

SELF-DEFENSE, NECESSITY AND U.N. COLLECTIVE SECURITY: UNITED STATES AND OTHER VIEWS

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I. INTRODUCTION

This inquiry explores conceptual differences regarding the lawful use of armed force under United States and other states' views.¹ The examination is cast largely in terms of the proper reading of United Nations Charter Articles 2(4) and 51, including the concept of self-defense with aspects of necessity and aggression. It pursues twentieth century developments culminating in the modern framework of analysis for the lawful use of force, judicial views visible in the few International Court of Justice ("ICJ") precedents dealing with these issues, the practice of United Nations organs, and certain doctrinal divergences among modern publicists.

Opposing views of self-defense typically characterize it as surviving customary law under U.N. Charter Article 51 or as an entirely new textually based treaty concept (usually in the form of a definitional construct approach combining Articles 2(4) and 51). This article argues that the proper treaty interpretation would recognize that a restrictive version of customary law survives under Article 51. This conclusion is not controversial under Anglo-American views of international law but is probably a minority view in the international sphere. At the same time, the oft-repeated U.S. claim which maintains that self-defense is self-judging as a

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1. For clarity's sake, this article refers to different national ideas concerning international law as the U.S. or Anglo-American view, the Continental Legal Science view, the Socialist law view and the Developing Nations view. As apparent from the names, these views have been influenced traditionally by both political and legal factors. Monolithic characterization is overly simplistic, however, because views of the law have always differed within these broad categories. Nonetheless, individual views within the groups largely share a common approach and customarily resemble one another. See sources cited in notes 52-54 for individual publicists' views. As these views involve oversimplification, they do not describe any one publicist's or state's views of international law. Recent political developments in Eastern Europe probably will result in as yet unspecified changes in certain Socialist views.

matter of law is incorrect. Despite their rejection under competing views of international law, wherever possible proportionality restraints should apply to the exercise of self-defense.

II. SELF-DEFENSE, USE OF FORCE AND TWENTIETH CENTURY DEVELOPMENTS "OUTLAWING WAR"

The international law language of protected interests and external state action has changed over time. Self-preservation and self-help under eighteenth and nineteenth century views of the law of nations are predecessors of modern self-defense, but differ from it in significant respects. The older sense of self-preservation included not only repulse of armed attack, but also the advancement of a state's economic and similar interests. Prior to the twentieth century development of the idea of the peaceful resolution of international disputes, self-help in terms of the use of force under a necessity rationale was self-preservation's handmaiden in practice. Thus, nineteenth century state practice contains such anomalies for modern ears as the United States' claim of "self-defense" in the *Bering Sea* arbitration (offered in justification for interference with foreign sealing vessels on the high seas alleged to endanger U.S. seal populations and so U.S. economic interests)² and British claims in the *Caroline* precedent of "self-preservation" justifying military attacks on insurgents.³ The older terminology bears the unmistakable imprint of natural law, but state practice even then departed from the strict natural law interpretation of self-defense in the leading U.S. precedent, the *Caroline*, involving an 1837 British attack carried out on U.S. territory against the steamship transport of Canadian insurgents.

The development of modern principles limiting armed force is best understood against the backdrop of nineteenth century views concerning the legality of its use and the formal, legal concept of war. In opposition to older natural law views requiring "just cause" for a "just" or legal war, the positivistic nineteenth century international law concept of war adhered to the view that each state retained the right to go to war against another state at any time for any reason, or for no reason at all (under *jus belli ac pacis*).⁴ This right derived from the concept of sovereignty. At the

2. John Bassett Moore, 1 *History and Digest of the International Arbitrations to Which the US has Been a Party* 839-40 (US Government Printing Office, 1898). See generally Karl Josef Partsch, *Self-preservation*, in Rudolf Bernhardt, ed., 4 *Encyclopedia of Public International Law* 217 (1982).

3. At the time of the *Caroline* precedent, more proper legal usage may have characterized that famous precedent as involving self-preservation rather than self-defense. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 *Am J Intl L* 82, 87 (1938).

4. See Hans Wehberg, *L'interdiction du recours à la force. Le principe et les problèmes qui se posent*, 78 *Vol I Rec des cours* 1, 11-31 (1951).

same time, the use of force in international relations was distinguishable from war *per se*. A state was considered at war only if it satisfied a subjective, intent-based test of *animus belligerendi*.⁵ This test required that one or sometimes both parties intend or believe that a state of war exist before the use of force would be viewed as a hostile act in the course of a war.⁶

Determining the legality of the use of armed force had little meaning in the context of a system where the right to make war had no legal limits. However, collateral nineteenth century rationales for recognizing the use of force retain some relevance for modern international law principles. For these purposes, one can distinguish between the older concepts of self-help and self-preservation as justifications for the use of force. The self-help rationale focused on the lack of an adjudicatory and enforcement mechanism under then-contemporary international law, which left a state without effective recourse if an obligation owed by another state was violated. The self-preservation rationale responded to the perception that a state must have some "right" or similar entitlement to resist attacks on its interests (and ultimately on its very existence).⁷

5. See Quincy Wright, *When Does War Exist?*, 26 Am J Intl L 362, 365 (1932). This was simply one aspect of the "state of war" doctrine, which was exposed to criticism. See Fritz Grobe, *The Relativity of War and Peace: A Study in Law, History and Politics* 171-88 (Yale U Press, 1949). See generally Ian Brownlie, *International Law and the Use of Force by States* 38-40 (Oxford U Press, 1963).

6. The existence of a state of war had serious legal consequences. On that basis, a determination would be made whether various international law principles grouped together generally under the "laws of war" or the "laws of peace" would apply to nations' activities (and whether neutrality principles would apply to their dealings with third party states). As a practical matter, nations often preferred to treat even major uses of armed force and violations of territorial sovereignty as not involving a state of war. It generally was acknowledged that armed force could be used both to protect a state's interests and by way of reprisal in response to another state's actions.

7. There is an inherent and continuing tension between positivistic views of international law and the view that a state has a transcendent right to its continuing existence (whether such a "right" stems from natural law, which those who stress the positive law basis of modern international law reject, or otherwise). The self-preservation right concept had roots in earlier natural law ideas but found its locus in nineteenth century doctrine as an attribute of sovereignty in the international law sphere of co-equal sovereigns. This doctrinally elegant "black box" solution removed self-preservation from the direct line of inquiry for nineteenth century legal positivists, then buried such issues as the inalienability of this attribute of sovereignty. The basis for the self-preservation right retains its relevance for any modern inquiry into the permissible use of armed force because unarticulated assumptions about it lie close to the surface in the modern debate concerning the permissible scope of the doctrine of self-defense. See notes 74, 223-25 and accompanying text. The theoretical issue survives today in the sovereign equality approach of the United Nations. To the extent that self-determination and similar rights compel recognition of a people's right of statehood, if they so choose, a state which effectively embodies those self-determination rights is entitled under sovereign equality to continuing recognition unless and until that people determine to associate with another state. Whatever the source of this "survival right," it may be transcendent insofar as other states cannot interfere with it and are even pledged to defend it. This obligation imposed upon other nations is derived from notions of the collective defense of international peace and of a duty of refusal to recognize any state's acquisition of territory by conquest. Views of the self-preservation rationale remain mixed in modern times, in part because of its earlier broad interpretation which under the name of "self-defense" went

A. Nascent Regulation of the Use of Force and the Prohibition on Aggression

The development of modern international law views concerning war and the use of force date back to the turn of this century. From the time of the First Hague Peace Conference, one traditional strand of legal thought has accepted the notion of armed conflict but has sought essentially on humanitarian grounds to limit the fashion in which hostilities would be conducted.⁸ This humanitarian law is beyond the scope of this article, but the other articles in this symposium treat various aspects of this matter.⁹ Instead, this article addresses the second legal strand, the limitation of the use of force itself under international law. Development of the second strand effectively dates back to the founding of the League of Nations in the aftermath of World War I. Through interpretation of the U.N. Charter, it ultimately may affect all modern use of armed force by states.

The League's founding is an acknowledged watershed in the development of the law of nations. The League of Nations Covenant¹⁰ reflects the general political consensus in the aftermath of World War I that the traditional law *jus belli ac pacis* was grossly unsuitable as a method of resolving international disputes. For purposes of this inquiry, the rejection of the self-help rationale is clear but not particularly helpful. Instead, this article focuses on three narrow doctrinal points.

far beyond response to armed attack and encompassed assertion of economic and similar state interests. See note 2 and accompanying text.

8. The First Hague Peace Conference resulted in the various 1899 Hague Conventions and Declarations largely limiting armaments. The Second Peace Conference led to the 1907 Hague Conventions. This legal strand carries forward through modern day arms control agreements and the various Geneva Protocols. For a comprehensive collection of these and other humanitarian law of war documents, see Dietrich Schindler and Jiri Toman, eds, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Henry Dunant Institute, 1973). Dating the modern "humanitarian" arms limitation movement to the First Hague Peace Conference is somewhat arbitrary. On the sea warfare side, the abolition of privateering and regulation of neutral shipping rights in the 1856 Declaration of Paris, reprinted in 1 Am J Intl L 89 (Supp 1907), is a precursor to if not part of this movement, while the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in the Field (signed August 22, 1864; in force June 22, 1865), reprinted in 1 Am J Intl L 90 (Supp 1907), covers treatment of the wounded, and the St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes (signed November 29, 1868/December 11, 1868; in force November 29, 1868/December 11, 1868), reprinted in 1 Am J Intl L 95-96 (Supp 1907), concerns the limitation of specific weapons (explosive bullets) due to the special dangers and carnage they would wreak on troops. Despite these early agreements, it seems more reasonable to date the movement aspect from the First Hague Peace Conference.

9. See George K. Walker, *The Crisis over Kuwait, August 1990-February 1991*, 1991 Duke J Comp & Intl L 25; Horace B. Robertson, Jr., *Specific Means and Methods of Application of Force*, 1991 Duke J Comp & Intl L 1; Gennady M. Danilenko, *The Relevance of Humanitarian and Diplomatic Law to the Conflict in the Gulf*, 1991 Duke J Comp & Intl L 124.

10. Covenant of the League of Nations, 1 Hudson 1, 13 Am J Intl L 128 (Supp 1919) (concluded January 10, 1920; in force January 10, 1920) ("Covenant").

First, the apparent renunciation of war as a method of settling international disputes was recognized at the time of the League's founding as a departure from existing customary law. The League Covenant's creation of new international law was effective only among League member states and did not accede immediately to the status of new and universally binding customary law. Most of the major powers were members, but the United States, for example, was not.

Second, the operative Covenant provisions largely referred to a rejection of "war." At least initially, older intent-based state of war doctrines permitted a state to use armed force in the conduct of international affairs but then allowed it to deny that war was involved.¹¹ The Covenant's rejection of war as self-help was not absolute, insofar as Article XV contemplated that one state legitimately might conduct a war against another state that failed to abide by the terms of a judicial or arbitral decision resolving a dispute between those states. To the extent that Article X of the Covenant required mutual assistance against "aggression" or its threat against the "territorial integrity and existing political independence"¹² of League members, this undertaking was characterized as a moral rather than legal obligation by some states.¹³ By its terms, Article X seemed directed more against the idea of wars of conquest eventually opposed by the United States under the Stimson non-recognition doctrine.¹⁴ This left member states individually to decide how to respond in a specific instance.¹⁵

Third, although it outlawed "resort to war," the Covenant was silent on "self-defense" (unlike the U.N. Charter). Covenant Article XVI stipulated that a member state's violation of its obligations in resorting to war would be an act of war against all other members.¹⁶ It contemplated that those states then could wage a defensive war against the transgressor (but

11. See Covenant at Arts XI-XIV and XVI (cited in note 10). Whether the League intended this focus on the technical concept of war, as opposed to the use of armed force, may be questioned based upon preparatory work on the Covenant and other indications. See Brownlie, *International Law and the Use of Force by States* at 59-60 (cited in note 5). Regardless, this wording presented a technical problem, at least until publicists and state practice developed objective theories of war (applied in the 1930s to Japanese activities in Manchuria).

12. Covenant at Art X (cited in note 10).

13. Brownlie, *International Law and the Use of Force by States* at 62, 65 (cited in note 5).

14. The Stimson non-recognition doctrine asserted that "states should refuse to recognize 'any situation, treaty or agreement which may be brought about contrary to the . . . Pact of Paris.'" James Leslie Briery, *The Law of Nations: An Introduction to the International Law of Peace* 172 (Sir Humphrey Waldock, ed) (Oxford U Press, 6th ed 1963).

15. This ineffectual approach did not hinder the chain of events leading up to World War II and was clearly foremost in the drafters' minds in devising the current security system under the U.N. Charter. See notes 43-49 and accompanying text.

16. Covenant at Art XVI (cited in note 10).

without avoiding problems inherent in keying the response to "war").¹⁷ The Covenant mentions self-defense only indirectly, as in the problematic mutual assistance undertaking of Article X or in Article XXI's reference to the continuing validity of "regional understandings like the Monroe Doctrine for securing the maintenance of peace."¹⁸ The drafters perceived no necessity to articulate a "self-defense" doctrine because it was subsumed in the broader concept of self-preservation understood by contemporaries.¹⁹ To the extent that self-preservation was, depending upon one's doctrinal inclinations, a positivistic attribute of sovereignty, a natural law right, or some generally-acknowledged inherent state entitlement,²⁰ there was no technical flaw in failing textually to affirm its existence.

The Covenant's shortcomings were recognized as early as the 1920s. A combination of general anti-war sentiment²¹ and demands for structural improvement in the means for peaceful resolution of disputes (chiefly arbitration and conciliation) inspired further conferences and treaties.²² Within the League's ambit, the 1923 Draft Treaty of Mutual Assistance²³ and the 1924 Geneva Protocol for the Pacific Settlement of International Disputes²⁴ addressed some of the Covenant's flaws, but failed to be adopted as formal treaty law for a variety of reasons. Nonetheless, both specifically condemned "aggressive war." By 1925, the Locarno Treaties' Article 2 (providing for arbitration of disputes among various European powers) distinguished between "attack," "invasion" and "resort to war." The Locarno Treaties expressly recognized that these do not include the use of armed force in the exercise of "legitimate defense" or pursuant to actions taken under the aegis of the League or various Covenant provisions.²⁵ The 1928 Havana Conference of Ameri-

17. See Hans Wehberg, *Le problème de la mise de la guerre hors la loi*, 24 Vol IV Rec des cours 147, 164 (1928).

18. Covenant at Art XXI (cited in note 10).

19. See sources cited in note 2. In this broad sense, self-preservation is even more sweeping than the modern U.S. concept of "national security."

20. See note 7.

21. See Wehberg, 24 Vol IV Rec des cours at 174-85 (cited in note 17) (details of the US anti-war movement).

22. The efforts of some segments of the international community to ban armed conflict on humanitarian grounds combined completely with the efforts of those trying to establish practical mechanisms of dispute resolution and nascent collective security in a fashion which did bring to the fore the self-defense concept *per se* (also referred to by contemporaries as "legitimate defense," literally translating the French *défense légitime*). See generally Brownlie, *International Law and the Use of Force by States* at 66-105 (cited in note 5).

23. League of Nations OJ A.1923.C.III 203-6 (Spec Supp No 16 1923).

24. League of Nations OJ Annex 18, 136-40 (Spec Supp No 24 1924).

25. Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, Italy (Annex A) (1925) 54 LNTS 289, 20 Am J Intl L 21, 23 (Supp 1926) (signed December 1, 1925) ("Locarno Treaties").

can States, in which the United States participated, again produced resolutions condemning "aggressive war" without defining aggression²⁶ or opposing the use of war as an instrument of national policy.

The 1928 General Treaty for the Renunciation of War ("Kellogg-Briand Pact")²⁷ represented the culmination of efforts between the World Wars to address perceived problems in the Covenant and in the League system. The Kellogg-Briand Pact is important because the signatory states intended both to go beyond the Covenant substantively and eventually to form a new general international law excluding aggressive war. Unlike the League Covenant, the Kellogg-Briand Pact arguably continues in force, subject to the U.N. Charter and subsequent agreements. By its terms, the Kellogg-Briand Pact condemned "recourse to war" to resolve disputes and "renounce[d] it as an instrument of national policy. . . ."²⁸ The Kellogg-Briand Pact repeated the Covenant's problematic employment of the term "war," raising the question of whether it suffers from the same infirmities or was intended generally to establish that, subject to limited exceptions, the use of armed force to resolve disputes was unlawful. However, it is more likely that the use of armed force itself was rendered generally unlawful, based upon the weight of scholarly opinion concerning this specific question,²⁹ state practice including subsequent agreements and government opinions expressed throughout the 1930s,³⁰ and the fact that subjective state of war doctrines arguably had been displaced by objective war theories.

The Kellogg-Briand Pact contained no explicit reference to self-defense. In preparatory work and by exchange of diplomatic notes, however, parties reserved rights of "self-defense," "legitimate defense" or "legitimate self-defense."³¹ The United States expressly stated by note that nothing "restrict[ed] or impair[ed] in any way the right of self-defense" which was "inherent in every sovereign state and implicit in every

26. See *Sixth International Conference of American States* in James Brown Scott, ed, *The International Conference of American States 1889-1928* 293-449 (Oxford U Press, 1931); William Everett Kane, *Civil Strife in Latin America*, 115-18 (Johns Hopkins U Press, 1972). The United States traditionally has opposed international efforts to formulate a definition of aggression and only grudgingly agreed to the 1974 Definition of Aggression, UN GA Res 3314, Annex (XXIX 1974) (see note 58 and accompanying text). Given the inherent difficulties in achieving a clear legal definition of aggression, it is problematic to define self-defense negatively as the use of force in opposition to aggression.

27. Treaty Providing for the Renunciation of War as an Instrument of National Policy, 46 Stat 2343, 94 LNTS 57 (concluded August 27, 1928; in force July 24, 1929) ("Kellogg-Briand Pact"). The United States was a signatory.

28. *Id.* at Art 1.

29. See Brownlie, *International Law and the Use of Force by States* at 84-86 (see 84 note 3, containing a catalog of authorities) (cited in note 5).

30. *Id.* at 87-111.

31. *Id.* at 235-37.

treaty.”³² The U.S. note went on to characterize self-defense as an “inalienable” and “natural right,” which “[e]very nation is free at all times and regardless of treaty provisions”³³ to exercise, and apparently claimed for each state the ability to decide for itself at least initially when its own right of self-defense applied.³⁴ Other states may not have chosen to explain their analogous reservation regarding self-defense in terms similar to those of the United States,³⁵ but there was a clear consensus among states that self-defense was excluded from any prohibition on the use of force.

Through the late 1930s, there was an accession of the principles of the Kellogg-Briand Pact to the status of generally binding customary law coupled with a growing division of opinion concerning interests legally protectable under the concept of self-defense (the permissible scope of the self-preservation rationale). Both trends are important because they define contemporary disputes concerning customary law as it existed immediately prior to the entry into force of the U.N. Charter. Existing commentary adequately documents the accession to customary law status of the Kellogg-Briand Pact’s restraints on the use of force.³⁶ The Nuremberg and Tokyo war crimes trials recognized the customary law basis of the prohibition on “aggressive war” and the characteristics of “self-defense” following aggression terminology in parallel use since the 1920s.³⁷

32. *Identical Notes of the Government of the United States to the Governments of Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, The Irish Free State, Italy, Japan, New Zealand, Poland, South Africa*, 22 Am J Intl L 109 (Supp 1928). See the U.S. draft, id at 114-15, which was the version substantially adopted by the treaty parties. These reservations form part of the preparatory work, and other states noted them in their own ratifications of the final treaty.

33. Id at 109-10.

34. Id.

35. In particular, a May 19, 1928, diplomatic note of Great Britain to the United States government claims that “there are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. . . . Their protection against attack is to the British Empire a measure of self-defence.” Brownlie, *International Law and the Use of Force by States* at 236 (cited in note 5) (quoting David Hunter Miller, *The Peace Pact of Paris* 196, 198-99 (G.P. Putnam Sons, 1928)). To the extent that the note referred to British colonies it would be unexceptional, but its coverage appeared to extend beyond them to such strategic areas as Afghanistan (raising the specter of a broader view of protection of national interests under older views of self-defense and self-preservation). Similar reservations exist concerning the Monroe Doctrine. See, for example, Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* 77-78 (Röhrscheid, 1952).

36. See Brownlie, *International Law and the Use of Force by States* at 74-105 (cited in note 5).

37. Regarding the war crimes trials, questions exist regarding the tribunals’ character as true international courts or as national courts of the victorious Allies. While the idea of international “crimes” under modern international law views of state responsibility is increasingly accepted, criminal law scholarship has been at times less sanguine about the suitability of these principles for the creation of individual criminal liability under international law. See generally Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (cited in note 35). Nonetheless, even national tribunals could apply international law (disregarding possible monism-dualism arguments), and the reservations regarding recognition of individual criminal liability go more to the extension of liability

By the early 1930s, there was general disagreement regarding the interests protectable under self-defense. Beyond sanctioning the repulsion of an aggressor's armed attack against a state's own territory, the law was unclear concerning intervention in asserting traditional diplomatic protection (military operations carried out on foreign territory to protect the lives or property of a state's nationals),³⁸ or in the protection of vital interests of a political or economic nature.³⁹ Disagreement about the scope of the traditional self-preservation rationale reduces to two polar positions: (1) a broad view based largely on pre-World War I precedents encompassing all of the above as protectable interests, and (2) a narrow view focusing on the concept of aggression or aggressive war and possibly nationals' lives in limited cases, essentially rejecting "vital interests" of a political or economic character as a permissible basis for self-defense.⁴⁰ The correct interpretation of the law is the restrictive view. This article will discuss the polar positions in more detail later. Now, however, the stage is set for determining the proper structural view of self-defense under the U.N. Charter.⁴¹

B. Different Interpretations of Self-Defense Under the U.N. Charter

The most important difference between the League of Nations and the United Nations systems lies in enforcement mechanisms rather than fine substantive distinctions concerning the legality of armed force. Given international law's inherent lack of coercive enforcement mechanisms (because there is no supranational sovereign to levy penalties in the Austinian sense),⁴² enforcement mechanisms and substantive law standards enjoy equal significance. The U.N. Charter incorporates modern substantive law norms governing the use of armed force as well as a new organizational structure to enforce international peace in the form of the Security Council system. The League's structure permitted only coordination of individual states' voluntary responses to aggression, while the Security Council system permits designation of an aggressor state and the articulation of a mandatory coercive regime.

to individuals than to the character of the abstract international law norm concerning outlawing aggressive war.

38. See notes 227-34 and accompanying text.

39. See Emile Giraud, *La théorie de la légitime défense*, 49 Vol III Rec des cours 687, 738-46 (1934).

40. *Id.* at 747-87. This article disregards the strand of legal thought which denied that even "defensive" wars were now lawful. Instead, the issue is joined between extensive historically based theories and restrictive modern theories concerning the scope of the self-preservation rationale.

41. Charter of the United Nations [1945] 59 Stat 103, 1 UNTS xvi (in force October 24, 1945) ("UN Charter").

42. See John Austin, *The Province of Jurisprudence Determined*, 169-70, 177 (John Murray, 2d ed 1861).

The final treaty terms of the U.N. Charter were negotiated at the 1945 San Francisco Conference on International Organization (open to all interested states except the defeated Axis Powers). Under the circumstances, the U.N. collective security system embodied a conscious effort to revive many of the League of Nations' aspirations in a more effective enforcement structure. Beyond the danger of general conflagration, the drafters of the Charter had before their eyes the example of the League's ultimate failure in its 1930s dealings with regional conflicts: Japan's 1931 invasion of Manchuria, the 1934-35 Italo-Abyssinian War, the 1939 Soviet-Finnish War and Germany's progressive occupations of the Rhineland (1936), Austria (1938) and Czechoslovakia (1939).

The San Francisco Conference saw a variety of proposals by small states addressed to reconciliation of non-intervention principles with collective response to aggression along League lines⁴³ and to conceptual problems with the novel legal terminology of sovereign equality.⁴⁴ The smaller states attempted to make collective response mandatory, a goal resisted by powerful states ever since the failure of League Covenant Article X. The result was a compromise. The Security Council system as agreed upon addressed perceived flaws in the League Covenant system by providing that a unified Security Council could compel U.N. member states to respond to threats against international peace (under Chapter VII of the U.N. Charter). The permanent members of the Security Council (France, the United Kingdom, China, the Soviet Union, and the United States) received special individual veto power over substantive measures (encompassing the maintenance of international peace). When united, the Security Council could preclude unilateral self-defense from interfering with its measures. There is a record of the conceptual interrelationship of Articles 2(1), 2(4) and 51,⁴⁵ revealing that Article 2(1)'s concept of a state's sovereign equality includes not only the enjoyment of rights, but also a duty faithfully to fulfill its obligations under the interna-

43. Doc 2 G/7(a) 3 UNCIO Docs 26, 30 (1945) (Uruguay proposal).

44. See Doc 1123 I/8 6 UNCIO Docs 65, 66-69 (1945) (speech of Peruvian delegate Belaunde); Ruth B. Russell and Jeannette E. Muther, *A History of the United Nations Charter: The Role of the U.S. 1940-1945* 672-75 (Brookings Inst, 1958).

45. Commentators have disagreed about the interpretation of this record. There are specific disagreements concerning the permissibility of anticipatory self-defense as well as textual arguments concerning the permissible use of force as self-help where no intent exists to acquire territory permanently. Compare Brownlie, *International Law and the Use of Force by States* at 264-70 (cited in note 5) with D.W. Bowett, *Self-Defence in International Law* 46-55 (Manchester U Press, 1958). Brownlie tried to distinguish self-defense under Article 2(4) from the same concept under Article 51. The importance of this weak point in his argument is that it is really directed at Bowett's and others' position that Article 51 simply preserved the customary law of self-defense with an eye towards Brownlie's eventual conclusion based on the text of Article 51 that anticipatory self-defense is unlawful (armed force is only lawful in response to "armed attack"). See Brownlie, *International Law and the Use of Force by States* at 278 (cited in note 5).

tional order. Along with the territorial integrity and political independence values reaching back to League Covenant Article X, Article 2(1) contains more subjective legal personality concepts supporting non-intervention as a formal matter.⁴⁶ Beyond Article 51's language, self-defense is also seemingly outside Article 2(4)'s coverage.⁴⁷

On an institutional level, the opposing vetoes of the United States and the Soviet Union largely foreclosed Security Council-mandated coercive peacekeeping activities during the Cold War period.⁴⁸ For the most part, the legal basis for any state's collective security response involved divergent interpretations under the U.N. Charter of competing views of self-defense and aggression developing since the 1930s. As a technical matter, substantive concerns revolve around whether one believes that the drafters of the U.N. Charter intended to depart from progressive legal developments concerning the use of armed force or merely intended to incorporate applicable customary law as understood on the eve of World War II.

Three aspects of the U.N. Charter are of special concern. The first is the reaffirmation of the League Covenant's and Kellogg-Briand Pact's general rejection of the use of force to resolve disputes between states, coupled with the introduction of the Security Council system as a perceived improvement over the old League system (rejection again of the self-help rationale).⁴⁹ The second and third aspects involve technical issues of treaty interpretation and the relative importance of pure textual exegesis in determining the interplay between Articles 2(4) and 51 of the U.N. Charter. However, linked or separate interpretation of these provisions is the literal source of widely divergent interpretations of modern self-defense rights. This article must specifically address the broader debate concerning self-defense, necessity and similar rights under provisions of the U.N. Charter.

46. Doc 739 I/1/A/19(a) 6 UNCIO Docs 717, 717-18 (1945) (Report of Rapporteur of Subcommittee I/1/A to Committee I/1).

47. *Id.* at 720-21.

48. See Walker, 1991 *Duke J Comp & Intl L* at 51 (cited in note 9).

49. The idea of the centralized adjudicatory and peacekeeping functions of the U.N. Security Council soon faded into the background as a result of East-West tensions and the permanent member veto rule, which precluded united action during many of the post-war disturbances of international peace. Certain peacekeeping functions have gravitated to the General Assembly in the interim, but this process is open to criticism. Nonetheless, the original structure was clear and presumably bound the signatory states unless one is willing to go to the extreme positions argued by some commentators that states' original abandonment of self-help was conditioned expressly on the effectiveness of the Security Council system or should now be disregarded under a *rebus sic stantibus* analysis. See note 106 and accompanying text.

Departing from the Covenant's and Kellogg-Briand Pact's problematic usage of the term "war," Article 2(4) expressly addresses the "use of force":

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁵⁰

Departing from prior treaties' silence, Article 51 expressly addresses "self-defense":

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members . . . shall not in any way affect the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁵¹

On a structural basis, modern views of self-defense may be separated into two polar groups.⁵² First, one group of mostly Anglo-American publicists⁵³ focuses on Article 51's "inherent right" language as a general savings clause for the customary law (viewing Article 2(4) as an abstract general statement of principle rather than an operative treaty provision). The second group of mostly Continental, Socialist and Developing Nations publicists interprets Article 51 as the proper focus for examination of the modern concept of permissible self-defense, viewing Article 2(4) by

50. UN Charter at Art 2(4) (cited in note 41).

51. *Id.* at Art 51.

52. There are numerous individual views. See *Addendum to the Eighth Report on State Responsibility*, UN Doc A/CN.4/318/ADD. 5-7, reprinted in 2 part 1 YB Intl L Comm 13, 51-70 (1980) ("*Addendum to the Eighth Report*") (authored by Special Rapporteur Ago); Peter Malanczuk, *Countermeasures and Self-Defense as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, in Marina Spinedi and Bruno Simma, eds, *United Nations Codification of State Responsibility* 197 (Oceana Press, 1987). See also Dennis Alland, *International Responsibility and Sanctions: Self-defense and Countermeasures in the ILC Codification of Rules Governing International Responsibility*, in Marina Spinedi and Bruno Simma, eds, *United Nations Codification of State Responsibility* 143 (Oceana Press, 1987), for a catalog of authors and opinions concerning self-defense.

53. See *Addendum to the Eighth Report* at 64 note 257 (cited in note 52). Among them are counted Myres McDougal and Florintino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale U Press, 1961); Bowett, *Self-Defense in International Law* (cited in note 45); Julius Stone, *Legal Controls of International Conflict* (Stevens and Sons Ltd, 1954); Claude Humphrey Meredith Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Vol II Rec des cours 451 (1952). Concerning prominent dissenters from the above view, Brownlie seemingly adheres generally to the customary law interpretation but abandons it in favor of a restrictive textual exegesis of U.N. Charter Article 51 concerning the legality of anticipatory self-defense. Brownlie, *International Law and the Use of Force by States* (cited in note 5). Steven M. Schwebel, *Aggression, intervention and self-defense in modern international law*, 136 Vol II Rec des cours 411 (1972), has, in some publicists' opinions, indicated his approval of this view. See *Addendum to the Eighth Report* at 64 note 257 (cited in note 52).

its terms as permitting the use of armed force only under Article 51's self-defense or the authority of a U.N. organ.⁵⁴

The second group considers the "inherent right" language as either surplusage or a drafting accident formalistically invoking long-dead natural law concepts.⁵⁵ Their interpretation of permissible self-defense under the U.N. Charter involves literal interpretation of Article 51's first clause linked largely in the case of Continental publicists to a variety of doctrinal interpretations of the self-defense concept (colored in part by municipal law). Socialist and Developing Nations publicists emphasize the nominally separate concept of aggression in linking Article 2(4) to Article 51. In paring down the scope of the self-defense concept, the second group seeks to proscribe the use of force in international relations. Typically, this is achieved by carving out areas of behavior and deeming them technically to be covered by outmoded self-preservation concepts or the doctrinally separate necessity concept. Thus recharacterized, the behavior falls within Article 2(4)'s general prohibition on the use of armed force, and outside Article 51's self-defense exception.

Under international law views of this second group, U.N. Charter Article 2(4)'s apparently absolute textual prohibition on the use of armed force against the "territorial sovereignty or political independence" of a state is the essential locus of the prohibition on aggression. Such an approach is attractive both to Continental publicists for technical reasons and traditionally to Socialist publicists, who see the purpose of international law as the assurance of peaceful coexistence among states with different social systems. Under such an approach, Article 2(4)'s apparent absolute phrasing is subject only to limitation by Article 51's right of self-defense and the use of armed force under the authority of U.N. organs. Proponents of this view customarily advance a separate textually based interpretation of Article 51. The focus on the parallel idea of Article 51 limiting self-defense as it existed under customary law quickly turns to its "armed attack" terminology to prescribe the new boundaries of self-defense.⁵⁶ This approach reads Article 51's armed attack terminology into Article 2(4) as the source of the aggression prohibition and essentially

54. See *Addendum to the Eighth Report* at 66 note 261 (cited in note 52); Gamal Moursi Badr, *The Exculpatory Effect of Self-defense in State Responsibility*, 10 Ga J Intl & Comp L 1, 10-14 (1980). See also Ralf M. Derpa, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt* 94-99 (Anthenäum, 1970) (publicists and state declarations).

55. In fact, the French text of the Charter employs the words *droit naturel*.

56. In lieu of "armed attack" the French language version of Article 51 employs the terminology *aggression armée*, which is identical to armed attack to the extent the concept of attack is itself a term of art. However, those jurists interpreting Article 51's text on a literal basis for jurisprudential reasons may find themselves logically constrained from reference to the term of art. For that reason, they often struggle with its slightly different literal meaning and must work backwards through some independent view of aggression to the *de minimis* concept visible in League practice.

equates it to the idea carrying over from the League era that not all unlawful uses of armed force constitute aggression.⁵⁷ As a result, self-defense under what claims to be a pure textual exegesis of permissible self-defense under Article 51 effectively has incorporated the same sense of a *de minimis* exception (through "armed attack").

Twentieth century developments limiting the use of force (aimed at aggression and aggressive war) reach all the way back to Article X of the Covenant of the League of Nations. Socialist and to a lesser extent Continental and Developing Nations publicists' views of self-defense have characterized it simply as the use of armed force in resisting "aggression." This view of self-defense as the converse of aggression is appealing initially, but ignores problems of the long and finally inconclusive attempts to define aggression ending in the 1974 Definition of Aggression Resolution.⁵⁸ Beyond easy cases, substantial disagreement continues concerning the scope of aggression as an independent legal concept.⁵⁹ Determination of what constitutes aggression, however, is vitally important under this approach when it defines self-defense negatively. At an extreme, self-defense becomes less an independent legal concept than a definitional construct. It may serve to justify or deny self-help in the form of the unilateral use of armed force without regard to the otherwise generally binding international law obligation peacefully to settle disputes.⁶⁰

As the converse of aggression, this view of self-defense as a kind of definitional construct has not usually been considered at least under So-

57. See note 67 and accompanying text.

58. In the immediate aftermath of postwar war crimes trials, the U.N. undertook to define the aggression concept formulating a restatement of the so-called Nuremberg principles and the *Draft Code of Offenses Against Mankind* as substantive law to guide a proposed international criminal tribunal as permanent replacement for the international military tribunals criticized in some quarters as drumhead courts of the victorious Allies. In various venues, these efforts continued sporadically from the late 1940s through the early 1980s. The U.N. General Assembly has promulgated certain generalized statements of principles and compromise definitions (purporting to be statements of existing law), most notably the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV 1970), and the Definition of Aggression Resolution, (cited in note 26). However, their drafting history, text and generalized nature provide better evidence of diplomatic compromise than the law. See note 26. The 1974 UN GA Definition of Aggression addressed the Security Council in non-binding form in terms of studied vagueness necessary to achieve a consensus permitting its passage. See generally Julius Stone, *Conflict Through Consensus: United Nations Approaches to Aggression* (Johns Hopkins U Press, 1977). See also McDougal and Feliciano, *Law and Minimum World Order* at 143-60 (cited in note 53); Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (U of California Press, 1958); Benjamin B. Ferencz, *Defining Aggression: Where it Stands and Where it's Going*, 66 Am J Intl L 491 (1972).

59. See generally Stone, *Conflict through Consensus* (cited in note 58); Schwebel, 136 Vol II Rec des cours at 411 (cited in note 53).

60. This approach lies at the base of the opinion of the Court in the *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (Nicaragua v US), 1986 ICJ 14 ("Nicaragua Case"). See notes 166-201 and accompanying text.

cialist law views to incorporate restrictive elements accompanying the traditional customary law concept of self-defense (most notably the necessity and proportionality requirements under the *Caroline* test).⁶¹ As a result, a state considered to be the victim of aggression might equally well restrict its military operations to driving out invaders (without its own troops crossing its borders), or might carry the war to the enemy by its troops' invasion of enemy territory. From the early days of the aggression concept's development following World War I, there was a theoretical concern that recognition of any and all unlawful uses of force as aggression could lead to the uncontrollable expansion of a minor conflict.⁶² As a result, from the League of Nations period forward the aggression concept has included the idea of unlawful armed force but excluded on a *de minimis* basis so-called frontier or other minor incidents. A minor incident such as the cross-border shooting of several frontier guards might constitute under a plain language definition an attack on another state's territory and officials, but the aggression concept itself came to treat the idea of attack as a term of art.

As under the Kellogg-Briand Pact, the original draft general provision of what became Article 2(4) of the U.N. Charter simply assumed the availability of self-defense. Further, that draft provision originally referred only to the use of force without the League Covenant's Article X language relating aggression to the "territorial integrity and existing polit-

61. The idea of defensive war evident in the League Covenant is probably the original source of this view of unlimited response, although the defensive war idea itself seems a quaint piece of doctrinal history. Secretary Daniel Webster's well-known formulation of self-defense principles justifying incursion on a non-offending state's territory ("the *Caroline* test") was delivered in an insurgency or armed band case, excusing British incursion on U.S. territory only if it could show:

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation. It shall be for [Britain] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

Letter of Secretary of State Webster to British Envoy Fox, April 24, 1841, 29 *British and Foreign State Papers, 1840-1841*, 1129, 1138 (HMSO, 1857). This inquiry later discusses the limitations imposed on the exercise of self-defense, but notes for the moment only the interrelationship between a necessity claim and the loss of local governmental authority in failing to suppress the activity allegedly endangering the foreign state. See also Jennings, 32 *Am J Intl L* at 82 (cited in note 3).

62. This is without regard to the danger of an aggressive state staging or provoking minor incidents to justify a massive invasion in response, as occurred during the 1930s and at the outbreak of World War II. Even if a small conflict might start in a specific location, it would expand geometrically if the victim state chose to attack an offending state on its home territory. From the League precedent of the 1925 *Greco-Bulgarian Frontier Incident* (involving the shooting of two Greek frontier guards by their Bulgarian counterparts, resulting in a Greek invasion of Bulgarian territory), see notes 132-35 and accompanying text, through many attempted definitions up to and including the 1974 Definition of Aggression (cited in note 26), minor incidents involving unlawful armed force have been excluded from the aggression concept.

ical independence of any state."⁶³ The rationale behind this choice was that Article 2(1)'s principle of the sovereign equality of all member states would preclude infringement on other states' territory or independence.⁶⁴ Restrictions on the use of force exist technically in opposition to the principle of sovereign equality, and the "territorial integrity or political independence"⁶⁵ language was added at the request of smaller countries to make explicit the external threat problem. Early attempts at Article 2(4)'s exegesis were incorrect in tying it to an interpretation of this additional language and arguing that any use of armed force beyond self-defense (under a restrictive interpretation of Article 51 tying it to armed attack) or action under the authority of a U.N. organ was *per se* unlawful.⁶⁶ The territorial integrity language was not intended to displace self-defense as it existed under customary law (understood under a restrictive self-preservation rationale), and at the same time should be related to the longstanding interest in and attempts by various segments of the international community in parallel to define aggression, the details of which are beyond the scope of this article.

The most basic difficulty with the textualist or definitional construct approach to Articles 2(4) and 51 is that it assumes an incorrect interpretation of the Charter. Even accepting it on its own terms, however, it is subject to a number of substantial problems. First, the idea of a *de minimis* or frontier incident exception is intuitively attractive, but provides no real guidance (quantitative or otherwise) concerning how "minor" an armed attack must be before it falls below the boundary of self-defense. Second, non-Anglo-American publicists commonly extend the idea of armed attack as a limitation on the exercise of self-defense beyond its roots in a League-style *de minimis* view of direct aggression to indirect aggression and the armed band problem in particular (support for insurgencies and terrorism).⁶⁷ *De minimis* unlawful direct armed force equates

63. Covenant at Art X (cited in note 10).

64. This approach was in lieu of positive guaranties of continued state existence or of frontiers as under the 1924 Locarno Treaties (cited in note 25) due to concerns regarding undue interference with then-anticipated changes in states and the emergence of new states (self-determination and decolonization).

65. Covenant at Art X (cited in note 10).

66. See Stone, *Aggression and World Order* at 72-76 (cited in note 58).

67. This point of view found expression in particular in the views of the Soviet Union treating support for armed bands as intervention and indicating in committee discussions of drafts leading up to the 1974 Definition of Aggression that acts of intervention alone should not be viewed as aggression unless they amount to armed attack. See Twenty-Seventh Session, Supp No 19, A/8719. Report of Special Committee on the Question of Defining Aggression, 31 January-3 March (1971) 1, 20 ("Report of the Special Committee"), reprinted in Benjamin B. Ferencz, 2 *Defining International Aggression: The Search for World Peace* 493, 506 (Oceana Press, 1975). The Soviet Union was opposed to the U.S. proposal on indirect aggression covering armed bands (substantially duplicating the relevant language of the 1970 Declaration on Principles of International Law Concerning Friendly Relations

poorly to even massive unlawful support of indirect armed force in the form of sponsorship of armed bands.⁶⁸ Under these circumstances, the underlying armed attack formulation then becomes the ultimate source of an agency-style attribution approach to armed band problems and aggressions. While some states assert a right to assist foreign political movements,⁶⁹ their claim ignores the early state practice development of the

and Cooperation Among States in Accordance with the Charter of the United Nations, UN GA Res 2625 (XXV 1970)). The following, however, would be acceptable:

The sending by a State of armed bands, irregulars or mercenaries which invade the territory of another State in such force and circumstances as to amount to armed attack as envisaged in Article 51 of the Charter.

When a State is victim in its own territory of subversive and/or terrorist acts by armed bands, irregulars or mercenaries organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State.

Report of the Special Committee at 15, reprinted in Ferencz, *2 Defining Aggression* at 501. The *Nicaragua Case* opinion followed this approach, except for the references to the U.N. Charter which would not have been permissible due to the ICJ's reading of the multilateral treaty exception. See notes 70, 166-201 and accompanying text.

68. See Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 *Intl & Comp L Q* 712-13 (1958). Traditionally, outside of special areas such as piracy, international armed attacks generally have involved the armed forces of a state. More recently, publicists have questioned whether a state's support of persons who commit terrorist acts abroad should result in the recognition of that state's legal responsibility for their acts. See Gordan A. Christenson, *The Doctrine of Attribution in State Responsibility*, in Richard B. Lillich, ed, *International Law of State Responsibility for Injuries to Aliens* 321, 336 (U of Virginia Press, 1983); Richard B. Lillich and John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 *Am U L Rev* 217, 251-76 (1977). See also Manuel Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, 1962); Giuseppe Sperduti, *Responsibility of States for Activities of Private Law Persons*, in Rudolf Bernhardt, ed, 10 *Encyclopedia of Public International Law* 373, 373-75 (North-Holland, 1987). While U.S. publicists have advanced the claim that a state's permitting the use of its territory as a base for the commission of terrorist acts abroad is enough by itself to incur state responsibility, this seems to go beyond precedent. Lillich and Paxman, 26 *Am U L Rev* at 258-60, discussing the Texas Cattle Claims; Majorie M. Whiteman, 8 *Digest of International Law* 749-55 (US Government Printing Office, 1967); 9 United States Department of State Arbitration Series, *American-Mexican Claims Commission, Report to the Secretary of State* 51-52 (US Government Printing Office, 1948). It also does not differentiate clearly among various contexts and the implications of attributing armed band conduct to a state. Addressing legal aspects of the armed band problem is of great practical importance in an age where subversion and state-sponsored "private" violence have in many ways supplanted traditional armed conflict as the chief threat to international peace. See notes 67 and 69.

69. In the case of Socialist international law, the right traditionally has taken the form of an assertion that assistance may be given to national liberation movements, while in the case of other block views the right takes the form of an assertion that assistance may be given to self-determination movements (since decolonization largely has taken its course, the self-determination claims now are asserted chiefly by the Arab states in supporting various Palestinian groups opposing Israel). See Ahmed M. Rifaat, *International Aggression, A Study of the Legal Concept: Its Development and Definition in International Law* 277 (Humanities Press, 1979); Stone, *Conflict through Consensus* at 66-86 (cited in note 58) (concerning discussions surrounding adoption of the Definition of Aggression). While often confused, the two views are not the same and interesting questions may be raised concerning Socialist international law views of assistance to self-determination movements in light of ethnic unrest in Eastern Europe (for example, the ethnic Albanian movement in Kosovo within Yugoslavia and more generally in the many ethnic republics of the Soviet Union). Such issues might arise under the contested right of humanitarian intervention as a variety of intervention beyond the traditional custom-

aggression concept itself as well as the significant danger to individual states' security and general international peace that a common practice of state sponsorship of armed bands presents.⁷⁰

This approach also presents the problem of what a state's armed forces may do lawfully in the face of a "minor" attack not constituting aggression. Assuming the forces of a state cannot avoid a fight by retreat or otherwise (and ignoring whether there is a duty of retreat),⁷¹ their use of armed force to protect themselves might seem in violation of international law due to the lack of preconditions to the exercise of self-defense under the definitional construct approach (there was no armed attack). This may not be problematic on their own state's territory, as recourse to municipal law may seem justified. However, as seen in the problem of self-defense in international waters, these problems may arise outside a state's territory.⁷²

ary law asserted chiefly by Western publicists (distinct from self-defense or intervention to rescue a state's nationals faced with imminent danger of bodily harm). See also note 74.

70. Concerns about tying open-ended subversion concepts to aggression are misplaced, insofar as the traditional views of even the Soviet Union, going back to the 1933 Convention on the Definition of Aggression, had no problem considering the support or tolerance of armed bands aggression. Socialist international law now takes the view under a textual interpretation of U.N. Charter Article 51 that mere support or tolerance of armed bands does not constitute an "armed attack" triggering a right of self-defense under the definitional construct approach. However, this is an entirely different concern from the idea that the subversion concept itself could not be phrased in sufficiently restrictive legal terms. Instead, opposition to including subversion in the concept of indirect aggression seemingly is a product of differences of opinion concerning a right to support national liberation and self-determination movements without incurring the danger of a self-defense response. See Twenty-Eighth Session, Agenda Item 95, Report of the Special Committee on the 1973 Question of Defining Aggression A/9411 at 10-11, reprinted in Ferencz, 2 *Defining International Aggression* at 550 (cited in note 67). While the legal issue was sharply politicized during the Cold War, it is not tied solely to politically motivated sponsored insurgencies of the right or left. Looking forward, these issues may arise more often in ethnic self-determination struggles more reminiscent of India's involvement in East Pakistan (now Bangladesh) than the situation presented by the *Nicaragua Case* (cited in note 60).

71. Under the authority of *The Marianna Flora*, 24 US 1 (1826) (opinion by Justice Joseph Story, a commentator in his own right on prize law as a peculiar older branch of international law), retreat is not required in a maritime misapprehension of attack case. Concerning acts undertaken on a state's own territory, it does not seem possible to find such a duty except perhaps from proportionality and fundamental human rights restraints.

72. Related views of international law attempt to avoid this interpretive difficulty in the specific context of a warship's high seas defensive measures by positing some international law entitlement to use armed force outside Article 51 (presumably under some survival of the customary law). See Dietrich Schindler and Kay Hailbronner, *Die Grenzen des völkerrechtlichen Gewaltverbots* 124-25 (Müller, 1986) (proceedings of the 1985 meeting of the Deutsche Gesellschaft für Völkerrecht) ("1985 DGFV Proceedings") (comments of Schindler and Hailbronner in open discussion following presentation of their papers); but see *id.* at 147 (Frowein comments upon Schindler and Hailbronner, expressing the opinion that Article 51 did apply to such incidents). This formalistic response is unsatisfactory, however, in its inconsistency in following a textualist interpretation to its apparent limits and then simply assuming that this exception should be recognized, despite its basic adherence to a very broad prohibition on the use of armed force. See *id.* at 154. To the extent this is premised formally on the idea that Article 2(4) is limited to a state's territory, it ignores the idea that the underlying value is sovereign equality and not territory *per se*. Any attempt to deal with self-protection under the municipal

The customary law approach to self-defense must face a different problem under Article 51. Rather than concerns relating to its direct linkage to an aggression concept of uncertain scope or questionable extensions of municipal law concepts, interpretive problems arise in connection with how to determine the extent to which older, broad views of self-defense have been restricted under the U.N. Charter. One approach focuses on the extent to which nineteenth century views of self-preservation and self-help had been narrowed in development of the self-defense concept (chiefly in the period between the World Wars). Under this approach, progressive development of the customary law of self-defense under a narrow self-preservation rationale had already followed progressive treaty developments (chiefly under the League Covenant and Kellogg-Briand Pact) and as a result was self-limiting at the time of the Charter's adoption. Others adhering to the customary law view of self-defense still may attach significance to Article 51's armed attack terminology on one of two grounds. One approach finds limitation of a broad self-preservation view in the employment of the armed attack concept as an indication that self-defense is now limited to repelling unlawful armed force. A different approach finds in the literal pairing of the attack concept with self-defense that anticipatory self-defense's legality under customary law has been abolished under the Charter.⁷³

law rubric of protective jurisdiction faces the disquieting prospect that different states may apply differing standards under their municipal law. While some argue that fundamental human rights law represents a minimum standard, some states contest the existence of such law and many states disagree about its actual content. The downing of a civilian aircraft illegally in a state's airspace presents the converse problem: whether Article 2(4) restrains a state's ability to use any amount of armed force within its own borders. See *id.* at 148, 152 (Frowein and Hailbronner criticize the use of Articles 2(4) and 51 in claims against Bulgaria in the International Court of Justice for the downing of an El Al flight in the 1950s and by the U.S. against the Soviet Union in the downing of KAL Flight KE007 in 1983. They advocate, instead, that the unjustified downing of foreign aircraft over a state's territory is a violation of fundamental human rights and proportionality principles). See generally Brun-Otto Bryde, *Self-Defence*, in Rudolf Bernhardt, ed, 4 *Encyclopedia of Public International Law* 212, 214 (North-Holland, 1982).

73. This reasoning applies equally to approaches treating self-defense as a definitional construct linked to aggression, but in such approaches addresses responses to active preparation for aggressive war. For example, may a threatened state take preemptive action following mobilization by a state intending aggression (but before the aggressor state's armed forces have crossed into the victim state's territory)? The answer to the question by those adopting the definitional construct approach is commonly in the affirmative, sometimes on the basis of reasoning that preparation for aggression in the form of invasion preliminaries already constitutes aggression. In the *Nicaragua Case* (cited in note 60), the ICJ noted but did not decide the problem of the legality of anticipatory self-defense. It is likely that the Court will address the issue in the pending *Flight 655 Case*, insofar as the U.S.S. Vincennes' misapprehension of attack by a civilian airliner is at issue. To the extent an attacker actually must first launch weapons before self-defense becomes lawful, the Vincennes' mistaken belief that it was under attack by an Iranian F-14 would not constitute self-defense. See notes 202-5 and accompanying text. Modern technology forces an anticipatory response, however, given the speed and destructive range of even modest weapons. Here the armed attack concept is subject under some approaches to a formal interpretation that the attack itself reaches back beyond the execution stage to

To better understand where different self-defense concepts part company in practice, one need only examine differing views of "indirect aggression" (crucial during the Cold War) and the extent to which traditional necessity principles associated with the exercise of self-defense rights on foreign territory can be reconciled with U.N. Charter provisions. The U.S. view maintains that sponsored insurgencies normally constitute grounds for collective self-defense measures against the sponsoring state. Meanwhile, Socialist law and Developing Nations views claim special rights to undisturbed external support of national liberation fronts and anti-colonial movements (for example, Arab states' traditional support for the Palestine Liberation Organization) under self-determination or similar principles. For technical reasons, the Continental Legal Science view characterizes such foreign sponsorship as mere intervention, not justifying collective use of force against the sponsoring state or the use of force on a foreign state's territory against insurgents operating from cross-border sanctuaries under restrictive interpretations of U.N. Charter Article 2(4).⁷⁴

preparation and planning. Regarding anticipatory self-defense's legality, the resolution of the basic question of the correct interpretation of Article 51 (as essentially a procedural provision relating to regional security arrangements rather than an independent locus of textual interpretation for the self-defense concept) means that anticipatory self-defense should be permissible under the Charter to the extent it was permissible under the customary law in force at the time of its adoption. This does not imply, as assumed by some, that actions fairly characterized as armed reprisals or retaliation may be subsumed in modern law under the category of self-defense, anticipatory or otherwise. See Robert W. Tucker, *Reprisals and Self-defense: The Customary Law*, 66 Am J Intl L 586 (1972).

74. Anglo-American views of international law and state practice traditionally have recognized the applicability of the self-defense concept to armed band attacks, while more recent Continental Legal Science views have characterized armed band attacks as covered by the necessity concept. Due to a combination of collateral limitations on necessity and restrictions on the use of armed force under the U.N. Charter, under the Continental view if an armed band's attack is not attributable to a state it is outside the international law self-defense concept (and thus the use of force against that state or on its territory is unlawful). These competing national views of international law concepts were most recently visible in International Law Commission ("ILC") proceedings for the drafting of Part I, Articles 31-34 of the *Draft Articles of State Responsibility* ("Draft Code") adopted by the ILC. *Report of the International Law Commission on the Work of its Thirty-Second Session (5 May-25 July 1980)*, UN Doc A/35/10, reprinted in 2 Part 2 YB Intl L Comm 5, 33-52 (1980). See also note 223; Julio Barboza, *Necessity (Revisited) in International Law*, in Jerzy Makarczyk, ed, *Essays in International Law in Honour of Judge Manfred Lachs* 27 (Martinus Nijhoff, 1984); Jean J.A. Salmon, *Faut-il codifier l'état de nécessité en droit international?*, in Jerzy Makarczyk, ed, *Essays in International Law in Honour of Judge Manfred Lachs* 235 (Martinus Nijhoff, 1984). These ideas help to explain the ICJ's implicit view of indirect aggression in the *Nicaragua Case*. This is perhaps most visible in Judge Ago's concurring opinion, where he refers to attribution questions and the ILC's *Draft Code*, expressing regret that the Court did not refer explicitly to the *Hostage Case* precedent on imputation of responsibility for armed band acts to a state. *Nicaragua Case*, 1986 ICJ 14, 187-90 (cited in note 60) (separate opinion of Judge Ago). The U.S. view itself has from time to time departed from traditional law principles in postulating rights of humanitarian intervention (against totalitarian states). Differing views also are apparent in connection with the use of armed force abroad in situations such as hostage rescues and counterterrorism measures. See notes 69, 209, 226-45 and accompanying text.

To understand the structure of the U.N. Charter and territorial questions relating to the use of force, one must distinguish the following related concepts. League Covenant Article X addressed the direct aggression problem and purported to protect small states from invasion and large-scale armed attack (invoking the idea of aggression as later employed in the Kellogg-Briand Pact). U.N. Charter Article 2(1) incorporates the concept of sovereign equality, and implies the rights and obligations attaching to territorial sovereignty. At the Dumbarton Oaks preparatory conference for drafting the U.N. Charter, Article 2(1)'s predecessor originally was thought sufficient to dispose of the aggression problem. Along related lines, the predecessor of Article 2(4) prohibited the use of armed force essentially as a mirror image of the undertaking to settle disputes peacefully. The "territorial integrity and political independence" language was only added to draft Article 2(4) of the Charter in San Francisco at the insistence of small states (to make sure that the thrust of old League Covenant Article X was not lost).⁷⁵ The significance of distinguishing the concepts is in whether the territorial incursion problem and necessity in connection with self-defense should be addressed literally under the territorial integrity language of Article 2(4).⁷⁶ If not, it is arguably a territorial sovereignty problem (involving rights but also obligations) under the basic sovereign equality scheme of Article 2(1).

III. PROPER INTERPRETATION OF THE SELF-DEFENSE CONCEPT UNDER THE U.N. CHARTER

To escape the frozen repetition of national views of self-defense which seemingly has overtaken scholarly discussion, this inquiry shall acknowledge the treaty character of the U.N. Charter⁷⁷ and engage in the

75. Russell and Muther, *History of the United Nations Charter* at 672-75 (cited in note 44).

76. As for example did Bowett, arguing that territorial integrity under Article 2(4) was not an absolute bar on incursions in the sense of inviolability, but rather only an expression of the idea that incursions must be otherwise justifiable under the customary law. Bowett, *Self-Defence in International Law* at 152 (cited in note 45) (in opposition to Lauterpacht, who argues that Article 2(4)'s language is itself aimed at the inviolability concept and is inconsistent with anticipatory self-defense). *Id.*, citing Lassa L.H. Oppenheim, 2 *International Law* 154 (Hersh Lauterpacht, ed) (David McKay, 7th ed 1948). His conclusion is not incorrect in one sense, but he did not go beyond it to make the formal connection to rights and obligations of territorial sovereignty and older necessity precedents under a self-preservation rationale.

77. Acknowledgement is due a continuing debate concerning the nature of constituent agreements creating international organizations like the U.N. Charter. See generally Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* 181-258 (Cambridge U Press, 1989). However, this inquiry deals chiefly with its Articles 2(4) and 51. Passing over longstanding academic distinctions, the debate concerns parties' attitudes towards international organizations themselves and their political role. A constituent agreement may be viewed as a constitutional document that either its political or judicial organs legitimately may interpret (through analogy to a separation of powers analysis). It is not clear, however, that a judicial interpretation generally would take precedence, and in the case of

technical exercise of treaty interpretation.⁷⁸ The correct treaty interpreta-

the ICJ's interpretations of the U.N. Charter it may not. *Id.* at 225-26, citing UN Doc 889 III/4/12 UNCIO Docs 709 (referring to a document by Committee II/2 subsequently adopted by the Conference although the document reference apparently intended is Doc 750 IV/2/B/1 13 UNCIO Docs 833-34 (1945), as a declaration prepared by a subcommittee of Committee IV/2). However, a constituent agreement may be viewed as an international law agreement like any other, the provisions of which are subject to the standard interpretative approach. While Articles 2(4) and 51 on their face relate to substantive norms, they are so bound up in the politically oriented Security Council peacekeeping system that their proper interpretation arguably must be consigned to it and not to the International Court of Justice (the Security Council would remain free to request an advisory opinion or call upon the parties under Article 33(2) to settle their dispute before the International Court of Justice). As evident in the U.S. response to the *Nicaragua Case*, serious questions exist about the justiciability of the use of force. See Oscar Schachter, *Disputes Involving the Use of Force*, in Lori Fisler Damrosch, ed., *The International Court of Justice At a Crossroads* 223 (Transnational, 1987); Eugene V. Rostow, *Disputes Involving the Inherent Right of Self-Defense*, in Lori Fisler Damrosch, ed., *The International Court of Justice At a Crossroads* 264 (Transnational, 1987). Many of the concerns expressed go to adjudications regarding on-going conflicts and compulsory jurisdiction. Their absence does not displace the abstract justiciability question or the particular U.S. position taken in the Kellogg-Briand Pact that any decision concerning the availability of the "inherent right of self-defense" may lie solely in the hands of the state laying claim to its applicability. On the whole, that part of the commentary ultimately rejecting justiciability concerns seems to have the better part of the argument. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 Am J Intl L 259 (1989). By virtue of the *Nicaragua Case* itself, the International Court of Justice has indicated that it will adjudicate questions involving the use of force and self-defense. Thus, despite any general questions regarding the scope of Article 5 of the Vienna Convention, the relevant U.N. Charter provisions are subject to canons of interpretation for treaties.

In an analogous situation, however, in the course of debating provisions for the *Draft Code* (cited in note 74), the ILC faced the problem of the substantive scope of the self-defense and necessity doctrines together with issues such as whether the text of Article 51 defined self-defense, or whether the concept enjoyed broader treatment under the U.N. Charter in determining the scope of responsibility. Its members specifically deferred determining the substantive scope of self-defense and necessity in the course of their codification efforts on the basis that such determinations could only be made by the proper organs of the United Nations. See Peter Malanczuk, *Countermeasures and Self-Defense* at 197, 260-64 (cited in note 52); *Report of the International Law Commission on the Work of its Thirty-Second session (5 May-July 1980)*, UN Doc A/35/10, reprinted in 2 part 2 YB Intl L Comm 5, 58-60 (1980). Under the circumstances, the proper organ might be the Security Council or perhaps the General Assembly, but in any case the distinguished group of jurists did not appear to contemplate that it would be the ICJ.

78. Commentators have in the past indirectly noted the differing interpretive approaches to Article 51 when arguing issues of the permissible scope of self-defense without, however, formally dealing with the correct resolution of formal interpretive theory. See McDougal and Feliciano, *Law and Minimum World Public Order* at 232-37 (cited in note 53) (rejecting another scholar's narrow interpretation of Article 51 under a "clear meaning" approach). One explanation for failure to attempt to resolve the issue as a formal matter of treaty interpretation might be questions regarding applicable customary law and a lack of consensus regarding accepted principles prior to the Vienna Convention. While too much can be made of the hidden influence of national law approaches, the groups apparently have fallen too quickly into styles of interpretation tied to their general national views of international law. In particular, this is visible in that general point of view which focuses on treaty interpretation as an exercise in determining the parties' intent, coupled here with U.S. affinity for using legislative history in interpretation, versus strict rules in other legal systems rejecting legislative history in favor of exegesis of a literal text's self-evident meaning linked with the idea of doctrinal development through rational objectivity. The legislative history affinity is distinct and not a product purely of any common law outlook, since the United Kingdom also strictly rejects the legislative history approach in interpreting parliamentary acts. See Ludwik Ehrlich, *L'interprétation des traités*, 24

tion of the U.N. Charter is that Article 2(4) is more than a general statement of principles and directly covers the use of armed force in international relations (as augmented by Article 2(1)'s sovereign equality concept). It largely incorporates the customary law in this area developed particularly in the wake of the Kellogg-Briand Pact (but subject to a final power of determination by certain U.N. organs). Article 51's specific mention of self-defense should not be understood as an independent locus of textual interpretation. Instead, Article 51 simply states a rule of preliminary disposition pending Security Council action (which preliminary disposition may remain permanently in place insofar as the Security Council is unable to act due to veto or chooses not to act). Interpretation of Article 51's language must include consideration of its "inherent right-*droit naturel*" language. This conclusion is reached by consideration of the rules of treaty interpretation relating to parties' presumed intention and when it is appropriate to go beyond the literal text to preparatory work or other sources to determine meaning.

A. Treaty Interpretation and the Correct Understanding of Self-Defense Under the U.N. Charter

As a guide to treaty interpretation, the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention")⁷⁹ is applicable to the U.N. Charter in its character as the constituent instrument of an international organization⁸⁰ (for ease of discussion, despite acknowledgement of the Vienna Convention's non-retroactive character).⁸¹ While the United States is not a party to the Vienna Convention, the U.S. State Department considers it "the authoritative guide to current treaty law and practice"⁸² and a presumptive codification of customary international law.⁸³ Based on unanimous adoption at the Vienna Conference, the Vienna Conven-

Vol IV Rec des cours 1, 118-20 (1928). The focus on the "clear sense" of the text has established roots going back to Vattel. See also notes 86-88 and accompanying text.

79. Vienna Convention on the Law of Treaties, UN Doc A/CONF 39/27, (1969), 63 Am J Intl L 875 (1969), 8 ILM 679, 1969 UN JYB 140 (concluded May 23, 1969; in force January 27, 1980) ("Vienna Convention").

80. Id at Art 5. See also note 77 and accompanying text.

81. Vienna Convention at Art 4 (cited in note 79).

82. Mark W. Janis, *An Introduction to International Law* 15 (Little, Brown, 1988) (quoting S Exec Doc L, 92d Cong, 1st Sess, at 1 (1971)).

83. Id; 1 Restatement (Third) of the Foreign Relations Law of the United States 144-5 (ALI, 1987) ("Restatement (Third)"). The presumptive codification concept is open to challenge because as the ILC itself characterized its work on the Vienna Convention as "both codification and progressive development," Janis, *An Introduction to International Law* at 15, (quoting *Report of the Commission to the General Assembly*, UN Doc A/6309/ Rev 1, reprinted in 2 YB Intl L Comm 169, 177 (1966)) with some difficulty in separating the two, Ian Sinclair, *The Vienna Convention on the Law of Treaties II* (Manchester U Press, 2d ed 1984), while others see in it more *de lege feranda* than *lex lata*, Edward Slavko Yambrusic, *Treaty Interpretation: Theory and Reality* 247 (U Press of America, 1987).

tion's provisions concerning the interpretation of treaties (Articles 31-33) have been characterized as declarative of existing law.⁸⁴

At the same time, the Vienna Conference itself highlighted two different schools of thought on the proper approach to treaty interpretation (largely paralleling national laws' jurisprudential views).⁸⁵ The first defines the primary task of treaty interpretation as ascertaining the common or real intention of the parties in an inquiry including but not limited to the treaty text,⁸⁶ while the second determines meaning of the treaty text alone on the basis of the language's ordinary meaning.⁸⁷ Apart from theoretical jurisprudential differences, the chief distinction between the two lies in the relative permissibility in the course of interpretation to references to preparatory work and party communications (as opposed to a purely textual exegesis).

Under Article 31 of the Vienna Convention, the primary rule of interpretation requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁸⁸ Context is defined to include agreements and instruments entered into in connection with the treaty's conclusion, while consideration may also be given to subsequent express agreements between the parties as well as subsequent state practice in the application of the treaty establishing the parties' agreement regarding interpretation.⁸⁹ Under its Article 32, the convention allows recourse in treaty interpretation to preparatory work

84. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Vol I Rec des cours 1, 42 (1978).

85. See note 78.

86. This is the traditional approach under U.S. views of international law; see Article 19 and Commentary in Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 Am J Intl L 655, 937-76 (Supp 1935), and also the Socialist approach essentially as a result of Socialist international law's theory of the will. See G.I. Tunkin, *Theory of International Law* 97-98 (Harvard U Press, 1974). In the context of recognition of the effects of the Vienna Convention, in addition to the use of preparatory work and related materials under its Article 32, Socialist law goes beyond traditional views of clear meaning in apparently calling for the application under Article 31 of teleological interpretation methods, see Panos Terz, *Das Grundprinzip der Vertragstreue. Die Rechtsquellen des Völkerrechts. Das Völkervertragsrecht*, in Edith Oeser and Walter Poeggel, eds, *Völkerrecht, Grundriß* 120 (DDR Staatsverlag, 1988).

87. Within these two basic views exist a larger number of national schools of thought and specific philosophies of interpretation. See Yambrusic, *Treaty Interpretation: Theory and Reality* at 9-54 (cited in note 83) (distinguishing conceptual differences and strains of Common law, Civil law and Socialist law families). For a specific example in the context of Article 2(4), see Jourslav Žourek, *La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?*, in *Mélanges offerts à Henri Rolin* 517, 519 (1964) (specific rejection of restrictive interpretation of Article 2(4) based on "legislative history" analysis of rejection of Brazilian amendment to draft Charter enlarging meaning of force to include economic coercion as impermissible given *sens clair* analysis of "force").

88. Vienna Convention at Art 31(1) (cited in note 79).

89. *Id* at Art 31(2) and (3) (cited in note 79).

and the circumstances surrounding conclusion of the treaty only if in following the application of Article 31, the language's meaning remains "ambiguous or obscure . . . or leads to a result which is manifestly absurd or unreasonable."⁹⁰ This inquiry will now apply these principles to the problem of the proper interpretation and interrelationship of U.N. Charter Articles 2(4) and 51.⁹¹

Under the Vienna Convention, the textual exegesis or ordinary meaning approach enjoys primacy in the absence of inherent ambiguity or manifestly absurd result. Publicists employing the ordinary meaning approach, but dismissing Article 51's inherent right-*droit naturel* language as mere infelicitous drafting (viewing the natural law approach as generally discredited) violate its most basic canon.⁹² The idea that self-defense is based on natural law concepts would be unacceptable under many national views of international law (for example, beyond Continental Legal Science, Socialist and Developing Nations views), but under an ordinary meaning approach the use of the natural law terminology indicates the adoption by reference of its scheme of self-defense (without reaching or expressing an opinion on the validity of the natural law approach itself, which is a national view of international law not shared by all states).⁹³ Regarding the scheme of self-defense adopted, U.S. views expressed in the notes accompanying the Kellogg-Briand Pact are representative.⁹⁴ In connection with characterizing self-defense as a "natural right," the U.S. note asserted that it was "inalienable" and "inherent in every sovereign state and implicit in every treaty."⁹⁵ Under this approach and subject to the reservation in Article 51's subsequent language to the effect that a state's actions in self-defense would not bind the Security Council, Article 51 would incorporate the views concerning self-defense as a permissible use of force expressed in connection with the Kellogg-Briand Pact, and as further developed in customary law during the remainder of the 1930s.

90. *Id.* at Art 32 (cited in note 79).

91. Beyond these formal principles of interpretation, it is noteworthy that in past proceedings the ICJ usually has taken a generous approach to the use of preparatory work and related materials. See 1 Restatement (Third) at § 325 (cited in note 83); see also *id.* at Comment e and Note 1; Yambusic, *Treaty Interpretation: Theory and Reality* at 55-144 (cited in note 83).

92. To the extent "inherent right" is ambiguous, one is already beyond Article 31 to Article 32 of the Vienna Convention and so reference to the preparatory works and circumstances is permissible. Applying the multiple language rule of Article 33 (3) eliminates the ambiguity through the substitution of *droit naturel* in the French text.

93. See Rudolf L. Bindschedler, *La délimitation des compétences des Nations Unies*, 108 Vol I Rec des cours 307, 397 (1963).

94. See notes 31-35 and accompanying text.

95. *Identical Notes of the Government of the United States to the Governments of Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, The Irish Free State, Italy, Japan, New Zealand, Poland, South Africa*, 22 Am J Intl L at 109-10 (cited in note 32).

Applying the same set of principles from the Vienna Convention, one should conclude that Article 51 itself is ambiguous. Thus, reference to preparatory work and circumstances would be permissible. On a simplistic level, the most compelling basis for recognizing ambiguity may be the very diversity of opinions concerning Article 51's true meaning. What *are* the parameters of permissible self-defense? Publicists asserting that Article 51's idea of the proper scope of self-defense is narrower than under customary law in the 1930s face a dual problem.⁹⁶ The ordinary meaning approach presumably would focus on the general international law concept of self-defense as known to participants at the 1945 San Francisco Conference which produced the final version of the U.N. Charter, or as utilized during the 1944 Dumbarton Oaks preparatory meetings. To contemporaries, the ordinary meaning presumably would be the familiar one from 1930s customary law affirmed in the Nuremberg and Tokyo war crimes trials.⁹⁷ On the other hand, if couched in terms that permissible measures of self-defense are only those literally detailed under Article 51's first sentence,⁹⁸ the clear meaning argument is undone through the ambiguity introduced by an apparently limited savings clause referring to "inherent rights" (arguably not limitable for reasons previously discussed). It is possible to argue, in the alternative, either that various positions asserted as the ordinary meaning of the treaty text are not, or, to the extent they are correct interpretations, that the treaty text is ambiguous insofar as the ordinary meaning would be something else.

Article 51's ambiguous character now permits reference to supplementary materials under Article 32 of the Vienna Convention. At this point, the "legislative history" of Article 51 and its relation to Article 2(4)⁹⁹ come to the fore. As noted by many scholars,¹⁰⁰ the predecessor

96. See, for example, sources discussed in McDougal and Feliciano, *Law and Minimum World Public Order* at 232-34 (cited in note 53).

97. It would be difficult to argue that progressive development supports the basic premise, both because arguments under the plain meaning approach have been linked to a restrictive interpretation ever since the Charter was drafted and because of steady resistance under Anglo-American views of international law. See text accompanying notes 166-67.

98. One might argue that Article 51's statements concerning what constitutes permissive force must be read narrowly and literally either under a formalistic approach applying *inclusio unius est exclusio alterius*, or under the more general renunciation of the use of force in international relations contemplated by Article 2(4) and other U.N. Charter provisions.

99. A similar exercise exploring ambiguities is possible for Article 2(4), but is unnecessary because of its relationship to Article 51. Much of the debate concerning the scope of Article 2(4) has centered on whether its general prohibition on the use of force is limited to armed force or extends also to economic coercion. This article discusses only the use of armed force, so it is unnecessary to examine the issue of how far beyond the prohibition may extend. The issue is subject to some confusion in collateral areas touching on the use of armed force. For example, older, broader versions of the self-preservation rationale may encompass economic interests while asserting that the self-defense concept applies (e.g., the *Bering Sea Arbitration*, see note 2 and accompanying text), but this confuses the nature of permissible force with the current scope of the self-preservation rationale itself.

drafts of what became the U.N. Charter originally contained no mention of self-defense (and as such were directly comparable to the Kellogg-Briand Pact). At Dumbarton Oaks, this was explained by the fact that the Charter could not in any case "deny the inherent right of self-defense against aggression."¹⁰¹ The subsequent addition of Article 51 therefore was not an attempt to change the substantive scope of self-defense as narrowly understood in terms of the 1930s customary law.¹⁰² Instead, Article 51 was inserted to clarify the point that the new Security Council system would not displace contemporaneous efforts involving the creation of regional security systems (specifically the Inter-American system contemplated by the 1945 Act of Chapultepec).¹⁰³ The Security Council remained responsible for any disturbances or threats to international peace, however, so regional organizations could only act on an emergency basis pending Security Council action.¹⁰⁴

Despite the above technical exercise of treaty interpretation, one might argue that more than forty years of international law development and many divergent interpretations of the relevant U.N. Charter provisions have overtaken whatever the treaty parties intended originally. Outside of Anglo-American international law scholarship, the textualist view predominates (that Article 51 is the locus of radically new substantive law). However, this ignores the basic idea that states make international law. Despite claims of progressive development in international law, unless states intend changes, even support by the united voice of all publicists will not result in change in the law. Concerning self-defense and the use of armed force, however, there is no unanimity of publicists'

100. See McDougal and Feliciano, *Law and Minimum World Public Order* at 235 (cited in note 53); Bowett, *Self-Defence in International Law* at 182-84 (cited in note 45); Russell and Muther, *History of the United Nations Charter* at 688-704, 1019-28 (cited in note 44); Leland M. Goodrich and Edward Hambro, *Charter of the United Nations* 297-99 (World Press Foundation, 2d ed 1949); Doc 576 III/4/9 12 UNCIO Docs 680-82 (1945) (Summary Report of Fourth Meeting of Committee III/4); Doc 972 III/6 11 UNCIO Docs 52-59 (1945) (Commission III: Security Council).

101. McDougal and Feliciano, *Law and Minimum World Public Order* at 235 note 257 (cited in note 53) (citing Russell and Muther, *History of the United Nations Charter* at 466) (cited in note 44).

102. See McDougal and Feliciano, *Law and Minimum World Public Order* at 235-36 (cited in note 53) (citing Doc 944 I/1/34(1) 6 UNCIO Docs 446, 459 (1945) (Report of Rapporteur of Committee I to Commission I, as adopted by Committee I/1).

103. See Russell and Muther, *History of the United Nations Charter* at 688-704, 1019-28 (cited in note 44). See also notes 187-92 and accompanying text; J. Lloyd Meacham, *The United States and Inter-American Security, 1889-1960* 249-77 (U Texas Press, 1961) (expressing view of Latin American states concerning continuation of regional security arrangements and problems with the Security Council system itself, since the original Dumbarton Oaks proposals provided that Security Council authorization would be necessary before any regional security organization could take enforcement action).

104. Even then states expressed concerns about the functioning of a politicized Security Council system. Regarding the relative priority of regional versus centralized security arrangements, Latin American states saw the U.S. veto in the Security Council as a guarantee of regional resolution of problems. See Meacham, *The United States and Inter-American Security* at 249-77 (cited in note 103).

interpretations or states' views. Under those circumstances, it is a mistake to purport to determine current international law in this important area simply by reference to whichever interpretation is politically popular or congenial under the largest number of national views of international law, or is supported by more publicists.

To the extent states intended to retain the restricted customary law view of self-defense and the use of armed force under the U.N. Charter, one should not lose sight of the fact that the community of states perceived customary law rules as reasonable and chose them in a functional sense because they furthered international peace and order more than other options (such as utopian international law schemes to abolish states' use of armed force completely or to establish a world-state). Along these lines, at least one publicist, seeking to rationalize U.N. Security Council practices in the face of their literal disregard of the U.N Charter's proscription on the use of armed force, apparently unconsciously has "rediscovered" the substance of customary law views as predictive of the international community's views on armed self-help.¹⁰⁵ More recently, in light of an admitted failure of the U.N. Charter system to suppress armed conflict, other publicists, normally espousing restrictive views concerning the use of force, have noted a certain disregard of such interpretations in state practice. They draw the tentative conclusion that, because of disuse, U.N. Charter restraints either have disappeared or are losing force under modern international law (chiefly the broad prohibition on the use of armed force under Article 2(4)).¹⁰⁶ They omit to offer principled alternatives while perhaps contemplating the dangerous possibility that no restraints remain once the admission is made that state practice does not follow the most restrictive doctrinal views of U.N. Charter provisions and insufficient state practice exists to recognize new customary law as having replaced it. It would be better to admit that the functional rules of a restricted customary law approach (reconciling international law's systematic problems with self-help and self-preservation interests) never lost their force, a view which current state practice supports.

105. See Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 Am J Intl L 415 (1969). The actual parallelism noted was in the area of reprisals. See Nicholas Greenwood Onuf, *Reprisals: Rituals, Rules, Rationales* 52-53 (Princeton Center of Studies Research Monograph No 42, July 1974).

106. See Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 Am J Intl L 809 (1970). See generally Malanczuk, *Countermeasures and Self-Defense* at 245-46 (cited in note 52); Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in Antonio Cassese, *The Current Legal Regulation of the Use of Force* 505-23 (Martinus Nijhoff, 1986); *The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?* Proceedings of the 78th Annual Meeting of the American Society of International Law 68 (1984); Albrecht Ranzelhof, *Use of Force*, in Rudolf Bernhardt, ed, 4 *Encyclopedia of Public International Law* 265, 274-75 (North-Holland, 1982).

B. Proportionality and Problems with Broad Self-Judging Views

Of interest here are two distinct legal issues intertwined in a practical sense. First, it is necessary to evaluate the claim often advanced in connection with a natural law-based self-preservation view that a state's good faith claim of self-defense is not open to any examination. The presumption behind this broad self-judging claim is that a state's right of self-preservation would be imperfect if subject to another's review. If self-defense were entirely self-judging (which it is not), there would be no necessity to confront the second legal issue, which is whether the principle of proportionality is part of, and imposes limitations on, self-defense itself.

Regarding self-judging claims, U.S. views of the international law self-defense concept reflect strong natural law influence. This view of an "inherent" right, reaching back to Grotius and beyond,¹⁰⁷ posits that the right of self-preservation is paramount. Under a broad view of necessity, it puts the state fighting for its continued existence beyond otherwise-binding international law restraints. Its most obvious logical weakness lies in the fact that it is fundamentally inconsistent with the idea of sovereign equality. If one state had an absolute right of self-preservation, other states would perforce have a corresponding obligation to suffer any and all of its acts which otherwise objectively violate their rights.¹⁰⁸ Such a system has never been effective in state practice, because it would break down upon assertion of reciprocity.¹⁰⁹ As the leading U.S. international

107. Hugo Grotius, *De Jure Belli Ac Pacis* 172 (Francis W. Kelsey, trans) (Carnegie Endowment, 1925). Grotius may be its modern source, but in fact its roots go back through just war doctrine under scholastic ideas and to ancient authors. See Jaroslav Žourek, *La notion de légitime défense en droit international: Aperçu historique et principaux aspects du problème (Dix-septième Commission), Rapport provisoire*, 56 *Annuaire de l'institute de droit international* 1, 10-17 (1975).

108. See Charles de Visscher, *Les lois de la guerre et la théorie de la nécessité*, 24 *Revue générale de droit international public* 74, 76 (1917) (citing Lassa L.H. Oppenheim, 1 *International Law* 184 (Longman, Green, 2d ed 1912)). There has been little support expressed for the few modern attempts articulating claims that a state, the international law rights of which are violated by a second state, is legally required to submit to the objectively illegal acts of the second state claiming necessity. See Žourek, 56 *Annuaire de l'institute de droit international* at 67 (cited in note 107) (criticizing Strupp).

109. Continental commentators also have suggested at times a hierarchy of rights in which one state's self-preservation concerns overcome other states' lesser rights, but this jurisprudential approach borrowed from Hegelian views of necessity is now out of favor. See de Visscher, 24 *Revue générale de droit international public* at 87-93 (cited in note 108). The hierarchy of values approach still exists in some Continental Legal Science views of justification and excuse under municipal criminal law, see Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts: Allgemeiner Teil* § 32 at 317 (Duncker and Humblot, 4th ed 1988) (noting *Kollisionstheorie*); Paul Bockelmann, *Hegels Notstandslehre* 21-69 (Walter de Gruyter, 1935), but the analogy does not hold for international law at least with regard to the use of force. The original background for Article X of the League Covenant and its successor in Article 2(4) of the U.N. Charter included the World War I violation of neutral Belgium's territorial integrity, claimed by contemporary German scholarship to be less important than Germany's self-preservation interest in attacking France through Belgium. See de Visscher, 24 *Revue générale de droit international public* at 89 (cited in note 108).

law statement concerning self-defense, Webster's assertion of limitations on claimed British rights makes the entire *Caroline* precedent itself inconsistent with the extreme position that the mere assertion of core self-preservation interests automatically frees a state from otherwise binding international law obligations.

The Kellogg-Briand Pact note is a superficially absolute assertion of an inherent self-preservation right, including unilateral determination of when self-defense can be claimed. However, even beyond the *Caroline* test, U.S. international law practice customarily has not recognized such a reciprocal right in other states. In the nineteenth century case of the *Virginius*,¹¹⁰ during a Cuban insurrection this merchant ship of apparent U.S. nationality was stopped and seized on the high seas by a Spanish warship (due to suspicion that its crew, including British and U.S. sailors, was sailing to Cuba to give assistance to the insurrection). The ship was taken into port, and numerous British and U.S. crew members were summarily executed. The United States and the Great Britain immediately challenged Spain's action. Under contemporary international law views Spain had no colorable independent ground for interference with the vessel's free passage during peacetime on the high seas. For that reason, it claimed self-preservation and necessity in connection with suppression of the colonial revolt.

The difference between United States and British views is instructive. The British government accepted the idea that necessity justified the otherwise unlawful seizure of the vessel, but objected to the summary executions as lacking due process.¹¹¹ On the other hand, the United States government refused to recognize the necessity claim despite clear documentary evidence that the vessel did not in fact enjoy U.S. nationality. The U.S. ship's papers were procured by a U.S. legal owner, but its beneficial owners were Cuban (and so the vessel did not enjoy U.S. nationality under contemporary law). The matter eventually was resolved on the basis of the U.S. government's insistence on its sole power to determine the U.S. nationality of the *Virginius* (it was summarily determined not to be, disposing of the impediment to Spain's capture of the vessel), coupled with formal assurances from Spain that it intended no disrespect to the United States. Under the circumstances, Britain recognized the overriding self-preservation/necessity claim where the United States did not.¹¹²

110. See John Bassett Moore, 2 *Digest of International Law* 895-903 (US Government Printing Office, 1906) (account of incident addressing points discussed in text).

111. See Brierly, *The Law of Nations* at 316 (cited in note 14); Gilbert Gidel, 1 *Le droit international public de la mer* 349 (Mellortée Chateauroux, 1932).

112. The *Virginius*' character as a U.S. vessel theoretically may have raised greater U.S. than British concerns, but on the facts and given clear documentation of its false nationality the U.S. rejection of a claim of overriding necessity in opposition to its rights is clear. A question has been

World War I witnessed many violations of neutral rights clearly recognized under pre-1914 international law. For example, under a claim of necessity, Germany occupied neutral Belgium (justified as preempting a French occupation of Belgium). Germany claimed that its self-preservation interests overcame Belgian territorial rights.¹¹³ Also, Great Britain and Germany claimed necessity in the early establishment of mined war zones.¹¹⁴ Germany asserted later that its otherwise unlawful unrestricted submarine warfare was permissible under reprisal doctrine and a self-preservation/necessity rationale in response to unlawful British activities.¹¹⁵ United States rejection of the German position led to a break in diplomatic relations and eventual entry into the war.¹¹⁶ The general U.S. rejection of mined war zones and unrestricted submarine warfare presents an example of nonrecognition of the broad self-preservation/necessity argument in a wartime setting.

Following World War II, defense counsel at war crimes trials took the position that a variety of Axis measures allegedly constituting unlawful aggressive war actually were taken in self-defense. The German invasion of neutral Norway was purportedly undertaken to deny Great Britain the opportunity to invade and appropriate Norway as a forward base for sea and air attacks directed against Germany.¹¹⁷ The International Military Tribunal at Nuremberg accepted the possibility of such a defense, but went on to state that the necessary elements articulated in the *Caroline*

raised whether this U.S. position was not implicitly abandoned in the subsequent case of *The Mary Lowell*. See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 79-80 note 31 (Stevens and Sons Ltd, 1953). The better view is that it was not, because those adopting such a position rely on an arbitral judgment involving a private party (deemed estopped from claiming protection of a flag) and the arbitrator recognized that the result might have been different had the United States been involved as a party. See Gidel, 1 *Le droit international public de la mer* at 350 note 2 (cited in note 111); John Bassett Moore, 2 *Digest of International Law* at 983 (cited in note 110); John Bassett Moore, 3 *History and Digest of the International Law Arbitrations to which the United States has been a Party* 2772-77 (US Government Printing Office, 1898).

113. See notes 108-9.

114. See Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* 87 (Columbia U Press, 1928).

115. See *Telegram from the Ambassador in Germany (Gerard) to Secretary of State, May 4, 1916* in US Department of State, *Papers Relating to the Foreign Relations of the United States* 257, 259 (US Government Printing Office, Supp 1916); *Telegram of the Secretary of State (Lansing) to the Ambassador in Germany (Gerard), Papers Relating to the Foreign Relations of the United States* 263 (US Government Printing Office, Supp 1916); *Telegram of the German Ambassador in Washington (Bernstorff) to the Secretary of State (Lansing), January 31, 1917, Telegram of the Secretary of State (Lansing) to the Ambassador in Germany (Gerard), Papers Relating to the Foreign Relations of the United States* 97, 100 (US Government Printing Office, Supp 1917).

116. See Charles Cheney Hyde, 3 *International Law Chiefly as Interpreted by the United States* 2011-13, 2018-20 (Little, Brown, 2d ed 1947).

117. See Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* at 328 (cited in note 35); see generally F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 *Am J Intl L* 770, 774 (1947).

precedent (immediacy, unavoidability and proportionality) were lacking.¹¹⁸ As a result, the tribunal held the defense unavailable. In reaching this conclusion, the tribunal squarely faced the issue whether it could re-examine the German decision made during the war. Defense counsel specifically argued that these measures were self-judging on the authority of the U.S. note exchange in the conclusion of the Kellogg-Briand Pact.¹¹⁹ As a result of Germany's sovereign character, neither its basis for claiming self-defense nor its determinations concerning individual elements of the *Caroline* test could be reexamined. The tribunal rejected the argument¹²⁰ on the grounds that international law otherwise would have no effectiveness, which contemporary jurists recognized as a clean and final break with the position that sovereignty precluded reexamination of a state's acts serving its self-protection.¹²¹

By historically refusing reciprocal application, United States practice weakens a claim to any potential position asserting the sole right by a threatened state to determine the availability of self-defense. Further, such a position is not currently supportable under state practice, judging by its specific rejection by the League of Nations in reviewing Japanese activities in Manchuria during the 1930s,¹²² by the Nuremberg tribunal as noted above,¹²³ and implicitly by the International Court of Justice in rejecting the collective self-defense claim in the *Nicaragua Case*.¹²⁴ Under present circumstances, any assertion of a natural law basis for self-defense along the lines of the Kellogg-Briand Pact note would be viewed at best as a peculiarly national view of international law.

One should recognize that the U.S. position espoused in the Kellogg-Briand Pact note represents a confusion of political with legal princi-

118. McDougal and Feliciano, *Law and Minimum World Public Order* at 232 (cited in note 53).

119. See Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* at 329 (cited in note 35).

120. In rejecting the authority of the League of Nations to pass judgment on its 1931 Manchurian invasion, Japan made similar arguments and referred to the U.S. note exchange over the Kellogg-Briand Pact. The League Council rejected this position. See Bowett, *Self-Defence in International Law* at 32-33 (cited in note 45). The United States was not a member of the League, however, so this is merely evidence of general international law and not particular U.S. views.

121. See Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* at 329 (cited in note 35); Schick, 41 *Am J Intl L* at 774 (cited in note 117).

122. See George Scott, *The Rise and Fall of the League of Nations* 230-38 (Hutchinson of London, 1973). See generally Seki Hiroharu, *The Manchurian Incident, 1931*, in James Williams Morely, ed, *Japan Erupts: The London Naval Conference and the Manchurian Incident, 1928-1932* 139 (Columbia U Press, 1984); Shimada Toshihiko, *The Extension of Hostilities, 1931-1932*, in James Williams Morely, ed, *Japan Erupts: The London Naval Conference and the Manchurian Incident, 1928-1932* 231 (Columbia U Press, 1984); Chiro-Tung Liang, *The Sinister Face of the Mukden Incident* (St John's U Press, 1969); Takehiko Yoshihashi, *Conspiracy at Mukden: The Rise of the Japanese Military* (Yale U Press, 1963).

123. See notes 117-21 and accompanying text.

124. See notes 166-81

ples.¹²⁵ To the extent it ever was a statement of legal position, United States agreement under the U.N. Charter to the Security Council system forced it to abandon an absolute international law claim of right to determine unilaterally the availability of self-defense (unilateral action is only permissible pending action by the Security Council; the United States' practical protection is in its veto power as a permanent member of the Security Council).¹²⁶ If the United States as a matter of national policy disagrees with a duly authorized legal evaluation of the permissibility of self-defense,¹²⁷ its option is the political one permitted by U.S. views of municipal law supremacy. Under the U.S. Constitution, the President in the exercise of the foreign affairs power¹²⁸ or the Congress under its legislative powers¹²⁹ may choose consciously to disregard binding international law obligations without violating municipal law principles.¹³⁰ This Constitutional power does not, however, avoid or vitiate the binding obligation in the international law sphere.¹³¹

The question of proportionality is whether actual self-defense is subject to any restraints on the manner of its exercise once its preconditions have been met. The issue typically is phrased in terms of whether the self-defense concept itself incorporates proportionality restraints (or at least such restraints have been incorporated into customary law), versus the idea that such restraints are not and should not be recognized. Opinion largely divides along the lines of the basic approach to determining whether the use of force is lawful. Those who articulate a narrow customary law view of self-defense supported by the *Caroline* precedent typically

125. See de Visscher, 24 *Revue général de droit international public* at 94-96 (cited in note 108) (strict assertion by any state of natural law position arguing sole power of decision over self-defense is a confusion of political with legal positions).

126. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 *Am J Intl L* 259, 262-63 (1989).

127. This assumes it is made by United Nations organs with jurisdiction under the Charter to make a binding determination.

128. See *Garcia-Mir v Meese*, 788 F2d 1446, 1453-55 (11th Cir 1986); *Ferrer-Mazorra v Meese*, 479 US 889 (1986); 1 *Restatement (Third)* at § 115 (cited in note 83); *id* at note 3.

129. See *id* at notes 1-2; *Whitney v Robertson*, 124 US 190 (1888).

130. This idea of the constitutional basis for supremacy of consciously inconsistent municipal law over international law is the subject of dispute, but the better view maintains its validity. See generally the American Journal of International Law commentary under *Agora: May the President Violate Customary International Law (Cont'd)?* including Anthony D'Amato, *The President and International Law: A Missing Dimension*, 81 *Am J Intl L* 375 (1987); Frederick L. Kirgis, *Federal Statutes, Executive Orders and "Self-Executing Custom"*, 81 *Am J Intl L* 371 (1987); Jordan J. Paust, *The President Is Bound by International Law*, 81 *Am J Intl L* 377 (1987); Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 *Am J Intl L* 913 (1986); Michael J. Glennon, *Can the President Do No Wrong?*, 80 *Am J Intl L* 923 (1986); Louis Henkin, *The President and International Law*, 80 *Am J Intl L* 930 (1986).

131. Under the U.S. Constitution it is easier to recognize the political nature of the self-defense decision than in nations which make international law expressly binding over municipal law, even in municipal proceedings, and give the judiciary more control over the executive branch.

would affirm proportionality's existence. On the other hand, those who approach lawful self-defense in terms of any armed force exercised in opposition to "aggression" typically reject the idea.

Disregarding the *Caroline* precedent for a moment, it is difficult to attribute much significance to any hypothetical proportionality requirement regarding the use of armed force in connection with self-defense *per se* prior to the rise of modern international law's general restraints on the use of force. However, the linkage between the *ex post* review of self-defense and proportionality became apparent early in the development of the modern law in the League of Nations treatment of the 1925 *Greco-Bulgarian Frontier Incident* (involving the shooting of two Greek frontier guards by their Bulgarian counterparts, resulting in a Greek invasion of Bulgarian territory).¹³² Here the issue was the permissibility of Greece's

132. The 1925 *Greco-Bulgarian Frontier Incident* evolved out of a minor border incident entailing the death under contested circumstances of two Greek soldiers at a remote frontier post. See League of Nations OJ A6 192, 179-84 (Spec Supp No 44 1926) (Report to the Seventh Assembly of the League on the Work of the Council, on the work of the Secretariat and on the Measures Taken to Execute the Decisions of the Assembly); James Barros, *The League of Nations and the Great Powers: The Greek-Bulgarian Incident* 2 note 3 (Clarendon Press, 1970).

Following the cessation of immediate hostilities, the League of Nations empaneled a Commission of Inquiry. See Brownlie, *International Law and the Use of Force by States* at 140-41 (cited in note 5). Among relevant findings, the Commission concluded that the entire incident originated in a quarrel between individual Greek and Bulgarian sentries (but had spread to reserves at the rear). Just when the original conflict began to die out of its own accord, the mistaken information that Bulgarian troops had invaded caused the Greek government to send two army corps into Bulgarian territory. The actions of neither side were premeditated, and the Greek forces were only carrying out a "policing operation" without intent to permanently acquire Bulgarian territory. *Id.* at 141. As rapporteur in the dispute, the British Foreign Secretary opposed Greece's significant military response to the minor nature of the frontier incident in presenting the Report to the Council for adoption:

[E]ven if this information [concerning battalion strength Bulgarian entrenchments just inside Greek territory] had been accurate, the Greek Government would not have been justified in directing the military operations which it caused to be undertaken. . . . [W]e believe that all the Members of the Council will share our view in favour of the broad principle that where territory is violated without sufficient cause reparation is due, even if at the time of the occurrence it was believed by the party committing the act of violation that circumstances justified the action.

League of Nations OJ 173 (1926) (Council Meeting of December 14, 1925), repeated in League of Nations OJ A.6 1926 at 184 (Spec Supp No 44 1926). The repetition of this statement in the report to the Assembly on the Council's activities is evidence of contemporaries' consciousness of its importance as the enunciation of a general principle. The Council adopted the Report in reliance only on Article XI (threat of war and circumstances threatening to disturb international peace) of the League Covenant, but territorial invasion and use of force questions already blended together under the League Covenant. By his language, the rapporteur focused on the problem of an excessive Greek military response to a relatively minor frontier incident by *de facto* invasion of Bulgaria. The Council required Greece to pay an indemnity.

The *Greco-Bulgarian Frontier Incident* occurred immediately following execution of the Locarno Treaties. The Great Power political figures involved at the League of Nations were substantially the same as at Locarno and largely would be those involved subsequently in creation of the Kellogg-Briand Pact (for example, Briand himself). As such, their views regarding self-defense and the use of force take on significance as evidence of apparent *opinio juris* at the level of state practice. The indi-

claim to self-defense in support of its broad incursion eight kilometers into Bulgarian territory. This self-defense claim was based upon alleged Bulgarian occupation in battalion strength of a limited area surrounding a frontier post in Greek territory. The proportionality issue blends here with the question whether any Greek use of force could be justified under self-defense.

Originally, Greece simply asserted in response to Bulgaria's appeal to the League of Nations that it was acting in self-defense. As President of the League Council, Briand recognized the danger that self-defense might be a pretext for broadening a minor incident into a major conflict.¹³³ In conveying the League Inquiry Commission's report to the Council, British Foreign Secretary Chamberlain, acting as rapporteur, asserted the specific legal principle that even were the facts to be as Greece (mistakenly) perceived them, Greece's relatively deep incursion in army corps strength into Bulgaria would be unlawful.¹³⁴ Briand and Chamberlain's sentiments were not identical, however, insofar as Briand seemed concerned about the potential for abuse of self-defense and the danger of broadening conflict while Chamberlain asserted as a matter of law that Greece's disproportionate use of force was unlawful.

Chamberlain's statement may be ambiguous. His analysis was based either on the proposition that the claimed self-defense was pretextual (and Greece merely desired to "teach Bulgaria a lesson"), or originally would have been permissible but was carried to unlawful excess. In the more general context of determining aggression, soon thereafter another League report seemingly resolved any question in asserting that "*la légitime défense suppose l'emploi de moyens proportionnés à la gravité de l'attaque et dont l'usage est justifié par le danger pressant.*"¹³⁵ In exceed-

vidual incident is a single precedent, but importantly its background evidences state practice of broader acceptance concerning violation of international law obligations relating to the use of force.

133. The English language version of the League of Nations Official Journal states:

Briand understood the representative of Greece to indicate that all these incidents would not have arisen if his country had not been called upon to take rapid steps for its legitimate defense and protection. . . . It was essential that such ideas should not take root in the minds of nations which were Members of the League and become a kind of jurisprudence, for it would be extremely dangerous. Under the pretext of legitimate defense, disputes might arise which, though limited in extent, were extremely unfortunate owing to the damage they entailed. These disputes, once they had broken out, might assume such proportions that the Government, which started them under a feeling of legitimate defense, would be no longer able to control them.

League of Nations OJ 1709 (1926). French language sources appear to quote Briand directly, and deal specifically with the facts of the Greco-Bulgarian incident without reaching border disputes in general. Žourek, 56 *Annuaire de l'institute de droit international* at 43 (cited in note 107) (quoting *Société des nations journal officiel* 1707 (1925)).

134. See note 132.

135. Žourek, 56 *Annuaire de l'institute de droit international* at 43 (cited in note 107) (quoting de Brouckere 1926 report, League of Nations Doc A.14.1927.V at 69 (1924)). "Self-defense presup-

ing these bounds, the state that originally might have been defending itself would become an unlawful aggressor.¹³⁶

The perceived problem with this approach becomes apparent when contemplating the difference between an isolated incident and a conflict of broader scope.¹³⁷ If excessive armed force renders self-defense aggression, how can one determine what is "excessive"? In the case of an isolated incident, the straightforward answer is that armed force beyond a limited amount reasonably necessary to resolve the situation is excessive. In the case of a broader conflict such as one involving territorial invasion, any number of military strategic responses may be appropriate depending upon the situation. As a result, it is harder to say what is excessive because rarely will it be clear in advance how and when the conflict can be brought most expeditiously to a close. It is certainly appropriate for the armed forces of the state attacked to drive out invaders, but is it lawful to pursue them into their own territory afterwards? Militarily speaking, the fastest way to end the war for the attacked state might even be simply to launch its own massive invasion of the aggressor state's home territory while holding the original invaders in check in its own territory (analogous to the recent bombing of Iraq in lieu of limiting attacks to Iraqi troops stationed in Kuwait). Is this "massive" counterinvasion then aggression? To what extent does proportionality permit the use of massive force to minimize casualties on one side? Here dropping the atom bomb on Japan at the end of World War II comes to mind (instead of proceeding with a seaborne invasion of the Japanese home islands in which tremendous U.S. casualties were expected, an action which is analogous to the recent intense aerial bombardment of Iraq and Iraqi military targets apparently in initial preference to a ground war presumed to involve higher U.S. and allied casualties)¹³⁸. The checkered history of attempts to

poses the use of means proportional to the seriousness of the attack, and that its employment is justified by the immediate nature of the danger." (Author's translation).

136. Aggression definitions from the 1933 Soviet definition through the 1974 Definition of Aggression (cited in note 26) commonly exclude frontier and similar minor incidents from categories justifying responsive armed force.

137. See Žourek, 56 *Annuaire de l'institute de droit international* at 48-49 (cited in note 107).

138. This is an analogy to the extent that military activities against Iraq are pursued under the Security Council's authority, although proportionality concerns are similar. There are potential interpretive differences concerning UN SC Res 678, UN Doc S/RES/678 (1990). Paragraph 2's operative language

Authorizes member states cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement [the Security Council resolutions pertaining to the removal of Iraq from occupied Kuwait] and to restore international peace and security in the area. . . .

Id. The crux of the problem is the issue whether the use of armed force to remove Iraq from Kuwait was truly necessary, or whether given enough time economic sanctions would have sufficed. The point is perhaps moot, but one expects that some states may claim lack of necessity (if opposed to the use of armed force on political or other grounds). In this case, on-going military operations to remove

define aggression itself bears witness to the improbability of developing easy *a priori* tests for when armed force becomes excessive.

While extreme responses are easy to judge as disproportionate, most incidents involving armed force fall in the middle of the spectrum and are only the last in a confusing chain of events. Implication of any proportionality requirement then is resisted (particularly under Socialist views of international law), because it potentially might hinder response to aggression and thus could unintentionally favor the state guilty of the original unlawful use of force. As a result and despite the League precedent, differences in state views concerning proportionality became particularly apparent in the course of the U.N.'s long-running effort to define aggression. Modern academic debates concerning the subject have been further confused by a tendency to examine the question of proportionality in terms of the lawfulness of nuclear response to a conventional forces attack (confusing special arguments about employment of nuclear weapons with the generic problem of excessive force).¹³⁹

Recalling again the *Caroline* precedent, the question arises whether the element of proportionality in the famous Webster test¹⁴⁰ is inherent in the self-defense concept *per se* versus the idea that it is an element of the discrete necessity aspects of the case or arises out of the territorial incursion element. Depending upon the answer, in theory proportionality requirements might then differ even in isolated instances as between an incident involving armed force taking place on or over international waters (the 1988 downing of Iran Air Flight 655 in the Persian Gulf by the U.S.S. *Vincennes*), in foreign territory (the *Caroline* situation) or on or over a state's own territory (the 1983 downing of Korean Airlines Flight KE 007 by the Soviet Union, claiming that it was engaged in espionage activities during its overflight of Soviet territory).

Secretary Webster's language addressed measures taken by British forces to uphold that state's legitimate interests beyond the power of local (U.S.) government to protect. Close examination of the statement reveals that within the *Caroline* test the meaning of necessity varies, but in terms of the older law largely goes to the element of self-help on foreign territory rather than directly to a narrowly understood self-preservation rationale.

Iraq from Kuwait might be justified under collective self-defense (as preserved under UN SC Res 661, UN Doc S/RES/661 (1990), reprinted in 29 ILM 1325 (1990). Such an interpretation would then present the self-defense/proportionality question directly.

139. This tendency to view the proportionality question in terms of nuclear weapons' lawfulness as opposed to excessive force in connection with self-defense is evident even among distinguished publicists. See Žourek, 56 *Annuaire de l'institute de droit international* at 48-49, 70, 73, 75-79 (cited in note 107) (especially questions 8 and 9 of Žourek's questionnaire and the related answers of other publicists).

140. See note 61 and accompanying text.

By its terms, however, the proportionality requirement does address the core self-preservation interest, since

even supposing the necessity . . . authorized [entry into the United States, British armed forces] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.¹⁴¹

One should understand the Webster test against the background of the broader natural law-based sense of self-preservation as understood by then-contemporary international law¹⁴² (particularly under British views, as the test was articulated in a diplomatic exchange concerning differences with the British Government). The proportionality requirement itself was simply a means to impose limits on any unilateral claim of an absolute right to take action based on sovereignty. As such, proportionality's proper role in minimizing the danger of escalating conflicts under modern restrictions on the use of armed force has not diminished.

Beyond older broad claims of self-preservation, proportionality should be recognized as a useful limitation on all sovereignty-based views of international law (including any residual natural law influences under various states' views of international law, positivist views of agreement within a hypothetical community of states, or Socialist international law's will theory). To the extent questions remain about practical difficulties applying proportionality principles to large scale conflicts, this should not disqualify or distract from its application to localized incidents.¹⁴³ The recognition of proportionality's application may help as in the *Greco-Bulgarian Frontier Incident* to minimize the very danger that an uncontrolled local incident may expand to a large scale conflict.

C. Past, Present and Future International Court of Justice Case Law: The *Corfu Channel*, *Nicaragua* and Pending *Iran Flight 655* Cases

The *Corfu Channel Case* involved the alleged state responsibility of Albania for foreign warships' mine-inflicted losses suffered in its territorial waters during peacetime.¹⁴⁴ The case's peculiar posture presented

141. *Id.*

142. See Žourek, 56 *Annuaire de l'institute de droit international* at 19-21 (cited in note 107).

143. The interpretation and place of proportionality principles under international law is a separate source of disagreement among different national views of international law. A full examination of the differences lies beyond the scope of this article, although on a tentative basis it appears that such principles under Continental Legal Science views are borrowed in part from municipal public law, while Anglo-American views (at least in the legality of force area) derive them from necessity principles. Proportionality principles met with a mixed reception in the ILC's preparation of the Draft Code; proportionality was recognized only in connection with reprisals. See 1985 DGfV Proceedings at 121-22 (cited in note 72).

144. See *Corfu Channel Case Judgment of April 9th, 1949* (UK v Albania), 1949 ICJ 4 ("*Corfu Channel Case*").

substantial issues both in the area of the law of straits and territorial waters¹⁴⁵ as well as Great Britain's threat or use of force within another state's jurisdiction (together with the basic issue of Albanian responsibility for the mine damage). State responsibility issues in the *Corfu Channel Case* are beyond the scope of this inquiry.¹⁴⁶ Instead, the focus of this article is whether the disputed assertion by British warships of innocent passage rights was permissible during a time of heightened regional tension in traversing a claimed international strait, or whether the passage constituted a violation of Albanian territory (territorial waters being assimilated to territory for these purposes).

Over a period of time, Albania had contested the legality of foreign ships' passage through the Corfu Channel in an area in which Greece, which was technically at war with Albania, claimed portions of Albanian territory. One day, an Albanian coastal battery fired in the direction of two passing British warships making the first passage.¹⁴⁷ Thereafter, Great Britain ordered its warships to avoid the area for a time until it informed Albania by diplomatic note that in the future shore battery fire would be returned. Subsequent naval orders were issued specifically to traverse the strait (retesting the Albanian response for political reasons).¹⁴⁸ Four warships were sent into the straits in battle readiness (in anticipation of receiving fire from the coastal batteries), but in a manner preserving their peaceful appearance. Unbeknownst to the British warships, prior to this second passage unidentified parties had mined the straits. Two British warships struck mines, suffering significant damage and loss of life. British ships passed through the strait a third time to sweep Albanian territorial waters for mines in gathering evidence. Regarding the mines' source, it appeared that Albania lacked the technical capacity to perform the mining operations. In the end, the question became whether the mining had been undertaken by Yugoslavia at Alba-

145. For a review of the straits and territorial waters issues, see Daniel Patrick O'Connell, 1 *The International Law of the Sea* 260-317 (I.A. Shearer, ed) (Clarendon Press, 1982); Il Yung Chung, *Legal Problems Involved in the Corfu Channel Incident* 173-231 (Librairie E. Droz, 1959).

146. The issue of state responsibility is, however, raised directly in the Kuwait context by ¶ 8 of UN SC Res 674, UN Doc S/RES/674 (1990), which raised the issue of Iraq's additional responsibility to Kuwait also for indemnity. Most recently, the International Court of Justice recognized Iranian liability in the *Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment)* (US v Iran), 1980 ICJ 3 ("Hostages Case") (this claim was then compromised by the U.S. in the Algiers Accords, *Agreement on the Release of the American Hostages*, 81 Dept of State Bull 1 (February 1981), reprinted in 20 ILM 223 (1981)), and on the United States' part in the *Nicaragua Case*, 1986 ICJ 14 (cited in note 60). See also Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 Va J Intl L 891 (1990). There are older precedents too, notably in the League of Nations treatment of the 1925 *Greco-Bulgarian Frontier Incident* (cited in note 132).

147. *Corfu Channel Case*, 1949 ICJ at 27 (cited in note 144).

148. *Id.* at 27-28.

nia's behest (deemed not proven), or, without regard to the identity or the minelaying culprit, whether Albania knew or should have known of the mining due to its coastal watch (the view embraced in the Court's opinion,¹⁴⁹ but a point of dispute in dissenting opinions asserted that this did not constitute fault as required by principles of state responsibility).¹⁵⁰

The issues presented under the law of straits and territorial waters concerned unsettled problems of international law, namely whether the Corfu Channel constituted an international strait (the answer depended upon the choice from among several competing legal tests) and whether the British warships passing through were exercising innocent passage rights (the answer depended upon whether the legal test of innocent passage touched upon purpose or was limited to appearances). The content of the competing rules is less important than the recognition that a substantial initial dispute existed between Great Britain and Albania concerning the lawfulness of British warships' passage and that the applicable substantive law itself was unclear. The Court's opinion of the interrelationship between the use of armed force and territorial incursion is apparent in connection with its differentiated treatment of the second and third British visits to the straits. Albania generally contested the idea that the strait enjoyed an international character placing it under the innocent passage rule,¹⁵¹ but argued in any case that only the first and not the second or third British visits to the straits constituted innocent passage.¹⁵² Therefore, according to Albania both the second and third visits by British warships violated Albanian territory.

The Court rejected Britain's argument that its presence in the straits was not undertaken with the intention of territorial conquest and thus the threatened use of force was not prohibited by U.N. Charter Article 2(4)'s language (based on the provision's literal interpretation, but effectively harkening back to the original understanding of the same words under League Covenant Article X). The Court analyzed the second passage in sovereignty terms and found no violation,¹⁵³ but found the third passage to be a novel and unlawful form of intervention.¹⁵⁴ Ever since the opinion was issued, publicists have rationalized it as affirming Britain's innocent passage rights while remaining troubled by its apparent

149. *Id.* at 15-22.

150. Dissenting opinion of Judge Krylov at 68-72; Dissenting opinion of Judge Azevedo at 88-96; Dissenting opinion of Dr. Ācer at 116-27.

151. *Id.* at 27-28.

152. *Id.* at 30, 33.

153. *Id.* at 26, 36.

154. *Id.* at 34-36.

acquiescence in British armed self-help during the dispute (questioning the Court's clear articulation of a principled basis for its decision).¹⁵⁵

The Court indicated that by sending four combat-ready warships through the straits in the second passage Britain went beyond a test of Albania's attitude to a demonstration of force with the intention of compelling Albania to refrain from firing on passing ships in the future.¹⁵⁶ In technical terms, depending upon the interpretation given the "use of armed force," even without firing Britain engaged in the use of armed force (and in any case had threatened use of armed force on a state's territory).¹⁵⁷ However, the Court found that under the circumstances (presumably asserting the right of innocent passage ultimately held valid) British activities in making the second passage did not violate Albanian sovereignty.¹⁵⁸ On the other hand, the Court found Britain's show of force in the third passage following additional Albanian protests to be unlawful as solely for purposes of gathering evidence of Albania's alleged violation of its international law obligations.¹⁵⁹

Regardless of whether the Court recognized Albania's contention that neither the second nor the third British visits constituted innocent passage *per se*, it recognized a positive threat in the second passage in terms bordering on the older customary law concept of a naval demonstration of force in the number of ships on the second passage. Regardless of the basic substantive innocent passage rule articulated, the concept of a naval demonstration held in territorial waters during a period of heightened regional tension is difficult to reconcile with textualists' strict reading of U.N. Charter Article 2(4). By analyzing both objective territorial incursions in terms of sovereignty (with inconsistent results), the Court indicated that under limited circumstances territorial incursion would not violate sovereignty (or "sovereign equality" in terms of U.N. Charter concepts). Under the circumstances, this indicates that U.N. Charter Article 2(4) cannot be read too literally.

Waldock, an influential British publicist, asserted that customary law principles of self-preservation were untouched by the U.N. Charter,¹⁶⁰ and opined that the distinction in the *Corfu Channel Case* turned on the

155. See, for example, Brownlie, *International Law and the Use of Force by States* at 283, 287-89 (cited in note 5).

156. *Corfu Channel Case*, 1949 ICJ at 31 (cited in note 144).

157. See Romana Sadurska, *Threats of Force*, 82 Am J Intl L 239 (1988); Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich L Rev 1620, 1625 (1984).

158. *Corfu Channel Case*, 1949 ICJ at 31 (cited in note 144).

159. *Id* at 34-35.

160. Waldock, 81 Vol II Rec des cours at 503 (cited in note 53). Interestingly, this distinction does accommodate self-defense (narrowly understood) while excluding reprisals. Certain publicists cite the *Corfu Channel Case* for the proposition that armed reprisals are unlawful *per se*.

difference "between (1) a forcible affirmation of legal rights, which is legitimate, and (2) forcible self-help to obtain redress for rights already violated, which is illegal."¹⁶¹ While the formulation is superficially appealing, it ignores the fact that both instances involve self-help.¹⁶² Such self-help represents a departure from general principles mandating the peaceful resolution of international disputes, bearing in mind that numerous diplomatic exchanges and British visits to the straits all were undertaken over a period of time in the course of a dispute between states concerning rights of passage through those waters. This formulation also neglects the fact that the Court analyzed the disputed second and third British visits specifically in terms of sovereignty, characterizing the unlawful third visit as intervention.

The *Corfu Channel Case* is better understood as evidence of limiting aspects in opposing ideas of one state's sovereign equality to other states' protected interests impinged on within its territory. This view of the case is most visible in the opinions of individual judges. Their differences of opinion were on the factual issue of Albania's involvement in the mining of its own waters and the related issue of whether fault was an element of state responsibility. The state responsibility question itself entailed an examination of state duties, the violation of which might lead to responsibility. Judge Winiarski's dissenting opinion quoted at length from the arbitral award in the *Island of Palmas Case* (Netherlands v US) of Judge Huber, the distinguished neutral Swiss jurist and former President of the Permanent International Court of Justice:

Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.¹⁶³

161. *Id.* at 502.

162. See Brownlie, *International Law and the Used Force by States* at 285-87 (cited in note 5).

163. *Corfu Channel Case*, 1949 ICJ at 53 (cited in note 144) (Judge Winiarski's dissenting opinion) (quoting Judge Huber in *Island of Palmas Case* (Netherlands v US), 2 R Intl Arb Awards 829, 839 (1928)). See 1985 DGfV Proceedings at note 59 (cited in note 72) (Comments of Frowein questioning whether any international law principle compelled the consent of the host state to permit Germany's use of armed force in freeing Lufthansa passengers at Mogadishu had consent not been freely given). But see *id.* at 152 (comments of Hailbronner arguing that such a duty might be found in principles applicable to protection of human rights and that a failure to consent, notwithstanding the

The scope of this inquiry does not extend beyond acknowledging survival under the U.N. Charter of the reciprocal limiting aspects of territorial sovereignty expressed by Judge Huber and visible in the necessity aspects of precedents such as the *Caroline*. This article's interest is only indirect; summary review of the collateral point regarding what the precedent may indirectly indicate about certain views of self-defense and a demonstration that necessity rationales permitting limited territorial incursion in appropriate self-defense cases survive under the Charter.¹⁶⁴ Without giving the intervention concept the full examination it otherwise deserves,¹⁶⁵ however, the discussion now turns to an examination of the *Nicaragua Case*.

The *Nicaragua Case*¹⁶⁶ is the Court's most recent pronouncement on the self-defense concept. The opinion is noteworthy as an implicit confirmation by the International Court of Justice of the post-World War II war crimes tribunals' rejection of the position that a state is the sole judge of its own activities asserted to be in the exercise of self-defense rights. However, it has attracted comparatively more attention to compulsory jurisdiction issues and the Court's general role than to its substantive pronouncements on self-defense.¹⁶⁷ Further, the Court's peculiar approach to the multilateral treaty exclusion resulted in the application of what it referred to as a variety of customary law (despite liberal references to the multilateral Charters of the United Nations and Organization of American States), rendering interpretation of the precedent problematic.

duty, would still not constitute an "armed attack" within the meaning of the strict prohibition on the use of armed force).

164. The second British visit does not appear to satisfy the *Caroline* test of immediacy or necessity for the exercise of self-defense since British vessels were only fired on by Albanian shore batteries on their first visit to the strait. Nonetheless the Court found it lawful on the express theory that it did not violate Albanian sovereignty itself. See note 153. As previously noted, however, the British used or at least threatened the use of armed force on Albanian territory. See notes 156-60 and accompanying text. The British assertion of self-preservation (traditionally a broader concept than self-defense) exceeded the scope of narrowly drawn self-defense.

165. Others suggest that armed intervention for humanitarian or similar purposes also falls outside the reach of Art 2(4), but this article takes no position on that issue.

166. *Nicaragua Case*, 1986 ICJ 4 (cited in note 60).

167. See Herbert W. Briggs, *The International Court of Justice Lives Up to Its Name*, 81 Am J Intl L 78, 83-85 (1987); Gordon A. Christenson, *The World Court and Jus Cogens*, 81 Am J Intl L 93, 99-100 (1987); Tom J. Farer, *Drawing the Right Line*, 81 Am J Intl L 112, 112-15 (1987); Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 Am J Intl L 116, 119-20 (1987); John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 Am J Intl L 135 (1987); John Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 Am J Intl L 151 (1987); Fred L. Morrison, *Legal Issues in the Nicaragua Opinion*, 81 Am J Intl L 160, 160-63 (1987) (abbreviated commentaries noting the importance and apparent shortcomings of the Court's reasoning, but not exploring the *Nicaragua Case*'s claimed basis for its views of self-defense). See also John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 Am J Intl L 43 (1986); James P. Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 Am J Intl L 568 (1986) (commentary following decision on preliminary measures in advance of decision on the merits in the *Nicaragua Case*).

For all of its general references to customary law and self-defense, the opinion is surprisingly devoid of a scholarly basis for its assertions concerning the content of this customary law. This may be partially attributable to incomplete briefing and argument of the issues (due to the United States' failure to appear in the merits phase of the proceedings). However, it appears that the Court effectively adopted the definitional construct approach to self-defense, essentially tying it to the related interpretation of U.N. Charter Articles 2(4) and 51 (that U.N. Charter Article 2(4) restrictions on the use of armed force permit its use only under the direction of a U.N. organ or under a restrictive idea of self-defense keyed to Article 51's "armed attack" language). As a result, the Court's concept is largely divorced from traditional customary law views of self-defense.

While the Court claimed to be applying customary law, its approach was substantially a legal fiction based upon the idea that the "customary law" of self-defense had taken on the shape of the Court's apparent *sub silentio* view of the Charter. As a matter of interpretive principles, this view of "current" customary law was flawed as applied to United States actions. Many states and a preponderance of foreign publicists may disagree with Anglo-American views that "older" customary law survives in restricted form under the U.N. Charter (and Article 51 in particular).¹⁶⁸ However, few would question that the United States consistently has advanced its views of self-defense. Under elementary principles governing the formation of customary law, states consistently registering disagreement are not bound by the "new" law. Even if the standard rules of formation do not apply to *jus cogens* principles, disagreements among states concerning the law in this area are simply too sharp and widespread to ignore.

Putting aside whether its basic decisional strategy was appropriate, the Court's approach hardly exposed to analysis its implicit view of the substantive restraints on the use of armed force and the relevant U.N. Charter provisions (because Charter interpretation was not formally at issue, given the Court's decision on the multilateral treaty exception). The Court's interpretive system, distinguishing between unlawful intervention and armed attack for purposes of self-defense, simply ignored indirect aggression issues.¹⁶⁹ The United States government's legal argument (incomplete due to its non-appearance at the merits stage, but visible in pleadings at the preliminary measures stage) was that the Nicaraguan government's support of insurgents in bordering countries

168. See note 53.

169. As are compromised on the face of, but still not resolved under, the 1974 UN Resolution Definition of Aggression (cited in note 26).

amounted to waging a secret war.¹⁷⁰ The United States justified all of its measures under collective self-defense (U.N. Charter Article 51), including substantial financial and other support to the Contras.¹⁷¹ The Nicaraguan government's legal position was that it had not violated any international obligations (or, to the extent disputes in that regard existed, only those mandating peaceful resolution), and the Contras were simply mercenaries in the United States' hire.¹⁷² The Nicaraguan government argued that, through these alleged mercenaries, the United States violated Article 2(4) by engaging in military operations on Nicaraguan territory without justification.¹⁷³ Had the Court upheld either of the United States' or Nicaragua's position, the offending state likely would have been guilty of aggression as a legal matter.

Perhaps understandably given the politically inflammatory nature of the *Nicaragua Case*, the opinion carefully avoided examination or even significant mention of the legal concept of aggression as such (indirect or otherwise, whether on the part of the United States or Nicaragua). While this kind of ambiguity is an intentional and perhaps desirable element in the political context of the Security Council system, it cannot be accepted in a judicial opinion that must be based on a close examination of the law. This avoidance led in the *Nicaragua Case* to a basic misunderstanding of self-defense in the aggression context itself.¹⁷⁴ As a result, and without regard to the United States' lack of participation in the merits stage, the *Nicaragua Case* is poor authority generally for self-defense principles.

The Court indicated that, beyond U.N. Charter Article 2(4), customary law principles governing the use of force find their expression in the 1970 U.N. General Assembly's Declaration on Friendly Relations.¹⁷⁵ It stated in passing the necessity "to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."¹⁷⁶ Distinguishing customary principles of self-defense from those under the U.N. Charter, the Court initially acknowledged the inherent

170. *Nicaragua Case*, 1986 ICJ at 72 (cited in note 60).

171. *Id.* at 22, 127.

172. *Id.* at 53, 64.

173. *Id.* at 21-22.

174. For the perspective of a U.S. publicist on the problem of the definition of aggression from the U.S. view up to the period immediately preceding the 1974 U.N. Resolution Definition of Aggression and the related self-defense issue, see generally Schwebel, 136 Vol II Rec des cours at 411 (cited in note 53).

175. *Nicaragua Case*, 1986 ICJ at 99-100 (cited in note 60), citing the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN GA Res 2625 (XXV) (1970).

176. *Nicaragua Case*, 1986 ICJ at 101 (cited in note 60). It then implicitly separates those passages dealing with sponsorship of armed bands and terrorism from violation of existing international boundaries and duties to abstain from reprisals involving armed force. The Court does not acknowledge that they were all stated as independent duties, but none are literally in terms of aggression or

right (“*droit naturel*”) language of U.N. Charter Article 51 as recognizing a “‘natural’ or ‘inherent’ right of self-defence” of a customary nature.¹⁷⁷ While the *Nicaragua Case*’s opinion concerning the U.N. Charter was not authoritative (due to its resolution of the multilateral treaty exclusion issue), it seemed to view Article 51 as an independent source of textual interpretation concerning restrictions on self-defence.¹⁷⁸

The Court stated that an “armed attack” is a necessary prerequisite to the availability of self-defence, but that assistance to insurgents in providing weapons or logistical or other support would not be included in the “armed attack” concept.¹⁷⁹ The Court’s essentially conclusory statement that “[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks”¹⁸⁰ is problematic. The Court’s failure to confront divergent international legal opinions concerning indirect aggression and the support of armed bands leaves the critical issue open.

Regarding collective self-defence, the Court also took the position that under customary law a state under attack must request assistance before a third party state may act (as opposed to the idea that the third party state may exercise collective self-defence against the express wishes of the state under attack).¹⁸¹ The Court’s unsupported assertion regarding a customary law of collective self-defence is somewhat puzzling. “Collective self-defence” as a technical concept is a recent invention tied largely to the League Covenant and U.N. Charter systems. In so doing, the Court seemingly confused the question of the ability of the third state to assert and take action under a collective self-defence claim with the

self-defence. By treating the duties recited as presumably only touching intervention as opposed to aggression, the Court simply avoided the heart of the armed band problem under U.S. views.

177. *Id.* at 94. However, it characterized as “extreme” the position argued in this article that Article 51 largely preserves customary law (as opposed to constituting a separate locus of textual interpretation). *Id.* at 94, 96. The Court’s rejection of what it referred to as this “extreme contention” is troubling because it asserts no principled or scholarly basis but rather only cross-references its earlier unsupported assertions that the U.N. Charter and customary law are different in some undefined way. *Id.* This might be simply a function of its interpretation of the multilateral treaty exclusion (in resisting the United States’ claim that the exclusion deprived the Court completely of jurisdiction because the U.N. Charter law was the customary law, the Court asserted that they were different in some undefined way) or, with a view to the future, that whenever a case interpreting the relevant U.N. Charter self-defence provisions does finally arrive, that it might interpret the text of Article 51 to foreclose anticipatory self-defence. It specifically reserved the anticipatory self-defence question in the opinion. *Id.* at 103.

178. Bearing this and the circumstances of the Flight 655 incident in mind (see notes 202-5 and accompanying text), the Court’s specific reservation of the anticipatory self-defence question takes on special significance. See *Nicaragua Case*, 1986 ICJ at 103 (cited in note 60).

179. *Id.* at 103-4.

180. *Id.* at 103.

181. *Id.* at 104-5.

validity of the claim itself.¹⁸² The immediate source of such a collective security concept prior to the U.N. Charter appears to exist in traditional defensive alliances and various mutual anti-aggression undertakings from the creation of the League Covenant through promulgation of the U.N. Charter. Perhaps due to its general neglect of the aggression question, the Court's opinion reflects little of this aspect of collective self-defense.

The Court initially cited U.N. Charter Article 51's "inherent right of individual or collective self-defence" language for the proposition that the "inherent" reference is evidence of the existence of collective self-defense in customary law.¹⁸³ Accepting the Court's assertion on its face, however, anti-aggression views in existence immediately prior to promulgation of the U.N. Charter would have constituted existing customary international law. Despite the Court's position, there is little, if any, evidence in this period of a general belief that third party states' collective security responses to admitted aggression were conditioned on the request of an attacked state. The specific inter-American undertakings of the time up through the signing of the OAS Charter in 1948 are phrased literally in that the attack (or act of aggression) of one state is an attack on (or act of aggression against) all concerned states.¹⁸⁴ Such a position also would be fundamentally inconsistent with the idea that aggression is a threat not only to the state attacked, but also to general international peace. Further, ideas such as the Stimson non-recognition doctrine and various treaty equivalents specifically call for states to disregard even treaty arrangements between attacking and attacked states (on the theory that the attacker's coercive powers extend far enough to affect the attacked state's public positions).¹⁸⁵ Following this approach to its logical conclusion

182. *Id.* Under the Court's articulation of its rule, the exercise or non-exercise of "collective self-defense" seemingly becomes a right of the attacked state. This would ignore the threat to general international peace which, by definition, makes the attack a common concern. The Court's concern with the possibility of collusion and unjustified claims of collective self-defense is answered through an examination of the basis of the self-defense claim itself. It is doubtful whether state practice honors the Court's requirement of some general public appeal for assistance. Discrete appeals seem sufficient in state practice and may be politically compelled. Under the circumstances of the *Nicaragua Case*, the Court apparently entertained questions about the United States' claim of collective self-defense as a pretext for political intervention. However, by discarding the collective self-defense claim on an essentially procedural objection, it avoided the harder question of indirect aggression on which the substance of the collective self-defense claim was based.

183. *Id.* at 102.

184. See Final Act and Convention of the Second Meeting of the Ministers of Foreign Affairs of the American Republics at Habana Art XV, Declaration of Reciprocal Assistance and Cooperation for the Defense of the Nations of the Americas, 3 Dept of State Bull 127, 136 (1940) ("Havana Declaration"); Inter-American Reciprocal Assistance and Solidarity [1946] 60 Stat 1851, 1853, TIAS No 1543 (signed March 8, 1945; in force March 8, 1945) ("Act of Chapultepec"); and Charter of the Organization of American States, Art 5(f) [1951] 2 UST 2394, 2418, 119 UNTS 3, 52, TIAS No 2361, 2418 (signed April 30, 1948; in force December 13, 1951) ("OAS Charter").

185. See Brownlie, *International Law and the Use of Force* at 412-13 (cited in note 5).

leads to the untenable position that an attacking state need only carry out its attack quickly enough (presumably in sponsored *coup d'état* form to install a puppet government) to leave the attacked state's government no time to appeal to the international community, thereby absolutely prohibiting collective self-defense.¹⁸⁶

As further support for finding a prior request requirement in the customary law of collective self-defense, the Court also referred to provisions of the 1947 Inter-American Treaty of Reciprocal Assistance¹⁸⁷ and the 1948 Charter of the Organization of American States ("OAS Charter").¹⁸⁸ These contain language obligating third states to engage in collective self-defense under U.N. Charter Article 51 and stipulating that such measures will be undertaken after notice by the attacked state pending meeting of the treaty organ of consultation.¹⁸⁹ While the Court states that the treaties were consulted merely for guidance on customary law, it apparently misunderstood the treaty provisions' function and so drew incorrect inferences concerning that law.¹⁹⁰ The Rio Treaty provision in

186. Rejection of this approach seems clear in the current invasion of Kuwait by Iraq. The international community has effectively disregarded any statements and positions taken by the replacement Kuwaiti government installed by Iraq in the invasion's immediate aftermath. The idea that recourse to the U.N. Security Council exists is somewhat uncertain, given the possibility of veto deadlock as was common at the height of the Cold War. Although beyond the scope of this article, the U.N. General Assembly may also exercise discretion over matters of self-defense through a Uniting for Peace Resolution. See Walker, 1991 Duke J Comp & Intl L at 48 (cited in note 9). Such a resolution would seem to rely on the principle of self-defense in any case.

187. Inter-American Treaty of Reciprocal Assistance, Art 3 [1948] 62 Stat 1681, 1700, 21 UNTS 77, 95-6, TIAS No 1838, 24 (signed September 2, 1947; in force December 3, 1948) ("Rio Treaty").

188. OAS Charter at Arts 5(f), 24 (cited in note 184). The opinion actually refers to Article 3(f) and 27, by which the Court must mean Article 5(f) and 24. Article 3 has no subsections, and Article 5(f) deals with the correct subject matter. Article 27 concerns economic standards, and Article 24 addresses aggression.

189. *Nicaragua Case*, 1986 ICJ at 104-5 (cited in note 60).

190. The successors to the Act of Chapultepec promulgated at the 1945 Mexico City Inter-American Conference on Problems of War and Peace were the Rio Treaty and the OAS Charter, negotiated as the first regional international arrangements under the U.N. Charter, the special security provisions of which merit attention. The Rio Treaty itself makes specific mention of individual and collective self-defense under the U.N. Charter, following Article 51's armed attack language, but incorporates the aggression concept in a differentiated response scheme in the absence of an equivalent to the U.N. Security Council system. See Rio Treaty at Art 3 (additionally, Article 10 contains a general non-impairment clause for parties' rights and obligations under the U.N. Charter) (cited in note 187). Rio Treaty Article 3 defines the "armed attack by any State against an American State" carried out within specified hemispheric boundaries to be an "attack" against all, requiring their assistance in the exercise of self-defense. *Id.* at Art 3. This represented an election of the mandatory collective response to aggression which eluded the League of Nations in the 1920s and 1930s. Rio Treaty Article 6, however, distinguishes aggression which is not an armed attack or which takes place outside specified hemispheric boundaries and provides in those instances for consultations prior to response. On the historical record, Article 6's formulation of aggression short of an armed attack reflected concerns of internal subversion. Article 6 also reflected the developing anti-communist Cold War outlook of the United States. Kane, *Civil Strife in Latin America* at 151-54 (cited in note 26). It also could call upon the precedent of wartime Axis subversion. See *id.* at 135-47. See generally

question does contemplate an attacked state informing other treaty parties of the attack and *compelling* them to engage in collective self-defense prior to any decision on response by the treaty organ of consultation. The significance of this provision, which has no parallel in the U.N. Charter, lies in the constant attempts of small countries since League Covenant Article X to establish an automatic guaranty of individual security in the form of compelled collective response to aggression. In conscious deviation from the essentially optional response scheme of the U.N. Charter (absent a united Security Council),¹⁹¹ the Rio Treaty incor-

The Havana Declaration (cited in note 184). Under the Rio Treaty, only state armed attack evokes automatic response, while other activities, also denoted aggression, first require consultations on the appropriate response. See Rio Treaty at Arts 3, 6, 7, and 9 (cited in note 187). Without regard to whether armed attack or other aggression is involved, in compliance with U.N. Charter Articles 51 and 54, reports to the Security Council are necessary whenever self-defense is exercised. *Id.* at Art 5.

The OAS Charter collective security provisions parallel those of the Rio Treaty, but contain certain refinements. The OAS Charter resurrects the general aggression formula couched in sovereignty terms:

Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.

OAS Charter at Art 24 (cited in note 184). Article 25 of the OAS Charter incorporates the Rio Treaty's differentiated response to armed attack by a state and other aggression. Soon thereafter treaty precedents developed treating cross-border insurrectionist armed band attacks (including effective claims of state sponsorship) under Rio Treaty Article 6 (prior consultation for aggression not constituting state armed attack) as opposed to Rio Treaty Article 3 (mandatory response for aggression constituting state armed attack, as in the 1948 Costa Rica claim that armed bands formed in Nicaragua had invaded its territory). See Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* at 128-29 (cited in note 68); Inter-American Institute of International Legal Studies, *The Inter-American System: Its Development and Strengthening 122-24* (Oceana Press, 1966).

However, this affected only uninvolved American states' treaty obligations as a choice between prior consultation and mandatory collective response, not whether sponsorship of the armed band attack is aggression or its treatment otherwise under self-defense principles. Garcia-Mora goes too far in this direction when he indicates that because governments commonly do not regard activities of armed bands as an armed attack they do not justify self-defense under U.N. Charter Article 51. Garcia-Mora, *International Responsibility for Hostile Acts* at 129 (cited in note 68). Apart from his apparent unhappiness with the possibility of territorial incursion in the exercise of self-defense, his views of the relationship between self-defense rights and the U.N. Charter differ from those expressed in this article. His citation of the *Corfu Channel Case* for the proposition that territorial incursion to suppress armed bands is probably no longer permissible under international law is somewhat misleading, *id.* at 120. He quotes passages in that opinion finding a violation of sovereignty and impermissible intervention in the third British visit to the straits without acknowledging that the second British visit was specifically found lawful and not a sovereignty violation. See notes 144-64 and accompanying text. On the other hand, he does note the changed position of the individual in international law and apparently approves of criminal liability for armed band members under the United Nations International Law Commission's Draft Code of Offenses Against the Peace and Security of Mankind. Garcia-Mora, *International Responsibility for Hostile Acts* at 114 (cited in note 68). OAS Charter Article 15 (cited in note 184) alone deals with intervention, acknowledging coverage of armed force but also other forms of interference.

191. The San Francisco Conference specifically rejected a mandatory response scheme when a minority composed of small states tried to force inclusion of a definition of aggression in the Charter

porated the mandatory collective self-defense response scheme into the inter-American security system to provide the desired small country guaranty.¹⁹² This followed creation of the U.N. Charter and so is impossible to read into Article 51 as part of the "inherent" customary law. Under the circumstances the Court simply misread the Rio Treaty, and its interpretation is not supported by a plain meaning review of the treaty text. There is neither language nor a direct inference that a collective defense response is permissible *only* on the attacked state's request. The Court's observations regarding the Rio Treaty provisions and the OAS Charter scheme are somewhat disingenuous (when connected with its concentration on "armed attack"). The opinion leaves the impression that the Rio Treaty's compulsory collective self-defense response language is the sole provision directed at aggression.¹⁹³ Thus, it substantially ignores provisions excluded from the structure of compulsory collective self-defense (referring instead to actions taken after consultation).¹⁹⁴ On the other hand, it notes that general provisions of the OAS Charter do not contain the language from which it infers that the exercise of collective self-defense depends on a prior request by the attacked state. Instead, the Court notes that an article in the OAS Charter¹⁹⁵ provides for the application of the procedures laid down in special treaties, here the Rio Treaty.

Article 25 of the OAS Charter incorporates the differentiated response system of the Rio Treaty,¹⁹⁶ so it is difficult to explain how this system could escape even a cursory review. The Court's omission may be attributable to a more basic problem revealed by the study of its text. It specifically provides for consultation in the face of an "aggression which is not an armed attack."¹⁹⁷ This acknowledgement that aggression does not equate purely to armed attack (here used in the sense of an armed forces invasion as opposed to subversion) is problematic for the Court, as it would eviscerate the Court's essential position that "armed attack" is the key to self-defense (viewed as a definitional construct opposed to aggres-

in order to link it to a mandatory response scheme. See Russell and Muther, *History of the United Nations Charter* at 670-75 (cited in note 44).

192. See note 190.

193. Rio Treaty at Art 3 (cited in note 187); See *Nicaragua Case*, 1986 ICJ at 104-5 (cited in note 60).

194. Rio Treaty at Art 6 (response to an aggression less than an armed attack or of an extrahemispheric nature) and Art 7 (conflict between two or more American states) (cited in note 187).

195. *Nicaragua Case*, 1986 ICJ at 105 (cited in note 60). The opinion actually refers to OAS Charter Article 28, by which reference the Court must mean Article 25 of Chapter V (entitled "Collective Security"). Article 28 is part of Chapter VII which addresses social standards.

196. Rio Treaty at Arts 3, 6 and 7 in particular (cited in note 187).

197. *Id.* at Art 6.

sion) and possesses a generally accepted meaning.¹⁹⁸ It is also inconsistent with the apparent *sub silentio* position of the Court that U.N. Charter Article 2(4) restrictions on the use of armed force permit its use only under the direction of a U.N. organ or under a restrictive idea of self-defense keyed to Article 51's "armed attack" language. All of these issues simply reinforce the observation that the Court's avoidance of the aggression problem unbalances the entire opinion.

The Court went on to treat support of armed bands as a problem of "intervention," carefully noting the high value attached to territorial sovereignty, and that intervention in itself would not justify recourse to armed force in the same fashion that an armed attack would justify self-defense.¹⁹⁹ In so doing, the Court seemed oblivious to the linkage of rights and obligations adhering to territorial sovereignty while asserting a superficially attractive, apparently absolute version of non-intervention. This may be criticized on several bases. First, it is inconsistent in important ways with the general import of the Court's own *Corfu Channel Case* (indicating that Article 2(4) should not be read too restrictively and that obligations and rights relating to a state's territory may be reciprocal). Second, it ignores the implicit acknowledgement in definitions of aggression from the 1930s forward that a high emphasis on non-intervention can only exist in conjunction with a legal regime permitting effective recourse against indirect aggression. Third, it disturbs the basic U.N. Charter concept that self-defense is available against aggression pending Security Council action (including acknowledgement that the Security Council traditionally cannot act in most situations due to political division). Fourth, it may artificially narrow the intervention concept itself, which is commonly considered to include the use of armed force.²⁰⁰ The Court categorically distinguished intervention from self-defense, while the better analysis would admit that territorial incursion could be present in both cases (intervention in a non-technical sense) and inquire into whether it would be justified (under an analysis of whether the obligations of territorial sovereignty have been honored).

Such a justification drawing on traditional necessity and state responsibility precedents contains two elements. First, a state is not an absolute guarantor that no armed band activity directed against other states will take place on its territory, so it can only be held to a standard of no

198. Or, in the alternative, it may point out the problem that there is no effective consensus on "armed attack" as the Court otherwise states. The Court's focus on armed attack seems to arise out of its tendency to read into customary law a restrictive textual interpretation of self-defense under Article 51 of the U.N. Charter even as it denies Article 51's applicability.

199. *Nicaragua Case*, 1986 ICJ at 106-9 (cited in note 60).

200. See, for example, OAS Charter at Art 15 (cited in note 184), which includes the use of armed force under intervention.

impermissible support coupled with some reasonable attempt to prevent such activities on its territory. Second, if a government's control over its own territory is too weak or general anarchic conditions lead to a flaunting of its authority and laws protecting other states' interests, under some circumstances territorial incursion is permitted the other state to protect its own interests.²⁰¹

The Court reached none of the important indirect aggression issues and worked from conclusory categories in its intervention analysis. The preceding criticism is not the claim sometimes advanced that the Court's decision was "politically motivated." If anything, the *Nicaragua Case's* avoidance of the entire indirect aggression issue by name may be an attempt to avoid even the appearance of a political decision. Unfortunately, since the legal concept of aggression is part of the law it cannot be avoided in such a judicial decision. By refusing even to acknowledge the existence of a substantial indirect aggression question, the Court seemed to depart silently from the substantive view that a state's tolerance of their presence on its territory and various forms of support given to armed bands constitute indirect aggression. The Court may have been concerned that acknowledgement of indirect aggression would broaden the conflict internationally (by opening the door to collective self-defense measures). Such a concern may be a serious one, but if activity does constitute indirect aggression (which has effectively already broadened a conflict), implicit revision of legal concepts will not correspondingly narrow the conflict itself. Avoiding the indirect aggression issue does no good if it strains interpretation of self-defense and other international law doctrines.

A full discussion of the pending case entitled *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States)* ("Flight 655 Case"), involving the 1988 downing of an Iranian civil airliner over the Persian Gulf by the U.S.S. *Vincennes*,²⁰² is beyond the scope of this paper. However, its potential importance should be recognized, assuming that the Court will be called upon directly to address issues of self-defense, necessity and related matters under U.N. Charter Articles 2(4) and 51. Unlike the *Nicaragua Case*, the United States indicated its apparent willingness to appear and

201. This was the situation in case in the *Caroline* precedent. See Jennings, 32 Am J Intl L at 82-88 (cited in note 3). This specific aspect often is lost in modern discussions of the case.

202. Iran submitted its application to institute proceedings under the case title *Aerial Incident of 3 July 1988 (Iran v US)* (1989 General List No 79), 28 ILM 843 (1989) ("Flight 655 Case"). Iran submitted its memorial on July 24, 1990 and the Court fixed the due date for United States' countermemorial for March 4, 1991. Telephone conversation with the Secretariat of the International Court of Justice, The Hague (August 17, 1990). For a full discussion of the case, see David K. Linnan, to be published in *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-defense and State Responsibility*, 16 Yale J Intl L (forthcoming Summer 1991).

argue the case on its merits (prior to the invasion of Kuwait, but given practical constraints it might be even more difficult now for the United States not to appear).²⁰³ On its face, the *Flight 655 Case* involves international civil aviation treaty law. However, the United States has adopted the position that, while the downing of Flight 655 was a tragic mistake, it was incidental to the *Vincennes'* lawful use of force in self-defense and so no legal responsibility attached to the act.²⁰⁴ Given state's views of civil aviation treaty law expressed following the 1983 Soviet downing of Korean Airlines Flight KE 007, it appears that civil aviation treaty undertakings regarding air safety are subject to the reservation of rights under the

203. See Norman Kempster, *Wary Bush Says Force is Still an Option on Hostages*, Los Angeles Times 1:1 (August 16, 1989); Paul Lewis, *US Lets World Court Try Iran Air Case*, New York Times A:3 (August 15, 1989); *US at World Court*, New York Times A:18 (August 29, 1989) (Letter to the Editor of John H. McNeil, Assistant General Counsel (International and Intelligence), Department of Defense). Based upon information provided by Department of State spokesperson Richard Boucher, see *State Department Regular Briefing of August 15, 1989*, Federal News Service (NEXIS, Wires file) ("*State Department Briefing*"), some ambiguity remains concerning whether the United States' participation might be limited to appearing before the International Court of Justice only to contest its jurisdiction over the Flight 655 matter (apparently under a theory that the dispute in question was settled definitively by the International Civil Aviation Organization Council ("ICAO Council") and is not of a type subject to judicial appeal under applicable civil aviation treaties). In responding to reporters' questions and elaborating on President Bush's general statement that the United States would appear and litigate the Iranian claims before the Court, the State Department spokesperson indicated that:

Iran is suing under the Chicago and Montreal Conventions in which we agreed to the submission to the Court of various civil aviation disputes. We will contest Iran's suits on jurisdictional grounds and on the merits. But we recognize the Court's authority under these two conventions to determine whether it has jurisdiction. Our participation is aimed at challenging Iran's assertions. In any event, the Court will proceed with the case whether we participate or not. By appearing, we will be able to present our case and protect U.S. interests most effectively.

Id. The reference to jurisdictional grounds and the merits seemingly indicates a willingness to litigate on the merits should the jurisdictional challenge fail. Additionally, the United States' apparent interest in convincing other nations (chiefly the Soviet Union) to accept the Court's authority to resolve certain multilateral and bilateral treaty disputes, as well as practical imperatives given the current Middle East situation counselling scrupulous adherence to international law requirements, generally support the idea that the United States would contest the case on the merits should its jurisdictional arguments fail. However, when the question was posed in terms of whether the United States would reserve the right to withdraw from the litigation or whether it would acknowledge the Court's authority to award an indemnity should a decision on the merits go against the United States, the State Department spokesperson declined to comment on such "speculative" questions. While the United States has taken no official position, given the interests at stake and the concerns recited above it appears that the United States will remain before the Court to contest the merits should its jurisdictional challenge fail. It appears that the jurisdictional challenge based on civil aviation law will fail at least as to matters under the Chicago Convention.

204. See Marian Nash Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 Am J Intl L 318, 321-22 (1989) (Congressional testimony of the Legal Adviser, Abraham D. Sofaer); Kempster, *Wary Bush Says Force is Still an Option on Hostages* at 1:1 (cited in note 203) (State Department spokesperson Richard Boucher noting that the United States will argue that the *Vincennes* acted in self-defense after its crew mistook the Iranian jetliner for a hostile warplane and "[t]he mere fact that this belief was erroneous does not alone make the actions of the *Vincennes* unlawful"). Id.; *State Department Briefing* (cited in note 203).

U.N. Charter (in particular Articles 2(4) and 51).²⁰⁵ Thus, the issue will be joined over the legality of the *Vincennes*' use of armed force against the aircraft. If lawful under the Charter, the action should not violate civil aviation law. Presumably the Court will be called upon to address the widely differing views of self-defense discussed here and, on the facts of the incident, whether the Charter permits anticipatory self-defense and whether a state is the sole judge of the lawful scope of its self-defense interests.

Based on noted shortcomings in the *Nicaragua Case*, one hopes that the Court in hearing the *Flight 655 Case* will engage in a deeper analysis of self-defense problems rather than simply referring to its opinion in the *Nicaragua Case* as authority. While issues of aggression, self-defense and territorial incursion have been intertwined generally under international law since the time of the 1919 League Covenant, the self-defense concept itself enjoys a separate existence (without regard to territorial interests, strictly speaking). This should be particularly apparent to the Court on the facts of the *Flight 655 Case* (dealing with a warship's actions undertaken in self-defense while in international waters).

IV. REPRISALS AND THE BOUNDARY TO SELF-DEFENSE

The concept of reprisal exists as a special variety of self-help at the boundary of self-defense. This inquiry now focuses on what past actions of the Security Council may reveal about the legality of this use of armed force in current state practice. Specifically, it analyzes: (1) the extent to which armed reprisal (or traditionally "armed measures short of war") is a permissible self-help measure despite its seeming conflict with U.N. Charter Article 2(4); and (2) the extent to which it is possible to distinguish between armed reprisals and self-defense measures as instances of self-help.

As a point of departure, traditional international law's strict separation between the law of war and the law of peace enabled consideration of "armed measures short of war" under the law of peace. Due to the shift previously traced from a concept of unlawful aggressive war visible in the League Covenant to a concept of unlawful armed force under Article 2(4), the U.N. Charter formally has abandoned these distinctions in its general rejection of the use of armed force. The Charter requires that disputes be resolved peacefully, but the concept of reprisals still survives.²⁰⁶ The fo-

205. See Linnan, to be published in 16 *Yale J Intl L* (cited in note 202).

206. See *Case Concerning Air Service Agreement of 27 March 1946 Between the United States of America and France* (United States v France), 18 R Intl Arb Awards 417, 443-46 (1978). See also Lori Fisler Damrosch, *Retaliation or Arbitration—Or Both? The 1978 United States-France Aviation Dispute*, 74 *Am J Intl L* 785 (1980).

cus here is only on the legality of self-help involving armed force in situations analogous to the traditional category of armed measures short of war.²⁰⁷ While reprisals need not involve the use of armed force, this article addresses only armed reprisals.

For the purposes of this discussion, the *Naulilaa Arbitration* is the definitive customary law statement of the right of reprisal.²⁰⁸ Thus, reprisal here means a state's act that would be unlawful except for the prior illegal act of the state to which it responds. The reprisal itself is subject to a proportionality requirement and may also only affect the offending state,²⁰⁹ since violation of third party states' rights would violate international law independently. On a theoretical level, however, by virtue of U.N. Charter Article 2(4), there is widespread agreement among publicists that armed reprisals violate international law²¹⁰ (subject to the caveat that reprisal arguably might be covered by self-defense under Article 51 and special rules apply to reprisals in the course of an armed conflict).

This conviction concerning the illegality of armed reprisals is not limited to the academic community. The most prominent evidence in state practice is in the U.N. General Assembly's 1970 Declaration on Friendly Relations²¹¹ assertion that "[s]tates have a duty to refrain from acts of reprisal involving the use of force."²¹² Notwithstanding this apparent clear statement of the law, a continued state practice of armed retaliation bears closer examination.

Continued reciprocal acts of violence between Israel and various Arab states from 1948 onward present the most striking example of armed retaliation in modern times. Scholars have sought to reconcile Security Council practices under which resolutions directed against such re-

207. Armed reprisals still may be permissible in limited circumstances under the law of armed conflict. See Robertson, 1991 *Duke J Comp & Intl L* at 19-20 (cited in note 9).

208. See *Responsabilité de l'Allemagne a raison des dommages causés dans les colonies portugaises du sud de l'Afrique* (Portugal v Germany), 2 R Intl Arb Awards 1011, 1025-28 (1928) ("*Naulilaa Arbitration*"). While it seems safe to accept the statement as current law, the *Naulilaa Arbitration* may not have validly stated the customary law at the time. See generally Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational, 1984); Frits Kalshoven, *Belligerent Reprisals* (A.W. Sijthoff, 1971); Evelyn Speyer Colbert, *Retaliation in International Law* (King's Crown Press, 1948).

209. See *Responsabilité de l'Allemagne a raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participe à la guerre* (Portugal v Germany), 2 R Intl Arb Awards 1036, 1056-57 (1930) (specifically referring to the part of the judgment regarding the *Cysne Case*).

210. See, for example, Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 *Am J Intl L* 1, 1 note 2 (1972) (catalog of publicists). See also Roberto Barsotti, *Armed Reprisals*, in Antonio Cassese, ed, *The Current Legal Regulation of the Use of Force* 79-84 (Martinus Nijhoff, 1986); 2 *Restatement (Third)* at § 905, Comment a (cited in note 83); Robertson, 1991 *Duke J Comp & Intl L* at 20 (cited in note 9).

211. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN GA Res 2625 (XXV 1970).

212. *Id.*

taliation have normally criticized violence on both sides, since no resolution critical of only one side would pass.²¹³ The reciprocal criticism would not, however, commonly rise to the level of condemnation one might expect in the case of a clear breach of Charter Article 2(4). Further, a proportionality element often is present in criticisms of one side's use of armed force. Validation of armed retaliation is extrapolated from the criticism of disproportionate acts. Otherwise, why single out the proportionality aspect if the entire pattern of behavior were unlawful? Under these circumstances, Security Council actions are then treated typically as authoritative evidence of new customary law or special interpretations of states' obligations under the Charter.²¹⁴

From Security Council practices some commentators conclude under a variety of rationales either that armed reprisals are lawful or that they are at least "appropriate" even if unlawful (to the extent they do not draw condemnation).²¹⁵ Other explanations upholding the general illegality of armed reprisals in peacetime seek to justify the Security Council's practice in terms of whether the various states have existed in a continuous state of war since the late 1940s (a view espoused in particular by some Arab states, with the result that the reprisals would be judged under the law of armed conflict), or of the special exigencies of political compromise between permanent members of the Security Council in reaching agreement upon resolutions. In short, either the circumstances did not present a problem of peacetime armed retaliation at all, or the resolutions and related behavior incorporated political rather than legal principles. Here the best explanation is probably the insight that Security Council actions are more often politically than legally motivated.

A variety of views exists concerning the consistency of Arab-Israeli armed retaliation with self-defense principles. On a formal level, proportional acts of self-defense in response to a foreign state's aggressive acts (following such precedents as the *Caroline*) lie close to armed reprisals conceived as proportional acts of self-help in response to a foreign state's unlawful acts. One accepted approach distinguishing armed reprisals from self-defense traditionally has focused on reprisals' supposed punitive character (as opposed to the idea that self-defense seeks not to punish but rather to avert a danger). Here, under a simplistic approach, the punitive element of retaliation is consistent with self-defense under a deterrent ra-

213. See, for example, Barsotti, *Armed Reprisals* at 89 (cited in note 210). See generally Barry Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 Colum J Transnatl L 1 (1982); Bowett, 66 Am J Intl L at 1 (cited in note 210).

214. See generally Barsotti, *Armed Reprisals* at 90-98 (cited in note 210).

215. The fullest collection of publicists' theories attempting to rationalize the continued existence of armed reprisals in general is in Onuf, *Reprisals, Rituals, Rules, Rationales* at 45-57 (cited in note 105).

tionale.²¹⁶ The rejection of this position is implicit in condemnations of Great Britain's delayed "defensive response" in its 1964 bombing of the Harib Fortress in Yemen (acting as Protecting Power of the South Arabian Federation in response to earlier attacks by Yemeni forces on Beihan, a member state).²¹⁷

A more subtle approach challenges the very possibility of distinguishing between armed reprisals and self-defense under customary law.²¹⁸ This approach is of continuing interest given that it is implicit in recent U.S. justifications of punitive operations in the Middle East essentially as self-defense. Examples of U.S. use of this approach are the 1986 air attack on Tripoli, Libya in the wake of the bombing of a Berlin nightclub frequented by U.S. servicemen²¹⁹ and the 1987 Operation Praying Mantis in which the U.S. Navy mounted a combined air and sea operation in the Persian Gulf targeted at destroying Iranian oil platforms and warships during the Iran-Iraq War (in the immediate aftermath of the mining of the U.S.S. *Samuel B. Roberts*).²²⁰ This approach is problematic, however, insofar as it confuses self-help and self-preservation rationales.²²¹ The func-

216. See Levenfeld, 21 Colum J Transnatl L at 37 (cited in note 213).

217. See UN SCOR S/PV.1106 (Security Council Meeting of April 2, 1964); UN SCOR S/PV.1107 (Security Council Meeting of April 3, 1964); UN SCOR S/PV.1108 (Security Council Meeting of April 6, 1964); UN SCOR S/PV.1109 (Security Council Meeting of April 7, 1964); UN SCOR S/PV.1110 (Security Council Meeting of April 8, 1964).

218. See Tucker, 66 Am J Intl L at 586 (cited in note 73).

219. See *Address to the Nation*, 22 Weekly Comp Pres Doc 491, 491-92 (April 21, 1986).

220. See Ronald O'Rourke, *Gulf Ops*, Proceedings US Naval Inst Proc 42 (May 1989); Captain Bud Langston, USN and Lieutenant Commander Don Bringle, USN, *The Air View: Operation Praying Mantis*, Proceedings US Naval Inst Proc 54 (May 1989); Captain J.B. Perkins III, *The Surface View: Operation Praying Mantis*, Proceedings US Naval Inst Proc 66 (May 1989).

221. The protection of neutral shipping in the Tanker War presents an analogous problem. As a technical matter, in the absence of a Security Council determination characterizing either Iran or Iraq as "aggressor" under Chapter VII of the U.N. Charter, under U.S. views it legally still could maintain a neutral posture toward both belligerents. See Note, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 8 BC Intl & Comp L Rev 517, 524-26 (1985). However, this posture assumes that such a Security Council designation of aggression is a precondition to whatever duties of opposition to aggression attach under modern U.N. Charter law, which has been the apparent U.S. view under Dept of the Navy, *Law of Naval Warfare*, NWIP 10-2 § 232 (Office of the Chief of Naval Operations, September 1955), superseded by Dept of the Navy, Judge Advocate General, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* § 7.2.1 (NWP 9 (Rev. A)/FMFM 1-10 1989). Instead, it probably is better to base the claim of neutrality law's continued existence on general post-war state practice. The complications inherent in third party states' dealings with combatants arise to the extent it is possible to distinguish between an aggressor state and its victim. In the context of the 1980-88 Iran-Iraq War, few parties would dispute that the war commenced with a unilateral Iraqi invasion of Iran. See, for example, Richard Falk, *Some Thoughts on the Decline of International Law and Future Prospects*, 9 Hofstra L Rev 399 (1981). In accordance with common Security Council practice, its repetitive resolutions (calling for a cease-fire and negotiated resolution to the conflict) omitted designation of either party as the aggressor to preserve political flexibility. Were third party states to adhere scrupulously to neutrality obligations such as impartiality, few problems would arise. However, given the modern political concept of non-belligerence as opposed to traditional neutrality, see Josef Köpfer, *Die Neutralität im Wan-*

tional equivalence of self-defense and armed reprisal may be achieved only by defining the scope of the self-defense concept extremely broadly.²²² However, the available evidence indicates that the Security Council itself and the International Court of Justice in the recent *Nicaragua Case* have a restrictive view of self-defense. Further, this inquiry already has rejected the position commonly argued under such circumstances that a state is the sole judge of the lawful scope of its self-defense. In any event, the International Court of Justice likely will reject this position in the pending *Flight 655 Case*.

V. INSURGENTS ABROAD, HOSTAGE RESCUE ON FOREIGN TERRITORY, AND THE BOUNDARY TO SELF-DEFENSE

The inquiry now expands to further doctrinal questions concerning self-defense on foreign territory, as well as to limited aspects of the international law concept of necessity. In terms of pre-U.N. Charter law, the state of necessity (*état de nécessité* or *Notrecht*) was associated closely with broad views of self-preservation and a natural law approach. In this context, the *Caroline* incident itself represents a situation involving one state's use of armed force on another state's territory to attack insurgents. The *Caroline* precedent lies at the heart of Anglo-American views of self-defense, but states and publicists adopting a textualist approach to U.N. Charter Articles 2(4) and 51 often reject it under their interpretation of self-defense (commonly recharacterizing it as a necessity precedent, since

del der Erscheinungsformen militärischer Auseinandersetzungen (Bernard & Graefe, 1975); Majorie M. Whiteman, 11 *Digest of International Law* 139-210 (US Government Printing Office, 1968); Dietrich Schindler, *Aspects contemporains de la neutralité*, 121 Vol II Rec des cours 221 (1967); problems arise whenever non-belligerents elect to deal preferentially with a belligerent state that may be regarded objectively as the aggressor state. During the Iran-Iraq War, a volatile combination was present in the form of financial and similar aid to Iraq offered by non-belligerent Gulf Arab states at the same time as those countries sought the protection of neutral status under prize law for their oil tankers. To the extent merchant vessels either sailing under their flag or carrying their oil to export markets were attacked by Iranian forces, those Iranian attacks might be rationalized as armed reprisals permitted as a matter of developing customary law against non-belligerents not adhering to traditional neutral obligations. See Francis V. Russo, Jr., *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 *Ocean Devel Intl L* 381 (1988). Otherwise, the same partial acts of non-belligerents may be recognized as hostile acts in a traditional sense. See Farhaug Mehr, *Neutrality in the Gulf War*, 20 *Ocean Devel Intl L* 105 (1989). The difficult question is whether acts undertaken in protection of non-belligerent shipping are lawful, since the victim state would argue that partial commerce is in furtherance of the underlying aggression (and so could be the subject of self-defense measures).

222. Tucker implicitly admits this when he argues that reprisal-type activities will either be subsumed under self-defense, or, to the extent self-defense is narrowly conceived, armed reprisals must exist. Tucker, 66 *Am J Intl L* at 586 (cited in note 73). This qualifier linked to self-defense's scope makes clear that the underlying problem is simply the perceived necessity of self-help in an imperfect collective security system. Perceived need does not, however, equate to necessity unless U.N. Charter Article 2(4) has lost its binding character under desuetude or effectiveness principles. See note 106 and accompanying text. Neither Tucker nor the official U.S. position appears to go that far.

they read Article 2(4) to prohibit the use of armed force on a state's territory unless "self-defense" is involved).²²³

The superficial differences in a Continental Legal Science doctrinal analysis of self-defense versus necessity derive from a Continental public

223. Recent discussions by the ILC of then Rapporteur Ago's *Addendum to the Eighth Report* (cited in note 52) reveal the depth if not the source of doctrinal disagreement among international law scholars concerning the applicability of self-defense principles to the armed band attack problem. The lack of consensus among ILC members and their consciousness of diverging state views concerning the proper scope of the general self-defense and necessity concepts caused the ILC to strive specifically to avoid formally incorporating any doctrinal characterizations in the Draft Code. See Malanczuk, *Countermeasures and Self-Defense* at 260-64 (cited in note 52). As one commentator noted, Draft Article 33's treatment of necessity incorporates the Rapporteur's ideas concerning necessity in lieu of leaving the matter to the interpretation of competent organs. See *id.* at 276-77. The aspect of doctrinal disagreement of direct interest finds expression in the issue whether a state's response against armed band attack is governed by the international law principles of self-defense or those of necessity. The practical effect of consigning armed band attacks to the necessity doctrine may be to articulate an unrealistic approach under which there apparently is no possibility of lawful international law response. This division of opinion is clearest in ILC member Schwebel's unanswered and perhaps rhetorical question to Rapporteur Ago in the course of discussing his drafts to the effect that apparently a state could not lawfully protect itself by using force against an attack by terrorists. See *1621st Meeting of ILC, June 27, 1980, UN Doc A/CN.4/318/Add.5-7, A/CN.4/328 and Add.1-4, 1 YB Intl L Comm 191, 192 (1980)*. See also Malanczuk, *Countermeasures and Self-Defense* at 264-70 (cited in note 52). This apparent anomaly would arise due to current Draft Code Article 33(2)'s express provision that necessity may not be invoked to preclude wrongfulness of a state's act "if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law." Draft Code at Art 33(2)(a). The unlawful use of force would be such a violation of a peremptory norm, and if self-defense is inapplicable, it is unclear how the use of force is theoretically justified under international law. Beyond doctrinal formalism, this approach opposes the use of force by a state abroad against domestic enemies (the *Caroline* situation) or the conduct of military operations abroad in protection of nationals' lives and property (ranging from largely discredited traditional intervention to the harder modern cases of aircraft hijackings and hostage-taking incidents on foreign soil).

On the other hand, Rapporteur Ago's doctrinal idea of necessity is formulated in terms of the ability of one state to assert the primacy of its specific right or interest over those of a second state (to justify actions which otherwise objectively violate the rights of the second state). Importantly, the second state need not commit a wrong to justify the claim of necessity. In formulating his approach, the Rapporteur considered the necessity issue in terms of the right of one state to undertake unilateral military action against its domestic subversives encamped within the borders of a neighboring state (again the *Caroline* fact pattern). While admitting that some views of international law might permit the state to launch a cross-border attack against insurrectionists under a self-preservation rationale, applying the same public law subjective rights analysis, he found no wrong on the part of the invaded state to justify the incursion on its territorial integrity. Roberto Ago, *Le delit international*, 68 Vol II Rec des cours 415, 539-45 (1939). These differing doctrinal views of self-defense and necessity have been applied in retrospect to recharacterize traditional self-defense precedents in state practice as either "true" self-defense or mere necessity. Older precedents recharacterized as involving necessity are then subject to rejection on the basis of intervening changes in general views of international law (here the peremptory norm character of prohibitions on the unlawful use of force). To the extent the older precedents reinterpreted to involve necessity doctrine contain embarrassing references to application of "self-defense" principles, these references may be disclaimed as involving misnomers or slack language under older inconsistent usage. This approach to recharacterizing leading precedents has been applied specifically to the *Caroline*, which lies at the heart of U.S. and traditional general international law views of self-defense.

law subjective rights approach requiring one state's prior wrong (an attack in disregard of the international law obligation not to use force under normal circumstances) as the *a priori* source of another state's right of self-defense.²²⁴ In the case of aggression such as the armed forces of one state invading the territory of another, there is no substantial practical difference in applying this national view of international law. Applied to the armed band attack situation, however, absent attribution of its action to a state, there is no state wrong and thus no right of self-defense. To the extent national views of international law deny that individuals are international law subjects, a "private" armed band attack exists on another (dualistic) legal plane and does not entail an international law right of self-defense in response. However, this formalistic view ignores the entire modern development of the idea of individual responsibility for breaches of international law.

The basic difference between a textualist's approach to self-defense from a subjective rights analysis and the international law views behind the *Caroline* lies in the U.S. view that self-defense under international law is rooted in self-preservation (following the traditional natural law analysis). Thus, the focus is not on some reciprocal relationship between equal subjects of international law, but rather on the single state repelling the threat directed against it. Apart from doctrinal rejection of any claimed natural law influence, those opposing recognition of the self-preservation basis of self-defense do so out of the fear that the self-preservation rationale itself cannot be limited. On the *Caroline*'s facts, the self-preservation interest is a necessary but not sufficient condition to carry the battle against insurgents to another state's territory. However, older views of diplomatic protection also allowed a state to use armed force in protecting its nationals from imminent harm under then current broader views of self-preservation. During the postwar period, such use of force in hostage and similar situations often has been characterized as "self-defense" in an apparent attempt to bring it within the terms of U.N. Charter Article 51. At the same time, textualists favoring a broad reading of Article 2(4)'s prohibition on the use of armed force typically have opposed the legality if not the morality of these actions.²²⁵

Publicists have noted that theoretical ideas of self-defense and overwhelming necessity in circumstances of local lawlessness are not as contentious as they may appear judging by the tenor of opinions expressed in opposition. A considerable amount of opposition is due to the admitted

224. See *id.* at 538-39; *Addendum to the Eighth Report* at 65-66 (cited in note 52). See also Alfred von Verdross, *Völkerrecht* 431-32 (Springer, 5th ed 1964) (including partial catalog of publicists' positions).

225. See, for example, 1985 DGfV Proceeding at 113-54 (cited in note 72) (discussion comments).

possibility of abuse.²²⁶ Under some circumstances, it provides a ready excuse for stronger states to intervene militarily in what is substantially an attempt to affect the weaker state's political life (particularly but not exclusively in connection with military intervention alleged to be in protection of nationals' lives and property). The mere possibility of abuse, however, cannot justify categorical rejection of otherwise valid legal precedents addressing recognized problems in the international sphere. Assuming the existence of the actual preconditions for limited territorial incursion, there seemed little question concerning the legality of military operations under pre-World War II customary law in the case of protection of nationals.

To determine current state practice, one should examine incidents involving post-World War II territorial incursions under traditional military intervention in protection of nationals' lives and property together with the newer variation of aircraft hijacking and hostage cases.²²⁷ Judging by international reaction to what is essentially self-help in exigent circumstances, the law now permits limited territorial incursions under narrow circumstances where (1) the *Caroline* test's factors are met, (2) there is an absence of effective governmental authority to enforce (or failure to respect) municipal laws protecting foreigners, and (3) the goal of state activity seems clearly limited to protection of its nationals' lives against imminent danger.²²⁸ The international community at large,

226. See *Addendum to the Eighth Report* at 40 (cited in note 52).

227. See generally Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff, 1985).

228. Waldock's formulation of the customary law prior to the League Covenant regarding intervention in protection of nationals' lives parallels this in great part:

The landing of forces without consent, being unmistakably a usurpation of political authority, is *prima facie* intervention. The question is whether it is an intervention which is justifiable as an exceptional measure of self-protection. That must depend on whether it satisfies the principles laid down in the *Caroline* incident. There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury.

Waldock, 81 Vol II Rec des cours at 467 (cited in note 53).

Waldock believed that this customary law survived under the U.N. Charter. He accepted the view that U.N. Charter Article 2(4) prohibited the use of force except in self-defense under Article 51's terms or under the authority of a U.N. organ. *Id.* at 493. He argued from the history of Article 51 that it was aimed at coordination of regional security, and so the armed attack language should not be interpreted too strictly as the customary law still existed. *Id.* at 496-97. From these premises he apparently reached the conclusion that "self-defense" was preserved and as a result so was the ability of a state to intervene in protection of its nationals' lives. This involves a leap of reasoning, however, because it equates self-defense with the historically broad views of "self-preservation" (in criticizing Waldock, Brownlie notes as a second possibility that the Kellogg-Briand Pact and U.N. Charter limitations on the use of force are subject to the existing customary law, which possibility he characterizes as even more remote). See Brownlie, *International Law and the Use of Force by States* at 298-99 (cited in note 5). While Brownlie assails Waldock's viewpoint (in which intellectual camp he includes Bowett, the other major contemporary British commentator on the self-defense issue, see note 45), he is still

through the forum of the United Nations, has generally rejected military interventions perceived to involve a desire to affect the conduct of affairs by the state intervened against. This rejection followed in spite of claims that the operations were conducted to protect nationals' lives. This has occurred even where such a claim might have some basis in fact, but where collateral indications such as the magnitude of the military intervention are inconsistent with the sole goal of protecting nationals' lives. Thus, military intervention claimed to be in protection of nationals' lives did not find broad international acceptance²²⁹ in the 1956 Suez Crisis²³⁰ or the 1983 Grenada Invasion.²³¹ Other criticized cases present special problems, such as the 1965 Dominican Crisis involving consensual intervention at the request of a government claiming that it could no longer guarantee protection of foreign lives,²³² or the 1960 dispatch of Belgian

effectively unable in the end to explain the *Corfu Channel Case*. His characterization of the Court's upholding the second passage as innocent passage in a technical sense is unconvincing. See Brownlie, *International Law and the Use of Force by States* at 286-88 (cited in note 5). Brownlie goes astray when he accepts Waldock's characterization of the *Corfu Channel Case* issue as self-help generally, turning on a distinction between the assertion of rights denied and remedy for a wrong already committed. The ICJ itself discussed and apparently resolved the issue in terms of sovereignty itself, see note 153, which apparent anomaly in the original source should have earned more of Brownlie's attention than the Waldock-Bowett position. See notes 163-65 and accompanying text. As a matter of national views of international law, however, Brownlie's detailed attention to Waldock's position itself is understandable in light of the fact that the British government asserted it in the 1956 Suez crisis. Wolfgang Friedmann and Lawrence A. Collins, *The Suez Canal Crisis of 1956*, in Lawrence Scheinman and David Wilkinson, eds, *International Law and Political Crisis: An Analytic Casebook* 113-14 (Little, Brown, 1968).

229. The concept of broad international acceptance is problematic given the reality of block groupings. Such acceptance is absent at least where states which otherwise cooperate on a regular basis express significant opposition, as in the U.S. condemnation of British and French intervention in the Suez Crisis in 1956.

230. See Brownlie, *International Law and the Use of Force by States* at 297 (cited in note 5); Friedmann and Collins, *The Suez Canal Crisis of 1956* at 114-21 (cited in note 228). Rapporteur Ago noted that the British and French Governments did not formally plead the "doctrine of necessity" before the U.N. General Assembly in support of their military intervention. He presumed that Britain and France did not plead on the grounds that other governments then could have disproved the presence of all necessary elements. *Addendum to the Eighth Report* at 42 note 132 (cited in note 52). This also may simply represent a misperception in the Rapporteur's expectation of articulation in the case of the necessity "doctrine" for Great Britain. Elements of necessity implicated in the *Caroline* rule were claimed to be present in the Government's apparent espousal of Waldock's position on the older customary law in Parliamentary debates. See note 228 and accompanying text.

231. In the case of Grenada, protection of nationals' lives was an alternate basis asserted together with what was essentially a consent rationale (by invitation of governmental authorities or regional organizations). The contested authority to issue the invitation is beyond this article's scope of investigation. This article takes no position on the Grenada invasion's actual legality because that would necessitate a broader investigation of this question and the entire intervention issue. However, despite assertions that the U.S. military operations were to protect U.S. lives at risk in allegedly chaotic conditions, this rationale did not find wide acceptance in the international community. See Scott Davidson, *Grenada* 86-87, 138-48 (Gower, 1987).

232. There was international political criticism that the articulated protection rationale was merely an excuse and, while consensual, the intervention impermissibly influenced the outcome of

troops to the newly independent Congo in the face of actual loss of life.²³³ On the other hand, the recent spate of military operations aimed narrowly at rescue of a specific group of nationals held hostage abroad in aircraft hijackings have generally enjoyed much greater international acceptance. Nonetheless, these small scale military operations commonly do involve territorial incursion in asserted protection of nationals' lives. The distinction between these and the more criticized interventions lies in clearly exigent circumstances and their narrow focus on protecting nationals in imminent danger.

The 1970s presented several instances of military operations involving territorial incursion in connection with aircraft hijackings (ending in hostage situations). The 1977 Mogadishu operation involving German forces freeing Lufthansa passengers and the 1978 Larnaca operation involving Egyptian forces were both rationalized under international law as having been conducted with the consent of the states where the hostages were held.²³⁴ However, Israel specifically raised the claim of "self-defence" in its 1976 non-consensual military operation at Entebbe, Uganda to free the passengers of an El Al flight.²³⁵

the civil war. See Richard W. Mansbach, ed, *Dominican Crisis 1965* 43-49 (Facts on File, 1971). Rapporteur Ago seemed not to rely on the asserted consensual nature of the intervention, but still erred in noting that the United States claimed only that the Dominican Government was unable to protect its nationals, *Addendum to the Eighth Report* at 43 note 139 (cited in note 52), without apparently recognizing that the United States might be disinclined to raise a general "necessity" plea (but U.S. together with British views of the customary law effectively require adherence to the *Caroline* requirements, see note 228).

233. Here nationals' lives were at risk and were lost in the unrest, but there was an apparent general perception that Belgium itself had procured the situation through a poorly prepared, precipitous grant of independence. See Ernest W. Lefever, *Uncertain Mandate: Politics of the U.N. Congo Operation* 131-33 (Johns Hopkins U Press, 1967). By intervening immediately in the wake of independence, it undercut that process and created a new problem in the form of the Katanga secession. See A.G. Mezerik, ed, *Congo and the United Nations* 3, *Chronology of the United Nations* 2, 2-5 (1963). The U.N. Security Council demanded the removal of Belgian troops, but then dispatched U.N. forces to replace them in maintaining order. See Lefever, *Uncertain Mandate: Politics of the U.N. Congo Operation* at 12, 131-44. Rapporteur Ago maintained that Belgium's 1960 dispatch of paratroopers to the Congo was practically the sole modern instance of an explicit claim that a plea of "necessity" in protecting nationals' lives justifies such a military operation. *Addendum to the Eighth Report* at 43-44 (cited in note 52). He opined, however, that it was important to note that the plea of necessity was not rejected. *Id* at 43. This is consistent with the view that protection of nationals was a legitimate concern, but Belgium's actions in the larger context of Congolese independence were open to criticism.

234. See *id* at 44. See also note 163.

235. *Addendum to the Eighth Report* at 44 (cited in note 52); UN SCOR S/12123. For differing views, see UN SCOR S/12124; UN SCOR S/12132; UN SCOR S/12135; UN SCOR S/12136; UN SCOR S/12139. See also Ulrich Beyerlin, *Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht*, 37 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 213 (1977); Helmut Strebelt, *Nochmals zur Geiselbefreiung in Entebbe*, 37 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 691 (1977).

While it was not surprising that the Entebbe operation was criticized from various quarters in the related U.N. Security Council debate, beyond rhetoric the criticism seemed directed more generally at the unresolved Palestinian problem and related self-determination issues than at the Ugandan territorial incursion itself.²³⁶ As a practical matter, few in the international community seemed to doubt the imminent danger to the passengers, the apparent failure of the Amin Government to take steps against the hostage-takers (governmental collusion was suggested), or that Israel solely intended the rescue of the passengers (as opposed to an effort to influence Uganda's internal affairs). While the entire Entebbe incident might be cited as a precedent involving self-defense and armed bands (involving conception of the politically motivated hijacking as an attack on the Israeli state itself), it is probably better understood as involving the protection of nationals with the Israeli employment of the term self-defense paralleling a slightly broader self-preservation conception.²³⁷

In addition to aircraft hijackings, one hostage rescue case involving non-consensual territorial incursion and a military operation has been treated at least peripherally by the International Court of Justice. In the *Hostage Case*, the failed U.S. military rescue mission of April 24-25, 1980, which occurred between the Court's *Order of Provisional Measures*²³⁸ and its *Judgment*,²³⁹ was commented on if not reviewed fully by the Court.²⁴⁰ Any legal characterization of the entire rescue mission is inconclusive, because the hostages largely enjoyed diplomatic or consular status and their captivity formally was attributed to Iran. As such, their captivity could be an attack on the United States under certain interpretations, and in fact the Security Council was notified of the attempted rescue mission pursuant to Article 51 of the U.N. Charter.²⁴¹ Despite these indications of a self-defense claim, official U.S. Presidential statements stressed the humanitarian nature of the rescue mission, the steadily increasing danger to the hostages (threats of their execution were endemic), and that the mission's sole aim was their rescue (and as such did not constitute a

236. See note 235.

237. In this sense, self-defense as used here parallels the broader British usage of self-preservation. As a practical matter, Israel may have chosen the self-defense language as much as a political as a legal matter and to bring its activities literally under the terms of U.N. Charter Article 51.

238. *Case Concerning United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures)* (US v Iran) 1979 ICJ 7 ("Provisional Measures").

239. *Hostages Case*, 1980 ICJ at 3 (cited in note 146).

240. *Id.* at 43-44.

241. See *Report by the United States to the Security Council pursuant to Article 51 of the Charter of the United Nations*, in *ICJ Pleadings, United States Diplomatic and Consular Staff in Tehran* 486 (1982).

military act against Iran).²⁴² Taken as a whole, the rescue mission seems closer to a military operation in protection of nationals (albeit with special status) than a formal act of self-defense. While two dissenting judges would have found this U.S. activity to be a violation of international law,²⁴³ the majority of the Court simply expressed its concern that the rescue mission was "of a kind calculated to undermine respect for the judicial process in international relations."²⁴⁴ The Court seemed to consider that the unilateral U.S. military action presented international law problems more in connection with recourse to self-help in a pending case than with the Iranian territorial incursion *per se*. To the extent that the rescue mission did not involve the exercise of self-defense (narrowly understood), the Court's attitude comports with a belief that limited military operations solely in protection of threatened nationals are permissible under international law.²⁴⁵

Preliminary conclusions are in order. Despite suggestions that state practice under the U.N. Charter in protection of nationals is inconclusive because the examples are few,²⁴⁶ it probably is wiser to recognize that the few examples indicate continuous state practice. The modern territorial incursion examples merely adhere to a narrow view of the pre-World War II customary law, essentially distinguishing military operations in the course of politically motivated intervention from limited efforts to protect a state's nationals where reasonable protection is not afforded by the host state due to a failure of its own authority. However, it probably is incorrect to justify such actions in terms of self-defense (as claimed in the En-

242. See *id* at 484-85. The statements were annexed to the notice supplied to the Security Council. See *id* at 486.

243. *Nicaragua Case*, 1986 ICJ at 59 (cited in note 60) (dissenting opinion of Judge Tarazi from Syria); *id* at 52 (dissenting opinion of Judge Mozorov from the Soviet Union).

244. *Hostages Case*, 1980 ICJ at 43 (cited in note 146).

245. See Ronzitti, *Rescuing Nationals Abroad* at 61-62 (cited in note 227) (citing *The ICJ Decisions and Other Public International Law Issues*, in Richard Steele, ed, *The Iran Crisis and International Law 32* (John Bassett Moore Society of International Law, 1981) (remarks by Richard B. Lillich), and John R. D'Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, 21 Va J Intl L 486, 517 (1981)).

246. See *Addendum to the Eighth Report* at 44 (cited in note 52). The opinion of the Rapporteur seems to be influenced in part by the fact that post-World War II state practice seems largely to follow pre-World War II state practice, which would be inconsistent in various ways with his formulation of a concept of necessity and recharacterization of older self-defense precedents. Compare Ronzitti, *Rescuing Nationals Abroad* at 62-63 (cited in note 227) (noting relatively few post-U.N. Charter instances of the protection of nationals abroad, and indicating that insofar as the author was of the opinion that the U.N. Charter had prohibited such use of force, these were still too few to represent new law made through state practice; however, admitting that the few instances were sufficient to resist any desuetude claims for those arguing that the U.N. Charter had not prohibited such use of armed force under all circumstances). Rather than characterizing the newer examples of state practice as insufficient because they may not be reconcilable with the theory, it seems better to acknowledge that the newer examples are simply an extension of older state practice and to inquire whether the theoretical treatment is a valid explanation *per se* or predictive of future state practice.

tebbe operation and the failed military rescue mission in the *Hostage Case*). Invocation of self-defense in such instances is mistaken because its employment here in substance follows the older usage under broad views of self-preservation or formalistically in connection with somewhat dated ideas of diplomatic protection (to the extent the self-defense terminology is not mistakenly employed due to a failure to distinguish hostage rescue from the insurgency situation such as the *Caroline* precedent involving similar but distinct necessity aspects). Instead, it probably is preferable to analyze the employment of armed force here under the reciprocal rights and obligations attaching to a state's protection of other states' legitimate interests within its territory. On the other hand, the readiness of states to claim self-defense under such circumstances, 'if not simply mistaken, is transparently a response to the textualist position that effectively no employment of armed force on another state's territory is lawful unless "self-defense" is involved. This misconstrues the self-defense concept in an attempt to avoid disagreements under Article 2(4) and the intervention concept.

VI. CONCLUSION

There are interesting signs that a jurisprudence of self-defense and the proper relationship of U.N. Charter Articles 2(4) and 51 may emerge in the not-too-distant future. The *Nicaragua Case* represented a first, albeit flawed step. To the extent that the pending *Flight 655 Case* is argued on the merits, it appears that the ICJ soon will examine the self-defense concept again. At that time, it will confront the opposing views characterizing self-defense as surviving customary law under Article 51 or as an entirely new treaty-based concept (typically in the form this inquiry has referred to as the definitional construct or textualist approach combining Articles 2(4) and 51). If it carefully examines the law, the Court should reach the same conclusion as this inquiry, that the proper treaty interpretation of the U.N. Charter would recognize that a restrictive version of customary law survives under Article 51. At the same time, U.S. claims are incorrect that self-defense is self-judging as a matter of law. Further, wherever possible, proportionality restraints should apply.

If there is light at the end of the tunnel in the possibility of converging views on Article 51 and self-defense, Article 2(4) still stands in darkness. Article 2(4) straddles self-help, self-preservation, aggression and intervention concerns, where differences between states' views of the law (and their readiness to pursue armed self-help) remain. Legal views of different states may be reconciled in a clear case such as the invasion of Kuwait. Views diverge beyond the clear case, although with some care it

is possible to separate intervention and similar concerns from self-defense for purposes of development of the law.

