RE-ASSESSING THE RIGHT TO SELF DEFENCE IN INTERNATIONAL LAW: REVISITING ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS

BY

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TABLE OF CONTENTS

Declaration ____ vi

Acknowledgements ____ vii

Dedication ____ viii

List of Treaties and Agreements ____ x

List of Official Documents ____ xi

List of Cases and Advisory Opinions ____ xiii

List of United Nations Security Council Resolutions ____ xiv

List of United Nations General Assembly Resolutions ____ xviii

List of Abbreviations ____ xix

Abstract ____ xxii

CHAPTER ONE - INTRODUCTION

1.1. Background ____ 1

1.2. Statement of the problem ____ 6

1.3. Hypothesis ____ 10

1.4. Research questions ____ 10

1.5. Theoretical framework ____ 11

1.6. Literature review ____ 15

1.7. Research methodology ____ 19

1.8. Chapter breakdown ____ 19

CHAPTER TWO – THE RIGHT TO SELF DEFENCE UNDER INTERNATIONAL LAW

2.1. Introduction 22

2.1.1. Self Preservation 22

2.1.2. Reprisals 24

2.1.3. Retorsions 25

2.2. Historical evolution of the right to self-defence in International law 27

2.3. Sources of law governing the right to self defence in international law 34

2.3.1. Right to self-defence under customary international law 34

2.3.1.1. Anticipatory self defence 36

2.3.1.2. The principles of necessity and proportionality 40

2.3.1.3. Protection of nationals abroad 48

2.3.2. Right to self-defence under treaty law 52

2.3.2.1. Covenant of the League of Nations 52

2.3.2.2. The Treaty on Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of 1928 55

2.3.2.3. The Charter of the United Nations 57

2.3.2.3.1. Armed attack 58

2.3.2.3.2. Attack to be orchestrated by a State actor 60

2.3.2.3. 3. Action must be reported to the Security Council 63

2.3.2.3.4. Action may be taken collectively 65

2.3.2.3.5. Necessity and proportionality in contemporary international law 67

2.4. The interplay between Article 2(4) and 51 of the Charter and
Customary International law 68

2.5. Conclusion 75

CHAPTER THREE – THE ROLE OF THE SECURITY COUNCIL IN REGULATING THE RIGHT TO SELF-DEFENCE

3.1. Introduction 80

3.2. The Constitution, Powers and Role of the United Nations Security Council 82

3.3. Trends on the Use of Power of Veto 85

3.3.1. Protection of National Interests 85

3.3.2. Protection of Allies 90

3.4. Instances of Failure by the Security Council in Discharging its Mandate
Under Article 51 of the Charter 95

3.4.1. The Falkland Wars between Argentina and the United Kingdom in 1982 95

3.4.2. The Bosnia War between 1992 and 1995 102

3.5. Conclusion 107

CHAPTER FOUR – STATE PRACTICE

4.1. Introduction 113

4.2. The Six Day War between Israel and Egypt, Jordan and Syria in 1967 114

4.2.1. Legal Issues Arising from the Six Day War 116

4.2.2. The Role of the United Nations Security Council in the 1967 War 126

4.3. The United States of America Invasion of Iraq in 2003 137

4.3.1. Legal Issues arising from the Iraqi War 140

4.3.2. The Role of the United Nations Security Council in the Iraqi War 148

4.4. The Entebbe (Uganda) raid by Israeli Forces in 1976 152

4.4.1. Legal Issues Arising from the Entebbe Raid 154

4.5. The Russian Invasion of Georgia in 2008 162

4.5.1.. Legal Issues Arising from the Russia-Georgia Invasion 167

4.5.2. The Role of the United Nations Security Council in the Conflict 173

4.6. The United States invasion of Afghanistan in 2001 176

4.6.1. Legal Issues Arising from the US Invasion of Afghanistan 178

4.6.2. The Role of the United Nations Security Council in the Conflict 184

4.7. The Kenyan Incursion into Somalia in 2011 188

4.7.1. Legal issues Arising from the Kenyan Incursion into Somalia 190

4.7.2. The Role of the Security Council 194

4.8. Conclusion 195

CHAPTER FIVE – CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion 201

5.2. Recommendations 210

BIBLIOGRAPHY 217

DECLARATION

I VALENTINE MWENDE MULWA declare that this thesis is my original work and has not been presented or submitted for examination in any other university.

Signature: ______________________________________

Date: ______________________________________

This thesis has been submitted with my approval as the University Supervisor

Name: PROFESSOR F.D.P. SITUMA

Signature: ______________________________________

Date: ______________________________________

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DEDICATION

I dedicate this thesis to my family, Sam, Imani and Michael. You will always remain my true measure of success. God bless you.

LIST OF TREATIES AND AGREEMENTS

1. The Hague Convention for the Pacific Settlement of International Disputes of 1899; 1 Bevans 230.

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5. Security Council Resolution 235 of 1967, adopted at its 1352nd meeting held on 9th June, 1967; 22 UN SCOR 3 (1967).

6. Security Council Resolution 236 of 1967, adopted at its 1357th meeting on 11th June, 1967; 22 UN SCOR 4 (1967).

7. Security Council Resolution 242 of 1967, adopted at its 1382nd meeting held on 22nd November, 1967; 22 UN SCOR 8 (1967).

8. Security Council Resolution 338 of 1973, adopted at its 1747th meeting held on 22nd October, 1973; 28 UN SCOR 10 (1973).

9. Security Council Resolution 502 of 1982, adopted at its 2350th meeting held on 3rd April, 1982; 37 UN SCOR 15 (1982).

10. Security Council Resolution 573 of 1985, adopted at its 2615th meeting held on 4th October, 1985; 40 UN SCOR 23 (1985).

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4. Question of Palestine, GA Res, adopted by the General Assembly on 19th June, 1967; UN GAOR, 5th Emergency Special Session, agenda 5; U.N. Doc. A/PV.1596 (1967).

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to Eliminate Colonialism, Apartheid and Racial Discrimination in Southern Africa, G.A. Resolution 36/125, adopted by the General Assembly on 24th November, 1981; 36 U.N. GAOR Supp. 51; U.N. Doc. A/36/51, (1981).

ABBREVIATIONS

1. AJIL – American Journal of International Law
2. AUILR – American University International Law Review
3. BJIL – Berkeley Journal of International Law
4. BSDR – Baltic Security and Defence Review
5. BUILJ – Boston University International Law Journal
6. CJIL – Chinese Journal of International Law
7. CIS – Commonwealth of Independent States

1. CYIL – Canadian Yearbook of International Law
2. EJIL – The European Journal of International Law
3. EPIL – Encyclopaedia of Public International Law
4. FAJ – Foreign Affairs Journal
5. FF – The Fletcher Forum
6. FILJ- Fordham International Law Journal
7. GSICL – General Survey of International and Comparative Law
8. HICLR – Hastings International and Comparative Law Review
9. HLR – Hanse Law Review
10. ICJ – International Court of Justice
11. ICLQ – International and Comparative Law Quarterly

12. ILR - Israel Law Review
13. ILS – International law Studies
14. JCSL – Journal of Conflict and Security Law
15. JIA – Journal of International Affairs
16. JTLP – Journal of Transnational Law and Policy
17. JBIIA – Journal of the British Institute of International Affairs
18. MEJ – Middle East Journal
19. LN – League of Nations
20. SHJDIR – Seton Hall Journal of Diplomacy and International Relations
21. STR – Stanford Law Review
22. SYBIL – Singapore Yearbook of International Law
23. TGS – Transactions of the Grotius Society
24. TICLJ – Temple International and Comparative Law Journal
25. UJIEL - Utrecht Journal of International and European Law
26. UK – United Kingdom
27. UN – United Nations
28. UN DOC – United Nations Document
29. UNELJ – University of New England Law Journal
30. UNGA – United Nations General Assembly
31. UN GAOR – United Nations General Assembly Official Records
32. UNSC – United Nations Security Council
33. UN SCOR – United Nations Security Council Official Records
34. UNYB –United Nations Yearbook

35. USA /US – United States of America

36. VJIL – Virginia Journal of International Law

37. VJTL – Vanderbilt Journal of Transnational Law

38. VLR – Villanova Law Review

39. VULR – Valparaiso University Law Review

40. WQ – The Washington Quarterly

41. WUGSLR – Washington University Global Studies Law Review

ABSTRACT

The United Nations Charter at Article 2(4) specifically calls on all members of the United Nations to refrain in their international relations from the threat or use of force. Article 51 of the Charter, however, permits individual or collective use of force in exercise of the right to self-defence and only so in response to an armed attack. All other resort to use of force is subject to authorisation from and management by the Security Council. The Council determines whether measures for the use of force are appropriate in each circumstance as it is charged with the primary responsibility for the maintenance of international peace and security.

However, what appears to be a clear delineation on when an individual State or group of States may resort to the use of force in international law has been blurred by state practice. Actual state practice, exhibited by the States' interpretation of Article 51 of the Charter and the use of force in purported exercise of the right to self-defence, indicates that States are operating outside the provisions of the Charter. The use of force in this regard is therefore, illegal. It is, however, appreciated that the modern State has to contend with threats that were not contemplated by the Charter in 1945. These include technological advancements in modern warfare and communication, as well as the increase of States interests beyond their territorial boundaries and the significant danger posed by attacks initiated by non-state actors. Some of the actions taken by the States have in retrospect shown to have been justified and necessary at the time for the preservation of State security. Thus, although the action taken may itself have been illegal to the extent that it offends the express provisions

of the Charter, it was nevertheless necessary and justified and therefore, legitimate. Consequently, States now agitate for a wider scope of the right to self-defence; beyond the provisions of Article 51 of the Charter. This agitation is manifest in the arguments set forth by States in justifying their resort to the use of force. This paper addresses the issue whether or not there is need to re-articulate the provisions of Article 51 with a view of taking into account contemporary state practice in the purported exercise of the right to self-defence.

Chapter one of the paper introduces the problem. It states the hypotheses underlying the research, sets forth the research questions sought to be answered and identifies the theoretical framework from which the paper stems. It also outlines in summary the views of different scholars on the right to self-defence in international law. Chapter two is the theoretical chapter. It analyses the evolution and scope of the right to self-defence in international law and examines in detail the said right under customary international law and treaty law. Chapter three examines the role of the Security Council in regulating the right to self-defence in international law. Chapter four highlights state practice with regard to the interpretation of Article 51 of the Charter and the use of force by States in international law. It seeks to illustrate whether action taken by the State in each case is both legal and legitimate. Chapter five makes a conclusion of the study in light of the statement of the problem and the hypotheses. It ends with a recommendation to review Article 51 of the Charter with a view of taking cognisance of emerging threats faced by States in contemporary international law

CHAPTER ONE

INTRODUCTION

1.1 Background

For as long as humankind's existence has been documented, conflict and war continue to form part of its history. It appears that, for as long as a group of people exist together, conflict is inevitable. Within many legal systems, the right to protect oneself from an aggressor is recognised. This is referred to as the right to self-defence. Black's Law Dictionary defines self-defence, in international law, as "the right of a State to defend itself against a real or threatened attack".[1] Albert Bleckmann defines the right to self-defence as "the right to protect oneself from serious violations of one's rights".[2] The extent to which an individual may be allowed to take measures in self-defence is dependent on the system's structure. In a system where law enforcement is centralised, the exercise of this right is limited.[3] An individual will be expected to refer any violations of its right(s) to the appointed authorities, within the system, for adjudication and retribution in accordance with the system's predetermined guidelines.[4] However, in a less centralised structure, the individual bears the primary responsibility to procure justice for oneself.[5] It is for this reason that the scope of the right to defend oneself has evolved, over the years, correspondingly, to the development of legal systems. Legal systems have progressively become more centralised, with the use of force generally being reserved for the governing

[1] Bryan Garner, Black's Law Dictionary 8th edition, (West Publishing Company, Minnesota, 2004), p.1390.
[2] Albert Bleckmann, "Self Defence", in R.Bernhardt (ed), IV EPIL 361 (2000).
[3] Ibid.
[4] Ibid.
[5] Ibid.

authority.[6]

In international law, in earlier times, it was deemed to be the right of a State to go to war to protect itself from the aggression of others or to further its interests.[7] However, in modern times, there has been a progressive outlaw of the unilateral use of force by States. Consequently, the scope of self-defence cannot be understood without making reference to the development of the law against war.[8] Wars arise when the aggressive action taken by one party is met with resistance from the party at whom the aggression is directed. The concepts of war and the use of force have been within the sphere of international law since the beginning of history. The efforts to control the use of force are also as old as the very concept of resorting to force to settle disputes among States in the international province. Consequently, the law of war *(jus in bellum*) has grown alongside the law against war which limits the right of States to resort to war (*jus ad bellum*).

As early as 400 B.C., the Chinese philosopher, Mo Ti, propounded the view that international aggression was to be discouraged and wars be devoid of legal sanctions and be declared "the greatest of all crimes".[9] During the Middle Ages, in Europe, war was only approved, and lawful, when resorted to in the event of irreconcilable differences. Scholars, such as Grotius, urged those in power to turn to "independent judges" so as to avoid an armed conflict.[10] States have, over time, entered into treaties aimed at maintaining

[6] Donald K Anton, Penelope Mathew & Wayne Morgan (eds), International Law Cases and Materials (Oxford University Press, Oxford, 2005), pp. 483 - 484.
[7] Ibid.
[8] Supra, note 2.
[9] Benjamin B. Ferencz, "Aggression", in R. Bernhardt (ed.) I EPIL 58 (1992).
[10] Ibid.

world peace.[11] But within the same treaties lie provisions giving latitude to States to wage war against each other in certain circumstances. This is a reflection of the old age tussle of outlawing war on the one hand and at the same time regulating how and when States should go to war.

In 1945 the United Nations Charter came into force against the background of the Second World War. The First World War and the Second World War had left the world scarred and devastated. For this reason, there was a general reaffirmation, within the founding fathers of the United Nations, to outlaw war and acts of aggression.[12] The purpose of the United Nations, therefore, was to ensure that the world would never again have to go through another war. This is manifested in the Preamble of the Charter, which provides:

> We the Peoples of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind... And for these ends: to practice tolerance and to live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of the principles and the institutions of methods, that armed force shall not be used, save in the common interest...[13].

To achieve the goal of international peace and security, and to prevent the devastations of war, the Charter put in place a collective security system. Firstly, it sought to outlaw all

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[11] The Hague Convention for the Pacific Settlement of International Disputes of 1899, 1 Bevans 230; The Hague Convention for the Pacific Settlement of Disputes of 1907, I Bevans 577; Versailles Peace Treaty of 1919, 2 Bevans 235; Charter of the United Nations 1945, 1 UNTS XVI.

[12] For a definition on aggression please see Stephen M. Schwebel, "Aggression, Intervention, and Self-Defense in Modern International Law", Justice in International Law: Selected Writings (Cambridge University Press, Cambridge, 1994), pp 531-555.

[13] Charter of the United Nations 1945, 1 UNTS XVI.

use of force by providing that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations".[14] The Charter not only prohibits the use of force but the threat of the use of force. Secondly, the Charter only recognised two exceptions to the general prohibition against the use of force. The first exception is the use of force initiated by the Security Council under the provisions of the Charter.[15] The Charter authorises the Security Council to determine the existence of, and to take action to address, any threat to international peace and security. It provides:

> 1. In order to ensure prompt and effective action of the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties this responsibility the Security Council acts on their behalf.
> 2. In discharging these duties the Security Council shall act in accordance with the purposes and the principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII and VIII...
> 3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.[16]

It further, provides that "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".[17] The Charter, therefore, charges the Security Council with responsibility of making the decisions regarding the use of force. It also charges it with ensuring that international peace and security is maintained. In so doing, the Charter envisages that the machinery of force in international law is concentrated in a central organ of the United Nations.

[14] Ibid., Article 2(4).
[15] Ibid., Articles 24, 25, Chapter VII and Chapter VIII.
[16] Ibid., Article 24.
[17] Ibid., Article 25.

The instances in which the Security Council has resorted to the use of force include the exercise of the right to collective self-defence, in the year 1950 to ensure the withdrawal of North Korea forces from the territory South Korea [18] and in 1990 to secure the withdrawal of Iraqi forces from the territory of Kuwait.[19] The actions taken by the Security Council also include humanitarian intervention. In 1992 the United Nations Security Council through Resolution 794[20] authorised "the use of all necessary means to establish as soon as possible a secure humanitarian relief environment for humanitarian relief operations in Somalia".[21] In 1999 the Security Council created the United Nations Mission in Sierra Leone (UNAMSIL), whose mandate was to end the Sierra Leonean civil war and to protect civilians under imminent threat of physical violence.[22]

The other exception to the use of force, under the Charter, is under the "inherent" right of a State to self-defence in Article 51 of the Charter. It is also the only instance where the Charter authorises the unilateral use of force. The said provision recognises the right of a State to use force in response to an armed attack to protect itself. Further, it envisages that a State exercises this right as an interim measure. A State, resorting to the unilateral use of force, in self-defence, is obligated to report the measures undertaken by itself to the Security Council. Thereafter, the Security Council has the right to take over the matter from the State and proceed forthwith as the Council deems appropriate.

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[18] Security Council Resolution 84 of 1950, adopted at its 476th meeting held on 7th July, 1950, 5 UN SCOR 5 (1950).
[19] Security Council Resolution 661 of 1990, adopted at its 2933rd meeting held on 6th August, 1990, 45 UN SCOR 19 (1990).
[20] Security Council Resolution 794 of 1992, adopted at its 3145th meeting held on 3rd December, 1992, (1992), 47th session, Security Council Distr. General 92-77211, (E), U.N. Doc. S/INF/48 (1992).
[21]Ibid.
[22] Security Council Resolution 1270 of 1999, adopted at its 4054th meeting held on 22nd October, 1999, 54th session, Security Council Distr. General 99-31502 (E), U.N. Doc. S/INF/55 (1999).

1.2 Statement of the Problem

The United Nations Charter, at Article 2(4), specifically calls on all members of the United Nations to refrain in their international relations from the threat or use of force. Article 51 of the Charter, however, permits individual or collective use of force in exercise of the right to self-defence and only so in response to an armed attack. A literal interpretation of Article 51 presupposes that the right to self-defence only arises after an actual "armed attack". There are also arguments that such attack must originate from a fellow State and attacks from non-state actors, therefore, do not qualify as an "armed attack" within the meaning of Article 51.[23] There is also general affirmation that acts of aggression can only be attributed to a State actor.[24]

It is argued that the Charter reflected the fears, and addressed the needs, existing at the time of its adoption. For instance, back in 1945 warfare contemplated (a) ground, air force or navy troops exchanging fire face to face, (b) that parties involved were all State actors, and (c) aggression constituted the violation of another State's physical boundaries. Modern warfare, on the other hand, may entail (a) the use or threat of use of chemical weapons,[25]

[23] Vidan Hadzi-Vidanovic, "Kenya Invades Somalia invoking the right of self-defence", available at, http://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence (site accessed on 2nd July, 2013).
[24]Definition of Aggression, 1 GA Res 3314 (XXIX), adopted by the General Assembly on 4th December 1974, UN GAOR 29th session, U.N. Doc A/9631 (1974).
[25] Yves Engler, Canada's Use of Chemical Weapons in Afghanistan", (2013), available at http://www.rawa.org/temp/runews/2013/09/19/canada-s-use-of-chemical-weapons-in-afghanistan.html (site accessed on 27th September, 2013).

biological weapons [26] and weapons of mass destruction;[27] (b) attacks orchestrated over one thousand miles away, by use of missiles or remote controlled bombings;[28] (c) invisible enemies operating from an indeterminable hideout or unidentifiable suicide bomber;[29] and (d) attacks by non-state actors, such as the Al-Qaeda[30] and Al-Shabaab.[31] Further, due to advancement in technology, States are also able to come by information of an imminent attack through sophisticated intelligence long before the attacker is at the door.[32]

Consequently, the situations in which States have used force unilaterally have grown and continue to develop. These situations go beyond what the provisions of the Charter contemplated and provided for in 1945. There are States that continue to feel the need, and have justified the action, to strike their enemies before the enemy attacks them;[33] they have called this anticipatory self-defence or pre-emptive self-defence.[34] There are States that

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[26] Robert Johnston, "Review of the Fall 2001 Anthrax Bio-attacks", (2005), available at http://www.cdc.gov/niosh/nas/rdrp/appendices/chapter6/a6-45.pdf (site accessed on 27th September, 2013).

[27] Michael Peck, "5 Weapons of Mass Destruction the US Military Uses Everyday", Forbes, 29th September, 2013, available at, http://www.forbes.com/sites/michaelpeck/2013/04/29/974/ (site accessed on 29th September, 2013).

[28] . Phil Stewart and Adam Entous, "Iranian Missile May be Able to Hit U.S. by 2015", Reuters Washington, Monday April 19, 2010, available at, http://www.reuter.com/article/idUSTRE63J04H20100420, (site accessed on 20th September, 2010).

[29] Scott Atran, "The Moral Logic and Growth of Suicide Terrorism", 29(2) The Washington Quarterly, Spring 2006, pp 127-147.available at : http://www.sitemaker.umich.edu/satran/files/twq06spring_atran.pdf , (site accessed on 20th September, 2010).

[30] Wikipedia, The Free Encyclopaedia, "Al Qaeda", available at, http://en.wikipedia.org/wiki/Al-Qaeda (site accessed on 13th March, 2013).

[31] Jonathan Beale, "Nairobi Attack: Kenya Forces Comb Westgate Site", BBC News Africa, 24th September, 2013, available at http://www.bbc.co.uk/news/world-africa-24216327 (site accessed on 27th September, 2013).

[32] Mary Ellen O'Connell, "The Myth of Preemptive Self-Defense", American Society of International Law, Task Force on Terrorism, August 2002 pp.2-4, available at, http://www.asil.org/taskforce/oconnell.pdf , (site accessed on 27th July, 2010).

[33] Aaron Weiss, "Israel's Legality in the Six Day War", (2010), available at http://www.jdsupra.com/legalnews/israels-legality-in-the-six-day-war-51071/ site accessed on 17th September, 2013).

[34] Ibid.

have felt that the only option they had, and have justified it, was to enter the territory of another State to rescue their nationals who have been injured or are facing threat of injury.[35] They argue that an affront to their nationals is an affront to the State itself.[36] Further, the nationals of a State are an extension of its territory and measures undertaken by the State to protect its nationals constitute an integral part of the right to self-defence.[37] In more recent times, States have moved from pre-emptive self-defence to preventive wars. Preventive wars are initiated to prevent another party from attacking, when an attack by that party is neither imminent nor known to be planned, but is only speculated that it will be carried out sometime in the future.[38]

Consequently, there is growing State practice, in the name self-defence, that remains unregulated by the Charter. This State practice is illegal and unlawful to the extent that it offends the express provisions of the Charter. Further, there is a possibility that this state practice will crystallise into a norm of customary international law. (It is not, however, submitted, for purposes of this paper, that the current state practice is consistent, frequent and acceptable, as to constitute a norm under customary international law.) Such customary international law would in the end be inconsistent with the express provisions of the Charter. There is also the danger that the increase in the unrestricted unilateral use of force will destablise international security. Some States may, in fact, wage wars of aggression

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[35] Israeli Defence Forces, "The Entebbe Rescue Mission", available at, http://www.jewishvirtuallibrary.org/source/terrorism/entebbe.html, (site accessed on 21st December, 2012).
[36] Ibid.
[37] Ibid.
[38] Jeffrey Record, "The Bush Doctrine and the War with Iraq", 33 (1) Parameters, 4 (2003) p. 9, available at http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/03spring/record.pdf (site accessed on 27th September, 2013).

against other States under the guise of pre-emptive and other emerging forms of self-defence. Mary Ellen O'Connor cites the United States invasion of Iraq in 2003 as a potential such "wrong" precedent when she writes:

> If America creates a precedent through its practice, that precedent will be available, like a loaded gun, for other states to use as well. The preemptive use of military force would establish a precedent that the United States has worked against since 1945. Pre-emptive self-defence would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, and so on. Any state that believes another regime poses a possible future threat- regardless of the evidence – would cite the United States invasion of Iraq.[39]

On the other hand some of the actions taken by States, although illegal, have in retrospect shown to have been necessary and consequently, justified for the preservation of State security. These actions although illegal are nonetheless legitimate.[40] Accordingly, there is need to take into account genuine emergent threats that are not currently addressed within the Charter. It is against this background that a case for the reform of the law governing the unilateral use of force is made. The agenda for this reform is not new. In 2003, Kofi Anan, the then United Nations Secretary General, named a panel of jurists to study global threats and make recommendations on changes to the Charter framework.[41] In his words,

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[39] Supra, note 32, p. 19.

[40] Carl Q. Christol, "Law and Legitimacy: The Iraq War," (2004) available at, www.pegc.us/archive/Articles/LAW%20AND%20LEGITIMACY.doc, (site accessed on 4th June, 2013). See also, Natalia Alvarez Molinero, "Legality and Legitimacy in the Use of Force", University of Aberdeen, (July 2008), available at, http://fride.org/download/COM_Legalidad_legitimidad_ENG_jul08.pdf (site accessed on 11th October 2016);

[41] See UN Press Release SG/A/857, Secretary General names High - Level Panel to study Global Security Threats and Recommend Necessary Changes ," 4 November, 2004, available at, www.un.org/News/Press/docs/2003/sga857.doc.htm , (site accessed on 26th September, 2013).

the UN Secretary General stated, "we must decide whether it is possible to continue on the basis agreed [in the UN Charter], or whether radical changes are needed."[42]

1.3 Hypotheses

This Study is founded on three basic hypotheses. These are:-

1. Modern developments in warfare and emergence of new threats to States have rendered Article 51 of the United Nations Charter obsolete.
2. The unilateral use of force has been abused by States under the guise of a "broad interpretation" of the right to self-defence.
3. The United Nations Security Council has failed in its mandate to effectively control and regulate the right to self-defence in international law.

1.4 Research Questions

The research seeks to answer the following questions:

1. Has state practice and modern development in warfare necessitated the move away from article 51 of the Charter of the United Nations?
2. Is it time for member States of the United Nations to revisit the provisions of Article 51 of the Charter?

[42] Kofi Annan, Address to the General Assembly, New York, 23 September 2003, available at: http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm, (accessed on 26th September, 2013).

3. Has the United Nations Security Council failed to effectively control and regulate the right to self-defence in international law?

1.5 Theoretical Framework

This paper is broadly based within the positivism. It is argued that the law regarding the use of unilateral force in international is as stated under Article 51 of the Charter. Consequently, any action not in conformity with the Charter is illegal. It is, however, acknowledged that there is a rise in new situations necessitating the unilateral use of force. It is further conceded that though the actions taken by States may be illegal they may nonetheless be legitimate. Consequently, a case is made for the need to revise the law regulating the right to self-defence in international law with a view to taking into account developments in the contemporary world.

The research is also based on the neorealism approach to international relations. Realism, whose roots lie within the positivist school of thought, in general, presupposes that the underlying factor in world politics is competitive self-interest among States.[43] This, and the absence of a central government, is the primary driving force of how States relate to one another.[44] The constant agitation by States to protect what they consider to be their interests in turn creates a power struggle. The pursuit for power and the absence of an international government leads to anarchy.[45]

[43] Korab-Karpowicz and W. Julian, "Political Realism in International Relations", in Edward N. Zalta (ed), The Stanford Encyclopaedia of Philosophy, (2011), available at: http://plato.stanford.edu/entries/realism-intl-relations/ (site accessed on 28th February, 2013).
[44] Ibid.
[45] Ibid.

The starting point for neorealism is that, the behavior of States is regulated by the structure of the international system. Anarchy or absence of a central system is the ordering principle of this international system. Neorealists consider security of the State to be its fundamental interest. Security is achieved through distribution of power.[46] Power in neorealist terms is the combined capability of a State. Security is achieved when States increase their power through "power balancing" by deterring potential aggressors.[47] For instance in 2003 the United States of America waged a war on Iraq, on the basis that Iraq possessed weapons of mass destruction.[48] To achieve its own security the United States, claimed that there was need to deter a potential aggressor in Iraq.[49]

Anarchy remains constant but the distribution of power, namely the capabilities of a state, shift and change. Power, consequently, bears the role of shaping interstate relations. In 2008 Russia waged war on Georgia. Before that, Georgia had made known its intentions to join NATO a decision that had greatly irked Russia. Russia claimed that the war waged on Georgia was a response to protect its nationals whose rights had been abused by the Georgian government. Analysts claim that the reason behind the Georgian attack was a statement by Russia that it was still the power house in the region.[50]

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[46] Ibid.

[47] Kenneth N. Waltz, Realist Thought and Neorealist Theory, 44(1) Journal of International Affairs 21 (1990), p 36, available at, http://labmundo.org/disciplinas/WALTZ_realist_thought_and_neorealist_theory.pdf (site accessed on 11th March, 2013).

[48] Carl Q. Christol, "Law and Legitimacy: The Iraq War," available at, www.pegc.us/archive/Articles/LAW%20AND%20LEGITIMACY.doc, (site accessed on 4th June, 2013).

[49] Ibid.

[50] Legal Aspects of the War in Georgia, "Russia's Protection of Citizens Justification, available at http://www.loc.gov/law/help/russian-georgia-war.php, (site accessed on 2nd July, 2013).

The international system has been described, in realist terms, as "a self-help system where each State is responsible for its own survival and is free to define its own interests and to pursue power".[51] In 1967, Israel fought the six day war against her Arab neighbours alone. Just before the war Israel had tried to get the international community to intervene and stop Egypt from evicting UNEF Forces from the Sinai.[52] The international community was not able to intervene much. In the end Israel went to war alone, seeking to protect what it considered to be its national interest, its borders.[53]

Power controls state co-operation and the extent to which a state will place itself in a position that may render it dependent on another.[54] Sovereign states may sign treaties to provide a legal basis of how the relate with one another. [55]However, it is important to note that in a power struggle, each state will interpret that treaty to its advantage.[56] Consequently, state interest always comes first.[57] In 2003, the United States in waging war on Iraq proclaimed that it was acting in self defence within the limits of Article 51 of the United Nations Charter.[58] This position was heavily criticised by the United Nations and other members of the organisation who disagreed with such an interpretation.[59]

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[51] Supra, note 43.
[52] David Meir – Levi, "Israel's Defensive Preemptive Strike", available at: http://www.sixdaywar.co.uk/independent_israels_pre-emptive_defensive_strike.htm (site accessed on 30th April, 2013).
[53] Ibid.
[54] Supra, note 43.
[55] Ibid.
[56] Ibid.
[57] Supra, note 47, p. 35.
[58] Supra, note 52.
[59] Ibid.

From the foregoing, it is evident that states will constantly seek avenues to wiggle out of their obligations under the treaties with a view to further their self-interest. Where they fail to so do, they execute their obligations begrudgingly. It is, therefore, important that the law keeps up with the time and constantly provides for emerging situations sufficiently. This will ensure that they fully co-operate in the international system through international institutions.

A departure of neorealism from classical realism is that neorealism does not advocate for the abandonment of the law regulating the use of force.[60] It urges the legitimisation of certain standards of State conduct not sanctioned by the law.[61] It, however, acknowledges that there is need to identify against what principles a claim for self defence may be validated or invalidated. This is especially where two States of equal might both claim to act in self-defence.[62] A clear definition is also important as it helps guard against dangers of powerful States wishing to advance their national interests.[63] The focus on changing the law and not the institutions involved reflects the departure of neorealism and neoliberals. The liberals are idealist and would argue that "states can widen the perception of their self-interest through economic cooperation and involvement in international institutions."[64] The liberals emphasize the role of the institution. The realist emphasizes on what the State can do. Neorealism focuses on the State. Consequently, an isolation of standard and legitimate

[60] Louis Henkin, Right v Might: International Law and the Use of Force, (Council of Foreign Relations, 1991), p. 10
[61] Ibid, p. 11.
[62] Isobel Roel, "Evaluating Self-Defence Claims in the United Nations Collective Security System: Between Esotericism and Exploitability", Thesis Submitted to the University of Nottingham for the Degree of Doctor of Philosophy, (August 2009), available at http://etheses.nottingham.ac.uk/1526/ (site accessed on 26th September, 2013), p. 1.
[63]See Ibid., at p. 17.
[64] Supra, note 43.

concerns of States, not addressed by the Charter, will be made and a recommendation made for the same to be legalised.

1.6 Literature Review

The exercise of right to self-defence and the law governing the resort to use of force in international law has in recent times generated a measure of controversy. The debate rallies around the scope of the right to self-defence in international law. More specifically, the deliberations revolve around the interface between the right to self-defence as governed by Article 2(4) and 51 of the United Nations Charter and the right to self-defence under customary international law. There are numerous authors who have contributed to this debate. On one extreme of the divide are those who call for a stringent restriction of the use of force. Consequently any resort to the use of force must be strictly confined and justified within the limits of Article 2(4) and 51 of the Charter.

Ian Brownlie calls for a literal interpretation of Articles 2(4) and 51 of the Charter. Consequently, all use of force in contemporary international law that is in contravention of the express provisions of the Charter is unlawful.[65] He acknowledges that the right to self-defence is still subject to customary international law but denies that the customary international law that was in force prior to the 1920s is applicable under contemporary international law.[66] Accordingly, the customary law that is applicable and that which the Charter contemplated is the practice that existed right about the time the Charter was adopted.[67] Consequently, the principles of law, on when a State may act in self-defence,

[65] Ian Brownlie, International Law and the Use of Force, (Clarendon Press, Oxford, 1963), pp. 112-113.
[66] Ibid.
[67] Ibid.

emanating from the *Caroline case* may not therefore, be applied to justify measures taken by contemporary States. [68]

Randelzhofer also belongs to the restrictive approach. He is of the view that the purpose of Article 2(4) and 51 of the Charter was to restrict individual use of force by States to instances of an armed attack.[69] Further, Article 51 excluded exercise of any form of self-defence that was inconsistent with the Charter. Consequently Article 51 superseded what he calls the "traditional right to self-defence. [70]

Yoram Dinstein disagrees with the proposition that Article 51 only represents one set of the laws governing the exercise of the right to self-defence. He disputes that Article 51 of the Charter was only meant to govern the right to self-defence in the event of an armed attack and that customary law would continue to govern anticipatory self-defence.[71] He questions the logic of the drafters of the Charter on one hand stating the obvious - that an armed attack gives rise to a right to fight back – and on the other, failing to specify the conditions precedent to waging a pre-emptive war. [72] On the other divide are those who argue that developments in modern warfare call for a broad interpretation of Article 2(4) and 51 of the Charter. They state that the provisions of the Charter may be interpreted liberally with a view to permit the use of force by States, beyond the explicit provisions of the Charter, in the face of modern threats. They argue that the right to self-defence as spelt

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[68] Ibid.
[69] Albert Randelzhofer, "Article 51" in : Bruno Simma (ed), The Charter of the United Nations, A Commentary, 2nd Edition, (Oxford University Press, Oxford 2002) 790, at p. 792.
[70] Ibid., p.806.
[71] Yoram Dinstein, War Aggression and Self Defence, 4th Edition, (Cambridge University Press, Cambridge, 2005) p.217.
[72]Ibid.

out under the Charter is part of a wider right to self-defence under customary international law.

Mathew Allen Fitzgerald is of the view that the UN Charter was designed to be flexible. That an armed attack referred to under Article 51 of the Charter "need not be permanently limited to the situations immediately expected by the drafters."[73] Further, that the Charter is more of a constitution as opposed to a treaty or agreement. He goes on to add that given the constitutional characteristic of the Charter, its provisions are subject to changing interpretations by the United Nations organs, the International Court of Justice and the member states.[74]

Anthony D'Amato is of the view that that Article 2(4) only refers to a prohibition on force aimed at the territorial integrity and political independence of States or force that is inconsistent with the purposes of the Charter.[75] He goes on to state that it is no wonder that the proscription of force under the Charter is vague as are all general legal proscriptions.[76]

Bowett is of the view that an actual armed attack need not occur for a State to invoke the right to self-defence.[77] The right to self-defence is inherent. Further, the acknowledgement

[73] Mathew Allen Fitzgerald, "Seizing Weapons of Mass Destruction from Foreign Ships on the High Seas under Article 51 of the UN Charter", 49(2) VJIL, 473 (2008), p. 485.
[74] Ibid.
[75] Anthony D'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor", 77 AJIL, 584 (1983).
[76] Anthony D'Amato, "Israel's Air Strike Upon the Iraqi Osiraq Reactor: A Retrospective", 10 Temple International and Comparative Law Journal 259(1996) , p.262.
[77] Derek Bowett, Self-Defence in International Law, (Manchester University Press, Manchester, 1958), pp. 185-6.

of "inherent" under Article 51 of the Charter simply demonstrates that the Charter recognises that the right to self-defence does exist outside of the Charter, that is, under customary international law.[78] The principles of customary international law in this regard are found in the *Caroline case*. Further, the absence of centralised machinery for the enforcement of international law in turn necessitates "a need for greater self- help" for States.[79]

It was the intention of the drafters of the Charter to strictly proscribe the use of force within the provisions of the Charter. As stated by Dinstein, it did not make sense to state the obvious, (that a State under attack has a right to self-defence), and thereafter leave the sphere of anticipatory self defence (whether or not a State could respond to a pending threat) unregulated. However, from a realist approach, the law is what the States and the courts say the law is. It is evident from state practice that States continue to invoke customary international law in situations that appear to contradict the express provisions of the Charter. By so doing, they create precedents that may serve as a reference for the future practice. However, it is not in any way alleged here that the state practice so far constitutes a norm in customary international law. Nevertheless, the random practice does create precedence. Further, the norm has been that States will first act and then seek to justify their action after the fact as opposed to identifying the legal rationale of their actions beforehand. Consequently, States will constantly push the frontiers of the right of self-defence in a bid to establish just how much they can get away with. It is, therefore, urged, in this paper, that there is need to revisit the provisions of Article 51 of the Charter with a

[78]Ibid.
[79] Ibid.

view to expressly spell out the circumstances and conditions under which such right is to be exercised.

1.7 Research Methodology

The style adopted in the research was analytical. The first step taken was the collection of facts. The facts were then applied to the law with a view to identifying the legal issues. Conclusions were then drawn from the synthesis. Reference was made to data drawn from publications of other scholars, records of state practice, treaties and judicial decisions of international institutions. The data was analysed with a view of formulating principles and common patterns in state practice. These principles and patterns were employed to speculate or anticipate future state practice. Consequently, the predictions were the bases for formulating proposals on more effective and sound regulation of the unilateral use of force under international law. The research was library based and recourse was made to both primary and secondary sources. The secondary sources included a diversity of literature on the subject matter including books, journals and articles. The primary sources included treaties and judicial opinions and judgments. A substantial number of these materials were accessed through the internet.

1.8 Chapter Breakdown

The thesis is divided into five Chapters as hereunder:

Chapter One: Introduction

This Chapter is the introduction to the research paper. It addresses the following issues:

- The definition of the right to self defence

- A brief background of the problem
- The Statement of the Problem.
- The hypotheses,
- The research questions,
- The theoretical framework
- Literature review
- Research methodology
- Chapter synopsis.

Chapter Two: The Right to Self-Defence in international law

- Brief introduction on the evolution of the right of self-defence and distinction between the right of self-defence from other related concepts such as reprisals and retorsions.
- The right to self-defence under customary international law and
- The right to self-defence under treaty law.
- The interplay between Articles 2(4) and 51 of the Charter and customary international law.

Chapter Three: The Role of the Security Council in Regulating the Unilateral Use of Force in International Law

- The role of the Security Council in the common security system.
- The Constitution, power and decision making procedure in the Security Council.
- The Security Council and the Falkland and Bosnia-Herzegovina Wars.

Chapter Four: State Practice

- State practice in anticipatory self-defence and the progressive move to preventive self-defence
- State practice in protection of nationals abroad.
- State practice and armed attack by non-state actors.

Chapter Five: Conclusion and recommendation

- Conclusion.
- Recommendation

CHAPTER TWO

THE RIGHT TO SELF-DEFENCE IN INTERNATIONAL LAW

2.1 Introduction

In Chapter One, the right to self-defence was described as “the right of a State to defend itself against a real or threatened attack”.[1] It is important from the onset to distinguish the right to self- defence from other closely related concepts and terms. This will shed light on understanding the concept better. In this regard we shall compare and contrast the right to self-defence in international law with the concepts of self-preservation, reprisals and retorsions.

2.1.1 Self Preservation

According to Partsch, self-preservation has been used to designate a number of different rules authorising, in exceptional circumstances, one State’s interference or intervention affecting the rights or interests of another.[2] Self-preservation denotes a much broader concept encompassing necessity, reprisals, retorsions, self defence and self-help.[3] In the 19th and 20th centuries, self-defence and self-preservation were used interchangeably.[4] There was a general view that a State had a legal right to decide the circumstances under which it would go to war.[5] It was not until the *Caroline Case* in

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[1] See page 1.
[2] Karl Josef Partsch, Self-Preservation, in R Berhardt (ed), IV EPIL, 380 (1992).
[3] Ibid. ; also see Hans Kelsen, The Principles of International Law (Rinehart & Company, Inc, 1952) , pp 58 – 59.
[4] Stanmir A. Alexandrov, Self Defence Against the Use of Force in International Law (Martnus Njihoff Publishers, 1996), p.23.
[5] Ibid., p. 19.

1837 that attempts were made to justify a "legal war" in the concept of self-defence.[6] Self-defence began to emerge, therefore, as a legal right as opposed to a political whim.[7] Waldock says

> The truth is that self-preservation in the case of a State as of an individual is not a legal right but an instinct; and even if as it may often happen that the instinct prevails over the legal duty not to do violence to others, international law ought not to admit that it is lawful that it should do so.[8]

In a nutshell, therefore, self-defence is a form of self-preservation. The main difference, however, between the two is that self-defence presupposes a prior attack, but self-preservation as a concept has no limits.[9] Partsch defines the situations in which self-preservation may be invoked and classifies them into three scenarios, namely, " (a) an objective emergency where the threat has come about through no action of the acting State nor the target State; (b) a case of aggression, where an armed attack has been undertaken by the target State against the acting State; (c) the case of the acting State taking countermeasures against the target State in respect of completed unlawful acts by the target State against the acting State in a bid to ensure that the target State does not repeat the unlawful acts against the acting State in the future." [10] Partsch describes situation (b) as self defence and (c) as a reprisal.[11]

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[6] Ibid.
[7] Ibid.
[8] Reprinted in supra, note 4, p. 24.
[9] Supra, note 4, p. 24.
[10] Supra, note 2, p. 381.
[11]Ibid.

2.1.2 Reprisals

Reprisals comprise of actions falling within the third category of the classifications of self-preservation above.[12] There is a fine line distinguishing lawful reprisals and unlawful reprisals. This distinction arose in the *Naulilaa Arbitration* between Germany and Portugal in 1928.[13] In this matter, three German nationals entered the then Portuguese colony of Angola to negotiate the transportation of certain supplies. An argument ensued between them and some locals. The Germans were shot and killed. Thereafter, and without further communication from Germany to Portugal, Germany invaded Angola and destroyed a number of forts. Portugal brought a claim against Germany for compensation of the destroyed property. However, Germany claimed that it had acted lawfully in the circumstances.

In rejecting the claim by Germany, the Tribunal defined a reprisal as

> An act of self help by the injured State, responding, after an unsatisfied demand, to an act contrary to international law committed by the offending State ...its object is to effect reparation from the offending State for the offence or a return to legality by the avoidance of further offences.[14]

Consequently, a lawful reprisal must satisfy the following criteria, (a) it must be an act in retaliation for a breach in international law; (b) it must be preceded by an unsuccessful demand for redress; and (c) it must be reasonably proportional to the injury suffered.[15] The claim by Germany was rejected for the following reasons, namely, (i) the retaliation was made in respect of an accident and not a breach of

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[12] Supra, note 2, p. 381.
[13] *Naulilaa Case* (Portugal v Germany, (1928), 2 UN Reports International Arbitral Awards 1012.
[14] Ibid.
[15] Michael Kelly, "Time Wrap to 1945 -Resurrection of the Reprisal and Anticipatory Self-Defence in International Law", 13(1) Journal of Transnational Law and Policy 1(2003), p. 7 available at, http://www.pegc.us/_LAW_/Volume170Mitchell.pdf (site accessed on 16th September, 2013).

international law; (ii) no demand for redress was made prior to the retaliation; and (iii) the form of retaliation was not proportionate to the injury caused.[16]

It is important to note that the United Nations General Assembly in its 1970 Declaration on Principles of International Law [17] declared that "States are to refrain from acts of reprisal involving the use of force". [18] Hence, a reprisal which resorts to use of force is illegal in international law.[19] An act of revenge or retaliation also constitutes an unlawful reprisal. As indicated earlier, reprisals fall under scenario 3 whereas self-defence falls under scenario 2, in the classifications of self-preservation above.[20] The main distinction between self-defence and reprisals, however, is that the offending action in scenario 2 is deemed to be imminent or ongoing. In contrast, the offending action in scenario 3 will have been completed by the time the injured State takes action. It is for this reason that reprisals are more often than not likely to be viewed as acts of revenge and retaliation. Reprisals include forceful reprisals which are outlawed in international law under the general prohibition against use of force and non-forceful reprisals such as economic sanctions and expulsion of ambassadors.

2.1.3 Retorsions

Just like a reprisal, a retorsion is a retaliation taken by a State against another State in response to an act done by the State at which it is aimed.[21] A retorsion is considered to

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[16] Ibid., p. 8.
[17] Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV) , adopted by the General Assembly on 24th October, 1970, UN GAOR 22nd Session, Supp. 128, U.N. Doc. A/8082, at 121 (1970).
[18] Ibid.
[19] Karl Josef Partsch, "Reprisals", in R. Bernhardt (ed.),IV EPIL 200 (2000), p. 201.
[20] Supra, note 2, p.381.
[21] Karl Josef Partsch, "Retorsions", in R Bernhardt (ed.), IV EPIL, 232 (2000).

be unfriendly and harmful to the target State but is nevertheless legal.[22] However, if the reprisal violates the right(s) of the target State then it will be illegal in international law.

An example of a retorsion is the March 2010 visa row between Kenya and the United Arab Emirates.[23] The row sparked off when a group of United Arab Emirates officials were arrested in Mombasa by Kenyan Security forces and deported on suspicion that they were terrorists.[24] The United Arab Emirates government in retaliation imposed stiff visa requirements for Kenyans intending to travel to the Emirates. The visa requirements were obviously meant to hurt Kenyan traders frequenting the Emirates to purchase their business wares. The measure was also aimed at destabilising a number of Kenyans already working for gain in the Emirates. Eventually the dispute was resolved and the stiff visa requirements aimed at Kenyans were relaxed.[25] The aim of a retorsion is, however, very similar to that of a reprisal. It is a message sent by the acting State to the target State that the acting State is displeased with the conduct of the target State.

In summary, it may be said that a retorsion encompasses legal means employed by State A to coerce State B to suspend a legal act which is harmful to State A.[26] A reprisal comprises use of illegal acts by State A directed at State B intended to coerce State B to cease an illegal act directed at State A.[27] A reprisal action is essentially aimed at applying coercion with a view to inducing State B change its unlawful policy

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[22] Malcolm N. Shaw, International Law 6th Edition, (Cambridge University, Press, Cambridge, 2008), p. 785.
[23] Available at http://www.businessdailyafrica.com/companyindustry/dubairejectskenyasbidtoendvisarow/-/53955 (site accessed on 23rd July, 2013).
[24] Ibid.
[25] Ibid.
[26] Supra, note 15.
[27] Ibid.

towards State A.[28] Self-defense is the use of legal armed force employed by State A against State B and is intended to directly ward off a physical danger illegally generated by State B and threatening to State A.[29] Self-defence, as measure of self-preservation, may therefore , be distinguished from reprisals and retorsions on the basis that self defence requires "an armed attack" to engage. Further, self-defence is engaged for the purpose of repelling an attack. This is in contradistinction with reprisals and retorsions which are retaliatory in nature. In the next section we explore the emergence of the right to self-defence and its evolution to date.

2.2 The Historical Evolution of the Right to Self-Defence in International Law

The scope of the right to self-defence in international law has been molded against the development of the law against war.[30] Before World War I, the State had an indisputable right to wage war.[31] The right was inherent in the State's sovereignty.[32] Consequently, the right of a State to wage a war in self-defence was not contestable.[33] However, this is not to say that States had a *carte blanche* to wage war unsystematically. Actual state practice obliged States to justify the necessity to wage war.[34] The recognised just causes for waging war included the right to self-defence; protection of the innocent from "brutal aggressors"; and punishment of wrongdoers.[35] Though, the

[28] Ibid.
[29] Ibid.
[30] Albrecht Randelzhofer, "Article 51" in Brunno Simma (ed.), 2nd edition, The Charter of the United Nations, A Commentary (Oxford University Press, London, 2002), 788, at p. 790.
[31] Ibid.
[32] Ibid
[33] Ibid.
[34] Ibid.
[35] Orend Brian, "War", in Edward N. Zalta(ed), The Stanford Encyclopedia of Philosophy (2008) , at p. 5, available at, http://plato.stanford.edu/entries/war/ , (site accessed on 18th March, 2013).

law permitted States to wage war as of right, a general prohibition on the use of force implicitly guided the conduct of States. Roda Mushkat states:

> A general presumption against the use of force has always existed, even in the nineteenth century when States indulged in war as a matter of sovereign right. At the same time, theorists and practitioners alike generally realised that violence was part of human life and could not be wholly suppressed or denied. The formulation of a doctrine resulted that dealt with the problem of force in international relations not through a total ban, but via a system of limitations and restraints, on both ends and means. Consequently, the legitimacy and justness of war depended on meeting specific conditions, namely, if undertaken by the lawful authority, with the intention of promoting good and removing evil, for causes deemed just, and if the means employed were proportional to the ends of war.[36]

The predominant theory guiding war and the use of force during this era was the "Just War Theory."[37] The principles of what constituted a just war may be summarised as follows: 1) war ought to have been waged for the right reason, namely, a just cause such as in self-defence; (2) war ought to have been waged by a legitimate authority, such as the State or government of the day; (3) war ought to have been waged in response to a wrong committed and was so waged to redress the wrong that had been committed; (4) war should have been reasonable; it should have had a reasonable chance of success; hopeless causes were not morally justifiable; (5) the ultimate goal of war was to reestablish peace; the peace established after the war must have been preferable to the peace that would have prevailed had the war not been waged; the force must not have been excessive; injury inflicted by the war ought not have exceed the injury for which

[36] Mushkat, Roda. "Who May Wage War? An Examination of an Old/New Question." 2(1)American University International Law Review 97 (1987), p. 151, available at, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1633&context=auilr (site accessed on 18th March, 2013).

[37] Supra, note 35.

redress was sought by the war; and (6) war was waged as a last resort after all other non-violent options had been exhausted.[38]

The just war theory has, in history, received endorsement and approval from a number of scholars as being "the will of God".[39] One such scholar, Hugo Grotius, in his *Magnum Opius* stated:

> He, who wills the attainment of a given end, wills also the things that are necessary to that end. God wills that we should protect ourselves, retain our hold on the necessities of life, obtain that which is our due, punish transgressors, and at the same time defend the State… But these divine objectives sometimes constitute causes for undertaking and carrying on war… Thus it is God's will that certain wars should be waged… Yet no one will deny that whatsoever God wills, is just. Therefore, some wars are just….[40]

Before Grotius, Saint Augustine of Hippo, arguably one of the first theologians to endorse the theory of a just war, submitted that "that a Christian should be a soldier and serve God and country honourably".[41] Further,

> …while individuals should not immediately resort to violence, God has given the sword to government for good reason. Christians as part of government should not be ashamed to protect peace and punish wickedness. [42]

He went on to add:

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[38] Ibid.
[39] Miller Jon, "Hugo Grotius", in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy , Fall Edition, (2011), available at,* http://plato.stanford.edu/archives/fall2011/entries/grotius/ (site accessed on 18th March, 2013).
[40] Ibid.
[41] Mendelson Michael, " Saint Augustine", in Edward N. Zalta (ed), The Stanford Encyclopaedia of Philosophy, Winter Edition, (2012), available at, http://plato.stanford.edu/entries/augustine/ (site accessed on 18th March, 2013).
[42] Ibid.

> Peacefulness in the face of a grave wrong that could only be stopped by violence would be a sin. Defence of one's self or others could be a necessity, especially when authorized by a legitimate authority.[43]

In later years, Saint Thomas Aquinas laid out the conditions under which a war could be just, namely, (i) the war must be for a good cause and not for benefit of self; (ii) war must be waged by a legitimate authority, such as the state; and (iii) war must be declared with the intention of creating peace.[44]

In 1917, at the heart of World War I, when the United States declared war on Germany, the US President's decision was backed by religious leaders in the country. The Episcopalian Archbishop of New York, William Manning, in showing support for the war and justifying the same as a religious leader, is quoted to have said:

> Our Lord Jesus Christ does not stand for peace at any price...Every true American would rather see this land face war than see her flag lowered in dishonor...I wish to say that, not only from the standpoint of a citizen, but from the standpoint of a minister of religion...I believe there is nothing that would be of such great practical benefit to us as universal military training for the men of our land.
>
> If by Pacifism is meant the teaching that the use of force is never justifiable, then, however well meant, it is mistaken, and it is hurtful to the life of our country. And the Pacifism which takes the position that because war is evil, therefore all who engage in war, whether for offense or defense, are equally blameworthy, and to be condemned, is not only unreasonable, it is inexcusably unjust.[45]

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[43] Ibid.

[44] McInerny Ralph and O'Callaghan, John, " Saint Thomas Aquinas,", in Edward N. Zalta (ed), The Stanford Encyclopaedia of Philosophy, Winter Edition (2010), available at, http://plato.stanford.edu/entries/aquinas/ (site accessed on 18th March, 2013).

[45] Reprinted in: Wikipedia – The Free Encyclopaedia, "Just War", available at, http://en.wikipedia.org/wiki/Just_war_theory , (site accessed on 18th March, 2013).

However, long before World War I, the theory of a just war had begun to diminish with increased influence from positivism and the Peace of Westphalia in 1648.[46] With the principles of state sovereignty and equality beginning to take root, no State was placed to be a better judge of another's cause.[47] Hence, whether a war was ethical or not became irrelevant. All that mattered was whether a State had honoured the pacts and agreements that it had made with others.[48] At the turn of the 20th Century, freedom to wage war not only began to diminish, but also the theory of a just war was now seriously questioned.

Jonathan Riley-Smith writes:

> The consensus among Christians on the use of violence has changed radically since the crusades were fought. The just war theory prevailing for most of the last two centuries — that violence is an evil which can in certain situations be condoned as the lesser of evils — is relatively young. Although it has inherited some elements (the criteria of legitimate authority, just cause, right intention) from the older war theory that first evolved around A.D. 400, it has rejected two premises that underpinned all medieval just wars, including crusades: first, that violence could be employed on behalf of Christ's intentions for mankind and could even be directly authorised by him; and second, that it was a morally neutral force which drew whatever ethical coloring it had from the intentions of the perpetrator.[49]

[46]Supra, note 22, p. 779.
[47] Ibid.
[48] Ibid.
[49]Jonathan Riley-Smith, "Rethinking the Crusades", (March 2000), available at, http://www.firstthings.com/article/2007/01/rethinking-the-crusades-35 (site accessed on 8th January, 2013).

At the dawn of the First World War, the Pacifist movement had gained momentum and there was strong opposition to the war. One such remarkable Pacifist, Valentin Bulgakov of Russia, is quoted to have stated that:

> Our enemies are - not the Germans, and - not Russians or Frenchmen. The common enemy of us all, no matter what nationality to which we belong - is the beast within us. Nowhere is this truth so clearly confirmed, as now, when, intoxicated, and excessively proud of their false science, their foreign culture and their civilisation of the machine, people of the 20th century have suddenly realised the true stage of its development: this step is no higher than that which our ancestors were at in the days of Attila and Genghis Khan. It is infinitely sad to know that two thousand years of Christianity have passed almost without a trace upon the people.[50]

With increasing restrictions on the right to go to war, and justification for war, the right to self-defence became more defined and grew in importance.[51] At the end of World War

I, the Covenant of the League of Nations was adopted.[52] Under this Covenant, it became harder for States to wage war against Member States of the League. [53] However, war was not entirely proscribed.[54] In 1928, the United States and other powers, Germany, France, Great Britain and Italy entered into the Kellogg-Briand Treaty.[55] The treaty renounced war as an instrument of national policy.[56] Further, all disputes between

[50] Reprinted in Wikipedia – The Free Encyclopaedia "Opposition to World War I", available at, http://en.wikipedia.org/wiki/opposition_to_World_War_1, (site accessed on 8th January, 2013).
[51] Supra, note 30, p. 789.
[52] League of Nations 'Draft Treaty of Mutual Assistance' of 1923, League of Nations Official Journal, special supplement No. 16, Records of the Fourth Assembly, Third Committee, 203.

[53] Ibid, Article 12 and 13.
[54] Jutta Brunee, "The Security Council and Self-Defence: Which way to Global Security?" available at, http://www.law.utoronto.ca/documents/brunnee/BrunneeSecurityCouncilSelf-Defence.pdf (site accessed on 21st March, 2013).
[55] The Treaty on the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of 1928, 94 LNTS 57.
[56] Ibid., Article 1.

Member States would, thereafter, be resolved only by pacific means.[57] Consequently, States could only go to war in self-defence.[58] Any party to the treaty who violated the provisions of the pact would forthwith be stripped off its privileges under the agreement.[59] It followed, therefore, that the only legal war was a war waged in self-defence.[60]

After World War II, with the adoption of the United Nations Charter,[61] in 1945, there emerged not only a general proscription against war, but also the threat of use of force.[62] Under the UN Charter, a State can only employ unilateral force in self-defence and only in response to an armed attack.[63] Consequently, the significance of the right to self-defence gained prominence under the Charter. In the post Charter era, States could no longer wage war as a matter of right. The right to self-defence was to now be exercised under the supervision of the United Nations Security Council.[64] The said right was now subject to scrutiny by other States and could be challenged if it lacked legal sanction and legitimacy.[65]

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[57] Ibid., Article 2.
[58] Supra, note 30 p. 789.
[59] Ibid.
[60] R.C.H. Lesaffer, "Kellogg-Briand Pact (1928), in Max Planck Encyclopedia of International Law, (Oxford University Press, London, 2011), available at, http://arno.uvt.nl/show.cgi?fid=114787 (site accessed on 13th September, 2013).
[61] Charter of the United Nations 1945, 1 UNTS XVI.
[62] Ibid., Article 2(4).
[63]Ibid., Article 51.
[64] Supra, note 54.
[65] Ibid.

2.3 Sources of Law Governing the Right to Self-Defence under International Law

The main sources of law governing interstate affairs include custom, treaties, general principles of law applied by civilised nations and judicial decisions of the international courts and tribunals.[66] For purposes of this paper we shall limit this discourse to two main sources, namely, custom and treaties. Customary international law is one of the main sources of international law.[67] It is created by authoritative state practice [68] (i.e. near universal practice; over a duration of time; that is consistent; and repeated) coupled with the belief by the state actors that such practice is governed or required by law (*opinio juris*).[69] Treaties constitute agreements between one or two more States.[70] The fundamental principle is that the treaties are binding upon the parties and the obligations therein must be performed in good faith under the principle of *pact sunt servanda.*[71]

2.3.1 The Right to Self-Defence under Customary International Law

Two areas of state practice that have generated controversy over the years, with regard to the right to self-defence, are, anticipatory self-defence and the protection of nationals abroad. Anticipatory self-defence derives its justification from an incident in 1837 between the United Kingdom and the United States.[72] Its controversy emanates from its subjective and speculative nature. The right is said to engage when State A determines from speculation, that it is about to be attacked by State B. The assessment of the situation giving rise to the right is, therefore, subjective. This is contrasted with

[66] Supra, note 17, pp.54 -98.
[67] Ibid., p. 56.
[68] Ibid., pp 56- 73.
[69] Ibid., p.73.
[70] Ibid., p.632.
[71] Ibid.
[72]The *Caroline Case*, Avalon Project, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (site accessed on 8th January, 2013).

the provisions of the United Nations Charter which clearly indicate a prior armed attack must precede the right to self-defence.[73] From this incident the principles governing anticipatory self-defence were established, namely; "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation,' and furthermore that any action taken must be proportional, "since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it".[74] These statements by the US Secretary of State to the British authorities became the acceptable definition of the customary right of self-defence.[75]

The other area of state practice, stirring an equally heated debate, is the protection of nationals abroad. This is a claim by a State that it possesses a right to protect its nationals wherever situate as its nationals are an extension of its territory.[76] Consequently, such acts of rescue are considered to be a part of the wider right of self-defence.[77] The controversy of this practice stems from the fact it involves the violation of another State's territorial integrity. Further, the true motive behind the invasion or raid of the host State, by the rescuing State, is sometimes in doubt. Scholars who support the existence of this right include Humphrey Waldock, [78] and the Waldock principles are considered to be acceptable guidelines governing the scope of this right.[79]

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[73] Article 51.
[74] Dan Webster, Note of April, 24, 1841, see The *Caroline Case*, Avalon Project, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (site accessed on 8th January, 2013).
[75] Chris Richter, "Preemptive Self-defence, International Law and US Policy", available at http://www.polsis.uq.edu.au/dialogue/vol-1-2-6.pdf , (site accessed on 13th September, 2013).
[76] Andrew Thomson, "Doctrine of Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation", 11 Washington University Global Studies Law Review 627 (2012), p. 629, available at, http://law.wustl.edu/WUGSLR/Issues/Volume11_3/Thomson.pdf (site accessed on 13th September, 2013).
[77] Ibid.
[78] See Claud Humphrey Meredith Waldock, The Regulation of the Use of Force by Individual States in International Law, (Recueil Sirey, 1952).
[79] Supra, note 76, pp 628-629.

2.3.1.1 Anticipatory Self-defence

Anticipatory self-defence or preemptive self-defence refers to the measures taken by a State, involving the use of force, to strike what is believed to be an enemy, under the belief that the enemy is about to harm the said State.[80] Proponents of the existence of a right to self-defence under customary international law, and more so the right to anticipatory self-defence, base their arguments on the events of what is often referred to as the is *Caroline Affair.*[81] The principles of law in the *Caroline Case* emerge from an exchange of diplomatic notes between the United States Secretary of State, Dan Webster and his British counterpart, the British Foreign Minister, Lord Baring Ashburton, in 1842. Preceding the lengthy discourse was a series of events that had greatly soured American-British Diplomatic ties between 1837 and 1842.

In 1837, some Canadian rebels, fleeing from British Forces within Canada took refuge on Navy Island on the Canadian side of the River Niagara which separates Ontario and New York. Whilst in hiding, the Canadian Rebels sought the assistance of American citizens for food and arms. A group of Americans obliged and used the *SS Caroline,* a steamboat, to ferry supplies from the United States to the Canadian rebels across the River Niagara. When the British Royal Forces became aware, they crossed the international border between the two countries and towed the Caroline, which was in American waters. They thereafter set the said boat on fire and cast her adrift the Niagara Falls. In the process they also killed one American. These actions upset the government

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[80] Sean Murphy and Patricia Robert Harris, "The Doctrine of Preemptive Self-Defense", 50 Villanova Law Review 699 (2005), p. 701, available at, http://lsgs.georgetown.edu/programs/nlp/preventivewar/Villanova%20Preemption%20Article%20Final.pdf (site accessed on 13th September, 2013).
[81] Supra, note 72.

of the United States and it demanded an apology and reparation from Her Majesty's government. Her majesty's government accepted that there had been breach of the border and territorial integrity of the United States. However, the British government claimed that such breach was absolutely necessary as it was necessitated by self-defence.[82]

On the 24th of April, 1841, Daniel Webster wrote a note his counterpart, Lord Ashburton, of Great Britain. In the note, Webster protested the conduct of Her Majesty's government in the matter. First, he pointed out that the actions of the British Forces were wrong and offensive to the sovereignty and dignity of the United States. Such actions constituted a violation of American soil and territory.[83] Second, he stated that, the government of the United States did not consider the actions of Her Majesty's government to be justified by "any reasonable application or construction of the right to self-defence under the "Laws of Nations".[84] Third, he denied that the American government had "permitted" or condoned the actions of the Americans who were assisting the Canadian rebels.[85] Fourth, he refuted the claim by Britain that the American participants were "pirates". [86] Finally, America was of the view that "the general law of nations does not forbid the citizens or subjects of one government from taking part in the civil commotions of another".[87]

[82] Letter from Lord Ashburton to Mr. Webster dated Wednesday 28th July, 1842 at paragraph 9, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (site accessed on 13th September, 2013).
[83]) Letter from Dan Webster to Lord Ashburton dated 27th July 1842 at paragraph 2, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (site accessed on 13th September, 2013).
[84] Ibid, paragraph 3.
[85] Ibid., paragraphs 5 and 11
[86] Ibid., paragraph 7.
[87] Ibid., paragraphs 8 and 9.

At the end of the note, Mr. Webster proceeded to write the famous words which were, years later, to form the basis for justification of the right to self-defence under international law:

> Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show, upon what state of facts, and what rules of national law, the destruction of the "*Caroline*" is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada,- even supposing the necessity of the moment authorized them to enter the territories of the United States at all,- did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *"Caroline"* was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror. A necessity for this, the Government of the United States cannot believe to have existed.[88]

In reply, Lord Ashburton, whilst acknowledging that there had, regrettably, been a violation of the soil of United States, went on to justify the action as necessary in the circumstances.[89] He went on to further pose a question which, today, arguably, lays the basis for pre-emptive strikes:

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[88] Ibid., paragraph 19.

[89] Letter from Lord Ashburton to Dan Webster dated 28th July, 1842 at paragraph 3, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (site accessed on 13th September, 2013).

> Supposing a man standing on ground where you have no legal right to follow him has a weapon long enough to reach you, and is striking you down and endangering your life, how long are you bound to wait for the assistance of the authority having the legal power to relieve you or, to bring the facts more immediately home to the case, if cannons are moving and setting up in a battery which can reach you and are actually destroying life and property by their fire, if you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so, other than by seizing your assailant on the verge of a neutral territory?[90]

In the end, both statesmen were agreed that "undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[91] Whilst Mr. Webster acknowledged that the cases for self defence were growing every day, he denied that that the circumstances of the *Caroline* justified the action taken by Britain. [92] More so, he denied, that the same met the requirements of self defence in international law.[93] However, in the spirit of conciliation, the United States government accepted the apology from Her Majesty's government for trespass and agreed to lay the matter to rest.[94]

The *Caroline Case* confirmed the existence of the right to self-defence under customary international law. It also went on to confirm that such right to self-defence included the

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[90] Ibid, paragraph 5.
[91] Ibid.
[92] Letter from Dan Webster to Lord Ashburton dated 6th August, 1842, paragraph 3,available at http://avalon.law.yale.edu/19th_century/br-1842d.asp (site accessed on 13th September, 2013).
[93] Ibid, paragraph 4.
[94] Ibid, paragraph 5.

right of a State to strike first, in self-defence, when faced with an imminent attack. This is interchangeably referred to as the pre-emptive self defence or anticipatory self defence. It also set out the legal principles that would govern the exercise of this right. These principles have come to be referred to as the *Caroline* test.[95] Webster's words that the necessity for the action must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" have now come to constitute the test for necessity (also referred to as imminent threat).[96] His other words that "the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it, have now come to constitute the test of proportionality.[97] Together they are referred to as the twin principles of necessity and proportionality.[98]

2.3.1.2 The Principles of Necessity and Proportionality

A lawful act of self-defence, under international law, comprises the two principles of necessity and proportionality.[99] The same have their roots in the *Caroline Case*.[100] Necessity requires the absence of a reasonable alternative;[101] the measures taken

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[95] Frederic L. Kirgis, "Preemptive action to Forestall Terrorism" available at http://www.asil.org/insigh88.cfm (site accessed on 18th March, 2013).
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] James Apple, "Use of Force and Self Defense", International Judicial Monitor (Spring 2009). available at, http://www.judicialmonitor.org/archive_spring2009/generalprinciples.html. (Site accessed on 18th March, 2013).
[100] Supra, note 89.
[101] Christian J. Tams and James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorism Self-Defence", 45(1) Israel Law Review 90 (2012) p. 96, available at http://www.academia.edu/2041503/Applying_Necessity_and_Proportionality_to_Anti-Terrorist_Self-Defence (site accessed on 14th September, 2013).

ought to be the only reasonable option of responding to or repelling an attack.[102] The State must show that in the circumstances it was left "with no choice of means".[103] Necessity will affect the lawfulness or legality of the action.[104] If the action taken, by a State, is considered to have been unnecessary then all measures taken by it, in that regard, are considered illegal.[105]

Proportionality, on the other hand, addresses itself to the scope, level and magnitude of the force employed.[106] The effect of the force must be commensurate with the risk which it is intended to address; in other words the "punishment" meted out must befit the "crime".[107] Consequently, the force employed must be limited to the purpose for which it was employed. On another level, the benefit to be reaped from the action must be commensurate to the harm it causes.[108] For instance, the use of force should not cause unnecessary destruction and suffering. In conclusion it may be said that "necessity determines the availability of the right to self-defence whereas proportionality limits the scope and intensity of the response".[109] The *Caroline* test was affirmed and applied by the International Court of Justice in the *Nicaragua Case* [110] and the *Legality of the Threat of use of Nuclear Weapons Case*.[111]

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[102] Ibid.
[103] Supra, note 101.
[104] Supra, note 99.
[105] Ibid.
[106] David Kretzmer, "The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum", 24(1) European Journal of International Law 235 (2013) p.237, available at http://www.ejil.org/pdfs/24/1/2380.pdf (site accessed on 14th September, 2013).
[107] Ibid.
[108] Ibid.
[109] Supra, note 101, p.101.
[110], Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America, (Merits), Judgement, I.C.J Report, 1986, p.14.

available at http://www.refworld.org/docid/4023a44d2.html (accessed 14 September 2013).
[111] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996, p. 226.

In 1979, the Nicaraguan government was overthrown by *Frente Sandinista de Liberacibn Nacional* (FSLN).[112] On attaining power, after the revolution, the new Nicaraguan regime began to support guerrillas in the neighbouring republic of El Salvador. [113] The United States, on learning about this development, terminated US aid to Nicaragua.[114] Meanwhile, the new regime (in Nicaragua), was facing opposition from supporters of the previous government, namely, the *Fuerza Democratica Nicaragüense* (FDN) and the *Alianza Revolucionaria Democratica* (ARDE) (hereinafter referred to as "the *contras*").[115] In 1983, the United States, gave recognition to the *contras*.[116] Further, it enacted legislation,[117] specifically, for the provision of funds to be used by United States intelligence agencies to support "directly or indirectly military or paramilitary operations in Nicaragua".[118]

In 1984, the government of Nicaragua filed a case before the International Court of Justice (ICJ).[119] In that case the government of Nicaragua sought redress for the actions by the United States government. It claimed that the actions by the United States had violated the territorial integrity of Nicaragua and were further aimed at overthrowing the government of Nicaragua.[120] Further, Nicaragua accused the United States of

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[112] Supra, note 110, paragraph 19.
[113] Ibid.
[114] Ibid.
[115] Ibid., paragraph 20.
[116] Ibid.
[117] Continuing Appropriation Act 1985 (Section 8066), available at, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/documents/d-all-39.pdf (site accessed on 16th September, 2013).
[118] Supra, note 110, paragraph 20.
[119] Ibid., paragraph 25.
[120] Ibid., paragraph 21.

mining Nicaraguan ports, destroying airports and oil infrastructures as well as attacking its military bases.[121] In response, the United States challenged the jurisdiction of the Court.[122] Further, it went on to justify its actions on the basis that United States was acting in collective self-defence on behalf of El Salvador.[123] El Salvador had later joined the United States in its declaration of intervention.[124] In the declaration, El Salvador claimed to have been the victim of Nicaragua's aggressive acts and to have requested the United States to exercise the right of collective self defence on its behalf.[125]

The Court, in its finding, held that the *conditio sine qua non* required for the exercise of collective self-defence had not been fulfilled.[126] It nonetheless proceeded to make a finding on whether the activities of the United States in Nicaragua would have passed the test of necessity and proportionality. The Court was of the view that they had not.[127] The Court stated that the measures taken by the United States, in alleged collective self-defence, on the basis of assistance given by Nicaragua to armed opposition in El Salvador were not necessary.[128] First, the actions taken by the United States government were commenced several months after "the major offensive of the armed opposition against the government of El Salvador had been completely repulsed".[129] The Court

[121] Ibid.
[122] Ibid., paragraph 24.
[123] Ibid., paragraph 35.
[124] Ibid., paragraph 236.
[125] Ibid.
[126] Ibid., paragraph 237.
[127] Ibid.
[128]Ibid.
[129]Ibid.

found that it was, therefore, possible to eliminate the threat to the Salvadorian government without engaging in the acts in and against Nicaragua.

The Court further stated that the actions of the United States government had also failed the proportionality test.[130] The Court was of the view that the assistance to the contras may have met the test of proportionality, had they been legal. However, the "mining of Nicaraguan ports and destruction of oil installations and airports was excessive and disproportionate to the aid extended to the Salvadorian armed opposition by Nicaragua.[131]

The *Legality of the Threat or the Use of Nuclear Weapons* advisory opinion sheds more light on the principles of necessity and proportionality. In 1994 the United Nations General Assembly requested for the opinion of the International Court of Justice on the question, "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"[132]

The Court held:

> There is in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons; there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such; a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.[133]

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[130] Ibid., paragraph 237.
[131] Ibid.
[132] UNGA RES, A/RES/49/75, 90th Plenary Meeting, 15th December, 1994) available at http://www.un.org/documents/ga/res/49/a49r075.htm (site accessed on 19th March, 2013).
[133] Supra, note 111, paragraph 105.

It, however, went on to state:

> A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons; the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; however, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake; there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. [134]

From a reading of the finding of the Court and the opinions of the judges, it is evident that the same were guided by the principles of necessity and proportionality. For instance, Judge Higgins, on circumstances necessitating the use of nuclear weapons, stated as follows:

> That the 'military advantage' must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available.[135]

Judge Schwebel also stated:

> While the principles of international humanitarian law govern the use of nuclear weapons, and while "it is extraordinarily difficult to reconcile the use . . . of nuclear weapons with the application of those principles", it does not follow that the use of nuclear weapons necessarily and invariably will contravene those

[134] Ibid.
[135] See Dissenting Opinion of Judge Higgins, supra note 110, p. 259, paragraph 21, available at http://www.icj-cij.org/docket/files/95/7525.pdf (site accessed on 13th March, 2013).

> principles. But it cannot be accepted that the use of nuclear weapons on a scale which would - or could - result in the deaths of "many millions in indiscriminate inferno and by far-reaching fallout . . . and render uninhabitable much or all of the earth, could be lawful.[136]

The Court did not find any law or principle of law prohibiting the use or threat of use of nuclear weapons. However, it went on to address the legality of the use of such weapons in the context of the principles and rules of international humanitarian law and the law of neutrality.[137] More so, it addressed the unique characteristics of nuclear weapons and their destructive capacity. The Court considered their capacity to cause untold human suffering and their ability to cause damage to generations to come.[138]

The Court observed that the cardinal principles of "international humanitarian law" included the protection of the civilian population and civilian objects.[139] It further, prohibited use of weapons that were incapable of distinguishing between civilian and military targets.[140] It also prohibited use of weapons intended to cause unnecessary or aggravated suffering to the combatants.[141]

The Court also went to address the principle of neutrality against use of nuclear weapons.[142] It was considered, by some members of the Bench, that it was in order to rule out the use of a weapon, the effects of which, simply, could not be contained within the territories of the contending States.[143]

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[136] Dissenting Opinion of Judge Schwebel at page 321, available at: http://www.icj-cij.org/docket/files/95/7515.pdf (site accessed on 13th March, 2013).
[137] Supra, note 111, paragraph 74.
[138] Ibid., paragraph 77.
[139] Ibid., paragraph 78.
[140] Ibid.
[141] Ibid.
[142] Ibid., paragraph 88.
[143] Ibid., paragraph 92.

In the end, the Court was of the view that the unique characteristics of nuclear weapons made the use of such weapons "irreconcilable" with the law regulating armed conflict. In essence, the Court could not envisage a situation where the threat would be of a magnitude to justify the consequences of use of such weapons. However, the Court did not conclusively state that the weapons were outlawed. It also considered the inherent right of self-defence under Article 51 of the Charter, where the very existence of a State was at stake. In such event, the Court was of the view that a State ought to have the right to use whatever means at its disposal to ensure its survival.[144]

In conclusion necessity entails a demonstration, by the State employing force, that there is no other way of dealing with the crisis at hand.[145] It must be shown that the use of force is a reasonable response to the threat.[146] The use of force must be shown to be the last resort.[147] On the other hand proportionality involves the assessment of whether the threat deserves the measure of force with which it is met. Accordingly proportionality does not mean that the response be commensurate to the attack;[148] rather the response must be effective to deter a future attack or to end one.[149] Finally, the use of disproportionate force can invalidate the use of force that was necessary and legal in the first place.[150] The next section, of this chapter, examines the right to self defence with respect to protection of nationals abroad.

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[144] Ibid.
[145] James A. Green and Francis Grimal, "The Threat Of Force As An Action In Self-Defense Under International Law", 44 Vanderbilt Journal of Transnational Law 286 (2011), p. 321 available at http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/green-cr.pdf , (site accessed on 13th September, 2013).

[146] Ibid.
[147] Ibid.

[148] Ibid.
[149] Ibid.
[150] Ibid

2.3.1.3 Protection of Nationals Abroad

The doctrine of protection of nationals abroad has been defined by Ruys as "a concept which refers to the conducting of a military intervention, in the territory of a third State, aimed at the protecting and/or rescuing of threatened nationals of the intervening State".[151] There exists a debate as to whether it is legal, in international law, for a State A to forcibly intervene within another State B, in violation of State B's territorial integrity, with the objective of protecting the nationals of State A from harm or injury.[152] Before Article 2(4) of the United Nations Charter there was, comparatively, very limited restraint on the use of force by States. Consequently, there would have been no debate as to whether a State could wage war to rescue its nationals within the territory of another State. However, with the general outlaw on the use of force and the codification of the right to self-defence in Article 2(4) and Article 51 of the Charter, respectively, a debate has arisen as to whether States are permitted by, international law, to engage in such ventures.

The concept of States rescuing their nationals abroad is not new in international law. In 1867 Sir Robert Napier led Her Majesty's troops to rescue a group of Englishmen in Abyssinia (modern day Ethiopia) who had been detained by the emperor of Abyssinia.[153] In the 15th century, Hugo Grotius stated " kings, and those who are invested with a power equal to that of kings, have a right to exact punishments, not only

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[151] Tom Ruys, "Protection of Nationals' Doctrine Revisited 13 Journal of Conflict and Security Law 233 (2008) p. 237 available at, https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp11-20/wp17.pdf (site accessed on 22nd March, 2013).

[152] Supra, note 22, p. 792.

[153] George Clode, "Richard Jeynes follows Robert Napier's Expedition to Ethiopia to free British Hostages', (12th September, 2012), available at http://www.military-history.org/articles/war-zone-abyssinia1868.htm (site accessed on 14th September, 2013).

for injuries committed against themselves, or their subjects…war is lawful against those who offend nature''.[154]

Also, Huber stated:

> However, it cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions. This right of intervention has been claimed by all States; only its limits are disputed.[155]

The legal justifications for the practice are, however, varied. On the one hand, there are scholars who argue that the practice comprises a *jus cogens* norm stemming from customary international law and does not necessarily comprise a right to self-defence.[156] Further, the use of force in this regard does not constitute the use of prohibited force within the Article 2(4) of the Charter.[157] On the other hand are scholars, who argue that the protection of nationals abroad constitutes an act of self-defence.[158] Further, that an injury to a national of a State constitutes an injury to the State.[159] The nationals of a State are, thus, viewed as an extension of the State's territory.[160] Consequently, the State has an obligation to protect its citizens when in

[154] Hugo Grotius, The Law of War and Peace, available at, http://www.publicbookshelf.com/public_html/Outline_of_Great_Books_Volume_I/therights_bfg.html (site accessed on 22nd March, 2013).
[155] Judge Huber, Rapporteur of the Commission in the Arbitration between United Kingdom and Spain in 1925, reprinted in: D.W. Bowett, "The Use of Force by States", 43 Transactions of the Grotius Society, (1957) , p.11.
[156] Supra, note 76, p. 636.
[157] Ibid.
[158] Ibid., p 639.
[159] Ibid.
[160] Ibid.

danger, even where the national is situated beyond the territorial boundaries of that State.[161] However, within this school there is a further division. There are those who argue that the practice does not contravene Article 51 of the Charter.[162] They argue that the said right is inherent in the nature of the State. Consequently, the right was unaffected by the adoption of the United Nations Charter in 1945.[163] It, therefore, follows that State practice in this regard is legal and permissible under the Charter. Within those arguing that the practice comprises an act of self-defence by the State, there are those who argue that, though not expressly stated under the Charter, the right to protect ones nationals abroad is legal under customary international law.[164] Further, the said right is regulated under customary international law which covers a different scope from the right to self-defence under the Charter.[165]

It is not within the scope of this study to discuss the merits and demerits of each school of thought. However, it is clear that the right has its origins in customary international law. The point of departure is whether or not it forms part of the right of self-defence. For purposes of this study, it will be treated as part of the right of self-defence. This is based on the attitude of States and the manner in which they have regarded the practice. In 1956, the United Kingdom's Foreign Secretary Selwyn Lloyd, in justifying the United Kingdom's incursion into Egypt stated, "Self-defence undoubtedly includes a situation in which the lives of a State's nationals abroad are threatened and it is important to intervene on that territory for their protection".[166] Similarly, in justifying

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[161] Albrecht Randelzhofer, "The Use of Force by States", in R. Bernhardt (ed),IV EPIL 1254 (2000).
[162]Supra, note 76, p. 638.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Reprinted in Natalino Ronzitti, Rescuing Nationals Abroad through Military Coercion and Intervention, (Martinus Njihoff Publishers, Leiden, 1985), p. 29.

its incursion into Uganda in 1976, before the United Nations General Assembly, Israel stated:

> 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. This right, flowing from the right of self-defence, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.[167]

The proponents of the right of States to protect their nationals abroad are, however, agreed that the right is set against certain conditions.[168] These are discussed extensively by writer Waldock and have come to be known as the Waldock criteria.[169] They provide that force may be used in self-defence against threats to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals (b) there is effectively, no other way to forestall imminent further attacks on one's nationals; and (c) the force employed is proportionate to the threat.[170]

In conclusion, it may be said that though a there is no agreement between legal scholars as to the legal basis of the practice of protection of nationals abroad, there exists State practice that continues to grow in this field.[171] Consequently, States are not deterred

[167] UN Doc S/PV 1941 at paragraph 77-81, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL760088.pdf?OpenElement (site accessed on 17th June, 2013).
[168] Supra, note 76, p. 663.
[169] Ibid.
[170] Ibid.
[171] See Israeli raid in Entebbe in 1976 at Kennedy Hickman, " International Terrorism: The Entebbe Raid", available at http://militaryhistory.about.com/od/battleswars1900s/p/entebbe.htm (site accessed on 17th December 2013); also see the US invasion of Grenada in 1975 at Howard Zinn, " 1983 US Invasion of Grenada", available at, http://libcom.org/history/articles/grenada-us-invasion-1983 (site accessed on 17th December, 2013).

from this practice by the debate. Hence, there exists a need to formulate express guidelines for exercise and control of protection of nationals abroad. Leaving the state of affairs as is, may turn out to be problematic as the State practice may crystallise into customary international law. In which event, it is possible that we would then have in place customary international law which is not in tandem with the provisions of the Charter. There is, therefore, need to revisit the provisions of Article 51 to ensure that it spells out the parameters of the right to self- defence more so with regard to the protection of nationals abroad.

2.3.2 The Right to Self-defence under Treaty Law

For purposes of this paper we shall look at the right to self-defence as incorporated in three international law instruments namely, the Covenant of the League of Nations (1919),[172] The Kellogg-Briand Pact (1928)[173] and the United Nations Charter (1945).[174]

2.3.2.1 Covenant of League of Nations (1919)

At the Paris Peace Conference in 1919, a commission was set up to agree on a covenant that was to govern the League of Nations and in 1920, it came into effect. The League comprised a General Assembly and an executive Council, with a Permanent Secretariat.[175] The Council would create a Permanent Court of International Justice to make judgements on the disputes.[176] The High Contracting Parties, to the Covenant,

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[172] Supra, note 52.
[173] Supra, note 55
[174] Supra, note 61.
[175] Supra, note 52, Article 2.
[176] Ibid., Article 14.

agreed to a general “obligation not to resort to war…in order to promote international co-operation and to achieve international peace and security”.[177] Member States were expected to "respect and preserve as against external aggression" the territorial integrity” of other members.[178] Members were also expected to disarm "to the lowest point consistent with domestic safety’.[179] All States were required to submit their disputes for arbitration or judicial inquiry before going to war.[180] Further, members were not to resort to war until three months after the arbitral award, or judicial decision, or report, by the Council had been delivered.[181] Members of the League also agreed not to wage war against fellow members who were compliant with the requirements of the Council.[182]

Articles 10 to 16 of the Covenant were considered to be the basis of how war would henceforth be conducted by members. Article 16 spelled out the consequences of deviating from the set guidelines. It provided:

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.
>
> The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking

[177] Ibid., Preamble.
[178] Ibid., Article 10.
[179] Ibid., Article 8.
[180] Ibid., Article 12.
[181] Ibid.
[182]Ibid., Article 13.

> State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.
>
> Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

Members of the League attempted to outline a mechanism, through the draft Treaty of Mutual Assistance,[183] by which international conflicts could be contained and resolved. It was intended that Council would identify the aggressor nation and the League would support the victim.[184] Unfortunately, the Treaty of Mutual Assistance never came to pass.[185] It was agreed by the parties that the four days provided, within which the council was to identify the aggressor, were insufficient.[186] Further there were no guidelines on how the Council would make this decision.[187] Finally, the treaty mandated military participation on the part of member nations a clause that did not auger well with most of the members. [188]

In 1925, the League, once again, attempted to improve the outline on the mechanism for the containment of war through the Geneva Protocol for the Pacific Settlement of

[183] League of Nations 'Draft Treaty of Mutual Assistance' (15 October 1923) (1923) 4 League of Nations

Document A. 111.1923.1.

[184] Jeffery W. Taliaferro, Norrin M. Rispman and Steven E. Lobell, " The Locarno", The Challenge of the Grand Strategy: The Great Powers and the Broken Balance between the World Wars, (Cambridge University Press, Cambridge, 2012), p. 112.

[185] Ibid.

[186] Ibid.

[187] Ibid.

[188] Ibid.

Disputes.[189] It provided for compulsory arbitration of international disputes through the League.[190] Any nation unwilling to submit to the League's arbitration would be declared the aggressor.[191] This proposal was brought down by the British delegation, whose overseas colonial leaders feared that they would be dragged into European affairs by the Geneva Protocol.[192]

In the end, the Covenant introduced a restriction to the previously unlimited right of a sovereign to wage war freely. War could only now be lawfully waged within certain conditions. In the end, the Covenant did not prohibit war, but just made it harder for States to wage war. However, through this Covenant, the right to self- defence began to emerge as "…a genuine exception to the procedural restraints on the right to resort to war".[193] In other words, the minimal restrictions did not apply to a State going to war in self-defence.

2.3.2.2 The Treaty on Renunciation of War as an Instrument of National Policy (The Kellogg - Briand Pact) of 1928

In 1928, the United States, and other powers including but not limited to, Germany, France, Great Britain and Italy entered into "The General Treaty Renouncing War as an Instrument of National Policy", which came to be known, popularly as, the Kellogg – Brian Pact.[194] It had two operative Articles. Article 1 provided, "The High Contracting Parties solemnly declare in the names of their respective peoples that they

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[189] Protocol of the Pacific Settlement of Disputes (Geneva Protocol, 1924), Council on Foreign Relations, available at, http://www.cfr.org/treaties/protocol-pacific-settlement-international-disputes-geneva-protocol/p22306 (Site accessed on 10th April, 2013).

[190] Ibid., Article 6 and 7.

[191] Ibid., Article 10.

[192] John F Williams, " The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes", 3(6) Journal of the British Institute of International Affairs 288 (1924) , available at, http://www.jstor.org/stable/3014555?seq=3 (site accessed on 10th April, 2013).

[193] Martin Dixon, The Right to Self-Defence, (Oxford University Press, Oxford, 2007), p. 311.

[194] Supra, note 55.

condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article 2 provided, "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

It renounced war as an instrument of national policy.[195] Further, the treaty was to promote peaceful and friendly relations between the parties and their people.[196] They also agreed that settlement of all disputes should only be pursued through pacific means.[197]Any party to the treaty who violated the provisions of the pact would forthwith be stripped off its privileges under the agreement.[198] It followed, therefore, that the only legal war, was a war waged in self-defence.[199] It was concluded outside the League of Nations despite being formed during its currency. One month following its conclusion its members concluded the General Act for the Pacific Settlement of International Disputes, in Geneva.[200] This Act aimed at establishing conciliation commissions to resolve disputes of the parties.[201]

In conclusion it may be stated that both the Covenant of the League of Nations and the Kellogg-Briand Pact did not succeed in their objectives. Neither was successful in

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[195] Randall Lessaffer, "Kellogg-Briand Pact (1928) ", Max Planck Encyclopedia of International Law , (2011), at paragraph 7 available at, http://arno.uvt.nl/show.cgi?fid=114787 (site accessed on 14th September, 2013).
[196] Ibid.
[197] Ibid.
[198] Ibid., paragraph 8.
[199] Ibid., paragraph 16 and 18.
[200] The General Act for Pacific Settlement of International Disputes was approved by the Ninth Assembly of the League of Nations in 1928 and amended by the Revised General Act for the Pacific Settlement of International Disputes in 1949 (71 UNTS 101), available at, http://www.worldlii.org/int/other/LNTSer/1929/220.html (site accessed on 14th September, 2013).
[201] Ibid, Article 2.

preventing or ending wars. This is evidenced by the number of wars that broke out between the members thereafter.[202] However, their importance to international law cannot be over-stated. Both treaties remain critical reference points when seeking to establish the norms governing the threat or use of military force in international law that were in existence immediately preceding the adoption of the United Nations Charter. [203]

They also served a useful base upon which the principles of the United Nations Charter were built.[204] For instance, the general prohibition on the use of force, under the Charter,[205] is a broader confirmation of the interdiction of aggressive wars and wars aimed at expanding territories. It is also worth noting that the States that have resorted to the use of force, since the Charter came into effect, have justified their actions under the right to individual or collective self-defence.[206] Consequently, it may be said that these two treaties laid the basis for principles governing the use of force in modern international law.

2.3.2.3 United Nations Charter

The United Nations system, aiming at international peace and security, operates on a general prohibition against the use of force by States in their international relations.[207] Consequently, it reserves the task of regulating the use of force in international relations

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[202] The Japanese invasion of Manchuria in 1931, the Italian invasion of Abyssinia in 1935, the Soviet invasion of Finland in 1939, and the German and Soviet Union invasions of Poland and eventually the Second World War (See History Learning Sites, "League of Nation Failures", available at http://www.historylearningsite.co.uk/league_nations_failures.htm (site accessed on 9th January, 2014).

[203] Leo Van Den Hole, " Anticipatory Self Defence Under International law", 19(1) American University International Law Review 69 (2003), p. 71, available at, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1160&context=auilr (site accessed on 14th September, 2013).

[204] Supra, note 195, paragraphs 17 and 18.

[205] Supra, note 61, Article 2(4).

[206]See state practice under Chapter Four, infra.

[207] Supra, note 61, Article 2(4).

for the United Nations Security Council.[208] The only exception to the general rule, where a State or group of States may resort to unilateral use of force, is found at Article 51 of the Charter. The said Article authorises individual States, acting alone or collectively, to employ force only when acting in self-defence. Even then, the United Nations Security Council is still granted a supervisory role over the exercise of such force and the same is only to be used in response to an armed attack. Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[209]

From the provisions of the Article, it is apparent that the right to self-defence is to be exercised within certain proscribed parameters and the same are discussed below.

2.3.2.3.1 There must be an armed attack

The Charter authorises States to use force only in response to an "armed attack". It, however, does not define what constitutes an armed attack. This is not to say that States are free to employ force unilaterally under the guise that they are under "armed attack".[210] Practice overtime demonstrates that States are required to justify their decision to resort to use of force and to demonstrate that they were under an "armed

[208] Ibid., Articles 39-41.
[209] Ibid., Article 51.
[210] Supra, note 30, p. 796.

attack"[211] Some actions have now been identified and classified, other factors held constant, to constitute "an armed attack" These include:

(a) invasion, bombardment and cross border shooting

These will only constitute an "attack" if they are of such magnitude as to destabilise the Victim State. Minor incursions will not constitute an armed attack.[212]

(b) attacks on State positions abroad

An armed attack will occur if military units, such aircraft and warships are attacked in a foreign State or in the high seas.[213]

(c) breach of stationing agreements

A violation of the conditions upon which the sending State's armed forces has been allowed within the receiving State will constitute an armed attack if the violations have the effect of an invasion or occupation as against the receiving State.[214]

(d) Participation on the use of force by military organised unofficial groups

Not all indirect participation would constitute an armed attack.[215] This distinction was made by the ICJ in its judgment in the *Nicaragua Case*, when it stated:

> …it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State… But the Court does not believe that the concept of "armed attack" includes not only acts by armed bandits where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or

[211] Ibid.
[212] Ibid.
[213] Ibid., p.797.
[214] Ibid., p. 799.
[215] Ibid., p. 800.

> logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[216]

In essence, the Court rejected the idea that assistance to rebels in the form of provision of weapons or logistical support constituted an armed attack. However, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein, would constitute an armed attack.

2.3.2.3.2 Attack is presumed to be orchestrated by another State

Although the Charter does not distinguish between an attack by a State and an attack by a non-state actor, there has been considerable debate on the issue.[217] In view of the definition of "an armed attack" above, there are those who argue that attacks by non-state actors do not qualify as armed attacks for purposes of the right to self-defence in international law.[218] On the other hand, there are those who argue that Article 51 does not specifically state that an armed attack is only attributable to a State.[219] Further, that there must have now evolved a new customary rule (since the *Nicaragua Case*) which allows the use of force in self-defence against non-state actors where the actions of the aggressors are of such magnitude as to qualify as an armed attack.[220]

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[216] Supra, note 110, paragraph 195.

[217] Daniel Bethlehem, "Principles Relevant to the Scope of a State's Right of Self-defence Against an Imminent or Actual Armed Attack by Non-state Actors ", 106 AJIL 769 (2012), p. 770.

[218] Vidan Hadzi-Vidanovic, "Kenya Invades Somalia Invoking the Right of Self-defence", http://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence (site accessed on 9th January, 2013).

[219] Noam Lubell, Extra Territorial Use of Force Against Non-state Actors (Oxford University Press, Oxford, 2010), p. 31.

[220] Ibid.

The scope of the right to self-defence in response to an armed attack by a non-state actor gained prominence in 2001. On September 11, 2001, the World Trade Center in the United States was bombed by a terrorist group.[221] The *Al Qaeda,* a terrorist organisation operating mainly from Afghanistan, claimed responsibility for the event.[222] Consequently, the United States invaded Afghanistan with a view to flush out and destabilise the terrorists.[223] A number of legal issues arose from these facts. Of importance to this discourse, are resolutions emanating from Security Council following the attacks. Security Council Resolution number 1368 of 2001 passed by the Security Council in its meeting 4370th meeting on 12th September, 2001 stated that:

> Reaffirming the principles and purposes of the Charter of the United Nations; determined to combat by all means threats to international peace and security caused by terrorist acts; recognizing the inherent right of individual or collective self-defence in accordance with the Charter; unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security.[224]

Security Council Resolution 1373 issued by the Council in its 4385th Meeting on 28th September, 2001 stated:

> Reaffirming its resolutions 1269 (1999) of 19th October 1999 and of 1368 (2001) of 12th September, 2001; reaffirming also its unequivocal condemnation of the terrorists attacks which took place in New York, Washington DC and Pennsylvania on 11th September, 2001and expressing its determination to prevent all such acts; reaffirming further that such acts like any act of international terrorism, constitute a threat to international peace and security; reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368

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[221]Supra, note 217.
[222] Ibid.
[223] Ibid.
[224] Security Council Resolution 1368 of 2001, adopted at its 4370th meeting held on 12th September, 2001, 56th session, Security Council Distr. General 01-53382 (E), U.N. Doc. S/INF/57 (2001).

> (2001); reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.[225]

The said resolutions reaffirmed the inherent right of a State to self-defence. It has been argued that this affirmation by the Security Council constituted a recognition that the right to self-defence could arise in response to an armed attack by a non-state actor.

On the other hand, there are those who argue, for instance, that the action by the Kenyan Defence Forces in "Operation Linda Nchi" against the Al-Shabaab did not qualify as self-defence in international law.[226] This is because the Al-Shabaab is not a State. Hence, the claim by Kenya that she was acting in self-defence must be rejected. This school of thought relies on the advisory opinion of the ICJ in the *Wall Advisory Opinion* of 2004.[227] In 2003 the General Assembly requested the ICJ to give an advisory opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions? [228]

The State of Israel in defending its position stated that the wall had been built in self-defence against Palestinian terrorists.[229] The Court was of the view that the defence was

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[225] Security Council Resolution 1373 of 2001, adopted at its 4385th meeting held on 28th September, 2001, 56th session, Security Council Distr. General 01-55743 (E), U.N. Doc. S/INF/ 57 (2001).
[226] Supra, note 217.
[227] Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports, 2004, p. 24.

[228] Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, GA Res ES – 10/13, adopted by the General Assembly on 19th September, 2003, UN GAOR 10th session, September 2003, U.N. Doc. A/RES/ES-10/12, (2003).
[229] Supra, note 227, paragraph 63.

unavailable to Israel as the alleged threats had emanated from non-state actors operating from a territory under Israeli occupation.[230] This school of thought also lends credence to their argument by citing the United Nations General Assembly definition of aggression. The General Assembly defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations as set to in this definition".[231] This definition presupposes that aggression against a State can only emanate from a fellow State actor.

In recent times, however, well organised non-state actors have proven that they are capable of inflicting severe damage on a State.[232] In the premises, it would be injudicious not to recognise that they represent a genuine threat to States in contemporary international law. Consequently, there is need for an affirmative statement within the law recognising non-state actors as having the capability of mounting `an armed attack.

2.3.2.3.3 Action must be reported to the Security Council

Article 51 of the Charter provides that all action taken by a Member State pursuant to exercising its right to self-defence should be reported to the Security Council immediately. The Article goes on to further provide that despite any action already taken by a State in self-defence, the Security Council is possessed of the right to make any decision on the matter with a view of maintaining international peace and security. It is clear that the unilateral action of the State is to be exercised in the interim pending

[230] Ibid., paragraphs 139 - 140.
[231] Definition of Aggression, 1 GA Res 3314 (XXIX), adopted by the General Assembly on 4th December 1974, UN GAOR 29th session, U.N. Doc A/9631 (1974).
[232] Supra, note 217.

the intervention of the Security Council. This provision affirms the mandate of the Security Council, as the primary custodian of international peace and security.[233] It also affirms that the Council is charged with the duty of determining the existence of a threat to international peace and to determine if an act of aggression has occurred.[234] The Security Council is also empowered to use non-pacific means such as economic and diplomatic sanctions as well as the use of force to restore international peace and security.[235]

In essence, the action of a State to use force in self-defence, is meant to be temporary until such a time that the Security Council will step in and take over. Upon intervening, the Security Council is entitled to make a determination on whether or not it was necessary for the particular State to have undertaken the measures it did. It also makes a determination whether or not it is necessary to continue with the measures employed by the State or whether in the circumstances it is inclined to elect other suitable measures. The aim of the Charter, obviously, is to limit unilateral military action, and to place decisions on the use of force primarily in the collective hands of the Security Council. It also ensures that States are not the judges of the legality of their actions and the right of self-defence is not to be used as a weapon by an aggressor to settle scores.

In the *Nicaragua Case*, the issue was raised as to whether the duty to report to the Security Council had any legal bearing on the right to self-defence.[236] On the one hand

[233] Supra, note 61, Article 24(1).
[234] Ibid., Article 39.
[235] Ibid., Article 41-42.
[236] Supra, note 110, paragraph 200

there are those who argue that the duty to report to the Council is one of the mandatory requirements for the lawful invocation of the right to self-defence.[237] Consequently, failure to report these measures to the Council renders them unlawful.[238] This in contradistinction to when a party is relying on international customary law, where there is no obligation to report.[239] In the *Nicaragua Case,* the Court was of the view that, failure by a State to report would "be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence".[240] On the other hand, there are those who argue that the requirement to report is merely procedural and should not affect the substantive right of self-defence.[241]

2.3.2.3.4 Action may be taken collectively

Article 51 of the Charter provides that if a member State of the United Nations suffers an armed attack, then, any other State has the right, but not the duty, to use armed force against the aggressor in reliance upon the principle of collective self-defence.[242] In the *Nicaragua Case* one of the issues for determination by the Court was "whether the United States by training, arming, equipping and financing the *contras* and by directly attacking Nicaragua, flying over its airspace, destroying its infrastructure and mining its ports was acting in collective self-defence?" [243]

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[237] Yoram Dinstein, War Agression and Self-Defence 4th edition, (Cambridge University Press, Cambridge, 2005), pp. 216-217.
[238] Supra, note 110, paragraph 200.
[239] Ibid.
[240] Ibid.
[241] Supra, note 237.
[242] Craig Martin, "Collective Self-Defence and Collective Security: What the Differences Mean for Japan", (2007) , available at http://ishingen.wordpress.com/2007/08/30/collective-self-defence-vs-collective-security-and-what-it-means-for-japan/ , (site accessed on 19th December, 2013).
[243] Supra, note 110, Paragraph 228.

The Court indicated that in order for it to find that an armed attack, warranting intervention, had occurred not only must the attacked State declare that they are under attack, but they must also request the intervening State for assistance.[244] The Court expressly rejected the postulation that the intervening State can, on its own assessment, exercise the right to collective self-defence.[245] In this instance, the Court found that the *conditio sine qua non* required for the exercise of the right to collective self-defence had not been fulfilled.[246] In this case, the ICJ in rejecting the invocation of collective self- defence by the United States on behalf of El Salvador, stated that "notwithstanding several opportunities to do so, El Salvador did not declare itself under an armed attack until just prior to the commencement of this action".[247] The 1958 Lebanon Crisis is an example of collective self-defence where the appeal for help was made by Lebanon which was under attack .[248] The States of Egypt and Syria had united to form the United Arab Republic (UAR) with a view of attacking the Christian led state of Lebanon.[249] Upon the increased pressure from the UAR, which had a following within the State of Lebanon, the President of Lebanon called on the United States to back him and assist him in repelling the attack.[250] Another example is the 1990 invasion of Kuwait by Iraq.[251] The Kuwaiti government whilst in exile called for the help of the international community to help expel Iraq which had invaded Kuwait.[252]

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[244]Ibid., paragraph 232.
[245]Ibid., paragraph 235.
[246] Ibid., paragraph 237.
[247] Ibid., paragraph 233.
[248] George S. Gragnich, "The Lebanon Operation of 1958, Center for Naval Analyses", (1970), available at, http://www.cna.org/sites/default/files/research/0200015310.pdf (site accessed on 19th March, 2013).
[249] Ibid.
[250] Ibid.
[251] Christopher Greenwood, "Iraq's Invasion of Kuwait: Some Legal Issues", 47(3) The World Today, (March 1991), available at, http://www.cna.org/sites/default/files/research/0200015310.pdfhttp://www.jstor.org/discover/10.2307/40396273?uid=3738336&uid=2129&uid=2&uid=70&uid=4&sid=21102065127691 (site accessed on 19th March, 2013).
[252]Ibid.

2.4.3.5. Necessity and Proportionality in contemporary international law

The Charter does not expressly provide that the right to self-defence, under Article 51, is to be exercised within the dictates of the principles of proportionality and necessity. However, scholars are of the view that these principles, having their roots in customary international law, remain applicable to the right of self-defence in contemporary international law.[253] Consequently, a State exercising its right to self-defence under the Charter is obligated to employ force that is necessary to repel the attack and not be vengeful.[254] It is argued that the restrictive nature, on the use of force, with which Article 51 is couched, calls for minimum use of force.[255] This implicitly invokes the application of the principle of proportionality. It also means that the measures employed by a State have to be necessary.[256]

So far we have looked at the historical evolution of the right to self-defence. From an era where States had a right to wage war without giving justification for their decisions; to an era where capricious wars or wars waged for unjust reasons were discouraged; and finally to an era where war is generally prohibited unless it is waged in self-defence and only then in response to an armed attack. Analysis was made of the right to self-defence under customary international law as enunciated in the *Caroline Case* principles. An analysis was also made of the evolution of the right to self-defence as articulated in the Covenant of the League of Nations, the Kellogg-Briand Pact and

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[253] Supra, note 30, p. 805.
[254] Ibid.
[255] Brun –Otto Bryde, “Self Defence”, in R. Bernhardt (ed), IV EPIL, 361 (2000), p.362.
[256] Ibid.

finally under the United Nations Charter. The Charter at Article 2(4) generally prohibits the use of force whilst article 51 preserves the use of force only in self-defence. A number of issues have arisen on the interplay of Articles 2(4) and 51 of the Charter. Another set of issues have also arisen on the interplay between Articles 2(4) and 51 of the Charter on the one hand and customary international law on the other. A resolution is sought on whether there exist two parallel regimes, one under conventional law and another under customary international law, governing different scopes of the right to self-defence. In the next section, we discuss the interplay between Article 2(4) and 51 of the United Nations Charter and the right to self-defence under customary international law.

2.4 The Interplay between Article 2(4) and 51 of the Charter and Customary International law

The provisions of Article 2(4) and 51 of the Charter have generated a myriad of heated debates amongst international scholars. The disputations range from the legality of use of force in international law, following the provisions of Article 2(4) of the Charter to the scope of the right to self-defence in contemporary international law.[257] In one extreme we find a group of scholars who argue that the effect of Article 2(4) of the Charter was to outlaw all use of force by States in their international relations.[258] Further, the provisions of the said Article constitute a peremptory norm in international law.[259] A peremptory norm, also known as *jus cogens*, has been defined as the

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[257] Josef Mrazek, "The Right to Use of Force in Self-Defence", 2 CYIL 33(2011), pp. 33-34.
[258] See Leung Fiona Nga Woon, "Resolving the Conundrums in Article 2(4) and 51 of the Charter :A Matter of Treaty Interpretation", at p. 16 available at, http://lbms03.cityu.edu.hk/oaps/slw2010-4635-lnw806.pdf (site accessed on 14th September, 2013).
[259] Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of the United Nations Security Council Resolutions", 16 (1) The European Journal of International Law

fundamental principle of international law which is accepted by the international community of States as a norm from which no derogation is ever permitted.[260] These scholars argue that the provisions of Article 51 are to the extent that they allow the unilateral use of force by States, inconsistent with Article 2(4) of the Charter.[261] It follows, therefore, that the provisions of Article 51 are to the extent of the inconsistency null and void.[262] These scholars deny that States are entitled to a right of self-defence in international law following the provisions of Article 2(4) of the Charter.

However, this argument has been criticised by another set of scholars. Green argues that the exceptions to the general use of force within the Charter, namely, self-defence and collective security also enjoy a near universal acceptance.[263] He further argues that both concepts enjoy recognition in the Charter and therefore, it is impossible to conclude that the general prohibition against the use of force constitutes a peremptory norm. [264] He also argues that state practice does not support the notion that the general prohibition against the use of force is a peremptory norm.[265] Although it is clear that a number of States have accepted the general prohibition against the use of force, there still exists a significant number whose conduct suggests that they are not so persuaded.[266] He states, "It is unclear whether the 'international community of States

63 (2005), available at http://207.57.19.226/journal/vol.16/No.1/art3.pdf , (site accessed on 15th September, 2009).

[260] Rafael Nieto – Navia, " International Peremptory Norms (Jus Cogens) and International Humanitarian Law", available at: http://www.iccnow.org/documents/WritingColombiaEng.pdf (site accessed on 28th March 2013)

[261] Supra, note 258.

[262] Ibid.

[263] James Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force", (March 2011) available at, http://www.ejiltalk.org/questioning-the-peremptory-status-of-the-prohibition-of-the-use-of-force/ (site accessed on 24th December, 2013).

[264] Ibid.

[265] Ibid.

[266] Ibid

as a whole' has truly 'accepted and recognised' the peremptory status of the prohibition on the use of force as is so often claimed".[267] Further, it is argued that the Charter at Article 51 recognises the inherent right of a State to self-defence. An inherent right is non-derogable and the Charter cannot be deemed to have taken away the right of a State to self-defence. [268] Kanade argues that the two Articles do not contradict each other but rather each covers a different scope of the right to self-defence in international law.[269] Further, when the two Articles are read together they delineate the parameters of the right to self-defence in contemporary international law; [270] Article 2(4) is the general rule proscribing the use of force in international law and Article 51 being the exception to the unilateral use of force.[271]

The second deliberation rallies around the scope of the right to self-defence under contemporary international law. The dividing factor being, whether or not the Charter exhaustively determines the ambit within which the right to self-defence is to be exercised.[272] The argument has roughly been narrowed down to the legality or otherwise of the use of force in anticipatory self-defence and to some extent the protection of nationals abroad.[273] Proponents of the right to anticipatory self-defence argue that the right to self-defence under customary international law remains unaffected by the adoption of Article 51 of the Charter.[274] Further, Article 51 only

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[267] Ibid.
[268] Ibid.
[269] Mihir Kanade, "Article 2(4) of the UN Charter: Alive and Well", available at: http://www.monitor.upeace.org/innerpg.cfm?id_article=632,(site accessed on 23rd July, 2013)
[270] See Supra note, 1, p. 790 and supra, note 17, p.788 respectively.
[271] Supra, note 260
[272] Supra, note 257.
[273] Ibid.
[274] Derek Bowet, *Self-Defence in International Law*, (Manchester University Press, Manchester, 1958) pp.185-6.

represents a part of the wider right to self-defence in international law.[275] Consequently, there is still in existence, another realm of the right to self-defence under customary international law. Most important, they argue that the principles of law enunciated in the *Caroline Case* remain applicable and most illustrative of the law dictating the exercise of this right.[276] Accordingly, the use of force in anticipatory self-defence is not illegal where it is illustrated that an armed attack is imminent.[277] The same school of thought argues that protection of nationals abroad may also be legally justified within the wider breadth of the right to self-defence under international law.[278] These scholars call for a liberal and wide interpretation of the right to self-defence. Lowe suggests:

> Self-defence is regarded not as a crystallised legal rule but rather as an acknowledgement of a legal principle that States are entitled to take the measures necessary to deal with situations of clear and present danger, it is reasonable to interpret it flexibly. If the notion of 'self' is broadened to enable defensive action to be taken by any one among a number of potential targets, and the notion of imminence is broadened (or perhaps simply understood) to encompass action taken at the last opportunity that is certain to exist to take defensive measures, that strikes me as a reasonable and principled development of the right.[279]

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[275] Ibid.

[276] See the dissenting Opinion of Justice Schwebel in the *Case involving Military and Paramilitary Activities in and against Nicaragua*, at paragraph 200, available at http://www.icj-cij.org/docket/files/70/6501.pdf (site accessed on 9th January, 2014).

[277] See Olumide K. Obayemi, "Legal Standards Governing Pre-emptive Strikes and Forcible Measures of Anticipatory Self-Defence Under the UN Charter and General International Law", 12(1) General Survey of International & Comparative Law 19 (2006), pp. 21-23, available at http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1100&context=annlsurvey (site accessed on 14th September, 2013).
See Anthony Clark Arend, "International Law and the Preemptive Use of Military Force", 26(2) The Washington Quarterly 89 (2003), available at, www.cfr.org/content/publications/attachments/.../03spring_arend.pdf *(site accessed on 25th February, 2013).*

[278] Supra, note 22, p.791.

[279] AV Lowe, "Clear and Present Danger: Responses to Terrorism", 54 ICLQ 185 (2005) , p. 192

To justify this stand, a number of reasons have been advanced. First, it is argued that the use of the term "inherent" under Article 51 of the Charter signifies that the right to self-defence subsists in the very nature of the State.[280] The right was not granted by the Charter, it merely recognised it.[281] Consequently, this existence beyond the Charter is recognised and reflected under customary international law.[282] Further by use of the word "inherent" the Charter intended for a continuation of the broader right under customary international law.[283]

Second, it is also argued that the Article 51 does not state that the right to self-defence is only available only if an armed attack occurs.[284] Accordingly, the occurrence of an armed attack is only one of the circumstances, amongst others, that would entitle a State to resort to self defence.[285]

Third, Article 2(4) of the Charter does not constitute a general prohibition on the use of force; rather, it comprises a prohibition on the use of force that is aimed at the territorial integrity and political independence of other States or force that is inconsistent with the principles and purposes of the United Nations. [286] Consequently, exercise of the right to self-defence that is not aimed at undermining the territorial integrity or political

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[280] Supra, note 276.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Hannes Herbert Hofmeister, "Neither the Caroline Formula Nor the Bush Doctrine – An Alternative Framework to Assess the Legality of Preemptive strikes", 2UNELJ, 31 (2005) p. 41.
[285] Ibid.
[286] Anthony D'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor, 77 AJIL 584 (1983).

independence of a State is not unlawful. Neither is its exercise inconsistent with the principles and purposes of the United Nations.[287]

Fourth, state practice, after the Charter, suggests that there exist situations outside the provisions of the Charter which call for the use of force and such use of force is legitimate and justified.[288]

On the other end of the divide is the school that argues that the concept of anticipatory self-defence is illegal under contemporary international law.[289] It is argued that any form of self-defence, after the adoption of the UN Charter, should be exercised strictly within the purview of Article 51 as read together with the Article 2(4) of the Charter.[290] Further, the Charter does not provide for anticipatory self-defence, and all force employed in anticipatory self-defence is illegal.[291] The basis for this stand has been given. As a starting point, the antagonists of the right to anticipatory self-defence, concede that the "inherent right" referred to under Article 2(4) of the Charter must have been a reference to a right recognised under customary international law.[292] It is, however, disputed that this right was constituent in the customary international law prevailing at the time the Charter came into force. [293] It is argued that the principles in

[287] Ibid.
[288] See Supra, note 274.
[289] Mary Ellen O'Connell, The Myth of Preemptive Self-Defense, (August 2002), at p.3, available at http://www.asil.org/taskforce/oconnell.pdf (site accessed on 27th July, 2010).
[290] Ibid.
[291]Ibid.
[292] Ian Brownlie, "International Law and the Use of Force by States Revisited", 1(1) Chinese Journal of International Law 1 (2002) , p.4, available at http://chinesejil.oxfordjournals.org/content/1/1/1.full.pdf (site accessed on 16th March, 2013).
[293]Ibid., p.5.

the *Caroline Case* related to the period 1838 to 1842.[294] Further, state practice between 1842 and 1945 had changed. Therefore, the principles of customary international law guiding state practice immediately preceding the adoption of the Charter did not include the principles enunciated in the *Caroline Case.*[295] The proponents argue that the relevant state practice, informing customary law to the drafters of the Charter would be the practice between the years 1920 to 1945.[296] The state practice during this period is reflected in the treaties, regarding the use of force in international law, signed by States at that time.[297] The gist of these treaties was summarised by Ian Brownlie as follows:

> Firstly, the obligation not to have recourse to war for the solution of international controversies. Secondly, the obligation to settle disputes exclusively by peaceful means. Thirdly, the reservation of the right of self-defence and also of collective self-defence. Fourthly, the reservation of the obligations of the League Covenant.[298]

This school argues that the state practice between 1920 and 1945 constitutes the acceptable status of customary international law implicitly acknowledged by the Charter.[299] Second, it is argued by the antagonists that it was the intention of the Charter to limit the unilateral use of force to the event of an "armed attack".[300] It did not make sense why the drafters of the Charter would only list one condition as a pre requisite to the exercise of the right to self-defence and leave out the rest.[301] Consequently, the

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[294] Ibid.
[295] Ibid.
[296] Ibid., p.6.
[297] The treaties include the Convention of the League of Nations (1920) and the Kellogg-Briand Pact (1928)
[298] Supra, note 292, p.5.
[299] Ibid.
[300] Ibid., pp.2-4.
[301] Michael Byers, "Jumping the Gun", available at, http://www.1rb.co.uk/v24/n14/michael-byers/jumping-the-gun/print (site accessed on 27th July, 2010)

drafters intended the conditions set out in the Charter to be exhaustive and there is no room to infer other conditions.[302]

From the foregoing, it is evident that Article 51 defines the parameters of the right to self-defence in contemporary international law. It was the intention of the drafters of the Charter to restrict the use of unilateral force as much as possible. Consequently, the same was limited to the event of an armed attack only. Further, it was the intention of the drafters to concentrate the use of force in all other circumstances in a collective security system headed by the Security Council. The use of force would, henceforth, be regulated and supervised by the Security Council.

Secondly, the Charter presupposed that the Security Council would effectively curb and censure unlawful use of unilateral force. Further, the Security Council would successfully deal with international crises, thereby precluding the need by States to employ force unilaterally. Chapter Three addresses the performance of the United Nations Security Council in this regard, the question being whether it has discharged this mandate as envisaged by the Charter.

2.5 Conclusion

The right to self-defence (in international law) is not a creation of the law, but is inherent in the very nature of the State. This is acceded to in both customary

[302] Ibid.

international law and conventional law.[303] This right is, however, not unfettered and is to be exercised within certain proscriptions delineated by law. Customary international law requires a State to demonstrate that "the necessity to employ force in self-defence was instant, overwhelming and leaving no choice of means, and no moment for deliberation".[304] Further, the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it".[305] Similarly, a State taking measures to ensure the safety of its nationals abroad should illustrate that " (a) an imminent threat of injury to nationals exists (b) there is a failure or inability on the part of the territorial sovereign to protect them and (c) measures of protection are strictly confined to the object of protecting them against injury".[306]

Article 51 of the Charter reaffirms the primal nature of the right to self-defence. The right is, however, to engage (a) in the event of an armed attack; (b) against another state-actor; (c) subject to supervision by the Security Council; (d) subject to compliance with the requirements of customary law of necessity, immediacy and proportionality; and (e) subject to international humanitarian law and the observation of non-derogable human rights provisions.[307] Self-defence measures may be undertaken individually or collectively. Collective self-defence is, however, subject to the following restrictions, namely, (a) the victim State must declare itself to be under attack (b) the victim State

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[303] Supra, note 89, paragraph 5, and supra note 61, Article 51.
[304] Supra, note 83, paragraph 19.
[305] Ibid.
[306] Supra, note 76, p. 663.
[307] Kenneth Manusama, The United Nations Security Council in the Post-Cold War Era, (Martinus Nijihoff Publishers, Leiden, 2006), p.243.

must expressly request for the intervention of the intervening State(s) before the intervening State(s) launches the attacks.[308]

The debate on whether (i) Article 51 of the Charter exhaustively delineates the law applicable to the right to self-defence in contemporary international law or (ii) whether there exists a parallel regime under customary international law covering a different scope of the right to self-defence that is distinct and separate from that expressed under Article 51 of the Charter is concluded as follows: The scope of the right to self-defence, under contemporary international law is outlined by Article 51 of the Charter. The Charter recognises this right to be inherent in the State. Consequently, the Charter does not grant this right but merely outlines a framework for its regulation. The right is therefore, rooted in customary international law. Customary international law emanates from state practice and accordingly metamorphoses with time. It is argued that Article 51 of the Charter was modeled against the customary law that was obtaining immediately before the adoption of the Charter in 1945. These rules are reflected in the state practice prevailing at the time. The state practice and the attitude of States towards use of force during this period are mirrored in the treaties signed by States between the First and the Second World Wars. The treaties such as the League of Nations Convention and the Kellogg – Briand Pact demonstrate a progressive restriction on the right to self-defence. This progressive restriction culminated to Article 51 of the Charter of the United Nations which permitted the exercise of this right only in the event of an armed attack.

[308] Supra, note 111, paragraph 232.

The argument that there exists a wider right of self-defence under customary international unregulated by the Charter is not tenable. The proponents of this debate rely on the *Caroline Case* to justify the legality of use of force in anticipatory self-defence, protection of nationals abroad and all other emerging situations not provided for the Charter. It is, however, argued that the State practice obtaining immediately before the adoption of the Charter did not support a liberal and unrestricted use of force in self-defence. The principles of the *Caroline Case* reflect the customary law obtaining between in the mid-19th century and are in conflict with the customary law obtaining in the mid-20th century. The rules in the mid-19th century were less restrictive and permitted anticipatory self-defence. However, practice in the mid-20th century suggests a more restrictive approach to the use of force only allowing States to employ force in self-defence in the event of an armed attack. It is concluded here that the principles of the *Caroline* may not wholly be imported into and made applicable to contemporary international law. However, the international customary law principles of necessity, proportionality and immediacy, recognised in the *Caroline Case*, continue to remain relevant and applicable in contemporary international law. In the premises, the doctrines of anticipatory self-defence and protection of nationals abroad do not fall within the scope of the right to self-defence under contemporary international law and any use of force employed in that regard remains unlawful.

The only unilateral use of force sanctioned by the Charter is force employed in accordance with the provisions of Article 51. It was the intention of the Charter to limit the unilateral use of force to the event of an armed attack. All other situations involving

the use of force under international law fall within the exclusive mandate of the Security Council. This is the collective security system envisaged by the drafters of the Charter. For the collective system to be successful, it was expected that the Council would effectively control and regulate the right to self-defence. In the next chapter we examine the role of the Security Council in supervising and controlling the use of unilateral force in international law and, more so, the right to self-defence.

CHAPTER THREE

THE ROLE OF THE SECURITY COUNCIL IN REGULATING THE RIGHT TO SELF DEFENCE

3.1 Introduction

The United Nations was founded in 1945 after the end of the Second World War. Following the devastating effects of the war, the founders of the United Nations sought to limit the use of force under international law. The use of force was to be regulated in a security system modeled against a background of a general prohibition on the use of force.[1] The United Nations security system seeks to concentrate the machinery of force, in international law, within the Security Council.[2] The individual State was left with only one option within which it could lawfully exercise the use of force, namely, the right to self-defence in the event of an armed attack.[3] This security system presupposed a Security Council that would effectively deter and punish all unlawful use of force.[4] It also presupposed that the Council would intervene in all other situations that would otherwise, necessitate the individual State to resort to the use of force outside the framework of the United Nations.[5] The Council was given the primary responsibility to maintain international peace and security.[6] This system was aimed at "saving

[1] Charter of the United Nations 1945, 1 UNTS XVI.
[2] Ibid., Articles 24 and 26.
[3] Ibid., Article 51.
[4] Jean Allain, "The True Challenge of the United Nations System of the Use of Force: Kosovo and Iraq and the Emergence of the African Union", 8 Max Planck UNYB 237 (2004), p. 244, available at http://www.mpil.de/files/pdf1/mpunyb_allain_8.pdf (site accessed on 20th September, 2013).
[5] Ibid.
[6] Ibid.

successive generations from the scourge of war".[7] The collective security system was premised on a balance of power system.[8]

After the Second World War, the Allied Powers were allocated five permanent seats in the Security Council.[9] This structure was aimed at ensuring that the permanent members would ever be present to respond to any threats posed by the vanquished powers or other emergent threats.[10] Each permanent member was given a power of veto on all substantive issues before the Council.[11] This meant that either of the five could prevent the Security Council from action. The system envisaged that the permanent members would be in agreement on crucial issues.[12] Unfortunately, this has not been the case. Consequently, this structure has been responsible for inaction and ineffectiveness of the Council wherever the individual interests of the permanent members are at variance.[13] As a result, the Council has failed to discharge its mandate under the collective security system.

The reasons for the ineffectiveness of the Council range from the abuse of the power of veto to a general lack of political will within the Council. On one level, the Council has failed to effectively deal with the situations, outside Article 51, that would necessitate

[7]Supra, note 1, Preamble.
[8] Allen Weiner, "The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?" 59(2), Stanford Law Review 415 (2006), p.452, available at http://iis-db.stanford.edu/pubs/21489/Weiner.pdf (site accessed on 17th September, 2013).
[9] Supra, note 1, Article 27.
[10] Sahar Ohhovat, "The United Nations Security Council: Its Veto Power and Its Reform", Working Paper No. 15/1, (Centre for Peace and Conflict Studies, The University of Sidney, (2012), at p. 11, available at http://sydney.edu.au/arts/peace_conflict/docs/working_papers/UNSC_paper.pdf (site accessed on 26th March, 2013).
[11]Supra, note 1, Article 27.
[12] Supra, note 10.
[13] Ibid.

a State to resort to the use of unilateral force; intervention in situations that called for its action to restore general security, stability, peace and, above all, prevent war and suffering. On another level, it has failed to regulate and control the unilateral use of force, as delineated under Article 51 of the Charter. This paper addresses the latter situation. In this Chapter we will look at the constitution, powers and role of the Security Council as provided by the Charter. Thereafter, we will look at the voting patterns of the members of the Security Council and especially so, the use of the veto by the five permanent members. It will be demonstrated that this power of veto, has been the subject of gross abuse. Finally, we will examine two instances, namely the Falklands War and the Bosnian War, when the Council was called upon to address situations regarding the use of force under Article 51 of the Charter. It will be demonstrated that the Council was ineffective and indecisive when it mattered most. It will be shown that the members of the Council were guided more by political propinquities and less by what was right. Consequently, the Council has failed to discharge its Charter mandate to effectively regulate the right to self-defence under international law.

3.2 The Constitution, Powers and Role of the United Nations Security Council

The Security Council is one of the six principal organs of the United Nations Organisation.[14] At any one given time, the Council comprises fifteen Member States of the United Nations.[15] Five of these are permanent, that is, USA, UK, Russia, China & France, and the other ten are elected by the General Assembly based on their

[14] Supra, note 1, Article 7.
[15] Ibid., Article 23.

contribution to the maintenance of international peace and security and equitable geographical distribution.[16] The non-permanent seat is held by a State for a term of two years after which the seat is reallocated to another Member State.[17] It is generally accepted, that in each term, out of the ten non-permanent seats, five are reserved for Afro – Asian states, two for Latin America, two for Eastern Europe and one for Western Europe.[18]

The Council has the primary responsibility for the maintenance of international peace and security.[19] It is considered that whilst performing this function and making decisions pertaining to the same function, the Council is acting on behalf of all the United Nations Member States.[20] Its decisions are also binding upon all the members of the United Nations.[21] To effectively discharge its mandate, the Council was granted powers under Chapters VI, VII VIII and XII of the Charter.[22] Chapter VI deals with the pacific settlement of disputes. The Charter gives precedence to pacific avenues before resort to use of force.[23] Chapter VII deals with the use of force and measures which the Security Council may take with a view to restoring international peace and security. These include measures not involving armed force [24] as well as military force.[25] The Council is given supervisory powers over States exercising the right to self defence in international law.[26] Article 51 only grants States an interim right of reprieve pending

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[16] Ibid.
[17] Ibid.
[18] Supra, note 10, p. 8.
[19] Supra, note 1, Article 24.
[20] Ibid.
[21] Ibid., Article 25.
[22] Ibid., Article 24 (2).
[23] Ibid., Article 33.
[24] Ibid., Article 41.
[25] Ibid., Article 42.
[26] Ibid., Article 51.

the intervention of the Council.[27] Further, all actions must be reported to the Council and the Council has the power to take over conduct of the matter from the particular State and make further decisions on the matter as it deems fit.[28] Chapter VIII deals with the role of the Security Council vis a vis regional arrangements for maintaining international peace and security. No enforcement action may be taken by the regional bodies without the authorisation of the Council.[29] Further, the Council should be informed of all the activities undertaken by the regional bodies.[30] It is by these powers that the Council is expected to discharge its primary mandate, to maintain international peace and security.

However, this mandate has been impeded by its procedure of operation. Decisions of the Council are made by voting. Each member of the Council is entitled to one vote.[31] Decisions on procedural matters are made by an affirmative vote of nine members.[32] On all other matters, decisions are made by an affirmative vote of nine members including the concurrent votes of the permanent members.[33] This means that permanent members possess the power to veto a decision. The next section illustrates how the power of veto has been used by the permanent members over time.

[27] Ibid.
[28] Ibid.
[29]Ibid., Article 53.
[30] Ibid., Article 54.
[31] Ibid., Article 27 (1).
[32] Ibid., Article 27(2).
[33] Ibid., Article 27(3).

3.3 Trends on the use of Power of Veto

Following its creation, an issue has constantly arisen as to whether the Security Council has managed to discharge its mandate under the Charter as envisaged.[34] The Council has been criticised for its "small size, exclusive nature, its relations with the General Assembly, its working methods and its undemocratic structure".[35] However, the most criticism stems from the use of the power of veto by the five permanent members.[36] The permanent members have been criticised for using the power to further national interests irrespective of the wishes of the larger United Nations membership.[37] Some of these instances are discussed below.

3.3.1 Protection of National Interests

The veto, as earlier mentioned, has been applied to protect national interests by use of an outright negative vote. In 1986, the United States blocked a resolution calling "for full and immediate compliance with the Judgement of the ICJ of 27 June 1986.[38] Initially, the United States government had raised a preliminary objection to the Court's jurisdiction.[39] After the Court decided that it had jurisdiction to entertain the case, pursuant to Article 36(6) of the Statute of the Court, the United States government opted not participate in the case.[40] It, however, reserved "its rights in respect of any decision of the Court regarding Nicaragua's claims".[41] The final judgment was against the

[34] Supra, note 10, p.11.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America, (Merits), Judgement, I.C.J Report, 1986, p.14.

[39] Ibid, paragraph 10.
[40] Ibid, paragraph 11.
[41] Ibid., paragraph 10.

United States [42] and the matter came before the Security Council for enforcement.[43] The United States vetoed the resolution, thereby rendering the judgment unenforceable.[44] Eleven members of the Council had voted affirmatively in favour of the resolution with France, Thailand and the UK abstaining.[45] The General Assembly, however, intervened and by adopting a resolution [46] calling for the "full and immediate compliance" by the United States with the Court's judgment.[47]

In 1989-1990, France, the United Kingdom and the United States exercised their power of veto to block a resolution which had been brought by the State of Panama against the United States.[48] By a letter dated 25 April, 1989, addressed to the President of the Security Council, the representative of Panama requested the Council to consider "the grave situation faced by his country as a result of the flagrant intervention in the internal affairs of Panama, by the United States.[49] Panama was protesting the raid by United

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[42] Ibid., paragraph 292.
[43] United Nations Security Council, Letter dated 11th July, 1986 from the Permanent Representative of Nicaragua to the United Nations addressed to the President of the Security Council, U.N. Docs. S/18250 (1986), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N86/187/03/PDF/N8618703.pdf?OpenElement (site accessed on 19th September, 2013).
[44] United Nations Security Council, Security Council in its 2704th meeting held on 31st July, 1986 U.N. Doc S/PV. 2704 (1986), available at http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N86/608/44/PDF/N8660844.pdf?OpenElement (site accessed on 19th September, 2013).
[45] Ibid.
[46] Judgment of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and Against Nicaragua: Need for Immediate Compliance, G.A. Res 42/18 adopted by the General Assembly on 12 November 1987, A/RES/42/18, available at, http://www.refworld.org/docid/3b00effb10.html (site accessed on 20 September, 2013).

[47] Ibid., paragraph 1.
[48] United Nations Security Council, Draft Resolution S/21084, at its 2905th meeting held on 17th January 1990, U.N. Doc S/PV 2905, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.2905 (site accessed on 19th September, 2013).
[49] United Nations Security Council, Letter dated 24th April, 1989, from the Permanent Representative of Panama to the United Nations to the President of the Security Council, U.N. Doc S/21034, available at: http://www.un.org/en/sc/repertoire/89-92/Chapter%208/AMERICA/item%2013_Panama%20-

States forces of the premises of the Nicaraguan ambassador to Panama.[50] The representative of the United States reported that the United States had acted in accordance with Article 51 of the Charter of the United Nations,[51] and the United States had "exercised its inherent right to self-defence, under international law".[52] The United States action in Panama had been in response to armed attacks against United States nationals by Panamian forces, under the direction of Panama's president.[53] The US representative stated that the action was designed to protect American lives, as well as to fulfill the United States obligations to defend the integrity of the Panama Canal Treaties.[54] The draft resolution, would have

> Reaffirmed the sovereign and inalienable right of Panama to determine freely its social, economic and political system and to develop its international relations without any foreign intervention; and would have recalled the obligation of all Member States, under Article 2, paragraph 4, of the Charter, to refrain from the threat or use of force against any State.[55]

Further, it would have:

> (1) strongly deplored the military intervention in Panama as a flagrant violation of international law; (2) demanded the immediate cessation of the intervention and the withdrawal of the United States armed forces from Panama; (3) called upon all States to respect the sovereignty, independence and territorial integrity of Panama; and (4) requested the Secretary-General to monitor the developments in Panama and to report to the Council within 24 hours after the adoption of the resolution.[56]

%203%20items%20-%20consolidated.pdf#page=1&zoom=auto,0,800 (site accessed on 8th April, 2013).p. 394

[50] United Nations Security Council, Security Council at its 2905th meeting on 17th January, 1990, U.N. Doc S/PV.2905 , at p. 3, available at, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.2905 (site accessed on 19th September, 2013).

[51] Ibid., p. 24

[52]Ibid.

[53] Ibid

[54] Ibid.

[55]Supra, note 48.

[56] Ibid.

Ten members of the Council voted for the resolution, as Finland abstained and Canada voted against it alongside France, United Kingdom and United States.[57]

In 1997, a draft resolution was initiated in the Security Council, seeking the authorisation for 155 United Nations observers for the purpose of the verification of the agreement of a definite ceasefire in Guatemala.[58] Fourteen members of the Council gave the resolution an affirmative vote and only China cast a negative vote.[59] In 1999, another draft resolution was initiated for "extended UNPREDEP for a further six months until 31 August 1999".[60] The draft resolution was aimed at deterring threats and to prevent clashes, to monitor the border area, and to report to the Secretary-General any developments posing a threat to the Former Yugoslav Republic of Macedonia.[61] This included monitoring and reporting on illicit arms flows and other activities prohibited under Security Council Resolution 1160 of 1998.[62] Thirteen members of the Council voted in favour of the resolution, with Russia abstaining and China casting a

[57] Supra, note 50, p. 36.
[58] United Nations Security Council, Draft Resolution S/1997/18* at its 3730th meeting on 10th January, 1997, U.N. Doc S/PV 3730, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1997/18 (site accessed on 19th September, 2013).
[59] United Nations Security Council, Security Council in its 3730th meeting on 10th January, 1997, U.N Doc S/PV.3730 , at p. 17, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.3730 (site accessed on 19th September, 2013).
[60] United Nations Security Council, Draft Resolution S/1999/201 at its 3982nd meeting on 25th February, 1999, U.N. Doc S/PV 3982, available at, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1999/201 (site accessed on 19th February, 2013).
[61] Ibid.
[62] Security Council Resolution 1160 of 1998, adopted by the Security Council at its 3868th meeting on 31st March, 1998, 53rd session, Security Council Distr. General 98-09023 (E), U.N. Doc S/INF/54 (1998).

negative vote.[63] In both of these instances, China exercised a negative, vote thereby preventing the Council from intervening in the crises. It was common knowledge that China exercised the negative vote to punish both Guatemala and Macedonia for granting Taiwan recognition as an independent State.[64] Beijing considers Taiwan a renegade province of China with no right to an independent legal status in international law.[65] Weeks before China exercised the veto; she had severed her diplomatic ties with Macedonia after the latter granted recognition to Taiwan.[66]

In June, 2002, the United States vetoed a draft resolution seeking the renewal of UN Peacekeepers in Bosnia.[67] The US had cast a negative vote because the draft did not contain a clause granting US soldiers immunity from war crimes.[68] Later, when the draft was amended to include the clause, the resolution was passed.[69] The resolution had been referred to the Council and the Council was "determined to promote the peaceful resolution of the conflicts in accordance with the purposes and principles of the Charter of the United Nations".[70] The reference was made under Chapter VII of the Charter.[71] The United States had vetoed a popular draft in which thirteen members of

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[63] United Nations Security Council, Security Council at its 3982nd meeting on 25th February, 1999, U.N. Doc S/PV. 3982, at p. 5, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.3982 (site accessed on 20th September, 2013).
[64] Supra, note 69, p. 20 and supra, note 63, pp 6-7.
[65] Supra, note 10, p.59
[66] Ibid.
[67] United Nations Security Council, Draft Resolution S/1999/201, at its 4563rd meeting on 30th June, 2002, U.N. Doc S/PV 4563, available at, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2002/712 , (site accessed on 20th September, 2013).
[68] United Nations Security Council, Security Council at its 4563rd meeting on 30th June, 2002, S/PV.4563, at pp. 2-3, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.4563 (site accessed on 20th September, 2013).
[69] Security Council Resolution 1422 of 2002, adopted at its 4572nd meeting held on 12th July, 2002, 57th session, Security Council Distr. General 02-47761 (E) *0247761*, U.N. Doc. S/INF/58 (2002).
[70] Supra, note 67
[71] Ibid.

the Council had voted affirmatively and one member (Bulgaria) had abstained.[72] The only reason the resolution was initially shot down was because it did not factor the interest of the US and its soldiers.

In 2009, Russia blocked a resolution seeking "to extend the mandate of the United Nations mission for a new period terminating on 30 June 2009".[73] The observer mission was to be sent to Georgia and Abkhazia.[74] Russia voted alone against the resolution; four other States abstained and ten members voted in favour of the resolution.[75] Russia protested the inclusion of a clause in the resolution which recognised the territorial integrity of Georgia.[76] Preceding the resolution was the Georgian-Russian war in which Russia had sided with the breakaway territory of South Ossetia from Georgia. [77]

3.3.2 Protection of Allies

The veto has also been used to protect allies of permanent member from adverse decisions of the Council. The most notable user of the power in this manner has been the United States with regard to Israel. For instance, since 1991 the US has used the veto fourteen times out of which 13 constituted a favour to Israel.[78] Consequently, Israel

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[72] Supra, note 68, p. 3.
[73] United Nations Security Council, Security Council Draft Resolution S/2009/310, at its 6143rd meeting on 15th June, 2009, U.N. Doc S/PV 6143, available at ,http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2009/310 (site accessed on 20th September, 2013).
[74] Ibid.
[75] United Nations Security Council, Security Council at its 6143rd meeting on 15th June, 2009, U.N. Doc S/PV. 6143, p.3 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6143 (site accessed on 20th September, 2013).
[76] Ibid., p. 2.
[77] Ibid.
[78] Supra, note 10, p. 13.

enjoys immense protection from adverse decisions of the Council by virtue of the United States co-operation. This practice of the US has resulted in the Negroponte Doctrine.[79] This is drawn from a statement made by the US representative to the UN in the year 2002, where he stated that for the US to back any resolution concerning the Israeli-Palestinian conflict, the said resolution should (a) explicitly condemn the acts of terrorism (b) condemn al-Aqsa Martyrs Brigade, the Islamic Jihad and the Hamas, [80] (c) appeal to all parties for a political settlement of the dispute, and (d) demand for the improvement of the security situation before requiring Israel to withdraw forces from occupied territories.[81]

In 2011, the US controversially exercised its veto to block a very popular resolution that had been co-sponsored by at least 130 countries.[82] The same had called for the reaffirmation of "illegality of settlement activity, called upon all parties to uphold international law, and urged intensification of international and regional diplomatic efforts".[83] The US vetoed the resolution amidst protest from the Middle East and despite intense lobbying by pro-Israeli groups.[84] All other members of the Security Council had voted in favour of the resolution and the US stood alone against it.[85]

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[79]Named after John Negroponte a former United States Ambassador to the United Nations between the years of 2001 and 2004 (see Wikipedia, "Negroponte Doctrine", available at, http://en.wikipedia.org/wiki/Negroponte_doctrine (site accessed on 9th January, 2014).
[80] These are terrorists group within Palestine responsible for a number of suicide attacks against Israel (see Wikipedia, " Hamas" , available at http://en.wikipedia.org/wiki/Hamas , site accessed on 9th January, 2014).
[81] Supra, note 10, p. 14
[82] United Nations Security Council, Security Council Draft Resolution , at its 6484 meeting on 18th February, 2011, U.N. Doc S/PV.2011/24, available at , http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/24 (site accessed on 20th September, 2013).
[83] Ibid.
[84] United Nations Security Council, Security Council at its 6484th meeting, 18th February, 2011, S/PV.2011/24 at p.4 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6484 (site accessed on 20th February, 2013).
[85] Ibid, p.3.

In 2006, Russia and China managed to temper the tone of a resolution against Iran.[86] Iran was then considered an ally of both.[87] The initial resolution sought to impose strict punitive sanctions against Iran following its nuclear program.[88] The resolution provided for the freezing of assets belonging to twelve individuals and ten companies of Iranian nationality that were alleged to be involved in nuclear programs.[89] The resolution was revised to allow member states of the UN more latitude to unfreeze the assets than had been provided in the earlier drafts.[90] The older drafts further required a mandatory travel ban against the persons alleged to be involved in the nuclear activities.[91] The final resolution did not have the mandatory ban which required member states to deny the persons entry; it simply warned the member states to exercise caution.[92]

During the 2009 civil war in Sri Lanka, it is alleged that a number of Sri Lankan Tamils were killed by Sri Lankan forces.[93] The Security Council had made attempts to work on a resolution that would have the Sri Lankan forces charged with war crimes.[94] However, China and Russia are important allies of Sri Lanka.[95] They managed to put

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[86] UN Security Council, Resolution 1737 (2006) Non-proliferation, 27 December 2006, S/RES/1737 (2006), available at: http://www.refworld.org/docid/45c30c6f0.html (accessed 20 September, 2013).
[87] Supra, note 10 p. 19.
[88] Ibid.
[89] Elisa Gootman, "Security Council Approves Sanctions Against Iran over Nuclear Program", (December, 2006), available at http://www.nytimes.com/2006/12/24/world/24nations.html?_r=0 ,(site accessed on 20th September, 2013).
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Reuters, "UN Admits Failure over Sri Lankan Civil War", 15th November, 2012, available at http://www.abc.net.au/news/2012-11-15/un-admits-failure-over-sri-lankan-civil-war/4372812, (site accessed on 21st September, 2013).
[94] Evelyne Leopold, "Sri Lanka: UN Security Council Makes First Move", Huff Post World, 13th May, 2009, available at http://www.huffingtonpost.com/evelyn-leopold/sri-lanka-un-security-cou_b_203259.html , (site accessed on 21st September, 2013).
[95] Ibid

off the tabling of such a resolution by making it clear that if it was tabled, they would veto it.[96] All the Council did in this matter was to issue a press statement expressing concern over the humanitarian crisis and that was after the United States had allowed the tabling of a report on Israel's war in Gaza.[97] In this instance, Russia and China did not cast their veto, but just made it clear to the Security Council that they would if a resolution was brought before it. According to the two powers, the war in Sri Lanka was an internal affair not requiring international intervention.[98]

In 2010, France managed to prevent the tabling of a resolution against Morocco.[99] Earlier, following political protests in Western Sahara, the Moroccan government forces had moved in to quell the unrest.[100] France prevented the Council from looking into possible war crimes committed by the Moroccan forces.[101]

In 2011, Russia and China vetoed a draft resolution that sought to condemn the Syrian government for violation of human rights. [102] The draft sought to allow peaceful protests against the government of Syrian President, Assad.[103] It also sought to allow the Council to review the matter after 30 days with a view imposing economic sanctions

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[96] Ibid
[97] Ibid.
[98] Ibid.
[99] Supra, note 10, p.16.
[100] Ibid.
[101] Ibid.
[102] Hayes Brown, " How Russia Has Blocked International Action in Syria", (September, 2013), available at http://thinkprogress.org/security/2013/09/09/2587861/brief-history-russia-blocking-international-action-syria/ (site accessed on 21st September, 2013).
[103] United Nations Security Council, Security Council Draft Resolution S/2011/612, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/612 (site accessed on 21st September, 2013).

if need be.[104] It also sought to call upon both the Syrian government and the rebels to cease from using force against innocent civilians.[105] In February, 2012, the two States also vetoed another Resolution seeking to censure the Syrian government.[106] A clause in the draft resolution "noting that nothing in this resolution authorises measures under Article 42 of the Charter,"[107] was not enough to appease China and Russia. In July 2012, another draft resolution was presented to the Council seeking to enforce economic sanctions over Syria but the same was vetoed once again by China and Russia.[108] According to China and Russia, the draft resolutions were unacceptable as they only targeted the government and not the other party in the conflict.[109] In April 2013, however, the Council passed resolution 2099 of 2013 which allowed an observer mission to monitor a cease-fire between the government and the rebels.[110] However, due to a resurgence of violence, the forces were forced to withdraw.[111]

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[104] Ibid.
[105] Ibid.
[106] United Nations Security Council, Security Council Draft Resolution S/2012/77, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/77 , (site accessed on 21st September, 2013).
[107] Ibid.
[108] United Nations Security Council, Security Council Draft Resolution S/2012/538, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/447/57/PDF/N1244757.pdf?OpenElement (site accessed on 21st September, 2013).
[109] United Nations Security Council, Security Council at its 6810th meeting on 19th July, 2012, S/PV. 6810, at p. 9 and 13, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6810 (site accessed on 21st September, 2013).
[110] Security Council Resolution 2099 of 2013, adopted by the Security Council at its 6951st meeting held on 25th April, 2013, 68th session, Security Council Distr. General 13-31441 (E), U.N. Doc. S/ INF/69 (2013).
[111] Supra, note 102.

3.4 Instances of Failure by the Security Council in Discharging its Mandate under Article 51 of the Charter

In the previous section we looked at general voting patterns of the Council. It was shown that politics and self-interest of the permanent members remain a key factor in the Council's decision making. In this section we analyse two instances involving the exercise of the right to self-defence under Article 51 of the Charter, namely, the Falklands war between Argentina and the United Kingdom in 1982 and the Bosnian war between 1992 and 1995. In both cases the Council was called upon to exercise its leadership as mandated by the Charter. However, in both cases the Council was either not in control in the management of the crises, or failed to give direction on the resolution of the conflict.

3.4.1 The Falklands War between Argentina and United Kingdom in 1982

The Falklands war was fought between Argentina and United Kingdom between April and June in 1982. The war revolved around the disputed sovereignty over the Falklands Islands, also referred to as Malvinas by the Argentineans, which lie off the coast of mainland Argentina in the Atlantic Ocean. Argentina first brought the dispute before the United Nations General Assembly in 1965.[112] In the proceedings before the Assembly, Argentina demanded that the Falklands Islands should be decolonised in accordance with Resolution 1514 (XV) of 1960,[113]and that the islands be "returned" to

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[112] Jorge O. Laucirica, "Lessons from Failure: The Falkland/Malvinas Conflict", Seton Hall Journal of Diplomacy and International relations, 79 (2000), 79, available at http://blogs.shu.edu/diplomacy/files/archives/laucirica.pdf (site accessed on 18th September, 2013).

[113] Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), adopted by the General Assembly on 14th Meeting December, 1960, A/RES/1514 (1960).

Argentina.[114] The United Kingdom stated that it had no doubts as to its sovereignty over the territory, and that, as a result, there was no question of Argentina's territory having been disrupted.[115] On 4th April, 1982, Argentina invaded the Islands and dispossessed Britain of them.[116] On 5th April, 1982, the United Kingdom in a declaration of self-defence, waged war on Argentina and restored the islands to its possession.[117] Of importance to this discourse, is the role played by the Security Council immediately before, during and after the war.

On 1st April, 1982, just before the war, the British representative to the United Nations sought a resolution of the Security Council requiring Argentina to refrain from carrying out an attack against British forces on the Islands.[118] Although the resolution was not passed, the President of the Council called upon Argentina not to embark on the invasion.[119] Nonetheless, the invasion was carried out the next day by Argentinean forces. On 2nd April, the British representative moved the Council to pass Resolution 505 which demanded an immediate (a) cessation of hostilities; (b) withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas); and (c) called on the Governments of Argentina and the United Kingdom to seek a diplomatic solution to their differences and to respect fully, the purposes and principles of the Charter of the

[114] Argentinean representative to the UN in December 1965, speech reprinted in Roger Lortan, "Falklands War: Countdown & Conflict, 1982, p.10 available at, http://www.britishempire.co.uk/forces/armycampaigns/southamerica/falklands/falklandswarconflict.pdf , (site accessed on 17th September, 2013).
[115] British representative to the UN in December 1965, speech reprinted in Roger Lortan, "Falklands War: Countdown & Conflict, 1982, p.10 available at, http://www.britishempire.co.uk/forces/armycampaigns/southamerica/falklands/falklandswarconflict.pdf , (site accessed on 17th September, 2013).
[116] Ibid., p. 49.
[117] Ibid., p. 143.
[118] Ibid., p. 53.
[119] Ibid.

United Nations.[120] The Resolution was passed on 3rd April, 1982. After, the resolution was passed the United Kingdom prepared to go to war in a bid to restore its administration over the islands. It did not involve the Security Council in making this decision. On the contrary, it made it clear that it did not want the matter to be brought before the Council. The British Prime Minister, in her address before the British Parliament stated,

> Let me turn now to the question of greater United Nations involvement. All our action has been based on a resolution of the United Nations. The Argentine invasion was carried out in defiance of an appeal issued by the President of the Security Council at our urgent request on 1 April. That solemn appeal was endorsed by the whole of the Security Council, but it was ignored. Immediately after the invasion we asked for another meeting of the Security Council. That meeting passed resolution 502….That resolution calls for Argentine withdrawal and a negotiated solution to the dispute. Without Argentine withdrawal, we have no choice but to exercise our unquestionable right to self-defence under article 51 of the charter….The question that we must answer is, what could further recourse to the United Nations achieve at the present stage? We certainly need mediation, but we already have the most powerful and the most suitable mediator available, Mr. Haig, backed by all the authority and all the influence of the United States, working to implement a mandatory resolution of the Security Council….Of course, we support the United Nations and we believe that respect for the United Nations should form the basis of international conduct. But, alas, the United Nations does not have the power to enforce compliance with its resolutions, as a number of aggressors well know….Those simple facts are perfectly well understood in the international community. Let me quote the Swedish Foreign Minister, because Sweden is a country second to none in its opposition to the use of force and its respect for the United Nations. The Swedish Foreign Minister said of the South Georgia operation: "We have no objection to Britain retaking British territory. Time and again one is forced to observe that the United Nations is weak and lacks the authority required to

[120] Security Council Resolution 502 of 1982, adopted at its 2350th meeting held on 3rd April, 1982, UN SCOR 15 (1982).

> mediate.”…. That may not be desirable, but it is a fact of life and we must make our dispositions and judgments accordingly.[121]

A mediation process aimed at reconciling Argentina and the United Kingdom had preceded the war but had been unsuccessful. The mediation process was at first facilitated by Mr. Haig, a representative of the United States government.[122] There was very little involvement by the United Nations at the onset and the Secretary General only stepped in after the United States had failed.[123] When the Secretary General took over the mediation process, his efforts were hampered by the United States' representative who was still bent on pushing his government's proposals.[124] It was later to emerge that the United States had, in fact, not been neutral in the process and Mr. Haig had been biased in favour of the United Kingdom.[125] In the end, the United Kingdom, with encouragement from the United States, failed to give the Secretary General its full co-operation and the mediation failed.[126] Laucirica notes:

> The United States did not support the mediation effort of the Secretary General. During Pérez de Cuellar's negotiations in New York; Secretary Haig was actively engaged in efforts to resuscitate his own proposals. While this was probably done more to promote Haig and his own plan than to handicap the Secretary General, it could not be construed as supportive and did very possibly damage the New York talks. At the very least, the United States maneuvers were discourteous….The abandonment of formal neutrality by the United States had yet another negative implication…. America's siding with Great Britain “certainly did not encourage British cooperation with the Secretary General and very likely inhibited it…. And it is also likely that “once the United States allied

[121] Margaret Thatcher, “Speech on the Falklands War”, on 29th April, 1982, available on http://www.totalpolitics.com/speeches/war/falklands-war/34258/speech-on-the-conduct-of-the-falklands-war.thtml (site accessed on 18th September, 2013).

[122] Supra, note 112, p. 91.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.

> itself with the United Kingdom, Washington's attitude toward the United Nations mediation became in part a function of London's attitude.[127]

From the foregoing, it is argued that the United Nations Security Council failed to discharge its mandate under the Charter during the 1982 Falklands war for the following reasons: First, the Council had the opportunity to prevent a war and compel the parties to resolve the dispute amicably but it failed to do so.[128] The Council from the onset had the option to pass a resolution barring either party from embarking on a war.[129] However, no resolution was passed when the occasion presented itself, instead the President of the Council merely made an appeal to Argentina not to carry out the invasion.[130] The resolution censuring Argentina was only passed after the invasion had taken place.[131]

Second, the parties involved appear to have had no regard for the Council's directives or its ability to resolve the conflict. The appeal made by the President of the Council to Argentina not to invade was made in vain.[132] Further, after the Council passed the resolution requiring Argentina to withdraw from the Islands, the United Kingdom refused to have the matter placed before the Council for further directives.[133] Instead, it chose to reclaim the islands under the right to self-defence under Article 51 of the

[127] Ibid.
[128] Supra, note 114, p. 53.
[129] Ibid.
[130] Ibid.
[131] Supra, note 120.
[132] Supra, note 114, p.53.
[133] Supra, note 121.

Charter.[134] The United Kingdom in so doing also expressed its doubt in the ability of the Council to deal with the matter.[135] It is argued here that the intention of Article 51 is to allow a State to employ force "in the heat of the moment". However, once a party is in a position to approach the Council for intervention, it is expected that unilateral use of force will not be employed by the individual State. In this case, any action against Argentina should have been taken by the Council and not the United Kingdom under Article 51.

Third, the United Nations failed to take a central role in the mediation process right from the onset. By the time the Secretary General attempted to take over the process it was too late. The United Nations Secretary General was ignored as the United States representative took charge of the mediation process.[136] The UN did not enter the mediation scene until it was apparent that the United States had failed in the process.[137] It is argued that for the UN to be successful, it must intervene in the mediation process before "third parties".[138] Laucirica states:

> The importance of timing in an intervention effort is obvious. If an offer to mediate comes in the wake of a failed effort by another third party, the chances of success are likely to be thought by all parties diminished. . . . Implicit in this condition is the belief that an intervener [sic] cannot hope to function successfully without the ability to take at least some initiatives quickly, authoritatively, and with a sure hand.[139]

[134] Ibid.
[135] Ibid.
[136] See The Belgrano Enquiry, "Sidelining the UN", available at, http://belgranoinquiry.com/article-archive/sidelining-the-un (site accessed on 18th September, 2013).
[137] Ibid.
[138] Supra, note 112, p. 90.
[139] Ibid.

Fourth, the Council further contributed to the crisis by allowing the United States to facilitate the mediation process.[140] The United States was not neutral and all along had the interest of the British at heart. This greatly hampered the process of resolving the issues and averting a possible war.[141] This became evident when the United States lent military support to the United Kingdom during the war.[142]

Finally, it is clear that the ability of the Council to discharge its duties effectively is greatly hampered when the interests of a permanent member are involved. It has been argued that perhaps the only reason the United Kingdom successfully pushed for Resolution 505 was because Argentina refused to co-operate with the Soviet Union.[143] The Soviet Union had requested for Argentina's support in the UN on the withdrawal of the United States forces from Central America.[144] Argentina considered disaffection from America, in this regard, too high a price to pay and declined.[145] Had Argentina agreed to Russia's proposal there is a good chance that Russia would have vetoed Resolution 505, but for this reason chose to abstain from the vote, as did China.[146] It is also clear that the United Kingdom confidently disregarded the Council and took matters in its own hands because it could only face censure from the Council if it voted affirmatively on such a motion. Further, it is to be noted that the United States 'support for United Kingdom was based on the historical ties between the two nations and not because the United States was persuaded that the United Kingdom was right.[147]

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[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Daniel Ford, "Not Right but British: The Super Power Role in the Falklands War", available at http://www.warbirdforum.com/falk1.htm (site accessed on 18th September, 2013).
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.

3.4.2 The Bosnian War between 1992 and 1995

Starting from the year 1991, the Socialist Federal Republic of Yugoslavia (SFRY) disintegrated into a number of smaller republics seeking political independence from the federal republic.[148] This disintegration was opposed by Serbia which advocated for a United Yugoslavia.[149] The constituent republics on the other hand, were apprehensive of a Serbian dominated federal government.[150] The first republics to secede from the federal republic were Croatia and Slovenia.[151] The Yugoslav federal government attempted to thwart the process of their secession.[152] Though Slovenia successfully resisted the federal army, Croatia was not as fortunate and war thereafter broke out between Croatia and the federal government.[153] Following the war, and the deterioration in peace and security within the region, the Security Council passed Resolution 713 of 1991.[154] It provided:

> [The Security Council] Decides, under Chapter VII of the Charter of the United Nations that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.[155]

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[148] Angela Kachuyevski, "Sovereignty, Self Determination and State Collapse: Reassessing Yugoslavia", available at, http://fletcher.tufts.edu/_Fletcher-Forum/Archives/~/media/Fletcher/Microsites/Fletcher%20Forum/PDFs/2008summer/Kachuyevski_32-2.ashx (site accessed on 8th April, 2013).
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Security Council Resolution 713 of 1991, adopted at its 3009th meeting held on 25th September, 1991, 46 UN SCOR 42 (1991).
[155] Ibid., paragraph 6.

Of the other republics, Bosnia-Herzegovina, which comprised of *Bosnik* Muslims, Croats and Serbs, declared its independence on 29th February, 1992.[156] Immediately, upon issuing its declaration, Bosnia was invaded by federal Serbian forces. Working in collaboration with the Serbian population within Bosnia, the Serbian forces were fighting for the creation, out of Bosnia, of a Serbian republic.[157] Croatia also immersed itself in the war as it fought alongside the Croats within Bosnia, to equally curve out of Bosnia a Croatian republic. [158] What followed was a calamitous war between the Serbian forces, Croatian forces and the forces of the Republic of Bosnia-Herzegovina. The Bosnian forces, however, were disadvantaged as they lacked the necessary weapons to repel their attackers. The 1991 arms embargo over Yugoslavia meant that they could not "stock up" on arms. The Serbian and Croatian forces, on the other hand, were well equipped, Serbia having inherited most of the artillery and arsenal from the former Yugoslavia, and the Croats smuggling weapons through the Croatian coast.[159] Consequently, there was an onslaught upon the Muslim Bosniks, as they were terrorised, murdered, raped and detained mostly by the Serbs and to a lesser extent by the Croats.[160]

The new government of Bosnia petitioned the Security Council to lift the arms embargo.[161] It argued that the effect of the embargo had hampered its right to self-defence under Article 51, as it could not access arms to repel its attackers.[162] This appeal

[156] Supra, note 148.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] GA. Res. 48/88, U.N. GOAR, 48th Session, U.N. Doc. A/RES/48/88 (1993) of the 3247th Meeting, U.N. Doc. S/PV.3247 (1993) at pp. 9-17.

[162] Ibid.

was opposed by the United Kingdom, France and Russia and the embargo was not lifted.[163] The United Kingdom argued that "lifting the embargo would be a signal that the UN is turning its back on Bosnia and leaving the inhabitants to fight it out come what may".[164] There are three main grounds upon which the Security Council may be criticised for its role in the Bosnian War of 1992.[165]

First, by refusing to lift the ban imposed by resolution 713, the Council in effect abrogated Bosnia's inherent right to self-defence.[166] Under the circumstances, the continued ban meant that both Serbia and Croatia had the upper hand over Bosnia. Consequently, the poorly armed Bosnians were easily overpowered and massacred. Article 51 of the Charter affirms the inherent nature of the right to self-defence. This right should be upheld and be allowed to take effect whenever the occasion demands. By allowing the ban to stay in place, the Council debilitated the right of Bosnia to defend its territory and people. It has been argued that resolution 713 to the extent that it inhibited Bosnian's right to self-defence was in fact invalid.[167] Positive law such as the Security Council resolution cannot abrogate this right which is inherent in the State.[168]

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[163] Associated Press, The Gasden Times, "Council Refuses to Lift Bosnian Arms Embargo", 30th June, 1993, available at, http://news.google.com/newspapers?nid=1891&dat=19930630&id=XcIfAAAAIBAJ&sjid=ONgEAAAAIBAJ&pg=1621,3750283 (site accessed on 18th September, 2013).

[164] Ibid.

[165] Gideon A. Moor, "The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities", 18(3) Fordham International Law Journal 870 (1993), p. 871, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1424&context=ilj (site accessed on 19th September, 2013).

[166] Ibid.

[167] Paul Williams, "Time to Lift the Illegitimate Bosnian Arms Embargo" (1995), available at http://www.bosnia.org.uk/bosrep/report_format.cfm?articleid=1934&reportid=107 (site accessed on 19th September, 2013).

[168] Ibid.

Second, by imposing the embargo, the Security Council had assumed the "responsibility of taking effective measures to end the conflict and restore international peace and security in Bosnia".[169] Unfortunately, this was not case and the Council was unable to take effective measures to resolve the conflict. For instance, economic sanctions imposed on Serbia such through Resolution 752 [170] had very little effect on Serbia. Rigby states:

> Serbia was self-sufficient in food, rich in hydro-electric power and produced one-fifth of the oil it used… Romania continued to ship oil to Serbia, while Greece freely participated in smuggling operations…Moreover, when the Western European Union and NATO began policing the Adriatic in July, they had no authority to stop vessels suspected of breaking sanctions. The UN and the EC made no mention of what they would do if Serbia defied the sanctions.[171]

Also, Serbia openly defied the Security Council directives and had little regard for the peacekeepers.[172] Rigby states: "Despite UN escorts, however, aid convoys continued to be attacked and looted by local war-lords who showed little respect for the UN presence in Bosnia. UN soldiers remained powerless to respond".[173] Perhaps the most tragic disregard for the UN forces, by Serbian forces, was the June 1993 raid over UN safe areas. The Serb forces in full view of the UN troops attacked, killed and raped Bosnian Muslims who were under the protection of the UN.[174] The United States made proposals to the Council to lift the arms embargo for the benefit of Bosnia but they were opposed

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[169] Supra, note 165, p. 873.
[170] Security Council Resolution 752 of 1992, adopted at its 3075th meeting held on 15th May, 1992, 47 UN SCOR 12 (1992).
[171] Vincent Rigby "Bosnia-Herzegovina: The International Response", (1994), available at http://publications.gc.ca/Collection-R/LoPBdP/BP/bp374-e.htm (site accessed on 19th September, 2013).
[172] Ibid.
[173] Ibid.
[174] Chuck Sudetic, "Bosnia Serbs Renew Attacks on UN 'Safe Area' Town", (1993), available at http://www.nytimes.com/1993/06/06/world/bosnia-serbs-renew-attack-on-un-safe-area-town.html (site accessed on 21st September, 2013).

by the European representatives.[175] In particular, Russia a close ally of Yugoslavia threatened to breach the economic sanctions against Yugoslavia if the arms embargo was lifted. The United States made further proposals for military intervention in form of air raids against the Serbs.[176] This was similarly opposed by Russia and other European States.[177] The involvement of the United Nations was strictly limited to peacekeeping and humanitarian relief roles.[178] In the end, the United States, working within NATO and outside the framework of the United Nations, led the air strikes against the Serbian forces bringing the war to an end.[179] This, obviously, undermined the credence in the Security Council in its ability to discharge the mandate to restore international peace and security in the event of conflict. It also brought into question its effectiveness in discharging the mandate to regulate the right to self-defence under Article 51 of the Charter.

Third, the Council initially relegated its responsibility of resolving the crisis in Bosnia to the European Union.[180] The Secretary General, in response to requests for increased Council intervention in Bosnia, is quoted to have expressed the need for "the division of labour between the United Nations, whose peace-keeping mandate was limited to the situation in Croatia...and the peace-making role of the European Community (EC) as a whole... I observe that it might be more appropriate for EC to expand its presence and

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[175] Alan Fogelquist, " Russia, Bosnia and the near Abroad", Eurasia Research centre, (1998), available at, http://globalgeopolitics.net/arc/1995-04-29-Fogelquist-Russia-Bosnia-FSU.htm , (site accessed on 15th January, 2014).
[176] Ibid.
[177] Ibid.
[178] Ivo H. Daalder, "Decision to Intervene: How the War in Bosnia Ended", (1998), available at http://www.brookings.edu/research/articles/1998/12/balkans-daalder (site accessed on 19th September, 2013).
[179] Ibid.
[180] Supra, note 171.

activities in Bosnia-Herzegovina." [181] Also, the Security Council, in passing Resolution 749 of 1992, appealed to all the parties to co-operate with the European Union. [182]

Subsequently, when the UN eventually intervened in Bosnia, rivalries between the UN and EU efforts led to a lack of co-ordination.[183] This greatly hampered the peace process as efforts were duplicated.[184] Further, the UN entered Bosnia without a cogent plan. For this reason, it not only compromised the process, but also endangered the lives of the peacekeepers.[185] Rigby states "UN peacekeepers were now on the ground in Bosnia but their precise role remained unclear."[186] The peacekeepers also felt that humanitarian relief was hampering the peace process, and in the future the two initiatives ought not to be undertaken by the same body simultaneously.[187] A senior UN official in Bosnia is said to have admitted that that the UN had made a mistake; "we are in a quagmire… we did everything wrong from the start". [188]

3.5 Conclusion

The structure, composition and the decision making process of the Security Council remain paramount factors when evaluating the performance and operations of the Council. A permanent member of the Council possesses the power to forestall action by the Council by casting a negative vote against a resolution. The power of veto has therefore, had a great impact on the performance of the Council. In section 3.3. of this study, it was demonstrated how a single State or a minority, is able to defeat a popular

[181] Ibid.
[182] Security Council Resolution 749 of 1991, adopted at its 3066th meeting held on 7th April, 1992, 46 UN SCOR 10 (1991).

[183] Supra, note 178.
[184],Ibid.
[185] Ibid.
[186] Supra, note 171.
[187] Ibid.
[188] The Economist 17th April, 1993 p. 47

resolution even where it is meant to advance the common good. The power of veto has been abused, as national interest and that of allies, revenge and punishment are sometimes elevated over international peace and security.[189]

It was also demonstrated how the attitude of some of the permanent members has affected the performance of the Council. For instance, in the 1982 Falklands war, the United Kingdom sidelined the Security Council when it declared war in self-defence against Argentina. The British Prime Minister stated that the UN was weak and lacked the power to enforce its resolutions or steer a fruitful mediation process.[190] It thereafter, refused to refer the matter to the Council and opted to act unilaterally. It is argued that the only reason the United Kingdom was able to do that is because it is a permanent member and a Council resolution admonishing it would require the United Kingdom's affirmative vote. Similarly, in 1992-1995 Bosnian war, the United States led NATO forces in the air strike against Serbian forces. This initiative was carried out outside the auspices of the Council and lacked its endorsement. On the contrary, a number of Council members including France, United Kingdom and Russia had expressly stated their opposition to the same.[191] Once again, it is argued here, that the only reason the United States sidelined the Council is because any resolution admonishing the United States would require the United States affirmative vote.

The perception that the Council is not able to discharge its mandate under the Charter is also fuelled by certain historical outcomes. For instance, in the 1982 Falklands war, the Council had the opportunity to prevent the war between Argentina and the United

[189] See section 3.3 of this paper.
[190] Supra, note 163.
[191] Supra, note 178.

Kingdom. Prior to the Argentinean invasion of the Falklands Islands, the Council should have passed a resolution restraining either party to the dispute from using force. The said resolution should have stated in clear and unequivocal terms the dire consequences to be meted out to any party in defiance of the resolution. However, the action taken by the Council was an appeal to Argentina by the President of the Council not to attack. Argentina proceeded with the invasion the next day, obviously sensing that the Council may not have been united in its resolve to censure Argentina. In the 1992-1995 Bosnian war, the United Nations had for over three years failed to bring an end to the war. The war was determined by NATO forces. This obviously brought into serious question the ability of the Council to restore international peace and security. Further, the decision of the Council not to lift the arms embargo over Yugoslavia, and at the same time failing to stop the war, was tantamount to "condemning Bosnia to death".

It is not surprising therefore, that there has been an increased lack of confidence in the power of the Council and its role in international law. Franck, in making reference to an emerging approach among American law professors and practitioners, classifies international law as:

> A disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government.... As for the leaders of the executive branch, it appears to be the common intuition that international law is to be seen as an anomaly, a myth propagated by weak states to prevent the strong from maximizing their power advantage.[192]

[192] TM Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in the age of Power Disequilibrium", 100 AJIL 88 (2006), p. 89.

It is against this background that some have called for reforms in the Council and especially the power of veto.[193] However, this is not a simple matter and there has been resistance from the permanent members who are the beneficiaries of the said power. [194] The General Assembly in its 2005 UN World Summit on the Information Society (WSIS) stated that there was no need for reform. It was affirmed:

> That the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.[195]

Similarly, the position of the British government is reflected in the passage appearing in a letter to the Committee Specialist from the Parliamentary Relations and Devolution Department, in 2004. It states:

> In the Government's view, the right approach is to continue to seek to build a political consensus on the circumstances in which it is appropriate to resort to military action within the current legal framework rather than seeking to change existing rules of international law on the use of force. Existing rules are sufficiently flexible to meet the new threats we face. The role of the Security Council is central to that process. Seeking to develop the rules of international law other than on a case-by-case basis would be very difficult and probably unsuccessful. [196]

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[193] Jutta Brunee, "The Security Council and Self Defence: Which way to global Security ?", available at: http://www.law.utoronto.ca/documents/brunnee/BrunneeSecurityCouncilSelf-Defence.pdf (site accessed on 21st March, 2013).
[194] Ibid.
[195] 2005 World Summit Outcome, G.A. Res 60/1, adopted by the General Assembly on 24 October 2005, A/ RES/ 60/1 (2005).
[196] Letter to the Committee Specialist from the Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office, 5 July, 2004, paragraph 2, available at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/441we27.htm (site accessed on 16th January, 2014).

The power of veto remains the biggest obstacle to performance of the Security Council and its reformation. It is, however, important to note that it is not all hopeless with regard to the limitless power of the veto. In 1950, the UN General Assembly adopted "Uniting for Peace Resolution". The Resolution provided:

> *[The United Nations General Assembly] Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of The peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.[197]

This resolution was the brainchild of the United States. The resolution was passed during the 1950 Korean War. South Korea was an ally of the United States whereas the North Korea was an ally of Russia and China. The North was repeatedly aggressive towards the South. The United States feared that the Council would not assist the South because China and Russia would definitely veto any resolution along those lines. The United States took the issue to the General Assembly. By virtue of this resolution, the General Assembly may now by-pass the Security Council. This makes the General Assembly the final arbiter. However, unlike those of the Security Council, resolutions of the General Assembly are not binding on members. This resolution was successfully

[197] Uniting for Peace, GA Res 377 (V), adopted by the General Assembly on 3rd November, 1950, 302nd plenary meeting, A/RES/377 (1950).

used in 1981 against South Africa. South Africa was opposed to the independence of Namibia. Using the uniting for peace resolution, the Assembly recommended sanctions against South Africa and military assistance to all those fighting for the independence of Namibia.[198] This resolution has not been applied widely though. There is a general fear that by-passing the Security Council "threatens the main rules that underpin international society."[199]

It may be said in conclusion that the Security Council has not been as effective as it was envisaged in the Charter in its responsibility to supervise the use of force under the collective security system. Article 51 only allows States to resort to the use of unilateral force in the event of an armed attack. All other scenarios are to be referred to the Council. The agitation for a more effective Council through reformation continues but with no tangible results. Against the background of an ineffectual Council, scenarios affecting world peace continue to unfold. The modern State is still faced with perils that threaten its existence. In the next chapter we will look at how States have responded to the emergent situations threatening their security in international law.

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[198] Activities of Foreign Economic and Other Interests which are Impending the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Namibia and in All other Territories under Colonial Domination and Efforts to Eliminate Colonialism, Apartheid and Racial Discrimination in Southern Africa, G.A. Resolution 36/125, adopted by the General Assembly on 24th November, 1981, 36 U.N. GAOR Supp. 51, U.N. Doc. A/36/51 A/RES/36/51, 178 (1981).
[199] Supra, note No.10, p. 27.

CHAPTER FOUR

STATE PRACTICE

4.1 Introduction

In this chapter, we discuss instances where States resorted to the unilateral use of force in international law. All instances are post 1945, that is, after the adoption of the United Nations Charter. In all cases the States, waging war, claimed to have been acting in self-defence. The first two cases demonstrate the doctrine of preemptive self defence (the Arab-Israeli war of 1967) and its gradual progression into the doctrine of preventive self defence (the United States invasion of Iraq in 2003). The next two cases namely, The Israeli raid of Entebbe Airport in Uganda in 1976 and the Russian invasion of Georgia in 2008 demonstrate the doctrine of protection of nationals abroad. The last two cases namely, the United States invasion of Afghanistan in 2001 and the Kenyan incursion into Somalia in 2011 demonstrate the emerging threats to the security of nations originating from non-state actors.

State practice is analysed with a view of illustrating how States have interpreted the provisions of Article 51 of the Charter. We scrutinise the views of States as to what constitutes the right to self-defence in international law. An examination is also made on how States relate to the Security Council with regard to its mandate under the Charter to regulate the unilateral use of force. In each incident the following will be outlined and discussed as appropriate, that is, (i) a factual background in each case, (ii) the legality of the war, whether action was sanctioned by law, (iii) necessity for use of force, whether action was justified and therefore legitimate, (iii) proportionality of the measures taken in self-defence in relation to the threat and (iv) the role of the Security

Council in the conflict. Finally we shall identify the common thread(s) arising from all the incidents to support the conclusions and give a basis for recommendations.

4.2 The Six Day War between Israel, Egypt, Jordan and Syria in 1967

On 5th June, 1967, the State of Israel launched surprise attacks against the Arab States of Egypt, Jordan and Syria.[1] What ensued, thereafter, was a six day war which lasted up to 10th June, 1967, when a ceasefire was called under the auspices of the United Nations.[2] In order to fully appreciate the issues arising from the six day war, there is need to briefly retrace into the history of Israel and her Arab neighbours. In 1947, the United Nations General Assembly (UNGA) adopted Resolution 181 proposing the partitioning of the territory known as Palestine into an Arab State, a Jewish State and an international City of Jerusalem.[3] The city was to be administered as an international territory under the auspices of the United Nations.[4] The Jewish leadership accepted the recommendation of the United Nations, but the Palestinian Arabs and the Arab League strongly rejected it as inequitable and unfair to the Palestinian Arabs.[5] After the resolution was passed, the Jews made a declaration of the establishment of the state of Israel.[6] The Arab states of Egypt, Iraq, Jordan, and Syria declared that they would not recognise the state of Israel.[7] Thereafter, they went on to invade the territory that had

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[1] David Meir-Levi, "Israel's Defensive Preemptive Strike", available at: http://www.sixdaywar.co.uk/independent_israels_pre-emptive_defensive_strike.htm (site accessed on 30th April, 2013).
[2] Ibid.
[3] Future Government of Palestine, GA Res 181 (II) adopted by the General Assembly on 29th November, 1947, UN GAOR, 22nd Session, Supp 11; U.N. Doc. A/364/11 (1947).
[4] Ibid.
[5] Supra, note 1.
[6] See The Jewish Virtual Library, "The Declaration of the Establishment of the State of Israel", 14th May, 1948, available at, http://www.jewishvirtuallibrary.org/jsource/History/Dec_of_Indep.html (site accessed on 17th January, 2014).
[7] Supra, note 1.

been allocated to the Arab State of Palestine under GA Resolution 181.[8] The Arab states also vowed that they would obliterate the state of Israel and waged war on the new state.[9]

The first Arab Israeli war broke out in May, 1948 and lasted until 1949, when Israel signed Armistice Agreements with Egypt, Jordan, Syria and Lebanon between the months of February and April, 1949.[10] As at the date of the 1949 agreements, Israel was in control of over 78% of the territory comprising the former British Mandatory of Palestine.[11] Egypt had taken the Gaza Strip and Jordan had the West Bank and East Jerusalem.[12] The United Nations Truce Supervision Organisation was to supervise the armistice agreements.[13] Though there was a truce, tension between the State of Israel and her Arab neighbours remained high.[14] There were intermittent eruptions of violence originating from either side but these did not escalate into a full war until June 1967.[15]

On the dawn of 5th June, 1967, Israel military forces embarked on an offensive against Egypt, Jordan and Syria.[16] According to Israel, its neighbours had been planning an

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[8] Ibid.
[9] Ibid.
[10] Egypt Israel Armistice Agreement UN Doc S/1264/Corr.1 23 February 1949; Lebanon Israel Armistice Agreement UN Doc S/1296, 23 March 1949; Hashemite Jordanian Kingdom Israel Armistice Agreement UN Doc S/1302/Rev.1, 3 April 1949, and Syria-Israel Armistice Agreement, UN Doc S/1353, 20 July 1949.

[11] Supra, note 1.
[12] Ibid.
[13] United Nations Truce Supervision Organisation
Available at: http://www.un.org/en/peacekeeping/missions/untso/background.shtml (site accessed on 30th April 2013).
[14] Supra, note 1.
[15]Ibid.
[16] Eli Hertz, "The Six Day War: Myths and Facts, (June, 2013), available at, http://www.israelnationalnews.com/Articles/Article.aspx/13413#.UtjS5PvW7xU (site accessed on 17th January, 2014).

attack against it and the preemptive strike was necessary to avert the threat.[17] The war lasted six days within which, Israel had managed to take control of the Gaza Strip and the Sinai Peninsula from Egypt, the West Bank and East Jerusalem from Jordan, and the Golan Heights from Syria.[18] The government of Israel defended the use of force in the circumstances as an act in self-defence.[19] The Arab neighbours denied that Israel was under any form of threat and rebuffed the claim that the Arabs had been planning an attack on Israel.[20] They also challenged the legality of the concept of pre-emptive self-defence.[21] The Arab states maintained that the conduct of Israel in the circumstances constituted an act of aggression and Israel ought to have been punished.[22] Consequently, a number of legal issues arose from this war.

4.2.1 Legal Issues Arising from the 1967 Arab-Israeli War

The controversies stemming from the war touch on the legality of the preemptive war, the justification for launching the war and the proportionate use of force. These are discussed as follows: First, an issue has been raised as to whether the preemptive war waged by Israel was lawful under contemporary international law.[23] In his speech before the United Nations Security Council, the Israeli Ambassador to the United Nations, Abba Eban, defended the State of Israel. He argued that Israel had acted in self-defence and its actions were lawful and within the provisions of Article 51 of the Charter. He stated:

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[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] See Avi Shlaim, "The Middle East: The Origins of Arab-Israeli Wars", in Ngaire Woods(ed), Explaining International Relations Since 1945, (Oxford University Press, Oxford, 1996), pp. 219-240.

[21] Ibid.
[22] Ibid.
[23] John Quigley, The Six Day War and Israeli Self-Defence: Questioning the Legal Basis (Cambridge University Press, Cambridge, 2012), p 135.

> Thus, on the morning of 5 June, when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hashelosha we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defense as formulated in Article 51 of the United Nations Charter, Israel responded defensively in full strength. Never in the history of nations has armed force been used in a more righteous or compelling cause.[24]

The Ambassador claimed that the Arab States had committed acts of aggression against the state of Israel.[25] Egypt had committed an act of aggression by blockading the Strait of Tiran, thereby, cutting-off the Israeli port from the rest of the world.[26] Further, the Arab forces were acting in concert ready to strike and war was inevitable.[27] Abba Eban further stated that, "The question then widely asked in Israel and across the world was whether we had not already gone beyond the utmost point of danger".[28] There were accusations on both sides as to which side was the first to strike.[29] However, there is a general concession amongst analysts and scholars that Israel was the first to attack.[30]

In view of the fact that Israel was the first to attack, it is submitted that the war waged by Israel in 1967 was unlawful. Although Israel claimed that it was acting "in accordance with its inherent right of self-defence as formulated under Article 51 of the United Nations Charter",[31] such claim is refuted. The provisions of Article 51 of the Charter clearly state that the right to self-defence is to engage only in the event of an

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[24] United Nations Security Council, Security Council in its 1348th meeting, 6th June, 1967, S/Agenda/1348, paragraph 155, available at http://unispal.un.org/UNISPAL.NSF/0/F0E5CF015592D4D10525672700590136 (site accessed on 23rd September, 2013).
[25] Ibid., paragraph 173.
[26] Ibid.
[27] Ibid., paragraphs 145-150.
[28] Ibid., paragraph 153.
[29] Ibid., paragraphs 47-49 and 155-156.
[30] G M Adler, "Six Day War: Context and Proximate Causes of the War",

available at, http://www.sixdaywar.co.uk/6_day_war_aftermath_prof_adler_context_pt1.htm (site accessed on 30th April, 2013).
[31] Supra, note 24.

"armed attack". Despite the fact that there was evidence of an impending attack upon Israel, the war waged in anticipation was unlawful in contemporary international law. It is important to note that the circumstances of the 1967 war fall within the principles of the *Caroline case*.[32] However, the said principles related to the period 1838 to 1842 and do not form part of the law prevailing in 1967.[33] The war waged in 1967 by Israel, did not satisfy the prerequisite of a prior "armed attack" as stated by Article 51 and was therefore illegal.

Second, an issue has also been raised as to whether Israel was nevertheless justified in initiating the attack.[34] There are those who are of the view that Israel was not justified in attacking the Arab armies, as they did not pose a threat to Israel.[35] They argue that the Arabs only mobilized their armies because they had been advised by the Soviet Union (as it was then) that the Israel was planning an attack.[36] Consequently, the deployment of the Arab armies was not meant for the offensive; rather it was meant for defence.[37] Avi argues that, though the Arabs had constantly challenged Israel to a duel, they had not planned a war.[38] This view may be supported by some comments that were later made by the Israeli authorities. For instance, the Israeli Chief of Staff Rabin is said to have stated:

[32] See section 2.3.1 of this paper.
[33] See section 2.4 of this paper
[34] Supra, note 23.
[35] Supra, note 20.
[36] Ibid.
[37] Ibid.

[38] Ibid.

> I do not believe that Nasser wanted war. The two divisions which he sent into Sinai on 14 May would not have been enough to unleash an offensive against Israel. He knew it and we knew it.[39]

General Matetiyau Peled, the Chief of Logistical Command during the war wrote in an article:

> All those stories about the huge danger we were facing because of our small territorial size, an argument expounded once the war was over, have never been considered in our calculations. While we proceeded towards the full mobilisation of our forces, no person in his right mind could believe that all this force was necessary to our 'defence' against the Egyptian threat. This force was to crush once and for all the Egyptians at the military level and their Soviet masters at the political level. To pretend that the Egyptian forces concentrated on our borders were capable of threatening Israel's existence does not only insult the intelligence of any person capable of analysing this kind of situation, but is primarily an insult to the Israeli army.[40]

In the same Israeli newspaper, on the same day, General Ezer Weizmann, Chief of Operations during the war and a nephew of Chaim Weizmann, was quoted as saying, that **"**there was never any danger of annihilation and that "this hypothesis has never been considered in any serious meeting.**"**[41] In the spring of 1972, General Matetiyahu Peled, Chief of Logistical Command during the war and one of 12 members of Israel's General Staff, addressed a political literary club in Tel Aviv. He said:

> The thesis according to which the danger of genocide hung over us in June 1967, and according to which Israel was fighting for her very physical survival, was nothing but a bluff which was born and bred after the war.[42]

Some statements made by some Israeli government officials suggest that the war may have been waged with a view to bringing more Arab territory under Israeli control.

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[39] In an interview published in *Le Monde* on 28 February 1968, reprinted in Alan Hart, "The Lies about the 1967 War are still more powerful than the truth", http://www.alanhart.net/the-lies-about-the-1967-war-are-still-more-powerful-than-the-truth. (site accessed on 30th April, 2013).

[40] On 3 June an article of his own for *Le Monde newspaper, reprinted in* Alan Hart, " the Lies about the 1967 War are still more powerful than the truth", http://www.alanhart.net/the-lies-about-the-1967-war-are-still-more-powerful-than-the-truth (site accessed on 30th April, 2013).

[41]Ibid

[42]Ibid

Mordecai Bentov, a member of the wartime national government, made a statement to the effect that the "entire story of the danger of extermination was invented in every detail and exaggerated *a posteriori* to justify the annexation of new Arab territory."[43]Further, Alan Hart writes"

> Israeli forces were in occupation of the whole of the Sinai and the Gaza Strip (Egyptian territory), the West Bank including Arab East Jerusalem (Jordanian territory) and the Golan Heights (Syrian territory). And it was not much of a secret that the Israelis could have gone on to capture Cairo, Amman and Damascus. There was nothing to stop them except the impossibility of maintaining the occupation of three Arab capitals.[44]

However, the series of events immediately preceding the war reveal that there was enough evidence to suggest that Israel was justified in initiating the attacks. The Israeli Ambassador to the United Nations argued that Egypt had committed an act of aggression when she blockaded Israeli shipping in international waters.[45] Egyptian President, Gamal Abdel Nasser, had in the month of May preceding the war, ordered the blockade of the Straits of Tiran.[46] Consequently, all shipping to and from the Israeli port of Eilat was frozen.[47] The Straits of Tiran were considered to be international waters.[48] Prior to the Egyptian orders, of a blockade, Israeli ships had right of passage through the straits under the supervision of the United Nations.[49]

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[43] On 14 April 1971, a report in the Israeli newspaper *Al-Hamishmar*, reprinted in Alan Hart, " the Lies about the 1967 War are still more powerful than the truth", http://www.alanhart.net/the-lies-about-the-1967-war-are-still-more-powerful-than-the-truth (site accessed on 30th April, 2013).

[44] Alan Hart, "The Lies About the 1967 War Are Still More Powerful Than the Truth", http://www.alanhart.net/the-lies-about-the-1967-war-are-still-more-powerful-than-the-truth (site accessed on 30th April, 2013).

[45] Supra, note 24, paragraphs 173-175.

[46] Question of Palestine, UN GAOR, 5th Emergency Special Session, agenda 5; U.N. Doc. A/PV.1596 (19th June, 1967), paragraph 129, available at: http://unispal.un.org/UNISPAL.NSF/0/729809A9BA3345EB852573400054118A (site accessed on 4th September, 2013).

[47] Ibid., paragraph 131.

[48] Ibid., paragraphs 129.

[49] Ibid.

Further, within the same month of May, Egypt had expelled the United Nations Emergency Force (UNEF) from Gaza and Sinai.[50] This was in violation of an agreement reached in 1956 where Egypt agreed to the stationing of UNEF troops in the Sinai.[51] The UN troops were to ensure that all States complied with the Armistice Agreements of 1949.[52] Israel, argued that the removal of UNEF troops left Israel exposed and vulnerable to attacks by her neighbours.[53] Israel further alleged that, between 30th May and 3rd of June, 1967, Egyptian, Jordanian, Syrian, Iraqi, Algerian and Sudanese armies had lined the Israeli borders with a view of attacking Israel.[54] According to Israel, this development, viewed against a series of what it considered to be aggressive declarations made by the leaders of the Arab Nations, was an act of aggression. Some of the "declarations" included the following speeches by Egyptian, Syrian and Iraqi state officials. On 30th May, 1967, President Nasser of Egypt stated:

> The armies of Egypt, Jordan, Syria and Lebanon are poised on the borders of Israel ... to face the challenge, while standing behind us are the armies of Iraq, Algeria, Kuwait, Sudan and the whole Arab nation. This act will astound the world. Today they will know that the Arabs are arranged for battle, the critical hour has arrived. We have reached the stage of serious action and not of more declarations. [55]

On the same day, Syria's defence Minister, Hafer Assad announced:

> Our forces are now entirely ready not only to repulse any aggression, but to initiate the act ourselves, and to explode the Zionist presence in the Arab homeland of Palestine. The Syrian army, with its finger on the trigger, is united. I believe that the time has come to begin a battle of annihilation.[56]

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[50] Ibid., paragraphs 116-117.

[51] Ibid.
[52]Ibid.
[53] Ibid., paragraph 117.
[54] Ibid., paragraphs 119-128.
[55] *Gamal Abdel Nasser in his speech of May 30th 1967, reprinted in, " Six* daywar.co.uk, "Crucial Quotes", available at, http://www.sixdaywar.co.uk/crucial_quotes.htm (Site accessed on 30th April, 2013).
[56] *Syria's Defence Minister Hafez Assad (later to be Syria's President) on* May 30, 1967, reprinted in *Six* daywar.co.uk, "Crucial quotes", available at: http://www.sixdaywar.co.uk/crucial_quotes.htm (Site accessed on 30th April, 2013).

Similarly, the following day, President Aref of Iraq declared:

> The existence of Israel is an error which must be rectified. This is our opportunity to wipe out the ignominy which has been with us since 1948. Our goal is clear - to wipe Israel off the map.[57]

Israel argued that the declarations were an indication that the Arab States were preparing to attack Israel.[58] Further, such declarations had progressively mounted from "vague warning, through open threats to precise intention".[59]

Israel also argued that there had never been peace between Israel and her Arab neighbours.[60] There had been repeated exchanges of fire and bombings between Israel, on the one hand, and Jordan and Syria, on the other.[61] In 1964, there was an attempt by Syria, acting within its borders, to divert a tributary of the River Jordan, the *Banyas*, in a bid to cut off water supply from the River Jordan to Israel.[62] Israel used to pump water from the River Jordan to farm in its desert land, the Negev.[63] The Arab neighbours protested the irrigation of the Negev from the said river.[64] In response to the attempted diversion, Israel attacked Syrians at the site of the diversion.[65] In her defence, Israel claimed she had not drawn water in excess of the volumes allocated to her in the Eric Johnson's 1955 plan for sharing the water of the Jordan River between Israel and her

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[57] *President Aref of Iraq on 31st May, 1967, reprinted in Six* daywar.co.uk, "Crucial quotes", available at, http://www.sixdaywar.co.uk/crucial_quotes.htm (Site accessed on 30th April, 2013).
[58] Supra, note 46, paragraph 93.
[59] Ibid., paragraph 127.
[60] Ibid., paragraph 112.
[61] Committee for Accuracy in Middle Reporting in America (CAMERA), "The Six day War: Myths and Facts," Available at: http://www.sixdaywar.org/myths-and-facts.asp (site accessed on 30th April, 2013).
Also see supra, note 25 paragraph 104-110.
[62] Moshe Gat, "Between Stability and Tension", (Westport, Praeger , 2003), p.30.
[63] Ibid.
[64] Ibid.
[65] Supra, note 61.

neighbours.[66] This tension over use of the waters obviously contributed to the war. Israel was of the view that Syria had acted aggressively by interfering with the flow of the river.[67] Consequently, it was only a matter of time before the scuffles escalated into a full war.[68]

Third, the final issue arising out the 1967 war is the proportionality of the force employed by Israel. The principle of proportionality requires that the force employed in self-defence be commensurate and limited to eliminating the threat.[69] The proportionality of the 1967 war was raised with the bombing of the *USS Liberty*. This was a US intelligence gathering warship that was shot down by Israeli forces.[70] Although Israel stated it was a case of mistaken identity, some argued that the Israeli destroyed the ship to cover up Israel's culpability.[71] It is alleged that Israel had committed war crimes by executing Egyptian prisoners of war at *El Arish*.[72] Consequently, this American ship was bombed when it came too close to *El Arish*.[73] However, the issue was settled between the American government and that of Israel as "exchange of friendly fire".[74]

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[66] Ibid.
[67] Ibid.
[68] Supra, note 46, paragraphs, 112-113.
[69] See section 2.3.1.2 of this paper.
[70] James M. Ennes, Jr., "USS Liberty: Did Israel Commit One War Crime to Hide Another?", available at, http://www.ussliberty.org/washrp96.txt, (site accessed on 30th April, 2013).
[71] Ibid.
[72] Ernsun N. Kurtulus, "The Notion of a 'Pre-emptive War': The Six Day War Revisited", 61 Middle East Journal 220 (2007) , p.230, available at http://www.jstor.org/stable/4330386 (site accessed on 30th April, 2013).
[73] Supra, note 71.
[74] Ibid.

The issue of proportionality was also raised with the Israeli acquisition and occupation of Palestinian territory.[75] It has been argued that the force used by Israeli was not only aimed at protecting the territory of Israel, but was also intended for illegal ends, namely, the acquisition of Palestinian territory.[76] There are those who argue that Israel's acquisition of the lands formerly under the Arab States was unlawful and that the Israeli should return the land to the Palestinian people.[77] Further, that settlement by the Jews under these territories is also not permissible and is illegal.[78] Those challenging the acquisition cite the provisions of Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).[79] The Convention provides that, "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".[80] The Convention aimed at curbing a practice during the 2nd World War where some States moved their own populations into occupied territories.[81] The aim of such States was to colonise the natives.[82] Upon such occupation, the economic status of the native population deteriorated and their existence as a separate and distinct people was threatened.[83] Consequently, the settlement of the Israeli population in the West Bank and Gaza Strip after the war is considered belligerent.[84] Further, it offends the provisions of Article 49(6) of the Fourth Geneva Convention, as

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[75] Committee for Accuracy in the Middle East Reporting in America, "The Six Day War, "Long term Effects: Settlements" available at: , http://www.sixdaywar.org/contents/settlements.asp (site accessed on 30th April, 2013).
[76] Ibid.
[77]Ibid.
[78] Ibid.
[79] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at, http://www.refworld.org/docid/3ae6b36d2.html [accessed 23 September 2013]
[80]Ibid,Article 49(6).
[81]Permanent Observer Mission of Palestine to the United Nations, " Israel's Belligerent Occupation of the Palestinian Territory, Including Jerusalem and International Humanitarian Law " (15th July, 1999) available at, http://unispal.un.org/UNISPAL.NSF/0/6B939C57EA9EF32785256F33006B9F8D
[82] Ibid.
[83] Ibid.
[84] Ibid.

it has resulted in the deterioration of the economic standards of the Palestinian Arabs and a violation of their political rights.[85]

On the other hand, those who find no fault in Israeli occupation argue that Article 49(6) is inapplicable.[86] They proceed to differentiate between territory acquired through an aggressive conquest (that is illegal) and territory acquired in self-defence (which they argue is legal).[87] They further distinguish the title of the party holding the land as at the date of occupation. As such, territory in the hands of a party illegally is to be treated differently from territory that is in the hands of the rightful owners.[88] Israel argues, for instance, that Gaza and West bank were illegally held by Egypt and Jordan as at the date Israel occupied them. Schwebel states:

> (a) a State acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense; (b) as a condition of its withdrawal from such territory, that State may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it of such a nature as to justify exercise of self-defense; (c) where the prior holder of territory had seized that territory unlawfully, the State which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title.[89]

Elihu Lauterpacht, in support, states:

> [T]territorial change cannot properly take place as a result of the unlawful use of force. But to omit the word "unlawful" is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor's charter. For if force can never be used to effect lawful territory change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the

[85] Ibid
[86] Eli E. Hertz, "Misuse of the Geneva Convention", available at, http://www.israelnationalnews.com/Articles/Article.aspx/9290#.URPd9fLmDGg, (site accessed on 30th April, 2013).
[87] Ibid.
[88] Ibid.
[89] Stephen Schwebel, "What weight to Conquest?" 64 AJIL 521 (1970), p.526.

> prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.*[90]*

With regard to the land question, it is submitted that Israel cannot lay claim or title to any of the lands it occupied pursuant to the war.[91] This is especially with regard to her claims on Jerusalem and the Golan Heights. In 1980, the Israeli Parliament passed a law declaring Jerusalem, East and West, to be Israel's "eternal and indivisible capital". [92] In 1981, another law was passed which basically provided for the application of Israeli laws to the Golan Heights.[93] This may be considered a de facto annexation of both Jerusalem and what were previously known as the Syrian heights. As far as Gaza and the West Bank are concerned, Israel had always been ready to return these lands provided her neighbours conceded to peace treaties with her.[94] However, Jerusalem and the Golan Heights remain controversial. In the next section we discuss the role played by the Security Council in the 1967 war.

4.2.2 The Role of the United Nations in the 1967 War

The role of Security Council in the 1967 war is studied in three phases that is, before, during and after the war. The first phase enquires whether or not the Council could have

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[90]Elihu Lauterpacht, "Jerusalem and the Holy Places, Anglo-Israel Association, Pamphlet No. 19 (1968), p. 52. cited in The Six Day War, Conquest Arising From Defence Action in Contrast To Conquest By Aggression, http://www.sixdaywar.co.uk/6_day_war_aftermath_conquest_7.htm (site accessed on 30th April, 2013).

[91] Berenice Van Den Deriessche, "What is the Legal Status of East Jerusalem?", available at, http://www.diakonia.se/sa/node.asp?node=841, (site accessed on 30th April, 2013).

[92] See The Jerusalem Law of July 30, 1980, Israel Ministry of Foreign Affairs website, available at, http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook4/Pages/113%20Basic%20Law-%20Jerusalem-%20Knesset%20Resolution-%2030%20J.aspx (site accessed on 4th September, 2013) .

[93] See The Golan Heights Law of December 14, 1981, Israel Ministry of Foreign Affairs website available at, http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Golan%20Heights%20Law.aspx (site accessed on 4th September, 2013).

[94] Vox Populi, "The History of the Land for Peace Formula", available at, http://voxpopulifpa.wordpress.com/2012/11/03/the-history-of-the-land-for-peace-fomrula/ (site accessed on 4th September, 2013).

prevented the war. Following the 1948 Arab-Israeli War, and the 1956 Suez crisis, Egypt agreed to the stationing of United Nations Emergency Forces (UNEF) within its Sinai Desert.[95] UNEF was formed under the authority of the General Assembly and was subject to the national sovereignty clause.[96] An agreement between the Egyptian government and the UN Secretary-General, The Good Faith Accord, or Good Faith Aide-Memoire, placed UNEF in Egypt with the consent of the Egyptian government.[97] Since the operative UN resolutions were not passed under Chapter VII of the United Nations Charter, the planned deployment of UNEF had to be approved by Egypt and Israel.[98] A similar request to place UNEF forces within the Israeli border was rejected by Israel.[99] The forces were tasked with ensuring that the parties observed the 1949 armistice agreements.[100] For the ten years that UNEF patrolled the Egypt-Israeli border, there was a relative sense of peace.[101] In the wake of the 1967 war, Egypt demanded the withdrawal of the UNEF from the Sinai desert.[102] The UN Secretary-General attempted to negotiate with the Egyptian government, but to no avail.[103] Eventually, all States who had sponsored their forces to UNEF recalled their troops.[104] Thereafter, war broke out.

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[95] See United Nations, Middle East, UNEF 1, available at, http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html (site accessed on 4th September, 2013).
[96] Charter of the United Nations 1945, 1 UNTS XVI.

[97] Supra, note 95.
[98] Ibid.
[99] Ibid.
[100]See page 120 above.
[101] Supra, note 95.
[102] Michael Carroll, “The Role of the United Nations in the Six Day War”, available at, http://www.sixdaywar.co.uk/un-role.htm (site accessed on 17th January, 2013).
[103] Ibid.
[104] Ibid.

It is evident from the foregoing that the Security Council had the opportunity to intervene in the conflict and prevent it from escalating into a full war. The General Assembly had initially attempted to create buffer zones through UNEF, but these had only been successful for a while. From the onset, Israel declined to allow UNEF within its boundaries. Egypt agreed for a while, but subsequently reversed its decision and ordered UNEF to withdraw from the Egyptian border. Although the Council had the opportunity to deploy forces under Chapter VII of the Charter, it did not. Resolutions passed under Chapter VII of the United Nations are binding and non-negotiable.**[105]** It can only be inferred that the Council would not have passed any resolutions to which Israel had an objection as the United States and other allies would veto such a decision. Further, from the moment Egypt requested the removal of the UNEF forces from its borders, the Security Council must have realised that war was imminent; nevertheless it took no concrete steps to avert the same.

The sentiments that the Council had not done enough to prevent the war were shared by a number of United Nations state members. For instance, the Argentinean representative to the United Nations, Mr. Ruda, in his address before the Security Council on 6th June, 1967 stated:

> In our previous intervention during this debate on the grave situation in the Middle East, we stated *[1343rd meeting]* that our immediate task was to use every means at our disposal to maintain international peace and security. We felt that the problems of the moment were so great that we should not seek final solutions then and there, but that we should confine our efforts to avoiding an outbreak of fighting. In our favor, to that end, was the fact that the parties had not yet begun hostilities. Unfortunately, although the pause requested by the Secretary-General did last for several days, it was not long enough to calm emotions, and yesterday saw the outbreak of fighting on a larger scale…Confronted by this situation, the Security Council, directly it was

[105] Supra, note 96, Article 24.

> notified of the fighting, should with all speed have taken immediate provisional steps to halt the hostilities.[106]

In the same meeting, Mr. Pachachi of Iraq also stated, “It was the duty of the Security Council to determine from where the threat to peace came and to take necessary action to prevent the one party which declared its intention to go to war from carrying out its threat”.[107] Mr. Goldberg of the United States stated:

> Under the Charter we did not have to wait, as we pointed out in our presentation to the Council, until a breach of the peace had occurred. The Charter uses the words "threats to the peace". It was our considered judgement, based on events which were reported by the Secretary-General, that the Council should exercise its collective judgement, collective responsibility, and collective power, in the interest of restraining all of the parties and bringing about a peaceful composition of the situation and averting the tragedy of war.[108]

Mr. Eban, the Israeli representative to the United Nations, expressed his dissatisfaction with the rest of the world for failing to come to the aid of Israel, at a time when her neighbours had declared war against Israel. In his address before the Council, he stated:

> We were puzzled in Israel by the relative lack of preoccupation on the part of friendly Governments and international agencies with this intense concentration which found its reflection in precautionary concentrations on our side. My Government proposed, I think at least two weeks ago, the concept of a parallel and reciprocal reduction of forces on both sides of the frontier. We elicited no response, and certainly no action.[109]
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> He further stated: “By the end of May, our children were building air-raid shelters for their schools. There was peril wherever Israel looked, and she faced it in deepening solitude.”[110]

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[106] United Nations Security Council, Security Council at its 1348th meeting, 6th June, 1967, S/PV.1348, at paragraphs 53-54.available at, http://unispal.un.org/UNISPAL.NSF/0/F0E5CF015592D4D10525672700590136 (site accessed on 24th September, 2013).
[107] Ibid., paragraph 104.
[108] Ibid., paragraph 133.
[109] Ibid., paragraph 169.
[110] United Nations Security Council, Security Council at its 1526th meeting, on 19th June, 1967, S/PV. 1526, paragraph 138, available at, http://unispal.un.org/UNISPAL.NSF/0/729809A9BA3345EB852573400054118A (site accessed on 24th September, 2013).

It also appears from meetings of the Council, just before the war, that the Council was divided as to its role in the conflict. It was yet to be resolved whether or not, the Council should have intervened immediately or whether it was best to leave the matter to the Secretary General. Mr. Goldberg in the Council's meeting on 24th May, 1967 stated**:**

> It has been said, for example, that one of the possibly adverse effects of a discussion at this time would be to dramatize a situation better left quiet. But this Council would be burying its head in the sand if it refused to recognize the threat to peace implicit in the developments which have occurred since the Secretary-General left New York two days ago. It is precisely because of these developments, not known to him or to any member of the Council, that we have been called here today urgently to consider what the Council ought to do in the discharge of its responsibility to further his efforts--and not to impede them. This Council meeting cannot dramatize a situation which at this moment is at the center of the stage of world concern. It can, however, play a role, as we hope, in drawing the curtain on a tragedy which potentially threatens the peace and well-being of all the people in the area and, indeed, of all mankind.[111]

Similarly, Mr. Eban in the Council's meeting on 19th June, 1967 recounted the sentiments expressed by certain Council Members, prior to the war. He stated:

> On 24 May and on succeeding days, the Security Council conducted a desultory debate which sometimes reached a point of levity. Russian and oriental proverbs were wittily exchanged. On 24 May, the Soviet representative asserted that he saw no reason for discussing the Middle Eastern situation at all. The Bulgarian representative uttered these unbelievable words: "… at the present moment there is really no need for an urgent meeting of the Security Council,"…Those words were spoken on 24 May, one and a half days after the imposition of the blockade, which held world peace trembling in the balance.[112]

Having established that the Council did not take adequate measures to prevent the war, the second phase enquires whether or not the Council took any meaningful steps to

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[111] United Nations Security Council, Security Council at its 1341st meeting, on 24th May, 1967, S/PV. 1341, paragraphs 49-51.

[112] Supra, note 110, paragraphs 138-139.

bring the war to an end. It also evaluates the attitude of the parties towards Security Council, on its role and authority during the conflict. As a starting point, it is important to note that both sides to the conflict did, at the earliest opportunity inform the Council that they had taken defensive measures under Article 51 of the Charter. In the Council's meeting on 5th June, 1967 the Secretary General of the United Nations advised members that he had received notification from both Israel and the United Arab Republic, earlier that morning, each stating that they had launched defensive attacks against the other under Article 51 of the Charter.[113] It would, therefore, appear that they shared due regard for the Council's supervisory authority under the Charter.

However, it was alleged that during the war, Israeli forces wantonly shot at Indian UNEF troops without due regard to their status as UN forces.[114] It was reported in the Security Council meeting of 5th June, 1967 by the United Nations Secretary-General that,

> The Commander of UNEF reported that…Israel artillery opened fire on two camps of the Indian contingent of UNEF which were in the process' of being abandoned… General Rikhye also reported that a UNEF convoy immediately south of Khan Yunis on the road between Gaza and Rafah was strafed by an Israel aircraft on the morning of 5 June, although the vehicles, like all UNEF vehicles, are painted white. First reports indicate that three Indian soldiers were killed and an unknown number wounded in this attack. The Commander of UNEF has sent an urgent message through the Chief of Staff of UNTSO to the Chief of Staff of the Israel Defense Forces urging him again to give orders to Israel Armed Forces to refrain from firing on UNEF camps, buildings and vehicles.[115]

[113] United Nations Security Council, Security Council at its 1347th meeting, 5th June, 1967, S/PV. 1347, paragraphs 4-6, available at, http://unispal.un.org/UNISPAL.NSF/0/CD0BEBA6A1E28EFF0525672800567B2C (site accessed on 24th September, 2013).
[114] Ibid., paragraphs 18-19.
[115] Ibid.

On 6th June, 1967, the day following the out-break of the war, the Council passed resolution 233 of 1967 which called upon "the Governments concerned to take forthwith as a first step all measures for an immediate cease-fire and for a cessation of all military activities in the area".[116] Although passed unanimously, the resolution was the subject matter of heated debate within the Council. A majority of the members felt it was the minimum the Council could have done, whilst others felt that the Council had let Israel "off the hook". For instance, the Russian representative, Mr. Fedorenko, stated:

> The resolution unanimously adopted by the Security Council calling for an immediate cease-fire and a cessation of military activities, represents the minimum which the Council should do at the present stage. As stated in the resolution itself, it is only a first step. The Soviet Union delegation's view had been that the Council should also have taken a decision concerning the immediate withdrawal of the aggressor's troops behind the armistice line. Because of opposition by certain Council members, however, it has not been possible to reach agreement on that important issue.[117]

The Iraqi representative, expressed dissatisfaction with the resolution and the manner the Council had handled the issue from its onset. He stated:

> It would have been natural, indeed necessary, for the Council, before ordering or recommending a cease-fire to determine the responsibility for the breach of peach and the act of aggression which had been committed. That is what this Council is for. When a clear breach of the peach and a clear premeditated act of aggression in committed, is it right for the Council merely to satisfy itself with a cease-fire resolution, without making even an effort to determine the responsibility for the outbreak of hostilities? [118]

He further stated:

> The cease-fire resolution which the Council adopted today is a complete surrender to Israel…For two days there have been negotiations to see whether a cease-fire resolution would be adopted that would be accompanied by a call for the withdrawal of forces back to the point from which hostilities started… That was not done because of the fact that certain States…and I mention the United States of America in particular, refused to go along with it. It refused to

[116] Security Council Resolution 233 of 1967, adopted at its 1348th meeting held on 6th June, 1967, 22 UN SCOR 2 (1967).
[117] Supra, note 113, paragraphs 50-52.
[118] Ibid., paragraph 107.

go along with it for the very simple reason that Israel refused to go along with it…[119]

Although the resolution for a ceasefire was adopted on 6th June, 1967, the war did not stop until 10th of June, 1967. Subsequent to passing Resolution 233 of 1967, the Security Council adopted Resolutions 234, **[120]** 235 **[121]** and 236 **[122]** of 1967. Resolution 234 demanded that all governments were to discontinue military activities by 2000 hours on 7th June, 1967.**[123]** Resolution 235 of 9th June, 1967, demanded the cessation of hostilities between Syria and Israel.**[124]** Resolution 236 of 11th June, 1967 condemned the violation of the ceasefire.**[125]** The resolutions never mentioned Israel, by name, but it was common knowledge that Israel was the State in violation of the Council demands for a ceasefire.**[126]** Further, that Israel only agreed to end the war when a number of States severed diplomatic ties with it.**[127]** Although, the Council was able to finally bring Israel to a ceasefire, this was four resolutions later. Further, the consistent defiance of the Council Resolutions obviously damaged the authoritativeness of the Council. In fact, Hart argues that, the only reason Israel gave up the war was because of "**the** impossibility of maintaining the occupation of three Arab capitals".[128]

The third and final phase of the analysis on the role of the Council in the 1967 war, enquires into its conduct after the war. More specifically, whether or not any punitive

[119] Ibid., paragraph 109.
[120]Security Council Resolution 234 of 1967, adopted at its 1350th meeting held on 7th June, 1967, 22 UN SCOR 3 (1967).
[121] Security Council Resolution 235 of 1967, adopted at its 1352nd meeting held on 9th June, 1967, 22 UN SCOR 3 (1967).
[122] Security Council Resolution 236 of 1967, adopted at its 1357th meeting on 11th June, 1967, 22 UN SCOR 4 (1967).
[123] Supra, note 120, Paragraph 1.
[124] Supra, note 121, paragraph 2.
[125] Supra, note 122, paragraph 1.
[126] Supra, note 110, paragraph 30.
[127] Ibid., paragraph 34.
[128] Supra, note 44.

or deterrent measures were executed by the Council against the culpable party or parties. After the ceasefire, in June 1967, it took the Council five months to pass a further resolution in the matter. On 22nd November, 1967, the Council adopted Resolution 242.[129] The Resolution called for**,** **"**withdrawal of Israel armed forces from territories occupied in the recent conflict." [130] The deliberations took long because the content of the resolution could not be agreed upon.[131] Some members of the Council, (including Russia, China and Iraq) demanded that Israel be censured for its conduct in the war, whilst others (including the United States and United Kingdom) refused to vote in favour a resolution admonishing Israel.[132] Eventually, the resolution was adopted under Chapter VI of the United Nations Charter. [133] A resolution under Chapter VII would have been binding and more compelling. Even then, the Resolution did not resolve the dispute. The Arabs and Israel adopted different interpretations of the Resolution, further fueling the growing discord.[134]

Resolution 242 aimed at resolving the conflict between Israel and her neighbours and the restoration of secure borders**.**[135] In its preamble, it provided for "inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in the Middle East in which every State in the area can live in security".[136] More specifically, it required the Israeli forces to withdraw from the territories it had occupied

[129] Security Council Resolution 242 of 1967, adopted at its 1382nd meeting held on 22nd November, 1967, 22 UN SCOR 8 (1967).
[130] Ibid., paragraph 1(i).
[131] Eli E. Hertz," Myths and Facts: United Nations Security Council Resolution 242", available at, http://www.mythsandfacts.org/conflict/10/resolution-242.pdf (site accessed on 8th May, 2013).
[132] Ibid.
[133] Yoav J. Tenebaum, "A Conceptual Framework of Analysis to Interpret United Nations Security Council Resolution 242", available at, http://www.newjurist.com/conceptual-analysis-of-UN-resoultion-242.html (site accessed on 8th May, 2013).
[134] Ibid.
[135] Ibid.
[136] Supra, note 129.

during the war.[137] It also called for the safeguarding of navigation by the parties in international waterways.[138] It also sought a fair settlement of the refugees. It emphasized the need to respect the territorial integrity of the concerned parties.[139]

One bone of contention in the enforcement of this resolution has been the interpretation of the clause calling on Israeli forces to withdraw "from territories occupied in the recent conflict".[140] The Arabs argue that, the resolution demanded that Israeli forces withdraw completely from all land that it had occupied as a result of the 1967 war.[141] On the other hand, Israel argues that, the resolution specifically omitted the words "the" and/or "all" before the word "territories". Consequently, the resolution envisaged a situation where Israel would withdraw to a line which was different from that existing before the 1967 war.[142]

Another bone of contention has been the interpretation of Resolution 242 with regard to the unilateral withdrawal of Israeli forces from territories or within a peace for land agreement with the Arabs.[143] According to the Arabs, the resolution called for the unconditional withdrawal of the Israeli forces from Arab territories.[144] On the other hand, the Israeli argue that the resolution envisaged Israeli withdrawal within a framework of peace agreements with the Arab States.[145] Israel also argues that it

[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Supra, note 133.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Supra, note 94.

occupied the territories in self-defence and it is entitled to hold onto the territories until the threat posed by the Arab States expires.[146]

In October 1973, the Security Council adopted Resolution 338[147] which sought to buttress the implementation of Resolution 242.[148] It was adopted at the end of the Yom Kippur War of 1973,[149] to call for a cease-fire. Previously, Syria had rejected Resolution 242 as it intended to recapture the Syrian Heights it had lost to Israel in the 1967 War.[150] Egypt was also unhappy and broke the cease-fire also intending to recapture the Sinai Peninsula that was lost to Israel in the 1967 war.[151] A cease-fire, engineered by the United States and Russia eventually brought the war to an end and negotiated Resolution 338.[152]

In 2002, the Council adopted Resolution 1397.[153] This resolution, for the first time, called for a two-state solution to end the conflict. It directly called on the parties to end attacks and hostilities that had contributed to numerous casualties in the region.[154] It envisioned two states of Palestine and Israel existing side by side with secure borders.[155] In November 2003, Resolution 1515[156] was adopted by the Security Council, which

[146] Avinom Sharon, "Why is Israel's Presence in the Territories Still Called Occupation?" Jerusalem Centre for Public Affairs, available at: http://jcpa.org/text/Occupation-Sharon.pdf , (site accessed on 4th September, 2013).
[147] Security Council Resolution 338 of 1973, adopted at its 1747th meeting held on 22nd October, 1973, 28 UN SCOR 10 (1973).
[148] Ibid.
[149] Eli E. Hertz, Myths and Facts, "Resolution 338: a reaffirmation of resolution 242", available at: http://www.mythsandfacts.org/Conflict/10/Resolution-338.pdf (site accessed on 8th May, 2013).
[150] Ibid
[151] Ibid
[152] Ibid
[153] Security Council Resolution 1390 of 2002, adopted at its 4452nd meeting held on 12th March, 2002, 57th session, Security Council Distr. General 02-21602 (E), U.N. Doc. S/INF/58 (2002).
[154] Ibid.
[155] Ibid.
[156] Security Council Resolution 1515 of 2003, adopted at its 4862nd meeting held on 19th November, 2003, 58th session, Security Council Distr. General 03-62185 (E), U.N. Doc. S/INF/59 (2003).

recalled Resolutions 242, 338 and 1397. It endorsed a two state solution to the Israeli-Palestinian conflict.[157] Security Council Resolution 1850[158] was adopted in 2008 and the Council called on Israel and the Palestinians to fulfill their obligations towards achieving peace in the Middle East. Further, it called on all the States in the Middle East to coexist and recognise each other.[159] It noted that lasting peace could only be achieved by a continued commitment to mutual recognition and freedom from violence.[160] Over the years, the Council continues to be seized of the matter. However, due to competing national interests of the States involved, the Israeli-Arab peace process continues to be slow. Similarly, the Council is unable to take decisive action against an uncooperative party due to the same competing national interests.

4.3 The United States of America Invasion of Iraq on 19th March, 2003

In the early 1980s, it was widely believed that Iraq had started a biological weapons program [161] in violation of Biological Weapons Convention of 1972.[162] Evidence of the program was first discovered during the 1990-1991 Gulf War.[163] However, investigations conducted thereafter by the United Nations Special Commission

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[157] Ibid.

[158] Security Council Resolution 1850 of 2008, adopted by the Security Council at its 6045th meeting held on 16th December, 2008, 63rd session, Security Council Distr. General 08-65359 (E), U.N. Doc. S/INF/64 (2008).

[159] Ibid.

[160] Ibid.

[161] David Albright and Khidir Hamza, "Iraqi Reconstitution of its Nuclear Weapons Programme", available at, http://www.isis-online.org/publications/iraq/act1298.html , (Site accessed on 31st May, 2013).

[162] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163; 11 ILM 309 (1972), available at http://www.opbw.org/convention/documents/btwctext.pdf (site accessed on 24th September, 2013).

[163] Supra, note 161.

(UNSCOM), reported that the program did not continue after the war.[164] In September, 2002, the United States began to make a case for an Iraqi invasion on the basis that the Iraqi biological weapons program was still in force and the program was a threat to the American people.[165]

France and Russia were skeptical of a war and, instead, called for a diplomatic solution to the situation.[166] It was clear that they would not sanction a war, against Iraq, as permanent members of the Security Council.[167] In 2002, the United Nations Security Council, through Resolution 1441,[168] called for a weapons inspection by United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) [169] and the International Atomic Energy Agency (IAEA).[170] Both IAEA and UNMOVIC did not find evidence of the revival of a nuclear weapons or weapons of mass destruction program.[171] However, in March, 2003, the forces of United States, the United Kingdom, Spain, Italy, Poland, Australia, and Denmark invaded Iraq with a view "to disarm Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people."[172] The decision to invade was strongly opposed by France,

[164]Daryl Kimball & Peter Crail, " Disarming Saddam - A Chronology of Iraq and UN Weapons Inspections 2002-2003", available at: http://www.armscontrol.org/factsheets/iraqchron , (site accessed on 31st May, 2013).
[165] Ibid.
[166] Press Release SC/7564, Security Council 4644th Meeting, available at, http://www.un.org/News/Press/docs/2002/SC7564.doc.htm , (site accessed on 31st May, 2013).
[167] Ibid.
[168] Security Council Resolution1441 of 2002, adopted at its 4644th meeting held on 8th November, 2002, 57th session, Security Council Distr. General 02-68226 (E) *0268226*, U.N. Doc. S/INF/58 (2002).
[169] Ibid.
[170] Ibid.
[171] Supra, note 161.
[172] Supra, note 164.

Germany, New Zealand, and Canada.[173] They argued that there was no evidence of weapons of mass destruction in Iraq and the invasion was uncalled for.[174]

In May 2003, President Bush of the United States declared an end to "major combat operations", with the fall of Baghdad and the government of Saddam Hussein.[175] However, American and British forces continued to stay in occupation pending the formation of a new Iraqi government.[176] Of critical importance is that the Americans and their allies neither found biological weapons nor weapons of mass destruction.[177] The States involved in the invasion never invoked the right to self-defence under Article 51 of the Charter. However, the government of the United States did state that the operation was necessary for the protection of American people.[178] Following this war, a number of legal issues have arisen on the use of unilateral force in international law. The 2003 Iraqi war is illustrative on the attitude of States towards the unilateral use of force, and by default their position on the express provisions of Article 51. It further demonstrates the attitude of States towards Security Council and their regard for its mandate to regulate the unilateral use of force under Article 51.

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[173] Online NewsHour, "Russia, China France Blast Opening of Iraq War", Thursday March 20th 2003, available at, http://www.pbs.org/newshour/updates/worldreaction_3-20.html (site accessed on 31st May, 2013).
[174] Ibid.
[175] BBC News/Middle East Online, "Timeline Iraq after Saddam", Tuesday 20th March, 2007, available at,
[176] http://news.bbc.co.uk/2/hi/middle_east/4192189.stm , (site accessed on 31st May, 2013).
[177] The Guardian, "There Were No Weapons of Mass Destruction in Iraq", Thursday 7th October, 2004, available at: http://www.guardian.co.uk/world/2004/oct/07/usa.iraq1 , (site accessed on 4th June, 2013).
[178] See "Transcript of George Bush's War Ultimatum Speech From the Cross Hall in the White House", The Guardian.com, 18th March, 2003, available at, http://www.theguardian.com/world/2003/mar/18/usa.iraq (site accessed on 17th January, 2014).

4.3.1 Legal Issues arising from the 2003 Iraqi War

The legal issues arising from the war in Iraq touch on the legality of the war, the legitimacy or justification for the war and, finally, the conduct of the war. A heated debate has arisen on whether there exists a legal basis for a State or group of States to wage war, outside the auspices of the United Nations, if that war is not waged in self-defence under Article 51 of the Charter. In justifying the attack, the United States accused Iraq of manufacturing weapons of mass destruction.[179] The United States argued that not only did Iraq have the weapons, but Iraq also intended to use the weapons. In the premises, the possession of such weapons by Iraq posed an imminent threat to the American people.[180] Consequently, the United States was justified in waging a war to prevent a possible attack against its citizens.[181] In sanctioning the war on Iraq, the then US Secretary of State, Collin Powell stated:

> We know that Saddam Hussein is determined to keep his weapons of mass destruction; he's determined to make more. Given Saddam Hussein's history of aggression… given what we know of his terrorist associations and given his determination to exact revenge on those who oppose him, should we take the risk that will someday use these weapons at a time and the place and in the manner of his choosing as at when the world is in a much weaker position to respond? The United States will not and cannot run that risk to the American people. Leaving Saddam Hussein in possession of weapons of mass destruction for a few months or years is not an option, not in a post-September 11 world.[182]

There is divided opinion amongst scholars as to whether the United States was justified in waging war against Iraq, 2003. Christol argues that, the United States administration

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[179] Ibid.
[180] Ibid.
[181] Ibid.

[182] U.S. Secretary of State Colin Powell to the United Nations Security Council on 5 February 2003 reprinted in: Wikipedia, 2003 invasion of Iraq, http://en.wikipedia.org/wiki/2003_invasion_of_Iraq, (site accessed on 4th June, 2013).

was justified as the war was waged with a view of protecting the American people from possible attacks in the future.[183]Others argue that it did not matter in the end whether Iraq had weapons of mass destruction; what really mattered was whether there was reason for the Americans to believe that Iraq had such weapons.[184] John Yoo, in describing what he terms as "reasonably necessary defence", says:

> To use force in anticipatory self-defense, a State must have available information that reasonably indicates that it will suffer an attack from the enemy. What is important is not what is discovered after the fall of the Hussein regime--we cannot justify self-defense upon facts we only found out afterwards--but what we thought were the facts at the time we used force....What is important from the perspective of international law is not whether Iraq had WMD in the end. What matters is whether, at the time of the invasion, it appeared reasonably necessary to defend against Iraq's threat to U.S. national and international security...[185]

Another protagonist, Joshua Muravchik states:

> The complaint that Bush's doctrine of preemption traduces international law is the most serious charge laid against it. But is it well founded? Bush's statement does not strike a posture that places America above the law, as some critics have suggested. To the contrary, it seeks to embed the new doctrine in established legal traditions. 'For centuries,' it asserts, 'international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves.' And it continues: we must adapt [this] concept of imminent threat to the capabilities and objectives of today's adversaries.' Those capabilities include weapons of mass destruction that can be 'easily concealed, delivered covertly, and used without warning.' In this, Bush is on strong legal ground.[186]

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[183] Carl Q. Christol, "Law and Legitimacy: The Iraq War," available at, www.pegc.us/archive/Articles/LAW%20AND%20LEGITIMACY.doc, (site accessed on 4th June, 2013).

[184] John Yoo, " Why Iraq's Weapons don't matter", Legal Times, August 2003 , available at: http://www.aei.org/article/foreign-and-defense-policy/international-organizations/why-iraqs-weapons-dont-matter/ , (site accessed on 4th June, 2013).

[185] Ibid

[186] Joshua Muravchik "The Bush Manifesto", reprinted in Procon.org, " US – Iraq War", available at: http://usiraq.procon.org/view.answers.php?questionID=000876 (site accessed on 4th June, 2013).

On the other hand are the scholars opposed to the war. At one level, there are those who argue that there is no room for anticipatory self-defence in contemporary international law. The only instance, in which a State is allowed to employ military force in self-defence, is in the event of an *armed attack.* There are those who, further, argue that even if anticipatory self-defence had been legal, the United States had not satisfied the conditions of pre-emptive self-defence as outlined in *the Caroline case*. Consequently, the war waged by the United States and its allies was a preventive war and not a pre-emptive war, which has no basis whatsoever in international law. Arthur Schlesinger distinguishes a preventive and pre-emptive war as follows:

> The distinction between "pre-emptive" and "preventive" is worth preserving - it is the distinction between legality and illegality. "Pre-emptive" war refers to a direct, immediate, specific threat that must be met at once. In the words of a department of defence manual, "an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent". "Preventive" war refers to potential, future and, therefore, speculative attacks. …According to Secretary of State Webster's "famous" 1841 statement, a pre-emptive reaction could be justified only on very narrow grounds - if the prospective attack showed "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation". This was manifestly not the case with Iraq. It was not a pre-emptive war. It was a preventive war. Preventive war rests on the premise that the preventer has accurate and reliable knowledge about the evil enemy's capabilities and intentions. It rests on the assumption of the perfectibility of the intelligence process. It rests therefore not on fact, but on prophecy. Yet history outwits all our certitudes. [187]

Mathew Happold denies that the action taken by the United States could be classified as self-defense. He further denies that there exists a legal justification for the use of force in international law that is not in accordance with the Charter. He states:

> The prohibition of the use of force is a foundational rule of international law. Only two exceptions are permitted: the use of force in self-defence or with the express authorisation of the UN Security Council exercising its powers under Chapter VII of the UN Charter. Iraq has not attacked the US, the UK or their

[187] Arthur Schlesinger, "Seeking Out Monsters", October 2004, available at, http://www.guardian.co.uk/world/2004/oct/19/uselections2004.usa14 , (site accessed on 4th June, 2013).

> allies, nor is there any evidence that it is about to do so. Force may only be used in self-defence in response to an actual or (according to some commentators) an imminent armed attack. Therefore, any arguments based on self-defence fail. What the US national security strategy has advocated are pre-emptive attacks on countries which may threaten the US. The use of armed force in such circumstances is contrary to international law.[188]

Stephen Zunes argues:

> International law is quite clear about when military force is allowed. In addition to the aforementioned case of UN Security Council authorization, the only other time that a member state is allowed to use armed force is described in Article 51, which states that it is permissible for 'individual or collective self-defense' against 'armed attack...until the Security Council has taken measures necessary to maintain international peace and security.' If Iraq's neighbors were attacked, any of these countries could call on the United States to help, pending a Security Council decision authorizing the use of force. Based on evidence that the Bush Administration has made public, there doesn't appear to be anything close to sufficient legal grounds for the United States to convince the Security Council to approve the use of military force against Iraq in US self-defense.[189]

After the war, the Americans could not prove that Iraq was manufacturing Weapons of Mass Destruction.[190] It has also been argued that there was not enough intelligence, prior to the war, to warrant the pre-emptive strike. Hans Blix, the former Chief UN Weapons Inspector in Iraq, stated:

> Any government learning that a 9/11, perhaps with weapons of mass destruction, is about to happen cannot sit and wait, but will seek to prevent it. However, such preventive action, if undertaken without the authorization of the Security Council, would have to rely critically upon solid intelligence if it were to be internationally accepted. The case of Iraq cannot be said to have strengthened faith in national intelligence as a basis for preemptive military action without Security Council authorization. Saddam Hussein did not have any weapons of mass destruction in March 2003, and the evidence invoked of

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[188] Mathew Happold, "The Legal case for War with Iraq", March 2013, available at, http://www.guardian.co.uk/world/2003/mar/13/qanda.politics (site accessed on 4th June, 2013).

[189] Stephen Zunes, "The Case Against War", available at, http://www.thenation.com/article/case-against-war , (site accessed on 4th June, 2013).

[190] David Krieger, "The War on Iraq as Illegal as Illegitimate", March 2005, http://www.wagingpeace.org/articles/2005/03/00_krieger_war-illegal-illegitimate.htm, (site accessed on 4th June, 2013).

> the existence of such weapons had begun to fall apart even before the invasion started… Saddam Hussein was not a valid object for counter-proliferation. He was not an imminent or even remote threat to the United States or to Iraq's neighbors.[191]

The other justification for waging war against Iraq, according to the then United States President, George W. Bush, was "to disarm Iraq, to free its people and to defend the world from grave danger."[192] Humanitarian intervention has been defined by Marko Majanovic as "a state's use of military force against another state when the chief, publicly declared aim of that military action is ending human-rights violations being perpetrated by the State against which it is directed."[193] According to Black's Law Dictionary, it has been defined as, "an intervention by the International community to curb abuses of human rights within a country, even if the intervention infringes the country's sovereignty."[194] According to Wil D. Verwey, humanitarian intervention is understood "as referring only to coercive action taken by States, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state"[195]

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[191] Reprinted in: David Krieger, "The War on Iraq as Illegal as Illegitimate", http://www.wagingpeace.org/articles/2005/03/00_krieger_war-illegal-illegitimate.htm (site accessed on 4th June, 2013).
[192] Supra, note 183.
[193] Marjanovic, Marko, "Is Humanitarian War the Exception?", available at, http://mises.org/daily/5160/ , (site accessed on 4th June, 2013).
[194] Bryan A. Garner, Black's Law Dictionary 8th Edition, (West Publishing Co., Eagan, 2004), p. 840.
[195] Wil D. Verwey, 'Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective', in Jan Nederveen Pieterse (ed.), World Orders in the Making (Macmillan Press Limited, London, 1998), p. 180.

Saban Kadas states that there are four ingredients of what constitutes humanitarian intervention, namely, use of military force, absence of the target state's permission, and assistance to non-nationals is the aim and, intervention is carried out under the auspices of the United Nations.[196] On the other hand, interference has been defined as "the act of meddling in another's affairs"[197] In international law, States are required to refrain from meddling in the internal affairs of other States. This principle is known as the principle of non- intervention and stems from the sovereignty and equality of States.[198]

In justifying the war against the government of Iraq in 2003, the United States and the United Kingdom, stated that Saddam was a tyrant and danger to the Iraqi people as he had committed numerous atrocities.[199] Proponents of the war argue that the two States, UK and USA, were merely helping the Iraqi people rid themselves of a bad leader.[200] Further, they were driven by a conscience that could not allow them watch the gross violation of human rights perpetrated by the Iraqi government.[201]

This justification has not gone uncriticised. According to Human Rights Watch, the war in Iraq did not qualify as a case of humanitarian intervention. This is because:

> …as a threshold matter, humanitarian intervention that occurs without the consent of the relevant government can be justified only in the face of ongoing

[196] Saban Kadas, "Humanitarian Intervention: A Conceptual Analysis", 2 Turkish Journal of International Relations 21 (2003), p.21.

[197]. Supra, note 194, p.840.

[198] Muge Kinacioglu, "The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate", http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf , site accesse on 4th June, 2013).

[199] Kenneth Roth, "Was The Iraq War A Humanitarian Intervention?"

Http://Www.Gpia.Info/Files/U771/Roth_Iraq_War.Pdf , (site accessed on 10th February, 2013).

[200] Ibid.

[201]Ibid.

> or imminent genocide, or comparable mass slaughter or loss of life. To state the obvious, war is dangerous. In theory it can be surgical, but the reality is often highly destructive, with a risk of enormous bloodshed. Only large-scale murder, we believe, can justify the death, destruction, and disorder that so often are inherent in war and its aftermath. Other forms of tyranny are deplorable and worth working intensively to end, but they do not in our view rise to the level that would justify the extraordinary response of military force. Only mass slaughter might permit the deliberate taking of life involved in using military force for humanitarian purposes.[202]

Further, according to Human Rights Watch, the atrocities allegedly committed by Saddam Hussein had not reached the threshold for humanitarian intervention. There was no evidence that the said atrocities were ongoing and needed to be curbed. The evidence supplied by the coalition forces comprised evidence of atrocities committed in the past. Hence, there was no imminent danger. Finally, there was great value in receiving the approval of the Security Council, which the two States had circumvented.[203] There was a window to conduct such intervention through the auspices of the United Nations, but the same were ignored. This has greatly undermined the legitimacy of the alleged intervention. Further, the law on intervention requires that the war should be waged primarily for intervention purposes, and yet, this was not the case. [204] In this instance, the primary reason for the invasion had been disarmament, and intervention was secondary.

In the end it may be said, that the war waged against Iraq by the forces of the United States and the United Kingdom in 2003 did not satisfy the criteria for self defence in International law. There is no justification, in contemporary international law, to wage

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[202] Human Rights Watch, "War in Iraq: Not a Humanitarian Intervention", http://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention , (site accessed on 10th February, 2013).
[203] Ibid.
[204] Ibid.

war to prevent a possible attack in the future. The only unilateral use of force permissible under the Charter is that which is employed in the exercise of the right to self-defence under Article 51. The right to self-defence only engages in the event of an armed attack. The invasion by the United States, of Iraq, constituted a preventive war and could not have been justified under Article 51. The war did not even constitute pre-emptive action under the customary law requirements of the *Caroline Case.* Although the principles of *Caroline Case* may not grant legality to a pre-emptive action, they may, nonetheless, accord it some legitimacy in deserving circumstances. There was no demonstration of an imminent danger. The United States and its allies failed to prove that Iraq possessed any weapons of mass destruction or biological warfare. Further, war was not the only option. The United Nations weapons inspectors had requested for more time to complete their investigations.[205] The Iraqi government had not, at the time the war was waged, refused to co-operate with the weapons inspectors.[206] The cost of the war, in terms of loss of life and destruction of property was not proportional to the imagined threat or the alleged atrocities committed by Saddam Hussein. The war could not, therefore, be classified as an intervention. The number of civilian deaths and causalities in Iraq and the loss of infrastructure arising from the war far exceeded any gain that may have been reaped from this war. The official stand of the United Nations was expressed through its Secretary-General, Mr. Koffi Annan, who stated that the war was not in conformity with the UN Charter and from Charter point of view it was illegal.[207]

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[205] Supra, note 161.
[206] Ibid.
[207] Reprinted in: David Krieger, "The War on Iraq as Illegal as Illegitimate", available at, http://www.wagingpeace.org/articles/2005/03/00_krieger_war-illegal-illegitimate.htm (site accessed on 9th February, 2013).

In conclusion, it is stated that the 2003 invasion of Iraq was not only illegal but also unnecessary. The intervention by the United States and its allies did not constitute humanitarian intervention; rather it was a case of interference. The doctrine of proportionality was equally not satisfied and the force used was unjustifiable. In the next section we will examine the role of the United Nations Security Council in the war.

4.3.2 The Role of the United Nations Security Council in 2003 War in Iraq

There was not much involvement of the Security Council in 2003 war in Iraq. This war remains a classic example of circumvention of the Security Council, in a matter lying squarely within its jurisdiction. When the issue of the Iraqi invasion first arose, Russia and France made it clear that they would not support such a war.[208] It can only be inferred that the US and UK sidestepped the Council as they appreciated that the Council would never sanction the war. It is further, inferred that they did not invoke the right to self-defence as that would have forced them to report the measures taken to the Security Council. After the war, the Council was never moved by any party to discuss the merits or demerits of the war. It can only be surmised that such action would have been futile since the UK and the US possess the power of veto.

However, some scholars have resorted to some of the Security Council resolutions to argue that the Iraq war was legal as it had been sanctioned by the Council. The relevant

[208] Supra, note 166.

resolutions are United Nations Security Council Resolutions 678 of 1990,[209] 687 of 1991,[210] and 1441 of 2002.[211] Resolution 678 was passed by the Council following the Iraqi invasion of Kuwait in 1990. At the time, it was also widely feared that Iraq was manufacturing nuclear weapons. [212] The resolution called on members of the United Nations, co-operating with Kuwait, "to use all necessary means" to ensure that Iraq complied with Resolution 660 of 1990. [213] It also authorised members to "use all necessary means…to restore international peace to the area" (Middle East).[214] Resolution 687 of 1991 required Iraq to cooperate with the United Nations inspectors on the acquisition and manufacture of biological and weapons of mass destruction.[215]

Those in favour of the legality of the war argue that, in 2003, Iraq was in "material breach" of its obligations as had been envisaged in Resolution 687 of 1991.[216] Consequently, Iraq being in such breach, the coalition forces were authorised under Resolution 678 to wage war in Iraq.[217]

Resolution 1441 of 2002 castigated Iraq for failing to co-operate with the weapons inspectors and for supporting terrorism.[218] It called upon Iraq to take a final opportunity

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[209] Security Council Resolution 678 of 1990, adopted at its 2963rd meeting held on 29th November, 1990, 45 UN SCOR 27 (1990).
[210] Security Council Resolution 687 of 1991, adopted at its 2981st meeting held on 3rd April, 1991, 46 UN SCOR 11(1991).
[211] Security Council Resolution1441 of 2002, adopted at its 4644th meeting held on 8th November, 2002, 57th session, Security Council Distr. General 02-68226 (E) *0268226*, U.N. Doc. S/INF/58 (2002).
[212] Supra, note 161.
[213] Security Council Resolution 660 of 1990, adopted at its 2932nd meeting held on 2nd August, 1990, 45 UN SCOR 19 (1990).
[214] Supra, note 209.
[215] Supra, note 210.
[216] *Ellen Jean Creighton, "*Jus Ad Bellum in the Iraq War: A Matter of Interpretation?" Atlantic International Studies Organisation, http://atlismta.org/online-journals/0506-journal-government-and-the-rights-of-individuals/jus-ad-bellum-in-the-iraq-war/#_ftn41 , (site accessed on 2nd February, 2013).
[217] Ibid.
[218] Supra, note 211.

to co-operate with the United Nations inspectors.[219] Those in favour of the war argue that, by passing that resolution the Council had confirmed that Iraq was in breach of previous directives given by the UN.[220] Such a finding, therefore, permitted the allies to resume the use of force, as contemplated in Resolution 678, against Iraq.[221] The use of force was one of the consequences contemplated under warnings of the Council to Iraq that non- compliance would result in "serious consequences."[222]

However, an interpretation of these resolutions to justify the war is opposed on the following grounds. First, in 1991, the official position of the United States government officials was that the mandate of Resolution 678 was "to free Kuwait". [223] The mission then, was to free Kuwait and not to procure the surrender of Saddam Hussein.[224] Further, the wording of Resolution 678 only authorised States, cooperating with the Government of Kuwait, to use force.[225] In 2003, Kuwait made it very clear that it did not support the invasion of Iraq.[226] Consequently, Resolution 678 cannot be used to support the 2003 invasion.

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[219] Ibid.

[220] See Andru E. Wall, "Was the 2003 Invasion of Iraq Legal?", 86 International Law Studies 69 (2003), at p. 69,, available at, https://www.usnwc.edu/.../Was-the-2003-Invasion-of-Iraq-Legal-.aspx (site accessed on 4th June, 2013).

[221] John Yoo, International Law and the War in Iraq 97 AJIL, 563 (2003).

available at, http://scholarship.law.berkeley.edu/facpubs/1746 (site accessed on 2nd February, 2013).

[222] Ibid.

[223] Supra, note 220, p. 73.

[224] Ibid.

[225] Ibid.

[226] Ibid.

Second, Resolution 687 directed the parties during the 1990 war to comply with the cease-fire agreement.[227] Consequently, parties were not permitted to resume hostilities without the express permission of the Council.[228] With regard to Resolution 1441, the Security Council made it very clear that it was to remain seized of the matter.[229] It was, therefore, a case of bad faith for the United States to initiate and lead the war against Iraq. Other members of the Security Council, France, Russia and China, had made it very clear that Resolution 1441 was not justification to resort to the use of force.[230] There was an opportunity for the United States to refer the matter to the Security Council for a resolution expressly authorising the use of force, but, instead, it took matters in its own hands.[231] Finally, it is also argued that the mandate of enforcing Security Council resolutions lies with it and not with an individual State.[232]

In conclusion, Resolutions 678 and 687 were very specific to the sanctioning of force to repel Iraq from Kuwait. Accordingly, attempts of interpreting Resolutions 678 and 687 to constitute the authority to invade Iraq in 2003, are not only strained, but would result in a miscarriage of justice. Resolution 1441 was clear that only warned Iraq of serious consequences, and did not authorise the Council to wage war. Further, the invasion was not waged by the Council, but by individual States who had no mandate to do so. If the Council had intended to wage war, there was nothing to stop it from so doing. Further, a directive for war should not be ambiguous. In this particular case,

[227] Supra, note 210.
[228] Supra, note 220, p. 73.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid.

France, Russia and China, had made it clear that the resolution did not sanction a war against Iraq.

4.4 The Entebbe (Uganda) Raid by Israeli Forces in 1976

On 27th June, 1976, an Air France Plane was hijacked by members of the Front for Liberation of Palestine (FLP).[233] The plane was travelling from Tel Aviv to Paris, but was commandeered to Entebbe in Uganda before it reached its destination.[234] After the hijackers had taken control of the plane, they separated Israeli nationals and Jews from the rest of the passengers.[235] The latter were subsequently released, but the hijackers threatened to kill the Israeli/Jewish hostages.[236] Attempts at a possible peaceful negotiation failed as Israel accused the Ugandan authorities of refusing to co-operate with Israel's attempts to free its nationals.[237] It had been alleged by the Israeli government that the Ugandan government had been collaborating with the hijackers.[238] On 4th July, 1976, Israeli Defence Forces raided the Ugandan Airport and released the hostages.[239]

Following the incident, the President of Uganda, aggrieved by the Israeli raid, wrote a protest letter to the President of United Nations Security Council, the Chairman of the

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[233] Laura Etheredge, "The Entebbe Raid", The Encyclopaedia Britannica, available at: http://www.britannica.com/EBchecked/topic/188804/Entebbe-raid , (site accessed on 5th June, 2013).
[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] Ibid.
[239]Ibid.

Organisation of African Unity, and the Secretary-General of the United Nations[240]. Uganda complained that the actions of Israeli forces, in collaboration with those of other States such as Kenya, had aggrieved Uganda.[241] The letter stated that such actions constituted an act of aggression against Uganda.[242] Further, that a number of Ugandans had been killed and a lot of property destroyed.[243] Uganda would, therefore, be seeking compensation against its aggressors.[244]

At the request of the Chairman of the OAU, a Security Council meeting was convened on 9th July, 1976. The Ugandan representative, Colonel Juma Abdalla, the then Minister of Foreign Affairs in Uganda, called on the Security Council to, "unreservedly condemn in the strongest possible terms Israel's barbaric, unprovoked and unwarranted aggression"[245]

On the other hand, the Israeli representative to the Security Council, Chaim Herzog, in his address before the Council stated:

> We come with a simple message to the Council: we are proud of what we have done, because we have demonstrated to the world that in a small country, in Israel's circumstances, with which the members of this Council are by now all too familiar, the dignity of man, human life and human freedom constitute the highest values. We are proud not only because we have saved the lives of over 100 innocent people—men, women and children—but because of the significance of our act for the cause of human freedom….We call on this body to declare war on international terror, to outlaw it and eradicate it wherever it

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[240] U.N. Doc S/12124/ Letter dated 5th July, 1976 from the Charge D' Affaires of the Permanent Mission of Uganda to the United Nations addressed to the Chairman of the Organisation of African Unity, The President of the Security Council and the United Nations Secretary General , available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N76/134/65/PDF/N7613465.pdf?OpenElement , (site accessed on 5th June, 2013).

[241] Ibid.

[242] Ibid.

[243] Ibid.

[244] Ibid.

[245] Reprinted in, Jan Kittrich, The Right of Individual Self Defence in Public International Law (Logos Verlog, Berlin, 2008), at p. 57.

> may be. We call on this body, and above all we call on the Member States and countries of the world, to unite in a common effort to place these criminals outside the pale of human society, and with them to place any country which co-operates in any way in their nefarious activities...[246]

A number of the representatives from different States also made their submissions before the Council. A section of States tabled a resolution condemning the hijacking but not mentioning the raid, whereas another section of States tabled a resolution condemning Israel for violating the territorial sovereignty of Uganda.[247] Neither resolution saw the light of day; no resolution was passed with respect to this incident. During the debates, a number of legal issues were extensively discussed.

4.4.1 Legal Issues Arising from the 1976 Entebbe Raid By Israeli Forces

The debate in the Council rallied around the violation of the territorial integrity of the State of Uganda on the on hand, and the right of Israel to rescue its nationals on the other. The issue of proportionality was also raised. Queries were made on the level force of force employed by Israel and whether the same had been necessary. Kurt Waldheim, the then Secretary-General of the United Nations, was of the view that Israel had violated the sovereignty of Uganda.[248] Further, it was the obligation of every State to uphold the principle of territorial integrity and sovereignty of member States. [249] He, however, also made it clear that this was not the only issue at hand requiring

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[246] Chaim Herzog, Israeli Ambassador to the UN address to the Security Council reprinted in , Hillel Fendel, " Israel Commemorates 30th Anniversary of Entebbe Rescue", available at, http://www.israelnationalnews.com/News/News.aspx/106568#.Ua7wGNjEGQA , (site accessed on 4th June, 2013).
[247] Supra, note 245, p. 61.
[248] U.N. Doc. S/PV 1939 paras. 13-14, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).
[249] Ibid.

consideration.[250] The aerial raid could not be viewed in isolation of the hijacking.[251] Most of the Arab and African States argued that Israel was not justified in carrying out the Entebbe raid.[252] Accordingly, the right to self-defence only arose after an armed attack as prescribed in the Charter.[253] In this particular case, they argued, that the threshold to resort to use of force had not been reached.[254]

The western bloc generally argued in favour of Israel, and sought a condemnation of the hijacking and terrorism in general.[255] The United States of America was of the view that Israel was justified in carrying out the raid.[256] William Scranton, the United States representative to the United Nations, argued that a right existed in international law, which allowed a State to temporarily violate the territory of another State with a view to rescuing its nationals facing imminent threat or danger.[257] He noted that the Government of Uganda had cooperated with and aided the hijackers.[258] In the premises, the government of Israel had been left with no option, but to intervene.[259] The United Kingdom merely side stepped the issue at hand, and made a general statement to the effect that, in the future, the world ought to ensure that situations forcing a State to take unilateral action, as Israel had done, would not arise again.[260]

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[250] Ibid.
[251] Ibid.
[252] Supra, note 245, p. 60.
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] U.N. Doc. S/PV 1941 Paras. 74-77, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/88/PDF/NL760088.pdf?OpenElement , (site accessed on 5th June, 2013).
[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] U.N. Doc. S/PV 1940 para 99, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/80/PDF/NL760080.pdf?OpenElement , (site accessed on 5th June, 2013).

The Swedish representative expressly acknowledged that Israel had "infringed" the territorial integrity of Uganda.[261] However, he also urged the world to understand that Israel must have been under intense pressure when dealing with the threat which its nationals were facing.[262] Kaj Sundberg of Sweden went on to add that "a State where hijackers landed with hostages must be prepared to shoulder the heavy responsibility of protecting all victims under circumstances which were bound to be difficult and delicate…."[263] However, the representative of the Soviet Union, one Mikhail Kharlamov, condemned the raid stating that it had caused substantial destruction of property and a considerable number of Ugandans had unnecessarily died. He noted that action was illegal and had been a violation of Article 2(4) of the Charter.[264]

On its part, Israel started off by making a legal justification of the right of a State to rescue its nationals abroad. Israel argued that her action, to rescue her nationals, was legal and permitted in international law.[265] In making this argument the Israeli representative, quoted Derek Bowett to the effect 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

[261] U.N. Doc. S/PV 1940 para 111-124, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/80/PDF/NL760080.pdf?OpenElement , (site accessed on 5th June
[262] Ibid.
[263] Ibid.
[264] U.N. Doc S/PV 1941 para 164, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/88/PDF/NL760088.pdf?OpenElement , (site accessed on 17th June, 2013).
[265] U.N. Doc. S/PV 1939 para. 106, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

the practice of States." [266] The said representative also went on to refer to the words of Max Huber, the Rapporteur in the 1925 Great Britain and Spain Arbitration as follows:

> However, it cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions.
>
> This right of intervention has been claimed by all States. Only its limits are disputed...[267]

The representative went to quote Huber in delineating the boundaries within which this right was to be exercised:

> We now envisage action by the protecting State which involves a *prima facie* violation of the independence and territorial inviolability of the territorial State. In so far as this action takes effect in derogation of the sovereignty of the territorial State it must necessarily be exceptional in character and limited to those cases in which no other means 'of protection are available. It presupposes the inadequacy of any other means of protection against some injury, actual or imminent, to the persons or property of nationals and, moreover, an injury which results either from the acts of the territorial State and its authorities or from the acts of individuals or groups of individuals which the territorial State is unable, or unwilling, to prevent.[268]

On the issue whether or not a legal right exists to intervene, by use of military force, within the territory of another State, it is submitted that it does not. Article 51 provides that a State may only resort to armed force in the event of an armed attack. All other

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[266] D.W. Bowett, Self Defence in International Law (Preager, New York, 1958), reprinted in 2009 by the Law book Exchange) pp 87-88 reprinted in U.N. Doc. S/PV 1939 para. 106, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

[267] Reprinted in the Speech of the Israeli Ambassador to the United Nations before the Security Council, U.N. Doc. S/PV 1939 para 106, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June,

[268] Ibid.

use of force must be sanctioned by the Security Council. Consequently, the use of force by the State of Israeli to rescue its nationals in 1976 in Entebbe was unlawful as it violated the provisions of Article 2(4) and 51 of the United Nations Charter. However, on the issue whether or not Israel was in any event justified to conduct the intervention, it is submitted that it was. The circumstances surrounding the case suggest that although the requirement for legality was not met, that of necessity and consequently, legitimacy was.

First, it is posited that the Israeli nationals were evidently in danger.[269] After the hijacking, the passengers in the plane were segregated into two main groups comprising of Jews on the one hand and non-Jews on the other.[270]

Thereafter, the hijackers threatened to kill the Jews.[271] Further, the apprehension of danger was "heightened" by the fact that nine months prior to the incident, the President of Uganda had made anti Semitic statements. In the Council meeting following the raid, the Israeli representative stated:

> The Government of Israel's apprehension was heightened by knowledge of President Amin's attitude towards the Jewish people. In September 1972, President Amin sent a cable, which was published on 13 September, to the Secretary-General, Mr. Kurt Waldheim, with copies to the Prime Minister of Israel and to the leader of the PLO, Yasser Arafat. In this cable, President Amin applauded the murder of the Israeli sportsmen at the Olympic Games in Munich

[269] U.N. Doc. S/PV 1939 para. 106, available at,, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

[270] U.N. Doc. S/PV 1939 para. 81, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

[271] U.N. Doc. S/PV 1939 para. 83 - 84, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

> who, bound hand and foot, were gunned down by the PLO. Moreover, in the same message, he had the obscene ghoulishness to praise Hitler for his role in destroying over 6 million Jews. The members of the Council will recall that but nine months ago, in the General Assembly; President Amin called for the extinction of Israel as a State." [272]

In the circumstances it is evident that a real threat against the Israeli passengers existed.

Secondly, the host State, namely, Uganda, was unwilling to assist the Israeli nationals.[273] In support of this argument the Israeli representative quoted Brierly as follows:

> Whether the landing of detachments of troops to save the lives of nationals- under imminent threat of death or serious injury owing to the breakdown of law and order may be justifiable is a delicate question. Cases of this form of intervention have been not infrequent in the past and, when not attended by suspicion of being a pretext for political pressure, have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect. . . .[274]

There appears to have been evidence that the government of Uganda was collaborating with the terrorists. This view was based on information relayed to the Israeli government to the effect that the Air France Captain clearly stated that one of the

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[272] Ibid.

[273] U.N. Doc. S/PV 1939 para. 107, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

[274] J.L. Brierly, The Law of Nations 6th edition, (Oxford University Press, Oxford, 1963), pp. 427- 428 reprinted in U.N. Doc. S/PV 1939 para 107, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June,2013).

hijackers knew in advance that the plane was destined for Entebbe. [275] Further, there was open collaboration between the hijackers and the Ugandan Soldiers. For instance, the hostages were openly escorted to the bathrooms by Ugandan soldiers.[276] Also the Ugandan soldiers took turns with the terrorists in guarding the hostages.[277] The Ugandans also supplied arms to the terrorists.[278] Further, the Ugandan President had been seen conversing with the terrorists and had declined the French Ambassador to Uganda an opportunity to negotiate with the terrorists directly.[279] It is evident that the Ugandan government would not have assisted the Israelis. The intervention, therefore, had been necessary in the circumstances.

Thirdly, on the issue of proportionate use of force it is submitted that there was no evidence of destruction and death other than that which was related to the rescue mission.[280] It is said that there were ninety six Israeli hostages. [281] At the end of the raid one Israeli woman had died, twenty Ugandan Soldiers had died, one Israeli soldier also

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[275] U.N. Doc. S/PV 1939 para 93, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June,2013).
[276] Ibid.
[277] Ibid.
[278] Ibid
[279] Ibid.
[280] Jeffrey A. Sheehan, "The Entebbe Raid: The Principle Of Self-Help In International Law As

Justification For State Use Of Armed Force", p. 151, available at,

https://docs.google.com/viewer?a=v&q=cache:o83lPFuAPjwJ:dl.tufts.edu/file_assets/tufts:UP149.001.00002.00002+&hl=en&gl=ke&pid=bl&srcid=ADGEESgs-3yGD2Z0ebphrsZuAy2fYj4B9G60O0755bT9NRuVu2AsjdEceOQNXCmXv2NcR_gsx45OJF2-XMc-ISS9qQk_PS4tbf9sz9HZSWPRq1pod9bpAVroQWI7kqm9PNa9hNFgeLxW&sig=AHIEtbScgq5Ts8IC5INsIyfPItDm95KKdw

[281]Ibid.

died and all the hijackers were dead.[282] The doctrine of proportionate use of force was addressed by the Israeli representative when he quoted O'Connell as follows:

> Traditional international law has not prohibited States from protecting their nationals whose lives or property are imperiled by political conditions in another State, provided the degree of physical presence employed in their protection is proportional to the situation. When the Sixth International Conference of American States at Havana attempted to formulate a legal notion of intervention in 1928, the United States pointed out that intervention would need to be clearly defined, for the United States would not stand by and permit the breakdown of government to endanger the lives and property of American citizens in revolution-ridden countries. Interposition of a temporary character' would not, in such circumstances, it was argued, be illegal...[283]

One of the main requirements for lawful exercise of the right of self-defence, under customary international law, is that the force applied must be proportionate to the risk. In other words the force should not be applied for any other purpose other than rescuing the hostages.[284] Further, it should not be retaliatory or aimed at punishing other parties.[285] Excessive force would cause the action to be unlawful. This is not to say casualties and a measure of destruction is not to be expected from such an operation.[286] However, it must be demonstrated, by evidence, that there was unnecessary or unreasonable use of force in the circumstances.[287] In this case, no evidence was tabled

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[282] Ibid

[283] D.P. O'Connell, International Law, 2nd edition, (Stevens, London, 1970), pp 303-304, reprinted in U.N. Doc. S/PV 1939 para 108, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June,2013).

[284] Lt. Colonel Richard Erickson, "Legitimate use of Military Force Against State Sponsored Terrorism, Protection of Nationals Abroad", available at http://www.au.af.mil/au/awc/awcgate/au/erickson.pdf (site accessed on 30th April, 2013).

[285] Ibid.

[286] Ibid

[287] Ibid.

before the Council to show that Israel had subsequently, conducted herself in a manner to suggest that she had any other motive, besides rescuing her nationals in Entebbe.

In conclusion, it is submitted that although the Security Council could not agree whether or not Israel had acted lawfully in rescuing its nationals in Ugandan soil, the law with regard to the unilateral use of force is clear. The use of unilateral force is only permitted under Article 51 of the Charter, in the event of an armed attack. Article 51 does not contemplate the rescue of nationals abroad as a component of the right to self-defence. However, with regard to legitimacy, it is argued that Israeli government was justified to conduct an intervention in the circumstances. It was evident a real threat existed and the government of Uganda had failed to take measures to protect the Israeli hostages. The force employed by the Israeli forces was limited to rescuing the nationals and therefore satisfied the principle of proportionality. In a nutshell the use of force in the Entebbe raid, by Israeli forces was illegal but nonetheless legitimate.

4.5 The Russian Invasion of Georgia in 2008

Russia and Georgia have enjoyed a complex, and sometimes tempestuous, relationship dating back to the 18th Century. In 1783, the Eastern Georgian kingdom of *Kartli-Kakheti* signed an Alliance Treaty with the Russian Empire.[288] Under the treaty, Russia agreed to offer protection to the kingdom against aggressors.[289] However, the kingdom

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[288] Treaty of Gerogievsk (1783) PSRZ, vol. 22 (1830), pp. 1013-1017. (Translated into English by Russell Martin available at, http://www.westminster.edu/staff/martinre/Treaty.html , (site accessed on 2nd August, 2013).

[289] Ibid.

was to remain distinct and separate from the territory of Russia.[290] On December 22, 1800, the Russian empire signed a proclamation incorporating Georgia into the Empire, at the request of the then reigning Georgian monarch. [291] This was in violation of the 1783 treaty; the nobility in Georgia protested the incorporation. In May 1801, the Russian empire enforced a Russian government over the Georgian Kingdom and dethroned the Georgian heir.[292] In 1918, a group of Georgian rebels declared the Democratic Republic of Georgia and waged war against the Russians.[293] However, the independence did not last for long. In 1921, Georgia was once again conquered by the Russians and incorporated into the Soviet Union in 1922.[294] With the breakup of the Soviet Union, Georgia became an independent state once more in 1991.[295]

The 2008 war between Russia and Georgia revolves around the controversial "Georgian provinces" of Abkhazia and South Ossetia. In the wake of the disintegration of the Soviet Union, South Ossetia and Abkhazia operated as autonomous regions within the Georgian Soviet Republic.[296] Upon the collapse of the Union, Georgia became an independent state. At the same time, South Ossetia expressed the desire to form a republic, distinct and separate from Georgia.[297] This proposition was opposed by Georgia. The fallout, between mainstream Georgia and South Ossetia, eventually escalated into war when, in January, 1991, Georgia sent troops into South Ossetia to

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[290] Ibid.
[291] David Mchedlishvili, "The History of Georgia", available at, http://ggdavid.tripod.com/georgia/history.htm (site accessed on 2nd August, 2013).
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Peter Roudik, "The Russian Federation: Legal Aspects of the War in Georgia", available at, http://www.loc.gov/law/help/russian-georgia-war.php , (site accessed on 2nd August, 2013).
[297] Ibid.

subdue the South Ossetia separatist movement.[298] A cease-fire was eventually reached in June 1992, with the result that South Ossetia was now partly controlled by the Georgian government and partly by the unrecognized government of South Ossetia.[299] The situation on the ground remained tense. However, there were joint peacekeeping forces made up of Georgian, Russian and South Ossetia soldiers.[300] In 2004, and again in 2008, other wars broke out when Georgian soldiers attempted to take control of South Ossetia.[301]

The situation in Abkhazia was no different, except that Abkhazia had been agitating for an independent existence since 1957.[302] Consequently, about the same time that Georgia was fighting South Ossetia, it was also fighting separatist forces in Abkhazia. There was a Georgia-Abkhazian war between 1992 and 1993, [303] and another in 1998.[304] In between the wars, the region was rife with intermittent sporadic eruptions of violence and a peaceful existence had eluded it for a while. [305] On many occasions, Georgia extended an autonomous status to Abkhazia.[306] However, the latter declined as it was bent on being accorded the status of an independent State, distinct and separate from Georgia.[307]

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[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Brunno Coppieters, "Georgia-Abkhaz Conflict", Federal Practice, Exploring Alternatives for Georgia and Abkhazia (VUB University Press, Brussels, 2000) available at, http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2004/1-2004Chapter5.pdf (site accessed on 2nd August, 2013).
[303]Ibid.
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] Ibid.

In the initial stages of the conflict, between Georgia on the one hand and the secessionist governments of Abkhazia and South Ossetia on the other, Russia had maintained the role of a peacekeeper and mediator.[308] However, behind the scenes, Russia actively supported the secession of the territories from Georgia with the hope that the territories would be united to Russia.[309] For instance, Russia was rooting for the unification of South Ossetia and North Ossetia and yet North Ossetia was part of Russia.[310] Russia had also extended Russian citizenship to the population within the two territories of South Ossetia and Abkhazia. [311]

On 1st and 2nd August, 2008, the South Ossetia paramilitary forces, with the support of Russian forces, invaded villages within South Ossetia, occupied by ethnic Georgians, with a view to expelling the Georgians from the South Ossetia territory. [312] On 8th August, 2008, Georgia initiated an attack against South Ossetia in a bid to consolidate Georgian territory, and to bring order to the region. Further, Georgia also wanted to protect its peacekeepers in South Ossetia as they had, in the recent times, been the targets of attack by the South Ossetia militants.[313] The offensive taken by Georgia resulted in the injury of a number of South Ossetia residents, including Russian

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[308] Ibid.

[309] Ryan Mauro, "The Moscow Bombings: A Prelude to Russia's Invasion of Georgia?", available at, http://frontpagemag.com/2010/ryan-mauro/the-moscow-bombings-a-prelude-to-russias-invasion-of-georgia/ (site accessed on 21st August, 2013).

[310] Rebecca Ratlif, "South Ossetia Separatism in Georgia", available at,

http://www.haguejusticeportal.net/index.php?id=10221 (site accessed on 2nd September, 2013).

[311] Phoebe Okowa, "The Georgia v. Russia Case: A Commentary", available at,

http://www.haguejusticeportal.net/index.php?id=10221 (site accessed on 2nd August, 2013).

[312] Charles King, "The Five Day War: Managing Moscow after Georgia", available at, http://www.foreignaffairs.com/articles/64602/charles-king/the-five-day-war , (site accessed on 2nd August, 2013).

[313] Ibid.

peacekeepers. Russia responded by launching war against Georgia.[314] Russia justified the use of force against Georgia on the basis that it had the responsibility to protect its nationals from the atrocities that were being committed against them by the Georgian authorities.[315] Further, it stated that it was intervening with a view to realising peace in region and averting human suffering.[316]

During this war, Russia defeated Georgia and invaded Georgian territory proper, beyond South Ossetia and Abkhazia. Russia occupied the Georgian cities of Poti, Gori, Senaki and Zugdidi.[317]A ceasefire was eventually reached on 12th August, 2008.[318] Russia withdrew from the uncontested regions within Georgia, but remained within South Ossetia and Abkhazia under bilateral agreements made directly between the Russia and the separatist governments.[319] After the war**,** Russia extended recognition to both Abkhazia and South Ossetia as independent States.[320] Georgia, on the other hand, accused Russia of violating her territorial integrity by invading Georgia's territory.[321] Further, Georgia accused Russia of meddling in the internal affairs of Georgia by offering assistance to the separatist movements.[322]

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[314] Ibid.
[315] Nicolai N. Petro, "Legal Case for the Russian Intervention in Georgia", 32 Fordham International Law Journal 1524 (2008).

[316] Ibid
[317] Supra, note 291.
[318] Supra, note 315, p. 1526.
[319]Ibid.

[320] Ibid.
[321] Ibid.
[322]Ibid.

4.5.1 Legal Issues Arising from the Russian Invasion of Georgia

The main legal issue arising out of the Russian invasion of Georgia is whether, Russia had a legal right to carry out the invasion under the doctrine of protection of nationals abroad. Russia argued that it was its obligation to protect its nationals abroad, if the said nationals were in danger.[323] According to Russia, Georgian troops had committed, and were in the process of committing, atrocities amounting to genocide against Russian citizens residing in South Ossetia.[324] The Russian representative to the United Nations, Vitaly Churkin, stated that, in the circumstances, Russia had no option but to exercise its inherent right to self-defence under Article 51 of the Charter.[325] Further, Georgia's actions constituted acts of aggression against the government of Russia, and Russia was obliged to protect its people.[326] The Chairman and Chief Justice of the Constitutional Court of the Russian Federation, Valery Zorkin, also stated**:**

> [It] is absolutely legal for a sovereign State to apply the full force of its military and destroy the armed forces of a foreign State if the goal of such an operation is to secure the lives of its compatriots who are permanently living abroad, in the case of a military conflict on the foreign territory where they reside…. That the peace enforcement operation conducted by the Russian military in South Ossetia was in accordance with article 14.5 of the Russian Federal Law on the State Policy in Regard to the Fellow Citizens Residing Abroad, which provides that, if a foreign State violates recognized norms of international law and human rights in regard to Russian expatriates, the Russian Federation shall undertake efforts authorised by international law to defend their interests....By invading Georgia, Russia fulfilled its obligations to its fellow citizens.[327]

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[323] See Letter from Ambassador Vitaly Churkin, Permanent Representative of the

Russian Federation to the United Nations, to the President of the Security Council

(Aug. 11, 2008), U.N. Doc. S/2008/545, available at, http://ivww.securitycouncilreport

[324] Ibid.

[325] Ibid.

[326] Ibid.

[327] Reprinted in Russian Federation: Legal aspects of the War in Georgia, "Russia's Protection of Citizens Justification", , available at, http://www.loc.gov/law/help/russian-georgia-war.php , (site accessed on 2nd July, 2013).

However, the claim by Russia, that it was acting in self-defence, may be challenged on a number of grounds. First, the vast Russian citizen population in South Ossetia had been created "artificially".[328] This population was, previously, *de jure* Georgian citizenry who had subsequently accepted Russian citizenship in the wake of the separatist movement.[329] Upon the dissolution of the USSR, Russian law on citizenship allowed residents of the former Soviet republics to apply for Russian citizenship.[330] This process was elaborate and took several months.[331] However, just before the war, Russia had made it fairly easier for Georgian nationals living in the disputed territories of South Ossetia and Abkhazia to acquire Russian passports.[332] In addition, the South Ossetia separatist government allowed its 'citizens' to acquire both Russian and South Ossetia citizenship.[333] Consequently, a large number of the population, within the separatist regions became citizens of Russia. Consequently, the Russian citizenship granted to Georgian citizens was *mala fides.* The nationality was only granted with a view of creating a Russian population within the State of Georgia. In hindsight, it would appear that Russia had "stage managed" the process with a view to attacking Georgia as it did, under the guise of protecting its nationals in Georgia.

Second, Russia's conduct, in a number of ways, amounted to interference in the "internal Affairs" of Georgia. For one, the so called "Russian citizens" were in fact

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[328] Supra, note 291.
[329] Ibid.
[330] Ibid.
[331] Ibid.
[332] Ibid.

[333] Ibid.

nationals of Georgia fighting for secession.[334] Further, Russia in complete disregard of the policy of the Commonwealth of Independent States (CIS), [335] had unilaterally lifted economic sanctions imposed upon the separatist governments of Abkhazia and South Ossetia.[336] When lifting the sanctions, Russia declared them as "outdated, impeding the socio-economic development of the region, and causing unjustified hardship for the people of Abkhazia."[337] By so doing, Russia seriously undermined the unification of the separatist provinces with greater Georgia. By lifting the sanctions, Russia enabled the provinces to thrive as independent States outside the control of Georgia.[338]

Third, before the war, Russia had not disputed that South Ossetia was an integral part of Georgia.[339] Recognition of South Ossetia as a State was extended by Russia after the war.[340] When Georgia deployed its troops to the town of Tskhinvali, it was within its mandate to take measures to bring about stability within her internationally recognised territory. By repelling Georgian forces from South Ossetia and assisting the separatist government take control of South Ossetia, Russia's actions similarly amounted to interference in the internal affairs of Georgia.

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[334] Ibid

[335] See Charter Establishing the Commonwealth of Independent States available at, http://www.dipublico.com.ar/english/charter-establishing-the-commonwealth-of-independent-states-cis/ (site accessed on 3rd September 2013). The CIS is an organisation comprising of former Soviet Republics following the fall of the USSR.

[336] Supra, note 327.

[337] Ibid.

[338] Use Of Force Issues Arising Out Of The Russian Federation Invasion

Of Georgia In August 2008 Executive Summary

available at, Http://Www.Civil.Ge/Files/Files/Use-Of-Force-Eng-2207.Pdf (site accessed on 2nd July, 2013).

[339] Supra, note 327.

[340] Ibid.

Fourth, there is no rule in international law permitting the protection of a State's peacekeepers within foreign territory.[341] Consequently, the claim by Russia that it was acting with a view to protect its peacekeepers in South Ossetia has been criticised as having no legal basis.[342] Further, contemporary international law does not allow the use of unilateral force outside the provisions of Article 51 of the Charter. Article 51 of the Charter only permits the unilateral use of force in the event of an armed attack. All other resorts to the use of force must be sanctioned by the Security Council. The claim of self-defence is challenged on the basis that doctrine of protection of nationals abroad does not fall within the provisions of Article 51 of the Charter.[343] Consequently, there was no legal justification for the Russian invasion of Georgia and the war was, therefore, illegal.

Fifth, even if the rescue of nationals was legal, Russia's conduct did not satisfy the requirements of necessity and the proportionate use of force.[344] Proponents of the right of States to protect their nationals abroad are, agreed that the right is set against certain conditions which have come to be known as the Waldock criteria.[345] They provide that force may be used in self-defence against threats to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other state in support of terrorist attacks against one's nationals (b) there is effectively, no other way to forestall imminent further attacks on one's nationals; and (c) the force employed

[341] Supra, note 338.

[342] Ibid.

[343] See section 2.3.1.3 of this paper..

[344] See section 2.3.1.2 of this paper.

[345]See sections 2.3.1.1 and 2.3.1.3 of this paper.

is proportionate to the threat.[346] During the war, Russian forces advanced deep into Georgian territory and occupied undisputed territory.[347] There was a large scale wanton destruction of infrastructure. Russia launched cyber attacks which were aimed at paralysing the network and computer systems in Georgia.[348] The aim of the attacks was to influence public opinion by manipulating the data that was visible to the public.[349] They also corrupted systems so that on-line services, such as media, banking and government services were inaccessible.[350] This was aimed at paralysing the Georgian economy. Russian naval vessels blocked off the Georgian coast and destroyed the Georgian vessels in the disputed waters of Abkhazia.[351] Russian military forces, advanced deep into Georgia beyond the undisputed territory. The Russians occupied the main highway to the Georgian capital and occupied the cities of Poti and Gori. [352] In the process, they destroyed several military bases, equipment and infrastructure in Georgia. The Georgian authorities estimated that 70% of the capital's buildings were damaged during the war, with about 10% of the city's buildings being "beyond repair.[353]

At the end of the war, Russia had set up "buffer zones" around the disputed territories of Abkhazia and South Ossetia.[354] Consequently, the undisputed territory of Georgia was cut off from the separatist territories with little hope for unification. Thereafter, Russia went on to grant recognition to the separatist States of Abkhazia and South

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[346] Ibid.
[347] Supra, note 338.
[348] Major William Ashmore, "Impact of Alleged Russian Cyber Attacks", available at, http://www.dtic.mil/dtic/tr/fulltext/u2/a504991.pdf (site accessed on 2nd July, 2013).
[349] Ibid.
[350] Ibid.
[351] Ibid.

[352] Ibid.
[353] Ibid.
[354] Ibid.

Ossetia.[355] Evidently, Russia's use of force, in the circumstances, was not solely aimed at protecting its nationals. The logical conclusion of this invasion was the intimidation of Georgia and the facilitation of the secession of South Ossetia and Abkhazia from Georgia. The force employed by Russia was not kept within the objective of protecting the nationals.

Finally, Russia also claimed that the Georgian invasion was justified as the latter had committed serious atrocities and grave crimes against humanity.[356] Russia justified the attack as necessary to end and alleviate further human suffering.[357] However, this claim by Russia is challenged on the basis that, the Russian invasion similarly, resulted in a high number of deaths.[358] Human Rights Watch reported that both Georgian and Russian forces indiscriminately killed and injured civilians.[359] Further, Russia specifically targeted Georgian cities and villages.[360] Also, Russia failed to protect the civilians of the Georgian territories it occupied during the war.[361] As an occupying power, it permitted South Ossetia forces to attack and injure ethnic Georgian civilians and damage their property.[362] Further, the war resulted in wide scale displacement and deportation of ethnic Georgians living in South Ossetia. Most of the displaced persons fled to the undisputed Georgian territory.[363] Following the conflict, the Georgian

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[355] Supra, note 327.
[356] Supra, note 315, p. 1537.
[357] Ibid.
[358] Tanya Lokshina, "Georgia War -Auditing the Damage" , available at http://www.hrw.org/news/2009/01/30/georgia-war-auditing-damage (site accessed on 3rd September, 2013).
[359] Human Rights Watch Report, " Up in Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia", (January 2009), available at, http://www.hrw.org/sites/default/files/reports/georgia0109web.pdf (site accedded on 3rd September, 2013).
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Ibid.

government had to actively settle the displaced persons within the undisputed territory of Georgia.[364]

In conclusion, it is submitted that the Russian invasion of Georgia was unjustified. The invasion had no legal basis in international. It represents a classic example of unlawful use of force contrary to Article 2(4) of the United Nations Charter. It did not qualify as an act of self-defence under Article 51 of the Charter. Further, it failed to meet the customary law requirements of necessity and proportionality.

4.5.2 The Role of the Security Council in the Conflict

The role and impact of the United Nations in the Georgian conflict remained apathetic, as is the norm when a dispute involves a permanent member of the Security Council. Georgia brought the dispute before the International Court of Justice (ICJ) and before the United Nations Security Council. Before the Court, Georgia filed a case against Russia under the provisions of the Convention on the Elimination of all Forms of Racial Discrimination (CERD).[365] Georgia alleged that Russia had, within the South Ossetia territory, engaged in actions which were in breach of the provisions of CERD. Georgia sought relief to ensure that all persons within the territory of Georgia enjoyed the rights and freedoms envisaged under CERD. Accordingly, Georgia submitted that the Court

[364]Ibid.
[365] Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia), Judgment, I.C.J. Reports, 2011, p.70.

had jurisdiction in the matter pursuant to the Article 22 of the Convention. Russia raised four preliminary points of law, but the Court determined only two.

First, Russia argued that there was no dispute requiring a resolution.[366] This objection was dismissed as the Court found that, indeed, there had been a dispute between the parties. [367]The Court cited previous deliberations between the parties before the Security Council as evidence that a dispute existed.[368]

The Second objection raised by Russia was that Georgia had failed to meet the prerequisite procedures before bringing the matter to the Court. This Objection was upheld by the Court and it therefore did not address itself to the other objections.

> The Court has already observed the fact that Georgia did not claim that, prior to the seisin of the Court, it used or attempted to use the other mode of dispute resolution contained at Article 22, namely, the procedures expressly provided for in CERD. Considering the Court's conclusion, at paragraph 141, that under Article 22 of CERD, negotiations and the procedures expressly provided for in CERD constitute preconditions to the exercise of its jurisdiction, and considering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court does not need to examine whether the two preconditions are cumulative or alternative. [369]

Georgia also presented the dispute before the Security Council through a letter dated 8th August, 2008, addressed to the President of the Council.[370] Georgia was allowed to

[366] Ibid.
[367] Ibid.
[368] Ibid.
[369] Ibid, paragraph 183.
[370] S/2008/536, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S2008%20536.pdf (site accessed on 3rd September, 2013).

ventilate the dispute in an emergency meeting of the Council.[371] The meeting did not yield much as it comprised of accusations and counter-accusations between Georgia and Russia. The French initiated a draft resolution seeking the withdrawal of Russian Forces from Georgian territory, including South Ossetia.[372] The draft was blocked by Russia as it argued that the cease-fire brokered by the French President, allowed it to remain within South Ossetia.[373] Subsequently, Russia initiated a draft resolution seeking an arms embargo against Georgia.[374] However, the same was vetoed by the United States.[375] Similarly, the UN Secretary-General was pressured into amending the Secretary General's report so that the report did not make reference to Abkhazia as being part of the territory of Georgia.[376] Russia had threatened to veto the report if the amendment was not made and the Secretary General bowed to the Russian threat.[377] The Council was unable offer any direction on the matter or act decisively. France proposed a resolution to have Russia withdraw from South Ossetia, but the motion was defeated by Russia.[378] Although Georgia brought the matter before the Security Council, it was left unaided. On the contrary, the Secretary-General by presenting a

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[371] UN SC 5952nd Meeting, S/PV 5952, Friday 8th August 2008, available at, http://www.un.org/News/Press/docs/2008/sc9418.doc.htm , (Site accessed on 3rd September, 2013).
[372] Adrian Blomfield, "Russia Rejects UN Call to Pull out of Georgia", The Telegraph, 20th August, 2008 available at, http://www.cbc.ca/news/world/story/2008/08/20/russia-georgia.html (site accessed on 3rd September , 2013).
[373] Ibid
[374] S/2008/570 , Russian Federation Draft Resolution, available at, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20Blue%20draft%20resolution.pdf (site accessed on 3rd September, 2013).
[375] Ibid.
[376] Vladimir Socor, "UN Secretary General Revises Report on Abkhazia under Russian Pressure", European Dialogue available at, http://www.eurodialogue.org/UN-Secretary-General-Revises-Report-on-Abkhazia-under-Russian-Pressure , (Site accessed on 3rd September, 2013).
[377] Ibid.
[378] See Security Council Report, Update Report No 2: Georgia, 12th August, 2008, available at, http://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-4423477.php (site accessed on 20th January, 2014).

report that did not make reference to Abkhazia as forming part of Georgia's territory, created a precedent for the argument that Abkhazia was not part of Georgia.

4.6 The United States Invasion of Afghanistan in 2001

On 11th September, 2001, the United States suffered terrorist attacks. At the time, it was widely believed that the attacks had been carried by the *Al Qaeda,* an international terrorist group.[379] It was also believed that the said group carried out its major operations from Afghanistan.[380] After September 11 2001, attacks executed on United State's soil, the American government requested the Afghanistan government to extradite one Osama bin Laden, who was at the time living in Afghanistan.[381] It was also widely believed by the American government that bin Laden was the mastermind behind the American attacks.[382] Bin Laden, at the time, denied that he had anything to do with the attack.[383] The Afghanistan Taliban government, on its part, declined to extradite bin Laden to the United States to face trial in the absence of any evidence that he was involved in the attack.[384]

On 12th September, 2001, the Security Council adopted Resolution 1368 of 2001.[385] The said Resolution stated that it "regards such acts, like any act of international

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[379] David Ray Griffin, "Did 9/11 Justify the War in Afghanistan?", (2010), available at, http://www.globalresearch.ca/did-9-11-justify-the-war-in-afghanistan/19891 (site accessed on 26th September, 2013).
[380] Ibid.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Security Council Resolution 1368 of 2001, adopted at its 4370th meeting held on 12th September, 2001, 56th session, Security Council Distr. General 01-53382 (E), U.N. Doc. S/INF/57 (2001).

terrorism, as a threat to international peace and security," and expressed "its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."[386] Further, it called "on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".[387] On 28th September, 2001, the Security Council passed Resolution 1373 of 2001.[388] The Resolution provided for measures to be undertaken by States to combat terrorism, including freezing assets belonging to terrorists or their organisations.[389] It also encouraged member states to share their intelligence on terrorist groups with a view to combat international terrorism.[390] It also called for the domestication of international treaties on terrorism by member states.[391] The resolution identified the Taliban regime of Afghanistan and the Al-Qaeda as terrorist organisations.[392] On 7th October, 2001, the United States, supported by, among others, the governments of United Kingdom and Germany, undertook military action against the Taliban regime in Afghanistan under the provisions of Article 51, the right to individual and collective self-defence.[393] It was believed that the Taliban regime was hosting and supporting the Al Qaeda terrorist organisation. In the following month, the United States and allied forces managed to oust the Taliban from power. Most Taliban and Al Qaeda members are said to have

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[386] Ibid., paragraph 2
[387] Ibid., paragraph 3.
[388] Security Council Resolution 1373 of 2001, adopted at its 4385th meeting held on 28th September, 2001, 56th session, Security Council Distr. General 01-55743 (E), U.N. Doc. S/INF/ 57 (2001).
[389] Ibid.
[390] Ibid.
[391] Ibid.
[392] Ibid.
[393] Ben Smith and Arabella Thorp, "The Legal Basis for the Invasion of Afghanistan", (2010), available at,
www.parliament.uk/briefing-papers/sn05340.pd *(site accessed on 26th September, 2013).*

retreated into mountains, within Afghanistan and the neighbouring State of Pakistan.[394] On 14th November, 2001, the Security Council passed Resolution 1378 of 2001.[395] The Resolution affirmed that the United Nations would play an important role in the country (Afghanistan) and called for the establishment of a transitional administration leading to the formation of a new government.[396] It further condemned the Taliban for allowing Afghanistan to be used as a base and safe haven for Al-Qaeda, other terrorist groups, Osama bin Laden and for violations of international law.[397] The Council affirmed that the United Nations would play a central role in establishing a transitional administration in Afghanistan.[398] A number of issues have arisen as a result of this war. The main issue revolves on the legality of the USA invasion of Afghanistan.

4.6.1 Legal Issues Arising from the 2001 US Invasion of Afghanistan

Upon launching the attacks in Afghanistan, the United States representative to the United Nations reported the matter to the Security Council on the same day.[399] The position of the United States was that the invasion was a measure it was undertaking under its right to self-defence as provided for by Article 51 of the Charter.[400] This measure was necessitated by the terrorist attack of 11th September, 2001. The letter stated:

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[394] Ibid.
[395] Security Council Resolution 1378 of 2001, adopted at its 4415th meeting held on 14th November, 2001, 56th session, Security Council Distr. General 01-63857 (E), U.N. Doc. S/INF/57 (2001).
[396] Ibid.
[397] Ibid.
[398] Ibid.
[399] Letter dated 7th October, 2001 from the Permanent representative of the United States of America to the President of the Security Council, U.N. DOC. S/2001/946 (2001), available at, http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf (site accessed on 26th September, 2013).
[400] Ibid.

> On 11 September 2001, the United States was the victim of massive and brutal attacks….These attacks were specifically designed to maximize the loss of life….Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks....The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation….From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad….In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan…. In addition, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan…[401]

The United Kingdom, similarly, sent a letter to the Security Council on the same day.[402] The United Kingdom reported to the Council it was acting in defence of the United States in collective self-defence.[403] According to the two States, Afghanistan was harboring terrorists who had previously attacked the United States. Further, future attacks were anticipated and it was important to take measures to neutralise and deter the same.

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[401]Ibid.

[402] Letter dated 7th October, 2001 from the Charge d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the

Security, U.N. Doc. S/2001/947 (2001).

[403] Ibid.

The theory that the United States was acting in self-defence in the 2001 Afghanistan war, is refuted on a number of grounds. First, the provisions of Article 51 of the Charter only authorise the use of force to repel an armed attack. For a State to successfully plead that it was acting in self-defence, it must demonstrate that the attack was still in progress when the defensive action was initiated.[404] However, by the time the United States launched the 2001 war, the terrorists had executed the attack to completion. Consequently, the terrorists attack on 11th September, 2001 did not constitute "an armed attack" within the meaning of Article 51, and the measures taken by the United States did not constitute self-defence.[405] The course of action taken by the United States constitutes revenge or an unlawful reprisal.[406] A reprisal refers to a situation where the acting State takes countermeasures against the target State in respect of completed unlawful acts.[407]

Second, the invasion of Afghanistan was not only illegal but also uncalled for, as the Taliban regime was not synonymous with Al-Qaeda. The invasion of Afghanistan was unwarranted as the terrorist attacks executed by Al-Qaeda could not be attributed to the State of Afghanistan.[408] Further, the United States' right to self-defence cannot be said to have engaged, as the terrorist attacks orchestrated by Al-Qaeda did not qualify as "armed attacks" within the meaning of Article 51.[409] "An armed attack" can only be executed by a state-actor, which Al-Qaeda is not.[410] The United Nations General

[404] John Quigley, "The Afghanistan War and the Right to Self-defence", 37(2) Valparaiso University Law Review 541 (2003), pp. 543-544.
[405]Ibid.
[406] For a detailed discussion on reprisals, see page 21 above.
[407] Ibid.
[408] Supra, note 404.
[409] Ibid.
[410] Ibid.

Assembly in its definition of aggression insinuated that acts of aggressions can only be committed by state actors.[411] The General Assembly in adopting the definition of aggression stated:

> 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.[412]

It went on to add that acts of aggression include:

> The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State…sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[413]

In view of this definition, the Taliban regime had not committed any acts of aggression against the United States and the invasion was unwarranted. Further, Al-Qaida was not responsible for an armed attack as aggression can only be committed by a fellow State actor. The Talban would only have been held responsible if it had been demonstrated that Al Qaeda had been conducting the attacks on its behalf.[414]

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[411] Definition of Aggression, 1 GA Res 3314 (XXIX), adopted by the General Assembly on 4th December 1974, UN GAOR 29th session, U.N. Doc A/9631 (1974).

[412] Ibid., Article 1.

[413] Ibid., Article 3 (f) and (g).

[414] Supra, note 404, p. 544.

Third, a review of the circumstances surrounding this case, suggests that the use of force was not employed as a last resort.[415] The Charter requires that use of force be resorted to, only, where all other measures have failed.[416] An opportunity existed for the United States to conduct further investigations in the matter.[417] After the September 11, 2001, terrorist attacks, Osama denied that he was responsible for the same.[418] The Taliban had offered to extradite Osama to the United States, if the United States tabled evidence to prove his involvement.[419] Unfortunately, this avenue was not explored by the United States and its allies; instead, it declared war on Afghanistan.[420]

Fourthly, the unilateral use of force is only to be employed in urgent circumstances; otherwise all matters requiring use of force should be referred to the Security Council.[421] Article 51 of the Charter provides measures in self-defence are to be undertaken "until" such a point when the Security Council steps in. The Charter only intended the unilateral use of force to be employed temporarily, pending supervening action by the Council.[422] Consequently, where danger is not imminent the matter ought to be referred to the Council for deliberation.[423] In the premises, the United States and the United Kingdom ought to have referred the matter to the Council as there was no urgency to act.

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[415] Ibid., p. 546.
[416] Supra, note 96, Articles 33, 37, 38 and 41.
[417] Supra, note 404, p. 547.
[418] Ibid.
[419] Ibid.
[420] Ibid.
[421] Ibid.
[422] Ibid.
[423] Ibid.

Fifth, a case has been made that the real motive of the United States waging war in Afghanistan was not self-defence but self-interest.[424] The United States wanted control of a pipeline transporting oil and natural gas from the Caspian Sea region to the Indian Ocean through Afghanistan and Pakistan.[425] Further, the decision to invade Afghanistan had been made long before the September 11 attacks, when the Taliban regime refused to accede to American requests to incorporate "American friendly" officials in the Taliban government.[426]

Sixth, a case has been made that the United States waged an overly destructive war.[427] The customary law principles of necessity and proportionality require that the use of force be exercised with due regard to necessity of each situation. [428] Consequently, the use of force should be limited to eradicating the threat. The mode of warfare should not cause undue suffering, especially to the civilian population, and indiscriminate destruction of property. [429] The United States forces unleashed not only unnecessary but excessive military force on the people of Afghanistan.[430] The mode of warfare

[424] See Patrick Martin, " US Planned War in Afghanistan Long Before September 11", 2001, available at, http://www.wsws.org/en/articles/2001/11/afgh-n20.html , (site accessed on 20th January, 2014); Tim Kelly, " Why Did the United States Invade Afghanistan", 2011, available at, http://fff.org/explore-freedom/article/united-states-invade-afghanistan/ , (site accessed on 20th January, 2014); David Ray Griffin, " Did 9/11 Justify the War in Afghanistan?", 25th June, 2010, available at, http://www.globalresearch.ca/did-9-11-justify-the-war-in-afghanistan/19891 (site accessed on 20th January, 2014).

[425] David Ray Griffin, "Did 9/11 Justify the War in Afghanistan?" 25th June, 2010, available at, http://www.globalresearch.ca/did-9-11-justify-the-war-in-afghanistan/19891 (site accessed on 20th January, 2014).

[426] See Patrick Martin, " US Planned War in Afghanistan Long Before September 11", 20th November, 2001, available at, http://www.wsws.org/en/articles/2001/11/afgh-n20.html , (site accessed on 20th January, 2014)

[427] Bill Roggio, "Taliban Condemn Destruction of Bases, Urge Karzai Government to Join Jihad", 27th July, 2012, available at, http://www.longwarjournal.org/threatmatrix/archives/2012/07/taliban_lament_destruction_of.php (site accessed on 20th January, 2014).

[428] See section 2.3.1.2 of this paper.

[429] Ibid.

[430] Mark W. Herold, "US Bombing and Afghan Civilian Deaths – Official Neglect of 'Unworthy' Bodies", 26(3) International Journal of Urban & Regional Research 626 (2002), p. 627.

employed by the United States and allies has been responsible for numerous Afghan civilian deaths and the indiscriminate destruction of property.[431]

The war waged in 2001, by the United States government, against the Taliban regime of Afghanistan was illegal. The war did not satisfy the requirement of Article 51 of the Charter. Use of force under Article 51 requires that force be employed to repel an attack not to punish an attacker or deter them from carrying out future attacks. The use of force by the United States in 2001 constituted an unlawful reprisal which is inconsistent with the provisions of Article 2(4) of the Charter.

4.6.2 The Role of the Security Council

Upon being informed that the United States and the United Kingdom were exercising the right to individual and collective self-defence, there was neither an affirmation nor a denial by the Council of the legality of the war. Although the Charter does not expressly provide that the Council should make a decision to that effect, it intends that use of force unilaterally employed be an interim pending the Council's intervention.[432] Upon the report being made to the Council, it should have taken over the operation and conducted it under its auspices. The Council's inaction in this incident was inconsistent with its response in previous similar matters.

[431] Ashley Jackson, "The Cost of War: Afghan Experiences of Conflict, 1978-2009", November 2009, available at, http://www.oxfam.org/sites/www.oxfam.org/files/afghanistan-the-cost-of-war.pdf (site accessed on 20th January, 2014).
[432] Supra, note 96, Article 51.

For instance, in 1985, the Council adopted Resolution 573 of 1985 against Israel.[433] The circumstances leading to the resolution were that three Israeli nationals had been killed in Cyprus by the Palestinian Liberation Organisation (PLO).[434] In retaliation, Israeli forces bombed a building in Tunisia believed to have been housing members of the PLO.[435] Tunisia protested to the Council.[436] In adopting Resolution 573, the Council condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct".[437] It further demanded that "Israel refrain from perpetrating such acts of aggression or from the threat to do so."[438] It requested "State Members of the United Nations to take measures to dissuade Israel from resorting to such acts against the sovereignty and territorial integrity of all States".[439] The turn of events in the Israeli-Tunisia incident was very similar to the 2001 American invasion of Iraq. In both cases, the measures taken by Israel and the United States forces constitute reprisals. Although Israel claimed to have been acting in self-defence, when it bombed the PLO premises in Tunisia,[440] the Security Council rejected this argument.[441]

In 1990, following the Iraq invasion of Kuwait, the Security Council categorically affirmed that Kuwait was entitled to the right to self-defence and endorsed the use of

[433] Security Council Resolution 573 of 1985, adopted at its 2615th meeting held on 4th October, 1985, 40 UN SCOR 23 (1985)
[434] Israeli Air Force, "Operation Wooden-leg", available at, http://www.iaf.org.il/4694-33087-en/IAF.aspx (site accessed on 26th September, 2013).
[435] Ibid.
[436] Letter dated 1st October, 1985 from the Permanent Representative of Tunisia to the President of the Security Council, U.N. Doc S/17509 (1985).
[437] Supra, note 433, paragraph 1.
[438] Ibid., at paragraph 2.
[439] Ibid., at paragraph 3.
[440] Supra, note 436.
[441] Supra, note 433.

force under the Chapter VII of the Charter.[442] Resolution 661 of 1990 stated that the Council,

> Mindful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security…Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter…Acting under Chapter VII of the Charter of the United Nations….Determines that Iraq so far has failed to comply with paragraph 2 of resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait….Decides, as a consequence, to take the following measures to secure compliance of Iraq with paragraph 2 of resolution 660 (1990) and to restore the authority of the legitimate Government of Kuwait.[443]

This maybe contrasted with the 2001 case where the Council said nothing. This suggests that the Council members were not convinced of the legitimacy of the war in 2001, but chose to remain quiet.

Similarly, in 1950, when North Korea invaded South Korea, the decision to employ force in self-defence was jointly made by the Council. The forces deployed to repel the attack by North Korea were under the auspices of the United Nations Security Council. Resolution 83 of 1950 provided:

> [The Council] Having determined that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace; having noted the appeal from the Republic of Korea to the United Nations for immediate and effective steps to secure peace and security. Recommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.[444]

Further, Resolution 84 of 1950 provided:

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[442] Security Council Resolution 661 of 1990, adopted at its 2933rd meeting held on 6th August, 1990, 45 UN SCOR 19 (1990).

[443] Ibid.

[444] Security Council Resolution 83 of 1950, adopted at its 474th meeting held on 27th June, 1950, 5 UN SCOR 2 (1950).

> [The Council] Having determined that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace…. Authorises the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating.[445]

In contrast, Resolution 1368 [446] adopted by the Council in 2001 following the September 11, 2001, terrorist attacks, recognised the right to individual and collective self-defence in general terms.[447] Resolutions 661 of 1990 and 83 of 1950 were very specific that Kuwait and South Korea respectively, had a right to self-defence in the circumstances.[448] Resolutions 661 and 84, specifically called for the involvement of the United Nations in the war.[449] Resolution 1378 of 2001 called for the involvement of the Council in the establishment of a new regime in Afghanistan after the Taliban had been ousted. [450]

It is not difficult to see why the Council remained relatively inactive in this matter. Obviously, a resolution condemning or challenging the validity of the war would never have seen the light of day in the Security Council. The United States and the United Kingdom would automatically cast a negative vote on a resolution censuring their conduct. The impotence of the Council, when dealing with a matter touching on the national interests of one of its permanent members has never been so apparent.

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[445] Security Council Resolution 84 of 1950, adopted at its 476th meeting held on 7th July, 1950, 5 UN SCOR 5 (1950).

[446] Security Council Resolution 1368 of 2001, adopted at its 4370th meeting held on 12th September, 2001, 56th session, Security Council Distr. General 01-53382 (E), U.N. Doc. S/INF/57 (2001).
[447] Ibid,, preamble.
[448] Supra, notes 442 and 444.
[449] Supra, notes 442 and 445.
[450] Supra, note 395.

4.7 The Kenyan Incursion into Somalia in 2011

On 16th October 2011 the Kenyan Defence Forces (KDF) crossed the Kenyan border into Somalia in pursuit of Islamic militants believed to be members of a notorious terrorist group known as *Al-Shabaab*.[451] The immediate precursor to this turn of events was a number of incursions into Kenya from Somalia resulting in a spate of kidnappings of foreigners within the Kenyan territory.[452] The said kidnappings were believed to have been carried out by the Al-Shabaab who operated from the territory of Somalia.[453] In invoking the right of self defence under Article 51 of the Charter and launching "Operation *Linda Nchi*" the then Internal Security Minister George Saitoti stated:

> Our territorial integrity is threatened with serious security threats of terrorism, we cannot allow this to happen at all…It means we are now going to pursue the enemy, who are the Al Shabaab, to wherever they will be, even in their country…[454]
>
> Further,
>
> Kenya has been and remains an island of peace, and we shall not allow criminals from Somalia, which has been fighting for over two decades, to destabilize our peace…[455]

In similar fashion the then Kenyan Defence Minister Yusuf Mohammed Haji stated," If you are attacked by an enemy, you are allowed to pursue that enemy until where you get him…We will force them far away from our border…"[456] At the time of invoking the right to self defence Kenya indicated that it would report all the measures taken

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[451] Muhyadin Ahmed Roble, "The Third Intervention: Kenya's Incursion into Somalia goes where others have Failed", 9(39) The Terrorist Monitor, (2011), available at, http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=38581&no_cache=1#.V-JESfl96M8 (site accessed on 21st September, 2016).
[452] Ibid.
[453] Ibid.
[454] Kenya Declares War on Al-Shabaab, The Daily Nation, Saturday 15th October 2011, available at, http://www.nation.co.ke/news/Kenya-declares-war-on-Al-Shabaab/1056-1255736-9x7xlbz/index.html (site accessed on 21st September 2016).
[455] Ibid.
[456] Ibid.

pursuant to this right to the Security Council in accordance with Article 51 of the Charter.[457]

The circumstances under which the Kenyan Government invoked the right to self-defence in this case are similar to those of the United States in its invasion of Afghanistan in 2001.[458] In both cases the governments declared war against non-state militants operating within another State. However, what sets the Kenyan case apart from that of the United States, are the joint communique issued by the Kenyan Government and the Transitional Federal Government of Somalia on the matter. [459] Under the Mogadishu Joint Communiqué endorsed by the 41st Extra-Ordinary IGAD Council of Ministers [460] and the Nairobi Joint Communiqué of 31st October 2011,[461] the Kenyan and Somali Governments agreed to "jointly pursue the objective of defeating *Al Shabaab* and other militant groups to its logical conclusion".[462] It was also agreed that the *Al Shabaab* not only constituted a danger to Kenya and Somalia, but also to the rest of the world.[463] It was jointly recognised that Kenya was entitled under Article 51 of the Charter to defend herself against external aggression.[464]

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457 Ibid.
458 See the US invasion of Afghanistan discussed at pp 172 to 183 of this paper.
459 Joint Communique issued at Nairobi by the Heads of State of the Republic of Kenya, Uganda and the Transitional Federal Government of Somalia excerpt available at http://reliefweb.int/report/somalia/joint-communique-issued-nairobi-following-meeting-heads-state-kenya-uganda-and-tfg (site accessed on 21st September 2016).
460 Joint Communique Issued at the Conclusion of a Meeting between the Government of Kenya and the Transitional Federal Government of Somalia on 18th October 2011 at Mogadishu excerpt available at, http://graphics8.nytimes.com/packages/pdf/world/joint-communique-kenya-somalia.pdf (site accessed on 21st September, 2016).
461 Joint Communique Issued at the Conclusion of a Meeting between the Government of Kenya, the government of Uganda and the Transitional Federal Government of Somalia on 31st October 2011 at Nairobi, available at: https://kenyastockholm.com/2011/10/31/joint-kenya-somali-communique-on-war-in-somalia/ (site accessed on 21st September 2016).
462 Abdikafar Hosh, "Somalia-Kenya Agree on Fight against Militants", available at, http://www.somaliareport.com/index.php/subcategory/1/Home_LAND/Government/102011///1 (site accessed on 21st September 2016).
463Ibid.
464 Ibid.

4.7.1 Legal issues arising from the 2011 Incursion of Kenya into Somalia

The claim by Kenya to have been acting in self-defence in its incursion into Somalia has come under criticism on a number of points.[465] First, the Kenyan incursion into Somalia further fuelled the debate as to whether attacks from non-state actors constitute an armed attack within the provisions of Article 51 of the Charter. There are those who argue that in certain instances an attack by a non-state actor would suffice to engage the right to self-defence.[466] Birkett suggests that the support Kenya received from the international community suggests acceptance by States that non-state actors, such as the *Al Shabaab*, are capable of carrying out an armed attack.[467] He states:

> Kenya has received support from the international community similar to that received by the USA with regard to Operation Enduring Freedom. For example, the Kenyan invasion gained support of the African Union, Israel, the USA and France. This support merely serves to demonstrate that there exists *opinion juris* in favour of Kenya's inherent right to self-defence as a response to *Al Shabaab* in the present case…Operation Linda Nchi is yet another example of recent state practice favouring the use of armed force in self-defence against non-state actors with or without the consent of the State from which they operate…[468]

Article 51 does not expressly state that the perpetrator of an armed attack must be a State. However, it is argued here that an armed attack can only be mounted by a State actor. For one, Article 51 is an exception to the general rule found in Article 2(4) of the Charter. Article 2(4) prohibits "the threat or use of force against the territorial integrity and political independence of another State".[469] Logically, therefore, in the same way

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[465] Vidan Hadzi-Vidanovic "Kenya Invades Somalia Invoking the Right of Self-Defence", Blog of the European Journal of International Law, (October 2011), available at, http://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence/ (site accessed on 21st September 2016).
[466] Daley J. Birkett, "The Legality of the 2011 Kenyan Invasion of Somalia and its Implications for the Jus Ad Bellum" 1093 (10), JCSL, 1 (2013).
[467] Ibid, p.13
[468] Ibid,
[469] Charter of the United Nations 1945, 1 UNTS XVI.

that the general rule applies to conduct between States, the defence can only be invoked by one State against another.[470]

Further, the United Nations General defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State….[471] This definition may be extrapolated to support the argument that in the same manner that acts of aggression can only occur between States, armed attacks can only take place between State actors.

A review of the jurisprudence of the ICJ similarly lends credence to the argument that an armed attack can only be attributed to a State. In the *Palestinian wall case* [472] the Court, (in response to a claim by Israel that she had built a wall in the occupied territory of Palestine in self defence), stated that, "Article 51 of the Charter, the Court notes, recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." [473] In the *Democratic Republic of the Congo v Uganda case* [474] the Ugandan military had launched attacks against Ugandan rebels launching attacks against Uganda but operating within the territory of the Democratic Republic of the Congo. In rejecting the claim by Uganda to have been acting in self defence the Court stated that:

> It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that

[470] Kimberly N. Trapp, "Can Non-State Actors Mount an Armed Attack?" Oxford Handbook on the Use of Force, (M. Weller ed., Oxford University Press, London, 2014), available at, file:///C:/Users/USER/Downloads/SSRN-id2407477.pdf , (site accessed on 11th October 2016).
[471] Definition of Aggression, 1 GA Res 3314 (XXIX), adopted by the General Assembly on 4th December 1974, UN GAOR 29th session, U.N. Doc A/9631 (1974).
[472] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, (2004), I.C.J. 136.
[473] Ibid, paragraph 138.
[474] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, I.C.J. Reports 2005, p. 168.

> there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. [475]

From the foregoing, it is evident that an armed attack in international law can only be effected by a state actor. It is therefore, urged that the claim by Kenya to have been acting in self-defence must be rejected as the attacks by Al Shabaab cannot be attributed to the Transitional Federal Government of Somalia[476].

Second, debate has also arisen as to whether the spate of kidnappings immediately preceding the incursion were sufficient to attain the threshold of an armed attack.[477] In launching the operation against Al Shabaab, Kenya cited nine incidents where militants of Somali origin were responsible for sporadic violence within the Kenyan territory.[478] It has been argued that collectively these incidents could not possibly constitute an armed attack because by their “scale and effects they were too small and disparate”.[479] The International Court of Justice in the Nicaragua *Case* stated:

> Whether self-defence be individual or collective, it can only be exercised in response to an "armed attack". In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces. The Court quotes the definition of aggression annexed to General Assembly resolution 3314 (XXIX) as expressing customary law in this respect.[480]

[475] Ibid, paragraphs 146-147.
[476] Ibid.
[477] Volterra Fietta, “Kenya Invades Somalia Relying on the Right of Self-Defence”, (December 2011), available at: http://www.volterrafietta.com/kenya-invades-somalia-relying-on-the-right-to-self-defence/ (site accessed on 21st September 2016).
[478]Ibid.
[479] Ibid.
[480]Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America, (Merits), Judgement, I.C.J Report, 1986, p.14.

Consequently, for an attack to qualify as an "armed attack' the scale and effect of the attack must satisfy a certain threshold. Consequently, "pinprick" attacks which do not result in significant loss of life or property do not qualify as "armed attacks".[481]

Hadzi-Vidanovic states:

> In its argument, however, the Kenyan government invoked nine separate incidents from 2009 to 2011. It would seem that by invoking these incidents the Kenyan Government is relying on the doctrine, most vocally supported by Professor Dinstein (War, Aggression and Self-Defence, at 231), according to which a number of successive pin-prick attacks of lower intensity that show a distinctive pattern can constitute an armed attack when taken as a whole. But even if taken together, and if one could identify a distinctive pattern (bearing in mind that Al-Shabaab denied responsibility for the most recent abductions), it is doubtful if these incidents reached the required gravity threshold. There was no significant (if at all) destruction of property and no significant loss of life…[482]

Third, in declaring war on Al Shabaab, Kenya also invoked the doctrine of hot pursuit.[483] Hot pursuit (also known as fresh or immediate pursuit) refers to the urgent and direct pursuit of a criminal suspect by law enforcement officers, or by belligerents under international rules of engagement for military forces.[484] Such a situation grants the officers in command powers they otherwise would not have.[485] From a general perspective this doctrine is controversial and has been criticized for it invariably leads to a violation of the territorial integrity of another State.[486] Its application on land has been altogether rejected.[487]

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available at http://www.refworld.org/docid/4023a44d2.html (accessed 14 September 2013), at paragraph 191.

[481] Supra, note 465.

[482] Ibid.

[483] Supra, note 454.

[484] Tejaswinee Roychowdhury,"The Doctrine of 'Hot Pursuit' in International Law: Its Legality in the 21st Century", (March 2016), available at: http://www.letscomply.com/knowledge-hub/2016/03/doctrine-hot-pursuit-international-law-legality-application-21st-century/ (site accessed on 21st September 2016).

[485] Ibid.

[486] Ibid.

[487] Ibid.

4.7.2. The Role of the Security Council

In a letter dated 17th October 2011, Kenya informed the Security Council of the military operation citing "unprecedented escalation of threats to the country's national security".[488] In said letter Kenya notified the Council that it had gone into Somalia with the consent of the Transitional Government of Somalia.[489] Noteworthy, is that Kenya did not specifically state to the Council that the military action was taken under Article 51 of the Charter. It stated:

> I write to inform you that Kenya, with the concurrence of the Transitional Federal Government of Somalia, has been compelled to take robust, targeted measures to protect and preserve the integrity of Kenya and the efficacy of the national economy and to secure peace and security in the face of the Al-Shabaab terrorist militia attacks emanating from Somalia… In the light of the foregoing, Kenya, in direct consultations and liaison with the Transitional Federal Government in Mogadishu, has, after the latest direct attacks on Kenyan territory and the accompanying loss of life and kidnappings of Kenyans and foreign nationals by the Al-Shabaab terrorists, decided to undertake remedial and pre-emptive action…[490]

The Kenyan incursion into Somalia remains largely non-emotive due to the fact that Kenya went in with the consent of the Transitional Government of Somalia. The operation initially received a boost from the African Union and later an endorsement from the Council in its adoption of Resolution 2036 (2012) requesting the African Union to increase AMISOM's troop levels in Somalia.[491] The fact that the Kenya Defence Forces went into Somalia with the consent of the Transitional Government of Somalia and fought alongside the Somali Forces means that Kenya did not violate the

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[488] Letter dated 17th October 2011 from the Permanent Representative of Kenya to the President of the United Nations security Council, UN Doc S/2011/646, available at, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%202011%20646.pdf (site accessed on 11th October 2016).

[489] Ibid.

[490] Ibid.

[491] UN Doc S/2012/176.

territorial integrity of Somalia. Consequently, Kenya did not need to invoke the right to self defence nor the doctrine of hot pursuit in the first place.

4.8 Conclusion

Upon evaluating state practice, and state attitude towards the unilateral use of force, in light of the provisions of Article 51 of the Charter, the following trends are identified. First, state practice reveals that States have adopted a liberal interpretation of Article 51 of the Charter. The said Article expressly provides that the right to self-defence will only engage in the event of an armed attack. However, there are instances where States have invoked the right to self-defence under circumstances not amounting to an armed attack. In 1967, Israel launched anticipatory offensive attacks against her Arab neighbours contending that the neighbours were preparing an attack against her. Israel argued that she was entitled to the right of self defence under the circumstances even though she was the first to strike.

In 1976, Israel invaded Uganda with a view to rescuing its nationals, who were being held hostage by Palestinian terrorists. In 2008, Russia invaded Georgia with a view to protecting its nationals residing within the South Ossetia territory, from an onslaught of Georgian forces. In both instances, Israel and Russia argued that a threat to their nationals constituted a threat to their respective territories. Further, the nationals of a particular State are an extension of its territory, and it was incumbent on a State to protect its nationals wherever situated. Consequently, in their view, the right to self-defence under Article 51 of the Charter permitted them to protect and rescue their nationals abroad.

In 2001 the United States invaded Afghanistan invoking its right to self-defence following the September 11, 2001, terrorist attacks. The United States claimed its actions lay within the provisions of Article 51, even though at the time of the invasion the United States was not under attack. In 2003, the United States similarly invaded Iraq claiming that Iraq represented a future threat to the American people. In this particular instance, the United States did not invoke the right to self-defence. Nonetheless, this case illustrates the increasing liberal attitude towards the unilateral use of force in international law. The 2001 and 2003 invasions by the United States, demonstrate the new and emergent doctrine of preventive wars. These are wars waged in complete absence of an imminent threat, and are waged with a view to avoiding a future attacks. This doctrine contravenes the provisions of Articles 2(4) and 51 of the Charter. When read together, the two Articles limit the use of unilateral force in international law, in response to an armed attack. The trend started by the United States is a dangerous precedent, and seriously undermines the need to restrict the unilateral use of force.

Second, state practice reveals that States are now facing new emergent threats. The traditional "enemy" was a fellow State. However, with the emergence of terrorism, it is now evident that non-state actors equally pose a grave threat to the modern State. The September 11, 2001 terrorist attacks have shown that non-state actors are capable of launching strikes with overwhelming ramifications. The 1976 Israeli raid of Entebbe, illustrates that the interests of States are not limited to their borders. The contemporary State finds that its interests do not always lie within its territory, but will also be situated within the territory of another State.

The mode of warfare has changed from conventional warfare to unconventional warfare. Traditionally, war has been conducted by using military weapons and battlefield in open confrontation, the general purpose of the warfare being to weaken or destroy the opponent's military force, thereby negating its ability to engage in conventional warfare. Modern warfare may entail the use or threat of use of biological toxins or infectious agents with intent to kill or incapacitate humans, animals or plants, as an act of war. They are employed in various ways to gain a strategic or tactical advantage over an adversary, either by threats or by actual deployments. In 2003, the United States invaded Iraq, because it feared that Iraq may employ chemical and biological warfare against the American people and it could possibly not wait for the actual attack to occur.

Third, state practice has also revealed that some wars are politically motivated, especially those waged by powerful States. The 2001 invasion of Afghanistan and 2003 invasion of Iraq, remain classic examples of wars waged by the mighty, because they are mighty. In both instances, there was no legal basis for carrying out the invasions. Further, the United States expressly stated that invasions were intended to procure regime changes in the two States. The Taliban regime in Afghanistan and the government of Saddam Hussein in Iraq were not sympathetic to American interests, and it was in the interest of the United States to procure a regime change. Consequently, it cannot be ruled out that the basis for these wars was political.

The 2008 invasion of Georgia by Russia is another example of a war waged by a powerful State to intimidate a less powerful State. In this case, Russia practically “stage-managed” the 2008 invasion of Georgia. It granted Russian citizenship to

Georgian nationals, thereby, creating a Russian population within the break-away territory of South Ossetia in Georgia. Historically, Russia was vexed by Georgia's decision to break away from the Soviet Union. It cannot be ruled out that Russia's motive for invading Georgia was to intimidation. Further, Russia's conduct during and after the war, indicates that it intended to procure the breakaway of South Ossetia from Georgia and South Ossetia's subsequent unification to Russia.

Fourth, there is a recurrent theme of the excessive use of force. Even where the use of force was legitimate, there is tendency by States to employ a force that was larger than necessary given the circumstances. For instance, though Israel's threat from the Arab neighbours appears to have been legitimate, Israel, nevertheless, went on to occupy and, later, annex territory in contravention of international law. In 2008, Russia invaded Georgia with a view to protecting its nationals, but went on to invade Georgia's territory destroying military bases and infrastructure in the process. Similarly, the United States has been accused of causing extensive damage to Afghanistan and Iraqi infrastructure following its invasions in 2001 and 2003.

Finally, with regard to the role of the Security Council in regulating the right to self-defence, it is concluded that, its overall performance has been unsatisfactory. In 1967 it failed to prevent the war between Israel and the neighbouring Arab States. Before, the war broke out; it had the opportunity to pass a resolution that would avert either party from taking military action against the other. However, due to competing divisions within the Council, the resolution was not passed. The following day, the six day war of 1967 started.

In 2008, the Security Council failed to resolve the Russia-Georgian conflict. Upon the Russian invasion of Georgia, Georgia brought a complaint to the Security Council. It sought, among other reliefs, a resolution requiring Russian forces to evacuate from the Georgian territory of South Ossetia. However, the resolution was defeated by Russia and its supporters. A Russian sponsored resolution seeking an arms embargo over Georgia was similarly blocked by the United States and other supporters of Georgia. Following this war, the Council failed to resolve the conflict as it could not find a middle ground favourable to both sides.

The Council has also been unable to censure States for the unlawful use of force. In 1967, when after the Council passed a resolution for a cease-fire, Israel defied the direction of the Council and continued to launch attacks against the other side. Israel only bowed after the Council threatened to impose economic sanctions. Attempts to censure Israel for its conduct were swiftly blocked by the United States. Similarly, in 1976, when Israel raided Entebbe Airport in Uganda, it was evident that Israel had acted contrary to international law. However, attempts by the Council to censure Israel were thwarted by United States amongst others. Attempts to censure Uganda for co-operating with terrorists were equally thwarted by Russia amongst others.

It has also been demonstrated that the Council is even more impotent where the villain is a permanent member of the Council. For instance in 2001, when the United States invaded Afghanistan, the Council remained silent. It did not even offer to intervene and complete the operation as it had done in the cases of South Korea in 1950 and Kuwait in 1990. Needless to say, that the war was illegal as it constituted a reprisal. It is noteworthy, that in 1985 the Council castigated Israel for engaging in similar conduct

to that of the United States in 2001. In 2003, the Council remained silent even though other members of the Council, namely Russia and France had expressly disapproved of the war. Nevertheless, the actions of the United States have never been challenged within the Council. The Council simply turned its head and looked away.

This Chapter ends with the identification of trends in state practice, with regard to the use of force in international law, pursuant to the right to self-defence. The first part of the next Chapter draws conclusions through the synthesis of the findings of this study in light of the Statement of the Problem, the Hypotheses and the Research Questions. The second part of the next discusses the recommendations on the way forward

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The United Nations Charter limits the exercise of the right to self-defence only in response to an armed attack.[1078] It is also the only instance when a State or group of States are permitted by the Charter to employ the use of force unilaterally; all other uses of force in international law are generally prohibited, and are to be exercised as a last resort with the authorisation and supervision of the Security Council.[1079] Even, then, the right is to be exercised in the interim pending intervention and further direction from the Council.[1080] The Charter is silent on whether an armed attack can be launched by a non-state actor.[1081] It is also silent on whether a threat to the nationals of a State may constitute an attack within the meaning of Article 51.[1082] However, it is presupposed that strikes by non-state actors do not constitute "armed attacks" within the meaning of Article 51.[1083] It is also presupposed that the protection of nationals abroad does not constitute the right to self-defence within the meaning of Article 51 of the Charter.[1084]

The research set out to explore the necessity of reviewing the provisions of Article 51 of the Charter in view of current state practice. The Study was founded on three basic hypotheses, namely, (1) modern developments in warfare and emergence of new threats to

[1078] Charter of the United Nations 1945, 1 UNTS XVI.
[1079] See Ibid., Articles 2(4), 41 and 42.
[1080] Ibid., Article 51.
[1081] Ibid.
[1082] Ibid.
[1083] See section 2.3.2.3.2 of this paper.
[1084] See sections 2.4 and 2.5 of this paper.

States have rendered Article 51 of the United Nations Charter obsolete, (2) the unilateral use of force has been abused by States under the guise of a "broad interpretation" of the right to self-defence, and (3) the United Nations Security Council has failed in its mandate to effectively control and regulate the right to self-defence in international law. An examination of state practice attests to the correctness of all three hypotheses.[1085] First, States are now faced with threats that were not contemplated by Article 51 of the Charter. In the 1967 war, Israel launched anticipatory offensive attacks against her Arab neighbours contending that the neighbours were preparing an attack against Israel.[1086] In this regard Israel employed anticipatory self-defence which is not permitted under the Charter.[1087] The argument advanced by the proponents of anticipatory self-defence is that allowing the enemy to strike first might leave the State so weak that it lacks the capacity to fight back.[1088] Consequently, such a State would be destroyed and the right to self-defence would be nugatory.[1089] The emergence of terrorism reveals that non-state actors pose an equally grave threat to the modern State, as that posed by State actors.[1090] The September 11, 2001, terrorist attacks have shown that non-state actors are capable of launching strikes with overwhelming ramifications.[1091]

[1085] See Chapter Four of this paper.
[1086] Speech of the Israeli Ambassador to the United Nations Abba Eban, United Nations Security Council, Security Council in its 1348th meeting, 6th June, 1967, S/Agenda/1348, paragraph 155, available at, http://unispal.un.org/UNISPAL.NSF/0/F0E5CF015592D4D10525672700590136 (site accessed on 23rd September, 2013).
[1087] Supra, note 1.
[1088] Leo Van Den Hole, "Anticipatory Self-Defence under International Law", 19(1) American University International Law Review 69 (2003), p. 89.
[1089] Ibid.
[1090] See Niaz A Shah, "Self-Defence, Anticipatory Self-Defence and Pre-emption: International Law's Response to Terrorism", 12(1) Journal of Conflict and Security Law 95 (2007).
[1091] Ibid.

The 1976 Israeli raid of Entebbe illustrates that the interests of States are not limited to their territorial borders.[1092] The contemporary State finds that its interests do not always lie within its territory, but will sometimes be situated within the territorial jurisdiction of another State.[1093] This situation presents two sets of conflicting interests; the interest of one State to secure its borders and its territorial integrity, against the interest of another State to protect its nationals situated within the territory of another State.[1094] Further, the mode of warfare has changed from conventional warfare to unconventional warfare.[1095] Traditionally, war was conducted by use of military weapons and open battle field confrontation.[1096] The general purpose of warfare was to weaken or destroy the opponent's military force, thereby negating its ability to engage in combat.[1097] Modern warfare, however, may entail the use or threat of use of biological toxins or infectious agents with intent to kill or incapacitate humans, animals or plants, as an act of war.[1098] It may also entail the use or threat of use of nuclear weapons whose impact is widespread and non-discriminatory.[1099] In 2003, the United States invaded Iraq because it feared that Iraq may employ weapons of mass destruction against the American people.[1100]

[1092] See section 4.4 of this paper.
[1093] Joseph S. Nye, "Redefining the National Interest", (1999) available at, http://www.foreignaffairs.com/articles/55209/joseph-s-nye-jr/redefining-the-national-interest (site accessed on 30th January, 2014).
[1094] Tom Ruys, "Protection of Nationals' Doctrine Revisited", 13 Journal of Conflict and Security Law 233 (2008).
[1095] Nagao Yuichiro, "Unconventional Warfare: A Historical Perspective", (2001), available at, http://www.nids.go.jp/english/event/symposium/pdf/2001/sympo_e2001_6.pdf (site accessed on 30th January, 2014).
[1096] Ibid.
[1097] Ibid.
[1098] Ibid.
[1099] Ibid.
[1100] U.S. Secretary of State Colin Powell to the United Nations Security Council on 5 February 2003 reprinted in: Wikipedia, 2003 invasion of Iraq, http://en.wikipedia.org/wiki/2003_invasion_of_Iraq, (site accessed on 4th June, 2013).

Second, the unilateral use of force has been abused by States under the guise of a broad interpretation of the right to self-defence. In the 2001 invasion of Afghanistan, although the United States claimed it was acting in self-defence, an analysis of the facts revealed that this was a case of a reprisal.[1101] In the 2003 invasion of Iraq, the United States did not justify the use of force under Article 51, yet the unilateral use of force in international law is only permitted under Article 51.[1102] In both instances, there was no legal basis for carrying out the invasions. The 2001 invasion constitutes a subversion of the meaning of Article 51 of the Charter, and the 2003 invasion constitutes an outright disregard for the provisions of the said Article. In both instances the United States expressly stated that invasions were intended to procure regime changes in Afghanistan and Iraq.[1103] At the respective times of the invasions, it was common knowledge that the Taliban regime in Afghanistan and the government of Saddam Hussein in Iraq had not been sympathetic to American interests in the two countries.[1104] Consequently, it cannot be ruled out that these invasions were political wars aimed at procuring a regime change in favour of the United States in the two States.

[1101] See section 4.6.1 of this paper.
[1102] See section 4.3.1 of this paper.
[1103] See George W Bush Address to the Nation, Washington DC, 20th September, 2001, available at, http://www.presidentialrhetoric.com/speeches/09.20.01.html (site accessed on 31st January, 2014) and George W Bush Address to Saddam Hussein, Washington DC, 17th March, 2003, available at http://www.presidentialrhetoric.com/speeches/03.17.03.html (site accessed on 31st January, 2014).
[1104] See David Ray Griffin, "Did 9/11Justiry War in Afghanistan?", Global Research Centre, (2010), available at http://www.globalresearch.ca/did-9-11-justify-the-war-in-afghanistan/19891 (site accessed on 31st January, 2014) and also see Jim Lobe, "Why Did the US Invade Iraq?', (2008), available at http://www.antiwar.com/lobe/?articleid=12552 (site accessed on 31st January, 2014).

The 2008 invasion of Georgia by Russia is the case of a war waged by a powerful State to intimidate a less powerful State. In this case, Russia practically "stage-managed" the 2008 invasion of Georgia.[1105] It granted Russian citizenship to Georgian nationals living in the South Ossetia territory of Georgia, thereby, creating a Russian population within Georgia.[1106] Russia's conduct during and after the war, indicated that it intended to procure the breakaway of South Ossetia from Georgia, and the subsequent unification of South Ossetia to North Ossetia and ultimately to Russia.[1107] Prior to the dissolution of the Soviet Union, both Georgia and Russia were constituent republics of the Union.[1108] At the time, North Ossetia was the North Ossetian Autonomous Soviet Socialist Republic, part of the Russian Soviet Federative Socialist Republic (R.S.F.S.R.), while South Ossetia was the South Ossetian Autonomous Oblast, part of the Georgian Soviet Socialist Republic.[1109] After the 2008 war, Russia extended recognition to South Ossetia and urged it to be united with North Ossetia, yet North Ossetia was part of Russia.[1110] Consequently, it is evident from the foregoing that Russia had extended Russian citizenship to the nationals of Georgia with the intention of destabilizing and interfering in the internal affairs of Georgia.

[1105] Kristopher Natoli, "Weaponising Nationality: An Analysis of Russia's Passport Policy in Georgia", 28 Boston University International Law Journal 389 (2010), p. 409.
[1106] Ibid.
[1107] Giorgi Lomsadze, "Georgia: Putin Tweaks Tbilisi on Ossetian Annexation", (August 2011), available at, http://www.eurasianet.org/node/64017 (site accessed on 3rd,February, 2014).
[1108] Chris Roth, "Is Ossetian Reunification Just Russian Irredentism by another Name?" (January 2014), available at, http://springtimeofnations.blogspot.com/2014/01/is-ossetian-reunification-russian.html (site accessed on 3rd February, 2014).
[1109] Ibid.
[1110] Salome Zurabishvili,"Moscow'sPossible Motive in Recognising Abkhazia and South Ossetia", (September, 2008), available at, http://www.rferl.org/content/Moscows_Possible_Motives_In_Recognizing_Abkhazia_South_Ossetia/1291181.html (site accessed on 3rd February, 2014).

Third, the United Nations Security Council has failed in its mandate to effectively control and regulate the right to self-defence in international law. In 1967 it failed to prevent the war between Israel and the neighbouring Arab States. Before the war broke out, it had the opportunity to adopt a resolution that would avert either party from taking military action against the other.[1111] However, due to competing camps within the Council, the resolution was not passed.[1112] The following day, the six day war of 1967 started.[1113] The Security Council also failed to determine the Russia-Georgian conflict in 2008.[1114] Upon the Russian invasion of Georgia in 2008, Georgia brought a complaint to the Security Council.[1115] However, a draft resolution requiring Russian forces to evacuate the Georgian territory of South Ossetia was defeated by Russia.[1116] A Russian sponsored resolution seeking an arms embargo over Georgia was similarly blocked by the United States and other States supporting Georgia.[1117] Although the war came to an end, the dispute between Russia and Georgia remains to be resolved.[1118]

[1111] See address of Israeli representative to the United Nations , Alba Eban, before the United Nations Security Council, Security Council at its 1526th meeting, on 19th June, 1967, S/PV. 1526, paragraphs 138-139, available at, http://unispal.un.org/UNISPAL.NSF/0/729809A9BA3345EB852573400054118A (site accessed on 24th September, 2013).

[1112] Ibid.

[1113] Ibid.

[1114] Roman Muzalevsky, "The Russian-Georgian War: Implications for the UN and Collective Security, 4 Uluslararasi Stratejik Avastirmalar Kurumu, 29 (2009), p. 33.

[1115] S/2008/536, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S2008%20536.pdf (site accessed on 3rd September, 2013).

[1116] Adrian Blomfield, "Russia Rejects UN Call to Pull out of Georgia", The Telegraph,, 20th August, 2008 available at, http://www.cbc.ca/news/world/story/2008/08/20/russia-georgia.html (site accessed on 3rd September , 2013).

[1117] S/2008/570 , Russian Federation Draft Resolution, available at, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20Blue%20draft%20resolution.pdf (site accessed on 3rd September, 2013).

[1118] Jamestown Foundation, Russia Gradually Expands Its Occupation Zone in Georgia, 23 September 2013, Eurasia Daily Monitor Volume: 10 Issue: 168, available at, http://www.refworld.org/docid/5243f3a44.html (accessed 3 February 2014)

The Council has also been unable to censure States for the unlawful use of force. During the 1967 war, the Council passed a resolution for a cease-fire on 6th June, 1967.[1119] However, Israel, in defiance of the Resolution, continued to launch attacks against the other side.[1120] Israel only bowed from the fight after the Council threatened to impose economic sanctions.[1121] After the war, attempts by the Council to censure Israel for its conduct were swiftly blocked by the United States.[1122] In 1976, Israel raided Entebbe Airport in Uganda. It was evident from the facts that Israel had acted in contravention of international law.[1123] However, attempts by the Council to censure Israel were thwarted by United States and other States supporting Israel.[1124] Similarly, attempts to censure Uganda for co-operating with terrorists were equally thwarted by Russia alongside other States supporting Uganda.[1125] In the end, no resolution was passed with regard to this incident. The Security Council is most impotent when the "villain" State is a permanent member of the Council. In 2001, when the United States invaded Afghanistan, the Council remained silent.[1126] It did not offer to intervene and complete the operation as it had done in the past in the cases

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[1119]United Nations Security Council, Security Council Resolution 233 of 1967, S/RES 233 (1967), at its 1348th meeting, 6th June, 1967, available at, http://unispal.un.org/UNISPAL.NSF/0/CEE5B4E9F80ED573852560C3004B16FB (site accessed on 24th September, 2013).

[1120] United Nations Security Council, Security Council at its 1526th meeting, on 19th June, 1967, S/PV. 1526, paragraph 30, available at, http://unispal.un.org/UNISPAL.NSF/0/729809A9BA3345EB852573400054118A (site accessed on 24th September, 2013).

[1121] Ibid, paragraph 34.

[1122] Eli E. Hertz," Myths and Facts: United Nations Security Council Resolution 242", available at, http://www.mythsandfacts.org/conflict/10/resolution-242.pdf (site accessed on 8th May, 2013).

[1123] See section 4.4.1 of this paper.

[1124] U.N. Doc. S/PV 1941 Paras. 74-77, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/88/PDF/NL760088.pdf?OpenElement , (site accessed on 5th June, 2013).

[1125] U.N. Doc. S/PV 1939 paras. 13-14, available at, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/600/79/PDF/NL760079.pdf?OpenElement , (site accessed on 5th June, 2013).

[1126] Ben Smith and Arabella Thorp, "The Legal Basis for the Invasion of Afghanistan", (2010), available at, www.parliament.uk/briefing-papers/sn05340.pd (site accessed on 26th September, 2013).

of South Korea in 1950[1127] and Kuwait in 1990.[1128] Needless to say, the war was illegal as it constituted a reprisal.[1129] In 1985, the Council castigated Israel for engaging in similar conduct to that of the United States in 2001 invasion of Afghanistan.[1130] In 2003, the Council deliberated on the legality of the war in Iraq, but no State initiated a motion to censure the United States for it conduct.[1131]

At the end of the study, the choice of the problem engendering the research is vindicated by the evidence. The Charter intended that the Council would regulate all the machinery of force in international law, and the unilateral use of force would only be employed in self-defence. What, at a glance, appears to be an intelligible division of authority and power has been assaulted to obscurity by state practice.[1132] The inability of the Security Council to make critical decisions with regard to the regulation of the right to self-defence in international law, as well as the proliferation of emergent threats faced by States, has seriously undermined the collective security system contemplated by the Charter.[1133] Consequently, there appears to be a concerted move by States to stretch the limits of Article 51 of the Charter and, thus, the unilateral use of force in international law.[1134] The trend set by some of the world's powerful nations creates dangerous precedents and seriously

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[1127] Security Council Resolution 83 of 1950, adopted at its 474th meeting held on 27th June, 1950, 5 UN SCOR 2 (1950).
[1128] Security Council Resolution 661 of 1990, adopted at its 2933rd meeting held on 6th August, 1990, 45 UN SCOR 19 (1990).
[1129] See section 4.6.1 of this paper.
[1130] Security Council Resolution 573 of 1985, adopted at its 2615th meeting held on 4th October, 1985, 40 UN SCOR 23 (1985).
[1131] United Nations Security Council, Security Council at its 4726th Meeting held on 26th March, 2003, SC/7705, available at, http://www.un.org/News/Press/docs/2003/sc7705.doc.htm (site accessed on 3rd February, 2014).
[1132] See Chapter Four of this paper.
[1133] See Chapter Three of this paper.
[1134] Supra, note 55.

undermines the objective of the Charter to restrict the unilateral use of force in international law.[1135] The restrictions on the unilateral use of force are critical to international order, and if their violation is permitted to continue without admonishing offending States, then the general prohibition against the use of force will be rendered nugatory.

The research sought to answer the following questions, namely, (1) has state practice and modern development in warfare necessitated the move away from article 51 of the Charter of the United Nations? (2) Is it time for member States of the United Nations to revisit the provisions of Article 51 of the Charter? (3) Has the United Nations Security Council failed to effectively control and regulate the right to self-defence in international law? All three questions are answered in the affirmative. In conclusion, it is noted that, it is no longer feasible to proceed on the basis of Article 51 of the Charter as was adopted in 1945. The impact of emerging threats, such as, attacks by non-state actors[1136] and the dawn of biological and chemical warfare[1137] can no longer be discounted. Further, state practice reveals that States are nevertheless, resolved to responding to emergent threats even where such response amounts to a breach of Charter provisions.[1138] Most of the emergent threats would have in an ideal situation been addressed by the Security Council.[1139] The Council is equipped under the Charter to address all situations falling outside of Article 51 and

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[1135] See the USA invasion of Afghanistan in 2001 (the Section 4.6 of this paper), the USA invasion of Iraq in 2003 (section 4.3 of this paper), and the Russia invasion of Georgia in 2008 (section 4.5 of this paper).
[1136] See Section 4.6 of this paper.
[1137] Supra, note 18.
[1138] See section 4.2, 4.4 and 4.6 of this paper.
[1139] United Nations Reports, "A More Secure World: Our Shared Responsibility", Report of the Secretary-General's High Panel-Level on Threats Challenges and Change, (2004), p. 65, available at, http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (site accessed on 3rd February, 2014).

requiring the use of force.[1140] However, the Council has not effectively discharged its mandate in controlling the right to self-defence in international law.[1141] The Council has failed to intervene or make timely decisions when the situation demanded.[1142] The limitations on the effectiveness of the Council stem from lack of adequate resources to lack of political will in the five permanent members to implement key decisions.[1143] The case for reformation of the Security Council, however, is beyond the scope of this paper. Failing to address the new threats, or the illegal state practice, or throwing back the problem at the Security Council, is tantamount to "burying ones head in the sand" like the proverbial ostrich. In view of the statement of the problem and the findings of this research, there is need to revisit the provisions of Article 51 of the Charter. The recommendations on the way forward are made in the next section.

5.2. Recommendations

In view of the conclusion above, the following recommendations are made. First, there is need to recognise that non-state actors are capable of carrying out attacks with devastating effects. The Charter should affirmatively recognise that an 'armed attack" includes attacks from non-state actors.

[1140] Ibid.
[1141] See section 3.4 of this paper.
[1142] Ibid.
[1143] Supra, note 62, p.79.

Second, the Charter should spell out the terms of engagement between a target State (the State that is apprehensive of being attacked) and the host State (the State within whose territory the non-state actors or terrorists reside). It is posited here that the point of reference in determining the terms of engagement between the host State and the target State is the complicity of the host State.[1144] Brady identifies three categories of host States, that is, the unwilling host, the ambivalent host and the accomplice host.[1145] The unwilling host is actively involved in the pursuit and arrest of the terrorists. Consequently, intervention within such a State should be subject to the consent of the host State. Where a host State is capable of effectively apprehending and prosecuting terrorists, it should be left to discharge its sovereign duty.[1146] However, in situations where the host State is incapable of effectively expelling the terrorists, then the target State ought to be permitted by the Charter to intervene and eradicate the threat posed to its citizens, under its right to self-defence.[1147]

With regard to the ambivalent State, the target State should follow and exhaust diplomatic channels aimed at propelling the host State to action. However, if the State is unable to deal with the threat or refuses to deal with the threat, then the target State should be permitted to intervene and pursue the terrorists within the host State with a view to eliminating the

[1144] Rene Vark, "State Responsibility for Private Armed Groups in the Context of Terrorism", XI Juridica International, (2006), available at http://www.juridicainternational.eu/?id=12655 (site accessed on 30th September, 2013).
[1145] Jacob Brady, "How the Presence of Terror Groups Affects the Ethics of International Relations and Interventions", (2005), available at http://isme.tamu.edu/JSCOPE05/Brady05.html (site accessed on 30th September, 2013).
[1146] Ibid.
[1147] Ibid.

threat.[1148] With regard to the final category, it is posited here that a host State that supports terrorists against a target State should be considered an enemy of and a threat to the target State. Consequently, the target State should be at liberty to employ force against the host State under its right to self-defence. It is submitted that in any event the target State should limit the use of force to eliminating the threat.

Third, there is need to recognise that a threat to the nationals of a State constitutes a threat to the State itself. In this regard, it is recommended that the Charter be amended to recognise the right and responsibility of a State to protect its nationals abroad, as a constituent part of a State's general right to self-defence in international law. In this regard the codification of the Waldock Principles[1149] within the Charter is also recommended. Consequently, the right should only be exercised where (i) there is an imminent threat of injury to nationals; (ii) a failure or inability on the part of the territorial sovereign to protect them; and (iii) the action of the intervening state is strictly confined to the objective of protecting its nationals.[1150]

Fourth, with regard to prospective attacks and the right to anticipatory self-defence, it is recommended that the Charter be amended to give clear guidelines on when and how a State may employ force in anticipation of an attack. Hofmeister recommends that the State

[1148] Ibid.
[1149] Claud Humphrey Meredith Waldock, The Regulation of the Use of Force by Individual States in International Law, (Recueil Sirey, 1952).
[1150] See Ibid.

claiming anticipatory self-defence must prove the following conditions, namely, (1) commitment and capacity of the potential attacker to attack, (2) clear and compelling evidence of the intention and capacity of the potential attacker, and (3) measures undertaken should be proportionate to the potential risk.[1151] The UN Secretary General High Panel on Threats, Challenges and Change recommends that the decision to use or endorse the use of military force should be subject to the following criteria, namely, (1) seriousness of threat, (2) proper purpose, (3) last resort, (4) proportional means, and (5) balance of consequences. [1152] It is recommended that these criteria on the use of force be incorporated into the Charter. Consequently, any State invoking the right to anticipatory self-defence must demonstrate that the potential attacker is committed to carrying out the attack. These may include recurrent declarations by the potential attackers to carry out their threat, such as those made by the Arab States just before the six day war in 1967.[1153] The capacity of the potential attacker to carry out its threat should also be demonstrated. For instance, in the 1967 war, the Arab States had assembled large armies along their borders with Israel.[1154] The force employed should also be proportionate to the threat posed. It should be confined to eliminating the threat and not result in undue human suffering and destruction of property and infrastructure. The current requirement for an "armed attack"

[1151] Hannes Herbert Hofmeister, "Neither the Caroline Formula nor the Bush Doctrine – An Alternative Framework to Assess the Legality of Preemptive Strikes", 2 UNELJ 31 (2005), at p. 51.

[1152] Supra, note 62, p. 67.

[1153] *Gamal Abdel Nasser in his speech of May 30th 1967, reprinted in, " Six* daywar.co.uk, "Crucial Quotes", available at, http://www.sixdaywar.co.uk/crucial_quotes.htm (Site accessed on 30th April, 2013), *Syria's Defence Minister Hafez Assad (later to be Syria's President) on* May 30, 1967, reprinted in *Six* daywar.co.uk, "Crucial quotes", available at: http://www.sixdaywar.co.uk/crucial_quotes.htm (Site accessed on 30th April, 2013) and *President Aref of Iraq on 31st May, 1967, reprinted in Six* daywar.co.uk, "Crucial quotes", available at, http://www.sixdaywar.co.uk/crucial_quotes.htm (Site accessed on 30th April, 2013).

[1154] See Question of Palestine, UN GAOR, 5th Emergency Special Session, agenda 5; U.N. Doc. A/PV.1596 (19th June, 1967), paragraphs 119-128, available at, http://unispal.un.org/UNISPAL.NSF/0/729809A9BA3345EB852573400054118A (site accessed on 4th September, 2013).

has proved to be too restrictive and does not address imminent threats. However, caution needs to be observed to ensure that the right to anticipatory self-defence is not too wide that it renders the general prohibition against use of force nugatory. The guidelines discussed above are recommended as reasonable boundaries within which the right is to be exercised.

Finally, it is recommended that the Charter expressly provide that all States invoking the right to self-defence must account and justify to the Security Council on the necessity for the use force in each case. The States should present clear and compelling evidence in support of their claims and rationalise the cause of action taken. The Iraqi invasion by the United States in 2003 is perhaps the best example of a State undertaking a war in the absence of clear and compelling evidence and, at the same time, illustrates a situation where a State refused to account to the Security Council for its unilateral use of force.[1155]

It is, however, important to note that the implementation of these recommendations would not be an unchallenging exercise. First, there are those who do not favour the rewriting of Article 51 and insist that it should remain as it is.[1156] They argue that the Security Council is adequately empowered to address emergent threats not contemplated under Article 51 of the Charter.[1157] Further, the way forward is not to find ways of by-passing the Council,

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[1155] John Tagliabue,"France, Russia to Veto Iraq War/Powell says US Ready to Attack Without UN Support", New York Times, Thursday 6th March, 2003, available at, http://www.sfgate.com/politics/article/France-Russia-to-veto-Iraq-war-Powell-says-2665477.php (site accessed on 3rd February, 2014).

[1156] Supra, note 62, p. 63.

[1157] Ibid, p.65.

rather, efforts should be intensified to make it work better.[1158] Second, some recommendations such as the recognition of attacks by non-state actors and the protection of nationals abroad address issues that cut across the board and are unlikely to face resistance from States. However, with regard to reinforcing the provisions preventing the use of force without Council approval, one would expect resistance from powerful States. Any amendments or alterations to the Charter require the mandatory concurrent vote of all five permanent members of the Council before coming into effect.[1159] Powerful States, who also happen to be the permanent members of the Council, are unlikely to consent to provisions that would otherwise put them in a weaker position than they were previously.

At the end of this paper, it is concluded that it is more viable to proceed on the basis of rearticulation of Article 51, rather than resending the problem on unilateral use of force to the Security Council. Chapter Three of this paper demonstrates that the Council's flaws are more political than legal.[1160] The power of veto by permanent members of the Council has been employed to protect the national interests of permanent members[1161] or those of their allies.[1162] It has also been used to punish States who do not toe the line as expected by a

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[1158] Ibid.

[1159] Supra, note 1, Articles 108-109.

[1160] See Section 3.3 of this paper. Also see Yonatan Lupu,"Rules, Gaps and Power: Assessing Reform of the UN Charter", 24(3) Berkeley Journal of International Law, 881(2006), p. 907.

[1161] In 2002 US vetoes draft resolution on extension of peacekeeping mission in Bosnia as it did not grant US forces immunity from war crimes see United Nations Security Council, draft resolution S/1999/201, at its 4563rd meeting on 30th June, 2002, available at, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2002/712 , (site accessed on 20th September, 2013).

[1162] In 2011, US vetoes popular draft resolution that sought to criticise Israel see United Nations Security Council, Security Council draft resolution S/PV.2011/24, at its 6484 meeting, 18th February, 2011, , available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/24 (site accessed on 20th September, 2013).

permanent member. [1163] This power has been used to ward off punishment imposed on a permanent member.[1164] The power has also been a shield behind which powerful States act in complete disregard for the authority of the Council.[1165] Consequently, the permanent members, through their abuse of the power of veto, have been responsible for paralysing decision making in the Council. Throwing back the problem to the Security Council is, therefore, retrogressive, and it is more desirable to address the confines within which Article 51 is to be rewritten. Not much may be done to prevent unilateral use of force by powerful States if they refuse to accede to rewritten parameters on the use of force. However, the powerful States need to appreciate that sooner or later actions by one State set a precedent for others to act in the future.

[1163] In 1997 China vetoes draft resolution for a verification of a ceasefire in Guatemala to punish Guatemala for granting recognition to Taiwan see United Nations Security Council, draft resolution S/1997/18* at its 3730th meeting on 10th January, 1997, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1997/18 (site accessed on 19th September, 2013).

[1164] In 1990 US vetoes a draft resolution seeking to enforce judgment against it , see United Nations Security Council, Draft Resolution S/21084, at its 2905th meeting held on 17th January 1990, U.N. Doc S/PV 2905, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.2905 (site accessed on 19th September, 2013).

[1165] See the conduct of the UK in the 1982 Falkland's war (Section 3.4.1 of this paper) and the conduct of the US in the 2001 and 2003 invasion of Afghanistan and Iraq respectively (Section 4.6 and 4.3 of this paper respectively).

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