

A Critique of United States' Application of Article 51 of the United Nations Charter in Iraq and Afghanistan

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Abstract

The study gives a critique of the application of force for the purposes of self-defence by the US with a special focus on the invasion of Iraq and Afghanistan. The regulation of force in international relations has a long history that culminated in the formation of the UN in 1945. Although, the UN Charter outlaws the use of force, its application is permissible on various grounds that include self-defence provided for by Article 51. Nevertheless, the force used should be with the parameters of law. Ensuing are some of the principles developed to measure the legitimacy of claimed right to self-defence: occurrence of an armed attack and its location, immediacy of the reaction, necessity and proportionality. The invasion of Iraq and Afghanistan reveals that the US adopts a broader interpretation of Article 51 to include pre-emptive attacks and war against terror. The paper concludes that the US actions greatly undermine the credibility of the UN collective security as well as destroying the predictability of international law. The study mainly relied on documentary search.

Keywords: US, UN Charter Article 51, Self-Defence, Pre-Emptive Attacks, Afghanistan and Iraq.

1. Introduction

For centuries, the right to wage war in self-defence had been considered the sovereign right of each state. However, according to Schrijver; p1) “unregulated warfare deteriorated into cruelties, as the First and Second World Wars proved to be too cruel and too bloody for soldiers and indiscriminate for civilians.” Hence, great world leaders made efforts in outlawing the use of force in non-defensive circumstances. At every stage in the development

of international law, force was accepted as unavoidable. This struggle culminated in the formation of the UN in 1945. This paper traces the evolution of the concept of self-defence examining how the United States of America (US) has applied it to justify its invasion of Iraq and Afghanistan.

Prior to the formation of UN, the League of Nations was formed following World War 1 to regulate use of force. Unfortunately, its failure manifested in the outbreak of the Second World War. Another attempt for regulating international armed conflicts prior to the UN is the signing of the General Treaty for Renunciation of War known as the Pact of Paris or the Kellogg- Briand Pact (Dugard, 1994: 313). The Pact lacked substantive machinery for collective action against a recalcitrant state. Therefore, it could not halt aggressive wars that followed the advent of dictators in the 1930s. Following the outbreak of World War 2 the UN was formed with a more elaborate Charter than the previous attempts. It outlaws the use of force by states serve for defensive purposes as outlined in Article 51 of its Charter.

Although UN Charter outlaws non-defensive claims to use of force, it provides little assured restraint upon state action the problem lies in the broadening interpretation of self-defence and unilateral use of force by powerful states. According to Glennon (2001: 89) “a broader conception of self-defence by states has pushed the rules of law into a zone of twilight –a sphere where predictability has been lessened, expectations confused and the contours of law rendered uncertain”. UN Charter is more than five decades old yet the world is still suffering from the effects of armed struggles that have led to the loss of more than twenty five million people and other unbearable consequences (ibid). Some of the conflicts recorded include the, Israel, French and British invasion of Egypt 1956, US invasion of Dominican Republic 1954 and invasion of Dominican Republic 1965 (ibid). In response to the 11 September terrorist attacks of 2001, US attacked Iraq and Afghanistan in the name of self-defence. This background informed this study to examine the issues surrounding the use of force at international law.

2. Conceptual Framework

The regulation of force in international relations draws its rationale from various standing theories that act as guidelines for the understanding of the subject. This paper adopts the just war tradition, realism, idealism, power theory and collective security. More importantly, the state practice in relation to the application of Article 51 since the coming into force of UN Charter is very important. This is because states claim to be acting within the confines of law when they engage with one another and what they do in practice actually reflects what they believe to be permissible under international law.

The just war tradition distinguishes just and unjustifiable uses of organized armed forces (www.justwartheory.com). St Augustine accepted violence as part of human life and inevitable in the conduct of national affairs. Therefore, just war theory seeks to ensure that force is used for the good of the people (ibid). This theory provides a basis on how force by states can be restrained, made more humane and directed toward lasting peace and justice. Aristotle justified force for the purposes of making peace arguing that, “nobody chooses to make war or provokes it for the purposes of making war and a man would be regarded as bloodthirsty monster if he made friendly nations into enemies in order to bring battles and slaughter” (Slomanson, 2000: 434). Contrary to the facile arguments offered in support of just war theory, the idea of fighting for peace only makes sense in theory. US touted World War 1 as “the war to end all war.” Sadly, the Second World War disproved this argument. Opponents of warfare notes that warfare tends to engender more warfare - a fire that generates its own fuel. Just and peace promoting war efforts are exceedingly rare in human history thus nearly every major figure in just war tradition, from St Augustine to Walzer has argued that warfare is only ever justified as an option of last resort.

Nevertheless, the concept of just war theory has influenced the development of international conventions regulating the use of force by states. During the development of modern international law in the eighteenth and nineteenth centuries, the use of force was often characterised as a necessity (ibid). The most powerful European states developed convenient justifications for their aggressive use of force. One such claim was that force was the only effective way for enforcing international law. Therefore, the aggrieved state could not allow the violation of international law to go unpunished for fear of anarchy (ibid). The US has applied force against countries such as Iraq in the name of enforcing international law. Surprisingly, such a drive has led to the breach of other international legal instruments. Scholars have been reluctant in analysing the impacts of such armed conflicts to other international legal instruments such as international humanitarian law and international human rights law. Thus the focus of this study has not been solely directed upon the question of whether the application of force by the US is legal or illegal according to Article 51 but went on to analyse whether the concerned application of force is not leading to other adverse consequences.

The use of force under the UN Charter can once more be viewed from the concept of collective security. Davis (2003: 23) states that collective security implies an arrangement in which all members cooperate collectively to provide security for all by the actions of all against any state within the group or outside that might challenge the existing peaceful order. In a collective security system states join together usually by signing a treaty and making an explicit commitment to renounce the use of force in settlement of disputes. However, force is against any member or non-member that will be found breaking the law. Collective security offers security to all the states or the members within the system not only the powerful ones. It is a requirement of collective security system that all states should take part in actions against the aggressor. This is often justified by the claim that "peace is indivisible". Therefore, peace in each country is threatened by insecurity anywhere. The UN charter is a manifestation of collective security system. Thus, the researcher examines the use of force by the US under Article 51 as part of collective security system.

Understanding of international law is crucial before one analyse the application of Article 51. Law is defined as that element which binds the members of the community together in their adherence to recognized values and standards and international law covers relations between states in all their myriad forms of interaction from war to satellites and regulates the operations of many international institutions (ibid: 178). However, international law has been criticized for lacking the qualities of proper law mainly because it lacks a recognized legislative body, a hierarchy of courts and a proper enforcement mechanism. Since the whole body of international law is controversial it is not surprising that the application of force on self-defence has been viewed from different angles.

It is important to take into consideration the link between article 51 and customary law that reflects the actual practice of states. This informed the study in exploring whether state practice in relation to use of force under Article 51 since 1945 can constitute a parallel legal system that is different from the original intentions of the UN Charter. The classical international law views customary rules as resulting from the combination of two major elements. These are an established widespread and a consistent practice on the part of states and a psychological element known as *opinion juris sive necessitatis* (opinion as to law or necessity) (Gray in Evans, 2003: 589). Thus the ICJ in the *North Sea Continental Shelf* case states that;

Not only the acts concerned amount to a settled practice, but they must also be such or carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The Need of such a belief, i.e., the existence of subjective element is implicit in the very notion of *opinion juris sive necessitatis* (Byers, 2003: 123).

When analysing the application of Article 51 by the US this study examines whether its the actual state practice reflects what states recognise as lawful or not. However, states interpret the UN Charter differently; making it difficult to understand the universally accepted international legal standards in relation to the concept of defence.

Realists such as Carr and Morgenthau have raised the rather overlooked aspect of power politics in international law (*ibid*). They argue that states are self-interested actors engaged in a ruthless struggle for power, considered as the ability to control or influence directly how other states behave through factors such as wealth, military strength, size and population (*ibid*: 135). When analysing the application of force by the US under article 51 it is therefore vital to understand the interplay between international law and politics. International lawyers overlooked this important aspect. According Rues-Smit (2004: 35) “international law takes on something of a distinctly alien form, removed and remote from the ground realities of sovereign relations: It is caught up in its own methodologies and indulgencies and is divorced from the decisions it aspires to influence.” Thus, sometimes it is due to the loopholes that exist within the UN Charter that led to different interpretations of its provisions.

War can be directly linked to foreign policy and viewed as an instrument for enforcing national policy. Therefore, force is perceived as a useful dimension of political struggle for achieving national objectives. Thus, force is a necessity for the achievement of political power in international relations. China’s revolutionary leader Mao Tse Tung viewed “politics as a war without bloodshed and war as politics with bloodshed” (Lauterpaucht in Slomanson, 2000: 435). This contention shed light to the understanding of the question on why states in their relations apply force even to the contempt of international law.

According to realists, history has never produced binding limitations on the use of force (*ibid*). Their perspective is that international rules governing the use of force are meaningless in a crisis. Thus, the ole of law in international relations is pre-stated. In validating their argument, the realists state that states have retained the inherent right to use force voluntarily notwithstanding the contemporary prohibition of force by the UN Charter. According to those who lean to this school of thought it is unrealistic to expect states to justify their conduct to anyone. As a result, the attempt to regulate the use of force by states is bound to fail. Therefore, realism helps in understanding the reasons why states flout international law.

The application of the international law concerning use of force in international relations has been affected by structural changes that took place to international system since the coming into being of the UN Charter. Scholars have chosen to analyse the application force depending on these changes such as the Cold War period from 1948 to 1989, and its demise thereafter. According to Henkin (1995: 145) during the Cold War, then, the big powers did not see in their common interest to lend full support to the law of the Charter and strongly press for peace, they were not themselves scrupulous to respect the law. The Union of Soviet Socialist Republic (USSR) generally saw its interest in spreading Soviet influence, as greater than any interest of international peace (*ibid*: 144). The USA was determined to resist communist expansion, insulating it from the Northern Hemisphere disregarding international law.

4. Self Defence Provision and the Structure of Article 51 of the UN Charter

The concept of self-defence derives from the notion of self-help available to states after being aggrieved. Such measures should meet the requirements enunciated by UN Charter Article 51. Article 51 of the UN Charter provides that; “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 UN, until Security Council has taken necessary measures...” Wallace (2005: 285). Thus, an act of self-defence is permissible only following an armed attack. However, the actual definition of an armed attack was left to customary international law Gray in Evans 2003: 601). A traditional definition of an armed attack considers an attack by a regular army of one state against the territory or against the land, sea or air forces of another state. During the *Nicaragua case*, the ICJ relied on the definition of Aggression as a basis for interpreting the meaning of armed attack. The court noted that it must include the sending by or on behalf of a state of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to actual armed attack (ibid: 602). What is important here is government involvement in the alleged action. The September 11 terrorist attacks of 2001 on USA seemed to have propelled the broadening of the definition to include terrorist attacks as constituting armed attack.

The location of the alleged attack is crucial in understanding the legitimacy of force used for the purposes of self-defence. Distain (1998: 156) traditionally an armed attack that prompts the counter force for self-defence was expected to occur within the boundary of the victim state. However, an armed attack can occur beyond territorial boundaries for instance a vessel of a country may be attacked on the high seas and a satellite of the victim state might be attacked in the outer space. As such a victim state is entitled to resort to self-defence measures regardless of the geographical point of the attack. An attack may occur on the installations of the victim state such as, military base or an embassy and this may constitute an armed attack. During the *Tehran case of 1980*, the ICJ used the phrase “armed attack” when discussing takeover by Iranian militants of the US embassy in Tehran, and the seizure of the embassy staff as hostages in November 1997 (ibid). Thus attack of property and nationals of a state outside its borders may amount to armed attack.

4.1 Necessity and Proportionality

Godwin-Gill and Talmon (1999: 78) Although states have inherent rights to self-defence, the claim should be reconciled with international customary requirement of necessity and proportionality. The meaning of this dual requirement is found in the correspondence of US Secretary of state Webster during the *Caroline incident*. Webster was responding to a British claim that it had a legal right to attack an American Ship (the *Caroline*) in American waters because it carried armed men intending to support the Canadian Rebellion of 1837. Webster then argues that, “to admit that claim Britain must show a necessity of self-defence, instant, overwhelming leaving no choice of means and no moment for deliberation (ibid: 79).” This has been the standard for measuring the authenticity of the claimed right to self-defence. These requirements have stood the test of time and are recognised as rational measurements of legality claimed right to self-defence.

In the *Nicaragua Case*, the ICJ reaffirmed these requirements as grounded in customary international law and added in the *Nuclear Weapons Case* that this dual condition applies to Article 51 regardless of the means of force employed (ibid: 78). However, the application of force must be an act of last resort which derives from the just war theory. During the invasion of Panama (**year**) the then US President Bush stated that, “the action was taken after every other avenue was closed and the lives of Americans were in grave danger”(ibid). On the same occasion, Ambassador Pickering gave a more illustrious argument, asserting that US had exhausted every available diplomatic means to resolve peacefully disputes with Mr Noriega. One advantage of diplomatic means is that of lowering the temper of the protagonists.

Immediacy is another condition closely linked to proportionality. This requirement shows that there must not be an undue time lag between the alleged armed attack and the activation of self-defence (ibid). Thus, immediacy should be considered an integral element of necessity and proportionality. A state advancing or invoking its right to self-defence may not be

expected to wage war long after an isolated armed attack (Dinstein 1998: 220). Hence, a state invoking Article 51 should immediately inform the Security Council.

However, contrary to the above it is worth noting that in certain circumstances war waged for the purposes of self-defence cannot be required to commence within few minutes or even few days from the original armed attack by the aggressor or accused state (*ibid*). One reason supporting this line of thinking is that a victim state under attack cannot be expected to shift its gear from peace to war instantaneously. A democratic system of governance concretises this argument. This is because in a democratically governed state there is need to carry out consultations within the state before an armed response or revenge commences. In such situations Frontline officers in the target country must report to and receive instructions from their superiors before any meaningful action is taken (*ibid*). More so in democratic systems moving forward to a war of self-defence is a time consuming process because in such systems the wheels of the government grind slowly.

Even if the interval between an armed attack and recourse to war of self-defence by the victim state is longer than usual or expected, the concerned war may still be regarded as legitimate. The delay however, must be reasonable and warranted by circumstances surrounding the situation. “Other reasons that may be considered to justify the delay of waging a war of self-defence might include the fact that the protagonists may opt to give amicable negotiations rather than promptly employing counter force” (*ibid*). In the event that the negotiations fail the aggrieved state may legitimately resort to force regardless of the lapse of time. Aside, the distance between the victim state and the aggressor might cause complexities to the extent that length preparations are required before military machinery can function smoothly. *The Falkland Islands war of 1992* validates this state of affairs. In relation to negotiations, it can be argued that one of the protagonists might use diplomacy as a delaying tactic without necessarily giving meaningful concessions to the other part.

The understanding of Article 51 will not be complete without mentioning the provision for collective self-defence. The Article permits advance organisations and military preparation for collective self-defence. The concept of collective self-defence provided for under Article 51 act as a basis for the formation of organizations such as the North Atlantic Treaty Organisation (NATO) and Warsaw Pact Gray in Evans 2003: 605). The end of cold War and incapacity of the UN Security Council to perform its mandate influenced the rapid increase in the formation of regional and sub-regional organisations such as the African Union (AU). In responds to the 11 September terrorist attacks on USA, NATO members invoked Article 5 of the Washington Treaty to assist USA in its war against terror.

4.2 Role of the Security Council in Relation to Self Defence

It is a requirement of the UN Charter Article 51 that states must report their use of force in self-defence to the Security Council immediately and the right of states to exercise this right should be temporary before Security Council has taken necessary measures to maintain international peace and security (*ibid* 602). USA on several occasions failed to put up with the UN Charter requirement that states should report their actions under self-defence immediately to the Security Council. The ICJ in the *Nicaragua Case* reaffirmed this position articulating that states are required by the UN Charter to inform the Security Council of their actions carried out for purposes of self-defence. Dinstein (1998: 197) noted, that “the ICJ held that the failure by the USA to report its use of force to Security Council was an indication that the USA was not itself convinced that it was acting in self-defence”. It is clear therefore that the process does not end on merely reporting to the Security Council but what it means is that the reporting stage is where the Security Council now makes its investigation on whether the complainant state has got the right to self –defence or not.

Moreover, the court stated that when the use of force is governed by the law of the Charter a state is precluded from invoking the right of self-defence if it fails to comply with the requirement of reporting to the Security Council. Such a view of the obligation to report to the Security Council will place the requirement at the heart of the exercise of self-defence (ibid: 197). Contrary to the views held by the majority in relation to the reporting argument in the *Nicaragua case* Judge Schwebel in his dissenting argument asserts that measures of self-defence may either be covert or overt-just as an armed attack triggering self-defence may be overt or covert. As such, there should be no expectations that covert actions should be reported to the Security Council. However, if the international legal system is to survive use of covert actions should not be accepted as legitimate.

It can again be argued that Article 51 of the UN Charter does not state that non-performance of the reporting obligation carries with it incurable consequences for the invocation of the right of self-defence. This is because the sequence of events envisaged by the framers of the UN Charter is such that at the initial stages of the conflict, a victim state takes measures in self-defence and only thereafter does it have to communicate through a report to the Security Council (ibid). It is also submitted that the dispatch of a report to the Security Council is only one of the many factors bearing upon the legitimacy of state's claim to self-defence. More so the instantaneous transmittal of a report to the Security Council is no guarantee that the Council will accept that the force used in self-defence is legitimate. As such, failure by the victim state invoking its right to self-defence to file a report at an early stage should not prove an irremediable defect. In this regard, it is worth noting that, "It will be a gross misinterpretation of Article 51 for the Council to repudiate self-defence, thus condoning an armed attack, only because no report has been put on record (ibid: 197)." One can note that there are complexities that states encounter during the process of reporting and as such, lack of prompt reporting to the Security Council should not in any case doom the entitlement to the right of self-defence.

After receiving a report from any state in relation to the force taken for the purposes of self-defence, the Security Council is expected to study all the relevant facts concerning the case in question. Surprisingly, there is no mandatory provision under Article 51 requiring the Council to establish a fact-finding mission but it can take any action it deems necessary for the maintenance of international peace and security. The Security Council can opt for one or a combination of the following options; approving the exercise of the right self-defence or, calling for cease-fire. Other options include demanding total withdrawal of forces to the original lines, insisting on the cessation of the unilateral action of the defending state supplanting it with measures of collective security or declaring the defending state as the actual aggressor. Whatever the decision made by the Security Council, the resolution must be unequivocal and all UN member states are obligated to act as the Council ordains. However, this is not always the case, because most powerful states usually influence the decisions of the Security Council and they can disregard its Resolutions without any negative effects on their part. For example due to its preponderance in the international economy, US cannot be affected by measures such as economic sanctions.

According to Gray as cited in Evans (2003: 591) the use of force under Article 51 was intended to be temporary and the UN Charter is explicit in articulating that the victim will only use this option awaiting the response, of the Security Council. The Security Council retained the discretion of determining whether a threat to peace and security or the armed attack had occurred that warrants the resort to force by the alleged victim state for the purposes of self-defence. This guideline will only apply where the UN Security Council is effective in performing its mandate. The following chapter examines the effectiveness of the Security Council in performing its mandate in relation to the application of the right to self-defence by USA.

The UN Charter prohibits the use of force in international relations. Article 2(4) provides that, “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations” (ibid: 591). Therefore, use of force for self-defence should be regarded as an exception narrowly defined so that no aggressive state will grab the opportunity to advance outrageous interests. The right intention for resorting to war would be where a victim state seeks to redress a suffered wrong.

Despite this clear and concise prohibition of force by the UN Charter, the world has witnessed more than one hundred major international armed conflicts since 1945 that led to the death of more than twenty million people. Scholars as well as states are divided on the meaning of law that regulates the use of force and how the law should be applied. The following Chapter analyses whether the use of force by states with particular reference to USA has been in line with the principles of the UN Charter or it constitute a deviation from the traditional intentions of the UN Charter. There has been much debate concerning the interpretation of the UN Charter to the extent that the prohibition of force has become meaningless.

5. US Invasion of Afghanistan (2001)

Following the September 11 attack, the US government took several aggressive steps to fight global terrorism. One of these steps was an attack on Afghanistan ultimately overthrowing the Taliban government. US accused the Taliban government of harbouring a terrorist group suspected of orchestrating terror attacks. However, US justifications were not convincing especially the argument of self-defence. The force used was neither necessary nor proportional as unparalleled civilian deaths were recorded.

In stark contrast with the provision of Article 51, the then US President Bush stated that they will make no distinction between the terrorists and those harbouring terrorists. Under international law, force used for the purposes of self-defence must be directed upon the actual perpetrator of the crime. Traditionally force was expected to be directed only against a state. In a letter to the Security Council, during the war against Afghanistan US based its argument on the fact that the Taliban regime permitted parts of its territory under its control to be used as a terrorist base of operation for Al-Qaeda. Thus, USA used the doctrine of state responsibility to support its invasion of Afghanistan. However, the case of Afghanistan failed to meet the conditions of state responsibility and this can be supported by the arguments given by the International Law Commission (ILC) on the subject. According to Bianchi (2004: 12) the ILC noted that, “a state is responsible if the person or group of persons is in fact acting under the instructions or the control of that state, if the person or group of persons is in fact authorities or if the accused state acknowledges and adopts the conduct in question as its own.” USA overthrew the Taliban government despite the fact that it had no ties with the alleged terrorist group accused of attacking USA.

USA has indicated that, its Harbouring doctrine would imbue responsibility to a state that permits a terrorist group to operate and train within its borders even without supporting or adopting its actions. USA seemed to have gained unequivocal support from the UN Security Council Resolution 1373, which stipulates that, “all states shall prevent terrorists from using their territory for terrorist purposes and deny safe haven to those who finance or plan or facilitate terrorist activities (ibid: 12).” The resolution seemed to have given US the green light to invade Afghanistan since no resolutions were passed to condemn the invasion. To the contrary, the Organisation of American States (OAS) and NATO passed resolutions expressing their unconditional support of the US’s right of self-defence. The passing of resolution 1373 by the Security Council and its subsequent actions all point to the view that it approved and supported US actions in Afghanistan. After the fall of Kabul, the UN joined the US to develop a new plan that was aimed at establishing a new multi-ethnic government and

the initiative of a long-term process of nation building. More so, UN Security Council passed other resolutions authorizing the US to maintain law and order and endorsing an initiative to form a multi-ethnic transitional government in Afghanistan.

The unilateral application of force by the US had destroyed economic well-being of the affected states. In Afghanistan, analysts argue that the invasion was driven more by economic interests. The US has argued that it had discovered “previously unknown and untapped” mineral reserves with the estimated value of one trillion dollars, the minerals include inter alia huge veins of iron, copper, cobalt, gold and critical industrial metals such as lithium (Chossudovsky 2010: 1). The minerals could transform Afghanistan into one of the most mining centres in the world. The argument of the US that the minerals were previously unknown is just concealment of the truth to make the world assume that it discovered the minerals well after the invasion.

A research by Chossudovsky revealed that the Soviet Union geologists discovered the minerals during 1960s. During that time, Soviet Union had built the first gas pipeline in the country to supply gas to Uzbekistan and the Soviet Union was receiving up to 2.5 billion cubic meters of Afghan gas annually. Following the discovery of minerals in Afghanistan, the Soviet Union committed more than 650 million US dollars for exploitation and development of minerals. The Soviet Union also proposed a number of projects including an oil refinery capable of producing a half million tonnes per year and a smelting complex for the Ainak deposit that was aimed at producing 1.5 million tons of copper per year. Immediately after the withdrawal of Soviet Union World Bank (WB) analysis projected that Ainak copper production alone could capture as much as two per cent of annual world market. This information was presumably available to the US before the invasion. The term “previously unknown deposits” seeks to exclude Afghanistan’s mineral wealth as justifiable *casus belli* (ibid: 1). Thus, the 2001 invasion of Afghanistan had set a stage for the exploitation of mineral deposits by western mining and energy conglomerates. Despite undermining international law, the invasion by USA has led to the impoverishment of target states. This is because the US has turned the alleged right to self-defence in Afghanistan into occupation. No industrial development can thrive in a war situation such as in Iraq.

During the US invasion of Afghanistan, fundamental human rights were disregarded. While it is terrorists violate the rights of individuals, those accused of committing acts terror themselves must be treated in accordance with human rights law especially where detention, fair trial, non-discrimination and deportation are concerned. The US detention camp at Guantanamo Bay in Cuba has been regarded as the most notorious base world over used for torturing suspected US enemies. It is worth noting that the US has abrogated its international human rights obligations citing threat of terrorism. More so even if USA had genuine reasons to invoke its right to self-defence the force used was disproportionate and the aerial bombings against Afghanistan were indiscriminate. Villages were destroyed killing civilians and their livelihood for instance a farming village Chowkar- karez 25 miles of Kandahar was bombed by US warplanes and at least 93 civilians were killed. A US official who participated in the bombings argued that, “A 2,000 IB bomb, no matter where you drop it is a significant emotional event for anyone within a square mile.” This was a total disrespect of international humanitarian law according to which civilians must not be the target of attack in any warfare whether offensive or defensive.

From 7 October 2001 to January 2002, the Al-Ahram Weekly of Egypt estimated that about 300 – 3400 civilian deaths were recorded in Afghanistan. Thus, one commentator succinctly captured the nature of the war in Afghanistan arguing that, “the war in Afghanistan has been a war upon the people, the homes, the farms, and the villages of Afghanistan, as well as upon the Taliban and Al Qaeda.” This indicates that US’s claim that it was waging a just war can be disqualified considering the number of civilians that were killed within a small space of time. Civilians were killed deliberately because US had advanced military equipment that

ensures precision accuracy when launching an attack. The alternative US media noted that during the first week of bombing, 400 Afghanistan civilians had been slaughtered and Pentagon has blithely dismissed this reality. The disproportionate and indiscriminate bombardment of US on Afghanistan had made the whole nation to suffer for the crimes of few obvious individuals. Indeed the war was unnecessary and failed to fit within the definition of a just war. If the war was waged in the name of self-defence then it will be difficult to understate the meaning of the law. Such actions will not encourage voluntary compliance to international law by other states. Thus if states can willingly disrespect the rules governing the use of force it will be meaningless to talk of international law and collective security system.

6. The Invasion of Iraq by US Led Coalition of the Willing (2003)

In September 2001, the Bush Administration formulated and announced the US National Security Strategy (USNSS). The strategy was explicit on the fact that it was prepared to use pre-emptive strikes to prevent its enemies from using Weapons of Mass Destruction (WMD) against it or its allies and friends. Concurrently, the Bush Administration was peddling a speculation that Iraq's WMD programme posed a threat to US's political, economic and security interests. Consequently, it became obvious that Iraq could be the first victim of pre-emptive strike.

Notwithstanding other reasons such as alleged possession of nuclear weapons and flouting prior UN Security Council resolutions, US military invasion of Iraq follows the principle aims of the aforementioned USANSS. The security strategy contained the guiding security philosophy or ideologies of the US in the period after the September 11 attacks of 2001. The USNSS contained a range of positive elements, for instance the focus on the need for international and regional cooperation as well as the view on development assistance for the purposes of achieving global peace and security. Regrettably, the implementation of the security strategy never considered such options that could have been welcomed by the international community.

To legitimise the invasion of Iraq, the Bush Administration sought and obtained UN Security Council Resolution 1441 on November 8 2002. The resolution noted among other factors that Iraq was still in material breach of its obligations under the prior UN Security Council Resolutions to destroy and not to seek to obtain various prescribed weapons and capabilities. UN Security Council Resolution 1441 further stipulated that, "Serious consequences could result from the failure of Iraq to comply unconditionally with its obligations contained in UN Resolutions (White House news release 2003: 11)." One can argue that US took the responsibility of the UN Security Council though the UN Charter does not provide for such an action. The world will not be safe if a single country can supersede the international collective security.

Beyond invoking prior Security Council Resolutions, the US had expanded doctrine of self-defence to justify its right the right to launch pre-emptive strikes. The expansion of Article 51 has led to major controversies and uncertainty in relation to application of force in international relations. The Bush administration had stated that it had launched a pre-emptive attack on a dangerous regime possessing WMD. The then US president George Bush argued that, "responding to such enemies after they have struck us is not self-defence, it is suicide (Anneus and Torpman 2004: 400)." The USANSS made it clear that the US was not going to wait for its enemies to attack first. This again makes sense when there is a serious threat from an enemy with nuclear weapons. Unfortunately, there was no such imminent attack from Iraq on the US. Evidence is glaring that Iraq was not in possession of NW or WMD. Therefore, the claims by the US were unfounded and even unsubstantiated by the realities on the ground. For years, the US and British armed forces have surrounded Iraq and its Northern and

Southern areas were being sealed off as no fly zones White House news release (2003:13). Thus Iraq was not able to develop NW in such a scenario. Although some would want to believe that Saddam Hussein had at some time possessed chemical weapons, such weapons were not an imminent threat to the US. Again, analysts accused the US of assisting Hussein to acquire the biological weapons because by then they were serving its interests. Even if Iraq was in possession of actual nuclear weapons, there is no indication that it has threatened to attack the US to the extent that US was left without an option rather than to launch a pre-emptive strike.

The international community has been always rejecting the concept of pre-emptive self-defence. However, pre-emptive strikes can be accepted at least if there is covert action that demonstrates that an armed attack is imminent. The advent of Nuclear Weapons (NW) and WMD may require some sort of elasticity in the application of the doctrine of anticipatory self-defence other important aspects need to be considered as well. Thus, the principles enunciated during the *Caroline incident* should be taken into consideration whenever a state wants to invoke its right to self-defence. There should be at least an imminent threat and no opportunity for negotiations before the attack can be averted.

A restrictive interpretation of Article 51 shows that present rules of self-defence do not permit the use of force against states deemed unfriendly or dangerous in order to deny them weapons possessed by many countries. Regime change cannot be deemed the wisest solution against the possession of WMD as the current situation in Iraq and Afghanistan indicates. The removal of regimes in these two countries by the US has worsened the situation rather. More so, the attack on Iraq was against a well-known fact that other states such as India, Pakistan, North Korea possess WMD. The US could have wanted to control the “black gold” –oil from the Middle East and the idea of democratizing the whole region starting with Iraq basing on the principles of Democratic Peace Theory, which stipulates that mature and stable democracies do not fight each other.

Proponents of the invasion argue that, “... the US is entitled to go forth and defend its national security in a case as here where there is nothing contrary to law or morality.” Thus, the application of the right to self-defence by the US has led to major divisions among international legal scholars on the best way to interpret the rules regulating the use of force. Although there is need for a state to defend its interests if they are under threat, rules of necessity and proportionality should be applied. The right to self-defence should always be regarded as an exception to article 2(4) of the UN Charter that outlaws the use of force. Force in this regard should be limited at weakening the enemy or aggressor’s armed forces and not toppling a country’s government. In Afghanistan and Iraq, the US deposed ruling governments against the principle of territorial integrity and political independence of other states. In these cases, the US application of force can be viewed as occupation. The US forces did not observe conditions of necessity and proportionality during the occupation of the two countries.

7. Conclusion

In international relations, force has remained a principal option for solving conflicts. Hence, UN Charter Article 51 provides for inherent right of states to use force for collective and individual self-defence following an armed attack. Other conditions include necessity and proportionality of the means used. Actions taken for the purpose of self-defence should be reported to the Security Council immediately which will then decide whether the claimed right is legitimate or not followed by a resolution either upholding the inherent right of the victim state or condemning the aggressor. Unfortunately, the Security Council is ineffective in carrying out its mandate. Since the US is the major contributor to the UN budgetary support, it is now the “Dollar” that rules rather than the rule of Law. US adopted a broader

interpretation of self-defence to include, war against terrorism as was the case in Afghanistan in 2001 and combating drug trafficking, which led to the invasion of Panama. In Iraq US had invoked Article 51 to launch a pre-emptive attack to a regime deemed dangerous to its national interests. While elasticity is crucial when interpreting the right to self-defence the reasons offered must be genuine. This paper reveals that in most cases the US invoke Article 51 in controversial situations thereby undermining the credibility and integrity of international law and collective security system. This is normally the case when unilateral force is used by-passing the UN Security Council. However, on the other hand the actions of the US in invoking the right to self-defence reveals gaps within the body of international law as well as positive developments in customary international practice that are actually in tandem with the changing circumstances. Such changes include increased acts of terrorism and the existence of WMD.

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