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THE MEANING OF SELF-DEFENCE UNDER ARTICLE 51 OF THE UNITED NATIONS CHARTER

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ABSTRACT

This thesis examines the development of the concept of individual and collective self-defence as expressed in Article 51 of the UN Charter. In doing so, it will analyse the attempts to stretch the scope of the right of self-defence beyond the limits allowed under Article 51 and assess whether such attempts have undermined the Charter regime. The concept of self-defence is seen as part of a series of evolutionary attempts to limit the horrors of war by formulating criteria for the legitimacy of armed force. This study looks at the developments from the racial and religiously – motivated medieval concept of "Just War", and the "defensive" Islamic concept of Jihad, through arbitration and treaty between sovereign states, to the development of the legal doctrine of self-defence, subject to the criteria of necessity and proportionality, established in the *Caroline* case. The focus is on the modern development of the concept of self-defence in the UN era, has developed within the context of a global collective security system.

However, the circumstances of its drafting left Article 51 with a number of ambiguities and inadequacies, which are explored with reference to illustrative examples from recent history. Attention is drawn to the nature and scope of the so-called "inherent right"; the difficulties surrounding the definitions of "armed attack" and "aggression" as events which activate the sight of self-defence; and the unforeseen burden placed on Article 51 as a result of the paralysing effect of the Cold War on the collective security system.
A further development in recent years has been a trend to fit Article 51 to the scope of the post-colonial, post-Cold War era, by attempting to enlarge it, both temporally and spatially. The former leads to claims for various forms of anticipatory and retrospective

defence; the latter to broader conceptions of the people, territory and governance system to be defended whereby the legal framework of Article 51 is made subject to political and humanitarian considerations. However well-intentioned, such trends would greatly increase the number of exceptions to the prohibition in Article 2(4) and open the door to misuse of the Article 51 provision thereby increasing the danger of threats to peace and security.

Clearly, the 1945 conception of self-defence is no longer adequate to deal with the changing force of international relations. Article 51 must change; the question is whether it can do so within the spirit of its nature as an "emergency" response with value especially to weaker and third world nations.

INTRODUCTION

The purpose of this thesis is to examine the development of the concept of individual and collective self-defence which finds expression in Article 51 of the UN Charter. In doing so, this study will assess how the right of self defence has been treated in contemporary international law and what dangers lie ahead when this right is abused and undermined. The Charter of the UN seeks to maintain a delicate balance between the principle of the prohibition on the use of force and the right of states to act in self-defence under Article 51. This study aims to examine how this delicate balance has been maintained or disturbed during the last five decades of UN history. Although war has existed as long as human society, numerous attempts have been made, throughout history, to limit its horrors by formulating criteria for the legitimacy of the resort to war. The first chapter of this thesis traces early efforts in this regard. It is shown how, in the Middle Ages, racial and religious supremacy were the main legitimising factors of the "Just War" in the West, while in the East, the theory of war focused on the essentially defensive Islamic concept of Jihad. The latter concept is reviewed in some detail, in terms of its aims, the authority which has the right to declare such a war, and its development in modern times. After the Peace of Westphalia, international relations were dominated by the concept of the sovereign state. Recourse to war became a matter for determination of the sovereign, based on "policy", though some success was achieved in averting wars by arbitration and treaty.

Chapter Two examines the development of efforts to limit the right of war in the 19th and early 20th centuries, and the concomitant development of self-defence as a legal doctrine which could be invoked to justify the use of force, only subject to certain

criteria, notably those of necessity and proportionality. In this respect, a review is presented of the development of the right of self-defence as a result of the Caroline case of 1837. Consideration is also given to the role of the League of Nations and the Pact of Paris, and how they treated the use of force.

The tracing of these developments is followed, in Chapter Three, by a discussion of the emergence of the modern understanding of self-defence in the UN era, where it has developed within the context of a global collective security system, though the motivations to self-defence and security actions differ.

The drafting of Article 51 of the UN Charter was fraught with political complexity; the formula that eventually emerged was an attempt to fit regional security arrangements, particularly the inter-American system, into the UN framework, though the Article was moved from the chapter on regional security in order to make clear that such arrangements would be subject to Security Council control. The political circumstances of its drafting left Article 51 with a number of ambiguities and inadequacies which are explored in the remaining chapters of the thesis, drawing on illustrative examples from recent history.

Chapter Four considers the nature and scope of the so-called "inherent right" of self-defence, with particular reference to the interpretation of Article 51, which paradoxically appears both to enlarge and restrict the right of self-defence; and to the dilemma surrounding the definitions of "armed attack" and "aggression" as prerequisites for determining the point at which the self-defence right is activated. Consideration is given to the development of the definition of aggression, from the first attempts at the time of the League of Nations, to the General Assembly Resolution (3314) of December 14, 1974. An attempt is made to analyse that resolution, to clarify what constitutes aggression, and therefore could invoke the right of self-defence. Moreover,

consideration is given to the role of the Security Council, and its relation with Article 51.

Although Article 51 can be said to have been fraught with ambiguity from the outset, the difficulties were compounded when the stalemate of the Cold War era largely paralysed the collective security system, leaving Article 51 as the major avenue through which measures intended for collective security might be pursued, and a frequently cited basis for actions which, from another perspective, might be deemed aggressive. In Chapter Five, the Berlin blockade of 1948, the Cuban Missile Crisis and the Vietnam War are analysed to show how, during the Cold War, the concept of self-defence was misused by the superpowers to justify actions taken in their political interest.

Also of concern are trends in recent years to attempt to enlarge the scope of Article 51, in ways which would greatly increase the number of exceptions to the prohibition in Article 2(4) and thereby increase the danger of threats to peace and security. These include the extension of the self-defence right, forward and backward in time, to create the concepts of anticipatory and retrospective defence. Chapter Six examines the nature of pre-emptive and protective self-defence, showing the tension between the logical need, in an age of nuclear weapons, to allow a state to take defensive action before a fatal blow is received, and the need to uphold the intention of the Charter, particularly when volatile political situations in some parts of the world make questions of intention and readiness for aggression very difficult to resolve.

Chapter Seven considers the possibility of extending the self-defence right backwards in time. A distinction is drawn between reprisal and self-defence, and the associated dilemma of effectiveness versus proportionality is considered. In consequence of the engagement or overlap between the right of self-defence and reprisal, it is easy for any state to claim to be exercising the right of self-defence under Article 51, in respect of

any military action, although such action may in reality be a reprisal action. This is exactly what happened in 1986, when the US launched air raids against Libya, in retaliation for attacks which had taken place in Europe. Also discussed are the US missile attacks on Iraq in 1993, an American response to the attempt to assassinate the former US president George Bush, in Kuwait. Another reprisal action was taken conducted by the US in 1998, against Afghanistan and Sudan, in response to attacks against US embassies in Africa. These reprisal actions are considered to see their relation with the right of self-defence.

In the case of regular self-defence, a distinction is drawn between backward self-defence, in respect of an infringement occurring at a time when the victim state was too weak to respond, and remedial self-defence, invoked when the political, social and economic situation resulting from a past event is considered so oppressive as to amount to an ongoing aggression.

In Chapter Eight, constitutes an attempt to clarify the aims of self-defence, from population, the territory, and finally to the state, together with the logic by which these are viewed as values to be defended. In connection with population, it is considered whether rescue and humanitarian intervention operations fall within the concept of self-defence. The defence of territory, as a fundamental component of statehood, is explored with reference to border defence, forward defence, and border problems. The state as an object of defence is discussed with reference to the issues of state and government, separated states, dispute states, imperial states, and regimes' right in collective self-defence. In this regard, important inferences regarding armed attack and collective self-defence are drawn from the Nicaragua case.

The thesis concludes by highlighting some significant themes emerging from the analysis and speculating on the future of Article 51 in a multipolar world.

CHAPTER ONE

HISTORICAL RESTRAINTS UPON AGGRESSION

Although war has existed as long as human society, and has often been regarded as an inevitable concomitant of human nature, equally there have, since early times, been attempts to limit the horrors of war, by restricting the circumstances in which it may rightfully be fought, and laying down rules for the conduct of the fighting. In the Middle Ages, Christianity and philosophy were invoked to develop a concept of Just War, in which racial (Greek) and religious (Christian) supremacy were the main legitimising factors. In this chapter, the ideas of the main philosophers in the field of Just War, will be reviewed. The second part of the chapter will deal with the Islamic concept of Jihad; consideration will be given to its motives; the authority for declaring Jihad; the principles of Jihad; Jihad as non-warfare and, finally, the status of Jihad in modern times. Subsequently, the period of the beginning of the early modern era, and the attempts to control or limit the use of force, especially in the Hague Peace Conference of 1899, 1907 and the Bryan Arbitration Treaties, will be considered.

Ideas of Just War

Theories of Just War have historically been used to justify warfare on judicial, moral, and especially religious grounds. Religion has often served to motivate and justify war.

Religion and politics were mixed together during the Middle Ages, forming a rather distorted model of "Christian" morality and doctrine according to the needs of the Church and the European state organisations.[1] In the Christian thought, two types of war had been seen as permissible; the Holy War and the Just War.[2]

The first was fought for religious ideals, supposedly to establish the kingdom of God on earth. The Holy War was seen in the Crusades, which were presented within the scope of the theocratic view of society as a positive duty during which violence, destruction of the enemy, and the use of force were legitimised. The second was, on the other hand, fought on public authority for more mundane objectives such as defence of territory, persons and rights in an attempt to achieve more concrete political goals. It tended to limit the incidence of violence by codes of right conduct and other humanitarian restraints both in its terms and under the *jus armorum*, which were lacking in the Holy War. The distinction between them was difficult to draw in theory as well as in practice. The concepts of Just and Holy War overlapped and encompassed both religious and political goals; in the heart of the war, soldiers became more and more convinced of the "holiness" of the war they were fighting. The concept of the Holy War and the Crusades was considered as a part of the general medieval debate on the right to war rather than an independent phenomenon.[3]

Before going forward, one has to point out that the underlying philosophies are in a way related to each other. Plato's ideas influenced Saint Augustine and after they were rediscovered, the works of Aristotle influenced Saint Thomas Aquinas, in addition, of course, to the essence of the Catholic theory of society and the state. Saint Thomas

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[1] Michael Walzer, Against 'Realism', In: Jean Bethke Elshtain, *Just War Theory,* (Oxford: Blackwell, 1992), p. 45-48. The just war theory has received widespread acceptance both within Western culture and in the international community as a means by which a war may be determined to be justified or not.
[2] Joan D. Tooke, *The Just War in Aquinas and Grotius,* (London: S.P.C.K, 1965), p. 1-5.

Aquinas fused Aristotle's Politics with the teaching of Saint Augustine's City of God and furnished his brother Dominicans with a close and literal translation of Politics into Latin, so that Aristotle's thought and books shaped the doctrines of law and politics throughout the Middle Ages and afterwards, that the law is the true sovereign and governments are servants of law are the main principles that governed the theories of Just War. Aristotle was brought to life on the general current of European political thought, of which he has always been an ingredient.[4]

The spirit of law is philosophy. Aristotle serves as the best illustration of this claim; his ideas are still inspiring law scholars and thinkers.[5] His works traced and influenced the political thought of almost all the thinkers afterwards. In his age of Hellenic Greece, warfare was considered a normal form of conflict between different peoples. It was Aristotle who coined the term Just War, applying it to wars waged by Hellenes against non-Hellenic peoples or barbarians. Just War could mean lawful or fair and equal. Justice for him was the establishment of a kind of proportion. Proportion here is to be seen as a Platonic term opposing the Pythagorean notion of reciprocity. In his book, *Politics*, Aristotle saw war as a natural form of acquisition[6], belonging to the nature of things, an instance of the normal rule of superiors over inferiors, in other words the rule that extended the rule of the Hellenes over the barbarians and enslaved them and this was seen as naturally just.

Men should go to war only to prevent their own enslavement, that is, in self-defence. Consequently, war was not an end in itself but a means to reach such higher goals as

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[3] Frederick H. Russell, *The Just War In The Middle Ages,* (Cambridge: Cambridge University Press, 1975), p. 131-39.
[4] Ibid.
[5] John Ferguson, *Aristotle,* (New York: Twayne Publishers, 1972), p. 13.
[6] David William Ross, *Aristotle,* (London: Methuen, 1923), p. 214.

peace, glory and strength[7]. When defence was justified, any means of defence was licit. Wars were based on soldiers' ability to fight and they enjoyed a high position in society, they formed a distinct community to secure victory. Superiority of numbers, strength of allies and skilful leadership were the key components that could secure victory. The soldiers' courage, justice and nobility were the most laudable[8]. War for Aristotle was only a means to achieve moral ends of justice and peace; it was destined to fail if it was transformed into an end. His concept of Just War was more moral and abstract rather than juridical in application. It was not, hence, a subject of demonstration in the court of law. For him, war had a mission that consisted of civilising the barbarians and preserving the natural social order and enslaving those non-Hellenes to serve as "an instrument for the conduct of life", an instrument not of production but of action. Slavery was a natural distinction between men to make some strong to work and others fit for political life[9]. Aristotle's views influenced the medieval theories and doctrines about politics and society. In the earlier middle ages Aristotle's works were lost to the West and thinkers such as Saint Augustine of Hippo relied instead upon Plato. His works were preserved, however, in the Arab World and eventually returned to western knowledge and heavily influenced, for example, Saint Thomas Aquinas.

Before tackling Saint Augustine's views on Just War, one has to mention Rome's fundamental contribution to the Just War which was the development of the concept of Just causes. For Cicero, wars should be won by virtue and courage rather than base, infamous or treacherous means.[10] He held that the use of force was justifiable only when

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[7] Aristotle, *The Politics*, trans. by Carnes Lord, (Chicago: University of Chicago Press, 1984), p. 1,7,1255 a, 3-1255 b, 3.
[8] Ibid, 7,2,133 1a, 14-19.
[9] Ross, p. 240-241.
[10] Tullius Cicero, De Officiciis, book III, ed. by Hubert Ashton Holden, (Cambridge: Cambridge University Press, 1949), p. 86-87. The Ancient Roman Republic had a law of just war, the *Jus Fetiale*, which may be seen as the earliest judicial expression of such ideas, for all its faults in application. See also, G.I.A.D Draper, "The Origins of Just War Traditions," (*New BlackFriars* 46, 1964-65), p. 82

the war was declared by an appropriate governmental authority acting within specific limits.[11] For Cicero, the ability to wage war rested with the state, and the state alone and could be lawfully waged only "after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made."[12] In addition, Cicero also proposed the existence of a universal norm for human behaviour which transcended the laws of individual nations and governed their relations with each other.[13] Cicero's belief in this universal norm was grounded in his view that there was a *humani generis societas*, a "society of mankind [sic] rather than of states."[14] This view of universal standard of behaviour for nation-states which exists outside of promulgated law would have a profound impact on later just war theorists, particularly on Hugo Grotius. Moreover, Cicero considered faith and honour should be maintained even with Romes enemies. His principles of right conduct of warfare were employed by later Christian writers.

Grotius was a 16th century Dutch Protestant who is sometimes referred to as the father of international law.[15] Grotius, who lived in the aftermath of the brutal Thirty-Years War in Europe, wrote extensively on the right of nations to use force in self-defence in his book *Jure Belli ac Pacis* (On the Rights of War and Peace).[16] It was largely Grotius who secularised just war theory, making the theory more acceptable for the age of the Enlightenment. For Grotius, a war is just if there basic criteria were met: the danger faced by the nation is immediate; the force used is necessary to adequately defend the

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[11] See David J. Bederman, "Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis," (*Emory International Law Review* 10, 1996), p. 1; 31-32

[12] Ibid.

[13] Ibid, p. 6-7.

[14] Ibid.

[15] Ibid, p. 1.

[16] Ibid.

nation's interests; and the use of force is proportionate to the threatened danger.[17] Grotius grounded his agreement with Cicero's notion of the need for a declaration of war in the natural law, and also argued that the purpose of just war theory is to provide "succor and protection for the sick and wounded in war, combatants and civilians alike."[18] For Grotius, it is not necessary to prove just war theory by consulting with any of the established laws of the nations of Europe, or their customs.[19]

According to Origen, "Christians should also be fighting as priests and worshippers of God, keeping their right hands pure." Christianity had become the official religion of the state in the fourth century, following the so-called "Peace of the Church" under Constantine the Great in 312, exercising power and influence through the institution of the church. The church paid for this position by compromising the purity of some of her ideals, particularly pacifism according to the teaching of Jesus Christ.[20] It was Saint Augustine, who first established the Christian doctrine with regard to the concept of Just War. He gave scant consideration to a war of defence. Presumably he took it for granted that such a war was immediately and obviously justifiable and even obligatory. He neither seriously doubted the permissibility of war in itself, nor was he shocked by its intrinsic evil although he did not ignore its inherent horrors. A Just War of aggression, however, must be carried on by authority of the prince and must have both a just cause and a right intention. Saint Augustine emphasised that a war inspired by a wrong spirit was not really a war but a brigandage.[21] Apart from the direct command of God, an injustice or a wrong caused by the enemy is the only sufficient justification of war. One

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[17] See Ziyad Motala and David T. ButleRitchie, "Self-Defence In International Law, the United Nations, and the Bosnian Conflict, (*University of Pittsburgh Law Review* 75, 1995), p. 10.
[18] Bederman, "Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis," p. 32.
[19] Ibid.
[20] Hilaire McCoubrey, *Ideas of Just War in the Christian tradition*, chapter III, unpublished.
[21] De Solages Bruno, *La Theologie De La Guerre Juste: Genese Et Orientation*, (Desclee De Brouwer: Paris, 1946), p. 41-2.

example of such an injury which Saint Augustine gave was that of the refusal of the Amorites to allow free passage through their territory to the Israelites. He accepted punishment as an important element in the Just War. However, although the only justification of war for Saint Augustine - an injustice or wrong in the part of the enemy - would seem to imply the right of punishment, and in spite of Augustine's acceptance of war as a means employed by God to chastise and punish the just as well as the unjust, this element is not centrally necessary to Augustine and he was more concerned with defending and maintaining the objective order of justice than with an analysis of, and ruling for, the subjective spiritual issues. The fact that Saint Augustine found a just cause of war in the refusal to restore property unjustly stolen and his whole concern for love and order appear to prove this.[22] The fact that Saint Augustine certainly insisted on war as a means of restoring order and of achieving peace in his writings[23] is due to the precise relation between the actual horrors of war and his aim for peace, although his frequent references to peace in the midst of war must seem contradictory and unrealistic. War is fought for the sake of peace, but there is no recognition of the inherent contradictions in such a proposition.

Saint Augustine combined Roman and Judaeo-Christian elements in a mode of thought that was to influence all the theories of war throughout the Middle Ages and onwards. The Just War served to reconcile the evangelical precepts of patience and the pacific tendencies of the early church with Roman legal notions.[24] Augustine argues in *Contra Faustum Manichaem* that the real evils in war were not war itself but the love of violence and cruelty, greed and dominant libido or lust for rule that so often accompanied it. Inspired by the Old Testament, he argued that, by divine judgement,

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[22] Robert Willem Regout, *La Doctrine De La Guerre Juste De Saint Augustine a Nos Jours: D'apres Les Theologiens et Les Cononistes Catholiques*, (Paris: A. Pedone 1934), p. 44.
[23] Jean Bethke Elshtain, *Just War Theory*, (Oxford: Basil Blackwell, 1992), p. 11-14.

wars pushed peoples for sins and crimes, even those unrelated to the war. When tackling the concept of Just War in the light of Saint Augustine's views one has to put in his/her mind the Platonic theory that had served as the basic pillar for his analysis; the logic was shaped by his postulates on the abstract concept of the City of God or the Heavenly City. The frequent references to the Old and the New Testament provided Augustine with a means of defeating the doctrinaire pacifism of the Manichean heresy and also with guidance to contemporary Christians who still harboured suspicion of war and military service. He saw in Moses' wars a just and righteous retribution, and compared the punishment of unwilling souls to that of the loving father of his child. He perceived "resist not evil" (Matt 5:39) and the command to "turn the other cheek" (Luke 6: 29) as referring to the inward disposition of the heart rather than the outward deed. Patience and benevolence did not always contradict with the infliction of physical punishment, for when Moses put sinners to death he was motivated not only by cruelty but by love. Augustine's distinction between the inward disposition of the heart and the outward acts was accepted without serious question in the Middle Ages, as well as his claim to reconcile war and the New Testament. Since his ethics and his whole philosophical ideas were based on the intention rather than the normative hostile act it was justified and motivated by one of the most important touchstones of his thought "charity". Warfare had become with Saint Augustine necessary, rather than inherently sinful.

Saint Augustine denied the use of physical violence to private persons; a private Christian could not kill an attacker in self-defence, for that could entail hatred and loss of love, one of the basic ideals around which his philosophy pivoted. Saint Augustine, a neo-Platonic thinker par excellence had succeeded in colouring Christianity with the motive of establishing peace, in which importance was accorded to the right intention:

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[24] Regout, p. 38-44.

Just War was fought for the sake of peace and carried out with mercy. It was a necessary act compatible with love and charity, a war that punishes as well as rewards.

In the end, Saint Augustine's ideas on Just War were mainly inspired by the Greek philosophers' theories that saw war as necessary for defending and preserving peace and good order. He was also influenced by the Islamic philosophy, as well as a great apologist of the Christian Catholic Church at the time when it had just allied itself to the state and his acceptance and theories of Just War could be considered as a defence against the charges that pacific Christianity had been responsible for the downfall of the Roman Empire.

Natural law so permeates the political and ethical thinking of Aquinas that little is to be gained from considering what be wrote on war without examining his understanding of it. Space forbids a full examination of his legal philosophy, but broadly speaking, he believed that ideally man has an innate understanding of moral and divine laws and principles which were implicit in his whole make-up and which should govern his conduct. These laws were imprinted in his very being and in the very construction of his mind and by them he was taught what he ought to do in the personal, social and political sectors, God was said to command the whole idea of natural law.[25]

This idea was first expressed explicitly as a doctrine by the Greeks, particularly by the Stoics, and from them it passed into the Roman legal thought. Later it was found in the Church Fathers, the Canonists, and the theological writers of the early middle ages. One of the most famous statements of the Stoic view of natural law was made by Cicero, who wrote:

> "The law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands and avert from wrongdoing by its prohibitions"[26]

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[25] Brian Davis, *The Thought of Thomas Aquinas*, (Oxford: Clarendon Press, 1992), p. 6-7.
[26] Tullius Cicero, *De Republica: De Legibus* / trans. by C. W. Keyes, (London: Heinemann, 1928), p. 33.

In his book, The Second Division of the Second Part of the *Summa Theologica*, Aquinas dealt with war as one of the sins contrary to charity and peace. In his book, Aquinas was putting practical theology in its full theological context in the order to which he belonged.[27] He first considered discord an inward sin; secondly he viewed contention as a sin of the tongue, and finally those sins which result in actions such as schism, quarrelling, war and seduction as sinful. Aquinas discussed war in itself, the circumstances under which it can be justifiable, the questions of whether or not clerics should fight, if it was lawful for belligerents to lay ambushes in war and, last but not least, whether fighting on Holy days was permissible. Objections against the justice or righteousness of war in itself were dealt in the Holy Scripture, in those texts:

"All who take the sword die by the sword."[28]
"Do not set yourself against the man who wrongs you."[29]
"Justice is mine says the Lord, I will repay."[30]

Aquinas argued against pacifist interpretations of those three statements or commands by quoting Saint Augustine's argument that John the Baptist would have counselled the soldiers to throw away their arms and give up soldiering altogether if warfare had been essentially against the teaching of the Gospel, instead of recommending them to be content with their pay and to do no violence. To formulate a convincing argument Aquinas focused his objections in three conditions:

1. Right authority.

2. Sufficient cause.

3. Right intention.

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[27] Ibid., p. 155.
[28] *The New English Bible*, New Testament, (Oxford: Oxford University Press, 1961), Matt. 26. 52.
[29] Matt. 5. 39.
[30] Rom. 12. 19.

Here again, he intensively quoted Saint Augustine[31] and echoed his reasoning that to take the sword meant only to take it unlawfully but that to use it in obedience to the proper and appropriate authority of a sovereign prince was just and not sinful.[32] Following his argument, which was originally formulated by S. Augustine, even where the sword was wrongly taken, the opportunity of repentance may intervene between the sin and its punishment, which was the natural death of any such sinners, was not necessarily death by a literal sword but spiritual death by a sort of a spiritual sword. The right authority was a key condition for Just War. No private person has the right to assemble troops and declare a war; a public person can, even without any superior human authority, here recourse to the sword if he be truly inspired by a zeal of justice; his authority, here, comes from God. Such authority was very limited, and dependent on a righteous cause. Thomas Aquinas' definition of Just War was almost identical to that of S. Augustine:

> "A just war is wont to be described as one that avenges wrongs, when a nation or a state has to be punished for refusing to make amends for the wrongs inflicted by its subjects, or to restore what was secede unjustly."[33]

Actions of just war were intended to bring about the common good for either the community or for those against whom one was fighting and the command of non-resistance was not always appropriate and it was not intended by God to be always practised. Here, Aquinas also quoted St. Augustine and agreed with him on the fact that the Gospel precepts of non-resistance should be obeyed except when they contradict the common good.[34] In tackling the concept of peace, he distinguished between true and

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[31] Frederick H. Russell, *The Just War in the Middle Ages*. p. 259.
[32] Ibid., p. 260.
[33] Frederick Charles Copleston, *Aquinas*, (Harmondsworth: Penguin, 1975), p. 22. See also, *Aquinas*, eds. by John Dunn and Ian Harris (Cheltenham: Edward Elgar, 1997), p. 61-67.
[34] Ibid., p. 270.

false peace and claimed that Jesus Christ came to establish the true peace[35] and war can be transformed into peace by the spirit in which it is fought; in the same way, the absence of war can be evil under some circumstances. Again, Aquinas' process of argument echoed St. Augustine. Wars' horrors can be redeemed by good intention. Peace, security, punishment of evildoers, and helping good people, were essential preconditions to a just war. A wicked intention can render a just cause unjust. His objection against the participation of clerics in warfare was based on his conviction that those persons had a particular vocation, a uniquely spiritual mission, such that even the urgency of defending one's life did not justify them in fighting. Military activity could prevent them from their proper duty at a time when it was proper to pray for victory and contemplate God in peace and fight with spiritual weapons. Saint Paul's words, "the weapons of our warfare are not carnal but mighty through God", were made to apply only to clerics as "no man, being a soldier to God, entangleth himself with secular business."[36]

The word "soldier" was seen as purely metaphorical and clerics were supposed to encourage their friends to fight materially by absolving them from their sins, praying for victory and using their divine position, as had done the priests of Joshua, who were at the forefront of the march only for the purpose of blowing their sacred trumpets (Josh. 6. 4). Aquinas acknowledged the fact that there is something essentially unchristian in the shedding of blood, even in a just war cause, since shedding blood is completely incompatible with the administration of the sacrament of Christ's body and blood: "It is altogether unlawful for clerics to fight because war is directed to shedding of blood." Aquinas considered whether it was lawful to deceive the enemy by laying ambushes[37]

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[35] Matt. 10. 34.
[36] 2 Tim. 2. 4.
[37] Russell, p. 271.

since deception and lies appear to be opposed to the virtue of faithfulness. Here, Aquinas made a distinction between deliberate and explicit deceit expressed in an external deed, such as a lie or the breaking of a promise. For him, ambush was nothing more than "concealment of plan." Though he mentioned St. Augustine's reference to the command of the Lord to Joshua to lay ambushes, he opted for a more strict view and understanding; he followed Jesus' warning that we ought not to give that which is holy to dogs.[38]

Fighting on holy days is another issue Aquinas tackled in his book. Objections were mainly derived from the old Testament's attitude to the Sabbath. The most obvious scriptural evidence against this attitude was that Jesus himself healed a man on the Sabbath for the good end of safeguarding the common good; there was no objection to that. Monseigneur De Solages criticised Aquinas in the beginning of his book "*La Theologie De La Guerre Juste*"[39] and acknowledged the importance of his book "*Summa Theologica*" with regard to his views on war. I have tried to summarise the main points he raised in three points:

1. War for T. Aquinas related to natural virtue such as justice, rather than to a supernatural virtue, such as charity. He did not mention charity, even *en passant*, but mentioned justice thirteen times.

2. War was seen as an individual, subjective, religious problem in the assumption of a clear distinction between objective and social justice and subjective individual morality, though Monseigneur De Solages claims that the distinction tends to be vague and dim rather than clear and evident.

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[38] Matt. 7. 6.

[39] De Solages, p. 9-17-18-31.

3. One of Saint Thomas Aquinas' milestones in the concept of just war is the fulfilment of a right intention. Monseigneur De Solages claims that right intention is a relative, changing term, and its alteration is possible.

Another common complaint that applies to all Aquinas' views and ideas is the abstract and impersonal style. He never identified nor argued on the nature of the prince's authority. He saw it as deriving directly from God, which was, or is not, always the case. He never related the question of war to the universe, the world or even Christendom, ignoring in a way the church's growing effect to reduce and prevent a war. It is clear that Aquinas perceived war from a religious and subjective and social viewpoint. To criticise Aquinas one has to remember that he was influenced by the idealistic views of the Greek metaphysicians and theologians, mainly Aristotle, Plato and Saint Augustine, whom he quoted often, without even acknowledgement.

To assess the theories of just war, we have to see if they have really limited wars more than they encouraged them. The *jus ad bellum* is acknowledged by the three philosophers. They are equipped with such penetrating logic as to look for a doctrine of preventive war. Despite their platonic background they acknowledged the necessity of wars as part of our human nature. This *avant garde* attitude enabled them to study war as a human natural phenomenon rooted in our psyche and soul and to try to limit its atrocities, theorising certain preconditions to its inevitability. We should never study those philosophers independently from the historical and political era they lived in. War, for them, is only necessary if it will secure peace, punish evildoers and protect ideals, such as justice, peace, security, democracy against invaders. They all view the defence of the *patria*, the sovereignty of the law, the battle against lust, greed and cruelty primary causes for just wars. They wanted to reduce the possibility of waging wars. Despite the importance of their ideas in shaping and influencing political and juridical

thought and the spirit of modern international law, religious and racial supremacy has served as the main legitimising factor for the concept of the Just War. Their judgement in this respect could not represent a comprehensive practical political view since Greek supremacy or Christian supremacy is only convincing from their angle of thought. I have to point out at the end of this part that Saint Augustine and Thomas Aquinas were deeply influenced by the Islamic philosophy which was deeply shaped in its turn by the Greek one, mainly Plato and Aristotle. The process of legitimising wars comes out of necessity. The philosophers of the medieval Europe wanted as part of the political scene to defend their territories against the growing threat of the Islamic Army that controlled South Europe.

The Islamic Concept of Jihad

By the seventh century, Islam appeared in the Arabian peninsula. The new religion spread rapidly throughout the length and breadth of Arabia, persuading many believers and gaining manifold adherents. Within a century of its appearance, the faith of Islam expanded to cover large areas beyond the boundaries of its own region, forming the Islamic Empire which extended from the Atlantic to the Pacific.[40] A similar concept to that of the Christian just war is to be found in the Muslim legal theory of war, the "*Islamic concept of Jihad*". The term Jihad is derived from the verb jahada (abstract noun juhd) which means "he exerted himself"; consequently, Jihad literally means exertion or striving. Jihad is commonly translated as "Holy or religious war", but this translation is far from exact.[41] Jihad in the juridico-religious sense indicates "the

[40] Murad Hofmann, *Islam: The Alternative*, (Garnet Publishing Reading: Glasgow, 1993), p. 1-5.
[41] See Tofiq Ali Wahib, *The Jihad in Islam*, (Saudi Arabia: Jeddah, 1980), p. 13.

exertion of one's power to the utmost of one's capacity in the cause of Allah",[42] and to "spread of the belief in Allah and in making His word supreme over this world".[43]

"Jihad in the technology of law is used for expending ability and power in fighting in the path of God by means of life, property, tongue and other than these".[44] According to this concept, a Muslim "may fulfil his Jihad obligation: by his heart; his tongue; his hand; and by sword".[45] It is important to mention here, that the concept of Jihad does not only connote a holy or religious war; but the holy war constitutes one of its important elements and is usually carried out as a last resort for the expansion of Islam.[46] Jihad, as meaning a resort to holy war in the path of *Allah* (God), was imposed upon Muslims by their Holy book the *Qur'an* and the *Sunnah* (the tradition of the Prophet Mohammed).[47] The Holy Qur'an says:

> "Allah hath purchased of the Believers Their persons and their goods; For theirs (in return) Is the Gardan (of Paradise): They fight in His Cause, And slay and are slain: A promise binding on Him In Truth, through the Torah, The Gospel, and the Qur'an: And who is more faithful To his Covenant than Allah? Then rejoice in the bargain Which ye have concluded: That is the achievement supreme."[48]

The motivation for a Muslim believer in fighting a war of Jihad is the word of God that each soldier dying in a Jihad fighting become a *Shahid* (martyr). A Shahid in the path of God is promised a place in heaven. The Our'an says:

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[42] See Majid Khadduri, *War and Peace in the Law of Islam*, (The Johns Hopkins Press: Baltimore, 1955), p. 55. The term "jahada" (he exerted himself) and all other terms derived from it, have been mentioned forty times in the Holy Qur'an. Reviewing the Holy Qur'an proves that the term "*Fi Sabeel Allah*" (In the way of Allah) has been attached to Jihad or "*qital*" (Fighting) thirty two times. The Holy Qur'an says: "And strive in His cause As ye ought to strive, (With sincerity and under discipline), The Holy Qur'an: Al-Madinah Al-Munawarah: Saudi Arabia (1998), surat: *Al-Hajj*: 22: 78. And the Qur'an says: "But those who are slain In the way of Allah, He will never let Their deeds be lost. See Surat: *Mohammed*: 47: 4.

[43] Ibid.

[44] Mohammed Hamidullah, *Muslim Conduct of State*, (Lahore: Pakistan, 1977), p. 150.

[45] Khadduri, p. 56.

[46] Reuven Firestone, *Jihad: The Origin of Holy War in Islam*, (Oxford: Oxford University Press, 1999), p. 13-16.

[47] *Sunnah* or the *Hadith* comprises what the Prophet said, did, or tolerated.

> "Those who believe, and emigrate And strive with might And main, in Allah's cause, With their goods and their persons, Have the highest rank In the sight of Allah: They are the people Who will achieve (salvation)."[49] "Their Lord doth give them Glad tidings of a Mercy From Himself, of His good pleasure. And of Gardens for them, Wherein are delights That endure."[50]

Also, Jihad as meaning a Holy war was permitted by Muslim *Sunnah*. In this connection, the Prophet Mohammed is reported to have said:

> "Every prophet had some profession (for livehood), and my profession is Jihad; and in fact my means of subsistence are placed under the shadow of my spear".[51]

A review of the historical development of Islam reveals that Muslims, at the time of the Disclosure, had no territorial ambitions outside the Arabian peninsula. Their main desire was that Islam would replace *Shirk* (polytheism) in Arabia.[52] Therefore, Jihad was only limited to the exhortation of the Muslims of Arabia to continue the fight against their polytheist rivals in that region.[53] After the contest between Islam and polytheism had ended in the victory of Islam and the establishment of an Islamic State over Arabia, the principle of Jihad, in the sense of a state of war between the Muslims and the unbelievers of Arabia, was subject to certain important changes. With the developments of the Islamic State, the second stage of Jihad began. A new interpretation of the principle of Jihad emerged: as a legitimate weapon for the spreading of Islam outside the Arabian peninsula.[54]

Later, the development of the principle of Jihad was influenced by the *Ulama* (Jurist-theologians and canon lawyers) who developed a theory whereby the world was divided into two regions. The first was the *Dar al-Islam* (the world of Islam), which included all

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[48] The Holy Qur'an, Suart: *At-Tauba*: 9: 111.
[49] Ibid: 9: 20.
[50] Ibid: 9:21.
[51] Quoted in Hamidullah, p. 9-10.
[52] Charles H. Alexandrowicz, "Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries," (*Hague Recueil* 100, 1960-II), p. 236-37.
[53] M. K. Nawaz, "The Doctrine of 'Jihad' in Islamic Legal Theory and Practice", (*Indian Yearbook of International Affairs* 8, 1959), p. 34-40.
[54] Ibid, p. 38.

territories controlled by Muslims and applied the Islamic *Sharia*.[55] The second was the *Dar al-Harb* (the world of war), which consisted of enemy territories or communities outside the world of Islam.[56] In theory, Dar al-Islam was supposed to be in permanent state of war with Dar al-Harb until the latter was transformed into Dar al-Islam.[57] That kind of war could not, in practice, imply continuous warfare.[58] Dar al-Islam was under an obligation to invite peacefully neighbouring non-Muslim communities to spread Islam in the world. If they accepted and they became adherents, they would retain their power and be regarded as a part of Dar al-Islam. But, if they rejected the invitation, then they should pay the *Jizyah* (protection tax).[59] If they refused, to accept either of these options, the *Khalifah* (successor of the Prophet Mohammed, leader of the Islamic State) had no choice but to wage a war of Jihad against the other party until either it was conquered, defrayed the Jizyah or embraced Islam.[60] That tendency was supported by the Qur'an:

> "Fight those who believe not In Allah nor the Last Day, Nor hold that forbidden Which hath been forbidden By Allah and His Messenger, Nor acknowledge the Religion Of Truth, from among The People of the Book, Until they pay the Jizya With willing submission, And feel themselves subdued".[61]

From what has been mentioned above, it becomes clear that the main Islamic idea is based on the fact that Islam and polytheism cannot be in agreement, although even in this respect, Islam asked Muslims not to be aggressive, for the Qur'an says:

> "Fight in the cause of Allah Those who Fight you But do not transgress limits; For Allah loveth not transgressors".[62]

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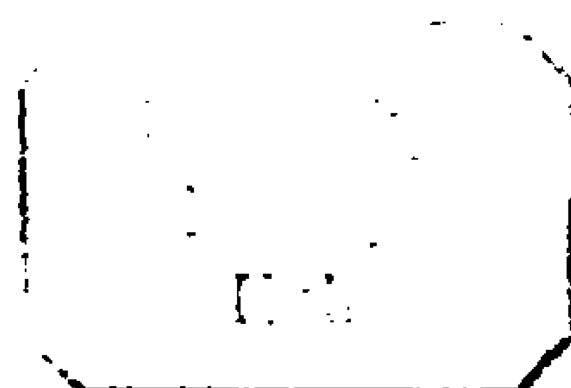
[55] Tofiq, p. 48-50.
[56] Khadduri, p. 170-1.
[57] Ibid, p. 53.
[58] Alexandrowicz, p. p. 236-7.
[59] Nawaz, p. 37.
[60] Hamidullah, p. 158-9.
[61] The Holy Qur'an: Surat: *At-Tauba*: 9: 29.
[62] Ibid, Surat: *Al-Baqarah*: 2: 190.



Under Islamic law, all secular wars are abolished. Only the war of Jihad is acceptable because it is waged in the path of God. War between Muslims is completely prohibited.[63] Military action against Muslims is justified only by denying them the status of Muslims, classifying them as apostates or against legitimate authority.[64] For example, when Caliph al-Ma'mun and his brother al-Amin struggled for control of the *caliphate* in 809-13, al-Ma'mun called al-Amin an apostate.[65] Muslim writers use the term *fitna*, meaning trial or temptation, to describe divisions within the Muslim community. Though pre-modern Muslim writers do not say so, *fitna* became a permanent condition after 750, when the political unity of the Muslim community (*umma*) came to an end. The earliest Muslim writer, Mohammed ibn al-Hassan Shaybani,[66] considered the Islamic laws of war and peace was formulated only retrospectively, by deriving general principles from a situation that no longer existed and would never again exist.

In effect, the law of Jihad was formulated after the conditions it fitted had passed. The jurists then sought to reconcile the division and disorder of later centuries with the theory, but they averted their gaze from the ugly reality of intra-Muslim warfare all around them. Instead, they primarily sought to establish the legitimacy of authority in the absence of an effective caliph ruling a unified Muslim community. Islamic law never addressed the reality of political division within the Islamic world. The division of the Islamic world did not end its expansion, Jihad in the sense of warfare continued, though the Jihad ideal rarely determined the policies of Muslim regimes and almost never permitted them to join together against a common non-Muslim foe. Often the term

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[63] Tofiq, p. 39-44. For more information see Ayatollah Morteza Mutahhari, *Jihad: The Holy War of Islam and Its Legitimacy in the Qu'ran*, trans. by Mohammed Salman Tawhidi, (Islamic Propagation Organisation: Iran, 1985), p. 13-16.

[64] Fred M. Donner, "The Sources of Islamic Conceptions of War," In: John Kelsay and James Turner Johnson, eds. *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, (New York: Greenwood Press, 1991), p. 51-52.

[65] Ibid.

ghazi, literally raiding, was used as a synonym. The Ottoman Empire is often called the empire of the ghazis because success in Jihad was a vital component of Ottoman legitimacy. But Jihad was not the sole motivation, or even the sole ideology, for Ottoman expansion. Other factors included population pressure, competition with other Muslim states, and the lure of border warfare. In addition to the doctrine of Jihad, Ottoman political ideology incorporated Turko-Mongol, Iranian, and Byzantine elements. A similar combination of ideological and other factors drove Muslim expansion in the Indian subcontinent.[67] Moreover, Muslim rulers such as Uzan Hassan Aqquynulu, the ruler of western Iran and eastern Anatolia in 1453-78, and the Safavid Shah Tamasp (1524-76) participated in Jihad not just for abstract reasons of faith but to enhance their legitimacy and acquire booty.

The main motives for Muslims to wage a war of Jihad, can be classified into the following:

1. Self-defence: It is a type of legitimate defence which is permitted by Al-Islam, to repel enemy attacks. Muslims should not fight, unless to defend themselves. This is supported by the Qur'an:

> "Fight in the cause of Allah Those who Fight you But do not transgress limits".[68]
> "If then any one transgresses The prohibition against you, Transgress ye likewise Against him".[69]

2. Assistance to Muslim People. The Holy Qur'an says:

> "And why should ye not Fight in the cause of Allah And of those who, being weak, Are ill-treated (and oppressed)? Men, Women, and children, Whose cry is: "Our Lord! Rescue us from this town. Whose people are oppressors; And raise for us from Thee One who will protect".[70]

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[66] His work is translated into English: Mohammed ibn al-Hassan Shaybani, *The Islamic Law of Nations: Shaybani's Siyar*, trans by Majid Khadduri (Baltimore: John Hopkins University Press, 1996).
[67] Richard M. Eaton, *The Rise of Islam and the Bengal Frontier, 1204-1760* (Berkeley: University of California Press, 1993), p. 71-77.
[68] The Holy Qur'an: Surat: *Al-Baqarah*: 2: 190.
[69] Ibid: Surat: *Al-Baqarah*: 2: 194.
[70] Ibid: Surat: *Al-An-Nisaa*: 4: 75.

3. Safeguarding the authority of Islamic state and its sovereign rights to impose *Jizya* (protection tax). In this respect the Holy Qur'an says:

> "Fight those who believe not In Allah nor the Last Day, Nor hold that forbidden Which hath been forbidden By Allah and his Messenger, Nor acknowledge the Religion Of Truth, from among The People of the Book, Until they pay the Jizya With willing submission, And feel themselves subdued".[71]

4. Punitive, against hypocrisy, apostasy, rebellion, on breaking of a covenant by the other party:

> "If then any one transgresses The prohibition against you, Transgress ye likewise Against him. But fear Allah, and know That Allah is with those Who restrain themselves".[72] "If thou fearest treachery From any group, throw back (Their Covenant) to them, (so as To be) on equal terms: For Allah loveth not the treacherous".[73]

5. Idealistic, a war in the path of God, that is, in the direction of the expansion of Islam and for making the Word of God supreme over the world:

> "Fight those who believe not In Allah nor the Last Day, Nor hold that forbidden Which hath been forbidden By Allah and His Messenger, Nor acknowledge the Religion Of Truth, from among The People of the Book, Until they pay the Jizya With willing submission, And feel themselves subdued.[74]

Here, an important point should be clarified, that the verse, does not tell us to fight the People of the Book, it tells us to fight only those of them who have no faith in God, or in the hereafter, and who do not abide by the rule of God, allowing what He has forbidden; and who are not religious according to the religion of truth.

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[71] Ibid: Surat: *Al-At-Tauba*: 9: 29.
[72] Ibid, Surat: *Al-Baqarah*: 2: 194.
[73] Ibid, Surat: *Al-Anfal*: 8: 58.
[74] Ibid, Surat: *At-Tauba*: 9: 29.

Only the *Khalifa* (Caliph), the heir of the Prophet, as simultaneously religious and political leader, could authorise the waging of Jihad by in the Islamic community.[75] So long as Mohammed was alive, he fulfilled this job.[76] On his death in 632, leadership of the Muslim community was taken up by others in turn, who were known by the title *Khalifa*, caliph (which means deputy).[77] Each caliph was also *Imam* for the community as a whole, though the caliphs were admitted to lack the special divine guidance received by Mohammed. They did, however, have the Qur'an as the record of that guidance, and they and their supporters employed it to justify the military and political actions they took to consolidate their central authority over the extended Muslim community.[78] Such actions were necessary immediately, because upon Mohammed's death the religion-political community he had formed quickly began to fragment: sometimes for political reasons, sometimes for religious reasons, sometimes for both.[79] The consolidation of caliphal authority was, in its structure, both religious and political. It was political in that it established that there would be a single Muslim political community with the caliph at its head, not a regression to the pattern of independent tribes and cities that had been normative in Arabia before Mohammed.[80] It was religious in that it established the Qur'an as the ongoing presence of revelatory guidance for that political community. This appeal to the Qur'an gave the caliphs a legitimacy as

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[75] See Khadduri, *War and Peace in the Law of Islam*, p. 87-88.
[76] Mohammed Shaltut, *Islam: Religion and System*, (Dar Al-Qlam: Cairo, 3 ed, 1966), p. 461-63.
[77] Peter Partner, *God of Battles: Holy Wars of Christianity and Islam*, (Harper Collins Publishers, 1997), p. 41-43.
[78] Shaltut, p. 463-64.
[79] Adnian Al-Romi and Ali Al-Haz'ei, "*Al-Jihad,*" (Al-Minar Library: Kuwait (1997), p. 39-44. See also John L Esposito, *The Oxford Encyclopedia of the Modern Islamic World*, (Oxford: Oxford University Press, Vol. 1, 1995), p. 239-40.
[80] Abdal Rhman Ali Flah, *Islam and Guardianship on Religions,* (Dar Al-Gad: Bahrain, 2 ed, 1978), p. 27-30.

successors to Mohammed that they would not otherwise have had, since it compensated for the fact that, unlike the Prophet, they lacked direct divine guidance.[81] Among the minorities within the Muslim community who, for many reasons, disputed the caliphal succession and the nature of caliphal rule, was the group who later came to be known as *Shi'ites*. This party attacked caliphal rule from two directions at once: by claiming that the Prophet had in fact designated his successor, and that succession should follow in the direct line of blood descent from Mohammed; and by insisting that only persons who themselves received direct divine guidance could legitimately exercise leadership of the Muslim community. The opposition of this group came to a head during a struggle for power between the third caliph, 'Ali, whom they supported as the Prophet's designate, and Mu'awiyya, the ruler of Syria.[82]

By 661, five years after Ali's succession to the caliphate, supporters of Mu'awiyya killed Ali, and Mu'awiyya gained power as caliph. Ali's supporters rejected him as an opportunist and continued to fight, led by the Prophet's Mohammed grandson, Hussein, who they regarded as the real caliph. In 680, at the battle of *Karbala*, Ali's faction were defeated and Hussein killed. This effectively ended the military phase of the conflict and caused the *Shi'a* to concentrate on their religious differences with the caliph and the dominant party.[83] The majority of Muslims, however, continued to accept the legitimacy of caliphal rule. The line of religious belief that developed in this context came to be known as *Sunni* from its dependence on the *sunna*, the "Mohammed custom and guidance". A number of distinctive elements in later *Sunni* Islam follow directly from the system set up by the early caliphs. Two important traditions of ruling authority have

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[81] Tofiq, p. 39-44.
[82] P. M. Holt, Ann K. S. and Bernard Lewis, *The Cambridge History of Islam*, (Cambridge: Cambridge University Press, 1978), p. 68-72.

been developed in the two major divisions of Islam, the *Sunni* and the *Shi'i*. Under the *Sunni* concept, the caliphate and its successors represented the union of political and religious rule initiated by Mohammed. In practice, however, the caliphs functioned as temporal rulers, having recourse to their religious authority as required for state purposes.[84] For the *Shi'ites*, the same was true of the *imam*, though in reverse: the *imam* was held to be the only legitimate heir to both religious and political power, but in practice the *imams* were restricted to religious leadership of the *Shi'ite* community while the caliphs and not the imams held actual power in the Islamic community as a whole.[85] In *Sunni* tradition the caliph, in his dual religious-political role, can authorise Jihad in general. Throughout the caliphate and even until late in the Ottoman empire, the rulers used the call to Jihad to mobilise and motivate their armies and secure the support of the public. In the *Shi'ite* tradition, the right was restricted to wage defensive Jihad only, however, they considered it a legitimate right: to protect the basic welfare of the Islamic community against those who threatened it.[86] The *Shi'ia* Jurists restricted Jihad for defensive purposes only as a result of the absence of the legitimate authority which could authorise offensive Jihad after the disappearance of the Twelfth Imam in 874; for them, there would be no just ruler in the world until the Twelfth Imam returned as Mahdi: which means the right guided one sent by God to rule the world at the end of time.[87]

From what has been discussed, the declaration of Jihad is linked with the availability of religious- political authority, which for *Shi'ih* is based on the caliph (or *Imam*) as the

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[83] Abdulaziz Abdul-Hussien Sachedina, *The Just Ruler (Al-sultan Al-adil) in Shi'te Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence*, (Oxford University Press, 1998), p. 114-15.
[84] Flah, p. 31-33.
[85] Ibid, p. 105-117.
[86] Afif Abdal Tbarei, *The Spirit of Islam*, (Dar Al-Alam: Beirut, 14 ed, 1977), p.397-98.
[87] Adnian Al-Romi and Ali Al-Haz'ei, p. 58-62. See also Khadduri, p. 66-69. See also Sachedina, p. 120-27.

leader of the Muslim community; under the *Sunni* tradition, the caliph can declare Jihad in general, regardless whether it is defence or offensive Jihad.[88] But under the *Shi'ih* tradition, Jihad is restricted only to protecting the Islamic state (defensive Jihad). The *Shi'ih* tradition limits Jihad to defensive purposes as a result of the absence of the legitimate authority to declare offensive Jihad.[89] The main point which needs to be emphasised, is that in the present time, the political-religious authority to wage Jihad is completely absent, since the Islamic institution of the caliphate was abolished on 3rd March 1924 by Kamel Attaturk with the deposition of Abdulmecid.[90]

The Main Principles of Jihad

The *first* principle, is that Islam in origin appeals to peace, since peace is the main aim and object for the Islamic religion and State.[91] The Qur'an says:

> "Allah is He, than Whom There is no other god; The Sovereign, the Holy One The Source of Peace (and Perfection) The Guardian of Faith, The Preserver of Safety, The Exalted in Might, The Irresistible, the justly Proud Glory to Allah! (High is He) Above the partners They attribute to Him".[92] "But Allah doth call To the Home of Peace".[93]

The *second* principle and the important one, concerning Jihad, is linked with the existence of a legitimate purpose to wage Jihad. That kind of holy war in Islam is not connected with the caprice or emotions of the leader (caliph), but should be based on the real need of the Islamic State. Without such a legitimate purpose for Jihad, this kind of war will not be holy.[94]

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[88] Esposito, Vol. 2, p. 371.
[89] Ibid.
[90] Ibid, p. 241.
[91] Mohammed Abd-Al-Issiz Abu-Skalia, *The Rules of Jihad in Islam*, (Saudi Arabia: Riyadh University Press, 1999), p. 99-103.
[92] *The Holy Qur'an*: Surat: *Al-Hashr*: 59: 23.
[93] Ibid: Surat: *Yunus*: 10: 25.
[94] Abu- Skalia, p. 104-5.

The *third* principle, is that before they wage the war of Jihad, Muslims should give warning and not surprise the enemy, because if they give the enemy time to consider his situation, there may not be any need for recourse to war. Traditionally, the Islamic State offered three options for the enemy: to enter Islam, to pay *Jizyah* (protection tax), or war. Here, the main idea, is that Islamic tradition prefers to leave a space of time for non-Muslims to review their position, since there may not be a need for war.[95]

The *fourth* principle, is that fighting is restricted to the field of war only, and against combatants only; civilians are to be protected. Muslims must not target non-combatants, women, children, the old and the infirm or worshippers.[96]

The *fifth* principle, is that there must be no treachery: It is a main rule in Islam to respect any agreement or treaty even with the enemy.[97]

The *sixth* principle, is that it is prohibited to tamper with the corpses of the enemy; the bodies of slain enemies are to be given to their families.[98]

The *seventh* principle, is to respect, to help and to take care of the prisoners of war.[99] The Qur'an says: "And they feed, for the love Of Allah, the indigent, The orphan, and the captive".[100]

The *eighth* principle, is that the war should not depart from the legitimate Jihad (which means it should not be aggressive).[101] The Qur'an says:

> "And if ye punish, let your punishment Be proportionate to the Wrong that has been Done to you: But ye show patience, That is indeed the best (course) For those who are patient".[102]

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[95] Ibid, p. 105-7.
[96] Ibid, p. 107-8, 114-15.
[97] Ibid, p. 108-9.
[98] Ibid, p. 109.
[99] Ibid, p. 110-12.
[100] *The Holy Qur'an*: Surat: *Al-Insan*: 76: 8.
[101] Abu-Skalia, p. 113-14.
[102] *The Holy Qur'an*: Surat: An-Nahl: 16: 126.

The *ninth* principle and the final one is, that Jihad should not be directed to material interest, or waged on account of race, colour, or sex. The Islamic tradition of Jihad explicitly denotes the peaceful intention of Islam and its concern for human interactions. It indicates that killing for satisfaction, power or dominance should not be practised by Muslims. The Prophet Mohammed offered the first Mosque in Islam in Medina to the Christians of Najran for Sunday services, to teach all Muslims to respect the temples and Churches of other faiths.[103]

Jihad as Non-warfare

Warfare is only one interpretation of the concept of Jihad. The root meaning of effort never disappeared. Jihad may be an inward struggle (directed against evil in oneself) or an outward one (against injustice). A *Hadith* (reports on the sayings and acts of the prophet), defines this understanding of the term. It recounts how Mohammed, after a battle, said "We have returned from the lesser jihad (*al-jihad al-asghar*) to the greater jihad (*al-jihad al-akbar*)." When asked "What is the greater jihad?," he replied "It is the struggle against oneself."[104] Although this *Hadith* does not appear in any of the authoritative collections, it has had enormous influence in Islamic mysticism (*Sufism*). Sufis understand the greater Jihad as an inner war, primarily a struggle against the base instincts of the body but also resistance to the temptation of polytheism. Some Sufi writers assert that Satan organises the temptation of the body and the world to corrupt the soul. Abu Hamid Mohammed al-Ghazali describes the body as a city, governed by

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[103] Tbarei, p. 389-92.
[104] Ali Iban Usman Al-Jullabi Al-Hujwiri, *The Kashf Al-Mahjub: The Oldest Persian Treatise on Sufism*, trans, by Reynold A. Nicholson, (London: Luzac, 1976), p. 200-202.

the soul, and besieged by the lower self. Withdrawal from the world to mystical pursuits constitutes an advance in the greater Jihad.[105]

Conversely, the greater Jihad is a necessary part of the process of gaining spiritual insight. By the eleventh century Sufism had become an extremely influential, and perhaps even the dominant, form of Islamic spirituality. Until this time, many Muslims conceive of Jihad as a personal rather than a political struggle. But Sufism provoked opposition, most importantly from Ibn Taymiya (a famous Islamic thinker), who condemned many aspects of Sufism which he believed contradicted the *Shari'a law*. Also, Ibn al-Qayyim al-Jawziya explicitly condemned the doctrine of greater Jihad, discarding as a deliberate fabrication the *Hadith* that originates this concept.[106]

Jihad in Modern Times

Perhaps the earliest perspective on Jihad, developed among Indian Muslims in the aftermath of the 1857 uprising (the so-called Mutiny). Sir Sayyid Ahmad Khan and others argued that Jihad meant only defensive war and could not justify further resistance to British rule as long as the British did not actively interfere with the practice of Islam. Sir Sayyid treated Islam as a private religion rather than a public force, and presented it as virtually a pacifist creed.[107] Modernist writers, seeking to reconcile Islam with Western ways, looked to the Qur'an to find an Islamic model to guide Muslim states. They sought a fundamentally defensive vision of Jihad, and toward this end argued that all the wars waged by the prophet and the first four caliphs were defensive.

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[105] John Renard, "Al-Jihad Al-Akbar: Notes on a Theme in Islamic Spirituality," (*Muslim World* 78, 1988), p. 225-240.

[106] Ibid.

[107] For more debate, see Maulavi Ali Cheragh, *A Critical Exposition of the Popular 'Jihad,'* (Karachi: Karimsons, Pakistan, 1977). Maulavi tried to show that all the wars of Prophet Mohammed were

Contending that the Qur'an requires Muslims to make peace if their adversaries wish to do so, they include a *Dar al-Sulh* (Abode of Peace), in their model of the world. Peace treaties may be permanent and Muslims may be neutral in international conflicts.[108] The modernists also work to reconcile Islamic law with international law.

Thus, the Organisation of the Islamic Conference, an umbrella organisation that includes as members most Muslim states, expressed an interest in establishing an international court to reconcile the *Shari'a law* with international public law. Similarly, Mohammed Shaltut, a former President of the Al-Azhar University in Cairo, contends that the Shari'a emphasis on international peace and the legitimate right of self-defence prefigures the principles of the United Nations.[109] Abu al-A'la Mawdudi, an Indian and later a Pakistani thinker, was the first Islamist writer to approach Jihad systematically. He presents it not merely as warfare to expand Islamic political dominance, but also to establish a just rule. Jihad for Mawdudi was akin to a war of liberation; Islamic rule means freedom and justice, even for non-Muslims. He argues that:

> "Islam wants to employ all the forces and means that can be employed for bringing about a universal, all-embracing revolution. It will spare no efforts for the achievement of this supreme objective. This far-reaching struggle that continuously exhausts all forces employment of all possible means are called Jihad."[110]

Other Islamist thinkers such as Hassan al-Banna and Sayyid Qutb followed Mawadudi's emphasis on its role in establishing a truly Islamic government. For them, as for Ibn Taymiya, Jihad includes the overthrow of governments that fail to enforce the

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defensive, and that aggressive war, or compulsory conversion, is not allowed in Islam, and the word Jihad does not exegetically mean 'warfare'.

[108] Mustansir Mir, "Jihad in Islam," in Hadia Dajani-Shakeel and Ronald A. Messier, eds., *The Jihad and Its Times*, (Ann Arbor: Center for Near Eastern and North African Studies, University of Michigan, 1991), p. 119-122.

[109] Flah, *Islam and Guardianship on Religions*, p. 31-32.

[110] Abu'l A'la Al-Mawdudi, *Al-Jihad fi Sabil Illah* (Beirut: Dar'Alfiker 'Al-Hadith, 1967), p. 141, see also p. 142-45.

Shari'a.[111] Moreover, two groups of contemporary Muslims have articulated doctrines of peaceful Jihad. Modernists may see the concept as central to the religion but see it as encompassing all forms of political and social action to establish justice. Fazlur Rahman, a Pakistani scholar, argued that it had to exist to accomplish Islam's social and political agenda. "There is no doubt that the Qur'an wanted Muslims to establish a political order on earth for the sake of creating an egalitarian and just moral-social order. Jihad is the instrument for doing so."[112] In this spirit, President Habib Bourguiba of Tunisia used "Jihad" to describe the struggle for economic development in Tunisia, much as Lyndon Johnson spoke of a "War of poverty."[113]

The Sufi doctrine of greater Jihad remains alive. Though less influential than Islamism in the political realm, it may have more impact on the spiritual life of Muslims, at least in some Muslim states such as Egypt, where one writer contends that the number of Egyptians active in Sufism may well exceed the number of Islamists.[114] But, the concept of Jihad as a moral struggle touches the daily lives of many Muslims, and not only Sufis. Jihad as warfare has had enormous consequences. But it has never mobilised Muslims en masse or transcended the ethnic and political divisions within the Muslim world. Few Muslim governments, and few individual Muslims, have acted in accord with doctrine. The conception of Jihad as warfare in defence of the Dar al-Islam did not produce a Pan-Islamic resistance to colonialism. The many movements that arose to resist European expansion or occupation were regional or local, tied to a specific leader, or regime. At no time did a Jihad movement arise which united Muslims with geographic, sectarian,

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[111] Emmanual Sivan, *Radical Islam: Medieval Theology and Modern Politics*, (New Haven; London: Yale University Press, 1990), p. 114-16.
[112] Fazlur Rahman, *Major Themes of the Qur'an*, (Minneapolis: Bibliotheca Islamica, 1994), p. 63-64.
[113] Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton, N.J: Markus Weiner, 1996), p. 116-17.
[114] Valerie J. Hoffman, *Sufism, Mystics and Saints in Modern Egypt* (Columbia, SC: University of South Carolina Press, 1995), p. 196-200.

or political differences. In most cases, Jihad against colonialism formed a part of programme of religious reform and renewal.

The most systematic attempt to mobilise Muslims against the West, the Ottoman declaration of Jihad against the Allies in 1914, failed entirely. With its declaration of war, the Ottoman regime simultaneously published a *fatwa* (ruling according to the *Shari'a*) calling the war a Jihad that every Muslim had to participate in - including the Muslim subjects of Russia, France, and Great Britain. To secure the widest possible circulation, the *fatwa* was published in Arabic, Persian, Urdu, and Turkish. But the *fatwa* did not cause significant Muslim defections from the Allied cause, nor did it prevent the Arab revolt against the Ottoman regime.[115] More recent invocations of Jihad have been equally ineffective. Frequent calls for Jihad against Israel have not overcome division among Israel's opponents or produced an effective mobilisation of their capability against Israel. Saddam Hussein's call for Jihad against the United States, part of an overall effort to Islamise the image of his secular regime, may have resonated among Islamists but it did not affect the outcome of the crisis. The same applies to the Iranian Supreme Leader Ayatollah Ali Khamanei's similar designation of war against the US as Jihad. But, neither pronouncement had significant political or military results. Even in Afghanistan, where resistance fighters went by the title *mujahidin*, the idea of Jihad had surprisingly little power. The Afghan cause did attract considerable support from the rest of the Islamic world, but only some Islamic states, such as Saudi Arabia, Pakistan, and Iran, actually allocated significant resources to the *mujahidin*. Moreover, the concept of Jihad did not unite the Afghan resistance, which remained divided by social, political, ethnic, and ideological differences. Although the resistance groups all considered themselves *mujahidin*, they perceived different paths of God and sought to

produce different results in human terms. These groups did not co-operate effectively and often fought each other rather than the Soviets. The concept of Jihad had little direct influence on the course of the Afghan war.[116] After the Soviets' withdrawal and the establishment of a new government, they continue to fight each other.[117]

Jihad, like Article 51 of the UN Charter, has a defensive nature; Jihad can not be practised without the real authority in the caliphate; the right of self-defence also can not be invoked without the occurrence of armed attack, and remains active until the Security Council have be taken measures to protect international peace and security.

Jihad now cannot mean dividing people into Muslims and non-Muslims and starting to kill the latter; this is far from the real Islam, the religion of mercy and forgiveness. In these days, many Muslims fanatic groups invoke Islam and Jihad for political purposes, to gain public sympathy and financial support. As a consequence of the unavailability of the real authority, which is founded on the caliph only (as a political - religious leader) to wage Jihad, true Jihad at this time is difficult to declare.

The beginning of the early modern era

The "just war" principle was advocated by scholarly consideration until the seventeenth century but was abandoned by the positivist writers in the eighteenth and nineteenth centuries.[118] The new tendency reflected the emergence of nation-states and the

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[115] Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton, 1979), p. 90-94.

[116] Olivier Roy, *Islam and Resistance in Afghanistan*, 2 ed, (Cambridge: Cambridge University Press, 1990), p. 21-27.

[117] Olivier Roy, *Afghanistan: From Holy War to Civil War*, (Princeton: Darwin Press, 1995), p. 10-13; 34-7.

[118] Ian Brownlie, *International Law and the use of Force by States*, (Oxford: Oxford University Press, 1981), p. 5-13.

formulation of the concepts of state sovereignty and the balance of power[119] in the period after the end of the Treaty of Westphalia in 1648. At that time, state sovereignty was characterised as perfect and exhaustive in character. The society of European States was subject to no legal superior and sovereign states were only bound by the law which they could make themselves. Thus, resort to war was a matter lying with the sovereign right of each state and was effected whenever it seemed appropriate to do so. A further result of this eventuality was that war was considered "just" and lawful on both sides. The emergence and development of the law of Neutrality in the routine of states explains this tendency. The European balance of power split on two events during the period of 1648-1918, as a result of the French Revolutionary and Napoleonic Wars of 1792-1815 and the World War of 1914-1918.

The European settlement of 1814 and the Final Act of the Congress of Vienna of 1815 re-established the concept of public order and balance of power in Europe and the new state of affairs that emerged after the Napoleonic wars was marked by a presumption against unilateral changes in the status quo of Europe emanating either from national revolutionary movements within the European states or from the unilateral policy of a European power.[120] The intervention undertaken by the Holy Alliance to suppress a revolution in the Kingdom of the Two Sicilies is a pertinent illustration of the former presumption whereas the Treaty of Paris of 1856, which was signed not merely by the belligerents, and the Treaty of Berlin of 1878, which revised the Treaty of San Stefano of the same year, illustrate the latter. Furthermore, another characteristic of this period was the unlimited right of states to resort to war and the total abandonment of the theory of just and unjust wars. The creation of nation states and the concept of state sovereignty

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[119] This means that will be no state will attempt to expand its political interests at the expense of the interests of other states, which means in my view a peaceful coexistence.

had the result that there was no international authority similar to the Pope or Holy Roman Emperor to apply it.[121] Hall confirmed that:

> "international law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up, if they choose, and busy itself only in regulating the effects of the relation."[122]

Therefore, the right to resort to war was based either on morality and policy outside the sphere of law or on its being a means of change aiding the evolution of international society or on the lack of a central authority on the international level for the enforcement of rights, the obtaining redress for wrongs done and the infliction of sanctions.[123] According to Oppenheim, the two latter reasons justifying resort to war were open to juridical objections, due to the fact that they were satisfactorily met only by the denial of the legal nature of international law or by an assertion of its weakness as a system of law. He elaborated on the above contradiction by arguing that:

> "as an instrument for the vindication of the law, war signified a legally inadmissible identification of victorious power wielded by the interested state with a legal right" and "as a means of changing the law it constituted a radical break in the continuity of the system of international law since by waging war a state would release itself from all the obligations of international law except those appertaining to the conduct of war."[124]

A new development of the period under consideration was an attempt to end resort to war by the use of the institution of arbitration for the pacific settlement of disputes between states and the conclusion of various treaties providing for the peaceful settlement of disputes. More important was the fact that disputes including Great Powers were in some cases successfully settled by arbitration.[125]

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[120] Harold Nicolson, *The Congress of Vienna: A Study in Allied Unity 1812-1822*, (London: Cassell, 1989), p. 121.
[121] Humphrey Waldock, "The Regulation of the Use of Force by Individuals States in International Law," (*Hague Recueil*, Vol. 81, 1952-II), p. 455-57.
[122] Edward William Hall, *A Treatise on International Law*, (Oxford: Clarendon Press, 1924), p. 82.
[123] Quincy Wright, "The Outlawry of War," (*American Journal of International Law*, Vol. 19, 1925), p. 76.
[124] Lassa Oppenheim, *International Law: A Treatise*, (London: Longmans, Vol. 2, 1952), p. 178-9.
[125] See the Alabama Claims Award, in John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, (Washington: Government Printing Office, Vol. 1, 1898), p. 495-682.

The First Peace Conference included three conventions, three declarations and final act. It was held in the interests of a general and lasting peace and "for limiting the progressive development of existing armaments".[126] Even though the Conference failed to effect its original purpose, as the larger powers were unwilling to agree to a limitation or reduction of armaments, its first Convention for the "Pacific Settlement of International Disputes" side by side with the other two Conventions were negotiated. The important value of the Hague Conference of 1899 was that it opened the door for another Conference. Eight years later, the Second Conference was held, in which more than forty-four States were represented at the Hague on June 15, 1907. In this Conference the Conventions of 1899 were revised and some ten new ones adopted. The Conference consisted of thirteen conventions, a declaration and a final act.

Convention I of the Second Peace Conference of 1907 was concerned with the pacific settlement of international disputes. Article I of the convention reads:

> "With a view to obviating as far as possible recourse to force in the relations between states, the contracting Powers agree to use their best efforts to insure the pacific settlement of international differences".[127]

To achieve that purpose, the contracting Powers agreed to use mediation of friendly powers, before resorting to force.[128] In International disputes not involving honour or vital interests arising from differences of opinion between the parties, which diplomacy failed to solve, the contracting Powers considered it desirable, so far as circumstances

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[126] Russian Circular Note Proposing The First Peace Conference. See James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, (Oxford: Oxford University Press, 1918), p. 15.
[127] Article 1 of Convention I for the Pacific Settlement of International Disputes. See Scott, "The Hague Convention and Declaration of 1899 and 1907", Scott, p. 42-3.
[128] Ibid, Article 2, p. 43

allowed, that the parties concerned should institute an international commission of inquiry to investigate the case and find a solution.[129] These international commissions of inquiry were constituted by a special agreement between disputants.[130]

Also, arbitration was recognised by the contracting States, as the most effective and equitable means of settling international disputes which diplomatic efforts had failed to settle[131], and in any case where a serious matter arose between two or more parties, the contracting Powers declared it their duty to remind the conflicting powers in a peaceful way that the Permanent Court was open to them.[132]

In Convention II of the Second Peace Conference "Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts", which was signed at the Hague, October 18, 1907, clear attempts were made to limit the right of war and resorting to armed force. Article I of the Convention reads:

> "The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of the country by the Government of another country as being due to its nationals.
> This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award".[133]

At that conference, many suggestions were made for compulsory arbitration. As a result, the final act of the conference included a declaration that the conference agreed:

> 1. In admitting the principle of compulsory arbitration.
> 2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to obligatory arbitration without any restriction".[134]

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[129] Ibid, Article 9, p. 45-6.
[130] Ibid, Article 10, p. 46.
[131] Ibid, Article 38, p. 55. It is important to notice here that, although the parties to the Convention understood arbitration as the most effective means of settling international differences, the Convention failed to impose any obligation on the signatories to submit their disputes, even if it was of a legal nature, to arbitration. For more information, see Oppenheim, (II), p. 37.
[132] Ibid, Article 48, p. 61. A Permanent Court of Arbitration had been arranged by the Signatory Powers at the First Peace Conference of 1899 and persevere by the Hague Peace Conference of 1907, see Scott, p. 57, Chapter II.
[133] Ibid, p. 89.

Another attempt to limit the right of war was made at Convention III of the Second Peace Conference of 1907 (Relative to the Opening of Hostilities).[135] The aim of this Convention was the maintenance of pacific relations between States. The contracting Powers decided that use of force or hostilities in general between them should not take place without previous warning. Article I of the Convention reads that:

> "The contracting Powers recognise that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war, or of an ultimatum with conditional declaration of war".[136]

As an outcome, none of these conventions made war totally illegal; war only became illegal under certain conditions. No distinction between offensive or defensive wars was made.[137] Consequently, these conventions had little influence to hinder States from begin war.

As a result of the movement for outlawing war, an important development was the conclusion by the United States in 1913 and 1914 of a series of "Treaties for the Advancement of Peace", also known as the Bryan Arbitration Treaties, with a great number of States.[138] The treaties established a Permanent Commission of Inquiry which had as its task to investigate and report on any dispute arising between the contracting Parties and they became known as "The Bryan Cooling-off Treaties".[139] In these treaties the contracting States agreed not to resort to force or begin hostilities in case of any dispute arising among two or more of them, which diplomatic offers failed to settle,

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[134] See the Final Act of the Second Peace Conference, Scott, p. 27.
[135] Convention III Relative to the Opening of Hostilities, signed at The Hague, October 18, 1907, Scott, p. 96-8.
[136] Ibid.
[137] See Derek W. Bowett, *Self-Defence in International Law*, (Manchester: Manchester University Press, 1958), p. 120.
[138] See (*American Journal of International Law* 7, 1913), p. 823; (*American Journal of International Law* 8, 1914), p. 565; (*American Journal of International Law* 9, 1915), p. 494.
[139] United Nations, War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, (London: H. M. Stationery Office, 1948), p. 235. For a listing of those treaties and other arbitrary agreement, see Phillip Jessup, "Rights and duties of States in Case of Aggression", (*American journal of International Law* 33, 1939), Suppl, p. 858-61.

before bringing it to the Permanent Commission of Inquiry for investigation and report.[140] The Commission might, by unanimous agreement, offer its help in a dispute, even before the parties were compelled by failure of diplomatic negotiation to resort to it.[141] In the Bryan Treaty between the United States and Guatemala, September 20, 1913, Article I read that the Parties "agree not to declare war or begin hostilities during such investigation and report".[142] In the Bryan Treaty between the United States and France, September 15, 1914, Article I read that the Parties "agree not to resort, with respect to each other, to any act of force during the investigation to be made by the commission and before its report is handed in".[143] That report should be ready and submitted by the Permanent Commission of Inquiry to the parties concerned within one year, unless the period had been limited or extended by mutual agreement between the parties. During this period the disputing parties were under an obligation not to resort to force until the report was received by them. However, the report was not binding on disputing parties and, after receiving it, they were free to follow what had been decided in the report or not. The validity of these treaties was for period of five years; however, at the end of this time they were to continue in operation during the following twelve months unless either of the parties to the treaties decided to withdraw by giving notice of withdrawal to the other party.[144] The Bryan Treaties represented important developments from the provisions of Hague Convention I of 1907 which was concerned with the Pacific Settlement of International disputes; those improvements: first, no

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[140] The Permanent Commissions of Inquiry were to be composed of five members. Each of the parties chooses one of its subjects and a subject of third state; the fifth member is also a subject of a third state chosen by common agreement between the two parties. See Oppenheim (II), p. 15.
[141] Ibid.
[142] Similar provisions are contained in similar treaties concluded between the United States and some other thirty-two states. Treaties listed in (*American Journal of International Law* 33, 1939), Suppl, p. 861.
[143] Identical provisions are contained in similar treaties between the United States and other seven states. Ibid. Here, it is important to notice, that the United States have been concluded a series of these treaties with some other states. Some of these treaties are printed in (*American Journal of International Law* 23, 1929), Suppl, p. 197. See also (*American Journal of International Law* 33, 1939), Suppl, p. 861.

disputes affecting honour and vital interests were ruled out; second, the Commission of Inquiry under the Bryan treaties was a permanent one constituted in advance of any dispute that might arise among the parties, while the Commission of Inquiry under the Hague Convention I was to be formed *ad hoc* by a special agreement between the parties when required; third, the principle of "moratorium" appeared in the undertaking not to resort to force before the report was submitted by the Commission.

As this chapter has shown, the attempt to restrain aggression has a long history. In the Middle Ages, the justification and limitation of warfare in the Western world was based on the concepts of Holy War and Just War. Aristotle, , Cicero, St. Augustine and St. Thomas Aquinas saw war as a natural human phenomenon but sought to limit its atrocities by limiting it to cases where it is necessary to secure peace, punish evil-doers, and protect ideals such as justice, security and democracy. The use of force at that period was still connected with the right authority and intention; on the grounds that the resort to religion gave good ground for the recourse to force.

The Islamic concept of Jihad has a defensive nature rather than an offensive one. Today, Jihad does not mean only the use of force or invasion of other non-Muslims nations, but it has become a public power to develop the lives of Muslims Jihad can be waged, for example, against poverty, disease, and illiteracy, from which many Muslim states suffer. The rejection of the just war principle which became more clear during the period after the European nations reached a general agreement in the Peace of Westphalia, which led in the early modern era, to the inclination of European nations limit the resort to war through treaties and international Conferences.

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[144] See Oppenheim (II), p. 15.

CHAPTER TWO

Self-Defence Before 1945

A basic dilemma facing international law in the 19th and early 20th centuries concerned the right of self-defence. Whilst it was widely held that such a right existed, attempts to limit the right of war required that the concept be defined and formalised; otherwise it could be used as a mere political excuse for aggression. This chapter examines the development of the legal doctrine of self-defence, from the *Caroline* incident of 1837, through the efforts made under the League of Nations, to the Pact of Paris in 1928. The *Caroline* case led to the formulation of specific conditions, namely, immediacy, necessity and proportionality, to justify a plea of self-defence.

The establishment of the League reflected the general revulsion against war induced by the unprecedented losses of the 1914-1918 conflicts. Article 10 of the League's Covenant appeared to place members under an obligation not to resort to war except in self-defence, although the ambiguity of the Covenant's provisions undermine its effectiveness as a peace-keeping instrument. Various treaties and protocols concluded during the League era, however, attempted further to prohibit war, subject to certain explicit exceptions, and in the case of the Locarno Agreements of 1925, create a system of collective self-defence. Ambiguity remained, however, regarding the admissibility of forcible measures short of war. The 1928 Pact of Paris attempted to improve the regime of the Covenant by binding parties to renounce war as an instrument of national policy and seeking settlement of disputes by pacific means. In the absence of the political will to made these measures effective, however, the world was in 1939 plunged into another

total war, and the League system collapsed, ushering in a new era, in the development of understandings and mechanisms in relation to international peace and security.

Before 1945, little attention was devoted to defining defence. The existence of a Just War Doctrine within Christendom exerted minimal restraint on the actual purposes and practice of warfare. With the emergence of polities resembling the modern state, jurists, scholars and propagandists alike, who often enough were one and the same, simply adapted the categories of just war to suit the needs of the secular.[145] Distinctions between defence and offence never figured prominently in this enterprise, and states were generally free to pursue a wide array of political ends with military means up to the end of the nineteenth century.

It was as a result of the *Caroline* incident of 1837 "that self-defence was changed from a political excuse to a legal doctrine."[146] The *Caroline* was an American merchant ship that had been hired by Canadian rebels to carry arms and supplies from the American side of the border to Canada. The *Caroline* was attacked by the British, and sent over the Niagara Falls, and one American at least have been killed. The British destruction of that ship, was justified by the British Ambassador to Washington on the grounds of "self-defence and self-preservation".[147] In his response, the United States Secretary of State required that the British Government, as conditions of self-defence, should show:

(1) The existence of "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".

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[145] Schwarzenberger considered that thinkers like Machiavelli, Bodin and Hobbes and jurists such as Vitoria, Ayala and Suarez, were not just scholars, but "men of the world", who wanted their ideas and inspirations to be translated into state policy. See George Schwarzenberger, "Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law," (*American Journal of International Law* 37, 1943), p. 461.

[146] Robert Y. Jennings, "The Caroline and McLeod Cases," (*American Journal of International Law* 32, 1938), p. 82.

[147] Ibid, p. 85.

(2) "That the local authorities ... did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within."[148] After extending on for several years, the case was finally settled by diplomatic means.[149] Webster was attempting to subject self-defence to the constraints of necessity. His aim, according to Jennings, was to distinguish an arena of legitimate defence from older, "Naturalist notions of an absolute primordial right of self-preservation".[150] The Caroline Doctrine has been called "the *locus classicus* of the law of self-defence"[151] and has been applied to many events during the twentieth-century.[152] Webster's formula of "necessity", however, has some defects. He describes a situation so urgent that it sounds almost like the "absolute primordial" terms of self-preservation which he presumably sought to avoid and which Brierly describes as more "an instinct" than a legal right.[153] It is also hard to accept that in an actual conflict, the defending state would only consider responding once a threat became "instant" and "overwhelming", leaving it neither "choice" nor "moment for deliberation".

After Webster, self-defence retired to the legal backstage until the end of the First World War. In the midst of soul searching in the war's aftermath, the distinction between just and unjust causes of war began to cohere around the distinction between defence and aggression. Nardin attributes this to the common sentiment among the victors that this Great War had resulted from the single cause of German aggression, to which the only

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[148] Ibid, p. 89, see also, D. J. Harris, *Cases and Materials on International Law*, (Sweet & Maxwell, 2ed., 1998), p. 894-95.

[149] In the Webster- Ashburton Treaty of 1842, by which also, at the same time, many other British-American problems were settled.

[150] Jennings, p. 92.

[151] This is Jennings' description, p. 92.

[152] Japan invoked the "Caroline Doctrine" after it occupied Manchuria. Also Israel in 1976 justified its raid on the airport at Entebbe, on the grounds of the Caroline Doctrine. See Kenneth R. Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842*, (Tuscaloosa: University of Alabama Press, 1989), p. 167-68 .

[153] James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, (Oxford: Clarendon Press, 1955), p. 319. See also 315-21.

response could have been self-defence.[154] This interpretation of the War's origin was written into the Treaty of Versailles and inspired interwar efforts to restrain the incidence of armed conflict, beginning with the League of Nations.

The League of Nations was established in 1919 by the conclusion of its constitution, the Covenant[155], which was incorporated in the peace treaties of 1919-1920 between the victorious Allies and the defeated Central Powers and the Ottoman Empire. The establishment of the League reflected a general feeling of revulsion against war, because the World War of 1914-18 was the first total war; it was not only the armed forces of the disputants, but their entire populations and national economic resources that were affected. Moreover, the unprecedented scale of human losses prompted a strong desire to ensure that a disaster of such magnitude would never be repeated.[156] Thus, it is not surprising that one of the two purposes of the League of Nations, according to the preamble of the Covenant, was to " ... achieve international peace and security" by means of " ... the acceptance of obligations not to resort to war." The League of Nations aspired to be an organisation that would police the aggressive and render the need for arms minimal among the innocent. In theory, states would need to resort to use of force only where the League has failed to take action, or find a solution. In this case, the League's Covenant gave to Members "the right to take such action as they shall consider necessary for the maintenance of right and justice". Therefore, the Covenant crudely foreshadowed the United Nations Charter, which would permit states to act in self-defence only when United Nations failed to materialise. The League appeared to permit a range of aims beyond defence, including, as it did, the notions of "right and justice". It also spoke of maintenance of these, rather than their establishment, which indicates a

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[154] Terry Nardin, "*Law, Morality and the Relations of States*, (Princeton: Princeton University Press, 1983), p. 282-3.
[155] Text of the Covenant of the League of Nations in UK Treaty Series (1919), No. 4.

predisposition toward whoever rights or whatever's justice was embedded in the status quo.

The provisions of the Covenant relevant to international peace and security were set out in Articles 10-17. Article 10 stipulated 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. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advice upon the means by which this obligation shall be fulfilled."

In reality, the aim of Article 10 was to guarantee the territorial *status quo* in the post-world war period, but since the United States refused to join the League, this purpose was unachievable. However, Article 10 has been interpreted as having imposed a legal obligation on member states.[157] Article 10 seemed to introduce a total prohibition of war except in self-defence and as such, to be a significant innovation in the Covenant.[158] But at the same time, that Article was attacked on the grounds of constituting a moral obligation and on the vagueness of its terms, especially the definitions of "territorial integrity" and "political independence"[159]. Further criticism of Article 10 was focused on its relationship with other provisions in the Covenant dealing with dispute settlement and the maintenance of international peace and security. Article 10 was not related to either Articles 11-15 or Article 16 of the Covenant.[160] Article 10 appeared to conflict with Article 15(7) which permitted resort to war in certain circumstances.[161] This ambiguity led to different opinions being adopted by scholars, in an effort to create a match between Article 10 and subsequent provisions of the Covenant. One idea put

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156 Frederick Samuel Northedge, *The League of Nations*. (Holmes & Meier Publishing, 1986), p. 1-3.
157 Ian Brownlie. *International Law and the Use of Force by States*. p. 62.
158 Ibid., p. 63, 65.
159 Ibid., p. 62.
160 Waldock, p. 469.

forward was that Article 10 was subordinate to the articles on the peaceful settlement of disputes and that it applied only to wars that were unlawful under Article 15.[162] Another suggestion was that wars under Article 15(7) would not contravene Article 10, provided that no action was taken by the lawful belligerent which would permanently affect the territorial integrity and political independence of its opponent.[163]

Lastly the 4th Assembly of the League in interpreting Article 10 argued that member states had complete freedom of choice regarding measures to implement the Article's guarantee, which significantly reduced its applicability.[164] However, Article 10 was invoked on various occasions by disputing states having recourse to the League of Nations, for example, by Bulgaria following the invasion of Bulgarian territory by the Greek army in 1925 (Graeco-Bulgarian dispute).[165] Also, China appealed to the Council of the League under Articles 10 and 11 after the "Mukden Incident" of Sept. 18, 1931 (Sino-Japanese conflict).[166] And when Italy invaded and later annexed Albania in 1939, the latter used Article 10 as the ground of its appeal to the League of Nations.[167] Nevertheless, Article 10 was not consistently referred to by either the Council or the Assembly of the League of Nations, apart from the appeal addressed on Feb. 16, 1922, by the members of the Council, to the Japanese Government under Article 10[168], and of the resolutions of the League Council concerning foreign intervention in the Spanish civil war.[169] The League Council and the member states were more inclined to refer to Article 11 concerning preventive action by the Council, mainly in the context of an end

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[161] Especially in the case of the Council of the League failing to reach a unanimous agreement in respect of a conflict between two member states. See Brownlie, p. 62-3.
[162] Emile Giraud, "La Theorie de La Legitime Defence," (*Hague Recueil* 49, 1934-III), p. 695.
[163] Brownlie, p. 63.
[164] Ibid., p. 64.
[165] *League of Nations Official Journal*, 1925, p. 1696.
[166] Ibid., 1931, p. 2453.
[167] Ibid., 1939, p.246.
[168] Text in (*American Journal of International Law* 27, 1933), p. 131.
[169] *League of Nations Official Journal*, 1937, p. 18.

to hostilities. Nevertheless, the progress represented by Article 10 was not entirely lost, as it provided the legal basis for the adoption by the League of the Stimson doctrine of non-recognition,[170] which some scholars viewed as implying that Article 10 involved mutual guarantees only against loss of territory or independence.[171] Article 11 did not suffer from such controversy as Article 10.

It provided that:

> "1. Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any member of the League summon a meeting of the Council.
> 2. It is also declared to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends".

This article introduced a new development, whereby any war, actual or threatened, was considered for the first time to be a matter of concern to the entire membership, irrespective whether any of the individual members were directly affected by it. Moreover, the League would take any action that appeared prudent and effective to safeguard the peace of nations.[172] Article 11 gave the Council discretion not to settle the dispute per se, but to take preventive and preliminary steps, e.g. to request the cessation of hostilities or set-up a commission to observe the execution of a cease-fire, in order to avoid escalation of the dispute. This discretion encouraged the frequent use of the article by member states. For example, in the Graeco-Bulgarian dispute of 1925, which arose out of the invasion of the Bulgarian territory by the Greek army following a frontier incident between the two states' armies, the Council of the League met in an extraordinary session and the Acting President called on both parties to cease military

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[170] Waldock, p. 470.
[171] Ibid., p. 469.
[172] To some degree, Article 11 of the Covenant is reminiscent of Articles 39 and 40 of the United Nations Charter.

action and to withdraw their troops to their own territories until the dispute had been considered by the Council.[173] It was also made clear by A. Briand, the President of the Council, that the Council's primary concern was the cessation of hostilities, rather than the merits of the dispute.[174] The appeal of the Council succeeded and its recommendations were implemented by both Greece and Bulgaria. The same was not true, however, in the early stages of the Sino-Japanese conflict in Manchuria. Although the Council appealed for cessation of hostilities and withdrawal of the Japanese troops, its request was virtually evaded and ultimately ignored by Japan.[175]

Under the Covenant, war was prohibited only under definite conditions which did not affect the right to resort to a counter war in self-defence against an illegal war.[176] Consequently, it was agreed that resort to war in self-defence was not restricted by the Covenant.[177] This conclusion is confirmed by the statement of the first Committee in its report to the Assembly in 1931:

> "One point appears beyond dispute-namely, that ... in the Covenant of the League in its present form ... the prohibition of recourse to war [does not] exclude the right of legitimate self-defence".[178]

The Covenant did not characterise resort to war in breach of its provisions as a crime, but it spelt out the conditions under which war was forbidden. Also, the sanctions of the Covenant were penal in character rather than remedial of the wrong done to the victim of aggression.[179]

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[173] *League of Nations Official Journal*, (1925 II), p. 1696.
[174] Ibid., p. 1698.
[175] Ibid., 1931, p. 2265.
[176] See Hans Kelsen, *Principles of International Law*, (New York: Holt, Rinehart & Winston, 2ed, 1966), p. 61.
[177] Waldock, p. 476.
[178] *League of Nations Official Journal* (1931). Report to the Assembly by the First Committee, Records of the Twelfth Assembly, 1931, Meetings of Committees, Minutes of the first Committee, p. 146, Annex 18, point 5 of the report.
[179] See Article 16, of the Covenant of the League of Nations. Also see Waldock, p. 479.

Now let us consider the efforts made along with the Covenant to restrict war, and regulate the use of force. In the draft *Treaty of Mutual Assistance* of 1923,[180] Article 1 declared that aggressive war was an international crime and imposed upon the parties the obligation not to commit such a crime.[181] The treaty was intended as an extension of the Covenant and aimed to facilitate the application of Article 10 and Article 16.[182] If one or more of the member states became involved in hostilities, the Council would decide, within four days of the receipt of notification by the Security Council, which party was the victim of aggression and whether it was entitled to claim assistance under the Treaty.[183] This raised the question of how to define aggression and so determine the aggressor. No definition was incorporated in the treaty itself, but it was forwarded to the Government with a commentary which attempted to clarify the subject by citing illustrative examples of situations [184] where the use of force would be considered legal and necessary as self-defence. Neither the Commentary nor the draft Treaty, however, contained any specific reference to a right of self-defence.[185]

In 1924, the Assembly discussed the draft of *a Protocol for the Pacific Settlement of International Disputes*,[186] which represented an attempt to link the prohibition of war with a more comprehensive system of pacific settlement than was provided in the

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[180] The Draft treaty failed to be adopted. See The League of Nations, *Ten Years of World Co-operation*, ed. By Eric Drummond, (London: Hazell, 1930), p. 64-5.
[181] *League of Nations Official Journal* (1923). Records of the Fourth Assembly 1923, Meetings of Committees, Minutes of the Third Committee, p. 200-3.
[182] Ibid., p. 203.
[183] *League of Nations Official Journal* (1923). Article 4, Records of the Fourth Assembly 1923, Meetings of Committees, Minutes of the Third Committee, p. 203.
[184] *League of Nations Official Journal* (1923). Commentary on the Definition of a Case of Aggression, Records of the Fourth Assembly, 1923, Meeting of Committees, Minutes of the Third Committee, p. 206-8.
[185] Ibid.
[186] Geneva Protocol on the Pacific Settlement of International disputes, adopted by the Fifth Assembly on October 2, 1924. Records of the Fifth Assembly 1924, Meeting of Committees, Minutes of the First Committee, p. 136-40. For more information about Geneva Protocol, see James W. Garner, "The Geneva Protocol for the Pacific Settlement of International Disputes," (*American Journal of International Law* 19, 1925), p. 123-133. See Philip Marshall Brown, "The Interpretation of the General Pact For the Renunciation of War," (*American Journal of International Law* 23, 1929), p. 373-79. Also see David Hunter Miller, *The Geneva Protocol*, (New York: Macmillan, 1929), p. 660-61.

Covenant. The drafters sought in particular to close the "loop-hole" left by Article 15(7), of the Covenant.[187] The Protocol made clear the obligation of states to assist each other in case of aggression and also to deal with threats of war.[188] Also, the Protocol condemned aggression. The central provision of the Protocol was Article 2, whereby the state members agreed "in no case to resort to war", except in resistance to aggression or with the consent of the League's Council or Assembly.[189] In the exercise of the right of self-defence, the victim state was, under Article 11 of the Protocol, assured of the assistance of the other signatory states in accordance with Article 16(3) of the Covenant, thus providing for a system of collective security based on collective self-defence.[190] A significant problem with the Protocol in relation with the right of self-defence, however, was the use of the term, "war".

The failure of the Draft Treaty and Geneva Protocol prompted the creation of the *Locarno Agreements*,[191] which achieved many important developments: (1) The Locarno Agreements referred not only to war but also to attack and invasion. Germany and Belgium and Germany and France agreed "that they will in no case attack or invade

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[187] Waldock, p. 483. See also Ten Years of Co-operation, p.68.
[188] *Ten Years of World Co-operation*, p. 68.
[189] The Protocol for the Pacific Settlement of International Disputes, Article 2 reads: "The signatory states agree in no case to resort to war either with one another or against a state which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol."
[190] Ibid., Article 11. Collective security is a broader concept than collective defence in so far as it refers to the general maintenance of international peace and security rather than to focused response to imminent or actual armed attack. The latter is, however, a sub-element of the former.
[191] The Locarno Treaty of Mutual Guarantee was initialled at Locarno on October 16, 1925, but signed in London, in December 1, 1925. The member states to the treaty were Belgium, France, Germany, Great Britain an Italy. Under the treaty there were obligations not to attack or invade each other and to settle disputes by peaceful means were undertaken between Germany and Belgium, and Germany and France. Great Britain and Italy undertook the obligations of guarantors of the threat. At the same arbitration conventions were concluded between Germany and Belgium, and Germany and France and arbitration treaties were concluded between Germany and Poland and Germany and Czechoslovakia. Also treaties of mutual guarantee were concluded between France and Poland and France and Czechoslovakia. See Charles G. Fenwick, "Legal Significance of the Locarno Agreements," (*American Journal of International Law* 20, 1926), p. 108-111. See also Charles G. Fenwick, "The Progress of Co-operation Defence," (*American Journal of International Law* 24, 1930), p. 118-122.

each other or resort to war against each other".[192] (2) There were several explicit exceptions: (a) legitimate defence; (b) action authorised by the League of Nations; (c) action in the absence of a decision to settle the conflict or stop an aggressor.[193]

The important point about Article 2, was that it defined as legitimate defence "resistance to violation of the undertaking" not to attack or invade each other, or resistance to "a flagrant breach" of the demilitarisation provisions of the Treaty of *Versailles* (Articles 42 and 43), "if such breach constitutes an unprovoked act of aggression and by reasons of the assembly of armed forces in the demilitarised zone immediate action is necessary".[194] The Locarno Agreements also created a system similar to one of collective self-defence. Great Britain, Italy, Germany, Belgium and France undertook the obligation to "collectively and severally guarantee ... the maintenance of the territorial *status quo* resulting from the frontiers between Germany and Belgium and between Germany and France, and the inviolability of the said frontiers as fixed by" the Treaty of *Versailles*.[195] The parties to the Locarno Agreements agreed to "come immediately to the assistance" and also to "come to help" of the victim.[196] The Locarno Agreements led to the emergence of two trends. First, the prohibition of war was expanded to cover acts of aggression and also to cover cases of use of force which did not necessarily have to possess the character of war. Second, the right of a state to act in self-defence was made to some degree and under some circumstances dependent on a decision or a finding by the Council. Before the Locarno Agreements, it had been unclear whether a state could act independently of the Council in the exercise of the right of self-defence. The Locarno Agreements allowed independent action in "flagrant"

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[192] Locarno Treaty, Article 2, the text of the Treaty. Reprinted in Friedrick Joseph Berber, *Locarno: A Collection of Documents*, (London: W. Hodge, 1936), p. 48-54.
[193] Ibid.,
[194] Ibid.,

cases but in all other cases imposed restraint until the Council had reached its decision.[197] In this respect the Locarno agreements were an important indicator, despite their narrow "Versailles" context.

Since the restrictions of the Covenant applied to war, rather than the use of force in general, it remained uncertain whether measures short of war were allowed as a means of self-defence.[198] As a result of this loophole, it could be argued that hostilities short of war were included in the provisions of the Covenant. This ambiguity as regards the effect of the Covenant in cases of use of force "short of war" was reflected in the Corfu Incident in 1923. When the Italian Chairman of the Greek Albanian boundary commission was murdered in Greece, Italy issued an ultimatum to Greece. Greece conceded most of the Italian demands would not allow Italian participation in the inquiry and asserted that no compensation would be paid unless the inquiry found Greece to be culpable. Italy retaliated by occupying the Greek Island of Corfu after a brief bombardment, in which a number of people killed and wounded.[199] The Council of the League appointed a Commission of Jurists, to determine whether coercive measures, lacking the character of war, were consistent with the Covenant, when taken without prior recourse to arbitration, judicial settlement or conciliation. The Commission produced what was referred to as a "delphic".[200] It answered that "coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant .. ."[201] The Commission suggested that

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[195] Ibid., Article 1. See George A. Finch, "A Pact of Non-Aggression," (*American Journal of International Law* 27, 1933), p. 725, 728-29.
[196] Locarno Treaty, Article 4(2) and Article 3.
[197] Bowett., p. 129.
[198] Hersch Lauterpacht and Lassa Oppenheim, *International Law: A Treatise*, Vol. 2, p. 152.
[199] Francis Paul. Walters, *A History of the League of Nations*, (Oxford: Oxford University Press. Vol. (I), 1952), p. 244-55.
[200] Waldock, p. 475.
[201] Minutes of the Twenty-Eighth Session Of the Council, Sixth Meeting, March 13, 1924, (*League of Nations Official Journal*, 1924) p. 523.

the Council should decide in each particular case "whether it should recommend the maintenance or the withdrawal of such measures."[202] Thus, although the Commission failed to suggest a criterion, it indicated that certain forceful measures short of war might be incompatible with the Covenant.[203] The general view of the members of the League was that such use of armed force short of war without prior recourse to pacific settlement was a violation of the Covenant.[204] So far as the Corfu incident was concerned it might reasonably be thought that bombardment followed by military occupation was, in fact, little if at all short of war.

The League of Nations, in the many incidents in which it was involved, was at least relatively successful in fulfilling one of its main duties, the pacific settlement of international disputes. International security was the League's main endeavour. The League worked as an international body to settle disputes and maintain peace and security and in so doing it strengthened and developed methods and established its authority. To this extent, the years of the League could be judged as successful and extremely important for the future with regard to international relations and international law. The outbreak of the Second World War, 21 years after the end of the "war to end war" again plunged the world into global conflict and is seen by some scholars as reflecting the total ineffectiveness of the League. It should be noted, however, that contrary to some elements of so-called "realist" thought, the failure of the League was not an inevitable product of its legal structure and mechanisms so much as a failure of the political will to make those institutions work - displayed finally at the Munich

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[202] Ibid. See also Quincy Wright, "Opinion of the Commission of Jurists on Janina-Corfu Affair," (*American Journal of International Law* 18, 1924), p. 536-44.
[203] Herbert Whittaker Briggs, *The Law of Nations: Cases, Documents and Notes,* (London: Stevens, 1952), p. 962.
[204] Ibid.

Agreement between Chamberlain, Daladier and Hitler which permitted the unlawful partition of Czechoslovakia.[205]

The Pact of Paris or Kellogg-Briand Pact, signed in Paris on August 27, 1928, can be seen as an attempt to improve the regime of the Covenant with regard to the regulation of the use of force and the maintenance of international peace and security. Until the Pact of Paris, this had taken the form of condemnation of war of aggression as a criminal breach of international peace.[206] The Pact of Paris became binding on sixty four states, virtually the whole international community, and because it was concluded outside the framework of the League of Nations, it remained in force after the League collapsed.[207] The Pact of Paris is concise and brief in its provisions. The key principles of the Pact are embodied in the preamble and the first two of its three Articles, which read as follows:

> "The High Contracting Parties persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated; Convinced that all the changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty."

Article I

> "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."

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205 See Hilaire McCoubrey and J C. Morris, "International Law, International Relations and the Development of European Collective Security," (*Journal of Armed Conflict Law* 4, 1999), p. 198-202.
206 James L. Brierly, "Some Implications of the Pact of Paris," (The *British Year Book of International Law* 10, 1929), p. 208.
207 M J. Bowman and D J. Harris, *Multilateral Treaties: Index and Current Status*, (London: Butterworths, 1984), p. 75-6.

Article II

> "The High Contracting Parties agree that the settlement or the solution of all the disputes or conflicts of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."[208]

The Pact was originally proposed by the French Foreign Minister, A. Briand, as a bilateral treaty between France and the United States. In reply, the US Secretary of State, Mr F. Kellogg, suggested that a greater contribution to world peace would be achieved if the principal world Powers could be bound to a declaration renouncing war as an instrument of national policy. This proposal was eventually accepted by France. A long diplomatic correspondence then followed which is of the highest importance for the interpretation of the Pact of Paris. An initial French proposal that only "wars of aggression" should be renounced was opposed by the American side; in his reply to the French Government on Feb. 27, 1928, Mr Kellogg asserted that an unqualified renunciation of war as an instrument of national policy was compatible with the Covenant of the League of Nations and would also avoid the problem of defining the aggressor. The French Government in its reply of March 30, 1928, sought assurances that the renunciation of war would not remove the right of legitimate defence, or affect her obligations under the Covenant of the League as well as under the treaties of Locarno and the various agreements of neutrality and guarantee to which she was a party.

Mr Kellogg replied that the right of self-defence would be unaffected by the renunciation of war. He assured, in a speech meant to remove fears to the contrary:

> "That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territories from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence".

Kellogg went on to explain, in what one could see as either semantic defeatism or a sensible absence of illusions, that this right would not be explicitly recognised in the treaty, since

> "no treaty provision can add to the natural right of self-defence. It is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence, since it is far too easy for the unscrupulous to mould events to accord with an agreed definition".[209]

Therefore, France emphasised "that the renunciation of war, thus proclaimed, would not deprive the signatories of the right of legitimate defence".[210] At the same time, Britain maintained a right to defend its colonies:

> "[t]here are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regimes cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect".[211]

The United States, on its part, did not enter a reservation to the Pact, but made a public statement in its Senate. The Pact should be seen as "a voluntary pledge upon the part of each nation that it will not have recourse to war except it self-defence". This necessarily involved a mutual

> "understanding that the right of self-defence is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defence and the necessity and extent of the same.

The "extent" of self-defence for the United States was defined by the Monroe Doctrine.

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[208] *International Treaty for the Renunciation of War as an Instrument of National Policy*, (Paris, 1928, Cmd. 3410, London H.M.SO., 1928). See also, D. J. Harris, *Cases and Materials on International Law*, p. 861.

[209] He specially aimed these remarks to French anxiety about the scope of the pact. See his speech before the American International Law Association on April 1928, *Documents on International Affairs 1928*, ed. by John W. Wheeler-Bennett, (London: Oxford University Press, 1929), p. 3.

[210] In a series of letters between French Ambassador Paul Claudel and Kellogg. See United States No. I (1928): Correspondence with the United States Ambassador respecting the United States Proposal for the Renunciation of War", Cmd. 3109, (*Accounts and Papers 1928* 14, 1928), London; see especially letter dated 26 March 1928.

[211] Letter from Sir Austen Chamberlain to United States Ambassador Houghton, 19 May 1928, in Cmd, 3109 as above.

The United States regards the Monroe Doctrine as part of its national security and defence. Under the right of self-defence allowed by the treaty must necessarily be included the right to maintain the Monroe Doctrine which is a part of our system of national defence".[212]

The Monroe Doctrine "rests upon the right of self-protection", and it is well understood .... may, and frequently does, extend in its effect beyond the limits of the territorial jurisdiction of the State exercising it".[213]

Eventually both the French and the US Governments severally submitted Notes and drafts of the proposed treaty to the British, German, Italian, and Japanese Governments. Finally on June 23, 1928, the treaty was presented by the US Government to fourteen states. The parties signed the treaty, on condition that the right of self-defence and the other undertakings under the Covenant and Locarno treaties would not be impaired.[214] Some jurists have questioned the legal character of the Pact on the grounds of the generality and vagueness of its terms which, in their view, gave it no more than moral value; of the lack of explicit qualification with regard to the renunciation of war; of the existence of reservations to it and the absence of any provision for sanctions in the nature of mutual assistance and armed action to suppress any violation of the Pact.[215] Most authors have not doubted the character of the Pact as a legal instrument, but the lack of sanctions or a collective security system under the Pact of Paris seems to be self-defeating because it is not unusual for international treaties to provide for no sanctions in case of violation of their terms.[216]

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[212] Report of the United States Committee on Foreign Relations, (14 January 1929, in *Documents on International Affairs* 1928), p. 5-6.
[213] Ibid.
[214] For more information about the diplomatic background of the Pact of Paris see Frank B. Kellogg, "The War Prevention Policy of the United States," (*American Journal of International Law* 22, 1928), p. 253-61 .
[215] See Roland S. Morris, "The Pact of Paris For the Renunciation of War: Its Meaning and Effect In International Law," (*Proceedings of the American Society of International Law* 23, 1929), p. 88-108.
[216] See Q. Wright, "The Meaning of the Pact of Paris," (*American Journal of International Law* 27, 1933), p. 41.

A very interesting issue regarding the interpretation of the Pact lies with the so-called reservations submitted by the signatories during the negotiations. Apart from the declaration of the British Government which created most of the controversy and expressions of concern by some states, there is general agreement that the declarations expressed during the diplomatic correspondence preceding the conclusion of the Pact constitute an integral part of the latter, in that they are conclusive of the intention of the parties and form the most authoritative interpretation of the treaty.[217] These statements were simply a restatement of Mr Kellogg's clarifications in the Note of June 23, 1928, and they led to the undertaking of the same obligations as would have been the case they had been part of the text of the Pact, as in fact was the case with the French draft. Nor did they conflict with the US Note by offering contradictory explanations which would have limited or modified of the effect of the treaty with regard to its application as between the reserving party and the signatories.[218] These were reservations only in the sense that they were conditions for the acceptance of the treaty as it was proposed by the US Government; they did not affect the essential context of the declarations, which were in accordance with the US proposal. The most important issue raised by the Pact of Paris is the degree to which it regulated unilateral resort to force by states. The treaty parties in Article I condemned recourse to war as a means of dealing with international disputes and renounced it as an instrument of national policy. Furthermore, under Article II they undertook to settle all the disputes or conflicts of any kind, which might arise among them, only by peaceful means.

There are two possible interpretations as to the scope of the Pact of Paris in relation to the use of force by states:

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[217] Brownlie, p. 84.

[218] Arnold Duncan McNair, *The Law of Treaties*, (Oxford: Clarendon Press, 1961), p. 158.

(A) The first one would rely on the fact that the wording of the Pact only explicitly condemned and renounced war, and war under the customary law at that time was understood in the restrictive sense of a state of war. Consequently, measures like reprisals and intervention would not be contraventions of the Pact, nor would they be contrary to Article II about the employment of pacific means for the settlement of disputes, because reprisals were considered to be pacific in character. This interpretation could be supported by the controversy created by the reply of the Committee of Jurists in the aftermath of the Corfu incident with regard to the effect of the League of Nations Covenant on the use of force short of war.[219]

(B) The second possible interpretation with reference to the effect of the Pact of Paris on the use of force would be that the General Treaty outlawed not only war but also the use of armed force short of war. This matter is quite controversial, in view of the differences of opinion over the term war in the Covenant and the fact that the preparatory works of the Pact offer little guidance on this point.[220]

Nevertheless, if "preparatory work" is taken to mean only the preceding diplomatic correspondence, one may deduce from then the explicit express declarations of the signatories with regard to the right of self-defence (that subsisted under the Treaty), defensive action was the only instance of unilateral resort to force short of war that was actually envisaged. If the signatories considered the customary law of the 19th century to be still applicable in 1928, there would have been no need for their anxiety to clarify the exceptional status of self-defence action. It is also noteworthy that the declarations referred to a "right of legitimate defence" without linking it to the term "war", for instance, "war" in self-defence. Considering reprisals as a pacific means for the settlement of disputes suggested a rather strange understanding of the term pacific. What

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[219] Waldock, p. 473-4.

was important in this view was not the nature of the measures applied to deal with a dispute, but the fact that they did not disrupt the state of peace by bringing about a state of war. This view might have been compatible with the Pact of Paris except that the Preamble noted " ...that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process...". This insistence on an "orderly process" would seem to rule out the use of force short of war between the signatories of the Pact for the settlement of their disputes.[221]

It may be argued that the Pact applied only to the change in relations and not the enforcement of existing legal relations,[222] but that view ignores the stipulation of Article 2 that the settlement of all disputes, of whatever origin, should be sought only pacific means only, as well as the statement in the Preamble that war is renounced as an instrument of national policy "to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated". That goal could hardly be achieved if reprisals and generally the use of force short of war were to be allowed. Although the use of armed force by way of reprisals was not considered under customary international law to break the state of peace, between states, due to their inherently hostile character it was doubtful whether this view would be taken by the states, as a whole, against which they were directed. It has been suggested that to accept that reprisals were legitimate as "pacific means" for the settlement of disputes under the Pact of Paris would "approach the bounds of credibility", because the phrase "pacific means" in the Pact "has a comprehensive character indicated by its reference to all disputes or conflicts of whatever nature or of whatever origin they may be".[223] This view is supported by the

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[220] Oppenheim, *International Law: A Treatise.* 184.
[221] James L Brierly, "International Law and Resort to Armed Force," (*Cambridge Law Journal* 4, 1930-32), p. 314.
[222] Oppenheim, p. 184.
[223] Brownlie, p. 86.

declarations made by some states on joining the Pact and a view responses of members to such declarations. When Switzerland signed the Pact of Paris, the Swiss Federal Council stated in the accession document that pacific means were to be understood as those which were usually employed in the peaceful settlement of disputes such as conciliation, mediation and arbitration, and the other signatories did not oppose this view.[224] In 1933, Mr Litvinov, the Soviet delegate at the Disarmament Conference, expressed the view that renunciation of war meant not only renunciation of the right to declare or wage war in the formal sense but also renunciation of all military operations and all acts of violence against another state.[225]

Moreover, the Pact of Paris was invoked with regard to acts of force short of war, by signatories thereto both outside and within the League of Nations, in the latter case in their capacity as members of the League's organs.

In 1937 when Japan invaded China without any declaration of war[226], the Assembly approved the Report of the Advisory Far Eastern Committee stating that the action of Japan was not justified on the basis of either existing legal instrument or the right of self-defence and that it was contrary to Japan's obligations under the Nine-Power Treaty of 1922 and the Pact of Paris.[227] Similarly, the Soviet attack on Finland in 1939 was held by the Assembly to constitute recourse to war in violation of the Covenant and that as a result, the Soviet Union had placed itself outside the League. It was found that the USSR had contravened Article 12 of the Covenant and the Pact of Paris.[228] During the conflict in Manchuria, the United States Secretary of State, Stimson, made the following declaration to both Japan and China:

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[224] Ibid., p. 87-8.
[225] See Political Committee séance du 15 Fevrier 1933, Proces verbaux, p. 2. Reference in Ian Brownlie, *International Law and the Use of Force by States*. p. 88.
[226] For more information about the war in China see Francis Paul Walters, *A History of the League of Nations*, (London: Oxford University Press, 1952, Vol. 2), p. 731-38.

"[The United States] does not intend to recognise any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris."[229]

Also the members of the Council of the League of Nations issued a warning to Japan, highlighting the guarantee against aggression in Article 10 of the Covenant and concluding that "no infringement of the territorial integrity and no change in the political independence of any member ... ought to be recognised as valid and effectual". The Assembly subsequently issued a resolution that it was "incumbent on members not to recognise any situation, treaty, or agreement brought about by means contrary" to the Covenant or the Pact of Paris.[230] The doctrine was not, for political reasons, made use of in the Italo-Ethiopian incident, [231] but it was applied by 19 American States in the Gran Chaco incident between Bolivia and Paraguay, [232] by the United States in regard to the action of Peru in Leticia,[233] by the United States, France and the Soviet Union in regard to Germany's annexation of Czechoslovakia and by the United States in regard to the USSR aggression in Finland.[234]

Undoubtedly, the repudiation of war as an instrument of national policy in the Pact of Paris required that anything having the same effects as such a war could not be regarded as valid. In view of the broad claims of self-defence and the lack of a practical distinction between war and armed attack short of war, continued attempts were made to define aggression. A Soviet-proposed definition of aggression was endorsed by a League

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[227] Lauterpacht, Oppenheim, Vol.II, p. 152-53.
[228] Briggs, p. 964.
[229] Quincy Wright, "The Stimson Note of January 7, 1932," (*American Journal of International Law* 26, 1932), p. 342.
[230] Ibid, p. 343.
[231] Waldock, p. 480.
[232] Lester H. Woolsey, "The Chaco Dispute," (*American Journal of International Law* 26, 1932), p. 796-801.
[233] See L. H. Woolsey, "The Leticia Dispute Between Colombia and Peru," (*American Journal of International Law* 27), 1933, p. 525-27.
[234] Waldock, p. 480.

Disarmament Committee in 1933.[235] According to this definition, adopted by the USSR in non-aggression treaties[236] the aggressor was defined as the first state to commit any of the following acts against another state: (1) declaration of war; (2) armed invasion, with or without a declaration of war; (3) armed attack on its territory, navy or air force; (4) naval blockade; (5) aid to armed bands formed on its own territory and invading another state or refusal, despite demands, to take all possible measures to deprive the armed bands of aid and protection.[237] According to Article 3 of the definition, no military consideration could excuse striking the first blow.[238] The Soviet definition was criticised because it was considered that automatically to blame as the aggressor the party striking the first blow "takes no account of self-defence" and consequently the definition, it was thought, could become a "trap for the innocent".[239] In 1933, when an anti-aggression treaty, the Anti-War Treaty of Non-Aggression and Conciliation, was signed in Latin America, whilst it condemned war of aggression and required parties to settle their disputes only by pacific means,[240] it was explicitly stated in the treaty that the right of self-defence was unaffected, since it was inalienable.[241]

The importance of defining aggression increased with the establishment of the Nuremberg Tribunal for the prosecution of the Nazi War Criminals.[242] Article 6 of the Nuremberg Charter defined as a crime against peace within the jurisdiction of the Tribunal the "planning, preparation, initiation or waging of a war of aggression, or war in violation of international treaties, agreements or assurances, or participation in a

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[235] Briggs, p. 969-970.
[236] Ibid, p. 969.
[237] Ibid, p. 970.
[238] Ibid.
[239] Waldock, p. 484.
[240] See (*American Journal of International Law* 28 *Supplement*, 1934), p. 79.
[241] Brownlie, p. 96.
[242] Agreement for Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London, August 8, 1945. Reprinted in (*American Journal of International Law* 39 *Supplement*, 1945), p. 257-264.

common plan or conspiracy for the accomplishment of any of the foregoing".[243] The Tribunal found that "already at the outbreak of the war, resort to aggressive war was an international crime" and relied "in the first place" on the Pact of Paris which was, in 1939, binding on 63 nations, including Germany, Italy and Japan.[244] The Tribunal stated that:

> "In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing".[245]

The Nuremberg Charter did not, itself, contain any definition of aggression or self-defence. Initially, the United States had proposed a definition of aggression which considered as legitimate self-defence resistance to an act of aggression or action to assist a state subjected to aggression, and stated explicitly that action in self-defence as defined did not constitute an act of aggression. In the event, neither a definition nor an express reservation of self-defence found a place in the Charter, but the existence of the right of self-defence was never doubted and was relied upon by defence counsel at Nuremberg. With regard to the actions at the Allied forces, the Tribunal took the view that "since the Allied belligerency was in resistance to aggression, and taken either by the actual victims of their aggression or by states coming to their aid, that belligerency was in self-defence or collective self-defence.[246] In 1946 the United Nations General Assembly affirmed by unanimous resolution the principles of International law

[243] Ibid.
[244] George A. Finch, "The Nuremberg Trial and International Law," (*American Journal of International Law* 41, 1947), p. 29-30.
[245] Peter Calvocoressi, *Nuremberg, The Facts, the Law, and the Consequences*, (London: Chatto & Windus, 1947), p. 36.
[246] Bowett, p. 139-41.

recognised in the Nuremberg Charter and also in the Judgement of the Tribunal.[247] The International Law Commission, at the request of the General Assembly, drafted and adopted a formulation of the Nuremberg Principles in which crimes against peace were defined as:

(1) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurance.

(2) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under.[248]

As this chapter has shown, the *Caroline* case, was important because it created the main principles of the right of self-defence, such as necessity and proportionality, which are still today regarded as essential in the consideration of any claim of use of force under the right of self-defence. Moreover, the attempts to restrict the resort to war after World War I, through the establishment the League of Nations, and later in the 1928 Pact of Paris, made successful contributions in the long term to controlling the use of force, in spite of, their defects. In my view the main problem was not the measures themselves, but the political intransigence of the powerful states at that time, whose only concern was for their own national interests, at the expense of international peace and security.

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[247] See United Nations General Assembly Resolution 95(I) of December 11, 1946. Reprinted in United Nations Resolutions, ed. by Dusan J. Djonovich, (Series I, General Assembly, Vol. I, 1946-48, New York: Oceana Publications), p. 175. See also II (*Yearbook of International Law Commission* II, 1950), p. 188.
[248] Ibid, p. 193, 195.

CHAPTER THREE

Self-DEFENCE, SECURITY AND THE BIRTH OF THE UN

The modern understanding of self-defence emerged historically from the pre-modern phase of international legal development but has been recast radically in the UN era. This has developed within the context of a global collective security system. A system of collective security may be defined as one which makes provision for mutual support and aversion of conflict, whilst a system of collective defence makes provision for specific joint military response against acts of aggression. This chapter will consider the hopes for a new world, especially after World War II, which were expressed in the London Declaration of 1941 and the Atlantic Charter of the same year. Also, in 1944, a Conference was held at Dumbarton Oaks near Washington, to prepare a first draft of a World Peace Organisation, in preparation for the San Francisco Conference. Finally, Article 51 was drafted at the San Francisco Conference in 1945. These topics will all be examined in this chapter.

The Birth of the New Organisation

The failure of the League of Nations and the ordeal of World War II, rendered necessary a major reshaping of the international security system. Amongst the main difficulties confronting the League of Nations experiment, were the United States' refusal to become a member and the weakness of the League Council and Assembly as means of effective crisis management. That the League was intended as a genuine collective

security system is made clear by Article 16 of the League Covenant. The problem in the 1930s was less one of concept than of political will in implementation. The international economic collapse of the late twenties and the early thirties, the rise of anti-democratic and militaristic regimes, especially those of Italian Fascism, German Nazism and Japanese Militarism, resulted in the disintegration and collapse of the League system[249].

The end of World War II revived the hopes for a new World which would be controlled by a new system for the maintenance of international peace and security, through a new organisation. By that time it had become clear that the system of security of the League of Nations, having failed in 1939, could not survive into the new era which would come after the War. There was, of course, some contrast between the Old and the New Orders , as Inish Claude remarks:

> "The UN could be described ...as a revised version of the League. Many of it features were indicative of conscious effort to avoid the deficiencies of the previous World Organisation ...in both negative and positive fashion the old order influenced the creation of the new"[250] .

The aim, thus, was to establish not so much a conceptually new security order as one which was mere practically collective. The process of development commenced early in the war when in June 1941, during the peak of the Axis victories with nearly all Europe under Axis rule, a meeting was held which many historians consider to be the foundation of the United Nations. The representatives of Britain, Canada, Australia,

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[249] Evan Luard, *A History Of The United Nations*, Vol. 1 *: The Years of Western Domination , 1945-55*, (London: Macmillan Press, 1982) , p . 3-16 .
The League's record shows a few successes in its very early years : It resolved a frontier dispute between Finland and Sweden ; defended the sovereignty of infant Albania when she was threatened by Greek forces from Bulgaria in 1925 and the payment of compensation by Greece after an incident between the two countries ; and resolved a territorial dispute between Turkey and Iraq over Mosul .

[250] Inish Lothair Claude, *Swords Into Plowshares: The Problems and Progress of International Organisation*, 4 ed , (New York: McGraw-Hill, 1984), p. 60-61 .

New Zealand and South Africa and the exiled Governments of Greece, Belgium, Czechoslovakia , Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and of General de Gaulle of France, met at St. James's Palace, London, and agreed upon the London Declaration , which read in part as follows :

> "The only true basis of enduring peace is the willing co-operation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security; It is our intention to work together, and with other free peoples both in war and peace, to this end"[251].

Exactly three months after the London Declaration the next step was taken with a joint declaration issued by President Roosevelt and Prime Minister Churchill , known as the Atlantic Charter. This Charter affirmed,

> "certain common principles in the national policies of their respective countries on which they based their hopes for a better future for the world"[252].

The sixth clause read:

> "After the final destruction of Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries , and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want"[253] .

The seventh clause stated:

> "that such a peace should enable all men to traverse the high seas without hindrance"[254].

And the eighth concluded the document with this outline of peace organisation:

> "They believe that all of the nations of the world , for realistic as well as spiritual reasons , must come to the abandonment of the use of force . Since no future peace can be maintained if land , sea or air armaments continue to be employed by nations which threaten , or may threaten , aggression outside of their frontiers , they believe , pending the establishment of a wider and permanent system of general security , that the disarmament of such nations is essential . They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments"[255].

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[251] *Guide to the Charter Of The United Nations*, Published By United Nations Department Of Public Information, 4 ed. (New York: United Nations, 1955) , p . 1 .
[252] Leland M Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents*, (London: Stevens, 1949) , p .3-5 .
[253] Ibid.
[254] Ibid.
[255] Ibid.

The Atlantic Charter was signed on September 24 by the USSR and the ten Governments of occupied Europe[256] and rapidly received widespread international support.

On New Year's Day 1942, President Roosevelt, Prime Minister Churchill, Maxim Litvinov of the USSR, and T. V. Soong of China signed a document which, though short, had significant influence in fixing and firmly establishing a policy for the post-war system with respect to peace and security which would be afforded to all nations[257]. Later, only those states which had declared war on Germany and Japan and subscribed to the United Nations Declaration were invited to take part in the San Francisco Conference[258]. In October 19-30, 1943, an important meeting took place in Moscow[259], at which the Foreign Ministers of Great Britain, the United States and the Soviet Union recognised

> "the necessity of establishing at the earliest practicable date a general international organisation, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security",

and they continued that :

> "for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security"

they would consult

> "with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations" and that they would "confer and co-operate with one another and with other members of the United Nations to bring about a practicable general agreement with respect to the regulation of armaments in the post-war period"[260].

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[256] *Guide to the Charter of the United Nations,* p . 1-3 .

[257] Evan Luard, *A History of the United Nations,* p . 17 - 27 .

[258] The United Nations Declaration reads that the nations which take part had : "subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States and the Prime Minister of the United Kingdom dated August 14, 1941, known as the Atlantic Charter."

[259] No substantial statement of United Nations policy with respect to the establishment of the new organisation to maintain peace and security was made until the Moscow Conference .

[260] Evan Luard, *A History of the United Nations,* Vol. (I), p . 17-23 .

At Tehran, Roosevelt, Stalin and Churchill met, for the first time, and declared that they would work for a decisive triumph over the Axis. As to peace, the Declaration read:

> "We are sure that our concord will win an enduring peace . We recognise fully the supreme responsibility resting upon us and all the United Nations to make a peace which will command the goodwill of the overwhelming mass of the peoples of the world and banish the scourge and terror of war for many generations"[261] .

The most crucial stage before the San Francisco Conference was the double conference of Dumbarton Oaks near Washington DC in 1944. This Conference was to prepare a first draft of a World Peace Organisation. The discussions were in two stages. The first stage was between the representatives of the Governments of the Soviet Union, the United Kingdom and United States. The second stage was between the representatives of the Governments of China, the United Kingdom and the United States[262].

The Dumbarton Oaks Proposals stated in Chapter I the aims of the new International Organisation. These included the following:

> 1. "To maintain international peace and security".
> 2. "To develop friendly relations among nations and to take other appropriate measures to strengthen universal peace".
> 3. "To achieve international co-operation in the solution of international economic, social and other humanitarian problems".
> 4. "To afford a centre for harmonising the action of nations in the achievement of these common ends".[263]

During that gathering there were wide consultations with a view to the elaboration of a plan which would take into account the experience of the past[264]. After six weeks, they produced a number of "tentative proposals".

The recommendations mainly concerned defining the framework of the new international organisation, and the responsibilities and obligations of the members of that international gathering. It gave to the Security Council enforcement powers which

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[261] *Guide To The United Nations Charter*, p . 5-6 .
[262] The division into two Conferences was due to the fact that the USSR did not recognise the Government of Chiang Kai-Shek as the legitimate Government of the Republic of China .
[263] Maurice Fanshawe, *The Charter Explained*, (London: United Nations Association, 1946), p. 5-11.

the League Council never had. At the same time the Security Council was even at this early stage assuming the shape of a body which, in pre-Cold War theory, had the clear backing of the great Powers - meaning the victorious World War II, and thus a potential efficacy largely denied to the League. It attempted at the same time to give the General Assembly the primary responsibility for essential matters dealing with the general welfare[265]. At Yalta there was a turning point between the preparations for the Charter of the United Nations and the founding conference at San Francisco. By that same time, the Dumbarton Oaks plan had been published and was the object of deep controversy and intensive public discussion. A unique compromise formula was produced by the big three at Yalta after difficult disagreement between the United Kingdom and the United States on the one side, and the Soviet Union on the other. The agreement provided that "all decisions on questions of procedure should be taken by a majority of seven votes, and that decisions on other questions should be taken by a like majority, with the added requirement of unanimity of the permanent members". At the same time there was a disagreement concerning crucial issues dealing with the great powers and whether they were to be allowed to exercise their veto rights in cases in which they were involved in a dispute[266].

The Drafting of Article 51: The San Francisco Conference

In preparation for the Dumbarton Oaks Conference the Soviet Union, China, the United Kingdom, and the United States drafted proposals including as a general principle the prohibition of the use of force, except for preventive or enforcement action undertaken

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[264] Ibid.
[265] Leland M Goodrich and Edvard Hambro, *Charter of The United Nations: Commentary and Documents*, p . 6-10 .
[266] Ibid.

by the organisation itself. No reference was made in these proposals to self-defence.[267] The formula agreed upon in Dumbarton Oaks was very similar to what eventually became Article 2(4) of the Charter, placing a general ban on the use and threat of force.[268] Because the prohibition of war under the Covenant of the League of Nations and under the Pact of Paris had never been taken to exclude the right of self-defence, it is not surprising that in the Dumbarton Oaks proposals similarly, it was not deemed necessary to include explicit reservation of the right of self-defence.[269] The ban on the threat or use of force "in any manner inconsistent with the purposes of the Organisation" was not considered to prevent the exercise of this right, which was regarded as inherent in the proposals.[270] That this was so, was made clear when the issue of self-defence was raised by the Chinese delegation in the context of the powers of the future Security Council. They requested assurances that the right of self-defence had not been removed and that the use of force in self-defence would not be considered inconsistent with the purposes of the organisation. It seemed satisfied by the explanation that the ban applied to the unilateral use of force without approval by the Security Council, other than in the cases of legitimate self-defence.[271] The Chinese delegation's query as to who would judge whether a state's use of force was consistent with the purposes and principles of the organisation, particularly if it claimed to be acting in self-defence, met with a

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[267] See United States Plan for the Establishment of an International Organisation for the Maintenance of International Peace and Security, December 29, 1943, in Ruth B. Russell, *A History of The United Nations Charter: The Role of the United States (1940-1945)*, (Washington: Brookings Institution, 1958), p. 990-95.
[268] Chapter II, Principles, paragraph, 4 of the Dumbarton Oaks Proposals read: "All members of the Organisation shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the organisation." Russell, p. 1019.
[269] See Proposals for the Establishment of a General International Organisation in *Foreign Relations of the United states*, (1944), p. 890-900.
[270] Geoffrey L Goodwin, *Britain And The United Nations*, (New York: Manhattan Publishing Company, 1957), p. 32-3.
[271] For more information see *Foreign Relations of the United States*, (1944), p. 862.

consensual reply that the Security Council was the body which would make such a decision.[272]

When the United States delegation, in preparation for the San Francisco Conference examined the Dumbarton Oaks Proposals, item by item, once again the question arose whether Chapter VIII should contain an express reservation of the right of self-defence in the context of the maintenance of peace and security provisions. Despite the general agreement that this was an inherent right, there was no real objection on the principle.[273]

When, at the San Francisco Conference, Committee I/1, deliberated the provision containing the prohibition of the threat or use of force, it concluded that the "use of arms in legitimate self-defence remains admitted and unimpaired."[274] Some countries thought that an express provision in the Charter asserting the right of self-defence in response to an attack by another state would be useful.[275] Others proposed that a collective obligation be undertaken by members "to resist every act of aggression against any member."[276] Nevertheless, none of the amendments proposed at the San Francisco Conference on the provision that later became Article 2(4), of the Charter referred directly to self-defence,[277] with the single exception of a Panamanian proposal whereby "subject to immediate reference to and approval by the competent agency" of the organisation, "a state may oppose by force an unauthorised use of force made against it

[272] Russell, p. 465-66.
[273] Ibid., p. 599.
[274] See Report of the Rapporteur of Committee I/1 to Commission I , *Documents of the United Nations Conference on International Organisation*, San Francisco, (Published in Co-operation with the Library of Congress, London & New York, 1945, Vol. 6), p. 459.
[275] See for example the statement of Turkey, *Documents of the United Nations Conference on International Organisation,* Vol. 4, p. 675.
[276] Proposal of New Zealand, *Documents of the United Nations Conference on International Organisation*, Vol. 3, p. 486-87; Vol. 6, p. 342-43.
[277] Ibid., Vol. 6, p.557-64.

by another state."[278] Evidently, the general inclination was to restrict the permission to use force and to focus on prohibition rather than permission.[279]

The source of Article 51 is to be found in the discussions of Committee III/4 which dealt with the problem of harmonising existing regional security arrangements with proposed Charter of the United Nations, and in so doing faced the problem of preserving some freedom of action in self-defence.[280]

Originally, what was at issue was the freedom of regional organisations to take enforcement action. The Dumbarton Oaks Proposals had provided that, where appropriate, use could be made by the Security Council of regional arrangements or agencies for enforcement action, but that no enforcement action should be taken under such arrangements or by such agencies without the Council's authorisation.[281] The statement of the four Sponsoring Powers made it clear that for the Security Council to give such authorisation would require the unanimous agreement of the permanent members.[282] Thus, a permanent member could make use to its veto power, to prevent a regional organisation from taking forceful action.[283] Although the United States delegation was satisfied with this provision[284], the Latin American countries which had recently concluded a regional arrangement, the Act of Chapultepec,[285] feared that the Act of Chapultepec could be found to be in contradiction with the Charter, that action in self-defence under regional arrangements could be subject to the veto in the Security

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[278] Ibid., Vol. 6, p. 565.
[279] Ian Brownlie, *International Law And The Use of Force By States*, p. 270-71.
[280] Bowett W. Derek, Self-Defence in International Law, (Manchester: Manchester University Press, 1958), p. 182.
[281] Russell, p. 1026.
[282] Text of the Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council, June 7, 1945, in *Documents of the United Nations Conference on International Organisation*, Vol. 11, p. 710.
[283] Bowett, p. 183.
[284] Russell, p. 693.
[285] The Act of Chapultepec provided for collective measures, including the use of armed force, to meet threats or acts of aggression against an American state. For more information see Leland Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents*, p. 176.

Council[286], or that action under the Act might be blocked as a result of the Security Council's being impeded from action by the exercise of the veto.[287] The discussion of the demand for autonomy of the inter-American security system was merged with the consideration of two proposals to exempt security arrangements against aggression by enemy states from the requirement of Security Council authorisation.[288] One was a proposal by France to make an exception to the Security Council's authorisation "in the case of the application of measures of an urgent nature provided for in treaties of assistance concluded between members of the Organisation and of which the Security Council has been advised."[289] The other was a proposal by the Soviet Union for a similar exception in the case of regional arrangements "directed against renewal of a policy of aggression on the part of the aggressor-states in this war."[290] The United States had no objections to either of these specific exceptions.[291] The Latin American representatives, however, were of the opinion that the Soviet Union proposal would reduce the inter-American organisation's role and they pressed for a similar exemption under the Act of Chapultepec.[292] The United States' advisers drafted an amendment on self-defence which they suggested should be added to Section B of Chapter VIII of the Dumbarton Oaks Proposals (on action against aggression), rather than to Section C (on regional arrangements). It referred to regional arrangements as an example of self-defence against attack, rather than as an exception to the general rule that regional

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[286] See *Foreign Relations of The United States* (1945), Vol. 4, p. 595.
[287] Josef Kunz, "Bellum Justum and Bellum Legale," (*American Journal of International Law* 45, 1951), p. 528, 530.
[288] Leland Goodrich, Edvard Hambro and Anne Simons, *Charter of the United Nations: Commentary and Documents*, 3d ed. (New York: Columbia University Press, 1969), p. 343.
[289] *Documents of the United Nations Conference on International Organisation*, Vol. 3, p. 387.
[290] Ibid., Vol. 3, p. 601.
[291] Foreign Relations of the United States (1945), Vol. 4, p. 596.
[292] Ibid., p. 659.

enforcement action required Council authority, thus distinguishing between regional enforcement action (which it did not deal with) and regional action of self-defence.[293] The characterisation of regional arrangements as self-defence, however, would still permit them to be invoked without the sanction of the Security Council. The permanent members had reservations about this. It was noted that the right of self-defence was reserved, but the procedure implied good faith not to take action except in self-defence.[294] The United States' view, in general, was that it should retain the ability to veto action in parts of the world outside the Western hemisphere and it was concerned that the regional right to take defensive action without Council authority should not be made general. The approach favoured by the United Kingdom and France was for a right of individual action, only in case of the Council's failure to act. The United States' proposal was therefore reworded to make clear that the regional arrangements should operate independently only in self-defence and only in the event of failure of the Council to act. The final text of the United States suggestion read:

> "Should the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member state, such member state possesses the inherent right to take necessary measures for self-defence. The right to take such measures for self-defence against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any such time such action as it may deem necessary in order to maintain or restore international peace and security".[295]

Neither the United Kingdom nor the Soviet Union accepted this proposal, however. Their fear was that it left the door open for a series of regional organisations, acting independently of the world institution.[296] The United Kingdom proposed a revised text:

> 'Nothing in this Charter should invalidate the right of self-defence against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary measures to maintain or restore international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority

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[293] Ibid., p. 674.
[294] Ibid., p. 592.
[295] Ibid., p. 685-86.
[296] Ibid., p. 691-98 and 698-706.

and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security".[297]

The Soviet delegation proposed a similar idea, though differently worded, beginning with the phrase "Nothing in this Charter impairs the inherent right of self-defence, either individual or collective", followed by a provision that in the event of failure to maintain peace and security on the part of the Security Council, the countries would have the right "to take measures of self-defence up to the time the necessary measures by the Security Council [were] being taken."[298] The United States delegation had the same understanding: that "the right of self-defence continued until the Security Council took adequate measures"[299] and redrafted the proposal to state this explicitly.[300] While this proposal seemed acceptable to the permanent members,[301] the Latin American delegations still feared that the inter-American system might be pronounced inconsistent with the Charter. In order to win them over, it was necessary for the United States to guarantee the continued validity of the inter-American system and to promise its integration with the general organisation and the implementation by treaty of the Act of Chapultepec.[302] The United States also suggested adding appropriate references to "resort to regional agencies or arrangements" among the approved methods of dispute settlement in order to strengthen the role of regional agencies and arrangements in this regard.[303] The new proposals were explained in a press release, which announced that the new provision recognised the inherent right of self-defence but in no way detracted from the ultimate authority of the Security Council as the main instrument of world

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[297] Ibid., p. 704.
[298] Ibid., p. 812.
[299] Ibid., p. 817.
[300] Ibid., p. 819.
[301] Ibid., p. 823-25. The United States agreed to exclude from the text the specific reference to the Act of Chapultepec.
[302] Ibid., p. 731.
[303] Ibid., p. 737-39.

enforcement action.[304] After the Latin American delegations informally gave their approval and the proposal was submitted to and approved by the five permanent members, it was formally presented in this final form:

> "Nothing in this Charter impairs the inherent right of individual or collective self-defence if an armed attack occurs against a member state, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security."[305]

This provision, with minor drafting changes, became Article 51 of the Charter.[306] To emphasise that the provisions of the article referred to the exercise of a reserved right of members and did not imply that regional arrangements were exempted from Security Council authority, it was also agreed that the new proposal should be included in the chapter on threats and breaches of peace and acts of aggression instead of in the chapter on regional arrangements.[307] Moreover, Article 51 have been mentioned the right of collective self-defence.

The expression "collective self-defence" is not defined in the Charter. The interpretation expressed, during a discussion of the issue within the United States delegation was that "if more than one state acts ... that is to be interpreted as 'collectively'"[308]. The Colombian delegate at the San Francisco conference stated his understanding of the concept as follows:

> In the case of the American states, an aggression against one American state constitutes an aggression against all the American states, and all of them exercise their right of legitimate defence by giving support to the state attacked, in order to repel such aggression. This is what is meant by the right of *collective self-defence*.[309]

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[304] Ibid., p. 831-37.
[305] *Documents of the United Nations Conference on International Organisations*, Vol. 12, p. 680.
[306] Ibid., Vol. 15, p. 188.
[307] Brownlie, p. 274.
[308] Foreign Relations of the United States (1945), Vol. 4, p. 679.
[309] *Documents of the United Nations Conference on International Organisation*, Vol. 12, p. 687.

The main issue was the scope of the action which the Charter intended that individual states or groups of states should be allowed to take without the prior permission of the Security Council.[310] The question was whether the exercise of the right of collective self-defence demands(a) the existence of a regional arrangement; (b) the existence of a bilateral mutual assistance treaty; or (c) is permitted even in the absence of any previous arrangements or treaty obligation. It was clearly for the purpose of fitting regional arrangements, especially the inter-American security system, into the general international organisation, that Article 51 was added at San Francisco. Also it was clear that at San Francisco the expression "collective self-defence" was used to cover action not only by members of regional arrangements, but also by parties to bilateral treaties governing their joint security, and also assistance by one state to another without any treaty obligation. Article 51 was deliberately transferred at the San Francisco Conference from Chapter VIII to Chapter VII which means that the right of collective self-defence had become "entirely independent of the existence of regional arrangements."[311] But also, any member of the United Nations is permitted under the Charter to use armed force to assist an attacked state, whether or not there has been any previous arrangement.[312] The right of collective self-defence can also be exercised by and with non-members of the United Nations, for two reasons: because the purpose of Article 51 is to reserve a right of self-defence inherent in all states,[313] and because, under Article 2(6) the prohibition against the use of force applies equally to non-member states, the right of self-defence cannot be denied to them.

Perhaps one of the main consequences of the World War II, was the general tendency among states to regulate the practice of the use of force. This control over the use of

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[310] Bowett, p. 130.
[311] Waldock, p. 504.
[312] Dinstein, 234.

force could be achieved only under an powerful organisation, whose main aim would be to protect international peace and security. On this basis, the United Nations appeared to avoid the mistakes of the League of Nations. The control over the use of force came by the balancing between Articles 2(4), and 51 from the UN Charter - in which perhaps a main aim of the UN Charter's drafters was to give small states a sense of greater security against more powerful ones.

[313] Waldock and Brierly, p. 419.

CHAPTER FOUR

THE NATURE OF THE INHERENT RIGHT

Integral to the UN security system is the notion of self-defence, which is the only permitted exception to the prohibition of force under Article 2(4). What is less clear, however, is exactly what is the nature of the inherent right of self-defence, and in what circumstances it may be invoked; Article 51 leaves many questions unanswered. The UN Charter generally intended to reserve armed force primarily for the UN and its agents. The reservation of a right of self-defence was a pragmatic measure, leaving room for unilateral action which would be inevitable and necessary in the event of any failure of formal multilateralism. This chapter explores the debate on the nature of self-defence under the UN Charter. It remained unclear, however, what sort of action in the modern strategic and technological environment, constitutes "armed attack" sufficient to give rise to a right in self-defence; a question highlighted by the Nicaraguan assistance to El Salvador's FMLN resistance movement and the subsequent mining of Nicaraguan harbours with US assistance. Further ambiguities revolve around anticipatory self-defence and collective self-defence. The word "inherent" applied to the self-defence right is confusing, as it implies that the right is the same customary right which existed before the creating of the UN; though the explicit authorisation of collective self-defence enlarges that right.

These difficulties raise also the question of definition of aggression, even though this term is not used in the Charter in specific relation to self-defence. Therefore, consideration will be given to the development of the definition of aggression, from the period of the League of Nations, to the General Assembly Resolution (3314) 14,

December 1974. That resolution will be analysed in an attempt to clarify what aggression mean and what could provoke the right of self-defence. The chapter begins with a general discussion of self-defence under the Charter, and highlights the ambiguities raised. There follows a consideration of interpretation of the scope of Article 51. Finally, the role of the Security Council in relation to self-defence is considered.

UN Charter and Self-defence

The UN Charter treats self-defence more coherently than the Covenant of the League of the Nations and Kellogg-Briand Pact, although it retains their sense that defence is essential and prior. Whereas the Covenant gave little guidance in the event that the whole League system broke down, the Charter accepted the likelihood as well as the legitimacy of unilateral, or extra-UN, action. The Charter restricted the range of that action, however, to occasions of self-defence rather than to a wider array of circumstances in which the organisation might fail to meet the needs of member states. In turn, the Charter departs from Kellogg-Briand's string of ad hoc exceptions. Instead, those who drafted the Charter made self-defence integral to the system, effecting a more systematic balance between the rule and the exception than either interwar effort.

Overall, the Charter was intended to shepherd an international order in which armed force was primarily reserved for the UN and its agents to protect the values and interests of a global community. In its aspirations to secure the world from the "scourge of war", it banned not only the use of armed force but force in general. Article 2(4) states:

> "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 manner inconsistent with the Purposes of the United Nations."

Any previous freedom to go to war or use of force was meant to be rendered "antiquated" at least on paper.[314] The sole extra-UN exception to Article 2(4) was the right to self-defence.[315] The experience of the 1930s and the Second World War offered raw evidence that the peace envisioned for the post-war world was unlikely to be either perpetual or total. Some states would certainly violate the ban on force at some stage. Although the UN was intended to step in to resist aggression, it was conceivable that it might fail to do so or, at least, be unable to act quickly enough to protect victim states from immediate damage. Either possibility left room for unilateral action, which implies that a right to such had to be guaranteed. That this guarantee came in the form of a permission to act in self-defence made immediate historical sense. German and Italian efforts to "modify" the Versailles arrangement through military conquest had alerted international observers to the need for timely resistance against aggression, perhaps in advance of multilateral consensus. Moreover, immediate post-war developments conduced to the "increasingly approved" position that defence wars were equivalent to just wars.[316]

The Charter of the United Nations implied that preparation for self-defence was inevitable and war in self-defence lawful. It recognised in the first section of Article 51 that any state under attack, with no prospect of UN intervention on its behalf, was permitted to act in its own military defence. In its second section, the Article made the right of self-defence subject to the authority and responsibility of the Security Council. Article 51 provided a crucial escape hatch. While it did not restore fully the pre-Charter licence to self-defence, it stood as a fairly open invitation to return to the old way of doing things should the new order not materialise. Were formal multilateralism to fail,

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[314] Yoram Dinstein, *War, Aggression and Self-Defence*, (Cambridge: Grotius, 1988), p. 91.
[315] Authorised enforcement action under Article 42 would, of course, be clearly within the UN remit.

any state or states could take their security into their own hands, or more accurately, into their own arms. Significantly, this exemption was formalised in the name of self-defence, a right viewed as unequivocal.

Not surprisingly, Article 51 left many terms undefined and questions unanswered. That a right to self-defence existed was undebatable; what it involved was far less so. Some writers have expressed doubt that interpreters of Article 51 will ever be able to agree on a definition beyond the skeletal, that self-defence amounts to a "legitimate use of counter-force."[317] However vain the effort, the interpretation of Charter language and intent has largely been viewed as a legal issue, both academically and practically. A first set of questions revolves around the notion of armed attack. What actions sufficiently constitute armed attack that self-defence becomes an acceptable response? Defining armed attack has been a particular challenge for the post-1945 experience of guerrilla warfare and low-intensity conflict, third-party support for insurgencies and indirect aggression, terrorism and extortion, and various forms of economic and political, but unarmed, coercion. Where are we to locate armed attack along a continuum of conflict which ranges from tank invasion to hostile radio propaganda? As one writer commented at the height of the Vietnam War, short of total invasion, the Charter is silent on the rights of victims of "loss trespass."[318]

The ambiguity of Article 2(4) does not help. Suppose that one state provides weapons and logistical support to an anti-government movement in another but displays no obvious interest in acquiring any of that state's territory or usurping its political independence. Assuming inaction by the Security Council, is this a sufficient

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[316] Terry Nardin, *Law, Morality And The Relations of States*, (Princeton: Princeton University Press, 1983), p. 282.
[317] Dinstein, p. 200.
[318] Thomas M. Franck, "Who Killed Article 2(4)? Changing Governing The Use of Force By States," (*American Journal of International Law* 64, 1970), p. 813-14.

provocation to justify armed self-defence against the first state by the one battling anti-government forces, or friendly states acting on the basis of "collective self-defence"? The International Court of Justice decided in the 1986 Nicaragua case that such a situation did not license self-defence under Article 51.[319] In this case, the "scale and effects" of Nicaraguan assistance to El Salvador's FMLN resistance movement were too small to be considered "armed attack", and closer in kind to "a mere frontier incident" and were of insufficient gravity to justify the mining of Nicaraguan harbours that had been carried out with US assistance.[320]

Another set of questions concern whether self-defence can *anticipate* an aggression. To read "if an armed attack occurs" as meaning that in all cases a victim state should wait for bombs to drop before responding appears to be unrealistic, especially in an age of nuclear, biological, chemical, and massively destructive conventional weapons. At the same time, as an impact of this massive progress in all types of weapons, to determine "who fired the first shot" also seems too simple, since attacks can begin without actual shots. Pertinent questions arise about how states should be entitled to respond to the threat of attack.[321] This puzzlement gave many the impression that Article 51 affirms the legitimacy of anticipatory self-defence and at the same time forbids it.[322] Others propose that it is difficult to determine when the assault begins to give endorsement for pre-

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[319] Dinstein, p. 181-83. The decision of the International Court of Justice is a clear example of how counter-measures could to some point be allowed.

[320] *Nicaragua v. United States of America.* International Court of Justice, (Merits Judgement, 27 June 1986), p. 103-4. The problem for the United States was that it could not verify the gravity of the cross-border assaults from Nicaragua. As the Court said "An armed attack must be understood as including not merely action ... across an international border, but also ... acts of armed force against another state of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces." The Court's view, was that the situation in this case was not classified as an armed attack.

[321] Goodrich and Hambro, *Charter of The United Nations: Commentary and Documents*, p. 347.

[322] Myres S. McDougal and Florentine P. Feliciano, "Resort to Coercion: Aggression and Self-Defence in Policy Perspective," In: *Law And Minimum World Public Order: The Legal Regulation of International Coercion*, (New Haven, NY: Yale University Press, 1961), p. 234. Bowett perceived Article 51 as admitting anticipatory self-defence.

emptive self-defence.[323] Dinstein considered Article 51 to be flexible and at the same time incompatible with the way which the Charter was drafted. In particular, he pointed to the massive loss that would result from waiting until bombs were dropped before being able to act in self-defence. He suggested a more extensive authority to act in a defensive way to face an initial assault, but within carefully defined boundaries only.[324]

Another group of issues revolves around collective self-defence. It is unquestionable that a gathering of states, united in the same principles and threatened by a strong enemy, may claim the right of collective self-defence. The Alliance against Iraq in the Second Gulf War is an apparent example. The dilemma is what the notion of collective self-defence includes. Collective self-defence involves a complex connection between Article 51 and regional security arrangements. The history of Article 51 gives clear evidence that collective self-defence has become an instrument of compromise between those who demand extensive authority over the use of force in the United Nations and others who claim that regional organisations should have some authority to act unilaterally.[325] Article 51, in fact, emanated to fix the controversy about the "Regional Arrangements" in Articles 52 to 54 (Chapter VIII). Article 53, in particular, contained an "authorisation" clause which requires any regional enforcement action to have the permission of the Security Council of the United Nations. The objective of this, was to make the UN more effective in resolving international disputes. But that power for the Security Council was confronted with the objection of the American states. Ahead of the San Francisco Conference they agreed under the Act of Chapultepec to link regional security with inter-American security programmes.[326] They agreed that the League of

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[323] This was the view of Brownlie.
[324] Dinstein, p. 175, 178-80.
[325] Thomas M. Franck, p. 824.
[326] John W. Halderman, *The United Nations And The Rule of Law: Charter Development Through The Handling of International Disputes And Situations*, (New York: Oceana Publications, 1966), p. 42-3.

Nations had accepted restrictions in its authority for the advantage of some areas or states and they claimed that they should have the same privilege. The European states, from their side, were afraid of a German revival and they wanted to have the right to act immediately against any possible German aggression. In cases of instant danger, Belgium, Turkey and Czechoslovakia proposed to allow individual response. The USSR demanded the freedom of collective action against the former Axis Powers.[327]

Meanwhile, China sought a centralised system for the new international gathering to protect Chinese interests. The UK, for its part, recognised the regional controversy, but at the same time did not like to ruin the United Nations plan from the beginning.[328] San Francisco examined many settlement steps, to which were attached some rights and exemptions. The US delegation proposed an umbrella article, which would reassert an "inherent" right of self-defence, to be enjoyed by any state or group, to act individually in the absence of Security Council measures. The UK delegation suggested that the article should read:

> "Nothing in this Charter shall invalidate the right of self-defence against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary steps to maintain or restore international peace and security."

Generally, the idea was agreed that self-defence was only an interim measure until the Security Council took the measures necessary for international peace and security, and this was the origin of Article 51.[329]

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[327] Arnold Wolfers, *Discord And Collaboration: Essays on International Politics*, (Baltimore: Johns Hopkins Press, 1962), p. 185.
[328] Evan Luard, *A History of The United Nations: The Years of Western Domination, 1945-1955*, p. 52-3.
[329] Ibid., p. 53-4.

The subject of self-defence was raised at the San Francisco Conference in relation to the problem of harmonising existing regional arrangements with the proposed Charter of the United Nations. The text of Article 51 refers to the "inherent right" which remains unimpaired by the Charter. Consequently, Article 51 recognises a right of self-defence "established independently of the Charter by natural law."[330] This view finds support in the statement of the Rapporteur of Committee I/1 at the San Francisco Conference that the "use of arms in legitimate self-defence remains admitted and unimpaired."[331] Therefore, the right of self-defence "has no other content than the one determined by Article 51"[332] and the right of self-defence as existing under Article 51 is the right conferred upon the member states.[333] This raises the question whether Article 51 recognises the existence of a customary right of self-defence. If the aim of the Charter had been to leave the scope of the right of self-defence unimpaired it would have taken the approach of the Covenant and the Pact of Paris, i.e. making no explicit reservation of self-defence.[334] In contrast, the approach adopted by the Charter of drawing a clear reservation of self-defence testifies that the right of self-defence continues to exist. Under Article 51 the right of self-defence may be exercised until the Security Council

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[330] Hans Kelsen, *Recent Trends in the Law of the United Nations*, (London: Stevens, 1961), p. 913-14.
[331] Report of the Rapporteur of Committee I/1 to Commission I, in (Documents of the United Nations Conference on International Organisation, San Francisco, Vol. 6), p. 459.
[332] Kelsen, p. 914.
[333] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, (London: Stevens, 1951), p. 792.
[334] Brownlie, p. 273.

has taken the measures determined in Article 51.[335] Thus, the main purpose of Article 51 is to remove possible doubts as to the impact of the Security Council's powers.[336] Article 51 enlarged the right of self-defence by explicitly authorising collective as well as individual self-defence.[337] Therefore, whether Article 51 extended the right of self-defence in one respect and limited it in another [338], or Article 51 reflected customary law as it had evolved and existed as of 1945[339], the right of self-defence was developed under the Charter in three areas: (1) it was extended to include collective as well as individual self-defence ; (2) to avoid any abuse of this right as an excuse for illegal use of force, it was limited to cases where an "armed attack" occurs against a member of the United Nations ; (3) it was regarded as a temporary right to be used only as the need arose "until the Security Council has taken the measures necessary to maintain international peace and security." The important issue here, which needs elaboration, is what is meant by the term *armed attack*. The term "armed attack" did not appear in neither the Covenant of the League of Nations, or the Pact of Paris. It was aggression that had been considered the opposite of self-defence and that the Draft Treaty of Mutual Assistance and the Geneva Protocol had attempted to define. The designers of the Charter deliberately decided not to attempt to define aggression, but to leave to the Security Council to decide in each case whether a particular act constitutes a threat to the peace, a breach of the peace, or an act of aggression. It was reported at the San Francisco Conference that:

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[335] Derek W Bowett, "Collective Self-Defence Under the Charter of the United Nations," (*The British Year Book of International* Law 32, 1955-56), p. 130-31.
[336] Humphrey Waldock and James L. Brierly, *The Law of Nations*, 6nd ed, (Oxford: Oxford University Press, 1963), p. 417-19.
[337] Lauterpacht and Oppenheim, *International law: A Treatise*, p. 155.
[338] Kelsen, *The Law of the United Nations*, p. 792.
[339] Brownlie, p. 274.

> "It ... became clear ... that a preliminary definition of aggression went beyond the possibilities of this Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. ... The list of such cases being necessarily incomplete, the Council would have a tendency to consider of less importance the acts not mentioned therein; these omissions would encourage the aggressor to distort the definition or might delay action by the Council. Furthermore, in the other cases listed, automatic action by the Council might bring about a premature application of enforcement measures. The Committee therefore decided ... to leave to the Council the entire decision as to what constitutes a threat to peace, a breach of peace, or an act of aggression."[340]

Moreover, under Article 39, the Security Council does not even have to determine the presence of aggression. To decide that there exists a threat to the peace or a breach of the peace is enough. Nor was there any definition of the expression "armed attack" in the files of San Francisco, because the expression was not regarded as ambiguous.[341] Many believe that for the right of self-defence to be invoked under Article 51, an attack should be so serious as to threaten the integrity of the attacked state.[342] Others, however, contend that "a single rifle shot ... fired by an armed soldier across the border" suffices.[343] Still, the phrase "armed attack" opens the door to the question whether Article 51 precluded the exercise of self-defence against illegal use of force which fell short of an armed attack and also whether Article 51 precluded the exercise of self-defence against a threat to use force.[344]

To answer these questions is difficult, because no real answers can be found in the drafting history of Article 51. The Americans at San Francisco discussed what could be considered "attack", but it seems that the idea was ambiguous.[345] It was indicated that the right of self-defence "is an inherent right and is not restricted to the case of a direct

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[340] Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B in (*Documents of the United Nations Conference on International Organisation*, Vol. 12), p. 502, 505. See also Leland. Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents*, p. 178.
[341] Brownlie, p. 278.
[342] Josef Mrazek, "Prohibition of the Use and Threat of Force: Self-Defence and Self-Help In International Law," (*Canadian Yearbook of International Law* 27, 1989), p. 109.
[343] Dinstein, p. 182.
[344] Waldock, p. 496-97.
[345] Foreign Relations of the United States (1945), Vol. 4, p. 670.

attack" and that the "concept is much broader"[346]. A major question concerned the distinction between an "attack" and an "armed attack", but no conclusion was reached.[347] Ultimately, the inclination was to focus solely on "armed attack". However, since armed attack was not defined, what constituted an armed attack would be determined by the states involved in the process of self-defence up to the point where the Security Council takes the measures necessary to restore peace and security. At this point, "the competence to interpret the term "armed attack" and to ascertain whether an "armed attack" exists in a concrete case, is transferred to the Council."[348] An important question is whether an imminent threat is enough to create an immediate right to recourse to force in self-defence. Generally, Article 51 limits the right of self-defence to the actual occurrence of an "armed attack" by one state against another. This suggests that the wording "if an armed attack occurs" is intended to mean "after an armed attack occurred."[349]

A further implication would be that the range of self-defence under Article 51 was different from that of the customary right of self-defence.[350] According to Judge Schwebel, there are two possible interpretations of Article 51. One is that Article 51 prevents anticipatory self-defence. This view is based on the arguments that: (a) the ordinary meaning of the text of Article 51 indicates so; (b) the discussion at San Francisco assumed that any permission for the use of force would be exceptional, and that exception should be narrowly construed; (c) Article 51 to was intended restrict and did restrict the of self-defence enjoyed by states under customary international law; (d)

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[346] Ibid., p. 667.
[347] Ibid., p. 678.
[348] Kelsen, p. 792. The International Court of Justice has interpreted the phrase "armed attack" and made judgement on whether "armed attack" available or not. For more information see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States, Judgement of 27 June 1986, Merits), 1986 ICJ Reports 14, p. 102-4, paragraphs, 193-95; p. 110, paragraph, 211; p. 120, paragraph, 232; p. 127, paragraph, 249.
[349] Kelsen, *Recent Trends*, p. 914-15.

and as a result the use of force in Article 51 should be interpreted in an limited way. The second interpretation is that Article 51 does not ban anticipatory self-defence because: a) it was accepted in customary international law; (b) the purpose of Article 51 was not to restrict the right of self-defence but to ensure that regional organisations could act in self-defence under the UN Charter.[351] It is important to mention that the final judgement on whether an armed attack under Article 51 has taken place will be made by the state concerned, which will have to prove the gravity and imminence of such an attack in order to justify an action of self-defence before the Security Council.

Armed Attack and Aggression

The Covenant of the League of Nations referred to war and external aggression; it did not use the terms "use of force" or "armed attack". Aggression was considered as the act which triggered the right of self-defence. Although continued efforts to define aggression were made after the foundation of the League of Nations, they were unsuccessful.[352] Article 10 of the Covenant of the League of Nations was composed to help to determine the aggressor, which mean, any act of force, or threat of using force, against the territorial integrity or the existing political independence of any of the Members of the League, is an illegal act of aggression, which the Members had agreed not to commit. Also, it is the duty of the Council to determine upon the means by which this aggression can be prevented.[353] Article 11, considered war that no more had a

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[350] Brownlie, p. 276.
[351] Stephen M. Schwebel, "Aggression, Intervention and Self-Defence in Modern International Law," (*Hague Recueil* 136, 1972-II), p. 479-81.
[352] For more information see Quincy Wright, "The Prevention of Aggression," (*American Journal of International Law* 50, 1956), p. 514, 519-22. See also Brownlie, p. 351-55.
[353] Bengt Broms, "Definition of Aggression," (*Hague Recueil* 154, 1974) , p. 305-307.

private aspect, but it is a matter of concern to the international community.[354] Article 11 announced that "any war or threat of war" to be a matter of concern to the whole League which required the League to take effective action to safeguard the peace of nations.[355] In Article 12 under "Disputes to be Submitted for Settlement" the Members of the League agreed to submit any dispute that might arise between them to arbitral jurisdiction and judicial settlement or to the inquiry of the Council. War in no case to permission to until three months had gone by after the arbitral or judicial decision, or after the report of the Council.[356] Also, under this Article recourse to war is not forbidden but made dependent on failure of some procedures of peaceful settlement. Here, it is clear that the Covenant depended on the supposition that the effect of time on the disputing parties would help to defuse the tension.[357] In Article 13 the Members of the League agreed to submit to arbitration or judicial settlement any conflict arising between them, which could not be satisfactory settled by diplomacy.[358] In this particular, the decision of the arbitrator is obligatory and the dispute cannot be settled by resorting to war against a Member state which has complied with the arbitral decision.[359] Article 15 demanded an obligation on the Members states to submit disputes, not decided by arbitration in accordance with Article 13, to the Council of the League of Nations for consideration and examination.[360] Having a communication with the parties and received their statements about the case, "the Council shall endeavour to effect a settlement of the dispute".[361] But, if the Council reached a end about the case under

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[354] Brownlie, p. 57.
[355] Article 11 (1) of the Covenant of the League of Nations.
[356] Ibid, Article 12 (1).
[357] John Fischer Williams, *Some Aspects of the Covenant of the League of Nations*, (London: Oxford University Press, 1934), p. 137-8.
[358] Article 13 (1) of the Covenant of the League of Nations.
[359] Ibid, Article 13 (4).
[360] Ibid, Article 15 (1).
[361] Ibid, Article 15 (2-3).

investigation, which is accepted unanimously by the Members,[362] then by virtue of Article 15 (6), war cannot be waged against the party complying with the recommendation of the report.[363] But, when the Council failed to arrive at a harmonious report, " the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice".[364] The problem here, that this paragraph, in its reference to "right and justice" which is unclear and vague, include an express reservation of freedom of action for Member states[365], create a gap in the Covenant whereby any war, however aggressive, could be resorted to within the limitations of legality included in paragraph 7 of Article 15.

As a result the Covenant of the League is command by the idea that war between its Members should not be regarded as prohibited except in definite cases. War was prohibited:

(1) before the submission of dispute to arbitral jurisdiction and judicial settlement or to the examination of the Council (Article 12 (1)).

(2) until three months after an arbitral award or judicial decision or report by the Council (Article 12 (1)).

(3) against a Member of the League who complies with an ward or judicial decision (Article 13 (4)).

(4) with any party to a dispute that complies with the recommendations of a unanimous report by the Council (Article 15 (6)). But, on the other hand, war was not prohibited:

(1) if the procedures and delays required by Article 12 had been followed;

(2) if the Council had failed to reach a unanimous report under Article 15;

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362 Ibid, Article 15 (6).

363 Here, the Council arbitrates only as a mediator. The parties have the freedom to accept or refuse the report.

364 Article 15 (7) of the Covenant of the League of Nations.

365 See Brownlie, p. 61.

(3) and if war were waged against a state which had accepted the unanimous report of the Council.

In implementing Article 8 of the Covenant, which was concerned with the declining of armaments, it was conceived among the various technical bodies of the League that any effort to attain disarmament should be combined with a system of guarantee and substantial protection against aggression.[366] Therefore, on September 27, 1922, the Third Assembly of the League of Nations proposed the creation of a General Treaty of Mutual Guarantee.[367] The Temporary Mixed Commission for the Reduction of Armaments, established by the League's Council on February 25, 1921, was assigned the task of preparing such a treaty. In relation with the Assembly's proposal for the creation of a Treaty of Mutual Guarantee, the Permanent Advisory Commission, which met in Geneva from April 16 to 23, 1923, submitted a report including opinions on the definition of aggression in the proposed treaty.[368] The Commission in its report illustrated that "the difficulties inherent in any attempt to define the expression 'cases of aggression'", and also the "doubt as to the possibility of accurately defining this expression a *priori* in a treaty, from the military point of view, especially as the question is often invested with a political character".[369] The report made clear that the definition of aggression as the traditional mobilisation of armed forces or the violation of a frontier, had lost its value with the new methods of warfare.[370]

However, under "Signs which Betoken an Impeding Aggression", the Commission's report stated:

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[366] See United Nations, War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the Laws of War*, (London: H. M. Stationary Office, 1948), p. 54-5.
[367] See Resolution XIV of the Third Assembly, *League of Nations Official Journal*, Assembly Resolutions, (Spec. Suppl. N. 9, 1922) p. 27; See also, Ferencz, (I) p. 70.
[368] *League of Nation Official Journal.*, (Spec. Suppl., no. 16, 1923), p. 114-124; See also, Ferencz, (I), p. 70-6.
[369] Ibid, p. 117.
[370] Ibid, p. 116.

But, even supposing that we have defined the circumstances which constitute aggression, the existence of a case of aggression must be definitely established. It may be taken that the signs would appear in the following order:

(1) Organisation on paper of industrial mobilisation
(2) Actual organisation of industrial mobilisation.
(3) Collection of stocks of raw materials.
(4) Setting on foot of war industries.
(5) Preparation for military mobilisation.
(6) Actual military mobilisation.
(7) Hostilities.[371]

On June 8, 1923, the Commission completed its work on the Treaty of Mutual Assistance. The treaty, although it, did not include any definition of aggression, gave the Council of the League the power to decide the existence of "a menace of aggression".[372] Under Article I of the Treaty of Mutual Assistance, aggressive war was declared as an "international crime", which none of the parties to the treaty should be guilty of committing.[373] In describing aggressive war, this Article stated that a war would not be a war of aggression if it were undertaken by a state which had accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice or by arbitration. Similarly, a war waged against a state refusing to comply with such recommendation or judgement was not a war of aggression. A provision was also attached that the party resorting to war should not have the intention to violate either the political independence or the territorial integrity of its rival. Otherwise, it would considered a war of aggression.[374]

Also, Article II asked the parties to give every assistance and help to any party to the treaty which it is under attack or an action of aggression.[375] "The Commentary on the Definition of a Case of Aggression" drawn up by the "Special Committee of the

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[371] Ibid, p. 177.
[372] See Article III of the *Treaty of Mutual Assistance*.
[373] Ibid, Article I (1).
[374] Ibid, Article I (2).
[375] Article II reads that: "The High Contracting Parties, jointly and severally, undertake to furnish assistance, in accordance with the provisions of the Present Treaty, to any one of their number should the

Temporary Mixed Commission", was to some degree critical of the definition of aggression.[376] The report provided similar views and remarks to those of the Permanent Advisory Commission. It indicated that "it is still conceivable that in many cases the invasion of a territory constitutes an act of aggression and, in any case, it is important to determine which state had violated the frontier".[377] Recognising the difficulties of deciding in the new methods of warfare, which of the conflicting parties had first used force or crossed a border, the report emphasised that:

> "In conclusion it may be pointed out that in the case of a surprise attack it would be relatively easy to decide on the aggressor, but that in the general case, where aggression is preceded by a period of political tension and general mobilisation, the determination of the aggressor and the moment at which aggression occurred would prove very difficult".[378]

The report went on to reach the finding that:

> "It is clear, therefore, that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised. It is therefore clearly necessary to leave the Council complete discretion in the matter....".

A new effort was made to develop the concept of aggression by the adoption of the Protocol for the Pacific Settlement of International Disputes by the League Assembly on October 2, 1924.[379] This Protocol, mainly, concerned the outlawing of aggressive warfare through the development of a system of pacific settlement of disputes, guarantees for the security of states and disarmament.[380] Article 10 of the Protocol dealt with aggression and a standard to decide the aggressor was provided. The Article indicated that "every state which resorts to war in violation of the undertakings

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latter be the object of a war of aggression, provided that it has conformed to the provisions of the present Treaty regarding the reduction or limitation of armaments".

[376] *League of Nations Official Journal*, (Spec. Suppl. No. 16, 1923), p. 183-5.

[377] Ibid, p. 183.

[378] Ibid, p. 185.

[379] This Protocol also known as Geneva Protocol. See Hunter David Miller, *The Geneva Protocol*, (New York: Macmillan, 1929); See also, James W. Garner, "The Geneva Protocol for the Pacific Settlement of International Disputes," (*American Journal of International Law* 19, 1925), p. 123.

[380] See Ferencz (I), p. 132-7.

contained in the Covenant or in the present Protocol is an aggressor"[381] Also, the Article provided that any "violation of the rules laid down for a demilitarised zone shall be held equivalent to resort to war".[382] The Protocol stated, that in case beginning hostilities, any state would be automatically considered to be an aggressor with a special decision from the Council, unless a majority decision to the contrary was taken by the Council. [383] Here, the Council would consider the cases when hostilities had begun and a state refused to submit the dispute to pacific settlement or refused to accept a judicial or arbitral decision or, the Council's majority recommendation, or refused or violated provisional measures enjoined by the Council.[384] But , if the Council could not determine the aggressor, it was bound to enjoin an armistice upon the belligerents. If a belligerent refused to accept the armistice or violated its conditions, it was to be considered the aggressor.[385] In general, the Protocol did not provide for obligatory assistance, but its articles on mutual assistance were more specific than those available in the Covenant.

In 1925, an important development was reached by the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy at Locarno on October 16, 1925.[386] The aim of this treaty was the maintenance and guarantee of territorial status quo resulting from the frontiers between Germany and Belgium, and Germany and France, which were fixed in the Treaty of Versailles.[387] The states members in the treaty agreed to refrain from aggressive acts and not to resort to war against each other. Under Article 2, "Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each

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[381] Article 10 (1) from the *Protocol for the Pacific Settlement of International Disputes.*
[382] Ibid.
[383] Article 10 (2).
[384] Ibid.
[385] Article 10 (4).

other".[388] Use of force could only be exercised in the following cases: (1) The exercise of the right of self-defence. (2) Action in pursuance of Article 16 of the Covenant; (3) Action as a result of a decision taken by the Assembly or the Council of the League of Nations or in pursuance of Article 15 (7) of the Covenant, directed against a state which was the first to attack.[389] In the Locarno Agreements, not much attention was given to the question of defining aggression.

In 1928, the Pact of Paris went much further than the Covenant of the League of Nations. Whereas the former had prohibited all wars of aggression, and distinguished only between legal and illegal wars, the Pact completely outlawed war. However, the matter of defining aggression was not much advanced by the Pact of Paris.[390]

At the Disarmament Conference in 1933, an important contribution was made by the Soviet Union in connection with the issue of defending aggression . The Soviet representative to the Conference, Mr. Litvinoff, referring to the French Plan for General Disarmament and the Organisation of Peace,[391] stated that the latter proposal in its reference to international sanctions gave rise to the questions: "How is the aggressor to be determined, and who is to determine the aggressor?"[392] Also, Litvinoff expressed his wishes to have aggression and war defined and aggression distinguished from defence.[393] Later, he presented to the General Commission of the Disarmament Conference a comprehensive draft proposal for the definition of aggression. The Soviet proposal reads:

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[386] See (*American Journal of International Law* 20, 1926), Suppl., p. 21.
[387] Article 1.
[388] Article 2 (1).
[389] Article 2 (2) sub-paragraphs (1), (2), (3).
[390] See in general Bengt Broms, "The Definintion of Aggression", (*Hague Recueil* 154, 1977), p. 308-309.
[391] For more information about the French proposal see Benjain B Ferencz, *Defining International Aggression: The Search for World Peace: A Documentary History and Analysis*, Vol. 1, (New York: Oceana Publications, 1975), p. 28.
[392] Ibid, p. 201.
[393] Ibid.

"1. The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions:

(a) Declaration of war against another State;

(b) The invasion by its armed forces of the territory of another State without declaration of war;

(c) Bombarding the territory of another State by its land, naval, or air forces or knowingly attacking the naval or air forces of another State;

(d) The landing in, or introduction within the frontiers of another State of land, naval or air forces without the permission of the government of such a State, or the infringement of the condition of such permission, particularly as regards the duration of sojourn or extension of area;

(e) The establishment of a naval blockade of the coast or ports of another State.

2. No consideration whatsoever of a political, strategical, or economic nature, including the desire to exploit natural riches or to obtain any sort advantages or privileges on the territory of another State, no references to considerable capital investments or other special interests in a given State, or to the alleged absence of certain attributes of State organisation in the case of a given country, shall be accepted as justification of aggression as defined in Clause 1.

In particular, justification for attack cannot be based upon:

A. The internal situation in a given State, as for instance:

(a) Political, economic or cultural backwardness of a given country;

(b) Alleged maladministration;

(c) Possible danger to life or property of foreign residents;

(d) Revolutionary or counter-revolutionary movements, civil war, disorders or strikes;

(e) The establishment or maintenance in any State of any political, economic or social order.

B. Any acts, laws or regulations of a given State, as for instance:

(a) The infringement of international agreements;

(b) The infringement of commercial, concessional or other economic rights or interests of a given State or its citizens;

(c) The rupture of diplomatic or economic relations;

(d) Economic or financial boycott;

(e) Repudiation of debts;

(f) Non-admission or limitation of immigration, or restriction of rights or privileges of foreign residents;

(g) The infringement of privileges of official representatives of other States;

(h) The refusal to allow armed forces transit to the territory of third State;

(I) Religious or anti-religious measures;

(j) Frontier incidents."[394]

It is easily recognised that the Soviet draft dealt with only one form of aggression, namely, armed aggression. During the consideration of the proposal in the political commission, various views were expressed. Whereas the representatives of China, Norway, France, Czechoslovakia and Poland, and many other states, supported the Soviet plan, at the same time, other states different views and attitudes.[395] The representative of the United Kingdom, Mr Eden, maintained that "the possibility of

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[394] For the text of the Soviet draft proposal for the definition of aggression see (Ferencz, Vol. 1), p. 202-204.

defining the aggressor had been fully discussed in the past, and the conclusion had always been that it was impossible to lay down any such rigid criteria of universal application, since it was impossible to foretell how they would work in particular sets of circumstances, and there was serious risk that their application might result, ... in the aggressee being pronounced to be the aggressor."[396] Also, Mr Westman, the representative of Sweden, announced that his government's desire "to confer on the Council more extensive powers with regard to all decisions to be taken with a view to disclosing the aggressor State and in order to place world public opinion in a position to make its influence felt."[397] The outcome was that the Soviet proposal never gained general acceptance.[398] A different draft was espoused in the Convention for the definition of Aggression completed between the Soviet Union, Afghanistan, Estonia, Latvia, Iran, Poland, Romania and Turkey on July 5, 1933.[399] Under Article II of the Convention "the aggressor in an international conflict shall, subject to the agreements in force between the Parties to the dispute, be considered to be 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, without a declaration of war, on the territory, vessels or aircraft of another State;

(4) Naval block of the coasts or ports of another State;

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[395] For more information see Document 10 (Eighth Meeting), the "General Discussion" on the draft declaration on the definition of Aggression proposed by the Soviet Union, Ferncz, Vol. 1, p. 205 at 49-51; 55.
[396] Ibid, p. 53.
[397] Ibid, p. 54.
[398] See Broms, "The Definition of Aggression," p. 309-10.
[399] See the text in Ferencz (Document 14), p. 255.

(5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, not withstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection."

On the other hand, Article III emphasised that "no political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article II." An annex relating to Article III was attached to the Convention. It was divided into two parts, each provided with grounds which, *inter alia*, could not be used as justification of an act of aggression within the meaning of Article III. In the first part (A), in regard to "the internal condition of a State", it named as examples, "its political, economic or social structure; alleged defects in its administration; disturbances due to strike, revolutions, counter-revolutions or civil war." In the second part (B), in regard to "the international conduct of a State", it named as examples, "the violation or threatened violation of the material or moral rights or interests of foreign State or its nationals; the rupture of diplomatic or economic relation; economic or financial boycotts; disputes relating to economic, financial or other obligations towards foreign States; frontier incidents not forming any these cases of aggression specified in Article." However, the High Contracting Parties determined "that the present Convention can never legitimate any violations of international law that may be implied in the circumstances comprised in the above list." The enumerative principle was adopted by listing five cases classified as aggressive. The question of deciding who the aggressor is, was to be answered according to the priority principle, that is to say, the first state to commit any of the five acts listed in Article II of the present Convention.[400]

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[400] Broms, p. 309-11.

In the treaty between Finland and the Soviet Union on January 21, 1932,[401] aggression was defined in Article I as, "any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party ..., even if it is committed without a declaration of war and avoids warlike manifestations."[402] The Treaty of Non-Aggression between Poland and the Soviet Union, signed in Moscow on July 25, 1932,[403] contained a general definition of aggression in Article I. The Article confirmed that: "The two Contracting Parties, recording the fact that they have renounced war as an instrument of national policy in their mutual relations, reciprocally undertake to refrain from taking any aggressive action against or invading the territory of the other Party, either alone or in conjunction with other Powers."[404] Moreover, Article I confirmed that any act of violence aimed at attacking the integrity and inviolability of the territory or the political independence of the State, committed by one contracting Party against another, would be regarded as contrary to the undertakings contained in the present article, even if the acts in question were committed without declaration of war and avoided all warlike manifestations as far as possible.[405]

At the San Francisco Conference, the work in the role of deciding the standard of aggression was refreshed. The rise of the phrase "acts of aggression" in Dumbarton Oaks Proposals,[406] as an act that the proposed organisation primarily had to prevent and put down, and also the wide power which was given to the Security Council in this respect, stimulated many states to inquire what expressly was meant by the "acts of aggression"? When the issue was considered by the Third Committee of the Third

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[401] See 157 L. N. T. S. (1935), p. 395. See also the Treaty of Non-Aggression between Latvia and the Soviet Union, signed on February 1932, (148 L. N. T. S., p. 122). And the Treaty of Non-Aggression between Estonia and the Soviet Union, signed on May 4, 1932 (131 L. N. T. S., p. 304).
[402] See also Broms, p. 313.
[403] See 136 L. N. T. S., p. 38.
[404] Article 1 (1).
[405] Article 1 (2).

Commission, many states defended the idea of listing a definition of aggression in the Charter's articles; whilst other delegations took an influential position by submitting definitions as examples to be used, if agreed upon. Other delegations, however, were opposed to any such definition.[407] Czechoslovakia was in favour of a clarification of what constitutes an act of aggression within the Charter's provisions.[408] Also, Czechoslovakia considered the complete freedom given to the Security Council to determine the existence of acts of aggression and to decide upon measures, is desirable to enable the Council to adapt its action to any situation, it is still very general, vague and imprecise. Also, the Czechoslovak delegation wondered "whether this absence of any rule of conduct will still be of advantage when the case seems absolutely clear, and when only application of previously defined rules would seem to guarantee action sufficiently swift to prevent an unscrupulous aggressor from creating, in his own favour, a situation the redress of which may prove very lengthy and very difficult."[409]

Czechoslovak went further, and requested that a definition of what constitutes an act of aggression should be reached as a guidance to the council in making its decision. In this connection they referred to Article II of the Convention for the Definition of Aggression of 1933 as a model which might help in this respect.[410] In general, however, the Czechoslovak proposal did not add anything new to the issue of defining aggression than was known from the League efforts.

Beside the Czechoslovak efforts to propose a definition of aggression, there were also efforts from Bolivia and the Philippines in this respect. The main concern for Bolivia was to insert a definition of aggression in the Charter's provisions. A draft definition of

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[406] See the text of the Dumbarton Oaks Proposals for a General Organisation, see Ferencz, Vol. 1, p. 285-306.
[407] See, Broms, p. 315-16.
[408] See the Observation of the Czechoslovak Government on the Dumbarton Oaks Proposals (The United Nations Conference on International Organisation, Document 17 (b)) in Ferencz, Vol. 1, p. 307-12.

aggression was proposed, which was motivated by the idea, that the security of the world is founded on the principle that aggression is a policy that contradicts the good will, which states should have after the tragedies of World War I and II.[411] A consideration of the Bolivian proposal for aggression, makes clear, that not only was a definition of aggression submitted, but also an immediate collective action against the aggressor state was required.[412]

The Philippines proposal for defining aggression,[413] suggested that any nation should be considered the aggressor, when it committed any of these actions:

> (1) To declare war against another nation;
> (2) To invade or attack, with or without declaration of war, the territory, public vessel, or public aircraft of another nation;
> (3) To subject another nation to a naval, land or air blockade;
> (4) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation.[414]

That proposal did not require a collective action to be taken immediately against the aggressor. The new development was that, an important addition was included for the first time in a definition of what constitutes an act of aggression, that is, the interference with the internal affairs of another nation by supplying arms, ammunition, money or

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[409] Ibid.
[410] Ibid.
[411] See the Proposal of the Delegation of The Republic of Bolivia for the Organisation of A System of Peace and Security (The United Nations Conference on International Organisation, Document 17 (c)), in Ferencz, Vol. 1, p. 313-21.
[412] From the Bolivian perspective, the aggressor state was that which committed any of these acts against another state:
(a) Invasion of another state's territory by armed forces;
(b) Declaration of war;
(c) Attack by land, sea, or air forces, with or without declaration of war, on another State's territory, shipping, or conflict;
(d) Support given to armed bands for the purpose of invasion;
(e) Intervention in another State's internal or foreign affairs;
(f) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement;
(g) Refusal to comply with a judicial decision lawfully pronounced by an International Court. See Ferencz, Vol. 1, p. 319.
[413] See the Proposed Amendments to The Dumbarton Oaks Proposals Submitted By The Philippine Delegation (The United Nations Conference on International Organisation, Document 17 (d)) in Ferencz, p. 322-27.

other forms of aid, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation. It is important to mention, however, the Philippines proposal did not clarify whether the activities of these agencies included ideological or economic interference as a mode of aggression.

As a result of these debates, it was decided not to define aggression in the Charter and to adopt the text of the Dumbarton Oaks Proposals, which does not specify acts of aggression, but gives the Security Council total discretion in determining what constitutes an act of aggression, when it has taken place, and what measures to be taken for its aggression.[415] After all, the question appear here, how the Articles of the United Nations Charter dealing with "the acts of aggression"?

Article 1 (1) of the United Nations Charter states that it is the purpose of the organisation "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, ..." Thus, Article 1, suggests that suppression of acts of aggression is the chief role of the new international organisation and affirms the principle of effective collective measures in the fulfilment of this aim.[416] Article 2(4) maintained that: "All members shall refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence ... ." Here, a question arises concerning the "threat or use of force," referred to in Article 2 (4) and whether it refers only to armed force, or to both armed and non-armed force, such as political or economic demands. There was a tendency to consider the term "force" in Article 2 (4) to be interpreted to mean both

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[414] Ibid, p. 326.
[415] See Broms, "The Definition of Aggression," p. 315-18.
[416] For more information see Goodrich and Hambro, p. 22-3; 25-9.

armed and non-armed use of force.[417] But, others have interpreted Article 2 (4) as only prohibiting the threat or use of military or armed force in international relations.[418] In support of this view, Waldock has indicated that:

> "... the word 'force' in Article 2 (4) undoubtedly covers only armed or physical force. This was the meaning given to it at San Francisco and the Preamble to the Charter states the aim of the United Nations to be "to ensure by the acceptance of principles, and the institution of methods, that armed force shall not be used save in common interest". There seems to be general agreement on this point."[419]

That restricted reading of Article 2 (4) is, however is supported by the practice of the United Nations,[420] although views on the scope of the prohibition imposed by Article 2 (4) upon member states, the views different between writers. For example, Stone states that what is prohibited by Article 2 (4) "is not use of force as such, but as used against the 'territorial integrity or political independence of any state', or 'in any other manner inconsistent with the Purposes of the United Nations'".[421] He suggests that a "threat or use of force employed consistently with *these* purposes, and not directed against the 'territorial integrity or political independence of any state', may be commendable rather than necessarily forbidden by the Charter."[422] Stone goes on to conclude that "there is, at any rate, no clear legal warrant for reading the Charter and the *travaux preparatoires*, as is sometimes done, as if Article 2 (4) excluded all resort to force except in self-defence or under the authority of the United Nations, thus excluding these other possibilities."[423]

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[417] See Hans Kelsen, "General International Law and the Law of the United Nations," In: *The United Nations*: *Ten Years Legal Progress* (The Hague, 1956), p. 4-6.
[418] Goodrich and Hambro, p. 49; Bowett, *Self-defence in International Law,* p. 148. See also, D. J. Harris, *Cases and Materials on International Law*, p. 862-66.
[419] Waldock, "The Regulation of the Use of Force by Individual States in International Law," p. 492.
[420] Goodrich and Hambro, p. 48-50. Also, it is worth mentioning here, that during the San Francisco Conference, the Brazilian delegation demanded that Article 2 (4) should be adjusted to read as follows: "... from the threat or use of force and from the threat or use of economic measures in any manner inconsistent ... ." But this proposal proved fruitless. See for more information, 6 United Nations Conference of International Organisation Docs., p. 334-559.
[421] Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, (London: Stevens, 1958), p. 43.
[422] Ibid.
[423] Ibid.

Oppenheim treated the question of interpretation of Article 2 (4) in a different manner. In his view, that the obligation not to resort to force or threat of force in international relations, recommended by Article 2 (4), should be taken as meaning that states shall refrain from such action against each other, that the article does not apply where the state uses force for the suppression of a revolt or a civil strife that arises within its own territory.[424] He also argued that this obligation, is not limited by the words "against the territorial integrity or political independence of any state."[425] Hence, a state employing force against another state, even if without seeking territorial gains, violates the Charter and its peace enforcement provisions.[426] Consequently, "the prohibition of paragraph 4 is absolute except with regard to the use of force in fulfilment of the obligations to give effect to the Charter or in pursuance of action in self-defence consistently with the provisions of Article 51 of the Charter ... ."[427]

Article 39 of the Charter offered an alternative approach to defining aggression, as it was stated that:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

By giving the Security Council the power to determine acts of aggression and to make decisions regarding the measures to be taken in such cases, the article seems to render the system of security to be more effective than that of the Covenant, especially when Article 39 is viewed together with Article 25 of the Charter, which requested state members to "accept and carry out the decisions of the Security Council ... ." But, the problem in the Security Council's task is, that in some cases, when the Council's action under Article 39 is undermined by the right of veto given to the Permanent Members of

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[424] See Lassa F. L. Oppenheim, *International Law*, Vol. 2 (London: Longman, 1952), p. 153-55.
[425] Ibid.

the Security Council under Article 27 of the Charter. This suggests, that it may be useless for the Security Council to determine the aggressor under Article 39, if there is no agreement between Permanent Members.[428]

Article 51 of the Charter maintained 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, ..." The right of self-defence included in Article 51 is usually discussed in connection with aggression. Although Article 51 does not include any reference to aggression, the words "armed attack" are used to indicate armed aggression.[429] However, since the concept of aggression was developing during the Second World War to include forms other than armed force, especially, economic and ideological aggression, it seems that the expression "armed attack" has been used intentionally in drafting Article 51 to limit the scope of self-defence to armed aggression. Thus, according to the wording of Article 51 the right of self-defence is not to be used unless an act of aggression in the form of an armed attack has occurred,[430] and allegations of economic or ideological aggression cannot be used as a plea or excuse for action in self-defence.[431] On the other hand, considering the fact that the determination of an act of armed aggression, under Article 51, belongs in the first instance to the attacked state until the Security Council has taken the measures necessary to maintain international peace and security under Chapter VII of the Charter, the drafters of the Charter may have preferred to avoid the use of the term aggression, which caused a hot debate at San Francisco in connection with its meaning, in Article 51. Nevertheless, the expression "armed attack" was no happier than "armed

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[426] Ibid.
[427] Ibid.
[428] Goodrich and Hanbro, p. 342-53.
[429] Broms, p. 326-27; 31.
[430] Waldock, The Regulation of the Use of Force, p. 496-7.

aggression". In connection with the expression "armed attack" a question was raised as to what constitutes an armed attack, and whether its actual occurrence is a precondition to the exercise of the right of self-defence or whether a threat of such an attack is a sufficient excuse for measures of self-defence.

In regard to the characteristic of an "armed attack" , such an attack must be of a serious nature that threatens the inviolability of the attacked state.[432] Therefore, small border incidents do not evoke Article 51, if there is no certain intention of attack.[433] In connection with the questions whether an armed attack is a precondition to action in self-defence or whether an imminent attack may create the use of such a right, there are many views concerning that matter. Some scholars read Article 51 in a restrictive way; an imminent threat of an armed attack is not an adequate excuse for forcible measures of self-defence.[434] Kunz, representing this school of thought, emphasises:

> "*Armed attack* as the only condition of the right of self-defence under Article 51 may, in conceivable circumstances, mean too little. For this right does not exist against any form of aggression which does not constitute 'armed attack'. Secondly this term means something that has taken place. Article 51 prohibits 'preventive war'. The 'threat of aggression' does not justify self-defence under Article 51. Now in municipal law self-defence is justified only against an actual danger, but it is sufficient that the danger is *imminent*. The 'imminent' armed attack does not suffice under Article 51.'"[435]

On other hand, many writers understand the right of self-defence in Article 51 to have a wide scope; Waldock supporting that wide interpretation of Article 51, confirmed that:

> "The Charter prohibits the use of force except in self-defence. The Charter obliges Members to submit to the Council or Assembly any dispute dangerous to peace which they cannot settle. Members have therefore an imperative duty to invoke the jurisdiction of the United Nations whenever a grave menace to their security develops carrying the probability of armed attack. But, if the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow. If an armed attack

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[431] See Q. Wright, "United States Intervention in the Lebanon," (*American Journal of International Law* 53, 1959), p. 124.
[432] Broms, p. 330-31.
[433] See Josef Laurenz Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations," (*American Journal of International Law* 41, 1947), p. 878.
[434] Hans Kelsen, *The Law of The United Nations: A Critical Analysis of Its Fundamental Problems*, (London: Stevens, 1951), p. 797-99.
[435] Kunz, p. 878.

is imminent within the strict doctrine of *Caroline*, then it would seem to bring the case within Article 51. To read Article 51 otherwise is to protect the aggressor's right to the first stroke."[436]

In reality, it is difficult however, to accept that a state should in all cases delay recourse to measures of self-defence until an armed attack has taken place even when the danger of such an attack is present and imminent. Here, the expression 'armed attack', as a condition for exercising the right of self-defence in Article 51, should be interpreted in both ways restrictively and widely. It is restrictively interpreted, to mean only the use of armed force (which means here, that no other kinds of aggression, such as economic, political and ideological aggression will be covered by Article 51). On the other hand, it is important that it should be defined widely enough to include also imminent attacks. These attacks which are "instant, overwhelming, leaving no choice of means, and no moment of deliberation."[437] Hence, if the danger of an armed attack is grave and imminent, the target state would be warranted, by Article 51, in exercising its inherent right of self-defence to prevent such an attack from taking place. [438] Nevertheless, this is a matter to be considered, in the first instance, by the state who finds itself in such a situation and the final judgement will be made by the Security Council. Therefore, when a state resorts to force in face of an anticipated armed attack, it would seem necessary, on its part, to prove the gravity and imminence of such attack in order to justify its action, as one of legitimate self-defence, before the Security Council when the latter determines who was the aggressor and who was the defender.

Under that wide interpretation of the expression "if an armed attack occurs" to include not only an actual attack but also a threat of an imminent attack, it may be observed that the principle of proportionality should be considered by the state resorting to measures

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[436] Waldock, The Regulation of the Use of Force, p. 498.

[437] See R. Y. Jennings, "The Caroline and Mcleod Case," (*American Journal of International Law* 32, 1938), p. 89.

of self-defence against an armed attack. Hence, measures exceeding the proper reaction to the unlawful attack may be considered as additional aggressive measures by the defendant state.[439] Consequently, the occupation of foreign territory, even if it resulted from an act of justifiable self-defence, would constitute by itself an act of armed attack. Attempts to define aggression, however, continued after the adoption of the Charter and 29 years after its foundation the United Nations General Assembly adopted a definition of aggression.[440] Before 1974, discussions on the definition of aggression were concerned with whether to create a general, comprehensive or limited definition, and with the relationship between aggression and armed attack. Many proposals considered that aggression should be defined in terms of an armed attack[441] but the problem with that approach was that it would merely transfer the discussion on the definition of armed attack to the discussion on the definition of aggression. The equation of aggression and armed attack in all instances was also problematic.[442] A second group of proposals defined aggression as illegal use of force, and since the use or threat of force is allowed only in self-defence, this would mean that every other use of force should be considered aggression. The problem with these proposals, is their failure to recognise that not every unlawful use of force is necessarily aggression.[443] Other, more specific proposals, considered aggression as direct or indirect use of force. The final group of proposals covered actions defined as "indirect aggression" including "economic aggression" and "ideological aggression"[444]. However, the broad scope of this approach met with

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[438] Goodrich and Hambro, p. 347.
[439] Brownlie, *International Law and the Use of Force by States*, p. 368.
[440] Definition of Aggression, Res. 3314 (XXIX) of December 14, 1974. For more information see Benjamin B. Ferencz, Vol. 2, p. 15-19.
[441] See the USSR Proposal, UN A/C. 1/ 608; 5 GAOR, Annex 2, Item 72, 1950, p. 4-5.
[442] Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, (London: Stevens, 1958), p. 72-77.
[443] Ibid., p. 73, 94.
[444] Julius Stone, "Hopes and Loopholes in the 1974 Definition of Aggression," (*American Journal of International Law* 71, 1977), p. 224, 230-31.

objections because the insertion of such acts in the definition of Aggression would increase the possibility of use of force as a response to ideological conflict or economic threat, with the claim that such action was legitimate self-defence against aggression.[445] The need to define armed attack independently of aggression was first recognised in 1956, when the Netherlands submitted a proposed definition of armed attack in the light of Article 51.[446] Many states participating in the debate did not view aggression and armed attack as synonymous and were concerned that a broader definition of aggression could be interpreted as expanding the scope of the right of self-defence. Also, a number of states considered armed attack as the most serious kind of aggression.[447]

Other proposals, suggesting a broader scope for the term aggression, specified that self-defence should remain restricted to cases of armed attack. In 1956 the USSR presented a draft definition to the second Special Committee, which concerned armed aggression, indirect aggression, economic and ideological aggression.[448] The Russians maintained that self-defence was limited to armed attack, as the most dangerous type of breach of the peace. In their view, the definition of armed attack was the principal task of the definition of aggression.[449] The Sixth Committee considered cases of aggression which did not justify military action in self-defence and discussed the qualification of armed attack as a special form of aggression. The proposals of Colombia, Ecuador, Mexico and Uruguay restricted the definition of aggression to "direct aggression". In their view, "exercise of the right of individual and collective self-defence recognised by Article 51

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[445] See the Report of the Special Committee on the Question of Defining Aggression, (24 August - 21 September 1953, 9 GAOR, Suppl. No. 11, UN Doc. A/2638), p. 8-10.

[446] Report of the Special Committee on the Question of Defining Aggression, (12 GAOR, Suppl. No. 16, UN Doc. A/3574), p. 24-5.

[447] Schwebel, p. 449-50.

[448] UN Doc. A/AC. 77/ L. 4, Report of the Special Committee on the Question of Defining Aggression, (12 GAOR, Supplement. No. 16, UN Doc. A/3574, Annex II), p. 30-1.

[449] Report of the Special Committee on the Question of Defining Aggression, (12 GAOR, Suppl. No. 16, UN Doc. A/3574), p. 17.

of the Charter, is justified solely in the case of an armed attack (armed aggression).[450] In the Fourth Special Committee, a draft resolution was proposed by thirteen states, which defined aggression as "the use of armed force by a state against another state" unless when in self-defence or under the authority of the Security Council, which would mean that the right of self-defence could only be exercised in case of an armed attack.[451] The result was that the definition of aggression was restricted to the use of armed force.[452] Here, it is important to analyse the definition of Aggression under the General Assembly Resolution (3314) of December 14, 1974.

The General Assembly declared its deep confidence that "the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security."[453] After declaring its gratitude to the Special Committee for its work on the question of defining aggression, the General Assembly requested states "to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations."[454] The Assembly then called the Security Council's attention to the definition of aggression and recommended it to "take account of that definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression."[455] The perambulatory part of the definition included ten paragraphs. It was first stressed that the hard work carried out by the General Assembly towards defining aggression was

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[450] UN Doc. A/AC. 134/L.4 /Rev.1 and Corr. 1, Report of the Special Committee on the Question of Defining Aggression, (23 GAOR, UN Doc. A/ 7185), p. 3-7.
[451] UN Doc. A/AC. 134/ L. 16 and Add. 1 and 2, Report of the Special Committee on the Question of Defining Aggression, (24 GAOR, Suppl. No. 20, UN Doc. A/ 7620), p. 6-8.
[452] Definition of Aggression, (Res. 3314 (XXIX) of December 14, 1974), Article 1. Reprinted in United Nations Resolutions, ed. by Dusan J. Djonovich, (Series I, General Assembly, Vol. XV, 1974-76), P. 392-94.
[453] Ibid, Paragraph 2.
[454] Ibid, Paragraph 2 (3).
[455] Ibid, Paragraph 2 (4).

based on the Charter of the United Nations and its main purposes. In this connection, the text of Article 1 (1) of the Charter, on the purposes of the United Nations, was used. Thus in paragraph 1 of the Preamble it was confirmed that the General Assembly, in adopting a definition, had based itself "on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[456]

The role of the Security Council was laid down in paragraph 2; it was maintained that in pursuant to Article 39 of the Charter, the Security Council "shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[457] It was also emphasised that the states should, according to the United Nations Charter, "settle their international disputes by peaceful means in order not to endanger international peace, security and justice."[458] In paragraph 4, it was highlighted, as usual, that nothing in the definition "shall be interpreted as in any way affecting the provisions of the Charter with respect to the functions and powers of the organs of the United Nations."[459] In the following paragraph, aggression was considered as the most serious and dangerous form of the illegal use of force which has catastrophic consequences; and the need was asserted for a definition of what constitutes aggression at the present stage.[460] In this connection, states were reminded of their crucial duty "not to use armed force to

[456] Ibid, Paragraph 1 of the preamble. See also, Broms, "Definition of Aggression," p. 336.
[457] Paragraph 2 of the preamble. See also, Broms, "Definition of Aggression," p. 336-37.
[458] Paragraph 3 of the preamble. See also, Broms, p. 337.
[459] Paragraph 4 of the preamble. See also, Broms, p. 337-38.
[460] Paragraph 5 of the preamble. See also, Broms, p. 338.

deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity."[461]

Despite the affirmation laid down in paragraph 6, special attention was paid to the territory of the state in the following paragraph. In this paragraph it was emphasised that "the territory of a state shall not be violated by being the object, even temporarily, of military occupation or other measures of force taken by another state in contravention of the Charter, and that it shall not be the object of acquisition by another state resulting from such measures or the threat thereof."[462] It was also declared that the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations," is an essential instrument that should be highly considered in association with the definition of aggression.[463] The value of the definition was laid down in paragraph 9, where it was stated that "the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor,"[464] and it was added that it would "simplify the determination of acts of aggression and the implementation of the rights and lawful interests of, and the rendering of assistance to, the victim."[465] Finally, it was established that, while it was acknowledged that the determination of the aggressor should be considered in the light of the events and circumstances of each particular case, it is nevertheless desirable that the principal elements of the act be formulated as guidance for such determination.[466]

Overall, the Preamble was composed in a way that gives weight to certain basic principles which should be considered in connection with the definition of aggression

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[461] Paragraph 6 of the preamble. See also, Broms, p. 338-39.
[462] Paragraph 7 of the preamble. See also, Broms, p. 339.
[463] Paragraph 8 of the preamble. See also, Broms, p. 339-40.
[464] Paragraph 9 of the preamble. See also, Broms, p. 340.
[465] Paragraph 9 of the preamble. See also, Broms, p. 340.

and its legal effect. First, it was emphasised in the Preamble that the whole enterprise is based on the United Nations Charter and its fundamental and basic purposes and principles laid down in Articles 1 and 2. This would mean in the first place that the definition does not imply any amendment of the Charter's provisions, which was thought about during the work on defining aggression, and was held by some members of the Special Committee and the Assembly's Sixth Committee. In the second place, any interpretation of the provisions of the present definition should be held within the meaning and scope of the Charter of the United Nations. In this connection, three of the purposes of the United Nations and two of its principles were given considerable weight.

The whole work on the definition was grounded on the principal purposes of the United Nations, such as the maintenance of international peace and security by the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, contained in Article 1 (1) of the Charter. To that end, the member states were assumed, in relation with aggression, to behave according to the well-established principles of the United Nations by settling their international disputes by peaceful means, and refraining in their international relations from the threat or use of force. Within the scope of the total and complete prohibition of the threat or use of force provided in Article 2 (4) of the Charter, two particular cases were given special attention with regard to the definition. The first was that armed force should not be used to deprive peoples of their right to self-determination, freedom and independence. The second is the non-violability of the territory of the state through military occupation, even temporarily, or by other measures of force in contravention of the Charter; and that the territory of the state should not be the object of acquisition by another state resulting

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[466] Paragraph 10 of the preamble. See also, Broms, p. 340-341.

from such measures. Second, it was clearly put forward in the Preamble that the authority of the Security Council in determining the aggressor under Article 39 of the Charter was retained unimpaired. That means that, under the present definition, the Security Council is still the only competent organ to have the authority to determine the aggressor in an international conflict and make recommendations or decide upon the appropriate measures which should be taken, in accordance with Articles 41 and 42, to maintain or restore international peace and security. In this regard, the definition does not limit the authority of the Security Council, but it will stand as a helpful and guiding instrument to the latter in its determination of the aggressor.[467] Article 1 defined aggression in general terms as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition." Article 1 of the definition was largely based on Article 2 (4) of the United Nations Charter. The word "threat," however, was deleted in formulating Article 1 of the definition. That would mean that aggression could only exist when an actual armed force was used by a state against another state. Thus, mere provocation or even a declaration of war does not amount to aggression. The article also implies that political, economic, cultural, or ideological forms of pressure or interference which do not involve the use of armed force are not covered by its text and hence do not constitute aggression.

An explanatory note was attached to Article 1 specifying the meaning of the term "State" as used in this article, and in the entire definition as well. First, it was explained that the term "state" "is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations."[468] This statement would make the definition applicable to both members states of the United Nations and to non-member states as

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[467] Ibid. For more discussion see Ferencz, Vol. 2, p. 19-26.

well, whether they are recognised or not by the international community as sovereign states. Within this meaning, Article 1 in particular and the definition in general do not apply to political entities which do not constitute a state in the legal sense of this term. Second, it was explained that the that the term "State" "includes the concept of a 'group of States' where appropriate."[469]

Article 2 was considered the core of the definition. It dealt with the most complicated and sensitive issues faced by the drafters, such as the principle of priority and the aggressive intent. According to the text of this article, "the first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression." A statement, however, was added to the effect that "the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."[470] By this additional statement, the discretionary power of the Security Council was safeguarded and it was provided with flexible rather than rigid authority. The article in this regard maintained the possibility that the Security Council might discharge the state which first used armed force. This part of the article, dealing with the aggressive intent of the attacker, restricted the authority of the Security Council in rebutting the *prima facie* evidence as provided in the first of that article in certain objective limits.

First, the exculpation or discharge of the party which first used armed force should, according to Article 2, be in conformity with the Charter and according to its provisions. Second, the decision of the Security Council, in this regard, should be reached in the

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[468] Article 1 of the definition, Explanatory note (a).
[469] Article 1 of the definition, Explanatory note (b). On Article 1 of the definition, see Ferencz, Vol. 2, p. 27-30.

light of other relevant circumstances refutable to the *prima facie* evidence of aggression, such as the first use of armed force. Third, and as an exceptional case, the Security Council might not consider the state which first used force as an aggressor if it realised that the acts committed or their consequences are not of sufficient gravity to be branded as aggressive. In connection with the first restriction, the reference to the Charter was addressed to the Security Council, which solely according to its discretionary power would examine the case in the light of the Charter's provisions and make its final decision. As to the second restriction, the exculpation of the *prima facie* aggressor should be based on relevant circumstances and sufficient objective evidence to the contrary. In both cases, the Security Council, in order to change presumptions, had to reach another decision which would only differ in character but not in substance. If, however, the Council were unable to reach such a decision, the *prima facie* presumption of aggression would therefore remain applicable.[471] In connection with the third exceptional case, where the Security Council would not consider the act of force committed as aggressive one, certain facts should be taken into account. As a general rule, the only cases in which armed force may be used are those which an explicit authorisation is given by the United Nations. Hence, any use of force contrary to this rule is an act of aggression. Some minor exceptions to this general rule are, nevertheless, conceivable. The use of force, contrary to this rule, which might not amount to aggression in the legal sense of this term, should be of insufficient gravity to meet the criteria of an act of aggression. Examples of these kinds of acts include small frontier incidents, which lack the intention of attack, the attack on another state's military aircraft or warships by honest mistake followed by an apology, or generally the very limited objectives of an attack resulting from a provocation on the side of the attacked

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[470] Ibid, p. 30-31. See also Broms, "Definition of Aggression," p. 344-47.

state. In these cases, the Security Council may decide the *prima facie* evidence of aggression, resulting from application of the first principle of Article 2 of the definition, is not of sufficient gravity, and thus does not constitute an act of aggression but either a breach of the peace or a threat to the peace.[472] In this connection the Security Council should take into account Article 3 of the definition where a number of clear-cut cases of aggression were listed. From the foregoing, it may be said that Article 2 as it was formulated reflected the way in which the Security Council was supposed to carry out its responsibilities in determining the aggressor in an international conflict. As a general rule, as set forth in this article, the first use of force is the most important element in determining the aggressor. However, while the first use of force constitutes an important and essential piece of evidence, it is not the sole element of such a determination. It would conclusively establish aggression unless, in an exceptional case, more concrete evidence to the contrary were proved.[473] In the latter case, the burden of proof lies in the hands of the state that first used force. In this connection, the evidence produced to the contrary should be sufficient and convincing enough to negate the *prima facie* presumption of aggression.[474]

It should also be emphasised that in all cases in which force has been used, the Security Council should determine the aggressor party.[475] The exceptional cases in which the Security Council may not nominate an aggressor, when armed force was used, should be kept very limited. This would prevent any misuse of the article and would affirm the general and unqualified prohibition of the use of force provided by in the Charter of the United Nations and the present definition. Finally, it may be said that Article 2, which

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[471] Ibid.
[472] For discussion about Article 2 of the definition of Aggression, see Julius Stone, "Hopes and Loopholes in the 1974 Definition of Aggression," p. 228-231.
[473] Broms, p. 344-47.
[474] Ibid.

cautiously balanced between anteriority and aggressive intent, was based on a very delicate compromise and should be read carefully in order to avoid any imperfection in its interpretation. As a two-edged sword, Article 2 might be interpreted as providing the Security Council with flexibility in order to determine the actual aggressor; it might also be used as a loop-hole in the definition if it is to be interpreted as providing the Security Council with the ability to refrain from making any finding. The latter interpretation should be excluded. Since the article refers to the authority of the Security Council, it should not be used by the latter as a means of wavering in its powers, that is, refraining from making a concrete decision on who was the aggressor party, if the definition is to have any legal and practical value.[476]

Article 3 of the definition, listing seven specific cases of the use of armed force, stated that any of these acts, "regardless of a declaration of war, shall subject to, and in accordance with, the provisions of Article 2, qualify as an act of aggression." The first of these acts is "the invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof."[477] In this sub-paragraph, two separate acts of aggression, closely connected to each other, were dealt with. On the one hand, any invasion or attack by the armed force of a state against the territory of another state is an act of aggression. Since such an invasion or attack may or may not result in the occupation of the territory which has been subjected to military operations, these acts by themselves constitute aggression as soon as they take place. On the other hand, any military occupation, even temporary, or any annexation of the territory of one state or part of it by the armed forces of another

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[475] Stone, "Hopes and Loopholes in the Definition of Aggression," p. 229-230.
[476] Broms, p. 344-47. See also Ferencz, Vol. 2, p. 30-33.
[477] Article 3 (a). See also Broms, p. 347-48.

state, were also deemed as acts of aggression. The military occupation of foreign territory may take place as a result of an act of aggression in the form of invasion or attack, or as a result of an act of counter-attack of legitimate defence. To be more specific, the invasion or attack of the territory of one state by the armed forces of another state followed by an immediate and complete withdrawal of these forces from the territory of the victim state is an act of aggression according to the provision of Article 3 (a) of the definition.

If, however, the state which committed the act of aggression by its invasion or attack of another state's territory continued its presence in this territory by military occupation, its latter act would constitute another and additional act of aggression. In this case, the occupation of foreign territory resulting from an act of aggression by the use of armed force is, to adopt a new term, a twofold aggression. But if the occupation of foreign territories was a result of an act of legitimate defence, the defendant state by occupying the territory of the aggressor or part of it, would become an aggressor itself. Under such circumstances the latter state would have committed an act of aggression exceeding defence.[478] In both the above-mentioned cases of aggression by occupation of foreign territory, whether two-fold or by exceeding defence, temporary or permanent, the aggression is continuous until the circumstances in question cease to exist. Continuous aggression would cease to exist only by the withdrawal of the military forces of the aggressor from the occupied territory. Such a withdrawal might take place by one of the following arrangements: (a) the withdrawal from the occupied territory concurrent with a resolution by a competent organ of the United Nations; (b) the conclusion of a peace treaty between the parties concerned for the withdrawal from the occupied territories

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[478] See the Opinion of the United Kingdom at the Twenty-Ninth Session, Supp. No. 19, A/9619, Report of Special Committee, In Ferencz, Vol. 2, p. 31-32.

and the termination of the state of hostilities among them; (c) the recapture of the territory under occupation by the armed forces of the victim state.[479]

If the military occupation (the continuous aggression) took the status of annexation of all or part of the occupied territory, it would become permanent aggression. Such an aggression would cease to exist if any of the above-mentioned arrangements took place, or if the people belonging to these territories, according to the principle of self-determination, agreed and accepted freely and by their own will such a new status. In sum, the invasion or attack by the armed forces of a state of the territory of another state is an act of aggression. The military occupation of a foreign territory, however short-lived, is an act of aggression. If the aggression by invasion or attack resulted in a military occupation of the attacked or invaded territory, such military occupation together with its initiatory act will constitute a twofold aggression. In the twofold aggression, the military occupation of the victim state's territory, in whole or in part, however temporary, is an aggravating circumstance to the first act. If, as a result of a successful counter-act of force of legitimate defence, the defendant state occupied, in whole or in part, the territory of the other state, however temporarily, its legitimate action would become one of aggression, exceeding defence. If such an aggression further exceeded the limits of its temporary presence without an immediate and complete withdrawal from the occupied territory, it would become continuous aggression.

The annexation of all or part of the occupied territory constitutes an act of permanent aggression. In general, it is to be stated that any aggression in the form of military occupation or annexation of foreign territory, whether twofold or exceeding defence, temporary or permanent, is continuous aggression of the utmost gravity, since it

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[479] Broms, p. 348.

signifies the continuing aggressive intent of the occupying power. In sub-paragraph (b) of Article 3 of the definition, the "bombardment by the armed forces of a State against the territory of another state" was deemed an act of aggression.[480] In connection with this paragraph the Special Committee on the question of defining aggression included in its report to the General Assembly an explanatory note to the effect that " the expression 'any weapons' is used without making a distinction between conventional weapons, weapons of mass destruction and many other kinds of weapon."[481] In sub-paragraph (c), "the blockade of the ports or coasts of a State by the armed forces of another State," a number of delegations in the Sixth Committee stated that the concept of blockade as described therein should also cover the unjustified denial of access to and from the sea to land-locked countries. They argued that the consequences of the latter are as serious as those of the blockade of ports or coasts, and such acts should be branded as acts of aggression. Consequently, on November 21, 1974, prior to the approval of the draft definition, the Sixth Committee decided to include in its report to the General Assembly a statement to the effect that "nothing in the Definition of Aggression, and in particular article 3 (c), shall be construed as a justification for a State to block, contrary to international law, the routes of free access of a landlocked country to and from the sea."[482]

In sub-paragraph (d), the "attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State," was condemned as an act of aggression. The provision of this sub-paragraph caused discussion in both the Special Committee and the Sixth Committee of the General Assembly. In the Special Committee the representative of Ecuador asserted that the expression "marine and air

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[480] Ibid.
[481] Ibid, 348-49. See also, A/9619 in Ferencz, Vol. 2, p, 9.
[482] See Broms, p. 350. See also Ferencz, Vol. 2, p. 35.

fleets," included in Article 3 (d) "should be deleted since it was unprecedented in all previous instruments of international law could give rise to unnecessary disputes in the future."[483] He also maintained that "it was a legitimate exercise of national sovereignty for a country to detain and impose penalties upon any foreign vessel or aircraft engaged in unlawful activities within its territorial waters or airspace."[484] In the Sixth Committee, many delegations were concerned with the wording of Article 3 (d) of the definition. They felt that the way in which this provision was formulated did not observe the right of the coastal state to protect the resources and shield the marine environment of a broad zone off its coasts. They also maintained that the protection of these resources, which is recognised by the current development of the law of the sea, may in some cases procure the use of force as preventive measures against illegal acts; the use of such measures of force, however legally authorised to preserve order and apply law over an area under the national jurisdiction of the state, might be considered, according to the vague formula of Article 3 (d), an act of aggression. Consequently, in avoiding any future controversy in regard to the meaning and effect of this sub-paragraph, it was decided by the Sixth Committee that its report to the General Assembly should include a statement preserving that "nothing in the Definition of Aggression, and in particular Article 3 (d), shall be construed as in any way prejudicing the authority of a State to exercise its rights within its national jurisdiction, provided such exercise is not inconsistent with the Charter of the United Nations."[485]

In sub-paragraph (e) of Article 3, the military bases on foreign territory were dealt with. In this connection it was stated that "the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in

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[483] See A/9619, in Ferencz, Vol. 2, p. 15.
[484] Ibid.
[485] See Ferencz, Vol. 2, p. 36-7.

contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement," is an act of aggression.[486]

In sub-paragraphs (f) and (g), two examples of indirect aggression were dealt with. In sub-paragraph (f) "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State," was deemed to constitute an act of aggression. According to this provision, the State which assists the aggressor State in performing its action would commit an act of aggression. Hence, as a general rule provided by this sub-paragraph, rendering assistance to an aggressor by allowing it territorial facilities or advantages is an act of indirect aggression, even if the State concerned not participated in the actual aggression by the use of armed force. The main concern of this sub-paragraph is to affirm that the support of an aggressor by affording it any territorial advantages is illegal and would be categorised as akin to the principal act itself, i.e. the act of direct armed aggression.[487]

In sub-paragraph (g), another act of indirect aggression was "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." A substantial element in this act is that the armed bands, groups, irregulars or mercenaries carried out the act they had been ordered to perform. The preparatory stages which preceded the dispatching of these acts do not amount in themselves to an act of aggression. Hence, until an actual use of armed force against another State has been attributed to these bands, their acts having been initiated from the territory of another State, no act of aggression has occurred.

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[486] Ibid, p. 36-7.

It should also be noted that, in the first place, this article should not be construed as depriving peoples of their right to fight for their self-determination, freedom and independence, or the right of other States to give assistance to those peoples in order to support their legitimate and just struggle. Hence, guerrilla warfare or resistance movements or any other kind of recognised activities which might be resorted to by people fighting for self-determination or freedom and independence would not be considered as constituting acts of aggression, nor would the action of the other States supporting those peoples by military equipment or offering them any kind of territorial facilities or advantages. Nevertheless, an important element - that the cause of those peoples is lawful and just - should be observed with regarded to the supporting State, in order to keep itself out of this provision. It is the United Nations, and not the supporting State individually, which has the authority to decide upon the lawfulness and justness of that cause. In the second place, Article 3 (g) should in no way be interpreted as adding new circumstances in which the right of self-defence as provided by the Charter may be invoked. This means that Article 3 (g) should not be construed in a way which might lead to the consideration of a minor incident as an act of aggression. Thus, it is to be stressed that if a State uses force against another State in reply to an act of subversion or terrorism committed in its territory by armed bands acting from within the latter State's territory, its act would be illegal and in contravention of both the present definition and Article 51 of the Charter. This is to be understood from the conditional phrase included in the provision of sub-paragraph (g) that the act in question should be "of such gravity as to amount to the acts listed above, or its substantial involvement therein."

Since acts of subversion or terrorism do not amount to any of the acts of aggression included in Article 3 (a-f), their occurrence is not a sufficient excuse for an act of armed

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[487] Ibid, p. 38.

force in self-defence.[488] An important point should be carefully regarded when applying Article 3 (g), namely, that the participation of the State, from which the acts in question were initiated, was fully established and its involvement in these acts was beyond doubt. Otherwise, the definition of aggression, instead of standing as an instrument for the prohibition and condemnation of the use of force, would become a means of legitimising it.[489]

Article 4 of the definition stated that "the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter." This provision was interpreted by some representatives at the Sixth Committee as flexible enough to make it possible for the Security Council to extend this list to include other forms of aggression not involving the use of force.[490]

Article 5 of the definition consisted of three paragraphs, the first of which presented a safeguard against misuse of the definition by observing the inadmissibility of any justification whatsoever to an illicit use of armed force. Thus, in connection with Article 2 which maintained the possibility that the Security Council might exculpate the State which first used force from the charge of aggression, it was observed in Article 5 that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."[491] According to this provision, it is inadmissible for the State which first used force justify its act by any internal or external policy of the victim State. In the report of the Special Committee on the question of defining aggression of 1974, an explanatory note concerning the first paragraph of Article 5 stated that "the Committee had in mind, in particular, the principle contained in the Declaration on Principles of International Law concerning

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[488] See the Mexican opinion on Article 3 (g), A/9619, in Ferencz, Vol. 2, p. 39.
[489] Ibid, p. 39-41. See also Broms, p. 351-54.
[490] Ibid, p. 354-55.

Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations according to which 'No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.'"[492] The second paragraph of Article 5, dealing with the legal consequences of aggression, followed the principles of the Nuremberg Tribunals after World War II. In this regard it was stated that "a war of aggression is a crime against international peace," and that "aggression gives rise to international responsibility."[493] In this provision, a distinction was made between a war of aggression and an act of aggression from the point of view of international responsibility. Accordingly, a war of aggression, which is an act of aggression in its utmost gravity, is a crime against peace that gives rise to international criminal responsibility; while an act of aggression, which was not part of an aggressive war or which did not result in a war of aggression, might not be defined as a crime but gives rise to international responsibility.

In the third paragraph of Article 5, it was stated that "no territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful."[494] Such a declaratory provision restated the Stimson Doctrine and the relevant principles of the Declaration on Friendly Relations. It also reaffirmed the principle laid down in paragraph 7 of the Preamble and Article 3 (a). An explanatory note to sub-paragraph 3 of Article 5 was set forth in the Special Committee's report whereby it was observed that "this paragraph should not be construed so as to prejudice the established principles of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force."[495]

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[491] Ibid, p. 355-56. See also Ferencz, Vol. 2, p. 42-3.
[492] See A/9619, in Ferencz, Vol. 2, p. 9.
[493] Broms, p. 356-57. See also Ferencz, Vol. 2, p. 43-5.
[494] See Broms, p. 358. See also Ferencz, Vol. 2, p. 45.
[495] See A/9619, in Ferencz, Vol. 2, p. 9.

Articles 6 and 7 of the definition did not create rights or duties but they provided affirmation to certain rules and principles of international law not being specifically dealt with in the definition but were set forth and established by other instruments of legal significance. Article 6 insisted that the Charter of the United Nations was the only legal basis for the draft definition of aggression, and stressed the fact that the purpose of the definition was to focus on certain types of State conduct which might constitute aggression, rather than to deal with circumstances in which resort to armed force might be lawful. Along with this meaning, it was stated in Article 6 that "nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful." In accordance with this article, the only cases in which force might be lawfully resorted to are in action of legitimate defence as provided by in Article 51 of the Charter or by explicit authorisation of the competent organs of the United Nations as provided in Article 53 of the Charter.[496]

In Article 7 of the definition, an explicit reference was made to the right of self-determination. In this connection the article indicated that "nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in

[496] Ibid, p. 45-6.

conformity with the above-mentioned Declaration."[497] Many States at the Special Committee maintained that peoples under colonial and racist regimes or other forms of alien domination had the right to struggle for their self-determination, freedom and independence by all means at their disposal. Consequently, they considered that Article 7 recognised that the armed struggle of such people was an instance of the legal use of force. They maintained as a result that the action of a State in aiding and providing those people with any kind of support was just as legal.[498]

Article 8 of the definition observed that "in their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provision."[499] Moreover, the definition should be read together with the relevant articles of the United Nations Charter and the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

The Role of the Security Council

According to Article 51 of the Charter, the Security Council is the final arbiter of whether there has been an armed attack and whether the use of force by a state could be justified on the basis of self-defence. The Security Council has frequently been prevented by the Veto from reaching a formal decision on the validity of claims of self-defence. The fact that a Security Council vote has not determined the existence of an armed attack and the legitimacy of a claim of self-defence, does not, however, mean that an armed attack does not exist. Actions based in self-defence, therefore, do not have to

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[497] Article 7 of the definition. See also Ferencz, p. 47-9.
[498] Ibid, A/9619, p. 15-26; 32-40. See also, Stone, "Hopes and Loopholes in the 1974 Definition of Aggression,"p. 233-37; Broms, p. 358-360.

be abandoned, until the Security Council adopts a resolution demanding the cessation of the defensive action.[500] Article 51 contains the legal obligation to report immediately any forcible measures taken in self-defence to the Security Council,[501] but that requirement has not always been observed.[502] Also, the failure to report will not prevent the Security Council from considering and passing judgements on the substantive issues of claims of self-defence.[503] Reporting to the Security Council is only one of several elements to be considered in relation to the legitimacy of a state's claim to self-defence and a failure by the state resorting to force to invoke self-defence should not be fatal, provided that the substantive conditions for the exercise of this right are met.[504] Dinstein expressed that it "would be a gross misinterpretation of Article 51 for the Council to repudiate self-defence, thus condoning an armed attack, only because no report has been put on record."[505]

During the Cold War, many claimed that the Security Council could not fulfil its first and primary responsibility of ensuring international Security. The end of the Cold War and the reversal of Iraq's invasion of Kuwait in 1991 were viewed as reviving the Council's role in collective security. The early 1990s brought fears from some quarters that the United Nations was acquiescing too readily in US uses of force, at times, unwisely, or merely constituting a multilateral veneer for unilateral action. At other times, critics claimed that forceful action was being taken in the name of the United Nations that had not really been authorised by the Security Council. It was clear that the

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[499] Ibid, p. 360-61. See also, Ferencz, p. 49-50.
[500] Kelsen, *The Law of the United Nations*, p. 803-4.
[501] The International Court of Justice referred it as "the reporting obligation enshrined in Article 51 of the United Nations Charter." *Nicaragua case*, p. 121, paragraph, 235.
[502] Oscar Schachter, "Self-Defence and the Rule of Law," (*American Journal of International Law* 83, 1989), p. 263.
[503] Jean Combacau, "The Exception of Self-Defence In UN Practice," In: Antonio Cassese, ed., *The Current Legal Regulation of the Use of Force*, (Dordrecht: Martinus Nijhoff Publishers, 1986), p. 16-18.
[504] Dinstein, p. 199.
[505] Ibid.,

use of force from the NATO's side during the Kosovo Crisis, have been bypassing of the Security Council authority, in the grounds that "the absence of such authorisation, military coercion ... constitutes a breach of Article 2 (4) of the Charter."[506] The world needs a Security Council which is powerful enough and sufficiently unified to authorise strong countermeasures against aggressors or genocidal regimes; not a mere multilateral rubber stamp for unilateral decision making.

Whilst, overall, the UN Charter aimed to prevent recourse to force, except that undertaken by the UN and its agents to protect global interests and values, it recognised the possibility of a failure of multilateralism and reserved to states an unequivocal right of self-defence. What is important, and what I wish to emphasise, is that Article 1 of the Definition of Aggression, has declared clearly and in obvious way, that aggression can only exist when real armed force is used; since political, economic, cultural or ideological kinds of pressure or interference do not involve the use of force, they do not constitute aggression. This is important in my view, because it gives the world the chance to avoid unnecessary wars or use of force.

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[506] See Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," (*European Journal of international Law* 10, 1999), p. 5.

CHAPTER FIVE

COLD WAR AND SELF-DEFENCE

This Chapter will deal with the main events in the Cold War, in an attempt to examine the development of the right of self-defence during the Cold War. During that period there was a struggle between conflicting universal values. The Western states believed in the ideas of free market economy and a multi-party political system. In the East, the political life was completely controlled by a single party system and a command administrative economy. For nearly 40 years the world was under permanent threat of nuclear war between the West and the USSR. The Cold War was crowded by many crises.[507] The main landmarks in the period of the Cold War were the Berlin blockade in June of 1948, regional security arrangements, such as NATO, the Korean War, the Cuban missile crisis and finally the Vietnamese War.

The Berlin Blockade of 1948

This crisis is regarded by many as the first struggle between the USSR and the Western Powers after the defeat of Nazism in Germany. This conflict, or power struggle, brought into view matters relating to collective action in self-defence, even before the establishment of the NATO and Warsaw treaties. The Western Power forces, after the occupation of Berlin, had the right of access to it by road, air and rail, by virtue of

[507] See Thomas S. Arms, *Encyclopaedia of the Cold War* (New York: Facts On File, 1994), p. 1-4. See also Stephen Ashton, *The Cold War* (London: Batsford, 1990), p. 3-4.

special arrangements with the USSR.[508] But by March 30, 1948, the Soviets had decided to change the arrangements concerning West Berlin, and also they changed their policy and imposed many restrictions on the traffic between the Western Zones and Berlin.[509] In June 24, 1948, all land and water traffic to and from the Western part of Berlin was closed by the Soviet forces. Only air traffic, which the Soviets could not prevent, connected West Berlin with the West.[510] When the negotiations over the Soviet blockade of Berlin proved fruitless, the blockade was referred to the Security Council as a threat to international peace and security under chapter VII of the Charter. The United States, Britain and France considered the Russian restrictions as a real threat of force in violation of Article 2(4) of the Charter which was intended to prevent them from exercising their legitimate rights and responsibilities. However, the adoption of a resolution by the UN was thwarted by the Russian veto.[511]

As a result of the threat of force from the Soviets, the Western Powers regarded themselves as in confrontation with an actual use of force from the Soviet side. This gave them the option of responding with the use of force. Therefore, the use of force by armed convoys was deliberately investigated, but in the end found not to be a good option, because the armed conveys could easily be blocked.[512] The use of force in response to the blockade was questionable, based on the consideration that neither the territorial integrity nor the political independence of the Western powers were threatened in the blockade, but rather, rights based only on agreements which had been severely infringed. Because of this, it would be hard to claim the legitimacy of self-

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[508] Lawrence Scheinman, "The Berlin Blockade," In: Lawrence Scheinman and David Wilkinson, *International Law and Political Crisis: An Analytical Casebook*, (Boston: Massachusetts 1968), p. 1 , 4.
[509] See generally United States Department of State, The Berlin Crisis: A report on the Moscow Discussions (1948), p. 1-5. The USSR at that time, claimed that its restrictions and limitations on the traffic to and from Berlin, were as a result of problems in border and customs control measures.
[510] Scheinman, p. 8-9.
[511] See *Repertoire of the Practice of the Security Council* (1946-1951), p. 354; 441-42.
[512] Scheinman, p. 15-17.

defence. The Western Powers reserved their right of self-defence and noted that although they could have used force against the unlawful blockade, they were abstaining from doing so. Consequently, they responded to the blockade by flying over it, which was not regarded as a use of force.[513] The use by the Western Powers of airlift to access West Berlin, broke the blockade peacefully. This left Moscow wondering whether to use force to stop the airlift, but it did not do so. By the April of 1949, the Soviets understood that the West would never leave or abandon West Berlin, and as a result of the Western embargo against East Germany, imposed by the West in retaliation, which had a more serious impact on East Germany than the Soviet embargo on West Germany, the Four Powers agreed on May 4, 1949, to move all restrictions imposed since March 1, 1948.[514]

Regional Arrangements (NATO)

It is useful to consider regional arrangements, since Article 51 was introduced into the Charter as a result of direct pressure from the Latin American states, which to some degree preferred to have their own security system. Article 51 was not a part of Chapter VIII, which put all regional arrangements under Security Council authority, which prohibited any use of force without its permission.[515] However, it allowed the use of force in self-defence to be exercised individually, separate from any regional agreements, and it did not need any authorisation from the Security Council. On this point, Waldock stated that:

[513] Ibid, p. 16, 27 and 38.
[514] Ibid, p. 35-37.
[515] United Nations Charter, Article 53 (1).

"Article 51 was deliberately transferred at the San Francisco Conference from Chapter VIII to Chapter VII with the result that the right of collective self-defence is entirely independent of the existence of a regional arrangement"[516].

Certainly, states' right to prepare in advance through multi-agreements (collective self-defence treaties), is clear in Article 51, from their right to use force in a collective way.[517] Therefore, many states, for the purpose of having the right of collective self-defence, have resorted to bilateral and multilateral treaties.[518] Mrazek considered that these treaties "supplement the right of collective self-defence with the duty of collective self-defence; every aggression becomes a matter for the whole international community and its prevention is a "common interest", a "common defence" or "self-defence" against the aggressor".[519] This makes the use of force a matter of concern for all States members in the treaty, because the procedure of responding against aggression is also a matter of their concern. Such arrangements can be considered as both regional arrangements and collective self-defence treaties.[520] The North Atlantic Treaty (NATO)

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[516] Waldock. "The Regulation of the Use of Force by Individual States in International Law", p. 509. For more information about regional arrangements and collective self-defence see Kelsen. *Recent Trends in the Law of the United Nations*, p. 918-20.

[517] Kelsen, p. 913-16. See also, Hersch Lauterpacht and Oppenheim, *International Law: A Treatise*, p. 157; Brownlie, p. 328-31.

[518] Among the main such treaties were the Inter-American Treaty of Reciprocal Assistance of September 2, 1947; the Brussels Treaty of March 17, 1948 (Belgium, France, Luxembourg; the Netherlands; the United Kingdom), modified by the protocol signed at Paris, October 23, 1954, by which Germany and Italy became members; the North Atlantic Treaty of April 4, 1949; the Mutual Defence Treaty between the United States and the Philippines of August 30, 1951; the Security Treaty between Australia, New Zealand, and the United States of September 1, 1951; the Security Treaty between the United States and Japan of September 8, 1951, later modified by a treaty of January 20, 1960; the Mutual Defence treaty between the United States and Korea of October 1, 1953; the Mutual Defence Treaty between the United States and the Republic of China of December 2, 1954; the South East Asia Collective Defence Treaty of September 8, 1954 (United States, United Kingdom, France, Australia, New Zealand, the Philippines, Thailand and Pakistan); the Baghdad Pact of February 24, 1955 (Turkey, Iraq, the United Kingdom, Iran and Pakistan); the Pact of the Arab League States of March 22, 1945, and Treaty of Joint Defence and Economic Co-operation between the States of the Arab League of June 17, 1950; the Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Treaty), signed May 14, 1955, which entered into force June 5, 1955. See generally Goodrich, Hambro and Simons, *Charter of the United Nations: Commentary and Documents*, p. 349-50. See also W . Kulski. "The Soviet System of Collective Security Compared with the Western System". (*American Journal of International Law* 44, 1950), p 453-76.

[519] Josef Mrazek, "Prohibition of the Use of Force and Threat of Force: Self-Defence and Self-Help in International Law", p. 93.

[520] Goodrich, Hambro and Simons, p. 350.

"clearly creates a collective system for exercising the right of self-defence"[521], and at the same time, the NATO Treaty can be regarded as a regional arrangement.[522] But in reality, it makes no difference whether Article 51 or Chapter VIII is implemented, because what is important is not which treaty has been practised, but the nature of the action taken on the basis of the treaty: regional enforcement under Chapter VIII (after the Security Council has given its permission), or action on the basis of collective self-defence in case of armed attack. This matter was considered deeply by the United States Senate Committee on Foreign Relations, in its report on the North Atlantic Treaty which confirmed that the North Atlantic Treaty should not be read restrictively either as a regional arrangement or as a collective self-defence treaty, since the treaty is "intended primarily to establish a collective defence arrangement under article 51" while on the other hand being "utilised as a regional arrangement under chapter VIII"[523]

Therefore, the "controversy arises from an attempt to characterise organisation by form rather than by function". As a result, the main question here is not "What sort of organisation is this?" but it should be "What function is it exercising?"[524] Generally, any agreements for collective self-defence usually try to limit the scope of military action to the geographical areas of states members in that collection, while admitting the Security Council's right to protect international peace and security.[525] Article 5 of the North Atlantic Treaty (NATO), recommended that:

> "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the party or Parties so

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[521] Waldock, p. 504.
[522] Kelsen, p. 920-25.
[523] United States Senate, 83 Congress, 2d Session, Doc. No. 87, Subcommittee on the United States Charter. *Review of the United Nations Charter: A Collection of Documents,* (Washington, 1954), p. 159.
[524] Bowett, p. 222. See also Dinstein, p. 235-36.
[525] Goodrich, Hambro and Simons, p. 350.

attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security"[526].

Article 7 of the North Atlantic Treaty reads:

This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.[527]"

Consequently, Article 5 would be exercised only if a state member has been the object of an armed attack, and every state's help or assistance will depend on the location, nature and importance of the attack, and will also depend on the situation on the ground.[528] The NATO treaty does not require immediate action from states members, or that they take military measures in collective self-defence. Other treaties depended directly on the armed attack for the right of collective self-defence to be exercised, and all such arrangements or treaties confirmed that the Security Council has the main role to protect international peace and security, and any measures of collective self-defence should stop when the Security Council has taken action to protect international peace and security.[529] The same applies to the Warsaw Pact, which designates its area of application by the geographical location of states members, and recognises the Security Council's role in protecting international peace and security.[530] It is worth noting,

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[526] North Atlantic Treaty Organisation, Article 5. The report of the Senate Committee on foreign Relations noted that "from a legal point of view article 5 of the treaty is solidly based on the inherent right of self-defence recognised in article 51 of the United Nations Charter", Review of the United Nations Charter, p. 150.
[527] North Atlantic Treaty Organisation, Article 7.
[528] Review of the United Nations Charter, p. 150-51.
[529] See Security Treaty between Australia, New Zealand, and the United States, Articles 4 and 5; Inter-American Treaty of Reciprocal Assistance, Article 3; Brussels Treaty, Articles 4 and 5. See generally, Bowett, p. 141-50; Bowett, p. 220-48. See Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, p. 791-800.
[530] See Warsaw Treaty, Article 4.

however, that many consider collective self-defence treaties to have been misused for political reasons. Combacau described that:

> "Regional military alliances no doubt pay lip service to the universal organisation and the system of collective security they were created to enforce, but the "collective self-defence" they claim to guarantee is in fact a cloak to operations of partial collective security, which are a far cry from logic of universal collective security as intended by the Charter"[531]

The Cuban Missile Crisis of 1962

During that crisis, the main argument was whether the use of force is acceptable, when there is a threat of armed attack, especially if that attack will be by developed technological weapons, such as nuclear missiles. In general, the United States at that time did not focus on the right of self-defence. In the end of 1962, the Americans declared that the Soviets had established nuclear missiles in Cuba and that such missiles had been shipped to Cuba by Soviet ships. Therefore, the United States announced that all ships bound for Cuba would be searched and any ship found to be carrying such weapons would not be allowed to pass to Cuba. Also, the United States referred the situation to the Security Council, emphasising that such offensive weapons posed too great a danger to international peace and security. The United States, when exercising the blockade against Cuba, was practising anticipatory self-defence or self-defence in general, but it highlighted and focused on Article 52 of the Charter and the provisions of the Rio Treaty, which covered not only cases of armed attack, but also threats to the peace other than armed attack.[532] The American action against Cuba, whatever its basis

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[531] Jean Combacau, "The Exception of Self-Defence In UN Practice," In: Antonio Cassese, ed., *The Current Legal Regulation of the Use of Force*, p. 31.
[532] See United States Letter to the Security Council of October 22, 1962, UN Doc. S/5181, 17 Security Council Official Records, Supplement for October - December, 1962, p. 146-48. See also Resolution of the Council of the Organisation of American States of October 23, 1962, 47 Department of State Bulletin, 1962, p. 722-23. This resolution referred to Article 6 of the Rio Treaty and noted that the situation where

or grounds, in Higgins' view, raised arguments about the "complex legal question of whether blockade without a declaration of war is permissible" and also whether the American action was acceptable under Article 51.[533] Cuba declared that it regarded the American action as an act of war and aggression.[534]

The Soviets, for their part, justified their missiles supplies to Cuba on the grounds that it was constantly under threat and pressure from the United States.[535] In those circumstances, an important question arose, whether the presence of Soviet missiles in Cuba could be justified by a lawful claim of self-defence on the part of Cuba, since Cuba had recently been victim of invasion from the United States.[536] Also, there was debate about whether these missiles should be considered as defensive or offensive weapons.[537] To many writers, the fact that the United States did not focus on Article 51 as the basis for its actions against Cuba was clear "evidence of recognition of the dangers inherent in relying upon a claim to the right of self-defence going beyond the Charter text"[538]. Others noted that the "nuclear balance at the time made a Soviet ... attack on the United States unthinkable", and also "a use of force falling within reach of

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"the inviolability or the integrity of the territory or the sovereignty or political independence of any American state" is "affected by an aggression which not an armed attack" and which necessitates that "the member states ... take all measures, individually and collectively, including the use of armed force". This was taken to justify measures, to guarantee that Cuba would not amass dangerous weapons and not be "an active threat to the peace and security of the Continent". See also the Presidential Proclamation No. 3504 on Interdiction of the Delivery of offensive Weapons to Cuba, October 23, 1962, (*American Journal of International Law Supplement*, Vol. 57, 1963), p. 512-13.

[533] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963), p. 202. See also Anthony D'Amato, "Israel's Air Strike Upon the Iraqi Nuclear Reactor". (*American Journal of International Law* 77, 1983), p. 588.

[534] See for more information the letter of Cuba to the Security Council of October 22, 1962, UN Doc. S/5183, 17 Security Council Official Records, Supplements for October - December, 1962, p. 148.

[535] See the Statement of the Soviet Government, 23 October 1962, UN Doc. S/5186, October 23, 1962, 17 Security Council Official Records, Supplement for October - December, 1962, p. 149-54.

[536] Higgins, p. 203. Many who supported the quarantine against Cuba, admitted that Cuba had a complete right to ask the USSR for help and military assistance, especially with the failed attempt against Castro's regime by the Bay of Pigs invasion. Rostow noted that "Cuba had a legal right to request Soviet assistance in defending itself against possible attack". See Eugene V. Rostow, "Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-defence?" (*American Journal of International Law* 85, 1991), p. 515.

[537] See Anthony Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm*, (London: Routledge, 1993), p. 75-76.

Article 51" was to some point acceptable because there was "coercive pressure on the American system of security"[539], which made the idea of imminent attack go beyond the dimensions of Article 51.[540]

Osgood and Tucker agreed that the USSR had provided weapons in full agreement and co-operation, and that any state under international law has the right to receive military weapons from another state nor is there any rule under international law to prohibit a state from giving weapons to another state or from establishing military bases in the other state's territory with that other state's consent. They stated that the United States' action "affords a striking example of the claim to take measures of self-defence against acts that are not at least *prima facie* unlawful"[541]. Also, it is possible to read the United States' action as "defensive measures not involving military action", which would make it acceptable against an action "less than 'armed attack'"[542]. The United States claimed that the nuclear weapons in Cuba had significantly changed the situation on the ground.[543] This action, in the American view, had changed the balance of power, since those missiles could reach the United States in a few minutes, in contrast to Soviet launched missiles which would have to cross the North Pole.[544] Consequently, the

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[538] See Goodrich, Hambro and Simons, p. 345.

[539] Eugene V. Rostow, "Disputes Involving the Inherent Right of Self-defence," In: Lori F. Damrosch, *The International Court of Justice at a Crossroad*, (Dobbs Ferry, New York: Transnational Publishers, 1987), p. 275.

[540] President Kennedy indicated that the quarantine was specifically designed "to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military and related supplies which may threaten the peace and security of the Continent." Cited in Romana Sadurska, "Threats of Force," p. 260.

[541] See Robert Osgood and Robert Tucker, *Force, Order and Justice*, (Baltimore: Johns Hopkins, 1967), p. 298.

[542] Quincy Wright, "The Cuban Quarantine," (*American Journal of International Law* 57, 1963), p. 563.

[543] See *Repertoire of the Practice of the Security Council* (1966-1968), p. 218.

[544] Hanson W. Baldwin, "A Military Perspective," In: John Plank, *Cuba and the United States: Long - Range Perspectives*, (Washington: Brookings Institution, 1967), p. 200, 213-14.

deployment of the missiles in Cuba was considered too risky. Quarantine alone was not enough; an attack on those missiles to destroy them was acceptable and necessary.[545]

It is important to note here, that the enlargement of the range of self-defence has a clear danger, since the use of threat to the balance of power as an excuse for legitimate use of force may have inconsiderable and unknown results. At that time there was considerable debate about the legitimacy of the American missiles in Europe, and especially in Turkey. Clearly the enlargement of the basis on which the right of self-defence could be acceptable, was very dangerous and would increase the danger of a nuclear clash between the East and the West.[546] Many viewed the claim of a shift in the balance of power to the Soviet benefit as exaggerated, since the USSR could easily have achieved that aim by miss - firing submarines, and also by launching sites for solid - fuelled ICBM's in the Soviet Union.[547] And many who supported the American claim of self-defence in that crisis, agreed that there had been no armed attack or even a threat of armed attack directed against the United States, since the US nuclear capability was in advance of that of the Soviets; therefore, any ideas of a Russian nuclear attack against the United States would be unconvincing.[548] As a conclusion, the deployment of Russian nuclear missiles in Cuba was a real threat to the national security for the United States and the Latin American states, but it is difficult to say that these missiles constituted grounds for military response in self-defence. The real argument, is not whether a state should wait until it becomes the victim of a nuclear attack and later use military force in self-defence to stop that attack or aggression. The real argument should

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[545] On October 22, 1962, the United States put it military force at the basis of ready to fight. The Soviet in the next day put their force in the basis of ready to fight. And at that time the world was under pressure of nuclear war. See David L. Larson, The Cuban Crisis of 1962: *Selected Documents, Chronology and Bibliography*, (London: University of America, 1986), p. 343.

[546] Brownlie, p. 276.

[547] Baldwin, p. 214.

[548] Rostow, "Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defence?" p. 515.

be when, or at what point, the state which is under a threat of nuclear attack can use force to defend itself against that threat. In this regard, Gardner noted that it is dangerous to accept "unilateral uses of force simply because there were some deployment of weapons or modernisation of weapons"[549].

Vietnam War

Generally, the US involvement in Vietnam was a clearly argued claim of collective self-defence. The military actions between France and Vietnam were ended on July 20, 1954 by the three Geneva Agreements, in relation to Vietnam, Cambodia and Laos.[550] The agreement which concerned Vietnam was explicitly clear, that the Vietnamese military forces should withdraw to the north and the French troops to the South. Each part would have its own civil administration, and general elections would be held to determine the future and the unification of the two zones of Vietnam.[551] Also, the Geneva Agreements were connected with the final Declaration of the Geneva Conference, in which it was clearly declared "that the demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary"[552]. Later, the United States made its policy clear, that it would not threaten or use force to undermine the Geneva Agreements.[553] By September 8, 1954, the United States, France and other states had signed the Southeast Asia Collective Defence Treaty. Under Article VI of that treaty,

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549 Richard N Gardner, "Commentary on the Law of Self-Defence," In: Lori F. Damrosch and David J. Scheffer, *Law and Force in the New International Order*, (Boulder: Westview Press, 1991).
550 For more information see Agreement on the end of military activities in Vietnam, July 20, 1954, in United States Department of State, *American Foreign Policy* (1950-1955), (Washington, 1957), p. 750-67; Agreement on the end of military activities in Cambodia, July 20, 1954, p. 767-75; Agreement on the end of military activities in Laos, July 20, 1954, p. 775-85. See also Robert F. Randle, *Geneva 1954: The Settlement of the Indo-Chinese War*, (Princeton: Princeton University Press, 1969), p. 389-408.
551 *American Foreign Policy*, 1950-1955, p. 750-67.
552 Randle, p. 413.
553 *American Foreign Policy* (1950-1955), p. 787-88.

each party would consider the "armed attack in the treaty area against any of the Parties or against any state or territory which the Parties by unanimous agreement may here after designate, would endanger its own peace and safety" and would act "to meet the common danger"[554]. Later, the parties of the treaty agreed by a protocol attached to the treaty to include for the purposes of Article VI the territories of Cambodia and Laos and the "free territory under the jurisdiction of the state of Vietnam"[555].

As a result of the incident in the Gulf of Tonkin, the United States Congress declared in a resolution that "in accordance with its obligations under the Southeast Asia Collective Defence Treaty, the United States is ... prepared ... to take all necessary steps, including the use of armed force, to assist any member of the treaty requesting assistance in defence of its freedom"[556]. When the US began military activities against North Vietnam, its main claim to justify that action was that it was exercising the right of collective self-defence, for the purpose of weakening the military forces of North Vietnam.[557] The United States employed many claims to support its intervention in Vietnam. The first was to accuse the North of using new methods of warfare, such as infiltration of thousands of armed rebels, munitions and other military supplies. The second was that South Vietnam was a legitimate political entity, recognised by many states, and this gave it the right to protect itself through the right of self-defence. Also, the temporary borders between the North and South were based on an international agreement, which prohibited use of force between them. The third, was that the

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[554] Southeast Asia Collective Defence Treaty it is includes: Australia, France, New Zealand, Pakistan, The Philippines, Thailand, the United Kingdom, and the United States, it was signed at Manila on September 8, 1954, and entered into force on February 19, 1955. See generally Collective Defence In South East Asia: The Manila Treaty and Its Implications: A Report By a Chatham House Study Group, (The Royal Institute of International Affairs, London; New York, 1956), 1-14.

[555] Protocol to the Southeast Asia Collective Defence Treaty, signed at Manila on September 8, 1954, which entered into force on February 19, 1955.

[556] See United States, Senate Committee on Foreign Relations. *Background Information Relating to Southeast Asia and Vietnam*, (Washington: DC: US Government Printing Office, 1970), p. 235.

legitimate Government of South Vietnam had requested help and assistance from the United States. The fourth, was that the United States was exercising its right of collective self-defence under Article 51 of the United Nations Charter. Also, the United States could exercise the right of collective self-defence under the Southeast Asia Collective Defence Treaty. Just as the United States had considered its participation in the Korean war as a legitimate model to protect divided states, it claimed its purpose was to defend South Vietnam against the Communist North.[558] The real arguments in that conflict were whether the conflict was between two different entities or whether it was a traditional civil war in one community, and also whether the infiltration across the borders of weapons and rebels from the North to the South would give an excuse to exercise the right of collective self-defence under the Southeast Asia Collective Defence Treaty.[559]

The general evaluation about the war in Vietnam was to consider it as a civil war between one nation and in one entity or community,[560] since the separation of Vietnam was temporary, depending as it did on the Geneva Agreements. These included a clear provision for elections in two years from the signing of the Geneva Agreements, which the Communists strongly believed that they would win easily, with the aim of unifying

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[557] Ruth B. Russell, *The United Nations and United States Security Policy*, (Washington: Brookings Institution, 1968), p. 325.

[558] See John N. Moore, The Lawfulness of Military Assistance to the Republic of Vietnam, in Richard A. Falk, *The Vietnam War and International Law*, (Princeton: Princeton University Press, 1968), p. 237, 358-478. See also Eliot Hawkins, An Approach to Issues of International Law Raised by United States Actions in Vietnam, in Richard A. Falk, *The Vietnam War and International Law*, (Princeton: Princeton University Press, 1968), p. 136. See also as a comparison point, Pravda Article Justifying the USSR Intervention in Czechoslovakia, September 25, 1968, translation in (*International Legal Materials* 7, 1968), p. 1323-25.

[559] The US Government had faced a real problem, when it was want to exercise the Southeast Asia Collective Defence Treaty, because both France and Pakistan were against the US intervention in Vietnam. For more information see Wolfgang Freidman, "Law and Politics in the Vietnamese War: A Comment," In: Richard A. Falk, *The Vietnam War and International Law*, (Princeton: Princeton University Press, 1968), p. 292, 300.

[560] Quincy Wright, "Legal Aspects of the Vietnam Situation," In: Richard A. Falk, *The Vietnam War and International Law*, (Princeton: Princeton University Press, 1968), p. 271, 277-80. See also Quincy Wright, "Legal Aspects of the Vietnam Situation," (*American Journal of International Law* 60, 1966), p. 752-53 and 756-59.

of Vietnam peacefully.[561] There have been many claims that the North's activities against the South did not amount to an armed attack. Wright noted that "there seems to be no evidence that organised contingents of the North Vietnamese army crossed the cease - fire line, until after the United States bombing attacks began in February, 1965"[562]. Comparing the Vietnam war with the Korean war, it appears that the two situations were completely different, as Falk indicated that the Korean war was a "direct and massive use of military force by one entity across a frontier of another", and also whether or not the United States established its intervention in a struggle to end a civil war, at the same time the use of force from the North did not come to the point of armed attack, which means that the US claim of collective self-defence had weak grounds or no basis.[563] It is clear there was no legitimacy for the American action to extend the bombing to North Vietnamese territory, which at the same time gave North Vietnam the legal basis and claim to respond to the US bombing.[564]

The use of force during the Cold War was connected with the power struggle between the United States and the USSR, because both sides had the desire to demonstrate power and to gain influence places. One of the aims of the Berlin blockade by the Soviet Union was to demonstrate the Soviet's new power, which the Red Army had gained after the defeat of the Nazi Germany; also the Soviet wished at that time to disturb the West, especially at the time when the US sought through the Marshall Plan to avoid Europe falling into the hands of communism. Neither side of the crisis, wished to enter a war, and if the Western Powers used force, this practice of force would come under deep questioning, on the basis that, the territorial integrity and political independence of the

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[561] Ralph K, White, "Misperception of Aggression In Vietnam," In: Richard A. Falk, The *Vietnam War and International Law*, (Princeton: Princeton University Press, 1968), p. 523, 529-31.
[562] Wright, p. 287.
[563] Richard A. Falk, International Law and the United States Role in the Vietnam War, in Richard A. Falk, *The Vietnam War and International Law*, (Princeton: Princeton University Press, 1968), p. 362; 366; 377.

Western Power was not harmed, but only some agreements had been violated; therefore, the use of force under the right of self-defence would be unlawful. Moreover, the North Atlantic Treaty Organisation (NATO), is a defensive organisation, whose main aim is to protect its member states from any aggression, which means that the use of force is restricted to the geographical areas of states members. Therefore, the use of force outside that limited area by NATO in the Kosovo Crisis is completely inappropriate. From another perspective, the use of force by NATO in that crisis was a clear bypassing the authority of the Security Council, which has the fundamental responsibility to protect international peace and security.

In the Cuban missile Crisis of 1962, there was a real threat to the national security of the United States; consequently the US conduct could be to some extent justified, especially with the threat of the nuclear attack. In the Vietnam War, whether the US intervention, was based on the concept of collective self-defence was unclear, in the sense that the conflict was a conflict between the United States and the USSR, both of which were at that time at the peak of their rivalry in the Cold War. In my view, that war was simply a civil war between the North and the South, but the intervention of the great powers escalated this conflict into a big war and made it become one of the main landmarks of the Cold War.

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[564] Ibid, p. 398.

CHAPTER SIX

SELF-DEFENCE BEFORE THE BLOW

The first and obvious questions which arise when a conflict breaks out between two states, are in Michael Walzer's words, "Who started the shooting? Who sent troops across the border?"[565] Many observers of conflict, like Dinstein, consider that the first action or blow is the crucial factor in assigning responsibility for the aggression and that for this purpose it is necessary to "pinpoint the exact moment at which armed attack begins," this being the qualifying moment "when forcible counter-measures become legitimate as self-defence."[566] The UN Charter identifies a right to individual and collective self-defence "if an armed attack occurs," and many thus consider that self-defence is admissible only after the actual eventuality of an armed attack.[567] In the *Nicaragua* case, the International Court of Justice affirmed this view with its majority opinion that armed attack is a necessary forerunner to justifiable self-defence.[568] The point of first military attack has the advantage of being a clearly discernible Rubicon, which can provide evidence of assault and is an indicator of intent. In this respect, Aristide Briand said : "A cannon shot is a cannon shot; you can hear it and it often leaves traces."[569] Walzer comments on "the importance of the shift from diplomacy to

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565 Walzer Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (New York: Basic Books, 1997), p. 74.
566 Dinstein, *War, Aggression and Self-defence*, p. 176.
567 This was the view of Schachter, Kelsen, Kunz, Brownlie and Henkin, who interpret the UN Charter in a restrictive manner.
568 The International Court of Justice resolution was that collective self-defence would only apply if Nicaragua had attacked El Salvador, which in reality it had not. The US, when it mined Nicaragua's ports, had invoked the notion of collective self-defence in the face of the Nicaraguan government's assistance to Salvadoran rebels. See Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict*, (Brookield: Dartmouth Publishing Company, 1992), p. 94.
569 Briand cited in Norman Menachem Feder, "Reading the United Nations Charter Connotatively: Toward a New Definition of Armed Attack," (*New York University Journal of International Law and Politics* 19, 1987), p. 412. In this connection, the first attack had an important legal and historical setting.

force" and "the problem that killing and being killed poses."[570] This importance of the first attack motivated Combacau to say, "nothing now appears less admissible than to be the first to use force."[571] This feeling was highlighted just before the Six Day War, when both the US and the Soviet Union warned their respective protegees against being the first to act.[572] This way of dealing with the right of self-defence places a considerable responsibility upon the shoulders of the victim state. A stipulation that it is the beginning of the aggression that opens the door to the right of self-defence could work to the advantage of the aggressor, especially in the light of the hugely and immediately destructive potential of nuclear weapons and other weapons of mass destruction. A first strike using such weapons could so effectively cripple its target, that the right to self-defence is effectively rendered irrelevant. Therefore, this chapter examines the concepts of pre-emptive and protective self-defence, with illustrative examples from the Arab-Israeli conflicts.

Pre-emptive Defence

The issue of pre-emptive defence has usually depended upon the interpretation of such criteria as "imminence" and "necessity" along with a need for "proportionality" which means that defensive action should be at a level consistent with the dimensions of the

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Britain for a long time rejected the "principle of priority" or the "principle of the initial act". This view was supported by the USSR, but Britain wished the matter to depend basically upon the "circumstances." Cited in McDougal, Myres S. and Florentino P. Feliciano, "Resort to Coercion: Aggression and Self-defence in Policy Perspective," In: Law and Minimum World Public Order: *The Legal Regulation of International Coercion*, p. 168.

[570] Michael, *Just and Unjust Wars*, p. 79.

[571] Jean. Combacau, The Exception of Self-Defence in UN Practice, *In The Current Legal Regulation of the Use of Force*, p. 20.

[572] See Lyndon Baines Johnson, The Six Day War, In: *The Vantage point: Perspective of the Presidency 1963-1969*, (London: Weidenfeld & Nicolson, 1971), p. 293-94. Also, see Walter Laqueur, *The Road to War: The Origins and Aftermath of the Arab-Israeli Conflict 1967-68*, (Baltimore: Penguin Books, 1970), p. 124.

aggression. The first condition will easily weaken any primary right to pre-emptive defence. The second one raises the problem of how to decide necessity, because it is in reality an extensive field, which can easily be deceptive. As for "proportionality", this raises the dilemma of limitation as against instrumentality.

Walzer added another criterion, which is that of "sufficient threat."[573] He considered anticipatory military action to be legitimate under three conditions: first, an "intent to injure" which is obvious but need not amount to a plan for a specific assault; second, the military means to make that injury "tangible"; and third, a time period in which waiting would impose an unreasonably costly burden.[574] Walzer's formulation, however, suffers from a clear defect, because it allows a pre-emptive blow in the presence of hostile intent alone, without any plans to do specific injury.[575] This will erode the significant distinction between pre-emption and prevention. Pre-emptive defence should not have to depend for legitimacy on time only, because waiting to practise pre-emptive defence while the danger escalates could lead to disaster. Moreover, pre-emptive defence should be connected with inevitability, which eases the relinquishment of responsibility for military action by the aggressor and the victim. But, this does not imply that the military action should be taken as soon as possible. It only suggests that defensible actions become admissible. There is a possibility of modifying Walzer's formulation concerning "sufficient threat" by combining the first and second categories and annulling the third one. In this case, pre-emptive defence will be legitimate on the basis of presence of intent to do specific injury, and effective readiness to attack. Here, it is important to distinguish between intent and "motive." Intention personifies external relationships

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[573] Walzer, *Just and Unjust Wars*, p. 81.
[574] Ibid., 75.
[575] This "means that aggression can be made out not only in the absence of a military attack or invasion but in the (probable)absence of any immediate intention to launch such an attack or invasion" (Walzer, *Just and Unjust wars*, p. 85).

with the world. Intent can easily invite a dangerous subjective interpretation which all too readily cases the narrow bounders between pre-emptive defence and central aggression. Intention, these days, is connected with technologies and better information systems, which can in many cases easily recognise a hostile plan before its initiation.[576] One may, however, note the serious British misinterpretation of Argentine intentions in the period leading up to the 1982 Falklands conflict. This points up the importance of military intelligence and the problems associated therewith. Ceadel regarded intention as a substantial element. His view was:

> "Pre-emptive defence occurs when a defender surprises with a first strike an aggressor who has already formed an intention to attack but has simply not got round to carrying it out. It is legitimately defensive because, although it involves the first use of force, it does not involve the first intention to use it."[577]

Grotius, too, had depended on intention when defining the criterion of imminence. He believed that "danger ... must be immediate and imminent in point of time" but regarding legitimisation of military response, said: "I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest, the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth."[578] Moreover, readiness needs both physical power and estimations of it. Readiness resides especially in the field of "material things" rather than "morals". Readiness includes a number of characteristics, because in some instances there are attacks in the absence of any readiness for an effective fight. The aggressor must meet both conditions before its assault becomes imminent. Lack of imminence will weaken the pre-emptor's credibility, because he needs to justify his defensive action. The element of imminence will to some extent prove both the intent

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[576] This was the view of Bunn. See George Bunn, "International Law and the Use of Force in Peacetime: Do US Ships Have to Take the First Hit?," (*Naval War College Review*, 1986): p. 74.
[577] Martin Ceadel, *Thinking About Peace and War*, (Oxford: Oxford University Press, 1987), p. 82.
[578] Grotius cited in Walzer, *Just and Unjust Wars*, p. 340-41.

and the extent of readiness. Therefore, imminence will clarify whether the conditions for legitimate pre-emptive defence are available. But it is important to understand that imminence is not the sole prerequisite for an act of pre-emptive defence. Imminence should be considered in relation to intent and capacity, but the concept is nonetheless integral to consideration of any claims to legitimate pre-emptive self-defence.[579]

The connection between pre-emptive defence and the idea of imminence can be traced back to the days of Daniel Webster in 1841. He understood that the relationship was clear in contemporary legal opinion. More recently, Schachter rejected the idea of pre-emptive defence, but at the same time he left the door open by accepting that some situations may exist where the threat of assault was "so immediate and massive" that it would be "absurd to demand that the target state await the actual attack."[580] McCoubrey and White distinguish between the beginning of the attack and the occurrence of that attack, suggesting that in the period in between, pre-emption actions become lawful.[581] This view is similar to Dinstein's "miraculously early defence", in which pre-emptive defence became legitimate.[582] Bunn regards imminence as an unfair requirement, because it will give the defending state more time to "take the first hit." He quotes Webster's idea of legitimate pre-emption: "a truck bomber driving at full speed towards a Marine barracks, or a kamikaze aircraft diving on a ship."[583] According to Webster, there must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation."[584] But the problem is that this concept is too

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[579] Ceadel's stress on intent was obvious.
[580] Oscar Schachter, "In Defence of International Rules on the Use of Force," (*University of Chicago Law Review* 53, 1986): p. 136-37.
[581] McCoubrey and White, *International Law and Armed Conflict*. p. 94.
[582] Dinstein, War, *Aggression and Self-defence*, p. 180.
[583] Bunn, p. 74.
[584] Kenneth R. Stevens, *Border Diplomacy: The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842*, (Tuscaloosa: University of Alabama Press, 1989), p. 35. The American Minister to the Court of St. James, Andrew Stevenson, insisted that the danger of a defensive situation

limited. Moreover, there is a theoretical link between this concept and the legacy of the *Caroline* case. The Caroline was an American ship that was being used to supply arms and food to rebels against the British government in Canada. The British attacked the ship and burned it, claiming that they were acting in self-defence (pre-emptive defence). The revolution's supply lines and stronghold were inside the American border;[585] and the British held that they were "fully justified in attacking the vessel as they did" as a result of "a necessity of self-defence and self-preservation."[586] Lord Ashburton raised the question, "How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?"[587] The result of that problem was that the US prohibited any ships from using its waters to give help to the rebellion in Canada. At the same time the US government claimed that the ship in reality was a "piratical" one, and this would to some extent ease the accountability of the United States.[588] Webster criticised the British actions, without imposing harsh limits on the beginning of self-defence. The Caroline incident did not, he said, pose an "immediate" threat, but this did not prohibit the British response, since they were acting in anticipatory self-defence, as a result of the fact that the ship and its crew were planning to pass weapons to the benefit of the rebellion. The problem with Webster's argument is that it is unclear whether immediate and overwhelming threat is a condition for self-defence in general or only in the case of pre-emptive defence. "It must be shown," he said in his paragraph,

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must be distinguished by the criteria of immediacy and imminence, and this will not happen until the enemy has both the intent and the ability to attack.

[585] The situation of Britain was similar to South Africa's when it attacked ANC bases in Lesotho and Zambia in 1982 and 1986, and Israel's when it invaded Lebanon in 1982.

[586] Henry S. Fox, the British Ambassador to Washington, cited in Stevens, p. 24-25.

[587] Ashburton cited in Robert Y. Jennings, "The Caroline and McLeod Cases," (*American Journal of International Law* 32, 1938), p. 90.

[588] Jennings, p. 87, 85.

"that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of the United States cannot believe to have existed."[589]

Here, Webster is dealing with complicated issues, which go far beyond self-defence, for instance, the difference between combatants and non-combatants, without considering how this is related to the right of self-defence. The weakness of Webster's analysis can be argued to arise from a misrepresentation of the real context(s) in which international conflicts occur.[590] Walzer indicated that "there is often plenty of time for deliberation, agonizing hours, days, even weeks of deliberation, when one doubts that war can be avoided and wonders whether or not to strike first." On this basis, Walzer supposes that it is hard to ask a nation to do " little more than respond to an attack once we had seen it coming but before we had felt its impact." This inflexibility will to some degree diminish pre-emptive defence to a "reflex action, a throwing up of one's arms at the very last minute." Of course, proceeds Walzer, "once one has stated the restrictions, it is no longer clear whether the right has any substance at all."[591]On the other hand, focusing on intent will lead us to a moral problem instead of a behavioural one. Through intent, usually, many options and decisions take place. Conversely any exercise of such options will help us to analyse actions and to judge intent. Some have debated that the only reasonable way to define intent is to go back in time, and to study the development of the events. In this respect, Bunn identifies "hostile intent" as existing only when one has

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[589] Webster's Paragraph of 24 April 1841, cited in Jennings, p. 89.
[590] The paragraph of Webster's in general marking the transformation of the concept of self-defence from "political" principle to "legal" principle (Jennings p.82). This was clear when the International Military Tribunal at Nuremberg, refused the Germany's claims, that its aggression against Norway was in pre-emption defence (McCoubrey & White p. 92).
[591] Walzer, *Just and Unjust Wars*, p. 74-5.

hit the point of "imminent threat of armed attack."[592] But, looking at the issue of intent from a military perspective, intent to attack will precede the start of the programmed assault, because time is needed for planning and preparation. The victim should have the right to act when the prospect of attack becomes immediate. Thus, the problem of intent will lead us to evaluate the right of self-defence on the basis of judgement, rather than on simple observation. The practical moves were well demonstrated by the experience of the Six Day War.

"Israeli-Egyptian Battle Erupts"
Each Side Accuses Other of Making First Assault"[593]

The "third Arab-Israeli War" began on June 5, and ended on June 12, 1967.[594] This war was marked by an escalation of aggression and tension between the two sides, months before the start of the military actions. Walzer views the Six Day War as an example of "legitimate anticipation" on the part of Israel, which began the attack, but did not initiate the hostility.[595] Israel made during that period many excuses and claims for the purpose of strengthening its international position. However, the concept of self-defence in that war was surrounded by ambiguity. The borders were not stable, there was constant struggle and there was no stable *status quo*, indeed no "peace" had been established, beyond a fragile "cease fire" from the second Arab-Israeli war.

Israel emphasised that it was surrounded by unfriendly states. The important element which pushed the Israelis to feel unsafe was that the Egyptians carried out many provocative acts before the military activities started. Firstly President Nasser on May

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[592] Bunn, p. 74.
[593] Headline, (*New York Times*, 5 June 1967), p. 1.
[594] Draper's phrase cited in Amos Shapira, "The Six Day War and the Right of Self-defence," (*Israel Law Review* 6, 1971), p. 68.

16 asked UN forces to withdraw from the Suez Canal zone and the Gaza Strip, where they had been placed since the Suez Crisis in 1956. Secondly, on May 22 he closed the Canal to all Israeli ships. From the Israeli viewpoint, this was a clearly provocative action, because Israel had many times declared that any intervention or ban against its shipping in the Gulf of Aqaba would be regarded as a declaration of war. The whole Israeli government was united in their reaction to this action, which they viewed as "an act of warfare' that would leave to Israel the right to choose when and how to respond."[596] After the beginning of the maritime blockade, the Israeli government launched an international diplomatic campaign under the supervision of Mr. Eban, for the purpose of gaining international support for the Israeli situation and recognition for any (defensive) action might Israel take. The Israeli point was that the UAR had already undertaken the first aggressive act, when the Egyptian government declared the blockade, and that this gave the Israeli reaction the legitimacy of self-defence. The Israeli Prime Minister informed the Knesset on 28 May:

> "The Government of Israel expresses the opinion that the closing of the Tiran Straits to Israeli shipping is tantamount to an act of aggression against Israel. We shall defend ourselves against this in the hour of need, in virtue of the right of self-defence to which every state is entitled."[597]

Eban, meanwhile, invoked an old Soviet draft on the definition of aggression which included "naval blockade", and declared his view that Israeli was entitled to view any

> "interference, by armed force, with the ships of the Israel flag exercising free and innocent passage in the Gulf of Aqaba and through the Straits of Tiran,...as an attack entitling it to exercise its inherent right of self-defence under Article 51 of the United Nations Charter and to take all such measures as are necessary to ensure the free and innocent passage of its ships".

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[595] Walzer, *Just and Unjust Wars*, p. 81. To some degree, that war motivated his ideas of pre-emptive defence.
[596] Abba Eban, *My Country*: *The Story of Modern Israel,* (London: Weidenfeld & Nicolson, 1972), p. 208.
[597] Speech of May 28, 1967, in Laqueur, p. 83.

He later said of President Nasser that he "did not recoil from an active state of war." That blockade "would take Israel to a point of no return." He continued that

> "there is no difference in civil law between murdering a man by slow strangulation or killing him by a shot in the head. From the moment at which the blockade was imposed, active hostilities had commenced and Israel owed Egypt nothing of her Charter rights.[598] If a foreign power sought to close Odessa, or Copenhagen, or Marseilles, or New York Harbour by the use of force, what would happen? Would there be any discussion about who had fired the first shot? Would anyone ask whether aggression had begun?"[599]

But this strategy did not bring Israel the support that its leaders expected. Eban expressed his anger about this when he said that the international community would do nothing if they saw "Arab armies in Tel Aviv."[600] Thus, there was a change in Israeli policy, especially in the international arena. The Foreign Minister began to adopt a new approach to Israel's problem, claiming that aggression against it had been planned and was imminent.[601] The evidence for imminent attack was at best ambiguous at that time. Both Israeli and US intelligence assessed that no Arab state was in a position to attack soon. On the other hand, Israel could still claim that the Arab states had decided to attack, at some point. When war began on 5 June, Israel asked its UN representatives to discuss its case before the Security Council and "unfold the design of Egyptian aggression and report on Israel's resistance."[602]

Eban told the Israeli Knesset that "beyond all honest doubt, between 4 and 5 June, Arab governments led and directed by President Nasser, methodically prepared and mounted an aggressive assault designed to bring about Israel's immediate and total destruction."[603] In 1972, looking back on that period, he said that "everything in Arab utterance and posture confirmed our impression that our physical survival was at

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[598] This raises a significant inquiry concerning whether the defender, in exercising self-defence, should adopt peacetime or wartime rules.
[599] Eban, *My Country*, p. 215.
[600] Ibid., p. 216..
[601] Lenczowski, George, "The Johnson Presidency," In: *American Presidents and the Middle East*, (Durham: Duke University Press, 1990), p. 108.
[602] Eban, *My Country*, p. 220.

stake."[604] Arab political speeches at that time prompted the Israeli fear that Egypt already had an "aggressive design of encirclement and blockade."[605] Nasser, for example, told his soldiers at an air base in Sinai that:

> "We are in confrontation with Israel. ...We are face to face with Israel. Our armed forces have occupied Sharm Al-Sheikh. We shall on no account allow the Israeli flag to pass through the Gulf of Aqaba. The Jews threatened to make war. I reply 'Ahlan Wasahlan: welcome, we are ready for war, the water is ours."[606]

Egyptian Radio, meanwhile, reported a "definite plan." It was claimed that Egyptian forces are "ready for war," and this would give Israel "no alternative" so that it "must resort to arms." On the same lines, Nasser expressed that an "armed clash between the UAR and Israel is inevitable."[607] The sense of Arabic imminent attack was tangible, but without any clear or unequivocal significance. The Israeli leaders knew that if they struck first, they would lose international support, especially from the United States,[608] and Israel confirmed that it would not act first. This was made clear when the Israeli Prime Minister pledged that Israel "will not attack any country which does not first launch an attack against us." On the same day, Eshkol announced to the Knesset, "we shall not attack any state so long as it does not wage war against us. But anyone attacking us will meet with our full power of self-defence and our capacity to defeat his forces."[609]

In the meantime, the situation in Israel was building to a sense of imminent catastrophe. As Walzer describes it,

> "rumours of coming disasters were endlessly repeated; frightened men and women raided food shops, buying up their entire stock, despite government announcements that there were ample

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[603] Eban quoted in Laqueur, p. 418-9.
[604] Abba Eban, *An Autobiography*, (London: Weidenfeld & Nicolson, 1977), p. 395.
[605] Ibid., p. 399.
[606] Cited in Eban, *My Country*, p. 205.
[607] Cited in Eban, *My Country*, p. 241.
[608] Eban, *An Autobiography*, p. 385, 421-22.
[609] Ibid., p. 406, 409.

reserves; thousands of graves were dug in the military cemeteries; Israel's political and military leaders lived on the edge of nervous exhaustion."[610]

Eban expressed his fear that Israel faced "drastic-slow strangulation or rapid solitary death."[611]It seems, then, that Israel's position here to some extent meets our criteria for pre-emption, because the Arab states had indicated their hostile intent. On the other hand, it was clear to Israel that the Arab states were far from ready for immediately effective attack. Israeli intelligence had information that Egyptian troops, in particular in Sinai, were in complete "disorder."[612] There was reason to believe that the Egyptian provocation was only a political manoeuvre for domestic consumption with the purpose of increasing Nasser's popularity in Egypt and also in the wider Arab World. The use of the "Israel" card to manipulate inter-Arab relations is by no means a past phenomenon and was seen, for example, in some aspects of Iraqi policy statements in the 1990-91 Gulf Conflict.

In 1967, the Arab states were unorganised and divided, which reduced any threat of planned attack on their part. The Israeli aim of self-defence was connected with the strategy that Israel should attack when it was the strongest and the Arab armies were weakest, and as a result of that policy, Israel began the war.[613] Later, Eban in his autobiography said that the reason "was not Egypt's immediate movement alone, but the outrage inherent in her aggressive design of encirclement and blockade."[614] Eban decided that Israel had to "make a total response to the next encroachment," since this encroachment was thought to threaten substantial interests for Israel, which would damage its preventive ability. He continued that, "there was no issue in which Israel had

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[610] Walzer, *Just and Unjust Wars*, p. 84.
[611] Eban, *My Country*, p. 205.
[612] Eban, *An Autobiography*, p. 371.
[613] This was to some point stimulated Walzer to create the third requirement of a "time period in which the risks of waiting are too high."
[614] Eban, *An Autobiography*, p. 399.

pledged its honour in more irrevocable terms." If the blockade had succeeded it would have meant the "collapse of Israel's deterrent power."[615] When Israel declared its power, this would give its enemies an open message that Jerusalem would not tolerate any threat to its security, or any possible aggression. That was the view of Eban when he wrote:

> "A nation which could not protect its basic and vital maritime interests would presumably find reasons for not repelling other assaults on its rights. Unless a stand were made here, nobody in the Arab World, and few people beyond it, would ever again believe in Israel's power to resist, and therefore to survive."[616]

These comments of Eban's about the circumstances of the Six Day War make it clear that Israel's aims from that war exceeded the limits of pre-emptive defence. Her main aim was to alter the regional balance of power in Israel's favour and to undermine any future potential for aggression. Therefore, the Israeli actions or activities in that war were not pre-emptive, but preventive defence. Its basic idea was that fighting a small war at the present time would be better than launching a big war in the future, the outcome of which was uncertain. In spite of this, many researchers on the Six Day War have considered it as an example of pre-emptive defence.[617] Personally, I find it closer to preventive defence. The problem in the Middle East is that the boundaries are not well-established and settled. For this reason, it is difficult to apply pre-emptive defence or any other kind of defence.

Preventive Defence

Any effort to distinguish between pre-emptive and preventive defence will be difficult, because the two terminologies are often used interchangeably, particularly in the

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[615] Eban, *My Country*, p. 204.
[616] Ibid.

political dimension.[618] For instance, when the US forces landed in Grenada in 1983, Dominica considered that action as "a matter of preventing Marxist revolution from spreading to all the islands" and described the operation as "a pre-emptive strike ... to remove a dangerous threat to peace and security"[619] Some scholars oppose any distinction between the two. Indeed, Hare and Joynt came to the point of refusing any anticipatory defence.[620] This, unfortunately, leads to a gap in analysis of many controversial events and episodes, such as the German war against Russia, and that of Israel against the Arab states in 1956 and 1967. Generally, pre-emptive defence is similar to preventive action, though with an increased gap between the defensive action and the attack.[621] This range can only be measured in terms of certainty or reasonable expectation that the assault will happen. But, if we broaden the range more, we will exceed the limit of preventive defence and enter the range of prevention actions.

Prevention

If any state takes part in a military action to prevent a possible aggression, this means that the action is a prevention action, whether against an attack or "conditions which, if allowed to develop, might become in time a source of danger."[622] The idea of prevention

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617 This was the view of Walzer from a moral philosophical point, as it was from a legal one for Beres. See Louis Rene Beres, "Israel, Force, and International Law: Assessing Anticipatory Self-Defence," (*The Jerusalem Journal of International Relations* 13, 1991), p. 3-5.
618 This was the position of Ceadel, who notes the ambiguity between these terms in general. Ceadel, *Thinking About Peace and War*, p. 83.
619 Wil D. Verwey, "Humanitarian Intervention" In: *The Current Legal Regulation of the Use of Force*, ed. A. Cassese, (Dordrecht: Martinus Nijhoff Publishers, 1986), p. 70.
620 Both Hare and Joynt protest, that these cases are connected with the concept of "inevitability", which is never perfect, especially at this risky time of the nuclear age. For more information see J. Hare, and Carey Joynt, *Ethics and International Affairs*, (London: Macmillan Press, 1982), p. 79.
621 During the Six Day War, that distance existed, but was small.
622 Charles Ghequiere Fenwick, "The Right of National Existence: Self-defence and Co-operative Defence," In: *International Law*, (New York: Appleton-Century-Crofts, 1948), p. 231. McDougal and Feliciano depend on Fenwick in their discussion of prevention. They see prevention as consisting mainly of non-military activities.

is related to the concept of the "balance of power," on the basis of which many prevention wars take place. Prevention happens usually before the aggressor state shapes its aggressive intent and even before it gains the means to practise the aggression. Walzer, in connection with prevention, commented that states "stare into temporal as well as geographic distance as they watch the growth of their neighbour's power."[623] The logic behind prevention is that, if the defender state ignores the increases in the power of aggression state, that will leave scope for it to exercise that power aggressively. Generally, early prevention is better than late prevention, because the element of time will make the task tougher and the aggressor more powerful.[624]

Walzer cites both Bacon and Vattel as supporters of prevention. Bacon sounded the alarm bell, when he asked statesmen to watch out for neighbour states who "overgrow" by any means, such as increasing territory, or controlling trade or by any other means so that they "become more able to annoy them, than they were."[625] He "shall make it plaine," Bacon said, "that Warres Preventive upon Just Feares, are true Defensives, as well as upon Actual Invasions."[626] Vattel, later, mentioned the "juncture" at which an adversary state "is on the point of receiving a formidable augmentation of power." At this stage, "securities may be asked, and on its making any difficulty to give them, its designs may be prevented by force of arms."[627] Walzer, however, denies the assumption that preventive war can be legitimate, since in his opinion, gain of power need not indicate any aggressive intent.[628] Walzer said that,

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[623] Walzer, *Just and Unjust Wars*, p. 77.
[624] Walzer makes the same point, Ibid, p. 77.
[625] Cited in Walzer, Ibid, p. 78.
[626] Cited in James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740*, (Princeton: Princeton University Press, 1975), p. 90. Johnson said that the Bacon plan, aimed at "changing the acceptance of defensive war in the just war tradition by broadening the category of what might justly be defended against."
[627] Cited in Walzer, p. 78.
[628] There is a complication, in Walzer's dealing with intent, because he explores adverse intention from such a liberal range of circumstances, so that he sometimes includes many preventive activities.

> " there is a great difference between killing and being killed by soldiers who can plausibly be described as the present instruments of an aggressive intention, and killing and being killed by soldiers who may or may not represent a distant danger to our country. In the first case, we confront an army recognisably hostile, ready for war, fixed in a posture of attack. In the second, the hostility is prospective and imaginary, and it will always be a charge against us that we have made war upon soldiers who were themselves engaged in entirely legitimate (non-threatening) activities. Hence the moral necessity of rejecting any attack that is merely preventive in character, that does not wait upon and respond to the wilful acts of an adversary."[629]

On the other hand, Walzer again decides that the logic of prevention relies on the advantage (utility) consideration, which will diminish the moral side, which can easily be avoided unless the options of the war are made in an immediate attack.[630] Advantage will continue to be the basis of many wars and conflicts. Those who rely on the cold consideration of advantage "radically underestimate the importance of the shift from diplomacy to force. They don't recognise the problem that killing and being killed poses."[631] Our "uneasiness" over preventive war is a result of the fact that "we don't want to fight until we are threatened, because only then can we rightly fight." He considered this as a moral security problem. He argued that the standard should not be fear only,[632] because this may grow and become an imaginary fear, which will increase the feeling of danger.[633]

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[629] Walzer, Just and Unjust Wars, p. 80.
[630] He supposes that preventive defence "has nothing to do with the immediate security of boundaries."
[631] Walzer, *Just Unjust Wars*, p. 79.
[632] Bacon refers to the phrase "just fear," which it is only important capability for fear. Walzer, *Just and Unjust Wars*, p. 78.
[633] Ibid.,

The distinction between preventive defence and prevention in general is quite important.[634] For some people, the difference between them is limited and slight. Some may claim that there is no difference, and even if there is, it is unimportant.

In the case of preventive defence, a threat must be offered immediately to the threatened; which cannot begin aggression. The threat must be tangible and "wilful" as Walzer said. The potential aggressor should be given the chance to illustrate, by words and actions, that it means no harm.[635] Preventive defence does not require that the threat come near the stage of intention to attack. Sufficient threat may sometimes be the taking of unconsidered action. The aggressive intention in preventive defence is a primitive one, unlike pre-emptive defence, in which the aggressive intention has cohered into an organised plan for attack. Commonly, preventive defence takes place before aggression reaches the stage of readiness, or even, sometimes, before it comes into view. The result here, is that readiness is potential, in contrast to pre-emption, where the readiness is real.[636]

In fact, the possession of potential military power will strengthen and support preventive defence, when threatening conduct occurs, but at the same time no specific intention to attack exists. That power is usually gained by obtaining the necessary military equipment and modern military technology. It may, sometimes, include strategic resources and territorial buffers. Goldmann recommended that prevention can only be

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[634] "A preventive strike is launched to destroy the potential threat of the enemy," Wrote Efraim Inbar in 1989, whereas "a pre-emptive strike is a launch in anticipation of immediate enemy aggression." See Beres, p. 10.
[635] This connects with Vattel's statement that "securities may be asked" but that armed force activities will be authorised upon an enemy's "making any difficulty to give them."
[636] The longer time-period in the case of preventive defence comes from the dissimilarity in both intent and readiness.

considered sufficiently defensive when the criterion of geographical proximity is met.[637] However, that proposal is impractical, because it does not mention anything about neighbouring countries whose relationship is not limited by geography.[638] The criterion of geographical proximity is not consistent with preventive defence, especially in areas of intensive conflicts, such as the Middle East, the Korean Peninsula or the Balkans, in which the balance of emerging powers is in the process of formation. The right to preventive defence is usually supported by researchers who reject what Webster recommended about imminent or overwhelming threat, while looking to Article 51 from a liberal view of point. McDougal, Waldock and Stone read and understand the sentence "If an armed attack occurs" as an open right instead of a restriction of the right of self-defence.[639]

They inferred from the word "inherent" that Article 51 was designed to recognise the right of self-defence which existed in customary law before the UN Charter, rather than to present a new, and restricted right.[640] McDougal considered the new technology in modern weapons to be an extra reason to permit defensive action ahead of assault, because to ask a state in the nuclear age to be calm and wait until it is under attack will force this state to receive with open arms a potentially all-destructive first blow, which is not in the interest of its people. As a result of that, he considered defensive first hits to be permissible when a state in a situation "regards itself as intolerably threatened by the

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[637] Kjell Goldmann, *International Norms and War Between States*, (Stockholm: Laromedelsforlagen, 1971), p. 112.

[638] Goldmann used proximity as the criterion to distinguish the US motivations in the Vietnam war from those of South Korea against North Korea. Both of them exercised power with the aim of preventing Communism becoming more dynamic and acquiring strong roots, which could to some extent, encourage it to more aggressive activities. He considered that the fear of South Korea was greater than of that the US, because Seoul is near Pyongyang.

[639] Concerning Stone's understanding of Articles 2(4) and 51, Walzler notes that it "significantly influenced" his thinking (Just and Unjust Wars, p. 340).

[640] McCormack examined in an article, the groundwork of the United Nations Charter, which appeared in 1945, and argued that the Charter framers in reality designed a wider interpretation for the Charter articles. But, as a fact of history, the framers' intention was to strengthen restrict interpretations. For more

activities of another."[641] McDougal and many writers found support in Vattel's ideas. He indicated that any state has not only a right but a duty to protect itself. In consequence of that fact, a state has "a right to everything that can secure it from such a threatening danger, and to keep at a distance whatever is capable of causing its ruin."[642] For states, "the safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design." This right, in Vattel's opinion, places on the state's shoulders an important responsibility of care; a duty "not to act upon vague and doubtful suspicions lest it run the risk of becoming itself the aggressor."[643] In addition to what has been said, concerning proportionality, it is difficult to determine, before any action or event, if there is harmony, because the matter of when and how to begin a preventive action depends more upon the consideration of the preventer than on the aggressor's actions. Therefore, the idea of the balance of power and its contrivances becomes relevant It may again be remarked that through the Cold War years, the UN was in effect a mixed "collective security" and "balance of power" system, with the latter in effect the predominant element as between US and the Soviet Union. It is easy to suppose that the general domain of the concept of power-balancing can be "defensive." The main impulse behind the balance of power is the maintenance of an existing stability of powers. This appears to be Ceadel's understanding of preventive defence.[644] Sometimes,

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information see Timothy L. H. McCormack, "Anticipatory Self-Defence in the Legislative History of the United Nations Charter," (*Israel Law Review* 25, 1991), p. 1-42.

641 McDougal cited in Thomas M. Frank, "Who Killed Article 2(4) ? Changing Governing the Use of Force by States," p. 821. McDougal's debate here is the contrary of Hare and Joynt's.

642 Vattel cited in Stevens, p. 25.

643 Vattel cited in Beres, p. 3 .

644 In Ceadel's view, "preventive defence" happens when an "enemy state has yet to form even an intention to attack," but "unless prevented by war the potential adversary will find itself in so preponderant a position that, according to basic defencist assumptions, it will soon be tempted to form an aggressive intention." Ceadel goes further to put two strategies. First a state goes for a small war now to

there are some actions considered in the field of "preventive defence," though the motivation is still unclear, so that they could equally be considered to fall within the sphere of prevention. It is important to note that preventive defence is not identical with the concept of prevention, which Walzer considered to concern the balance of power. The balance of power is usually shaped by somewhat opaque interactions which do not necessity conform to any technical doctrines of either international law or international relations.. Along the same line, preventive defence should not melt into the idea of pre-emptive defence, in line with Walzer's supposition that his type of legitimate anticipatory defence is a kind of pre-emptive and preventive defence. Finally, preventive defence may be considered as a reaction to a possible aggression, preceding the formation of the aggressor's intent and military readiness. The point may be made by reference to the Israeli assault upon Iraqi nuclear plants in 1981.

"Israeli Jets Destroy Iraqi Atomic Reactor"
"Attack Condemned by US and Arab Nations"[645]

On Sunday, June 7, 1981, Israel launched an aerial attack on the Iraqi nuclear reactor at Osirak outside Baghdad. The attack ruined the reactor, and killed three Iraqis and one French technician. The next day, Israel released a statement that its action against Iraq was one of legitimate anticipatory self-defence under Article 51 of the UN Charter.[646] The international community, including Israel's long-time friends, generally condemned

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avoid a bigger war in the future, whose results uncertain his example for that were the Six Day War, and the Cuban Missile Crisis. Second, a state invades or annexes a buffer state, for defensive reasons. His example for that was the USSR's partition of Poland with Germany. Ceadel, p. 83.
[645] Headline, (*New York Times*, 9 June 1981), p.1.
[646] W. Thomas Mallison and Sally V. Mallison, "The Israeli Aerial Attack of June 7, 1981, Upon The Iraqi Nuclear Reactor: Aggression or Self-Defence?" (*Vanderbilt Journal of Transnational Law* 15, 1982): p. 418.

the Israeli raid.[647]Israel considered its action as an act of anticipatory self-defence. "In destroying the Osirak reactor, Israel performed an elementary act of self-preservation, both morally and legally," explained Yehuda Blum, the Israeli Ambassador to the UN "In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the Charter of the United Nations."[648] In support of his stance, Blum mentioned many legal sources, among them Waldock, the President of the International Court of Justice. "It would be a travesty of the purposes of the Charter, to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow ... . To read Article 51 otherwise is to protect the aggressor's right to the first strike," Blum read from Waldock.

At that time, Israel still regarded Iraq as an enemy state, because the Iraqi Government had declared itself "in a state of war with Israel since 1948," and refused to sign the armistice agreement between the Arab states and Israel.[649] "A threat of nuclear obliteration was being developed against Israel by Iraq," and the "simple, basic fact" was that "Iraq's nuclear programme has, beyond a shadow of doubt, just one aim - to acquire nuclear weapons and delivery for them."[650] Israeli intelligence had evidence that the Iraqi reactor would be ready some time between 1 July and 1 September.[651] However, the Israeli government did not openly accuse Iraq of obtaining nuclear weapons, at the time, nor did it accuse Iraq of having any plans to attack it. This period of two months left Israel "with an agonizing dilemma," and when the Iraqi reactor

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[647] On 19 June the UN Security Council unanimously approved Res. 487 which recognised the "inalienable sovereign right of Iraq" and asked Israel to put its nuclear activities under IAEA supervision. However, the Security Council did not punish Israel under Ch. VII, and did not ask other countries to stop supplying Israel with military technology.
[648] UN SCOR, 36th Year, 2280th mtg. (12 June 1981), paragraph, 58.
[649] Ibid, paragraphs, 63-67.
[650] Ibid, paragraphs, 59, 85.
[651] Uri Shoham, "The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defence," (*Military Law Review* 109, 1985), p. 219.

became "hot", any Israeli hit on the reactor would result in widespread radioactive fallout in Iraq.[652]

> "In plain terms, Iraq was creating a mortal danger to the people and the State of Israel. It had embarked on ramified programmes to acquire nuclear weapons. It had acquired the necessary facilities and fuel. Osirak was about to go critical, in a matter of weeks."[653]

The "precious time" during which the Israeli government made every effort to terminate the problem diplomatically passed in vain.[654] If Jerusalem waited "until the eleventh hour after the diplomatic clock had run out," Israel faced a "stark prospect."[655] If the Iraqi project succeeded and they gained nuclear capability, this would mean that Israel would lose its right of pre-emptive defence. Israel found itself facing two important dilemmas: whether or not the event or the operation reached the standard of the right of self-defence, as Israel alleged, and how widely this right should be interpreted to begin with. In reality, Israel's case was critical. Nevertheless, at issue here is an argument about strategy. From the legal point of view, a right to anticipatory defence is approved, but limited to pre-emption. The Iraqi Government Ambassador to the UN referred to Waldock's remarks from which Israel had taken its excuse (the words quoted by Blum are italicised):

> "if the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then *it would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow.* If an armed attack is imminent within the strict doctrine of the Caroline, then it would seem to bring the case within Article 51. *To read Article 51 otherwise is to protect the aggressor's right to the first stroke.*'[656]

The situation clearly, even in Israeli's own estimation, did not meet these important requirements, because no Iraqi assault was immediately imminent. Israel, for its part, reiterated its claims that it was acting in self-defence. Blum rejected the idea of any

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[652] UN SCOR, 2280th mtg., paragraph, 95.
[653] Ibid, paragraph, 92.
[654] Ibid, paragraph, 95.

parallel between that incident and the *Caroline* case, especially in the nuclear age. The *Caroline* case happened, he said, "precisely 108 years before Hiroshima." Even, "to assert the applicability of the *Caroline* principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence."[657] Moreover "the concept of a State's right to self-defence has not changed throughout recorded history," he argued. If anything, "the concept took on new and far wider application with the advent of the nuclear era."[658] Israel's aim from its hit was "to eliminate the nuclear danger to Israel and to defend its physical existence."[659] There was little further concern expressed about the Israeli action, perhaps because of the political sensitivity involved in any discuss of Israel.[660]

D'Amato, on the other hand, rejected the Israeli claim to have exercised that anticipatory self-defence. He considered that the UN Charter in Article 51 permits the right of self-defence only in the event of an armed attack.[661] However, D'Amato gave Israel another choice. The UN Charter is against any threat or use of force against the "territorial integrity and political independence" of states members. The Israeli action, considered from his view, did not target Iraq's territorial integrity. Moreover, Israel did its best not to cause excessive of loss in property and in human life. As D'Amato argues,

> "it is open to serious question whether Israel's strike was a use of force against either Iraq's territorial integrity or its political independence. ...A use of the territory-namely, to construct a nuclear reactor-was interfered with, but the territory itself remained integral."[662]

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[655] Ibid, paragraphs, 102, 95.
[656] UN SCOR, 2288th mtg. (19 June 1981), paragraph, 200.
[657] Ibid., paragraph, 80.
[658] Ibid., paragraph, 85.
[659] Shoham, p. 219.
[660] This is exactly what Anthony D'Amato observed in 1983 in "Israel's Air Strike Upon the Iraqi Nuclear Reactor," (*American Journal of International Law* 77, 1983), p. 584-88.
[661] D'Amato also criticism the US enlarging of Article 51, when the Americans imposed the quarantine of Cuba.
[662] D'Amato, p. 585.

Such a state has the power to develop civil nuclear energy if it so desires. Finally, D'Amato suggested that the Israeli action could be viewed as "profoundly conservative," because Israel's first aim was to protect its population and existing borders.[663] There was an important development in that case, because it highlighted the problem that will face the international community, if an irresponsible government gains nuclear technology.[664] D'Amato concluded that "if Israel's unilateral, military, and self-interested aerial attack on the Iraqi reactor is hardly a peaceful or desirable precedent for the purposes of non-proliferation, it is possible to surmise that the community of nations breathed a little easier after the deed was done."[665]

In my view, Israel at that time was encircled by many hostile states, still in a state of war with Israel, which would give Israel, to some extent, the right of military defensive activities as a fundamental right. As Walzer describes it: "self-defence seems the primary and indisputable right of any political community, merely because it is there and whatever the circumstances under which it achieved statehood."[666]

Nevertheless, the Israeli operation in Iraq in 1981, on the nuclear reactor, had increased the fears and at the same time raised the alarm about the real desire not to transfer the right of self-defence to a means or instrument of aggression. The essence and intention of Article 51 of the Charter must be upheld. It is important that when the right in question is exercised, there exists a real necessity for defence, and not only claims. At the same time, there must be harmony between the dimensions of the defence and the aggression. It is useful to remember the statement of the US Secretary of State, Daniel Webster, regarding the conditions which should be considered, in the case of exercise of the right of self-defence: Firstly, the requirement of necessity which should be "instant,

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[663] Ibid., p. 586.
[664] Shoham, p. 219.
[665] D'Amato, p. 586-87.

overwhelming and leaving no choice of means, and no moment for deliberations." Secondly, the requirement of proportionality, which was expressed by the formula, "nothing unreasonable or excessive, since the acts justified by a necessity of self-defence must be limited to that necessity and kept within it."[667]

The main point which needs attention, is that we should be more careful in giving legitimacy to the use of force under the umbrella of anticipatory self-defence on the grounds that it is a dangerous kind of use of force, because many states use that claim to give their military action a source of legitimacy. Personally, I support the idea, proposed by McCoubrey and White, that there is a distinction to be made between the outset of the attack and the occurrence of that attack, and that in the period in between, pre-emptive use of force becomes lawful.

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[666] Walzer, *Just and Unjust Wars*, p. 82.
[667] David John Harris, *Cases and Materials on International Law*, p. 656.

CHAPTER SEVEN

DEFENCE AFTER THE BLOW

The issue of pre-emptive and preventive defence usually raises much controversy and disagreement, but there is a general understanding that at a minimum, aggression gives the victim the right to protect itself, by practising the right of self-defence. This concept or understanding of the right of self-defence is common among states and scholars, whether they recognise the right of self-defence as a restrictive right, or whether they consider it from a more liberal perspective. But the notion that defence should always come after the act of aggression is only the simplest form of this right. When Nazi Germany invaded Poland, in 1939, the right of Poland to act in self-defence was obvious, as was that of the Western states to give their help and assistance.

Therefore, this chapter deal with the matter of the use of force on the basis of punishment. In many situations, the right of self-defence overlaps with reprisal use of force; many reprisal actions have been claimed to be acts of self-defence on the basis of Article 51 of the UN Charter. In this connection, it is relevant to review the US air strikes against Libya in 1986, responding to the claimed Libyan involvement in a terrorist attacks occurred in Europe; the US missile strikes against Iraq on the grounds of an alleged attempt to assassinate former president George Bush, of which the US Government accused the Iraqi president Saddam Hussein and his intelligence service; and the US missile strikes against Sudan and Afghanistan, which the US administration considered as legitimate response, after the attacks on its embassies in Africa. Also, in this chapter will be considered to the idea, which many have claimed, that the right of

self defence is a continuing right do not change by time or conditions. The Iraqi invasion of Kuwait in 1990 was claimed to be an example of that kind of defence.

"Punishment" Defence

Reprisals, as forcible actions, are taken by a state in order to secure redress of illegal acts committed by another state, without belligerent intent.[668] The question has been raised as to the legality of such measures under International law. Because of this it is useful to consider the status of the reprisal in the period before the creation of the UN Charter, and also to study reprisals under the Charter.

Before the creation of the League of Nations, the Great Powers frequently resorted to certain measures defined as measures "short of war" against weaker states. These measures were taken to indicate that the states were not resorting to an act of war, and their actions were justified as being legitimate reprisals for international defects committed by other states, in order to secure the enforcement of alleged international legal rights, that is to say, a self-help remedy through armed force. The traditional international law, in general, did not include a method for controlling such a resort to coercion, nor any standard by which it could be said that a certain coercion was admissible or not. Traditional international law, in a case where violence arose, was only interested in the regulation and humanisation of such violence.[669] A point of present significance is that at that period, the acts of reprisal taken by states became war if the other party chose to regard them so. In fact, Oppenheim considered the acts as:

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[668] See Briggs, *The Law of Nations: Cases, Documents and Notes*, p. 958.
[669] See Myres S. McDougal and Florentine P. Feliciano, "Resort to Coercion: Aggression and Self-Defence in Policy Perspective," p. 135.

"unilateral acts of war, they are not wars in themselves as long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers them to be acts of war."[670]

Westlake considers reprisals as "acts of war in fact, though not in intention" because it was left for the state affected to determine for itself "whether the relation of war is set up between them or not. If it elects to regard them as doing so, the outbreak of war is thrown back by the expression of its choice to the moment at which the reprisals were made."[671]

A conditional prohibition of major coercion was established by the covenant of the League of Nations. Thus, according to the provisions of Articles 12, 13 and 15, a state member to the League may not declare a war against another state except in very special circumstances, namely, "prior submission of dispute to arbitration or judicial settlement or to inquiry by the Council of the League."[672] Therefore, under the Covenant was established a standard through which a test of permissible coercion was the fulfilment of the requirement of the prior recourse to non-violent procedures.[673]

As far as reprisals were concerned, there was no mention of them in any article, and there has been confusion as to the meaning of the phrase "resort to war", where the question is directed to the legitimacy of the force or the violence if the participants did not use the word "war" and instead used other verbal symbols such as "reprisal" or "intervention" or other measures "short of war", in expressing that exercise of

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670 Oppenheim cited in Arnold McNair, "The Legal Meaning of War and the Relation to Reprisals," (*Transactions of the Grotius Society* 11, 1962), p. 34.

671 Ibid p. 36. See also Professor Holland's opinion. He considered that the reprisals are "acts hostile in character but done without warlike intention" Ibid, p. 38.

672 The relevant portion of Article 12 of the covenant reads: "if a dispute should arise between them, likely to lead to a rupture, they will submit the matter either to arbitration or judicial or inquiry by the Council" as cited in S. Maccoby, "Reprisal as a Measure of Redress Short of War," (*Cambridge Law Journal* 2, 1926), p. 72.

673 M. McDougal and F. Feliciano, p. 139.

coercion.[674] Also the Pact of Paris (Kellogg-Briand Pact) retained the term "war". As a matter of fact, this Pact did not answer the question of the permissibility of the measures taken as measures "short of war". Since the problem was not expressly solved, a solution can only be found in the practice of states, especially in the Council of the League. This practice was clearly expressed in the Corfu Incident in 1923. It was occasioned by the occupation of the Greek Island of Corfu by an Italian cruiser, after the refusal of the Greek Government to agree to Italian demands, following the assassination of an Italian General by Greek citizens on Greek soil. After the occupation, the Italian Government sent the Greek Government a note stating that the occupation was of a temporary character and there was no intention of an act of war.[675] After the subject was referred to the Council of the League, it in turn, requested an advisory opinion from the Permanent Court of International Justice. The question was, "are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one member of the League of Nations against another member of the League without prior recourse to the procedure laid down in those articles?"[676] The Court replied that the consistency of such measures with the Covenant would depend on "all circumstances of the case."[677] The point of present emphasis is that neither the Council nor the jurists considered that the taking of armed reprisals was necessarily outside the scope of the articles of the Covenant, even if they were not regarded as a recourse to war; instead, the standard of the prior recourse to non-violent procedures was still the test. For example, it can be considered that certain measures "short of war" could be inconsistent with the

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[674] Marjorie Millace Whiteman, "Legal Regulation of Use of Force; Measures of Redress; Peacekeeping Machinery; and Peaceful Settlement of Disputes," (*Digest of International Law* 12, 1971), p. 5-6.
[675] F. X. De Lima, *Intervention in International Law with Reference to the Organisation of American States,* (Den Haag: Uitgeverij Pax Nederland, 1971), p. 31.
[676] H. Briggs, p. 961.

provisions of the Covenant.[678] Further discussions followed wherein the representative of Uruguay in the Council considered that forcible reprisal by one state "should be excluded without taking account of the description of these measures given by the states applying them."[679] Ultimately the Italian occupation was ended through international pressure, an interesting contrast with the later failure of the League effectively to respond to Italy's invasion of Ethiopia.

The important point is that the League of Nations brought into existence the prior recourse to non-violent procedures as a standard before the recourse to war, and that reprisals, as measures of short war, were included in this standard, which was developed by the practice of the Council and the PCIJ.

The reprisal issue was re-examined in the award given in the *Naulilaa* Arbitration in 1928. This arbitration is generally considered to be the most authoritative statement reflecting customary international law upon reprisals. This arbitration arose after the killing of three Germans at a Portuguese colonial frontier post when they were entering Portuguese territory. This provoked the Germans to take reprisals, and they invaded the Portuguese territory. The German-Portuguese Arbitration Tribunal laid down the requirements for reprisals to be legal. The first requirement is a prior illegal act by a state. Secondly, prior to the recourse to reprisals, the state must have made an adequate attempt to obtain redress for the illegal act which was committed by that state, a requirement which reflects the standard which was generated by the Covenant. Thirdly, the reprisal should not be excessive.[680] The UN Charter did not include in its provision either the word "reprisal" or "retaliation." In the light of this fact, it would be necessary to study its legality relying on the implied meaning in the Charter, supported by state

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[677] Ibid., p. 962.
[678] F. De lima, p. 32.
[679] H. Briggs, p. 962.

practice, and the opinions of jurists and tribunals. A point of present emphasis is that the United Nations Charter was drafted with the intention of improving upon the League Covenant and practice with particular reference to the failures of the 1930s. Accordingly, the wording of its articles is important in this respect and should be examined with care, to verify whether reprisals were prohibited within the meaning of the general prohibition upon aggressive resort to force in Article 2(4) of the Charter. The first point observed is that the Charter discarded the phrase "resort to war" as used in the League Covenant and employed instead the phrase "the threat or use of force." In other articles it has used the phrases "threat to peace," "breach of the peace" and "act of aggression." Consequently, the Charter did not only mean "war" as the highest degree of hostility, but also measures "short of war", thus including measures of self-help.[681]

The second point to be considered is that the coercion should not be directed against "the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations." The phrase territorial integrity means the effective control of state officials over certain geographic bases, and the people there located.[682] Other states are required not to curtail such sovereignty. The phrase "political independence" means the freedom of decision-making.[683] So, other states are required not to impair the decision-making capacity of the state. That is, the state must not be coerced through the threat or use of force to take any action which it would not otherwise take. Regarding the phrase, "or in any manner inconsistent with the purposes of the United Nations", these are stated in Article 1(1) of the Charter as being

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[680] Julius Stone, *Legal Controls of International Conflict*, (New York: Garland, 1973), p. 290.
[681] M. McDougal and F. Feliciano, p. 143. See also Goodrich, Hambro and Simons, *Charter of the United Nations*, p. 104. In the post Second World War era the term "war" has severely been abandoned in favour of "armed conflict". See also McCoubrey and White, *International Law and Armed Conflict*, p. 190-95. See also Christopher Greenwood, "The Concept of War in Modern International Law," (*International and Comparative Law Quarterly* 36, 1987), p. 285.
[682] Ibid., p. 177.
[683] Ibid.

"to maintain international peace and security; to take collective measures for the prevention and the removal of threat of peace, and for the suppression of acts of aggression or other breaches of peace."[684] It might be argued that the use of force which is not directed against the territorial integrity or political independence of a state is not contrary to the obligation of Article 2(4) by adopting a strictly literal interpretation. Following the discussion at San Francisco, however, it would be clear that these phrases were introduced at the insistence of the smaller states as a specific guarantee that force should not be used by the strong states in violation of the "territorial integrity and political independence" of the weaker states.[685] The UN Charter has created a centralised system by giving the Security Council the authority to determine the existence of a threat to the peace, breach of the peace, or act of aggression (Art. 39), on the one hand. It is also authorised to decide the measures that should be taken to prevent an "aggravation of the situation" (Art. 40, 41 and 42). These enforcement actions have the character of sanctions. In this way, it must seem that the power of sanctions no longer belongs to the state. It is only for the Security Council to determine and to take or authorise the appropriate measures. Because of this, many writers have accepted the illegality of reprisals in international law.[686]

The important question which now comes to mind is, does the right of self-defence include reprisal actions? The classic reply is that self-defence does not include retaliation. But at the same time, there is a minority who believe that the victim state could take reprisal actions, with the proviso that such actions should be limited and fulfil certain conditions. There is, in the classic view, a great difference between self-defence and retaliation, but under the liberal interpretation, there is in fact little or no

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[684] Ian. Brownlie, *Basic Documents in International Law*, (Oxford: Clarendon Press, 1983), p. 3.
[685] Goodrich and E. Hambro, *Charter of the United Nations*. p. 103.
[686] Ian. Brownlie, *International Law and the Use of Force by States*, p. 268.

difference. If we limit the right of self-defence as a response to attack, this gives us two options; reprisal or defensive war. Again, if we reject reprisals, and we set limits and conditions such as proportionality, on the right of self-defence, this may be argued dangerously to weaken legitimate responses to aggression. The problem here, is that reprisal is ultimately difficult to separate from the right of self-defence, on the basis that reprisal is at least closely linked with it. It is recognised that reprisals include acts of retaliation on the part of the state as a response to prior unlawful action from another state. Because of this, it includes some limited answer on the basis of an aggression or fault which has already happened. This, to some degree, reflects the traditional *lex talionis* principle - "an eye for an eye." In the area of peaceful dispute resolution this retains real point, for example, in "tit for tat" trade sanctions. Reprisals are not intended here to fix or repair that which has already been attacked or faced aggression, because such endeavours fall manifestly within the remit of Security Council action under Chapter VII of the Charter. In the legal meaning, reprisal is an illegal act, carried out to punish the aggressor who began this aggression. The International Law Commission has drawn a line between armed reprisals and self-defence on the basis of the concept that the aim of reprisals is always punitive rather than defensive[687], and they take place "after the event and when the harm has already been inflicted".[688]

Generally, reprisal should be an extraordinary and isolated action. Moreover, reprisal does not give the victim state the right to launch a full scale military attack - which would clearly violate article 2(4) of the Charter. The important idea about reprisal, that must be understood, is that reprisal has strict limits and it comes as a response to a prior hostile action. Walzer' explained its nature thus:

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[687] Report of the International Law Commission, 32nd Session, (*Yearbook of the International Law Commission*, 1980-II) p. 1, 53-4.

> "Soldiers engaged in a reprisal raid will cross an international boundary, but they will quickly cross back; they will act destructively, but only up to a point; they will violate sovereignty, but they will also respect it."[689]

Reprisals occur in both peacetime and wartime. Reprisals, armed conflict, which can be characterised as "first of all an act violating one or another of the laws of war,"[690] may be legitimated, as a result of unlawful action by the other side, although not to the point of violating basic humanitarian norms.[691] Thus, the right of reprisal may be abused, for example by targeting civilians by bombardment and mistreatment of war prisoners. As a result of this, the use of reprisal in wartime is in reality a use of force as a punishment for the violation of wartime rules.[692] Of more concern for the present purpose is peacetime reprisal. Reprisal in peacetime may sometimes include military attack, short term occupation of territory, economic embargo, blockade, seizure of property and harassment or expulsion of foreign nationals.[693]

Reprisal usually comes after prior conduct which is considered as an act of aggression by accepted rules. The main aim of the state which puts reprisal into practice should be punishment to deter any future aggression. The response to the aggression is intended to give a long-life lesson. It is clear that reprisal has a warning role "to induce a delinquent

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688 Derek W Bowett, "Reprisals Involving Recourse to Armed Force," (*American Journal of International Law* 66, 1972), p. 3.

689 Walzer, *Just and Unjust Wars*, p. 221.

690 Frits Kalshoven, *Belligerent Reprisals*, (Leyden: A. W. Sijthoff, 1971), p. 367.

691 See Jean Pictet, *Development and Principles of International Humanitarian Law*, (The Hague: Martinus Nijhoff, 1985), p. 13-14.

692 Kalshoven took a more extreme approach, when he considered that belligerent reprisals ought to be seen as mechanisms of law-enforcement. His view was that the reprisal state can change the laws of war. See Kalshoven p. 367-8.

693 Robert A. Friedlander, "Retaliation as an Anti-Terrorist Weapon : The Israeli Lebanon Incursion and International Law," (*Israeli Yearbook on Human Rights* 81, 1978), p. 71. From his side Onuf considered that reprisals do not need the use of force, but in reality they usually use force in international conflicts. See Nicholas Greenwood Onuf, "*Reprisals: Ritual, Rules, Rationales*," (Research Monograph No. 41, Princeton, NJ: Centre for International Studies, Woodrow Wilson School of Public and International Affairs, July 1974), p. 6.

state to abide by the law in the future."[694] Because of this, there is a connection with the aggressor through its punishment and, at the same time, it is an open message to any future aggressor, as to what the result of its actions will be. The role which reprisal has as an element of deterrence or prevention, makes it a legitimate weapon, as Walzer argued, though at the same time he refused to accept that the main aim of reprisal is punishment.[695] Many other writers consider that the punishment element in reprisal action is not limited to the purpose of deterrence only. Ceadel recognises reprisal action as a controversial and disputed area, because the retaliatory action appears "to place the punishment of an aggressor before the ostensible first priority of a defensive operation."[696] During wartime, sometimes, the role of reprisal does not appear, because it is difficult to separate it from the general war effort. From a historical point of view, reprisal can be considered as a legitimate instrument in state hands, as a kind of self-help in response to any kind of aggression short of declaring war.[697] The right of reprisal is usually "granted on the grounds of necessity, to take the law into one's own hand."[698] Reprisal is used to recover seized goods, to obtain compensation for damage to people, property and reputation. The result is that reprisal has become a legitimate instrument to achieve requests and demands through "law enforcement" in a decentralised international system.[699] Tucker considered capability to enforce the law, as the basis on which the legality of reprisal action should be evaluated. He commented that, "more often than not the independent use of force by states has served the purposes of law...

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[694] Robert W Tucker, "Reprisals and Self-Defence: The Customary Law," (*American Journal of International Law* 66, 1972), p. 591.
[695] Walzer's conception that reprisal action is not punishment gives to the view that it is legitimate. But it is unclear that they only experiential or none-punishment.
[696] That priority in Ceadel's view is: "the restoration of the status quo and the discouragement of future aggression" Ceadel p. 81.
[697] Goodrich, Simons and Patricia. *Charter of the United Nations: Commentary and Documents*, p. 348.
[698] Johannes de Legnano, Tractatus de Bello, de Represaliis et de Duello, 1360, cited in Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law," (*American Journal of International Law* 33, 1939), p. 673.

."[700] During the Arab-Israeli conflict, there were many reprisal actions, especially as the nature of that dispute led to retaliation actions. The Middle East had already suffered many events from wars to civil wars, but reprisal prevented the area from achieving peace or at least security settlement or measures. The situation in the Middle East is not a continuing military operation, but an intermediate position between peace and war, which Walzer called a "demi-monde" between peace and war, and what later became known as a "status mixtus".[701] Exactly the same thing applies to the Korean problem, because the situation there, from 1950 to the present, has been between peace and war. The main difference, is that North Korea uses long-range missile technologies to gain political and economic assistance, mainly from Japan and South Korea. In this case, reprisal is used for political blackmail.

However, it is important to note that there is an overlap between reprisal and the right of self-defence. Both of them have the same construction. Both must be a response to an prior attack, and in both cases, attempts should be made to mend the damage before resorting to the use of force.[702] Moreover, both, traditionally are controlled by the same standards of necessity and proportionality. In the case of connecting the standard of necessity with a proposed right of self-defence, it is usually connected with the terms imminence or immediacy, because it is here more a expressive standard than a real one. On the other hand, in the case of linking the standard of necessity with reprisal, firstly this requires the repriser to try to remedy the damage, and to set a limited time for such efforts before resorting to force.[703] The standard of proportionality is not very helpful,

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[699] This was the view of Kelsen.
[700] Tucker cited in Walzer, *Just and Unjust Wars*, p. 221.
[701] The traditional view considers that there is no intermediary position between peace and war. In the middle of the twentieth century, many states reconsidered this division. For more information see Philip C. Jessup, "Should International Law Recognise As Intermediate status between Peace and War?," (*American Journal of International Law* 48, 1954), p. 98-102.
[702] Bowett, "Reprisals", p. 3.
[703] Dinstein, *War, Aggression and Self-Defence*, p. 207.

because both the right of self-defence and reprisal are susceptible to ambiguities in this regard, and it is important to mention that some terms such as "reprisal self-defence" and "defensive retaliation." increase that ambiguity[704] Many authorities focus on the time at which the action happened, to decide whether it was a defensive act or reprisal. From a traditional view, reprisal is not the same as defence, because it comes after prior damage, which means that "harm has already been inflicted.[705]

After World War II the main tendency was to consider reprisal or retaliation actions illegal.[706] It is important to remember again that the UN Charter did not in any way mention reprisal. The mainstream view concerning reprisal considers it from the perspective of the general prohibition of Article 2(4).[707] Holders of this view regard enforcement actions authorised under article 42 and exercise of the right of self-defence in Article 51 as the only exceptions to Article 2(4). They argue that if the right to reprisal is permitted, this right should be explicit in the Charter. From this viewpoint, self-defence is legitimate but reprisal is not. Indeed, many Security Council resolutions frankly denounced some reprisal actions which the Council examined. The General Assembly's 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States maintained that "states have a duty to refrain from acts of reprisal involving the use of force."[708]

Moreover, the International Law Commission in 1980 made a distinction between reprisal and the right of self-defence on the basis that reprisals are disciplinary and not defensive.[709] In the Beirut raid in 1968, Israel claimed that its action was a retaliation for

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[704] In discussing the legality of reprisals, Schachter relinquishes the first term for the second; See Oscar Schachter, "The Right of States to Use Armed Force," (*Michigan Law Review* 82, 1984) p. 1638.
[705] Bowett, "Reprisals," p. 3.
[706] Ibid, p. 2.
[707] Ibid, p. 2.
[708] Res. 2625, adopted 24 October 1970. Reprinted in United Nations Resolutions, ed. by Dusan J. Donovich, (Series I, General Assembly, Vol. XIII, 1970-72), p. 338.
[709] Dinstein, War, *Aggression and Self-Defence*, p. 207.

an attack by two Arabs, two days earlier, on December 26, upon an El Al passenger plane at Athens Airport.[710] Israel regarded its reprisal action as legitimate, because it saw Lebanon as having given freedom of movement in Lebanon to the Palestinian Popular Front, of which the aggressors at Athens Airport were members, and they came from Lebanon. Therefore Israel held Lebanon culpable of participation in that terrorist act.[711]

Theoretically, the right of self-defence comes as a response, and after a prior aggression. Because of this, the restricted interpretation of Article 51 allows military action and recognises it as legal and legitimate only if it comes as a response to a prior attack. This association between the right of self-defence or reprisal and time, however, is complex because as Ceadel argues, it is difficult to find a defensive weapon to act in "pure interception", especially in these days, with the spread of mass-destruction weapons. Ceadel also recognises as defensive actions "counter-attacks or retaliations carried out as soon as possible afterwards."[712] For example in 1964 the British Government claimed that its attack on barracks in Yemen, "was not a retaliation or reprisal" because there was:

> "a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisals'; the other, which is expressedly contemplated and authorised by the Charter, is self-defence against armed attack. The term 'counter-attack' has perhaps led to some misunderstanding. But it is clear that the use of armed force to repel or prevent an attack-i.e. legitimate action of a defensive nature-may sometimes have to take the form of a counter-attack."[713]

But, unfortunately most of the attempts to distinguish between the right of self-defence and reprisal are based on misapprehension. Generally, the right of self-defence in law, in literature or common life, is recognised as an essential right, to achieve aims and

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[710] Richard A Falk, "The Beirut Raid And The International Law of Retaliation," (*American Journal of International Law* 63, 1969), p. 416.
[711] Ibid., p. 420-21.
[712] Ceadel, p. 81.

interests on behalf of which one is always allowed to fight. Reprisal, on the other hand, is a private type of fight, and the aim here is different from the aim which self-defence tries to achieve. It is relevant here to consider the pragmatist theory. Pragmatists demand that reprisal should viewed from the perspective that, in many cases, reprisal actions have been overlooked or, at least, subject to minimal criticism. In their view, this indicates that reprisals have some *justification* or even legality. Reprisal, from this point of view, should be considered as a significant instrument to protect interests, to which the international security arrangements did not give enough security. From this point of view, these pragmatics propose abandoning the unproductive effort to distinguish between self-defence and reprisal, and instead emphasising the distinction between reprisal actions that are defensive and therefore legitimate, and those that are not.[714] This, however, needs a flexible concept of the right of self-defence, which includes reprisal within it.[715] This interface between the right of self-defence and reprisal does not necessarily lead to approval of reprisal, because it will lead to increased suspicion about the right of self-defence. The main way to distinguish defensive action from reprisal, relies on the objective. Punitive reprisal aims to prohibit any future attacks, while illegal reprisal's purpose is to punish past infringements.[716] The main element which unites both those who support and those to criticise reprisal action, is their refusal to consider revenge as a lawful goal. Ceadel mentions the punishment character which reprisals have, on the grounds that it is a source of disagreement, and he means here the surplus injury or harm which exceeds the limit of what is necessary to deter future aggression. Bowett, Falk and Tucker considered prevention and also deterrence as

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[713] Statements of the UK Representative, UN, SCOR, 19th Year, 1109th mtg. 7 April 1964, para 26.
[714] Bowett, Falk, Schachter and Tucker all of them had begun with this approach.
[715] Bowett has a different view from Tucker and Schachter. He favours considering the right of self-defence and reprisal as independently separate, and he argues that self-defence should not become over-flexible.

legitimate means of reprisal and different from pure punishment. Walzer keenly supported the use of reprisal in international relations, because he considered that reprisal eventually would achieve "deterrence without retribution."[717]

It is clear that these writers deal with the positive side of reprisal, and view the employment of a military action as a quantifiable one. However, the intention of reprisal is difficult to confirm, and to separate from military actions. The success of defensive action does not prevent achieving revenge, and the existence of a reprisal intention only does not mean that the action is non-defensive. Reprisal for punishment has been criticised by many, and military action cannot fix or restore damage which has already occurred, such as lives or property that have already been destroyed. Moreover, its objective is not to prevent or deter future aggression. As a result of this, punishment reprisal is considered as an inexcusable and extreme use of force. The problem is how to separate the necessity from the use of force. During the Cold War in nearly all reprisal incidents, the main claim made in justification of these actions was that they were undertaken to prevent future aggression. If legitimacy is given to reprisal action on the basis of defensive reasons, the question then arises, how much and what type of force is necessary to prevent or deter future aggression. The amount of power which should be applied usually depends on the idea of proportionality. The general view is that the action should be limited to what is necessary for accomplishment of the basic security aims or objectives, without any gratuitous harm. Defensive reprisal is different, because no future threat exists; in consequence, its only aim is revenge. Defensive action applies to a threat which is present, but not manifest in attack. However, many reprisal actions after World War II exceeded the limits of proportionality with the prior attack, to the

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[716] Bowett, "Reprisals," p. 3. Also see Robert W Tucker, "Reprisals and Self-Defence: The Customary Law," (*American Journal of International Law* 66, 1972), p. 589.
[717] Walzer, *Just and Unjust Wars*, p. 209.

stage of inflicting gratuitous harm. The important question which needs to be answered here, is whether it is possible, through the proportionality measure, to determine the relationship between reprisal and the threat posed by the attacker. This difficulty arises, in both peacetime and wartime reprisal.[718] The attempt to connect reprisal with the prior attack through harmony or proportionality, may limit the effectiveness of reprisal to deter future aggression. On the other hand, the link between reprisal and future threat, is likely to result in toleration of reprisal in excess of the prior attack.[719]

Generally, many things about reprisal are unclear; for example, the possibility and the nature of future threat, the efficacy of deterrence and also the expected behaviour of a particular enemy in response to modest or dramatic displays of force, and the reaction of allies and so on.

"US bombers 'kill 100' in Libya raids"[720]

In April 1986, two terrorist attacks occurred in Europe, which further damaged the relationship between the US and Libya. The first attack, on 2 April, was against a TWA aeroplane, and resulted in four deaths. The second attack was against a night club in West Berlin, in which two American soldiers were killed, among many other casualties. In both attacks, allegations were made that Libya was responsible.[721] It is important to

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[718] Both Adam Roberts and Richard Guelff understand proportionality to have two identities. First, they regard proportionality as a state's standard response to an aggression outside wartime. Second, it connects the actions of repriser (the victim) actions whether to its enemy's actions or to the anticipated value of its own action. See Adam Roberts and Richard Guelff, Introduction by the Editors: In *Documents on the Laws of Wars*, (Oxford: Clarendon Press, 1989), p. 5.

[719] This logic has a background in the Christian theories of Just War. For more information see Judith Gail Gardam, "Proportionality and force in International Law," (*American Journal of International Law* 87, 1993), p. 391-413.

[720] Headline, (*The Times*, 16 April 1986), p.1

[721] Anthony D'Amato, "Editorial Comment: The Imposition of Attorney Sanctions for Claims Arising from The US Air Raid On Libya," (*American Journal of International Law* 84, 1990), p. 705. See also, for more discussion Stanmir A. Alexandrov, *Self-Defence Against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996), 184-86.

mention here, that the US Administration under the leadership of President Ronald Reagan, from the first moment he assumed office, in 1981, looked forward to a new development in American foreign policy, with regard to use of force, because until that time the US had been suffering from "Vietnam trauma." This does not mean that the US Administration wanted to enter new wars or conflicts, but it believed in the utility of limited military force as an integral part of a coercive diplomatic strategy for bringing political pressure to bear on America's actual and perceived adversaries.[722] As a result of that clash with Libya, the US Administration achieved its desire to demonstrate through robust action its willingness forcefully to protect its interests. The Libyan Government threatened an outbreak of a retaliatory actions in Europe and in the United States. At the same time, the Libyan authorities placed foreign employees into the utilities or areas which it anticipated that US would strike.[723] President Reagan accused Colonel Qaddafi, as he had already announced a war against the United States, and as a result of that Reagan continued, "We're going to defend ourselves and we're certainly going to take action in the face of specific terrorist threats."[724] What is significant here is that the US considered its policy against Libya as an "exercise of its right of self-defence."[725] In respect of the US right of self-defence, President Reagan asserted, "Self-defence is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight - a mission fully consistent with Article 51 of the UN Charter."[726] Reagan recalled his promise to fight terrorism when he presented each US hit as "a

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[722] Jentleson W. Bruce, "The Reagan Administration and Coercive Diplomacy: Restraining More Than Remarking Governments," (*Political Science Quarterly* 106, 1991), p. 57.
[723] Edward Schumacher, "Libya to Put Foreigners in Army Bases," (*New York Times*, 13 April 1986), p.18. In the event of armed conflict this would have amounted to an unlawful "human shield" policy, equivalent to that of Iraq in 1990-91.
[724] See President Reagan News Conference, (*New York Times*, 10 April 1986), p. 22.
[725] "American Bombers Targets in Libya," (*New York Times*, 15 April 1986), p. 10.
[726] See "Transcript of Address by Reagan on Libya," (*New York Times*, 15 April 1986), p. 10. See also, D. J. Harris, *Cases and Materials on International Law*, p. 913.

single engagement in a long battle against terrorism."[727] Later Reagan said on T.V. "Our evidence is direct, it is precise, it is irrefutable."[728]

The US claimed that its aim in its clash with Libya was to paralyse or stunt the Libyan Government's activity in supporting and financing terrorist movements. Because of this, the US Government considered its action as necessary and proportional to the Libyan aggression. The Americans knew that their options against Libya were limited. US aeroplanes could not damage Libyan oil fields or the oil refineries, since South European countries needed oil from Libya, and also, US Arab allies in the Middle East, and even the US public opinion, would not accept an invasion of Libyan territory.[729] Some preferred to view the US raids against Libya as having a deterrent influence on any future terrorist attacks; otherwise, the raids would be pure reprisal. But Walzer disagreed with this, because he considered that a clear oppression of the victim was part of a prior attack.

> "The ground of reprisal is not its overall effectiveness, it is the right, in the difficult conditions of the demi-monde, to seek certain effects. So long as the conditions exist, the right must also exist, even if those same conditions ... make it unlikely that rightful action will have entirely satisfactory consequences ... whenever there is some substantial chance of success, it is the legitimate resort of a victim state; for no state can be required passively to endure attacks upon its citizens."[730]

Also he argued that the Arab-Israeli conflict did not "suggest that peacetime reprisals make for peace, it also doesn't point to any alternative response to illegitimate attacks."[731] It is clear that Walzer preferred that the criterion of deterrence effect should be removed from any legal or moral judgement of reprisal action.[732] Therefore, Walzer defined the cases in which reprisal can be taken, when he said,

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[727] See Bernard Weinraub, "Qaddafi is Warned," (*New York Times*, 16 April 1986), p.1
[728] The 'Irrefutable Evidence, (*The Times*, 16 April, 1986), p. 7.
[729] See (*The Times*, 16 April 1986), transcript of President Reagan's broadcast, p.6.
[730] Walzer, *Just and Unjust Wars*, p. 221.
[731] Ibid., p. 217.
[732] It is clear that Walzer attempted try to please critics when he used the expression, "chance of success" rather than a real judgement. Ibid, p. 207-22.

Reprisals are limited with reference to previous crime, not with reference to the crimes they are designed to deter (not with reference to their effects or their hoped - for effects)."[733]

In the case of focusing on past crimes only, the deterrence element in this case will be weak but when the element of prevention or deterrence is powerful, the defensive spirit will be high. After the US raids, doubts were raised about the legitimacy of those air raids, whether they were consistent with international law or even met the requirements of Article 51 of the UN Charter. This was clear, when Owen commented that,

"there is considerable doubt whether the US was acting within both the spirit and the letter of international law. There has been far too much talk from President Reagan and others of retaliation, reprisal and revenge for this action to be convincingly described as one of self-defence under Article 51."[734]

The point which needs highlighting, although we dealt with it at the end of Chapter Six, is the point of proportionality or harmony between the reaction (self-defence or reprisal), with the prior aggression. That reaction should not go beyond the level of the original aggression, and not be transformed itself into aggression, which is a formula that a huge state such as the United States can accept and does not go beyond. The US Administration, for example, depended on top secret sources, regarding the involvement of the Libyan government in terrorist attacks, which it is difficult to examine.[735] The question should be, how it is possible for defensive reprisal not to exceed its limits?[736] Basically, there are two ways of considering proportionality. The first one is the restricted concept which judges reprisal action only against the prior aggression. It is, as Walzer called it, "backward-looking." The essence of this trend is that the reaction does not go beyond the prior attack, and does not create excessive casualties. Falk supported this trend. He mentioned, as an example, the Arab-Israeli conflict, when Israeli forces

[733] Ibid., p. 211. Bowett had the same understanding. Because sometimes reprisal actions enlarge the conflict, this will not affect the legitimacy of the retaliation action.
[734] See David Owen, "Bombing is not the answer," (*The Times*, 16 April 1986), p. 12.
[735] The "Irrefutable Evidence," emphasis added.

destroyed 13 Arab aeroplanes in Beirut Airport as a reprisal for the attack on its plane in Athens airport. Falk considered that attack to have badly damaged the Israeli case and supported the grounds of the Palestinian fighting groups.[737] The second tendency is the flexible concept, which seeks harmony between reprisal and the overall threat. This concept or line strengthens the position of open reprisal which need not be restricted by the scope of the prior attack. That means reprisal is transferred, in contrast to the *lex talionis*, from the eye to the rest of the body. Many support the view that the right of self -defence may justify that intensity of response.

For example, if the Israeli raid is considered retaliation to the indirect Lebanese participation in the Athens attack, it was definitely disproportionate. But the Israeli raid could be considered as a response to Lebanon's permitting the forces of the Popular Front for the Liberation of Palestine to use its territory and headquarters. The PFLP had, after the Athens incident, claimed the responsibility for that attack. It was also clear for a long time that this Palestinian group's first and last objective was to destroy the state of Israel, and establish a Palestinian state instead.[738] Moreover, history shows that the Israeli response did not harm civilians, and was carried out on empty planes; because of this, it is possible to argue that this response was both understandable and limited.[739] Some support for this flexible tendency may be found in academic writing. For example, Ago calls for respect and understanding of military necessities, which sometimes require that the response go beyond the limit of the prior attack. This was clear from his comment that

> "it would be mistaken ... to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the

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[736] See Onuf considered proportionality as the main element of reprisal construction.
[737] See Falk, "The Beirut Raid And The International Law of Retaliation", p. 438-39.
[738] Ibid,. p. 433-34.
[739] After the Independence of State of Israel in 1948, the clashes between Arabs and Israelis were nearly daily, which contain or include small attacks, and the Israeli reprisal from the same seize, unless in some cases, such as the Qibya Raid of October 1953, and the Gaza Raid of February 1955.

attack may well have to assume dimensions disproportionate to those of the attack suffered. ... Its lawfulness cannot be measured except by its capacity for achieving the desired result."[740]

Dinstein considered that the defensive response, by nature, need not be in precise harmony with the prior attack. The victim state should not be inhibited from using additional force, when or if the aggression was serious, or posed an exceptional danger.[741] But in reality, the issue of proportionality is still a matter of disagreement. Barboza, for instance, suggests that the concept of proportionality "means that the defensive action must not go beyond what is necessary in order to defeat the purpose of attack."[742] "An aggressor State may lose its appetite for continuing with the hostilities, but the defending State need not be so accommodating."[743] For example, Israel for a long time depended on the right of self-defence to justify use of force, which was in many cases refused by the Security Council of the UN and her actions were condemned.[744] Israel's defensive philosophy considered that the equilibrium of power in the Middle East depended basically on its continuing to justify its military actions on the basis of self-defence, because its existence as a state and nation were in serious danger. "Therefore ... all its military actions are essentially in the nature of self-defence."[745] Others developed an argument which mainly depends on the accumulation of the numbers of attacks; what is known as the explosion concept or the "accumulation of events" theory.[746]

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[740] Roberto Ago, "Addendum to Eighth Report on State Responsibility," (*Yearbook of the International Law Commission*, Vol. 2, 1980), p. 69. He continues that: "In fact, the requirement of the "necessity" and "proportionality" of the action taken in self-defence can simply be described as two sides of the same coin."

[741] Dinstein War, *Aggression and Self-defence*, p. 217, 219.

[742] Julio Barboza, "Necessity in International Law," In: *Essays in International Law in Honour of Judge Manfred Lachs*, ed. by J Makarczyk. (The Hague: Martinus Nijhaff Publishers, 1984), p. 34.

[743] Ibid.

[744] But other small reprisal actions by Israel were not condemned by the Security Council.

[745] Bowett, "Reprisal," p. 7.

[746] Ibid, p. 10.

This concept is built on the basis of occurrence of a series of small assaults, individually not dangerous enough to warrant armed response. but reaching the stage of a "final and unforgivable needle prick," which ultimately impels the victim to make a defensive reprisal' response. In this case, the harmony between the reprisal action and the prior aggression should be on the basis, overall, of these "individual minor infractions."[747] The same idea was used in an attempt to support the American blockade against Nicaragua.

Judge Schwebel claimed that the Nicaraguan Government had supported small and individual activities by the El Salvador rebels and as a result, these actions in its total were "cumulatively tantamount to armed attack upon El Salvador."[748] In general, the concept of the "accumulation of events" theory could accomplish many aims. The first one is that it allows the repriser the right of disproportionality in response to the particular acts which pose a risk to its national security. The second is that the repriser state arguably gains a claim to act in exercise of the right of self-defence. Indeed, Ceadel states that many self-defence activities are in reality reprisal actions. Also, we can add Miller's comment, that "in reality, all exercises of self-defence consist in a pre-emptive strike."[749] Because of this, Bowett wonders "is the legality of the action to be determined solely by reference to the prior illegal act which brought it about, or by reference to the whole context of the relationship between the two states?[750] The Security Council has usually favoured retaliation actions being in small and individual in scale.[751] The Security Council, when it has condemned reprisal actions, has based its

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[747] Norman Menachem Feder, "Reading the United Nations Charter Connotatively: Toward a new Definition of Armed Attack," p. 415, 416.
[748] Ibid., p. 415.
[749] Edward Miller, "Self-Defence, International Law, and the Six Day War," (*Israel Law Review* 20, 1985), p. 13.
[750] Bowett, "Reprisal," p. 4.
[751] Here there is a weakness in the Security Council approach, because small conflicts could easily escalate into major conflicts. Keeping international peace and security should be the first aim for the

disapproval upon their being disproportionate and undertaken as pure revenge.[752] Bowett concludes that "the Council will not look to the whole context of the action so as to ... accept the plea of self-defence in the face of continuing and repeated threats which, unless countered, will recur."[753] The fears of the Security Council and its wish that reprisal actions remain small in size may be understandable, but it is hard to accept that the Security Council does not consider events in depth and does not study the reasons for long conflicts, such as the Arab-Israeli conflict, and the Indo-Pakistani conflict. The Council usually resorts to taking decisions, rather than action. This gives a wrong message, that exercise of force on a small scale in a conflict, may be acceptable. Many times, the Security Council has condemned Israel's policy of military reprisal, as in the Qana incident in South Lebanon in 1996, but all the Council's decisions are still decisions and nothing has been done. This will reduce the power and prestige of the Council.[754] Also, it is worth mentioning, that in 1982 when the Lebanese Forces [Phalangist Unit] committed the massacre of *Shatilla* and *Sabra* Camps, the Israeli help to the Lebanese Forces and indirect responsibility were clear, but the Security Council did not take any actions against Israel or even establish an international Committee to investigate that massacre.[755]

Security Council, whether the conflict is small or huge. It is to some degree the same as the situation in Chechnya, where the international legitimacy is absent with thousands of innocent people dying there, and that legitimacy was available few months before when NATO used power in Kosovo for humanitarian purposes.

752 In Bowett's understanding, the legitimate response (defence), should take enough time before acting against the aggression. "Were this not so, the whole basis of military planning, such as one finds in NATO and other military pacts would be suspect." Bowett, "Reprisal," p. 7. The same applies the British air attacks on Yemeni position in 1964, and the Gulf of Tonkin Incident in 1964, both of these incidents were questionable as to their legitimacy.

753 Ibid., p. 7.

754 On Tuesday April 18, 1996 Israel shelled UIFIL's Fiji BATT compound in the village of Qana, a few kilometres south east of Tyre. Around 800 civilians had taken refuge at the base. Israelis targeted the base in retaliation for the Hizballah attack on one of their special forces groups. The result was that over 100 civilians were killed.

755 For more information see G.I.A.D Draper, *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D.* Draper, OBE, eds. by Michael A. Meyer and Hilaire McCoubrey (London: Kluwer International Law, 1998), p. 269-82.

"US Strikes Iraq for Plot to Kill Bush"[756]
"Revenge raids by cruise missiles on targets in Sudan and Afghanistan"[757]

The Gulf War (1990-91) left unresolved a number of important differences between the United States and Iraq. Iraq viewed the United States as responsible for the death and destruction inflicted by the coalition in 1991. Saddam Hussein, who remained in power, nursed a great personal hatred for the country that led the coalition that had just defeated him in battle.[758] In turn, the United States viewed Hussein as an irrational despot who threatened the security of the entire Gulf region, and it argued in the United Nations for the maintenance of economic sanctions, a no-fly zone, and a rigorous weapons inspection team. All these were viewed by Iraq as primarily US initiatives, which resulted in further deterioration in relations between the two nations. Within this context the United States and its (at that time) newly elected president, Bill Clinton, were again faced with the question how to respond to Iraqi aggression. In May 1993, just months after Clinton had assumed office, reports began to surface that Iraqi agents had plotted to assassinate former president George Bush. The Kuwait government arrested sixteen individuals, including eleven Iraqi nationals,[759] on charges that they had conspired to assassinate Bush with a car bomb during his visit to Kuwait on 14 April 1993.[760]

The Kuwaitis also seized two cars with remote-control devices and several hundred pounds of explosives. The Kuwaiti government announced that the group of terrorists had been made confessed that they worked for the Iraqi intelligence service.[761] Also, at

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[756] Headline, (*Washington Post,* June 27 June 1993), p. 1
[757] Headline, (*The Times,* August 21 1998), p.1
[758] See Christine Gray, "After the Cease-fire: Iraq, The Security Council And The Use of Force," (*The British Year Book of International Law* 65, 1994).
[759] See (*Keesing's Record of World Events* 39), 1993, p. 39487.
[760] See Douglas Jehl, "US Convinced Iraqi Saboteurs Plotted to Kill Bush," (*New York Times,* 8 May 1993), p. 1.
[761] See (*Keesing's* 1993), p. 39487.

this point it was claimed that there was evidence that the bomb to have been used was of Iraqi design and origin.[762] Here, facing domestic pressure to take strong action, President Clinton's options were limited: Saddam Hussein was already isolated, there were no diplomatic measures that would punish him meaningfully, and severe economic sanctions were already in place. Although the agents who were actually to have carried out the plot would be tried by the Kuwaiti courts, there was no legal recourse with respect to the Iraqi leadership. Faced with the choice between doing nothing and using force, President Clinton approved a retaliatory cruise missile attack against the Iraqi intelligence service headquarters.[763]

On June 27 1993 the destroyer USS *Peterson* (DD969) in the Red Sea and the cruiser USS *Chancellorsville* (CG 62) in the Gulf fired a total of twenty-three Tomahawk cruise missiles at the headquarters, in downtown Baghdad. Twenty of the missiles hit and heavily damaged the headquarters complex; the other three missed the target and struck in the neighbourhoods around it, damaging homes and killing many innocent people.[764]

The United States justified the missile attacks on Baghdad as an act of self-defence permitted under Article 51 of the United Charter.[765] President Clinton told the American people on the evening of the raid that:

> "[T]he Iraqi attack against President Bush was an attack against our country and against all Americans. We could not and have not let such action against our nation go unanswered. ... A firm and commensurate response was essential to protect our sovereignty, to send a message to those engage in state-sponsored terrorism, to deter further violence against our people, and to affirm the expectation of civilised behaviour among nation."[766]

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[762] Douglas Jehl, "US Cites Evidence in a Plot on Bush," (*New York Times*, 9 May 1993), p. 1.
[763] Stephen Labaton, "Congressmen Urge Action If Iraq Hatched Plot to Assassinate Bush," (*New York Times*, 10 May 1993), p. 1. See also Douglas Jehl, "Iraqi Tells FBI He Led Attempt to Kill Bush, US Officials Say," (*New York Times*, May 20 1993), p.1.
[764] See Gwen Ifill, "US Fires Missiles at Baghdad, Citing April Plot to Kill Bush," *New York Times*, June 27 1993), p. 1.
[765] See D. J. Harris, *Cases and Materials on International Law*, p. 913-14.
[766] See (*The Times*, 28 June 1993), p. 2. See also Louis Henkin, "Notes from The President: The Missile Attack on Baghdad And Its Justification," (*The American Society of International Law Newsletter* 3, June-August, 1993), p. 12-13.

Also, in a gesture aimed at winning international support, the American delegate to the United Nations, Madeleine Albright, presented to a special session of the UN Security Council the evidence that the United States had been legally justified in conducting the strike.[767] Albright argued that the US action had been an act of self-defence, permissible under Article 51 of the UN Charter. The decision by the Clinton White House to present its case before the UN was a clear attempt to seize the political high ground and to avoid international criticism.[768] General Colin Powell, then the Chairman of the Joint Chief of Staff, claimed that the action was appropriate, proportional, and consistent with Article 51 of the Charter.[769] Moreover, Powell emphasised the readiness of Pentagon for any reaction by President Saddam Hussein. He said, "We have lots [of missiles] and they have lots of targets."[770] There was support from America's European allies for the missile strike. There was some criticism from Arab governments, but opposition quickly evaporated. The US strike generated little sympathy for Saddam Hussein.[771] It did not enhance his standing in the Arab world, nor did it alienate the United States from either its European allies or the Arabs.[772]

From his side, the Iraqi foreign minister in a letter to the Security Council demanded an immediate condemnation of the American action. He asserted that the US action was a:

> "totally unjustified act of aggression [that] has left a large number of dead and wounded among the Iraqi civilian population, including women and children. This was a deliberate terrorist act perpetrated by the Government of the United States of America on grounds which were spurious

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[767] See Richard Bernstein, "US Presents Evidence to UN Justifying Its Missile on Iraq," (*New York Times*, June 28 1993), p. 1

[768] Madeleine Albright indicated that "a direct attack on the United States, an attack that required a direct United States response [and to which we] responded directly, as we are entitled to do, under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases," cited in Dino Kritsiotis, "The Legality of The 1993 US Missile Strike on Iraq And The Right of Self-Defence in International Law,"(*International and Comparative Law Quarterly*, vol. 45, 1996), p. 163.

[769] See Michael Reisman, "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications," (*European Journal of International Law* 5, 1994), p. 121.

[770] See *The Times* (June 28, 1993), p. 1.

[771] See (*Keesing's*, 1993), p. 39531.

[772] For more information concerning the international reaction on the missile strike see Kritsiotis, p. 164-65.

and unjustified, concocted by the American authorities with the complicity of the leaders of Kuwait."[773]

The prohibition of the use of force by states became a major principle after 1945, which enshrined in the UN Charter, has survived manifest violations during the Cold War years. In the Gulf War the UN and coalition powers dedicated themselves to a reaffirmation of the Charter and defeated the invasion of Kuwait. The US attack on Iraq places this success in jeopardy. Obviously, in this case, there was no UN authorisation and the Iraqi population was placed in danger, rather than being protected.[774] The right of self-defence which was invoked by the Clinton administration, offers no justification. The Charter says the right to self-defence can only be invoked by an armed attack. Even if it is admitted that self-defence may be invoked to protect nationals abroad, as was the case when Israel rescued mostly Israeli hostages held in Entebbe in 1976, in this case there was no actual or imminent threat and remedies other than the use of force are available. The plot against President Bush had failed, the alleged conspirators were in custody in Kuwait, and it has not been claimed that Iraq was about to launch another terrorist attack against America. If self-defence is not applicable, then the only other possible justifications might be reprisal and retaliation. Retaliation is merely punitive in character.[775] As a result, as long as international law remains in its present state, States which perceive themselves as aggrieved will consider armed force the only realistic response to States which engage in terrorist activities against them, and will invariably rely on their inherent right of self-defence to win the argument in international law. The United States did so to general acclaim in June 1993, in what can only be described as

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[773] Cited in Kritsiots, p. 163.

[774] See Jill Sherman, "Labour Questions Legality of US Attack," (*The Times*, 28 June 1993), p. 1. John Smith, the Labour leader said the US action it should have been sanctioned by the United Nations Security Council.

[775] For more debate see Alexandrov, *Self-Defence Against the Use of Force in International Law*, p. 186-88. See also, Christopher Walker, "Bitter Iraq Sought Vengeance," (*The Times*, 28 June 1993), p. 2.

an unhealthy development for international law generally, because the enterprise of self-help represented as an action in self-defence, reared its ugly head once again. Unless and until the international community improves the mechanisms for settling such disputes satisfactorily, and there is an urgent need to do so, the right of self-defence will continue to be a regular point of refuge in the practice of States.

In the 1990s a new terrorist threat to United States interests emerged, actions sponsored by an Islamic extremist, Osama bin Laden. The son of a Saudi billionaire, bin Laden had gone to Afghanistan in the 1980s to fight the Soviets alongside the *mujaheddin.* Over time, bin Laden had built up a quasi-military organisation that had become militant and dedicated to driving Western influences out of the Arab world. The group, which became known as "*Al Qaida,*" the Base[776], remained in the shadows, but its cells operated throughout the Middle East. Although Osama bin Laden returned to Saudi Arabia following the war in Afghanistan, he was exiled in 1991 after he began his radical campaign against the United States.[777] With his group of guerrilla fighters and his considerable wealth, estimated by some at over $300 million, bin Laden quietly began a war of terrorism against the West and the United States in particular. Operating primarily out of the rural regions of Afghanistan and Sudan, he provided funding, support, and training for groups willing to strike out against the United States. He allegedly assisted terrorist groups in buying weapons, equipment and computers, and he financed terrorist training camps in Sudan. He was also suspected of having provided support to the terrorists arrested in the 1993 bombing of New York's World Trade Centre and funding the warlords in Somalia that battled US military troops in 1993.

Bin Laden was different from other state-sponsored terrorists. He was personally secretive and seldom seen and his terrorist organisation was not dependent on, or

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[776] http://www.ict.org.il/ .

concerned with achieving the aims of, any single state; instead, it was driven by fundamentalist religious objectives. A former CIA official wrote that Osama bin Laden's group,

> "such as it is, is unlike any other. It has no real headquarters and no fixed address to target. It is a coalition of like-minded warriors living in exile from their homes in Egypt, the Sudan, Pakistan and other Islamic nations riven by religious and political battles. The bin Laden organisation is global and stateless, according to the United States intelligence analyses, more theological than political, driven by a millennial vision of destroying the United States, driving all Western influences from the Arab world, abolishing the boundaries of the Islamic nations and making them one, without borders."[778]

In 1996, frustrated by the continued presence of US forces in Saudi Arabia, bin Laden called for a holy war against them. He is suspected of having supported the 1995 bombing of a building in Riyadh used by the American military, killing seven people, and the 1996 Khobar Tower bombing in Dhahran, which killed nineteen American airmen. In February 1998, bin Laden issued a *fatwa*, a religious edict, calling on Muslims "to kill Americans and their allies - civilians and military."[779] During an interview with a London-based Arabic newspaper (Al-Hayat), bin Laden was quoted as saying, "We had thought that the Riyadh and [Dhahran] blasts were a sufficient signal to sensible US decision-makers to avert a real battle between the Islamic nation and US forces, but it seems that they did not understand the signal."[780] He told ABC News in June 1998, "We do not differentiate between those dressed in military uniforms and civilians; they are all targets."[781]

Despite these threats, Americans were unprepared for the simultaneous bombings of the US embassies in Nairobi (Kenya) and Dar Al-Salaam (Tanzania) on 7 August 1998. The

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[777] http:www.heritage.org/issues/98/chap19.html# .

[778] Milt Beardon, formerly of the Central Intelligence Agency, quoted in Tim Weiner, "After the Attacks: The Outlooks," (*New York Times*, 23 August 1998), p. 3.

[779] For more information about the Fatwa see, http://www.org.il/ .

[780] See Raja Mishra, "Osama bin Laden: Terrorists, Rich Backer," (*Philadelphia Inquirer*, 21 August 1998), p.1.

damage was horrific. In Nairobi, the bomb "brought down half the embassy" and left several square blocks of downtown Nairobi in a shambles[782]; in Dar Al-Salaam, most of the embassy building and some adjacent buildings were destroyed.[783] The loss of life was substantial; 224 people were killed in the two bombing, including twelve Americans. More than 4,800 persons were injured.[784] The Clinton administration quickly found evidence that bin Laden was responsible.[785] The details of this evidence remain closely held. At the time, the chairman of the Joint Chiefs, General Hugh Shelton, would announce only, "as many of you are aware, our intelligence community has provided us with convincing information based on a variety of intelligence sources, that Osama bin Laden's network of terrorists was involved in the planning, the financing and the execution of the attacks on US embassies in Kenya and Tanzania."[786] The Secretary of Defence, William Cohen, would say only, "There's been a series of reports that we have analysed, statements by Osama bin Laden himself, other information coming in as recently as yesterday about future attacks being planned against the United States. We are satisfied there has been a convincing body of evidence that leads us to this conclusion."[787] The US President was soon convinced that Osama bin Laden was responsible for the bombings and that additional terrorist acts were being planned by his organisation. Again, Clinton had few alternatives. Because Osama bin Laden was not a head of state, there were no political, diplomatic, or economic resources available.[788]

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[781] Ibid.
[782] See Marjorie Miller and Dean Murphy, "The US Embassy Bombing," (*Los Angeles Times*, 9 August 1998), p1.
[783] Ibid. See also, (*Keesing's Record of World Events* 44, 1998), p. 42434.
[784] See (*New York Times*, 8 October 1998), p. 1.
[785] http://usinfo.state.gov/topical/pol/terror/99129502.htm .
[786] See the text of Cohen, Shelton briefing on the strikes in http://pbs.org/newshour/bb/military/july-dec98/cohen_8-20.html , p.1-4.
[787] Ibid.
[788] See (*The Times*, 22 August 1998), p. 5.

Attempts were made to find and arrest bin Laden and members of his organisation, but the problem was that those efforts would take time. Finally, the bombings of the embassies were seen as direct assaults on US sovereign territory and as therefore requiring a strong unilateral response.[789] Ultimately, Clinton decided bin Laden's terrorism was a clear threat to US national interests and for the second time in his presidency, he decided to use military force to counter a terrorist threat.[790] The US President claimed that "convincing information from our intelligence community [which provided him with] high confidence" that the bin Laden terrorist network" had been responsible for the Kenyan and Tanzanian bombings.[791] On 20 August 1998, less than three weeks after the embassy bombings, Operation *Infinite Reach* was carried out. US Navy surface ships and a submarine in the Persian Gulf and Red Sea fired approximately seventy Tomahawk cruise missiles against terrorist targets in Khartoum (Sudan) and Khost (Afghanistan). The missiles arrived over targets in both countries nearly simultaneously.[792] In Afghanistan, they damaged a series of buildings in four different complexes that constituted a terrorist training camp and bin Laden's main operational base. Reports in the Pakistani press claimed that the camp "had been levelled," and the Taliban regime in Afghanistan reported that twenty-one people had been killed and an additional thirty injured.[793]

In Sudan, the missiles struck a pharmaceutical factory, known as *El Shifa*, in downtown Khartoum.[794] Sudan's state-run television broadcast images immediately after the raid indicating that the plant had been levelled; it reported that ten people had been injured

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[789] See (*The Financial Times*, 21 August 1998), p. 1.
[790] The US administration, by the use of force, crossed the threshold of threat of use of force, which was regarded by Sadursk as a clear message, composed by a decision maker and directed to the target, arguing that force will be used if a request or demand is not complied with. See Romana Sadurska, "Threats of Force," p. 242.
[791] See (*Keesing's*, 1998), p. 42435.
[792] Ibid.
[793] http://www.pbs.org/newshour/bb/military/july-dec98/cohen_8-20.html , p. 4-8.

but that there had been no deaths. One missile had apparently struck a nearby sweet factory, causing light damage.[795] In the aftermath of the raid, White House officials justified the attack on the factory in Khartoum by claiming that it had been a secret chemical - weapons factory financed by bin Laden.[796] In support they cited soil samples taken from the plant indicating the presence of Empta, a "precursor" substance used in the production of the nerve gas VX.[797] However, in the weeks after the strike, many began to question the adequacy of the administration's evidence.[798] Several critics argued that the evidence both that bin Laden had been associated with the plant and that it had been producing chemical weapons was circumstantial at best.[799] The Sudanese government asked the United Nations for an independent investigation to prove or disprove the allegations that the factory had been involved in chemical weapons. Even the former president Jimmy Carter would called for an independent investigation of the evidence.[800]

However, the US Government continued to argue, without releasing details, that the evidence had justified the raid, and they were able to convince the UN Security Council to shelve discussion of an independent investigation.[801] The strikes generally received support from the US people; a few Republican members of Congress questioned the timing of the strikes, suggesting that they may have been used as a distraction from the president's domestic troubles. Bin Laden's involvement in the embassy bombing has hardly been questioned. In November 1998, a grand jury in New York issued a 238-count indictment against him for acts of terrorism. Soon after, the US State Department

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[794] See (*The Times*, August 21 1998), p. 1.
[795] See Russell Watson and John Barry, "Our Target Was Terror," (*Newsweek*, 31 August 1998), p. 3.
[796] See Tim Weiner and James Risen, "Decision to Strike Factory in Sudan Based on Surmise," (*New York Times*, 21 September, 1998), p. 1.
[797] See (*Keesing's*, 1998), p. 42435. See also, (*The Financial Times*, 21 August, 1998), p. 1.
[798] See (*Keesing's*, 1998), p. 42435.
[799] Ibid.
[800] See (*The Times*, 22 August 1998), p. 2.

offered a reward of up to five million dollars for bin Laden's capture.[802] The missile strikes received strong support from Europe. Most Western European countries, including Great Britain, Germany, France, Spain and Austria, issued statements upholding the right of the United States to defend itself against terrorism.[803]

Russia, which had strongly criticised the use of US military force against terrorism in the past, now sent confused and mixed signals. The former Russian President, Boris Yeltsin, criticised the attacks publicly, but a spokesman later downplayed his remarks. Prime Minister Sergei Kiriyenko called the attacks unacceptable but added that "international acts of terrorism cannot go unpunished."[804] In Kabul, protesters converged on the US embassy, and large street demonstrations were held in Khartoum. Angry protests were voiced in Sudan, Afghanistan, Pakistan, and Libya.[805] In contrast, most Arab governments remained "silent or equivocal about their views on the missile strikes."[806] The public condemnation there was quickly faded. By October, less than two months after the strike, the Sudanese Government had dropped calls for an investigation into the bombings and had initiated high-level talks with Washington in hopes of improving relations. In February 1999, US representatives met with the Taliban to discuss bin Laden's status in Afghanistan; the Taliban was not willing to extradite bin Laden, but it restricted his access to communications and banned him from making public statements while in Afghanistan.[807]

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[801] See "Carter Urges Inquiry into US Raid on Sudan," (*New York Times*, September 18 1998), p. 1.
[802] http://www.usinfo.state.gov/topical/pol/terror/99129502.htm.
[803] See Edmund L. Andrews, "Baking in Europe," (*New York Times*, August 22 1998), p. 2. See also, (*The Times*, 21 August 1998), p. 4.
[804] See Michael Wines, "After the Attacks: The Reaction - US Raids Provoke Fury in Muslim World," (*New York Times*, 22 August 1998), p. 3.
[805] See (*Keesing's*, 1998), p. 42435-36.
[806] See Wines, "After the Attacks," p. 3.
[807] From his side, Mullah Mohammed Rabani, who is considered to be the second in command of the Taliban indicated that "We are a free country where Osama is living as a guest. This is reality. And it's up to the world to accept it or not," quoted in http://www.emergency.com/ennday.htm.

The use of force on the part of the US Government in this case is completely unacceptable, on the ground that the use of force as an option to limit terrorism is that it is counterproductive in a strategic sense, undermining US credibility. From this perspective, the use of force gives of the United States the image of a "cowboy," much more willing to employ the military than diplomacy to resolve differences.[808] Moreover, if the Americans had discovered incriminating evidence at the African embassies' bomb sites, they would have made it public. But within the timeline offered by the government - between the embassies explosions and the decision to launch the reprisal attacks - no such evidence could have been discovered, let alone analysed. The US, in this case, acted as the prosecutor, judge, jury and executioner, all in one. This is hardly compatible with her status as the only superpower in the world, which bestows on her greater responsibilities for the maintenance of world peace and justice for all. This unilateral action of the United States, of attacking a sovereign independent states, members of the United Nations, has created a bad precedent for others to follow. The United Nations was created after the World War II to maintain international peace and security. In the present case, the UN Charter was ignored and completely sidelined, and the US took the law into its own hands.

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[808] The allegation of Frederick Kirgis, that the target in Afghanistan was recognised as "an extensive terrorism training complex," and therefore it was a valid target, which give the US permission to invoked the right of self-defence (Article 51 of the UN Charter), is completely mistakable, on the grounds that self-defence, occurs between an attacker and his victim; in this case, the attack was unidentified. No evidence was proven or shown; only speculation. See Frederick L. Kirgis, "Cruise Missile Strikes in Afghanistan and Sudan," (*American Society of International Law* 24, 1998), p. 1-2.

Since 1945, reprisals have generally been conducted by established states against non-state guerrilla movements based in third states. Such situations raise a question as to what extent a state can be held responsible for activities taking place within its borders, or by guerrilla movements launching attacks outside its borders. Unwillingness or inability to control such activities may constitute "permissive cause."

Another issue arising from the context of reprisals is the typically low-level, irregular nature of guerrilla activity, leading to recognition of an intermediate status between war and peace, called *status mixtus*, in which it may be questionable whether the laws of peace or those of war are applicable. An obvious example of the *status mixtus* has been the Middle East, with its ongoing pattern of hostility, insurgency and border disputes, falling short of actual war whether technically so-called or as a factual condition of international armed conflict even for the purpose of modern international humanitarian law[809]. This is the sort of situation in which reprisals typically occur. Such situations create a problem in relation to self-defence as, at almost any point in time, it is possible to say that an attack has recently occurred, or that one may be anticipated. In such a situation, can self-defence actions avoid being punitive while still maintaining effectiveness? And what is gained by restoring the status quo before the attack, if the situation from which the attack was launched was unstable or inequitable? A further difficulty, if reprisals are only accepted as defensive when their purpose is to prevent or deter further attacks, is how they may be distinguished from preventive defence.

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[809] See Greenwood, p. 283.

The concept of regular self-defence sees the right of self-defence as a continuing right, which does not change with the modification of time or circumstances (conditions). Any community under attack, usually, has plenty of time to consider the possible harm of the first hit, and to prepare a response.[810] It will take time to plan, prepare and organise its defence. This is regarded as a fundamental part of response. The time needed for response may increase with the gravity of the first hit. A state under attack must have time to prepare an effective defensive plan, and even with the passage of time, defence in this case is still legal and legitimate. But the victim state should not wait for ever, because the result would be to weaken its right of defensive action, as the passing of time brings many changes. For example, it is possible that when territory is taken, if it continues to be under occupation, this will lead to changes in the political, social and economic formation.[811] For this reason, some have argued that the right of self-defence should have "transitory" borders or limits. Even though unable to determine these dimensions, Schachter[812] considered that passing of time should end the right of self-defence. He considers the time factor as basic to defensive action, because undue extension of the time factor will take the defensive notion "far beyond its basic meaning." Also he recommends that the factor of time be evaluated on the main basis of "necessity." For him the main concern is that the right of self-defence should not be used only as an excuse to settle old scores, especially as regards borders. He especially criticised the unionist movements, on the basis that they invoke old problems

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[810] It is important to note here, that appearances of the nuclear weapons has changed that picture, because the first nuclear hit will have devastating effects. The discussion here refers to conflicts connected with conventional weapons.

[811] This was Henry Sidgwick's anxiety about the French rights in Alsace-Lorraine, after the German occupation, cited in Walzer, *Just and Unjust Wars*, p. 56.

concerning borders, to justify their use of force. Ceadel [813] also considered that the passing of time will weaken the defensive justification. He commented by way of illustration, that "while France could have claimed a defensive justification had it started a war to retrieve Alsace-Lorraine shortly after losing it in 1870-1, it could not so plausibly have done so forty years later." In 1961 when India took back Goa, its main claim depended on the idea of "continuing effects".[814] India indicated that it had been prevented from defending Goa when Portugal had seized it 450 years earlier, by the intercession of 425 years of British Colonialism.[815]

Generally, there are two kinds of regular defence, both of them provoked by territorial claims, but distinguished on the basis of the outcome of military action. Each of them deals with the right of self-defence from a different view.

Henry Sidgwick managed to distinguish between both kinds of regular defence. He referred to the German occupation of the French Alsace-Lorraine areas, emphasising the influence of the passage of time, and the stability of occupation, and its effects on the political identity of the occupied area. Thus, he regarded the German occupation of the French areas as undermining any future French claims with the passing of time.

> "We must ... recognise that by this temporary submission of the vanquished ... a new political order is initiated, which, though originally without a moral basis, may in time acquire such a basis from a change in the sentiments of the inhabitants of the territory transferred; since it is always possible that through the effects of time and habit and mild government ... the majority of the transferred population may cease to desire reunion ... When this change has taken place, the moral effect of the unjust transfer must be regard as obliterated; so that any attempt to recover the transferred territory becomes itself an aggression ..."[816]

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[812] Oscar Schachter, "In Defence of International Rules on the Use of Force," (*University of Chicago Law Review* 53, 1986), p. 132.
[813] Ceadel, p. 84.
[814] Robert E. Gorelick, "Wars of National Liberation: *Just Ad Bellum,*" (*Case Western Reserve Journal of International Law* 11, 1979), p. 77.
[815] For more information see the (*Yearbook of the United Nations*, 1961), p. 129-32. See also R. P. Rao, *Portuguese Rule in Goa 1510-1961*, (London: Asia Publishing House, 1963), p. 1-8.
[816] Walzer, *Just and Unjust Wars*, p. 56. This is exactly what the Western governments, especially Washington, London and the legitimate government of Kuwait, feared after the Iraqi occupation to Kuwait to change the demographic, social and political formation there.

The distinction between the two types of regular self-defence depends on the nature of the political system which prevails after the military conquest. If deep changes occur in the political, economic and social fields, the connection of the occupied part with the occupier will be powerful, and this will lead to change in the reality of territorial demarcation.[817] There are two types of regular self-defence. The first, is backward self-defence. The idea of backward self-defence is built on the ground that the victim continues to benefit from the right of self-defence in respect of a prior attack or aggression, which happened in the past, when the victim was weak or unable to respond; and when the victim becomes able to respond, it will seek to remedy old losses and damage and respond to the aggressor's aggression on the basis of legitimate self-defence.[818] The second dimension, called remedial self-defence, is the invocation of a self-defence right on the ground that an existing political order represented by territorial boundaries is sufficiently violent or coercive as to be regarded as equivalent to an armed attack.

In other words, while in the first case, the self-defence right is invoked in respect of a particular act of aggression, in the second, it is invoked in respect of the ensuing political, social and economic conditions. When remedial action is taken by the victims of tyranny, the situation may be classed as an internal or domestic rebellion, but when such an action is assisted or carried out by a third party, the question of international self-defence is raised.

Both elements of regular self-defence existed in the Iraqi invasion of Kuwait on 2 August, 1990.

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[817] To some degree, it is near to what happened to the Palestinians territories in the West Bank and Gaza Strip, when they were occupied by Israel in 1967. The Palestinians National Authority endurancing many problems to reorganisation of Palestinians areas, because they depended on Israel, whose impact on these territories is strong in all domains.

"Iraqi invasion angers both East and West" [819]

Up to the outbreak of World War I, the area now comprised within the state of Iraq formed three provinces of the Ottoman Empire: the provinces of Mosul, Baghdad and Basra.[820] Each of the three provinces was administered by an appointed governor or *pasha*, responsible to the Ottoman Sultan in Constantinople.

In general, Iraq, like many other parts of the empire, enjoyed relative administrative economic and fiscal autonomy for much of the period between the original conquest and the mid-nineteenth century.[821] Until 1821, Iraq was ruled by Mamluks, mostly deriving from Georgia.[822] These Mamluk rulers were to a considerable degree in practice independent of the Ottoman Sultan.[823] During this period, the three provinces become united under the Government of Sulaiman the Great.[824] In 1831, the Ottoman army defeated the Mamluks, and the Turkish government strengthened its control over the tripartite territory.

> "With their strengthened position in Iraq, the Ottomans felt able to assert their influence in the Arab shaikdoms of the Gulf - thereby establishing an interest and some territorial claims which the independent state of Iraq was to pursue."[825]

Kuwait was founded in the early eighteenth century by tribes, which migrated in the late 17th century from the Arabian peninsula to the Gulf shores. The Al-Sabah family

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[818] It was claimed by the Iraqi Government when it invaded Kuwait in 1990, that Kuwait was a part of Iraq, and that British imperialism had separated them from each other, when Iraq was weak and unable to respond.

[819] Headline, (*The Times*, 3 August 1990), p. 1.

[820] Niblock T, *Iraq: The Contemporary State*, (London: Croom Helm, 1982), p. 2.

[821] Farouk-Sluglett Marion, *Iraq since 1958: From Revolution to Dictatorship*, (London: Tauris, 1990), p. 2.

[822] Peter Malcolm Holt, *Egypt and the Fertile Crescent 1516-1922: A Political History*, (London: Longman, 1966), p. 146.

[823] Peter Mansfield, *Kuwait: Vanguard of the Gulf*, (London: Hutchinson, 1990), p. 18.

[824] Ibid.

[825] Niblock, p. 2.

controlled the political power. Kuwait's strategic position on the route to India would ultimately lead to the establishment of British dominance in the region. In the late nineteenth century, the Ottoman government gave Shaikh Abdullah the title of Qaimmagam (governor of a sub-province), abolished the connection of Kuwait with the Basra province and allowed it to run its own internal affairs. On January 23, 1899, Mubarak, the ruler of Kuwait, signed a secret treaty with Great Britain, known as the Exclusive Agreement, in which he agreed not to sell, lease, mortgage, or give for occupation any territory to any other power without British consent. The treaty also stated that Mubarak and his successors were linked to Britain, and it would protect them. The Ottomans protested against the treaty and in 1901 they tried to expel Mubarak from power, but the arrival of a British naval force prevented them from doing so. In 1913, Britain and the Ottoman Empire signed the "Convention Respecting The Persian Gulf Area." This agreement resolved their disagreements about Kuwait. There were agreements on the borders of Kuwait with Najd (Saudi Arabia) and Iraq.

During the first World War, the British and the French governments made a secret agreement on a post-war settlement for the Middle-East, the Sykes-Picot Agreement, which divided the Middle-East into two areas:

"In one of which British, and in the other French, influence would be predominant, and in each of which a part would be reserved for direct British or French administration, while the other would be left free for direct Arab administration."[826] The border between Iraq and Kuwait was defined in a friendly agreement in 1923. According to this agreement, eight islands including Warba, Bubiyan and Falaka belonged to Kuwait. Reaffirmation of this agreement was made after Iraq became independent from the

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[826] Iraq later argued that Kuwait had been separated from the motherland by British imperialism. The Iraqis were in that period weak, divided and could not respond, and to practise the right of self-defence at that time was impossible.

British Mandate in 1932. In an exchange of letters between the Prime Minister of Iraq and the ruler of Kuwait, both agreed on the description of the existing frontiers. This was along the lines of the frontiers as defined in the 1913 Anglo-Turkish Convention. The first attempt of Iraq to exercise remedial self-defence was when King Faisal died in 1933, and his son, Prince Ghazi, took power after him. The new king was a unionist, and it was he who raised the issue of Kuwait's belonging to Iraq. In 1935, King Ghazi established an "Association of Arabs of the Gulf," committed to cultivate links with nationalist groups in the Gulf shaikhdoms.

In order to reduce the British role in Kuwait, the Iraqis supported the nationalist elements in the Emirate. Their demands for a share in the ruling family's power and for a union with Iraq found support from the Iraqi press, as well as from King Ghazi's Qaser Al-Zuhoor radio station. Through his private broadcasting station in the palace, King Ghazi demanded Kuwait's annexation, and tried to arouse the Kuwaitis against their ruler. The line taken by the broadcast was that the Shaikh (ruler of Kuwait) was an out-of-date feudal despot, whose backward rule contrasted with the enlightened regime existing in Iraq; Kuwait, it was implied, would be much better off merged with her neighbour. The Iraqi claim was based on the assertion that it had inherited the Ottoman title to the area.

> "The claim stemmed from both a general growing sense of Arab nationalism and from specific disputes with Iran over the Shatt Al-Arab, Iraq's channel to the sea."[827]

It can be concluded that King Ghazi considered that the continuing separation of Kuwait from Iraq would allow political, economic and social conditions to prevail in Kuwait, which would have harder effects than military aggression. King Ghazi raised the possibility of an Iraqi invasion of Kuwait to incorporate the shaikhdom. But all the Iraqi

plans to annex Kuwait came to end when King Ghazi was suddenly killed in a car accident in 1939.

A further attempt to annex Kuwait to Iraq occurred at the end of the monarchy in Iraq, in 1958, when Jordan and Iraq announced the Arab Federation. Iraq, whose economy was very weak, made no secret of seeing Kuwaiti oil revenues as the solution to its economic problems. In return for Kuwait's adhesion, the Iraqi government offered the Kuwaiti ruler a tripartite compensation. Firstly, Baghdad would be willing to demarcate the Iraqi-Kuwaiti border, in accordance with the 1913 Anglo-Turkish agreement. Secondly, Iraq would supply its neighbour with piped water from the Shatt Al-Arab; thirdly, the existing degree of autonomy enjoyed by the shaikh was guaranteed by Baghdad to continue. But Kuwait refused to join the Hashemite Union in 1958, apparently on British advice.

All ideas of Federation with Iraq disappeared after the overthrow of Iraq's Hashemite dynasty in July 1958. In June 1961, the Anglo-Kuwaiti Treaty of 1899 was terminated, and replaced by one of friendship between both countries. The new agreement acknowledged the full independence and sovereignty of Kuwait, and stated the readiness of Britain to help Kuwait if the latter requested such assistance. Immediately, the Iraqi premier, General Qassim, asked Kuwait for reunion with Iraq. The ruler of Kuwait later asked for British military assistance. On 20 July, 1961 Kuwait was given membership of the Arab League, despite Iraqi protests. The League accepted the Kuwaiti proposal to send Arab contingents as replacement for the British troops. The Arab troops would remain in Kuwait until the overthrow of Qassim's regime in 1963. From 1980 and until

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[827] Jill Crystal, *Oil and Politics In the Gulf: Rulers and Merchants in Kuwait and Qatar*, (Cambridge: Cambridge University Press, 1990), p. 52.

1988, Iraq was engaged in war with Iran. This war had a catastrophic impact on Iraq.[828] Eight years of war and the fall in world oil prices caused Iraq to face an economic crisis. In mid-March 1990, different opinions in oil pricing policy within OPEC became clear. While Kuwait and the UAE , who had a higher production capacity than their export quotas, wished to maintain the existing oil pricing, Iraq wanted a price increase. For this reason, Iraq lobbied the Gulf rulers to lower their production and to push the price from 18 $ to 20 $ per barrel. But Kuwait refused to accept the Iraqi proposal, and this led to an escalation of the tension between Iraq and Kuwait. On top of its border dispute with Kuwait, Baghdad raised four new demands: that its debt to Kuwait, incurred in the war with Iran would be cancelled; the related demand that Kuwait would pay compensation for Iraq's defence of Arab interests in that war; the charge that Kuwait, along with the UAE, had deprived Iraq of oil revenues by producing more than its OPEC quota and pushing down the price of oil; and the charge that Kuwait had taken oil unfairly from the Rumaila field, which straddles both frontiers. Negotiations between both countries took place, but failed to bring progress.

But during the negotiations between both countries on the Iraqi claims, Iraq invaded Kuwait on 2 August and annexed it a week later. Iraq, after the war with Iran, felt that it had become the major power in the region and could easily achieves territorial ambitions and regain its historical claims. The end of the Iran-Iraq war on 8 August 1988, marked "the beginning of the Gulf crisis of 1990-91".[829] Iraq's main claim in invading Kuwait was that it was protecting its rights by practising self-defence, because Iraq was now more powerful and could regain Kuwait which had been taken from it in

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[828] From this point the Iraqi claims against Kuwait, based on the idea that Kuwait is part of Iraq, were invoked not necessarily as a matter of conviction, but as a rationalisation for Iraqi desires to use Kuwait's wealth to solve Iraq's economic problems.

[829] Pierre Salinger and Eric Laurent, *Secret Dossier: The Hidden Agenda behind the Gulf War*, (London: Penguin Books, 1991), p.1-2

the past, when it was weak. Iraq's main concern was the Kuwaiti islands of Warba and Bubiyan which would give access to the Gulf, but Iraq discovered that during 1980-88, Kuwait had not only established a permanent military presence on Warba and Bubiyan but begun to implement plans physically to assert sovereignty over the islands and the northern frontier zone. Agricultural settlements set up at Abdaly on the north border were of greater value strategically than economically. A bridge was constructed across the Khor Sabiya to Bubiyan Island.[830] Iraq considered this as a change in the demographic, social and political formation of the frontiers areas, over which Iraq had long claims. In reality, the Iraqi President's main concern was to keep his one-million army fully occupied to prevent the possibility of it turning against him. He intended to use it to fulfil the following aims: firstly, to realise Iraq's long-standing claim to Kuwait; secondly, to gain direct access to the Gulf through the acquisition of Warba and Bubiyan; thirdly, to occupy the land opposite the high-yielding Rumaila oil field situated in the disputed frontier zone; fourthly, to create a situation in which he could not have to repay the huge sums borrowed from the Gulf states during the war with Iran; and finally, to help fashion himself as the leader of the Arab world.[831]

The Iraqi claim to Kuwait on the basis that they were united and had been separated by the British appears to be weak for many reasons: first, the shift of the Iraqi claim from a dispute over frontiers to a bid for sovereignty on the grounds that Kuwait was part of the province of Basra under Ottoman rule altered the nature of the dispute from a legal to a historical claim. History, however, has never been regarded under international law as valid evidence for legal rights. For this reason, the Iraqi action was considered a violation of Kuwait's territorial sovereignty and independence, contrary to the principles

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[830] Richard Neill Schofield, *Kuwait and Iraq: Historical claims and Territorial Disputes*, (London: The Royal Institute of International Affairs, 1994), p. 126.
[831] Salinger and Laurent, p. 11.

of international law and the United Nations charter as Iraq and Kuwait are members of the United Nations, which prohibits resort to force for the settlement of disputes. Second, Iraq's claims to the islands of Warba and Bubiyan are today important to Iraq for security and geopolitical reasons. Iraq wanted Warba island in particular, because Saddam regarded it as essential for the security of Umm Qaser port, as Iraq possesses a narrow Gulf coast. Third, Iraq has also raised economic issues concerning OPEC quotas for production, and the drilling of oil in the south Rumaila field without any agreement. These matters could be resolved peacefully via the apparatus of OPEC, through the Judicial Committee of OPEC. As a result, the Iraqi invocation of the right of self-defence to correct old and past situations in its conflict with Kuwait in 1990-91, was subject to considerable doubts and fogginess.

In general, the practice of the use of force under the umbrella of the right of self-defence should always connect with the fundamental concept of Article 51, which indicates that this right should come as a reaction to an armed attack. In all reprisal actions which the US undertook against Libya, Iraq, Sudan and Afghanistan, the main claim of the US administration was that they acted under the right of self-defence, and the Americans in all these military activities they insisted that they had top quality information, which proved that the states which the Americans attacked, were guilty of international terrorism. However, the US Government did not reveal enough information to support their claims. What is important, in my view, is that Article 51 should not be transformed to an instrument to use force - because the purpose of the drafters of the UN Charter in that article was to make the world more secure for small nations after the destruction of World Wars I, and II. This leads us to reject the new tendency from powerful states, such as the United States, to bypass the authority of the Security Council, because the Security Council is the main body responsible for protecting international peace and

security. On nearly all the occasions that the US administration used force, the Security Council was powerless - unable to take any decision, in the basis that the US would veto any decision that condemned its actions.

From the other side, the idea of the right of self-defence as a continuing right, which does not change with the modification of times or circumstances, and also the connecting of this right with historic aggression, are also completely rejected. As I mentioned before, the right of self-defence should come as a reaction to an armed aggression; any other interpretation of this right goes beyond this domain, which Article 51 regulated, and will turn this right into an instrument of aggression. The Iraqi president, Saddam Hussein claimed that Kuwait was part of Iraq, and his country, when it invaded Kuwait, was only correcting an old historic aggression, which had been imposed by the British imperialism; but this claim is not in the spirit of the right of self-defence.

Chapter Eight

The Objects and Limitations of Self-Defence

This chapter explores the basic objects that states claim to be protecting when they resort to force in self-defence. The first part discusses the defence of *population*; The second part, the defence of *territory*; and the final part, the defence of the *state*; each illustrated with reference to particular conflicts. In the process, these sections examine the logic that indicates these values or interests as defensible. Section one will look at how to apply the right of self-defence in population. Therefore, it is useful here to discuss rescue operations and their legitimacy in international law. Later this will take us to deal with humanitarian intervention, which many attempt to put in practice as a new exception to Article 2(4) of the UN Charter. In this connection, it is important to review the Kosovo Crisis, and to see if NATO's air campaign was in harmony with the international law, especially if the use of force occurred without Security Council authorisation. Moreover, in this section I will deal with the relationship between self-defence and self-determination.

Section two is concerned with territory as a subject to defence, since, in these days, the notion of statehood is unthinkable without a physical, territorial base. In connection with territory it important to consider border defence; forward defence and border problems. The final section looks at the state as an object of defence. It deals with matters, such as state and domain; separated state; dispute states; imperial states; and regimes' right in collective self-defence. At the end of this section, the Nicaraguan case will be reviewed on the basis that the International Court of Justice expressed an important opinion

concerning armed attack on the one hand, and the relation between armed attack and collective self-defence on the other.

Population

In this chapter it is important to consider people as an object of self-defence. To protect people is one of the main objects of the right of self-defence. The protection of a state's nationals is one of its a main responsibilities, and a source of its legitimacy. The right of protection of a state's nationals inside its territorial borders, it is undisputed. The matter of protection of people in general, however, is difficult for many reasons. First, human beings move from one place to another. Nationals of a state may move from their state of origin to live temporally or permanently in another state. Here, in general, the state inside whose territorial borders they live is responsible for their defence, but if the host state is unable or unwilling to provide the necessary protection, the state of origin may intervene to provide that protection.

Rescue Operations

There immediately comes to mind the question, can the right of self-defence be enlarged to a right to protect state's nationals when they are under danger in another state? For example, if a group of nationals is being held hostage, is a military operation to rescue them legitimate on self-defence grounds? The United Nations Charter did not mention a right of rescue at all. Nor does states' practice can give us a clear indication in this respect, because their response concerning such operation is ambiguous. Akehurst makes clear that "virtually every example of the use of force for this purpose has

provoked protests from other States that such use of force is illegal".[832] In general, rescue operations have been criticised on grounds unlinked to their aim of defending nationals. In reality, the condemnation usually comes from hidden motives. In 1956 in the Suez Crisis, United Kingdom claimed that there was immediate danger to its nationals in Egypt, but its claim was empty, because at that time, it was clear that the British Government had another motive (political), in the absence of any established proof that its nationals were in danger.[833] Also in 1965, when the United States intervened in Dominica, the legitimacy of its intervention to protect its nationals became weak, when the US troops stayed there more than sixteen months.[834] Nevertheless, without denying that there are some motives in the rescue operations, which may sometimes go beyond the main sphere of humanitarian consideration, there is in some sense "strong moral ground" which supports operations for the protection of nationals.[835]

The Restrictionist View

This school has been represented by Brownlie, who refuse completely the legitimacy of rescue operation totally. His idea was that the United Nations has been established to protect international peace and security and not to pursue a broader humanitarian agenda. Because of this, the United Nations has kept a monopoly over the legitimate recourse to international armed force. Brownlie and the other "restrictionists" consider

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[832] Michael Akehurst, "The Use of Force to Protect Nationals Abroad," (*International Relations* 5, 1977), p. 16.
[833] Robert R Bowie, *Suez 1956: International Crises and the Role of Law Series*, (London: Oxford University Press, 1975), p. 18-25.
[834] D.W. Bowett, "The Use of Force to Protect Nationals Abroad," In: *The Current Legal Regulation of the Use of Force*, ed, A. Cassese, (Dordrecht: Martinus Nijhoff Publishers, 1986), p. 45. See also Stanimir A. Alexandrov, *Self-Defence Against the Use of Force In International Law*, p. 192-93.
[835] Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, p. 121.

that the only permissible justification for the unilateral use of force remains self-defence as strictly mentioned by Article 51. On that basis, when a country is not a target for military attack, and use of force outside its borders, this action can be considered a violation of international law.[836]

Generally, rescue operations, in which no armed attack has been occurred, has to be regarded as a type of "humanitarian intervention" which should be banned. Farer made this clear, on the occasion of the 1989 American intervention in Panama:

> "Nothing in the United Nations Charter- the seminal textual source of the post-war paradigm of international order- or in any interpretative declaration of the General Assembly, or in any widely ratified international agreement recognised defence of nationals as a justification for armed intervention".[837]

Even where issues of human interest arise, the territorial integrity of another state must remain paramount. "That is particularly true of the use of force to protect nationals abroad and humanitarian intervention", said Akehurst, noting that these have been widely abused in the past.[838] The main tendency after the establishment of the United Nations and until this time, is that states give the priority to the non-use of force over humanitarian needs. Also, from state statements and votes in the General Assembly, most states' approach is that the only exception to Article 2 (4) ban on force is individual or collective self-defence and when the Security Council, after having determined that a threat to the peace, breach of the peace, or act of aggression has occurred, may if necessary, take military enforcement action involving the armed forces of the member states. For example, in 1970 the French ambassador to the United Nations emphasised that "there was no ambiguity in the Charter", and "the only exception to the prohibition of the use of armed force was the case of self-defence

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[836] John R. D'Angelo, "Resort to Force by States to Protect National: The US Rescue Mission to Iran and its Legality under International Law," (*Virginia Journal of International Law* 21, 1981), p. 488.
[837] Tom J Farer in "Agora: US Forces in Panama: Defenders, Aggressors or Human Rights Activities?" (*American Journal of International Law* 84, 1990), p. 505.

referred to in Article 51".[839] The "overwhelming majority" of state members in the United Nations preferred a restrict and limited interpretation of Article 51, which would require a "military attack" to take place before any defensive action became acceptable.[840] Only "a very small number" of states have regarded intervention on behalf of nationals as lawful.[841] In some cases, the total rejection of rescue operations can be weakened. For example, in the US intervention in Panama in 1989, the main criticism was not directed against the alleged aim of the action, but the disproportion with which was carried out. Although Akehurst in general has the same attitude as Brownlie, he argues that the 1976 Israeli rescue action at Entrbbe was "morally irresistible".[842] McCoubrey and White do not accept that rescue operations are legal, though they admit that there are "strong moral grounds" in their favour; their compromise tries to balance between full condemnation of such actions, and at the same time not encouraging other states from aiding the effort.[843]

"Hijacked jet Flies with 70 Israeli to Uganda"[844]

At the end of June 1976, a group from Popular Front for the Liberation of Palestine (PFLP) hijacked an Air France plane on its way from Tel Aviv to Paris. The aeroplane stopped at Libya for refuelling, and later it continued its way to Uganda and landed at Entebbe airport. The Palestinian group demanded that Israel should, in exchange for the hostages, release fifty-three of their comrades who were in Israeli jails by 1 July, later

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[838] Akehurst, "The Use of Force to Protect Nationals Abroad", p. 18.
[839] UN, GAOR, Spec. Comm. on Aggression, 25th Year (1970), paragraph, 36.
[840] Ibid, paragraph, 210.
[841] Ibid, paragraphs, 209, 211, 216.
[842] In Akehurst view, that the Israeli rescue action was an extraordinary, in the basis that the Air France passengers were brought to Uganda without their approval.
[843] McCoubrey and White, p. 121.
[844] Headline, The Times, June 28, 1976.

extended to 4 July. Non-Israeli passengers were permitted to leave the plane. The Ugandan President Idi Amin and his government wished to see the hostages released, but on condition that Israel first release the Palestinian prisoners.[845] In general, Israel has a policy that it should not under any circumstances negotiate with terrorists, but expressed willingness to explore every possible way of freeing the passengers, including French mediation. This Israeli policy against terrorists was based on the experiences early of the1970s, when hijackings and terrorist attacks were at their height. Also, Israel at that time faced a problem of how to reconcile its responsibilities under Article 2(4), to respect the territorial integrity and sovereignty of Uganda, inside whose borders the Israeli nationals were hold hostage, with its desire to help and rescue its nationals. But this problem from the Israeli side was settled by military action. On 3 July three Israeli planes landed at Entebbe, occupied the control tower, attacked the terminal building, destroyed several Ugandan MiG's, and freed all but three hostages who were killed. The Entebbe raid was a model example of a rescue operation. The Israeli citizens had been under great danger; and the Ugandan authorities was unable or unwilling to assist or help them, and it was clear that Israel at that time, have no hidden agenda or motives against Uganda. Not only was there an immediate danger against the Israeli nationals, but also they had been taken to Uganda against their will. From its side, Uganda not only did not help the hostages, but also had been aiding the hijackers. Although Israeli raid violated Ugandan sovereignty, it limited its violation to the actions necessary for rescue.[846]

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[845] Leslie C. Green, "Rescue at Entebbe: Legal Aspects", (*Israel Yearbook on Human Rights* 6, 1976), p. 313-315.

[846] Mitchell Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action", (*Journal of International Law and Economics* 12, 1977), p. 68-70. See also, Alexandrov, p. 195-97; D. J. Harris, *Cases and Materials on International Law*, p. 909-11.

This School, in contrast to the previous one, offers strong support for rescue operation, by considering them as a subset of self-defence, especially under conditions such as Entebbe. This position is expressed by Bowett and many other scholars, who hold the view that a country's nationals can be seen as an extension of the state, making an attack on one equal to an attack on the other. "It is perfectly possible," said Bowett, "to treat an attack on a State's nationals as an attack on the State, since population is an essential ingredient of the State."[847] Rescue effectively becomes an instance of self-defence. Some critics admit the connection: acknowledged Farer, "[T]he protection of nationals can be assimilated without great strain to the right of self-defence explicitly conceded in the text of the Charter," given "[p]eople being a necessary condition for a state."[848] The Bowett School limits rescue operations to those on behalf of nationals only. Bowett made a strong distinction between rescuing nationals, which is inherently defensive, and operations of a humanitarian nature. He argues that the protection of nationals is not an instance of humanitarian intervention. The main motive of rescue is self-defence: "desire to protect a State's own security and essential interests," and not " the desire to protect human rights." On the other hand, humanitarian intervention treats "the nationality of the person to be rescued .... as essentially irrelevant," which means that "whatever the legal basis of such intervention might be, it is not self-defence."[849]

For example, the United States claimed the right of self-defence under Article 51 as a justification for its 1975 air raid against Cambodia after the Mayaguez seizure; for its support for the Israeli raid at Entebbe; and also to support its rescue action when

[847] Bowett in Cassese, p. 41.
[848] Farer, "Agora," p. 505.
[849] Bowett in Cassese, p. 49.

American nationals held hostage in Tehran in 1980.[850] It only increases the harmony of rescue with self-defence that, historically the legal traits of one were seen to be analogous to those of the other. Before the United Nations Charter, states maintained and exercised a right to intervene abroad to protect their nationals and property, a right which was considered to follow from the more general right to self-defence. Both actions, in general, had in common conditions of imminent existing threat, exhaustion of peaceable alternatives, and judicious use of military force.[851] In the 1970s, the clear increase in hijackings and hostage actions, strengthened this idea that an attack on nationals could be seen as an attack upon the state itself, and on that ground, rescue operations could be seen as a variant of self-defence. In the Entebbe raid, the representative of the United States, declaring his government's support for Israel, stated that:

> "... there is a well established right to use limited force for the protection of one's own nationals from imminent threat of injury or death where the state in whose territory they are located is either unwilling or unable to protect them. The right, *flowing from the right of self-defence*, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury."[852]

Definitely, if any incident fits Bowett's consideration, it is the Israeli raid at Entebbe, and along the same line the American attempt to rescue its hostages in Tehran comes a close second. To some extent, Bowett's critics have the weight of the literal behind them when they rebuke the conflation of nationals with states, but here, Bowett, can reply with a strong argument in favour of conflation, especially where Israel is concerned.[853] From its side Israel had been depended upon demography as a source for

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[850] For example, Connaughto considered "the rescue of own-nationals as a form of self-defence." See Richard Connaughto, *Military Intervention In The 1990's: A New Logic of War*, (London: Routledge, 1992) p. 67.
[851] D'Angelo, p. 501.
[852] UN Document, S/PV, 1941 of July 12, 1976, p. 31-32. Reprinted in (*International Legal Materials* 15, 1976), p. 1232-34.
[853] For example Akehurst refuses this approach. He believes that "nationals cannot be identified with the State for all purposes" and Article 51 applies as composed, only to Member States", see Akehurst, p. 17.

legitimacy and viability. Also, Israel have been facing adversaries, who claimed the wish to extinguish Israel from the map through wars of small-scale attacks on its nationals. While the seizure of hostages does not fit the mould of conventional acts of inter-state war or armed attack, it did conform perfectly to the experience of the protracted Arab-Israeli conflict. The Israeli hostages may not have looked "state-like" to many observers; but they are were indeed looked like that to Israel's adversaries. Certainly, they only became targets because they were treated as such.

Equally, imposing was the US attempt to rescue Americans held hostage in Iran. Whereas demography did not render these hostages state-like, as at Entebbe, their work roles did. The Iranian students seized the hostages because they were US Embassy employees. It was as representatives of the United States that they were targets; and it was performance of that role that made them the object of a rescue operation. In both events, also, the range of the mission was clearly limited to the removal of the hostages, thereby encroaching minimally upon the sovereignty of the state in which they were held. Moreover, the governments of both Uganda and Iran could be held partly responsible for the dilemma of the hostages; sufficiently so that their right against intervention was arguably diminished, at the least to the degree required to liberate the respective captives. The circumstances of Entebbe, as well as Tehran, render both incidents powerful evidence for the subsumption of rescue beneath self-defence.

To these kinds of particulars, Bowett adds several more general arguments. He stands with liberal readers of the United Nations Charter. The use of the word "inherent" in Article 51, for example, indicates to him that the Charter meant to recall a prior right of self-defence which conventionally included a right of rescue. That this prior right was highly flexible further proves to Bowett his supposition that "armed attack" merely illustrates one among many possible grounds for self-defence, rather than excluding all

others. Self-defence and aggression are not mirror images, in his view, meaning that self-defence can be claimed against a range of lesser, or different, wrongs than aggression as it is traditionally defined.[854] If one rejects this diminishment of armed attack, Bowett can still turn to his equation between nationals and the state, so that an attack on foreign nationals becomes "armed attack", regardless. That the Charter avoids all mention of rescue, while the combination of post-Charter law has singled out for condemnation actions like reprisal yields further evidence to Bowett that a right of national rescue is fully consonant with the Charter and its framers' intent. Bowett's arguments however, is vulnerable to substantial criticism. Claims of a pre-1945 right of self-defence, even should one accept Bowett's reading of Article 51 in theory, neglect the emptiness of self-defence prior to the Charter.[855]

His extensive interpretation of armed attack somehow misses what Franck has called the "across-the-border" implication that has always been linked with international aggression.[856] Many authors admit that both legal scholarship and state practice treat self-defence as requiring some violation that takes place within the territory of the defending state itself. In turn, neglect to rescue in Charter law, especially in comparison to reprisal, may simply reflect the relative infrequency of one compared to the promiscuity of the latter. Here, naturally, one returns to the central assertion: that nationals can be construed as state-like when endangered behind the borders of another state. Specially, because other elements of Bowett's position are so contentious, he needs to elaborate his basic assertion that nationals are an "essential ingredient" of viable statehood, whose "essential" quality they retain when they live in other countries.

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[854] Bowett in Cassese, p. 41.

[855] De Arechaga said that: "The so-called customary law of self-defence, supposedly pre-existing the Charter, and dependent on this single word [inherent] ... simply did not exist." Quoted from Theodore Schweisfurth, "Operations to Rescue Nationals In Third States Involving the Use of Force on Relation to the Protection of Human Rights," (*German Yearbook of International Law* 23, 1980), p. 165.

Some of those who accept a right to rescue nationals abroad reject Bowett's linkage of rescue with self-defence. Instead, scholars like Lillich, Moore, Reisman, and D'Amato treat rescue as a subset of humanitarian intervention. Supporters of humanitarian goals vary in their support for intervention. Some allow great licence, construing as "humanitarian" such values as self-determination and economic development. D'Amato, for instance, proposes that the American intervention in Grenada was an instance of humanitarian intervention and that its 1989 intervention in Panama was "not only legally justified but morally required."[857] Others insist that only extreme inhumanity justifies action. The memory of the Second World War alone makes it difficult to deny that extraordinarily barbarous situations exist in which "the right to life and the right to physical and mental integrity are violated on such a massive scale that non-intervention by other States might be so immoral as to undermine the most basic principles, if not the very idea of law."[858] In general, supporters of humanitarian intervention "studiously avoid" any mention of self-defence.[859] They prefer to free humanitarian efforts from the legal requirements imposed upon self-defence of reporting to the Security Council. As a result, they see military intervention in support of human rights and needs as legitimate. The humanitarian perspective concentrates on three factors. First, it defines a set of values which are maintained to be humane rather than political and therefore universal rather than partisan. The most common view is that humanitarian values contain a right

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[856] Thomas M. Franck, "Who Killed Article 2 (4)? Or: Changing Norms Governing the Use of Force by States," p. 809.
[857] D'Amato, "Agora," p. 519.
[858] Wil D. Verwey, "Humanitarian Intervention," In: *The Current Legal Regulation of the Use of Force*, p. 71.

to life, freedom, and some form of legality.[860] One sees these values reflected in references to massacre and enslavement as the circumstances in which humanitarian intervention would be called for. Second, the humanitarian view maintains that these values can outbalance the host state's general right to non-intervention. Therefore, if the latter state is unable to provide for the security of residents, another state may intervene, or take action and sufficiently take the host state's place to ensure people's safety. Here, this kind of exchange in duties can described as a "substitution." Consequently, as the host state is unwilling, or even actively involved in putting people at risk, an assumed intervenor has additional grounds for overriding the host state's right to non-intervention.

Third, the importance of humanitarian values is increased by the affirmation that humanitarian efforts, by their nature, do not violate territorial integrity and political independence. Supporters of humanitarian rescue argue that intervention to protect or rescue nationals does not intrude upon territorial integrity or political independence. Rescue and humanitarian missions are both directed entirely at human safety. Traditionally, they are said to take no interest in either territory or politics. Article 2 (4), they note, only forbids that military force which is ordered against the "territorial integrity and political independence" of another Member state. They suggest that any resort to force which does not injure territorial integrity or political independence is therefore lawful. Provided that humanitarian operations abide by additional criteria of necessity and proportionality, and that they limit themselves to the aims of rescue and

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859 Yoram Dinstein, "*War, Aggression and Self-Defence*," p.89.

860 Rougier in Jean-Pierre L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the United Nations Charter," (*California Western International Law Journal* 4, 1974), p. 230-32.

help, there is no reason to treat them as illegal.[861] Rather, remarks Reisman, humanitarian rescues ought to be seen as a form of lesser trespass: a true rescuer, after all, only "uses" the territory of another state to travel through in its mission to rescue citizens, and it need not affect political independence at all.[862] As a result, the other state's politics can continue on their independent way, and territory remains with its "integrity" technically intact.

In general, a new reading of Bowett's views, reveals a harmony with the humanitarian concept. He embraces a similar rule that gives priority to the needs of people, in Bowett's case nationals, against the general right of states to non-intervention. Bowett further increases the claims of nationals with the same willingness to disaggregate territorial integrity and political independence from sovereignty as it is usually considered. By implication, his argument depends upon promoting human values over those held most intimately by states. Most telling, he flirts seriously with treating the defence of foreign nationals as a humanitarian goal. He notes, that "the values protected by the right of protection are the same values as are inherent in the promotion of human rights."[863] Bowett's principal concern appears to be the obligation of a state to protect its nationals and the relative importance of this duty against that which it has to other states to abstain from intervening in their affairs. Such a concern is clear, especially when one considers the number of British emigrants who continued to live abroad in its former colonies at the time of Bowett's main writings. Foreign nationals can hardly be deemed essential to state survival; rather, intervention by their state of origin appears to be essential to theirs. This seems to be what Bowett actually has in mind when he says that "People have expectations of protection from their government when abroad, and no

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[861] See Michael Reisman, "Coercion and Self-determination: Construing Charter Article 2 (4)," (*American Journal of International Law* 78, 1984), p. 642-45.
[862] Ibid.

government can lightly refuse such protection when it lies within its powers to afford it."[864]

In the Kosovo crisis, nobody can deny the deterioration in the humanitarian situation in Kosovo, prior to NATO's intervention. As a result of the tragic events there, the international community sought to fulfil its responsibilities to protect international peace and security. This was clear from the Security Council's efforts to find a solution for that crisis. Based on Chapter VII of the United Nations Charter, the Security Council, issued, in March 1998, resolution 1160 (1998), which requested the FRY and the Kosovar Albanians to work towards a political settlement. Also, in the same resolution, the Security Council imposed an arms embargo on both sides in the crisis.[865] What is important in that resolution, is that it left the door open for the Security Council to take further measures in the case of continuing deterioration, when it mentioned "that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures."[866]

But the situation deteriorated rapidly: fighting intensified and the Serbian security forces as well as the Yugoslav Army, used force in an excessive and indiscriminate manner, thus causing numerous civilian casualties, the displacement of hundreds of thousands of innocent persons from their homes, and a massive flow of refugees into neighbouring countries. During that time, the UN Secretary-General made it clear to NATO, that Security Council approval would be needed before use of force in Kosovo.[867] Later, the Security Council adopted resolution 1199 (1998), which referred to the "recent intense fighting in Kosovo" and "in particular the excessive and indiscriminate use of force by

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[863] Bowett in Cassese, p. 45.
[864] Ibid.
[865] See Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis," (*European Journal of International Law* 10, 1999), p. 791-99.
[866] See SC Res. 1160 of 31 March 1998.

Serbian security forces and the Yugoslav Army which had resulted in numerous civilian casualties and, according to the Secretary-General, the displacement of over 230,000 persons from their homes."[868] The Security Council also determined that the deterioration of the situation in Kosovo constituted "a threat to peace and security in the region."[869] The Council called on both parties in the conflict to stop hostilities and to take immediate steps to improve the humanitarian situation in Kosovo. It also "decided, should concrete measures demanded in resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and security in the region."[870]

Meanwhile, preparation was underway inside NATO for military intervention against FRY, if Belgrade did not compliance with the Security Council's resolutions. The legal basis which NATO depended on, was that the humanitarian situation was increasely serious, and it sought to link this humanitarian interest as much as possible with the previous resolutions of the Security Council, in order to gain more grounds of legitimacy. The NATO Secretary-General Solana on 9 October 1998 declared that:

> "The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter. The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned inter alia of the danger of an humanitarian disaster in Kosovo. The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY. The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future. The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199. On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are *legitimate grounds* for the Alliance to *threaten,* and if necessary, *to use force.*"[871]

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[867] See Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," p. 6.
[868] See SC Res. 1199 of 23 Sept. 1998.
[869] Ibid.
[870] Ibid.
[871] Cited in Simma, p. 7.

In a sense, that statement laid the grounds for the air strikes against FRY. This harsh stance on the part of NATO was fruitful. It pushed the FRY towards further negotiation and also intensive diplomatic efforts were made. The result was two agreements. The first one, dated 16 October 1998, between the FRY and the OSCE, allowed the latter to establish an inspection commission in Kosovo, and promised the compliance of FRY with all Security Council resolutions in connection with the conflict. The second agreement was directed to the establishment an air inspection commission over Kosovo in order to complement the OSCE mission.[872] Acting under Chapter VII, the Security Council ratified and supported the two agreements concerning the inspection of compliance by the FRY and all others concerned in Kosovo with the requirements of its Resolution 1199, and demanded full and prompt implementation of these agreements by the FRY. Later, the Council condemned the FRY for its failure "to execute the arrest warrants issued by the ICTY" in September 1998 and demanded "the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals."[873]

At the same time, NATO leaders begin to mobilise public opinion to support any use of force by NATO in Kosovo. The British Prime Minster, Tony Blair, indicated that the main aim of NATO was "to prevent [President] Milosevic from continuing to perpetuate his vile oppression against civilians."[874] The British Secretary of State for Defence pointed that NATO acting in full harmony with the international law and for humanitarian consideration. He declared that the aim of the NATO campaign was:

> "Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those *circumstances* clearly *existed in Kosovo*. The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the [United Nations] Security Council, but without the Council's express

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[872] Ibid, p. 7-8.
[873] See SC Res. 1207 of 17 Nov. (1998).
[874] Cited in Dino Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia," (*International and Comparative Law Quarterly* 49, April 2000), p. 341.

authorisation, when that is the only means to *avert* an immediate and *overwhelming humanitarian catastrophe*."[875]

Meanwhile, in the US, President Clinton regarded the aim of the NATO campaign as being to "prevent a wider war, to defuse a powder-keg at the heart of Europe that has exploded before in this century with catastrophic results."[876] The US, at that stage of the crisis, was convinced that a military solution to the conflict was the only option, since the FRY had blocked all possible peaceful ways.[877] This was obvious from the US oral proceeding before the International Court of Justice, when the US offered many excuses and claims as legal grounds for NATO action in Kosovo:

"The humanitarian catastrophe that has engulfed the people of Kosovo as a brutal and unlawful campaign of ethnic cleansing has forced many hundreds of thousands to flee their homes and has severely endangered their lives and well-being; the acute threat of the actions of the [FRY] to the security of neighbouring States, including the threat posed by extremely heavy flows of refugees and armed incursions into their territories; the serious violation of international humanitarian law and human rights obligations by forces under the control of the Federal Republic of Yugoslavia, including widespread murder, disappearances, rape, theft and destruction of property; and finally the resolutions of the Security Council, which have determined that the actions of the Federal Republic of Yugoslavia constitute a threat to peace and security in the region and, pursuant to Chapter VII of the Charter, demanded a halt to such actions."[878]

The main point, which should be mentioned here, is that before the use of force on the part of NATO, and with the continuing deterioration of the humanitarian situation and the increase of violence, the logical direction events would have been a return to the Security Council, for it to review and consider the situation again and to give permission for the use of force in that crisis, although it can be admitted that if that had been done, the Russians would have used the veto to prevent any resolution that would authorise the use of force in that crisis. Indisputably, the NATO intervention through its bombing campaign violated the United Nations Charter and International Law. In general, the use

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[875] Ibid, p. 341-42.
[876] Ibid.
[877] For more information about the bombing campaign, see James Ciment, *Encyclopaedia of Conflicts Since World War II*, Vol. (2), (Chicago, London: Fitzroy Dearborn Publishers), p. 1134-35.
[878] Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia," p. 342-43.

of force since 1945, has been linked with Article 2 (4), which asked Member states to refrain from threat or use of force. There are only two exceptions to this article: Article 51 (individual and collective self-defence) of the Charter, or collective use of force under the authority of the Security Council. This means that any threat or use of force that is neither considered as self-defence against an armed attack nor authorised by the Security Council should be regarded as a violation of the UN Charter. Moreover, under Chapter VIII of the Charter, no regional arrangement can practise the use of force without the Security Council's permission [Article 53 (1)]. As a result, if we consider that NATO depended on Chapter VIII for its intervention in Kosovo, this would be not only a violation of the UN Charter, since it was undertaken without permission, but also a violation of Article 5 of the North Atlantic Treaty, which limited NATO activities to the geographic area of Member states of the treaty.

Only the Security Council can decide that there are violations of human rights happen inside a state, which constitute a threat to international peace and security; on that basis the Council can give permission to take an enforcement action. The NATO claims, even with its noble intents, cannot provide justification for the NATO air strikes against FRY, since, that violation of human rights did not go beyond Kosovo's borders and so did not amount to an armed attack against another state. Here, the recourse to Article 51 is not available. Even the influx of refugees from Kosovo did not constitute an armed attack. The tendency from NATO to adopt a new exception to Article 2(4) under the umbrella of humanitarian intervention is completely unacceptable. NATO was in origin a defensive organisation, whose role is to protect Member states from any aggression; not to place itself on the same footing as the Security Council and to take its place in exercising its responsibilities to protect international peace and security.

Overall, the air strikes have been regarded by many as unlawful. The British Attorney General, John Morris, considered the NATO campaign as illegitimate.[879] Professor Bruno Simma emphasised that,

> "[I]f the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorises an enforcement action to put an end to these violations, a "humanitarian intervention" by military means is permissible. In the absence of such authorisation, military coercion ... constitutes a breach of Article 2 (4) of the Charter. Further, as long as humanitarian crises do not transcend borders ... and lead to armed attacks against other states, recourse to Article 51 [self-defence] is not available".[880]

He concluded that NATO's air strikes were in breach of international law.[881] Also, the House of Commons' foreign affairs committee was of the opinion that NATO, as a defensive organisation, is not authorised to use military actions in other countries without the Security Council's authority.[882] The NATO actions constitute an unfortunate precedent for states to use force to suppress the commission of international crimes in other states; on grounds that easily can be and have been abused to justify intervention for less laudable objectives. As now instituted, the so-called principle of humanitarian intervention can lead to an escalation of international violence, discord and disorder, and diminish protections of human rights world-wide. If current international law and organisations are insufficient to solve problems like the Kosovo crisis, better rules of law and improved organisations might be developed to avoid these terrible risks and properly protect human rights.

President Clinton and others have argued that when a nation is committing gross human rights violations against its citizens, other nations or multilateral coalitions have the right to intervene militarily, without the authority of the United Nations Security Council, to end those abuses. In the aftermath of the Kosovo War, US administration

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[879] See *The Current Digest of the Post-Soviet Press* 52 (July 12, 2000), p. 23.
[880] Simma, "NATO, the UN and the Use of Force: Legal Aspects," p. 1; 5.
[881] Ibid, p. 6.
[882] *The Current Digest of the Post-Soviet Press*, p. 23.

officials have invented a Clinton doctrine that proclaims that the United States will forcefully intervene to prevent human rights abuses when it can do so without suffering substantial casualties.[883] This doctrine rhetorically suggests a new, assertive, US approach to promoting and defending human rights abroad. However, the Clinton doctrine is highly selective, as indicated by Washington's decision to intervene in Kosovo - where, over the preceding year, an estimated two thousand had been killed - though ignoring the 1994 Rwandan genocide of over one million civilians within the span of a few weeks.[884] The US failed to act in Rwanda, a country of little strategic or economic importance. Similarly, although the State Department recognises that Turkey, a close ally, has committed flagrant human rights violations against the Kurdish minority, the administration not only fails to intervene to protect the Kurds but actually continues to export arms to Turkey. During his October 1999 visit to Turkey, President Clinton went so far as to praise Turkey's progress on establishing democracy and to promote its entry into the European Union. If human rights were of serious concern to the US, Washington would at least stop selling guns and helicopters to Turkey.[885]

Another close US ally, Indonesia, which invaded and annexed East Timor, causing the death of over 200,000 Timorese, is one of the world's worst human rights violators. Yet, throughout the incursions into East Timor, the US continued to arm and train the Indonesian military. When, in 1999, East Timor voted peacefully and overwhelmingly for independence, the US opposed the rapid creation of an armed UN peacekeeping force that could have stopped the forced exile of hundreds of thousands and the slaughter of Timorese civilians by Indonesian-controlled paramilitaries. Today, the US

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[883] http://www.ndu.edu/inss/strforum/forum166.html, p. 1-3.

[884] For more information about the genocide in Rwanda and the international reaction, see James Ciment, *Encyclopaedia of Conflicts Since World War II*, Vol. II, p. 1134-35.

[885] http://www.vanderbilt.edu/Law/journal/32-5-1.html, p. 3; 7-8.

is giving only limited support to the Australian/UN force; it refuses to supply combat troops but is giving some logistical help and a few helicopters.[886]

The purported good that might come from allowing countries to intervene unilaterally based upon humanitarian intervention argument is, however, outweighed by the dangers that arise from weakening the international restraints on the use of force.[887] In addition, the UN charter requires that the use of force be a last resort, taken only after all peaceful alternatives have failed. The UN's primary goal is to "save succeeding generations from the scourge of war." The Kosovo Crisis illustrates the danger of bypassing the Security Council and lends credence to those who argue that intervention was not for humanitarian purposes. Had the United States gone to the Security Council, it is possible that a settlement similar to the one that ended the air war could have been achieved without the use of force. The Security Council might have insisted on more negotiations, a more flexible approach to the *Rambouillet* proposal, or a less prominent role for NATO and the United States. Moreover, the destructiveness of the war and its aftermath undermine Washington's humanitarian claims and reemphasis the reasons why the Charter's framers chose peace as its central tenet.[888]

Special Associations

For the purposes of rescue, the national or nonnational separate becomes arguably, like nationality itself, a product output of the "specific" association between an intervening state and a certain group of people. Nationality is one especially durable type of special

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[886] http://www.unac.org/canada/bowles98/inter.html, p. 1-2.
[887] Louis Henkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention," (*American Journal of International Law* 93, 1999), p. 824-25.

association, but it is not the only one; nor is it inelastic. In the Congo in both 1960 and 1964, after all, Belgium and France rescued "nationals" who were defined not by citizenship but by white skin and Euro-American origins. Also, for example, the US intervention in the Dominican Republic, likewise, supposed that "a plea can be made that where it is legal to intervene to protect one's own nationals, it is an extension of this legality to protect the nationals of others. The so-called principle of nationality is not inflexible."[889] The implication is that the defence of persons beyond a states' borders, whether nationals or not, is best defined along a continuum, along which the boundaries of "membership", and consequently responsibility, are drawn and redrawn, expanded and contracted, according to the situation. In general, special associations come from a perception of proximity; and their emblematic form is the family or clan. In common social and ethical codes, it is considered acceptable to have special obligations to those related or near to us - families, friends, compatriots. These special associations are based on principle, not practice, in much of traditional political theory. Therefore, a person legitimately claims a greater duty to her own child than to children generally, even to the degree that these might conflict.

When a state claims a right to take action abroad in defence of its nationals, it maintains the special obligation it has to its own nationals. Historically, the practice of humanitarian intervention began with a selective view of humanity based on religious, cultural, and political affinities. The first humanitarian action so-called was the joint intervention of Britain, France and Russia in Turkey on behalf of Greek Orthodox in 1827. That operation was followed by others, among them French intervention in Syria

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[888] Consequently, the intervention risked destabilising the international rule of law that prohibits a state or group of states from intervening by the use of force in another state, absent authorisation by the United Nations Security Council or a situation of self-defence.

on behalf of Moronite Christians in 1860 and American intervention in Cuba in 1898.[890] In contemporary international politics, special associations of many sorts are widely acknowledged; they also appear important when states *justify* the resort to armed force.[891] One encounters ethnic and cultural affinities that cross legal borders; Yugoslavia trying to justify its support for rebels in Greece in 1947 on the basis of Slavo-Macedonian kinship, for example;[892] and Greece and the Netherlands arguing during the 1954 debate over "definition of aggression" that humanitarian intervention should be allowed when ties existed between intervening states and ethnic minorities.[893] One hears appeals to imperial obligation and affections: the Dutch confronting Indonesia over the status of West Irian comes to mind, as does Britain responding to the call of duty during the Falklands War. One also thinks of hemispheric spheres of influence such as the US intervention in Grenada and to some extent Panama, and the USSR in Afghanistan in 1979. Also invoked are ideology, as in the case of the USSR's intervention in Czechoslovakia and religious- racial connection, like the Jordanian Army's intervention in Palestine in 1948, and the Iranian-Jordanian military support for the Omani Government against Marxist rebels in the early seventies.

At a minimum, this suggests that some attention might be profitably redirected from state-to-state relations toward state-person and state-community relations. As a corollary, one could set aside certain preoccupations of international relations theory in order to make room for others derived from political theory, philosophy, and critical sociology, such as the nature of agency, identity, and community. Even when one begins from a traditional international perspective, rescue operations urge one in this direction.

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[889] A. J. Thomas and Ann Van Wynen Thomas, *The Dominican Republic Crisis 1965*, Background Paper and Proceedings of the Ninth Hammarskjold Forum, ed. by John Carey, (Dobbs Ferry, NY: Oceana Publications, 1967), p. 20.
[890] For more information see Fonteyne "Humanitarian Intervention", p. 219.
[891] Ibid, p. 224.

Think of the considerations that are seen to enhance or diminish a state's right to intervene on behalf of nationals. When nationals are taken as hostages, one notes their innocence in having been deprived of all choice or agency. When a host state itself is the source of threat, one holds it accountable because one credits it with effective agency. When an intervenor has hidden motives, one censures it for intruding in the state-person relationships of another polity while having no such relationships of its own at stake. As a result, it is worth noting here, that opening the discussion of international politics to the substance and methods of political theory does not settle one way or the other whether the locus of rights and duties is properly the individual or the group.

Self-defence and Self-determination

It is difficult to broach special associations and state-person commitments with out mentioning self-determination. On the surface, self-defence and self-determination appear contradictory. In form, self-defence is a negative claim, indicating the conservation of existing values. Self-determination, by contrast, seems a positive one, implying an aspiration to potential but as yet unpossessed values. In practice, self-defence has been the governing norm of already-established states, despite some attempts during decolonisation to apply it to national liberation movements. Meanwhile, self-determination was the leitmotif of anti-colonialism.[894] Moreover, self-defence is treated, both in the Charter and in public debate, as a right held by states against other states. It addresses the external relations between acknowledged states, and more

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[892] This was rejected by a United Nations Commission of Investigation. See Akehurst, p. 10.
[893] Ibid.
[894] The term, self-determination is used broadly in many other situations, such as the Soviet interventions in Hungary and Czechoslovakia, the US interventions in Vietnam and Grenada, and Vietnam's invasion of Cambodia.

specifically, Members of the UN, whereas self-determination is predominantly associated with internal struggles, addressing the relationship between popular communities and the states which govern them. Self-defence and self-determination become more compatible if one sees them as referring to different stages in the emergence of political community and statehood. Generally, it is the acquisition of sovereign statehood, that permits a community to claim rights vis-à-vis other states. The right of self-defence in particular, along with the injunction against the resort to armed force, has been seen as applying nearly exclusively to states, despite ongoing efforts to incorporate individuals and non-state organisations into the framework of international laws and norms. As a consequence, new states, especially previously colonial states, placed great emphasis or their independent statehood when justifying their engagement in armed attack conflicts. Here, one could note Indonesia's position during its protracted conflict with the Dutch (1947-49), while the latter claimed merely to be "policing" internal security; and Israel's justification for pushing back Arab forces past its formal borders, while the latter argued that their sole aim was restoration of internal order.[895]

At the same time, states are ideally only acknowledged as such, and granted Membership in the United Nations, when they evince a reasonable fit between a government and its citizenry. New states have generally been inducted into the society of nations with a presumption of internal legitimacy. Upon their arrival, they then become entitled to such rights of membership as self-defence. These issues may be illustrated by the conflict between India and Pakistan over possession of the "princely states" whose autonomy was left unresolved at the time of British India's independence. These principalities (362 in total) had been semi-autonomous under British rule and so were not part of the negotiations for British departure in 1947. The status of most of

[895] Kjell Goldmann, *International Norms and War Between States*, (Stockolm: Laromedelsforlagen,

them was rapidly settled by geography. A few, however, posed a greater challenge because of size, contiguity to both India and Pakistan, uneasy fit between their rulers and ruled, or all three, as in the case of Kashmir. Continued semi-autonomy was not really considered an option: the choice for these entities was between respective accessions, to India or to Pakistan. Neither of these states, in turn, appeared to relinquish claims to the princely states; each argued that the regions were properly theirs on the basis of "natural" national unity that would become theirs legitimately to defend.

"Kashmir Joins India ... Rebels Repulsed"[896]

Demography can be cruelly idiosyncratic; and all of the former British India confronted the question of where people belonged, with whom they belonged, and why. Independence in 1947 provoked massive migrations and bloodshed as people tried to conform to the new borders of Hindu India and Muslim Pakistan.[897] By the late summer of 1947, the status of Kashmir was engendering substantial unrest. In July, Muslims in the south-west had revolted in favour of accession to Pakistan. In central Kashmir, deserters from the state Army had formed their own army of independence (the Asad Kashmir Army). When, in October, the south-western rebellion proclaimed a provisional government, it was rapidly joined by thousands of sympathetic Pathan tribesmen who had been armed by Pakistan. These began an increasingly formidable march on Kashmir's capital. India accused Pakistan at the time of sending its reguler

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1971), p. 150-51.

[896] Headline, (*The Times*, October, 28 1947), p. 4.

[897] According to some estimates' more than 400,000 persons were killed during that period.

troops in the guise of civilians, but the charge was denied by Pakistan and remains an unproved allegation.[898]

When Muslims rebels got to within thirty miles of the capital, Kashmir's Hindu Maharjah announced that Kashmir would accede to India. He wrote to Lord Mountbaten, that "with the conditions obtaining at present in my State, ... I have no option but to ask help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India." Lord Mountbaten replied that:

> "In the special circumstances my Government has decided to accept the assession of Kashmir to the Dominion Government of India. ... Meanwhile, in response to the appeal for military aid, action was taken today to send troops of the Indian Army to Kashmir to help your own forces defend your territory and protect lives and property and the honour of your people."[899]

Indian troops entered Kashmir in opposition to the rebel Muslims, and fighting rapidly escalated.[900] By May 1948, the Pakistan army officially joined the conflict. Several months later, in December 1948, the UN brokered a cease-fire. That cease-fire remains the effective boundary between India and Pakistan, although the status of Kashmir has been persistently contested. At that time, India justified its involvement as a straightforward act of self-defence under Article 51. It had a right, after all, to enter its own territory, especially in response to "a situation ... whose continuance is likely to endanger the maintenance of international peace and security ... owing to the aid which invaders ... are drawing from Pakistan." Pakistan, while denying that its troops had entered the fray prior to India's, nonetheless insisted that they should have been allowed to do so as a form of "preventive defence" before India could annex Kashmir

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[898] The circumstances on the ground were unclear. The *Times* corespondent recognised that "it is difficult to draw a clear picture on what is happening." For more information see (*The Times*, October 28 1947), p. 4.

[899] See (*The Times*, 27 October, 1947), p. 4. See also, Erik Goldstein, *Wars and Peace Treaties 1816-1991*, (London: Routledge, 1992), p. 86.

[900] See (*The Times*, 31 October, 1947), p. 4.

successfully.[901] The conflict over Kashmir essentially pitted territorial and administrative claims against popular, demographic ones, the former winning the day, although not without great cost.

The fight over Kashmir was replicated in other Indian regions. In Hyderabad and Jungadh, for example, the issues remained the same, despite an ironic role reversal. In contrast to Kashmir, both of these principalities were ruled by Muslim governments while populated mostly by Hindus. Hyderabad's Nizam, for instance, preferred an independent arrangement with India to formal accession. Ostensibly to enhance his prospects, he made threatening noises to the Indian government that Hyderabad would accede to Pakistan. India responded with an economic blockade of his region. The Hyderabad government appealed to the United Nations [although being neither a state nor a member]. Before the United Nations could reply, Indian troops advanced inside Hyderabad. Within five days, Hyderabad had joined the Indian Dominion, and later the same thing happened in Jungadh. In general, both India and Pakistan can easily be seen to have alleged claims to go to the defence of Kashmir, as they would have defended themselves. In order to evaluate their particular claims, though, one needs to consider the particular values accorded to territory and state authority versus popular sentiment. The right of self-defence cannot deal with the probability that existing [selves] may grow in directions countered by the rival growth of another, or that they may splinter into different entities, each claiming a defensive right against the other. It is true that when established states [enlarge], they often do so at the cost of other states. Traditionally, this is labelled as an aggression, and self-defence should be appropriate to represent the right of its victim. Nevertheless, it is still the case, that current legal and customary norms dispute the right of self-defence to non-state groups.

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[901] The Indian representative to the United Nations, in *United Nations Repertoire*, 1946-1951, p. 405-6.

Territory

The essence of defence is keeping the other side out of your territory.

Robert Jervis

The second part of chapter eight, considers territory as an object of defence. Possibly, even more than population, territory and its associated borders are fundamental to the issue of self-defence. In these days, states are unthinkable without a physical, territorial base.[902] That is why, for example, when France was deprived of its territory during World War II, the Free French Government sought to reclaim it. When a non-state community seeks statehood - as in the case of the Palestinians, for example, their main would is for land, since it is only authority over a specific territory that can give the modern state its complete "physical expression."[903] Traditionally, territoriality underpins the realist view of international politics which deems the most important actors in international politics to be states, and these to be considered particularly as "territorially organised entities."[904]

Among the characteristics that define contemporary states; a characteristic particularly lacking among pre-modern states, is inclination for making precise and more or less fixed claims to specific as exclusively their own.[905] This is a relatively recent

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[902] Historically, the modern state is identified as such by being territorially bounded.
[903] See Barry Buszan, *People, States and Fear: An Agenda For International Security Studies In The Post-Cold War Era,* 2nd ed, (Boulder, Co: Lynne Rienner Publishers, 1991), p. 64.
[904] See Robert O. Keohane, *Neorealism and Its Critics*, (New York: Columbia University Press, 1986), p. 163.
[905] The first official boundary in this sense was established in the Treaty of the Pyrenees between Spain and France in 1659, which approved a joint commission to settle the exact border line. See Frederick V. Kratochwil, Paul Rohrlich, and Harpreet Mahajan, *Peace and Disputed Sovereignty: Reflections on*

development in the grand project of political history. In the medieval world, political jurisdiction was mainly personal rather than territorial. Such boundaries of feudatory and churchly authority as existed often overlapped territorially and "had none of the connotations of possessiveness and exclusiveness conveyed by the modern concept of sovereignty."[906] Over the period in which states acquired the surroundings that we identify today, land, "unlike other natural elements [such as air] ... became a private good, not a public one; its use and enjoyment ... open only to its owner."[907] The core of the modern state became "its territoriality"; this in turn, was defined as exclusive right of possession, "the functional equivalent of property rights." Just as territoriality is common to all states, so too is territorial vulnerability. Indeed, territorial security is arguably the single concern that unites all states, in kind if not in degree.[908] Territory, after all, is the strong-box of most socially understood values. It is the source of natural resources, from oil to agricultural land; it also houses establishment resources, from markets to desirable labour; it affords sheer space on which to live; and it provide the means for communities to develop within set boundaries. Particular territory also contains value unique to particular people, when families and tribes dwell in a region for generations, and when cultural integrity seems therefore inseparable from it. It is difficult to disagree with a generalisation that "humankind has always had a special relationship to the land on which it lives and which sustains it."[909] Territorial security is not really about preservation of land and its offerings themselves, absolutely, but about

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Conflict over Territory, (Columbia University Institute of War and Peace Studies, Lanham, MD: University Press of America, 1985), p. 11.

[906] See John Gerard Ruggie, "Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis," (*World Politics* 35), p. 263.

[907] See Gary Goertz and Paul F. Diehl, *Territorial Changes and International Conflict*, Studies in International Conflict Vol. 5, (London: Routledge, 1992), p. 1.

[908] Buzan said that "although population and territory vary enormously among states in terms of extent, configuration, level of development and resources, the threats to the state's physical base are common in type to all states because of the similar physical quality of the objects involved." See Buzan, *People, States and Fear*, p. 91.

the boundaries that separate them. When groups come to blows over territory, they are not concerned with territory itself, but with its ownership and the contribution of its various resources; in short, with the legitimate separation of "ours" from "theirs".

Territory seems the most basic value around which actual lines can be demarcated, making violations of it more tangible and objective than breaches of other sorts of boundaries; ethnic, ideological, psychological, economic. The problem is not that well fixed borders are not worthy of defence, but that many modern or recent borders are not very well fixed; and that in the process of becoming established, struggling parties can usually make claims of defence that are either equally strong or equally weak. For example, when fighting remains confined to a frontier area as in the Chinese assault of Vietnamese territory in 1979 and their continuing hostilities for the next ten years it suggests that the frontier itself is the matter of rivalry. In that conflict, both sides inclined to describe their actions in such terms. The Chinese representative to the United Nations considered his country actions as "limited counter-attack, in defence of our frontier."[910] Moreover, territory is valued for a wide variety of reasons; from the strategic and economic to the historical and cultural, from each of which it is usually treated as inseparable; so that one is wary of trying to isolate it as a value in and of itself.

Borders Defence

That a states has a right to protect its territory from any danger or threat seems by many beyond argument. "Territorial integrity" is the corollary of "political independence". Together, they form the framework of state sovereignty and define the essential values of the post-1945 world order. When a state governs a clearly-bounded area, over which

[909] Goertz and Diehl, p. 1

it has both legal title and effective control, and especially when it has done so far a long period of time, its territorial claims are generally considered indisputable. When, in addition, it can command the willing loyalty of the residents of that territory, its territorial claims harmonise with political legitimacy, and its territorial belongings become the foundations on which its population make their "common life."[911] To use force to guard such territory is to protect the prospect of civil life within it; in a sense it is a model example of "self-defence". It is more a element of historical certainty than one of interpretation or much controversy that South Korea was legitimately engaged in a defensive war against North Korea. Most would also accept that Israel had a right to self-defence after the surprise attack by Syria and Egypt on October 1973; and that Great Britain could claim a defensive right to reply to Argentina's attack of the Falkland Islands in 1982. In each of these events, boundaries existed that were legal and recognised. These boundaries were also effective in the sense that the groups living within them approved the authority and legitimacy of the state under which they lived. Also, in each it was apparent who struck the first blow. These three cases are the easiest to designate as self-defence.

It is disturbing, though, to note how deep ran disputes over the legitimacy of the other boundaries in question. Formally speaking, each was legal, even if the result of armistice rather than a full peace settlement, as in Korea, Vietnam, Israel, and Cyprus. South Korea, South Vietnam, Israel and Turkish Cyprus, however, had each been a source of struggle from the beginning of its legally bounded existence; also, none had been in existence very long. For example, Chad, like other ex-colonial states, retained borders that meant more to its previous administrators, in this case, France and Britain, than to itself and its neighbouring states. Chad northern border with Libya had never been

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[910] In *United Nations Repertoire*, 1975-1980, p. 341.

completely defined, and their common frontier had a contradictory record of colonial ownership. Moreover, the border area was inhabited by contending groups of Arabs, who tended toward Libya, and Africans, who leaned toward Chad. Still, the region of combat in Korea, Vietnam, Cyprus and Chad could be described as civil war, as much as international. To note the ambiguity or contentiousness of even legally fixed boundaries is not to advocate challenging them by force of arms, as did North Korea in (1950), Syria and Egypt (1973), Libya (1978), Argentina (1982) and Iraq (1990), to name those whose first military moves were the most clear and exciting. Nor is it to deny that the governments of their particular targets had a right to resist militarily. It does suggest, though, that the brightness with which Article 51 describes self-defence is too simple, as is the image of a peaceful community under outside attack that is most associated with it. It also indicates a need for greater attention to the circumstances in which states emerge and become viable as entities deserving a right to defence.

Forward Defence

Forward defence refers to a method in which " a state decides to take a stand not at its own frontier ... but at the frontiers of another state forward of this."[912] The motivation of forward defence is still a real threat to home territory; the reasoning behind it is that one's country may be better secured before an enemy actually reaches one's borders. When forward territories stay non-specific, until a matter of dispute arises, forward defence matches an actively preserved balance of power; when they are established, forward defence is expressed through coalitions and guarantees. During times of crisis, forward preservation tactics may drive states to promise the security of distant states,

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[911] This was Walzer expression, *Just and Unjust Wars*, p. 57.

exactly, as the United Kingdom in early 1939 did with Poland; or to occupy neutral states, as the Soviet Union did with both of Denmark and Norway in 1940. For example, China's claim that the United Nations forces in Korea posed a threat to its national security, was honestly convincing, especially when those forces crossed the 38th parallel toward the Chinese border. Forward defence includes elements beyond the spatial, in general. Especially during the Cold War, forward defence was seen psychological terms. In the relations between the United States and the USSR, the capacity of each to threaten the other was believed to reside prominently in their credibility and reputation, along with the hearts and minds of other nations whom they sought to win over. In forward defence, the territory at stake does not matter because of any intrinsic value, but because of the greater capacity it might give an adversary to become more directly and immediately threatening.

The US Secretary of State, Dulles, defended the US support and help given to Taiwan to defend the islands of Quemony and Matsu, on the grounds that these islands were not "just some square miles of real estate" but the locus of confidence in the United States' determination to resist aggression. And if the United States failed in this challenge, it would only face a greater one after "our friends become disheartened and our enemies overconfident and miscalculating."[913]

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[912] Ceadel, *Thinking about Peace and War*, p. 79.

[913] See the Speech of Dulles before the Far East-America Council of Commerce and Industry at New York, 25 September 1958, in *Department of State Bulletin*, XXXIX: 1007 (October 13, 1958), p. 565.

"US Naval Units Put to Sea Over Red Blow at Quemoys"[914]
"Bombing Raids on China"[915]

During the 1950s the United States on several occasions considered using atomic missiles against China.[916] Each time, the immediate provocation was contention between China and Taiwan over a number of small islands located between them in the Straits of Taiwan. The most important from a strategic point of view were Quemoy and Matsu. When the Nationalists retreated to Taiwan in 1949, they retained control of the islands from which they were able to harass the Chinese and their shipping. Both China and Taiwan claimed that the islands belonged exclusively to them. From late 1954 to April, 1955, and again in mid-1958, they became the focus of international crises that brought the US and China close to war. On both occasions, each of the parties involved declared the islands to be "foeward defensive" positions critical to their basic security.

The first crisis began with the heavy shelling of Quemoy from China in early September, 1954.[917] Hostilities quickly escalated between the Communist and Nationalist troops; within months, the northernmost group of islands had fallen to the Chinese troops. By early 1955 "from Washington's vantage point all-out war for the offshore islands and perhaps Taiwan itself seemed to loom." The Eisenhower administration's first priority was the continued defence of Taiwan, to which the US was bound by treaty. The situation regarding these islands led the Americans to consider that the defence of Taiwan would be more effective if a line were drawn further foeward. Some northern islands that had been lost early in the fight were negotiable, but for the US, the defence of Quemoy and Matsu appeared essential as "outposts for the

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[914] See (*New York Times*, 5 September, 1954), p. 2.
[915] See (*The Times*, 8 September, 1954), p. 6.
[916] For more information see Gordon H. Chang, *Friends and Enemies: The United States, China, and the Soviet Union, 1948-1972*, (Stanford, California: Stanford University Press, 1990).
[917] Ibid, p. 120.

defence of Formosa."[918] For the US, that line was needed, for psychological more than territorial reasons. Both Quenmoy and Matsu were too near the Chinese ports; as Eisenhower described them, within "wading distance" of the mainland.[919] These islands had been under Taiwanese control since 1945, however and had been heavily fortified by Nationalist forces, with considerable financial help from the United States. From the United States' perspective, their loss would do irreparable damage to the Nationalists' morale, thereby threatening their hold on Taiwan. The loss of Taiwan, of course, would be "humiliating and devastating to American credibility."[920] However, this crisis subsided by the Spring of 1955, when the Communist government backed away from hostilities and ceased fire.

The second crisis began in late August, 1958, when China initiated another shelling campaign against Nationalist garrisons on the islands. The United States immediately, assembled a counterforce in the area, which was described as "the most powerful armada the world had ever seen."[921] At this time, the United States was more vociferous in her commitment to the islands. In an address to the nation, Eisenhower emphasised the importance of Quemoy to the United States:

> "Let us suppose that the Chinese Communists conquer Quemoy. Would that be the end of the story? ... It is as certain as can be that the shooting which the Chinese Communists started on August 23d had as its purpose not just the taking of the island of Quemoy. It is part of what is indeed an ambitions plan of armed conquest ... [determining to] liquidate all the free-world positions in the Western Pacific area and bring them under captive governments."[922]

From his side, Dulles described to the British Prime Minister, Harold Macmillan, the consequences of a loss of these islands. Taiwan would be undermined, leaving it,

> "exposed to subversive and military action which would probably bring about a government that would eventually advocate union with Communist China; ... if this occurred it would seriously

[918] Ibid, p. 122-23.
[919] Ibid, p. 117.
[920] Ibid, p. 125.
[921] Ibid, p. 185.
[922] President Eisenhower, Public address, 11 September 1958, *Department of State Bulletin*, XXXIX (29 September 1958), p. 482.

jeopardise the anti-Communist barrier, including Japan, the Republic of Korea, the Republic of China, the Republic of the Philippines, Thailand, and Vietnam; that other governments in Southeast Asia such as those of Indonesia, Malaya, Cambodia, Laos and Burma would gradually come fully under Communist influence; that Japan with its great industrial potential would probably fall within the Sino-Soviet orbit, and Australia and New Zealand would become strategically isolated."[923]

Meanwhile both sides, China and Taiwan regarded themselves as engaged in a defensive war against the other. The Chinese Government accused the United States of intervening in a dispute that was properly internal to China, and questioned whether the United States wanted "China [to] give up its right of exercising sovereignty over its own territory and recognise the right of 'self-defence' for the United States on China's territory?"[924]

Also, the Chinese claimed that the United States supported the Taiwanese for the purpose of conducting "all sorts of harassing and disruptive activities against the mainland." For that reason, they argued, "the Chinese people cannot tolerate the presence in their inland waters along the mainland of an immediate threat posed by such coastal islands as Quemoy and Matsu."[925] In the dispute over these islands, one sees the interplay of two major themes that underpin the legitimacy of forward defence. The first operates in the realm of psychology and symbol, and the second in that of physical geography: both are asserted as causal to future aggression. The American concern during this crisis was predominantly with morale and credibility, which were always causally linked to ultimate territorial consequences, as communist regimes spread from state to contiguous state. As Dulles warned, the loss of Quemoy and Matsu would enable the Communists "to begin their objective of driving us out of the western Pacific, right back to Hawaii, and even to the United States." [926] In many Cold War expressions

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[923] In Chang, *Friends and Enemies: The United States, China, and the Soviet Union, 1948-1972*, p. 185-86.
[924] In *Documents on International Affairs*, 1958 (London: Oxford University Press, 1967), p. 175.
[925] Ibid, p. 180.
[926] See *New York Times*, 23 April 1956.

of forward defence, these two strains coexist: the call to take early to take early and firm stands for the sake of credible deterrence of aggression, alongside the more tangible claim that military threats must be stopped in their geographical tracks. The United States usually depicted its opposition to communism in distant parts of the globe as a "first line of defence against the threat to its own shores. Each of its efforts to keep communist regimes from gaining a foothold have their parallel in Soviet attempts to keep "counter-revolutionary" regimes from gaining ground in places like Hungary in 1956, Czechoslovakia in 1968 and Afghanistan in 1979.

Examples of forward defence can be encountered elsewhere. At the outset of the Kashmir dispute in 1948 between Pakistan and India, for example, Pakistan alleged that India's occupation of Kashmir was the first move in an effort to destroy Pakistan and rule the whole subcontinent; while India argued that Pakistan was the invader and that if Pakistan succeeded in controlling Kashmir, India itself would be the next target.[927] Moreover, the Chinese defended their intervention in the Korean Crisis, on the grounds that they feared the US was "copying the old trick of the Japanese bandits ... first invading Korea and then invading China." The Chinese claimed that "any aggressor who invades Korea today invariably invades China tomorrow"; which can interpreted as meaning that "to save our neighbour is to save ourselves."[928] The US President warned in mid-1959 that a communist victory in South Vietnam "would bring their power several hundred miles into a hitherto free region," leaving the remaining countries "menaced by a great flanking movement. The freedom of 12 million people would be lost immediately and that of 150 million in adjacent lands would be seriously

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[927] See Goldmann, *International Norms and War Between States*, p. 133.
[928] Ibid, p. 113-14.

endangered."[929] The US administration justified its 1965 intervention in Dominica as "a matter of preventing Marxist revolution from spreading to all the islands."[930]

Forward defence must be seen as a tenuous extension of the right of self-defence. Its weakness does not reside in the value it aims to secure, namely, home territory, but in its assertion that these are threatened by conflicts distant in either space or time. The first normative hurdle that forward defence must clear is that of showing that one's own integrity is genuinely at risk. To maintain a legitimately defensive presence in the Straits of Taiwan, for instance, the US would have to show that China had ultimate designs upon the United States and that its capture of Quemoy and Matsu would significantly affect its capacity to achieve these. Forward defence actions thus bears a heavy burden of proof about both the intentions and the capacity of their presumed enemy. Here, forward defence roughly corresponds to the notion of preventive defence. In its purely territorial form, forward defence also contains an inner contradiction. Think of the Indian-Pakistani conflict over Kashmir; in theory, proximity should strengthen the case of forward defence. The closer to home territory the forward line is, the more plausible it is that one is genuinely threatened. For India and Pakistan, Kashmir was very plausibly an important first line of defence for both, particularly in the context immediately following their tortured independence. Kashmir could equally credibly be claimed necessary to the forward defence of both India and Pakistan, because here, proximity enhances the claim that forward defence action is defensive. But, when a forward defensive stand is taken far from home territory, it ceases to look very defensive. Only powerful states can practise military force far beyond their borders; but weaker states can usually do so with the help and assistance of stronger friends. Forward

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[929] Ibid, p. 118.
[930] See Verwey, "Humanitarian Intervention," In: *the Current Legal Regulation of the Use of Force*," p. 70.

defence performance, in reality, has lost some legitimacy on the grounds that many forward defence performances took the appearance of interventions in internal conflicts or crises. Such was the case in China, Hungary, Vietnam, the Dominican, Czechoslovakia, Grenada, and Afghanistan.

Border Problems

"Nearly all available territory is already claimed by states nearly all of which recognise each other," said Buzan.[931] While most states may recognise each other, many do not accept the precise borders that divide them. Many border conflicts are as dormant as they are persistent; others flare but only into "frontier incidents" smaller than full-scale war.[932] Yet, even quiescent border disputes have a capacity to explode into armed confrontation under the right conditions. Border conflict, do not challenge fundamental territorial integrity. As Holsti indicated, both disputing states share " a pre-existing acknowledgement of and legitimacy for a territorial distribution of the past."[933] However, they dispute the precise allocation of territory at their common frontier. When a border area possesses great natural resources, in some cases, slight variations in demarcation can have substantial distributive consequences. When borders and physical features are associated with a state's historical identity, or what is claimed as such, disputes can become especially intractable. Most of the border disputes after 1945 followed in the wake of decolonisation and faced some kind of ambiguity. In many formerly colonial, developing countries, territory had never comprehensively been

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[931] Buzan, *People, States and Fear*, p. 91.
[932] For more information see Bowett, *Self-defence in International Law*, p. 257-8; and Dinstein, *War, Aggression and Self-defence*, p. 181-82.
[933] Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648-1989*, Cambridge Studies In International Law, no. 14, (Cambridge University Press, 1991), p. 279.

mapped, let alone its borders fully demarcated. Moreover, the history of colonial possession was often complicated, with territorial ownership trading hands and borders frequently shifting. The principle overwhelmingly used to decide borders during decolonisation was that post-colonial states should retain the title to all territories possessed by the former colony. This rule of *uti possidetis* was generally supported by both retreating imperial governments and their former colonies and seemed the most likely formula to ensure a stable transfer of properties and authority. It could not remedy inadequately mapped borders, however, nor a contradictory record of colonial possession. Either feature rendered newly independent states vulnerable to border conflicts. These tended to flare into active confrontation, as people moved into areas that were previously under-populated, forcing the question of where territorial lines were to be drawn.

"10,000 Red Troops Moving in Key Areas"[934]
"Nehru Speaks of 'Invasion of Whole Country"[935]

China and India shared roughly twenty-five hundred miles of border. This broke down into three sections: in the east, south-eastern Tibet abutted Indian Assam; in the centre, the borders of Tibet, Indian Sikkim, and the autonomous states Nepal and Bhutan all come together; in the west, Xinjiang and Tibet bordered Kahmir, itself divided between India and Pakistan. The official boundary had been established in 1913-14 under an agreement negotiated between Tibet and Great Britain. The resulting "McMahon Line" was the basis for all of India's claims to disputed territory. From its inception, China had rejected the McMahon division outright. Of the three conflicts stretches of border, the

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[934] Headline, (*New York Times*, 27 October, 1962), p. 1.
[935] See (*The Times*, 27 October, 1962), p. 8.

most serious was that in the west.[936] The frontier there had never been well-defined; it had not surveyed until 1864 and remained only vaguely mapped in the mid-twentieth century. Historically, the region extending roughly east of the Ladakh mountains through a plateau called Aksai Chin had been an independent province fronting Jammu and Kashmir to the west and Xinjiang and Tibet to the east. When in 1948, India acquired Jammu and Kashmir, and Tibet was controlled by China, both of them, China and India found themselves proximate.[937] For a long time, the borders between China and India were safe without any problems. In 1950, China controlled Aksai Chin, and at that time, India did not care about this area, which Nehru described as "a barren and uninhabited region, 17,000 feet high and without a vestige of grass."[938]

Later, however, India published a new map, which showed the mountain boundary to be further north; which mean suggests India was trying to indicate that Aksai Chin might properly belong to India. But, it is fair to mention here that India tried not to enter in a direct conflict with China. For its part, China was building a nearly 1200 kilometre road across the middle of Aksai Chin. This area was very important for the Chinese authorities, on the grounds that it offered the only transit across the mountains between Xinjiang and Tibet. The border problems began to be heat up by the mid-1950s, leading India to be more cautious in relation to borders matters concerning China; especially as China completely controlled Tibet, and had dissolved the government there. In this new situation, China was at the Indian border. Tension escalated when China made clear in spring 1960 that it would no longer recognise the McMahon line; fierce fighting began

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[936] In the eastern conflict area, the contention to some degree developed from the nature of the region, which was sparsely inhabited and mountainous. Consequently, Great Britain had little authority around the area there. India strengthened its control over the eastern areas, which incited the beginning of the conflict. This part of the Sino-Indian conflict was resolved, when, in 1972 India, decided to gave that area autonomy from Assam, for more information see John B. Allcock, *Border and Territorial Disputes*, 3d ed, (Harlow: Longman, 1992), p. 431-2.
[937] Ibid, p. 433.
[938] Quoted in Allcock, p. 434.

between the two sides in June 1960; India from this time embarked on a "forward" policy, when it invaded Goa in 1961, and installed of thirty border posts along the McMahon line in early 1962. In October 1962, Chinese troops invaded India, and the military operation was prolonged until the end of November, when China suddenly ceased its military operations. The borders problem between the two sides remains the subject of ongoing negotiations.[939]

To some degree, India has a reasonable claim to maintain the McMahon line as its border with China, on the grounds of the rule of *uti possidetis*. That doctrine alone, however, cannot settle the problems of boundaries which were not fully demarcated. And the problem, which should mentioned here, is that the McMahon line negotiations were originally conducted with Tibet, and not China, which in this case increased the difficulty. One writer noted that "Chinese incursions against India are shocking to India and Europe ... because they violate Indian and European maps."[940] Therefore, the absence of explicit boundaries makes it virtually impossible to determine who is the legitimate defender. Both parties had plausible claims to self-defence, however recklessly provocative their behaviour with their borders.[941] The Indian side has a right to strengthen its frontier with additional border posts; and at the same time China has a right to build a road through its own territory. As a comparison, it is worth considering in this respect, Ecuador and Peru. For 150 years, Ecuador has laid claim to a northern region of the Amazon River basin which has been located within the borders of Peru since a protocol signed in 1942. Their dispute developed as a consequence of the many territorial reorganisations enacted by Spain during its rule, which leaves *uti posseditis* an

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[939] See Nehru's letter to J. F. Kennedy (US President), (*The Times*, 27 October, 1962), p. 8.
[940] Evan Luard, *Conflict and Peace in the Modern International System: A Study of the Principle of International Order*, 2d, revised (London: Macmillan Press, 1988), p. 89-90.
[941] For discussion see Hidemi Suganami, "Bringing Order to the Causes of War Debates," (*Millennium: Journal of International Studies* 19, 1990).

unlikely ground for settlement. When hostility flared into a short border war in 1981, the disputed area of approximately 125,000 square miles included two major river systems (the Amazon and the Maranon), substantial oil reserves and production facilities, a rapidly growing population, and at least fifty miles of common frontier completely uncharted.[942]

Another interesting case is that of the Aozou strip between Chad and Libya, which was a source of disagreement between the two sides; Libya claimed that strip as its southern part, and Chad regarded it as its northern part.[943] The problem was that , there had been many contradictory agreements between the ex-colonial powers (Italy, England and France), concerning that area. The strip under contention was rich in uranium reserves. There was also inter-communal fighting between Arabs and Africans in that zone. But, after years of confrontation, Libya and Chad eventually ended their war and submitted the problem of possession of the strip to arbitration. None of these conflicts are exceptional. While the scale of fighting varies widely, the issues do not: poorly demarcated frontiers, scarce yet desirable resources, and borders appearing more arbitrary than legitimate, especially in relation to local populations. In such cases, self-defence might apply to persons; but it is challenging to associate it with property rights.

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[942] Allcock, p. 589.
[943] Ibid, p. 232.

The State

In this part of the chapter, looks at the state as an object of defence: especially, the state's right and ability to govern. One might anticipate that defending the state is close to the essence of international self-defence. The right to self-defence has been accorded exclusively to states; and state survival can legitimately demand the sacrifice of substantial portions of population and territory, not to mention the death of particular regimes. A state's right to exist can be fundamentally challenged. The threat is to an existing state's survival in its present form, beyond the loss of substantial elements of population and territory. In addition to armed attack, a state may face a normative assault on its legitimacy. At issue is the principle or idea that justifies a particular set of boundaries as legitimately the state's own. But, this not mean to revisit the narrower question of precise territorial demarcation or the proper allocation of frontier areas. Rather, an adversary challenges the legitimate reach of state authority over a society, or what could be labelled its proper domain.

Three types of conflict immediately suggest themselves: wars to unify currently divided states; secessionist efforts to create two or more states where there is currently one; and struggles of national liberation movements against distant empires. Each type of conflict disputes the existing boundary between domestic and international, or what is internal to the state and what is external to it. In general, the clarity and resilience of this boundary has been a defining feature of statehood. In such disputes, it becomes the object of contention.

Also, states can be threatened by collapse even without this sort of fundamental challenge to their domain. Here, states are sufficiently incapable of maintaining order that they have requested outside military intervention to sustain themselves. In some

cases, the newly decolonised states have, after their independence, invited assistance from their former rulers to maintain order and basic stability. In some situations, assistance to these new states was of short duration such as the deployment of British troops to Kenya, Tanganyika and Uganda in 1964, for example; in other events it congealed into a substantial relationship e.g. French intervention in Chad, intermittently from 1960 until 1978. While the respective regimes in these states were simultaneously under assault, the more acute perspective is that of the state, which appeared vulnerable to collapse into internal war and disorder without the infusion of foreign troops. Also, Syria's intervention in Lebanon in 1976 aimed to restore an order, which could no longer be provided by the disintegrated Lebanese government.

Moreover, conflicts arise over the legitimacy of particular regimes. Regimes have radically divergent lifespans; they can last for generations such as the Soviet-type communism in the USSR; or for years such as Sandinista regime in Nicaragua; or change overnight, as in the case of Portugal's revolution after the death of Salazar, and in Spain's transition to democratic rule after the death of Franco. They also derive internal legitimacy from various sources. When the legitimacy of a regime is in fundamental doubt, change usually arrives via a coup, revolution, or civil war. In theory, of course, these instruments are the stuff of domestic, if violent, politics. They should not even be pertinent to international relations or an international right to self-defence. In practice, however, many such conflicts have raised the question of international defence when parties to them invited outside military intervention to help decide the dispute. Frequently, these interventions were justified as "collective self-defence" according to Article 51 of the United Nations Charter. In some conflicts, the integrity of an existing state was in complete jeopardy, as in the case of UK support to the Omani government against the rebels in 1956-58; US support to the Lebanese President

Chamoun against the political intervention of UAR and Syria in 1958; Saudia Arabian and Egyptian intervention in Yemen between 1962-67; UK intervention in Federation of South Arabia in 1964; UK and Iranian intervention to support the Sultan of Oman against rebels in 1968-76; France and Mauritania against Algeria in Western Sahara in 1977-79; France and Belfium against Angola (the Shaba revolution) in Zaire in 1978; US and El Salvador against Nicaragua and FMLN in 1984-86; the Western military coalition to liberate Kuwait from the Iraqi occupation in 1990-91. In these cases, either the state as a whole or a critical element was essentially contested. By implication, any appeal to self-defence will be nearly as credible from one side as from another since the conflict does not revolve around protecting an existing entity, but deciding the shape and nature of that entity. In each conflict, the link between state and society was disputed or fragile or both; such boundaries as existed were deeply contested, painfully negotiated, explicitly permeated. In all the contexts, the contours of international selves were matters of judgement, debate and conflict rather than fact. This does not mean that were no grounds for normative judgement between contending sides, or assessment of the justness of either their cause or their methods. It does, however, suggest that self-defence affords minimal terrain on which to do so; and that a more fruitful arena might be that which permits discussion of the relationship between states and citizens rather than that between states alone.

State and Domain

Any organisation or group may resort to armed force if it has the military capacity to do so. When a state deploys military force against its own population, we call it policing; when a group uses force against its own state, we call it revolt; when states use force

against other states we generally call it either aggression or self-defence. Traditionally, states may request military support from friendly states. They may seek outside help to suppress an internal revolt or insurgency; in which case the outside assistance is treated as a matter under domestic jurisdiction; or they may invite intervention to counter what they perceive as intervention, including indirect or subversive intrusion, by another state, in which case the external assistance has often been proclaimed an act of collective self-defence. Such intervention has always had its risks, of course, like extensive engagement in an escalating political conflict; and friendly states have often shown some reluctance to intervene. Should an insurgency become serious enough to be recognised as a belligerent with a claim to rights like neutral treatment, for example, it would be wiser to have remained neutral from the start.[944]

Still, a state which goes in the other direction and provides military assistance to any non-state group is considered instantly guilty of intervention or subversion against another state. The entire globe is divided among existing states, each of which claims absolute authority over the people and territory in their jurisdiction. Non-intervention in each of their claimed areas of power is the cardinal rule of conduct in a contemporary world which views states as the only sovereign actors in international politics. Now that territory has become fully claimed among states, a potential source of ambiguity arises over the distinction between state and aspirant-state actors. In particular, questions about the nature of boundaries across and within states become newly salient and not so easily confined to the realm of interstate politics. The prominence, as well as the difficulty, of such questions is evident in conflict over the legitimate domain of existing states.

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[944] For instance, J. E. S. Fawcett quoting the advice by Law Officers to the British Government over the suitable reply to unapproved armed excursions into Mexico: "In all cases of revolt or civil war or of unauthorised enterprises or attacks by foreigners, a friendly state will be justified in ordering its officers to render all the good offices and aid in their power to the constituted authorities ... but (as a general rule) the Military or Naval forces of friendly states not immediately concerned should not ... actually and directly

On many occasions, states have resorted to force to defend the partition of a formerly unified state. Among these events, South Korea possesses probably the strongest claim of self-defence and the US-led international alliance intervening on its behalf therefore the strongest claim of collective self-defence. Korea had been divided clearly, if contentiously, at the 38th parallel from 1945. Between then and the outbreak of the war, the two sides proceeded to establish completely separate and incompatible governments. In 1948, the South held elections that were supervised by United Nations monitors, who were simultaneously refused entrance to the North. Shortly after the South announced the election of a new government, the North announced its own government. The United Nations and most other states recognised the government of South Korea; and the USSR recognised the North government. Both North and South, at the same time, considered themselves the legitimate government of Korea.

The strength of South Korea's claim to self-defence was from many sides. First, its border with the North was unambiguous, making any breach of it evident; second, the breach was dramatic and initiated by the North in its escalation beyond border attacks to what appeared to be full-scale invasion; third, the impression was reasonable that the people of the South accepted the legitimacy of South Korea's government.

From another perspective, however, South Korea's claim to self-defence was insecure; while the border was clearly demarcated, its very existence had been continuously contested by the South and the North. Also, the border between the two sides was newly demarcated and an outcome of a armistice rather than a well-established settlement. Demonstrably, the division also resulted more from conflict between the USSR and the

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attack or engage any but Pirates or Banditti"; See J. E. S. Fawcett, "Intervention in International Law: A

US, treating Korea as a field, than from a conflict between two political groups inside Korea that necessitated division. In addition, there had been skirmishing at the border since its inception, along with threats from both North and South to take the other by force. While the North's invasion stood in extreme disproportion to these earlier incidents, it could be interpreted as an escalation of an unfinished conflict. Most damaging to the claim of self-defence is that the Korean War occurred in the context of a dispute over legitimate sovereignty. On the other hand, the South had elected a new government. Without the involvement of the Soviet Union in the North and the US-led intervention with its allies to help the South, the Korean War might look more like a bloody but civil war.

The same is even more true of the war in Vietnam and the US use of force against the Chinese fighting over possession of islands in the Taiwan Strait. These conflicts erupted in countries that were unified in every way but the ideological. This is not to say that ideology alone is not a sufficient principle on which to base a claim for statehood; only that it must win out over other, usually very powerful, sources of political community such as historic unity and ethnicity. The division between Greek and Turkish communities on Cyprus is unique in its history of ethnic and linguistic difference.

However, the presence of inter-communal antagonism is not enough to consider either side of the island as equivalent to a state with a right to seek external intervention in self-defence. The island had been under the control of imperial powers; the Turkish for centuries, and the British for decades.[945] The Turkish community in Cyprus claimed the need for Turkish protection, indicating their vulnerability and asserting their rights as a minority population inhabiting an enclave of Cyprus. If one seeks to grant them a right

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Study of Some Recent Cases," (*Hague Recueil* 103, *1961-II*), p. 367.

[945] After 1974, as a result of the Turkish immigration, the demographic balance in the island have been change.

to self-defence and collective self-defence, one must consider the implication of granting similar rights to other minorities residing within what often appear arbitrary administrative boundaries. This leads us to consider the adherence and legitimacy of each part of a divided state, as sincerely as we need to inspect the solidarity and legitimacy of one likely to be reunified. It is in the nature of states that they justify their existence in some fashion to the community that they rule; they must prove, as Brilmayer emphasises that "both ... their right to exist and exercise power and ... their right to do particular things with the power they have."[946] The trouble with each party these particular conflicts is that neither could show an "entitlement to exercise power" that was sufficient to represent legitimate and viable statehood.[947]

Dispute States

By the time that a state becomes host to a major secession movement, the extent of its legitimacy comes under serious questioning. Either it is incapable of meeting the needs of an organised political community within existing institutions, which casts substantial doubt on its capacity to exercise its authority; or it rules over a distinct group - or several groups of people - sufficiently united and committed to secession that it is useful to examine the legitimacy of a single state to continue to dominate. Secession struggles indicate the limitation of self-defence to an acute degree. Secessionists explicitly claim that their fundamental political rights can only be met outside of the existing state; more, that these can only be guaranteed inside a state of their own. They seek separation; possibly most detrimental to compromise, they seek territory; and, importantly, they seek sovereign equality with the state from which they seek freedom. Among many minority groups which reside within the boundaries of a multifarious

[946] See Brilmayer, p. 26.

state, the impulse to separate is latent, though it often remains at the level of political conflict or only erupts into violence sporadically. Basque and Corsican activities come to mind, in this place. In other circumstances multinational states have resorted to extreme repression in order to quash a substantial secessionist movement. For instance, the Bengalis in East Pakistan, could not attained their independence until 1971 as Bangladesh; and in the Congo, Belgium acknowledged its apathy to Katangan secession but was accused by many of actually having activated it. Bangladesh became a state thanks largely to the Indo-Pakistani power struggle. Many other secession movements received no external support, and remained domestic conflicts to be handled, often brutally, by their respective states.[948] Listed below, are the largest of these:

Major unassisted Separation Disputes, 1945-1999

1. Burma: Karens & others hill peoples, 1948
2. India: Nagas & others in Assam for Nagaland, 1955-74
3. Sudan: Southern Aya NYAS, 1955-72, 1983-88
4. China: Tibetans, 1959
5. Iraq: Kurds, 1961-70, 1974-75
6. Ethiopia: Eritreans, 1962-91
7. India: Mizos in Assam, for (Mizoram), 1966-68
8. Nigeria: Ibos, (for Biafra), 1967-70
9. Philippines: Moro rebellion (Muslims separationist), 1972-
10. Bangladesh: Chittagong hill peoples, 1975
11. Indonesia: Aceh rebels in N. Sumatra, 1975
12. Congo: Shaba Wars, 1977, 1978
13. Iran: Kurds, 1979
14. India: Sikhs (for Khalistan), occasional
15. Sri Lanka: Tamils, 1985, 1987
16. Turkey: Kurds, occasional
17. Israeli West Bank & Gaza: Palestinians' *Intifada*, 1987-93
18. Azerbaijan: Armenians in Nagorno-Karabakh, 1988, 1995
19. Yemen: North and South merged to become the republic of Yemen, 1990
19. Russia: Chechnya, 1994-96, 1999

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[947] Luard set up a relevant argument, see *Conflict and Peace*, p. 61-67

[948] Here it is important to indicate that I intend to mention the traditional secession conflicts, which have not received any help and assistance from the international community. The separation conflicts in former Yugoslavia, Bosnia and Herzeqovina; Croatia and Kosovo; and in East Timor freedom was achieved largely by the help of the international community.

Even without examining the details of each particular conflict, it is easy to recognise situations in which the boundaries of political community are under assault.[949] By definition, sovereignty is fundamentally contested in each. The outcome of these conflicts decides whether or not rights such as political independence, territorial integrity, and individual and collective self-defence become available to both parties. In every case, military force has been used to achieve this outcome. The state deploys this force against the aspiring secessionists, along with the absence of military intervention on behalf of secessionists. Walzer makes a case for non-intervention in such cases that is most persuasive in being grounded in his respect for self-determination. What the international community must support, he argues, is self-determination among groups who are effectively capable of self-government. When such groups cannot demonstrate an ability to hold their own, there is good reason to doubt the wisdom of supporting their aspirations for statehood. The "mere appeal to the principle of self-determination isn't enough," Walzer writes; "evidence must be provided that a community actually exists whose members are committed to independence and ready and able to determine the conditions of their own existence."[950] At the same time, one must remain sensitive to the possibility that such a community might exist within an already-established state. As Walzer sees it, one of the primary purposes of non-intervention is to protect the process of self-determination and allow communities to develop on terms as free as possible from outside interference.

Even though generally reluctant to qualify the rule of non-intervention, Walzer does admit a few circumstances is which non-intervention can be overridden. One of the few

[949] Environments such as these, where the definition of societies and their bases of communication are equivocal, also distinguish states without active separation movements at all. Burundi and Rwanda are two examples.
[950] Walzer, *Just and Unjust Wars*, p. 93.

good reasons for doing so, he proposes, is the presence of two or more communities within one state, when one is engaged in armed struggle for independence:

> "in part because of the arbitrary and accidental character of state boundaries, in part because of the ambiguous relation of the political community or communities within those boundaries to the government that defends them ... it isn't always clear when a community is in fact self-determination, when it qualifies, so to speck, for non-intervention."[951]

Walzer considered that the difficulty with a secession movement "is that one cannot be sure that it in fact represents a distinct community until it has rallied its own people and made some headway in the 'arduous struggle' for freedom."[952] Once having done so, a secession movement can be seen as an effective belligerent, thereby qualifying for belligerent rights and moving closer to attaining sovereign rights.[953] Even when a secession movement does not make sufficient advance in its struggle that belligerent rights or statehood appears on the horizon, members of the international community may be tempted to intervene, particularly when their struggle has been suppressed with an obvious and massive violation of human rights. Many called for some form of international response to the slaughter of tens of thousands of Ibos by Nigeria, for instance; India at first characterised its 1971 war with Pakistan as humanitarian intervention. Indeed, extravagant abuse of human rights is the second of Walzer's three conditions that qualify the rule of non-intervention. Something jars between Walzer's almost romantic depiction of a community engaged in "arduous struggle for freedom," and the millions of Bengalis who cut down by the Pakistani troops before India intervened in their behalf. (India first claimed its intervention on the basis of humanitarian grounds, but later claimed that its action was justified based on self-defence, claiming that Pakistan had violated Indian territory).

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[951] Ibid, p. 89.
[952] Ibid, p. 93.

On the one hand, we are shown a picture of war for political independence which should only garner international support after arduous but unassisted struggle. On the other, we become aware of a struggle that amounted to more of a one-sided bloodbath which might never have acquired sovereign independence without a well-armed India as its champion. Whatever is disconcerting between these two images has something do with the contemporary view of sovereignty. Sovereign states occupy the highest pedestal in international relations by definition, since any entity that is sovereign is beholden to no higher authority. In international politics, the first rule of sovereignty is non-intervention; its corollary is self-defence. Both are premised upon primary respect for the autonomous state. "Sovereignty," as Onuf indicates, "makes the state indivisible"; it acts as "a protective shell for the state."[954] In the case of Pakistan, India gained a strategic edge in weakening Pakistan; it had a compelling political interest in staunching the flow of Bengali refugees; and it undoubtedly was also shocked at the brutality with which Pakistan tried to stamp out Bengali separatists. Indian motives for intervention do not afford clearer understanding of what sovereignty entails, however, or why the international community respects it in certain forms and not others. One hears no lingering complaints that Bangladesh is undeserving of statehood[955]; nor that Pakistan suffered unduly in relinquishing it.

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[953] McCoubrey and White take this approach on non-state groups, in addition to anti-colonial liberation movements. They support a right to insurgency, which prevents insurgents and the government they confront from receiving outside help.

[954] Nicholas Greenwood Onuf, "Sovereignty: Outline of a Conceptual History,"(*Alternatives* 16, 1991), p. 432.

[955] Bangladesh obtained the United Nations Membership in 1974.

Many of the armed conflicts that took place after 1945 and up to the present, arose over the gradual withdrawal of European states from their overseas colonies. Technically, none of the confrontations between colonial states and national liberation movements in their territories could be considered an international dispute, or inter-state dispute, which is why they are not included among the conflicts considered germane to this thesis. National liberation struggles and resistance to them occurred within the confines of a single, ostensibly sovereign state. When European states began to acquire overseas possessions they simply extended over these the roof of sovereignty, which they had recently achieved internally. Confrontations over decolonisation, from this perspective, are more appropriately viewed as insurrection against one state rather than war between two.

The United Nations Charter, reflecting the mood after World War II, affirmed both the inviolability of sovereignty and entitlement to national self-determination.[956] Most overseas territories experienced some form of confrontation during their transitions to independence, their violence varying with the balance of commitments among urban settlers and native parties. The main decolonisation conflicts are listed below.

Major Decolonisation Conflicts

1. United Kingdom- Jewish Settlers in Palestine 1936-48
2. US-Philippines 1945-46
3. France and Syria 1945 (troops withdraw in 1946)
4. Netherlands-Indonesia, 1945-47, 1947-49
5. France-Vietminh 1946-54

[956] Luard describes the end of World War II as having "unloosed a log jam that could not be halted. ... On the iniquity of colonialism, Washington and Moscow, Catholic dictators of Latin America and Muslim demagogues of the Middle East, all, however diverse their opinions on other matters, could reach agreement" (*Conflict and Peace*), p. 95

6. United Kingdom-Burma 1946-48
7. France-Madagascar, 1947 (repression of the public liberation activities)
8. United Kingdom-Malaysia 1948-57
9. France-Tunisia 1952-56
10. United Kingdom-Kenya 1952-56
11. France-Morocco 1953-56
12. France-Algeria, 1954-62
13. United Kingdom-Cyprus 1954-59; (continuing conflict between Greek and Turkish Cypriots)
14. United Kingdom- South Yemen (Aden) 1955-67
15. France-Cameroon 1955-60
16. Spain and France-Western Sahara, 1957-58; (continuing conflict between Morocco, Polisario front and Algeria, 1975-88)
17. Portugal-Angola 1961-74
18. Portugal-Guinea Bissau, 1963-74
19. Portugal-Mozambique, 1965-74
20. South Africa-Namibia 1967-89

In many of these conflicts, imperial states argued that they should be free from outside scrutiny or interference, including by the United Nation. The rationale was that any unrest within the existing boundaries of colonies had to be considered a concern for domestic authorities only. As Article 2 (7) makes explicit:

> "Nothing contained in present Charter shall authorise 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."

Together with Article 2 (4), which forbids the use or threat of force against Member states, and Article 51 which reserves to existing states alone the right to resort to force in self-defence, Article 2 (7) powerfully supports the claim that decolonisation battles should be consigned to the realm of domestic politics.[957] In this spirit, the Dutch called their counterinsurgency operations in Indonesia "police actions"; also the French bombed the Tunisian border town of Sakiet Sidi-Youssef, accusing the Tunisian government of aiding the Algerian rebels; Portugal engaged in retaliatory raids in Senegal, Congo and Zambia, alleging that these had similarly violated Portuguese domestic jurisdiction. There are two points deserve note. The first is partisan and

[957] Here, it is important to mention that national liberation movements have the option to transfer the dispute to the United Nations as a "threat to the peace."

express frustration over the exclusive application of United Nations norms to states, and to existing, even if disintegrating states at that. This issue relates to earlier remarks about the association between self-defence and a status *quo, independent* of justness or sustainability.

The second point should generate wider concern; it is the rigidity of a concept like self-defence when attached to the outward appearance of states, without attention to the relations within them. The likely result is normative dissonance in transitional periods, like post-war decolonisation, when ideas about legitimate conduct between states remains constant while ideas about their legitimate constitution are changing. During decolonisation one wants to assess the validity of claims to self-defence or a right of non-interference at least partly on the basis of the legitimacy of the aspirant state in question. That this was not possible forced the sort of normative acrobatics one witnesses in attempts to develop a concept of "permanent aggression," which appeared the only way to fit national liberation movements into the framework established by Articles 2 (4), (7) and 51. One alternative was to describe decolonisation as a domestic disorder or exclusively civil war, as did many a metropole upon the initial stirrings of national liberation movements. However unsatisfactory, that option naturally followed from an unwillingness to incorporate considerations of internal legitimacy and social experience into any discussion of external relations. At the very least, this gap contributes to the widespread impression that international laws and norms are out of touch with actual political experience.

On the other hand, a related issues attends states which, for whatever reason, cannot exercise effective control over their ostensible domain. An inability to maintain minimum order can reflect various troubles; frail institutions, partisan conflict, social disorder, civil war. Some of these are more easily repaired than others; each involves the

social and political dimensions of political community; most have, to a degree beset every new state to emerge after 1945. This work is not the place to discuss sociological and institutional intricacies of states and their stable development.[958] Instead, it is appropriate to appeal for greater inclusion of such subjects in international security analysis. For example, Lebanon appeared at the time of the Syrian intervention 1976, to be case unto itself. Also, in these days, the civil wars in Sierra Leone, and Somalia suffer from an absence of effective government. The post-Cold War era gave birth to many additional new states which are no less river in their efforts to establish the boundaries of effective communities and states. In each instance, prior boundaries, whether popular, territorial, or administrative; appeared sufficiently arbitrary and are sufficiently fragile as to open wide the question of where people belong, why, and how peacefully they will be allowed to stay. The domain of the state, and its capacity to govern, are up for grabs.

Governments and Collective Self-defence

When one state requests military intervention by another, it frequently asks it in the name of collective self-defence. The precise definition of collective self-defence is controversial. Fawcett considered it as "at the worst self-contradictory and at best clumsy and ambiguous."[959] It is generally agreed is that collective self-defence involves one state coming to the aid of another who has been the victim of armed attack, for instance, the United States rallying to defend South Korea. Setting aside uncertainty over the content of armed attack, the main area of disagreement occurs over whether the aiding state must itself be endangered by the armed attack. Kunz takes a conservative

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[958] Buzan gives a good conceptual framework for doing so in *People, States and Fear.*

position, arguing that collective self-defence is a null set that self-defence is a right possessed only by the state under attack. For his part, Bowett does not add much by defining it as the collective response of two or more states, each of whom is individually an object of attack. The purpose of the provision of collective self-defence, was to allow regional security arrangements to develop free of United Nations obligation or interference; and it was designed less to permit the actual resort to force than to approve multilateral preparation for mutual defence. Here, the collective element of Article 51 was intended as a barricade against the United Nations' interference.

Collective self-defence bears some resemblance to collective security, which Baehr and Gordenker describe as "broadening the notion of individual self-defence to include the entire community."[960] The idea of collective security may be traced in an early form in the 1815 Quadripartite Alliance Treaty, although this element swiftly faded from its agenda. More substantially it can be traced to the League of Nations system and specifically to Articles 10-15 of the League Covenant. It involves an idea of collective security response to aggression by one member of an international community against another on the part of all other members (or at least those practically able to respond). Claude Inis remarks that,

> "It [collective security] was conceived as a systematic arrangement that should serve ... to confront would-be aggressors ... with an overwhelming collection of restraining power assembled by the mass of states in accordance with clear and firm obligations accepted and proclaimed."[961]

This idea also informs Articles 39-42 of the United Nations Charter. Collective self-defence, in contrast, involves a mutual commitment by states to defend any member against aggression by a state outside the group. A clear example may be seen in Article 5 of the 1949 North Atlantic Treaty, the constitutional document of the NATO Alliance.

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[959] Fawcett, "Intervention in International Law: A Study of Some Recent Cases," p. 368.
[960] Baehr and Gordenker, p. 73.

The distinction between collective self-defence and collective security has been expressed by McCoubrey and White, thus:

> "A State acting in collective self-defence of another usually does so out of national-interest, whereas a collective security system requires a state to act for the benefit of all states to maintain or restore international peace and security."[962]

When the United States backed an invasion into Guatemala or the Soviet Union marched into Hungary, it is credible that each believed its security to be yoked to that of the smaller states and thus compromised by the proximity of a socialist government, in one case, and a liberalising one, in the other. Collective defence can also be seen as a form of counter-intervention, which Walzer considered to be the third reason for lifting the ban on intervention. The first, for Walzer, is based on a primary respect for community autonomy and self-determination. Once an intervention has taken place, the logic goes, that autonomy has been violated; under certain circumstances, counter-intervention may help restore a measure of autonomy by offsetting the weight of the former intruder. The second is that counter-intervention, along with collective self-defence, functions, as law-enforcement. Both actions are generally treated as lawful acts that counter a prior criminal one. Both are imbued with the spirit of Kelsen, who argued that the distinction between war and counter war was "indispensable," standing in "the same reciprocal relation as murder and capital punishment."[963]

Walzer seems to agree, echoing Mill's 1859 words on the subject, that "intervention to enforce non-intervention is always rightful, always moral, if not always prudent."[964] Importantly, both collective self-defence and counter-intervention depend upon the

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[961] Inis Lothair Claude, *Swords Into Plowshares: The Problems and Progress of International Organisation*, (London: McGraw-Hill, 1984), p. 247.
[962] Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflicts*, p. 126. For more discussion see David J. Scheffer, "Use of Force After The Cold War: Panama, Iraq, And The New World Order," In: Louis Henkin, *Right v. Might: International Law And The Use of Force*, 2nd ed, (New York: Council on Foreign Relations Press, 1991), p. 126-34.
[963] Han Kelsen, *Principles of International Law*, p. 25.

existence of external threat. Community autonomy is violated by the presence of outside influence and coercion.

"Allies launch massive air attack against Baghdad and Kuwait"[965]

Immediately after the Iraqi forces occupied the state of Kuwait, the Security Council adopted a resolution condemning that invasion.[966] The resolution expressed that there had been a grave infringement of international peace and security and requested from Iraq an immediate and unconditional withdrawal from Kuwait.[967] Here it is important to mention that the Security Council did not condemn the Iraqi invasion as a violation of Article 2 (4) or aggression.[968] On August 6, 1990, the Security Council adopted a new Resolution 661, which emphasised "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."[969]

Ipso facto, from the early hours of the conflict in the Gulf, there was a reliance on the idea of collective self-defence, especially after the letter from the Amir of Kuwait requesting help and assistance against the Iraqi invasion from the United States and other Western states. The latter , in turn, grounded their help to Kuwait on Article 51.[970]

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[964] Cited in Walzer, *Just and Unjust Wars*, p. 88.
[965] See (*The Times*, 17 January, 1991), p. 1.
[966] See Security Council Resolution 660 (August 2, 1990), reprinted in (*International Legal Materials* 29 1990), p. 1325.
[967] Paragraph 2 of the Security Council Resolution 660, "demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990."
[968] See Burns H. Weston, "Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Security Council Resolution 678 and Persian Gulf decision Making: Precarious Legitimacy." (*American Journal of International Law* 85, 1991), p. 516-17.
[969] See Security Council Resolution 661 (August 6, 1990), reprinted in (*International Legal Materials* 29, 1990), 1325-26.
[970] The Amir of Kuwait said in his letter to President George Bush that: "I request on behalf of my Government and in the exercise of the inherent right of individual and collective self-defence as recognised in Article 51 of the United Nations Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our

When the Iraqi forces begin to be a real danger to the Eastern part of Saudi Arabia, which is rich in oil, the Saudi Government asked the United States to send its troops to deter any possibility of an Iraqi invasion. The Americans, from their side, characterised their help to Saudi Arabia as assistance "to deter further Iraqi aggression ... [the duty of the troops] is wholly defensive... They will not initiate hostilities, but they will defend themselves, the Kingdom of Saudi Arabia and other friends in the Gulf."[971] The Security Council Resolution 661, was an important step, because it stated that the right of collective self-defence existed, and at the same time the Security Council made clear that it would be legitimate for third states to use force against Iraq if necessary to compel its withdrawal, well before the adoption of Resolution 678, which explicitly authorised the use of force.[972]

Later, when the Security Council imposed full economic sanctions against Iraq under Article 42 of the Charter, the legitimacy of collective self-defence came under question, since Article 51 states that the right of self-defence is active and can be exercised "until the Security Council has taken the measures necessary to maintain international peace and security." Thus, the requirement of taking measures under self-defence is terminated when the Security Council has taken the necessary measures to protect international peace and security. It could be argued that the Council had been "taken the necessary measures," by imposing sanctions against Iraq, and that there was therefore no longer any necessity to use force in self-defence.[973] But, in fact, this view was weak, since the right of self-defence as an "inherent right," does not need any authorisation from the

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rights are effectively implemented," cited in Thomas K. Plofchan, "Article 51: Limits on Self-Defence?" (*Michigan Journal of International Law* 13, 1992), p. 336. See also Security Council Resolution 662 (August 9 1990), reprinted in (29 *International Legal Materials* 1990), p. 1327.

[971] Cited in Abraham Chayes, "The Use of Force in the Persian Gulf," In: Lori Fisler Damrosch and David J. Scheffer, *Law and Force in the New International Order* (Boulder: West Press, 1991), p. 4.

[972] See Security Council Resolution 678 (November 29 1990), reprinted in (*International Legal Materials* 29, 1990), p. 1565.

[973] Chayes, p. 5-6.

Security Council to be exercised; if the actions of a state are in exercise of that right (self-defence), in accordance with Article 51, that right cannot be withheld.

It is true that the exercise of the right of self-defence under Article 51 is subject to the authority of the Security Council, but the Gulf crisis presented a new situation, whereby a complete state was to be wiped off the map. In a such a situation, the request to stop exercising the right of self-defence, would be ridiculous, at least up to the point where immediately effective Security Council action was taken. As Gardner pointed out, one could hardly say to the Kuwaiti freedom fighters, "Oh, you can't do that. You're violating international law; you have to lay down your arms; you have no right of self-defence any longer."[974] Generally, the request for a state to stop exercising the right of self-defence requires full support from the permanent members in the Security Council.[975] It is simple here to understand that even if the Security Council resolution 678, which permitted use force "all necessary measures" against Iraq had been vetoed, the collective self-defence right not have been affected.[976]

From another point of view, it can be said that the Council's resolution was clear, because it did not mention that the right of self-defence expired, when the Council had imposed an embargo and full economic sanctions. Rather, the reverse is true, since Resolution 661, which imposed the economic sanctions, at the same time affirmed the right in individual or collective self-defence.[977] Also, it is wrong to believe that the

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[974] See Richard N. Gardner, "Commentary on the Law of Self-defence," In: Lori Fisler Damrosch and David J. Scheffer, *Law and Force in the New International Order* (Boulder: Westview Press, 1991), p. 50.

[975] Waldock supported that tendency, when he said that: "once action in self-defence is in motion, it requires an affirmative decision of the Council, including the concurring votes of the Permanent members, to order the cessation of the defensive action." See Waldock, "The Regulation of the Use of Force by Individual States in International Law," p. 495-96.

[976] See generally Oscar Schachter, "United Nations Law in the Gulf Conflict," (*American Journal of International Law* 85, 1991), p. 457-61.

[977] Resolution 661 reads that: "Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter ... . Decides that all states shall not make available to the Government of Iraq or to any commercial, industrial

Security Council had achieved its function when the council imposed the sanctions, because the main purpose of the sanctions, namely, to repulse the aggression, to drive back the Iraqi forces from Kuwait and restore the legitimate Government of Kuwait, had not yet been achieved. Rostow expressed this situation when he remarked that the right of self-defence "remains intact until the Security Council has successfully dealt with the controversy before it."[978] In any case, the imposition of the embargo against Iraq sent a clear message to the Iraqi leadership, that the occupation of Kuwait was a grave and serious matter, and they should sooner or later leave Kuwait. At the same time, the Western states decided to make clear that the economic sanctions were a first step and a preliminary action to the use of force, if economic sanctions failed, which would make necessary a resort to armed force under Article 51.[979]

It can be said that there was a mutual assistance relationship between the collective self-defence and the economic sanctions, because both of them had the same purpose, which was to liberate the State of Kuwait. Therefore, the economic sanctions became more stringent, and the Security Council adopted a gradual approach, strengthening the sanctions and authorising limited use of force in their implementation. When the Council found that Iraq vessels were still being used to export oil, the Council adopted a new resolution, calling on demanding all states in "co-operation with the Government of Kuwait which are deploying maritime forces to the area" to use such measures as might be necessary "to halt all inward and outward maritime shipping in order to inspect and

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or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources ... ." See also, Plofchan, p. 343.

[978] See Eugene V. Rostow, "Agora: The Gulf Crisis in International and Foreign Relations Law", Continued: Until What? Enforcement Action or Collective Self-Defence? (*American Journal of International Law* 85, 1991), p. 511.

[979] Schachter, "United Nations Law in the Gulf Conflict," p. 459.

verify their cargoes and destinations and to ensure strict implementation" of the sanctions.[980]

Consequently, the embargo against Iraq was confirmed and advanced when resolution 670 was issued.[981] This handling of the Iraqi invasion, supports an argument that the economic sanctions to some extent delayed or weakened the process of the use of force to liberate Kuwait, invoking the right of self-defence. This was clear, when the Secretary General at that time, Javier Perez de Cuellar, suggested that "Article 51's validity had expired and that Iraq would have to launch another military attack before it could again apply."[982] But the situation was changed when the Security Council adopted Resolution 678, which emphasised that the economic sanctions which the Council had adopted in no way prohibited or removed the right of self-defence. The new resolution gave the right to states to co-operate with Kuwait to use "all necessary means to uphold and implement" the previous Council resolutions "unless Iraq on or before 15 January 1991" withdraw from Kuwait.[983]

It was clear that "necessary means" involved the use of military force to compel Iraq to withdraw and comply with the twelve resolutions adopted between August 2 and November 29, 1990. Resolution 678 indicated that the Security Council was "acting under Chapter VII of the Charter" but did not determine which Article of Chapter VII was invoked.[984] The prevailing view was that Resolution 678 fell within the scope of Article 51, because it called upon states which were co-operating with the Government of Kuwait to take the necessary means to implement the Security Council's previous

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[980] See Security Council Resolution 665 (August 25, 1990), reprinted in (*International Legal Materials* 29, 1990), paragraph 1.
[981] See Security Council Resolution 670 (September 25, 1990), reprinted in (*International Legal Materials* 29, 1990), 1334.
[982] Cited in Plofchan, "Article 51: Limits on Self-Defence?", p. 340.
[983] Security Council Resolution (678). For more argument concerning the authorisation to use force in the Gulf Crisis 1990-91, see Nigel D. White and Hilaire McCoubrey, "International Law and the Use of Force in the Gulf," (*International Relations* 10, 1991), p. 354-59.

resolutions. Also, that resolution did not ask states to use force, but at the same time did not prohibit them from doing so.[985] The right in collective self-defence was confirmed by resolutions 678 and 661 and other previous resolutions which "reflected a consensus about the continued existence of an inherent right of self-defence ... in accordance with ... Article 51."[986] It may, however, be argued that the authorising of "all necessary means" actually terminated the effect of Article 51 and made the coalition action implicitly dependent on Article 42.

Some, however, considered that Resolution 678 went too far and was too wide, because that resolution was adopted to restore international peace and security in the Gulf area, which means that the aim went beyond the collective right of self-defence and even that of necessary collective security action. Even Weston argued that Resolution 678 was "shaped more by a desire to go to war rather than by a desire to prevent one." This criticism has some justification, because the Security Council should receive full and complete reports about self-defence measures; as Schachter stated, "such reports should be timely and should give enough information concerning necessity, proportionality and the ends sought to enable the Council to make an informed judgement as to the legality of the actions taken." The war against Iraq illustrated that collective self-defence measures and measures to restore international peace and security, may overlap and, in effect, could mean that collective security can be achieved by collective self-defence under Article 51.[987]

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[984] Ibid.

[985] See Michael J. Glennon, "Agora: The Gulf Crisis in International and Foreign Relations Law: The Constitutions and Chapter VII of the United Nations Charter," (*American Journal of International Law* 85, 1991), p. 74; 88.

[986] David J. Scheffer, "Commentary on Collective Security," In: Lori Fisler Damrosch and David J. Scheffer, *Law and Force in the New International Order* (Boulder: Westview Press, 1991), p. 101. See also, Weston, "Agora: The Gulf Crisis in International and Foreign Relations law," p. 520.

[987] In Concern for more discussion about Resolution 687, see Serge Sur, *Security Council Resolution 687 of 3 April 1991 in the Gulf Affair: Problems of Restoring and Safeguarding Peace*, Research Paper 12, (New York: United Nations, 1992).

The important result of Gulf Crisis, is that the right of self-defence generally and collective self-defence in particular can be resorted to, without any permission or authority from the Security Council, as indeed appears from the face of Article 51 itself. Also, the Gulf war confirmed the proportionality standard, when the allied forces did not continue the military advance to Baghdad, but were satisfied with the liberation of the State of Kuwait, and establishment of safe zones in the North and South of Iraq to protect Kurdish and Shi'ah people from the tyranny and oppression of the Iraqi leadership.

Schachter stated that "while collective self-defence may well be the legal basis for future collective security actions, it becomes important to remind states that the conditions for collective self-defence ... are imposed by international law."[988] It may also be noted that this statement reflects an agenda of down-sizing the role of the United Nations, which implicitly conflicts with the United Nations Charter. In particular, it should not be forgotten that Article 51 applies only until the Security Council has acted.

The US President, Eisenhower explained his country's dispatch of Marines to Lebanon as an effort,

> "By their presence there to encourage Lebanese Government in defence of Lebanese sovereignty and integrity. These forces have not been sent as any act of war. ... As the United Nations Charter recognises there is an inherent right of collective self-defence. In conformity with the spirit of the Charter, the United States is reporting the measures taken by it to the Security Council."[989]

Eisenhower described the threat to Lebanon as planned, focused, and emphatically external:

> "In Iraq a highly organised military blow struck down the duly constituted Government. ... At about the same time there was discovered a highly organised plot to overthrow the lawful Government of Jordan. ... [Meanwhile,] substantial amounts of arms, money, and personnel

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[988] Oscar Schachter, "United Nations Law in the Gulf Conflict," (*American Journal of International Law* 85, 1991), 471-72.
[989] Statement of President Eisenhower, 15 July 1958, *The Department of State Bulletin* XXXIX: 997 (4 August 1958), p. 181.

infiltrated into Lebanon across the Syrian border. ... These events demonstrate a scope of aggressive purpose which tiny Lebanon could not combat."[990]

When the Secretary of State elaborated on Lebanon's vulnerability, he explained that "We do not think that the words 'armed attack' preclude treating as much an armed revolution which is fomented from abroad, aided and assisted from abroad."[991] Almost identically, the United States justified its 1965 intervention in the Dominican Republic as a response to Cuba's "vicarious indirect armed aggression." The American policy makers at that time estimated that the Dominican Republic faced " clear and present danger of the forcible seizure of power by the Communists" whose "act could be considered an armed attack against the territorial integrity, the sovereignty, and the political independence of the Dominican Republic."[992] The above examples, clearly demonstrated "that if Communists had successfully infiltrated the rebellion, their activities could be considered an armed attack."[993] Even absent hard evidence of infiltration, both the US and USSR were committed to the belief that the other's worldview was incompatible with free self-determination; and that the other could only win converts through trickery, seduction or coercion.

Here, three points need to be highlighted in connection with the appeal to collective self-defence. First, the dominant mode of intervention since 1945 has been subversive, covert, and incremental. When attack appeared in the form of subversion, there was rarely much evidence; when it assumed a more concrete shape, it tended to be covert or

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[990] Ibid, p. 183-84. Lebanon, in its complaint to the Security Council, claimed that the U.A.R. had intentionally threatened the Lebanese internal security by "the infiltration of armed bands from Syria into Lebanon, the destruction of Lebanese life and property by such bands, the participation of U.A.R. nationals acts of terrorism and rebellion against the establishment authorities in Lebanon, the supply of arms from Syria to individuals and bands in Lebanon rebelling against the established authorities." See UN Doc. S/4007 (22 May 1958). Reprinted in *United Nations Resolutions*, ed. Dusan J. Djonovich (Series II, Security Council, Vol. III), p. 615.

[991] See "News Conference of Secretary Dulles", *Department of State Bulletin* XXIX: 995 (21 July 1958), p. 105.

[992] See Thomas Mann, "The Dominican Crisis: Correcting Some Misconceptions," *Department of State Bulletin* LIII: 1376 (8 November 1965), p. 736.

incremental. The clear intervention in all of these cases has tended to be the counter-intervention which, in the cases of the United States and the USSR, occurred in the form of large-scale invasions. External support for opposition movements, by contrast, has generally been established by degrees. To counter this more ambiguous form of intervention with an overt military response requires that one "fix the point at which a direct and open use of force can plausibly be called a counter-intervention."[994]

Second, collective self-defence has invariably occurred in a context of domestic instability or war. Defenders have often bolstered their rationale for intervention by pointing to the express "invitation," or consent, of the existing government. Yet, invitations have their own frailties. In part, it can be hard to determine how "freely given" is the consent of the government. More problematic is that the consent of an existing government, under the circumstance in which it needs external intervention, may be inadequate. Lebanon in 1958 offers an example.

President Chamoun sought US help; he had requested US help three times before the Americans agreed to help his country. When a government is sufficiently frail,, however, that it cannot sustain itself without foreign assistance, one must question the depth of its legitimacy, let alone its future effectiveness. Walzer stated that, "the request for foreign help is an admission of domestic weakness."[995] When a regime's adversaries are truly the instrument of outside interests, the case for intervention in collective self-defence may remain strong. Should there be any possibility that outside interest represents a far smaller component of an opposition movement than its local contribution, the case for collective self-defence crumbles. In this climate, it it near

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[993] Ibid.
[994] Walzer, *Just and Unjust Wars*, p. 96.
[995] Michael Walzer, "The Moral Standing of States: A Response to Four Critics," In: *International Ethics*, eds., by Charles R. Beitz, Marshall Cohen, Thomas Scanlon and John Simmons, (Princeton: Princeton University Press, 1979), p. 228.

impossible for a collective self-defence operation to avoid infringing upon basic political independence. On several occasions, for example, defenders did not support the existing authorities at all but brought in an alternative; such as Kadar in Hungary, Cabral in the Dominican Republic and Karmal in Afghanistan. Each time, the claim was that these individuals and their supporters would govern the state more legitimately than their predecessors. Nevertheless, evidence of their legitimacy was sufficiently unpersuasive that they had major internal rivals, often with substantial popular support. In each case, if in various ways, at least one external state became a central part of the local political process, sometimes changing that irrevocably. In none of these particular cases was there an entity that was stable and sustainable but for unprovoked armed attack. Instead, there was a climate of internal dissent, factionalism, rivalry for popular political loyalties, frequently the resort to force. However arbitrary and violent such contestation appears, it would be wise to be cautious in assuming that military intervention by another state will render the process less arbitrary or less violent.[996] The third point, is that claims of collective self-defence imprint conflicts with a division between internal and external politics that is misleading. The extravagance of Cold War accusations about "alien" infiltration of domestic opposition movements should not distract us from the more subtle confusion exemplified in the record of these interventions. More serious is that such episodes forced complex situations into an extremely simple and mutually exclusive dichotomy between domestic politics and international relations. Every instance of collective self-defence gave us a portrait of streotyped rivalries and discouraged any appreciation of complex motivation or behaviour. In a way, collective self-defence can be seen as analogous to the practice of

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[996] Ibid, p. 230. He at the same time argues the potential benefits of a government coming to power principally through its own efforts; a long struggle for independence, he proposes, may force contending parties to regroup, negotiate, more fully anticipate a regime to come, and so on. See p. 227-28.

international recognition. While their mode is radically different, both have the effort of "naming" and bounding those entities deserving of state status. A political community attains international legitimacy and authority when relevant members of the international community recognise them as having it and then begin to act upon the basis of that recognition. In that one moment, such a community acquires the correlative rights and duties of statehood. Both practices deserve caution. Like collective self-defence during the Cold War, recognition of new states and regimes, especially if premature, can mark a dramatic intrusion into local relationships. Arguably, these are more sustainable and at lower military cost, if left to resolve themselves at a principally local level.

Finally, the implication is that the study, and sometimes the practice, of international relations pays insufficient heed to domestic processes, considerations of legitimacy, and dynamics of community; all of which must ground any persuasive claim to individual or collective self-defence. A plea to incorporate legitimacy, and the relationship between citizens and state, as central components of the study of international security is not terribly radical. To begin with, ideas about legitimacy are already present, if mostly in the form of assumptions. Moreover, in public rhetoric, claims about legitimacy are already made. Thus, the United States was drawn into a Grenada where "to protect the lives of the 1,000 Americans living on the island." Consequently the operation came on the basis of a need to "forestall further chaos" and "to assist in the restoration of conditions of law and order and of governmental institutions."[997] The alternative was to leave as a *fait accompli* the "vacuum of governmental responsibility" created when "a brutal group of leftist thugs violently seized power, killing the Prime Minister, three

[997] See (*The Times*, 26 October 1983), p. 1.

Cabinet Ministers, two labour leaders and other civilians, including children."[998] In such an eventually, Grenada would be given over to regime that could "not purport to be a government with any legitimacy or even control."[999]

The Nicaraguan Case

On April 1984, the Nicaraguan Government instituted an application in the Registry of the International Court of Justice beginning legal proceedings against the United States in respect of accountability for military and paramilitary activities in and against Nicaragua. Nicaragua maintained that the United States was using military force against it and disrupting its internal affairs, in infringement of Nicaragua's sovereignty, territorial integrity and political independence. Also, it emphasised that the United States had sponsored an army of more than 10,000 mercenaries, located them in more than ten base camps in Honduras along the border with Nicaragua, trained them, supplied them with arms, ammunition, food and medical needs, and directed their attacks against Nicaraguan political and economic interests, with the main aim of destabilising the government of Nicaragua so that in the end it would be eliminated, a new government installed, loyal to the United States.[1000]

The importance of the Court's decisions is symbolised by decision (3), where the Court:

> "*Decides* that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State."[1001]

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[998] Ibid, p. 6.
[999] Ibid.
[1000] See D. J. Harris, *Cases and Material on International Law*, p. 866-67.
[1001] See *Case Concerning Military And Paramilitary Activities In And Against Nicaragua* (Nicaragua v. United States of America) (Merits: Judgement of 27 June 1986), paragraph 3. See also, John Lawrence Hargove, "The Nicaragua Judgement and The Future of the Law of Force and Self-Defence," (*American Journal of International Law* 81, 1987), p. 137.

Also the Court made it clear that the United States had infringed principles of customary international law forbidding the use of force against another state;[1002] and that by directing and allowing over-flights of Nicaraguan territory and by other acts, the United States was in breach of its duty under customary international law not to infringe the sovereignty of another state;[1003] and by placing mines[1004] and failing to make known their location,[1005] the United States had infringed its obligations under customary international law not to use force, not to intervene, and not to infringe the sovereignty of another state. Moreover, the Court found that the United States was in breach of duties under the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua.[1006] The Court also went further and decided "that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligation."[1007] It took the view that the United States was under a duty to make reparation for "all injury caused to Nicaragua by the breaches of obligations under customary international law,"[1008] and violations of the 1956 Treaty;[1009] failing agreement between the parties, the amount of reparation was to be settled by the Court."[1010]

The United States had violated in particular, Article 2 (4) of the United Nations Charter, which requests that "All Members shall refrain ... from the threat or use of force against the territorial integrity or political independence of any state, ..." Similarly, Article 18 of the Charter of the Organisation of American States also recommended that:

[1002] Case Concerning Military And Paramilitary Activities In And Nicaragua, paragraph 4.
[1003] Ibid, paragraph 5.
[1004] Ibid, paragraph 6.
[1005] Ibid, paragraph 8.
[1006] Ibid, paragraph, 7, 10, and 11.
[1007] Ibid, paragraph, 12.
[1008] Ibid, paragraph, 13.
[1009] Ibid, paragraph, 14.

> "No State or group of States has the right to intervene, directly, or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."

The Court emphasised that when it gave its Judgement upholding its jurisdiction and the admissibility of the Nicaraguan claim in 1984, it was fully aware "that the United States regarded the law of the two Charters as applicable to the dispute; and furthermore, that the United States was "asserting collective self-defence in accordance with the United Nations Charter [Article 51] as justification for its activities vis-a-vis Nicaragua."[1011] During the case, the Court was concerned with the fact that the main basis of much of the United States argument was its assertion of a right of collective self-defence. This, said the Court, was "the principal justification announced by the United States for its conduct" towards Nicaragua.[1012] The Court noted that the United States "claim[ed] to be acting in reliance on the inherent right of self-defence 'guaranteed ... by Article 51 of the Charter' of the United Nations, that is to say the right of collective self-defence."[1013] With reference to this claim, the Court first held that "in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine," without having any need to determine a state's felt "necessity" of resorting to self-defence or "any evaluation of military considerations."[1014] Moreover, the Court_found that the right of self-defence - whether individual or collective - was recognised by both parties to the case and was firmly established in customary international law; the Court held that for collective self-defence, as well as for individual self-defence, its legal basis "is subject to the State

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[1010] Ibid, paragraph, 15.
[1011] Ibid, paragraph, 46.
[1012] Ibid, paragraph, 131.
[1013] Ibid, paragraph, 24. See also, B. S. Chimni, "The International Court and the Maintenance of Peace and Security: The Nicaragua Decision and the United States Response," (*International and Comparative Law Quarterly* 35, 1986), p. 962.

concerned having been the victim of an armed attack."[1015] The Court indicated that "the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld,"[1016] therefore, the Court rejected the alleged justification. In relation to "armed attack," the Court observed that:

> "[T]he Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as threat or use of force, or amount to intervention in the internal or external affairs of other State;"[1017]

but it is not armed attack[1018], and in reference to the relation between "armed attack" and collective self-defence, the Court added:

> "It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation;"[1019]

as the United States had done prior to any determination or request by El Salvador.[1020] On the customary international law principle of non-intervention, the Court indicated that:

> "[T]he principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State."[1021]

[1014] Case Concerning Military And Paramilitary In And Against Nicaragua, paragraph, 35.
[1015] Ibid, paragraph, 195.
[1016] Ibid, paragraph, 238.
[1017] Ibid, paragraph, 195.
[1018] Hargove, "The Nicaragua Judgement and the Future of the Law of Force And Self-Defence," p. 137-38.
[1019] See Case *Concerning Military And Paramilitary Activities In And Against Nicaragua*, paragraph, 195. See also, D. J. Harris, *Cases and Materials on International Law*, p. 867-68.
[1020] See *Case Concerning Military And Paramilitary Activities In And Against Nicaragua*, paragraphs, 233-36.

The Court noted that no new right of intervention had been established in customary international law.[1022] The Court therefore found that no such general right of intervention, in support of an opposition within another State, existed in contemporary international law.[1023]

Whatever the objects of the right of self-defence, the main aim is still to protect the state's territorial integrity and political independence. The connection between any state with its people, its land, and its territory will still play the main role as a deep-rooted relationship, and the right to defend them cannot be denied. Indeed, many regard it as a clear demonstration of the state's legitimacy. The right of self-defence should not, however, be transformed into an excuse to use force under the umbrella of self-defence. What happened in the Kosovo Crisis gives a great lesson, that bypassing the role of the Security Council will have adverse consequences for international peace and security. Admittedly, during the time of the Cold War, the performance of the Security Council was to some extent weakened, but at least at that time there were two superpower states, so some checks on behaviour were provided by the balance of power between them. Now there is only one superpower, the potential danger involved in any by-passing of Security Council authority is greatly increased.

[1021] Ibid, paragraph, 205.
[1022] Ibid, paragraph 207 reads: "Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition."
[1023] Ibid, paragraph, 209.

Chapter Nine

CONCLUDING REMARKS

Throughout human history, international relations have been characterised by a tension between the inclination to pursue desired objectives by military means, and the desire, at the same time, to limit the horrors and destructiveness of war. In medieval Europe, the accommodation between those objectives found expression in the concept of the "Just War", waged by duly constituted authority for legitimate purposes and with reasonable prospect of success. In Islam, it was expressed in the basically defensive concept of Jihad, fought to safeguard the Muslims' freedom of religion and to overcome oppression. In the early modern period, the use of force and its limitation became associated with the concept of the sovereign state. More recently, the desire to limit recourse to warfare, while at the same time leaving open a route for states to use force to secure certain national interests, has found expression in the United Nations Charter in a general prohibition against the use of force, with an exception made for the right of self-defence. Subsequently, self-defence has been widely invoked by states to justify their recourse to the use of armed force against each other.

This thesis has been concerned to examine the development of the concept of individual and collective self-defence as it is enshrined in article 51 of the UN Charter. It is plain from the investigations undertaken that this article has developed in a number of ways that were not necessarily contemplated by those who drafted the Charter. In the first place article 51 was clearly intended as a short term 'emergency' self-help response to armed attack pending effective international response and/or intervention. As a result of

the Cold War, the mixed collective security and balance of (super)power system became the order of the day. This resulted in the reliance upon the Chapter VII provisions for collective security that is to say articles 39-42 in recent cases of crisis which in turn became unsafe in many cases. As a result, article 51 was compelled to assume a burden of significance far beyond that which seems originally to have been intended. This has opened the door also to misuse of the provision. Many claims have been made to 'article 51' justifications for actions which might objectively be categorised simply as 'aggression'. For example the United States' attack on Iraq in 1993; and its attacks on Sudan and Afghanistan in 1998, were clear reprisal actions, which bore no relation to Article 51 of the Charter. Also, in the Kosovo Crisis, the use of force by NATO was apparently a breach of international law, especially since it involved bypassing the role and authority of the Security Council, which is the body with the primary responsibility to protect international peace and security.

Exploration of the meaning, scope and implementation of Article 51 inevitably raises fundamental questions about the nature and purpose of international relations and the law that seeks to regulate them. Who are the "selves" that have a right to defence? And what is it that they wish (or are entitled) to defend? The answers may at first sight appear simple: the "selves" with which the UN system is basically concerned are sovereign states and what they are defending is their very existence; the aim of self-defence is to restore the status quo that existed before an attack which threatens the survival of the victim. In reality, as the preceding chapters have demonstrated, matters are rarely so simple. The notion of self-defence can be considered to have two basic dimensions, temporal and spatial. Temporally, it can be viewed in terms of its relationship to an act (characterised in Article 51 as an "armed attack") which provokes it. As many examples explored in this thesis demonstrate, however, aggression and

threat often occur in forms other than the armed attack as traditionally conceived. Attacks may begin sporadically and gradually grow in intensity, or there may be an on-going state of low-level conflict falling short of armed attack or war. Modern weapons of mass destruction can be delivered to their target almost instantaneously, without troops ever crossing a border. A state may feel threatened economically or ideologically, without having been subjected to military attack as such. And as history shows, in many cases, a victim is not always in a position to exercise its right of self-defence at the time of an attack. In these circumstances, questions have inevitably arisen, in legal debate and state practice, regarding the extension of the self-defence right, both forwards and backwards in time. However attractive such nations may be in particular cases, the dangers inherent in such a temporally elastic view of self-defence have been clearly demonstrated.

The spatial dimension of self-defence, is concerned with the "objects" being defended: population, territory, and the very identity and legitimacy of the state itself. Examination of each of these "objects" in turn, revealed sufficient variety and ambiguity to call further into question the notion of a peaceful, united, recognisable community, residing on clearly defined territory and legitimately governed, which is suddenly required to defend itself against external threat. Population, for example, could take the form of individual persons at risk (prompting actions of rescue and/or humanitarian intervention); to people as members of a common society (prompting intervention in the name of "special association") to people as citizens of a state, giving to an equation between them, so that a threat to the former is regarded as tantamount to a threat to the latter. These different perspectives involve different rights and duties for the states concerned. To add to the confusion, many communities are in flux and not clearly identified. Their formations, movements and regroupings, because they have crossed

states lines, have brought humanitarian considerations into conflict with state-based nations of defence.

Equally ambiguous is the concept of territory. Territory is regarded as a basic prerequisite of statehood and defended on that ground, but territoriality and claims of defence based on it are also blurred by uncertain boundaries, competition for scarce resources, and contradictory claims. Questions also rise in regard to the legitimacy of the status quo that self-defence is intended to restore. In periods or regions witnessing fundamental transition, such as decolonisation or the current adaptation to the end of the Cold War and the collapse of the Soviet Union bloc, issues of power and authority, boundaries and membership became open for negotiation. In such circumstances, the viability of the traditional notion of self-defence is questionable.

The UN formulation of the self-defence right in Article 51 of its Charter increasingly challenged by the realities of the post-colonial, post-Cold War era, and state' response has been to attempts to expand that right, both temporally and spatially, in a manner never envisaged by the framers of the Charter. Additionally, it may be wondered whether the role of the Security Council has been permanently undermined by the paralysing effect of the veto during the Cold War era. In these circumstances, the question arises as to the future usefulness and applicability of Article 51.

Even leaving aside the general question of the possibly dangerous proliferation of claimed new exceptions to article 2(4) of the Charter, we are still forced to face the problems of the continuing use and abuse of article 51 itself. It may be argued that, as it has developed since 1945, the article does not sufficiently address the question of state sovereignty. As it has become increasingly clear, the codification of Article 51 in the United Nations Charter on rules of intervention is a further testimony to the fact that

although there was unanimity on the part of the international community in presenting such a provision as a means of crisis management, there has been little agreement upon its later use.. Although the spirit contained within the Article 51 is noble, from time to time there have emerged great differences among the parties using it. As yet, there have been few occasions when the members of the Security Council were able to find consensus in taking certain measures, after state action within the scope of Article 51.[1024] It goes without saying that there exists a razor thin line between justified and unjustified use of force. From a holistic point of view one can legitimately ask whether Article 51 should not be used to deal with security crises arising from poverty, malnutrition, economic and political mismanagement, and other forms of injustice and inequality, as well as overt military aggression. It may be noted that in many of the possible or argued cases of 'humanitarian intervention', as in the Tanzanian intervention in Uganda and in the Vietnamese intervention in Kampuchea/Cambodia the intervening states actually categorised their action as self-defence under article 51. Although it is difficult not to sympathise with the actions referred to, it must be wondered to what extent the wording of article 51 will actually sustain such broad interpretations. It is further the case that the use of article 51 in a uni-polar world has made it easy for major Powers or Power-blocs to adopt their own interpretations of article 51 without much opposition or protest. However, this status quo is subject to alteration in respect of both article 51 and the broader spectrum of security provision. A multi-polar world involving both western and non-western influences involves significantly wider perspectives. In such a context the International community's failure to intervene in Kashmir (India),

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[1024] In recent times the first such consensus could be arrived at during the Gulf Crisis. Baghdad's invasion of Kuwait on 2 August 1990 was a clear breach of international law. Therefore the Security Council could find it easy to invoke the provisions contained within Article 51 to a military operation. Yet, critics have always pointed that the Western interest in Kuwait's oil and the comatose Russian politics of the time allowed the American- led multinational force to engage in such an intervention. For a

Tibet (China), and Chechnya (Russia) raises serious questions about the general future of Chapter VII of the Charter. The attempts to use the idea of humanitarian intervention, as in the case of Kosovo, poses new dangers to the Charter system. While the Charter permits the use of force under narrowly defined conditions in exercise of the right of self-defence, arguments based on humanitarian intervention tend to undermine both the general prohibition on the use of force under Article 2(4) and the safeguard built around the right of self-defence under Article 51. Such a situation is likely to give rise to various excuses to use force for all sorts of politically motivated reasons. Therefore, in order to strengthen the Charter based system of managing international relations provisions like Article 51 should be respected as central principles from which no deviation should be permissible.

To conclude, the UN Charter is necessarily a flexible instrument. If it is to deal with changing international relations through the Cold War and beyond, article 51 must clearly change from its original 1945 conception, the important issue being whether it can change within the spirit of its nature as an 'emergency' response with value especially to weaker and third world nations which may be under threat.

The way forward for the international order is the approach taken by the ICJ in the *Nicaragua* Case rather than the one taken by the members of NATO during the Kosovo Crisis. The approach taken by the allied powers during the crisis not only undermined the UN authority but also the right of self-defence. This is because the allied powers tried to use the alleged right of humanitarian intervention as an additional exception to the principle of the prohibition on the use of force under the Charter. This is not a

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discussion how the UN Security Council could take the joint decision, see Gro Skaaren-Fystro, *A Victory for Collective Security: The UN and the Gulf Crisis*, (Oslo: Institutt for Forsvarsstudier, 1994).

healthy development for the maintenance of international law and order as envisaged under the Charter of the UN in general and Article 51 in particular.

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