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## The Right to Self-Defense Once the Security Council Takes Action

Malvina Halberstam

*Benjamin N. Cardozo School of Law, Yeshiva University*

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## ARTICLES

# THE RIGHT TO SELF-DEFENSE ONCE THE SECURITY COUNCIL TAKES ACTION

*Malvina Halberstam\**

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### INTRODUCTION

Article 51 of the U.N. Charter provides:

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.

One of the legal issues that emerged in the context of the Gulf crisis is the interpretation of the "until" clause in Article 51 of the U.N. Charter. Specifically, does a state retain the right of self-defense once the Security Council has taken measures to deal with the problem? Following the Iraqi invasion of Kuwait, the Security Council, acting under Chapter VII of the Charter, adopted a number of resolutions which called on Iraq to withdraw from Kuwait,<sup>1</sup> imposed sanctions on

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\* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. M.I.A., Columbia University School of International Affairs (1964); J.D., Columbia University (1961); B.A., Brooklyn College (1957). I wish to thank Esther Geuft, Cardozo 1993, and Lucille A. Roussin, Cardozo 1996, for their invaluable assistance with the research for this article.

1. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/INF/46 (1990); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 19, U.N. Doc. S/INF/46 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/INF/46

Iraq designed to compel it to do so,<sup>2</sup> and authorized a blockade to ensure that the sanctions were obeyed.<sup>3</sup>

When, several months later, Iraq had still not complied, and reports of its atrocities in Kuwait mounted, the United States and other states indicated they might use force to expel Iraq from Kuwait.<sup>4</sup> Some commentators took the position that once the Security Council was seized of the matter, the use of force in self-defense was barred under Article 51 unless authorized by the Security Council.<sup>5</sup> Both the U.S. and the U.K. took the position that no authorization was required.<sup>6</sup>

While the question as applied to Kuwait was rendered moot by the Security Council resolution authorizing the use of force;<sup>7</sup> the question whether a state that has been attacked may use force in self-defense and may seek the assistance of other states in doing so, once the Security Council has taken measures, continues to be of great importance. An examination of the question is particularly timely now, as the members of the United Nations celebrate the fiftieth anniversary of the adoption of the Charter and consider proposals for its amendment.

Five prominent international law scholars — Professors Chayes, Franck, Reisman, Rostow, and Schachter — have given differing answers as to whether and to what extent self-defense is permissible once the Security Council has acted.<sup>8</sup> Three, however, appear to agree that a state that has been attacked may lose its right to use force in self-defense if the Security Council has taken action, even if that action has

(1990); S.C. Res. 677, U.N. SCOR, 45th Sess., 2962d mtg., U.N. Doc. S/INF/46 (1990); S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/RES/686 (1991).

2. S.C. Res. 661, *supra* note 1, at 19.

3. *Id.*

4. Ivor Owen, *Military Option to Eject Iraq Cannot Be Discarded*, FIN. TIMES, Oct. 25, 1990, § 1, at 10; Robert Pear, *Bush, Meeting Foreign Minister, Lauds Beijing Stand Against Iraq*, N.Y. TIMES, Dec. 1, 1990, at A8; Judith Miller, *Bush's Gambit: A Way into War and a Way Out*, N.Y. TIMES, Dec. 2, 1990, at E1; David Hoffman, *Diminished Cooperation on Gulf, Arms Feared*, WASH. POST, Dec. 21, 1990, at A1.

5. See, e.g., Abram Chayes, *The Use of Force in the Persian Gulf*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 3 (Lori F. Damrosch & David J. Scheffer eds., 1991); Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991).

6. See Thomas L. Friedman, *Baker Off to Mideast to Put Muscle Behind Bush Threats*, N.Y. TIMES, Nov. 4, 1990, at A16; Craig R. Whitney, *British Warnings to Iraqis on War*, N.Y. TIMES, Nov. 7, 1990, at A19.

7. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/INF/46 (1990).

8. See Chayes, *supra* note 5; W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold World War: Practices, Conditions, and Prospects*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 5, at 26; Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 5, at 65; Franck & Patel, *supra* note 5; Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense*, 85 AM. J. INT'L L. 506 (1991).

not succeeded in removing the aggressor or stopping the attack. One believes that while such an interpretation of Article 51 is contrary to the legislative history of Article 51, it would be permissible if that would best achieve the objectives of the Charter, but concludes that at the present such an interpretation would undermine rather than further those objectives. Only one takes the position that Article 51 affirms a state's right to individual and collective self-defense until the Council has successfully dealt with the matter.

This article discusses the views of these commentators in the light of the language, history, and policies underlying Article 51. It concludes that the Charter was not intended to and should not be interpreted to deny a state the right of self-defense, even if the Security Council has taken measures to deal with the problem; if states are to cede their right to self-defense once the Security Council has taken measures, that should be made explicit.

#### I. VIEWS OF PROMINENT PUBLICISTS

Professor Abram Chayes is unequivocal in his view that a state may not use force in self-defense once the Security Council has become seized of the matter. He states that "Article 51 is not an affirmative grant of a right of self-defense but a statement of the situations in which the exercise of an 'inherent right' is not precluded by the Charter."<sup>9</sup> Moreover, "those situations are subject to a limit of time. They endure only 'until the Security Council has taken the measures necessary to maintain international peace and security.'"<sup>10</sup>

Instead, "[i]n the larger scheme of the Charter, it is the Security Council that has 'primary responsibility for the maintenance of international peace and security,' which is recognized as primarily a political rather than a legal task."<sup>11</sup> According to Chayes, "[t]o carry out that responsibility, the Council, once seized of a matter under Chapter VII, must have the authority to make the political judgments as to the requirements of the situation and the measures necessary to deal with it."<sup>12</sup> Additionally, "Security Council preemption . . . reinforces the fundamental objective of Article 2(4) and Article 51 to confine the permissible occasions for the unilateral use of force to the narrowest possible range, where it is immediately and universally apparent that armed

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9. Chayes, *supra* note 5, at 5.

10. *Id.*

11. *Id.* at 6.

12. *Id.*

response is required.”<sup>13</sup> Under this interpretation, a state could attack another state, bring the matter to the Security Council or get another state to do so, and block the victim state’s right of self-defense regardless of the measures taken by the Security Council or of their effectiveness in maintaining international peace and security.

Professor Oscar Schachter agrees that the Security Council has the authority to replace collective self-defense with enforcement measures under Chapter VII, provided that its intent to do so is clear. He holds that “[t]he claim sometimes advanced that self-defense as an inherent right cannot be taken away is not consistent with Article 51,”<sup>14</sup> because “[t]hat Article not only requires states claiming self-defense measures to report immediately to the Council; it says such measures shall not ‘in any way affect the authority and responsibility of the Security Council’ to take such action as it deems necessary.”<sup>15</sup> Moreover, “[t]he Council has in fact never doubted its right to reject a self-defense claim and to call on states making such claims to cease hostilities.”<sup>16</sup> Schachter concludes that “[i]t would be absurd to maintain that the use of force under a claim of self-defense cannot be denied and overridden by the Council when it determines that such action is necessary.”<sup>17</sup>

While the Security Council may, of course, reject a state’s claim that it is acting in self-defense, that is very different from a right to order a state to desist from using force in self-defense even though the Security Council has recognized that the state has been the victim of an armed attack. In the former situation, the Security Council is rejecting the state’s claim that events which would give rise to such a right have occurred. In the latter scenario, the Security Council would have the authority to tell a state that even though it is the victim of aggression — a fact that was not in dispute in the Iraqi invasion of Kuwait — it may not use force to resist that aggression. The Security Council might do so because the member states believe, in good faith, that a different approach, for example, economic sanctions, is preferable. Alternatively, the Security Council might consider it preferable to avoid the use of force because it believes it would be better for the victim of the attack or because it believes it would be in the best interest of the international community to do so, even if it was not in the best interest of the victim. Or, the Security Council might decide to bar the use of force simply

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13. *Id.*

14. Schachter, *supra* note 8, at 78–79.

15. *Id.* at 79.

16. *Id.*

17. *Id.*

because the aggressor state has greater political power in the Security Council.<sup>18</sup> While the Council has ordered states claiming to be acting in self-defense — often both sides make that claim — to cease hostilities, it has never ordered a state that was indisputably the victim of an armed attack to refrain from using force in self-defense.

Schachter explained his position further in a subsequent article. In it, he rejects unequivocally the suggestion that the right of self-defense was “overridden whenever the Security Council adopted measures considered necessary in case of an armed attack on a state,”<sup>19</sup> characterizing this position as “an implausible — indeed, absurd — interpretation”<sup>20</sup> of the “until” clause in Article 51. He does assert, however, that “[t]he Council may order a claimant to cease military action even if that action was legitimate defense.”<sup>21</sup> The only limitation is that “a decision of that character would need the unanimous concurrence of the permanent members; hence, it could not be adopted over the objection of one or more of those members.”<sup>22</sup>

Professor Thomas Franck takes the position that once the Security Council acts under Chapter VII states are barred from using force in self-defense under Article 51.

If states use armed force under the self-defense rubric of Article 51, their individual activities are subsumed by, or incorporated into, *the global police response* once it is activated. That is, the old way is licensed only until the new way begins to work: “until,” in the words of Article 51, “the Security Council has taken the necessary measures to maintain international peace and security.”<sup>23</sup>

After reviewing the negotiating history of Chapter VII of the Charter, and particularly of Article 42, providing for the use of force by the Security Council, he concludes, “[t]his record is entirely inconsistent with the notion that, once the Security Council has taken measures,

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18. States generally vote in their own political interests. *See, e.g.*, ALLAN GERSON, THE KIRKPATRICK MISSION 114, 117–19 (1991) (Disagreements within the U.S. government on whether to support Argentina or the U.K. in the Security Council in the Falklands conflict were based on differing views of which position would be more harmful politically for the United States.); *see also* Stephen M. Schwebel, *The Effects of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROC. AM. SOC'Y INT'L L. 301, 302 (1979) (“The members of the General Assembly typically vote in response to political not legal considerations.”).

19. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 458 (1991).

20. *Id.*

21. *Id.* at 459.

22. *Id.*

23. Franck & Patel, *supra* note 5, at 63 (emphasis added).

individual members are supposed to remain free to design their own military responses."<sup>24</sup>

It is not entirely clear whether Franck would bar use of force in self-defense once the Security Council has taken *any* measures under Chapter VII or would do so only if the Security Council has taken measures involving use of force. He speaks of "the global *police* response"<sup>25</sup> and of the inherent right of self-defense being "suspended during a *police action*."<sup>26</sup> Franck also adds a caveat, which he concedes "is not spelled out in the Charter," but which he says, "it is sensible to assume," namely, that "the 'inherent' right of self-defense, suspended during a police action, might revive if the Council — for example, by exercise of a veto — were to find itself blocked from taking necessary measures."<sup>27</sup> As Franck acknowledges, there is nothing in Article 51 or other Charter provisions that provides for an exception to the requirements of Article 51 if the veto is used. Nor does he cite anything in the *travaux préparatoires* to support that position. Thus, if the "until" clause bars self-defense once the Security Council is seised of the matter, it does so regardless of whether the Security Council is subsequently blocked from taking "necessary measures" by the veto. Further, who is to decide that the Security Council is "blocked from taking necessary measures" by the veto? Suppose, in the Gulf crisis the Soviet Union and/or China had voted against Resolution 678 authorizing the use of force. Would that have been a decision to give other measures more time to take effect or an inability to act because of the veto?

Although Professor Reisman takes the position that Article 51 was not intended to deny states the right to use force in self-defense once the Security Council acts, he does not consider that intent dispositive. He "think[s] it clear from the legislative history of Article 51 of the Charter that the original intention of the framers was to reserve action under Article 51 to the individual state and not to subject it to a requirement of advance Security Council authorization."<sup>28</sup> He continues, however:

But after almost half a century of practice and substantial changes in the international political context, legislative history cannot be dispositive. An interpretation based on a conception of the Charter as prohibiting unauthorized unilateral self-defense action when and because the Council is addressing a breach of the peace or act of

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24. *Id.* at 65.

25. *Id.* at 63 (emphasis added).

26. *Id.* (emphasis added).

27. *Id.*

28. Reisman, *supra* note 8, at 43.

aggression has a documentary cogency, for large-scale and violent self-help action hardly seems warranted when the sheriff is only a telephone call away. But such a putative interpretation must be examined in terms of real world scenarios to see whether and how it works.<sup>29</sup>

Reisman concludes that an interpretation of Article 51 that would bar self-defense once the Security Council takes action would be counter-productive at this point in time, because “[a]n interpretation of the Charter according to which individual states reserve the right of individual and collective self-defense keeps the pressure on an aggressor nation like Iraq and on the Security Council,”<sup>30</sup> while “[a]n interpretation that says that states no longer have that right bleeds that pressure off.”<sup>31</sup>

According to Reisman:

If an aggressor nation should perceive that a United Nations decision is the precondition for the use of force, then it probably will conclude that the pressure is off. Six months of privation caused by a blockade may be an acceptable price of acquiring a new piece of territory and the oil fields appurtenant thereto. More generally, an interpretation that assigns exclusive competence to the Security Council will produce war plans in staff colleges around the planet in which coveted territory is seized and the Security Council is seised, allowing the aggressor to hold and absorb the territory while the Council debates and perhaps orders economic sanctions.

The point is not that one should avoid the United Nations or not try to mobilize it. The point is that the United Nations is not yet an autonomous actor capable of doing the job and that interpreting the Charter as if it were capable of such challenges will undermine the Charter policies which the unorganized system, in its untidy way, has, until now, tried to secure.<sup>32</sup>

Reisman does not explain what principle of international law would justify denying a state a right that it had under customary international law and that the Charter, according to his own reading of Article 51, intended to preserve.

Professor Rostow categorically rejects the suggestion that Article 51 bars either individual or collective self-defense. “Subordinating the right of self-defense to a requirement of prior Security Council permission

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29. *Id.*

30. *Id.* at 43.

31. *Id.*

32. *Id.* at 43-44.



would," he believes, "be fatal to the right of states to defend themselves."<sup>33</sup> Instead, "[w]hat the Charter prescribes is precisely the opposite rule: that the aggrieved state and its friends and allies may decide for themselves when to exercise their rights of individual and collective self-defense until peace is restored or the Security Council, by its own affirmative vote, decides that self-defense has gone too far and become a threat to the peace."<sup>34</sup>

While Rostow (like Schachter), recognizes the authority of the Security Council to bar by an affirmative vote a state from using (further) force in self-defense, such a resolution by the Security Council must be based on a determination that "self-defense has gone too far and become a threat to the peace." Moreover, in Rostow's view, the right to self-defense includes not only a right to eject the aggressor but a right to take such further measures as are necessary to disable the aggressor from future aggression. He states,

The customary international law of self-defense, and therefore the law of Article 51 of the U.N. Charter, means that the coalition fighting Iraq could seek not simply to liberate Kuwait, but to make it impossible for Iraq to continue the extraordinary career of conquest it has pursued since 1979. Vattel wrote more than two centuries ago that, in exercising their right of self-defense, the offended parties have "a right to provide for their future security, and to chastise the offender, by inflicting upon him the punishment capable of deterring him henceforth from similar aggression, and . . . if necessary, disable the aggressor from doing further injury." In short, international law has never favored "costless aggression."<sup>35</sup>

Thus, four prominent international law scholars in the United States take the position that Article 51 of the U.N. Charter does, or would if the Security Council made its intent clear by an affirmative vote, or could in time under changed circumstances (but without Charter amendment), bar a state from using force to oust an aggressor, even if it was indisputably the victim of an armed attack and even if the measures taken by the Security Council had not succeeded in removing the aggressor. This interpretation of the Charter is very far reaching. In the

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33. See Rostow, *supra* note 8, at 510.

34. *Id.*

35. *Id.* at 514. For a discussion of the relevant provisions of the Restatement of the U.S. Foreign Relations Law and its application to the Arab-Israeli conflict, see Malvina Halberstam, *Recognition, Use of Force, and the Legal Effects of United Nations Resolutions Under the Revised Restatement of the Foreign Relations Law of the United States*, 19 *ISR. L. REV.* 495, 498, 508 (1984).

view of three of the commentators, a state's right of self-defense is already severely limited by the Charter; and in the view of the fourth (Reisman), a state's rights could be so limited in the future, without amendment of the Charter. Only one (Rostow) rejects this position unequivocally.

It is difficult to believe that the fifty states that ratified the Charter when the United Nations was established and the 130 or so states that have ratified it since, have all agreed to give up their right to self-defense in response to an armed attack once the Security Council takes action, *regardless of the action taken or of its success*. For example, under Chayes' interpretation, if the Security Council had failed to authorize the use of force in the case of the Iraqi invasion of Kuwait, Kuwait would have been barred from using force against Iraq. It would have been required to permit Iraq to continue to occupy its territory, engage in the destruction of its country, the pillage of its property, and the torture, murder and rape of its citizens.<sup>36</sup>

Professor Schachter's interpretation does not go so far. He states, "the Council's right to replace self-defense with other measures requires evidence of the Council's intent. . . . Veto by a permanent member would bar such a decision and leave intact the right of self-defense in response to the prior armed attack."<sup>37</sup> Even under this interpretation, however, only the five permanent members would retain their absolute right of self-defense. The right of any other state to use force in response to an armed attack would depend on at least one of the five permanent members agreeing that it should have that right. In the context of the Iraqi invasion of Kuwait, it would mean that if the five permanent members of the Security Council had decided — for altruistic reasons or for their own political interests — to give sanctions a year to work — not an inconceivable scenario — Kuwait and its allies would have been barred from using force in an attempt to throw Iraq out of Kuwait, notwithstanding the horrors that were being perpetrated daily by Iraq in Kuwait. In fact, an analysis of the language and legislative history of Article 51 demonstrates that it was intended to do just the opposite.

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36. See, e.g., Judith Miller, *Atrocities by Iraqis in Kuwait: Numbers Are Hard to Verify*, N.Y. TIMES, Dec. 16, 1990, at A1; Johanna Neuman, *Fear by Day, Fear by Night: Kuwaitis Tell UN of Iraqis' Brutality*, USA TODAY, Nov. 28, 1990, at A4; *Congressional Human Rights Caucus Meeting: Hearing on Reports of Iraqi Atrocities in Kuwait*, Federal News Service, Oct. 10, 1990, available in LEXIS, News Library, Arcnws File.

37. Schachter, *supra* note 8, at 79.

## II. THE PHILOSOPHY, LANGUAGE, AND HISTORY OF ARTICLE 51

An interpretation of Article 51 that would bar a state from exercising its right of self-defense once the Security Council has taken measures, regardless of whether those measures have been effective in restoring international peace and security, is inconsistent with the fundamental nature of self-defense, with the language of Article 51, and with its legislative history.

### A. Self-Defense as Fundamental Right

The right of self-defense — the right to resist attack — is one of the most, if not the most, fundamental rights both of individuals and of states. The right of an individual to use force in self-defense — even to kill if necessary — is recognized by major religions,<sup>38</sup> by moral philosophers,<sup>39</sup> and by municipal laws of most states.<sup>40</sup> The right of a state to use force in self-defense has long been recognized by customary international law.<sup>41</sup> Publicists have characterized it as *jus cogens*,<sup>42</sup> as a tenet of natural law,<sup>43</sup> and as an “inherent” right.<sup>44</sup> The U.N. Charter speaks of

38. See, e.g., BABYLONIAN TALMUD, SANHEDRIN 72A; *Exodus* 22:1.

39. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 320–21 (Peter Laslett ed., Cambridge U. Press rev. ed. 1960) (1689) (Book II, ch. III, §§ 18–19).

40. See MODEL PENAL CODE § 3.04 (1985); CÓD PEN. art. 34 (Arg.), reprinted in COMPARATIVE CRIM. L. PROJ., N.Y.U. SCH. L., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 6 (Frederick W. Danforth, Jr., ed. & Emilio Gonzalez-Lopez trans., 1963); STRAFGESETZBUCH ch. I, § 2 (Aus.), reprinted in COMPARATIVE CRIM. L. PROJ., N.Y.U. SCH. L., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 12 (Norbert D. West & Samuel I. Shuman trans., 1966); ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN, art. 17 (P.R.C.), reprinted in COMPARATIVE CRIM. L. PROJ., N.Y.U. SCH. L., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 25 (Chin Kim trans., 1982); GREEK PENAL CODE art. 22 (Greece), reprinted in COMPARATIVE CRIM. L. PROJ., N.Y.U. SCH. L., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 18 (Dr. Nicholas B. Lolis trans., 1973); CODICI PENALE art. 54 (Italy), reprinted in COMPARATIVE CRIM. L. PROJ., N.Y.U. SCH. L., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 23 (Edward M. Wise trans., 1978); SWEDISH PENAL CODE art. 24 (Swed.), reprinted in COMPARATIVE CRIM. L. PROJ., N.Y.U. SCH. L., THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 17 (Thorsten Sellin & Jerome L. Getz trans., 1972); J.R.R. COLLINGWOOD, CRIMINAL LAW OF EAST AND CENTRAL AFRICA 44 (1967); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, § 5.7 (2d ed. 1986).

41. See, e.g., EMMERICH DE Vattel, THE LAW OF NATIONS 291 (Joseph Chitty ed., 7th Am. ed. 1849); 2 HUGO GROTIUS, DE JURE BELLIS AC PACIS LIBRI TRES 172 (Francis W. Kelsey et al. trans., Carnegie Endowment 1925) (1625); OPPENHEIM'S INTERNATIONAL LAW 297 (Hersch Lauterpacht ed., 8th ed. 1955); L. OPPENHEIM, INTERNATIONAL LAW 177 (1st ed. 1905).

42. See HANS KELSEN, THE LAW OF THE UNITED NATIONS 803 (1950).

43. See *id.* at 792; GROTIUS, *supra* note 41, at 172 (for traditional naturalist doctrine, the “right of self-defence . . . has its origin directly, and chiefly, in the fact that nature commits to each his own protection[.]”).

44. L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS 106 (2d ed. rev. 1949).

the “*inherent* right of individual or collective self-defence” in the English version, and of “*droit naturel de légitime défense*” in the French version.<sup>45</sup>

### B. *The Language of Article 51*

Article 51 is formulated as an affirmation of, rather than as a limitation on, the right to self-defense. It states “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence.” This would have been a very odd way of drafting a provision that was intended to deny states one of the most fundamental aspects of sovereignty — the right to defend the state from attack. Had it been intended as a denial of the right, it should have said, “No state shall use force even in self-defense once the Security Council has taken measures under Chapter VII.” Clearly, the authors of the Charter knew how to formulate language prohibiting the use of force, as is evidenced by Article 2(4).<sup>46</sup> In fact, the Dumbarton Oaks Proposals did include a provision requiring prior authorization for the use of force by regional groups in collective self-defense.<sup>47</sup> That provision was not adopted, however.

Moreover, the “until” clause does not say “until the Security Council has become seized of the matter” or “until the Security Council has taken measures,” but rather “until the Security Council has taken measures *necessary to maintain international peace and security*” (emphasis added). While this language is somewhat ambiguous, and it is arguable that it means measures *designed or intended* to maintain international peace and security, as Chayes’ interpretation suggests, a more plausible interpretation is that it means measures that *in fact* maintain international peace and security. The latter interpretation is also buttressed by the use of the word “necessary” to modify “measures,” i.e., the right of self-defense continues until the measures necessary to maintain international peace and security have been taken. Under Chayes’ interpretation, the term necessary is rendered meaningless.

Finally, the article provides that measures taken in the exercise of the right to self-defense should be immediately reported to the Security Council “and shall not in any way affect the authority and the responsibility of the Security Council . . . (to take) such action as it may deem

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45. U.N. CHARTER art. 51.

46. *Id.* art. 2, ¶ 4 (“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.”).

47. See *infra* note 72 and accompanying text.

necessary . . ." If the "until" clause meant that a state could only exercise the right of self-defense until the Security Council took action, it would be unnecessary to state that the action taken by the state shall not affect the authority of the Security Council, since by hypothesis, it would have to cease as soon as the Security Council took action.

### C. The Legislative History of Article 51

The commentators who interpret Article 51 as a denial of the right of self-defense have not cited anything in the legislative history supporting that interpretation.<sup>48</sup> Indeed, Professor Reisman thinks "it [is] clear from the legislative history of Article 51 of the Charter that the original intention of the framers was to reserve action under Article 51 to the individual states . . ."<sup>49</sup>

There is nothing in the legislative history to suggest that a state loses its right of self-defense once the Security Council has taken measures, regardless of the measures taken or of their effectiveness.<sup>50</sup> Quite

48. Although Franck discusses the negotiating history and U.S. legislative history of Articles 42 and 43 at some length and in great detail, he cites nothing in either to support the position that under Article 51 states lose their right to act in self-defense once the Security Council takes measures to maintain international peace and security, *regardless of whether those measures succeed*. Franck & Patel, *supra* note 5.

49. Reisman, *supra* note 8, at 43.

50. This interpretation was not suggested in the discussion at the San Francisco conference. For the discussion of Article 51 at the San Francisco Conference see the discussions of Commission III, Committee 4 in Doc. 576, III/4/9, 12 U.N.C.I.O. Docs. 679 (1945); Doc. 642, III/4/9(1), 12 U.N.C.I.O. Docs. 689 (1945); Doc. 854, III/4/11, 12 U.N.C.I.O. Docs. 863 (1945); Doc. 889, III/4/12, 12 U.N.C.I.O. Docs. 701 (1945); Doc. 891, III/4/13, 12 U.N.C.I.O. Docs. 721 (1945); Doc. 904, III/4/13(1), 12 U.N.C.I.O. Docs. 737 (1945); Doc. 916, III/4/15, 12 U.N.C.I.O. Docs. 730 (1945); Doc. 993, III/4/12(2), 12 U.N.C.I.O. Docs. 717 (1945). For discussions of Commission III, Committee 4, Subcommittee A, see the Subcommittee's minutes in Doc. 186, III/4/A/1, 12 U.N.C.I.O. Docs. 829 (1945); Doc. 221, III/4/A/2, 12 U.N.C.I.O. Docs. 830 (1945); Doc. 280, III/4/A/3, 12 U.N.C.I.O. Docs. 831 (1945); Doc. 302, III/4/A/4, 12 U.N.C.I.O. Docs. 832 (1945); Doc. 335, III/4/A/5, 12 U.N.C.I.O. Docs. 833 (1945); Doc. 335, III/4/A/5(1), 12 U.N.C.I.O. Docs. 844 (1945); Doc. 533, III/4/A/9, 12 U.N.C.I.O. Docs. 848 (1945); WD 70, III/4/A/11, 12 U.N.C.I.O. Docs. 857 (1945). See also the *Dumbarton Oaks Proposals for a General International Organization*, Doc. 1, G/1, 3 U.N.C.I.O. Doc. 1 (1945), and the proposed amendments to ch. VIII, § c(2) of those proposals, found in Doc. 2, G/17(k)(1), 3 U.N.C.I.O. Docs. 335, 340-41 (1945) (Belgium); Doc. 2, G/7(o), 3 U.N.C.I.O. Docs. 376, 387 (1945) (France); Doc. 2, G/7(o)(2), 3 U.N.C.I.O. Docs. 392 (1945) (France); Doc. 2, G/14(1), 3 U.N.C.I.O. Docs. 543, 552 (1945) (Australia); Doc. 2, G/14(v), 3 U.N.C.I.O. Docs. 598, 598-99 (1945) (United States); Doc. 2, G/14(w)(1), 3 U.N.C.I.O. Docs. 601 (1945) (Soviet Union); Doc. 2, G/28, 3 U.N.C.I.O. Docs. 620 (1945) (Chile, Columbia, Costa Rica, Ecuador, Peru); Doc. 2, G/29(a), 3 U.N.C.I.O. Docs. 629, 629-30 (1945) (United States, United Kingdom, Soviet Union, China); Doc. 510, G/62, 3 U.N.C.I.O. Docs. 634, 636 (1945); *see also* Doc. 2, G/7(k), 3 U.N.C.I.O. Docs. 331 (1945) (Belgian response to Dumbarton Oaks proposals); Doc. 2, G/14(b), 3 U.N.C.I.O. Docs. 466, 470 (1945) (Czech response); Doc. 2, G/14(e), 3 U.N.C.I.O. Docs. 480, 482 (1945) (Turkish response); Doc. 2 G/14(r), 3 U.N.C.I.O. Docs. 577, 584 (1945) (Bolivian response); *Organization of the Conference*, Doc. 31, DC 6, 5 U.N.C.I.O. Docs. 124, 128 (1945); *Terms of Reference of Committee III/4 (First Revision)*, Doc. 269, III/4/5, 12 U.N.C.I.O. Docs. 764

to the contrary, the legislative history indicates that the intent was to *preserve* a state's right of self-defense until the Security Council had taken *adequate* measures to *restore* international peace and security. Article 51 was not in the Dumbarton Oaks Proposals for an International Organization. It was added at the San Francisco Conference, by the United States, at the urging of the American republics. Some of the American republics were concerned that the powers given to the Security Council might undermine the regional security arrangement provided for by the Act of Chapultepec.<sup>51</sup> Not wanting to propose an exception for the Americas only, the United States delegation decided to propose an exception for all regional security arrangements.<sup>52</sup> A number of other states were also interested in protecting regional or other collective security arrangements.<sup>53</sup> To accommodate these interests the language was changed to *collective* security arrangements, without regard to geographic proximity.<sup>54</sup>

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(1945). Nor was this interpretation suggested in the Senate Foreign Relations Committee Reports or in the debates in the Senate. *Charter of the United Nations for the Maintenance of International Peace and Security, Submitted by the President of the United States on July 9, 1945: Hearings Before the Senate Comm. on Foreign Relations, 79th Cong., 1st Sess., pt. 1* (revised) 304 (1945); *Review of the United Nations Charter: Report of the Subcomm. on the United Nations Charter of the Senate Comm. on Foreign Relations, S. DOC. No. 87, 83d Cong., 2d Sess. 62-63* (1954); 91 CONG. REC. 8059-64 (1945).

51. The Act of Chapultepec provides in part:

That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall, conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act. In any case invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression.

The Act of Chapultepec (1945), *reprinted in 7 DOCUMENTS ON AMERICAN FOREIGN RELATIONS* 717, 719 (Leland M. Goodrich & Marie J. Carroll, eds., 1947). For the actual discussion among the members of the U.S. delegation on this point, see *Minutes of the Thirty-Sixth Meeting of the United States Delegation, Held at San Francisco, May 11, 1945, in 1 FOREIGN RELATIONS OF THE UNITED STATES* 665, 665-70 (1945) [hereinafter FRUS]. For a summary of the statement by the delegates of the American States indicating their desire to ensure that the provisions of the Act of Chapultepec for regulating defense remained intact after the United Nations was established, see Doc. 576, III/4/9, 12 U.N.C.I.O. Docs. 679, 680-81 (1945).

52. *Minutes of the Thirty-sixth meeting of the United States Delegation, Held at San Francisco, May 11, 1945, in FRUS, supra note 51, at 667-68; Minutes of the Thirty-seventh Meeting of the United States Delegation, Held at San Francisco, May 12, 1945, in FRUS, supra note 51, at 675-86.*

53. See Doc. 576, *supra* note 51, at 680-82. The delegate of Colombia, speaking for the Latin American countries, said they wanted to be sure that regional self-defense pacts such as the Act of Chapultepec in the American system remained in effect. The French delegate, speaking for the European countries, said they were interested in assuring the right to general mutual assistance against aggression. The delegate of Egypt said he was interested in preserving the League of Arab States' right to collective self-defense.

54. *Minutes of the Thirty-sixth meeting of the United States Delegation, Held at San Francisco, May 11, 1945, in FRUS, supra note 51, at 667-68; see also Doc. 576, supra note 51, at 680, 687.*

Thus, Article 51 was added to ensure that the right of regional or collective security groups to use force until the Security Council had taken measures that were *adequate* and *effective* to restore international peace and security was not impaired. According to the minutes of a meeting of the U.S. delegation to the San Francisco Conference during which delegation members discussed the proposal that ultimately became Article 51,

Senator Connally inquired whether the Security Council could take cognizance of a situation in which there was an attack and counter-attack by other states acting in self-defense. Mr. Dunn replied in the affirmative and Mr. Dulles added that *however the states were not obliged to discontinue their countermeasures taken in self-defense. In other words, that there was concurrent power.*<sup>55</sup>

At a later meeting of the U.S. delegation, a statement was read which interpreted the proposal as follows:

In the event that an armed attack occurs against a member state, nothing impairs the exercise of the inherent right of self-defense, either individual or collective, during the period elapsing between the attack and the time the Security Council takes *adequate measures to restore* international peace and security.<sup>56</sup>

This statement met with general approval. Senator Connally said "that he understood that the right of self-defense continued until the Security Council took *adequate measures*" and added that in his view "the exercise of the right of self-defense should not be limited until the Security Council took *effective action.*"<sup>57</sup> The minutes go on to state that Senator Vandenberg "expressed whole hearted agreement with this position."<sup>58</sup> In summarizing Article 51 before the U.S. Foreign Relations Committee, Mr. Pasvolosky said,

That is the self-defense article which states that nothing in the Charter shall impair the inherent right of self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken all necessary measures.<sup>59</sup>

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55. *Minutes of the Thirty-sixth meeting of the United States Delegation, Held at San Francisco, May 11, 1945*, in FRUS, *supra* note 51, at 666 (emphasis added).

56. *Minutes of the Forty-eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, May 20, 1945*, in FRUS, *supra* note 51, at 817 (emphasis added).

57. *Id.* (emphasis added).

58. *Id.*

59. *Hearings Before the Senate Comm. on Foreign Relations on the Charter of the United Nations for the Maintenance of International Peace and Security, Submitted by the President of the United States on July 9, 1945*, *supra* note 50, at 304.

The statement is noteworthy in two respects. It refers to Article 51 as the self-defense article, not as the article limiting self-defense. And it states that the right exists until the Security Council has taken "all" necessary measures.

In the discussion of Article 51 by the Senate as a whole it was again emphasized that the right of self-defense was not subordinated to the Security Council until the Security Council has acted adequately. Senator Austin read Article 51, then explained:

In other words, this leaves the regional arrangements in the Western Hemisphere autonomous, though not independent, even to the point of mobilization of armed forces to prevent war, until the Security Council has acted, and then the hemispheric arrangements are subordinate to and delegated [sic] by the Security Council.

Senator Vandenberg interjected:

If the Senator will permit me, until the Security Council has acted adequately.

Senator Austin replied:

Yes; I thank the Senator very much for emphasizing "adequately."<sup>60</sup>

When the draft of Article 51 was presented to a subcommittee at the San Francisco Conference, the U.S. delegation explained that it "established the complete right of self-defense until the Security Council met the situation *effectively*."<sup>61</sup>

Arguably, Article 51 would have been clearer if it had used the term "restore" rather than "maintain." An earlier draft of Article 51 did, in fact, provide that nothing in the Charter shall impair the inherent right of individual or collective self-defense "until the Security Council has taken the measures necessary to maintain or restore international peace and security."<sup>62</sup> Mr. Gromyko (Soviet Union) suggested deleting the word "restore." Lord Halifax (United Kingdom) took the position that "the word 'restore' should be retained, that is *that the right of self-defense should continue during the period of restoration*."<sup>63</sup> Mr. Gromyko did not disagree on the substance, but said that he thought "that the word 'maintain' encompassed the concept of 'restore' and that

60. 91 CONG. REC. 8063 (1945).

61. RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945*, at 703 (1958) (emphasis added).

62. FRUS, *supra* note 51, at 823-24. A still earlier draft provided "until the Security Council has taken *adequate* measures to *maintain or restore* international peace and security." *Id.* at 819 (emphasis added).

63. *Id.* at 824 (emphasis added).



the latter was in effect unnecessary.”<sup>64</sup> The Chinese and French delegates also indicated a preference for “restore.”<sup>65</sup> In the end, Lord Halifax suggested and the other delegates agreed to use the word “maintain” in order not to split the delegation.<sup>66</sup> Although “restore” was deleted, it is quite clear from this discussion that both the delegates who wanted to retain “restore” — the United States, the United Kingdom, France, and China — and the delegate who wanted to delete it — the Soviet Union — agreed that the right of self-defense continued until international peace and security had been restored. An address by the Secretary of State broadcast on national radio and reprinted in the State Department Bulletin stated that the proposal “reemphasizes the inherent right of self-defense and extends that right to a group of nations . . . until the World Organization has taken effective action to *restore* peace.”<sup>67</sup>

In his interpretation of the Charter, Kelsen takes the position that a state may use force in self-defense until the Security Council has taken the measures that in the opinion of that state are adequate to maintain international peace and security. While Kelsen believes that “the victim of an armed attack and the states assisting in its defense are obliged to stop the use of force as soon as the Council has taken the ‘necessary measures,’ ”<sup>68</sup> he states that the “obligation to stop the exercise of the right to self-defense is conditioned by the fact that the Security Council ‘has taken the measures necessary to maintain international peace and security.’ ”<sup>69</sup> Moreover, it is for the state that has been attacked to decide whether the Council has taken the measures “necessary” to maintain international peace and security. In Kelsen’s view, “the language of Article 51 does not exclude an interpretation . . . according to which a state is not obligated to cease to exercise its right of self-defense when the measures . . . the Council has taken, are *according to the opinion of the state*, not the measures ‘necessary to maintain international peace and security.’ ”<sup>70</sup> This interpretation is confirmed, he says, “by the doctrine that the right of self-defense is conferred upon the states by a rule of general international law which has the character of *Jus Cogens*.”<sup>71</sup>

It should also be noted that the Dumbarton Oaks proposal did include a provision specifically requiring prior authorization by the

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Report on the San Francisco Conference*, 12 DEP’T ST. BULL. 1007, 1009 (1945) (emphasis added).

68. KELSEN, *supra* note 42, at 800.

69. *Id.* at 801.

70. *Id.* at 802 (emphasis added).

71. *Id.* at 803.

Security Council for use of force by regional groups. It provided: "The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, *but no enforcement action should be taken under regional arrangements or by regional agencies without the enforcement of the Security Council.*"<sup>72</sup> Although the prior authorization requirement was supported by some states,<sup>73</sup> it was opposed by most others.<sup>74</sup> That provision, and the proposed amendments that retained a prior authorization requirement, did not become part of the U.N. Charter. As Russell notes, in the end, "only New Zealand emphasized the supremacy of the world agency."<sup>75</sup>

Perhaps the clearest indication that Article 51 was not intended to bar self-defense once the Security Council took action is to be found in the testimony of John Foster Dulles. He stated, "Article 51 is a key article, which embodies a basic policy shift from the Dumbarton Oaks proposals. They would have prohibited any collective action, unless it was authorized by the Security Council."<sup>76</sup> It is absurd to suggest that

72. *Dumbarton Oaks Proposals for a General International Organization*, *supra* note 50, at 17-18 (emphasis added).

73. Bolivia took the position that states should be permitted to take regional enforcement action only *with* the prior approval of the Security Council. Doc. 2, G/14(r), 3 U.N.C.I.O. Docs. 577, 583-84 (1945).

74. The United States, the United Kingdom, the Soviet Union and China took the position that regional action could be taken independently from the Security Council for measures preventing aggression by the World War II enemy states until such responsibility is transferred to the United Nations. Doc 2, G/29(a), 3 U.N.C.I.O. Docs. 629, 630 (1945). France agreed with this proposal, subject to an obligation to account to the Security Council for measures taken. Doc. 2, G/7(o)(2), 3 U.N.C.I.O. Docs. 392 (1945). France also proposed that measures of an urgent nature provided for in treaties of assistance of which the Security Council had been advised should be permitted, subject to an accounting to the Security Council. Doc. 2, G/7(o), 3 U.N.C.I.O. Docs. 376, 386 (1945).

Czechoslovakia took the position that regional action could be taken independently in cases of immediate danger in which the Security Council has authorized automatic action in advance, with possible subsequent submission to the Security Council for approval. Doc. 2, G/14(b), 3 U.N.C.I.O. Docs. 466, 470 (1945).

Turkey suggested that independent action of a defensive nature could be taken by all regional groups subject to submission of an obligatory report of the measures taken to the Security Council. Doc. 2, G/14(e), 3 U.N.C.I.O. Docs. 480, 483 (1945).

Australia took the position that any defensive regional action could become permissible after the Security Council failed to authorize or to take such action. Doc. 2 G/14(1), 3 U.N.C.I.O. Docs. 543, 552 (1945).

75. RUSSELL, *supra* note 61, at 704.

76. *Structure of the United Nations and the Relations of the United States to the United Nations: Hearings before the House Comm. on Foreign Affairs*, 80th Cong., 2d Sess. 280 (1948) (statement of John Foster Dulles). Dulles further noted,

[t]hat meant that the veto in the Security Council could be used to block all measures of regional and collective self-defense.

Those who made up the American delegation at San Francisco, as your chairman will recall, realized that, in view of the veto power, the Security Council could not itself be relied upon to provide effective protection . . . . Consequently, at San Francisco, we proposed that the Charter authorize collective self-defense.

even though the prior authorization requirement was rejected by the drafters of the Charter, any state could impose a prior authorization requirement on the victim of aggression simply by bringing the matter to the Security Council.

Finally, the term "measures," in the clause "until the Security Council has taken measures necessary to maintain international peace and security," may have been intended to refer to measures involving the use of force. This was specifically stated by the Soviet delegate. In the discussion of where the new paragraph that became Article 51 should be placed, he stated, "this paragraph deals with the commencement of military operations . . ." <sup>77</sup> Furthermore, the second sentence in Article 51, requiring states to report to the Security Council "measures taken" in the exercise of the right of self-defense, clearly refers to military action. It is unlikely that the drafters would use the same word in two consecutive sentences of the same provision intending different meanings. If the term "measures" is so interpreted, a state's right to use force, individually or collectively, would not be limited by Security Council action unless the Security Council took measures involving the use of force to repel or expel the aggressor.

It is also noteworthy that in the almost half century since the Charter was adopted, Article 51 has repeatedly been cited by scholars, <sup>78</sup> and by states, <sup>79</sup> as an affirmation of the right of self-defense. It has never been cited as a denial of the right of self-defense. Chayes argues that that was because the United Nations could not function as it was "meant to" as a result of the Cold War; now that it can function as it was "meant to," article 51 should be interpreted as a denial, rather than as an affirmation, of the right of self-defense. <sup>80</sup> As has been shown, that interpretation is inconsistent with the language and legislative history of Article 51. <sup>81</sup>

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77. Doc. 576, *supra* note 50, at 683.

78. See, e.g., Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 720 n.54 (1988); Thomas K. Plofchan, Jr., *Article 51: Limits on Self-Defense?*, 13 MICH. J. INT'L L. 336 (1992); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

79. The U.S. invoked Article 51 to justify the U.S. invasion of Panama, see *Excerpts from Statement by Baker on U.S. Policy*, N.Y. TIMES, Dec. 21, 1989, at A9, and to justify air strikes against Libya in 1986, see Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612, 632 (1986). The U.K. invoked Article 51 to justify military action against Argentina in the Falklands dispute. See Domingo E. Acevedo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT'L L. 323, 324 (1984). Israel claimed self-defense for attacks against terrorist organizations based in Jordan and Lebanon, and the Soviet Union did so to justify intervention in Afghanistan in 1980. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 263 n.23 (1989).

80. Chayes, *supra* note 5, at 6.

81. See *supra* notes 46-77 and accompanying text; see also *Structure of the United Nations and the Relations of the United States to the United Nations: Hearings before the House Comm. on Foreign Affairs*, *supra* note 76.

Further, it is not at all clear that the Charter will now function as it was "meant to." As Reisman notes,

It is, in my view, too early to conclude that the system conceived of in the Charter will finally overcome and replace the dynamics of world politics. And even if the United Nations emerges as the world's policeman, it is important to examine the role of the United States and the pressures it brought through its interpretation of the Charter on other more timid or reluctant members. The United States was the major and indispensable actor responding to the Iraqi aggression. Without the clear policy of the United States, its leadership, and its willingness to invest military assets, the Security Council might well have satisfied itself with an anodyne resolution, expressing disapproval, imposing a variety of symbolic and possibly even some material sanctions but essentially yielding to a *fait accompli*. The extraordinary weakness of the Soviet Union at this moment, the dependence of Soviet progressives on Western assistance for *Perestroika*, and the absorption of the Soviet elite in internal developments which could presage major rearrangements of relationships between center and periphery there or even the disintegration of the federation may account for Soviet willingness to follow the American lead, to a certain point. There was never any commitment of Soviet forces to join in any U.N.-authorized action to expel Iraq from Kuwait.<sup>82</sup>

Even if the cold war is over, the United Nations remains a political body, not an impartial judge of right and wrong. Member states consider their own political interests when voting in the Security Council. It is unlikely that states would agree to cede their right to decide whether to use force in self-defense when attacked even if the decision were to be made by an impartial body, *a fortiori* when the decision is to be made by a political body.

As John Foster Dulles stated:

There is, the Charter says, an "inherent right of self-defense" and certainly nobody intended by joining in the United Nations Charter to abandon that inherent right of self-defense and put himself in a position where he had to be exposed to complete destruction.<sup>83</sup>

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82. Reisman, *supra* note 8, at 42.

83. *Structure of the United Nations and the Relations of the United States to the United Nations: Hearings before the House Comm. on Foreign Affairs, supra* note 76, at 290. Dulles argued that the "armed attack" proviso did not require states to "sit quietly and do nothing when right across the border atomic warfare is being prepared against them on a scale such that if they wait until it hits them they will be gone." *Id.*

Dulles further stated,

There was no attempt to limit the inherent right to self-defense. I prepared a memorandum for the United States delegation on that question of the inherent right of self-defense. I pointed out that there was that inherent right which could not be taken away by implication or even in my opinion expressly, because no individual can give up the right to protect his own life.<sup>84</sup>

### CONCLUSION

The Charter should not be interpreted as barring states from using force in self-defense, possibly, as in the case of Kuwait, in defense of their very existence — absent a provision that clearly so states, or, at the very minimum, a showing that that was the intent of the drafters and that states ratifying the Charter understood this to be its effect.

It is difficult to believe that some 180 states would have agreed to give up the most fundamental attribute of sovereignty, the right to use force in self-defense, to an international body, and particularly one like the Security Council. The Security Council decides on the basis of the political interests of the states voting — the state attacked may not even have a vote. It is inconceivable that they would have done so in language that affirms the “inherent right of individual or collective self-defence.”

A more plausible interpretation of Article 51 is that a state retains the right of self-defense until the Security Council has taken measures that have succeeded in restoring international peace and security. This interpretation is overwhelmingly confirmed by the legislative history of Article 51.

Where a treaty provision is open to several different interpretations, it should be interpreted so as to best achieve the objectives of the treaty, as Reisman urges.<sup>85</sup> But that position should not be taken so far as to permit an interpretation that is contrary to the intent of its drafters and that would deprive states of one of the most fundamental — if not the most fundamental — aspect of sovereignty. If states are to forfeit their right to use force in self-defense — the right to fight for their survival — their agreement to do so cannot be implied. It must be clear and explicit.

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84. *Id.* at 298.

85. Reisman, *supra* note 8, at 48.