

UNIVERSITY OF ZIMBABWE



FACULTY OF LAW

**SOVEREIGNTY VS THE RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW:
THE CASE OF RUSSIA - UKRAINE CONFLICT**

BY

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DEDICATION

Roseline and Gabriel Chikwene

My mother and father, if only.....

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ABBREVIATIONS

CIS	Commonwealth of Independent States
EU	European Union
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organisation
SFSR	Soviet Federative Socialist Republic
SSR	Soviet Socialist Republic
UK	United Kingdom
UN	United Nations
UNC	United Nations Charter
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America
USSR	Union of Soviet Socialist Republics
WWI	World War 1
WWII	World War 2

Treaties

Covenant of the League of Nations, 1920

Montevideo Convention on the Rights and Duties of States, 1933

United Nations Charter

Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation

Cases

Corfu Channel Case, ICJ Reports, 1949, pp. 4, 35

Democratic Republic of the Congo v. Uganda, ICJ Reports, 2005, pp. 168, 223

Great Britain v Costa Rica, 1 UN. Rep. International Arbitration Awards, 369 (1923)

Military and Paramilitary Activities against Nicaragua Case (Nicaragua v. U.S.A), 1986 I.C.J. 14 (June 27)

Oil Platforms Case (Islamic Republic of Iran v USA) [2003] ICJ Reports 161, 51

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CHAPTER 1

GENERAL INTRODUCTION AND BACKGROUND

1.1 Introduction

On 24 February 2022, the world was gripped by the news that Russia had invaded Ukraine in what Russia termed a ‘Special Military Operation’ to ‘demilitarize’ and ‘de-nazify’ Ukraine amongst other reasons. The other grievances as expressed by Mankoff J included, ‘the long-simmering dispute over the expansion of the North Atlantic Treaty Organization (NATO) and the shape of the post-Cold War security architecture in Europe, ... and the legitimacy of Ukrainian identity and statehood themselves’¹ as stated by Russian President Vladimir Putin in his address on 21 February 2022, prior to the invasion. The issue regarding Ukrainian identity can be seen as one of the major factors contributing to the continued breakdown in relations between the two states.

Historically, Ukraine was a member of the Union of Soviet Socialist Republics wherein Russia was the dominant state. The dissolution of the Soviet Union in 1991 birthed a much freer Ukraine, a Ukraine that emerged with free will to associate with anyone, including NATO. This perceived association with NATO has resulted in tension between the two states which tension eventually led to the invasion. Russia went into the attack with the perception that it was a big brother to whom Ukraine would cower in fear and the war would not last longer. However, what Russia did not anticipate was a Ukraine bold enough to stand up and defend itself from threats to its sovereignty. The result of this is the conflict that has been ongoing since February 2022 to date (July 2022) with no signs of cessation of hostilities on the horizon.

From the abovementioned, it is quite clear that two major principles of international law have been implicated in the impasse between Russia and Ukraine, namely the doctrine of self-defence and the principle of sovereignty of states.

1.2 Background to the Study

The international political and economic arena is governed by a diverse set of approaches that are designed to bring international order. International law is designed to govern state - state relations to ensure that there is peace amongst these nations. As a result of this, several fundamental principles underpin international law and these include trade, humanitarian law, environmental law, human rights as well as international criminal law amongst many others. Sovereignty

¹ J. Mankoff, *Russia's War in Ukraine: Identity, History, and Conflict*, Centre for Strategic and International Studies, <https://www.csis.org/analysis/russias-war-ukraine-identity-history-and-conflict>, Accessed 12 July 2022

and the right to self-defence are two key tenets of international law in the quest to ensuring peace and order.

Sovereignty is understood as including the following tenets, self- determination; political and economic independence; non-intervention in the affairs of another state; respect for territorial integrity of other states as well as permanent control over natural resources without interference from other states. These tenets of statehood were codified in the Montevideo Convention of 1933, despite their having been already in existence as far back as the Westphalia Treaty signing.

On the other hand lies an equally important principle of international law, known as the right to self-defence. These two principles/concepts have however found themselves at the fore of many discussions as modern day world occurrences have seen collision between the two. Discussions on this aspect is rife, but the recent activities of Russia on Ukrainian soil, in a bid to address its concerns over NATO actions brings in a new perspective to the two principles of international law.

The invasion of Ukraine by Russia brings to the fore discussions on sovereignty in international law firstly and majorly, because Russia is a permanent member of the United Nations Security Council that is mandated with making decisions pertinent to the maintenance of global peace and security. Secondly, Russia appears to posture on the responsibility to protect principle, having been one of the countries that spoke out against NATO's intervention in Libya in 2011 opting for a much stricter interpretation of sovereignty but at the same time invading Ukraine on the basis 'of a need to protect' the nearly eight million people in the South and East Regions of Ukraine.

The United Nations on the one hand guarantees the right to self-defence in Articles 41 and 51. Both scenarios offered by the two articles have been flouted by Russia during its invasion of Ukraine and the United Nations Security Council remains mum, presumably because Russia is one of the five permanent members of the UNSC.

It is clear from the above that two major principles of international law were implicated in the invasion and these are the doctrine of sovereignty and the right to self-defence.

1.3 Problem Statement

There is a perceived conflict between the principle of sovereignty and the right to self-defence in the international law arena. This resultantly creates a gap in the way states relate with each other when it concerns these two principles. The principle of sovereignty, in its form, should necessarily see all states as equal partners but recent developments have left smaller states as merely opinion holders in the international arena. The right to self-defence, on the other hand, is one that is subject to rules in its exercise including the legality in its use against other states.

One then begs the question whether such exercise, which evidently clashes with the ethos of Article 2 (1) of the UNC is necessary.

This research is going to analyse this perceived conflict with a view to obtaining the extent to which these doctrines of international law interfere with each other, the case of Russia and Ukraine being the major learning point as well as find out the relevance of these two in an ever changing world.

1.4 Research Questions

1.4.1 Research objectives

This study is guided by the following objectives:

- a) To what extent does the history between Russia and Ukraine contribute to the current conflict and how does the rest of the world perceive it?
- b) To what extent does the principle of sovereignty still hold sacred in the modern world vis-à-vis the attack by Russia?
- c) What are the permissible grounds for exercising the right to self-defence and anticipatory self-defence in terms of the UNC and what limitations do they bring to sovereignty?
- d) What is the nature and scope of the supposed collision between sovereignty and self-defence in the case of Russia and NATO?
- e) What recommendations can be proffered in this regard?

1.5 Literature Review

The general discourse that surrounds the currently ongoing Russia-Ukraine conflict is premised on two major aspects of international law, being the principle of sovereignty and the right to self-defence. This study will seek to interrogate the place of sovereignty in today's modern and globalized world and whether the right to self-defence has placed limitations on the scope and extent of a state's sovereignty. The principle of sovereignty has been widely encapsulated over time with origins dating as far back as the Westphalia Treaty in 1648.

The research will have resort to and analyse views as expressed by Hinsley on sovereignty as having absolute political authority² as well as definitions proffered by scholars such as Rousseau who imagine sovereignty as the general will of the people.³ It is the contention of this research that sovereignty owes much of its eminence to the Peace of Westphalia Treaty and this notion is strongly supported by Boas who

² F. H. Hinsley, *Sovereignty*, 1986, p26

³ JJ Rousseau, *The Social Contract*, 1985

opines that “the modern structure and form of the international system can be largely traced back to the Peace of Westphalia in 1648.”⁴

It is the contention of this research that the scope of sovereignty in the modern world is waning due to the emergence of other equally important international law facets such as human rights and the ability of other states to intervene in the affairs of a state when there is pressing and emergent need under the guise of the ‘responsibility to protect’. Macklem et al, have argued that human rights play an important role in international law that ensures states behave in a manner that speaks to their legitimacy. In other words, they offer a check and balance in the exercise of sovereign power. The research will also have resort to the views of modern scholars such as Krasner who expounds sovereignty as having four layers to its meaning and resultantly means different things in different states.⁵

This research, therefore seeks to fill this gap in literature on the interplay that exists between the ever changing principle of sovereignty and the right of states to defend themselves as espoused in the UNC by taking a critical analysis of events unfolding in Ukraine at the instigation of Russia.

The United Nations Charter expressly states in Article 41 that “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures”⁶ and further in Article 51 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 United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”⁷

Shaw has propounded that the use of force together with other principles of international law such as sovereignty, independence and the equal status of states inform the world order framework⁸. This proposition pushes forward the argument followed by this research that self-defence is an integral component of international law that is inherent with mechanisms designed to place limitations on the exercise of some international law rights.

1.6 Research Methodology

1.6.1 Types of methodology

⁴ G. Boas, *Public International Law: Contemporary Principles and Perspective*, Edward Elgar Publishing, 2012, p9

⁵ S. D Krasner, *Sovereignty: Organized Hypocrisy* (1999)

⁶ Article 41, United Nations Charter

⁷ Article 51, United Nations Charter

⁸ M N Shaw, *International Law*, Cambridge, 2008, p1118

1.6.1.1 Desktop study

Desktop study or research refers to research that results in data collected or acquired whilst one is sitting on a desk. The data is collected from already existing sources and resources. It is generally a low cost method.

1.6.1.2 Theoretical/Doctrinal Research

Theoretical research is usually conducted for the purpose of gathering information on a subject to increase one's knowledge. The knowledge so collected is generally not used for anything in particular, other than the expansion of knowledge. Its character entails the answering of the questions: what? why? or as?. Theoretical research does not seek to innovate or solve a problem but rather lays the foundation for further research. In the legal field, it was best explained by Ian Dobinson and Francis Johns as "research which asks what the law is in a particular area."⁹ The import of this method is carrying out legal analysis of already existing legal instruments and case law.

1.6.1.3 Descriptive Research

Descriptive research is often used to describe the characteristics of a population. The range of questions that inform the data collected includes what, when, and how in reference to a particular population or group. Descriptive research models result in the generation of hypotheses that require further testing with the use of much more thorough designs. The data that is collected using descriptive research methods is either qualitative or quantitative.

1.6.1.4 Historical Research

Historical research is the systematic collection and evaluation of data with a view to explain, describe as well as understand the occurrences of past events. What happens in this method is rather an attempt to accurately reconstruct events of a certain period so as to draw lessons of the past and possibly plan for the future. As its name suggests, the research is much confined to the 'history' domain.

1.6.2 Research Design

This research will be based on the above mentioned research methods with resort being had to the desktop study in most instances and focus on primary and secondary sources. It shall critically analyse the Russian - Ukrainian conflict in the eyes of the many global actors, and international law as well as, treaties, journal articles and case law on the principle of sovereignty and on the right of states' to self-defence. Furthermore, it shall use the descriptive method by moderately describing the current invasion of Ukraine by Russia and drawing historical nuances for the purpose

⁹ I. Dobinson and F. Johns, *Qualitative Legal Research*, in Research Methods for Law, Edinburgh University Press, 18-19, 2007

of evaluating the justifications of the invasion. In addition, the research will utilize comparative analysis of other regional contemporary cases on the exercise of the right to self-defence.

1.7 Significance of the Study

The dissertation is relevant in that it generates knowledge on the subject matter of State rights and obligations at international level. Moreover, it will produce recommendations in line with international best practices in the area of sovereignty and the use of self-defence for the benefit of legislators in this country. On a personal level, the study will lead towards the making of informed policy recommendations as it forms part of my duties as an employee of the Ministry of Justice, Legal and Parliamentary Affairs.

1.8 Chapter Synopsis

This research will be presented in the following five chapters.

CHAPTER ONE: General Introduction and Background

This Chapter will explore the overview of the topic and constitutes the introduction, background of the study, the problem statement, aims and objectives of the research, the literature review, research methodology utilised, significance of the study, limitations of the study and the chapter synopsis.

CHAPTER TWO: The Russia - Ukraine Conflict in Context

This Chapter gives a contextual background to the Russia - Ukraine conflict and look at it from the perspectives of those that are directly involved, ie, Russia and Ukraine, as well as those of stakeholders that include NATO, United Nations, Africa as well as China. The chapter seeks to lay bare the causes of the war in the eyes of different parties.

CHAPTER THREE: The Concept of Sovereignty in Contemporary International Law

This Chapter seeks to elucidate more on the concept of state sovereignty and its place in the contemporary world. There will be an analysis of the principle from earliest formulations and changes that followed with the League of Nations and the United Nations Charter and further discuss it in the context of Russia and Ukraine.

CHAPTER FOUR: Self-defence and anticipatory self-defence as limitations

This Chapter evaluates sovereignty's limitations as brought about by the United Nations Charter guaranteed right to self-defence and anticipatory self-defence as they apply to the case of Russia and Ukraine.

CHAPTER FIVE: Summary of findings, conclusion and recommendations

This Chapter concludes the discussion and provides summary of findings, specific and general recommendations on the international law principle of sovereignty and the use of force as preserved by the United Nations Charter.

Chapter 2

THE RUSSIA - UKRAINE CONFLICT IN CONTEXT

2.1 Introduction

Currently, the world is gripped by an ongoing conflict of sorts, with Russia battering Ukraine in a stance that is seen the world over, as ‘the biggest threat to peace and security in Europe since the end of the Cold War’¹⁰. This Chapter seeks to give a contextual background to the Russia - Ukraine conflict and bring out the perspectives of parties that are directly involved and those of stakeholders such as NATO as well as lay bare the causes of the conflict in the eyes of different parties.

2.2 Factual Chronology of the Russia - Ukraine War

The tension between Russia and Ukraine has existed for several years following the breaking up of the Union of Soviet Socialist Republics (USSR). The USSR which was viewed as a strong rival of the United States of America broke in 1991, with Ukraine being part of the reason of the break up as itself, Russia and Belarus signed the Belovezh Accords in December. These Accords recognised each other's independence and created the Commonwealth of Independent States (CIS) instead of the Soviet Union to which thirteen members of the former USSR, save for Georgia and the Baltics became members. It has been noted that, “Behind only Russia, it was the second-most-populous and -powerful of the fifteen Soviet republics, home to much of the union’s agricultural production, defence industries, and military, including the Black Sea Fleet and some of the nuclear arsenal. Ukraine was so vital to the union that its decision to sever ties in 1991 proved to be a *coup de grâce* for the ailing superpower.”¹¹ This falling out can thus be argued to be one of the reasons tensions between Russia and Ukraine continually escalated over the years, leading to the point of war.

In 2014, Russia annexed a part of Ukraine known as Crimea following an outbreak of protests against the Ukrainian former President Viktor Yanukovich, who was seen as pro-Russian. The protests were violently suppressed and at the same time offered Vladimir Putin an opportune moment to occupy Crimea. After this annexation, Russia began arming and assisting rebels in the Donbas region which is in the southeast of Ukraine. It is important to note that Russia’s seizure of Crimea was the first time since the Second World War that a European state had annexed the territory of another thereby going against the ethos of the principle of state

¹⁰ J. Mankoff, *Russia’s War in Ukraine: Identity, History and Conflict*, Centre for Strategic & International Studies, April 2022, p1 (accessed on 7/6/22)

¹¹ J. Masters, *Ukraine: Conflict at the Crossroads of Europe and Russia*, Council on Foreign Relations, April 2022

sovereignty. Lives in the excess of fourteen thousand were lost due to the fighting that took place in the Donbas region between 2014 and 2021, which before the current ongoing war, was the deadliest conflict in Europe since the Balkan Wars that took place in the 1990s. It has been argued, and rightly so, that, “the hostilities marked a clear shift in the global security environment from a unipolar period of U.S. dominance to one defined by renewed competition between great powers.”¹² The emergence of Russia and China on the global race for world supremacy have had far reaching effects to the world order, some, on one hand devastating and on the other tipping the scales against the so called ‘Big Brothers’ of the world.

Historically, between the years 1945 and 1954 Crimea was an oblast (province) of the Russian Soviet Federative Socialist Republic (SFSR) until it was transferred to the jurisdiction of and incorporated into the Ukrainian Soviet Socialist Republic (SSR) by decree¹³ in 1954. In 1992 after Ukraine had severed ties with the USSR and became independent, Russia tried to annul this decree. It is important to note that Russia’s interests in Crimea were due to the fact that the Crimean city known as Sevastopol was the main base for the Russian Black Sea Fleet. Disputes pertaining the city continued between Russia and Ukraine until the signing of the Treaty on Friendship, Cooperation and Partnership in May 1997 wherein the two states agreed to, ‘respect each other’s territorial integrity, and confirm the inviolability of the borders existing between them.’¹⁴

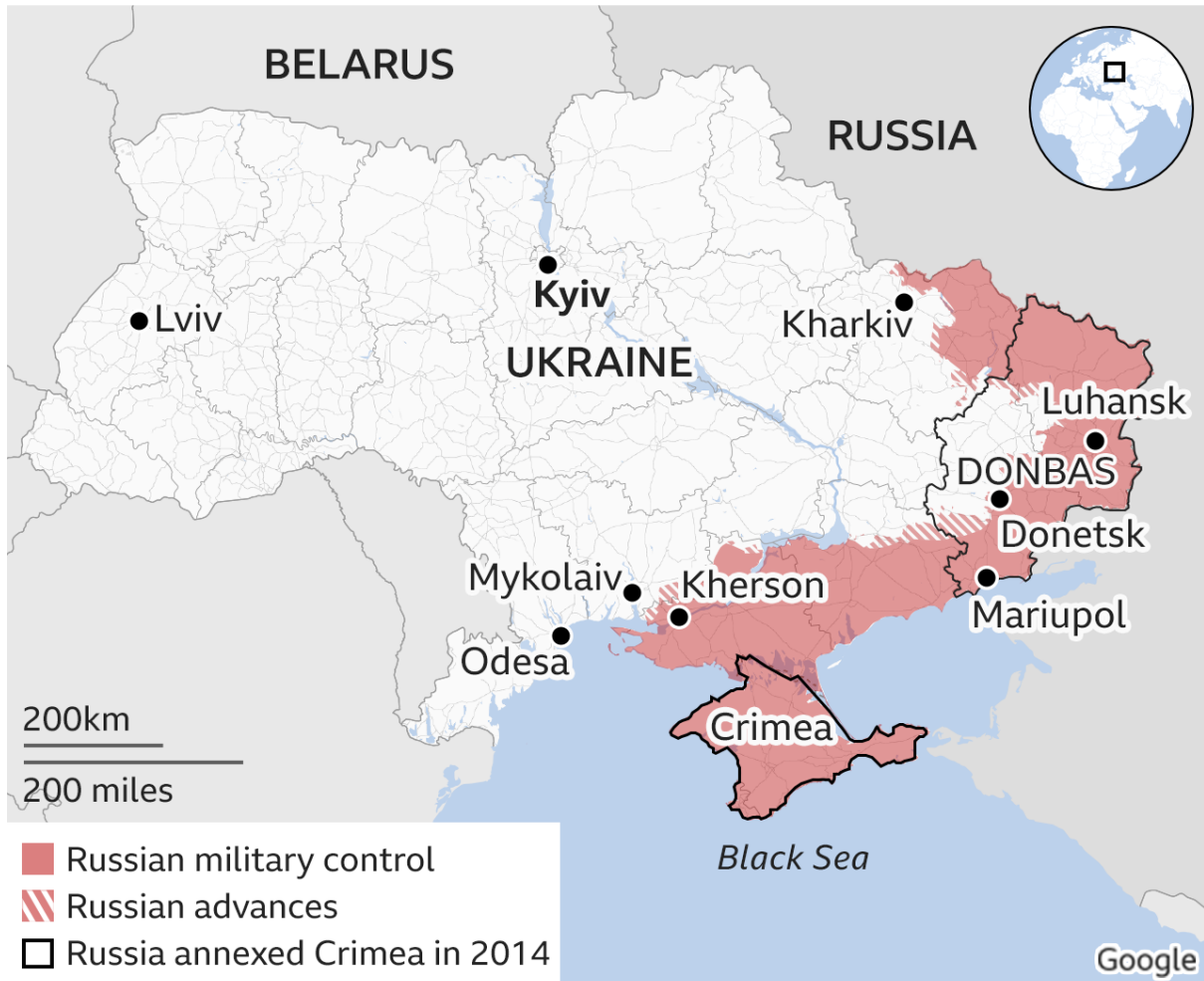
The events following the 2014 protests are quite a distinct feature of how the relationship between Russia and Ukraine keep evolving. In March 2014, Russian troops seized control of the Crimea region with Russian President Vladimir Putin alluding to the need to protect the rights of Russian citizens and Russian speakers who were based in Crimea and the southeast of Ukraine. Russia imposed a referendum, which was heavily disputed, that led to the annexation of the peninsula after Crimean citizens presumably voted to join the Russian Federation. This resulted in amplified ethnic separations, and after about two months pro-Russian secessionists in the Donetsk and Luhansk regions of eastern Ukraine held a referendum to declare independence from Ukraine. As was mentioned earlier, Russia started backing armed forces in the region which led to the eruption of further armed conflict as the Ukraine military fought the armed rebels.

¹² Masters, *ibid* 10, par 5

¹³ Angelika Nussberger, Russia, in *Max Planck Encyclopedia of Public International Law* Vol 43 (Oct. 2009).

¹⁴ Article 2, Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation

Areas of Russian military control in Ukraine



Source: Institute for the Study of War (21:00 GMT, 08 May)

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The Russian Government, on allegations of military activity near the Donetsk region as well as alleged shelling, refuted those claims thereby rendering the relationship between the two states and NATO, which also made allegations of military action by Russia, deadlocked. Efforts by Germany, France, Ukraine and Russia to end these hostilities proved futile and the relationship between the two states has continually deteriorated. Between 2016 and 2017 NATO and the United States of America then joined Ukraine efforts by deploying brigades to the Ukraine with the intention to bolster NATO presence in Ukraine.

Russia began deploying troops and military equipment near its border with Ukraine in the month of October 2021, and resultantly awakening concerns, arguably rightly placed concerns, over the potential of assault. By December 2021, Russia had started

¹⁵ Illustration of Russian control in the Donbas Region and its annexation of Crimea in 2014, <https://www.bbc.com/news/world-europe-56720589> Accessed on 22 June 2022

making demands, which will be addressed in the part dealing with Russian perspectives on the cause of the war.

2.3 Causes of the War - Russian Perspectives

It is an undeniable fact that the states that formerly belonged to the USSR have common history and ethos going into the future. That Russia and Ukraine have ties dating to as far back as the 1920s when the USSR was birthed. Because of this long standing history, Russia can be seen as having has profound traditional, pecuniary, and political bonds with Ukraine. Further to that, and in many ways Ukraine is crucial to Russia's identity and vision for itself in the world - dominance over Ukraine can, and will speak to the fact that Russia is an equal superpower.

2.3.1 Familial links

The capital of Ukraine, Kyiv, is also known as 'the mother of Russian cities,' which is equal in respect of cultural influence with Moscow and St. Petersburg. This illustrates the fact that Russia and Ukraine have and continue to have, solid ancestral ties that date back to many centuries ago.

2.3.2 Russian migrants

A census carried out in Ukraine in 2001 suggests that nearly eight million ethnic Russians were living there and were mostly concentrated in the south and east Regions. The Russian government insisted it had a duty to defend these people in a bid to justify its annexation of Crimea and the military activity that took place in Donbas in 2014.

2.3.3 'World power' perceptions

It has been put forward by schools of thought that the USSR collapse showed a lack or loss of power which would reflect badly on the power that Russia ought to have had. Jonathan Masters aptly contends that, "Losing a permanent hold on Ukraine, and letting it fall into the Western orbit, would be seen by many as a major blow to Russia's international prestige."¹⁶ The invasion of Ukraine is thus meant to spruce up the image of Russia as a dominant force in the world order.

2.3.4 Crimean significance

The city of Sevastopol as mentioned earlier, is the home port for Russia's Black Sea Fleet, which is the prevailing marine force in the region and thus Russia has always had interests in Crimea. Because during the USSR era, Crimea belonged to Russia at one stage and to Ukraine at another point, inevitably there are many Russian natives who continue to view it as home thereby strengthening the push by Russia to have control of it.

¹⁶ J. Masters, *Ukraine: Conflict at the Crossroads of Europe and Russia*, para 10

2.3.5 Energy

Russia has been using Ukrainian pipelines for a very long time to pump gas to its clients in Central and Eastern Europe and Ukraine has billed Russia billions of dollars per year as passage fees to Kyiv. Such a scenario would not be obtaining in the likelihood of Russia calling the shots in Ukraine. This need to control Ukraine can thus be viewed as one of the reasons why Russia attacked Ukraine.

2.3.6. President Putin's statement following the invasion

President Vladimir Putin has made several statements prior to and following the invasion of Ukraine by Russia on 24 February 2022. In one of his addresses, President Putin stated that the cause of his military action were a response to 'threats coming from Ukraine' and warned other countries to not intervene. President Putin blamed the United States of America and its allies for not paying attention to Russia's demand to prevent Ukraine from joining NATO as well as failing to give Russia assurances that such would not happen. In his words, the military exercise was aimed at 'demilitarising' and 'denazifying' Ukraine.

Ukraine grew its connections with NATO in the years preceding the invasion that took place in February 2022. Ukraine has held annual military exercises with the alliance and, in 2020, obtained one of six positions regarded as enhanced opportunity partners, a special status for NATO's closest allies who are not members. Ukraine's intention clearly illustrated its intention of becoming a full member of NATO, which in Russia's view, posed a threat to its security as this would bring USA (its enemy) to its doorstep.

2.4 Causes of the War - Ukraine Perspectives

The view of Ukraine on why Russia invaded and went to war can best be summed up as the rest of the world view which best explain Russian's objectives. The President of Ukraine, Volodymyr Zelenskyy, has put up a spirited fight against the war and has expressed the view that the intention of Russia is to enslave Ukraine. President Zelenskyy is on record for being against Russia activities in Ukraine and at one time referring to President Putin as "an enemy"¹⁷. The tenacious fight by President Zelenskyy speaks to resistance that Ukraine continues to put in a bid to free itself completely from the throes of Russian control.

The Foreign Minister for Ukraine, Dmytro Kuleba has spoken in support of President Zelensky and emphasized Ukraine's strength in fighting against Russia. With respect to international diplomacy, soon after the invasion, he mentioned that Ukraine was

¹⁷ T. Parfitt, "Ukraine poll leader Volodymyr Zelensky sees Putin as an enemy". The Times. Archived from the original on 21 April 2019, accessed 22 June 2022

ready to seek sensible diplomatic solutions to put an end to the war whilst emphasising that Ukraine would not surrender.

Russia, under President Putin, has been labelled a revanchist power, that is more than eager to recoup its former supremacy and stature and achieving this by bringing back to its control, the territory of Ukraine. The annexation of Crimea, sham referendums in the Donbas region are such clear examples of the Russian slow but deliberate and calculated plan. Gerard Toal has opined that “It was always Putin’s goal to restore Russia to the status of a great power in northern Eurasia.....The end goal was not to re-create the Soviet Union but to make Russia great again.”¹⁸

2.5 NATO Perspectives

The North Atlantic Treaty Organisation (NATO) has found itself in the midst of a ‘proxy war’ between Russia and Ukraine together with the USA and itself behind the scenes. The Organisation has strongly condemned the military invasion of Ukraine by Russia despite Ukraine not being a full member yet. The purpose of NATO is to offer collective defence to its members and their citizens in the face of an attack and whilst Ukraine is partner country that works closely with NATO, it does not qualify for collective security.

The nature of NATO and Ukraine’s relationship resultantly leads to a situation whereby NATO can only stand waiting in anticipation of Russia spreading the ambit on its War to a point attacking NATO member states. It is at this stage that NATO can only intervene. The reasoning behind this is premised on the fact that NATO actions should not be seen to escalate a conflict or have it spread beyond certain borders.¹⁹ The effect of this approach seems to leave Ukraine hanging out to dry as NATO insists on the no direct involvement approach this despite Ukraine suffering at the hands of Russia due to the issue revolving around its membership and the security threat it posed to Russia.

NATO has however been supportive to the Ukraine government and has offered humanitarian aid as well as non-lethal aid whilst its allies (individual member states) have assisted Ukraine through the supply of arms and other pertinent military equipment. Following the annexation of Crimea, NATO has helped Ukraine through military operations so as to enhance the skills of the Ukrainian military.

2.6 United Nations Perspectives

As an international body charged with ensuring that world peace and security is maintained, the United Nations has done quite a lot of work in ensuring that Russia is made responsible for its actions in Ukraine. Following the military invasion of Ukraine, the UN expressed its concern that it considered the Russian violence as a

¹⁸ G. Toal, *Near Abroad*

¹⁹ https://www.nato.int/cps/en/natohq/topics_192648.htm

violation of the territorial integrity and sovereignty of Ukraine. To the UN, the invasion was purely a violation of the ethos of the United Nations Charter, to which Russia was a member.

The International Criminal Court opened investigations for war crimes and crimes against humanity and the International Court of Justice ordered Russia to stop its activities in Ukraine. Several Resolutions have been adopted by different bodies of the UN including the Human Rights Council and the General Assembly. The most notable resolution was adopted on 7 April 2022 when the UN General Assembly resolved that Russia should be suspended from the Human Rights Council²⁰. The resolution received 93 votes in favour and 24 against thereby securing the two-thirds majority of those present on the day and had voting rights. In addition to these efforts, the United Nations and its partners have rallied humanitarian assistance for the people of Ukraine who have been rendered homeless and refugees in neighbouring countries.

The United Nations through the General Assembly is seen as strongly condemning the actions of Russia and has gone as far as appointing Special Rapporteurs, human rights experts to investigate crimes against international law as well as country visits to both Russia and Ukraine by the Secretary General Antonio Guterres. It would be prudent for one to wonder what these actions by the UN imply and if they are enough had these actions been carried out by a not so powerful country. The UN stands to lose a lot from this persisted violence on Ukraine as it will lose its international respect and value.

The United Nations, as a whole, is one organisation that faces a seriously challenging phase due to the invasion of Ukraine by Russia. This is because Russia is one of the five permanent members of the Security Council as established by Article 23 of the United Nations Charter. This article mandates the members of the Security Council with maintaining peace and security the world over. Challenges to this constitution have been made since time immemorial and because oft-times the conflicts that have taken place had Security Council backing, the challenges have been ignored. Currently, the UN is now faced with an aggressor, who is a permanent member of the Security Council and likely to evade accountability and responsibility because of special powers - the veto - conferred by the same Charter that seeks to maintain world peace. The fear is that “if this body (UN) in crisis and cannot preserve order, it should fade into oblivion like the League of Nations.”²¹

2.7 Africa Perspectives

²⁰ United Nations General Assembly Resolution ES-11/3, *Suspension of the rights of membership of the Russian Federation in the Human Rights Council*

²¹ Y. Vindman, Putin’s War is an Existential Crisis for the United Nations, www.foreignpolicy.com/2022/04/01/Russia-war-united-nations-ukraine/ Accessed 22 June 2022

Africa's reaction to the invasion of Ukraine has arguably been lukewarm, with some countries such as Kenya openly condemning Russian actions whilst other countries on the other hand have shunned away from commenting or taking action in any manner against Russia. Rajen Harshé thus comments on this lacklustre response saying, "A mixed-bag response of the African nations to the Russia-Ukraine war emanates from their dependence on both Russia and the West."²² It is important to note that the USSR, during the 'Rush for Africa' played no part and was rather more instrumental in helping African countries, which had been colonised, to fight against racism and colonisation. With these actions, Russia became a dominant player in the African context.

African states have thus been reluctant to temper with their existing linkages with Russia. This is evidenced by the fact that during the United Nations General Assembly of 2 March 2022, of the fifty-four African states represented at the UNGA, 17 chose to abstain from voting on the Resolution demanding Russia to end its operations in Ukraine with one country voting against and the remaining eight not voting at all. African countries can be seen as trying to balance their existing ties with the USA linked West and their anti-colonialist ties with Russia.

2.8 China Perspectives

Of the perceived 'world superpowers', China has had an 'unannounced' position with a clear abstention from the UNGA vote speaking clearly on behalf of China regarding their position on the war. Quite pertinent to this lack of a clear position is the fact that China has important stakes in the global economy and to be seen as siding with Russia would be injurious to its international supremacy plan. Harsh V. Pant contends that, "Backing Moscow beyond a point is likely to hurt Beijing's economic plans and long-term interests".²³ However, Chinese President Xi Jinping seems to have a different approach with recent utterances on his part indicating that, "China is "willing to continue to offer mutual support (to Russia) on issues concerning core interests and major concerns such as sovereignty and security."²⁴ The addition of the principle of sovereignty by China in its defence or supposed support of Russia and its actions becomes worrisome and seems to suggest the joining of forces between the two states in a bid to push for a new global order that leans on Russia and China.

China has however offered humanitarian aid to Ukraine, which action indicates a country not sure of its intentions. Perhaps the threat of distorted gains in the superpower arena are determinant of how China responds to questions regarding its

²² R. Harshe, *The Russo-Ukraine War: The African States' response to Russian imperialism*, accessed 22 June 2022, www.orfonline.org/expert-speak-category/raisina-debates-review

²³ V. H. Pant, *What China may have learnt and unlearnt from the Ukraine Crisis*, accessed 22 June 2022, www.orfonline.org/expert-speak-category/raisina-debates-review

²⁴ www.france24.com/en/live-news/20220615-xi-tells-putin-china-will-keep-backing-russia-on-sovereignty-security Accessed 22 June 2022

position on the war. It then makes sense when one opines that the war between Russia and Ukraine is very much an indirect war between Russia and NATO which has USA backing. It has been argued that China's rather quiet stance on the war may work in its favour as a disintegrated Europe offers itself a chance to overtake the EU as a superpower.

2.9 Conclusion

This Chapter has demonstrated a contextual analysis of the tensions that have existed between the states of Russia and Ukraine which go as far back as the era of the Soviet Union. Important to the discussion of the concepts of sovereignty and self-defence is the perspectives offered by key world players and these have been discussed. Chapter 3 will go into fuller detail on the principle of sovereignty and its place in contemporary international law and Chapter 4 will tackle self-defence as a limitation to sovereignty.

Chapter 3

THE CONCEPT OF SOVEREIGNTY IN CONTEMPORARY INTERNATIONAL LAW

3.1 Introduction

The international political and economic arena is governed by a diverse set of approaches that are designed to bring international order. International law is designed to govern state - state relations to ensure that there is peace amongst these nations. As a result of this, several fundamental principles underpin international law and these include trade, humanitarian law, environmental law, human rights as well as international criminal law amongst many others. The Principle of sovereignty finds itself at the fore of many discussions that are centered on international law.

Globalization has undoubtedly resulted in the change of world dynamics, including in the international arena and resultantly the principle of sovereignty has been forced to adapt to the changing times. This chapter seeks to elucidate more on the concept of state sovereignty and find its place in the contemporary world. Resort will be had to historical understandings of the concept and the changes brought about by the United Nations Charter in 1945 as well as discuss it in light of the Russia - Ukraine conflict.

3.2 The concept of Sovereignty

3.2.1 Definition

The Oxford Dictionary defines a sovereign as one who has supremacy or rank above, or authority over, other; a superior; a ruler, governor, lord, or master. Customarily, the notion of sovereignty refers to the idea of supreme, independent authority over a territory. The Oxford Dictionary further distinctly puts it that in international law, it is an essential aspect of sovereignty that all states should have supreme control over their internal affairs, subject to the recognized limitations imposed by international law²⁵. It can be imagined as absolute or limited, or both, as in one of its earliest formulations by Jean Bodin, who defined sovereignty as “absolute power limited only by the power of God”.²⁶

The Oxford Dictionary of Law defines sovereignty as “....a Supreme authority in a State. In any State sovereignty is vested in the institution, person, or body having the ultimate authority to impose law on everyone else in the State and the power to alter any pre-existing law. ...In international law, it is an essential aspect of

²⁵ <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100520397>

²⁶ Jean Bodin, *Les Six Livres de la République* (1999)

sovereignty that all States should have supreme control over their internal affairs ...”²⁷

F. H. Hinsley contends that sovereignty is “the idea that there is a final and absolute political authority in the political community ...and no final and absolute authority exists elsewhere”²⁸ According to Jean-Jacques Rousseau, it can be imagined as inherent in a people as well as the general will of a people.²⁹ From these definitions it is quite evident the principle of sovereignty is an important aspect of international law.

Stephen Krasner has proposed that four layers exist to the meaning of sovereignty. Krasner has propounded that, “sovereignty can refer to a State’s international legal sovereignty, “Westphalian” sovereignty, domestic sovereignty, and interdependence sovereignty.”³⁰ According to this school of thought as put by Krasner, the term ‘Westphalian’ sovereignty is thus used to refer to a State’s ability to disregard external players from exercising legal authority on its territory and over its population. The layer proposed as domestic sovereignty is thought to be used when referring to the internal organisation of State power and that State’s capacity to implement overall control within its territory.

In Krasner’s opinion, the term interdependence sovereignty denotes to a State’s capacity to standardise movements of people, ideas, goods, capital, and the like across borders. In Krasner’s legal interpretation, sovereignty therefore is best explained in terms of capacity, resultantly meaning sovereignty manifests differently in different States.

The international law definition of sovereignty is one that is quiet key in any discussion that revolves around the principle. J. L Brierly’s defines sovereignty as “an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states.”³¹ Partrick Macklem contends that, “In international law, sovereignty means more than what Krasner refers to as ‘international legal sovereignty’ and also includes elements associated with the other variants that he identifies.”³² Macklem rightly suggest that international law ‘establishes sovereignty’s international legal existence.’ He states that, “Sovereignty in international law refers to what the international legal order recognizes as the aggregate of valid claims that States make in their relations with other States.”³³

²⁷ E. A Martin, and Law, J, ed., *A Dictionary of Law*, Oxford: Oxford University Press, 2006

²⁸ F. H. Hinsely, *Sovereignty*, 1986, p26

²⁹ JJ Rousseau, *The Social Contract*, 1985

³⁰ S. D. Krasner, *Sovereignty: Organized Hypocrisy* (1999)

³¹ J. L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* , 4th ed. 1949, p48-49

³² P. Macklem, *The sovereignty of Human Rights*, Oxford University Press, 2015, p32

³³ Macklem, *ibid*, p33

Sovereignty can generally be understood in a narrow or wider view. The narrow view which is also the old school definition is best espoused in the *Tinoco Claims Arbitration* case³⁴ which highlighted that the Tinoco administration was the government of the day as it had effective control of the country despite some countries having not recognised it. This narrow definition of state sovereignty can give rise to the sovereignty of the ruling elite rather than a sovereign population and is thus problematic in the modern day usage. The modern day - wider view of sovereignty seeks to answer whether the State is expressing the sovereignty of the general populace. In this sense, sovereignty is premised on the consent of the citizens and is exercised as a result of a social contract that exists between citizens and those that rule over them. It has to be seen to justify the existence of a democratic state and on the other hand it has to be seen to promote and protect human rights. The emergence of human rights serves to some extent as a curb to excesses on the part of the State that include human rights abuses and impunity.

The principle of sovereignty is now understood as including the following tenets, self-determination; political and economic independence; non-intervention in the affairs of another state; respect for territorial integrity of other states as well as permanent control over natural resources without interference from other states. The tenets of statehood were codified in the Montevideo Convention of 1933, despite their having been already in existence. The Convention lists the criterion for identification as a state in Article 1 as follows, 'state must possess a permanent population; it must occupy a clearly defined territory; it must operate an effective government over the extent of its territory; and it must display capacity to engage in international relations - such capacity including the ability to fulfil international treaty obligations'³⁵. This criterion is one of the important basis for definition of statehood.

From the above discussions and proposals, it becomes evident that the concept of sovereignty is one that is varied in its use with a sway in political affairs, law, and further has numerous theoretical effects in all of them. It then begs the question whether the sovereignty of one state extends to the jurisdiction of another state as is the case in Russo - Ukrainian conflict and the extent it is allowable to be exercised.

3.2.2 Westphalian Sovereignty

Some schools of thought have argued that the notion of the principle of sovereignty has always existed in the interplay between humans.³⁶ It is further argued that sovereignty then, may have been very limited in those days as leaders who exercised the authority that flowed from sovereignty could not undo their actions, a case in point being monarchs who could pass law, but could not repeal such law in the event

³⁴ *Great Britain v Costa Rica (Tinoco Case)*, 1 UN. Rep. International Arbitration Awards, 369 (1923)

³⁵ Article 1, *Montevideo Convention on the Rights and Duties of States*, 1933

³⁶ O. Greenwood, "Sovereignty: Outline of a Conceptual History," Sage Publications Inc., *Alternatives: Global, Local Political* Vol 16, 1991, p425-446;

of changes that required a repeal. Our discussion however seeks to trace the history of sovereignty starting from the signing of the Treaty of Westphalia.

The concept of the principle of sovereignty was birthed by the Westphalia Treaty framework in 1648. The Westphalia Treaty introduced foundations of the modern state as well as the concept of territorial sovereignty through the marking of territorial boundaries and the giving of power to the Princes to make and join alliances. Gideon Boas contends that, “The modern structure and form of the international system can largely be traced back to the Peace of Westphalia in 1648,..”³⁷ The Treaty, as it outlines in its Preamble, brought to an end three decades of conflict for military and governmental dominance between France (with its European allies) and the Roman Empire. It has been suggested that the Peace of Westphalia Treaty saw, “the transition from empire to sovereignty.”³⁸ Loosely translated, the Treaty of Westphalia gave the Princes sovereignty in their territories and took away power from the Roman Emperor. Under the Westphalian system sovereignty, territorial integrity, and non-interference in internal affairs of countries have been its foundational principles.

It would seem prudent and right to opine that the Westphalia Treaty birthed what is now known as the modern version of the international law system and gave the state its place in the dynamics of political affairs vis-à-vis the international law arena. The Treaty of Westphalia is lauded for its many impacts on the notion of sovereignty as it is said to have affirmed the rights of political independence of its participants, as well as guaranteeing religious rights for the marginal groups. Macklem then contends that, “It also suggests, however, that sovereign statehood and political demands for cultural protection are mutually constitutive.”³⁹

Like any principle of international law, the Westphalia has come under attack as just being a ‘myth’ perpetuated by nineteenth and twentieth century scholars who gave a certain account of 1648 that has been argued to have been “influenced by ideas that can be traced to anti-Habsburg propaganda of the Thirty Years”⁴⁰. To downplay the key role of Westphalia in the shaping of sovereignty is what one would trying to ‘split hairs’. The argument falls short as the results flowing from the signing of the Westphalia Treaty have a bearing on the League of Nations as well as the United Nations and their perceptions on sovereignty.

3.2.3 United Nations Charter Sovereignty

³⁷ G. Boas, *Public International Law Contemporary Principles and Perspectives*, Edward Elgar Publishing, 2012, p9

³⁸ G. Simpson, ‘*International Law in Diplomatic History*’, in James Crawford et al, (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012).

³⁹ Macklem, *ibid* 31, p125

⁴⁰ A. Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, *International Organization* 55, 2, Spring 2001, p268

The end of World War 1 resulted in a need for 'world powers' to re-design international relations with a perceived view to prevent the reoccurrence of suffering that entailed modern warfare. The initiatives of the allied forces, which had emerged as victors after WWI, resulted in the birth of the League of Nations in January 1920. The thrust of the League of Nations was mainly centred on a need for 'collective security' so as to ensure future peace in the world. In essence the League required its Members to respect territorial integrity and sovereignty of other states as well as a clear rejection of the use of force as means to settle international disputes and or conflicts with other states.

The Covenant of the League of Nations set out sovereign rights that included the freedom from external interference as well as intervention. Article 15(8) of the Covenant of the League of Nations excluded from the purview of the League matters that considered to be within the "domestic jurisdiction" of states. It is important to note that this provision only applied to the settlement of disputes and not all matters of concern to the League. Article 10 provided a rather, not so strong, right of non-intervention, as it provided that "*The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.*"⁴¹ According to Chesterman, "This clause outlawed the acquisition of title by conquest and the changing of the territorial status quo by force, but it did not necessarily make humanitarian intervention illegal."⁴² This was a broad embargo on war and rightly put limits to the extent of a country's perceived sovereignty.

Despite its pole bearing developments in modernising the concept of state sovereignty, the League of Nations however failed to prevent the outbreak of the Second World War (WWII) mainly due to the fact that some states refused to join the grouping and thus were not bound by the obligations that entailed from the Covenant. The League ceased operations in April 1946, making way for the body that has been instrumental in ensuring world peace, known as the United Nations.

The United Nations was founded in 1945 following the demise of the League of Nations as a result of the outbreak of WWII. Article 2(1) of the United Charter provides that, "*The Organization is based on the principle of the sovereign equality of all its Members.*" Clearly announcing the importance of the role of sovereignty in the relations of the UN as a world body. It is prudent to note that the Charter did not abandon the ethos that flows from the principle of state sovereignty and encapsulates this by the provision in Article 2(7) which states that "*Nothing contained in the present Charter shall authorize the United Nations to intervene in the matters that are essentially within the domestic jurisdiction of any state.*"⁴³

⁴¹ Article 10, Covenant of the League of Nations, 1920

⁴² S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford: Oxford University Press, 2001, p43

⁴³ Article 2(7), United Nations Charter

This provision speaks to national sovereignty as well as the principle of non-intervention which requires states to abstain from interfering in the matters of other states. It is a principle of customary international law and finds itself in various UN declarations and resolutions. Because of globalization, the narrow/old understanding of sovereignty and its notions are losing their meaning and the discourse has shifted immensely towards international protection by recognizing the rights of outsiders to intervene.

3.2.4 Post 1990's Sovereignty

The 1990s have seen an unprecedented change in the widespread view that the United Nations Charter is a document of import that reflects the Westphalian principles in a manner that is highly significant. Things have changed and post the 1990's there has been a departure from the old notion that what transpires within the borders of one sovereign state is not the concern of persons, institutions, and states elsewhere. Humanitarian and human rights interventions have transformed the debate. The UN has moved away from the old position of respecting the rights of interveners towards preserving and protecting the rights of victims and the obligations of outsiders to act when faced with situations that require that the sovereignty of another state be interfered with.

Ordinarily, the state authorities whose citizen's rights are threatened that have the primary "responsibility to protect." This new notion creates a residual responsibility that lies with the larger community of states when a deviant member of their club misbehaves by abusing the rights of its citizens or simply collapses by killing its own people such as was the case in Idi Amin's Uganda. According to Radice, L, this action of intervention is, "In clear violation of traditional principles of Westphalian sovereignty, it is no longer uncommon for international institutions to exercise sovereign rights with binding effect on states, who in principle should not answer to any outside power"⁴⁴ This urgent need to exercise this responsibility to protect has been birthed due to the fact that sovereignty and human rights, are two principles of international law, that have often found themselves contradicting with some scholars arguing that international human rights is a mechanism designed to check the exercise of sovereignty by states. On the other hand, the right to self-determination is viewed as a pre-requisite condition for the full satisfaction and realization of citizen rights.

According to Christian Rues-Smit, "This connection between the right to self-determination and human rights was first articulated in 1950 by Afghanistan and Saudi Arabia in the United Nations negotiations that eventually produced the two International Covenants."⁴⁵ In 1952, a General Assembly Resolution was passed to

⁴⁴ L.C Radice, *Evolving Conceptions of Sovereignty as applied to Membership in International Organisations*, Clairmont McKenna College, 2019

⁴⁵ C. Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, Review of International Studies, Oct., 2001, Vol. 27, No. 4 (Oct., 2001), p535

the same effect that self-determination was a pre-requisite for the full enjoyment of all fundamental rights. It asserted the right to self-determination as well as the obligation on European states to decolonise⁴⁶. This resulted in the recognition of self-determination in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. It is evident that one of the two has to be in place for the full realisation of the other and as such the concepts are intertwined in their operation.

According to Patrick Macklem “Even though, in moral theory, they may be formal expressions of what we owe each other in ethical recognition of universal features of what it means to be a human being, human rights play a different normative role in international law. They express - imperfectly - what is required of the international legal order to enable it to acquire a measure of normative legitimacy.”⁴⁷ The human rights system has provided an effective tool for checks and balance measures for the sovereignty of the people i.e. sovereignty of the sovereign with a view to curbing arbitrary use of power. It is prudent to say that human rights have become a solution to de facto governments that would have assumed power by force. This is premised on the fact that, unlike in the *Tinoco*⁴⁸ case, effective control of a country’s boundaries does not warrant self-determination and/or sovereignty. A case in point is the loss in the 2016 presidential elections in Gambia by the incumbent Yahya Jammeh and his refusal to vacate office to allow the swearing in of a new president. The international community gave recognition to the winner of the elections and this pressure eventually led to Jammeh’s stepping down. It is safe to deduce that human rights tend to demand governments that are de jure. Governments that assume power by legitimate means such as through legitimate elections. Another case in point for such would be Malawi wherein the Constitutional Court annulled the 2019 election results on the basis that they were fraught with irregularities. The same situation applies in the United States of America where the system works efficiently on its own to recognize a duly elected president. A question however arises in situations where a government is declared elected in an election that outsiders feel was not free and fair. The Belarus incumbent is a classic example of a government elected in a supposedly ‘free and fair’ election but with evidence of human rights suppression. The idea of popular sovereignty falls flat in such a situation.

De facto governments tend to abuse human rights often by committing atrocities with impunity. Human rights have evidently, to a large extent, come in and curbed the rate of atrocities and effectively deliver justice for those who would have been wronged. Charles Taylor of Liberia was sentenced to fifty years in prison by the Special Court for Sierra Leone for war crimes and crimes against humanity.

⁴⁶ General Assembly Resolution 637 A (VI), 5 December 1952

⁴⁷ P. Macklem, et al, *The Sovereignty of Human Rights*, p105

⁴⁸ Tinoco case, ibid 33

State responsibility is also another important facet of international relations that stems from sovereignty and equality. With sovereignty comes the responsibility to protect and the State has the primary duty to protect its citizens. This practice brings to the fore the importance of human rights in the protection of citizens from dangers that are associated with the exercise of sovereign power. International institutions have a secondary obligation to secure protection of citizens of any country when a state abandons its responsibility. Human rights mechanisms, globally and regionally serve as an enforcement tool for state responsibility.

Scholars have expressed that sovereign power is derived from international law for example Hans Kelsen who opines that domestic law is validated by international legal norms whereas the widely held view contends that sovereignty derives from the people's will. According to Macklem "International law brings legal order to global politics not simply by legally authorizing the exercise of sovereign power by collectivities it recognizes as States. By authorizing the exercise of sovereign power by all sovereign States in the world, international law also produces a systemic distribution of sovereign power."⁴⁹ Suffice to say, human rights do not only provide a check for the exercise of sovereign power, but its distribution too.

The former (now late) Secretary General of the United Nations stated in 1999 the need to balance sovereignty and intervention when he stated that, "State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."⁵⁰ The statement clearly shows a shift by the United Nations in its understanding of sovereignty, to include the simple human being in protection mechanisms.

The responsibility to protect has however come under criticism as it is being maliciously used by some states in a bid to cause regime change. The NATO intervention of the Libyan Arab Spring protests led to a change in regime, which not only resulted in devastating humanitarian consequences but also led to some countries questioning the purpose of the responsibility to protect. There is thus a need to strike a balance between guarantees of sovereignty for a given state and

⁴⁹ P. Macklem et al, *The Sovereignty of Human Rights*, 45

⁵⁰ K. Annan, *Two Concepts of Sovereignty*, Sep, 1999, <https://www.un.org/sg/en/content/sg/articles/1999-09-18/two-concepts-sovereignty>, Accessed 8 July 2022

the responsibility of outside actors to protect the human rights of citizens of a country who are suffering human rights abuses.

3.3 Russo - Ukrainian Conflict

In the current Russian - Ukrainian conflict different perspectives are held by those involved in the conflict. It is important to point out at the beginning that the conflict has resulted in increased tension between Russia and the West as well as affected the 'presumed' balance that usually obtains in the United Nations Security Council. The notable bone of contention between the two states is the issue of Ukraine seeking to westernize its defence mechanisms by joining the North Atlantic Treaty Organisation (NATO), which would erase any ties that Ukraine still had, to the Soviet States.

In 1997, Russia and Ukraine signed the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation which was an agreement that fixed the principle of strategic partnership, the recognition of the inviolability of existing borders, and respect of territorial integrity and mutual commitment not to use its territory (either of the two states) to harm the security of each other. The treaty further prevented Ukraine and Russia from the invasion of one another's country respectively as well as the declaration of war. The Treaty was not renewed at the instance of Ukraine when it announced its intention not to renew the treaty in September 2018. This resultantly led to the treaty expiring on 31 March 2019. This non-renewal has led to the further downward spiral between relations of these two countries.

3.3.1 Sovereignty - Russian Perspectives

Russia's approach to sovereignty can be seen as reflecting a close link between the project to recentralise internally as well as the insistence of Russia's position as a great power on the international scene. Russian concepts of sovereignty seem tied to its urgent need to create a strong superpower, post the Soviet Union era, the role of culture and historical interpretation in its foreign policy, Russian concepts of hostile states and the domestic ideas linked to Russian concepts of federalism.

3.3.1.1 Russia - Post the Soviet Union

It has been argued that during the Soviet Union era, the USSR which had its capital in Moscow, was a 'significant power' and the fall of the Union that happened in 1991 seems to have taken away the power that Moscow perceived to have wielded. As a result of this, perceived power, where Russia was always deemed to be in control, post the USSR, Russia has always wanted to be seen to maintain the dominance it exercised in the Soviet Union and in respect of Ukraine, the 'big brother' opinion has been evident in their relationship.

President Vladimir Putin is on record for dismissing the independence of Ukraine and claiming that Ukraine 'is not a country' and that it was 'created by Russia' which

allegation has been dismissed by some scholars as not being factually true as the state of Ukraine was birthed from the Soviet Union. The ‘big brother’ claim that Russia asserts on Ukraine thus falls flat in the face of such a dismissal. President Putin’s desire to control Ukraine is also highly evident in the actions that follow the annexation of Crimea in 2014 wherein Russia imposed a referendum, which was heavily disputed, that led to the annexation of the peninsula after Crimean citizens presumably voted to join the Russian Federation. This resulted in amplified ethnic separations, and after about two months pro-Russian secessionists in the Donetsk and Luhansk regions of eastern Ukraine held a referendum to declare independence from Ukraine.

3.3.1.2 Russia Foreign Policy

Russia’s foreign policy stance is one that some have labelled as revisionist, in that it constantly reconsiders its previously accepted view of something. Its relations with prior members of the USSR bears testament. According to Tirkey, A, “Russia has historically been a staunch supporter of sovereignty, territorial integrity, and non-interference in the domestic affairs of a country. Moscow has largely adopted a ‘statist’ approach to understanding these principles, where state sovereignty forms the bedrock of the international order. However, such defences have been invoked to resist western interference in authoritarian regimes, and shield them from external scrutiny. Nonetheless, this stands in stark contrast with Moscow’s actions in its neighbourhood, where its foreign policy in the Commonwealth of Independent States (CIS) region reflects a hierarchy where Russian interests supersedes those of its neighbours. Moscow’s expansion of control over post-Soviet territories, such its invasion of Georgia in 2008 and its annexation of Crimea in 2014, stands as a testament to this fact.”⁵¹ The import of Russia’s actions seems to suggest its need to create a sphere of influence as a sign of its predominance in the region.

In seeking to understand Russian foreign policy, it is important to appreciate that Russia has, historically, always sought to be recognised as a country independent of the rest of the world and in doing so, has always pursued its interests as a country without basing on any doctrine or principle other than that of federalism. The Centre for Strategic and International Studies contends that of late Russia has become much assertive in its actions underpinned by, “.... a growing consensus among Russian analysts, scholars, and officials that Russia should play a larger role in the world, one where Moscow is free to act according to its own interests without being beholden to others and where no issue of global significance can be resolved without Russian participation.”⁵²

The major ideological construct of the post-communist period - sovereign democracy - insists that both sovereignty and democracy are socially and culturally determined,

⁵¹ A. Tirkey, *The Ukraine Crisis: Sovereignty and International Law*, Raisina Debates, Feb 2022, p2, accessed 22 June 2022

⁵² <https://www.csis.org/programs/russia-and-eurasia-program/archives/russian-foreign-policy>

and therefore clash with Western interpretations of these concepts. The emergence of a new, post-modern and Western-dominated set of global norms limiting sovereignty is closely linked to continued tensions between Russia and the West.

3.3.2 The Ukraine Perspective on sovereignty

According to Tirkey, A, “The Ukraine crisis presents grave questions regarding state sovereignty and territorial integrity, and how the emergence of new ‘spheres of influence’ could affect state sovereignty.”⁵³ It is undoubted that Ukraine is caught up in the midst of a tug-of-war between the West and Russia. The worldwide held view is that Ukraine, since the fall of the Soviet Union, is a very much sovereign country that should be left to make its own decisions. Ukraine has over the years, since 1992, been working on getting full NATO membership in what should be seen as an exercise of its sovereignty. It should follow that since Ukraine left the Soviet Union and became an independent state, decisions about which alliance or treaty to join, lie with the Ukraine government and not any other state.

The Budapest Memorandum signed in 1994 readily comes to mind when discussing the Ukraine - NATO - Russia issue. In the Memorandum, Russia assured Ukraine that it would ‘refrain from the threat or use of force’ against Ukraine on the condition that it surrendered a massive nuclear stockpile that had been inherited by Ukraine when the Soviet Union collapsed. In hindsight, Ukraine may have weakened its sovereignty resolve against Russia by that voluntary surrender, because despite the Russian ‘guarantees’ from the use of force, Russia still went ahead and invaded Ukraine in a situation that has become a full-on war.

The current President of Ukraine, , Volodymyr Zelenskyy, has demonstrated spirited efforts to uphold the sovereignty of Ukraine and exercise its free - will to associate with whomever they want to through the continued efforts to join NATO and the European Union.

3.4 Conclusion

It is an undeniable fact that the Westphalia Treaty laid an important foundation for the future of sovereignty in the area of international law as has been demonstrated in this chapter. Globalisation has also played an important role in ensuring that the principle evolves with changing times as is shown by the emergence of the responsibility to protect principle. The following chapter will seek to examine the limitations that flow from the right of self-defence and anticipatory self-defence to the exercise of a country’s sovereignty.

⁵³ Tirkey, ibid 49, p3

Chapter 4

SELF-DEFENCE AND ANTICIPATORY SELF-DEFENCE AS LIMITATIONS

4.1 Introduction

The right to self-defence in international law has always raised many questions especially when it regards the extent to which it applies and is relied on by states. Interesting to note is the fact that the right to self-defence is closely tied with the use of force, which areas are both provided for, quite clearly, in the United Nations Charter. Of similar and equal importance is the doctrine of anticipatory self-defence. The question naturally begs, what is its place in world where states are expected to respect a fellow State's sovereignty?

The United States of America in its 9 March 2003 attack on Iraq relied on the doctrine of anticipatory self-defence as justification for launching the attacks. President George W. Bush addressed the United Nations and announced that, through the 'National Security Strategy of the United States' the United States would act against 'emerging threats before they were fully formed'.⁵⁴ The so called, 'anticipated attack by Iraq on the USA' which resulted in the USA relying on the right to self-defence, led to a lot of protest the world over on the extremes a country is allowed to go to when exercising this right. A similar situation has found itself manifesting in the Russia-Ukraine conflict wherein Russia contends that its attacks on Ukraine are in defence of itself from the threats emanating from the presumed soon to be presence of NATO in Ukraine.

This chapter therefore seeks to find out the permissible grounds upon which the right to self-defence and anticipatory self-defence can be relied on as well as their place in international law. It will also analyse the historical context and the current use of force. The chapter will further analyse how the use of this right places limits on United Nations Charter guaranteed rights especially on a country's sovereignty, looking at Russia-Ukraine as a learning point.

4.2 The use of Force

The discussion on the right to self-defence can never be complete without talking about the use of force and how together with other principles such as sovereignty, freedom (independence) and the parity of states inform the world order framework.⁵⁵

4.2.1 Background

The use of force has changed quite intensely over the years and it is important to note that earlier history shows a point wherein there was no ban in the need to use

⁵⁴ M. E. O'Connell, *The Myth of Preemptive Self-Defence*, Paper for the American Society of International Law, August 2002, p.11

⁵⁵ MN. Shaw, *International Law*, Cambridge, 6th Edition, 2008, p.1118

force in inter-state relations. The use of force was legitimate means of settling inter-state disputes and this was known as the doctrine of *jus ad bellum*. The doctrine is thought to have originated from the Roman Empire where 'just war' was resorted to as long as 'God willed'. According to Shaw, "The concept of the just war embodied elements of Greek and Roman philosophy and was employed as the ultimate sanction for the maintenance of an ordered society." Scholars of old also gave definitions of this doctrine with St Augustine (354-430) defining the just war as the, 'avenging of injuries suffered where the guilty party has refused to make amends. War was to be embarked upon to punish wrongs and restore the peaceful status quo but no further'.⁵⁶ In the thirteenth century, St Thomas Aquinas further opined that "war could be justified provided it was waged by the sovereign authority, it was accompanied by a just cause (i.e. the punishment of wrongdoers) and it was supported by the right intentions on the part of the belligerents."⁵⁷

Jus ad bellum began to lose its significance after the end of WW1 as approaches to the doctrine shifted to a much stricter interpretation. The Treaty of Versailles (1919), although did not prohibit the use of force, is credited for having birthed the first recorded limitations on *jus ad bellum* as well as including the first use of the term 'aggression' as a reference to the unlawful use of force.

4.2.2 Covenant of the League of Nations

Although it did not expressly bar the use of force in international relations, the Covenant of the League of Nations brought with it a better approach in its use. This approach introduced international supervision in the conduct of war. According to Shaw, "The League system did not, it should be noted, prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels"⁵⁸ Articles 10 -12 of the Covenant laid down the circumstances which solidified the use of force unlawful as being; '(1) when made without prior submission of the dispute to arbitration or judicial settlement or to inquiry by the Council of the League; (2) when begun before the expiration of three months after the arbitral award or judicial decision or Council Report; (3) when commenced against a member which had complied with such award or decision or recommendation of a unanimously adopted Council report; and (4) under certain circumstances, when initiated by a non-member state against a member state.'⁵⁹ The idea behind these conditions was to allow states, which were near warring phases, to lower the tension so as to avert the possibility of war.

In 1928, the General Treaty for the Renunciation of War also known as the Kellogg-Briand Pact was signed. The essence of the Pact was to condemn resort to war under

⁵⁶ See J. Eppstein, *The Catholic Tradition of the Law of Nations*, 1935, pp. 65

⁵⁷ *Summa Theologica*, II, ii, 40

⁵⁸ M. Shaw, *ibid* 53, p1122

⁵⁹ Articles 10-12, Covenant of the League of Nations

international law⁶⁰ and obliged its member states to settle disputes by other peaceful means. The Kellogg-Briand Pact did not prevent the outbreak of WWII as was anticipated, but it is lauded for, 'forming the basis for 'crimes against peace', which, after World War II, were described in the Charter of the Nuremberg Tribunal as those crimes aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.'⁶¹ The Kellogg-Briand Pact may have been hamstrung by the fact that some members had entered reservations that they would use force in self-defence and thus the use of force still existed.

4.2.3 The United Nations Charter

After the end of WW2, the creation of the United Nations brought in significant changes in the manner in which force could be used by states. The Charter of the United Nations is essentially credited for birthing a much more pronounced framework on how force could be used in international law.

According to Henkin *et al*, Article 2(4) of the United Nations Charter is regarded now 'as a principle of customary international law and as such is binding upon all states in the world community'⁶². 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."⁶³ The wording of this article is relevant in that it does not limit itself to war, but covers all forms of aggression that could be perpetrated against another state before a full war had begun.

The importance of Article 2(4) was clearly underscored in the case of *Nicaragua v United States*⁶⁴ wherein the International Court of Justice pronounced that Article 2 (4) was a peremptory norm of international law and States could not derogate from it. It would seem that thus, the effect of Article 2(4) is that the use of force can only be vindicated as expressed in the Charter. Further to that, in situations where it is consistent with the purposes that are enshrined by the United Nations. Several case law from the ICJ has made pronouncements on this Article. In the case of, *Democratic Republic of the Congo v. Uganda*, the Court described the ban against the use of force as a 'cornerstone of the United Nations Charter.'⁶⁵ There has been wide ranging debate on what constitutes 'purposes of the UN' and O'Connell has contended that the prohibition only applies 'on force aimed at the territorial integrity and political independence of states or inconsistent with the purposes of

⁶⁰ Article 1, General Treaty for the Renunciation of War

⁶¹ T. Remler, *The Right of Anticipatory Self - Defence and the Use of Force in Public International Law*, UCT

⁶² L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd Edition, St Paul, 1993, p. 893

⁶³ Article 2(4) United Nations Charter

⁶⁴ *Nicaragua v United States*, [1986] ICJ Reports 14, at para 190

⁶⁵ *Democratic Republic of the Congo v. Uganda*, ICJ Reports, 2005, pp. 168, 223.

the UN.’⁶⁶ The ICJ however in the *Corfu Channel Case*⁶⁷ declared that the claim of intervention by right by Britain was, ‘the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot . . . find a place in international law’.

It is no doubt that international relations demand that states respect each other’s territorial sovereignty as was enunciated by the ICJ in the *Nicaragua* case and that the reliance on using force is a definite violation of international law. The current case of Russia and Ukraine revives this debate, and prompts this research to analyse the extent that Article 2(4) of the UNC is being respected. Further inquiry follows ultimately, on the impact that flows from the right to self-defence and/or anticipatory self-defence.

4.3 The right of Self-defence in international law

The right to self-defence is one of the three categories of the use of force with the other two being reprisals, which means, “illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state”⁶⁸ and retorsion which refers to the “adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a method of retaliation against the injurious legal activities of another state.”⁶⁹

Retorsion acts include economic measures (sanctions) and the expulsion of diplomatic representatives and are seen as often displaying displeasure in the conduct of a state. Reprisals as mentioned above, are illegal, but can be legitimised if used in terms of the right to self-defence⁷⁰.

The right to self-defence owes its earliest formulation in the *Caroline Case* of 1837 wherein British nationals seized and destroyed a vessel (the *Caroline*) which was docked in an American port on the basis that the *Caroline* had been supplying groups of American nationals, who had been conducting raids into Canadian territory. Following the incidence, the United States Secretary of State wrote to the British authorities laying down the essentials of the right to self-defence. The Secretary intimated that there had to exist ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’⁷¹. He further highlighted that not only were such conditions necessary before the self-

⁶⁶ M. N. O’Connell, *The Myth of Preemptive Self-Defence*, Paper for the American Society of International Law, August 2002, p.4

⁶⁷ *Corfu Channel Case*, ICJ Reports, 1949, pp. 4, 35

⁶⁸ MN Shaw, *ibid*, 53, p1129

⁶⁹ MN Shaw, *ibid* 53, p1128

⁷⁰ See Bowett, ‘*Reprisals*’. See also SCOR, 19th Year, 111th meeting, 8 April 1964, in which the Security Council condemned reprisals as contrary to the UN Charter and deplored the UK bombing of Fort Harib,

⁷¹ D. Webster, *Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr. Mcleod, for the Destruction of the Steamboat Caroline* - March, April 1841, 24 April 1841, Volume 29, British & Foreign State Papers, 1126-1142, page 1137

defence could become legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, 'since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it'⁷². These principles were accepted by the British government at that time and have become accepted as part of customary international law.

The conditions and principles as enunciated by the US Secretary have importance in the modern right to self-defence. According to Remler, "The Caroline doctrine thus establishes two main criteria for legitimate self-defence: first, the use of armed force must be strictly related to the protection of the territory or property and the population of the defending state. Second, the proportionality criterion precludes a state from using force beyond that necessary to repel an attack or "to preserve and restore the legal status quo." The defending state may not respond to an armed attack in an "unreasonable or excessive" manner, and force used in self-defence must discriminate between civilian and military targets, as required by the laws of armed conflict."⁷³

The Caroline Case can thus be viewed as an important facet to the development and growth of the right and according to Brownlie, "Jurisprudence following the Caroline dispute regarded the practice of self-defence as an act of self-preservation, which could only be permitted in dire circumstances."⁷⁴

4.3.1 The Right to self-defence under the United Nations Charter

As stated earlier, the right to self-defence is guaranteed in the United Nations Charter under Article 51 which 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 United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."⁷⁵ In essence, the article provides a condition upon which Member states are exempt to use force and basically this applies when an armed attack occurs against them. This article is an exception to Article 2(4) which bars the use of force by member states.

The ICJ was able to outline the scope of Article 51 in international law in the Nicaragua Case⁷⁶ as well as the relationship that concerned international customary law and Article 51 of the UN Charter. In the case, the ICJ stated that 'the Charter is not intended to regulate and cover the entire international law on use of force'⁷⁷

⁷² See Bowett, *Self-Defence*, and Brownlie, *Use of Force*, Chapter 13. See also I. Brownlie, 'The Use of Force in Self-Defence', 37 BYIL, 1961, p. 183

⁷³ T. Remler, *ibid* 59, p21

⁷⁴ I. Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, p734

⁷⁵ Article 51, United Nations Charter

⁷⁶ *Military and Paramilitary Activities against Nicaragua Case (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27)

⁷⁷ *Nicaragua v USA*, p175-179

and went on further to highlight that, “Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter . . . It cannot, therefore, be held that article 51 is a provision which ‘subsumes and supervenes’ customary international law”.⁷⁸ The decision of the ICJ in the Nicaragua case has been lauded for its instructive content regarding the interpretation of Article 51. The court found no armed attack was being carried out by Nicaragua against the United States and rightly, that the appeal to article 51 was not plausible.

The Court in the Nicaragua case went on further to define an ‘armed attack’ and explained it as ‘a state’s direct sending of troops, armed bands, irregulars or mercenaries into another state, which clearly was not the case with respect to Nicaragua’.⁷⁹ The import of this definition was to absolve Nicaragua from carrying out an ‘armed attack’ as supplying (in the event of doing so) arms did not mean an attack. Gideon Boas contends that “Article 51 has a more restricted application, and requires a state-sponsored strike to be carried out against a UN Member State before the right to self-defence can be invoked. Accordingly, not every threat or use of force that breaches Article 2(4) will invoke a state’s right to self-defence under Article 51.”⁸⁰

The ICJ in the *Nicaragua Case* and in the *Oil Platforms case*⁸¹ laid down principles key to the right of self-defence being raised and these are that if an armed attack has occurred against a state, the response of that State, in self-defence, is only restricted to actions that are necessary and proportionate. The Charter lays a further requirement in Article 51 that requires attacked states to report to the Security Council any measures it would have taken in self-defence. It becomes necessary to interrogate the current situation between Russia and Ukraine, where Russia attacked Ukraine on the basis of a need to ‘defend’ the people of the Luhansk and Donetsk regions.

Ruys has argued that the findings of the ICJ are very controversial and debatable, including their interpretation of ‘self-defence’⁸². This argument is premised on the fact that some schools of thought restrict the definition whilst others adopt a much wider view that customary law does not correspond to the Treaty laws in existence.

⁷⁸ Nicaragua v USA *ibid*, p349

⁷⁹ *Ibid*, 74 p103

⁸⁰ G. Boas, *Public International Law*, Edward Elgar, 2012, p328

⁸¹ *Oil Platforms Case (Islamic Republic of Iran v USA)* [2003] ICJ Reports 161, 51

⁸² Ruys, “Armed Attack”, Article 51 of the UN Charter, page 7. See also, Timothy McCormack, ‘A Non Liqueur on Nuclear Weapons - The ICJ avoids the Application of General Principles of International Humanitarian Law’ (1997) 37 *International Review of the Red Cross* 1; Theo Farrell and Hélène Lambert, ‘Courting Controversy: International Law, National Norms and American Nuclear Use’ (2001) 27 *Review of International Studies* 309.

4.4 Anticipatory self-defence as a right

Christopher C. Joyner and Anthony Clark Arend define ‘*anticipatory*’ as “the ability to foresee the consequences of some action and take measures aimed at checking or countering those consequences”⁸³ and an *anticipatory act* as being “able to visualize future conditions, foresee their consequences, and take remedial measures before the consequences occur.”⁸⁴ The Oxford Reference dictionary defines anticipatory self-defence in international law as “a pre-emptive strike by one state against another. Such action is of doubtful legality under the United Nations Charter.”⁸⁵

The question of what a state should do in the face of an armed attack often gets asked by different schools of thought. Boas opines that the “most controversial aspect of Article 51 concerns whether a state’s right to self-defence against an armed attack includes the right to anticipatory self-defence”⁸⁶. The right of anticipatory self-defence arises when there hasn’t been any aggression but a concerned state believes there is an imminent attack looming and that state has no other recourse. This however goes against the ideals of Article 51 that require that an attack have ‘occur(ed)’.

The right of anticipatory self-defence has its origins dating as far back as Hugo Grotius who indicated that self-defence could be permissible before the actual violence occurred. Grotius is credited for establishing “the danger must be immediate, which is one necessary point.”⁸⁷ The US Secretary of State, Webster, following the Caroline incident followed through with providing the principles for the employment of the right of anticipatory self-defence.

The exercise of the right to self-defence in international relations has drawn different reactions from the United Nations, which is mandated with ensuring world peace. The Six Day War between Israel and Egypt readily comes to focus. The incidences preceding the war read similar with the events that led to the Russia-Ukraine conflict. Egypt deployed its troops to its Sinai border, leading to the Israeli state responding through mobilisation. Tensions between the two states grew further following the remarks by the Egyptian President Gamal Abdel Nasser that “we intend to open a general assault against Israel. This will be total war. Our basic aim will be to destroy Israel.”⁸⁸ The result that followed this statement was the attack of the Egyptian airbase by Israel in response to the threats. Israel claimed anticipatory self-defence. Both the UN Security Council and the General Assembly

⁸³ C. Joyner, et al, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 USAFA Journal of Legal Studies Vol 27, p32 (2000).

⁸⁴ Ibid 81, p32

⁸⁵ <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095416548>

⁸⁶ Ibid 78, p333

⁸⁷ Hugo Grotius, *On the Law of War and Peace (De Jure Belli ac Pacis)*, translated by A. C. Campbell, London, 1814, Book II, chapter 1, V.

⁸⁸ UN Doc. S/PV.1348, 6 June 1967, p150.

did not adopt resolutions made to hold Israel accountable for the attack. The apparent reactions of the United Nations seemingly suggest that the UN bodies respond to state actions depending on who has carried out an attack. Currently, the General Assembly has adopted resolutions on Russia, and going as far as suspending it from the Human Rights Council, whereas the Security Council is not being seen to pronounce itself clearly other than through individual state actions such as the United States of America supplying Ukraine with arms.

The United Nations -Level Panel on Threats, Challenges and Change has however been seen to present a shift in support of anticipatory self-defence. The Panel in its 2004 Report stated that, “[A] threatened state, according to long established international law, can take military action as long as the attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real; for example the acquisition, with allegedly hostile intent, of nuclear weapons making capability.”⁸⁹ The threat of nuclear weapons is very real and the need to pre-empt the likelihood of attacks in this case seems very much urgent. The current United States of America, Joe Biden is recently credited for stating that the USA was “prepared to use all elements of its national power to stop Iran from getting a nuclear weapon.”⁹⁰ This in essence means the USA will resort to anticipatory self-defence so as to prevent Iran from ever utilising its nuclear based weaponry.

It is apparent that world dynamics have resulted in the wider contextualisation of Article 51 of the Charter with states having resort to using force, at times, to achieve immediate self-defence mechanisms. The prescriptions of a 1945 document can be perceived as failing to keep up with globalisation.

4.5 Self-defence as a limitation of sovereignty

It is no doubt that the principle of sovereignty in international law is perceived to be under the protection of the United Nations with the founding Charter clearly and unequivocally stating in Article 2(1) that ‘The Organization is based on the principle of the sovereign equality of all its Members.’ This article is part of the principles of the UN aimed at ensuring global peace, achieving equality amongst states as well as achieving international cooperation by states. It has been argued however, that the UN has somewhat double standards where it involves sovereignty and that “.....the UN has had a complicated relationship with sovereignty: while it clearly and unequivocally commits to the concept in its founding documents, it also establishes principles that require the surrender of sovereignty to put into practice.”⁹¹

⁸⁹ UN Doc. A/59/565, 2 December 2004, 54

⁹⁰ <https://www.bbc.com/news/world-middle-east-62155165> Accessed 17 July 2022

⁹¹ L. C. Radice, *Evolving Conceptions of Sovereignty as Applied to Membership in International Organizations*, Claremont McKenna College, 2019, p57

Article 2(7) of the Charter however reads with contrast to Article 2(1) by providing that “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”. This provision guarantees sovereignty and in the same breath takes it away under the guise of maintaining peace and order. The question is then asked, whose peace and order when the sovereignty of states such as Ukraine is being attacked by a Security Council member yet no action is being taken to defend Ukraine’s sovereignty.

The rights of self-defence and that of anticipatory self-defence in essence place limits on the enjoyment of sovereignty by allowing a state to attack another state on the basis of presumed ‘imminent’ attacks. The principle of sovereignty in its literal sense enjoins states to carry out any and all possible activities within its boundaries as long as they do not affect the neighbouring countries. For one country to then come out and attack another state on the premise of activities going on in its country would seem to suggest ‘a piercing’ of the sovereignty veil. Imagined attacks should not be allowed to go unpunished.

The idea of collectivism which is one of the ethos of the UN is in itself one of the biggest impediments to the enjoyment of the principle of sovereignty. The responsibility to protect as discussed earlier is one of the collective efforts that find itself in limiting the exercise of sovereignty.

4.6 Russia - Ukraine Conflict vis-à-vis the right to self-defence

4.6.1 Russia’s interpretation of its right to self-defence

When Russia invaded Ukraine in February 2022, it claimed, through a notification to the UN Secretary General, by its permanent representative that the military action was being taken in due accordance with the provisions of Article 51 of the Charter in the exercise of the right of self-defence. The allegations by Russia of an ‘imminent’ attack were premised on the expansion of NATO nearing Russian borders. President Putin claimed that,

[f]or the United States and its allies, it is a policy of containing Russia, with obvious geopolitical dividends. For our country, *it is a matter of life and death*, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to *the very existence of our state* and to its sovereignty. It is the red line

which we have spoken about on numerous occasions. They [NATO] have crossed it.⁹²

It is important to note that President Putin did not rely on the requirements of Article 51 of resorting to self-defence because an attack had occurred, but rather, he made reference to future imminent threats to which Russia needed to respond. In this claim, it can be seen that Russia relied on anticipatory self-defence to launch the attack and invasion of Ukraine.

The second basis for Russia to invoke the right to self-defence was born out of a perceived threat in the form of a bolder and strengthened Ukraine. President Putin stated that, “Russia cannot feel safe, develop, and exist while facing a permanent threat from the territory of today’s Ukraine.”⁹³ Russia claimed that there was need to defend itself as well as the people of the Donbass Region as well as the Russian diaspora that was domiciled in Ukraine as a means of collective self-defence.

The facts on the ground seem to suggest that there was no attack on Russia by either NATO or Ukraine or the USA to warrant the invasion of Ukraine. The military activities that took place in Ukraine with the assistance of NATO can best be explained as a state enjoying its sovereignty without interfering with its neighbour. The actions of Russia itself have been described as being, “at best an example of “preventive self-defence,” at worst, and most accurately, pure aggression”⁹⁴. The fact that the rest of the world, including NATO, has not intervened and five months later Russia continues its barrage on Ukraine clearly points to a case of the use of force to suppress the rights of a sovereign state.

4.6.2 Ukraine’s position on Russia’s self-defence claim

Ukraine has put up formidable resistance to the invasion and continued attack by Russia. President Zelensky contends the Russian attack as an attack by an enemy thereby thwarting the self-defence claim. President Zelensky continues to call for and push for a collective effort in defence of Ukraine. The Western ‘allies’ have only been seen to supply weapons to Ukraine in what can be termed a clear avoidance of further escalating the war.

4.6.3 Third party perspectives

4.6.3.1 NATO Perspectives

⁹² Address by the President of the Russian Federation’, *Office of the President of the Russian Federation* (24 February 2022) <http://en.kremlin.ru/events/president/transcripts/67843> (official English translation, as published by the Kremlin)

⁹³ Ibid, 92

⁹⁴ M. N Schmitt, *Russia’s “Special Military Operation” and the (Claimed) Right of Self-Defence*, Lieber Institute, Feb 2022

The very nature of anticipated relations between NATO and Ukraine can be argued as forming the real basis of the attack by Russia, but the response of NATO suggests a much awkward state of relations. The fact that Ukraine has not been accepted as a full member of NATO is the basis upon which NATO refused to intervene and assist Ukraine. NATO alleges that it is limited to defence against actual attacks carried out on NATO Allies and as a result Ukraine does not have recourse to Article 5 of the NATO Treaty, which postulates that an attack on one party in Europe or North America will be an attack against all parties.

NATO members therefore have no obligation under international law to militarily assist Ukraine in its defence against the Russian invasion. The import of this is that NATO has no legal basis to intervene on behalf of Ukraine.

4.6.3.2 Western States Perspectives

The rest of the Western states including the USA and the UK have had a confusing response and take vis-à-vis the Russian attack on Ukraine. The right to self-defence does not limit states from collectively responding to the attack without the existence of treaty for such collective response as was espoused in the Nicaragua case. The British Secretary for Defence refused for the UK to be directly involved in the conflict stating that, “I’m not putting British troops directly to fight Russian troops. That would trigger a European war because we are a NATO country and Russia would therefore be attacking NATO.”⁹⁵ The attitude of the western world seems therefore to suggest an avoidance of a full World War 3.

4.6.3.3 China perspectives

Chinese foreign policy includes amongst its key pillars the need to respect fellow countries’ territorial integrity and is perceived to be fully supporting Russia, behind the scenes, on the basis that NATO pushed it to invade Ukraine. The response, or lack of it, by China points to a country caught in between loyalties and also seeking to avoid conflict with the rest of the Western world.

4.7 Conclusion

This chapter has demonstrated the rights of self-defence and anticipatory self-defence as espoused in the UN Charter as well as how the Russia-Ukraine conflict is viewed vis-à-vis Ukraine’s sovereignty. It is no doubt that as much as the United Nations guarantees sovereignty through the Charter, that same Charter takes away that sovereignty under the guise of self-defence as well as the ‘collectivity’ ethos so as to preserve world peace. The changing world dynamics, innovation and technological advancements call for a revamp, if not a total overhaul, of the United Nations system so as to prevent abuse by the major players as is currently ongoing in Ukraine.

⁹⁵ <https://www.bbc.com/news/uk-60522745>

Chapter 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This Chapter presents conclusions and recommendations of the research on the relevance of sovereignty and the right to self-defence in international law. A summary of the major findings will be made and recommendations are proffered on how to strengthen the principle of sovereignty in a modern world whilst striking a balance with state's rights to defend themselves from attacks.

5.2 Restating the purpose of the study

The overarching purpose of this study was, in the main to analyse the interplay between sovereignty and self-defence and to find what extent the history between Russia and Ukraine contributes to the current conflict and how does the rest of the world perceives it. Further, the study sought find the principle of sovereignty in the modern world vis-à-vis the attack on Ukraine by Russia. The study also sought to find the permissible grounds for exercising the right to self-defence and anticipatory self-defence in terms of the UNC and the limitations they brought to sovereignty as well as proffer recommendations.

5.3 Summary of major arguments

To achieve the foregoing, the study, under Chapter 1 introduced the research topic, objectives and problem statement. It further outlined the aims of the research and the factual background underpinning the research and explored the conceptual aspects of the Russia - Ukraine conflict and presented a review of literature on the same.

The research employed a qualitative and thorough desktop research, incorporating doctrinal research, historical research and descriptive research methods, which focused on understanding the history between Russia and Ukraine as well the underpinnings of sovereignty and the right to self-defence.

Chapter 2 of the study explored the contextual background to the Russia - Ukraine conflict and looked at it from the perspectives of those that are directly involved, ie, Russia and Ukraine, as well as the perspectives of stakeholders that included NATO, United Nations, Africa as well as China. The Chapter laid bare the causes of the Russia - Ukraine war.

Chapter 3 elucidated more on the concept of state sovereignty and its place in the contemporary world. An analysis of the principle from its earliest formulations dating as far back as 1648 (the Westphalia Peace) was carried out. The chapter further explored the changes that have followed from the creation of the League of Nations to its fall and the birth of the United Nations Charter and the perceptions of

sovereignty during these eras and further discussed sovereignty in the context of Russia and Ukraine.

The research in Chapter 4 evaluated sovereignty's limitations as brought about by the United Nations Charter guaranteed right to self-defence and anticipatory self-defence as they apply to the case of Russia and Ukraine. The chapter also sought out an understanding of the use of force in international law.

5.4 Summary of main findings

The research found out that the concept of sovereignty is one that is not fully guaranteed as the body entrusted with its safekeeping is also charged with power to see its tempering. The exercise of collectivity as a tenet of the UN principles is one activity that undermines state sovereignty together with other Charter guaranteed actions and rights that include the right to self-defence. It should thus be imperative for the world order to revisit the Charter with a view for it to be a much more inclusive and fair document.

Notwithstanding the above, some definite findings have come out from this study and form the basis of conclusions as discussed below.

Firstly, the research found that tensions have always existed between the states of Russia and Ukraine which go as far back as the era of the Soviet Union with Russia imposing a dominance on Ukraine in a bid to be recognised as a world power. The responses of the stakeholders depend on their relations with Russia majorly, with those states that align with Russia turning a blind eye to the atrocities currently going on. Secondly, the study found out the causes of the Russia - Ukraine War.

Thirdly, the research unearthed the importance of sovereignty to international law and how the principle has evolved since its earliest formulations. The research found out that sovereignty perceptions differ from one country to another.

Fourthly, the research found out that although the use of force is prohibited under the United Nations Charter, it is still being used as an exercise of the right to self-defence or the right to anticipatory self-defence, which is, arguably, not guaranteed by the Charter.

Finally, the research concluded that the principle of sovereignty is no longer absolute and is facing constant limitations at the hand of other Charter guaranteed rights.

5.5 Recommendations

As this study demonstrates, reform of the United Nations system is essential for the maintenance of international peace and order. The study, as suggested below, offers recommendations which are important in international law.

5.6.1 Review the UN Charter

It is recommended that the UN member states of the General Assembly and the Security Council carry out a review of the Charter with a view to improving the right of self-defence, the roles of the UNGA, the UNSC and the ICJ. It is further recommended that the review should also look into the membership of the UNSC so as to respond to changes in world dynamics. The continued super power views have resulted in the abuse of the Charter to favour only a few.

5.6.2 Criteria to interpret the right to self defence

It is recommended that the UN, as the mother body, codifies, through the enactment of a new treaty, the premises upon which the right to self-defence and the right to anticipatory self-defence lie on as well as clearly pronounce the conditions precedent their exercise. This should apply to both collective and individual self-defence. Further to this, it would be prudent for the UNSC to be assigned a role before collective self-defence can be employed.

5.6.3 Respect for state sovereignty

It is recommended that the UN puts in place mechanisms to ensure the respect of a state's sovereignty as well as mechanisms to prevent super power domination of weak states. There is need to recast the principles of sovereignty so that they reflect a modern context.

5.6.4 Complaint procedures

It is also recommended that there be put in place a role for the ICJ to determine infringement of state sovereignty in the form of a grievance procedure for states to approach so as to avoid war. (On an urgent basis)

5.6.5 Changing doctrines

It is recommended that there be adaptation in the light of traditional concepts changing faces. It is imperative that doctrines be developed to fit existing contexts for example the Bush Doctrine following the invasion of Iraq. It is therefore recommended that the International Law Commission comes up with guidelines on the exercise of state sovereignty.

5.6 Conclusion

The face of sovereignty globally has shifted and the invasion of Ukraine by Russia on the pretext that NATO expansion efforts had encroached its territory smacks in the face of presumed good international relations. The further notification to the UN Secretary General, presumably, in terms of Article 51 as a right to self-defence defeats the purpose for which these mechanisms were created. The United nation, through its institutions, was not created to thwart the sovereignty of other states but rather as a fora for global consensus.

There is thus need for the world to steer towards revamping the current system so as to prevent the likelihood of another Russia - Ukraine scenario unfolding in the

near future. Like the League of Nations collapsed due to weaknesses, the United Nations may likely face a similar end if prevailing conditions are not addressed.

In conclusion, it has been noted that the principle of sovereignty has lost its absolute status at the hands of self-defence and there is need to revisit these doctrines to ensure their co-existence.

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