# Anticipatory and Preventive Self-Defense in International Law

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There is a wide range of disagreements within the international legal community with regard to legitimate resorts to forcible coercion in international law. The areas of contention include the meaning and scope of self-defense prior to establishment of the United Nations, the effect of the United Nations' Charter in general and Article 51 in particular on the right of self-defense, undesirable policies which can legitimize a forceful response on the part of the victim in exercise of its right to self-defense, the legality of anticipatory and preventive self-defense under contemporary international law, and the effect of the existence – or its lack – of community measures to resist aggression on individual right of self-defense. These differences are still evident in scholarly writings, diplomatic debates, and indeed state practice. There have been opposing contentions about the nature of existing law; in certain cases, there have been suggestions for an attempt to change the law.

## The Law of Self-Defense before the Charter of the United Nations

### *The Case of Caroline*

In the early 19th century, since war was considered a prerogative of sovereignty and a necessity for the maintenance of the balance-of-power in the international system, justice of the cause of belligerents in a war was indeed irrelevant from the view point of international law. In a very famous passage, Hall observed in 1880:

> International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up,

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> if they choose, and to busy itself only in regulating the effects of the relation.[1]

In this era, although claims of self-defense and self-preservation were often made by states resorting to armed force, the concepts of self-defense and self-preservation were solely political tools without legal definition or limitations. In the absence of a clearly defined legal concept, such claims were used mostly as political excuses for intervention and expansion. As Jennings points out, "it was in the Caroline Case that self-defense was changed from a political excuse to a legal doctrine."[2]

According to the report of the Law Officers of the Crown providing legal interpretation of the events for the British Foreign Office, on 13 December 1937, a group of Americans "openly invaded" and occupied the Navy Islands, a part of British possessions. The invaders, in collaboration with Canadian rebels, established in the island a provisional government aimed at "revolutionizing Canada." From December 13 to December 29, this group carried out "acts of warlike aggression on the Canadian shore, and also on British boats." The group maintained constant communication with people within the American territory and received reinforcements in terms of men and war materiale.

> On the 29th two discharges of heavy Ordnance were made on a British Boat from the American Shore, near the Fort. On this same day the "Caroline" came down the river from Buffalo, and after landing at Navy Island several men and packages, which it is impossible not to see contained Stores of War, she made two trips between Fort Schlosser and Navy Island, and transported from the former to the latter place a Six-Pounder and other warlike stores .[3]

Caroline was attacked at midnight on December 29 by the British forces while it had anchored in Fort Schlosser, an American port. According to the owner of the vessel, of the 33 passengers and crew members inside Caroline, 12 were missing, presumed to have perished as the British forces set the steamer on fire, cut it loose and let it go over the Niagara Falls.

The early opinions expressed within the British Foreign Office after the incident indicate that they considered self-defense and self-preservation in this case as only political excuses which did not need strict legal justification. The following passage from the letter of January

13, 1838 from Fox to Lord Palmerston – the British Foreign Secretary – clearly illustrates that self-defense and self-preservation were considered as political principles to be applied where the strict application of legal norms would not provide sufficient support for the position of Great Britain:

> But I am persuaded that when the whole case is examined, it will receive full justification; if not according to strict law as applicable to ordinary cases, at least upon the principles of self-defense and self-preservation.[4]

While the United States protested the British action against Caroline and demanded reparations, the British Foreign Office did not take a very serious approach to the Caroline controversy until 1840, when a British subject named McLeod was arrested in New York on charges of murder and arson after he made his participation in the Caroline incident known to the authorities. While the new American Secretary of State, Daniel Webster, requested that the Attorney General of the state of New York acquit McLeod, thus accepting Lord Palmerston's argument that the act of the destruction of Caroline was an act of the British Crown for which individuals had no criminal responsibility,[5] the controversy concerning the responsibility of British Government for the destruction of Caroline remained unsettled.

In 1842, the British government sent Lord Ashburton to Washington to settle outstanding disputes between the two countries which included Caroline. As Jennings points out, circumstances were more favorable for the settlement of the issues between the two countries as there was a need for "a determined effort for a peaceful settlement, if war was to be averted."[6]

It was in this context that Daniel Webster offered his now famous formula for determining the legitimacy of the action of the British forces. He called upon the British Government:

> [To show] a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by the necessity, and kept clearly within it.[7]

The definition provided a very strict interpretation for the applicability of what was then only a political concept and excuse. It is

important to note, that in its response, the British government explicitly recognized the acceptability and authority of the principles offered by Webster to define in a strict and limited manner a legal formulation of self-defense:

> Agreeing, therefore, on the general principle and on the possible exception to which it is liable, the only question between us is, whether this occurrence came within the limits fairly to be assigned to such exception.[8]

In the ensuing diplomatic consultations, the British government offered a factual account of the incident within the framework suggested by Webster. Thus, the principles of necessity and proportionality emerging from the case were considered by both parties, and subsequently by the international community, as expressing reasonable legal limits on the previously undefined and purely political principle of self-defense. As Brierly had correctly observed, "it is the formulation of the conditions for the exercise of self-defense in this case by the American Secretary of State, Daniel Webster, which has met with general acceptance."[9]

## General Treaty for Renunciation of War – Pact of Paris

The General Treaty for Renunciation of War, signed in Paris in 1928 opened a new chapter in the international law governing the use of force. As Lauterpacht points out, "prior to the conclusion of the Pact, war constituted a legal remedy. Subject to some exceptions, the Pact abolished it in that capacity."[10]

In the course of final discussions leading to the signing of the Pact of Paris, and also in various acts of signature, ratification, or adhesion to the Pact, statements were made by different states elaborating on their interpretation of the Pact, clarifying the extent of their undertakings with regard to the Pact. Although Secretary of State Kellogg, one of the two architects of the Kellogg-Briand Pact, declared that "there are no collateral reservations made to the treaty as finally agreed upon,"[11] it is imperative that such statements have significant bearing on any interpretation of the Pact.

The statements of understanding regarding self-defense, made by the two main sponsors of the Pact, namely the United States and France, enjoyed general support among the parties, as many of them referred to these statements in their acceptance of the treaty and later

declarations.

According to the French note:

> The renunciation of war, thus proclaimed, would not deprive the signatories of the right of legitimate defense. Each nation in this respect will always remain free to defend its territory against attack or invasion.[12]

The United States' note also elaborated on the same notion, with certain ambiguities:

> There is nothing in the American draft of an anti-war treaty to restrict or impair 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 a good case, 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.[13]

Several conclusions can be drawn from these statements not only vis-a-vis the interpretation of this particular treaty but also with regard to the more general legal definition and limitations of self-defense, prevalent in 1928.

First, the statements by most delegations restrict the use of force to a limited concept of "self-defense" or "legitimate defense" which is defined by France as "to defend its territory against attack or invasion" and by the United States as to "defend its territory from attack or invasion." Having considered the fact that these statements were made by states which "were concerned that the right of self-defense as it existed under international law should not be impaired by the treaty,"[14] one can safely assume that customary international law, as developed and recognized by the majority of independent and sovereign states in 1928 accepted a claim of self-defense only in cases of "attack or invasion."

Secondly, despite the claim by Japan in its invasion of Manchuria, and the claim by German war criminals in the International Military Tribunal, it is the consensus of international courts and the majority of international legal scholars that the United States' statement contending that the claimant "alone is competent to decide whether circumstances recourse to war in self-defense" cannot be understood to "preclude any subsequent international determination of the situation."[15] According to Lauterpacht:

> Elementary principles of interpretation preclude a construction which gives to a state resorting to an alleged war in self-defense the right of ultimate determination, with a legally conclusive effect, of the legality of such action.[16]

Quincy Wright observed that in an emergency situation the state resorting to self-defense is necessarily competent to make the determination of the necessity and legality of its action by itself. However, "the question of whether the exercise of this power is within the 'right of self-defense' as understood in international law is a wholly different question." Wright further refers to Kellogg's statement and argues that "Mr. Kellogg does not suggest that the limits of the right are to be decided by the state acting."[17]

In addition to these scholarly opinions, the findings of the Lytton Commission and of the International Military Tribunals, suggest the unacceptability of such a proposition. It is evident that the "justice of the cause" of the state resorting to force in exercise of its right to self-defense can be determined only by a competent international authority. The reservations to the Pact do not render the international community incompetent to pass judgment and require satisfaction with regard to the justice of the cause. As mentioned earlier, such an illogical interpretation has seldom been offered by legal authorities; instead, it was mainly advocated by states resorting to wars of aggression under the guise of self-defense.

The disputes and controversy, primarily within the American legal community, with regard to the legal effect of the Pact, notwithstanding, the opinions of the majority of international tribunals and conferences as well as the opinions expressed by representatives of sovereign nations – providing the basis for opinio juris– clearly point to an understanding and expectation that the Pact of Paris provided real legal rights and duties for Parties and even for the international community as a whole. According to American Secretary of State Stimson in 1932, "war has become illegal throughout practically the entire world."[18]

Also, the League of Nations, in its reports on the Italian invasion of Ethiopia and Soviet invasion of Finland in 1935 and 1939 respectively, made repeated references to the binding character of the Pact of Paris as creating legal obligations for the Parties. In the Report of the Council Committee on the case of the Italian invasion of Ethiopia:

> The Pact of Paris of August 27, 1928, to which Italy and Ethiopia are parties, also condemns "recourse to war for the solution of international controversies" and binds the Parties to the Pact to seek by pacific means "the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them.[19]

In the case of the Soviet invasion of Finland, the Council also made repeated reference to "understandings arising from the pact for the Renunciation of War," and "violation of the Pact of Paris."[20]

Some have also argued that repeated violations of the Pact of Paris by its signatories rendered the Pact invalid or unacceptable to members of the international community. German law professor Jahrreiss took this line of argument at Nuremberg, contending that the practice of states after the conclusion of the Pact "tended in the opposite direction from the Pact."[21]

A general overview of the treaties signed after 1928 between different groups of countries dealing with the subjects of alliance and self-defense clearly establishes the explicit recognition offered by states to the legal authority of the Pact of Paris. In the preamble to most of these treaties, reference is made to the Pact of Paris either as the basis for the treaty or as containing objectives that the treaty was to strengthen and reinforce.[22]

Although repeated violations of a treaty may indeed show the inadequacies of that treaty, what constitutes the requirement for a change in the law – especially if it is recognized as a norm of customary international law – is repeated action by states with the expressed or tacit belief that such action is acceptable or required by law. In the cases of violations of the Pact of Paris during the 1930's, this requirement in the development or change of the norms of international law was not satisfied. Instead, there was expressed recognition, on the part of the violators and the international community, of the force and effect of the General Treaty for Renunciation of War.

### The International Military Tribunals

The judgments of the International Military Tribunals of major war criminals in Nuremberg and Tokyo provide authoritative description of the state of international law with regard to use of armed force. The authority of the legal principles, upon which The Tribunals operated, were more firmly established by Resolution 95 (1) of the

United Nations General Assembly dated 11 December 1946, according to which the General Assembly "affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal."

On the issues dealing with self-defense, the Tribunals' treatment of reservations to the Pact of Paris, Caroline case, and anticipatory and preventive self-defense are particularly relevant to the subject under investigation.

a) Pact of Paris

Referring to the statement made in 1932 by Henry L. Stimson, then American Secretary of state, to the effect that war "has become practically illegal throughout the entire world," the Tribunal expressed the following decision with regard to "the legal effect of the Pact of Paris":

> In the opinion of the tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.[23]

Furthermore, with regard to the reservations made to the Pact, the Tribunal held that "whether action under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is to be observed."[24]

Dissenting judgments with regard to the legal effect of the Pact of Paris were made, specially in Tokyo. The most significant dissents on this issue were the separate judgments of Mr. Justice Pal of India, and Mr. Justice Roling of the Netherlands. However, a close analysis of their judgments reveals that the criminal nature of wars of aggression and individual criminal responsibility for waging such wars were the points of contention and not the legal force of the Pact or its effect on international law with regard to the use of force. It seems that since the Pact was the basic instrument to prove the criminal responsibility of defendants, the dissenters believed that

1) It did not make waging of war a crime; and

2) It was not intended to be applied in a court of law against individuals.

An examination of the review of literature provided by Mr. Justice Pal[25] and the following statement by Mr. Justice Roling clearly illustrate this fact:

> The Pact of Paris, signed on behalf of sixty-three nations, among those Japan, appears to be the only real basis for a different conception with regard to the jus ad bellum. It is questionable, however, whether it did in fact bring about such a change that aggressive war became a vile crime. The Pact itself provides only the one sanction that states waging war in violation of the Pact "should be denied the benefits furnished by this Treaty" (Preamble). But hardly any mention was made (before the Second World War), by those who interpreted this Pact, of the consequence that aggressive war is criminal, and involves individual responsibility.[26]

The arguments presented by the two Justices and the evidence they produced need to be examined when considering the issue of criminal responsibility for waging wars of aggression, and not in a consideration of the general force of the Pact of Paris, where the majority opinion of both tribunals accorded legal significance to the Pact, and stipulated that claims of self-defense were subject to international investigation.

b)Caroline Case and Preventive and Anticipatory Self-Defense

The Nuremberg and Tokyo Tribunals, in their opinions both on law and facts, accepted the authority of the principles laid down in the caroline controversy, while giving them a restrictive interpretation. They referred specifically to the Caroline Case when examining the claims of self-defense made by Germany in its armed action against Norway:

> It must be remembered that preventive action in foreign territory justified only in case of "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation."[27]

While the Tribunal accepted the validity of the principles, the Tribunal rejected the claim of legitimate self-defense by the German defendants. Therefore, it will be observed that it was not the principle that was contended by the Tribunal. Rather, the Tribunal was not convinced of the factual situation justifiying resort ro the principle.

However, the only case in which a claim of anticipatory self-defense was recognized by the tribunal was Netherlands' claim of anticipatory self-defense against Japan.[28] However, even in that case, Japan had declared war on the Netherlands prior to the armed hostilities initiated

by the later. Furthermore, the fact that the Netherlands was one of the judges and not one of the defendants cannot be disregarded.

However, when applying the principles derived from the Caroline controversy to German defendants, the Tribunal adopted a very narrow approach to self-defense, even going so far as to introduce aggressive intent to repudiate the claim of self-defense. The tribunal did not even allow introduction of documents, captured after German occupation of Norway, as evidence which could have substantiated the German claim of imminent Allied attack on Norway.[29]

*The Corfu Channel case*

The Corfu Channel case between the United Kingdom and Albania decided by the International Court of Justice in 1949 presents evidence of the existing rules of international law — not affected by the United Nations Charter — with regard to the use of force. The Court decided the case on the generally accepted rules of customary international law. Dissenting opinions were registered by some members of the Court who insisted on the necessity to apply Charter Principles. However, since Albania was not a member of the United Nations, the Court restricted the sphere of law to be consulted to customary inter - national law and the treaty obligations of the parties.

The part most relevant to the subject, here, is the opinion of the Court with regard to Operation Retail, the mine sweeping operation by Great Britian. It is important to note before attempting to examine the case, that Britain did not use the concept of "right of self-defense" to justify its Operation Retail. Instead she resorted to "self-protection" and "self-help" arguments. However, the reasoning of the Court clearly establish direct bearing on the right of self-defense.

Albania argued before the International Court of Justice that the British resort to force within Albanian territorial waters was illegal. It violateed Albanian sovereignty and territorial integrity. Furthermore, Albania argued that the force used was disproportionate to the task carried out. The United Kingdom, in turn, contested that the action was carried out as a measure of self-help and self-preservation in a case of extreme urgency.

In examining the British claim of self-preservation, the Court applied the criteria developed by Webster in the Caroline case for determining justifiability of self-defense, though no direct reference to Caroline was made. As the following passages, as well as other

statements by the Court, clearly indicate, the majority of the Court considered the measures taken by Britain to be in line with the requirements of necessity and proportionality. Yet, the Court considered the operation illegal basing its decision on the Court's responsibility to "ensure respect for international law."

With regard to the requirement of necessity the Court held:

> The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government.[30]

Addressing itself to the proportionality of the force used by the United Kingdom to the task at hand, the Court ruled:

> The method of carrying out "Operation Retail" has also been criticized by the Albanian Government, the main ground of complaint being that the United Kingdom, on that occasion, made use of an unnecessarily large display of force, out of proportion to the requirements of the sweep. The Court thinks that this criticism is not justified.[31]

Yet, the International Court of Justice ruled against Britain with regard to the legality of Operation Retail:

> The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court can not accept this defense either. Between independent states, respect for territorial sovereignty is an essential foundation of international relations.... to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.[32]

The unanimous decision of the Court in this regard is very significant in light of its acceptance of the necessity and proportionality of the British mine-sweeping action. As Hassan Shah points out, the language of the Court's decision clearly rejected the argument of self-help as a legal defense of armed action.[33]

It can be concluded from the Corfu Channel case that even outside the law of the United Nations Charter, recent international developments had such a profound effect on the generally accepted norms of international law that the legality of resort to force in self-help, even in accordance with the principles of Caroline, were questionable.

## The United Nations Charter

It is evident that the United Nations came into being when the predominant legal view in the international community restricted the legitimate resort to force to self-defense. A glance at the Charter of the United Nations reveals that in drafting this universal instrument, one of the overriding concerns and motivations of the founding fathers of the world organization, had been prevention of war and restricting unilateral resort to force. The first paragraph of the preamble illustrates this overriding pre-occupation of the drafters. It registers the determination of the peoples of the United Nations "to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind." The preamble of the Charter also refers to the method envisaged by the drafters to achieve this lofty objective:

> To ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.

Such clearly elaborated intentions of the drafters of the Charter notwithstanding, references in paragraph 4 of Article 2 of the Charter – which enumerates the underlying principles of the organization – have given rise to interpretations of the principle of non-use of force depriving it of its universal applicability.

Two major arguments have been advanced to justify more state discretion for unilateral resort to force in international relations.

During the Cuban Missile Crisis, the United States argued that only threats or uses of force "which are inconsistent with the purposes of the United Nations are covered by Article 2 paragraph 4."[34] More recently, the United States' Ambassador to the United Nations, Jean Kirkpatrick, extended the argument further in defense of American intervention in Grenada:

> The prohibition against the use of force in the UN Charter are contextual, not absolute. They provide ample justification for the use of force against force in pursuit of other values also inscribed in the Charter -- freedom. democracy, peace.[35]

This attempt at political justification of an otherwise illegal act has received some support from the American legal community. Reisman, suggesting "nine basic categories" under which unilateral resort to force has received "varying support", argues:

> Each application of Article 2(4) must enhance opportunities for ongoing

> self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences to increase the probability of the free choice of peoples about their government and political structure. Others have the manifest objective and consequence of doing exactly the opposite.[36]

However, as Ved Nanda rightly argues, "such a broad interpretation would provide an easy excuse for violation of the prohibition on the use of force."[37] Furthermore, as Gordon argues, this approach has not received any support from the membership of the United Nations.[38]

The legislative history of the Charter of the United Nations is very clear in rejecting this argument. It is contended that the phrase "in any other manner inconsistent with the purposes of the United Nations" was included in paragraph 4 of Article 2 in order to prevent any loopholes and certainly not to introduce new ones. The statement by the representative of the United States in the San Francisco Conference is the best illustration. He 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 phrase 'or in any other manner' was designed to insure that there should be no loopholes."[39]

In his *Report to the President*, the US Secretary of State interpreted the term "in any manner inconstant with the purposes of the Organization" to mean that "force may be used in an organized manner under the authority of the United Nations."[40]

This conclusion was supported by other delegations both in San Francisco as well as in their reports to their respective governments. The Department of External Affairs of Canada, for instance argued that based on Article 2(4), in addition to self-defense under Article 51, "force may be used only under the authority of the Organization and only in order to remove threats to the peace, and to suppress acts of aggression."[41]

The second attempt to broaden the license to resort to armed coercion is magnification of reference to "territorial integrity and political independence contained in Article 2(4). Emphasizing the reference to "territorial integrity and political independence, publicists such as Julius Stone have argued that since Article 2(4) prohibits the use or threat of force against territorial integrity and political independence of states, therefore, use of force as a measure of self-help in order to remedy and international wrong or to guarantee the rights of a state remain

lawful.[42]

A detailed analysis of the legislative history of the fourth paragraph of Article 2 would also invalidate the basic foundations of these arguments.

Under the original Dumbartan Oaks proposals, what became paragraph 4 of Article 2, did not make any reference to territorial integrity or political independence. It simply read:

> All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purpose of the Organization.

As Ruth Russel points out, those present in the Dumbartan Oaks discussion considered the reference to the principle of sovereign equality – which now constitutes the first paragraph of Article 2 – to be inclusive of respect for territorial integrity and political independence of states.[43] Yet, many delegations – mainly representing the smaller and less powerful countries – not present in those discussions were not satisfied with this omission. For example, the head of the Australian delegation at the San Francisco Conference pointed out in his general remarks in the plenary:

> We think express provision should be made in the Charter the better to secure the political independence and territorial integrity of individual nations. These rights are the very basis of a nation's existence. Unless they are fully respected, the principle of sovereign equality of nations declared in the Moscow Declaration and the Dumbartan Oaks draft would become an empty phrase.[44]

In Commission I, which was entrusted with the task of drafting the principles of the Organization, arguments in line with what Australian delegation had advanced in the plenary were put forward, and many far-reaching amendments and suggestions for protection of independence and sovereignty of member states were made. Finally, the suggestion by Australia to include the reference to territorial integrity and political independence within paragraph 4 received the support of major sponsors and other interested delegations.

However, this proposal was adopted while a number of delegations maintained serious reservations as to its possible interpretation. The Report of Committee 1 of Commission I clearly illustrates these difficulties:

> Various delegates felt that improvements in phraseology could be made in the text of Chapter II as it now stands. It was pointed out that the phraseology of paragraph 4 might leave it open to a member state to use force in some manner consistent with the purposes of the Organization but without securing the assent of the Organization to such use of force. It was felt, accordingly, that pragraph 4 should be reworded so as to provide that force should not be used by any member state except by direction of the world Organization.[45]

Therefore, it is clear that many objected to the wording of paragraph 4 and argued to maintain the original wording of the paragraph so that – to use the Costa Rican representative's phrase – "the principle of abstention from the use of force may be absolutely established."[46] The same suggestion was made by the representative of peru.[47] The representative of Norway also pointed out that "this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defense."[48]

In response to concerns raised by the delegations concerning potential loopholes created by the Australian amendment, original sponsors made statements declaring that such references did not create any loopholes. The delegate of the United States, for example, "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 phrase 'or in any other manner' was designed to insure that there should be no loopholes."[49]

In addition to statements made during the San Francisco Conference, clearly showing the intention of the drafters of the Charter to draft in the most all-inclusive language the prohibition of resort to unilateral armed force, the reports of various delegations to their governments regarding the achievements of the Conference support the same conclusion. According to *Report on the United Nations Conference on International Organizations*, prepared by the Department of External Affairs of Canada:

> The result of this paragraph is that force may be used only under the authority of the Organization and only in order to prevent and remove threats to the peace, and to suppress acts of aggression. The Members have assumed a definite and specific obligation to renounce the use of force in all other circumstances, except that under Article 51 they may use force for individual or collective self-defense necessary to maintain international peace and security."[50]

Furthermore, as already quoted, the Secretary of State of the United States in his *Report to the President* pointed out that the only legal use for force outside self-defense remain under United Nations authority.[51]

It is clear from these observations that according to Article 2(4) of the Charter, unilateral resort to force has been prohibited. The only exception to this general rule, acceptable to the drafters of the Charter, is the provision for individual or collective self-defense as envisaged in Article 51 of the Charter. This interpretation of Article 2(4) of the Charter, which is substantiated by historical and logical reasoning provided above, gives Article 51 of the Charter a central role in defining the only justifiable resort to force according to the international law of the United Nations Charter.

## Self-Defense Under the Charter

However significant as the only explicit recognition of justifiable resort to armed coercion in the United Nations Charter, the exact meaning and purpose of Article 51 of the Charter has remained a matter of controversy. This has been mainly due to its peculiar legislative history which has put in doubt the intentions of the authors of Article 51 with regard to its applicability on the right of individual self-defense.

It is clear from the travaux preparatoires of the United Nations Charter that the text, embodied in what is now the last Article in Chapter VII of the Charter, was not included in the Dumbartan Oaks Proposals. It was later added after discussions prior to and during the San Francisco Conference regarding defensive pacts of Europe and regional security and enforcement arrangements, particularly that of the Western Hemisphere.

Guided by the ambitious goal of reserving exclusive authority to use military power for the international organization, the Dumbartan Oaks Proposals had restricted the authority of regional arrangements and agencies with regard to enforcement action. According to section C of Chapter VIII of the Dumbartan Oaks Proposals – now contained as amended and modified during the San Francisco Conference in Chapter VIII of the Charter – entitled "Regional Arrangements":

> 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.

This formulation proved unacceptable to several delegations present in the San Francisco Conference. Several countries, led by Latin American delegations but including delegations from other regions such as Australia, New Zealand and Egypt, insisted on more specific recognition of and broader authority for already established regional arrangements.

Moreover, European countries, in particular France and the Soviet Union, were concerned about the continued validity of their defensive alliances against the enemy states. They further insisted that those agreements operated essentially outside the framework of the Security Council.

Amendments had been presented prior to the inauguration of the Conference in order to satisfy both concerns. Most Latin American governments introduced amendments to include recognition of their regional enforcement mechanism.

Amendments which in addition to recognizing the compatibility of the inter-American system with the purposes of the Organization, would in fact disable the Security Council to interfere in regional disputes until the failure of regional enforcement schemes became evident, were proposed by Brazil and also jointly by Chile, Colombia, Costa Rica, Ecuador and Peru.[52]

Whereas amendments proposed by the Latin American delegation in fact sought to pre-empt the Security Council in matters dealing with regional arrangements, Australia proposed an amendment, to be included at the end of the Chapter on Regional Arrangements, which would deal with cases when the Security Council failed – presumably due to the exercise of veto – to take action against threats to international peace and security.[53]

Among the amendments proposed by European states, there were proposals made by governments including Turkey, Belgium, and Czechoslovakia, which aimed at securing advance authorization by the Security Council for collective measures against aggression. Czechoslovakia, for instance, made the following observation with direct bearing on the extent of the right of self-defense:

> It [Dumbartan Oaks Proposals] stipulates further that "no enforcement action should be taken without the authorization of the Security Council". The Czechoslovak Government considers that such authorization

> should be given in advance and as a general rule for *cases of immediate danger* where the suspension of coercive action until the intervention of the Security Council may cause irremediable delays. The measures taken in these cases should be submitted subsequently for approval to the Council.[54]

France had also made a similar suggestion, clarifying further that such authorization should be given in advance for cases "of application of measures of an urgent nature provided for in treaties of assistance concluded between members of the Organization and of which security Council had been advised."[55]

As the Report of the American delegation to the US Senate suggests, the amendments proposed by France, Belgium, Turkey and Czechoslovakia dealt specifically with the recognition and the extent of the individual and collective right to self-defense:

> Essentially two issues were involved in this problem: (1) the permanent inherent right of self-defense, individual or collective, against a possible aggressor; and (2) the provisional or temporary right of the parties to such pacts to take preventive action against a possible aggression on the part of the states which had fought against the United Nations during the present war.[56]

It is in light of the extent of such proposals by a number of the delegations, prior to and during the Conference, that the outcome in the form of the current wording of different Charter Articles becomes significant. As expected, efforts were made to exempt action against enemy states from the strict principles of the Charter and to allow collective preventive action against enemy states in accordance with pacts of mutual assistance.

However, when dealing with other resorts to force, individual or collective, the drafters of the Charter exercised much greater caution and used much more strict definition. With regard to actions against enemy states, an amendment was proposed at the outset of the Conference by the Original Sponsors. This was to be included at the end of section C(2) of Chapter VIII – presently Article 53 – exempting arrangements against enemy states from the requirement of prior authorization by the Security Council. According to that amendment, following the phrase that "no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council," the Original Sponsors proposed

and were successful in passing the following wording:

> 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 the consent of the Governments concerned, be charged with the responsibility for preventing further aggression by a state now at war with the United Nations.[57]

Therefore, the Charter of the United Nations was to recognize the legitimacy of preventive action only when applied against "renewal of aggression" by the "enemy states." This revision met one of the concerns of the European states. However, it failed to satisfy the more basic concern of the European states with regard to individual and collective self-defense against perceived aggression, and it did not even address the Latin American and other non-Euroepan concerns about regional security arrangements.

To remedy this shortcoming, it was suggested during internal discussions within the American delegation that since nothing in the Dumbartan Oaks proposals would prohibit self-defense against attack, and since under the Chapultepec agreement "self-defense in the Western Hemisphere is a partnership affair[58]," it was possible to solve the issue through the introduction of a new amendment on self-defense. It was recommended by those who drafted the first proposal on this section that the new Article should be added to section VIII-B which dealt with actions against aggression rather than be included in the Chapter dealing with Regional Arrangements.[59] The amendment that was finally proposed to the Original Sponsors by the American delegation stipulated:

> Should the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member-state, such member state possesses the inherent right to take necessary measures for self-defense. The right to take such measures for self-defense against armed attack shall also apply to understanding or arangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.[60]

It may be observed that the American draft, while not accepting the notion of self-defense against possible aggression as understood from some European proposals, did in fact differentiate between what can give rise to individual self-defense as opposed to collective self-defense. Whereas it stipulated the necessity of the occurrence of armed attack to justify taking collective measures in self-defense, it provided a broader notion of the occurrence of aggression to license resort to armed force in individual self-defense. It should be pointed out that this difference in phraseology was not incidental and may be observed in other statements.[61] On the other hand, while it recognized regional arrangements, and specifically the inter-American system, it did not go as far as Latin American proposals depriving the Security Council of its authority.

This formulation was not acceptable to the British and Soviet delegations. A member of British delegation formulated an amendment with its origins in the American draft – while at the same time addressing the European concerns[62] – that was acceptable to all sides and was presented to the Conference:

> Nothing in this Charter should invalidate the right of self-defense against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary steps to maintain and restore international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the responsibility of the Security Council under this Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[63]

It should be observed that the new wording of the proposal which was acceptable to Original Sponsors differed in two basic ways from that of the American draft. It did not make any direct reference to specific regional arrangements; and it made the same qualification of armed attack for both individual as well as collective measures of self-defense.

It should also be borne in mind in reading the legislative history of what is now Article 51 of the Charter, that the main motive of the drafters of the amendment - at least the most politicized motive - had been to satisfy the concerns of the Latin American countries. But,as mentioned earlier the drafters of the amendment had to satisfy the concerns of certain European countries with regard to the basic issue of self-defense.

It was clealry stated by American delegates at Sand Francisco that the

proposal, which is now Article 51, was in fact "an amalgamation of amendments offered originally by Australia, Czechoslowakia, France, Turkey and Latin American States,"[64] Therefore the argument advanced by some that the drafters of Articled 51 were not concerned with individual self-defense cannot be taken seriously.

Taking into account that in some of European proposals justifiability of self-defense against possible aggression had been suggested and that in the original American proposal justification for individual self-defense was more broadly defined, it is reasonable to conclude that the wording of Article 51 with regard to individual self-defense was not incidental. Rather, in line with the basic concerns of the participants in the United Nations Conference on International Organizations, the drafters of this section attempted to define in a restrictive manner the individual right to self-defense against armed attack as well as the collective right to take action against prior armed attack.

A detailed and pointed interpretation of the Article was provided by the French delegate, Paul Boncor, who elaborated on the limitation the Article imposed on actions that could be taken by individual states of groups of states in exercise of self-defense, It is important to note that it was clear to the French delegation, which originally called for anticipatory action against possible aggression, that such was not permissible under the new provision:

> This text makes a clear distinction between the prevention and the repression of aggression. As far as prevention of aggression is concerned, it vests in the Security Council the task of making the necessary provisions and taking whatever measures are necessary.[65]

Moreover, in their reports to their governments, other delegations, while referring to the legislative history of the Article, referred to its effect on individual exercise of the right to self-defense. According to the report prepared by the Department of External Affairs of Canada, for instance:

> Another new Article [51] was also inserted. This declares that member of the Organization which is attacked by armed force has the right to defend itself, and other members have the right to come to its defense.[66]

## Developments in the Law of Self-Defense Since 1945

The practice of the relevant organs of the United Nations, particu-

larly Security Council, General Assembly and International Court of Justice, since the adoption of the Charter further clarifies the state of the contemporary international law of self-defense. In the final analysis, it illustrates the degree of consensus within the international community in this respect. The following generalizations on the nature of the law are presented based on the above discussion on the development of the law of self-defense and in light of the practice of the United Nations organs.

1. The prohibition on the unilateral resort to armed force contained in Article 2(4) represents the most basic norm of the international law of forcible coercion. Its provisions include proscription of armed reprisals as well as forcible measures of self-help. No political or economic consideration, nor any concern for estabishment of law and order, may justify a unilateral resort to force. The United Nations remains the only body capable of taking measures for enhancement of international peace and security in the framework of Charter provisions.

The illegality of forcible unilateral measures other than self-defense have been repeatedly reiterated by the security Council, the General Assembly and the Secretary-General of the United Nations. In the case of Israeli retaliatory measures against its Arab neighbors, armed reprisals were repeatedly condemned as illegal by the Security Council. For instance, the Security Council in its decision of 25 November 1966 "emphasized to Israel that actions of military reprisals cannot be tolerated."[67] Moreover, in the Suez Canal crisis, the General Assembly rejected the British argument of legality of forcible self-help.[68]

It should be noted here that the Security Council practice does not support the contention that the Security Council did not reject reprisals per se in the case of Israeli action; rather it condemned the unproportionality of Israeli reprisals.[68] Although the disproportionate nature of Israeli response were specifically addressed in many – but not all – cases, the pronouncement of the Security Council regarding illegality of reprisals have been unambiguous and unconditional. This fact was acknowledged by the Secretary-General of the United Nations, who concluded in his report that the Security Council had repeatedly condemned acts of retaliation and reprisals as illegal.[70]

2. The only legitimate use of force by an individual member of the United Nations remains to be self-defense subject to provisions of Article 51 of the Charter. The requirement of prior armed attack has

been expressed and its satisfaction sought in every case where a claim of self-defense was made. In all circumstances when claims of self-defense have been made by a party resorting to force, the claimant was questioned about the occurance of an armed attack prior to its resort to force. While the majority of the membership of the United Nations – namely the Third World countries and the Socialist bloc to a lesser extent – consider prior armed attack an absolute requirement, there exists no consensus on this issue.

The provisions of the 1974 definition of aggression regarding the priority principle and its inter-relationship with the notion of prevailing circumstances illustrate the degree of consensus. However, the travaux preparatoires as well as the language of the definition clearly give weight to the priority principle, qualifying it only with the possibility of a different finding by the Council based on circumstances within which the alleged act of aggression occurs.

The decision of the International Court of Justice in Nicaragua v United States of America, further substantiates a strict interpretation of the right of self-defense, not only under the provisions of the Charter of the United Nations, but also under customary norms of international law which "was presumed by the Court to follow the precise formulation found in Article 51 of the UN Charter."[71]

The United States had raised the argument of collective self-defense in justifying its actions against the Nicaraguan government.[72] While according to the final judgment of the Court, the evidence of Nicaraguan supply of assistance to Salvadoran resistance was not convincing and irrefutable, the Court assumed that such evidence was convincing and made the following assertion on the law of self-defense:

> Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defense *in customary international law*, it would have to be equated with an armed attack by Nicaragua on El Salvador.... [T]he Court is unable to consider that, in customary international law, the provision of arms to the opposition in another state constitute an armed attack on that state.[73]

Indeed, the legality of responding with armed force to acts generally called "indirect aggression" have been severely limited, thereby restricting even further the possibility of forcible measures of self-defense. Many Security Council resolutions condemning Israel for military actions claimed to have been in response to prior terrorist oper-

ations illustrate this tendency of the international community. In one case, in response to Israeli claims of military action in retaliation for terrorist attacks against Israeli civilians, the Security Council – in its Resolution 316 of 26 June 1972 – deplored all acts of violence, but condemned Israeli use of force.[74]

In fact it can be argued that in accordance with the definition of aggression, a state can only respond by forcible self-defense when an attack by irregulars is comparable in gravity as well as hierarchy of responsibility to those carried out by regular armed forces. This requirement effectively removes normal cases of indirect aggression from becoming justifications for resort to force under Article 51.

3. Preventive and anticipatory self-defense have found little support in the United Nations. The Security Council reactions to the Israeli claims of preventive self-defense, and particularly the extensive constitutional debate in the case of Israeli attack against Iraqi nuclear facility, Osiraq, strongly suggest that preventive and anticipatory resort to violence are not acceptable forms of self-defense in the contemporary international law.[75]

In the meetings of the Security Council on this matter – from 12 to 19 June 1981 – significant and substantive discussion broke out with regard to the legality of "preventive self-defense" in general and the Israeli claim to that effect in particular.[76] The representative of Israel presented a detailed argument to justify his government's action.

Israel cited extensive evidence – to be rebuffed later by International Atomic Energy Agency – that the Iraqi nuclear reactor had been built with the secret intention of producing nuclear weapons.[77] Iraqi hostility toward Israel and the presence of a state of war between the two states were also cited.[78] It was concluded by the Israeli representative that:

> In plain terms, Iraq was creating a mortal danger to the people and state of Israel. It had embarked on a ramified programme to acquire nuclear weapons. It had acquired the necessary facilities and fuel. Osirag was about to go critical in a matter of weeks.[79]

With this attempt at creating a factual background for its case, Israel presented a legal argument in defense of its pre-emptive strike against the Iraqi nuclear facility. By quoting prominent scholars in international law, the representative of Israel presented his government's interpretation of Article 51 of the Charter:

> Israel was exercising its inherent and natural right to self-defense, as understood in general international law and well within the meaning of Article 51 of the United Nations Charter. Commenting on the meaning of Article 51 of the Charter, Sir Humphrey Waldock, now President of International Court of Justice, stated .... that "it must be a travesty of the purpose of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow... To read Article 51 otherwise is to protect the aggressor's right to the first strike." In similar vein, Professor Morton Kaplan and Nicolas de B. Katzenbach wrote in their book *The Political Foundations of International Law*: "Must a state wait until it is too late before it may defend itself? Must it permit another the advantage of military build-up, surprise attack, and total offense, against which there may be no defense?..." And Professor Derek Bowet of Cambridge University, in his authoritative work on *Self-Defense in International Law* observed: "No state can be expected to wait an initial attack which, in the present state of armament, may well destroy the state's capacity for further resistance and so jeopardize its very existence." So much for the legalities of the case.[80]

The Security Council did not accept the factual or legal arguments of Israel, as it unanimously adopted its resolution which "strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct." It further considered Iraq entitled to appropriate redress.[81]

It should be noted that all delegations tried, at the same time, to refute the Israeli contention that Osiraq was intending to produce nuclear weapons since Iraq had signed the Nuclear Non-Proliferation Treaty and its facilities were subject to international inspection and scrutiny. The Council also referred to this fact in the preambular section of the resolution. Yet, the fact that members of the Council and other participants refuted the factual claims of Israel is not an indication that the legal doctrine advanced by the Israeli ambassador was acceptable. In this connection, with the exception of the United States, every delegation that took the floor during the debate on the item, refuted with different degrees of vehemence the Israeli arguments justifying "preventive self-defense," or its application to the case.[82] A sample of the legal arguments, advanced in rejection of the Israeli doctrine, reflects the attitude of the international community with regard to the doctrine of "preventive self-defense."[83]

Therefore, while every state first resorting to armed force is certain to advance the argument of preventive self-defense, the acceptance of the legality of such claims by the international community will not

be forthcoming.

It should be noted in this regard that while principles laid down in the Caroline affair have not been rejected, they have not been applied by the Security Council or any other United Nations organ in any recent case. Their strict interpretation by the representatives of states makes them applicable to only a very limited number of cases.[84]

4. The provisions of the Charter of the United Nations with regard to the legitimate and illegitimate uses of force have been restated and thus repeatedly reinforced by the organs of the United Nations. The draft Declaration on Enhancing the Principle of Non-Use of Force in International Relations, adopted in December 1987 by the General Assembly reproduces verbatim the language of Articles 2(4) and 51 of the Charter. This is of course indicative of lack of consensus among the membership of the United Nations beyond the terms of the Charter. At the same time, the fact that these principles and legal norms have been repeated discounts the rebus sic stantibus argument with regard to these principles of the Charter.

Certainly, those who have drafted and debated these instruments are aware of the shortcomings of the international organizations, and are cognizant of the realities of modern day international life. Yet, they have found it necessary to refer to the right of self-defense in exactly the same language as Article 51 of the Charter.

Furthermore, although individual members of the United Nations have found it necessary in extraordinary circumstances to present varying interpretations and modified versions of Articles 2(4) and 51, the collectivity of state-members of the United Nations have remained convinced of the continued validity of these principles of the Charter of the United Nations.

Two specific arguments in this regard should be addressed.

Some have argued that the United Nations system was built on the erroneous assumption of super-power harmony which would have enabled the effective resort to the collective security mechanism of the United Nations. While the drafters of the Charter may have been more optimistic about the future capabilities of the international organization than they should have been, the basic assumptions of the United Nations institution have not proved to be utterly false.

I contend that the system of collective security of the United Nations was not built on the assumption of super-power harmony. In that case, there would have been no reason to invest the veto power in the five

permanent members of the Security Council. As Inis claude points out, the drafters of the Charter "held that great power harmony was certainly necessary, not that it was necessarily certain."[85]

Furthermore, the practice of the United Nations organs and the legislative history of the Charter of the United Nations clearly illustrate the determination of the drafters of the Charter as well as that of the state-members of the United Nations to prevent unilateral resort to arms. As Henkin correctly points out:

> [The drafters of the Charter] were determined that international disputes must not again be resolved by military force. They wrote that determination into a rule of international law, without condition....they hoped to establish a machinery to enforce this law... And it is probable that the failure of this machinery was not foreseen. But there is no evidence that the success of this machinery was to be a condition of the basic principle against unilateral force.[86]

5. Another area which has attracted much heated debate within the international legal community is the advent of weapons of mass destruction including nuclear weapons.

During the discussions in the Atomic Energy Commission, the United States delegation presented a memorandum dealing with the extent of the right of self-defense in cases of nuclear confrontation. This memorandum was annexed to the report of the commission presented to the Security Council, and has opened the door to many arguments and debates on the requirement of "armed attack" in the nuclear age.

Despite the claim of many proponents of broad interpretation of the provisions of Article 51 of the Charter, the American memorandum dealt with a very specific issue, namely that adopting a definition for armed attack appropriate to atomic weapons and applicable only to such cases as the use of atomic weapons is a reasonable probability. In fact, the memorandum took the provisions of Article 51 with regard to other cases for granted and only sought clarification with regard to nuclear weapons. The American memorandum reads:

> Interpreting its provisions [Article 51 of the Charter] with respect to atomic energy matters, it is clear that if atomic weapons were employed as part of an 'armed attack', the right reserved by nations to themselves under Article 51 would be applicable. It is equally clear that an 'armed attack' is now something entirely different from what it was prior to discovery of atomic weapons. It would therefore seem to be both important and appropriate under present conditions that the treaty define

> 'armed attack' in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an *atomic bomb* but also certain steps in themselves preliminary to such action.[87]

It was noted in the Commission, that any modification of the provisions of Article 51 of the Charter to make it applicable to atomic weapons should not be implemented in the form of amendments to the Charter of the United Nations, but through a separate international agreement dealing with regulation of nuclear energy and armaments.[88] In its report, the Atomic Energy Commission proposed the creation of an international system of control and inspection, whose functions and terms of reference should be defined in an international "treaty or convention." The Commission concluded its proposal by the following reference to Article 51:

> In consideration of the problem of violation of the terms of the treaty or convention, it should also be born in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations.[89]

An objective reading of these paragraphs in the report of the Commissions leads to the conclusion that the subject under discussion was not Article 51. Rather, the Commission was concerned only with the application of Article 51 with regard to violations of a proposed treaty dealing with the control of nuclear weapons. It is very clear that these discussions did not intend to have any bearing on the application of Article 51 in cases of conventional warfare.

Moreover, the Security Council in its Resolution 255(1968) – on the question relating to measures to safeguard non-nuclear weapons States – reaffirmed the inherent right of self-defense "if an armed attack occurs."

While it can be argued, on the basis of the repetition of the language of Article 51 in the resolution dealing with this issue, that the intention of the international community even with regard to cases where nuclear weapons may be used was indeed to prevent any exception to the general provisions of Article 2(4) and Article 51, the concerns raised were, at best, limited to nuclear weapons and incompatible with and inapplicable to conventional cases.

6. The norms enshrined within the Charter of the United Nations with regard to the use of force have become customary norms of international law. The decision of the International court of Justice

in the Nicaragua v United States of America clearly substantiates this contention.

It should be noted that in the preliminary phases of the case, during the debate on jurisdiction, the Court had upheld the American contention that "because of the Vanderburg reservation, the Court lacked jurisdiction to apply the provisions of the UN Charter or the OAS Charter to the dispute."[90] The Court was, therefore, obliged to apply exclusively the norms of customary international law concerning the use of force and self-defense to this case.[91]

The Court found that "the substance of the relevant provisions of these multilateral treaties may be found in customary international law."[92] Therefore, in the opinion of 12 members of the International Court of Justice, the norms concerning non-use of force, contained in the charter of the United Nations, "continue to be binding as part of customary international law."[93] In the final analysis, the Court decided "to discern customary international laws, it is helpful for the Court to rely upon conceptions embodied in the UN Charter."[94]

There is a constant reference in the literature to what appears to be a dichotomy between the norms of customary international law and the law developed by the Charter of the United Nations and the practice of its major organs. The basic assumption of this dichotomy is that customary international law became constant after the first World War and operated in a separate domain; that the Covenant of the League of Nations, the General Treaty for Renunciation of War – and others similar to it – the Charter and the judgments of the International Military Tribunals, the decisions of the International Courts and the Charter of the United Nations did not interact with the norms of customary international law. The overwhelming majority of the International Court of Justice have refuted this argument.

## Conclusion

While the different doctrinal interpretations and divergent state practices have significance in international law and world order, it is necesary to attempt to differentiate between attempts at justification of illegal and inadmissible state practice and actual norms of international law.

It is the contention of this article, that the Charter of the United Nations enshrines the most commonly accepted norms of international law with regard to the legitimacy and inadmissibility of different resorts

to forcible coercion. The provisions of its Article 2(4) and 51 have been reinforced with abundant frequency and through judgements, decisions and resolutions enjoying universal acceptance.

An important area of consideration, however, remains to be the effectiveness of the United Nations machinery in the prevention and suppression of breaches of peace and acts of aggression. One can not neglect the lack of the practical success of the United Nations in solving international conflicts, and more importantly in deterring aggressors from committing acts of aggression.

The role of the Security Council in this regard is of particular significance. The Charter of the United Nations and decisions and declarations of the world body assign primary responsibility for dealing with cases involving use of force to the Security Council. The Council has primary responsibility for maintenance of international peace and security and suppression of acts of aggression. The authority of the Security Council even in cases involving the exercise of the right of self-defense is clearly established in Article 51 of the Charter.

The practical lack of success of the Security Council in maintaining international peace and security and preventing breaches of the peace – not to even mention suppressing acts of aggression – is clearly evident.

While in a few and limited hostilities, the Security Council has proved marginally effective, the majority of the cases before the Council represent persistent and prolonged forms of aggression and armed hostility about which the Security Council and the General Assembly have done nothing but issuing symbolic resolutions.

What should be the effect of this failure of the Security Council and the inability of the mechanism of collective security on one's interpretation of the prevailing norms of internatinal law recognized in the Charter of the United Nations with regard to prohibition of the use of force?

The important question is whether broadening the scope of the right of self-defense is the logical or even "practical" solution to the problem of the ineffectiveness of the United Nations system. Should the United Nations inability to deal with present illicit uses of force provide the grounds for invalidating even the present legal restrictions on the use of force?

The proponents of this view offer the "realities of international system" as the raison d'etre for their broad interpretation of legitimate

uses of force. Therefore, it is imperative that the question of the advisability of increasing the discretionary powers of states with regard to the use of force be analyzed in view of its effect on the realities of international system. In other words, the pertinent question should be whether the victims of aggression stand to benefit from such "reform" in the international law of the use of force and self-defense. Or whether those who have committed acts of aggression will be the beneficiaries of the reform.

Assuming the invalidity of the strict interpretation of the provisions for the exercise of the right of self-defense, could it be expected that Namibians, Angolans, or Mozambicans will carry out preventive strikes against South Africa? Or have we eliminated even this minor impediment to the South African resort to force?

Can one have expected the people of Afghanistan to attack the Soviet Union in order to prevent the latter's invasion and occupation? Or can anyone imagine that if the legal permission had existed, the government of Grenada would have declared war on the United States in order to pre-empt its military intervention and take-over?

It is contended that the relaxation of the present legal proscriptions on the use of force can only help the strong in their policies of forcible coercion against the weak. A mere glance at the history of the United Nations and cases where claims of anticipatory or preventive self-defense as well as claims of forcible response to minor direct and indirect incidents were advanced would conclusively establish that in all those cases the claimant was the stronger, more capable party to the conflict. At the very least, the claimant had the upper hand at the time of initiation of the conflict.

The members of the international community, witnessing the realities of international politics and the shortcomings of the United Nations system, have found it necessary to re-emphasize the original norms enshrined in the Charter of the United Nations. The most recent examples are the adoption of the Declaration on the Principle of Non-Use of Force by the General Assembly in December 1987 as well as the decision of the International Court of Justice in Nicaragua v United States of America.

The international community has in fact decided to maintain the norms of international law in the area of the use of force; norms which are simply restraints on the practice of the strong. Therefore, what is needed is not the abolition of the present restraints on the

use of force. Rather, the "reformers" should look to the international political system and its effects within the United Nations and seek reform and reorientation in the modes of relations and the process of decision-making in the capitals of states and within international organizations in order to develop methods for ensuring effective implementation of these norms.

## Notes

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15. *Ibid.*, p. 46.
16. Oppenheim, *op. cit.*, p. 188.
17. Wright, *op. cit.*, pp. 46-7.
18. *Ibid.*, p. 51.
19. *League of Nations Journal*, 1935, p. 1225.
20. See *ibid.*, 1939, pp. 532-542.
21. R. Woetzel, *The Nuremberg Trials in International Law* (London: Stevens and Sons, 1962), p. 150.
22. See for instance Pact of Non-Aggression between France and USSR which stipulates: "Desirous of confirming and defining, so far as concerns their respective relations, the General Pact of August 27 1928 for the renunciation of war." Cited in *League of Nations Treaty Series* 1935, p. 418. Also the Treaty of Non-Aggression between Afghanistan, Iraq, Iran and Turkey of July 8, 1937 declares: "Deeply conscious of their obligations under the Treaty for Renunciation of War." Cited in *Ibid.*, 1938, p. 23. The Treaty of Non-Aggression between the United Kingdom and Thailand dated June 14, "confirm 1940 also registers the desire of both parties to ... the General Pact for the Renunciation of War." Cited in *Ibid.* 1940-41, p. 422. The Treaty of Alliance between the United Kingdom and Iraq of June 30, 1930 expressly stipulates that nothing in the treaty can "prejudice the rights and obligations of the parties under the Pact of Paris." See *Ibid.*, 1932, p. 363.
23. "International Military Tribunal (Nuremberg) Judgment and sentences," *The American Journal of international law* 41 (1947): 217, from here referred to as Nuremberg.
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46. UNCIO, volume 3, *op. cit.*, p. 278.
47. UNCIO, volume 6, *op. cit.*, pp. 68-69.
48. *Ibid.*, p. 334.
49. *Ibid.*, p. 335.
50. Canada, *op. cit.*, p. 18.
51. Report to the President, *op. cit.*, p. 41.
52. UNCIO, volume 3, *op. cit.*, pp. 241 and 620-621.
53. The Parliament of the Commonwealth of Australia, *United Nations Conference on International Organization* (Canbera, Australia : L. F. Johnson, september 5, 1945), p. 26. From here referred to as Australia.
54. UNCIO, volume 3, *op. cit.*, p. 470.
55. *Ibid.*, p. 387.
56. United States Senate, *Hearings before the Committee on Foreign Relations* (Washington, DC: US Government Printing Office, 1945), p. 65.

57. UNCIO, volume 3, *op. cit.*, p. 688.
58.Russel, *op. cit.*, pp. 696-697.
59. *Ibid.*
60. *Ibid.*, p. 698.
61. See for instance *Ibid.*, p. 700.
62. See *Ibid.*, p. 699.
63. *Ibid.*
64. *Ibid.*, p. 703.
65. UNCIO, volume 11, *op. cit.*, p. 58.
66. Canada, *op. cit.*, p. 41.
67. United Nations, *Repertory of the Practice of the United Nations Organs*, Supplement No. 4 (New York: United Nations, 1982), par. 55. From here referred to as Supl. 4.
68. See for instance United Nations, *Repertory of the Practice of the United Nations Organs*, Supplement No. 2, (New York: United Nations, 1964), pars. 120, 121, and 163. From here referred to as Supl. 2.
69. Robert Tucker, "Reprisals and Self-Defense: The contemporary Law," *The American Journal of International Law* 66 (1972):595.
70. Supl. 2, *op. cit.*, p. 466, par. 11.
71. M. Leigh, "Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v United States of America), 1986 ICJ Rep. 14," *The American Journal of International Law* 81 (1987):209.
72. For a complete presentation of the American Case see N. Rostow,"Nicaragua and the Law of Self-Defense Revisited," *The Yale Journal of International law* 11, number 2 (spring 1986):437-461.
73. 1986 ICJ Report, p. 119, par. 230. It should be noted that, while because of the claims in the case, the requirements of collective self-defense are discussed, the arguments in the Court, including the dissenting opinions clearly show that the subject of controversy between the majority of the Court and three dissenting judges was the implications of the general notion of self-defence irrespective of individual or collective. See for instance, arguments by Judge Jennings and Judge Schewebel, 1986, ICJ Report, p. 528, and p. 348.
74. United Nations, *Repertory of the Practice of the United Nations Organs*, Supplement No. 5, volume 1; not distributed to this writing. par. 39. From here referred to as Supl. 5, Vl. See also United Nations, *Repertory of the Practice of the United Nations Organs*, Supplement No. 3, (New York: United Nations, 1972), p. 150, pars. 125-127. From here referred to as Supl. 3. Also consult Supl. 4, pars. 64 and 80.
75. On 9 June 1981, Israeli jets bombed and destroyed the Iraqi nuclear facilities at Osiraq. The Israeli government later informed the international community and the security Council, in particular, that such action had been taken as a measure of self-defense to insure the security of Israeli citizens.
76. Because of its special relevance to the questions under study, it is necessary to review the discussions and decision of the Security Council in this regard more extensively.
77. S/PV.2280 at 46-51. See also the document issued by Israeli government entitled "The Iraqi Nuclear Threat – Why Israel Had to Act" contained in S/14732.
78. S/PV.2280 at 38-45, also see S/ 14732.
79. S/PV.2280 at 51.
80. S/PV.2280 at 52-55.
81. Operative paragraphs 1 and 6 of the Security Council Resolution 487 (1981), S/14556.
82. See statements by Tunisia, Algeria, Sudan, Jordan (S/PV. 2280), Kuwait, India, Brazil, Cuba, Pakistan, Bulgaria (S/PV. 2281), Uganda, France, German Democratic Republic, Spain, China, Japan, United Kingdom, Lebanon (S/PV. 2282), Ireland, Yugoslavia, USSR, Egypt

Rumania, Vietnam.Sierra Leone, Mongolia, Zambia (S/PV. 2283), Niger, Philippines, Panama, Yemen, Syria (S/VP. 2284), Morocco, PLO, Czechoslovakia, Bangladesh, Poland (S/PV. 2285), Guyana, Somalia, Turkey, Hungary, Italy (S/PV. 2286), Nicaragua, Indonesia, Malaysia, Sri Lanka (S/PV. 2287), Mexico (S/PV. 2288). The United States' representative, while condemning Israel and voting for the resolution stated "our judgment that Isaeli action violated the United Nations Charter is based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute." (S/PV. 2288 at 58-60).

83. The representative of Uganda referred to the authorities cited by the Israeli ambassador in the defense of his argument and pointed out that their "views on this subject, incidentally, are long outdated and have been rejected by the overwhelming body of international legal opinion." He advanced the limit set by the Caroline case for action in anticipatory or preventive self-defense under customary international law but continued to point out "Indeed I recall no previous occasion when the Council has accepted the plea of self-defense in the absence of a prior armed attack." The representative of Spain pointed out that "the Charter does not allow for – indeed, if it did, that would amount to a return to the law of the jungle – any right to preventive action." The British ambassador, while adhering to the British doctrine of self-protection, pointed out: "It has been argued that the Israeli attack was an act of self-defense. But it was not a response to an armed attack on Israel by Iraq. There was no instance or overwhelming necessity for self-defense. Nor can it be justified as a forcible measure of self-protection" [emphasis added]. The ambassador of Guyana stipulated that "nowhere does it [Article 51] provide for pre-emptive strike , which is contrary to the spirit of the Charter." And the President of the Security Council pointed out that "it is inadmissible to invoke the right of self-defense when no armed attack has taken place." (S/PV. 2282, S/PV. 2286, S/PV. 2288).

84. See the argument advanced by Mr. Otunnu of Uganda with regard to the interpretation of Caroline principles, S/PV. 2282 at 6.

85. Evan Luard, *The Evolution of International Organizations* (New York: Praeger, 1966), p. 69.

86. Louis Henkin, "Force, Intervention, and Neutrality in Contemporary International Law," in Richard Falk and Samuel Mendlovitz, editors, *International Law* (New York: World Law Fund, 1966), pp. 336-337.

87. United Nations, *Repertory of the Practice of the United Nations Organs* (New York: United Nations, 1955), p. 434, par. 12. From here referred to as Main.

88. *Ibid.*, par. 13.

89. *Ibid.*, p. 435, par. 14.

90. Leigh, *op. cit.*, p. 206.

91. *Ibid.*, p. 206; also see p. 207.

92. *Ibid.*, p. 206.

93. From the ICJ Reports, 1984, p. 424, par. 73.

94. Richard Falk, "The World Court's Achievment , "*The American Journal of International law 81* (1987): 109.