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## The Law of the Inter-American Treaty of Reciprocal Assistance

Manuel R. Garcia-Mora

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# FORDHAM LAW REVIEW

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## THE LAW OF THE INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE

MANUEL R. GARCIA-MORA†

ON September 2, 1947, the Inter-American Treaty of Reciprocal Assistance, also known as the Rio Treaty,<sup>1</sup> was signed at the Inter-American Conference for the Maintenance of Continental Peace and Security held in Rio de Janeiro.<sup>2</sup> The Treaty became effective on December 3, 1948, when, as provided for by one of its clauses,<sup>3</sup> two-thirds of the American States deposited their ratifications with the Pan American Union.<sup>4</sup> In view of the precarious conditions of the world today, it is a matter of extreme importance to analyze the obligations contained in the Treaty and to discuss the important legal problems it has thus far encountered.

### I. THE BACKGROUND

The Inter-American Treaty of Reciprocal Assistance was not the product of an improvised action on the part of the American States. Nor did it constitute an isolated instrument without any reference whatsoever to the system within which it purported to function. Prior to its conclusion, the American States had long shown deep concern regarding the possibility of strengthening the security and well-being of the Western Hemisphere in the presence of the increasing menace coming from across the seas.<sup>5</sup> The ideal of Inter-American solidarity in the face of an

† Assistant Professor of Political Science, University of Detroit.

1. The terms "Inter-American Treaty of Reciprocal Assistance" and "Rio Treaty" will be used here interchangeably.

2. English texts of the Treaty have been printed in 43 *AM. J. INT'L L.* 53 (Supp. 1949); *N. Y. Times*, Aug. 31, 1947, p. 26, col. 2; 17 *DEPT STATE BULL.* 565-72 (1947); *HILL, INTERNATIONAL RELATIONS: DOCUMENTS AND READINGS* 116-18; (1950); 13 *CURRENT HISTORY* 228 (Oct. 1947); 33 *A. B. A. J.* 1058-60 (1947); *FENWICK, INTERNATIONAL LAW* 722-6 (3d ed. 1948); and *GANTENBEIN, THE EVOLUTION OF OUR LATE AMERICAN POLICY: A DOCUMENTARY RECORD* 822-8 (1950).

3. *RIO TREATY* Art. 22.

4. 1 *ANNALS OF THE ORGANIZATION OF AMERICAN STATES* 253-60 (1949) (hereinafter *A. O. A. S.*).

5. Early preoccupation with the possibility of aggression from outside of the Western Hemisphere was expressed in a memorandum sent by President Wilson to Secretary of State Lansing on April 19, 1917. Cited by *GANTENBEIN, op. cit. supra* note 2, at 106-7.

aggression is an unmistakable evidence of that attitude.<sup>6</sup> Although many previous Pan American Conventions could make a legitimate claim for having originated the ideas incorporated in the Rio Treaty,<sup>7</sup> there is no question that the idea actually crystalized in two important occasions during the last decade.

The first positive step in that direction was taken in 1940 at the Habana Meeting of Foreign Ministers with the signing of Resolution XV, which provided that "any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign this declaration."<sup>8</sup> The far-reaching effect of this declaration clearly indicated that the Monroe Doctrine became a multilateral pronouncement of the entire Inter-American community.<sup>9</sup> This aspiration had already been expressed by President Wilson as early as 1915 without any success.<sup>10</sup> Hence, the Habana Resolution was largely shaped by historical precedents as well as by a chain of circumstances that made the need for multilateral action on the part of the American States a glaring necessity. But it must be observed that the Habana Declaration aimed at an attack of a *non-American State* against "the sovereignty or political independence of any *American State*. . . ."<sup>11</sup> The significance of this observation is indeed beyond question since the Declaration could not possibly apply to aggressions of an intra-Hemispheric nature.<sup>12</sup>

6. Pan Americanism itself has a comparatively long recorded history. For views on Pan Americanism before its reorganization in 1948, see ALFARO, COMMENTARY ON PAN AMERICAN PROBLEMS (1938); HUMPHREY, THE INTER-AMERICAN SYSTEM (1942); YEPES, LE PANAMERICANISME AU POINT DE VUE HISTORIQUE, JURIDIQUE ET POLITIQUE (1936), and EL PANAMERICANISMO Y EL DERECHO INTERNACIONAL (1930); LOCKEY, PAN AMERICANISM: ITS BEGINNINGS (1926). For an up-to-date discussion see FENWICK, THE INTER-AMERICAN REGIONAL SYSTEM (1949).

7. *E.g.*, the resolutions adopted in Buenos Aires in 1936 and in Lima in 1938, and the famous Neutrality Declaration adopted in Panama in 1939. Dr. Charles G. Fenwick, who is the Director of the Department of International Law and Organization of the Pan American Union, is of opinion that the Convention of Buenos Aires of 1936 was "a turning point in the history of inter-American relations which culminated with the signing of the inter-American Treaty of Reciprocal Assistance." 1 A.O.A.S. 260 (1949).

8. INTERNATIONAL CONFERENCES OF AMERICAN STATES, FIRST SUPP. 1933-1940, at 360, 361 (1940).

9. BEMIS, THE LATIN AMERICAN POLICY OF THE UNITED STATES c. 22 (1943). See also in this connection FENWICK, INTERNATIONAL LAW 238 (3d ed. 1948).

10. See the Draft Articles for a Proposed Pan American Treaty submitted by President Wilson to Secretary Bryan. GANTENBEIN, *op. cit. supra* note 2, at 100.

11. RIO TREATY Art. 6 (*italics supplied*).

12. Regarding the view held by President Roosevelt on the Habana Resolution, see his note to the Prime Minister of Iceland. 5 DEP'T STATE BULL. 19 (1941).

The second fundamental step in the direction of the Rio Treaty took place in Mexico City at the Inter-American Conference on Problems of War and Peace held in 1945, when the famous Chapultepec Act was concluded.<sup>13</sup> An important provision of this Act laid the foundations of the Rio Treaty. This provision, which was incorporated in Article 3 of the Act, included the provisions of the Habana Resolution, although a slight but significant variation was introduced at this time. Article 3 of the Chapultepec Act reads as follows: ". . . every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall . . . be considered as an act of aggression against the other States which sign this Act. In any case invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression."

It can be readily seen that Article 3 of the Chapultepec Act included aggressions of a non-American State as well as of an *American State* against another American State. While the Habana Resolution was limited in its scope and operation to aggressions coming from outside of the Hemisphere against an American State, the Chapultepec Act went even further in bringing within its jurisdiction any possible aggression committed by an American State against another member of the Inter-American community.<sup>14</sup> Therefore, the solidarity which in the Habana Resolution was merely of a regional nature, became by the Chapultepec Act a solidarity against aggression in general no matter who the aggressor might be.<sup>15</sup> There was, however, one drawback in the Chapultepec Act: the obligation was binding only during World War II.<sup>16</sup> Nevertheless, the possibility was left open for the conclusion of a permanent treaty which would replace the Chapultepec Act upon the termination of the war.<sup>17</sup>

But no sooner had the Chapultepec Act entered into effect when a legal problem of a different nature arose. The question was whether the

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13. A text of the Chapultepec Act may be found in PAN AMERICAN UNION, CONGRESS AND CONFERENCE SERIES, No. 47 at 30 (1945); also in HILL, *op. cit. supra* note 2, at 114-6; and in GANTENBEIN, *op. cit. supra* note 2, at 816-9.

14. CONFERENCIA INTER-AMERICANA PARA EL MANTENIMIENTO DE LA PAZ Y LA SEGURIDAD DEL CONTINENTE. INFORME SOBRE LOS RESULTADOS DE LA CONFERENCIA, PRESENTADO AL CONSEJO DIRECTIVO DE LA UNION PAN AMERICANA POR EL DIRECTOR GENERAL 21 (1947). There is also an English edition of this report. Hereafter reference will be made only to the English edition, which will be cited as REPORT.

15. REPORT 22.

16. CHAPULTEPEC ACT Art. 5.

17. *Id.* pt. II. For the difficulties encountered in convoking an inter-American conference in order to conclude a permanent treaty, see Kunz, *The Inter-American Treaty of Reciprocal Assistance*, 42 AM. J. INT'L L. 111 (Editorial Comment 1948). Also REPORT 4-5.

inter-American regional system could exist within the international arrangement of the United Nations. Thus the legality of the Chapultepec Act was seriously open to question.<sup>18</sup> The American States made it unmistakably clear that they were determined to maintain the inter-American system existing within the framework of the United Nations.<sup>19</sup> In fact, according to available information,<sup>20</sup> it was due to the consistent support of the Delegations of the American States that the San Francisco Conference adopted Article 51 of the Charter,<sup>21</sup> which recognized the "inherent right of individual or collective self-defense."<sup>22</sup> By this recognition, the inter-American system in general and the obligations assumed under the Chapultepec Act in particular, were considered consistent with the purposes and principles of the United Nations Charter.<sup>23</sup> Although under the terms of the Charter the right of individual and collective self-defense can only be exercised in the absence of actions on the part of the Security Council, the important thing, at least for the time being, is that the Charter fully recognized the inter-American regional arrangement as a part of the world wide system of collective security and defense.<sup>24</sup> Hence, Article 51 of the Charter made possible the fulfillment of the pledge undertaken at Chapultepec.<sup>25</sup>

With this background in mind, it can be said from the beginning that the Rio Treaty was concluded in pursuance of the principles of the Char-

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18. Kunz, *supra* note 17, at 111.

19. Speech made by the late Secretary Stettinius to the American people. 12 DEP'T STATE BULL. 1009 (1945).

20. REPORT TO THE PRESIDENT ON THE RESULT OF THE SAN FRANCISCO CONFERENCE, by the Chairman of the United States Delegation, at 101-8 (June 26, 1945). On the discussions that preceded the adoption of Article 51 of the Charter, see GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 174-81 (1946).

21. At San Francisco the Delegation of the United States introduced an amendment to the Dumbarton Oaks Proposals that now appears as Article 51 of the Charter. Finch, *The North Atlantic Pact in International Law*, 43 PROC. AM. SOC'Y INT'L L. 90, 94 (1949).

22. Article 51 of the Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security."

23. See the statement made by Representative Sol Bloom. Quoted in 1 A. O. A. S. 258 (1949).

24. See the statement made by Oscar Sevilla Sacasa, Minister of Foreign Affairs of Nicaragua. Quoted in 1 A. O. A. S. 257 (1949).

25. For other pertinent provisions of the Charter of the United Nations with respect to the Rio Treaty, see GANTENBEIN, *op. cit. supra* note 2, at 828-31.

ter, and as such, is a vital part of the peace machinery of the United Nations. The language of the Treaty itself makes it clear that it was conceived within the framework of the Charter.<sup>26</sup> Perhaps of greater significance is the fact that the intention of its framers was to subordinate it to the United Nations.<sup>27</sup> Moreover, it may be of interest to note that the Rio Treaty constituted the first arrangement made within the provisions of the Charter. The Brussels Alliance<sup>28</sup> and the North Atlantic Pact<sup>29</sup> were largely patterned after the Rio Treaty.<sup>30</sup>

## II. OBLIGATIONS ASSUMED UNDER THE TREATY

Legally speaking, there are three major obligations which the signatory States assumed under the Rio Treaty.<sup>31</sup> In the first place, the High Contracting Parties condemned war and undertook the obligation not to resort to the use of or the threat of force in their international relations.<sup>32</sup> The repudiation of war as an instrument of national or international policy is an age-old principle of inter-American law.<sup>33</sup> It antedates the Kellogg-Briand Pact and may be considered as a vital principle in the conception of Pan American solidarity.<sup>34</sup> It should be observed

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26. RIO TREATY Art. 5. See also Article 10, which says that, "None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the high contracting parties under the Charter of the United Nations."

27. Thus, Article 3, cl. 4 of the Rio Treaty provides: "Measures of self-defense provided for under this article may be taken until the Security Council of the United Nations has taken measures necessary to maintain international peace and security."

28. Signed between the United Kingdom, France, Holland, Belgium and Luxembourg on March 7, 1948. It seems that under the Brussels Alliance the obligation of reciprocal assistance is automatic in the event that one of the parties "should be the object of an armed attack in Europe." See Article 4 of Brussels Alliance and compare it with Article 3 of the Rio Treaty.

29. Salvin, *The North Atlantic Pact*, INTERNATIONAL CONCILIATION, No. 451 at 375-456 (1949). Also Finch, *supra* note 21, at 95.

30. For a more comprehensive treatment of the Brussels Alliance and the North Atlantic Pact under the Charter of the United Nations, see BECKETT, *THE NORTH ATLANTIC TREATY, THE BRUSSELS TREATY AND THE CHARTER OF THE UNITED NATIONS* (1950).

31. For a discussion of each article of the Treaty, see REPORT 24-60. A more general discussion is found in KUNZ, *The Inter-American Treaty of Reciprocal Assistance*, 42 *AM. J. INT'L L.* 111 (Editorial Comment 1948).

32. RIO TREATY Art. 1. This Article reads as follows: "The high contracting parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this treaty."

33. See PAN AMERICAN UNION, *THE CODIFICATION OF INTERNATIONAL LAW IN THE AMERICAS*, LAW AND TREATY SERIES, No. 20 at 22 (1946).

34. Scattered references regarding the repudiation of war as an instrument of national policy culminated with the Resolution on Arbitration and Conciliation signed at the Sixth International Conference of American States held in Habana from January 16 to February

that this particular obligation of the Rio Treaty makes a special reference to the Charter of the United Nations. But the obligation not to resort to the use of or the threat of force as an instrument of national or of international policy could scarcely be complete without the establishment of a machinery for the peaceful settlement of disputes that inevitably arise between States. In this connection, no one can deny that noble pledges to resort to peaceful means in the solution of controversies are of no practical value when utterly devoid of a proper machinery to put them into effect. It is not surprising, therefore, to find that the Treaty itself fills this vacuum by imposing on the contracting States the additional obligation to submit all their controversies to the inter-American machinery of peaceful settlement before referring them to the General Assembly or the Security Council of the United Nations.<sup>35</sup> Under this specific provision the parties do not have to resort to the United Nations until the matter has been referred to the Inter-American System of Pacific Settlement. At first glance, it would seem that this provision excludes the jurisdiction of the United Nations until such time when the inter-American peace machinery has had an opportunity to deal with the dispute. However, a closer analysis of the provision will reveal that this is not the case inasmuch as the Charter itself has provided for such a possibility, and explicitly allows the members of the United Nations to settle local disputes through regional arrangements "before referring them to the Security Council."<sup>36</sup> This matter concerning the Pacific Settlement of Disputes was further elaborated in the Charter of the Organization of American States signed at the Bogota Conference on April 30, 1948,<sup>37</sup> when a highly complex machinery for the solution of controversies was established.

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20, 1928. For the text of this Resolution, see INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928, 437 (1931).

35. RIO TREATY Art. 2.

36. U.N. CHARTER Art. 52, ¶ 2.

37. See the CHARTER OF THE ORGANIZATION OF AMERICAN STATES (hereafter cited as Bogota Charter). For the text of the document, see INTERNATIONAL CONCILIATION, No. 442 at 418-33 (1948); also GANTENBEIN, *op. cit. supra* note 2, at 855-71. For comments, see Sanders, *Bogota Conference*, INTERNATIONAL CONCILIATION, No. 442 at 383-417 (1948); Fenwick, *The Ninth International Conference of American States*, 42 AM. J. INT'L L. 553 (1948); and Kunz, *The Bogota Charter of the Organization of American States*, 42 AM. J. INT'L L. 568 (1948). It will be seen that according to the Pact of Bogota, there are three types of questions which are excluded from the procedure thus outlined. They are: 1) those that fall within the domestic jurisdiction of one of the parties; 2) those which have been already, or may be, settled by arrangements between the parties; and 3) those matters of diplomatic protection. It appears that the last question was obviously put in to avoid the incorporation of the famous Calvo Doctrine and its corollary the Calvo Clause in inter-American law. For a discussion of the present status of the Calvo Clause, see Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205 (1950).

The second major obligation assumed by the signatory States is that of reciprocal assistance, which is incorporated in Article 3 of the Treaty. Because of its importance and implications it must be totally included here. It reads as follows:

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

"2. On the request of the State or States directly attacked and until the decision of the organ of consultation of the inter-American system, each one of the contracting parties may determine immediate measures which it may individually adopt in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. The organ of consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken.

"3. The provisions of this article shall be applied in case of any armed attack which takes place within the region described in Article 4 or within the territory of an American state. When an attack takes place outside the said areas, the provisions of Article 6 shall be applied.

"4. The measures of self-defense provided under this article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security."

This article of the Treaty is full of implications. Indeed it constitutes "the heart of the Treaty."<sup>38</sup> Although the opening clause contains provisions familiar to the Chapultepec Act, this time the obligation went even further: in the event of an armed attack against an American State the signatory parties have the obligation *to assist in meeting the attack* upon the request of the State or States directly affected by the attack. Under the Chapultepec Act there was no obligation to assist the victim of aggression, but merely a highly ineffective agreement to meet in consultation in the event of an aggression.<sup>39</sup> Furthermore, while the provisions of the Act were more general in that they referred to an attack and an aggression, the Rio Treaty specifically refers to an armed attack as a prerequisite for self-defense. This particularity of the Rio Treaty falls within the limitations of the right of individual or collective self-defense, as provided for by Article 51 of the Charter of the United Nations. It would be well to remember that under the Charter, the right of individual or collective self-defense can only be exercised in the event

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38. Borrowed from Kunz, *The Inter-American Treaty of Reciprocal Assistance*, 42 *AM. J. INT'L L.* 111, 114 (Editorial Comment 1948).

39. See note 55 *infra*.



of an *armed attack*.<sup>40</sup> Embedded in the Charter is the doctrine that the American States, or any State of a regional arrangement, cannot legally resort to individual or collective self-defense unless an armed attack has taken place. The Charter is explicit on this matter and leaves no room for State interpretation. On the other hand, it may be convincingly argued that individual self-defense can be resorted to in the face of any type of aggression, whether it be an armed attack or any other form of aggression.<sup>41</sup> But collective self-defense, which in the words of the Secretary General of the Organization of American States, is "the right for nations not directly attacked to go to the defense of another or others with which they have special and legitimate bonds of solidarity,"<sup>42</sup> can only be exercised in the presence of an armed attack. From the words of the Treaty, an armed attack seems to be a special type of aggression.<sup>43</sup> Therefore, an international lawyer would immediately assume that a formal and careful definition of an armed attack and of an aggression has been given in the Treaty.<sup>44</sup> However, nowhere does the Treaty give a definition of an armed attack or of an aggression.<sup>45</sup> Perhaps being

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40. REPORT 28. For a discussion of individual and collective self-defense under the Charter, see Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 792 (1948).

41. Kelsen, *supra* note 40, at 792.

42. REPORT 32, 33.

43. Kunz, *The Inter-American Treaty of Reciprocal Assistance*, 42 AM. J. INT'L L. 111, 115 (Editorial Comment 1948).

44. Thus, Professor Kenneth S. Carlston of the College of Law of the University of Illinois has wrongly assumed that the Rio Treaty defines aggression. See his remarks in 42 PROC. AM. SOC'Y INT'L L. 30 (1948). Mr. George A. Finch, the Editor-in-Chief of the *American Journal of International Law* seems to agree with Professor Carlston. See his article *The North Atlantic Pact in International Law*, 43 PROC. AM. SOC'Y INT'L L. 90, 95 (1949). *Contra*: Kunz, 42 PROC. AM. SOC'Y INT'L L. 40 (1948).

45. The Chapultepec Act attempted a definition of aggression in Article 3 as follows ". . . In any case invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression." The fact that the Chapultepec Act attempted this definition and the Rio Treaty fails to give one, may be explained by saying that the Chapultepec Act was concerned with aggressions in general, while the Rio Treaty is concerned with an armed attack as a prerequisite for assistance in order to fall within the provisions of the United Nations Charter. See REPORT 45. It is interesting to note that definitions of aggression have been attempted in other international instruments outside of the Western Hemisphere. Thus, the Convention for the Definition of Aggression of July 4, 1933, signed between Rumania, the Soviet Union, Czechoslovakia, Turkey and Yugoslavia provided the following in Article 2: ". . . accordingly, the aggressor in an international conflict shall . . . be considered that State which is the first to commit any of the following actions: 1. Declaration of war upon another State; 2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State; 3. Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State; 4. Naval blockade of the coasts or ports of another State; 5. Provision of

familiar with the difficulties involved in giving a definition of aggression,<sup>46</sup> the Rio de Janeiro Conference purposely omitted this definition and instead gave the Organ of Consultation<sup>47</sup> the power to characterize acts of aggression and armed attacks.<sup>48</sup> In addition, the Treaty included such other acts as unprovoked armed attack against the territory of another State, invasion of the territory of an American State by trespassing the demarcated boundaries and invasion of a region under the jurisdiction of another State, as acts of aggression.<sup>49</sup>

It is clear, therefore, that the above-mentioned acts are legally considered within the conception of an armed attack for the purpose of individual and collective self-defense. In the presence of these acts, each one of the signatory States, as mentioned previously, has the obligation to assist the State or States directly attacked upon the request of the latter. It is important to point out that the Treaty makes the obligation of reciprocal assistance contingent upon the request of the State or States directly attacked.<sup>50</sup> This in itself is a limitation of collective self-defense, although perhaps a desirable one in order to prevent arbitrary interpretations which may lead to a Hemispheric war under the pretext of giving assistance to the victim of a supposed armed attack.<sup>51</sup> Assuming further that the State or States directly attacked have requested assistance, then the other States have the specific obligation to take whatever measures

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support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its territory, all the measures in its power to deprive those bands of all assistance or protection. . . ." Cited by HILL, *op. cit. supra* note 2, at 36. Also Article 10 of the Geneva Protocol gave a definition of the aggressor in the following terms: "Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. . . . Any belligerent which has refused to accept the armistice or has violated its terms shall be deemed an aggressor." Cited by STRAUSS-HUPE AND POSSONY, *INTERNATIONAL RELATIONS* 829 (1950).

46. See Eagleton, *The Attempt to define Aggression*, *INTERNATIONAL CONCILIATION*, No. 264 at 579 (1930). The League of Nations itself in 1923 declared that the question of a definition of aggression was an insoluble one. *MINUTES OF THE THIRD COMMITTEE* 184 (1923). For a particular instance where a description did not help very much, see Garcia-Mora, *International Law Applicable to the Defense of the Panama Canal*, 12 *U. OF DETROIT L. J.* 63, 71-3 (1949).

47. RIO TREATY Art. 11. The Bogota Charter made the Meeting of Consultation of Foreign Ministers the Organ of Consultation. See Articles 39-47 of the Bogota Charter.

48. RIO TREATY Art. 9.

49. *Ibid.* It should be noted that this is not a definition of aggression but examples of aggression. See the remarks of Professor Josef L. Kunz in 42 *Proc. Am. Soc'y Int'l L.* 40 (1948) *passim*.

50. This requirement does not exist in the Brussels Alliance, as there the obligation of reciprocal assistance is automatic in the event that one of the signatory States is attacked. See note 28 *supra*. The same observation applies to the North Atlantic Pact.

51. REPORT 34.

they deem necessary to repel the armed attack.<sup>52</sup> Immediately thereafter the Contracting Parties have the further obligation to meet in consultation in order to examine the measures already taken and those that will be necessary to take collectively. Unlike assistance which can be given only at the request of the victim of an armed attack, consultation may be had at the request of any American State that has ratified the Treaty.<sup>53</sup> It appears quite evident from the foregoing that in the presence of an armed attack there is a double obligation on the part of the American States; namely, assistance and consultation, the latter not being a prerequisite to individual or collective self-defense. Both assistance and consultation are mandatory. It should be noted that consultation was not quite as significant either in the Habana Resolution of 1940<sup>54</sup> or in the Chapultepec Act of 1945.<sup>55</sup>

Significantly enough, the Treaty concerns itself with aggressions which do not involve an armed attack and with situations in general that may endanger the peace of America.<sup>56</sup> The pertinent provision states that

"If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an intra-continental or extra-continental conflict, or by any other fact or situation that might endanger the peace of America, the organ of consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the continent."

One can of course readily appreciate that in the face of an aggression

52. These measures according to Article 8 of the Rio Treaty are: "Recall of chiefs of diplomatic missions, breaking of diplomatic relations, breaking of consular relations, partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radio-telephonic or radio-telegraphic communications—and the use of armed force." Compare these measures with those of Article 41 of the Charter of the United Nations.

53. RIO TREATY Art. 13.

54. This was made so in 1942 by the Rio de Janeiro Meeting of Foreign Ministers. See on this, *Third Meeting of Ministers of Foreign Affairs of the American Republics, Rio de Janeiro, Brazil, January 15-28, 1942*, INTERNATIONAL CONCILIATION, No. 378 (1942). Also PAN AMERICAN UNION, CONGRESS AND CONFERENCE SERIES, No. 36 at 32 (1942). For comments on the attitude of the American States, see BEMIS, *op cit. supra* note 9, at 373-82; and Fenwick, *The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro*, 36 AM. J. INT'L L. 169 (1942).

55. Article 4 of the Chapultepec Act reads as follows: "That in case acts of aggression occur or there are reasons to believe that an aggression is being prepared by any other State against the integrity or inviolability of the territory, or against the sovereignty or political independence of an American State, the States signatory to this Act will consult among themselves in order to agree upon the measures it may be advisable to take."

56. RIO TREATY Art. 6.

which is not an armed attack, the character of which is left to the Organ of Consultation to determine,<sup>57</sup> the signatory States have only one obligation: namely, to meet in consultation in order to agree upon the measures which should be taken to assist the victim of the aggression and to maintain the peace and the security of the Hemisphere in general.<sup>58</sup> It should be clearly understood that in the case of an aggression which is not an armed attack, the inter-American regional system cannot resort to collective self-defense under Article 51 of the United Nations Charter, simply because this Article refers only to armed attacks, and the exercise of the right of individual or collective self-defense springs directly from the provisions of Article 51. It is submitted, therefore, that in the face of aggressions which are not armed attacks, the Contracting Parties are not free to take measures in the exercise of self-defense which they would be free to take in cases of aggressions that constitute armed attacks.<sup>59</sup> The use of force in the event of aggressions is a prerogative of the United Nations, and not of the inter-American Peace System, with the possible exception of individual self-defense, which is recognized by International Law as an inalienable right of all States.<sup>60</sup>

In addition to aggressions which are not armed attacks, the particular provision under consideration also deals with "any other fact or situation that might endanger the peace of America." From the standpoint of this latter clause, it should be absolutely clear that any aggression in any part of the world community other than the Western Hemisphere, such as the Communist aggression on the Republic of South Korea today, imposes definite obligations on the American States. Although such situations fall within the exclusive jurisdiction of the United Nations, nevertheless the American States have two obligations which arise from two separate treaties. In the first place, under the Rio Treaty the American States have the obligation to meet in consultation in order to take collective measures for the defense of the Western Hemisphere.<sup>61</sup> This obligation

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57. See note 47 *supra*.

58. The Organ of Consultation makes its decisions by a vote of two-thirds of the signatory States which have ratified the Treaty according to Article 17. On the voting procedure in Inter-American Conferences in general, see Fenwick, *The Unanimity Rule in Inter-American Conferences*, 42 *AM. J. INT'L L.* 399 (Editorial Comment 1948).

59. For comments on Article 51 of the Charter of the United Nations, see GOODRICH AND HAMBRO, *op. cit. supra* note 20, at 174-81. It is of interest to note that the Secretary General of the Organization of American States established a distinction between the obligation of the American States in the event of a threat of aggression and the obligation in the case of an actual aggression. See REPORT 40.

60. Kelsen, *supra* note 40, at 784.

61. It should be noted that, in line with what was said before, the measures to be taken in this case are to defend the Western Hemisphere, and not to repel the aggression. The latter can only be done by the United Nations. The Inter-American System is a

would be operative the moment there is an aggression outside of the American Hemisphere.<sup>62</sup> In the second place, under the Charter of the United Nations the American States, along with the other members of the United Nations, have the obligation to assist the United Nations in repelling the aggression. Hence, the obligation of mutual assistance in the face of an aggression committed outside of the Western Hemisphere would be based entirely on the United Nations Charter. This fact must be clearly kept in mind since it is only in the event of an armed attack directly against an American State<sup>63</sup> that, according to the Rio Treaty, reciprocal assistance must be given to the victim of the armed attack upon the request of the latter.

Closely connected with this second major obligation under discussion is the abandonment of neutrality as an institution of inter-American law.<sup>64</sup> From the obligation of reciprocal assistance, it logically follows that the American States can have a free exercise of judgment regarding the participation in a conflict only so long as the State or States directly attacked fail to request assistance, since it is the victim of the armed attack that can put into operation the obligation of reciprocal assistance contained in the Treaty. But even if the State or States directly attacked fail to ask for assistance, it cannot be technically said that the other States have a possibility of declaring neutrality, for legally there is a temporary suspension of the fulfillment of an obligation which will be effective the moment the victim of the armed attack asks for assistance.

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regional arrangement and therefore cannot deal directly with aggressions committed on other parts of the world, since that would be encroaching upon the jurisdiction of the United Nations.

62. Thus, it has been reported that the Council of the Organization of American States has met several times to plan collective action in the face of the Communist aggression against the Republic of South Korea.

63. As for instance, the attack on Pearl Harbor in 1941.

64. At any rate, the consensus of opinion is that neutrality as an attitude of a State was legally abandoned with the adoption of the United Nations Charter. On this, see FENWICK, *INTERNATIONAL LAW* 621 (3d ed. 1948); 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 363 (2d ed. 1949); JESSUP, *A MODERN LAW OF NATIONS* 204 (1948); and BRIERLY, *THE LAW OF NATIONS* 279 (4th ed. 1949). Also two United States Senate committees expressed the same opinion in a joint statement, which was printed in the *N. Y. Times*, June 23, 1950, p. 11, col. 2. It should be noted that the same opinion was maintained in connection with the Covenant of the League of Nations. See, POLITIS, *LA NEUTRALITE ET LA PAIX* c. 3, 4 (1935); 2 OPPENHEIM, *INTERNATIONAL LAW* 506-11 (6th ed., Lauterpacht, 1944). For the same opinion regarding the Rio Treaty, see Kunz, *The Inter-American Treaty Reciprocal Assistance*, 42 *AM. J. INT'L L.* 111, 117 (Editorial comment 1948). It may be suggested that if there is no recognition of neutrality under the Rio Treaty, the Convention on Neutrality on the Sea signed at the Sixth Pan American Conference which met in Habana in 1928 becomes inoperative. For comments on this Convention, see 3 ANTOKOLETZ, *TRATADO DE DERECHO INTERNACIONAL PUBLICO* 616-21 (3d ed. 1938).

This obligation is explicit and leaves no room for unilateral interpretation. In fact, it is the keystone of the system created by the Treaty. It is hoped, therefore, that the American States will not weaken this obligation by giving each State the power to determine whether or not assistance must be granted. It is perfectly tenable to give each State freedom in the determination of the measures to be used in meeting their individual obligation, as the Treaty itself so provides,<sup>65</sup> but it may be seriously questioned whether there is wisdom in making each State the judge of whether or not an aggression, and especially an armed attack, has taken place.<sup>66</sup> It is hardly necessary to emphasize that the Rio Treaty has actually created a positive defensive alliance between the American States, which examined from a juridical point of view, creates obligations of common military action if the need should arise. This simply means that the provisions of the Treaty have both legal and moral significance. Even in the presence of aggressions which are not armed attacks and aggressions in other areas of the world community, the consultation procedure established by the Treaty is far more significant than the consultation procedure of the Chapultepec Act,<sup>67</sup> because consultation in the Rio Treaty is in reality a preliminary to more active measures. While in the Chapultepec Act the obligation to meet in consultation was as far as the American States were willing to go in the direction of taking steps for the defense of the Western Hemisphere, in the Rio Treaty the consultation procedure in the event of an extra-continental or an intra-continental attack is just a preliminary step. Furthermore, it is fully understood that all the States that have ratified the Treaty must accept the decision of the Organ of Consultation with respect to the application of the measures already described,<sup>68</sup> with the only possible exception that a State is not required to use armed forces without its consent.<sup>69</sup>

Although under the specific obligation of reciprocal assistance it is premature to predict whether the American States will jointly apply more positive measures in the face of an armed attack against another American State, as unfortunately they failed to do in the last war,<sup>70</sup>

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65. RIO TREATY Art. 3, ¶ 2.

66. The fact that the States were given the right to determine whether war existed under the Covenant may be considered as a contributory cause of the collapse of the system of collective security of the League of Nations. On this, see MANDER, FOUNDATIONS OF MODERN WORLD SOCIETY 63-76 (rev. ed. 1947).

67. See note 55 *supra*.

68. See note 52 *supra*.

69. RIO TREATY Art. 20. For comments on this Article, see REPORT 42. Of course if a State refuses to use force, it still must apply the other measures provided for by Article 8 of the Treaty. For the text of Article 8, see note 52 *supra*.

70. In World War II the following American States failed to declare war on the

at least it seems likely that they will not insist upon rights of neutrality because they cannot do so, at least under the terms of the Treaty in its present form. They could, therefore, be compelled to help those American States, such as the United States, which due to their power and prestige in the world community, have the primary responsibility for the leadership in the defense of the Western Hemisphere. Active support to the United States in the event of a war has been in all probability assured by the obligations of reciprocal assistance and consultation contained in the Treaty.

So much for the second major obligation. The third major obligation under the Treaty refers to the case of a conflict between two or more American States.<sup>71</sup> The pertinent provision reads as follows:

"In the case of a conflict between two or more American states, without prejudice to the right of self defense in conformity with Article 51 of the Charter of the United Nations, the high contracting parties, meeting in consultation shall call upon the contending states to suspend hostilities and restore matters to the statu quo ante bellum, and shall take in addition all other necessary measures to re-establish or maintain inter-American peace and security and for the solution of the conflict by peaceful means. The rejection of the pacifying action will be considered in the determination of the aggressor and in the application of the measures which the consultative meeting may agree upon."

Frankly speaking, this provision looks pretty much like an afterthought and is really a repetition of other obligations. In fact, one wonders why this provision was included at all.<sup>72</sup> Undoubtedly, the Article does well enough to summarize the various obligations incident to a conflict between two or more American States, but it may be less useful in making undubitably clear that the American State, which as a consequence of a conflict has been the victim of an armed attack by another American State, can first of all resort to individual self-defense. This point should be clear thus far. The provision adds that the Contracting Parties will meet in consultation, which is precisely what they would do in the event of an extra-continental aggression. The only distinction, which perhaps accounts for the incorporation of this provision, is that

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Axis until 1945: Argentina, Chile, Ecuador, Paraguay, Peru, Uruguay and Venezuela. It has been said that they declared war at the last moment in order to receive an invitation to the San Francisco Conference. These States were neutral throughout the war, although they did not regard as belligerents the other American States engaged in the war.

71. RIO TREATY Art. 7.

72. The Fifth International Conference of American States held at Santiago in 1923 had already established a machinery to deal with this type of conflict in the "Treaty to avoid or prevent conflicts between the American States." For the text of this Treaty see U. S. TREATY SER. No. 752 (Dep't of State 1923). It may be argued, however, that this Treaty deals with the conflict before it arises, whereas the Article of the Rio Treaty under discussion deals with the conflict after it has arisen.

the signatory States may, in consultation, order the States involved in the conflict "to suspend hostilities and restore matters to the *statu quo ante bellum*." One needs no special effort to realize that such an order would be unsuccessful in the event of an armed attack launched from outside of the Hemisphere.

It may be suggested that there is some juridical significance in the provision to the effect that the rejection of the so-called pacifying action<sup>73</sup> will be a factor in the determination of the aggressor. But from the words of the provision, it cannot be authoritatively stated that the party that rejects the pacifying action *will* be considered the aggressor.<sup>74</sup> Similarly, it should require no greater stretch of the imagination to suppose cases where the aggressor *de jure* may not be the aggressor *de facto*.<sup>75</sup> Unfortunately, the language of the Article in question is not unequivocal. Some of it is unduly vague and if viewed in the light of past experience would lead to confusion and argument in the determination of the aggressor, even in the presence of a refusal to accept the pacifying action. The net effect of this clause is to intimate that a subjective appreciation of an aggressor may hereafter be the rule, with the possible limitation that in some cases the rejection of the pacifying action may be a determining factor, though by no means a decisive one.

### III. THE COSTA RICA V. NICARAGUA CASE

Exactly eight days after the Rio Treaty had come into effect by the ratification of Costa Rica, the latter country itself requested the Council of the Organization of American States,<sup>76</sup> in a note of December 11, 1948, to call a meeting of the Organ of Consultation according to Article 6

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73. This procedure has been termed "pacifying," which is different from the peaceful settlement of disputes in that while the latter takes place *before* a conflict or an aggression arises, the pacifying action, on the other hand, takes place *after* an aggression has been committed, and the purpose of the action is to restore matters to the point where they were before the aggression took place. See on this, REPORT 43.

74. Compare this provision of the Rio Treaty with Article 10 of the Geneva Protocol. For the text of the latter, see note 45 *supra*. It will be recalled that the Geneva Protocol expressly stated that "any belligerent which has refused to accept the armistice or has violated its terms *shall be deemed an aggressor*." (Italics supplied). It is obvious that the Rio Treaty is not quite as direct in pointing to the aggressor as the Geneva Protocol was.

75. WILD, SANCTIONS AND TREATY ENFORCEMENT 18 (1934).

76. According to Article 48 of the Bogota Charter "the Council of the Organization of American States is composed of one Representative of each Member State of the Organization, especially appointed by the respective Government, with the rank of Ambassador. The appointment may be given to the diplomatic representative accredited to the Government of the country in which the Council has its seat. During the absence of the titular Representative, the Government may appoint an interim Representative." The Council is the successor to the Governing Board of the Pan American Union.



of the Treaty,<sup>77</sup> in order to investigate her charges to the effect that Nicaraguan forces had invaded the territory of Costa Rica.<sup>78</sup> The alleged attack took place on December 10, 1948. On December 12, the Council held a special session designed to hear both parties, and an extraordinary meeting was called for December 14.<sup>79</sup> On the latter date the Council decided to call a meeting of Consultation of the Ministers of Foreign Affairs<sup>80</sup> in order to study the situation, and at the same time the Council became the Provisional Organ of Consultation, as provided for by the Charter of Bogota.<sup>81</sup> A Commission was also appointed to go to the scene of the conflict and to report its findings.<sup>82</sup> The findings of the Commission showed that both countries were negligent for not having taken adequate measures to prevent the development in their respective territories of movements tending to overthrow the Government of Costa Rica on the one hand, and to conspire against the territory of Nicaragua and other American States on the other.<sup>83</sup> Special reference was made to the Caribbean Legion, which allegedly received moral and material support from the Costa Rican Government to overthrow certain regimes, particularly that of Nicaragua. On the basis of these findings, the Council ordered both governments to abstain from further hostilities in the name of the principles of non-intervention and continental solidarity. In order to guarantee the fulfillment of these obligations by the parties engaged in the controversy, a Commission of Military Experts was dispatched to the scene of the conflict.<sup>84</sup> After laborious

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77. It will be remembered that this Article deals with aggressions which are not armed attacks and with situations that may endanger the peace of America.

78. All the documents of the controversy between Costa Rica and Nicaragua have been published by the Pan American Union in a voluminous mimeographed book and an equally voluminous supplement under the title of DOCUMENTOS RELATIVOS A LA SITUACION ENTRE COSTA RICA Y NICARAGUA (1949) (hereinafter DOCUMENTOS).

79. See the Resolution approved by the Council on December 12, 1948. DOCUMENTOS 30.

80. This is the Organ of Consultation according to Articles 39-47 of the Bogota Charter.

81. Article 52 of the Bogota Charter provides that "the Council shall serve provisionally as the Organ of Consultation when the Circumstances contemplated in Article 43 of this Charter arise." The circumstances contemplated in Article 43 are those of "an armed attack within the territory of an American State or within the region of security delimited by treaties in force. . . ." See also DOCUMENTOS 71.

82. The members of this Commission were: Brazil, Colombia, the United States, Mexico and Peru. Peru resigned later. It should be also noted that the controversy was immediately reported to the President of the Security Council on December 15, 1948 with an explanation regarding the nature of the measures taken up to that time. See DOCUMENTOS 76-8.

83. Dr. Fenwick has discussed some of the problems that arose due to the lack of provisions in the Rio Treaty to cope with them. See his article on *Application of the Treaty of Rio de Janeiro to the Controversy between Costa Rica and Nicaragua*, 43 AM. J. INT'L L. 329 (Editorial Comment 1949).

84. This Commission consisted of Brazil, the United States Mexico and Paraguay.

negotiations, all of which were undertaken by the Council itself, the controversy was brought to an end February 21, 1949, when a Pact of Amity between Costa Rica and Nicaragua was solemnly signed.<sup>85</sup> The provisions of this Pact may be summarized as follows: (1) the parties declared that the events brought before the Council should not break the fraternal friendship existing between the two peoples; (2) both governments agreed to prevent the repetition of similar events in the future; (3) they recognized their existing obligations under the Rio Treaty to submit their disputes to peaceful settlement, and for this specific purpose, both governments agreed to apply the American Treaty of Pacific Settlement known as the Pact of Bogota;<sup>86</sup> and (4) both governments agreed to reach an agreement with respect to the best manner of putting into practice the provisions of the Convention on the Duties and Rights of States in the Event of Civil Strife.<sup>87</sup>

On the whole, the solution of this controversy by the Council may be safely hailed as a success, which means that the Rio Treaty met its first test.<sup>88</sup> The Council, which for this purpose became the Provisional Organ of Consultation according to Article 52 of the Bogota Charter,<sup>89</sup> by its very actions gave certain interpretations to the Rio Treaty that today may be regarded as binding precedents.<sup>90</sup> From the attitude of the Council it appears that the Meeting of Ministers of Foreign Affairs as the Organ of Consultation<sup>91</sup> is not automatic upon the request of an American State, but depends entirely on the call of the Council.<sup>92</sup> The latter in turn is guided by Articles 3 and 6 of the Rio Treaty in that a Meeting of the Ministers of Foreign Affairs is in order only if there is an armed attack or any other form of aggression.<sup>93</sup> It is surprising that nowhere has the Council said that the *Costa Rican-Nicaraguan* case was either an armed attack or an aggression.<sup>94</sup> From a technical point

85. A Spanish text of this Pact may be found in DOCUMENTOS 126-30. An English version is printed in 1 A. O. A. S. 204 (1949).

86. For comments on the Pact of Bogota, see Sanders, *supra* note 37, at 400-5.

87. Signed at the Sixth International Conference of American States held in Habana in 1928. For the text of this Convention, see GANTENBERG, *op. cit. supra* note 2, at 740.

88. Of course, it still remains to be seen whether the Treaty will equally meet its test in the face of an extra-continental aggression or an armed attack.

89. See note 81 *supra*.

90. See 2 A. O. A. S. 22 (1950).

91. BOGOTA CHARTER Art. 39.

92. Fenwick, *Application of the Treaty of Rio de Janeiro to the Controversy between Costa Rica and Nicaragua*, 43 AM. J. INT'L L. 329 (Editorial Comment 1949).

93. *Id.* at 332.

94. Of course the determination of this rests with the Organ of Consultation and not with the Council. Here, however, there seems to be a contradiction, since the Council became the Provisional Organ of Consultation, and as such, should have the power to determine the nature of the conflict.

of view, therefore, there was no need to convoke a Meeting of the Ministers of Foreign Affairs as the Organ of Consultation,<sup>95</sup> not because the parties signed the Pact of Amity as the Annex attached to the Pact seems to imply,<sup>96</sup> but rather because legally there was neither an aggression nor an armed attack. If this proposition is accepted, then it is perfectly clear that only in the event of an aggression or an armed attack, that is, in the presence of situations contemplated by Articles 3 and 6 of the Rio Treaty, that the Council can convoke a Meeting of the Ministers of Foreign Affairs as requested by any of the signatory States. Thus, the inescapable conclusion is that since the conflict between Costa Rica and Nicaragua was neither an aggression nor an armed attack, but simply a "controversy" to which Article 2 of the Treaty was applicable,<sup>97</sup> the Council actually became in the words of Doctor Fenwick, "a court of summary jurisdiction for the settlement of disputes between two or more governments."<sup>98</sup>

Looking comprehensively at the provisions of the Treaty in the light of the case under consideration, it is submitted that the Treaty contemplates three types of situations which may arise. The first one may be a controversy, which is subject to the methods of peaceful settlement existing among the American States. The Inter-American Peace Committee,<sup>99</sup> formerly known as the Inter-American Committee on Methods for the Peaceful Solution of Conflicts, and created at the Second Meeting of Ministers of Foreign Affairs held in Habana in 1940,<sup>100</sup> is the proper instrument for the solution of controversies.<sup>101</sup> This situation corresponds to the first major obligation previously discussed. Although the Council never committed itself regarding the nature of the conflict between Costa Rica and Nicaragua since this determination falls within the compe-

95. As allowed by Articles 11 and 13 of the Rio Treaty.

96. 1 A. O. A. S. 209 (1949).

97. Article 2 of the Rio Treaty reads as follows: "As a consequence of the principles set forth in the preceding article, the high contracting parties undertake to submit every controversy which may arise between them to methods of peaceful settlement and endeavor to settle such controversies among themselves by means of the procedures in force in the inter-American system before referring them to the General Assembly or the Security Council of the United Nations." See note 35 *supra*.

98. Fenwick, *Application of the Treaty of Rio de Janeiro to the Controversy between Costa Rica and Nicaragua*, 43 AM. J. INT'L L. 329, 331 (Editorial Comment 1949).

99. Fenwick, *The Inter-American Peace Committee*, 43 AM. J. INT'L L. 770 (Editorial Comment 1949). Also 2 A. O. A. S. 22 (1950).

100. GANTENBEIN, *op. cit. supra* note 2, at 798.

101. It would also be the proper instrument for any other procedure established by the Pact of Bogota. The parties may even resort to a procedure of their own choice, including arbitration. On arbitration in the Americas, see Kunz, *International Arbitration in Pan American Developments*, 27 TEXAS L. REV. 182 (1948).

tence of the Organ of Consultation,<sup>102</sup> nevertheless the situation created between the two States may be properly classified as a controversy within the provisions of the Treaty, according to the action of the Council on the matter. In this connection, it is relevant to note that an even more recent controversy between Haiti and the Dominican Republic brought to the attention of the Council by the Government of Haiti, was openly considered a controversy after two meetings of the Council largely because the Council had learned that the two governments were disposed to reach a friendly agreement by resorting to the peaceful procedure provided for in other inter-American instruments.<sup>103</sup> Thus, the Council did not feel the need to call the Organ of Consultation, since the latter does not deal with controversies.<sup>104</sup>

In addition to situations characterized as controversies, the Treaty deals also with two other situations, namely, aggressions and armed attacks, both of which may be of an extra-continental or an intra-continental nature. It should be remembered that these two situations

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102. See note 94 *supra*.

103. In a recent controversy between Haiti and the Dominican Republic, the Government of Haiti called attention to certain facts which "constituted moral aggression" creating thereby a situation between the two countries likely to endanger peace. The facts referred to concerned a former colonel in the Haitian Army, who was accused of being involved in a plot to overthrow the government of Haiti. The complaint also stated that these activities against the Republic of Haiti were being conducted with the knowledge and approval of the Government of the Dominican Republic. 1 A. O. A. S. 217-9, 325 (1949).

104. Another important controversy arose with regard to the asylum granted by Colombia to ex-President Romulo Betancourt of Venezuela. The *de facto* government of Venezuela refused to grant safe-conduct to Betancourt. The matter was brought to the attention of the Council by Chile and Guatemala. It is of a special interest to note that the Council refused to consider this matter, and instead appointed a committee to study its competence to hear questions of this nature. 1 A. O. A. S. 216 (1949). Still another controversy arose in July, 1948, between the Governments of the Dominican Republic and Cuba. This controversy was successfully settled by the Inter-American Peace Committee. On this, see Fenwick, *The Inter-American Peace Committee*, 43 *AM. J. INT'L L.* 770 (Editorial Comment 1949); also 1 A. O. A. S. 393-8 (1949). It should be also mentioned that a case similar to the Betancourt matter arose between Colombia and Peru. In this case asylum was granted by the Colombian Embassy in Peru to Haya de la Torre, a Peruvian political refugee. Peru refused to grant safe-conduct on the ground that the case did not involve a political refugee but a common criminal not entitled to asylum. The case was referred to the World Court, which rendered a decision on November 19, 1950. The Court decided, among other things, that "political asylum can only be granted in cases of emergency"; that is to say, "where a person seeking asylum is in danger from mob, or when proof exists that the regular courts that would try him are under government control." These qualifications were not found to exist in the asylum granted to Haya de la Torre. Consequently, Peru was not bound to grant him safe-conduct. See the *Colombian-Peruvian Asylum* case, I. C. J. REPORTS 225 (1949), and I. C. J. REPORTS 266 (1950).

correspond to the second and third major obligations undertaken under the Treaty. In cases of aggressions and armed attacks the convocation of the Organ of Consultation to deal with the situation is in order, although the procedure is slightly different depending upon whether it is an aggression or an armed attack. In the event of an aggression, the call must be approved by an absolute majority of the members of the Council; and in the case of an armed attack, the call is made by the Chairman of the Council without the required vote of the Council.<sup>105</sup>

With these distinctions in mind, it can be readily seen that the far-reaching effect of the decision in the *Costa Rica v. Nicaragua* case resulted in an enlargement of the competence of the Council, inasmuch as the Council intervened in a matter which, technically speaking, falls within the competence of the Inter-American Peace Committee or of any other agency of pacific settlement. Under the provisions of the Rio Treaty and the Bogota Charter, the Council was intended to act only as the Provisional Organ of Consultation,<sup>106</sup> which implies that this function is limited and is brought to an end once the Council itself decides that a Meeting of the Organ of Consultation must necessarily be had. But in the *Costa Rica v. Nicaragua* case the Council successfully settled the controversy even though it had called a Meeting of the Organ of Consultation which actually never met. It must be added that the American States themselves have resorted to the Council in three more occasions as the proper agency of pacific settlement.<sup>107</sup> Although the Council was never given this last function for fear that it may assume political functions,<sup>108</sup> nevertheless it means that the American States have come to look upon the Council as the agency which is responsible for the pacific settlement of controversies. It has been suggested that in this capacity the Council is acting *ultra vires*, since there are other means of pacific settlement which were established by the Pact of Bogota.<sup>109</sup> But the important emphasis here is that those methods by their very nature take an inordinately long time and there are controversies which require a prompt action to prevent them from taking a more dangerous character. Under the present set-up of the Organization of American States there is no other agency which could promptly perform this function. Therefore, the American States will have to follow one

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105. See Articles 40 and 43 of the Bogota Charter, and the Pact of Bogota. For comments, see Sanders, *supra* note 37, at 383-405.

106. See note 81 *supra*.

107. See notes 103 and 104 *supra*.

108. Fenwick, *The Competence of the Council of the Organization of American States*, 43 AM. J. INT'L L. 772 (Editorial Comment 1949). Cf. Kunz, *The Bogota Charter of the Organization of American States*, 42 AM. J. INT'L L. 568, 577 (1948).

109. See the memorandum of the Mexican Representative. 2 A. O. A. S. 31 (1950).

of two courses of action in the future: either to establish another agency in the nature of an administrative commission, which would decide matters in a quicker fashion,<sup>110</sup> or the Council itself, in the absence of such an agency, may continue to exercise this type of summary jurisdiction. It makes little sense indeed for the Council to refuse to decide a matter merely on the ground that it is a political question or that it does not know whether it falls within its competence, when actually the matter could be settled immediately by the Council itself.<sup>111</sup> In this connection, the Representative of the United States in the Council has pointed out that one danger which must be avoided at all costs is to try to govern the Council by hard and rigid rules instead of by looking into the merits of each particular case.<sup>112</sup> Furthermore, if the Council, in the absence of another procedure, cannot exercise leadership in the solution of disputes of any nature, regardless of whether they are controversies, armed attacks or aggressions, the Rio Treaty and the Bogota Charter will certainly fail to fulfill the purpose for which they were intended. The *Costa Rica v. Nicaragua* case proves conclusively that it was the Council that settled that controversy, since the Organ of Consultation never had an occasion to meet.<sup>113</sup> This may be regarded as a precedent, and it may be added, most certainly a good one.<sup>114</sup> The inability of the Council to deal with disputes that the States may consider as political matters, ultimately means that the possibility of successful action by the Inter-American System in the presence of threats to peace will be greatly reduced. In this connection, it is relevant to point out that the distinction made in the traditional International Law between legal and political matters does not rest on solid foundations, but is rather the product of expediency in every specific case.<sup>115</sup> It has been proved beyond any reasonable doubt that there is no valid basis for distinguishing between legal and political matters, for their character of being either legal or political is not determined by an

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110. It appears that the Bogota Conference failed to create such a procedure. See Kunz, *The Bogota Charter of the Organization of American States*, 42 *AM. J. INT'L L.* 568, 577 (1948).

111. The *Betancourt* case is in point. For the facts of this case, see note 104 *supra*.

112. See the memorandum of the Representative of the United States. 2 *A. O. A. S.* 31 (1950).

113. See 2 *A. O. A. S.* 22 (1950).

114. This precedent seems to be the law today, since it was again applied to a conflict which arose on April 8, 1950, between the Republic of Haiti and the Dominican Republic. The procedure employed to solve this case was exactly the same as that used in the *Costa Rica v. Nicaragua* case. For a discussion of the case of *Haiti v. The Dominican Republic*, see Jamison, *Keeping Peace in the Caribbean* 23 *DEPT STATE BULL.* 18 (1950).

115. McDougal, *The Role of Law in World Politics*, 20 *MISS. L.J.* 253, 269 (1949).

objective criterion but by the subjective appreciation of the States themselves according to their individual convenience.<sup>116</sup> In similar vein, it may be contended that the distinction drawn in the Inter-American System between legal and political functions with respect to the competence of the Council is meaningless because it explains very little, if anything at all.<sup>117</sup> Furthermore, it is in the so-called "political field" where the causes of war are likely to be found.<sup>118</sup>

#### IV. CONCLUSION

It appears reasonable to conclude that the Rio Treaty, as interpreted by the *Costa Rica v. Nicaragua* case, does represent a step forward in the direction of establishing an effective machinery for the settlement of disputes of an intra-Hemispheric nature. However, there is at present the danger that the competence of the Council in dealing with these disputes may be unduly thwarted so as to render the inter-American machinery of pacific settlement burdensome and ineffective, to say the least. This danger is likely to result from the deep-seated tendency to distinguish between political and legal functions of the Council, denying the Council any power at all to deal with matters which the States may consider as falling within the political field, and therefore, within the forbidden domain of the Council. It is suggested that if this distinction is insisted upon by certain American governments, it is hoped that future Inter-American Conventions will say so explicitly and will prescribe their lines of demarcation with as much particularity as they can reasonably muster. Then, it will be possible to confine State discretion within measurable bounds.

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116. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933).

117. It seems that the Mexican Delegate feels that questions relating to the observance and interpretation of any international obligation are political matters and therefore wholly outside of the competence of the Council. His opinion is that in these cases the parties must resort to the means of pacific settlement. See the memorandum of the Mexican Representative, 2 A. O. A. S. 31 (1950) *passim*. For a discussion of the same matter, see Fenwick, *The Competence of the Council of the Organization of American States*, 43 AM. J. INT'L L. 772, 775 (Editorial Comment 1949).

118. CARR, *THE TWENTY YEARS' CRISIS 1919-1939* (1940).