ADDIS ABABA UNIVERSITY FACULTY Of LAW POST GRADUATE STUDIES

SELF DEFENSE UNDER INTERNATIONAL LAW EMERGING TRENDS AND ISSUES

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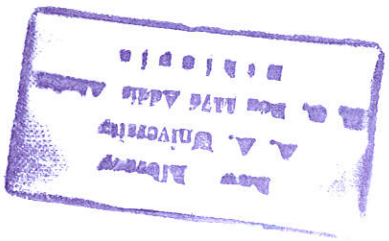
SUBMITTED FOR THE PARTIAL FULFILLMENT OF THE REQUIREMENT FOR MASTERS DEGREE IN PUBLIC INTERNATIONAL LAW, TO THE FACULTY OF LAW



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SELF-DEFENSE UNDER INTERNATIONAL LAW- EMERGING TRENDS AND ISSUES SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE LLM DEGREE.(PUBLIC INTERNATIONAL LAW)

BY:

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CHAPTER ONE

Introduction

1.1 The Research Problem

International law operates towards strengthening world peace and security. This is more or less achieved by imposing mandatory obligation on sovereign states to respect each other's sovereignty. To this end Article 2(4) of the United Nations Charter provides that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent/; with the purpose of the United Nations' .It is not uncommon for a situation to arise that compels a state to use force to defend itself. International law allows a state to do so but on certain conditions. This use of force by a state as an exception to Article 2(4) of the Charter is clearly provided under Article 51 of the Charter, which provides

> "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 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"

As can be understood from this provision the right of self defense is available for a state when **armed attack** is launched against it.

However some countries without being the victim of armed attack used force outside of their territories on the ground of self-defense. The following are cases in point.

- In 1975 the United States used force to rescue an American cargo boat and its crew captured by Cambodia[1]

- In 1976 Israel undertook a rescue operation by the use of force to rescue its nationals who were held hostages by Palestinians and other terrorists at Entebbe following the hijack of an Air France Airliner.[2]
- The United States conducted a bombing raid on Libya on 15 April 1986 as a consequence of alleged Libyan involvement in an attack on US servicemen in Western Berlin[3]
- Again on 26 June 1993 the US launched missiles at the headquarters of the Iraqi military intelligence in Baghdad as a consequence of an alleged Iraqi plot to assassinate former US president Bush in Kuwait.[4]
- Recently (2006) Ethiopia intervened in Somalia to dislodge the Union of Islamic Courts and justified its action as self-defense.

The whole problem boils down to the interpretation of the scope of Article 51 of the Charter. On the one hand there is an argument that favors extended interpretation of Article 51, on the other hand there is an argument that favors narrow interpretation of the same. More specifically the crux of the matter is imbedded in the phrase 'armed attack' which is the corner stone of Article 51. The Charter does not define what armed attack is all about. Even the General Assembly which seemed to have

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[1] Malcolm Shaw ,*International Law* (Fourth edition Cambridge University Press Cambridge 1997) 791
[2] Ibid.
[3] Ibid.
[4] Ibid.

understood the ambiguity of the word 'aggression' and defined it in resolution 3314(XXIV), 1974[5] did not take the challenge to define the phrase 'armed attack' in Article 51,a phrase which would have been given as equal emphasis as the word 'aggression'

Consequently, states resorted to self-judgment as to what constituted "armed attack" in their use of force even outside of their territories under the cover of self-defense within the meaning of Article 51 of the Charter. Even terrorist attack is defined by some victim states of the attack as armed attack and hence responded with the uses of force justifying their actions as self defense under Article 51.

1.2. Research Questions

Having seen the problems described above the research questions raised by this paper are the following;

1. What is the contemporary agreed upon definition of self-defense?
2. What are the emerging trends subsequent to the coming into force of the UN Charter? and
3. The legality of these trends

1.3. Objective of the Study

The objective of the study is to describe what self defense in international law is all about and to identify the problems associated with it together with giving answers to the questions raised above and other related questions

1.4. Scope of the Study

Except mentioning few instances of the pre- Charter (pre 1945) period which are considered as very essential to the topic, such as the Caroline

[5] United Nations General Assembly Res. .3314 (XXIX) (14 December 1974) Article 1

case, (1837) in which the essential elements of self defense in customary international law were established the study concentrates fully on the post 1945 period i.e. self defense as provided under the United Nations Charter.

1.5. Significance of the study

International peace and security is the concern of the whole of the international community. The question of peace and security is the question of survival. Self-defense is one of the factors that have a close relationship with international peace and security. Hence analysis of self defense under international law plays a significant role in indicating the future of international peace and security and creates in ones mind the questions; should the current trend be allowed to continue? Should the UN Charter be amended so as to accommodate the existing trends? . The significance of the study is to be viewed along this line.

1.6. Limitations of the study

The study is based on literature, state practice and to some extent on Security Council resolutions. There are no ample cases decided by the International Court of Justice on questions of self defense except few ones like the Corfu Channel case .For this reason the study is not supported by many decided court cases. However the writer thinks that the lack of court cases is not that much serious to affect the result of the study. As to the geographical limitation, the study is limited in Addis Ababa as it is the seat of many international organizations, it becomes easier to get the required information if the need arises.

1.7 Research Method

The research method employed in writing this paper is examination of international treaties, international custom, the writings of jurists, legal materials such as the United Nations Charter, resolutions of the General Assembly and the Security Council of the United Nations.

1.8 Organization of the paper

The paper is organized into four chapters. Chapter one is introduction. Chapter two deals with the conception of self defense under the United Nations Charter under which the provision of Article 51 is analyzed in a detailed manner. Chapter three entitled "self defense distinguished from other forms of self help "tries to show the difference among self defense, reprisals and retortions. Chapter four is about emerging trends and issues and deals with the controversial concept anticipatory self defense on the grounds of protection of nationals abroad, terrorist attacks, mere threats short of force. Finally, a brief conclusion of what is dealt with the four chapters will follow.

Chapter Two

The Conception Of self-defense

Under The Charter Of The United Nations

2.1 Introduction

Under this chapter an attempt is made to define self-defense, the essential features of self defense are briefly discussed, a detailed analysis of Article 51 of the United Nations Charter is made, some cases of individual and collective self defense are mentioned and finally a brief conclusion of the chapter is made.

2.2 Definition

We do not find the meaning of self-defense in a legal document such as the United Nations Charter. However the International Law Commission gives the following definition:

> One definition of self defense in interstate relations is a lawful use of force (principally counter force) under conditions prescribed by international law in response to the previous unlawful use (or the threat) of force[1]

At this juncture it is worth noting the essential elements embodied in the above definition

First, one can talk of self-defense in international law within the bounds of interstate relations only. From this it follows that the use of force in intrastate conflicts is outside of the domain of self-defense under international law. The reason behind this is that international law governs the relations between sovereign states, not domestic or internal affairs, which is the concern of municipal law.

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[1] Report Of The International Law Commission ,32nd Session ,II(2) ILCYBI, 53(1980)

Second, self-defense is a derivative of unlawful use of force. Therefore the source of self-defense proper is always an illegal use of force. This means that unless there is an illegal use of force by a state on another state there cannot exist the right of self-defense. So one can see the order that unlawful use of force occurs first and then self-defense follows but not the vice versa

Third, self-defense is not occasioned by unlawful use of force only, but it is also occasioned by the threat of force i.e. without the occurrence of the use of force

Fourth, self-defense as the lawful use of force is to be exercised under conditions prescribed by international law. In this regard a question may be raised as to what those conditions in international law are. These conditions will be dealt with under the subsequent sections when Article 51 of the United Nations Charter is analyzed in a detailed manner.

2.3. Essential Features Of Self Defense

Self-defense be it individual or collective has its own characteristic features which include the following;

1) Inherent nature of a state

As is expressly stated under Article 51 of the Charter self defense is an inherent right of a State to defend itself from an illegal use of force against it by an other State .It can be likened with human "right which is also inherent in each individual person .As human right is natural to each person that cannot be taken away from or given to an individual by any government, self defense as a natural right of a State cannot be given to it nor taken away from it by any state.

2) No Exhaustion Of Peaceful Settlement

A State that is a victim of an armed attack is not required to exhaust peaceful means before it can resort to the use of force to defend itself. It

is its discretion to decide whether to settle the dispute by peaceful means or to use its right of self-defense. No one can dictate it which measure to take except the special circumstance in which it finds itself.

3) Non Applicaabilty Of Veto

Since the exercise of the right of self defense is only with in the power of the victim State, to use or not to use this right cannot be brought to the agenda of the Security Council and hence cannot be vetoed at all.

4) Not A Collective Security Action

Self-defense is not a collective security action or an enforcement action, which is taken by the Security Council pursuant to Articles 39 and 42 of the United Nations Charter. On this particular point Kelson writes as follows:

> Collective self-defense under Article 51 must be distinguished from the system of collective security as established by the Charter in Article 1 paragraph 1, Article 24 para. 1 and Articles 39,41 and 42. Collective self defense under Article 51 is certainly an effective collective measure, but not the collective measure referred to in Articles 1,24, 39,41, and 42. The difference between collective self defense under Article 51 and the measures of collective security taken under Articles 39 41 or 42 is that the latter are actions of the Organization whereas the former are actions of individual members of the United Nations; that consequently the question as to whether there exists an act of aggression is to be decided by a central organ of the United Nations whereas in the latter case -at least provisionally by each member acting under Article 51, and finally that enforcement action taken by the Security Council as a measure of collective security is the ordinary and by the Charter intended reaction against a breach of the peace committed by an act of aggression

,whereas the collective self defense under Article 51 is purposed by the Charter as a provisional measure permitted only until the Security Council has taken the measures necessary to maintain international peace and security. That is to say; individual and collective self defense are admitted only until the machinery or collective security is put into action. ... The application of Article 51 is intended by the Charter only as a temporary measure; not as a substitute for the collective security to be realized by the Organization.[2]

5) Self Preservation

Self-defense is not synonymous with self-preservation. Self preservation is much broader a concept than the right of self-defense and it relates to the security of a State[3]. The difference between these two terms is made more clear by referring to an English case of 1884, in which when two men and a boy were cast away at sea in an open boat, and the men after their food and water had been exhausted for many days, killed and ate the boy, they were convicted of murder, although the jury found that in all probability all three would have died unless one had been killed for the others to eat.[4]

The obvious conclusion is that even though the motive was self-preservation, there was clearly no issue of self-defense. There was no attack against which the men had to protect themselves. They used force against the boy who neither attacked nor threatened them. Thus while self defense presupposes an attack, self preservation has no such

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[2] Hans Kelson , *The Law Of The United Nations ,A Critical Analysis Of Its Fundamental Problems* (Frederick A .Praeger Inc New York, 1966) 800

[3] Stanimir A. Alexandrov, *Self defense Against the Use of Force in International Law,*(Kluwer Law International , The Hague, Netherlands, 1996) 23

[4] Rv Dudley and Stephens(1884)14 Q.B.D 273

limitation, if broadly applied, it would serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a State.[5]

2.4. The Provision Of Article 51 Of The United Nations Charter

The general rule in international law is that states should co-exist peacefully and resolve conflicts that may arise among them, by peaceful means rather than resorting to the use of force. It is from this perspective that Article 2 paragraph 4 of the United Nations Charter provides the following:

> 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

But there may arise a situation where a state may be obliged to use force to defend itself. International law allows a state to do so, but under certain conditions. To this end Article 51 of the United Nations Charter provides as follows:

> Nothing in the present charter shall impair the inherent right of individual or collective self defense in 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

[5] Stanimir A. Alexandrov (n.3) 25

> any way affect the authority and responsibility of the Security Council under the present charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The wording of this Article signifies the existence of three categories of conditions for the exercise of the right of self-defense by a state. They are;

1. Condition precedent to the action of self-defense
2. Conditions simultaneous to the action of self defense
3. Condition subsequent to the action of self-defense

We will have a brief look at each of them.

2.4.1 Condition precedent to the action of self defense

This is a condition which must be fulfilled prior to the exercise of self-defense .The sole condition precedent in this case is the occurrence of an armed attack. A state is entitled to exercise its right of self-defense if and only if it is the victim of an armed attack .The crucial question to be raised at this point is the question as to what constitutes armed attack. The United Nations Charter does not define what the phrase "armed attack" is. In the absence of a legal definition to the term it becomes necessary to resort to a neighboring term which had been defined and from which the meaning of armed attack can be deduced.

> Eventhough the General Assembly's definition of aggression does not as such define the notion of armed attack, its Article 3 does in fact give some useful indications on how to interpret this term .The provision lists examples of acts of aggression all of which can, subject to certain

> qualification, be taken to characterize armed attack within the meaning of Article 51 as well.[6]

The neighboring term mentioned above that can be used to define armed attack relates to the term "aggression" under Article 39 of the United Nations Charter. The General Assembly of the United Nations defined aggression as follows:

> Aggression is 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, as set out in this definition[7]

What is more, Article 3 of the resolution enumerates the acts that can be categorized under aggression .The Article provides as follows:

> Any of the following acts regardless of a declaration of war shall subject to and in accordance with the provision of Article 2 qualify as an act of aggression.
>
> **a)** The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof
>
> **b)** Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state

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[6] Bruno Simma editor, *The Charter Of The United Nations ,a Commentary*,(second edition ,Oxford University Press, New York 2002).796

[7] United Nations General Assembly Res. .3314 (XXIX) (14 December 1974) Article 1

c) The blockade of the ports or coasts of a state by the armed forces of another state

d) An attack by the armed forces of a state on the land, sea, or air forces, marine and air fleets of another state

e) The use of armed forces of one state, which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement

f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for penetrating an act of aggression against a third State.

g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against an other state of such gravity as to amount to the acts listed above or its substantial involvement therein [8]

One may be convinced to think of the meaning of armed attack to be included under the meaning of aggression given above. Otherwise the General Assembly could have given the meaning of armed attack under Article 51 as it did for aggression under Article 39. The writer is of the opinion that armed attack as the name implies includes the use of arms,

for an attack cannot be called armed attack without the use of firearms. What is more, pursuant to Article 51-armed attack is launched against a state. These two features of armed attack (i.e. the use of firearms and the victim of the attack being a state) tally with those of aggression and

hence one can say that armed attack is a "subset" of aggression and there is no need to give a separate definition to it.

Although neither the United Nations Charter nor the General Assembly gave the meaning for "armed attack" some scholars for instance Oppenheim has attempted to define the phrase as follows:

> ...The requirement that there be an armed attack is clear, but not without difficulty .It includes direct attacks across an international frontier by a state's regular armed forces (if amounting to more than a mere frontier incident), and indirect attacks consisting of the sending by or on behalf of a state of armed groups or mercenaries into another state where they carry out acts of armed force for such gravity as would constitute an armed attack if conducted by regular forces. [9]

According to the above statement armed attack can be direct or indirect and in both cases armed groups are involved, any other act except these two cannot be considered as an armed attack. One can find a situation where a state rather than involving directly or indirectly in an armed attack against another state, simply gives a logistic assistance to a group or a state that launches an armed attack against another state. For example; If a certain state A, is at war with opposition groups in its territory and state B, a neighbor of state A, provides ammunition and other supplies to the opposition group, and state A, aware of this situation attacks the supply which are the properties of state B while being transported along the frontiers of state B, can state A's action be justified on the ground of self defense? Openheim's answer to this question is in the negative.[10] He argues armed attack doesn't include

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[8] Ibid Art.3
[9] Robert Openheim *International Law* ,p.417
[10] ibid. P. 418

such acts as assistance to the opposition groups taking the form of the provision of weapons, or logistic, financial or other support (although such acts may amount to an unlawful use or threat of force or to intervention in the internal affairs of a state)

The exclusion of provision of weapons or logistic assistance from "armed attack" seems non-plausible. The exclusion is equal in effect to separating the main components of the whole, and leaving the whole to exist without its component parts and give it the complete meaning, which naturally should not be the case. By the same token an armed attack cannot be carried out without ammunition and other logistics. If the attacked state is able to cut the supplies of ammunition and other logistics, definitely it has successfully defended itself. What is self-defense other than this then?

2.4.2 Conditions Simultaneous to The Action Of Self Defense

These are conditions to be fulfilled neither before nor after the action of self-defense but during the action itself, i.e. conditions that a victim state is supposed to meet while exercising its right of self-defense. These conditions include **necessity**, **promptness** and **proportionality,** conditions, which were expressly stated under customary international law. One cannot find these conditions expressly stated under Article 51 but could be taken as implied conditions under the same Article.

> The principles of proportionality and necessity are of outstanding legal and practical importance for the right of self-defense. Although Article 51 does not expressly state that these principles limit the right of self defense, it does not follow that these principles which are recognized for the traditional right of self defense, have been rendered inapplicable by the Charter provision. According to the better and prevailing view, any recourse to the right of self defense

> laid down in Article 51 is likewise subject to these principles of proportionality and necessity. Consequently lawful self-defense is restricted to the repulsion of armed attack and must not entail retaliatory or punitive actions.[11]

The issues of necessity, promptness and proportionality as conditions of self-defense in international law were raised for the first time in the well-known Caroline case of 1837.[12] The case arose out of the Canadian rebellion of 1837. The rebels recruited a number of Americans in Buffalo, New York and the combined force set up camp on Navy Island in the Niagara River upstream, from Niagara Falls, in Canadian waters. From Navy Island the rebels raided the Canadian shore and attacked passing British ships. On the night of December 29, 1837 Canadian Militia Crossed the Niagara River and set fire to the Caroline, a small American steamer that had been ferrying supplies to the rebels. The militia then set the burning ship adrift allowing it to plunge over the falls. At least two American crewmen were killed. In May of 1838, the Americans retaliated by burning a Canadian Vessel. This incident raised a hot debate between Daniel Webster the then American Secretary of state and Lord Ashburton, the then British special negotiator. Lord Ashburton argued that the Canadian militia had acted in self-defense. In response secretary Webster defined what a country must demonstrate to claim the excuse of self-defense. Accordingly, on July 27 1842[13] Webster sent a note to Lord Ashburton calling upon the British Government to show a

> Necessity of self-defense, instant, overwhelming leaving no choice of means and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to

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[11] Bruno Simma, Editor, The *Charter Of The United Nations, A Commentary*, (Second Edition, Oxford University Press, New York, 2002.)
[12] Ray August ,*Public International Law*,(Englewood Cliffs, Prince Hall Inc. New Jersey, 1955) 529
[13] R.Y Jennings , 'The Caroline and Mc Leod Cases' [1938] AJIL 32,89

> enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self defense, must be limited by that necessity, and kept clearly with in it. It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown that day light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the dankness of the night, while moored to the shore, and while unarmed men were asleep on board ,killing some and wounding others ,and then drawing her into the current ,above the cataract ,setting her on fire ,and careless to know whether there might not be in her the innocent with the guilty ,or the living with the dead ;committing her to a fate which fills the imagination with horror. A necessity for all these, the Government of the United States cannot believe to have existed.[14] (Emphasis added)

Lord Ashburton accepted Webster's definition "We are perfectly agreed on to the general principles of international law applicable to this unfortunate case"[15] he wrote. Although he attempted to justify the militia's conduct in the incident, he ultimately apologized, on behalf of the British for the injury done to the Caroline.

Although proportionality and promptness are not mentioned literally in the above quoted statement they are represented by two statements that can

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[14] Ibid.

[15] Ray August(n.12) 529

convey the same meaning. First, the underlined statement; "...the act justified by the necessity of self defense must be limited by that necessity and kept clearly within it..." is another way of talking about proportionality, and second, the other underlined statement which reads"...it must be shown that daylight could not be waited for..." refers to the issue of promptness. In other words, if it can be shown that daylight could not be waited for, it becomes a clear evidence of justification of the necessity of prompt action.

Promptness refers to the time within which the attacked state must use its right of self-defense to avert the attack launched against it.

According to the rule established in the Caroline case, a state must respond immediately to an armed attack. Failure to act immediately would result in loss of the right. Ray August foresees the problem of immediacy and asks, "How much time can lapse before there is no longer immediacy?" He attempts to try this question by linking the issue with the case of Falkland Islands and states:

> Once a state has exercised the right of self-defense, how long may it continue to do so? Under the scheme set up by Article 51 of the Charter the right of self-defense is a temporary one. It ends as soon as the Security Council takes measures necessary to maintain international peace and security. Ofcourse if the council fails to act or is unable to act because a permanent member casts a veto, the right of self defense may last indefinitely . . .[16]

It may not be possible to determine the question of promptness

i.e. how much promptness is promptness? It all depends on the particular case that arises. In other words, it may be hours, days, etc as

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[16] ibid. 533.

the case may be. For this purpose let's have a brief look at the case of the Falklands war that arose between Argentina and England in 1982.[17]

On April 2, 1982, Argentine forces invaded the Falkland Islands. The next day the Argentine forces took possession of South Georgia, approximately 800 miles to the East of the Falklands. The outnumbered British military garrison on the Falklands and South Georgia surrendered on April 2 and 3 respectively. Argentina took these actions to enforce its claims of sovereignty over the Falklands (which it calls the Malvinas) and South Georgia. Argentina's claim to the Falklands was based on its occupation of the islands between 1816 and 1833 and on a claim that it had succeeded to Spain's rights over the Islands following its own independence. On April 1, the president of the Security Council, acting for the council, called upon Argentina and the UK to refrain from the use or threat of force in the region. On April 3, following the Argentine action on April 2, the Security Council adopted resolution 502, which required the Governments of Argentina and the UK to refrain from the use of or threat of force in the region of the Falkland Islands.

A British task force sailed for the South Atlantic on April 5, 1982, and on April 25, they recovered South Georgia by force. On May 21 following the breakdown of diplomatic efforts, the British task force landed on the Falkland. The Argentine garrison surrendered on June 14.

It is clear from the case that Argentina's attack on the Falklands took place on April 2, 1982 and UK's self defense (if it can be called self defense at all) took place on May 21, almost a month and 20 days later therefore in the Falkland Island's case, the promptness on the part of the UK who alleged application of its inherent right of self defense, extended as far as a month and 20 days following Argentina's invasion of the Falkland Islands. Promptness, though it refers to immediacy, the time

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[17] ibid. 533-- 534

span may be prolonged by various factors such as the time taken in diplomatic negotiations, where the attacked state opts to use diplomatic means to settle the dispute before it exercises its right of self-defense by the use of force, and the geographical factors where the state alleging to use its right of self defense is geographically located far away from its attacked territory as in the case of Britain which is geographically located in Europe, but alleges to exercise its right of self-defense in its territory located in another continent Latin America.

With regard to proportionality it refers to the amount of force applied by an attacked state to avert the armed attack against it while exercising its right of self-defense. The result may not be similar to that of the original attack. Instead the attacking state may face consequences which are equal to, or more than, or even less than the original attack as the case may be .The result depends on the successful repulsion of the original attack. In general the two things to be compared in proportionality are the consequences of the original attack and the consequences of the counter attack by virtue of self-defense.

> The condition of proportionality has a special meaning in the context of a war of self-defense. When on the spot reaction or defensive armed reprisals are involved, proportionality points at symmetry or an approximation in "scale and effects" between the unlawful force and the lawful counter force. To gauge proportionality in these settings, a comparison must be made between the quantum of force and counter force used as well as the casualties and damage sustained.[18]

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[18] Yoram Dinstein *War Aggression and Self defense (*Second edition, Cambridge University Press New York, 1994) 231

Proportionality may or may not be confined to a particular area depending on the result of the defensive action. It may be confined to a particular area where the original attack took place if and only if the defensive action crashes the substantial part of the forces of the aggressor so that the chances of the attacking forces to launch further attack on the victim state is kept at a minimum. On the other hand, proportionality may not be confined to a particular area where the original attack took place and may be extended to a larger area if the attacking state's forces simply fled away from the territories of the attacked state without suffering proportional casualties. For instance if the forces of the attacking state constituted 5000 men during the attack which caused the death of 3000 men in the territory of the victim state and while the victim state was taking defensive action to repel the attack, the attacking forces suffering only 100 casualties, and the rest fled away from the territory of the victim state, the victim state may not stop chasing the enemy forces even up to their banker until it has caused a substantial injury, say, at least 3000 casualties.

> A similar argument is that owing to the requirement of proportionality, recourse to counter force in self defense has to be confined to the space where the armed attack was launched and should not be extended to remote areas. But these are misconceptions. As illustrated in the Gulf War, self-defense operations can legitimately take place throughout the region of war, and there is no need to adjust to artificial geographic limitations conveniencing the aggressor. In general, post Charter state practice shows that self defense, individual and collective, may carry the combat to the source of the aggression .War, if waged legitimately a response to an armed attack, need not be terminated at the

> point when the aggressor is driven back, and it may be carried on by the defending State until final victory. Particularly when engaged in a successful response to a large scale invasion, the defending State -far from being bound to stop at the frontier -may pursue the retreating enemy forces, hammering at them up to the time of their total defeat.[19]

A question may be asked as to who is determine the proportionality issue? It seems it is the state who exercises its right of self-defense that determines the situation for there is no any principle in international law that tells who should determine the proportionality of an action in self defense. Even if there is no rule of international law to this effect, and even if it is the discretion of the state to determine the issue of proportionality in a specific circumstance, it does not hold true to conclude that the international community is not capable of judging or having its own opinion about what ought proportional to be in a particular circumstance by appealing to commonsense. For example should the entire province of an attacking state be destroyed in response to an attack that destroyed a hospital? Is the massacre of 1000 civilians proportional to an attack that victimized only 100 people? Such and other similar situations do not pose difficulties to determine the issues of proportionality as they can be judged by appealing to common sense.

2.4.3 Condition Subsequent To The Action Of Self Defense

This is a condition which a victim state is required to fulfill after it has exercised its right of self defense .It relates to notification or report of the action taken on the ground of self defense .The condition is expressly provided under Article 51 which runs:

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[19] Ibid., 234

" ...Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council..."

The Article does not talk about the contents of the report but one can envisage that the report would include the justification of the measure showing the occurrence of armed attack, when and where the attack took place, the damage caused by the armed attack etc. For instance, in 1975[20] Cambodia seized the United States merchant ship Mayaguez off its coast and failed to release it even if the United States presented to it an ultimatum. Following the ultimatum the United States launched two attacks to release the crew in the process of which the Cambodian Military craft and installations were damaged and destroyed .The first attack was unsuccessful, and after the second attack when the ship was recovered and the crew freed, the United States reported to the Security Council on the measures taken against Cambodia, declaring that the use of force had been in self defense according to Article 51 of the Charter.[21]

The reason behind reporting measures taken by a state exercising its right of self-defense to the Security Council is to enable the Council to take measures to restore international peace and security for it is the organ of The United Nations entrusted with power by the United Nations charter. A question may be raised at this point as to what will happen if a state fails to report to the Security Council the measures it has taken on the ground of self-defense? Can it be taken as an aggressor? Or will it render self-defense as illegal? When compared with the previous two conditions (i.e. condition precedent to the action of self-defense, and conditions simultaneous to the action of self-defense), this third condition seems to be relatively less serious. If for example a State

[20] Stanimir A. Alexandrov, (n.3) 194.

[21] Letter of May 14 ,1975, Un Doc .S/1/684,30 SCOR

launches an armed attack on another state on the ground of self defense, when it is not a victim of armed attack (which is a condition precedent to self defense) it violates the United nations Charter and will be considered as an aggressor by the international community. Again if a state while acting under self-defense uses force, which is not proportional to that of the armed attack its action can be considered as aggression and hence will be, condemned by the international community. But, if a state exercised its right of self defense following the occurrence of armed attack against it, and used force proportional to the armed attack to repel the attack, but finally failed to report the measures it took to the Security Council, the failure would not bring harsh consequences as those mentioned in the first two conditions. In other words the defending state may not be considered as an aggressor, nor the failure will bring consequences that go to the extent of challenging the legality of self-defense. The fact that the defending state took action in self-defense cannot be a secret. Let alone the Security Council, the whole world will come to know about the action via mass media. So, although the Security Council did not receive the report from the defending state, it (the Security Council) can take measure on its own initiative to restore peace and security. In this regard Schachter [22] writes:

> ...This requirement, though explicit and unambiguous, has rarely been observed by states using force. However, the failures to report have not precluded the Council from considering, and in some cases passing judgment on such claims when the matter was raised by states that questioned the legality of the use of force.

Therefore, it does not mean that the defending state that violated the procedural requirement of reporting to the Security Council is free from

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[22] Oscar Schachter, 'Self-defense And The Rule of law' American Journal Of International Law, vol. 83.,p.263

condemnation. It would be condemned for not complying with the requirement though the condemnation may not be as strong as the condemnation for the violation of the first two conditions.

2.5 Cessation Of Self Defense

The right of self defense is exercised for a limited period of time .It ceases once the armed attack is repelled by the victim state .It may take place in two ways. One is by the voluntary action of the defending state after it successfully repels the armed attack. Neither the victim nor the attacking state wants to be involved in an endless war that drains its economy and man power. The second is through a legal requirement under Article 51 of the United Nations Charter where it is provided as follows:

> ...If an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

It follows from this part of the provision that once the Security Council takes measures following the report made to it by the defending State then the right of the defending State to take action on the ground of self defense ceases automatically. Here it should be understood that the measures taken by the Security Council might not always bring the desired result. Even if measures are taken the existing situation may not change for that matter may be worsened. So the measures to be taken by the Security Council must be result oriented, i.e. capable of stopping the aggression. Otherwise the right of the Victim State to defend itself cannot be undermined under the cover of the mere taking of measures by the Security Council.

> ...It cannot be claimed that the Security Council has taken the necessary measures if those measures do not result in

> repelling the attack and restoring international peace and security. Otherwise the right of self-defense would be overridden whenever the Security Council adopted measures, such as calling on an invader to withdraw and to cease hostilities regardless of whether the invader complied with the Council's order. Thus self-defensive action should be considered permitted until the Security Council takes action that definitely restores and maintains international peace and security...Therefore the right of self-defense remains intact until the Security Council has successfully dealt with the controversy before it.[23]

Measures taken by the Security Council to maintain international peace and security includes condemnation of the acts of the aggressor, and requesting the withdrawal of its invading forces from the territory of the victim State, economic embargo, and at last if the two measures fail to achieve the desired objective the use of force would be employed .The Iraqi invasion of Kuwait can be cited as an example in this regard. When Iraq invaded Kuwait in 1990, the Security Council condemned the action of Iraq and demanded the withdrawal of its forces from the territories of Kuwait[24]. Later it adopted another resolution[25], which imposed an economic embargo that did not bring about the desired result.

> ...Obviously the economic sanctions were adopted in the hope that they would be effective in bringing about the withdrawal of Iraqi forces. However it was made clear by some states, notably the United States and the United Kingdom, that the failure of economic sanctions might make it necessary to resort to armed force under Article 51...The

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[23] Stanimir A. Alexandrov, *(n.3)* 266-267

[24] UNDOC S/RES./660 (August 2 ,1990)

[25] UNDOC S/RES./661 (August 2 ,1990)

> embargo proved to be effective in economic terms; it was evident that the Iraqi economy was substantially damaged. However it was not clear whether this would bring about the demanded change in policy on the part of the Iraqi leadership. Consequently, since economic sanctions had not achieved their objective and the aggression against Kuwait continued, they could not be construed as resulting in the maintenance of international peace.[26]

Thus given that the economic embargo failed to force the withdrawal of Iraqi forces outside of Kuwait, Kuwait's right of self defense subsisted and hence could exercise its right of self defense individually or collectively. The military campaign called "Operation Desert Storm" which liberated Kuwait from the Iraqi invasion was the legal consequence of the failure of the economic embargo.

2.6 Individual And Collective Self Defense

The provision of Article 51 of the United Nations Charter categorizes self-defense into two broad categories. They are ***individual self-defense*** and ***collective self-defense.*** We will have a brief look at each of them.

2.6.1 Individual Self defense

Individual self-defense as the name implies is the right of an individual state to defend itself from any armed attack by another state. Under such type of defense the actors are only two states - the user of an illegal force i.e. the attacking state and the defending or the victim state. Individual self defense had been invoked by states on different grounds trying to justify their action by associating it with armed attack which is the basis of the exercise of the right of self defense under international law. These different grounds invoked by states for the exercise of their right of self defense include; violation of the territorial integrity of the

[26] Stanimir A. Alexandrov, *(n.3) 267*

victim state, the protection of nationals abroad, securing the right of innocent passage, a contention over territories the status of which is unknown at the time of the contention, terrorist attacks, etc. Instances of each of the above mentioned grounds of self defense are discussed briefly below.

A) Violation of the territorial integrity

The inviolability of the territorial integrity of a member state is guaranteed by Article 2(4) of the United Nations Charter .If a State violates the provisions of this Article and launches an armed attack on another state the attacked state has the right to repel the attack pursuant to Article 51 of the Charter. When in the 1970s, the forces of Siad Barre, the then president of Somalia invaded the Eastern and Southern parts of Ethiopia, Ethiopia had a right to resort to war and hence launched a counter attack against the enemy forces as a result of which the enemy was expelled from the occupied territories of Ethiopia. Again when the Eritrean Government invaded Ethiopia the Ethiopian forces successfully repelled the attack and restored the territorial integrity of the country. When we look at other African countries, in 1979[27] Tanzania invaded Uganda during the presidency of General Amin Dada. At the start of the conflict Tanzania justified its intervention as a reaction to the armed attack launched by Uganda at the end of October 1978 when Uganda had occupied a considerable part of Tanzanian territory while advancing territorial claims upon it. But when Tanzanian intervention started Uganda had already withdrawn its forces from the territory of Tanzania. As a result Tanzania's claim that its action was based on the ground of self defense was not convincing .For that matter, in April 1979, the capital of Uganda was occupied by rebels and Tanzanian troops. Mr. Nyrere, the then president of Tanzania, developed a line of argument according

to which the purpose of the Tanzanian intervention was to react against the aggression committed by Uganda when it invaded Tanzanian territory, to punish the Ugandan dictator (General Amin) for having ordered the invasion, and to prevent a second attack upon Tanzania, which Nyrere claimed, was imminent.[28]

B) The protection of Nationals abroad

Some States had used force on another State to free their nationals held hostages .One clear example in this regard is Israel's action on Entebbe (Uganda) in 1976 where force was used to free Israeli nationals who were held hostages by hijackers of an air plane.[29] Israel invoked explicitly Article 51 and justified the use of force to protect its national's abroad on the basis of the right of self-defense. Israel stated that the right of self defense under the Charter was exercised within the limits of the Caroline case, that the use of force was not directed against Uganda and the amount of armed force used was only as much as necessary in order to save its own nationals. Israel's argument was supported by the United States defending the lawfulness of the Israeli use of force stating that Israel had legitimately invoked a well established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death following from the right of self defense when the territorial state is unwilling or unable to protect the endangered persons. Nevertheless the majority of the members of the Security Council did not accept this argument of the United States.

Another instance is the action taken by the United States on Iran in 1980[30] to rescue its nationals in Tehran. The United States' view was

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[27] Ibid. , 210-211
[28] ibid. 211

[29] ibid. 196-197
[30] ibid. 197

that the Iranian violence against the United States Embassy and its officials constituted an armed attack within the meaning of Article 51 and that the United States was therefore entitled to use armed force in self defense[31] The United States invoked its right in accordance with Article 51 of the UN Charter, to protect and rescue its nationals where the Government of the territory in which they are located is unable or unwilling to protect them.[32]

C) To Secure a right of innocent passage

A right of self-defense had been invoked to secure a right of innocent passage through the territorial waters of another state. The Corfu Channel case which was the first case to appear before the ICJ can be taken as a case in point in this regard .The parties to the case were Britain on the one hand and Albania on the other.[33] Albania denied that foreign warships had a right of innocent passage through its territorial waters in the north Corfu Strait. In May 1946 Albanian shore batteries fired on two British warships which were making passage through the Strait .In October 1946, British ships sailed through the Strait to assert their right of passage. They were ready to respond to an attack. The ships were damaged by mines, 44 persons were killed and 42 were injured .As the UK strongly suspected that Albania was responsible, few weeks later British ships reentered Albanian waters with a large force of mine sweepers and discovered numerous newly laid mines. Then the UK referred the matter to the Security Council, which recommended that the dispute be submitted to the International Court of Justice. Thus the main issue was the existence of a right of passage for warships through the Corfu Strait but the acts of the UK raised directly the issue of self-defense and self

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[31] United States letter to the Security Council ,UNDOC S/13908 April 25 1980

[32] Statement of President Carter ,80 Department of State Bulletin no. 2039 -- 42--43(1980)

[33] Stanimir A. Alexandrov, *(n.3) 122-123*

help. The Court found that it was not illegal for the UK to send its warships through the straits in order to ascertain whether Albania would maintain its illegal attitude and would again impose by means of gunfire its view with regard to the passage. The Court held that the readiness of the ships to use force if attacked was not an unreasonable precaution in the light of the previous Albanian attack and concluded that the UK had not violated International Law by demonstrating such force that Albania would abstain from firing on the passing ships. In other words the conclusion was made that preparations for the use of force in self-defense, in case the need should arise, are legitimate and that such preparations were justified by the strong probability of armed attack, i.e. an imminent threat of armed attack.

D) A Contention Over Territories The Status Of Which Is Not Known

The desire to incorporate territories located between two states may lead to mounting tension which may result in armed conflict each of which may justify its action as self defense with in the meaning of Article 51 of the Charter. One such example is the contention between India and Pakistan over the territories of Jammu and Kashmir. In 1948[34], both India and Pakistan claimed the right of self-defense to protect the States of Jammu and Kashmir eventhough the status of those territories was unclear. The Government of the United Kingdom, on the eve of withdrawing from India decided to reserve for the former princely states, which had not been part of British India, the freedom to choose their future status, with the expectation that they would accede to either India or Pakistan. The Maharaja of Kashmir had made no decision about accession at the time of independence .In October 1947, however a large-scale incursion into Kashmir by tribes from north East Pakistan took place. The Maharaja appealed to India for

[34] ibid. 127

help and in exchange agreed to accede to India .In 1948 India took the matter to the United Nations. It accused Pakistan of aiding the tribal forces, which included Pakistani

nationals and which had occupied a part of the State of Jammu and Kashmir, regarded by India after the accession to be part of its own territory. India considered this to be an act of aggression against India and invoked self-defense to justify the right to enter Pakistani territory in order to take military action against the invaders. Pakistan noted India's threat of direct attack against Pakistan and asked for the withdrawal of the Indian troops from Jammu and Kashmir. Later in November 1948 Pakistan explained that during the first half of May Pakistani forces had to cross the border in order to halt the Indian forces and to stop streams of refugees that had started pouring into Pakistan and that the action taken was purely defensive.

The Security Council made no pronouncement on the claims of self defense .The real issue in the dispute was the status of Jammu and Kashmir and whether India or Pakistan had the right to consider it as part of its own territory, and consequently to invoke the right of self defense to protect it. Thus the Security Council considered the dispute as involving the right of self-determination rather than self-defense.

E)Terrorist Attack

Following terrorist attacks some countries such as the United States had taken measures against countries that were suspected to be the origins or sponsors of the terrorist activity. One good example is the United States bombing of Libya in 1986.[35] In 1986 the United States interpreted the concept of armed attack to include certain terrorist activities. Declaring the Libyan government responsible for terrorist acts in Europe,

[35] ibid. 184

including the bombing of a West Berlin night club frequented by the United States servicemen in which one was killed and many wounded, the United States launched a bomb attack on targets in Libyan territory and justified its action on the grounds of self defense. The United States invoked its right of self-defense on the basis of several contentions that are stated below.[36]

1) The US attempted to use peaceful means first, then other measures (sanctions) but did not succeed to make Libya alter its behavior.

2) The ongoing pattern of attacks by Libya against United States citizens and installations over considerable period of time amounted to an armed attack.

3) There was clear evidence of future threats and terrorist actions by Libya against the US targets i.e. there was an immediate threat, leaving no moment for deliberation.

4) There was a necessity for a preemptive action to deter future Libyan attacks, to provide it with incentives to alter its criminal behavior

5) The use of force was proportionate to the needs of self defense -the targets were limited to military infrastructure capable of supporting terrorist activities.

6) Article 51 and the right of self-defense included the right to protect one's nationals.

Ethiopia too has been the victim of terrorist activities and it had crossed the border of Somalia to counter attack the terrorist activity. The campaign against the Union Islamic Courts that declared Jihad on Ethiopia in the year 2006 is a case in point and the argument made by Ethiopia for its intervention in Somalia was self-defense with in the meaning of Article 51 of the Charter. Whether the above arguments

[36] ibid.

raised by both the US and Ethiopia are legally tenable or not is a controversial issue and will be discussed under chapter four.

At the beginning this section it has been pointed out that in individual self-defense the actors are two States. This is of course the usual condition. However there may arise exceptional situations where a victim State argues to exercise its right of self-defense in the absence of an attacking State. The State from which the attack originated may not have effective government responsible for keeping law and order in that state or it may have lost control of the area from which the attack originated. This may be due to civil war, as a result of which belligerents that have no recognition are created. If any armed attack is launched against a State from its war torn neighbor State, the victim State cannot be said to have exercised its right of self defense against another State but against armed groups be it terrorist or belligerent .The cases of Turkey and Ethiopia can be taken as cases in point in this respect.

In the spring of 1995[37] Turkey took a large scale military action against guerillas of the Kurdish Workers Party (PKK) in northern Iraq. Turkey claimed that PKK used the territory of northern Iraq for terrorist activities against Turkey and that in the absence of Iraqi administration in the area after the gulf War, Turkey had no authority to rely on; therefore Turkey had to use force in self defense. The aim of the self-defense operation was described to be to destroy the bases and break the command of the PKK. Ethiopia's campaign against the UIC, crossing into the border of Somalia in the year 2006 was made not in the absence of government in that State but in the presence of a weak government that was not able to control the UIC and its action was argued justifiable based on the right of self defense. Again the legality of these types of measures will be discussed in chapter four.

[37] ibid. ,180---181

2.6.2 Collectve Selfdefense

The Charter of the United Nations does not define what collective self-defense is all about. But in a very simple language one may say that it (collective self-defense) is a group action exercised by two or more states.

> Article 51 confers the right to use force not only upon the attacked State but also upon other states, which unite, with the attacked State in order to assist it in its defense. This is probably the meaning of the term collective self-defense[38]

In the previous section it was mentioned that individual self-defense incorporates two States. These two states are the aggressor and the victim. In collective self-defense at least two states are necessary to form a united front against an aggressor. Since collective self-defense is the extension of individual self-defense the same conditions that are required to be fulfilled for the exercise of individual self-defense also apply to collective self-defense.

Collective self-defense can be viewed as a mode of maintaining international peace and security. Because an illegal use of force is forbidden by international law, the repulsion of this illegal force by collective self-defense is equal in effect to enforcement action taken by the Security Council under Article 42 of the United Nations Charter. What is more the existence of collective self-defense serves as a warning for a state that is prone to aggression. No sensible government dares to invade a state that is a member of a collective self defense treaty for it understands the consequences it faces following its invasion on that member state.

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[38] Hans Kelson (n.2).792

Collective self-defense is exercised by a group of states by virtue of agreements they enter into. These agreements are coined in a similar fashion incorporating the phrase "armed attack" as their common denominator. For instance Article 5 of NATO (North Atlantic Treaty Organization) provides;

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all and consequently they agree that if such an armed attack occurs each of them, in exercise of the right of individual or collective self defense recognized by Article 51 of the Charter of the United Nations, will assist the party or parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary ,including the use of armed force, to restore and maintain the security of the North Atlantic area.[39]

The 1947 Rio de Janeiro treaty consists of a phrase indicating a collective self-defense system. Article 3 of the Treaty provides as follows;

> The High contracting parties agree that an armed attack by any state against an American state shall be considered as an attack against all the American states, and consequently each one of the said contracting parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self defense recognized by Article 51 of the Charter of the United Nations[40]

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[39] North Atlantic Treaty ,1949,34 U.N.T.S 243

[40] Rio de Janeiro Inter American Treaty of Reciprocal Assistance ,1947 ,21 U.N.T.S 77,93

The Warsaw pact, which was intended to counter balance the NATO, had the same phrase guaranteeing collective self-defense. Its Article 4 had provided the following;

> In the event of armed attack on one or more of the parties to the treaty by any state or group of states each of the parties to the treaty, in the exercise of its right to individual or collective self defense in accordance with Article 51 of the Charter of the United Nations Organization, shall immediately either individually or in agreement with other parties to the treaty come to the assistance of the state or states attacked with all such means as it deems necessary including armed force. The parties to the treaty shall immediately consult concerning the necessary measures to be taken by them jointly in order to restore and maintain international peace and security.[41]

In addition to the above mentioned treaties, following the entry into force of the United Nations Charter, a number of collective self defense treaties were made some of which include;

1) The Brussels Treaty (Belgium, France, Luxembourg, The Netherlands and the United Kingdom) [42]
2) The Mutual Defense Treaty between the United States and the Philippines[43]
3) The Security Treaty between Australia Newzealand and the United States[44]

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[41] Treaty of Friendship Cooperation and Mutual Assistance (Warsaw Pact) 1955(219 U.N.T.S)

[42] (19 U.N.T.S 51,211) Oct.23 1954

[43] (177 U.N.T.S133)Aug. 30 1951

[44] (131 U.N.T.S 83) Sept. 1 1951

4) The South East Asia Collective Defense Treaty among United States, United Kingdom, France, Australia New Zealand, the Philippines, Thailand and Pakistan[45]

5) The Mutual Defense Treaty between the United States and Korea[46]

All these treaties have their source in the Charter of the United Nations the relevant provision being Article 52 .Its sub Article 1 provides as follows;

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations

As can be understood from this provision regional arrangements or agencies are created for the purpose of dealing with matters connected with the maintenance of international peace and security, and their operation is not supposed to run counter to the aims and principles of the United Nations.

The collective self-defense system if properly applied supplements the purposes of the United Nations. Hence insofar as their purposes tally with that of the United Nations one can say that collective self-defense systems are the products of Article 52 of the United Nations Charter.

A question may be raised at this juncture as to how states organize themselves under the system of collective self-defense? Is it on the regional basis or is interest oriented? On the face of it the grouping

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[45] (209 U.N.T.S 28) Sept.8 1954

[46] (238 U.N.T.S 199) October 11 1953

seems to be based on geographical proximity as neighboring states or those within the same region can easily come to help each other. But this is not always the case, even the stronger ties may come from the interests of the states concerned. It was not geographical proximity that compelled the United States to conclude a collective self-defense treaty with Korea as mentioned above. Again it was not geographical proximity that brought the United Kingdom and the United States and other states to the Gulf war to liberate Kuwait from the invasion of Iraq. No state becomes indifferent for aggression. As aggression is a threat to international peace and security it becomes the concern of the international community as a whole.

> It may be said that an armed attack is like an infectious disease in the body politic of the family of nations. Every state has a demonstrable self interest in the maintenance of international peace, for once the disease starts to spread there is no telling if and where it will stop. This is the fundamental concept underlying the United Nations Charter. As long as the system of collective security within the United Nations organization is ineffective, collective self-defense constitutes the sole insurance policy against an armed attack[47]

An important question to be raised here is the question whether or not treaty is a *sine qua non* condition for the exercise of the right of collective self-defense. Article 51 except recognizing the inherent right of collective self defense does not say any thing on this point .One possible explanation for this would be that the Charter has left the modality of the exercise of the right to the discretion of the parties. This in turn would mean treaty is not *a sine qua non condition* for the exercise of the right of

[47] Yoram Dinstein (n18) 251

collective self defense, but States are at liberty to exercise their right of collective self defense by entering into a treaty or without a treaty if they desire so.

> Collective self defense may be exercised either spontaneously (as an unplanned response to an armed attack after it has become a reality or premeditatedly (on the footing of a prior agreement contemplating a potential armed attack)[48].

2.6.3 Some Cases Of Collective Self Defense

Following the coming into force of the United Nations Charter, numerous collective self-defense actions were taken by states for that matter by the United Nations itself. Some of the actions were considered legitimate within the meaning of Article 51 of the Charter, some others considered as illegal -just a cover for advancing individual state interests. In this section we will look at a few of these actions.

1) The War In Korea

After the First World War Korea was partitioned into two. North Korea and South Korea. The Northern part was under the influence of the communist block and the Southern under the Western (capitalist block). The Soviet Union and the United States could not agree on how authority should be handed over to the Koreans and eventually two separate governments were set up in the North and South. Both governments claimed to be the Government of Korea however it was the South Korean Government that was declared by the General Assembly as the only lawful Government of Korea.[49] It happened that during the early part of 1950 there was a series of border incidents by North and South Korea.

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[48] ibid.
[49] General Assembly Res. 195 (III)of Dec. 12 1948

On June 25 1950 South Korea informed the United Nations of a large scale attack by North Korean forces across the border and the United States immediately called a meeting of the Security Council[50] In the absence of the Soviet Union the Council adopted a resolution which noted the armed attack upon South Korea, determined that a breach of peace had occurred, and called on North Korea to cease hostilities and withdraw its armed forces .The resolution also called on member states to render every assistance to the United Nations in the execution of this resolution[51]

Following the resolution the United States sent naval and air forces to South Korea to protect the evacuation of United States civilians, and on the following day naval and air units were sent to give active support to South Korean forces. President Truman, the then President of the United States, justified those measures on the basis of the Security Council resolution and the right of collective self-defense.[52]

On the initiative of the United States the Security Council passed another resolution requiring the Members of the United Nations to furnish assistance to the republic of Korea that is necessary to repel the armed attack and to restore international peace and security in the area.[53] Member states were asked to provide military forces and assistance to make them available to a unified command under the United States.[54]

When the Security Council took such measures it was not taking an enforcement action under collective security system pursuant to Article 42 of the United Nations Charter. It was simply authorizing Members to take collective self-defense action on its behalf.

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[50] 1950 Year book the United Nations 221(United Nations New York 1951)
[51] Security Council Resolution S/1501 of June 25 1950
[52] Stanimir A. Alexandrov, *(n.3) 253*
[53] Security Council Resolution S/1511 of June 27 1950
[54] Security Council Resolution S/1588 of July 7 1950

2) The United Nations Operation In The Congo

Following the independence of Congo from Belgium in 1960 a civil war broke out in that country .A province called Katanga attempted to secede from Congo. As a result Belgium sent troops to Congo to protect Belgians and other foreign nationals.

On July 12,1960 the Government of the Congo requested the urgent dispatch by the United Nations of military assistance. The Congolese Government accused Belgium of committing an act of aggression and of preparing the secession of Katanga[55]. Following the request made by the Congo the Security Council passed a resolution calling on Belgium to withdraw its troops and authorizing the Secretary General to take steps to provide the Congo with the necessary military assistance.[56]

A United Nations force named by ONUC[57] was sent to the Congo, and initially the force was considered as a peacekeeping force that uses force only in situations of self-defense.

On 24 November 1961 the Security Council adopted a resolution that reaffirmed the mandate of ONUC in the following terms:

a) To maintain territorial integrity and political independence of the Republic of the Congo.

b) To assist the central Government of the Congo in the restoration and maintenance of law and order.

c) To prevent the occurrence of civil war in the Congo.

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[55] Cable from the President and the Prime Minister of Congo to the Secretary General. July 12,1960. UN DOC S/4382

[56] SC RES. of July 14,1960 ,UN DOC .S/4387 15 SCOR

[57] A French abbreviation for the UN peacekeeping force in the Congo

[9] SC RES. 169/1961

d) To secure the immediate withdrawal and evacuation from the Congo of all foreign military, paramilitary and advisory personnel not under United Nations command and mercenaries.

e) To render technical assistance[58]

As the situation deteriorated ONUC was not able to fulfil its peacekeeping operations .As a result the United Nations General Assembly passed a resolution[59] authorizing the Secretary General to take vigorous measures. Following the adoption of the resolution ONUC's mandate was changed from peacekeeping operation to a full military operation in collective self defense and it took military action against the Katangese rebels who attempted to secede the province of Katanga from the Congo. It is widely argued that the United Nations operation in the Congo was a clear case of violation of Article 2(7) of the United Nations Charter, which provides;

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

But this argument was refuted on the ground that though the Congo case appeared to be an internal affair, the involvement of foreign elements such as Belgium and other mercenaries had made the situation to assume an international character, hence ONUC' operation was justified[60]

3) Operation Desert Storm To Liberate Kuwait

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[58] SC RES. 169/1961
[59] Stanimir A. Alexandrov, *(n.3)285*
[60] ND White ,*Keeping the Peace, The United Nations and the Maintenance of International Peace and Security* (Manchester University Press, Manchester and New York, 1995) P. 235

When Iraq invaded Kuwait in 1990 the Security Council first adopted a resolution condemning the invasion and demanded the immediate and unconditional withdrawal of the Iraqi forces.[61] A few days later the Council passed another resolution[62] acting under Chapter VII of the Charter. A paragraph in the preamble of the Resolution expressly affirmed the inherent right of individual or collective self-defense in accordance with Article 51 in response to the armed attack launched by Iraq against Kuwait. Following this resolution the Kuwait Government in exile requested assistance from the United States and other nations pursuant to Article 51 of the Charter.[63] The Security Council recognized that it would be legitimate for third states to use force against Iraq if necessary to compel its withdrawal well before the adoption of Resolution 678, which explicitly authorized the use of force.

The fact that the Security Council mentioned the right of collective self-defense in Resolution 661/1990 has no any legal significance .As has been discussed earlier in section 2.2 individual or collective self-defense being an inherent right, States can exercise this right without prior authorization of the Security Council. What purpose does then the statement serve? The writer is of the opinion that the inclusion of the statement in the resolution may be to encourage states to exercise their right of collective self defense to repel the attack before the Security Council resorts to the adoption of a resolution that authorizes States to use force to expel the Iraqi forces out of Kuwait .It had also another purpose as Stanimir puts it:

> The resolution also served the political purpose of underlining the general support of the United Nations for

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[61] SC RES. 660/1990 (August 2 1990)

[62] SC RES. 661/1990

[63] Letter From The Amir Of The State Of Kuwait To President George Bush August 12 ,1990

> military measures if Iraq did not withdraw before January 16,1990. Many Governments considered it important for domestic political reasons to have United Nations authorization[64]

Finally Iraqi invasion of Kuwait was given a final blow by virtue of Resolution 678/1990 in which the Council authorized the Member States cooperating with the Government in exile of Kuwait should Iraq not fully comply with previous Council resolutions by 15 January 1991 to use all necessary means to uphold and implement Resolution 660/1990 and all subsequent relevant resolutions and to restore international peace and security in the area.

There are also instances where measures taken by a State under the cover of collective self-defense were rendered either controversial or illegal. We will see the cases of Vietnam and Afghanistan.

Vietnam[65]

When the United States took military action against North Vietnam it specifically stated that it was exercising the right of collective self-defense and that the bombing of North Vietnam was necessary to interdict and to inhibit continued aggression. The arguments invoked by the United States in favor of its position were the following;

1) There was an armed attack against South Vietnam by North Vietnam. Infiltration of thousands of armed persons, munitions and other military supplies.

2) Approximately 60 States had recognized South Vietnam as a separate international entity, yet South Vietnam enjoyed the right of self defense whether or not it was regarded as an independent State; although the line of demarcation was temporary it was established by an international

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[64] Stanimir A. Alexandrov, *(n.3) 273*
[65] ibid. 221-222

agreement which specifically forbade aggression by one zone against the other.

3) The government of South Vietnam requested the US to assist it in defending itself.

4) The US exercised its right to collective self-defense under the Charter.

5) The US could exercise its right of collective self-defense both under the Southeast Asia Collective Defense Treaty and on the basis of the request of the South Vietnam Government.

A group of prominent international lawyers, who formed a committee to discuss the US policies in Vietnam, refuted those arguments on the basis of the following grounds;

1) South Vietnam was not recognized as an independent State by the Geneva Convention; on the contrary Vietnam was recognized as a single State, and consequently the infiltrations from North Vietnam could not constitute an armed attack, the conflict was rather a civil strife where foreign intervention was not legitimate.

2) There was no armed attack since gradual infiltrations of guerillas over a period of ten years could not be regarded as an armed attack; response to such gradual infiltration was not use of force,' leaving no choice of means and no moment for deliberation. Article 51 limits the use of force in self defense to specific emergencies where there is no time to seek authorization from the Security Council, besides a large number of infiltrators were South Vietnamese who had moved North and were returning

3) The US had done little over the years to seek a peaceful solution of the Vietnam situation

4) Even if North Vietnam and South Vietnam were accorded the status of separate entities in international law and assuming that North Vietnam

was intervening in the civil war in South Vietnam, the United States had no right to respond to that intervention by bombing North Vietnam; there is no legal basis for an outside State to respond to an intervention of another State in a civil war with a military attack on the territory of the intervening State (in the civil war in Spain none of the intervening States -Germany and Italy supporting Franco and the Soviet Union supporting the legitimate Government -claimed the right to use military force against eachother's territories.)

5) The Government of South Vietnam was a client Government of the United States; it was incapable of achieving stability without the assistance of the United States and would collapse if the United States withdrew, therefore such Government could not address a valid request for assistance to the United States; such a request reminded the request addressed to the Soviet Union to intervene in Hungary.

6) The Korean war was not a good precedent for the situation in Vietnam: in Korea there was a massive military invasion from the North against a workable Government in the South, even so, the United States did not claim collective self defense, but took the issue to the Security Council.

7) The United States military presence in South Vietnam violated its commitment not to disturb the Geneva Agreements.

Afghanistan[66]

As a justification for the invasion in Afghanistan in December 1979, the Soviet Union relied on Article 51 as well as on a bilateral treaty of friendship, good neighborliness, and cooperation and on an invitation by the official authorities in Afghanistan. In order to be able to invoke Article 51 and the bilateral treaty, the Soviet Union claimed that there was outside interference in Afghanistan .The claim was hardly credible but its credibility was further undermined by the fact that the Soviet

[66] ibid. ,226

Union objected to a discussion in the United Nations stating that such a discussion would constitute interference in Afghanistan's domestic affairs. The overwhelming majority in the Security Council rejected the Soviet justification and demanded that foreign troops leave.[67] A resolution of the Security Council that would have deplored the intervention and called for an immediate withdrawal of all foreign troops was vetoed by the Soviet Union. The General Assembly met in emergency special session and adopted a resolution calling for an immediate and unconditional withdrawal of all foreign troops from Afghanistan[68], which was a clear indication that the Soviet action was considered illegal. The majority of Governments and world public opinion did not accept the Soviet Union's legal arguments.

Before concluding this chapter, it would be very important to mention one important point that is considered as condition precedent to the exercise of collective self-defense. Here, it is not to repeat those conditions necessary for the exercise of individual self-defense, of course, which are also conditions for collective self-defense. But there is another additional condition applicable only to collective self-defense. This is the requirement of making invitation on the part of the victim State i.e. the attacked State must openly declare that it is attacked and request for assistance from a third State to repel the attack. The International court Of Justice had affirmed this requirement in the case of military and paramilitary activities in and against Nicaragua[69] when it stated two essential conditions for the lawful exercise of collective self-defense. The first such condition is that the Victim State should declare its status as victim and request assistance, the second condition is that the wrongful act complained of must constitute an armed attack.

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[67] UN DOC. S/13729,35 SCOR (1980)

[68] GA Res. .ES 6/2 (January 14 1980)

[69] Nicaragua v. US ,Jurisdiction and admissibility ,1984, ICJ Rep. 392,432-36

2.7 Chapter Summary

Self defense as provided under Article 51 of the UN Charter is the inherent right of a state to defend itself from an armed attack launched against it by another state .A closer examination of Article 51 shows the existence of three categories of conditions for the exercise of self defense which are: condition precedent to the action of self defense, conditions simultaneous to the action of self defense and condition subsequent to the action of self defense.

Condition precedent to the action of self defense is a condition that must be fulfilled prior to the exercise of the right of self defense .The sole condition in this case is the occurrence of armed attack .A state cannot justify its use of force against another state on the ground of self defense unless it can show that armed attack has been launched against it by another state.

Conditions simultaneous to the action of self-defense are conditions that must be fulfilled during the exercise of the right of self-defense, not before or not after the exercise of this right. This includes necessity, promptness and proportionality. These are conditions which were expressly stated under customary international law but not expressly provided for under Article 51 of the UN Charter but could be taken as implied conditions under the same Article.

Condition subsequent to the action of self-defense refers to a condition, which a victim state is required to fulfill after it has exercised its right of self-defense. This condition relates to the obligation of a victim state to report to the Security Council the measures it has taken against an aggressor state on the ground of self-defense.

The provision of Article 51 of the UN Charter categorizes self-defense into two broad categories namely individual self-defense and collective self defense.

Individual self-defense is the right of an individual state to defend itself from any armed attack by another state. Under such type of defense the actors are only two states, i.e. the attacking state and the Victim State.

In collective self-defense at least two states are necessary to form a united front against an aggressor state. Since collective self-defense is the extension of individual self-defense the same conditions that are required to be fulfilled for the exercise individual self-defense also apply to collective self-defense. Collective self-defense can be viewed as a mode of maintaining international peace and security. Because an illegal use of force is forbidden by international law, the repulsion of this illegal force by collective self-defense is equal in effect to enforcement action taken by the Security Council under Article 42 of the United Nations Charter. What is more the existence of collective self-defense serves as a warning for a state that is prone to aggression. No sensible government dares to invade a state that is a member of a collective self defense treaty for it understands the consequences it faces following its invasion on that member state.

Self-defense be it individual or collective has its own characteristic features. These essential features are: its inherent nature, no obligation on the part of the defending state to exhaust peaceful settlement, non applicability of veto, and distinguished from collective security action.

As is expressly stated under Article 51 of the Charter self defense is an inherent right of a State to defend itself from an illegal use of force against it by an other State .It can be likened with human "right which is also inherent in each individual person .As human right is natural to each person that cannot be taken away from or given to an individual by

any government, self defense as a natural right of a State cannot be given to it nor taken away from it by any state.

A State that is a victim of an armed attack is not required to exhaust peaceful means before it can resort to the use of force to defend itself. It is its discretion to decide whether to settle the dispute by peaceful means or to use its right of self-defense. No one can dictate it which measure to take except the special circumstance in which it finds itself.

Since the exercise of the right of self defense is only with in the power of the victim State, to use or not to use this right cannot be brought to the agenda of the Security Council and hence cannot be vetoed at all. What is more Self-defense is not a collective security action or an enforcement action, which is taken by the Security Council pursuant to Articles 39 and 42 of the United Nations Charter.

Chapter Three

Self Defense Disinguished From Other Forms Of Self Help

3.1 Introduction

It has been discussed under chapter two the right of self defense as one form of self help being an inherent right of a State to defend itself against armed attack. Though not in the name of self-defense there are numerous instances of tit for tat measures that a Sate takes against another State. For instance a State may reduce or totally stop its economic aid to another State, take similar measures that another State has taken against its nationals residing in that other State etc.

In this chapter some measures that closely resemble self-defense but are not really self-defense will be treated. Accordingly only two such measures viz. ***retorsions*** and ***reprisals*** will be dealt with.

The reason behind confining this chapter only on these two of the various self-help methods is that they have survived other self help methods after the establishment of the United Nations.

> Since the establishment of the Charter regime, there are three categories of compulsion open to States under international law. These are retorsion, reprisal and self-defense[1]

[1] Malcolm N. Shaw ,*International Law*(Fifth edition ,Cambridge University Press, UK, 2003) 1022

3.2 Retorsion Since it is not prohibited by international law, the measure of retorsion is not illegal. Rather it is a State's lawful but malicious act on another State.

> Retorsion is a measure of self help, which though unfriendly is within the legal powers of the State employing it and is therefore necessarily a legal measure even if it involves the use of force in its application .For example if State X adopts an economic policy damaging to State Y, it is a perfectly legitimate act of retorsion for the latter then to exclude State X's fishing vessels from its territorial waters where it has previously permitted them to fish.[2]

There are numerous causes for the measure of retorsions among which are, cutting of economic aid which is lawful since there is no legal obligation on a State to give economic aid to another State apart from special treaty provisions[3]. The United States' suspension of economic aid to the Government of Ceylon (today's Srilanka) is a case in point.[4]

By the Ceylon petroleum Corporation Act of May 29 1961, the Ceylon Petroleum Corporation was created and powers were given to the Minister of Trade and Commerce to vest in the Corporation. In April, May and June 1962, properties belonging to the oil companies operating in that country, namely Shell Esso and Caltex were so vested of which two were American companies. The amount of compensation to be paid has not been agreed upon by the parties nor has any compensation

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[2] J.L Brierly ,*The Law Of Nations ,An Introduction To The International Law Of Peace*,(sixth edition, Sir Humphrey Waldock, editor ,Oxford University Press New York and Oxford, 1963) 399

[3] Gerhard Von Glahn ,*Law Among Nations* ,(The Macmillan Company ,New York, 1965) 499

[4] Chittharanjan Amerasinghe " The Ceylon Oil Corporation" American Journal of International Law Volume 58 ,1964, 445-446

been paid. On February 7, 1963, the United States Government suspended aid to Ceylon and issued a statement which it said interalia

> The Government of the United States did not then and does not now contest the right of Ceylon as a sovereign State to nationalize private property. However when such property belongs to a citizen or a company of a foreign country, the payment of prompt adequate and effective compensation is required by international law[5]

In addition to the cutting of economic aid discriminatory tariff rates and discriminatory treatment of aliens and similar acts not governed by treaties fall under retorsion. Hence the existence of a treaty is a bar to the application of retorsion .For instance if two States A and B are members of the World Trade Organization, neither of them can take discriminatory action on the other with respect to their trade transaction provided that it invokes the existence of a preferential treatment which allows it to discriminate. On the other hand if State A is a member of the World Trade Organization but State B is not, and if State A declares that all imports from State B are banned from entering its territory or increases the tariff rate on certain imported commodities as compared to the tariff rates on similar commodities imported from another State the measure would be harmful to State B. But one cannot say that State A's action amounts to violation of international law, for international law does not forbid a State to take such measures. What State B can do is to take a counter measure in the form of retaliation if it has the capacity to do so.

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[5] US Information Service Bulletin of February 8,1963 as reported in the Times

> Generally retorsion consists of retaliation in kind - if State X withdraws non treaty concessions or privileges from nationals of State Y, the latter will proceed to duplicate this action against nationals of State X living in the territory of Y[6]

Travel restriction by a State on the diplomatic staff of another State residing in its territory is also a manifestation of retorsion. A good example of retorsion in this respect was supplied by the United States at the beginning of 1955 when in response to travel restrictions imposed by the USSR on foreign diplomats, the United States Government barred Russian diplomats from travel in large portions of the US except for certain "open" cities in otherwise closed areas[7].

The original act provoking retorsion may or may not be illegal depending on the circumstances of the case. But retorsion in response to the original act is always legal though unfriendly. The original act may be illegal as in the case of nationalization of alien's property without prompt, adequate and effective compensation mentioned above or it may be legal as in the case of diplomatic severance.

Having discussed retorsion, we now look at some of the distinctions between self-defense and retorsion. There are a number of points that distinguish self-defense from retorsion.

First, self-defense is legally recognized as an inherent right of a state, which is specifically provided in the Charter of the United Nations, while retorsion is not expressly mentioned in the Charter

Second, the occurrence of armed attack, which is the basis of the exercise of self-defense, is not a requirement for retorsion.

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[6] Gerhard Von Glahn (n.3)
[7] Ibid. 500

Third, the original act which triggers self defense is always illegal whereas the original act that provokes retorsion may be either legal or illegal depending on the circumstances of the case.

Fourth, self-defense can be exercised individually or collectively. But there is no as such collective retorsion.

Fifth, unlike self-defense there is no reporting duty to the Security Council on the state taking retorsion.

3.3 Reprisals

It has been discussed under section 3.1 above that retorsion as a form of self help is legally justified though not expressly provided for under the UN Charter. Reprisal is diametrically opposite to retorsion for its use by a state is legally unjustifiable. Reprisal may involve the use of force but one cannot find a room for the use of force in the Charter of the United Nations except for self-defense. It should be born in mind that one cannot find the prohibition of reprisals expressly provided in the Charter but it is by applying constructive interpretation of the relevant provisions of the Charter that this conclusion is arrived at (i.e. the illegality of reprisals).

> ...In the main, however controversy has centered on the scope of the right of self defense permitted by the Charter, the implicit assumption being that apart from self defense, the use of force is strictly forbidden to states. Thus whatever the uncertainties attending the right of self-defense, the common view has been that the Charter must be interpreted to forbid the taking of forcible measures of reprisal. This view does not stem from any express prohibition of armed reprisals in the Charter for the Charter does not expressly forbid such measures. Instead the Charter obliges Members to

> settle their international disputes by peaceful means (Art. 2 para 3) and more importantly to refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state or that provided in Article 2(4). It is these provisions which when taken together with Article 51 presumably must place beyond argument the interpretation that although the Charter reserves to states a right of self defense it closes off any right to measures of reprisals involving the use of force[8]

Therefore reprisal accompanied by the use of force has no place in the Charter and hence illegal. So a state no matter how displeased with the action of another state, for that matter being a victim of an attack that does not amount to the scale of an armed attack is not allowed to resort to reprisal. Rather it is obliged to settle the dispute by means other than reprisal for instance by peaceful means.

> A reprisal is by strict definition an illegal act. Under earlier principles of international law, a reprisal could sometimes be legal, if it met certain conditions and were justified by the prior illegal act of the state against which the reprisal was directed. Subsequent to the establishment of the United Nations, however, it seems that reprisals can no longer be considered legal. Article 2(3) of the Charter requires states to settle their international disputes by peaceful means and under Article 33(2), the Security Council may call upon them to do so...[9]

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[8] Robert W. Tucker 'Reprisals And Self defense: The Customary Law'(1972) 66 AJIL 586

[9] Anthony D'Amato, *International Law and Political Reality, Collected papers* (vol. One KLUER Law International, The Hague Netherlands, 1995),127

As mentioned in the above quoted statement, the use of reprisal by a state has been rendered illegal after the coming into force of the UN Charter. Before the Charter there was a possibility of legally justifiable reprisal provided the following conditions were satisfied;

1. The occasion for the reprisal must be a previous act contrary to international law

2. The reprisal must be preceded by an unsatisfied demand

3. If the initial demand for redress is satisfied, no further demands may be made

4. The reprisal must be proportionate to the offense [10]

The most authoritative statement of the customary law of reprisals was made in the Naulilaa case in which the arbitrators examined the incident in line with the above four preconditions.

In 1915[11] while Portugal was still neutral in the First World War an incident had taken place at Naulilaa a Potuguese post on the frontier of Angola and the then German South-West Africa in which three Germans were killed. On the evidence, it was clearly established that the incident arose out of a pure misunderstanding .The Germans, however, as a measure of reprisals, had sent an expedition into Portuguese territory, attacked several frontier posts, and driven out the garrison from Naulilaa. German's plea that it was a case of legitimate reprisal was rejected by the arbitrators who said:

> Reprisals are acts of self-help by the injured state, acts in retaliation for acts contrary to international law on the part of the offending state which have remained after a demand for amends. In

[10] Ibid. 127- 128

[11] J.L Brierly (n.2) 400

> consequence of such measures the observance of this or that rule of international law is temporarily suspended in the relations between the two states ...They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending state reparation for the offence, the return to legality and the avoidance of new offences [12]

The arbitrators concluded that Portugal committed no illegal act, and Germany had made no request for redress and the disproportion between the German action and its provocation was evident.

In another instance, in 1914[13], a Mexican squad arrested at Tampico without cause a paymaster and two seamen of the U.S.S Dolphin .The men were released shortly thereafter, and General Huerta, head of Mexico's provisional Government made a personal apology. But the United States Admiral in the area also demanded that the Mexicans salute in a special ceremony, the United States flag by firing 21 guns. Huerta replied that he would do this only if the United States fired a like salute gun for gun .The United States declined. United States marines thereupon landed at Vera Cruz and seized the customhouses. An army force later relieved the marines and occupied the city for several months. This was effectively the end of the matter. The joint congressional resolution disclaimed any purpose to make war upon Mexico.

Still we find another classic case of reprisal taken by Italy against Greece in what was known as the Corfu incident[14]. The Italian representative on the Commission, which in 1923 was making out the frontier between

[12] Ibid., p.401
[13] Anthony D'Amato (n 9) 127
[14] ibid., 128-129

Albania and Greece, was shot together with three of his assistants by Greek bandits. Mussolini at once had his fleet bombarded Corfu, killing

Several civilians. He occupied the Island and demanded indemnity. Frightened Greece paid 50,000,000 Lire directly to Italy.

The foregoing three instances show the practice of states with regard to reprisal under customary international law.

As has been already mentioned in the post Charter period, of course till now, reprisal has not been legally acceptable measure. In addition to the prohibition of the Charter (Ofcourse by logical interpretation of the provisions of the Charter), another prohibition had been expressly made by the General Assembly in a resolution adopted in 1970 which contains the statement "states have a duty to refrain from acts of reprisal involving the use of force"[15]. But it is clear that the General Assembly resolutions are not legally binding decisions unless it can be shown that the practice of states shows that they are consistently adhering to the resolution and hence bring it to the level of customary international law.

Though reprisal is prohibited by the UN Charter and the above mentioned General Assembly resolution the practice shows that the law is getting weaker and weaker while the practice of reprisal is growing stronger and stronger.

> In recent years, and principally though not exclusively in the Middle East, this norm of international law has acquired its own credibility gap by reason of the divergence between the norm and the actual practice of states.[16]

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[15] UNGA. Res. 2625(XXV) (24 October 1970)

[16] Derek Bowett 'Reprisals involving Recourse to Armed Force' (1972) 66 American Journal of international Law, 1

The state practice on reprisal is more amplified in the Middle East than in any other part of the world where the Arab -Israel confrontation has become a usual phenomenon .It is carried out under the cover of self defense just by widening the interpretation of Article 51 of the Charter, for that matter some times by openly admitting the action taken to be reprisal.

> Recent practice particularly in the context of the Arab-Israel conflict suggests that not only have states like Israel, the United States and the United Kingdom not abandoned their wider view of self defense based upon 'the accumulation of events theory' -despite the Security Council's rejection of the theory, but even more striking, Israel has relied less and less on a self defense argument and has taken action which is openly admitted to be a reprisal. The Beirut raid of December 28, 1968 is the obvious example of an action not really defended on the basis of self-defense at all[17]

The consequences faced by a state following its action of reprisals is mere condemnation by the Security Council .For instance the Israeli attack on Qibya on October 14-15 1953 was condemned by the Security Council[18]

The Security Council had also condemned the Gaza incident of February 28 1955, in which an Israeli force attacked an Egyptian military camp in Gaza[19], the Israeli attack on Syrian positions near Lake Tiberias on December 11-12 1955[20]

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[17] Ibid. 10
[18] UNSC Res. S/3139
[19] UNSC Res. S/3378 (March 29 1955)
[20] UNSC Res. S/3538(19 January 1956)

Condemnation by the Security Council of a reprisal may not always be taken as effective way of characterization of actions as reprisals. This is because there may arise situations where reprisal may not be condemned by the Security Council. For instance Israeli air attacks on the Jordan River Development Scheme in Syria in July 1966 and in Jordan on August 10,1969 have not been condemned by the Security Council[21].

On the other hand the attitude of a state which is the target of reprisals, not to refer the case of reprisal to the Security Council to seek condemnation may also encourage the practice of reprisal.

> A number of actions capable of characterization as reprisals have not in practice been condemned. Many are not even referred to the Security Council, presumably indicating that the target state felt that there was little chance of condemnation .For example there were air strikes by Israel against Jordan on February 11, March 16, March 26, April 20-21, 1969, of these only the Es-Salt raid on March 26 was referred to the Security Council.[22]

The condemnation by the Security Council itself carries with it different considerations that do not categorically indicate the illegality of reprisals by using some qualifying concepts such as reasonableness and proportionality.

> ...It is nevertheless true that the Security Council has never been able to stop the practice of reprisal and ... may now be moving towards a partial acceptance of reasonable reprisals...The clear

[21] Derek Bowett (n. 16) 13
[22] Ibid. 11

> position is that the Council, as a matter of principle, condemns armed reprisals as illegal. The unclear position emerges from the Council's failure to condemn in certain circumstances ...We would then have an apparent conflict between the principle of the illegality of all armed reprisals and the Council's practice in not condemning a particular reprisal because it appeared reasonable.[23]

Hence a reprisal aimed at the guerillas, destroying their camps or base might be regarded as reasonable, whereas a reprisal aimed at the Government or at state installations such as airports, dams irrigation system, ports, etc is far less likely to avoid condemnation.[24]

With regard to proportionality the Nahalin incident of March 28 1958 can be cited as relevant example. After the incident neither the Mixed Armistice Commission nor the Council condemned Israel. Perhaps the most striking feature about the incident is the equation -or proportionality of the damage; the guerrilla attack from Jordan on an Israeli bus in the Negev killed eleven, the Israeli attack on the Jordanian village killed nine and wounded fourteen[25]

A somewhat similar incident, the Karameh incident of March 1968 brought unanimous condemnation of Israel. But thereafter an Israeli bus struck a mine in the Negev killing two adults and injuring several school children, the Israeli reprisal took the form of a large scale attack on Karameh with tanks, helicopters and aircraft in support, followed by

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[23] Ibid. 21-22
[24] Ibid., 20
[25] Ibid.

claims to have killed 150 terrorists. The debate in the Council emphasized the disproportionate character of the reprisal.[26]

In addition to characterization of reprisals on the basis of reasonableness and proportionality, the problem of the notion of the phrase "armed attack" and states' loss of confidence in the capacity of the Security Council to take effective measures may be taken as the factors that encourage the dominance of the actual practice of reprisal over the law.

Armed attack as provided under Article 51 of the Charter is a vague phrase in the sense that it does not tell how much force -both in terms of men and arms is to be considered as an armed attack. In other words how many armed persons -two? Three? , Four? a squad? Company? etc should be taken as a starting point of armed attack? What remedy would be available for a state that is attacked by a force, which is less than armed attack? If for instance armed attack starts with a minimum of 10 armed men within the meaning of Article 51, then what should a victim state do, if 9 armed men launched an attack at its border killing 20 people and destroying property?

Strict interpretation of Article 51 does not help the Victim State in this situation, as there is no armed attack within the meaning of Article 51 of the Charter. Thus the Victim State cannot take forcible measures on the ground of self-defense. But no sensible state remains dormant until the attack reaches the level of armed attack under the Charter. Rather it will be compelled to resort to armed reprisals.

As regards the loss of confidence of states in the capacity of the Security Council to take effective measures, it is clear that the Security Council does not take measures on behalf of a victim state that is subjected to an attack less than armed attack. In such a situation, the Victim State

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[26]Id

will have no alternative other than resorting to force in the form of reprisals.

> ...Not surprisingly, as states have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self help in the form of reprisals and have acquired the confidence that in so doing they will not incur anything more than a formal censure from the Security Council. The law on reprisals is, because of its divorce from actual practice rapidly degenerating to a stage where its normative character is in question.[27]

From what has been discussed so far, one can envisage that the trend indicates the movement of reprisals is closer to the notion of self-defense thereby narrowing down the borderline between self-defense and reprisals. Despite this, the difference between the two terms is clearly stated by Mr. Morozov who was once the Soviet representative in the Security Council in the course of the debate on the Gulf of Tonkin incidents in August 1964. He stated the difference between the two terms as follows:

> The difference between the right of self-defense and the right of retaliation is quite obvious to any first year student at any law school or any institution of legal studies. In fact contemporary international law categorically denies and rejects

[27] Ibid. 2

> a right of retaliation .The recognition of the right of self defense in Article 51 of the United Nations Charter *ipso jure* precludes the right of retaliation...[28]

There are also preconditions, which serve as common denominators for both terms which, include the following:

1. The Target State must be guilty of a prior international delinquency against the claimant state.

2. An attempt by the Claimant State to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.

3. The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the Target State.[29]

The difference between the two forms of self-help lies essentially in their aim or purpose. Self defense is permissible for the purpose of protecting the security of the state and the essential rights-in particular the rights of territorial integrity and political independence upon which that security depends .In contrast reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future[30]

3.4 Chapter Summary

To sum up, in this chapter self defense which is an inherent right of a state expressly recognized by the UN Charter is distinguished from the other forms of self help-retorsion and reprisals. Retorsion is not legally prohibited but does not use force unlike self-defense, which uses it.

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[28] UNSC Official Records, 19th year, 1141st Meeting Para. 82--83
[29] Derek Bowett (n. 16).3

Reprisal on the other hand is an illegal act as opposed to self-defense. Inspite of this the actual practice of states shows that reprisal has become the order of the day, states invoking it as self-defense. All the three forms of self-help have one thing in common, which is hostilities and unfriendly relations between two states.

[30] Id

Chapter Four

Emerging Trends And Issues

4.1 Introduction

Under chapter two it has been discussed that the basis for the exercise of the right of self-defense by a victim state is the occurrence of armed attack. But there were in the past, and still there are today situations under which states invoked the right of self defense in response to attacks against them other than the occurrence of actual armed attack. In other words victim states have persistently sought that Article 51 of the United Nations Charter should be stretched so as to accompany the modalities of attacks that can not be taken as armed attack per se but which are equal in effect to armed attack. This chapter deals with the emerging trends with respect to the attacks that do not exactly fall with in the meaning of Article 51 of the Charter and the legality of the responses made to such attacks by the victim states. Accordingly the focus of attention of the discussion will revolve around four areas viz.

- The protection of nationals abroad
- Anticipatory self defense
- Preemptive self defense
- Extermination of terrorism

Each of them will be dealt with a separate section.

4.2 The Protection Of Nationals Abroad

The protection of nationals abroad is not as such a recent phenomenon to be called an emerging trend in the strict sense of the term. However in the post Charter period states have justified their use of force for the protection of nationals abroad as the exercise of their right of self-defense within the meaning of Article 51 of the UN Charter. It is this attempt to

legitimate their action pursuant to Article 51 that is to be considered as an emerging trend.

The citizens of a state residing in another state may be exposed to danger on different occasions such as the breakout of civil wars or political hostages believed to face imminent danger of death or injury. In such situations the national state of the victims steps in so as to rescue the lives of its citizens by using force the justification given being the exercise of the right of self defense within the meaning of Article 51 of the United Nations Charter. The British intervention in Egypt following the Suez crisis in 1956 is a case in point in this regard. After France and the United Kingdom bombed the Egyptian airport near the Suez Canal, on October 31, 1956, they dispatched a contingent of troops to occupy certain key positions along the canal on November 3.[1] The British representative before the United Nations Security Council made the following statement in justification of the British action.

> ...In Egypt there are many thousands of British and French nationals .The chain of events which began with the Israel moves into Egypt has developed into hostilities and hostilities have created a disturbed situation .In those circumstances, British and French lives must be safeguarded again emphasize ...that we should certainly not want to keep any forces in the area for one moment longer than is necessary to protect our nationals[2]

Of course the British representative did not support his statement with a

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[1] Natalino Ronzitti ,*Rescuing Nationals Abroad Through Military Coercion And Intervention On Grounds Of Humanity* (Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1985,) 28

[2] 11 UN SCOR 749th meeting ,para, 174

Legal argument, but it was the then British Prime Minister Anthony Eden who touched upon a legal argument as a justification for British intervention, when he declared before the House of Commons:

> "...There is nothing...in the Charter which abrogates the right of a Government to take such steps as are essential to protect the lives of their citizens"[3]

Further Eden based his argument on Article 51 of the Charter by stating that to intervene in order to protect nationals abroad was to exercise the right of self defense set forth in Article 51 of the UN Charter .The justification forwarded by Eden was supplemented by the then British Foreign Secretary Selwyn Lloyd who declared his opinion before the House of Commons as follows;

> ...The right for individual countries to intervene in an emergency is justified not only because Security Council action was subject to paralysis from a veto of one of the permanent members, but also because the Security Council is not a body capable of taking quick action. The action taken by the British forces was action in self-defense under Article 51 of the UN Charter[4]

The foreign Secretary further stressed in his opinion that three criteria should be fulfilled for the exercise of the right of self-defense in the protection of nationals abroad which he enumerated as follows;

1. The nationals of the intervening state had to be under an imminent threat of injury.

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[3] E.Lauterpacht ,*The Contemporary Practice Of The United Kingdom In The Field Of International Law-Survey & Comment* ,111 ,August 16-December 31 1956, International &Comparative Law Quarterly ,Vol. 6 (1957) P.326

[4] Parliamentary Debates (Hansard),Fifth Series, Vol. 588, House Of Commons Official Report ,Col. 1377,30 October 1955

2. There must be failure or inability on the part of the local sovereign to protect foreign citizens

3. Action of the intervening state must be strictly confined to the object of protecting the nationals against injury.[5]

The House of Commons also had no reason to reject the British action in Egypt, instead it put stamp on the legality of the action on the ground of self defense. To this end the Lord Chancellor stated:

> ...Self-defense undoubtedly includes a situation in which the lives of a state's nationals abroad are threatened and it is necessary to intervene on that territory for their protection.[6]

The attitude of some states towards the use of force for the protection of nationals abroad on the ground of self defense within the meaning of Article 51 of the United Nations Charter is not changed so far. This is particularly true of those states whose nationals abroad have been repeatedly subjected to imminent threats or injuries. For instance twenty years after the Suez crisis where Britain intervened in Egypt to protect its nationals, another incident took place in Entebbe, Uganda in 1976 where Israel took forcible measures to free her detained citizens by Palestinian armed groups. Following Israel's measure an interesting debate was held in the Security Council on the legality of the action taken. The detail of the case is presented below[7].

On June 27, 1976, an air France airliner enroute from Telaviv to Paris was hijacked over Greece shortly after leaving the Athens airport and it was diverted to the Entebbe airports in Uganda. About 100 Jewish passengers were held as hostages, the others were released. The four

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[5] Parliamentary Debates ,(Hansard), Fifth Series, Vol. 588, House Of Commons Official Report, Col. 1566,31 October 1956

[6] Parliamentary Debate (Hansard),Fifth Series, Vol. 199, House Of Lords Official Reports

[7] Ray August *Public International Law*, (Engle Wood Cliffs, Prince Hall Inc. New Jersey, 1955) 531

hijackers demanded the release of about 50 Palestinian terrorists imprisoned in Israel and other countries. According to the international news media covering the incident at the time, Uganda not only failed to take steps to help the hostages, but it actually aided the hijackers. Uganda denied this. On July 3, 1976 Israeli transport aircraft flew soldiers to Entebbe and released the hostages by force. The four hijackers were killed during the rescue operation, as were some Uganda and Israeli soldiers. Ugandan aircraft and the Entebbe airport were also extensively damaged.

As a result a debate in the Security Council on the question of Israeli's right to carry out the rescue was held[8]. In the debate the Representative of the Ugandan Government argued: "Uganda gave all the help and hospitality it was capable of giving to all the hostages, the response to

this humanitarian gesture by Zionist Israel . . . was to invade Uganda . . . we call upon this council unreservedly to condemn in the strongest possible terms Israel's barbaric, unprovoked and unwarranted aggression against the sovereign republic of Uganda. Uganda demands full compensation from Israel for the damage to life and property caused during its invasion . . .

In response to the argument made by Uganda the representative of the Israeli Government presented the following argument. [9]

> Uganda violated a basic tenet of international law in failing to protect foreign nationals in its territory. Furthermore, it behaved in a manner, which constituted a gross violation of the 1970 Hague Convention on the suppression of the unlawful seizure of Aircraft. Both Israel and Uganda had ratified this convention. The right of a state to take military

[8] United Nations Document S/PV. 1939 pp. 27, 51-59 and UNDOC S/PV .1941, pp. .31-32(1976):International Legal Materials ,VOL. 15, p.1224(1976)
[9] Ibid.

> action to protect its nationals in mortal danger is recognized by all legal authorities in international law. In self defense in International law, professor Bowett states, on page 87, that the right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted both in the writings of jurists and in the practice of states.

One of the participants of the debate in the Security Council, the United States of America argued in favor of Israel and presented its argument in the following manner. [10]

Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the charter of the UN. However, there is a well established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them. The right flowing from the right of self-defense is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury. The requirement of this right to protect nationals were clearly met in the Entebbe case, Israel had good reason to believe that at the time it acted, Israeli nationals were in imminent danger of execution by the hijackers. Moreover, the actions necessary to release the Israeli nationals or to prevent substantial loss of Israeli lives had not been taken by the Government of Uganda, nor was there a reasonable expectation such actions would be taken. It should be emphasized that the assessment of the legality of Israeli actions depends heavily on the unusual circumstances of this specific case. In particular the evidence is strong that, given, the attitude of the Ugandan

[10] Ibid.

authorities, co-operation with, or reliance on them in rescuing the passengers and crew was impractical.

Another major incident worth mentioning after the Entebbe incident would be the United States attempt to free the American hostages held in Iran by military force in 1980. Although the mission failed, President Carter justified the action on the ground of self-defense within the meaning of Article 51 of the UN Charter. He declared before the Congress:

> In carrying out this operation, the United States was acting wholly within its right in accordance with Article 51 of the UN Charter to protect and rescue its citizens where the Government of the territory in which they are located is unable or unwilling to protect them.[11]

It is not only Israel, United States, and France who used force for the protection of their citizens abroad on the ground of self defense, rather many states have taken similar measures on the same ground. The writer simply took the three countries as a sample.

The crucial question to be raised at this juncture and which needs a categorical answer is the question "is the use of force to protect nationals abroad legally justifiable?"

There are two diametrically opposite arguments, the one answering the above question in the positive, and the other in the negative.

The argument in favor of the legality of the use of force to protect nationals abroad proceeds from the wider interpretation of Article 51 of the UN Charter. In so doing, it views Article 51 as incorporating the customary right of self-defense rather than extinguishing it. What is more the argument likens the nationals of a state with its territory and

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[11] M.J Glenon and Th.M. Franck, *United States Foreign Relations Law:* Documents and Sources, Vol., III, The War Power, (1981) Pp. 345 Ff.

the protection of its nationals abroad to have the same effect as the protection of its territory.

> The jurists of the 19th century and earlier considered as lawful the use of force to protect the lives of nationals abroad. This right was regarded as the exercise of the right of self preservation, as the exercise of the right of self defense, as one of several justifiable forms of intervention, or action justified in terms of necessity .The logic is that the nationals of a state are an extension of the state itself, a part as vital as the state territory and that the *raison d'être* of the state is the protection of its citizens[12]

Another argument in favor of the use of force for the protection of nationals abroad proceeds from the literal interpretation of Article 2(4) of the United Nations Charter. According to this argument[13] Article 2(4) forbids the use of force against the territorial integrity and the political independence of any state, or its use in any other form which may be inconsistent with the aims of the United Nations. The use of force for the protection of nationals is not inconsistent with the first clause of Article 2(4) whenever this does not involve a separation of part of the state which the object of the intervention (otherwise its territorial integrity would be violated) or a prolonged presence of the intervening state's troops in the state where the intervention has taken place. The use of force even it may not assume the forms just prescribed is contrary to the inviolability of the state, which is the object of the intervention. Nevertheless Article 2(4) does not set to protect the inviolability of the state, but only its territorial integrity and its political independence.

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[12] Stanimir A. Alexandrov, *Self defense Against the Use of Force in International Law*,(Kluwer Law International , The Hague, Netherlands, 1996) 188-189

[13] Natalino (n.1) 1

The failure of the collective security system established by the United Nations Charter under its Article 43 has been also one aspect of the argument in favor of using force for the protection of nationals abroad.

> The failure to implement Article 43 of the Charter and those which follow it, and the disagreements which came to light immediately after its entry into force, between the permanent members of the Security Council have prevented the collective security system from working properly. This had led certain authors to claim that Article 2(4) does not contain an absolute but only a relative prohibition. The use of force as a self measure distinct from the legitimate use of self defense would remain forbidden whenever the collective security system is capable of working properly, force would be permitted, however, where the system in question does not function properly[14]

The very fact that Article 51 of the Charter incorporates the phrase "inherent right" has become a solid ground for writers to argue in favor of the use of force for the protection of nationals abroad. The argument starts from the premise that self defense being an inherent right is derived from natural law and what is natural should prevail over what is man made, i.e. natural law prevails over positive law. Thus self defense should not be limited by Article 51 .In this regard Connel[15] argues that if there is today no right of self defense for members of the United Nations except Article 51 then even a well established doctrine such as that of the Caroline might be found to have been abrogated .In analyzing Article 51 it must first be noted that it acknowledges the inherency of the right

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[14] Ibid. 2-3

[15] D.P.O' Connel *International Law For Students* (Stevens And Sons, London ,1971) 135

of self defense and seems to allow that interpretation must take into account a basic natural law right beyond the abrogating power of the law .The content of the right of self defense on this thesis would be basically greater than that which Article 51 concedes.

So far we have seen the arguments raised in favor of using force for the protection of nationals abroad. Now we will see the other side of the argument, which rejects the use of force for the purpose described above. Accordingly the existence a law for the use of force for the protection of

A national abroad is completely denied .In this regard Natalino states:

> "An evaluation of the law now in force within the international community leads to the conclusion that the right to intervene to protect one's own citizens abroad does not exist"[16]

Linking the issue with the notion of armed attack he further argues that intervention to protect nationals abroad cannot be ascribed to self defense. Self-defense presupposes an armed attack against a state and it is a mere pretext to consider an attack against nationals abroad as an attack on the state itself of which the nationals are citizens[17].

Theodore[18] reinforces this argument by stating that in order for the right of self-defense under Article 51 to cover the protection of nationals abroad, an attack on nationals abroad must be equated with an attack on the state. This is hardly an acceptable proposition even in cases where individuals are targeted because of their nationality.

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[16] Natalino (n. 1) 65
[17] Ibid. 69
[18] Theodor Schweisfurth, *Operations To Rescue Nationals In Third States Involving The Use Of Force In Relation To The Protection Of Human Rights*, 23 German Year Book Of International Law 159,162-165 (1980)

Even the repeated practice of some states in using force for the protection of nationals abroad is argued not to form customary law as it has been opposed by a substantial number of states.

> ...It is dubious that the right to protect one's nationals abroad exists under Article 51 of the Charter. The practice of claiming self-defense to justify such use of force has been confined to a relatively small number of states and has not been supported by the majority. Thus it lacks the degree of wide spread support necessary for a customary right subsisting under Article 51 even though some states still maintain the right to use force abroad in the protection of nationals. The majority of states do not seem to find such use of force justifiable under Article 51. In every instance of use of force by a state to protect its nationals abroad, the legality of the action has been challenged by a large number of states[19]

When one tries to weigh the arguments so far, the argument favoring the use of force for the protection of nationals abroad does not seem to carry more weight.

In the first place, the argument that Article 51 incorporates the customary right of self defense rather than extinguishing it lacks plausibility, for one thing the said Article does not expressly provide so, for another, since Article 51 is an exception to the general rule provided for under Article 2(4) of the Charter, it must be interpreted narrowly. If one applies wider interpretation, it renders the general rule useless.

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[19] Stanimir ,A. Alexandrov(n.12) 202-203

In the second place, the analogy drawn between nationals of a state and a part of its territory is not acceptable for analogy is made between similar things .A State's territory and its nationals are not similar things. What is more the analogy loses ground, for Article 51 talks only of a state not of individual citizens. It is crystal clear from the words of the Article that self defense is available if and only if an armed attack is launched against a state not against its citizens residing abroad.

One can persistently argue that even if the framers of the United Nations Charter were able to understand the necessity of the protection of nationals abroad they could not be willing that the situation to be covered by Article 51. Since the purpose of the Charter is to maintain international peace and security, and when this purpose is compared with the lives of citizens abroad, the purpose prevails over the lives of some individuals. If the peace and security of the world is lost everything is lost, but if the lives of some citizens is lost the whole thing is not lost.

In general, the intention of the drafters of the Charter is clear that self defense within the meaning of Article 51 is available in a situation where armed attack is launched against a state. There is a rule of interpretation of law that states that whenever the law is clear there is no room for interpretation and Article 51 cannot be an exception in this case. Thus the argument for the extensive interpretation of Article 51 to include the use of force for the protection of nationals abroad is not legally tenable, rather it amounts to an interpretation that encourages the deliberate violation of international law.

4.3 Anticipatory Self Defense

The other source of controversy in the use of force on the ground of self-defense since the coming into force of the Charter is **anticipatory self-defense.** A State taking the measure of anticipatory self-defense is not faced with nor is a victim of armed attack. But by examining the

circumstances it decides that the attack is inevitable and hence takes action beforehand, i.e. it looks forward to an uncertain event as certain and acts as if the uncertain thing (armed attack) has become certain .The Middle East provides a good example where anticipatory self defense is invoked now and then in the Arab-Israel confrontation. The first such confrontation was the one that followed the Suez Canal crisis. It is important to see the facts as it helps one to judge whether the action taken based on the facts is legally acceptable or not. On July 26, 1956[20] Egyptian President Nasser announced the nationalization of the Suez Canal Company owned by France and the United Kingdom .The reaction of France and the United Kingdom who owned the Company was very hostile. The Egyptian move also caused great concern to Israel since Egypt had been obstructing the passage of ships destined for Israel through the Canal. Besides frequent fedayeen raids against Israel territory occurred from Sinai and Gaza. Secret meetings were held among Israel France and the United Kingdom to discuss concerted military action: an Israeli attack followed by joint Anglo-French police action; on October 29, 1956, Israel invaded the territory of Egypt in the Sinai Peninsula. The next day the United States called for an emergency meeting of the Security Council and proposed a resolution[21] which noted Israel's violation of the armistice, called for a withdrawal of Israeli forces, for a cease fire and for all members to refrain from the use of force contrary to the Charter.

All the three countries (Israel France and the United Kingdom) that launched an armed attack against Egypt had tried to legally justify their action. Israel justified its action by invoking self-defense within the

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[20] Ibid. 150

[21] 11 SCOR 749th meeting ,October 30 ,1956

meaning of Article 51 of the United Nations Charter. Accordingly it stated the following reasons[22].

1. The raids of armed bands (fedayeen) which in the view of Israel were regarded by Egypt as an instrument for Israel's destruction.

2. Blocking the shipments destined for Israel through the Canal

3. Threats of use of force by Egypt.

Israel further asserted that the threats and uninterrupted series of encroachments constitute in its totality the essence and reality of armed attack. France and the United Kingdom justified their attack against

Egypt on the following grounds[23]

1. To stop the hostilities

2. To defend the Suez Canal from stoppage of traffic

3. To prevent nationalization of the Suez Canal Company by Egypt

4. To guarantee for freedom of traffic.

The Security Council was not able to adopt a resolution against the measures taken by Israel France and the United Kingdom since it was blocked by the veto of France and the United Kingdom. However the matter was transferred to the General Assembly under the uniting for peace procedure.[24]

An emergency special session was convened where the United States proposed a resolution similar to the one proposed in the Security Council calling for a cease fire and withdrawal by Israel, France and the United Kingdom. The resolution received overwhelming support; it was adopted by 64 in favor, 5 against and 6 abstentions.[25]Consequently the

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[22] GAOR ES-1 Plenary ,November 1,1956 at 22-23 and 61
[23] Stanimir ,A. Alexandrov(n.12)151
[24] 11 SCOR Supplement for Oct.--Dec. 1956, 116-117 UNDOC. S/3721
[25]GA. Res. 997(ES-1)Nov .2 1956; GAOR, ES-1 supplement No. 1 ,at 2 UNDOC A/3354

first United Nations Emergency Force (UNEF) was sent to the Middle East with a mandate to secure and supervise the cessation of hostilities, oversee the withdrawal of the military forces and protect Israel against the fedayeen[26]

Anticipatory self-defense had also been invoked on the ground of information obtained about the huge concentration of armed forces around the border from which a decision is arrived about the inevitability of the outbreak of war. The 1967 Israel -Arab war can be taken as an example in this regard.

On May 29 1967[27] one week before the outbreak of the Six Day War, Israel complained to the Security Council of massive troop concentration built up in the Sinai Peninsula and of threats of President Nasser to interfere with shipping in the Straits of Tiran at the entrance (to the Gulf) of Aqaba which was a part of an overall plan of aggression against Israel. The United Arab Republic (Egypt and Syria)in turn accused Israel of continued violation of the UN Charter and the armistice agreements. Later the United Arab Republic(UAR) stated that it had received accurate information that Israel had been concentrating huge armed forces on the Syrian border and had every reason to believe that the Israeli authorities had seriously contemplated an attack against Syria. Therefore the UAR had decided to defend the Arab nation by all measures and since the presence of UNEF would have conflicted with that situation, the UAR requested the Secretary General to withdraw the UNEF[28].

Following the decision of the UAR specially the withdrawal of the UNEF from its position, Israel interpreted the situation as one which revives belligerence, thus it launched its air strikes against Egypt on June 5

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[26] Stanimir ,A. Alexandrov(n.12)152
[27] Ibid. 153
[28] Repertoire Of The Practice Of The Security Council 1966-1968,135 UN New York, 1971 V.158

1967 after which it claimed that it was entitled to act in *self defense* because of the clear implication that Syrian and Egyptian forces had been deployed as part of an impending attack[29].

Anticipatory self-defense has also been invoked in relation to the use of nuclear weapons. This is also a controversial issue but what is so special about it is that nuclear weapons being technologically more sophisticated weapons raise an additional question of determining as to when the attack starts .Two instances of anticipatory self defense in connection with nuclear weapons can be mentioned .The first will be the well known the *Cuban Missile Crisis* of 1962 and the second will be the *Israeli attack on the Iraqi nuclear reactor in* 1980. The facts of each of these events will be seen in a brief manner.

A)The Cuban Missile Crisis Of 1962[30]

On October 22 1962, the United States indicated that it had sufficient evidence that Russian nuclear missiles were being installed in Cuba brought to Cuba by Russian ships. Accordingly the US announced that all ships going to Cuba were to be examined and any found to be carrying such weapons would not be allowed through. Then the United States brought the issue before the Security Council on the grounds that the delivery of offensive weapons including nuclear missiles to Cuba was a threat to international peace and security. In the search for legal authority the US didnot invoke anticipatory self-defense under Article 51, rather it resorted to the regional arrangement provision of Article 52 and subsequently to the Rio Treaty signed by the OAS. More specifically the US justified its action on the basis of the resolution adopted by the OAS. The resolution of the Council of the OAS of October 23, 1962 invoked Article 6 of the Rio Treaty referring to cases where the inviolability or the integrity of the territory or the sovereignty, or political

[29] Statement Of Mr. Eban ,UNDOC, S/PV, 1348(1967),71
[30] Stanimir ,A. Alexandrov(n.12) 154---155

independence of any American State is affected by an aggression which is not an armed attack, and recommended that the member States take all measures, individually and collectively including the use of armed force to ensure that Cuba could not continue to receive military supplies and prevent Cuba from becoming an active threat to the peace and security of the continent. Whether this resolution on which the United States justified its action is compatible or not with the United Nations Charter will be examined later in this section.

B. Israeli Air Strike Against The Iraqi Nuclear Reactor

In 1981, Israel launched an air attack on the Iraqi nuclear reactor specifically invoking Article 51 of the UN Charter. According to the official statement made by the Israeli Government, Israel had been forced to defend itself against the construction of an atomic bomb in Iraq, which Iraq itself would not have hesitated to use it against Israel. Thus the need to avert the danger before it materializes.[31]

Stressing on the immediacy and the necessity of the measure Israel further argued;

> The reactor was to go critical in a matter of weeks and that in order to avert even greater pain to the civilian population Israel had decided to strike before the nuclear facility became an immediate and great menace to Israel.[32]

4.3.1 Arguments For And Against The Legality Of Anticipatory Self Defense

The issue of the legality of anticipatory self-defense has been controversial to date. There are two groups of thoughts, one advocating

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[31] Israeli And Iraqi Statements On Raid On Nuclear Plat, In The New York Times, June 9 1981 At A 8, Col. 1.

[32] Stanimir ,A. Alexandrov(n.12)160

the legality of anticipatory self defense, and another advocating just the opposite .The essence of both arguments boils down to the interpretation of Article 51 of the United Nations Charter.Those who argue in favor of anticipatory self defense claim that Article 51 should be interpreted broadly whereas those who argue against anticipatory self defense reject the broader interpretation of the same Article. Some of the arguments made by both groups are presented below, first the arguments in favor followed by the arguments against.

4.3.1.1 Arguments In Favor Of The Legality Of Anticipatory Self Defense

Supporters of anticipatory self-defense argue that Article 51 does not limit the circumstances in which the right of self-defense is exercised. They deny that the word "if" as used in Article 51 means "if and only if ". They also argue that the conditions stated in Article 51 cannot be treated as exhaustive. They also raise the issue of inherency stated in the same Article and claim that since Article 51 describes self defense as an inherent right, it would be inconsistent for a provision simultaneously to restrict a right and to recognize that right as inherent[33]

According to this argument the phrase "if an armed attack occurs" in Article 51, a phrase which is considered the corner stone of the Article and the only condition precedent for the exercise of the right of self defense is not strictly adhered to .It is viewed only as one factor and the Charter does not preclude the use of force in self defense in anticipation of an armed attack. It also views the inherent nature of self defense as an implication of a wider exercise of the right in the absence of armed attack, i.e. whenever there appears to exist a threatening situation. This

[33] Michael Akehurst ,*A Modern Introduction To International Law,* (Sixth Edition, Routledge ,London And New York, 1987) 262

is the same as adhering to the customary practice as established by the Caroline case in 1837. In this regard Bruno states:

> Those authors who interpret Article 51 as merely confirming the preexisting right of self defense consider anticipatory measures of self defense to be admissible under the conditions set up by Webster in the Caroline case i.e. when the necessity of that self defense is instant, overwhelming and leaving no choice of means and no moment for deliberation.[34]

Supporters of anticipatory self-defense raise the issue of nuclear weapons and the necessity of anticipatory measures to avert the danger before nuclear hazard becomes a reality. For instance when Israel attacked the Iraqi nuclear reactor in 1981, one of the points it raised in its argument was that the scope of self defense had broadened with the technological advance and the concept had a wider application with the advent of the modern era and hence legitimate self defense included now the right to forestall a surprise attack.[35] Again to justify its quarantine on Cuba, the United States equated the missile installation with armed attack and hence invoked self-defense as a ground for its measures .To this end President Kennedy in a radio broadcast on October 22 1962[36] stated the following reasons for the measure taken.

1. It was a pacific blockade traditionally recognized in international law as constituting a peaceful method for settling a dispute as called for by Article 2(3) of the United Nations Charter.

2. It was not directed against the territorial integrity or political independence of any state and was not contrary to any purpose of the

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[34] Bruno Simma, Editor, The *Charter Of The United Nations, A Commentary*, (Second Edition, Oxford University Press, New York, 2002.) 893

[35] Repertoire Of The Practice Of The Security Council 1981--1984 V.49 At 326

[36] 47 Dept. Of State Bulletin 715 Ff.(1962)

UN and was therefore consistent with the obligations of the US under Article 2(4) of the Charter.

3. It was justified by the Rio treaty and resolution of the consultative organ of the OAS in pursuance of that treaty, and could not be regarded as enforcement action requiring prior consent of the Security Council under Article 53 of the UN Charter.

4. It was initiated as a measure of *individual and collective self defense* in response to a threat of force amounting under present conditions to "armed attack", and was therefore permissible under Article 51 of the Charter, prior to submission to the United Nations normally required by Article 37 of the Charter.

It has also been argued that the quarantine and the OAS resolution were justified as a measure of individual or collective self-defense permitted by Article 51 of the Charter. It was also suggested that the term armed attack, which alone justified such defense without prior United Nations authority, must be interpreted to include a serious threat of armed attack. Reference had been made to the statement by Secretary of State Webster in the Caroline case, generally accepted prior to the Charter, that military defensive action was permissible in case of an instant and overwhelming necessity, thus creating a limited right to preventive action; that such a construction is necessary in the nuclear age because to delay defensive action until an actual nuclear attack would be suicidal and the Charter supports this construction by forbidding threats as well as use of force in Article 2 para.4 [37]

The argument that Article 51 of the UN Charter should be interpreted to include the customary law of self-defense as enshrined in the Caroline case which in the final analysis permits anticipatory self-defense has also

[37] Quincy Wright ,The Cuban Quarantine ,57 AJIL (1963), 560

been supported by the ICJ. In the case Nicaragua v. US the Court stated as follows.

> ...The Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of regulation of the use of force in international relations. On one essential point this treaty itself refers to preexisting customary international law; this reference to customary law is contained in the actual text of Article 51 which mentions the inherent right (in the French text the droit naturel) of individual or collective self defense which nothing in the present Charter shall impair and which applies in the event of an armed attack. The court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a natural or inherent right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter[38]

Anthony also supports this line of argument stating the applicability of anticipatory self-defense in certain circumstances

> The international law of the 19th century may have permitted anticipatory self-defense in certain circumstances. The exchange between Webster and Ashburton concerning the Caroline case would seem to leave open the possibility that in some situations the gun could be legally jumped[39]

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[38] ICJ Reports (1986),94 para 176

[39] Anthony D'Amato, *International Law and Political Reality, Collected papers* (vol. One KLUER Law International, The Hague Netherlands, 1995) 119

One can possibly say that the description 'the gun could be legally jumped 'in the above quoted statement refers to the exercise of the right of self defense in the absence of armed attack and the word "legally" refers not to Article 51 but customary international law .The writer is of the opinion that Anthony cannot be taken to be a strong adherent of anticipatory self defense as the loose expression he used testifies this, i.e. the phrase "would seem" in the above statement does not show that he categorically supports the legality of anticipatory self defense.

4.3.1.2 Arguments Against The Legality Of Anticipatory Self Defense

A series of strong arguments against the concept of anticipatory self-defense has been made to date. In this subsection we will try to look at some of them only .As has already been stated the supporters of this line of argument base their stand in the narrow interpretation of Article 51 of the United Nations Charter. They view armed attack as the sole criterion of the exercise of the right of self-defense within the meaning of Article 51. They consider the use of any other criterion other than armed attack as a violation of the United Nations Charter, Bruno is one of the supporters of this line of argument.

> An anticipatory right of self defense would be contrary to the wording of Article 51 ("if an armed attack occurs") as well as to its object and purpose which is to cut to a minimum the unilateral use of force in the international relations...Therefore Article 51 has to be interpreted narrowly as containing a prohibition of anticipatory self defense. Self-defense is thus permissible only after the armed attack has already been launched.[40]

[40]Bruno Sima (n.34) 803

Another argument against anticipatory self defense touches upon the area of state practice and concludes that state practice does not favor anticipatory right of self defense .As Brownly[41] states since 1945 the practice of states generally has been opposed to anticipatory self defense. The Israeli attack on the Iraqi nuclear reactor in 1981 was strongly condemned as a clear violation of the Charter of the United Nations in the Security Council Resolution 487(1981) adopted unanimously .The Bush doctrine published in 2002 claims a right of preemptive action against states who are seen as potential adversaries. This doctrine is applicable in the absence of any proof of an attack or even an imminent attack. However it lacks a legal basis.

Stanimir[42] also argues that a broad interpretation of Article 51 allowing anticipatory self defense that would justify the Israel attack, and by analogy the United States quarantine against Cuba could render Article 51 meaningless.

Another writer Jessup[43] argues that the restriction in Article 51 very definitely narrows the freedom of action, which States had under international law. A case could be made out for self-defense in the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring State would justify a resort to the Security Council but would not justify resort to anticipatory force by the State, which believed itself threatened.

One point for that matter a major point on which the justification for anticipatory self defense on the part of the States who claim that right rests on the idea of *imminent danger.* Supporters of the argument against

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[41] Ian Brownly ,*Principles Of Public International Law* (Sixth Edition ,Oxford University Press ,Oxford ,New York, 2003) 702

[42] Stanimir ,A. Alexandrov(n.12) 162

[43] Philip Jessup ,*A Modern Law Of Nations*, (Macmillan ,1948) 166

anticipatory self-defense have criticized this on the ground of lack of objectivity in determining "imminent danger"

> The question whether an attack is imminent is inevitably a question of opinion and degree, and any rule founded on such a criterion is bound to be subjective and capable of abuse .To confine self defense to cases where an armed attack has actually occurred on the other hand has the merit of precision; the occurrence of armed attack is a question of fact which is usually capable of objective verification[44]

One may ask as to what the fate of customary international law is with regard to the use of force in anticipatory self-defense in the eyes of the proponents of the illegality of anticipatory self-defense. They have a clear answer for this question. They do not recognize the existence of the customary law subsequent to the coming into force of the UN Charter as Miroslav clearly puts it

> ...Today there is no place for any construction of a contradiction between Article 51 of the Charter and the customary law mainly because customary law was replaced in this respect by the law of treaties binding all states. Conditions of Article 51 cannot be altered unilaterally and any attempts to extend the right of self-defense beyond the limits of Article 51 are therefore illegal[45]

Before winding up the discussion on the two opposed arguments on the legality of anticipatory self-defense, determination of which of the two arguments is legally tenable is of paramount importance. In this respect the writer is of the opinion that the argument made against the legality of

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[44] Michael Akehurst (n.33) 263

[45] Miroslav Potocny ,*Principles Of Peaceful Coexistence* (.Zdenek Cervenka(Dr.) Trans. ,University Of 17th November ,Prague, 1968) 120

anticipatory self-defense carries more weight than the other opposed argument.

What has been discussed under this chapter section 4.1 about the interpretation of Article 51 is fully applicable in this case also. Article 51 clearly stipulates the precondition for the exercise of the right of self defense which is the occurrence of armed attack, since the existence of mere threats of force is not provided as armed attack under Article 51, anticipatory self defense triggered by mere threat of the use force has no legal foundation at all. The United Nations itself, in its history, has never accepted the notion of anticipatory self-defense as a right. Instead it had seriously condemned the use of force on the ground of anticipatory self-defense through the adoption of resolutions. The uniting for peace resolution adopted by the General Assembly, and the Security Council resolution condemning Israel's air raid on the Iraqi nuclear reactor just discussed in this section are cases in point. A number of delegations had discussed the legal concept of anticipatory self-defense. Many believed that the Charter clearly defines self-defense as inherent only if an armed attack occurs and that the notion of preemptive strike was unacceptable.[46]

In almost all cases anticipatory self defense has been invoked by the economically as well as militarily strong states just driven by their own national policy rather than the occurrence of an armed attack against them. For instance in the Suez crisis, in the case of France and the United Kingdom, it was generally supposed that a desire to eliminate President Nasser from the Government of Egypt, a determination to prevent Soviet influence, infiltration or invasion of the Middle East, a determination to prevent a precedent encouraging other Arab States to

[46] Stanimir A. Alexandrov (n.12) 161

nationalize oil wells or pipe lines, and in the case of France, a determination to prevent propaganda inciting Algeria nationalism and aid to the insurgents were motivations.[47]

France and the United Kingdom had expressly declared their motives, which deviate from the purpose of the Charter. For that matter France had accepted the criticism made against it. For instance in his address to the General Assembly on November 22, 1956, the French Foreign Minister Christian Pineau had stated as follows;

> ...We have been sharply criticized for taking the initiative in launching military operations when we had not been attacked directly. From a strict formal point of view, I am willing to recognize the merit of this criticism; but everything leads us to believe that this stockpiled equipment (in Sinai) was waiting for the (Soviet) volunteers who at the chosen time would have used it more effectively.[48]

The British motive had also been made clear when British Ministers in parliament suggested that the measures taken were justifiable because they had at least, for a time, stopped Soviet penetration and Egyptian aggressiveness[49]

It is clear that none of the above motives exhibited by France and Great Britain do tally with the occurrence of armed attack. For that matter the motive does not go with anticipatory self-defense as indirectly expressed in Webster's definition of self-defense in the Caroline case, as Quincy Wright correctly puts it:

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[47] Quincy Wright ,*Intervention ,1956,*51, AJIL (1957),272

[48] id

[49] British Prime Minster Anthony Eden's Speech In London ,November 16 & Statement Of Foreign Minister Selwyn Lloyd In The House Of Commons December 3 Respectively, Printed In The New York Times Nov. 16 & Dec. 4,1956

> ...If such objectives motivated British and French Governments, the operation would constitute the use of force as an instrument of national policy and as a means for settling a dispute or situation explicitly forbidden by the UN Charter. Such objectives do not constitute the instant and overwhelming necessity for defense that justifies the use of armed force in international relations.[50]

In general what France and the United Kingdom invoked as the exercise of the right of anticipatory self defense in the Suez Canal crisis had been strongly criticized to be an instrument of national policy other than the right of self defense within the meaning of Article 51 of the Charter

> While the vital interest of Great Britain in the flow of traffic through the Canal cannot be questioned, it cannot be said that in nationalizing the Canal Egypt was guilty of an armed attack against Britain, which alone would justify defensive action under Article 51 of the Charter. Nor can it certainly be said that Egypt was guilty of violating international law or treaty in nationalizing the Canal. The same comment applies to the French interest in preventing propaganda inciting Algerian nationalism. While under certain circumstances propaganda stimulated by foreign government hostile to the internal security of another State may be a breach of international law, this has not been deemed a danger permitting military attack upon the Government supporting such propaganda[51]

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[50] Quincy Wright (n.37) 273
[51] id

It is also argued that in the Cuban quarantine the United States did not invoke the right of anticipatory self defense .Of course it has been mentioned in this section that President Kennedy enumerated four grounds on which the quarantine was made out of which the fourth ground explicitly mentions individual and collective self defense, however the legal adviser of the US State Department notes that President Kennedy did not invoke this argument[52]

Michael Akehurst testifies to this fact even by substantiating the reason behind why the US did not invoke anticipatory self defense in the Cuban Quarantine

> Unlike many academic writers, the USA did not invoke a right of anticipatory self defense in order to justify the quarantine imposed on Cuba during the Cuban Missile Crisis .The USA realized that such an attitude would have created a precedent which the Soviet Union could have used against US missile sites in Europe. Indeed on the same reasoning, virtually every state in the world could have claimed to be threatened by a build up of arms in a neighboring State and could have resorted to preventive war. Fear of creating a dangerous precedent is probably the reason why States seldom invoke anticipatory self-defense in practice[53]

Even Article 6 of the Rio Treaty on which the US justified its quarantine on Cuba is not legally acceptable as the said Article runs counter to the very purpose of the UN Charter specifically Article 51. The contradiction is clear on the face of the document that Article 6 of the Rio Treaty allows member states of the Region to use force in a situation other than the

[52] Quincy Wright (n.37) 554
[53] Michael Akehurst (n .33) 262

occurrence of armed attack, whereas Article 51 allows the use of force if and only if armed attack occurs against a victim state.

Arguments against the legality of anticipatory self defense are widely accepted than arguments in favor of anticipatory self defense for the former clearly adheres to the words of the Charter while the latter deviates from same.

> One view for instance affirms that under the Charter a State is required to wait until it has actively sustained a surprise nuclear assault before it can resort to threat or use of force to prevent or to avert or otherwise respond even to the clearest and most well-grounded anticipation of it. *At less extreme points* in the range is the view that a State may have an anticipatory right of self defense for a wide variety of situations extending for example to the broad statement that the Charter does not require a State to remain inactive like a sitting duck awaiting its own destruction[54](emphasis added)

The phrase "at less extreme points "in the above quoted statement is a clear indication of the fact that arguments made in favor of anticipatory self defense are by far less convincing than those made against the same.

Hence if both the law and State practice (with the exception of Israel) do not favor anticipatory self defense, what purpose does it serve other than violation of the rules of international law?

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[54] Julius Stone ,*Of Law And Nations* ,(William S. Hein & Co., Inc. Buffalo, New York, 1974) 3-4

4.4 Preemptive Self Defense

Preemptive self-defense is synonymously used with anticipatory self-defense leading to the conclusion that there is no appreciable difference between the two terms. However there is an interpretation that treats preemptive self-defense differently from anticipatory self-defense and argument is made for the legality of preemptive self-defense. The argument associates such kind of self-defense with a certain theory stated below.

> One argument in favor of preemptive self-defense is based on the 'accumulation of events theory'. If a State is not in a position to respond to individual attacks (terrorist acts or incursions of armed bands) it would be entitled to respond to a whole series of such attacks accumulated over time[55]

As can be deduced from the above quoted statement preemptive self defense is exercised against an attack in the form different from conventional war between States but against an attack launched by armed groups be they terrorists or others. Since such groups use a hit and run tactics it would be difficult for a victim state to make an immediate response like that of conventional warfare between two states. Such sporadic attacks accumulated over time may cause substantial harm to a victim state. Consequently the victim state may be compelled to take action so that the attack may never take place again or at least the frequency with which it appears may be reduced. Again Israel can be taken as a very good example in this case.

> In sum Israel claimed that Article 51 justified the use of force to protect the life and safety of its citizens against *continuous incursions* of armed bands and

> other acts of terrorism from the territory of other states[56]

If the concept of preemptive self defense is to be understood as explained above then one can see a clear cut difference between anticipatory self defense and preemptive self defense .The difference attaches mainly to the time element in the sense that anticipatory self defense is exercised before an attack has occurred whereas preemptive self defense is exercised after an attack is launched against a victim state. Even if the difference between the two terms can be observed in this manner both suffer the same legal validity, i.e. preemptive self defense like anticipatory self defense is considered as illegal for that matter it is viewed as same as armed reprisals.

> It is very difficult to distinguish between the accumulation of events theory and reprisals since the purpose of the use of force in response to an accumulation of events is also to punish the other side for several cases of use of force and to deter it from future use of force[57]

The position of the UN Security Council on the question of preemptive self defense is clear .In most cases it did not accept the argument of Israel and the use of force by Israel was found to be of preemptive or punitive character and was considered in the nature of reprisals rather than self defense[58].

Besides anticipatory self-defense and preemptive self-defense there is a third term which resembles the above two terms. This third term is "**interceptive strike**". A state may actively respond to an attack

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[55] Stanimir A. Alexandrov(n.12) 165-166
[56] ibid. 179
[57] ibid. 166
[58] ibid. 179

launched against it while the attack is at its earliest stage; i.e. an attack which has already been started by the attacking state but has been neutralized by the defending state before it caused casualties. Interceptive strike on the part of the defending state seems miraculous but it is a possibility. Dinstein describes what interceptive strike is all about, its distinction from anticipatory self-defense, and its legality within the meaning of Article 51 of the UN Charter.

> Had the Japanese carrier strike force been destroyed on its way to Pearl Harbor, this would have constituted not an act of preventive war but a miraculously early use of counter force. To put it in another way the self-defense exercised by the United States (in response to an incipient armed attack) would have been not anticipatory but interceptive in nature. Interceptive unlike anticipatory self-defense takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack, which is merely foreseeable (or just conceivable), an interceptive strike counters an armed attack that is imminent and practically unavoidable... interceptive as distinct from anticipatory self defense is legitimate even under Article 51 of the Charter[59]

During the Gulf War, Iraq had been continuously launching scud missiles against Israel. Israel had also been taking counter measures by launching patriot missiles to inactivate the scud missile before it caused damage .In this case it is possible to say that Israel took interceptive not anticipatory measures, and her action is justifiable as self defense within the meaning of Article 51 of the Charter.

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[59] Yoram Dinstein *War Aggression and Self defense* (Second edition, Cambridge University Press New York, 1994) 190

4.5 To Eliminate The Sources Of Terrorism

Nowadays it has become common to hear "terrorist "attacks resulting in huge loss of human lives and destruction of property .The nature of the attack is different from that of a conventional warfare where the two warring sides come face to face to a battle field. Following the tragic events of the Munich Olympic in 1972 where 20 Israeli athletes were killed by terrorists, more than 5000 terrorist incidents were reported worldwide. Those attacks left 8000 persons wounded and over 4000 dead for the period 1975---1985[60]. The trend has continued on a wider scale threatening international peace and security. For instance the bombing of the Pan American Airline on the sky of Lockerby, Scotland in 1982 in which more than 200 people were killed, the attacks on the embassies of the United States in Kenya and Tanzania in 1998 which killed nearly 300 people including twelve Americans[61], the September 11,2001 attack on the World Trade center and on the Pentagon which caused the loss of so many lives and damage to property are some of the major known examples

At this juncture a question maybe raised as to how terrorism is to be defined. One cannot get a categorical answer to this question, as there is no universally accepted definition of terrorism.

> Terrorism does not refer to a well-defined and clearly identified set of factual events. Neither does it have any widely accepted meaning in legal doctrine. Hence the word does not refer to a unitary concept in either law or in fact[62]

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[60] US Department of State , Bureau Of Public Affairs ,International Terrorism(1985)
[61] Ian Brownly (n.41) 713
[62] W. Mallison and S. Mallison, The Concept Of Public Purpose Terror in International Law, Doctrines & Sanctions to Reduce The Destruction Of Human And Material Values .How. L.J 18:12 1974

Terrorist acts were condemned by the 1994 General Assembly Declaration on measures to eliminate international terrorism although the condemnation does not amount to the definition of terrorism. The Declaration runs;

> Criminal acts intended or calculated to provide a state of terror in the general public, a group of persons, or particular persons for political purposes are in any circumstance unjustifiable whatever the considerations of a political, philosophical, racial, ideological, ethnic, religious or any other nature that may be invoked to justify them[63]

On the other hand Anthony and Robert try to give a workable definition for terrorism by distinguishing terrorist act by at least three specific qualities which are;

a. Violence whether actual or threatened

b. A political objective however conceived

c. An intended audience, typically though not exclusively a wide one[64]

The fact that there is no universally accepted definition of terrorism does not lead to the conclusion that terrorist acts are legally justified. On the contrary one can say terrorist acts are illegal, as its effect is no more acceptable by any sensible state.

> Virtually all of the world's domestic legal systems have banned many of the actions typically undertaken by terrorist actors, interalia murder, assault, maiming, arson, kidnapping and malicious destruction of property. Hence it can be argued that

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[63]UNGA Res., 49//60(1994)

[64] Anthony Clark Arend & Robert J, Beck, *International Law &The Use Of Force* ,(Routledge ,London and New York, 1993)141

> by general principles of law, such acts are prohibited by international law[65]

So there is no question about the illegality of the 'terrorist' acts as described above, but the question is about the legality of the measures taken by victim states of the terrorist act to eliminate the sources of terrorists.

For instance in the 1985 Tunis raid[66], on October 1 1985, Israel launched an air strike on the PLO headquarters in Borj Cedria, a suburb of Tunisia .The attack which killed or injured more than a hundred persons came a week after the murder by Palestinian "terrorists" of three Israelis in Larnaca Cyprus. The then Israeli defense minister Yitzhak Rabin declared after the assault " we decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carryout terrorist activities". But he did not say a word about the legality of Israel's action. Nor Ambassador Netanyahu, in subsequent Security Council debate presented a legal argument .On the other hand, the Security Council by a 14-0-1 vote passed a resolution condemning Israel's active armed aggression [67]

Following the September 11,2001 attack, the United States and the British forces campaigned against Afghanistan where they thought the source of the terrorist attack was found. These two countries justified their actions on the ground of self-defense when they made their report to the Security Council, and their action was not condemned by the Council, instead it was appreciated.

> On October 8 2001, after the beginning of their military action against Afghanistan, the United States and the United Kingdom reported to the Security

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[65] id
[66] ibid. ,152
[67] SC Res. 573. UN SCOR. Res. & Decs. 40: 23, Undoc. S/INF/(1985)

> Council that this action was taken in accordance with their inherent right of individual and collective self defense. In a press statement of the same day, the President of the Security Council declared that the members of the Council were appreciative of the presentation made by the United States and the United Kingdom. This means that the Security Council agreed that both states were acting in self-defense[68]

It is not surprising to see the Security Council justifying the United States' and the United Kingdom's action as self defense for it had already adopted a resolution condemning the September 11 attack recognizing in its preamble the inherent right of individual or collective self defense[69]. Rather what is surprising is the double standard the Security Council was using in which case it condemned Israel's action on PLO's headquarter in Tunis whereas it justified United States' and the United Kingdom's action against Afghanistan in the aforementioned resolutions.

In the majority of cases victims of terrorist attacks are the strong countries specially America and Israel .In exceptional circumstances some small countries may also be targets of terrorist attacks. One such example is Ethiopia. In 2006 it had campaigned against the Union of Islamic Courts (UIC) in Somalia, a force which was powerful than the Transitional Government of Somalia. Before Ethiopia launched an attack on the UIC the issue whether there is a necessity to launch military attack was hotly debated in the House of the Peoples Representatives .The Government's as well as the ruling party's argument was that the UIC has been presenting a clear and imminent danger to the Country and the Country is entitled to defend itself. For instance the Prime

[68] Bruno Simma (n.34) 802
[69] UNSC Res. 1368(2001)

Minister of Ethiopia, Ato Meles Zenawi delivered the following speech to the Parliament:

> ...Having declared war they have launched an attack against Ethiopia .The reason why we say they have launched an attack is; first, by declaring jihad repeatedly against Ethiopia, they have threatened to launch attack. Second, they have declared to annex all areas of the Horn of Africa inhabited by Somali speaking people to their territories. Third, they have also declared that they will annex the Ethiopian Somali region to their territories, and fourth, they are committing an act of aggression against Ethiopia by harboring, organizing training and arming in the areas occupied by the UIC those rebel groups who want to dismantle the constitutional system of Ethiopia. What is more, they send these armed groups to the territory of Ethiopia to launch armed attacks. All these facts are indications of clear and present danger that should be averted soon[70](translation mine)

However in response to the Premier's statement above, it was argued by some members of opposition parties that there was no clear and imminent danger presented by UIC against Ethiopia and emphasized the necessity to wait until the first fire is opened by the radicalists .His Highness (MP) Bulcha Demekssa had stated the following

> ...Ethiopia should not be seen in the international forum as a violator of international law. However if the UIC crosses our boarder and fires a bullet, it would be appropriate for the Country to take counter measures.

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[70] FDRE House Of Peoples Representatives second Year Fourth Regular Session minute Tikimt 28 1999 E.C Addis Ababa

> With respect to clear and present danger the mere preparation of one state to launch an attack on another state cannot be taken to mean there is an imminent danger .As the party who took the initiative to attack first is considered as violator of international law, Ethiopia should not be the first to take such a measure[71](translation mine)

After Ethiopia has launched an attack against the UIC, Prime Minister Meles in his report to the parliament stated that neither the Security Council nor any country in the world condemned its action and he affirmed that this fact by itself is an indication of the recognition of Ethiopia's right to defend itself.

The Prime Minister's argument is nothing but the claim for the right of anticipatory self-defense. Again here one may raise the question as to whether Ethiopia's intervention in Somalia is legally justified or not. It has been repeatedly discussed that there is no as such anticipatory self-defense within the meaning of Article 51 of the UN Charter. Hence Ethiopia's case cannot be an exception in this regard. Of course Ethiopian forces were fighting against the UIC in collaboration with the forces of the Transitional Government of Somalia. This indicates that the Transitional Government had consented or invited Ethiopia's intervention in its fight against the UIC as it was clear from the circumstances of the case that the involvement of foreign elements in the conflict, specially the Eritrean Government has changed the nature of the conflict from being a purely internal affair to an international affair. From this perspective Ethiopia's argument could have been based on collective self-defense under Article 51 of the Charter. On the other hand it is clear that there had been sporadic armed group attacks near the Ethio-

[71] ibid.

Somalia border, but this provocative action does not give rise to the use of the right of self-defense under Article 51 of the Charter.

Since one of the reasons to fight the UIC as stated by the Prime Minister was the sending of armed groups by the UIC in the territory of Ethiopia, the measure taken to stop these armed incursions cannot be categorized as self defense within the meaning of Article 51. Rather the measure taken by Ethiopia is that of punitive or deterrence in nature. In other words Ethiopia's action can be characterized as armed reprisals, which is not legitimate pursuant to Article 51.

However, the existing international trend does not seem to categorize this type of action as reprisals. Some countries, specially the United States have taken a firm stand in interpreting action taken against terrorist attack to be self defense within the meaning of Article 51. This was confirmed by the United States Ambassador after its air raid on Libya in response to the bombing of West Berlin night club in 1986 in which two Americans were killed

> ...At the Security Council, Ambassador Vernon Walters (US Ambassador) argued that the United States recognize (d) and strongly support (ed) the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. Such an action, contended Walters, was an aspect of the inherent right of self defense recognized in the United Nations Charter[72]

In practice whenever a State is subjected to a terrorist attack, it does not simply remain passive but takes a forcible measure against the terrorists who launched the attack .In doing so it tries to legitimize its action on

[72] Anthony Clark & Roberts(n.64) 153

the ground of self defense. This is a clear implication of the vulnerability of Article 51 of the Charter now and for the future.

4.6 Chapter Summary

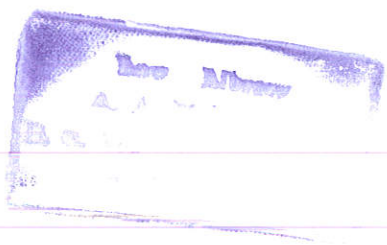
The post Charter period (post 1945) has witnessed the use of force by some states on the ground of self defense the legality of which has been controversial up to the present time. The controversy is mainly centered mainly on four areas, namely the protection of nationals abroad, anticipatory self defense, preemptive self-defense and abolition of terrorism.

The citizens of a state residing in another state may be exposed to danger on different occasions such as the breakout of civil wars or political hostages believed to face imminent danger of death or injury. In such situations the national state of the victims steps in so as to rescue the lives of its citizens by using force the justification given being the exercise of the right of self defense within the meaning of Article 51 of the United Nations Charter.

The crucial question to be raised at this juncture and which needs a categorical answer is the question "is the use of force to protect nationals abroad legally justifiable?"

There are two diametrically opposite arguments, the one answering the above question in the positive, and the other in the negative.

The argument in favor of the legality of the use of force to protect nationals abroad proceeds from the wider interpretation of Article 51 of the UN Charter. In so doing, it views Article 51 as incorporating the customary right of self-defense rather than extinguishing it. What is more the argument likens the nationals of a state with its territory and the protection of its nationals abroad to have the same effect as the protection of its territory.



The other argument against the legality of the protection of nationals abroad advocates the narrow interpretation of Article 51 and consequently rejects the legal justification for the use of force to protect nationals abroad under the cover of self defense within the meaning of Article 51 of the UN Charter.

The other source of controversy in the use of force on the ground of self-defense since the coming into force of the Charter is **anticipatory self-defense.** A State taking the measure of anticipatory self-defense is not faced with nor is a victim of armed attack. But by examining the circumstances it decides that the attack is inevitable and hence takes action beforehand, i.e. it looks forward to an uncertain event as certain and acts as if the uncertain thing (armed attack) has become certain .The Middle East provides a good example where anticipatory self defense is invoked now and then in the Arab-Israel confrontation.

Here also there are two groups of thoughts, one advocating the legality of anticipatory self defense, and another advocating just the opposite .The essence of both arguments boils down to the interpretation of Article 51 of the United Nations Charter. Those who argue in favor of anticipatory self-defense claim that Article 51 should be interpreted broadly whereas those who argue against anticipatory self-defense reject the broader interpretation of the same Article.

Preemptive self-defense is synonymously used with anticipatory self-defense leading to the conclusion that there is no appreciable difference between the two terms. However there is an interpretation that treats preemptive self-defense differently from anticipatory self-defense and argument is made for the legality of the preemptive self-defense. The argument associates such kind of self-defense with a certain theory stated below.

One argument in favor of preemptive self-defense is based on the 'accumulation of events theory'. If a State is not in a position to respond to individual attacks (terrorist acts or incursions of armed bands) it would be entitled to respond to a whole series of such attacks accumulated over time

Preemptive self defense is exercised against an attack not in the form of conventional war between States but against an attack launched by armed groups be they terrorists or others. Since such groups use a hit and run tactics it would be difficult for a victim state to make an immediate response like that of conventional warfare between two states. Such sporadic attacks accumulated over time may cause substantial harm to a victim state. Consequently the Victim State may be compelled to take action so that the attack may never take place again or at least the frequency with which it appears may be reduced.

Preemptive self defense like anticipatory self defense is considered as illegal for that matter it is viewed as same as armed reprisals.

It is not uncommon to hear "terrorist "attacks resulting in huge loss of human lives and destruction of property .The nature of the attack is different from that of a conventional warfare where the two warring sides come face to face to a battle field. There is no question about the illegality of the 'terrorist' acts, but the question is about the legality of the measures taken by victim states of the terrorist act to eliminate the sources of terrorists. It has never been accepted as legal by the Security Council or by the international community.

In practice whenever a State is subjected to a terrorist attack, it does not simply remain passive but takes a forcible measure against the terrorists who launched the attack .In doing so it tries to legitimize its action on the ground of self defense.

5. Conclusion

As a general principle the use of force by one state against another state is forbidden by the United Nations Charter Article 2(4). In so doing the Charter at least theoretically guarantees international peace and security. However this prohibition by the Charter is not absolute and hence it provides an exception to the general principle which enables a state to use force the purpose of which is to defend itself from an armed attack launched against it by another state. This legitimate use of force by a victim state is clearly provided by Article 51 of the Charter.

The post Charter period has witnessed that emerging trends such as the use of force for the protection of nationals abroad, the concept of anticipatory self defense, preemptive strike and the use of force to abolish terrorism have become challenges to the aforementioned provisions of the United Nations Charter. The challenges are manifested in the interpretation, especially of Article 51 of the Charter. States that employ the use of force on the ground of the protection of nationals abroad, anticipatory self defense, preemptive strike or for the abolition of terrorism justify their measures to fall within Article 51 hence arguing for the wider interpretation of this provision. Consequently the sole precondition provided for under Article 51 for the exercise of the right of self defense which is the occurrence of actual armed attack is ignored or considered only as one of the conditions for the exercise of the right.

The Charter envisages the exercise of the right of self-defense in interstate conflicts. When non-state actors like armed groups, terrorists are involved such as the well known September 11,2001 incident, the problem of defining Article 51 becomes even more greater .On the one hand to exercise its right of self defense, the law obliges a

state to wait until another state launches an armed attack against it. On the other hand, the law does not say anything about an attack launched against a state by non-state actors such as terrorists. In such a situation the Victim State does not keep quiet but responds to the attack and justifies its action on the ground of self-defense within the meaning of Article 51 of the Charter. This may lead to the conclusion that self defense is in the eyes of the defender rather than in the eyes of the law. This in turn indicates that the emerging trends are likely to put Article 51 in a vulnerable position and consequently pose a major threat to international peace and security. Therefore the law should be respected no matter how ambiguous it may seem. The ambiguity may be cleared with the passage of time through the amendment of Article 51 of the Charter. Till then Article 51 of the UN Charter should be invoked only in situations where a state has become a victim of armed attack by another state. To act otherwise would be tantamount to endangering international peace and security.

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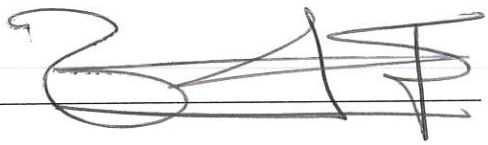
Declaration

I, the undersigned, declare that the thesis is my original work and has not been presented for degree in any other university and that all sources of materials in the thesis have been duly acknowledged.

Declared by: Getachew Tadesse

Signature 

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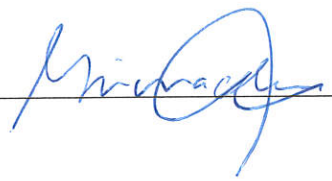
Signature: 

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