nationals is justified under certain conditions, namely: (a) an imminent threat of injury to the nationals; (b) a failure or inability on the part of the territorial sovereign to protect them; and (c) measures of protection strictly confined to the object of protecting them against injury.¹⁶³ These conditions would only apply if such right is recognized under Article 51, but state practice is short of reflecting such a right.¹⁶⁴ Furthermore, self-defense is invoked when there is an armed attack on a state. An argument that an attack on a state's nationals abroad constitutes an attack on that

158. See Joyner, *The United States Action in Grenada*, 78 A.J.I.L. 131 (1984).

159. See Use of Force, Protection of Nationals – Deployment of U.S. Forces to Panama (U.S. Digest, Chap. 14, S.1), reprinted in 84 A.J.I.L. 545 (1990).

160. See GA Res. 38/7 (108-9-27).

161. See 1983 UNYB 211.

162. See GA Res. 44/240 (75-20-40) (Dec. 29, 1989).

163. See Waldock, *supra* note 96, 467. These conditions are similar to the conditions recognized in the Caroline incident.

164. See RONZITTI, RESCUING NATIONAL ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON THE GROUNDS OF HUMANITY, 52-76 (Dordrecht, 1985); IAN BROWNLIE, *supra* note 32, 299; Akehurst, *supra* note 152, 104.

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state itself of which the nationals are citizens is a mere pretext.¹⁶⁵ The concept of nationality, the basis upon which the justification for this aspect of self defense is sought is not even without controversy under international law.¹⁶⁶ Is nationality equated with citizenship? Where one is a citizen of say, two states, and resides in one of the two states, can the other state of which he is also a citizen exercise the right of self defense against the first state in order to protect him from a mistreatment meted to him by the state where he is residing? Where the nationals of a state are being mistreated by another state, the best way towards resolving the problem and thereby safeguarding them has been by diplomacy. While in extreme cases of maltreatment, for instance the wanton massacre of considerable number of nationals, a state may possess an intrinsic right to protect its nationals; such right can be located elsewhere, say, under the principle of sovereignty, but certainly not under the concept of self defense pursuant to Article 51 of the UN Charter.

H. CONDITIONS FOR THE EXERCISE OF RIGHT OF SELF DEFENSE

(i) Necessity and Proportionality

The conditions of necessity and proportionality are the core factors taken into consideration in the determination of the lawfulness or genuineness of a state's claim to the exercise of the right of self defense. The requirements of necessity and proportionality are derived from customary international law that existed before 1945 and are often traced to the Caroline incident of 1837. They have, however, survived the adoption of the UN Charter.¹⁶⁷ These principles stipulate that a state which is the victim of an armed attack is entitled to use force against the attacker, but only to the extent necessary to defend itself and repel the attack and no more. Necessity presupposes the existence of an ongoing armed attack and the need to stop the attack. The necessity principle requires that, to justify an action in self defense, a state must show that the action it has taken was the only option at its disposal in the circumstances of the armed attack against it by the attacker, and that there was no other means it could have used to ward off the attack.¹⁶⁸ Proportionality inquires into the overall scale and effect of the means employed to repel the armed attack and its relationship to the attack

165. See RONZITTI, *supra* note 164, 69.

166. See the *Nottebohm* case, I.C.J. Reports, 1955, 5.

167. See the *Nicaragua* case, *supra* note 100; Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports (1996) 226, para. 141.

168. See *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, 195, para. 140.

itself.¹⁶⁹ Thus, a kind of comparison is drawn between the gravity of the armed attack and the seriousness of the force used to defend it. To legally exercise the right of self defense, a state should not exceed the degree and kind of force required to repel the armed attack against it or to restore its security. The requirements of necessity and proportionality are founded on the position that the aim of self defense is to put an end to the illegal situation arising from the armed attack and nothing more. Thus, self defense should not be retaliatory or punitive.¹⁷⁰

It is important to note that necessity and proportionality as conditions for the exercise of the right of self defense do not necessarily stipulate that a state which is a victim of an armed attack must use only the same degree and kind of force, or even the same weapons as the attacking state, but that the state, to properly act in self defense, use such force as is proportionate to what is required to achieve the legitimate objectives of self defense. Notwithstanding this last point, an important factor used in a consideration of the necessity of self defense is the nature of the weapon used.¹⁷¹ In determining the legality of an exercise of the right of self defense in terms of the requirements of necessity and proportionality, once the first condition is met, the court or tribunal goes into the second test, and if that condition is equally met, then that self defense claim is justified. Thus, an action in self defense can satisfy the necessity test, but fail to meet the proportionality requirement. In that case, a claim to self defense would not be justified. But where the necessity requirement is not met, it would be needless to go into the proportionality test as that requirement would invariably crumble.¹⁷² There are no hard and fast rules governing the determination of the necessity or proportionality of self defense. It all depends on the facts of a particular case. In the Nicaragua case, although the I.C.J. had, on other grounds, found the actions of the United States as not amounting to a legitimate exercise of the right to self defense, the court ruled that the United States attacks on Nicaragua, assuming those acts were properly founded on the exercise of the right of self defense, were not necessary, neither were they proportionate to the alleged assistance the Nicaraguan government rendered to El Salvador.¹⁷³

169. See Gill T.D., *supra* note 99, 366.

170. See CHRISTINE GRAY, *supra* note 80, 121.

171. See Leo Van den hole, *supra* note 87, 101.

172. See the *Oil Platform Case* (Iran v. United States), 2003 I.C.J. 161, para. 76-77.

173. See the *Nicaragua case*, *supra* note 100, para. 237. In the *Oil Platform Case* (Iran v. United States), the I.C.J. reached similar conclusion when it held that there was no necessity justifying the United States attacks on the platforms, since there was nothing to show that the United States had complained to Iran of the military activities of the platforms.

The requirements of necessity and proportionality continue to be the major guideline in the determination of the legality of a claim to the right of self defense. Each state involved in a dispute where self defense is raised puts forward the argument that is favorable to it. But it is the court, after a consideration of the facts of the case that would make a decision one way or the other.

IV. ANTICIPATORY SELF DEFENSE

A. BACKGROUND

Anticipatory self defense is simply the exercise by a state of the right of self defense towards an armed attack that is yet to be unleashed on that state by another state. As the name suggests, it is the use of self defense to ward off an attack, the commission of which has not been initiated. The principle of anticipatory self defense is one of the many aspects of the general concept of self defense that have generated the most sustained controversy. The controversy is aptly represented by two schools of thought. While the proponents of the first school argue for a narrow, limited interpretation of the exercise of the right of self defense to apply to only situations of "armed attack", those espousing the second view see self defense as extending beyond the exercise of it in cases of armed attack, but also applying in the event of possible attack. Such is the academic debate.

B. THE RESTRICTIVE SCHOOL

The *gravamen* of the argument of this school is that the right of self defense can only be exercised by a state which has been a victim of an actual armed attack. This argument, built on a textual interpretation of Article 51 of the UN Charter, posits that there is nothing in Article 51 that indicates that the right of self defense should be exercised in any other event outside the occurrence of an armed attack.¹⁷⁴ This view suggests there is much clarity in the provision of Article 51 and therefore, unnecessary meaning should not be introduced in its interpretation. The text of that provision calls for its narrow interpretation. The limitation imposed on the right of self defense under Article 51, namely, that it be exercised only in cases of an armed attack will be defeated by a liberal interpretation of Article 51. It would seem that those who favor a restrictive interpretation of self defense under Article 51 believe that at the time the UN Charter became operational,

174. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE*, 167, 3rd ed. (Cambridge University Press, 2001).

customary international law did not permit an unrestricted right of self-defense.¹⁷⁵ To buttress the argument that Article 51 does not allow self defense in anticipation of an attack, it is posited that Article 51 confines the duty of the Security Council to only the employment of counter force in response to an armed attack. The argument of supporters of the restrictive school is built on a strong policy consideration and is a reaction to the view held by the expansive school. The proponents of the expansive school have argued that an insistence that a state must in all cases wait until it is attacked before it could exercise its right of self defense, may have adverse consequences on that state, especially considering the nature of modern weapons.¹⁷⁶ Advocates of the restrictive school maintain that anticipatory self defense involves the task of ascertaining the existence of an imminent armed attack. Determining with certainty that an armed attack is imminent is extremely difficult, and a wrong judgment may lead to an unwarranted and unnecessary conflict between states.¹⁷⁷ Although in the Cuban Missile Crisis of 1962, the United States did not invoke anticipatory self defense as a justification of its action, but had advanced Article 52 of the UN Charter and provisions of the Rio Treaty, which deal with threats to the peace other than armed attack,¹⁷⁸ some academic views sought to justify United States action on that basis.¹⁷⁹ Other writers expressed an opposing view.¹⁸⁰ There was even from some quarters the view that the United States could not invoke the right of self defense since it could not prove any necessity warranting the exercise of such right and since there was no proof of the offensive character of military developments in Cuba.¹⁸¹ It was argued, and rightly too, that Cuba was only exercising its right of self defense by the installation of the missiles as it had previously been attacked by the United States.¹⁸² It could be inferred that the avoidance of a claim to the right of anticipatory self defense on the part of the United States suggests

175. See IAN BROWNLIE, *supra* note 32, 259; RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT (1979).

176. See Myres McDougal, *The Soviet-Cuban Quarantine and Self Defense*, 57 A.J.I.L. 597 (1963); Gardener, *Commentary on the Law of Self Defense, in Law and Force in the New International Order* 51- 52 (Damrosch & Scheffer eds.) (1991).

177. See IAN BROWNLIE, *supra* note 32, 259.

178. See the letter of the United States to the Security Council of Oct. 22, 1962, UN Doc. S/5181, 17 SCOR, Suppl. for Oct.-Dec., 1962, at 146-148; Resolution of the Council for the Organization of American States of October 23, 1962, 47 Department of State Bulletin 722-723 (1962).

179. See MacChesney, *Some Comments on the 'Quarantine' of Cuba*, 57 A.J.I.L. 592 (1963).

180. See HENKINS, HOW NATIONS BEHAVE, 295- 296, 2nd ed. (1979).

181. See the Statement of Mr. Quaison-Sackey (Ghana), UN Doc. S/PV. 124 (1962), at 51.

182. See ROSALYN HIGGINS, *supra* note 111, 203.

the uncertainty of the legality of that right under Article 51 of the UN Charter.¹⁸³

In 1981, Israel bombed a nuclear reactor that was still under construction in Iraq and expressly sought justification for its action under the right of anticipatory self defense on the basis of Article 51. Israel argued for an expansive interpretation of self defense that would apply to forestall an imminent attack.¹⁸⁴ Iraq, however, maintained a contrary position, contending that the right of self defense only applied to cases of armed attack. Israel's argument did not prevail in the Security Council, which in its unanimous resolution, roundly condemned the military attack by Israel as a clear violation of the UN Charter.¹⁸⁵ The contention of Israel was that the nuclear reactor in Iraq was a threat to it, and therefore it would be dangerous for Israel to wait longer when the construction of the nuclear reactor would have been completed before acting in self defense. It could be suggested from this argument that Israel was not under any imminent threat from Iraq so self defense did not apply.

C. THE EXPANSIVE THEORY

In contrast to the view of the advocates of the restrictive school, the expansive school of thought maintains that the right of self defense under Article 51 of the UN Charter is wide enough to cover the use of self defense against an anticipated armed attack. Those who hold this view readily make reference to the term, "inherent right of self defense," used in Article 51, as a suggestion that the UN Charter preserves the customary international law right of self defense that was in existence prior to the UN Charter. This customary law permitted anticipatory self defense.¹⁸⁶ The plank upon which the principle of anticipatory self defense is built is that it cannot be right to expect a state to be a "sitting duck and wait until the bombs are actually dropping on its soil" before it could act in self-defense.¹⁸⁷ Besides, "the fear that nuclear missiles could, on the first strike, destroy the capability for defense and allow virtually no time for defense has appeared too many to render a requirement of armed attack unreasonable".¹⁸⁸ Thus, it would amount to "a travesty of the purposes of the Charter to compel a defending state to allow its

183. See Goodrich Hambro and Simmons, *supra* note 69, 345.

184. See *Repertoire of the Practice of the Security Council 1981-1984*, 202-204.

185. See SC Res. 487 (June 19, 1981); UN Doc. S/RES/487 (1981).

186. See Schwebel, *Aggression, Intervention and Self Defense in Modern International Law*, 136 RCADI (1972-II), 463 Bowett, *supra* note 54; McDUGAL and FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961).

187. See Gardner, *supra* note 176, 51-52; Myres McDougal, *supra* note 176, 597.

188. See Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1633-1635 (1984).

assailant to deliver the first, and perhaps fatal, blow".¹⁸⁹ Another argument proffered to support anticipatory self defense is the ineffective nature of the UN collective security system, especially in the era of the Cold War.¹⁹⁰ With the precarious situation, a measure of self defense against an imminent threat became necessary. States therefore inherited from the United Nations the responsibility to act swiftly to maintain international peace and security.¹⁹¹ It is also argued in favor of anticipatory self defense that in a situation of an imminent armed attack on a state, where there is no time on the part of that state to take any action to prevent the attack, it becomes necessary for that state to take anticipatory action against the attack, and the right to use this preemptive action is not denied by Article 51, especially when it is construed together with Article 2(4) of the UN Charter.¹⁹²

The adherents of the expansive school find succor in the Caroline incident which they allege to have established the right of anticipatory self defense.¹⁹³ They maintain that the words of the Secretary of State Daniel Webster that an intrusion into the territory of another state can be justified as an act of self defense only in those "cases in which the necessity of that self defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation"¹⁹⁴ set forth a limited right of preventive action because they did not require an actual armed attack.¹⁹⁵

In the absence of any dispositive statement determining the legality or otherwise of the exercise of anticipatory self defense, the debate rages on. The International Court of Justice has not even helped matters. Despite the numerous cases it has decided and the advisory opinions it has rendered involving the use of force, including the right of self-defense,¹⁹⁶ it has not clarified whether or not anticipatory self defense is

189. See Guy Roberts, *The Counterproliferation Self Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 *Denver Journal of International Law and Policy* 483, 513 (1999).

190. See the Dissenting Opinion of Judge Jennings in the *Nicaragua case*, *supra* note 100, at 543-544.

191. See FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, 259-260 (1964).

192. See HENKIN, *supra* note 180, 143-145.

193. See Gill T.D., *supra* note 99, 364-365, Leo Van den hole, *supra*, 95.

194. See Letter from Secretary of State Daniel Webster to Lord Ashburton of August 6, 1842, cited in Moore, John Bassett, *A Digest of International Law*, Vol. II, 412 (1906).

195. See Leo Van den hole, *supra* note 87, 96-97.

196. For example: the *Oil Platforms Case (Iran v. United States)* 2003 I.C.J. 161; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 I.C.J.; *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J., 136, 195.

permissible. In the Nicaragua case, which circumstances compelled the court to decide under customary international law, the I.C.J. only ruled that the UN Charter's provision on the use of force corresponds essentially to customary international law. However, the court did not make any pronouncement on anticipatory self defense because it felt it was not necessary to adjudicate on that issue.

It seems that the weapons used by the proponents of a restrictive right of self defense, on the one hand, and those arguing for a liberal interpretation of the right of self defense, on the other hand, are the terms, "armed attack" and "inherent right of individual or collective self defense", respectively. A determination of whether the term armed attack as used in Article 51 of the UN Charter as a basis for the exercise of the right of self defense includes an imminent attack does not pose much problem. The task in this regard is to ascertain if "armed attack" contains any ambiguity in its meaning, which does not appear so. That term implies an actual attack that has taken place or is taking place, and not a future attack or an imminent attack, or even a threatened attack. Secondly, can the drafters of the UN Charter be considered as law makers, that is, legislators? Or put in another way, are their roles to be seen as similar to those of law makers? The answer to this question, no doubt, should be in the affirmative. It is a cardinal principle of law that the legislature does not use words in vain. Therefore, the term, "armed attack" appearing in Article 51 is not cosmetic; neither did the drafters of the UN Charter use it in vain. If they had intended the right of self defense under the UN Charter to extend to self defense in anticipation of armed attack, they would have expressly done so. The best way to ascertain the intention of the legislature when interpreting legislation is to look at the actual words used in a particular piece of legislation. It is only when there is ambiguity in a provision of that piece of legislation that recourse is had to some other interpretation aid. Thus the assertion, made in support of anticipatory self defense, that the negotiating history of the drafting of the UN Charter or its *travaux préparatoires* incorporates the entire gamut of customary law rules on self defense,¹⁹⁷ cannot prevail over the clear provisions of Article 51. The term, "armed attack" as used in Article 51, contains no ambiguity. It presupposes that the right of self defense is exercisable by a state only when that state is a victim of an actual armed attack and not when there is an imaginary attack or a fanciful attack on that state. Stretching that term to include anticipated or imminent armed attack would defy every cannon of legislative interpretation.

197. See Thomas Plofchan, *Article 51: Limits on Self Defense?* 13 Mich. J. Int'l L. 336, 343-350 (1992).

On the other hand, to determine whether Article 51 of the UN Charter gives recognition to anticipatory self defense when it makes reference to “inherent right of individual or collective self defense”, an expression that has consistently been interpreted to mean customary international law recognition of self defense, is to determine if anticipatory self defense existed under customary international law when the Charter of the United Nations came into existence. This task becomes meaningful in the light of the near unanimous view that Article 51 is a codification of the customary international law that was already in practice prior to inception of the UN Charter regime. If this wide view is correct, it then follows that Article 51 could not have codified what was not in existence at the time the UN Charter came into force. Reference is always made to the *Caroline* incident to show that anticipatory self defense existed under customary international law before 1945 and still exists by virtue of Article 51. Did the *Caroline* incident clearly endorse the exercise of the right of self defense against a threatened attack on a state, as is proclaimed by some writers? The verbal formula in the *Caroline incident* was issued out when self defense was equated with self preservation.¹⁹⁸ That formulation by Daniel Webster does not reflect state practice. Besides, the application of the requirements, enunciated therein, are not compatible with situations where an armed attack has not occurred. There are certain difficulties inherent in the notion of anticipatory self defense. A state has to determine with some exactitude that another state has perfected plans to launch an armed attack on it. This determination is not easy to make, and a wrong assessment of the situation may turn the state into an author of aggression, in its bid to defend itself from an armed attack existing only in the figment of its imagination. An attempt to get around these problems has led to another categorization, or rather, distinction. This is tendency to distinguish “anticipatory self defense, where an armed attack is foreseeable, from interceptive self defense where an armed attack is imminent and unavoidable”, such that the exercise of self defense is permitted in the latter, but not in the former.¹⁹⁹ The content of the right of self defense under Article 51 is not altogether the same with self defense under customary international law. Reference is readily made to the view of the International Court of Justice in the *Nicaragua* case that the principles of the use of force under the Charter coincide with those under customary international law. The same court, however, did cite one difference that exists between self defense under Article 51 and under customary international law, when it remarked that: “*the court, whose decision has to be made on the basis of customary international law, has already observed that in context of the law, the*

198. IAN BROWNLIE, *supra* note 32, 258.

199. See MALCOLM SHAW, *supra* note 3, third ed., 695.

reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist."

D. SELF DEFENSE AND THE DOCTRINE OF PREEMPTION

While the battle over the legitimacy of anticipatory self defense is being fiercely fought, international law is confronted with yet another combat, somehow related to the anticipatory self defense debate. This new battle is the one over the preemption doctrine or preemptive self-defense.²⁰⁰ The distinction between anticipatory self defense and the preemptive doctrine seems to be that while anticipatory self defense consists in the exercise of the right of self defense against an individual armed attack that is imminent, preemptive self defense involves the use of force in self defense against a whole series of attacks, which have accumulated over time, in order to repel future attacks that may come from the attacker.²⁰¹ The most contemporary, and perhaps controversial, issues of preemptive self defense are found in the National Security Strategy document published by the government of the United States in 2002, during the administration of President George W. Bush. The publication was in response to the 9/11 attacks on the United States, and was aimed at fighting terrorism and states harboring terrorists. The policy espoused by this document is sometimes referred to as the "Bush Doctrine".²⁰² The central theme of that policy is contained in its message that:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries... The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.²⁰³

It is manifest from the United States' publication that preemptive self defense permits the use of force in self defense against an armed attack that has ceased to exist. In other words, it entitles the state invoking it to act in self defense when there is no necessity for so acting. It would

200. "Preemption doctrine" (or the doctrine of preemption) and "preemptive self defense" are used interchangeably here.

201. See STANIMIR ALEXANDROV, *supra* note 15, 166.

202. See LORI DAMROSCH, et al, *supra* note 77, 1187.

203. See The National Security Strategy of the United States of America 15 (Sept. 2002).

appear that this would no longer be self defense, but reprisal, because as has been stated, “*For the use of force to be permissible under the Charter, such force must . . . be immediately subsequent to and proportional to the armed attack to which it is an answer. If excessively delayed or excessively severe, it ceased to be self defense and became a reprisal ... an action inconsistent with the purposes of the United Nations.*”²⁰⁴ Reprisal attacks, unlike acts of self defense which are defensive, are punitive in character.²⁰⁵ Thus, the preemptive doctrine has no legal basis under international law. It is on this basis that the United States’ bombing of Iraq in 1993 has been criticized. The United States had fired twenty three tomahawk missiles on Iraqi military outposts,²⁰⁶ allegedly in response to an Iraqi plot, supported by the then President of Iraq, Saddam Hussein, to assassinate former President George H. Bush while he was on a visit to Kuwait. Based on an investigation carried out by the Secret Service, Federal Bureau of Investigation, and Central Intelligence Agency,²⁰⁷ which resulted in a report containing circumstantial evidence, the Clinton administration believed that the assassination plot in fact existed and sought justification for the bombing under the right of self defense in Article 51 of the UN Charter.²⁰⁸ Those who hailed the action of the United States in bombing Iraq as being permitted under self defense have proffered some arguments, the validity of which is doubtful. They opine that, considering the strained international relations between the United States and Iraq at that time, the bombing was justified.²⁰⁹ They also claim that judging from Iraq’s antecedents on the international plane (its conduct in the Gulf War and its interference with United Nations inspectors) future assassination plots by Iraq were feasible.²¹⁰ These arguments are anything but persuasive. There are strong points to show that the United States’ missile attack on Iraq has no justification in international law. First, assuming the assassination plot on the President of the United States was real, since the plot was discovered and therefore foiled before its execution, could it be said there was an armed attack on the United States or even a threat of attack?²¹¹ The answer is clearly in the negative. Again, still based on the

204. See GA, 20th Session, Sixth Committee, 886th mtg. (Dec. 1, 1965).

205. See Report of the International Law Commission, 32nd Session, 1980 II (2) Yearbook of the International Law Commission 1, 53- 54.

206. See Ryan Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the UN Charter*, 19 B.U. Int’l. L. J. 207 (2001).

207. See Alan Surchin, *Terror and Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 Duke J. Comp. & Int’l L. 457, 459-461 (1995).

208. See Ryan Hendrickson, *supra* note 206, 213.

209. See Lieutenant Commander Winthrop, *Attack on the Iraqi Intelligence Service Headquarters*, 1993 Army Law 45 (1993).

210. Alan Surchin, *supra*, note 207, 474.

211. See Ryan Hendrickson, *supra*, note 206, 214.

assumption above, the bombing was not necessary considering the time the assassination plot was uncovered and the time the attack took place (two-month interval).²¹² The attack also was not proportionate to the alleged threat. It was therefore a reprisal rather than a defense. There was ample time for the United States to take other measures, like negotiation or making a report to the Security Council, and perhaps seeking its authorization to respond to the assassination plot.²¹³

The National Security Strategy of the United States, which is targeted at terrorism, has many flaws. As can be seen, one of the objectives of the Bush Doctrine is to deter and prevent terrorists who have the potentials to attack in the future, and this deterrence would involve the use of force on those states the United States perceive to be involved in terrorist activities, including the harboring of terrorists. What threshold would be used to measure what would be necessary and proportionate to prevent a future attack, which likelihood of occurrence is more of a guess work than a scientific determination? Much as the majority of the international community lent their support to the United States in its military operations in Afghanistan following the 9/11 attacks, the circumstances of which were quite ascertainable and justifiable, an extension of the war on terrorism to states that are not directly connected²¹⁴ to the terrorist attacks on the United States²¹⁵ would need extra-ordinary argument to fit into the requirements of international law.²¹⁶ It was based on the Bush Doctrine that Iraq, Iran and North Korea were identified by the United States as the “Axis of Evil”, and the war on terrorism extended to them. While not making any argument regarding the legality of the acquisition of weapons of mass destruction by states, a hazy area the International Court of Justice has not been able to clear,²¹⁷ the possession of, or capacity to possess, weapons of mass destruction by a state does not lead

212. The alleged assassination plot was discovered in April 1993 while the bombing took place in June 1993. See Alan Surchin, *supra* note 207, 474-475.

213. See STANIMIR ALEXANDROV, *supra* note 15, 187..

214. The United States and the United Kingdom could not substantially link Saddam Hussein with the 9/11 attacks. See UK Foreign Affairs Committee, Seventh Report of Session 200-02, Foreign Policy Aspects of the War Against Terrorism, HC 384, para. 215.

215. In its letter to the Security Council under Article 51 of the UN Charter following the 9/11 attacks, the United States had remarked: "... our inquiry is still in its early stages. We may find that our self defense requires further actions with respect to other organizations and other states". See S/2001/946.

216. For the controversy surrounding this extension of the fight against terrorism, see Glennon, *The Fog of Law: Self Defense, Inherence and Incoherence in Article 51 of the UN Charter*, 25 Harvard Journal of Law and Public Policy, 539 (2002); Bothe, *Terrorism and the Legality of Preemptive Force*, 14 E.J.I.L., 227 (2002); Sofaer, "On the Need of Preemption, 14 E.J.I.L., 209 (2003).

217. See *Legality of the Threat or Use of Nuclear Weapon Weapons*, International Court of Justice, Advisory Opinion, 1996 I.C.J. 226, para.48.

to the conclusion that such possession or capacity thereof is for terrorist purposes.

The preemption doctrine was invoked again by the United States to attack Iraq in March in 2003, with the military support of the United Kingdom and Australia under Operation Iraqi Freedom, in the absence of an express authorization from the United Nations Security Council.²¹⁸ The purpose of the Operation was to purge Iraq of its weapons of mass destruction. Like the 1993 missile attacks on Iraq, the legality of this joint venture has been an issue of controversy among scholars and commentators,²¹⁹ especially considering the fact that after Saddam Hussein was forced out of power in Iraq in April 2003, the United States and the United Kingdom did not discover any weapons of mass destruction in the possession of Iraq.²²⁰ International law, at least in principle, presumes the equality of states. The danger of the preemptive doctrine is that if it is claimed by one state, other states would equally seek to invoke it.²²¹ Terrorism is a dastardly act that is both detested and reprehensible in international law. No well meaning state can condone acts of terrorism. The efforts at fighting terrorism should be concerted and coordinated. However, international law is an embodiment of rules regulating the relations of states. The United Nations Charter is the most important document regulating international relations, supplemented or rather complemented, by rules of customary international law. Whatever conduct that is undertaken by a state, either individually or with another state, should conform to both the UN Charter and customary international law. The preemptive use of force does not seem to have support under both regimes.

V. COLLECTIVE SELF DEFENSE

A. INTRODUCTION

Both customary international law and the UN Charter recognize the right of collective self defense. Article 51, in addition to its provision for individual self defense, entitles a state to the right of collective self defense if an armed attack occurs. A preliminary issue that may be raised here is whether a non-member of the United Nations is entitled to the

218. See CHRISTINE GRAY, *supra* note 80, 270.

219. See *Agora: Future Implications of the Iraqi Conflict*, 97 A.J.I.L. 253 (2003); Kessings (2003), 45453, 45508, 45520, 45588; CHRISTINE GRAY, *supra* note 80, 193- 194.

220. UMOZURIKE has observed that "thorough searches after the invasion of Iraq showed there were no weapons of mass destruction nor were the links with terrorist groups established". See UMOZURIKE, *supra* note 63, 207; See also CHRISTINE GRAY, *supra* note 80, 183.

221. See LORI DAMROSCH, et al, *supra* note 77, 1187.

right of collective self defense. In other words, can members of the United Nations act in collective self defense in favor of a non-member? State practice shows that the answer is in the affirmative.²²² The right of self defense, whether individual or collective, is inherent in all states, and a state should not be denied the right on account of its non membership of the United Nations. Another point is that collective self defense is not merely the aggregate of individual right of self defense, since practice has shown that a third state may exercise the right of collective self defense even where it has no interest of its own to protect, provided that the victim state has suffered an armed attack.²²³ Collective self defense could be by a third state, or in the form of regional organizations or arrangements.²²⁴

B. COLLECTIVE SELF DEFENSE BY A THIRD STATE

A state may act in collective self defense in aid to a victim state, whether or not there is a treaty obligation between it and that other state, provided there has been an armed attack on the state being defended, and it has requested the assistance of the first state. In addition, the victim state should have declared itself to have been attacked.²²⁵ Hence, it has been observed that during the San Francisco Conference, Article 51 was intentionally transferred from Chapter VIII to Chapter VII "with the result that the right of collective self defense is entirely independent of the existence of a regional arrangement".²²⁶ The views expressed at some point in the past that the right of collective self defense could avail a third state only if there was an existing agreement for collective defense between it and the victim state,²²⁷ and that a common interest must exist between the two states²²⁸ are positions incompatible with Article 51 which recognizes self defense as a right and not a duty, although it could metamorphose into a duty by regional arrangements or collective self defense pacts.²²⁹ However, in a majority of the cases, there is a treaty relationship or arrangement between the third state and the state being defended.²³⁰

222. See IAN BROWNLIE, *supra* note 32, 280, 329.

223. This is inferable from the judgment of the I.C.J. in the Nicaragua case. See para 211.

224. It may also be by a group of states with an express approval of the United Nations. See STANIMIR ALEXANDROV, *supra* note 15, 252- 278.

225. See the Nicaragua case, *supra* note 100, paras. 195, 199, 232.

226. See Wadlock, *supra* note 96, 504.

227. See Kulski, *The Soviet System of Collective Security Compared with the Western System*, (44) A.J.I.L. 453 (1950).

228. See McDOUGAL and FELICIANO, *supra* note 92; BOWETT, *supra* note 54.

229. See STANIMIR ALEXANDROV, *supra* note 15, 109, 102.

230. See Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Hague Recueil 455 (1952-II).

Like the right of individual self defense, collective self defense has been subjected to abuse by states. In some instances, a state may claim a right of collective self defense when there has been no armed attack. In Lebanon in 1958, a struggle for power had occurred within the Lebanese government, which led to the infiltration, into Lebanese territory, of armed men and arms supply from Syria in the United Arab Republic, but there was no attack on the territory of Lebanon. Lebanon felt there had been interference in its internal affairs by the United Arab Republic.²³¹ On the request of Lebanon, the United States sent its troops to Lebanon and claimed the purpose was to help Lebanon stabilize the political situation created by the interference of the United Arab Republic, pending when the United Nations would take necessary measures in respect of the situation.²³² The United States and Lebanon relied on collective self defense under Article 51 of the UN Charter. Although states were divided in their opinion as to the legality of the intervention of the United States,²³³ there was no clear basis for the exercise of the right of collective self defense by the United States in the absence of an armed attack. The failure of the United States to cite any incident of armed attack on Lebanon by the United Arab Republic strengthens this conclusion.

The General Assembly frowned at a similar effort, by the Soviet Union, to place reliance on Article 51 of the UN Charter, in December 1979, to justify its intervention in Afghanistan. This was after an attempt by the Security Council to pass a resolution condemning the action of the Soviet Union was defeated by the veto of the Soviet Union.²³⁴

C. REGIONAL ORGANIZATIONS/ARRANGEMENTS

Although it has been stated that collective self defense generally does not depend on the existence of a treaty or other form of agreement, states do enter into treaties on collective self defense, where they create a duty on all members to assist one another in the face of an armed attack against a member. The treaties so made create a duty of self defense, supplemented by the right of self defense under Article 51 of the UN Charter, to the extent that an attack on a member is seen as an attack on all the members entitling them to collective self-defense.²³⁵ One

231. Lebanon made other allegations against the United Arab Republic, including acts of terrorism. See the letter of Lebanon of May 22, 1958 to the Security Council, UN Doc. S/4007, 13 SCOR, Suppl. April-June 1958, at 33.

232. See 13 SCOR, 827th meeting, 15 July, 1958.

233. See CHRISTINE GRAY, *supra* note 80, 144.

234. See STANIMIR ALEXANDROV, *supra* note 15, 226-227.

235. See Mrazek, *Prohibition of the Use and Threat of Force: Self Defense and Self Help in International Law*, 27 Canadian Yearbook of International Law 81 (1989). The North Atlantic

clarification must be made here. Article 51, which provides for collective self defense, is not part of Chapter III of the UN Charter- the provision on regional arrangements. Regional arrangements are indirect instruments utilized by the Security Council to maintain international peace and security, and any action taken under the regional arrangements must be with the authorization of the Security Council.²³⁶ On the other hand, the exercise of the right of collective self defense under Article 51 does not require the prior consent of the Security Council. Despite the foregoing distinction, a self defense treaty can have the dual character of a self defense pact and a regional arrangement.²³⁷ However, the danger inherent in this dual character of a treaty is that a regional arrangement or organization may, under the guise of exercising the right of collective self defense pursuant to Article 51 take enforcement action under Chapter III of the UN Charter without obtaining the consent of the Security Council.²³⁸

There have been less cases of collective self defense founded on treaties when compared with the number of collective self-defense treaties,²³⁹ and those instances were mired in controversy. In August 1968, Czechoslovakia was visited with an illegal use of force by a regional organization, comprising members of the Warsaw Pact under the guise of collective self defense. Part of the justification claimed by the Soviet Union was that the intervention was on the request of the government of Czechoslovakia. This defense was rejected by the majority of the Security Council members who based on evidence, especially the communication to it from the Foreign Ministry and the National Assembly of Czechoslovakia, found that there was no request by Czechoslovakia and that Czechoslovakia did not suffer any external attack.²⁴⁰

Treaty, in Article 5, provides that "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 ... they agree that, if such an attack occurs, each of them, in exercise of the right of individual or collective self defense ..., will assist the party or parties so attacked...". See Text of the Treaty in (1949) Vol. 43, A.J.I.L., 159.

236. See Article 53 of the UN Charter.

237. See Goodrich Hambro and Simmons, *supra* note 69, 350. In such a case to determine which of Article 51 and Chapter III would be invoked would require a determination of the action taken under that treaty. The North Atlantic Treaty has been characterized as both a collective self defense treaty and a regional arrangement. See BOWETT, *supra* NOTE 54, 222.

238. See Jean Combacau, *The Exception of Self Defense in U.N. Practice*, in ANTONIO CASSESE, ed., *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE*, 9 (Dordrecht, 1986).

239. On this and some of the collective self defense treaties, see CHRISTINE GRAY, 135-136.

240. See UN Doc. S/PV. 1441, at 31, 34 (1968).

D. THE ACTIONS OF ARMED BANDS AND IRREGULAR FORCES

In its efforts to define what constitutes an armed attack justifying the exercise of the right of self defense under Article 51 of the UN Charter, the International Court of Justice in the Nicaragua case placed some reliance on the Definition of Aggression²⁴¹ and came to the conclusion that the actions of armed bands, groups, and irregular forces or mercenaries amount to armed attack, where the scale of their effects is comparable to an actual armed attack and where they are attributable to a state.²⁴² This determination by the court of what amounts to armed attack became imperative since a state which is making a claim of collective self defense can only succeed if there had been an armed attack on the alleged victim state to justify the aid given by that state. The court came to the conclusion that the acts of Nicaragua, either in respect of El Salvador, Honduras, or Costa Rica, did not amount to an armed attack, and therefore the use of force by the United States against Nicaragua was not justified as an action in collective self defense.²⁴³ The court went ahead to hold that in respect of an unlawful intervention, which falls short of an armed attack, a third state has no right of “collective” armed response comparable to “the right of collective self defense in respect of an armed attack.”²⁴⁴ Assuming the alleged actions of Nicaragua were proved against them, they could attract only proportional counter measures against it from El Salvador, Honduras and Costa Rica alone, but certainly not from the United States, being a third state.²⁴⁵ The court’s position on the actions of armed bands and irregular forces seems to find favor in state practice.²⁴⁶ When the United States intervened in Lebanon, purportedly on the request of the latter and in the exercise of the right of collective self defense, both countries, initially, did not raise the issue of armed attack. It was at a later stage that Lebanon contended that Article 51 did not envisage any difference between a regular army and irregular forces for purposes of exercising the right of collective self defense.²⁴⁷ The pronouncement of the court seems to have reduced the controversy as to whether or not actions of irregular troops amount to armed attack in order to trigger the exercise of the right of collective self defense.

241. See Resolution on the Definition of Aggression, GA Res. 3314 (XXIX) (Dec. 14, 1974).

242. *Nicaragua case*, *supra* note 100, para. 195.

243. *Nicaragua case*, *supra* note 100, para. 236-238.

244. *Nicaragua case*, *supra* note 100, para. 211.

245. *Nicaragua case*, *supra* note 100, para. 249.

246. See Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 I.C.L.Q. 712 (1958); Gill, *The Law of Armed Attack in the Context of the Nicaragua Case*, 1 Hague Yearbook of International Law 30 (1988).

247. See SC 833rd meeting, 18 July 1958.

E. THE SUPPLY OF ARMS

In the Nicaragua case, the United States had contended that the assistance rendered by Nicaragua to the rebels in El Salvador constituted armed attacks entitling it to act in collective self defense of El Salvador. The court, while disagreeing with the United States on this point, stated that assistance to rebels by way of provision of weapons or logistical or other support may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states, but such assistance does not constitute armed attack.²⁴⁸ The court observed that in customary international law, the act of a state in providing arms to the opposition in another state cannot be classified as an armed attack. Relating this to the conduct of Nicaragua, the court noted that even if the provision of arms by Nicaragua to the rebels in El Salvador was at its apogee, it would still not have amounted to armed attack.²⁴⁹ The ruling of the court did not go down well with some commentators who faulted it and thought that the action of Nicaragua amounted to armed attack.²⁵⁰ Other writers, however, were at one with the I.C.J.²⁵¹ During the United States' intervention in Lebanon in 1958, some states supported Lebanon's claim to the right to request the United States to send its troops to Lebanon. This claim has been said not to amount to a justification of the exercise of right of collective self defense, but as recognition of the right of the United States to send its troops to assist the Lebanese government.²⁵²

F. FRONTIER INCIDENT

The I.C.J. in the Nicaragua case also made a distinction between armed attack and frontier incident. In the conclusion of the court, while an armed attack gives rise to the exercise of the right of individual and collective self defense, a mere frontier incident does not. This distinction is dependent on the gravity and effects of the alleged action upon which a claim of collective self defense is founded.²⁵³ This implies that an

248. *Nicaragua case*, *supra* note 100, para. 195.

249. *Nicaragua case*, *supra* note 100, para. 230.

250. See Sofaer, *Terrorism, the Law and the National Defense*, 126 *Military Law Review* 89, 94 (1989); Nicholas Rostow, *Nicaragua and the Law of Self Defense Revisited*, 11 *Yale Journal of Int'l L* 437, 453 (1987); Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 *A.J.I.L.* 151, 154 (1987); Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 *A.J.I.L.*, 43 (1986).

251. See Tom Farer, *Drawing the Right Line*, 81 *A.J.I.L.* 112, 113-114 (1987); James Rowles, "Secret Wars", *Self Defense and the Charter: A Reply to Professor Moore*, 80 *A.J.I.L.* 568, 572 and 579 (1986); Paul Reichler, and David Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder*, 11 *Yale Journal of Int'l L* 462, 470-471 (1985-1986).

252. See CHRISTINE GRAY, *supra* note 80, 144.

253. *Nicaragua case*, *supra* note 100, para. 195.

armed attack has a more serious connotation and effect than a mere frontier incident. This bears resemblance to the proportionality requirement, and has been criticized as vague.²⁵⁴ This brings in the element of judgment and what criteria should be used in making this determination. Although the court established that Nicaragua had made certain trans-border incursions into Honduras and Costa Rica, which incursions were imputable to the government of Nicaragua, it could not find any material evidence which would have enabled it to ascertain the circumstances of those incursions or their motivations, and to determine whether they amounted, singly or collectively, to an armed attack by Nicaragua on either or both Honduras and Costa Rica, justifying the United States to act in collective self defense.²⁵⁵ It then means that another criterion used in labeling an act either as an armed attack or a frontier incident is the “circumstances and motivation” test. It is doubtful to what extent this test could be applicable. The distinction between armed attack and frontier incident has been criticized.²⁵⁶ It has been thought to be inconsistent with the requirement of Article 51 of the UN Charter,²⁵⁷ and as capable of engendering violence in international politics.²⁵⁸ However, the distinction is supported in some quarters.²⁵⁹ Although Judge Schwebel gave a dissenting opinion in the final judgment of the court, especially with respect to the conclusion drawn by the court that there was no armed attack by Nicaragua against El Salvador to which the United States might respond in collective self defense, he agreed with the court on the distinction between armed attack and frontier incident.²⁶⁰ The court did not, however, elaborate on this distinction.

G. LIMITATIONS OF THE RIGHT OF COLLECTIVE SELF DEFENSE

Although the right of collective self defense is inherent, there are circumstances under which its exercise can be limited. These circumstances could be seen as conditions for the exercise of such right. These conditions are put into consideration by the court when determining whether or not a particular claim to the right is justified. The

254. See Ian Brownlie, *supra* note 246, 366.

255. *Nicaragua case*, *supra* note 100, para. 231.

256. See DINSTEN, WAR, AGGRESSION AND SELF DEFENSE, 175, 3rd ed., (2001); Schachter, *In Defense of International Rules on the Use of Force*, 53 *University of Chicago Law Review* 113 (1986).

257. See Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self Defense*, 81 *A.J.I.L.* 135 at 139 (1987).

258. See Reisman, *Allocating Competences to Use of Coercion in the Post Cold- War World, Practices, Conditions, and Prospects*, in DAMROSCH and SCHEFFER (eds.), *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, 26, 39-40 (1991).

259. See Farer, *Drawing the Right Line*, 81 *A.J.I.L.* 112 (1987).

260. See Schwebel, *Dissenting Opinion*, para. 15.

conditions were recognized and applied by the International Court of Justice in the Nicaragua case. One of the requirements is that the victim of an armed attack has to make a declaration that it has been attacked. The second requirement is that a state may not be entitled to the exercise of the right of collective self defense except there is a request to it for assistance by the victim state. On the first requirement, the court in the Nicaragua case noted that being the victim of an armed attack, it is only the state, which has been attacked that must form and declare the view that it has been so attacked. This duty cannot be delegated to any other state. The court reasoned that under customary international law, the state seeking to exercise the right of collective self defense is not permitted to make its own assessment as to whether or not the victim state has been attacked.²⁶¹ The court went further to justify this requirement, stating that since it is the victim state that is the most directly aware of the armed attack, it is that state that would likely make public the fact of the armed attack on it.²⁶² With regard to the second condition that the victim of an armed attack must have requested the assistance of the state which comes to its aid, the court observed that:

In customary international law ... there is no rule permitting the exercise of collective self defense in the absence of a request by the state which regards itself as the victim of an armed attack. The court concludes that the requirement of a request by the state which is the victim of the alleged attack is additional to the requirement that such a state should have declared itself to have been attacked.

The court was of the view that when a state is attacked and wishes another state to come to its aid in collective self defense, it would usually make an express request in that regard.²⁶³

It is important to note that the occurrence of the two requirements must precede the action taken in collective defense of the victim state. In other words, both the state's declaration that it has been attacked and its request for assistance must take place before the third state can exercise its right of collective self defense for the benefit of the victim state. Thus, in the Nicaragua case, the court discovered, through evidence, that the United States' action against Nicaragua, allegedly taken as an exercise of collective self defense in favor of El Salvador, Honduras, and Costa Rica, had already commenced before El Salvador made a declaration that

261. *Nicaragua case, supra* note 100, para. 195.

262. *Nicaragua case, supra* note 100, para. 232.

263. *Nicaragua case, supra* note 100, para. 232.

it was a subject of armed attack and requested the assistance of the United States. In the case of Honduras and Costa Rica, there was no evidence to show that they had made either a formal declaration or had requested for the United States' assistance.²⁶⁴ The two requirements do not apply retrospectively; neither can they be used to remedy a breach of the prohibition of the use of force, as the United States attempted to do in the Nicaragua case. They are not curative.

The court came to the conclusion that the United States had failed to meet the condition *sine qua non* for the exercise of the right of collective self defense. Therefore, the court held that the defense of collective self defense did not avail it, and that it had violated the law prohibiting the use of force in international law.

There is a general controversy as to whether the two conditions that for a right of collective self defense to arise there should have been both a declaration by the victim state that it had been attacked and a request for assistance by that state, are mandatory. For instance, it has been argued that once an armed attack has occurred against a state, the belief of the victim as to what has occurred is of no consequence because the state acting in collective self defense is equally subject to the armed attack.²⁶⁵ This position seems to be founded on the view that for a third state to exercise the right of collective self defense it must have an interest of itself to protect arising from, say a treaty.²⁶⁶ But this view is not represented in general state practice. While it is conceded that in many of the cases where collective self defense has been claimed, there was a treaty relationship between the alleged victim and the aiding state,²⁶⁷ there have equally been cases where such treaty relationship did not exist and this was not raised as a ground vitiating the claim of collective self-defense.²⁶⁸ Judge Schwebel considered the two requirements as not formal,²⁶⁹ while Judge Jennings believed that a strict insistence on the conditions might be unrealistic.²⁷⁰

Although the court in the Nicaragua case, apart from its reference to Article 3(2) of the Rio Treaty, did not cite any other authority to support

264. *Nicaragua case*, *supra* note 100, para. 233, 234, 236.

265. See Macdonald, *The Nicaragua Case: New Answers to Old Questions*, Canadian Yearbook of International Law 127 at 143 (1986).

266. This was the view expressed by Judge Jennings in his Dissenting Opinion. See para. 545.

267. For example, the United Kingdom and the South Arabian Federation; El Salvador, Honduras, Costa Rica and the United States; Chad and France.

268. United States/Lebanon (1958), United Kingdom/Jordan (1958); United States and United Kingdom/Kuwait (1990).

269. Schwebel, Dissenting Opinion, paras. 191, 221-227.

270. Jennings, Dissenting Opinion, 544-545.

the requirement of a request for assistance by the victim state and cited no authority in respect of a declaration by the victim state that it has been attacked, it would not be baseless to argue that the two conditions are mandatory. The two conditions are the means through which the victim state can intimate the aiding state of its predicament. Therefore, they form the basis upon which the third state can come to assist the state which has suffered an armed attack. Besides, as the court said, and rightly too, it is only the victim state, the subject of the armed attack, that can correctly make the assessment of whether or not it has suffered an actual attack. Only that state has that competence because it is directly at the receiving end. After all, it is said that, "he who wears the shoes knows where they pinch." Leaving the third state to decide when a victim state has suffered an armed attack and to decide on its own that it would assist the attacked state, will lead to the third state acting contrary to the wishes of the victim state and against the norms of international law.

CONCLUSION

The concept of self defense is riddled with controversies, central to which is the relationship between self defense under the UN Charter, precisely Article 51, and under customary international law. Here various issues have come into play, including "armed attack" and "anticipatory self defense," in which may be subsumed the "preemptive doctrine." While the International Court of Justice in the Nicaragua case seemed to have dealt in great detail with what constitutes an armed attack, the same cannot be said of anticipatory self defense. The exposition given by the court on the definition of armed attack is remarkable, although criticisms are still expressed by writers and commentators regarding some of the findings of the court. The Caroline incident (that is the most appropriate expression since it did not come before any formal arbitrator, court or tribunal) is the fulcrum of the argument for anticipatory self defense, and much of the legal literature is replete with reference to that incident. That authority is shaky in this regard. The conditions outlined in the Caroline incident upon which the claim to the legality of anticipatory self defense could be determined, strictly speaking, apply to self defense when an actual armed attack has occurred and not to anticipatory self defense. The conditions of necessity (which technically includes immediacy) and proportionality are more relevant in the determination of an occurrence of armed attack, than in a finding as to whether an armed attack is imminent. By way of concession, it might be agreed that the requirement of necessity can be applied in determining how imminent an attack is, as would warrant anticipatory self defense, though with some difficulty. But it is doubtful if the application of the condition of proportionality to

anticipatory self defense is practicable. How does one measure the proportionality of an action taken in anticipatory self defense in relation to an armed attack that has not been commenced let alone consummated? This, if not impossible, is extremely difficult. If Country A attacks Country B in self defense of an anticipated armed attack from Country B, what threshold will be applied by Country A in assessing the proportion of the yet-to-be unleashed attack? Whatever criterion that is employed will be clearly arbitrary. To this end, the Caroline incident does not offer a logical platform on which anticipatory self defense can be placed. The arguments put up by some writers in support of anticipatory self defense are strenuous attempts to stretch the scope of Article 51. It should be noted that the arms of Article 51 are not collapsible and like all non collapsible articles, any unreasonable pressure exerted on it would result in its breakage, which would be contrary to the intentions of the drafters of the United Nations Charter.

Anticipatory self defense is not inferred from a reading or interpretation of Article 51 of the UN Charter. The term “armed attack” as used in that provision has no ambiguity and no attempt should be made to import any ambiguity into it. However successful a state’s claim to the use of self defense against a future attack may be, such claim cannot be clearly founded upon customary international law. From the trend of academic opinions, it appears the uncertainty and controversy surrounding the interpretation of Article 51 will continue unabated, with the sophistication of the nature of particular weapons. States will still be left with the liberty to determine what constitutes an armed attack and when an armed attack has occurred as to trigger the exercise of the right of self defense. With this state of affairs, the argument of those who doubt the law character of international law becomes strengthen.