JUS COGENS AND THE INHERENT RIGHT TO SELF-DEFENSE

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> The arms embargo has deprived Bosnia-Hercegovina of the right of legitimate self-defense. It has caused the destruction of the country, deepened the war and caused genocide. It has tied the hands of the attacked and helped the aggressor. It has made the aggressor reluctant to . . . compromise. Those who maintain the arms embargo are accepting . . . the primacy of force in international negotiations. President Izetbegovic, Republic of Bosnia-Hercegovina.[1]
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> Madeleine Albright, the United States Ambassador to the United Nations, warned . . . that the United States would undermine international sanctions . . . if Congress unilaterally lifted the arms embargo against Bosnia . . . .
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> Members of the Congress who favor lifting the arms embargo unilaterally say Bosnia is an independent nation entitled to self-defense under article 51 of the United Nations charter until the Council has taken measures to maintain peace.
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> But Albright said . . . the issue is one of politics, not of law. 'The bottom line here is that this is not a legal issue, it is a political issue . . . . If any one country decides to act on its own and break down a multilateral arms embargo, we then ruin that as a tool of the international community.'[2]

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1. Entreaty to the European Community to lift the arms embargo. Boris Johnson and George Jones, *EC refuses to lift arms embargo 'Ending weapons ban would lead to more Bosnia fighting,'* DAILY TELEGRAPH, June 22, 1993.

2. *Albright warns against unilateral action on Bosnia*, REUTERS LTD. NORTH AMERICAN WIRE, May 2, 1994.

This clash highlights the tension between the United Nations Charter and the unilateral use of armed force by states. It poses a question of obvious significance to international law, order and governance: whether there might not be restrictions upon the Security Council within the realm of its enforcement authority beyond which even it is powerless to act.

Which advocate is correct? Is there an overriding legal regime that precludes Security Council intervention, suspension and obstruction of a state's efforts to engage in armed self-defense or can decisions curtailing the exercise of that right be made and enforced on the basis of political considerations? The answer is found in jus cogens, norms so fundamental to international order that their operation can effectively trump even the actions of the Security Council.

This paper will explore jus cogens and its relation to a state's unilateral use of armed force, armed self-defense and the Security Council, and will demonstrate the inability of the Security Council to preclude armed self-defense. Discussion will address the following issues:

1) What is jus cogens?
2) What are the criteria for determining that a norm is jus cogens?
3) Is the use of armed force in interstate relations jus cogens?
4) What is the specific content of the peremptory norm governing the use of armed force in interstate relations?
5) Is the United Nations Charter subject to jus cogens?
6) Is the United Nations Charter in derogation of jus cogens?
7) What is the relationship between a state's inherent right of self-defense and Security Council action?
8) What are the implications for enforcement measures imposed by the Security Council?

I. What is Jus cogens?

Presently there is little dispute that there exist certain peremptory norms within international law. The use of the term *peremptory* is to classify these norms as ones from which no state can derogate. The identification process has not arisen overnight. It has been evidenced by over forty years of thought and debate within the relevant scholarly and political communities.

A. The Scholars' Approach

Juristic efforts to classify certain rules or rights and duties on the international level as inherent have, intermittently, affected interpretations of treaties, and eminent opinions have been offered in support of the view

that certain overriding principles of international law exist, thus forming a body of jus cogens. However, it was not until the International Law Commission (ILC) began its work on drafting a *treaty on treaties* that the concept of jus cogens became the object of consistent attention.[3] In his First Report to the ILC on the Law of Treaties, in his capacity as its Rapporteur, H. Lauterpact proposed "A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."[4] In his view, the test for whether the object of the treaty was illegal and the treaty void for that reason is, "inconsistency with such overriding principles of international law which can be regarded as constituting international public policy."[5] As reported in the 1953 ILC Yearbook:

> [i]n his comment to draft article 15, Lauterpacht stated that the incorporation of this article must be regarded as essential in any codification of the law of treaties, notwithstanding substantial practical and doctrinal difficulties. That unlawfulness of the object of a treaty implies the treaty's invalidity is generally — if not universally — admitted by writers who have examined this aspect of the validity of treaties.
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> Lauterpacht went on to say that the test of lawfulness and validity of a treaty is not pure and simple inconsistency with customary international law, because states may by mutual treaties modify rules of customary law, but inconsistency with those overriding principles of international law which may be regarded as constituting principles of international public policy . . . .[6]

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3. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 512-13 (1979) (citing *Lauterpacht*, 27 B.Y. 397-98 (1950); and [1953] 2 Y.B. Int'l L. Comm'n 154-55, U.N. Doc. A/CN.4/63/1953 especially ¶ 4; Fitzmaurice, 30 B.Y.30 (1953); 92 Hague Recueil II, 120, 122, 125 (1957)).

4. Lauterpacht, [1953] 2 Y.B. Int'l L. Comm'n 154-55, U.N. Doc. A/CN.4/63/1953 *reprinted in* SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 208-09 (1984). The International Law Commission (ILC) began work on the law of treaties in 1949. It was not, however, until 1953, under the leadership of Lauterpacht as its second Rapporteur, that attention was directed to jus cogens. LAURI HANNIKAINEN, PREREMPTORY NORMS (Jus cogens) IN INTERNATIONAL LAW 157 (1988).

5. SINCLAIR, *supra* note 4, at 209.

6. Int'l L. Comm'n, [1953] 2 Y.B. Int'l L. Comm'n 154-55, U.N. Doc. A/CN.4/63/1953.

The third Rapporteur, Fitzmaurice, proposed the following as a draft article in the Third Report on the Law of Treaties in 1958: "[i]t is essential to the validity of a treaty that it should be in conformity with or not contravene or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of jus cogens."[7] In commentary, Fitzmaurice pointed out that the majority of rules in international law are *jus dispositivum*. It is "only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no option) that the question of the illegality and invalidity of a treaty inconsistent with them can arise."[8]

In its work in 1963 and 1966 on the preparation of a *treaty on treaties*, under the stewardship of its fourth Rapporteur, Waldock, the ILC undertook in depth discussions of jus cogens. As reflected in the relevant Yearbooks, there was agreement that there are rules of jus cogens in contemporary international law. Peremptory norms were viewed as norms from which states cannot contract out.[9] They are universal and express the interest of the international community as a whole.[10]

In his second report in 1963, Waldock proposed the following as draft article 13: "a Treaty is contrary to international law and void if its object or its execution involves the infringement on a general rule or principle of international law having the character of jus cogens." He offered the following definition of jus cogens. "[J]us cogens means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law."[11] The commentary on the proposal noted:

> Imperfect though the international legal order may be the view that in the last analysis there is no international public order — no rule from which states cannot at their own free will contract out — has become increasingly difficult to sustain. The law of the Charter concerning the use of force and the development, however tentative – of international criminal law – presupposes the existence of an international public order containing rules having the

7. SINCLAIR, *supra* note 4, at 209; HANNIKAINEN, *supra* note 4, at 158.

8. SINCLAIR, *supra* note 4, at 209; HANNIKAINEN, *supra* note 4, at 158.

9. [1963] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/Ser.A/1963.

10. [1966] 2 Y.B. Int'l L. Comm'n 219-20, U.N. Doc. A/CN.4/Ser.A/1966.

11. HANNIKAINEN, *supra* note 4, at 158.

> character of jus cogens. The Commission will therefore, it is believed, be fully justified in taking the position in the present articles that there are certain rules and principles from which states cannot derogate . . . . [12]

In its 1966 discussions, the ILC, recognizing that such peremptory, nonderogable norms exist, provided (in its draft article 50) the following general definition: "[a] treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[13]

There was, additionally, virtual unanimity within the ILC regarding the existence of rules permitting no derogation in international law and that peremptory norms express the interest of the international community as a whole.[14]

Commentary in 1963 and 1966 touched on whether the emergence of rules having the character of jus cogens was comparatively recent or more long-standing. Several members opined that the concept of jus cogens had originated in regard to such universal crimes as piracy and the slave-trade as well as such principles as the freedom of the high seas and other rules on the law of the sea.[15]

The majority view was that jus cogens is a more recent innovation brought about by the fact that certain aspects of interstate relations have become of concern to all states, such as the formation of the League of Nations and its pioneering effort to substitute some form of *constitutional government* for the *blind play of physical force* into international relations.[16] Those espousing the majority view did not generally attempt to prove that the notion was an innovation but, rather, referred to jus cogens

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12. *Id.* The ILC did identify bilateral and regional treaty arrangements. Although there was an exception suggested providing that the article would not be applied to a general multilateral treaty which expressly abrogated or modified a rule having the character of jus cogens, such was rejected at the Vienna Convention. The present Convention contains no such exclusion or exception.

13. [1966] 2 Y.B. Int'l L. Comm'n 247.

14. HANNIKAINEN, *supra* note 4, at 161 and note 9 (citing the comments of ILC members Suy and Cadieux).

15. HANNIKAINEN, *supra* note 4, at 161-62 (reflecting the opinions of El Erian, Yasseen, Castren and Ago). Rosenne thought that jus cogens had existed in international law for a long time even if in inchoate form. *Id.*

16. This position is attributed to member Pal, in comments made during the 1963 discussions. *Id.* at 162.

as an accepted fact. It was only the preparation of the Convention that had rendered the notion a concern of the international community.[17]

Despite the evident agreement within the ILC on the existence of peremptory norms, it was agreed to leave the full content of the notion to be worked out in state practice and the jurisprudence of international tribunals.[18] What the ILC did do was to provide "examples of the more conspicuous instances of treaties that are void by reason of inconsistencies with a jus cogens rule."[19] That content cannot be worked out merely by treaty. A treaty cannot impart the character of jus cogens to a norm, even if the parties agree that there is to be no derogation therefrom. It is, rather, the particular nature of the subject matter with which a treaty deals, not the form of the provision, that gives a rule the character of jus cogens.[20]

The final draft article, submitted for consideration to the state representatives at the Vienna Conference, proposed: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[21]

B. The Vienna Conference: The View of the International Community of States

The Conference turned its attention to draft article 50 in the 1968 session.[22] The ILC draft definition was lengthened and made more specific.[23] The new article, now renumbered as 53, provides that:

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17. *Id.*

18. *Id.* at 76 and 164-65. Although there was unanimous agreement on one norm, the use of force, there was disagreement as to other norms that might be categorized as peremptory. Consequently, it was determined that illustrations of jus cogens would be noted but that the field would be left for subsequent development by states and courts.

19. *See infra* at 13-14.

20. [1966] Y.B. Int'l L. Comm'n 76, U.N. Doc. A/CN.4/Ser.A/1966. HANNIKAINEN, *supra* note 4, at 163. There are a number of views on the manner in which a new or modified norm emerges. Some commentators, such as Dinstein, although rejecting the notion of *instant custom*, have noted that a multilateral treaty could modify jus cogens or demark the emergence of a new norm if there was extensive recognition/acceptance to be bound to the treaty as a condition of its entry into force. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 104-06 (1994). Others, such as Sinclair suggest the logical impossibility of the idea that a treaty itself, could create such a norm. SINCLAIR, *supra* note 4, at 225-26. From this author's perspective, it would seem inconsistent for a peremptory norm to be created by a multilateral treaty unless there had been extensive antecedent acceptance accompanied by the opinion that derogation therefrom was not permitted.

21. SINCLAIR, *supra* note 4, at 218.

22. HANNIKAINEN, *supra* note 4, at 166.

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[24]

The final text was arrived at in the 1968 session and was approved in a final vote of eighty seven-eight-twelve in 1969.[25]

The consensus at the Conference fell into three primary groups. A clear majority of states accepted that "there undeniably exist peremptory norms" in international law. Consequently, a provision to this effect was necessary. However, it was felt that, at this stage of international relations, it was not possible to arrive at a detailed definition of the notion, nor was it the task of the Convention to do so. It was, nonetheless, held that peremptory norms protect important interests of the international community.[26]

A smaller group of states admitted the existence of peremptory norms but expressed doubt regarding the imprecision of their identification. Even though this group admitted that certain norms clearly appeared to be peremptory, they questioned the adequacy of the criteria available to separate *jus dispositivum* from jus cogens. This vagueness might make misuses of the notion possible.[27]

Only a small group of western states were very critical of or entirely opposed to the inclusion of provisions on peremptory norms in the Convention.[28] The clear upshot of this and the approval vote reflected that

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23. *Id.*

24. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

25. United Nations Conference on the Law of Treaties (UNCLT), Official Records, Second Session (1969) at 106-07 [hereinafter UNCLT II]. The 1968 session, (UNCLT I) was attended by 103 States; the 1969 session by 110. HANNIKAINEN, *supra* note 4, at 166. The inclusion of the words *at the time of its conclusion* was voted on separately. It was adopted by a vote of 43 to 27 to 12. *Id.* at 167. Although this seemingly stresses the non-retroactive character of peremptory norms, the approval numbers are not overwhelming.

26. HANNIKAINEN, *supra* note 4, at 169.

27. *Id.* at 170-72.

28. France was among the most critical. HANNIKAINEN, *supra* note 4, at 17.

nearly all state participants agreed that there are peremptory norms in international law.[29]

II. What are the Criteria for Determining that a Norm is Jus Cogens?

As article 53 makes clear, there are four criteria specified for the identification of a peremptory norm:

1) status as a norm of general international law;
2) acceptance by the international community of states as a whole;
3) immunity from derogation; and
4) modifiable only by a new norm having the same status.[30]

What does this first criteria status as a norm of general international law mean? Although far from settled, it is useful to proceed from the idea that norms of general international law are of general applicability, that is they create obligations and/or rights for at least a great majority of states or other subjects of international law.[31] Debate is engaged on whether the reach of such norms is universal in its obligatoriness or whether a rule of general international law requires the acceptance of nearly all as opposed to all states.[32] Consequently, inclusion of a norm as part of general international law, would imply that the obligations it creates are accepted by the great majority of states, if not all states.[33]

Clarification of the universality component of general international law, for jus cogens identification purposes, is provided in the second criteria specified in the Convention: that the norm be accepted and recognized by the international community of states as a whole. In explaining the meaning of the phrase *as a whole*, Yasseen, the Chairman of the Drafting Committee of the Vienna Convention had stated:

> By inserting the words *as a whole* in article 50 the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as a peremptory norm by all states. It would be enough if a very large majority did so; that would mean that, if one

29. *Id.* at 174.

30. Vienna Convention, *supra* note 25, at art. 53; HANNIKAINEN, *supra* note 4, at 3.

31. HANNIKAINEN, *supra* note 4, at 208.

32. According to Hannikainen, there is quite a lot of support for this view. HANNIKAINEN, *supra* note 4, at 209.

33. *Id.*

> state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.[34]

Consequently, for a norm to be recognized by the international community as a whole, it would suffice if all the essential components of the international community recognize it.[35] A considerable majority of those who have commented upon this have seemed to accept the views of Yasseen.[36] Additionally, most agree that the lack of acceptance or even the expression of opposition on the part of one or a few states is no obstacle to a norm having peremptory status.[37]

One apparent difference in effect between general international law and customary international law is the inability of customary international law to bind those states which persistently object, whereas under general international law, if a norm has reached the necessary level of widespread acceptance, its operation can not be avoided by objection or state veto; non-recognizing states are bound nonetheless.

Obviously, no norm could realistically be considered a principle of general international law if it did not, at a minimum, meet the criteria of acceptance and adherence required for customary international law. However, whether a norm has been denominated or identified as customary international law should not frustrate, eliminate, or immunize its categorization and recognition as a norm of an even more profound nature, such as jus cogens. That inquiry requires assessment of the extent of recognition and acceptance such as would cause its *elevation* to the status of general international law, whereby it would bind even non-consenting states.

Determining whether a norm rises to the level at which it binds not only all states, but can not be changed by contract, disobeyed, or subject to derogation, has one final step. It is the third criteria enunciated in the

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34. UNCLT I 1968, *supra* note 26, at 472. This remained the position of the ILC on the term "international community of States as a whole." HANNIKAINEN, *supra* note 4, at 211.

35. *Int'l L. Comm'n Report* U.N. Doc. A/31/10, p. 287 and 251 (1976), *cited in* HANNIKAINEN, *supra* note 4, at 211. It would appear that these comments were made in connection with the ILC efforts towards a draft Convention on State Responsibility.

36. *Id.*

37. *Id.* The qualifier "accepted and recognized by the international community of states as a whole art. 53. . . . [A]pparently . . . means by a 'very large majority' of states, even if over dissent by a very small number of states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW at 102 rep. note 6 (1987) [hereinafter FRL].

Vienna Convention, the non-derogable nature of what might otherwise be a norm of custom, that is the dividing line separating principles of general international law from those of jus cogens.[38] Until a norm has attained widespread recognition that it is not derogable, it remains a matter of *jus dispositivum*.

In addition to setting forth these four criteria, there was an underlying policy consideration stressed by several states similar to that manifest in earlier ILC Commentaries.[39] This factor, a social criterion, not articulated in the Convention itself, identified the purpose of peremptory norms as protecting vital interests of the international community. This concern expressed the view of the underlying rationale and place for such norms in international global governance and world public order.[40]

Hannikainen incorporates this concern as a fifth criteria to the provisions of article 53 and suggests:

> If a norm of general international law protects an overriding interest or value of the international community of states and if any derogation would jeopardize seriously that interest or value, the peremptory character of the norm may be presumed but only if the application of the criteria of peremptory norms produces no noteworthy negative evidence.[41]

III. Is the Use of Armed Force in Interstate Relations Jus Cogens?

By the same measure of unanimity in which the very existence of jus cogens was previously accepted by both the scholarly community represented by the ILC and the political community consisting of the state

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38. The inclusion of this norm in the United Nations Charter enhances its non-derogable nature, as any action in contravention thereof, is a breach of a state's obligation under the Charter. However, as jus cogens status is not *created* by treaty, the argument really rests on the notion that what is incorporated in the Charter is the pre-existent norm, the universality and acceptance of which is evidenced by inclusion in the Charter.

39. HANNIKAINEN, *supra* note 4, at 3-5, and 176.

40. *Id.* at 176. The Mexican delegate, for example, noted that rules of jus cogens are derived from principles which the legal conscience of mankind deems absolutely essential to coexistence in the international community at a given stage of the community's historical development. *Id.* at 4 (citing U.N. Doc. A/CONF 39/11, p. 294).

A general overview of the writings of some scholars on the origins of the notion of jus cogens from a natural law and positivist perspective can be found in SINCLAIR, *supra* note 4, at 201-09. Although some commentators analogize jus cogens proscriptions to municipal law prohibitions on the unenforceability of contracts as contravening public policy, Sinclair is not too sympathetic to this view. *Id.* at 205-06.

41. HANNIKAINEN, *supra* note 4, at 20 and 207.

representatives at the Vienna Conference, there was accord that the use of force constitutes the most conspicuous example of jus cogens.

A. The ILC Position

As early as his writings in 1953, H. Lauterpacht noted that there had never been any waiver or change from that characterization of the use of force and its status as jus cogens.[42] By 1958, Fitzmaurice, the third Special Rapporteur of the ILC, noted the prohibition of wars of aggression as an example of a jus cogens rule.[43]

Subsequent commentaries of the ILC clearly accord peremptory status to the norm prohibiting the use of force, embodied in the United Nations Charter, as expressing "not merely the obligations of Members of the United Nations but the general rules of international law of today concerning the use of force."[44]

Illustratively, Waldock's 1963 draft article provided: "In particular, a treaty is contrary to international law and void if its object or execution involves . . . the use or threat of force in contravention of the principles of the Charter of the United Nations. . . . "[45] According to the Commentary this "hardly needs explanation; the principles stated in the Charter are generally accepted as expressing not merely the obligations of Members of the United Nations but the general rules of international law today concerning the use of force."[46]

The prohibition of the use of force noted by the ILC as a conspicuous example of a rule of international law having the character of jus cogens was, in fact, the only rule of jus cogens about which the ILC was unanimous.[47]

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42. *Id.* at 180.

43. [1958] 2 Y.B. Int'l L. Comm'n 27-28, and 40-41.

44. [1963] 2 Y.B. Int'l L. Comm'n 53. In what appears as an effort to separate the dependence of its status as jus cogens from the use of force proscription contained in the United Nations Charter, Hannikainen refers to such a prohibition as that concerning "the use of (aggressive) force," rather than "reflected in article 2(4)" or even that "contained in the Charter." *See, e.g.*, HANNIKAINEN, *supra* note 4, at 178 and 180.

45. [1963] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/Ser.A/1963.

46. *Id.* at 53.

47. HANNIKAINEN, *supra* note 4, at 163. Despite this unanimity, the ILC eventually decided that no examples of jus cogens would be included in their draft. Rather such was to be left to state practice and the decisions of international tribunals. *Id.* at 162 (citing the 1966 Int'l L. Comm'n Report).

B. State Criteria

Following the suggestion of the ILC to give primacy to states in the determination of the particular norms of jus cogens, the state representatives at the Vienna Conference reflected much support for the prohibition of the use of force as an example of a peremptory norm.[48] Of the thirty-two states submitting examples of jus cogens, half declared that the prohibition on the use of force was clearly of such character.[49] Another one fourth (eight states) listed this prohibition more generally as peremptory because it constitutes part of the leading principles of the United Nations Charter.[50]

The consensus of states on the criteria necessary for jus cogens status is manifest in article 53 of the Convention. Clearly, under the perameters set forth therein, the use of force meets those criteria.[51] There is almost no other norm of international relations more embedded in practice and accepted as law nor with more widespread recognition as non-derogable than that concerning the use of force regime, long prohibiting certain uses of armed force in international relations.[52]

As if further justification were necessary for according jus cogens status to the use of force regime, it is beyond peradventure that the public policy concerns underlying the notion of a jus cogens regime; the protection of overriding interests of the international community of states are manifest.[53]

Additional confirmation that the use of armed force in derogation of the norms reflected in the United Nations Charter, is considered by the international community of states as a whole to violate jus cogens

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48. *Id.* at 178.

49. *Id.* at 177.

50. *Id.* The final vote on the Vienna Convention was 79-1-9. There were eight states that voted against the draft article on jus cogens (article 50). These were Belgium, France, Switzerland, Australia, Turkey, Liechtenstein, Monaco, and Luxembourg. Among the states that abstained were: Japan, Malaysia, New Zealand, Norway, Portugal, South Africa, and the United Kingdom. HANNIKAINEN, *supra* note 4, at 181 and 174.

51. *See id.* at 9-12.

52. For an extended discussion of the extent, nature and scope of the use of force prohibition, *see id.* at 18-30.

53. The fundamental connection of the norm to the United Nations regime, the aim of which is to secure international pace and security, fulfills the fifth component of the jus cogens criteria: the protection of overriding interests of the international community of states. HANNIKAINEN, *supra* note 4, at 207.

proscriptions is reflected in the Restatement of Foreign Relations Law of the United States.[54]

C. Judicial Contribution

The other source of input denominated by the ILC is that of international tribunals. Decisions of the International Court of Justice increasingly reflect judicial acknowledgment that jus cogens exists and that questions pertaining to the use of armed force are involved therein.[55] For example, the Court's opinion in the Nicaragua case reflects majority acceptance of the arguments of both the United States and Nicaragua that there are certain underlying issues relating to the use of force that have the character of jus cogens and notes:

> The principle of the prohibition of the use of force expressed in article 2, paragraph 4, of the Charter of the United Nations . . . is frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens.' (citations omitted) (1966 version).[56]

Notice is given to jus cogens in the separate opinions of Judges Singh and Setta-Camara as well.[57]

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54. FRL, *supra* note 38, at 102, cmt. h and k at 237-8 and rep. note 6 at 34. The United States agreed to the inclusion of articles 53 and 64 in the Vienna Convention but has yet to ratify the treaty. HANNIKAINEN, *supra* note 4, at 149.

55. United States federal courts have even recognized the applicability of jus cogens to human rights violations such as torture, disappearances, and arbitrary detentions under the Alien Tort Claim Act as violations of the laws of nations. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994); Comm. of United States Citizens in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-17 (9th Cir. 1992).

56. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 190 (June 27).

57. Judge Singh underscored that "the principle of non-use of force belongs to the realm of jus cogens." *Id.* at 153. Judge Sette-Camara expressed the firm view that the non-use of force can be recognized as a peremptory rule. *Id.* at 199.

The Court approached the use of armed force as customary international law. To the extent that the I.C.J. statute speaks to general principles of law as evidenced by custom, the substance of

D. Scholar's Note

Even a commentator as confessedly conservative in his investigation and analysis of jus cogens as Sinclair, notes that, applying a test for qualification of a particular rule as a norm of jus cogens by reference to the evidence for its acceptance as such by the international community as a whole, with the burden of proof resting on the party alleging the jus cogens character of the rule:

> It would seem that sufficient evidence for ascribing the character of jus cogens to a rule of international law exists in relation to the rule which requires states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any other state. There is ample evidence for the proposition that, subject to the necessary exceptions for the use of force in self-defense or under the authority of a competent organ of the United Nations or a regional agency acting in accordance with the Charter, the use of armed or physical force against the territorial integrity or political independence of any state is now prohibited. This proposition is so central to the existence of any international legal order of individual nation states (however nascent that legal order may be) that it must be taken to have the character of jus cogens.[58]

IV. What is the Specific Content of the Peremptory Norm Governing the Use of Armed Force in Interstate Relations?

Peremptory norm status is not accorded to the use of armed force merely because there are provisions relating thereto in the Charter. That there is no necessary linkage between and dependence upon peremptory status and inclusion in a treaty was clear in the debates at the Vienna Conference.[59] The ILC has clearly set forth the proposition that a treaty in

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the jus cogens and customary international law can, effectively, be the same. It is the nature of the derogation that is the separating line. I.C.J. Statute, art. 38(1)(b) (1945).

The I.C.J. decision in *Barcelona Traction, Light & Power Co.* also speaks to the concept of jus cogens in its references to obligations owed erga omnes (to the international community at large) such as that derived from outlawing acts of aggression which all states have a legal interest in protecting. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

58. SINCLAIR, *supra* note 4, at 222-23.

59. Of the thirty-two states offering the use of force as the prime example of jus cogens, only eight ascribed that status to its inclusion as a fundamental principle of the Charter. None

and of itself, without pre-existing state practice which it reflects, is insufficient to create a peremptory norm.[60] Further the commentaries of the ILC do not restrict its understanding of the jus cogens character of the use of force to that which was specifically codified in the Charter. Rather, the comments reflect that the use of force regime is embedded therein, but derives its peremptory character from its identity as a general principle of law.[61]

Logic compels this conclusion because the Charter could not create or modify a pre-existent peremptory norm without being in violation of the existent norm unless, at a minimum, there was widespread, pre-existent recognition of the new norm, confirmed, for example, by extensive state practice, coupled with evidence that the treaty was written with the intent to conform international treaty obligations to that new norm.[62] The relevant Charter travaux clearly reflect the contrary.[63]

A. What is the Content of the Use of Armed Force Regime that Pre-existed the Charter and Found Reflection Therein?

The norm prohibiting force in interstate relations, is widely recognized as prohibiting the threat or use of armed force against the territorial integrity and/or political independence of another state.[64] This prohibition is not limited to wars of aggression but also extends to the use or threat of aggressive armed force.[65] This normative regime is reflected in

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seemed to specifically restrict and identify the content of this norm as reflected in the Charter alone. *See* HANNIKAINEN, *supra* note 4, at 15.

60. This result is the logical extension of the rule that would void any treaty that, at the time of its creation, is in conflict with a pre-existent peremptory norm. *See id.* at 7, and note 21.

61. *See generally* [1953] Y.B. Int'l L. Comm'n; [1966] Y.B. Int'l L. Comm'n.

62. DINSTEIN, *supra* note 21, at 105-06 (rejecting the notion of instant custom and highlighting that treaties effecting a modification of jus cogens could occur if, at the time of their making the modifying treaty had gained the backing of the international community as a whole). *See also* SINCLAIR, *supra* note 4, at 225-26.

63. This is more thoroughly presented *infra* pp. 38-59, 61-63.

64. *See generally* Military and Paramilitary Acitivities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 190 (June 27). *See also infra* pp. 18-25.

Use of the term *aggression* or *aggressive use of force* will be used as a term of art to denote the use of armed force in contravention of this general proscription. Just as the term *force* has been subject to definitions that range from military to non-military coercion, both direct and indirect, the almost fifty year effort, still not definitively resolved, to come to a specific definition of aggression, renders its use here more confusing than clarifying. It is, perhaps, essential to remember that at the UNCIO in 1945, the Charter drafters rejected any effort to insert a set definition of aggression although such is featured in the authority of the Security Council. *See* 6 UNCIO (1945), discussions of Comm. 3, Comm. III.

65. HANNIKAINEN, *supra* note 4, at 327.

article 2(4) of the Charter, in the charters of such regional organizations and entities as the OAS, OAU, the Arab League, NATO, and the Warsaw Pact, as well as various declarations of non-aligned countries and bilateral treaties.[66] The prevalence of its inclusion in these numerous instruments emphasizes the universality of the prohibition, rather than marks its creation. Further evidence of this universality was stressed in 1987 by the United Nations General Assembly Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use in International Law, which was adopted unanimously.[67]

As noted by Hannikainen, after an exhaustive review of jus cogens as applied to the use of armed force, "[a]ll states are under the peremptory obligation to refrain from the use or threat of *aggressive* armed force, i.e., armed force with an aggressive (including dictatorial) intention, against another state . . . ."[68]

B. *What is the Relationship Between the Prohibition on the Use of Armed Force and a State's Right to Use Such Force in its defense?*

Once there was general acceptance by states of limitations on their recourse to armed force in what had, theretofore, been discretionary policy, a use of force regime developed in which distinctions were made whereby armed force was either justified or not; permissible or

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66. *Id.* at 332.

67. *Id.* at 333. A number of UNGA Resolutions confirm the universality of the prohibition on the use of aggressive force in interstate relations. These include the unanimous 1970 Declaration on Principles of International Law Concerning Friendly Relations Among states which interprets the principle of the prohibition of force as including the use or threat of force and the 1974 definition of aggression, also approved by unanimity. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (1970). G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, at 142, U.N. Doc. A/9619 (1974).

68. HANNIKAINEN, *supra* note 4, at 356. His reference to aggressive intent appears as an effort to separate out those uses of force, such as the rescue of nationals and humanitarian intervention which have involved the use of force in the territory of another state undertaken in seeming violation of 2(4) yet, without any aggressive intent. While such may implicate lesser uses of force and debate rages as to whether this is unlawful under the Charter regime, such milder forms of force do not implicate jus cogens concerns. *Id.* at 336-37, 340.

He notes: "[E]ssentially my conclusion concurs with the view of the ILC regarding the content of the peremptory prohibition of the use of aggressive armed force." *See* Int'l L. Comm'n Report 1980, U.N. Doc. A/35/10, at 90-93. HANNIKAINEN, *supra* note 4, at note 114. The elipsed section of Hannikainen's comments reflects jus cogens status to aggressive force "within the territory of another state." This concerns the question of a state's consent to the use of such force within its territory in a variety of contexts. Though interesting, that topic is beyond the scope of the present paper.

For a listing of some of the writers who support the peremptory character of the prohibition of the use of aggressive armed force, in addition to those mentioned elsewhere in this paper, *see Id.* at 324, note 6.

impermissible.[69] However, that proscription upon a state's unilateral discretion to use armed force did not apply in one situation: self-defense.[70]

Reviewing pre-League practice and doctrine, League Covenant provisions, the Kellogg-Briand Pact era and thereafter, Brownlie asserts that after 1920, when the effective legal regulation of armed force appeared, that which became the operative international norm on armed force in interstate relations was a regime that empowered states to use such in reaction to an actual or imminent resort to armed force.[71]

Although efforts were undertaken to put regulation into the process whereby a state had lawful recourse to engage in war under the League of Nations, that option remained. Effectively, all the League Covenant did was offer a series of procedural steps antecedent to the initiation of armed force by one state against another.[72]

That gap was sought to be rectified with the Kellogg-Briand Pact, a multilateral effort to make explicit the prohibition on the use of war as a mode of settlement of international disputes.[73] Consequently, the Pact constituted a legal regime declarative of the impermissible use of force.

The Pact process was, however, declarative of the permissible end of the use of force spectrum as well. Specifically, a condition precedent to the signing of the Kellogg-Briand Pact was the agreement on reservation of

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69. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES chs. XII and XIII (1963); DINSTEIN, *supra* note 21, at ch. 3.

70. *See infra* at 21-29.

71. DINSTEIN, *supra* note 21, at ch. 3. BROWNLIE, *supra* note 70, at 216-52, 254-55 (reflecting the *U.N.G.A.* 6th Committee discussions on defining aggression). For an extended discussion of the problems surrounding and the efforts to effect a definition of aggression, see JULIUS STONE, AGGRESSION AND WORLD ORDER (1959); DINSTEIN, *supra* note 21, at 123-32; and THOMAS & THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW, chs. I and II (1972).

72. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 19-22 (1993).

Although arguably inconsistent with the availability of war to states under the Covenant, article 10 provided:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation will be fulfilled.

Id.

Interpretations have generally affirmed the view that article 10 was intended as subordinate to provisions which allowed for recourse to war in the face of the inability of the Council to act. i.e., that such force would not constitute aggression. *Id.* at 21-22. This view, too, supports the notion that what is not impermissible is permissible and vice versa.

73. BROWNLIE, *supra* note 70, at 217-8; AREND & BECK, *supra* note 73, at 23.

the right of legitimate self-defense.[74] Although Kellogg's original conception had been for a complete renunciation of war, he assured the French Ambassador that the renunciation of war did not deprive the signatories of the right of legitimate defense.[75] Written expressions of the reservation of the right to self-defense were submitted by France, Great Britain, and Japan.[76]

Of decisive importance was the United States' Note of June 23, 1928.[77] Concerning self-defense, it conveyed:

> [t]here is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion; and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has good cause the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events with the agreed definition.[78]

In their respective notifications of acceptance of a slightly revised American draft, each of the recipient's of the United States' Note expressly accepted or *noted* the interpretation put upon it in the United States' Note.[79] With these conditions, the treaty was signed without the reservation appearing in the text.[80]

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74. BROWNLIE, *supra* note 70, at 235.

75. These assurances were made on March 1, 1928. *Id.*

76. *Id.* at 235-36.

77. That note, explaining the United States draft of April 13, was sent to Austria, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, the Irish Free State, Italy, Japan, New Zealand, Poland, and South Africa. *Id.* at 236.

78. *Id.* (quoting Kellogg's address to the American Society of International Law).

79. BROWNLIE, *supra* note 70 at 236-37.

80. *Id.* at 237.

In contrast to state practice before 1920 and the writings of jurists relative to that period, according to which the right of self-defense was regarded as synonymous with the right of self-preservation including the redress of wrongs, Brownlie asserts that such was not the regime that was understood as part of customary practice after the Pact.[81] Rather, the wording of the Pact and the expressed understandings of the parties about self-defense are not reflective of such a broad scope for self-defense.[82] By 1928, the common meaning of aggression was attack or invasion or threat thereof.[83] In the periods immediately before and after the conclusion of the Pact the term *legitimate defense* appeared frequently in contexts in which it had the sense of justified reaction to attack or threat of attack.[84]

With this as foundation, Brownlie notes:

> [t]he legal developments of the period of the League had the result that, while the right of self-preservation no longer existed in its classical form some of its content was preserved. This residual right was referred to as that of self-defense or legitimate defense. It was understood that this right of legitimate defense was subject to objective and legal determination and that it was confined to reacting to immediate danger to the physical integrity of the state itself . . . . Unfortunately, the acceptance of the existence of a legally defined right was not in fact accompanied by any precise definition of the content of the right.[85]

He continues:

> In the period of the League the right of self-defense commonly appeared in the context of the use of force. It was essentially a reaction by a state against the use or threat of force by the armed forces of another state . . . . The essence of the right was proportionality to the threat offered and this would create a presumption that force was only lawful as a reaction against force.[86]

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81. *Id.* at 240.

82. *Id.*

83. *Id.* at 240-41.

84. *Id.* at 241.

85. BROWNLIE, *supra* note 70, at 252.

86. *Id.*

Additionally, he notes that, for the years 1930-1939 "[s]tate practice . . . fairly consistently supports the view that resort to force in collective or self-defense is a reaction to an actual or imminent resort to force."[87]

According to Brownlie, the period from 1920 through 1939 marks the end of a broad state entitlement to use force for such matters as protection of rights or a generalized claim to *self-preservation*, in the face of the norms whereby such uses of force exceed that which would be available to rebut impermissible uses of force against a state.[88]

Moving ahead chronologically, he submits:

> In state practice both before and after the Second World War resort to force by virtue of the right of self-defense is almost without exception associated with the idea of reaction against the use of force. The concept of aggression appeared as the right of self-preservation fell into disrepute and in the period of the League and the Second World War 'aggression' was synonymous with an armed attack, the unlawful use of force, which justified action in self-defense.[89]

Consequently, self-defense had a more restricted and obvious meaning than had existed prior to these efforts at incursions into state power to use armed force.

For at least thirty years it has appeared in state practice principally, though not exclusively, as a reaction to the use of force against the territorial domain, the physical entity of a state. It is not surprising that the draftsmen of the United Nations Charter should define it in article 51 by reference to the occurrence of an armed attack.[90]

The practice of states from 1929-1945 does not suggest that self-defense was "anything other than a reaction to force or threat of force against the territory of a State."[91]

It is noteworthy that in its 1949 report on the Draft Declaration on Rights and Duties of States, all members of the ILC regarded the right of

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87. *Id.* at 250.

88. Brownlie does note, however, that protection of nationals may occupy a continuing place. *Id.* at 250-52.

89. *Id.* at 255. His comments were also directed at dispelling the notion that self-defense covers reaction to non-militarized forms of force or coercion.

90. *Id.* at 255-56. As his book was published in 1963, he is looking back to the early 1930s.

91. Brownlie, *supra* note 70, at 241, 251-52. He does note the existence of a few cases that do not fit this general pattern.

self-defense as exercisable through the medium of armed force only in case of the threat of armed attack or actual armed attack. This was offered as commentary upon draft article 12 which provided that every state has the right of individual or collective self-defense against armed attack.[92]

That such followed so swiftly upon and used the same armed attack wording as article 51 of the United Nations Charter could well reflect the then current understanding and intent in use of that terminology in the Charter: retention of the right to armed self-defensive responses to the threat or use of armed force as opposed to other coercive measures short of military force.

What is clearly evident is that the regulation of the use of armed force in interstate relations under international law that began in earnest under the League system and the Kellogg-Briand Pact is that which ultimately was incorporated and mostly recently *codified* in the United Nations Charter. Presently, it is beyond challenge that the provisions of article 2(4), prohibiting the threat or use of armed force in violation of a state's territorial integrity and/or political independence, which necessarily includes and incorporates the right to use such force in self-defense, constitute still binding rules of traditional international law.[93]

Not only was the normative regime on impermissible and permissible armed force established prior to its incorporation into the Charter, but the inherent nature of that regime was infused in the Charter as well. It is one predicated upon a dyadic dynamic whereby what one state is empowered to confront with armed force is that which, by definition, is impermissible to the other.

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92. [1949] Y.B. Int'l L. Comm'n 108-11, 145-47.

93. DINSTEIN, *supra* note 21, at 93-94; J.N. SINGH, USE OF FORCE UNDER INTERNATIONAL LAW at 9-20 (1984); *see also* Military and Parimilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 190 (June 27) (reflecting contemporaneous, simultaneous vitality of the pre-existent norm on the use of armed force between states and the United Nations Charter regime).

Although the I.C.J., commentators, and others may have categorized the *extra-Charter* use of armed force as customary international law, this author suggests that such is not dispositive of the normative rank to be accorded to that regime. Elevation to the status of jus cogens is effected regardless of any prior categorization provided the normative regime fulfills the criteria identified in article 53 of the Vienna Convention. While it is indeed unlikely that a norm could attain jus cogens status without being considered, at a minimum, under customary international law, that categorization is not determinative for jus cogens analysis. That assessment requires examination into the extent of acceptance, state practice, and derogability.

Usage of the term *traditional* as a modifier of international law is used throughout the original discussion presented to connote generally the extra-Charter normative regime to avoid the confusion engendered by use of the terms *customary international law* and *general international law* as articulated in article 53 of the Vienna Convention. *See* SINGH, *supra* note 94, at 10.

As this was the existent regime when diplomats and scholars referred to the impermissible use of force as the most conspicuous example of jus cogens, this author suggests that it is that regime in its entirety, not just one aspect of it, that is the non-derogable norm.[94]

C. The Dialectic Dyadic Dynamic

What is both apparent and key in this normative regime is the inherent complementarity of the two ends of the use of force spectrum.[95]

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94. This does not mean that other uses of force might violate either the Charter or customary international law norms but yet may not constitute jus cogens. This is analogous to the I.C.J. comments in the Nicaragua case that there may well be impermissible uses of force that do not run afoul of the customary international law prohibition against *armed attack*.

95. STONE, *supra* note 72, at 72-76. His book is generally directed at efforts to define aggression. This sub-section, entitled *The Attempted Approach to Definition through Armed Attack*, concludes that, although the term armed attack might seem to be more explicit than a looser one such as aggression or even legitimate self-defense, no ground is effectively gained in defining aggression by shifting the focus to the actions of the victim's permitted license of self-defense against armed attack. Quite simply he notes:

> If States generally accepted the view that all forceful self-redress by individual Members is forbidden by the Charter exception 'self-defense against the armed attack against a Member,' within article 51, they should certainly have rallied immediately to the thesis that nothing more was necessary to denote 'aggression' than to define 'self-defense against armed attack'. For the concept of 'self-defense' would then not have its vague customary law outlines but be more precisely limited by reference to 'armed attack' as an observable phenomenon against which it reacts. Some problems would remain . . . for instance of distinguishing what degree of violence 'armed attack' must involve and . . . the proportionality requirements . . . . If States really accepted this view of the Charter, indeed, the question of 'aggression' itself would become irrelevant; the question what is 'armed attack' would have been substituted for it. (citations omitted).

Id. at 72-73.

Further reflecting the relation between what is permissible and what is not, Stone notes the comments of G.G. Fitzmaurice:

> The whole problem is to determine when certain acts are justified and, therefore, are not aggressive, and when they are not justified and therefore are aggressive. This situation is one which can only be carried out in each particular case in the light of the facts and the situation as it exists at the time, and cannot be achieved by a prior rule laid down in advance.

Id. at 18 n.5.

An examination into the fifty-year effort to arrive at a definition of aggression, which was purposefully not done at the time of the drafting of the Charter, is, regrettably, not feasible within the constraints of this paper. However, it is to be noted that the result of that effort, the U.N.G.A.R Definition of Aggression effectively recognizes the inter-relationship of the two ends of the use of force spectrum. U.N.G.A./Agg, *supra* note 68. Specifically, the first use of armed force is only prima facie evidence of aggression. The obvious result is that a state can permissibly undertake a first strike presumably in anticipation of an armed attack and not be deemed to have engaged in aggression.

Evidenced in the writings of Judge Lauterpacht in 1935 and others even before him, the notion of aggression as complementary to the notion of self-defense, has a pedigree extending back into the pre-Charter/Kellogg-Briand Pact regime.[96] Kellogg himself regarded defense as the "conjunct of aggression."[97] According to Stone, this view is very widely acknowledged and is a correct one.[98] Of equal vintage are the comments of G. Schelle, in whose view:

> The correspondence of the questions is exact, since (matters of proportionality apart) only when aggression occurs does the right of self-defense arise. Indeed, . . . all that distinguishes self-defense from aggression is that the former takes place first. So . . . when there was no legal restraint on the license to go to war, there was also no restraint on the right of self-defense . . . . [I]ndeed that is it because "la notion de legitime defense se definit par l'agression," that this latter notion must be defined.[99]

More contemporary recognition that complementarity between self-defense and aggression remains a vital notion is reflected in the jurisprudence of McDougal and Feliciano.[100] Additionally, J.N. Singh has noted:

> The existence of legal prohibition surely means the absence of legal permission and likewise, the existence of legal permission means the absence of legal prohibition in regard to the same subject matter. In order to judge the legality of a particular threat or use of force in a situation, the examination of legal prohibitions as well as legal permissions is necessary.[101]

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96. STONE, *supra* note 72, at 75, *citing*: H. Lauterpacht, *The Pact of Paris* . . . (1935) 20 TRANS. GROTIUS SOC. 178, at 199.

97. BROWNLIE, *supra* note 70, at 240.

98. STONE, *supra* note 72, at 75 n.182. Such a dynamic is unlikely to have been affected by the passage of 37 years since Stone's book was published.

99. STONE, *supra* note 72, at 75 n.182.

100. MYRES SMITH MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER ch. 3 (1961). As noted by John Norton Moore, the notion of complementarity is a refined version of the legal realists' observations that legal norms frequently travel in pairs of complementary opposites such as self-defense-aggression. John Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968) at 656 n.20.

101. SINGH, *supra* note 94, at 8.

Given this inextricable linkage of the lawful and unlawful uses of armed force, each can only be defined in relationship to one another. According to Dinstein, "[t]he evolution of the idea of self defense in international law goes hand in hand with the prohibition of aggression . . . . [S]elf defense as a legitimate recourse to force is inextricably linked to the antithesis of the employment of unlawful force by . . . its opponent."[102]

What is really subject to assessment within the dynamics of the interstate use of armed force is considering where to draw the line.[103] Operationally, it is only by examining the entirety of the exercise of armed force between states that the boundary between proscription and permission can be determined.

As a direct consequence, the fundamental use of force proscription, reflected in the *traditional* prohibition on the use or threat of armed force against another state, necessarily implicates and defines the countervailing permitted self defensive use of armed force as one which encompasses the ability to defend against the use and the threat of armed force as well.[104]

This interdependence not only effects the applicable substantive prohibition and entitlement, but also implicates the applicable legal status of the normative regime. Specifically, to the extent that the traditional prohibition on the use of armed force is not *jus dispositivum*, but rather, jus cogens, the integrity of the system, the maintenance of balance between the two components of the system, mandate that its counterpart, the permissible use of armed force be recognized as having that same normative status.[105]

V. Is The Charter Subject to Jus Cogens Proscriptions?

What impact does recognition of the jus cogens character of the use of armed force regime have on the Charter and the use of force regime established thereunder? Is the Charter even subject to the jus cogens regime described in the Vienna Convention? Three factors are relevant:

1) the Charter entered into force before the Vienna Convention was even drafted,
2) the Vienna Convention is not by its terms, retroactive, and

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102. DINSTEIN, *supra* note 21, at 177, *citing* Report of the International Law Commission, 32nd Session, 1980 II (2) Int'l L. Comm'n Y.B. 1, 52.

103. DINSTEIN, *supra* note 21, at 177-78.

104. SINGH, *supra* note 94, at 14-20. Logic compels this conclusion as well.

105. It is indeed arguable that self-defense itself manifests the four criteria of peremptory norm status and might, therefore, constitute jus cogens separately from its linkage with the illegal use of force.

3) the Vienna Convention has not seen universal ratification.

The answer is, however, presaged by recognizing that what was enshrined in the United Nations Charter reflected pre-existent norms prohibiting the unilateral use or threat of armed force and the correlative right to undertake measures in self-defense.

Article 4 of the Vienna Convention limits its application to only those treaties which have been concluded after the Convention's entry into force. This is, however, without prejudice to the application of any rules set forth in the Vienna Convention to which treaties would be subject under international law independently from the Convention.[106] Debate at the Vienna Conference reflected concern that the Convention provision preserve the operation of rules of customary international law as well as take into account general principles of law which are a separate source of international law.[107] Article 4 was inserted to preserve the application to treaties of any pre-existent rules of customary international law and general principles of law.[108] Determining whether jus cogens has application to the Charter upon an international law basis other than the Convention regime, suggests analysis on whether jus cogens constitutes a codification of customary international law or a *progressive development*.[109]

The distinction between these two categories is evinced in article 15 of the Statute of the International Law Commission. According to that statute, progressive development of international law means "the preparation of draft Conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states."[110] Codification of

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106. Article 4 provides:

Non-retroactivity of the Present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states.

Vienna Convention, *supra* note 25.

107. SINCLAIR, *supra* note 4, at 8.

108. *Id.* at 249; I.C.J. Statute, art. 38(1)(b) (1945).

109. This approach is not meant to exclude consideration of jus cogens as a *general principle of law*, under the theory expressed by some that it represents, on the international level, the prohibition most legal systems recognize on the non-enforcement of contracts deemed in violation of law and/or public policy. Considerations of space preclude an in-depth presentation of this *positivist* theme as an underpinning of jus cogens. For a more detailed discussion see SINCLAIR, *supra* note 4, at 204-06.

Additionally as previously suggested, assessment of a norm as customary international law for this analysis does not preclude its promotion to jus cogens. *See supra* note 4, at 94.

110. SINCLAIR, *supra* note 4, at 11.

international law is defined to contemplate "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent, and doctrine."[111]

In submitting its final set of draft articles on the law of treaties, the ILC did not specifically categorize whether its work was either progressive development or codification.[112] Rather, in its covering report, the commission stated:

> The Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls.[113]

The ILC characterized its work on jus cogens as similarly reflecting this dichotomy. The ILC expressed the view that the draft article on peremptory norms involved partly a codification and partly a progressive development of international law.[114] It acknowledged that peremptory norms exist in international law that permit no derogation and set down a general definition of jus cogens.[115] The *progressive development* component would then relate to the specifics, i.e., which norms were to be accorded jus cogens status. This the ILC left to be worked out by state practice and the jurisprudence of international tribunals.[116]

That the use of force regime proposed herein as jus cogens is declarative of a pre-existing normative regime supports the notion that the regime is applicable to the Charter independently of the Vienna Convention.[117] To the extent that these norms were pre-existent and merely

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111. *Id.*

112. *Id.* at 12.

113. Int'l L. Comm'n [1966] Y.B. 177; SINCLAIR, *supra* note 4, at 12.

114. HANNIKAINEN, *supra* note 4, at 162.

115. That definition is "[a] norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, *supra* note 25, art. 53.

116. *See* Int'l L. Comm'n, *supra* note 114, at 76; HANNIKAINEN, *supra* note 4, at 162.

117. That the use of force regime described herein existed as a recognized normative regime in customary international law before the Charter, has been confirmed by the I.C.J. in the Nicaragua litigation. Military and Parimilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 126-34, at para. 175-94 (June 27). Consequently, even were the Vienna

codified in the Charter renders the Charter subject to the operation of jus cogens even though it came into force before the promulgation of the Vienna Convention.[118]

There are effectively two prerequisites for the retroactive application of the Vienna Convention provisions on jus cogens. The first component, establishing that peremptory norms exist in international law, is in this case, established and confirmed by that which would generally be the second and more difficult hurdle of establishing what the particular peremptory norm is.

What is at issue is the extent to which there is a regime concerning the use of armed force in interstate relations from which states are not free to derogate. To the extent that the Charter reflects and embodies the pre-existent norms regulating the use of that armed force, nothing new is being offered. The United Nations Charter regime is merely reflective of the pre-existent norms, the customary international law, to which all member states have signaled their acknowledgment of continuing allegiance and obedience to.[119]

Furthermore, there is nothing novel or *progressive* in categorizing the use of armed force regime as non-derogable. No restrictions upon a state's recourse to such force which did not previously exist, would be imposed.[120]

Convention not applicable, the principles of articles 53 and 64 would be effective as customary law. FRL, *supra* note 38, at 331, n.4.

118. Determining into which category a particular provision of the Vienna Convention falls is, Sinclair suggests, effected predominantly by implication. SINCLAIR, *supra* note 4, at 12. The I.C.J. in the Namibia decision, in determining whether another rule of the Vienna Convention [termination on account of material breach] would be applicable under customary international law independently of the Convention, noted the voting record at the Vienna Convention relating to its adoption as relevant. *Id.* at 20.

119. The comments of the I.C.J. in the Nicaragua case are, again, enlightening:

> [T]o deduce the existence of customary rules . . . the conduct of States should, in general be consistent with such rules . . . instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself . . . the significance of that attitude is to confirm rather than weaken the rule.

Military and Parimilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 130, at para. 186 (June 27).

120. Returning again to the *Nicaragua* case, the I.C.J. decision made clear that a breach of this extra-Charter customary international law regime remains both cognizable and punishable. Military and Parimilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 126 (June 27).

To the contrary, those who would argue that changes in the pre-existent regime under the Charter effect a diminishment of the *customary* principles are the true advocates of a progressive development.[121] Consequently, it would appear clear that the *traditional* use of armed force regime is an independent basis for the application of the jus cogens proscription, free from the non-retroactive provision of the Vienna Convention.

VI. Is the Charter in Derogation of Jus Cogens?

The *ultimate penalty of voidness* only results if a treaty is in derogation of jus cogens at the time of the conclusion of the treaty or as such emerges thereafter.[122] Consequently, the question is whether articles 2(4) and 51 of the Charter conform to the jus cogens armed force regime. This task obviously requires interpretation of the Charter. Attention, therefore, needs to be turned to interpretive modalities and materials to determine the consistency of the Charter with the jus cogens regime proposed herein as well as the absence of any newly emerged norm.

A. How is the Charter to be Interpreted?

Naturally, the Vienna Convention on the Law of Treaties provides rules for interpretation. These include:

> Article 31. General Rule of Interpretation
>
> 1. A treaty shall be interpreted in good faith in accord and with the ordinary meaning to be given the terms of the treaty in their context and in the light of its objects and purpose . . . .

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121. There are two simultaneous, yet independent regimes concerning the use of armed force; one under the Charter and the other under pre-existing norms. *Id.*, at 126-34, para. 175-194. In addition to finding that the Charter itself explicitly referenced pre-existent customary international law by referring to the inherent right of self-defense in article 51, the Court referred to two pre-Charter documents in finding the opinio juris supporting the customary international law regime on the prohibition of force reflected in article 2(4). *Id.* at 127, para. 176 and at 130-32, para. 186-89. Consequently, assuming a different, more restrictive regime under the Charter does not mean, absent evidence of state practice and opinion juris, that such has altered customary law. As the customary regime remains, treaty based restrictions have not effected a progressive development. Although new peremptory norms can emerge (i.e. progressively develop) there is no evidence that a new normative regime, in contradistinction to the Charter regime, has deprived the traditional regime on the use of armed force of its abiding existence, applicability, and vitality.

122. The remedy for the violation differs slightly if a new norm emerges after the treaty. Vienna Convention, *supra* note 25, art. 53, 64, 71.

> 3. There shall be taken into account, together with the context: . . . .
>
> (b) Any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32. Supplementary Means of Interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

These provisions have been referred to as a general expression of the principles of customary international law of treaty interpretation.[123] Pre-dating the Convention regime and still evident in its terms are three primary schools of thought concerning the aim and goal of treaty interpretation. As reflected in the writings of Sir Gerald Fitzmaurice:

> [t]here are today three main schools of thought on the subject, which could be conveniently called the 'intentions of the parties' or 'founding fathers' school; the 'textual' or 'ordinary meaning of the words' school; and the 'teleological' or 'aims and objects' school. The ideas of these three schools are not necessarily exclusive of one another, and theories of treaty interpretation can be constructed and are indeed normally held compounded of all three.[124]

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123. SINCLAIR, *supra* note 4, at 153.

124. Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRITISH YEAR BOOK OF

All three approaches, individually or as components within the Vienna Convention approach, retain import in efforts to interpret the Charter.[125] What will become apparent in the subsequent analysis is that, regardless of which modality is selected, the same outcome is obtained: the Charter's consistency with the jus cogens use of armed force regime proposed in this paper.

Equally clear is the place and import to be given to examination of the relevant travaux preparatoires in efforts to determine the meaning of the text, the intention of the parties, and the object and purpose of the United Nations Charter, notwithstanding any counterassertions predicated upon the Vienna Convention provisions.[126]

As Sinclair notes:

> [t]he question of recourse to travaux preparatoires has often been regarded as the touchstone which serves to distinguish the adherents of the 'textual' approach from the adherents of the 'intentions' approach . . . . In any event, it is clear that no would-be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted.[127]

Such investigative options as are provided by the travaux and other extrinsic material are not cast aside by the Vienna Convention. The rules for interpretation set forth in the Vienna Convention do not, according to Sinclair, establish a fixed, inflexible hierarchy between the general rule set forth in article 31 and supplementary means of interpretation provided for in article 32.[128] Rather, the would-be interpreter is still expected to have

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INTERNATIONAL LAW 1 (1951), *cited in* DAN CIOBANU, IMPACT OF THE CHARACTERISTICS OF THE CHARTER UPON ITS INTERPRETATION 31, in CURRENT PROBLEMS OF INTERNATIONAL LAW (Antonio Cassese ed. 1975); SINCLAIR, *supra* note 4, at 115.

125. According to Sinclair, the Vienna Convention's rules on interpretation constitute *an economical code of principles* which nonetheless have their value.

> By placing emphasis on the key elements of treaty interpretation, and on the relationship between these elements, the Convention rules establish a set of guidelines which are not only firmly grounded in antecedent state practice and international case law but which serve to indicate to the would-be interpretor the relative weight which . . . would be attribute[ed] to each of those elements.

SINCLAIR, *supra* note 4, at 153-54.

126. SINCLAIR, *supra* note 4, at 115-16.

127. *Id.* at 116.

128. *Id.* at 117.

recourse to all the materials that will provide evidence relative to the meaning of the text when confronted with a question concerning treaty interpretation which *ex hypothesi*, involves an argument as to the meaning of the text.[129]

Most enlightening and indicative of the synthetic approach to be taken in interpretative efforts concerning the United Nations Charter and the continuing relevance of the travaux, are the comments of Goodrich and Hambro on the then new Charter.

> In interpreting the Charter, we encounter one very special problem of treaty interpretation, namely, that of the weight to be attached to preparatory work (travaux preparatoires). The general principle to be followed seems reasonably clear. In the words of the Permanent Court of International Justice 'there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.' But the practice of the Permanent Court seems clearly to support the view that preparatory work should be consulted with a view to determining the true intent of the parties where there is any doubt as to the meaning of the words used. We would thus seem to be justified in making extensive and fairly detailed reference to the discussions that took place in UNCIO, not only to give some understanding of the play of forces that occurred, but also to throw light on the actual meaning of the Charter.[130]

Given the extent and virulence of the debate on such issues as the meaning of article 2(4) and that of the terms *armed attack* and the *inherent right of self-defense* articulated in article 51 of the United Nations Charter, significant questions of interpretation remain. Even under the arguably more strictly defined and structured Vienna Convention interpretation regime, this obviously implicates recourse to the travaux in an effort to interpret both articles 2(4) and 51.

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129. *Id.*

130. LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 48-49 (1946) [hereinafter GOODRICH & HAMBRO]. UNCIO refers to the United Nations Conference on International Organization held in San Francisco from April 25 through June 1945, when the Charter was signed. *Id.* at 11.

B. What Limitations Are There in the Charter on the Legitimate Right of Self Defense?

Before beginning that specific inquiry, it seems appropriate to be mindful of the comments of the Rapporteurs of Subcommittee 1/1/A and Committee I of Commission I:

> The provisions of the Charter, being in this case indivisible as in any other legal instrument, are equally valid and operative. The rights, duties, privileges, and obligations of the Organization and its members match with one another and complement one another to make a whole. Each of them is construed to be understood and applied in function to the others.[131]

Turning first to the Charter restriction on a state's unilateral recourse to force ultimately contained in article 2(4), the reports of the subcommittee and committee on its content clearly show that no interference was intended or anticipated in a state's inherent right to engage in legitimate self-defense.

The original proposal in the Dumbarton Oaks proposal made no mention of either territorial integrity or political independence.[132] However, the subcommittee unanimously approved an Australian amendment which added this phraseology and passed the resulting article on to the committee as a new paragraph.[133] That amendment effectively wrote the article as it would appear in the Charter.[134]

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131. Subcommittee I/1/A and Committee 1 of Commission 1 were responsible for drafting the Preamble, Principles and Purposes of the Charter. *Id.* at 12. Their reports are published in volume 6 of the official multivolume series entitled, UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS. Doc. 723, I/1/A/19, 6 U.N.C.I.O. Docs. 696 (1945) [hereinafter Subcommittee I/1/A].

132. Chapter II. Principles: (4) "All members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the organization." Doc. 1, G/1, 3 U.N.C.I.O. Docs. 3 (1945).

133. Commission I, Committee 1, *Report of Rapporteur Subcommittee I/1/A to Committee I/1*, Doc. 739, 6 U.N.C.I.O. Docs. 720 (1945) [hereinafter Doc. 739].

134. Committee I/1, *Appendix to Rapporteur's Report*, Doc. 908, I/1/34(a), 6 U.N.C.I.O. Docs. 404 (1945). As adopted by the subcommittee and approved by the Committee, the provision read that "[a]ll members [of the Organization] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any [member or] state or in any other manner inconsistent with the purposes of the United Nations." *Id.*

The differences between this draft and the final provision are merely editing variations deleting the words in brackets.

Although other amendments had been proposed and rejected by the subcommittee, one by the Norwegian Government had proposed that no force should be used if not approved by the Security Council. As discussion of this amendment helped to "clarify the Australian amendment itself," and "helps to explain the present text," the Subcommittee Rappporteur offered the following few words in his report to the committee: [135]

> The sense of approval was considered ambiguous because it might mean that approval before or after the use of force. It might thus curtail the right of states to use force in legitimate self-defense, while it was clear to the subcommittee that the *right of self-defense against aggression should not be impaired or diminished.* It was on these understandings that the subcommittee voted the text submitted to you.[136]

At the subsequent meeting of the committee, attention was focused on the proposed *new paragraph 4* including the words of the Australian amendment which had been accepted by the drafting subcommittee.[137] This amendment provoked considerable discussion.[138] That discussion reflects the following:

> The Delegate of New Zealand said that though he would vote for the text including the Australian amendment . . . his Delegation did not regard this text as an adequate substitute for the original suggestion by New Zealand . . . relating to a collective undertaking to resist aggression.[139]
>
> The Delegate of Brazil said that the change, made in the text to incorporate the Australian amendment, had not removed the element of ambiguity . . . and he suggested

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135. Doc. 739, *supra* note 134, at 720-22.

136. *Id.* at 721. These understandings also included a note that "there will be no legitimate wars in any sense." *Id.* (emphasis added).

137. *Summary Report of Eleventh Meeting of Committee* I/1, Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331 (1945) [hereinafter Committee I/1].

138. *Id.* at 334.

139. New Zealand had submitted an amendment, reflecting a "notion found in many other amendments" that read: "[A]ll members of the Organization undertake collectively to resist every act of aggression against any member." That amendment was rejected by a majority not reaching two-thirds primarily because: "(1) The key-note for collectivity is found in the opening words of this Chapter . . . . (2) The amendment limits itself to the collective resistance of every act of *aggression*, aggression not being defined." Doc. 739, *supra* note 134, at 721.

> that, apart from the *use of legitimate self-defense*, the text as it stood at present might well be interpreted as authorizing the use of force unilaterally by a state, claiming that such action was in accordance with the purposes of the Organization. He suggested that it was essential to clarify this by some wording as "all members of the Organization shall refrain . . . from the threat or use of force unless such action was being taken according to procedures established by the Organization and in accordance with its decisions.[140]
>
> The Delegate of Norway said that the committee should reconsider the present language which did not seem to reflect satisfactorily its intention, and thought that in any case it should be made very clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond *individual or collective self-defense*. He was himself in favor of omitting the specific phrase relating to "territorial integrity and political independence" since this was, on the one hand, a permanent obligation under international law and, on the other hand, could be said to be covered by the phrase *sovereign equality*, as suggested in the commentary by the Rapporteur.
>
> The Delegate of the United Kingdom said that he did not dissent from the reasoning of the Norwegian Delegate, but he thought that the wording of the text had been carefully considered so as to preclude interference with the enforcement clauses of chapter VIII of the Charter.[141]
>
> The Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the

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140 *Id.*

141. This numbering reflects the original Dumbarton Oaks proposal. The United Nations Dumbarton Oaks Proposals for a General International Organization, 3 U.N.C.I.O. 12-19, Doc. G/I (1945). Entitled "Arrangements for the Maintenance of International Peace and Security Including Prevention and Suppression of Aggression," then chapter VIII included Security Council authority over the pacific settlement of disputes, determination of threats to the peace and acts of aggression, as well as provisions relating to regional arrangements. These provisions were separated into different chapters and articles in the final United Nations Charter.

> phrase *or in any other manner* was designed to insure that there should be no loopholes.[142]

In recommendations to the commission, the committee Rapporteur noted the subcommittee's preliminary report had "received in full committee an adequate general acceptance which allows it to remain an element of the preparatory work that led to the committee's final recommendations."[143]

Concerning this new paragraph 4, the committee report reflects:

> The committee decided to include the Australian amendment so that the paragraph comes before you under a new text.
>
> The committee likes it to be stated in view of the Norwegian amendment to the same paragraph that the unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired.[144]
>
> In connection with paragraph 4, a motion was considered which the committee wishes to see mentioned in this report. It was to add after paragraph 4 the following text: "[A]ll members of the Organization undertake collectively to resist any act of aggression against any member."
>
> That motion, the committee wishes to state, had twenty six votes in favor and eighteen against.[145]

Clearly, there was every indication that the delegates recognized such a prohibition as that contemplated in new paragraph 4 could impact on self-defense and thus specifically rejected the notion that the proposed regime was intended to interfere, interrupt, or compromise legitimate self-

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142. Committee I/1, *supra* note 138, at 334-35. (Emphasis added).

What is noteworthy in the recorded debate is the absence of any opposition to the comments stating that the right to legitimate self-defense was clearly excluded from the use of force proscription. Given such explicit acceptance and lack of challenge, it was clear that such were to remain intact.

143. *Report of the Rapporteur of Committee 1 to Commission I,* Doc.885, 6 U.N.C.I.O. Docs. 387 (1945) [hereinafter Committee 1, Doc. 885].

144. The Norwegian amendment, which was not approved by the subcommittee had sought to prohibit the use of force if not approved by the Security Council. *See supra* note 39.

145. Thus the motion failed to meet the two-third majority required for passage. Discussion appears at Committee 1, Doc. 885, *supra* note 144, at 400.

defense in any way. Nor was there any notation or intimation that this self-defense entitlement was not to apply to a threat of force as well. As is evident, article 2(4) was intended to reflect the dialectic dynamic in the use of force regime: On the one hand, the threat or use of force against the territorial integrity, political independence of another state is not permitted while, on the other, the protective response mechanism, self-defense, remains inviolate.

Obviously, the content of that right was that which was existent at the time of the drafting efforts, otherwise the use of the word that remains in the discussions would have been nonsensical. However, more in-depth corroboration for that conclusion lies in an examination of the travaux for what has become article 51, the only article in the Charter that specifically refers to self-defense.

The discussion of self-defense arose in conjunction with the concerns of the Latin American countries to insure the freedom of action of their regional arrangement, most recently expressed and envisioned in the Act of Chapultepec, to provide collective self-defense yet remain within the United Nations framework.[146]

The principal debate upon this provision at the UNCIO occurred in commission III, committee 4 and subcommittee III/4/A.[147] Provisions for regional arrangements had appeared in the Dumbarton Oaks proposals as section C of chapter VIII, but made no reference or provision for general collective self-defense efforts by such entities.[148]

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146. GOODRICH & HAMBRO, *supra* note 131, at 175-83.

147. *See generally* 12 U.N.C.I.O. Docs. 663-866 (1945).

148. The Dumbarton Oaks proposal read as follows:

Section C. Regional Arrangements. 1. Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council.

2. 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 authorization of the Security Council.

3. The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under the regional arrangements or by regional agencies for the maintenance of international peace and security.

Dumbarton Oaks Proposal, Doc. 1, 3 U.N.C.I.O. Docs 18-19 (1945).

The provision reflecting self-defense was a new paragraph recommended for inclusion by the unanimous vote of subcommittee III/4/A to committee III/4.[149] That new paragraph read as follows:

> Nothing in this Charter (shall) impair(s) the inherent right of individual or collective self-defense if an armed attack occurs against a member (of the United Nations) state, until the Security Council has taken (the) measures necessary to maintain international peace and security. Measures taken in the exercise of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Chapter to take such action as it (may) deem(s) necessary in order to maintain or restore international peace and security.[150]

The subcommittee was unanimous in recommending this text to the committee.[151] At its fourth meeting committee III/4 considered the recommendations of the subcommittee.[152] The new paragraph was approved unanimously.[153]

Debate, as there was on this provision, is instructive for what it did not reflect: there was no evident intent to change the pre-existent self-defensive regime notwithstanding the usage of the term armed attack nor any indication that a state's right to self-defense was extinguished at any time prior to the existence of a peace available to be maintained by the Security Council.

As the discussion below reflects, however, there was provision for the use of force by the European states against the enemy states outside the Security Council context, which precipitated much of the debate.

149. *Interim Report To Committee III/4 by Subcommittee III/4/A on the Amalgamation of Amendment*, Dr. V.K. Wellington Koo, Doc. 533, 12 U.N.C.I.O. Docs. 533, 848 (1945) [hereinafter Interim Report/533].

150. *Id.* at 849. The words in parenthesis reflect changes, either additions or deletions, that were made in the proposal and reflected in the final article. The only modification that would appear to have substantive implications is the deletion of the word from its place immediately preceding measures necessary in the first sentence.

151. *Id.*, at 849. Issue was joined concerning the proper placement of the article within the Dumbarton Oaks proposal. *Id.* This debate was more heated and extensive than that concerning the text of the article itself. *See Summary Report of Fourth Meeting of Committee* III/4, Doc. 576, 12 U.N.C.I.O. Docs. 682-84 (1945) [hereinafter Committee III/4, Doc. 576]; *Draft Report of Dr. V.K. Wellington Koo*, Rapporteur of Committee III/4, to Commission III, Doc. 891, 12 U.N.C.I.O. Doc. 724 (1945) [hereinafter Committee III/4, Doc. 891].

152. Committee III/4, Doc. 576, *supra* note 152, at 679.

153. *Id.* at 680.

The discussion reflects, in pertinent part, the following:

In connection with this decision, the Chairman, speaking as the Delegate of Columbia, made the following statement:

The Latin American Countries understood, as Senator Vandenberg had said that the origin of the term 'collective self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. The Charter, in general terms, is a constitution, and it legitimizes the right of collective self-defense to be carried out in accord with the regional pacts so long as they are not opposed to the purposes and principles of the Organization as expressed in the Charter. If a group of countries with regional ties declare their solidarity for their mutual defense, as in the case of the American states, they will undertake such defense jointly if and when one of them is attacked. And the *right of defense* is not limited to the country which is the direct *victim of aggression* but extends to those countries which have established solidarity, through regional arrangements, with the country directly attacked. This is the typical case of the American system. The Act of Chapultepec provides for the collective defense of the hemisphere and established that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to *repel aggression*, authorized by the article which was discussed in the subcommittee yesterday, is legitimate for all of them. Such action would be in accord with the Charter, by the approval of the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.

The Delegates of Mexico, Costa Rica, Paraguay, Venezuela, Chile, Ecuador, Bolivia, Panama, Uruguay, Peru, Guatemala, El Salvador, Brazil, Honduras, and Cuba associated themselves with this statement . . . .

> The Delegate of Argentina associated himself with the statement of the Chairman . . . .
>
> The Delegate of France expressed his desire to give utterance to the voice of Europe amidst the general concert of the Latin American nations. In his opinion, the formula approved by the Committee extended in general to cases of mutual assistance against aggression.
>
> The Delegate of Czechoslovakia expressed his satisfaction that the text approved effectively reconciled the right of self-defense, individual, and collective, with the maintenance of a central authority capable of dealing with the problems of security as they arose.
>
> The Delegate of Egypt observed that the principle involved in the new text should certainly extend to the League of Arab States. The delegate for Australia said that, in supporting the amendment, . . . the phrase "individual or collective security" was regarded by the Australian Delegation as sufficiently wide to cover that part of the Australian amendment referring to the right of the parties, in certain circumstances, to adopt necessary measures to maintain international peace and security in accordance with any arrangements consistent with the Charter.[154]
>
> The Delegate of New Zealand expressed apprehension lest regional arrangements tend to produce conflict between regional groups. His delegation attached primary importance to the supremacy of the world Organization . . . .[155]

During the discussion on the operation and interaction between the provisions concerning pacific settlement of disputes, regional arrangements and the Security Council, the Chairman of Committee III/4 stated:

> [I]f at any time an *armed attack* should ensue, *that is, an aggression* against a state which is a member of a regional group, *self-defense*, whether individual or collective,

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154. Reference to *security* was subject to a subsequent Corrigendum noted at 12 U.N.C.I.O. Doc. 689 (1945).

155. Committee III/4, Doc. 576, *supra* note 152, at 680-82.

> exercised as an *inherent right*, shall *operate automatically* within the provisions of the Charter, until such time as the *Security Council* may take appropriate *punitive measures against the aggressor state*.
>
> In the case of the American states, an *aggression against one* American *state constitutes an aggression against all* the American states, and all of them exercise their *right of legitimate defense* by giving support to the state attacked, in order to repel such aggression. This is what is meant by the right of collective self-defense.[156]

No challenge, repudiation or objection was noted in the travaux to this view.[157] There is, consequently, no evidence in these recorded discussions of any debate on or intent to include norms in the Charter to compromise, change or impact upon the pre-existent prohibition on the use of armed force and the correlative right to self-defense.

There is, however, additional documentation reflecting discussion during the San Francisco Conference amongst members of the United States delegation, the other sponsoring states and France, as well as other national representatives, outside the reported subcommittee and committee meetings that are crucial to an understanding of events and decisions that occurred during the Conference and are, thus, highly relevant to assessing the content, definition and intent behind article 2(4), the self-defense entitlement in article 51 and the role of the Security Council.

For the United States delegation, discussion on self-defense arose early, in connection with consideration of that provision of the Dumbarton Oaks proposals that would find final form as article 2(4). On April 26, 1945, discussion at the 18th meeting of the United States Delegation reflects concern over a proposed amendment to chapter II, 4 of the Dumbarton Oaks proposals.[158] That proposed amendment read: "[a]ll members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the Organization and the provisions of the Charter."[159]

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156. *Id.* at 685-87 (emphasis added).

157. *Id.* at 684-88.

158. 1 Foreign Relations of the United States, Diplomatic Papers (1945), General: The United Nations (1967), at 425-29 [hereinafter Foreign Relations of the United States]. The original proposal appears at note 133.

159. Foreign Relations of the United States, *supra* note 159, at 426. The delegation decided against supporting this amendment, preferring the original language. *Id.* at 427.

Senator Vandenberg said he "was nervous about the problem of self-defense in view of the long arguments that had occurred in the Senate when the Kellogg-Briand Pact came up. The Foreign Relations Committee of the Senate had never been willing to yield until a reservation on the subject of self-defense was made."[160]

The question was posed why it would not be advisable to include the qualification about self-defense in the Charter, as there was concern that if no mention was made in the Charter, the Senate would make a reservation. Mr. Stassen specifically asked what would be the disadvantage of including an explicit statement in the Charter that "nothing in the Charter takes away the right of self-defense."[161]

As ultimately approved, article 2(4) contained no explicit reference to self-defense. The Committee of five recommended that the Dumbarton Oaks proposal be amended by the inclusion of an Australian amendment adding the language "against the territorial integrity or political independence of any member or state."[162] Described as a statement regarding the preservation against external aggression of the territorial integrity and political independence of members, Dean Gildersleeve, the United States delegate to the relevant Committee, pointed out the importance of this provision to the smaller nations who wanted this specification to make them feel more secure. Additionally, approval of this amendment needed to be considered against a New Zealand amendment seeking to guarantee territorial integrity that was receiving considerable backing.[163]

Although an explicit reference to self-defense was not inserted into article 2(4), the issue was far from dead. It resurfaced in the course of the extended debates on regional arrangements and the use of armed force from which article 51 ultimately resulted. In fact, the central figures in the process by which self-defense became the means to resolve the problem of regional arrangement authority, were those who had earlier suggested including a specific reservation of the right to self-defense in the Charter itself.

Extensive documentation exists on the drafting history of article 51 in the United States Foreign Relations documents. Recourse to these materials has a special significance in this particular area, as it was the

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160. Foreign Relations of the United States, *supra* note 159, at 426-27. Vandenberg repeatedly voiced concern about Senate ratification were no express reservation of the right of self-defense was included in the Charter. *Id.* at 594.

161. *Id.* at 428.

162. *Id.* at 747.

163. *Id.* at 726.

United States that bore the task of accommodating the desires of the Latin American States to the demands of the other sponsoring powers and participating states. As events reflect that what became article 51 was adopted by the Subcommittee and Committee without amendment in the form presented to them by Senator Vandenberg, the drafting efforts and negotiations that preceded the submission of the proposal offer invaluable insight.

On May 4, 1945, the United States delegates met and discussed the problem concerning the relationship of the security provisions of the general organization to hemispheric defense, particularly in relation to Chapter VIII, Section C, of the Dumbarton Oaks proposals dealing with regional arrangements.[164] According to these provisions, no enforcement action could be undertaken by a regional organization without the authorization of the Security Council.[165] The Dumbarton Oaks proposals contained no agreement on voting arrangements.[166] That agreement, subsequently reached at Yalta, provided for the veto power. Such, it was feared, could render regional action subject to the veto of any one state.[167] In commentary, Senator Vandenberg noted that the proposals "spelled the end of the Monroe Doctrine."[168] As French and Soviet proposals provided that action in Europe could be taken under bilateral treaty without any intervention or authorization by the Security Council it was, therefore, considered "extremely important to protect our concept of preclusive rights in this hemisphere."[169]

Delegate Stassen was noted to comment:

> [i]t was essential to permit the Security Council to authorize enforcement action . . . . On the other hand, we retained the essential right of self-defense. We could act if we were attacked, but we then would have to begin immediately presenting to the Security Council what we were doing in our own defense.[170]

Senator Vandenberg, again recalling the debates on self-defense that occurred in connection with the Kellogg-Briand Pact, asked whether there was any way to express the right to self-defense which was claimed

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164. *Id.* at 588-97. The initial Dumbarton Oaks Proposal appears *supra* note 148.

165. Foreign Relations of the United States, *supra* note 159, at 591.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 592.

as inherent, yet not *throw the door open* to individual action. In response, Mr. Stassen noted that there should be no effort to define the right of self-defense because "to define it simply raised the question as to what constitutes self-defense."[171]

Excerpts of a report from the Acting United States Secretary of State to Diplomatic Representatives in the American Republics provide a brief overview of events during the San Francisco Conference through mid-May 1945, concerning the evolving regional organization conundrum. The question of the relation of regional arrangements to the international organization passed through two phases at the San Francisco Conference.

In the first phase it was raised by the Russians, with the strong support of the French and the tacit support of the British, in relation to the bilateral pacts negotiated among European states and directed against enemy states in the present war. To this [a Soviet amendment to Chapter VIII, Section C, of the Dumbarton Oaks Proposal] the United States presented a counterproposal to which the Soviets, after considerable debate, finally agreed. That counterproposal read as follows:

> No enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council with the exception of measures against enemy states in this war provided for pursuant to Chapter XII, Paragraph 2, or, in regional arrangements directed against renewal of aggressive policy on the part of such states, until such time as the organization may, by consent of the governments concerned, be charged with the responsibility for preventing further aggression by a state now at war with the United Nations . . . .
>
> An indirect result of the presentation of this four power amendment was unfortunately to open the second phase of the problem of regional arrangements at the conference by giving a considerable number of the Latin American delegations the impression that European regional arrangements were being removed from the control of the Security Council whereas the much older and better-established regional system of the Western Hemisphere would be subjected to the domination of the Council. They were particularly fearful that, in view of the veto

171. Foreign Relations of the United States, *supra* note 159, at 593.

> power exercised by each of the permanent members of the Council, a non-American state would be able to prevent enforcement action of any kind under the Act of Chapultepec . . . .
>
> The United States delegation found itself faced by most difficult alternatives . . . .
>
> Various compromises were discussed. The Australians and the French suggested that it might be possible to authorize enforcement action under regional arrangements if the Security Council in a particular case did not find itself able to agree upon effective action on its own account.[172]
>
> . . . [t]he American delegation finally came to the conclusion that the best solution lay in an explicit statement in the charter of that inherent right of individual or collective self-defense . . . .[173]

Credit for re-framing the issue from one of exempting the Western Hemispheric regional arrangement to that of self-defense would apparently go to Mr. Stassen who had, in connection with article 2(4), previously suggested the advisability of an explicit reference to self-defense in the Charter.

Stassen's idea was presented at the 35th meeting of the United States delegates on May 10, 1945. Notes of that meeting reflect:

> Mr. Stassen stated that he had another idea in connection with the regional question . . . .
>
> [He] pointed out that he had heard over and over again that the basic objection to the present plan was the inability of a regional organization to act in the event of an arbitrary veto of one of the major powers. He said that he had come to the conclusion that it might be best to spell

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172. A French amendment to the Dumbarton Oaks Proposals that received much support read: "Should the Council not succeed in reaching a decision, the members of the organization reserve to themselves the right to act as they may consider necessary in the interests of peace, right and justice." U.N.C.I.O., *supra* note 133, at 385. It is important to note that this approach, which would hinge a state's self-defensive actions to Security Council inaction, was ultimately rejected.

173. Foreign Relations of the United States, *supra* note 159, at 831-34.

> out in the Charter the right of self-defense, in order to meet the recurrent criticism on this question.
>
> Mr. Stassen then read the following memorandum:
>
> 'Memorandum to U.S. Delegates and Advisors'
>
> On the basis of suggestions and discussions these past few days with a number of our delegates and advisors it appears to me that the following would be the best answer to our regional problems and it would at the same time meet other problems . . . .
>
> VI-E Self-Defense
>
> 1. Nothing in this Charter shall be construed as abrogating the inherent right of self-defense against a violator of this Charter . . . .[174]

By 2:30 p.m. the next afternoon, a new draft article was presented for discussion at the United States delegation meeting.[175] The draft to be added was a new paragraph 12 to Chapter VIII, Section B. It provided:

> In the event of an attack by any state against any member state, such member possesses the right to take measures of self-defense. The right to take measures of self-defense against armed attack shall apply to arrangements, like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall not affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[176]

During discussion on that draft within the United States delegation, Senator Connally asked whether the Security Council could take cognizance of a situation in which there had been an attack followed by a counterattack by other states acting in self-defense. After receiving an affirmative answer, Mr. Dulles noted that states were, however, not

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174. *Id.* at 658-60.

175. *Id.* at 663-64.

176. *Id.* at 664, 674.

obligated to discontinue their countermeasures taken in self-defense. Rather, there was "concurrent power."[177]

Senator Vandenberg pointed out a bit of potential confusion with the use of and distinction between the term *attack* in the first sentence and the term *armed attack* in the second. Mr. Dulles explained it was done deliberately to maintain consistency with the usage of the Monroe Doctrine which covers two situations, *overt attack* and "political efforts from outside the continent to effect the overthrow of the political institutions of the American Republics."[178]

A drafting change was suggested by Mr. Pasvolsky (State Department) to insert the word *inherent* before the phrase *right to self-defense*.[179] Additionally, the words "be reported immediately to the Security Council" and "shall not in any way" were to be added before the phrase "affect the authority and responsibility of the Security Council."[180] According to Senator Connally, "it was clear that this addition did not mean that the attacked states should stop fighting before the necessary countermeasures were taken by the world organization."[181]

The British and French objected to the draft as written. The United States delegation worked out a compromise reflecting an earlier French draft that hinged unilateral action upon the lack of a decision by the Security Council.[182] That draft read:

> [s]hould the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member state, such member state possesses the inherent right to take necessary measures for self-defense. The right to take such measures for self-defense against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility

177. *Id.* at 666.

178. *Id.* at 677.

179. Foreign Relations of the United States, *supra* note 159, at 670. The word was added without any apparent debate on the connotation, intent, meaning, or implication of the insertion.

180. *Id.*

181. *Id.*

182. *Id.* at 683. *See also supra* note 172.

> of the Security Council under this charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[183]

When this draft was presented at the third Five-Power Informal Consultative Meeting on May 12, 1945, the British reacted very unfavorably.[184] Representatives of the United Kingdom and the United States met to attempt to resolve differences. In the course of that effort, Mr. Dulles noted that "the United States proposal attempted to define aggression in terms of 'armed attack' and in this way it was hoped to avoid the problem of trying to define aggression as such."[185] In reply, Sir Alexander Cadogen repeated his belief that "the Security Council should have the opportunity to determine the circumstances of an armed attack without trying to write any such close definition into the provisions."[186]

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183. Foreign Relations of the United States, *supra* note 159, at 834. Nowhere in the discussion of the United States delegation was there any particular attention paid to the use of and any necessary distinctions to be made between the terms aggression, armed attack, or attack even though all three were included in the draft. One intriguing question that went unanswered was that of Mr. Bloom who inquired whether the intent was to include the threat of aggression or merely actual aggression. *Id.* at 679.

184. *Id.* at 691-98. Mr. Eden's challenge was not on the question of what *armed attack* meant, but his fear of *regionalism* impairing the effectiveness of an international organization. *Id.* at 695-96. In expressing his intense dislike, Eden did note that no one had been able to define aggression in 30 years. *Id.* at 692. The only discussion of armed attack arose when Mr. Stassen, explaining sentence two of the draft, said "the right of collective or group action comes into operation in the event of an armed attack." Within the context, the obvious implication is an effort to clarify that armed force was to be available to confront armed not unarmed force.

To Eden's protestations that the proposal empowered regional organization action outside the sway of the Security Council, Senator Connally noted:

> The United States proposal was not greatly at variance with the Anglo-Soviet and the Franco-Soviet treaties. Under these treaties, as in the case of the Act of Chapultepec, an attack against one is treated as an attack against all parties to the agreement. In both cases the treaties were aimed at resistance to armed aggression. The United States draft enlarges the scope but not the principle of the exception already agreed upon with respect to Chapter VIII, Section C, Paragraph 2.

Id. at 694.

Stassen went on to note:

> [The] United States draft would not give the regional organization freedom of action. It was not as broad as . . . Chapter VIII, Section C, Paragraph 2 [directed against the renewal of aggression by the enemy states]. Under that formula the parties to the treaties could take enforcement action against enemy states. Under the United States' draft there is no right of enforcement. There is only the right of action in self-defense against armed attack.

Foreign Relations of the United States, *supra* note 159, at 695.

185. *Id.* at 700.

186. *Id.*

According to Dulles, it was not merely a question of an option for Security Council action, rather it was a question of:

> [T]he United States carrying forward within the world organization its traditional policy of the Monroe Doctrine as expanded and further defined in modern times; that the Unites States now regards an attack on any of the American Republic as an attack upon the United States and in that event, the United States wished to exercise collectively, its right to self-defense.[187]

An alternate text was agreed upon and subsequently presented to the Five Powers at another informal consultative meeting.[188] It read:

> nothing in this Charter impairs the inherent right of self-defense, either individual or collective, in the event that the Security Council has failed to maintain international peace and security and an armed attack against a member state has occurred. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[189]

Initially, all but the British seemed generally comfortable with the proposal. Mr. Eden subsequently accepted the draft as it appears in the main text. Ambassador Gromyko indicated this draft came closer to his understanding of the principles and purposes of the organization, but additional time to study it was necessary. The Chinese Ambassador (Koo), reacted favorably, noting "out of this draft . . . we might be able to get something . . . acceptable." Mr. Bidault, the French representative, noted "the draft said something that was self-evident. In case of aggression any state has the right of self-defense."[190]

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187. *Id.* The discussants recalled Eden's point that "self-defense in modern Europe was a difficult term to define, and that attempts to specify in the Charter those conditions under which such self-defensive measures could be taken would raise many difficult issues." *Id.* At 703.

188. *Id.* at 705-07.

189. Foreign Relations of the United States, *supra* note 159, at 705.

190. *Id.* at 706.

On May 14, the matter was taken up with the chiefs of the principal Latin American delegates.[191] Discussion focused on the apparent deletion of any reference to the Act of Chapultepec in the proposed drafts. None of the discussion related to the content of the inherent right nor to the intended purpose or meaning of the term *armed attack*. Rather, it was to assure the Latin American representatives that the Act of Chapultepec and the regional organization would be viewed as consistent with the Charter and, therefore, not subjected to prior approval by the Security Council.[192]

At the next Five Power Informal Consultative Meeting only one minor change was made to proposed paragraph 12, the deletion of the word *fail* in connection with Security Council action.[193] The remainder of the discussion dealt with other proposed changes concerning the operation of the regional organizations themselves.[194]

At an executive session of the United States delegation held at noon on Sunday, May 20, 1945, discussion turned to a new Russian draft of paragraph 12.[195] It read:

> [n]othing in this Charter impairs the inherent right of self-defense, either individual or collective, if prior to undertaking the measures for the maintenance of international peace and security by the Security Council an armed attack against a member state occurs. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

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191. *Id.* at 835.

192. *Id.* at 712-18. The attendees at that First Informal Consultative Meeting With Chairman of Delegations of Certain American Republics, included the United States, Brazilian, Chilean, Cuban, Colombian, Mexican, Peruvian, and Venezuelan delegations. This was the first of three such informal consultative meetings with the Latin American diplomats held between May 14-20, 1945. *Id.* at 712.

Their second meeting focused entirely on the questions concerning the Act of Chapultepec, relating to a draft article under chapter VIII, section A, paragraph 3, not the provision relating to self-defense which was denominated new paragraph 12, under chapter VIII, section B. *Id.* at 730-36.

193. Foreign Relations of the United States, *supra* note 159, at 737.

194. *Id.* at 737-39. Under discussion was the proposals on chapter VIII, section A, paragraph 3, and section C. *Id.* The Russians were apparently concerned that collective action could be taken on the basis of previous agreements. At the 44th meeting of the United States delegation on May 17, 1945, Mr. Pasvolsky noted that to quell these concerns he "gave an explanation of the Monroe Doctrine and the right of collective measures in defense." *Id.* at 778, 781-82.

195. *Id.* at 813-20.

> Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[196]

Following additional discussion amongst members of the executive group, a new draft was circulated.[197] It read:

> [n]othing in this Charter impairs the inherent right of self-defense, either individual or collective, if an armed attack occurs against a member state before the Security Council has taken adequate measures to maintain international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[198]

Finally, a question was directed to the term *armed attack*. Delegate Hackworth expressed the view that the draft greatly qualified the right of self-defense by limiting it to the occasion of an armed attack. Mr. Stassen replied that "this was intentional . . . we did not want exercised the right of self-defense before an armed attack had occurred."[199]

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196. *Id.* at 813.

197. *See* Foreign Relations of the United States, *supra* note 159, at 824..

198. *Id.* at 817.

199. *Id.* at 818. This comment was made in an executive session of the United States delegation. Even assuming that the clear intent was to limit any armed response until after a first strike, there is no reflection that this view was shared with and by any other state delegation. Debate in the Subcommittee and Committee on this draft, which was ultimately approved and included in the Charter, reflects no discussion on this question. Such a non-event can hardly support the proposition that inclusion of the term constituted a new norm inserted with the intent to create a new regime.

It still remains questionable whether Stassen's comment was not intended to differentiate between an attack as referenced under the Monroe Doctrine and Act of Chapultepec. This could well contemplate non-military attacks from military (armed) attacks rather than confining self-defense to an armed response to a first strike which would, effectively, repudiate the pre-existing regime under the Caroline Doctrine. To the contrary, the interchangeable reference to armed attack and aggression in the Subcommittee and Committee discussions as well as the use of *aggression armee* in the equally authoritative French version of the Charter, strongly evidence a focus on armed force in contradistinction to non-armed force rather than a first strike regime.

That no such new bright line test was intended is supported by the decision not to include a definition of aggression in the Charter itself and the 50 year struggle to arrive at a definition of aggression. For additional comments see STONE, *supra* note 72, at 72-73.

In response to another question by the Subcommittee of Five, a slightly modified draft was produced. At 6:00 p.m. that evening, it was presented at the seventh Five-Power Informal Consultative Meeting on Proposed Amendments.[200] As then formulated, the proposal read:

> [n]othing in this Charter impairs the inherent right of individual or collective self-defense if an armed attack occurs against a member state, until the Security Council has taken the measures necessary to maintain (or restore) international peace and security. Measures taken in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[201]

Subsequent discussion by the Five Powers reflected no discussion on the term *armed attack*.

At 9:00 p.m. the next evening, this proposal was presented to the Ambassadors of Certain American Republics.[202] "The Latin American Ambassadors expressed enthusiastic support for these drafts and indicated their appreciation of the efforts made by the United States delegation in reaching these agreements. No dissent from the drafts was expressed."[203] As discussed above, the record of discussion and passage in the subcommittee or committee reflected no changes to this draft prior to approval.[204]

From this record is there evidence that a new norm was intended or had emerged? Specifically, does it appear to have been the widespread understanding and intent that inclusion of the term armed attack in the Charter was to effect a limitation or modification of the pre-existent norm of self-defense by rendering impermissible an armed response until a state had suffered a first strike?

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200. Foreign Relations of the United States, *supra* note 159, at 818, 823-26. The reasons for the modification concern use of the words "maintain or restore international peace and security."

201. *Id.* at 823-24.

202. *Id.* at 825-26.

203. *Id.* at 826.

204. HANNIKAINEN, *supra* note 4, at 42-47.

Hardly. The record of proceedings in Subcommittee III/4/A and Committee 4 clearly reflect no evident intent to do that.[205] In fact, throughout the discussion on article 51, in which armed attack is mentioned, the delegates use of the term *attack*, *armed attack*, and *aggression* interchangeably.[206]

The traditional self-defense right continues to exist outside what may be a more restrictive standard under the Charter and contemplates more than a response to a first strike appears recognized by the I.C.J. in its Nicaragua decision.[207] As noted by Schachter, "in my view it is not clear that article 51 was intended to eliminate the customary law right of self-defense and should not be given the effect."[208]

As there has been little apparent effective change in the states' unilateral recourse to force, it would appear to be problematic to assume that state practice manifests widespread recognition and acceptance of such a normative change, reducing the sphere within which they can act in armed self-defense.[209] The change has been more linguistic than substantive.[210]

If anything, the failure of the anticipated collective machinery envisioned in the United Nations system and the evolving practice of member state authorizations has reinforced the import and necessity of individual and collective self-defense.[211] As Dinstein suggests,

> [a]s long as the Charter's scheme of collective security fails to function adequately, states are left to their own devices when confronted with an unlawful use of force. Again and again, they invoke the right of (individual or

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205. Foreign Relations of the United States, *supra* note 159, at 826. There was, however, one statement by Mr. Stassen to Mr. Bloom, another United States delegate, during an executive session, stating that it was the intent to have *armed attack* restricted to an attack that had occurred. Assuming for the moment that it meant to eliminate the traditional content of self-defense, which does not require the completion of a first strike, rather than narrowing the broad sway of the Monroe Doctrine and the attack language of the Act of Chapultepec which could be understood to contemplate unarmed as well as armed attack. The absence of any record of multilateral discussion and agreement that such a restricted meaning of *armed attack* should hardly support the notion of widespread understanding and acceptance that the term was intended to limit self-defense.

206. HANNIKAINEN, *supra* note 4, at 44-47.

207. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 134, paras. 175-90, 193-94 (June 27). *See also supra* note 58.

208. Oscar Schacter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984).

209. DINSTEIN, *supra* note 21, at 310.

210. *Id.*

211. *Id.*

> collective) self-defense in response to an armed attack. Thus, instead of being a provisional interlude pending the exercise of collective security, self-defense . . . has virtually taken the place of collective security. The very 'centre of gravity in the United Nations has swung from article 39 to article 51.'[212]

Schacter, too, notes: "[w]e are bound to conclude that the collective security system of the United Nations Charter has now been largely replaced by the fragmented collective defense actions and alliances founded on article 51."[213]

VII. What is the Relationship Between a State's Inherent Right of Self-Defense and Security Council Action?

What was the intended relationship between the authority of states to engage in armed self-defense and the authority of the Security Council to undertake measures in the case of such occurrences?

The Charter scheme for this interplay reflects and confirms the jus cogens status of the regime. This result obtains as the Charter clearly reflects that the exercise of this right is immune from derogation or interference by the Security Council. The focus here is on that portion of article 51 whereby a state's inherent right to self-defense continues "until the Security Council takes measures necessary to maintain international peace and security."[214]

That a state's right to engage in self-defense is not dependent upon the action or inaction of the Security Council is clear from an examination of the evolution of article 51. No consideration of this question appears in the reported subcommittee or committee discussions on article 51 published in the multi-volume UNCIO report.[215] However, as with the other aspects of article 51, there was discussion of this question by the Five Powers prior to the finalization of article 51 in the form in which it

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212. *Id.*

213. Schachter, *supra* note 209, at 1639.

214. There is a second component to Security Council authority in article 51 which reads: Measures taken by Members in the exercise of this right of self-defence . . . shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

As discussed below, this applies concurrently with, not instead of, the exercise of self-defense.

215. *See generally supra* notes 42-47 and 147.

was submitted to and unanimously approved by Subcommittee III/4/A and Committee 4.[216]

A Russian draft, examined in an executive session of the United States delegation on May 20, 1945, was understood to preclude interference with a state's exercise of self-defense "during the period elapsing between the attack and the time the Security Council takes adequate measures to restore international peace and security."[217]

A question arose amongst the Committee of five whether the phrase *maintain* or *restore and maintain* international peace and security was more appropriate, given that an attack constituted a breach of the peace.[218] During discussion, the view was expressed and agreed upon that the right of self-defense continued until such time as the Security Council took effective action.[219] That discussion, resulted in the production of the draft presented at the seventh Five-Power Informal Consultative Meeting on Proposed Amendments.[220]

Discussion on this draft by the five delegations focused on only one issue: whether to include the term *restore*. The British urged retention of the term to reflect that the right of self-defense should continue during the period of restoration as well as up to the point at which the Security Council was taking action to restore the peace.[221] The United States accepted the elimination of the term although it was quite willing to have it retained.[222] The Soviet delegation thought the term maintain encompassed the term *restore* rendering it unnecessary.[223] To this Lord Halifax replied, "you can't maintain what isn't there."[224] The Chinese delegation preferred retaining the term.[225] Ultimately, the British ceded their concern in the interests of not splitting the delegation, although it was

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216. As indicated above, the drafting of article 51 was effected by the Five Powers in consultation with representatives of some Latin American Republics. Once the language was agreed upon, the article which was submitted for consideration by the subcommittee and committee, was approved without amendment or modification. *See generally supra* notes 47-59. Consequently, this drafting history is especially illuminating and relevant.

217. *Id.* at 816-17.

218. Foreign Relations of the United States, *supra* note 159, at 818.

219. *Id.* at 817.

220. *Id.* at 823-26.

221. *Id.* at 824.

222. *Id.*

223. *Id.*

224. Foreign Relations of the United States, *supra* note 159, at 824.

225. *Id.*

more logical to retain the term.[226] All agreed to the term *maintain*.[227] The plan was for the text to go to Committee the next day without the term *restore*.[228] The Soviet Government was to be informed of the three to five agreement on the utility of including the term.[229] However, if the Soviet government did not agree on its inclusion, Lord Halifax would not press the issue.[230] No discussion is reflected at that meeting on the term *armed attack*.

There was no discord, question or comment made on this language by the ambassadors of the American Republics or the members of the Subcommittee and Committee who reviewed it prior to its unanimous approval.[231]

The travaux, then, confirm the place for unilateral armed self-defense within the Charter system; the right was to remain unimpaired during the restoration phase. There are no contrary or countervailing indications in the reported discussions of the subcommittee or committee that even suggested any other intent or interpretation.

The structure intended under article 51 contemplated two responses in the event of an armed conflict between states. The Security Council is empowered to take any measures against the aggressor state(s) in order to maintain or restore international peace and security. Simultaneously, the victim state retains its right to engage in armed force for self-defense.[232] Presumably, had the United Nations available to it the intended police force, the actions of the victim state in self-defense and the United Nations in collective security would be consistent, complementary, and co-existent.

The drafting history reflects the clear de-linkage between self-defense and actions by the Security Council.[233] To avoid the suggestion that the Security Council remained completely disempowered to act while a state was engaged in armed self-defense, the second sentence of article

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226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Foreign Relations of the United States, *supra* note 159, at 824.

231. *See generally supra* notes 42-47, 57, 59-60, 190.

232. This obviously puts the obligation upon the Security Council to make a determination of aggression and responsibility. That it may refuse or be unable to do so, given the veto system and the political dynamic, was the impetus for the concern of the Latin American states that found eventual resolution through explicit reservation of the right to self-defense. *See supra* notes 51-52.

233. *See supra* notes 57-58, 172. concerning the French proposal and other drafts pegging unilateral action to Security Council inaction. All these were jettisoned in the drafting process.

51 was added.[234] Clearly, the Security Council must remain fully empowered to act against an aggressor.

The second phase would begin once peace had been restored, when the focus would shift to its maintenance. At that point, there would no longer be any necessity for self-defense. Unilateral armed efforts in self-defense would not be permissible and would be subject to Security Council mandate as there would be no existent threat or use of force.

Reflecting on the relationship between a state's self-defensive rights and the legitimacy, propriety, and authority of Security Council action, Dinstein, notes:

> [t]he modes of action open to the Council are manifold. Inter alia, the Council can . . . insist on the cessation of the unilateral action of the defending state, *supplanting it with measures of collective security* . . . or . . . decide that the state engaged in a so-called self-defense is in reality the aggressor.[235]

Eugene Rostow states the situation even more explicitly:

> [w]hat the Charter prescribes . . . [is] that the aggrieved state and its friends and allies may decide for themselves when to exercise their rights of individual and collective defense until peace is restored or the Security Council, by its own affirmative vote, decides that self-defense has gone too far and has become a threat to the peace.[236]

VIII. What are the Implications for Enforcement Actions Imposed by the Security Council?

Effectuating the Charter goal of preventing international armed conflict was not, then, to have been at the expense of a state's pre-existent

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234. SCHOCHTER, *supra* note 214.

235. Emphasis added. DINSTEIN, *supra* note 21, at 207. The absence of such collective security capability would obviously eliminate the basis for such interference by the Security Council in the unilateral action by the defending state. Theoretically, the Security Council could announce a multilateral cease-fire. If enforceable and enforced to end hostilities between opposing states, this would not necessarily interfere with self-defense.

236. Eugene V. Rostow, *The Gulf Crisis in International Law and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense*, 85 AM. J. INT'L L. 506, 510 (1991). In support of his thesis, Rostow refers to D.W. Bowett's rejection of the view that Security Council consideration of a conflict can effectively be deemed to suspend the injured party's rights of self-defense. Rather, for Bowett, the aggrieved state may act even in conflict with the Security Council. *Id.* at 511.

right to engage in armed self-defense. No interference with a state's inherent right to defend itself was intended because Security Council action is not authorized until there is a peace to be maintained.

What implications does this regime have upon the authority of the Security Council to undertake binding measures against states engaged in armed self-defense? Is the Security Council empowered to undertake any measures it deems appropriate in efforts to resolve an ongoing armed conflict? Dinstein suggests:

> [a]pparently it is not enough (under article 51) for the Security Council to adopt just any resolution, in order to divest member states of the right to continue to resort to force in self-defense against an armed attack. The only resolution that will engender that result is a legally binding decision, whereby the cessation of the (real or imagined) defensive action becomes imperative. Short of such a measure, the member state engaged in self-defense is not obligated to desist from the use of force. However, the defending state still acts at its own risk, perhaps more so than before. Continued hostilities may precipitate a decision by the Council against a self proclaimed victim of an armed attack.[237]

This author suggests that if such action interferes with a state's inherent right of armed self-defense, it implicates jus cogens. Consequently, not even the Security Council can institute measures that prevent a state from availing itself of that right as the state sees fit.[238]

The strictures of jus cogens and its effect is not limited solely to conflict between a peremptory norm and the prohibition or invalidation of a treaty.[239] Rather, as clearly expressed by the ILC in its 1966 commentary: "a rule of jus cogens is an overriding rule *depriving any act*

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237. DINSTEIN, *supra* note 21, at 208-09. The earlier version of his book had the following as the concluding portion of that sentence: "[T]hat a breach of international peace has been committed, thus laying the ground for the introduction of enforcement action." *Id.* at 196-97.

For the one qualification, *imperative*, Dinstein cites to C.H.M.Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.C.D.I. 451, 495-96 (1952).

238. A state's unilateral decision to engage in self-defense remains, however, subject to review by the international community through, for example, the political or legal branches of the United Nations organization and application of the traditional requirements: necessity and proportionality.

239. HANNIKAINEN, *supra* note 4, at 6.

or situation which is *in conflict* with it *of legality*."[240] The effect of a jus cogens violation extends to acts and renders them unlawful.[241] The outcome of a jus cogens regime, then, is the comprehensive prohibition of all acts contrary to the peremptory norm implicated.[242]

Additionally, pertinent evidence exists in state practice, international jurisprudence and doctrine that the prohibition of derogation which is a component of the article 53 definition of jus cogens, is to be understood to prohibit any acts conflicting with a given norm.[243]

The clear import of the preceding analysis is to suggest that binding measures imposed by the Security Council that interfere with a victim state's inherent right to engage in armed self-defense, even if such are equally imposed upon the aggressor state, violates jus cogens. Such measures are nullities which no state can be compelled to comply with, without itself engaging in an agreement and acts that violate the most widely recognized and fundamental peremptory norm for the maintenance of world order.[244]

To the extent that this inherent right of self-defense is a peremptory norm, not even the Security Council can institute mandatory measures such as an arms embargo, imposed on all the reputed parties to an ongoing armed conflict, as such effectively undermines the ability of a

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240. Emphasis added. Int'l L. Comm'n Report, U.N. Doc. A/6309/Rev.1, p.89 (1966). This comment was made in connection with draft article 61, which became article 64 in the final text (conflict with newly emerging norms).

241. *Id.*

242. *Id.* The logic is clear. Without this expansive coverage, peremptory norms would be rendered meaningless as states need only avoid including problematic provisions in treaty form to remain empowered to act in derogation of jus cogens. *Id.* Allowing such an end run around jus cogens would undermine the fundamental policy for such norms: ensuring that certain norms, considered essential for world public order, that protect vital interests and values of the international community of states, not merely the interests of some, remain inviolate. HANNIKAINEN, *supra* note 4.

243. HANNIKAINEN, *supra* note 4, at 7. He notes that this interpretation is consistent with the presumed purpose of international jus cogens: to protect the international community from all acts contrary to peremptory norms. *Id.*

Because peremptory norms protect overriding interests and values of the international community, states owe peremptory obligations to that community not to individual states. One such obligation *erga omnes*, in the protection of which all states can be held to have a legal interest, as such is necessary for the maintenance of international peace and security, is the prohibition of the use of aggressive force between states. Barcelona Traction, *supra* note 58, at 32. *See also* HANNIKAINEN, *supra* note 4, at 5.

244. Even were there evidence in the Charter travaux that states intended to surrender their otherwise more extensive rights to engage in self-defense to the international organization, anticipating a *global police force* to confront aggression in their stead, the failure of the bargain or arrangement to have occurred would render such self-defensive entitlements necessary. STONE, *supra* note 72, at 96, 100-01.

victim state to engage in self-defense and, thereby, prevents a state from availing itself of that right. While any state remains free to choose not to supply arms, a mandatory prohibition violates jus cogens.

While some may suggest that this implicates a regime whereby the use of force is unrestrained and, therefore, antithetical to the intended United Nations Charter regime, that is not quite the scenario. Other legal requirements still remain relevant. For example, states remain obligated to pursue pacific settlement before using force, to support the claimed necessity for engaging in self-defense and comply with Charter obligations.[245] Ultimately, if the determination is made that a state, claiming to be acting in self-defense is found not to be by the Security Council, it remains empowered to call such continuing actions threats to the peace or aggression and institute enforcement measures accordingly. These same options exist if a state's reputed self-defensive measures fail to comply with the customary restrictions in that they are neither necessary or proportionate.[246] In the final analysis, recognition of the peremptory status of a states right to engage in armed self-defense does not signal the end of the Charter system for the regulation of the interstate use of armed force. Rather, recognition of the status which self-defense was to hold from the outset, merely returns to the original framework.

That the envisioned Security Council force has not come to pass, necessitates recognition that unilateral self-defense remains essential to confront the threat to world welfare posed by armed aggressors. This social concern in preventing and confronting aggression is the final justification to confirm the jus cogens status of the traditional self-defense regime. Given the incapacity of the United Nations to field its multilateral force, the only remaining option is that of a state victim, and others responding to its call, to confront that armed aggression by armed force.

The use of force regime proposed herein, which includes the right to engage in armed self-defense, protects an overriding interest or value in the international community of states. That community would be seriously jeopardized by derogation therefrom. Rather than producing any negative evidence, this regime remains, however regrettable, affirmatively

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245. While it must be noted that pacific measures can not be imposed in derogation of a state's jus cogens entitlement to use self-defense, whether or not recourse has been had thereto may be highly relevant to a determination that such self-defensive measures were not necessary.

246. While a sanction, such as an arms embargo might be imposed at this juncture, that does not legitimize doing so earlier, while a victim state is engaged in self-defense. As demonstrated by the Nicaragua litigation, the I.C.J. may have a place in this regulatory process as well.

necessary. Consequently, the peremptory status of the norm may be presumed.[247]

247. This is the fifth criteria suggested by Hannikainen. HANNIKAINEN, *supra* note 4, at 12-13.